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Abortion Politics: The Roman Catholic Church's Tax-Exempt Status in Jeopardy Under Section 501(c)(3) of the Internal Revenue Code

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COMMENT

Abortion Politics: The Roman Catholic Church's Tax-Exempt Status in Jeopardy Under Section 501(c)(3) of the Internal Revenue Code

I. INTRODUCTION

Historically, religious organizations have engaged in various forms of religious activism. Some vigorously speak out on matters of current religious and political importance. Indeed, churches throughout history have influenced this nation by inspiring societal values and helping shape public views amidst perceived moral decay.

Recently, religious organizations inserted themselves into the modern-day political arena, causing religious activity to cross over into government affairs. The recent presidential campaigns and elections, for instance, have catapulted religion into the mainstream of this nation's political agenda.[1] The proper role of organized religion in the democratic process appears to be in question. The concern is that the line between what is religious and what is political has been abridged and its division left unclear.

An example of where this line of demarcation can blur is in the peculiar area of abortion and federal tax-exemption. In general, under section 501(c)(3) of the Internal Revenue Code (the Code),[2] all charitable, non-profit organizations, including those organized and operated exclusively for religious purposes, are exempt from taxation so long as no substantial part of their activity is aimed at attempting to influence legislation or at partic-

1. 1988 presidential primary elections cast a television evangelist, Pat Robertson, and a former preacher, Reverend Jesse Jackson, as candidates for the presidential nomination of their respective parties.

2. 26 U.S.C. § 501(c)(3) (1982).

ipating in political campaigns.[3] The American Roman Catholic Church (the Catholic Church) is a strong political advocate for the anti-abortion position,[4] having institutionally supported the pro-life movement since the Supreme Court's decision of *Roe v. Wade*.[5] The dilemma facing the Catholic Church is that its political activities have placed its tax-exempt status in jeopardy.

In *Abortion Rights Mobilization, Inc. v. Regan*,[6] the tax-exempt status of the Catholic Church, one of the largest churches in the world, is being challenged. The plaintiffs[7] claim that the Church, by attempting to influence legislation and by participating in a nationwide plan to change abortion laws, is in specific violation of the section 501(c)(3) restriction on political activity.[8] Though the merits of the case have not been addressed,[9] the case nonetheless presents an issue of paramount importance, not only to the Catholic Church, but to a broad range of other reli-

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3. Section 501(a) provides that "[a]n organization described in subsection (c) . . . shall be exempt from taxation under this subtitle . . . ."

Section 501(c) provides a list of various exempt organizations including those in subsection (3), which states:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, *no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in, any political campaign on behalf of any candidate for public office.*

Id. (emphasis added) (parentheticals omitted).

Also, Treas. Reg. § 1.501(c)(3)-1(a)(1) (1987) defines what is meant by "organized and operated for . . . religious purposes." It states:

> In order to be exempt as an organization described in section 501(c)(3), an organization must be both organized and operated exclusively for one or more of the purposes specified in such section. If an organization fails to meet either the organizational test or the operational test, it is not exempt.

4. *See infra* notes 20-25 and accompanying text.

5. 410 U.S. 113 (1973).

6. 544 F. Supp. 471 (S.D.N.Y. 1982).

7. The plaintiffs in *Abortion Rights Mobilization* are various individuals and organizations that "seek[] to secure and implement a woman's right to a legal abortion." *Id.* at 474. Abortion Rights Mobilization, Inc., in particular, is a non-profit, tax-exempt organization "prohibited from engaging in political activity under the terms of its tax exemption." *Id.*

8. *Id.* at 475. The plaintiffs have sought declaratory judgment and an injunction to have the United States revoke the tax-exempt status of the Catholic Church. Brief for Appellant at 5, *In re* United States Catholic Conf., 824 F.2d 156 (2d Cir. 1987) (No. 86-6092).

9. *See infra* note 18 and accompanying text.

gious and non-profit organizations as well. Because of the Catholic Church's tremendous size, and the enormous amount of exemptions and deductions at stake, the consequences of this action to the Church and its members would be overwhelming.[10]

The purpose of this note is to discuss the important statutory issues raised by *Abortion Rights Mobilization*, and to assess the likelihood that the Catholic Church's exemption will be revoked under the Code once the merits are addressed.[11] It discusses the background of the case, as well as the pertinent provisions of section 501(c)(3). This note then applies the Code to the facts of the case and discusses the Catholic Church's impact on the anti-abortion movement, the Church's involvement in legislative and electoral activities, and the significance of those activities to congressional decision-making in the context of section 501(c)(3). Though this note does not contest the constitutionality of section 501(c)(3),[12] it nevertheless addresses different in-

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10. Plaintiffs challenge the tax-exempt status of one of the largest and most influential churches in the world. If the plaintiffs are successful in their challenge, the impact will be two-fold: 1) the tax-exempt status of the organization will be revoked, and 2) the individual members as taxpayers will not be able to deduct their contributions. Under 26 U.S.C. § 170(c)(2)(D) (1982), a supplementary section referred to by section 170(a) of the Internal Revenue Code, taxpayers may deduct charitable contributions or gifts so long as they are for the use of section 501(c)(3) organizations which are not disqualified by reason of attempting to influence legislation or by participating in political campaigns. Thus, all contributors to the Church, including millions of citizens of the United States, may be left without any tax incentives to contribute to the Church organization.

The case could also result in the retroactive collection of back taxes on all exempted revenues earned by the Church over the entire period in dispute. Section 7805(b) of the Code "gives the Commissioner the power to prescribe taxes retroactively and his discretion will not be disturbed unless it constitutes an abuse of discretion." Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 858 (10th Cir. 1972) (*citing* Automobile Club of Mich. v. Commissioner, 353 U.S. 180 (1957)). Though the issue of retroactivity and the basis for its application is separate and will not be discussed further in this note, that issue is mentioned to show the significant economic impact the *Abortion Rights Mobilization* case may have on the Church. If retroactive payment is required, the impact of the decision will be felt by nearly every member of the Catholic Church as well as by the organization and its entities.

11. The emphasis of the analysis will not necessarily be to predict the outcome of the case on the merits, but to discuss the major statutory concerns and issues potentially facing the litigants. This note will discuss some of the statutory issues that may be presented in the trial court. For a discussion of the procedural posture of the case, see *infra* note 18 and accompanying text.

12. As a general rule, acts of Congress are construed to avoid unconstitutionality if any other possible construction remains available. *See, e.g.*, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979). This is especially true in the field of taxation:

> The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court can-

terpretations of the Code and the specific problems they present. It determines that there is uncertainty in the language of the Code, and thus, a technical application will not be appropriate in the case of a true religious organization like the Catholic Church. This note concludes that a church should be allowed to create a separate affiliate for its political activities so that the religious activities of the organization will remain tax-exempt.

II. BACKGROUND

A. The Abortion Rights Mobilization *Case*

In *Abortion Rights Mobilization*,[13] twenty-nine individuals and organizations that actively support a woman's legal right to have an abortion[14] are challenging the tax-exempt status of the Catholic Church. Plaintiffs specifically contend that by lobbying and participating in partisan politics, the Church is in violation of section 501(c)(3)'s restriction on political activity.[15] Though this Code section generally exempts all charitable, non-profit organizations from taxation, it also prohibits those organizations from attempting to influence legislation and from participating in political campaigns.[16] The plaintiffs contend that, although the Catholic Church has been granted tax-exempt status, no pro-abortion group can be granted such status when participating in similar legislative and electoral activities.[17]

The case is currently pending in the Second Circuit, on remand from a Supreme Court decision that allowed the Catholic Church to challenge the plaintiff's standing. However, the merits of the case have not yet been reached.[18] Consequently, this

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> not have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

Madden v. Kentucky, 309 U.S. 83, 87-88 (1940) (footnotes omitted) (quoted in Regan v. Taxation With Representation of Wash., 461 U.S. 540, 547-48 (1983)).

13. 544 F. Supp. 471 (S.D.N.Y. 1982).

14. *Abortion Rights Mobilization*, 544 F. Supp. at 473.

15. *Id.*

16. *Id.*; *see supra* note 3.

17. *Abortion Rights Mobilization*, 544 F. Supp. at 475. Plaintiffs also raise constitutional issues. They allege that by allowing the Church to maintain its tax-exempt status, the government is, in effect, "breaching the wall between church and state" in violation of the establishment clause by supporting the Roman Catholic Church's political views. *Id.* at 475-76. These issues, however, are not within the scope of this note.

18. The plaintiffs sued the federal government in the southern district of New York,

note will analyze the merits of the case without the benefit of a complete factual record.[19]

Nevertheless, many of the factors which bear on how *Abortion Rights Mobilization* should be decided are discussed in various publications. For example, several articles have been written documenting the political influence of the Catholic Church's Pastoral Plan for Pro-Life Activities (Pastoral Plan).[20] These articles generally describe the Pastoral Plan as an institutional, nationwide, pro-life program designed to use the political pro-

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challenging the IRS's grant of tax-exempt status to the Catholic Church. *Id.* at 471. Although the plaintiffs also named the Church as a defendant, the Church and its entities were subsequently made non-parties when the court granted a motion to dismiss for failure to state a claim. Subsequently, the United States challenged the plaintiffs standing to bring an action concerning the tax status of the Catholic Church, a third party to the suit. The court subsequently held that, except for five health service clinics, plaintiffs had standing to sue. *Id.* at 491.

During subsequent discovery proceedings, plaintiffs sought various subpoenas requesting information from the internal records of the Church regarding the implementation of the Church's anti-abortion plans and its contacts with political candidates. Subpoenas were served on the United States Catholic Conference (USCC) and the National Conference of Catholic Bishops (NCCB). Once they received the subpoenas, however, the USCC/NCCB challenged the subpoenas and refused to comply. Eventually, Judge Carter of the district court held the USCC/NCCB in contempt, stating that they had " 'willfully misled the court and the plaintiffs and made a travesty of the court process.' " *In re* United States Catholic Conf., 824 F.2d 156, 160 (2d Cir. 1987) (quoting Abortion Rights Mobilization, Inc. v. Baker, 110 F.R.D. 337 (S.D.N.Y. 1986)), *rev'd sub nom.* United States Catholic Conf. v. Abortion Rights Mobilization, Inc., 108 S. Ct. 2268 (1988).

The USCC/NCCB then appealed to the Second Circuit, arguing that the contempt citations were void because the district court had no jurisdiction over the initial proceedings. The Second Circuit subsequently held that as non-party witnesses, the USCC/NCCB could not challenge the contempt citations on the jurisdictional ground. The Supreme Court reversed, holding that the USCC/NCCB could challenge the plaintiff's standing to sue. United States Catholic Conference v. Abortion Rights Mobilization, Inc., 108 S. Ct. 2268, 2270 (1988). The Second Circuit must now consider whether the plaintiffs have standing. It should be noted that whether the district court ever reaches the merits of the case depends on how the court determines the standing question.

For a discussion of the issues presented to the Second Circuit, see Note, *In re* United States Catholic Conference: *Considering Non-Party Rights*, 1988 B.Y.U. L. REV. 89.

19. *In re* United States Catholic Conf., 824 F.2d 156, 158 (2d Cir. 1987), *rev'd sub nom.* United States Catholic Conf. v. Abortion Rights Mobilization, Inc., 108 S. Ct. 2268 (1988).

20. *See* Hofman, *Political Theology: The Role of Organized Religion in the Anti-Abortion Movement*, 28 J. CHURCH & ST. 225 (1986); Uslaner and Weber, *Public Support For Pro-Choice Abortion Policies in the Nation and States: Changes and Stability After the* Roe *and* Doe *Decisions*, 77 MICH. L. REV. 1772 (1979); Vinovskis, *Abortion and the Presidential Election of 1976: A Multivariate Analysis of Voting Behavior*, 77 MICH. L. REV. 1750 (1979); Vinovskis, *The Politics of Abortion in the House of Representatives in 1976*, 77 MICH. L. REV. 1790 (1979).

cess to bring about changes in state and congressional legislation.[21]

Furthermore, the plaintiffs' amended complaint cites to the judicial conclusions of a related opinion, *McRae v. Califano*,[22] which describes the Catholic Church's political activities in detail.[23] Although the facts and conclusions of *McRae* are not binding on the *Abortion Rights Mobilization* case, the *McRae* opinion nevertheless expresses a judicial determination of the Church's extensive involvement in the anti-abortion movement, which is relevant to this case.[24] The direct implication of *McRae*

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21. *See* McRae v. Califano, 491 F. Supp. 630, 703 (E.D.N.Y), *rev'd on other grounds sub nom.* Harris v. McRae, 448 U.S. 297 (1980). *See also* NATIONAL COUNCIL OF CATHOLIC BISHOPS, PASTORAL PLAN FOR PRO-LIFE ACTIVITIES (1975) [hereinafter Pastoral Plan] (a publication of the NCCB's Committee for Pro-life Activities).

The purpose of the Pastoral Plan is specified as follows:

> This effort at persuasion is part of the democratic process, and is carried on most effectively in the congressional district or State from which the representative is elected. . . . Thus, it is absolutely necessary to have in each congressional district an identifiable, tightly-knit and well-organized pro-life unit. This unit can be described as a public interest group or a citizens' lobby. No matter what it is called: (a) its task is essentially political, that is, to organize people to help persuade the elected representatives; and (b) . . . it is focused on passing a constitutional amendment.

Hofman, *supra* note 20, at 238 (footnotes omitted) (quoting PASTORAL PLAN at 10 (1975)).

22. 491 F. Supp. 630 (E.D.N.Y.), *rev'd on other grounds sub nom.* Harris v. McRae, 448 U.S. 297 (1980).

23. *Id.* at 703-28.

24. In *McRae*, the district court addressed the question of whether the Hyde Amendment, which limits medicaid funding for abortions, unconstitutionally established the anti-abortion position of the Catholic Church. In question was the extensive involvement of the Catholic Church in its attempt to rally members and nonmembers alike to influence the legislative decision-making process. The court eventually found that the Hyde Amendment was not a direct product of the Church's political plan, and did not have the direct effect of "establishing" a government orthodox position on abortion. It nevertheless stated that "it is more likely than not that those efforts have been a factor that cannot be eliminated from the chain of causation." *Id.* at 727.

The significance of *McRae* to the *Abortion Rights Mobilization* case has to do with the factual findings by the court. Because *McRae* dealt with whether the Church actually had a direct causal influence upon the legislature so as to represent an impermissible entanglement between church and state, the findings are at least relevant. The district court had the opportunity to fully adjudicate the factual issues at trial using discovery, subpoenas, and other evidentiary procedures.

Nevertheless, the issue in *McRae* did not specifically address the Church's involvement in the context of § 501(c)(3). No judicial notice or collateral estoppel can therefore be applied to the *Abortion Rights Mobilization* case. However, in reaching its conclusion, the court necessarily addressed the preliminary issue of whether the Catholic Church attempted to influence legislation before addressing whether or not such attempts were significant enough to invoke the establishment clause. Therefore, while *McRae* is not cited here as authority, the case is significant because it explains the facts and circum-

and the other writings is that the Catholic Church's Pastoral Plan has had an effect on the decision-making process in Congress and in other legislative bodies since the Plan was implemented in 1975.[25]

Plaintiff's main contention in the *Abortion Rights Mobilization* case is that the Pastoral Plan for pro-life activities is a direct attempt by the Catholic Church to persuade Congress and other legislative bodies to overturn *Roe v. Wade*.[26] Because of the Church's involvement in legislative and electoral activity, the plaintiffs contend that the tax-exempt status of the Catholic Church should be revoked.[27]

B. The Background of Section 501(c)(3) and its Rationale

Under section 501(c)(3) of the Internal Revenue Code,[28] all non-profit organizations operated exclusively for religious, charitable, educational and like purposes are exempt from taxation.[29] This exemption is generally premised on the theory that the government is able to justify the loss of revenue by providing an incentive for non-profit organizations to promote the general welfare.[30] As the Supreme Court has said, while neither the fed-

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stances regarding the Catholic Church's attempts to influence public opinion as well as to influence the passage of the Hyde Amendment. The court in *McRae* subsequently wrote a massive 214 page opinion documenting in significant part the legislative and electoral activities of the Catholic Church.

25. As statistical evidence of the Church's influence on Congress in 1976, soon after the Plan was implemented, "74.7% of Catholic representatives endorsed the Hyde Amendment on June 24 and only 51.2% of the Presbyterian, 57.1% of the Methodist, 55.3% of the Baptist, 42.5% of the Episcopalian, and 10.5% of the Jewish representatives voted for it." Vinovskis, *supra* note 20, at 1806. The Plan has also affected the direction of political thought and opinion by helping to make abortion an important political issue and causing it to play a prominent role in the 1980 and 1984 elections, and in other political campaigns and discussions in the post *Roe v. Wade* era. *See* Hofman, *supra* note 20.

26. 410 U.S. 113 (1973).

27. Abortion Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471, 475 (S.D.N.Y. 1982).

28. 26 U.S.C § 501(c)(3) (1982).

29. Section 501(c) provides a list of tax-exempt organizations referred to in the operative section, 501(a).

30. H.R. REP. No. 1860, 75th Cong., 3d Sess. at 19 (1939). The primary reason for giving churches and other charity organizations a tax benefit is that they perform socially beneficial activities that relieves the government from expenditures it might otherwise have to make.

> The exemption from taxation of money or property devoted to charitable or other purposes is based upon the theory that the government is compensated for the loss of revenue by its relief from the financial burdens which would otherwise have to be made by appropriations from public funds, and by bene-

eral government nor the states can constitutionally "pass laws which aid one religion, aid all religions, or prefer one religion over another,"[31] they may provide across-the-board exemptions to non-profit organizations that advance the public welfare.[32] Thus, nearly all religious, non-profit organizations which benefit the public welfare can qualify for the tax exemption.[33]

The portion of section 501(c)(3) relevant to the *Abortion Rights Mobilization* case, however, is the latter part, which places restrictions on the tax-exempt status of non-profit organizations.[34] Section 501(c)(3) states in part that non-profit organizations such as those operated exclusively for religious purposes

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fits resulting from the promotion of the general welfare.

Hageman, *An Examination of Religious Tax Exemption Policy Under Section 501(c)(3) Internal Revenue Code*, 17 VAL. U.L. REV. 405, 407 (1983).

Some have also raised the argument that tax-exemptions for religious organizations are required by the free exercise clause, and that "religious organizations, like many other non-profit organizations, have no measurable net income and consequently are not appropriate objects of taxation." *See* Schwarz, *Limiting Religious Tax Exemptions: When Should the Church Render unto Caesar?*, 29 FLA. L. REV. 50, 54-56 (1976). Tax-exemption for charitable organizations, however, is largely based on tradition and policy, and is generally accepted as a valid form of public assistance to accommodate the good works of all charities, whether religious or not.

31. Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

32. *See* Mueller v. Allen, 463 U.S. 388, 397 (1983). *See also* Schwarz, *supra* note 30, at 58-59. Tax-exempt status also applies to integrated auxiliaries whose primary activity is to further the religious purposes of the church with which it is affiliated. Hageman, *supra* note 30, at 412-13.

33. Tax exemption for religious organizations was upheld under the establishment clause by the Supreme Court in Walz v. Tax Commission, 397 U.S. 664 (1970). The legitimacy of accommodating religious organizations through tax exemption was justified on the grounds that complete "disestablishment" or separation of religion from government is neither possible nor desirable. *Id.* at 670. The Court stated "[n]o perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement." *Id.* The Court found that an accommodating approach to religion is not only desirable, but must be given to preserve "the autonomy and freedom of religious bodies while avoiding any semblance of established religion." *Id.* at 672.

The Court also determined that either taxation or exemption will inevitably involve government entanglement to a degree, so the question is whether government involvement is excessive and whether it leads to an impermissible degree of entanglement. *Id.* at 674-75. The Supreme Court accepted a benevolent neutrality approach to first amendment rights and held that a New York state statute exempting religious organizations from property tax was not unconstitutional as an attempt to establish, sponsor or support religion. It concluded that "there is no genuine nexus between tax exemption and establishment of religion . . . . The exemption creates only a minimal and remote involvement between church and state . . . ." *Id.* at 675-76.

34. Section 501(c)(3) also has other restrictions disallowing exemptions to organizations to which the net earnings of the organization inures to the benefit of any private shareholder or individual. *See supra* note 3.

shall be exempt from taxation, provided that (1) "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation," and (2) the organization "does not participate in, or intervene in, any political campaign on behalf of any candidate for public office."[35]

The rationale behind this restriction "stem[s] from the Congressional policy that the United States Treasury should be neutral in political affairs and that substantial activities directed to attempts to influence legislation or affect a political campaign should not be subsidized."[36] Just as the establishment clause prohibits government from giving special treatment to specific religious organizations, section 501(c)(3) of the Code generally prohibits government from supporting, via a tax exemption, non-profit organizations that further specific political viewpoints. The restriction also discourages abuse by organizations who might want to use the organization's tax-exempt charitable designation as a front for political activity.[37] Tax-exemptions are designed to promote and encourage charitable activity. Congress did not intend that they be used to assist non-profit organizations in their pursuit of political activity.[38]

This specific limitation in section 501(c)(3) was recently upheld by the Supreme Court in *Regan v. Taxation With Representation of Washington.*[39] In *Regan*, a non-profit, non-religious corporation (TWR) brought suit challenging the Internal Revenue Service's denial of its application for tax-exempt status.[40] The IRS denied the application because "it appeared that a substantial part of TWR's activities would consist of attempting to influence legislation, which is not permitted by § 501(c)(3)."[41] TWR claimed in part that the prohibition against substantial lobbying is unconstitutional under the free speech clause of the first amendment.[42] It argued that " '[t]o deny an exemption to

35. 26 U.S.C. § 501(c)(3) (1982).

36. Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 854 (10th Cir. 1972) (emphasis omitted).

37. Hageman, *supra* note 30, at 408.

38. *See* Clark, *Church Lobbying: The Legitimacy of the Controls*, 16 HOUS. L. REV. 480, 488 (1979).

39. 61 U.S. 540 (1983).

40. "Taxation With Representation of Washington (TWR) is a non-profit corporation organized to promote what it conceives to be the 'public interest' in the area of federal taxation. It proposes to advocate its point of view before Congress, the Executive Branch, and the Judiciary." *Id.* at 541-42.

41. *Id.* at 542.

42. *Id.*

claimants who engage in certain forms of speech is in effect to penalize them for such speech.' "[43] Though the Court has generally held that the government may not deny a benefit to a person because he chooses to exercise a constitutionally protected right,[44] the Court found that the government's refusal to "pay for TWR's lobbying"[45] does not infringe upon any first amendment rights or regulate any first amendment activity. The Court again rejected the " 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.' "[46]

Furthermore, in his concurring opinion, Justice Blackmun stated that any constitutional defect inherent in section 501(c)(3) may be avoided by section 501(c)(4),[47] which provides tax-exempt status for separate lobbying affiliates of 501(c)(3) organizations.[48] Though Justice Blackmun opined that a prohibition on lobbying is unconstitutional because it denies a benefit when a person exercises his constitutional rights, he argued that a non-profit organization may still create a separate affiliate for lobbying purposes under section 501(c)(4), while maintaining its tax-exempt status as a non-lobbying principal organization.[49] Under this view, the interaction between the different Code provisions alleviates any infringements on first amendment rights.[50]

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43. *Id.* at 545 (quoting Speiser v. Randall, 357 U.S. 513, 518 (1958)).

44. *Id.*; *see* Perry v. Sindermann, 408 U.S. 593, 597 (1972).

45. *Regan*, 461 U.S. at 546.

46. *Id.* (quoting Cammarano v. United States, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)). The Court in *Cammarano* held that Congress is not required by the first amendment to subsidize lobbying.

47. Section 501(c)(4) organizations are among those mentioned under 501(a) as being exempt from taxation. Section 501(c)(4) exempts from taxation:

> Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

26 U.S.C. § 501(c)(4) (1982).

48. *Regan*, 461 U.S. at 552 (Blackmun, J., concurring). *See also* McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. REV. 405, 427-28.

49. *Regan*, 461 U.S. at 552. Section 501(c)(4) provides tax-exempt status to civic organizations and affiliates of § 501(c)(3) organizations that promote the social welfare, but § 170 of the Code does not allow deductions for contributions made to such organizations. The underlying rationale for the tax distinction between 501(c)(3) and 501(c)(4) organizations is consistent with the government's neutral stand on political affairs. The government will not subsidize 501(c)(4) organizations engaged in lobbying activities insofar as contributions made to aid such affiliates are not deductible by the contributors.

50. Justice Blackmun's observation may be helpful to the future activities of the

III. ANALYSIS

The novel issue raised by the *Abortion Rights Mobilization* case presents some statutory questions of first impression. The following discussion, while applying section 501(c)(3) to the facts of this case, addresses some questions that may arise under various interpretations of the Code. In particular, the meaning of the phrase "substantial part of the activities" will be discussed. That phrase has not been addressed properly by Congress, the lower courts or the Supreme Court. In response to this uncertainty, this note focuses on several logical interpretations of that phrase and the potential ramifications each one presents.

Few cases have challenged the tax-exempt status of religious organizations under section 501(c)(3) for lobbying activities.[51] Thus, the possible application of section 501(c)(3) to the activities of the Catholic Church has not been fully litigated or addressed by the courts. In *Christian Echoes National Ministry,*

Catholic Church. If the Church were to create an affiliate, in Justice Blackmun's opinion the Church might continue to operate as a tax-exempt organization while using the affiliate for its political activities. The Church might, through the affiliate, acting as a separate political entity, continue in its attempts to reform legislation and intervene in political affairs.

In addition, even if the Church were to lose its tax-exempt status under 501(c)(3), it might nevertheless qualify as a tax-exempt social welfare organization under 501(c)(4). It is unlikely, however, that the Church would ever be willing to forego the tax-deductible status of all of its contributors nationwide by declaring itself a 501(c)(4) organization. The effect of such a change would serve to reduce total contributions made to the Church thereby causing a substantial reduction in Church funds.

Moreover, it is uncertain whether the *Abortion Rights Mobilization* case may even have an effect on the future tax-exempt status of the Church if the Church were to stop at once all of its prohibited political activity, assuming the Church would choose to do so. Once the Catholic Church chooses to stop its prohibited political activities, notwithstanding the result of this case, its exempt status might still be reinstated upon reapplication if the IRS finds the Church to have an exclusively religious purpose. Thus, the tax consequences of the case may be limited to the Church's having to pay the amount of back taxes owed from exempted revenues on a retroactive basis. However, in practical terms, it would be an accounting nightmare to determine the amount of back taxes due. Since the Catholic Church is such a large organization, consisting of hundreds of entities, including schools, congregations and hospitals, how will the court determine which entities ought to pay back taxes? Is it the entire network of organizations, or just the National Council of Catholic Bishops? Given these practical problems, the amount of payment due would be difficult to determine. Nevertheless, once the figures are added up, the total amount is likely to be substantial, and the Church could suffer greatly in its future activities.

51. *See* Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972). *Cf.* Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983) (non-profit corporation organized to promote the public interest in the area of federal taxation); Haswell v. United States, 500 F.2d 1133 (Ct. Cl. 1974) (educational and informational non-profit organization).

Inc. v. United States,[52] however, the tax status of a recently established, non-profit, religious corporation was challenged. Though *Christian Echoes* did not involve an established church in the traditional sense, that case will be discussed initially because it furnishes an analytical basis for the discussion of the issues raised in the *Abortion Rights Mobilization* case.

Christian Echoes National Ministry (Christian Echoes), a self-designated religious corporation, was established in 1951 to spread Christian values to the nation in a "battle against Communism, socialism and political liberalism . . . ."[53] Christian Echoes was specifically organized to establish and maintain weekly religious broadcasts and religious publications.[54] Upon revocation of its tax-exempt status and subsequent assessment of back taxes, Christian Echoes sought a tax refund from the IRS.[55] The court upheld the revocation, concluding that a "substantial and continuous" part of Christian Echoes' activities was aimed at influencing legislation.[56] In so doing, the court found that Christian Echoes was engaged in at least twenty-two politically motivated activities, such as making appeals to readers to write their congressmen to support the Becker Amendment for restoration of prayers in public schools.[57] The court also found that Christian Echoes intervened in political campaigns by urging followers to support various conservative candidates for public office and to defeat liberal candidates.[58] As a result of these

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52. 470 F.2d 849 (10th Cir. 1972).

53. *Id.* at 852.

54. The articles of incorporation of Christian Echoes state in part that the corporation was founded " 'to establish and maintain weekly religious, radio and television broadcasts, to establish and maintain a national religious magazine and other religious publications, to establish and maintain religious educational institutions . . . .' " *Id.* at 851.

55. The IRS had revoked the corporation's previously granted tax-exempt status because "(1) [the corporation] was not operated exclusively for charitable, educational or religious purposes; (2) it had engaged in substantial activity aimed at influencing legislation; and (3) it had directly and indirectly intervened in political campaigns on behalf of candidates for public office." *Id.* at 853.

56. *Id.* at 856.

57. *Id.* at 855. Among the 22 activities, Christian Echoes made appeals to its followers to (1) work in politics at the precinct level, (2) contact their congressmen in opposition to the increasing interference with freedom of speech in the United States, (3) write their congressmen to influence decisions in Washington, and (4) demand that Congress limit foreign aid spending. *Id.*

58. *Id.* at 856. The court found that Christian Echoes sought support for conservatives like Senator Strom Thurman and Congressman Bruce Alger. Christian Echoes also urged followers to defeat Senator Fullbright and attacked President Kennedy, President Johnson and Senator Hubert Humphrey. *Id.*

findings, the court held that the revocation of Christian Echoes' tax-exempt status was proper.[59]

In *Christian Echoes*, the court applied section 501(c)(3) of the Code as well as the treasury regulations in its analysis. Though the language of the Code is somewhat ambiguous, the treasury regulations provide additional help to determine when an organization is not organized and operated exclusively for religious purposes.[60] Treasury regulation § 1.501(c)(3)-1(c)(3) in part provides that an organization is not operated exclusively for

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59. The court found that the tax-exempt revocation was properly applied retroactively and forced repayments of previous exemptions to the IRS. *Id.* at 858. The court also addressed constitutional issues under the free exercise clause of the first amendment, as well as the free speech clause, and upheld section 501(c)(3) in each instance.

60. Treas. Reg. § 1.501(c)(3)-1(b)(3) (1976) states:

> An organization is not organized exclusively for one or more exempt purposes if its articles expressly empower it—
>
> (i) To devote more than an insubstantial part of its activities to attempting to influence legislation by propaganda or otherwise; or
>
> (ii) Directly or indirectly to participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of or in opposition to any candidate for public office; or
>
> (iii) To have objectives and to engage in activities which characterize it as an "action" organization as defined in paragraph (c)(3) of this section.

Treas. Reg. § 1.501(c)(3)-1(c)(3) (1976) provides:

> (i) An organization is not operated exclusively for one or more exempt purposes if it is an "action" organization as defined in subdivisions (ii) [or] (iii) . . . of this subparagraph.
>
> (ii) An organization is an "action" organization if a substantial part of its activities is attempting to influence legislation by propaganda or otherwise. For this purpose, an organization will be regarded as attempting to influence legislation if the organization (a) Contacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or
>
> (b) Advocates the adoption or rejection of legislation.
>
> The term "legislation", as used in this subdivision, includes action by the Congress, by any State legislature, by any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure. An organization will not fail to meet the operational test merely because it advocates, as an insubstantial part of its activities, the adoption or rejection of legislation.
>
> (iii) An organization is an "action" organization if it participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.
>
> The term "candidate for public office" means an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State or local. Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.

one or more exempt purposes, when (1) a substantial part of the organization's activities is aimed at attempting to influence legislation by propaganda or otherwise, or when (2) the organization participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office. The treasury regulations also provide other terms and provisions which are discussed in more detail later in this note.

In spite of their apparent clarity, the treasury regulations appear to expand the Code definitions unnecessarily by suggesting that if the regulatory restrictions are violated, the organization is not exclusively operated for one or more exempt purposes. Although this is a plausible interpretation of the Code, it ignores the possibility that a religious organization's political activity might be independent, but entirely consistent with its exempt purposes. For example, if a religious organization attempted to influence legislation strictly for the purpose of furthering its charitable activities and preserving its religious beliefs, it seems that such activities should not deprive it of its charitable and religious designation.

The use of the treasury regulation's interpretation, however, was generally upheld in *Christian Echoes*. In *Christian Echoes*, the court implied in its conclusion that Christian Echoes was not operated exclusively for charitable, educational or religious purposes because it failed to meet the treasury regulation's broad interpretation of the limitation on attempts to influence legislation.[61] The court followed the treasury regulation's definitions and concluded that "Congress intended that the limitations be given a broad or liberal interpretation."[62]

A. Attempting to Influence Legislation by Propaganda or Otherwise

Though it is clear from the Code that one must determine whether a religious organization's attempts to influence legislation constitute a "substantial part of its activities," a logical starting point in the analysis is to determine whether or not there has been any attempt to influence legislation in the first place. Once it is shown that there have been some attempts

61. Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 855 (10th Cir. 1972). *See also* Schwarz, *supra* note 30, at 74-75.

62. *Christian Echoes*, 470 F.2d at 855.

made, then the appropriate question will be whether such attempts represent a substantial part of the organization's activities.

In *Abortion Rights Mobilization*, the plaintiffs challenge the Catholic Church's tax-exempt status as a non-profit religious organization in part because of the Church's alleged attempts to influence legislation.[63] The treasury regulations state that "an organization will be regarded as attempting to influence legislation if the organization —(a) Contacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or (b) Advocates the adoption or rejection of legislation."[64] The following discussion assesses whether, under the above treasury regulation's definitions, the Catholic Church has attempted to influence legislation "by propaganda or otherwise."

In November of 1975, in response to the Supreme Court's decision of *Roe v. Wade*, the National Council of Catholic Bishops (NCCB) promulgated an institutional program called the Pastoral Plan for Pro-life Activities.[65] The Plan, in short, is designed to promote "a public policy effort directed toward the legislative, judicial and administrative areas"[66] in support of a comprehensive pro-life legislative program that includes the passage of a constitutional amendment prohibiting abortion. The Plan unabashedly advocates a change in legislative and public policy with the specific intent to outlaw abortion through statutory and constitutional amendments.[67]

Applying the treasury regulation's definitions, the first question is whether the Church has contacted members or urged the public to contact members of a legislative body. According to *McRae*, it is apparent that at least some prominent leaders of the Church have contacted Congress. In March of 1974, immediately after the decision of *Roe v. Wade*, several Church officials made direct pleas to Congress in an effort to amend the Constitution. The Cardinal Archbishops of Philadelphia, Los Angeles, Boston and Chicago appeared as witnesses before the Subcom-

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63. It is also being challenged for the Church's alleged participation and intervention in political campaigns on behalf of candidates for public office. *See infra* section C.

64. Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (1976).

65. *See* Hofman, *supra* note 20, at 238.

66. McRae v. Califano, 491 F. Supp. 630, 703 (E.D.N.Y.), *rev'd on other grounds sub nom.* Harris v. McRae, 448 U.S. 297 (1980).

67. *See* Hofman, *supra* note 20, at 238.

mittee on Constitutional Amendments of the Senate Committee on the Judiciary. They presented documentation supporting a constitutional amendment that would " '[e]stablish that the unborn child is a person under the law in the terms of the Constitution from conception on.' "[68]

The relevant question, however, is whether this appearance before Congress was made pursuant to Church authority, or whether the Archbishops testified on their own behalf as concerned citizens. The Code does not prohibit private action by individuals who happen to be leaders of a church.[69] It prohibits instead the *organization* from making such contacts for the purpose of influencing legislation.[70] Thus, such private contact by individual church leaders may by itself be allowed.

Since the Church's Pastoral Plan was implemented, however, the Church has given both authority and direction to members to contact their elected representatives on behalf of the Church organization. The Plan specifically calls upon "all Church sponsored or identifiable Catholic national, regional, diocesan and parochial organizations and agencies" to effectuate the purposes of the plan.[71] Since that directive was given, many efforts have been made by the Church to carry out the objectives of the Plan.[72] Therefore, any subsequent contacts made by the Church leaders or by members under authority of the Church's Pastoral Plan, to influence any legislative body,[73] including local and state municipalities, may qualify as the organization contacting to influence legislation under the treasury regulations.[74]

Moreover, the Pastoral Plan urges the public to contact members of a legislative body to show support for a constitu-

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68. *McRae*, 491 F. Supp. at 702-03 (citation omitted).

69. Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (1976).

70. *Id.*

71. Hofman, *supra* note 20, at 238.

72. *See McRae*, 491 F. Supp. at 702-28.

73. The term "legislation" as defined in the treasury regulations includes "action by the Congress, by any State legislature, by any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure." Treas. Reg. § 1.501(c)(3)-1 (c)(3)(ii)(b) (1976).

74. Though a complete listing of every contact made by Catholic Church officials would be impossible, one can infer from the specific admonition of the Plan, and the consequent support for the Plan by the Church organization, that many other recorded and unrecorded contacts may have been made. As suggested by the findings in the *McRae* case and various other articles, Church members and officials have responded to this calling and have attempted to carry out the objectives of the Plan.

tional amendment.[75] "[T]he pamphlet states that the activity is not simply the responsibility of Catholics and should not be limited to Catholic groups or agencies."[76] The group's "task is essentially political, to organize people to help persuade elected representatives, and . . . [is] focused on passing a constitutional amendment . . . ."[77] The Plan is also designed to rally and encourage pro-life political action groups in all states in various congressional districts.[78] These congressional district groups are "more directly a public interest group or citizen's lobby."[79] These pro-life groups are "to conduct a continuing public information effort, directed to elected officials and potential candidates, to persuade them that abortion must be legally restricted . . . ."[80]

Under the second prong of the treasury regulation's definitions, the next question is whether the Pastoral Plan advocates the adoption or rejection of legislation. In this regard, the Plan unequivocally casts the ultimate goals and recommendations of the National Council of Catholic Bishops and the United States Catholic Conference. It clearly states that its comprehensive pro-life legislative program must include:

> a) Passage of a constitutional amendment providing protection for the unborn child to the maximum degree possible.
> b) Passage of federal and state laws and adoption of administrative policies that will restrict the practice of abortion as much as possible.
> c) Continual research into the refinement and precise interpretation of *Roe* and *Doe* and subsequent court decisions.
> d) Support for legislation that provides alternatives to abortion.[81]

Furthermore, additional evidence of the Church's attempts to influence legislation can be found in the *McRae* case. Although *McRae* held that the Pastoral Plan did not directly influ-

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75. McRae v. Califano, 491 F. Supp. 630, 704 (E.D.N.Y. 1980). The Plan sets up in each state, under the state catholic conference, a state coordinating committee, a diocesan pro-life committee, and a parish pro-life committee, to publicly denounce abortion. Hofman, *supra* note 20, at 243.

76. *McRae*, 491 F. Supp. at 704.

77. *Id.* at 705.

78. *Id.* at 704.

79. Hofman, *supra* note 20, at 243.

80. *McRae*, 491 F. Supp. at 705.

81. *Id.* at 704.

ence Congress to pass the Hyde Amendment,[82] the Catholic Church's intention to influence its passage was clear. "During the debates on the Hyde Amendment in the Ninety-fourth Congress, the Catholic Church played an active role in organizing its parishioners in every congressional district to lobby their congressmen to support the Amendment, pursuant to its [Pastoral Plan]."[83] In fact, nearly three-fourths of the Catholic representatives in Congress voted for the amendment.[84] Whether or not the Plan was found to be a direct cause of the legislation, it is apparent that the Church's Pastoral Plan has had an influence on the public as well as on the legislative decision-making process.[85]

At any rate, it is clear from the language of section 501(c)(3) that the *effect* or *result* of the Church's involvement, for purposes of the Code, is irrelevant. The provision merely states that any *attempt*[86] to influence legislation by propaganda or otherwise, whether or not such attempts are successful, may be enough to disqualify the organization from tax-exempt status. Thus, by looking at the specific objectives of the Pastoral Plan and the way in which it has been carried out, without regard to its effect or total impact on society, it appears that the Catholic Church has attempted to influence legislation.

On the other hand, an argument can be made that a church should be allowed to engage in activity, political or not, to advance or preserve its religious purposes. Any impairment of the right of churches to function as religious entities could be seen as an infringement upon first amendment, free exercise rights. Though it is not clear that the Catholic Church was carrying out its Pastoral Plan strictly for religious purposes, it is clear that abortion is an issue of religious and moral importance. Thus, although the technical restrictions of the Code and the treasury regulations may be violated, the courts may be reluctant to interpret the Code restrictions as broadly as the Tenth Circuit did in *Christian Echoes*, especially in the case of an established religious organization like the Catholic Church.

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82. *See supra* note 24.

83. Hofman, *supra* note 20, at 239-40.

84. *See supra* note 25.

85. *See generally* Hofman, *supra* note 20.

86. The treasury regulations define "attempts" as any contacts with a legislative body, or any acts urging the public to contact a legislative body. *See supra* note 60. They do not require that such contacts be successful in any way in proposing or opposing legislation.

B. The Problem of Defining "Substantial Part of the Activities"

If it can be determined that the Church has made attempts to influence legislation, the court must still consider the more difficult question of whether, under section 501(c)(3), the organization's attempts to influence legislation constitute a "substantial part of its activities." Nowhere in the Code, its legislative history, or the regulations is the meaning of the phrase "substantial part of the activities" defined or explained.[87] The difficulty is with the literal meaning of the phrase and its interpretation. Before the courts can apply section 501(c)(3) to the *Abortion Rights Mobilization* case, the proper meaning of the phrase will have to be determined. This section discusses three possible interpretations of the phrase: first, a percentage test; second, a straight ceiling on legislative activity; and third, a subjective balancing test.

1. A percentage test: some practical problems with its application to religious organizations

The literal language of the phrase "substantial part of the activities" suggests some type of percentage test that would compare the amount of lobbying activities of the organization with the amount of religious activities. Under such a test, if the Church's attempts to influence legislation constitute a substantial percentage of the activities of the Church as a whole, the test would be met and the exemption revoked.[88] For example, if twenty percent of the cost and efforts of a church were for the purpose of influencing legislation, the court might find such activity to be a substantial part of its activities. In such a case, twenty percent would be considered substantial, and thus, the organization would lose its tax-exempt status.

There are several practical problems, however, with such a view of the statute. First, in order to make a comparison of legis-

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87. The court in Haswell v. United States, 500 F.2d 1133, 1142 (Ct. Cl. 1974) stated that "[n]either the legislative histories of sections 170(c)(2) and 501(c)(3) nor the cases that have arisen thereunder, provide specific guidance as to the content of the phrases 'organized and operated exclusively,' 'no substantial part,' and 'to influence legislation,' as used in those sections." Furthermore, the regulations merely indicate that "[a]n organization will not fail to meet the operational test merely because it advocates, as an insubstantial part of its activities, the adoption or rejection of legislation." Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (1976).

88. *See* Hageman, *supra* note 30, at 422.

lative and religious activities, one must first understand what is meant by "activity." An obvious difficulty is that the term "activity" is not defined in the Code.[89] The question is whether the term refers only to those activities that can be measured by monetary expenditures, or covers all activities as measured by time, money and effort. If the latter is true, how will time, money and effort be measured in terms of religious and political activity? In the case of religious organizations, the problem is magnified because most of their religious and many of their political activities have no inherent monetary value. Churches and church members are engaged in various acts of worship, religious services, and charitable work, as well as other activities that are not reflected in church financial records.[90] Furthermore, under a percentage test, the courts must determine what activities are aimed at attempting to influence legislation and what activities are considered religious. As mentioned before, there is no bright line between the two. In addition, courts are generally prohibited under the establishment clause from making any searching inquiries into church activities or to attempt to ascertain the private motives of a religious organization for the purpose of determining what is religious and what is not.[91] Thus, the test is inherently difficult to apply to religious organizations.

The second problem with the percentage test is that Congress has not defined what is meant by "no substantial part of the activities." Congress made an effort to clarify that provision by passing section 501(h),[92] which sets safe-harbor spending lim-

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89. *See supra* note 3.

90. In fact, if only expenditures were measured, the Catholic Church may not be in any danger at all. Since many of its legislative activities cannot be measured in monetary terms, a percentage test that compares expenditures alone will inevitably show that the Church has made only an insubstantial amount of actual expenditures for lobbying purposes. As evidence, according to a recent article, the United States Catholic Conference staffs only three bishops in its lobbying offices to carry out its legislative agenda, with each bishop constituting a separate lobbying corporation. Clark, *supra* note 38, at 502 n.149. More importantly, the total expenditures needed to maintain the offices, other than those administrative expenses needed to publish propaganda and to arrange for other more costly legislative and electoral activities, could be nominal compared to the Church's entire operating expenditures. *Id.*

91. *See* Corporation of the Presiding Bishop v. Amos, 107 S. Ct. 2862, 2870 (1987) (Brennen, J., concurring). An additional problem is that no court would be competent to decide which activities are needed to carry on a church's religious functions, or to measure those activities with any objective accuracy.

92. Congress modified § 501 with the passage of the Tax Reform Act of 1976 in an effort to clarify that section. The purpose of the modification was to determine the appropriate measure of legislative activity that would be permissible by an exempt organi-

itations on lobbying expenditures for nearly all 501(c)(3) organizations except churches. Section 501(h) allows 501(c)(3) organizations to elect to have specific lobbying ceilings apply to their legislative activities as a safe-harbor in lieu of the more subjective language of the Code.[93] Congress, however, specifically disqualified "churches and any convention or association of churches" from the safe-harbor ceiling election of section 501(h). This forced churches to apply the more subjective language of the Code.[94] This specific exclusion of churches suggests, by nega-

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zation before its exempt status is revoked. "In essence, the bill sought to define what 'no substantial part' as referred to legislative activity means in section 501(c)(3)." Hageman, *supra* note 30, at 408-09.

The Treasury favored the legislation stating that:

> H.R. 13500 [the proposed modification to the Code] is a product of a number of attempts to reach a compromise among representatives of conflicting interests. It has been designed to provide certainty and predictability to the administration of the lobbying provisions of sec. 501(c)(3). It provides clear quantitative measures of permissible lobbying activities. It defines with some precision which activities constitute lobbying and which do not. Finally, it enlarges the scope of activities in which charitable organizations may engage without adverse tax consequences.

Id. (quoting *Influencing Legislation by Public Charities: Hearings on H.R. 13500 Before House Comm. on Ways and Means*, 94th Cong., 2d Sess. 77 (1976)).

In its final form, H.R. 13500 (which is the resolution that led to the passage of section 501(h) of the Code in the Tax Reform Act of 1976) disqualified churches from the new provisions. Thus, the clarity that Congress promised in its bill specifically excluded churches from its guidance.

93. Section 501(h) allows all 501(c)(3) organizations except churches to elect the method of determining when a substantial part of the organization's activities has been aimed at attempting to influence legislation. They may choose to have specific lobbying ceilings apply to their case as a safe-harbor, or they may have the more subjective language of the Code apply. 26 U.S.C. § 501(h)(3) (1982).

Section 501(h)(1) states the general rule that:

> In the case of an organization to which this subsection applies, exemption from taxation under subsection (a) shall be denied because a substantial part of the activities of such organization consists of carrying on propaganda, or otherwise attempting, to influence legislation, but only if such organization normally—
>
> (A) makes lobbying expenditures in excess of the lobbying ceiling amount for such organization for each taxable year, or
>
> (B) makes grass roots expenditures in excess of the grass roots ceiling amount for such organization for each taxable year.

26 U.S.C. § 501(h)(1) (1982). Sections 501(h)(2)(B) and (C) define the ceiling amounts.

94. Section 501(h)(5) specifically disqualifies churches:

> For purposes of paragraph (3) an organization is a disqualified organization if it is—
>
> (A) described in section 170(b)(1)(A)(i) (relating to churches),
>
> (B) an integrated auxiliary of a church or of a convention or association of churches . . . .

26 U.S.C. § 501(h)(5) (1982).

tive implication, that Congress intended that a percentage test be applied to religious organizations.[95] Nevertheless, even if a percentage test were intended by Congress, no factors to determine what is meant by "substantial" are provided by the Code. Furthermore, even though the treasury regulations provide further clarification on many of the relevant Code provisions, they do not define what is meant by "substantial part of the activities." Thus, little help is available from the statute or the regulations. The third practical problem is that there is very little case law on the issue. Only a few cases have addressed the percentage test, and in those cases, the facts and results have varied. In *Seasongood v. Commissioner*,[96] the Sixth Circuit addressed an issue regarding a challenge to an organization's tax-exempt status under a similar provision of the 1939 Internal Revenue Code.[97] Although that case dealt with the Hamilton County

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One commentator has added:

> As a result of a statement by the National Council of the Churches of Christ in the United States of America, several compromises were made in H.R. 13500. Churches, their integrated auxiliaries and conventions or associations of churches were disqualified under the bill. This means they are protected by the current language of the section. Furthermore, the decision in *Christian Echoes National Ministry v. United States* was not affected by Congress. The National Council of Churches did suggest the Committee drop the restriction on "influencing" legislation altogether, because of a church's need to contribute to the solutions to the problems of society. However, this point was not approved by the Committee after taking it into consideration.

Hageman, *supra* note 30, at 409 (citations omitted).

95. Churches opposed the proposed provision under § 501(h)'s safe-harbor legislation because of the intrusive nature of the monitoring and information process needed to determine the amount of lobbying expenditures made by the organization. If churches were covered under the provision, they would have been required to file returns and tax forms (form 990) which are not currently required by the Code. *See* Clark, *supra* note 38, at 495 n.102.

Under the provision, compliance with strict regulations regarding tax return information would have been scrutinized by the IRS. The tax information from the churches would have been necessary because the provision, being designed to be more fair, would have taxed only the amount of lobbying expenditures in excess of the ceiling amounts without jeopardizing the tax-exempt status of the whole organization.

Nevertheless, in spite of the stated fairness of the new provision, and the ambiguity of the existing language, churches preferred to be governed by the existing subjective approach which does not lock in the amount of total lobbying allowed. Churches were subsequently disqualified for that reason. For a complete discussion of the debate over H.R. 13500, see *Influencing Legislation by Public Charities: Hearings on H.R. 13500 Before House Comm. on Ways and Means*, 94th Cong., 2d Sess. 77 (1976).

96. 227 F.2d 907 (6th Cir. 1955).

97. In *Seasongood*, the court dealt with the proper meaning of sections 23(o)(2) and 101(6) of the Internal Revenue Code of 1939. *Id.*

Good Government League,[98] a non-religious organization, and addressed the meaning of an old 1939 provision containing language similar to section 501(c)(3),[99] the court opined that a percentage test should apply. In *Seasongood*, the court held that where "something less than 5% of the time and effort of the League was devoted to [political] activities,"[100] such activities were not substantial within the meaning of the Code in relation to the other legitimate activities of the organization. *Seasongood* provides some indication that a percentage test can be inferred from the language of the Code.[101] In a more recent case, however, the Court of Claims in *Haswell v. United States*[102] stated that "[a] percentage test to determine whether the activities are substantial is not appropriate."[103] The court determined that a subjective balancing test should be applied to organizations under section 501(c)(3), not a percentage test. Citing language from *Christian Echoes* for support, the court stated that a percentage test "obscures the complexity of balancing the organization's activities in relation to its objectives and circumstances in the context of the totality of the organization."[104] *Haswell's* interpretation of the Code has also been cited by some commentators as the controlling definition of the term "substantial."[105] The court nevertheless found that under the circumstances, when expenditures for legislative activity constituted 20.5% and 19.27% of its total expenditures for 1967 and 1968 respectively,

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98. The court conceded that the League was organized for, and operated at all times in, the public interest within the category of charitable or educational purposes. *Id.* at 909.

99. Section 23 of the old Code stated that in computing net income, there should be allowed as deductions contributions or gifts made within the taxable year to:

> A corporation, trust, or community chest, fund, or foundation, created or organized in the United States or in any possession thereof or under the law of the United States or of any State or Territory or of any possession of the United States, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . .

Id. at 910 n.1.

100. *Seasongood*, 227 F.2d at 912. *See also* Clark, *supra* note 38, at 509.

101. *See* Hageman, *supra* note 30, at 422.

102. 500 F.2d 1133 (Ct. Cl. 1974).

103. *Id.* at 1142.

104. *Id.*

105. *See Political Expenditures*, Tax Mgmt. (BNA) No. 231-2d at A-32 (1982). *See also* Clark, *supra* note 38, at 491.

such expenditures were substantial compared to the organization's other activities.[106] In addition, *Haswell* involved a non-religious, service organization not affiliated with any religious organization, as did *Seasongood*.[107] Consequently, the cases are not persuasive, nor is the case law very consistent or clear on the issue, and thus, these cases provide the courts with little or no guidance.[108]

The fourth problem with the percentage test is that its application may result in unequal treatment of some religious organizations because such a test necessarily places emphasis on the organization's size. The implication of a straight percentage test is that, the larger the church, the greater the amount of legitimate religious activity, and consequently, the larger the permissible amount of legislative activity. A large church, like the Catholic Church, may spend a significant amount of time, effort and money attempting to influence legislation, but since the Church is so large and participates in a tremendous amount of religious activities, such expenditures may constitute only a small percentage of the Church's total activities. On the other hand, a small religious organization, based on the same percentage, would only be allowed to participate in a relatively insignificant amount of legislative activity since the amount of its total religious activities is much less.[109] Thus, small churches may find it much more difficult to maintain their tax-exempt status when participating in legislative activity.[110]

For example, a small, independent, 200-member congregation stands to lose its tax-exempt status if it lobbies extensively to defend against the threat of an adverse county ordinance or

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106. *Haswell*, 500 F.2d at 1142.

107. In both *Seasongood* and *Haswell*, the courts addressed the issues with respect to non-religious organizations. As mentioned, *Seasongood* involved the Hamilton County Good Government League, *see supra* note 98, and *Haswell* involved an organization designed to preserve, improve and expand railroad passenger services, not a church organization. *Haswell*, 500 F.2d at 1136. Furthermore, *Christian Echoes*, which was cited as support for the *Haswell* interpretation, involved a religious corporation principally organized for the purpose of spreading publicity on moral issues. Very little, if any, true religious practices in the traditional sense were involved. *Christian Echoes*, 470 F.2d at 851. Under these circumstances, no clear precedent for an accurate, representative interpretation of section 501(c)(3) exists.

108. *See* Clark, *supra* note 38, at 491 n.78.

109. *See* Clark, *supra* note 38, at 532.

110. *See* Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 N.Y.U. INST. ON FED. TAX 1415, 1451-56 (1973).

other local legislation. Because of its small size, the church as an organization may make only an insubstantial amount of effort to oppose legislation even if the legislation has a significant adverse effect on the church organization. Because many small churches rely heavily on their tax-exempt status to operate successfully, they may not be able to afford the risk of contacting elected representatives and legislative bodies even when it becomes necessary to do so. A loss of their exempt status may have the effect of inhibiting their religious activity altogether.

On the other hand, if the same 200-member congregation were a small parish belonging to a large church organization, like the Catholic Church, that parish could engage in much greater political activity. As long as the parish's political activities do not constitute a substantial part of the entire church's total activities, the church as a whole, including the parish, would be able to maintain its tax-exempt status. The effect is that a small independent church may lose its tax-exempt status for minor legislative activity, while a parish belonging to a large church organization would maintain it in spite of engaging in a substantially greater amount of legislative activity.[111]

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111. Such an unjust result may violate the Constitution under the equal protection clause because of the unequal treatment of large and small churches. It may also violate the free exercise clause because it may have the effect of inhibiting the religious practices of small religious organizations.

It could also be argued that such a view violates the establishment clause because through tax exemption the government is, in effect, supporting or establishing the views of large churches, while disestablishing the views of smaller churches. The establishment clause prohibits the so-called establishment of a national church, as well as any excessive entanglement between church and state. Though mere tax-exemption for non-profit organizations is permissible, a tax-exemption that has the effect of favoring large established churches may come close to being an impermissible entanglement or establishment of a national church viewpoint under the first amendment.

Moreover, part of the rationale behind tax-exemption is inconsistent with a provision that prefers large organizations over others. Tax exemptions are given because all non-profit organizations, large and small, purportedly benefit society, and consequently the government does not want to impose tax burdens on such organizations. A government that effectively gives special treatment to large churches may be seen as unjustly adopting the large church's views merely because of the organization's size and power. Conversely, such treatment, insofar as it affects small churches, may be seen as a direct infringement upon their religious freedom.

On the other hand, it could be argued that because of its size, a large church should be allowed a proportional influence upon government. The democratic process favors a government represented by the people in proportion to their voting power. A particular church, because of its size and membership, may rightly be given its proportionate share of influence.

This argument, however, belies the significance of the religion clauses. Although political activity may be scrutinized under certain congressional policies, when such activity

2. The ceiling limitation: an improbable approach

Another possible means of interpreting "substantial" is to prescribe a fixed amount of money that an organization could devote to political activities while maintaining its tax exempt status. This interpretation would require no comparison or percentage test.

Though this meaning is often suggested as a standard, it is not accurate.[112] The problem with this interpretation is that it contradicts the plain language of the provision. As mentioned before, the words "substantial *part* of the activities" suggests a percentage test. Also, just as the percentage test may favor large churches in some circumstances, a monetary ceiling may indirectly favor small churches because the amount of the limitation would not depend on the size of the organization. A hypothetical ceiling in the amount of $20,000 may be more than enough to allow small organizations to influence legislation for its purposes. On the other hand, such a limitation may be a great hindrance to the nationwide activities of a large church. Furthermore, Congress specified in the Code that the 501(h) ceiling limitations on lobbying expenditures for section 501(c)(3) organizations are elective and do not apply to churches.[113] This is generally because Congress did not want to intrude upon the religious freedom of organizations by inspecting church records and tax forms regarding its expenditures for lobbying activities.[114] Thus, it

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involves religious rights, the standard is necessarily heightened under the first amendment. Even the smallest neophyte religion must have equal protection under the law. Though political activity and its limitations may be governed by Congress, limitations or other regulations on religious activity must be governed by the principles of the religion clauses.

112. In Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972), the court began its analysis by stating that "[a] religious organization that engages in substantial activity aimed at influencing legislation is disqualified from tax exemption, whatever the motivation." *Id.* at 854. The court later discussed the test as being an inquiry into the circumstances and objectives of the organization.

In Hofman, *supra* note 20, at 241-42, the author states:

> In order to qualify for federal tax-exempt status, churches may not participate in political campaigns or "substantial" legislative (i.e., lobbying) activities. Specifically, this prohibits a church from endorsing a candidate for political office, from establishing a political action committee (PAC) to channel funds to a candidate or cause, and from lobbying efforts which could be characterized as "substantial." Substantiality is generally measured by reference to church expenditures; expenditures of less than five percent of an organization's total budget are generally not considered substantial.

113. *See supra* note 94 and accompanying text.

114. *See supra* note 95 and accompanying text.

seems apparent that Congress did not intend that there be a fixed ceiling on political activity by churches.

3. The subjective balancing test: a plausible interpretation of the Code

Another possible interpretation, the subjective balancing test, is suggested by both the *Christian Echoes* and *Haswell* courts. Although the subjective balancing test mentioned earlier is not precise or clear in its application, it appears to be the most widely accepted approach.[115] The court in *Christian Echoes* stated the test as follows:

> The political activities of an organization must be balanced in the context of the objectives and circumstances of the organization to determine whether a *substantial* part of its activities was to influence or attempt to influence legislation. A percentage test to determine whether the activities were substantial obscures the complexity of balancing the organization's activities in relation to its objectives and circumstances.[116]

This language suggests a subjective, qualitative inquiry into the objectives and circumstances of an organization. However, the imprecise nature of the test and the ambiguity of the court's language makes it difficult to apply. Nevertheless, the subjectivity of the test allows for flexibility in application and permits an analysis of policies and circumstances in light of the unique facts of each case. The following discussion is devoted to such an analysis.

If the objectives and circumstances of the Catholic Church bear on the substantiality of the Church's legislative activity, some philosophical ideology concerning its anti-abortion activities will have to be discussed initially. The religious philosophy of many churches, both new and old, is not only to provide religious services and a place for religious instruction, but also to offer moral direction to a society often perceived to be in moral chaos. Under the circumstances, the abortion issue is a moral or religious issue as well as a political one, and thus, the alleged political actions of the Catholic Church may not be a substantial

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115. *See Political Expenditures, supra* note 105. The Internal Revenue Service has cited *Haswell's* interpretation as the controlling case for the definition of "substantial." *Id. See* 7 INTERNAL REVENUE MANUAL, EXEMPT ORGANIZATIONS HANDBOOK § 394 at 7751 (1977).

116. *Christian Echoes,* 470 F.2d at 855 (emphasis in original) (citation omitted).

deviation from the objectives and circumstances of the organization.[117]

As Cardinal Joseph Bernardin, chairman of the Bishop's Pro-Life Committee, argued:

> The purpose of the First Amendment was not to silence the religious voice, but to free religion from state control so that moral/religious values and principles could be taught and cultivated in the wider society. This left religious institutions with the kind of influence they should have in civil society—moral influence.[118]

Because the free exercise clause protects every person's freedom to choose and express their own religious beliefs, a strong argument can be made that the Pastoral Plan is merely the institutional exercise and extension of a sacred, religious belief. Abortion is inherently a moral issue involving some religious theology, and any institutional expression regarding that issue, no matter how it may affect societal behavior, may be justified as an exercise of religious freedom.

The Catholic Church's activities, though political in nature, are arguably conducted to advance its religious purposes.[119] The Church's political activities are in line with its purpose of promoting respect for human life and preserving traditional church values. Few secular organizations would be more qualified to express a moral opinion on the abortion issue.

On the other hand, under a strict interpretation of the Code, without consideration for the value of free expression by religious organizations, it is difficult to justify political activity on the basis of moral worth or religious content. In this regard, the *Haswell* court, citing *Christian Echoes*, said:

> An organization that engages in substantial activity aimed at influencing legislation is disqualified from a tax exemption, *whatever the motivation.* The applicability of the influencing legislation clause is not affected by the selfish and unselfish

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117. *See* Schwarz, *supra* note 30, at 68.

118. Hofman, *supra* note 20, at 227.

119. The court in Haswell v. United States, 500 F.2d 1133 (Ct. Cl. 1974) stated that:

> The section 501(c)(3) regulations state that an organization will be considered as operated exclusively for an exempt purpose only if it engages primarily in activities which accomplish its exempt purposes. An organization is not exclusively operated for charitable purposes if more than an insubstantial part of its activities is not in furtherance of exempt purposes.

Id. at 1147.

> motives and interests of the organization, and it applies to all organizations whether they represent private interests or the interests of the public.[120]

No matter how valuable it is for our society and the democratic process to allow highly respected organizations to express their views on fundamentally important issues like the right to life, if their actions are not permitted by statute, then those actions cannot be sanctioned. As the Supreme Court in *Regan v. Taxation with Representation of Washington* stated, tax exemption is a " 'matter of grace [that] Congress can, of course, disallow . . . as it chooses.' "[121] Because Congress has broad discretion in making classifications in the field of taxation and because section 501(c)(3) has been upheld by the Supreme Court, it would be difficult to say that the Code, barring special circumstances, should not be followed.

Given the possibility of such differing interpretations the question is, what is the proper interpretation of the Code? Should motivation be considered in determining whether an organization's political activity might be a substantial part of its activities? Under a technical interpretation of the "influencing legislation" clause, applying the limitation on political activity as broadly as the Tenth Circuit did in *Christian Echoes*, the Catholic Church is arguably in violation of section 501(c)(3). The Church's Pastoral Plan is, in many respects, substantial in both its effect and purpose, and would be considered a substantial part of the Church's activities. But if the court considers the Church's beneficent motives as a factor, the court might find that the Church's activities are more or less religious or charitable in nature, and conclude that the Church should retain its tax-exempt status. Furthermore, given that the Catholic Church is a true religious organization, unlike the Christian Echoes National Ministry, which was organized principally for propaganda purposes, a more favorable interpretation might be applicable.

The problem with any interpretation, however, that tends to favor religious organizations in particular is that the basic constitutional doctrines under the establishment clause prohibits such favoritism.[122] Recall that the federal government is not al-

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120. *Haswell*, 500 F.2d at 1142 (emphasis added). *See Christian Echoes*, 470 F.2d at 854. *See also* Schwarz, *supra* note 30, at 69-70.

121. *Regan*, 461 U.S. at 549 (quoting Commissioner v. Sullivan, 356 U.S. 27, 28 (1958)).

122. It is important to state that the scope of this note precludes a thorough inquiry

lowed under the establishment clause to enact laws "which aid one religion, aid all religions, or prefer one religion over another."[123] As mentioned earlier, the basic policy of section 501(c)(3) is to promote charitable deeds by all non-profit, charitable organizations, not necessarily to help religious organizations with their lobbying activities.[124] Thus, any interpretation that gives credence to the Catholic Church's anti-abortion activities merely because the activities are motivated by religious fervor would not be sustained.

On the other hand, the free exercise clause should also be considered and given weight to protect the integrity of religious organizations. In this regard, the most compelling argument is that religious freedom, and the principles governing that freedom, basic to the fundamental liberties this nation enjoys, outweighs the policies implemented by Congress to increase revenue through the use of certain tax incentives. Although some may not agree, religious organizations have always been a positive influence on both the secular and religious societies. An alarming precedent, one which might affect all churches, would result if the Catholic Church were assessed back-taxes as a penalty for conducting its anti-abortion activities.

Bishop Malone, president of the USCC, described the role of churches in society as follows:

> As a nation we are constitutionally committed to the separation of Church and State, but not to the separation of religious and moral values from public life. The genius of the American political tradition lies in preserving religious freedom for all—but not at the price of excluding religious and moral content from of domestic and foreign policy.[125]

Cardinal Joseph Bernardin, chairman of the Bishop's Pro-life Committee, also argued that "the purpose of the First Amendment was not to silence the religious voice, but to free religion from state control so that moral/religious values and principles could be taught and cultivated . . . ."[126]

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into the many and varied constitutional questions that are presented by the circumstances of the case. Instead, the focus of this section is to point out general policies, as supported by basic constitutional doctrine, as well as congressional principles, regarding the application of § 501(c)(3) to the *Abortion Rights Mobilization* case.

123. *See supra* note 31 and accompanying text.

124. *See supra* notes 36-38 and accompanying text.

125. Hofman, *supra* note 20, at 226.

126. *Id.* at 227.

The Lutheran Council also emphasized the need for religious freedom on moral issues with this statement:

> Many of us see the ministry of advocacy not as an effort to lobby for political power, but as a vital exercise of prophetic authority central to our faith. The free exercise of religion, therefore, should mean that the decision to speak or not to speak in the public arena be left to the individual churches and not be a determiner of tax exempt status or the deductibility of gifts to the church.[127]

This rationale, however, is not meant to allow indiscriminate involvement at all levels of government:

> Rather, because the teaching role of the Catholic Bishops is concerned with communicating the Catholic moral tradition to church members, the Catholic Conference concentrates its political attention on those policy issues involving significant moral guidance for use by Catholics and other persons of good will in making their decisions on political candidates and issues.[128]

Given the compelling nature of these considerations, and the tremendously devoted following that religious groups like the Catholic Church maintain, it would be difficult for any court to take away the Catholic Church's tax-exempt status. This is especially true given the emotional impact of, and the deep religious convictions bearing on, the abortion issue. A narrow interpretation of the Code restrictions that takes into consideration the organization's objectives and circumstances would be a more realistic approach to the problem. More importantly, such an interpretation would allow some flexibility and free the religious voice so that it may continue to speak out to the nation as it always has.[129]

C. Did the Catholic Church Participate or Intervene in Political Campaigns?

In addition to its restrictions on legislative activity, section

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127. Hageman, *supra* note 30, at 430.

128. Hofman, *supra* note 20, at 227 (quoting Bishop Malone).

129. This does not mean that churches can abuse this right, but it means that unless some clear and unequivocal justification for doing so is present, a true religious organization like the Catholic Church should not have to suffer the hardships of losing its tax-exempt status. Religious freedom inevitably means much more to this nation than the relatively insignificant loss in gross tax revenue caused by giving the Church a tax-exemption.

501(c)(3) also restricts exempt organizations from participating or intervening in a political campaign on behalf of a candidate for public office.[130] Even if the Catholic Church's legislative activities are not found to be a substantial part of its overall activities, section 501(c)(3) provides another restriction that is less ambiguous, and therefore, easier to apply. Treasury regulation 1.501(c)(3)-1(c)(3)(iii) states that:

> Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.[131]

In *Abortion Rights Mobilization*, plaintiffs claim that the Catholic Church has participated and intervened in a campaign on behalf of or against candidates for public office. Although there is no question that the Church has taken a strong position in the anti-abortion movement, the appropriate question is whether the Church has endorsed a particular candidate.

In the 1976 presidential election, abortion was made a national issue largely through the efforts of the Pastoral Plan. The National Council of Catholic Bishops played a prominent role near the end of the campaign by raising the issue as a potential threat to pro-choice candidates like Jimmy Carter. They posed the question whether Catholics at large can justify in their conscience support for a candidate who favors abortion.[132] Although there is still some question whether the Church actually urged members how to vote, it is quite clear that the Church's position and its activities in this regard can be seen as an indirect attempt to support a pro-life candidate.

In *McRae*, the court noted that the NCCB's actions were "construed by some as supporting President Ford's candidacy and as intended to influence Roman Catholics to vote for the President."[133] The court further stated that "[t]he differences between the positions of President Ford and Mr. Carter on the issue were made the subject of a flyer that urged a vote for President Ford as a Pro-life candidate."[134] Whether or not members

130. *See supra* note 3.
131. *See supra* note 60.
132. *See* Vinovski, *supra* note 20, at 1756-62.
133. McRae v. Califano, 491 F. Supp. 630, 716 (E.D.N.Y. 1980).
134. *Id.* at 722.

were directly told how to vote, the Church, by informing members of its position on the issue, and in the same breath advising them of a candidate's pro-life or pro-abortion position may have had the same effect.

In another election, the influence of the Catholic Church was more prevalent, leading the court in *McRae* to say "[t]here is little room for conjecture—except on the issue of ultimate effect—concerning the impact of organized pro-life activity on Minnesota politics."[135] In this instance, the Catholic Bulletin published various lists of all the candidate's positions regarding abortion. In particular, candidate Mary Peek, who was listed as a candidate favoring abortion on demand up to within 20 weeks of gestation, was defeated in her run for a seat in the State House of Representatives.[136] Although no causal effect was proven, the court found that Mrs. Peek and her opponent held similar views on almost all issues except the Vietnam War and abortion. The court believed that "the social disapprobation of abortion within the Catholic community, resulting from the hierarchically created atmosphere of disapproval, must to some extent carry through to the voting booth."[137] The court also claimed that the Catholic Bulletin, published in 1972 and in subsequent years, identified pro-life and pro-choice candidates both for the primary and for the general elections. A flyer was circulated in the fourth congressional district providing information regarding the horrors of killing millions of babies in cold blood, and immediately following this graphic language, a list showing those candidates who favor abortion and those who do not was included.[138]

In the end, any anti-abortion statement proclaimed by the Church, that ties a particular viewpoint of a candidate to that issue, is arguably an intervention or participation in that campaign. Although the Church has made efforts not to support a candidate outright, the net effect of their activities is to encourage voting behavior just as if explicit support were given.

However, it is difficult to conclude that the Church as a whole has participated, directly or indirectly, in a political campaign to the degree that the entire organization and its entities

135. *Id.* at 716.
136. *Id.*
137. *Id.* at 717.
138. *Id.* at 720-21.

should lose its tax-exempt status.[139] The logical question is whether a single violation, or two, or three, should be enough under the Code to invoke this restriction upon the entire Catholic Church.

Since section 501(c)(3) does not impose a substantiality requirement, a strict interpretation of the Code would mean that a single incident could cause the entire Church to lose its tax-exempt status without any consideration for the relative insignificance of the intervention. As was the case for the restriction on legislative activity, a technical application may not be appropriate. Given the strong policy reasons favoring continued tax-exempt status for religious organizations, the code should be construed to allow some flexibility. It would be unwise to revoke the Church's tax-exempt status considering the relatively small amount of participation and intervention attempted by the Church. The following section discusses a possible solution to this problem.

D. Creating a Political Affiliate: A Possible Solution to the Problem

With the apparent need for further interpretation or guidance under section 501(c)(3) from Congress, Justice Blackmun's view of the Code might serve as a spearhead to a workable and fair solution to the problem.[140] Under his view, any 501(c)(3) organization can create a separate, tax-exempt affiliate under 501(c)(4).[141] That affiliate will be exempt from taxation if it is a non-profit, social welfare organization, or a charitable, educational or recreational organization.[142] In addition, section 501(c)(4) organizations are not under the same restrictions on political activity as the 501(c)(3) organizations are. They are free to influence legislation as much as they desire and to support political candidates for public office.[143]

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139. It is worth noting that it would be extremely difficult to determine what entities make up the Catholic Church organization for purposes of assessing back taxes. Since the Catholic Church is a large organization consisting of hundreds of entities including hospitals and schools, how is it that the courts will be able to determine which entities ought to pay back taxes? Is it the entire network of organizations and auxiliaries? Or is it just the National Council of Catholic Bishops?

140. *See supra* notes 47-50 and accompanying text.

141. *Id.*

142. *See supra* note 47.

143. *See supra* notes 47-49 and accompanying text. The drawback is that under section 170 of the Code, contributions made to 501(c)(4) organizations are not deductible

The Catholic Church, for instance, could set up a separate organization specifically to promote legislative and electoral activities in the area of abortion. The two organizations would remain separate for tax purposes. If the affiliate qualified as a nonprofit, civic league or organization, operated exclusively for the social welfare, or for charitable purposes, both the affiliate and the Catholic Church organization would be tax-exempt. On the other hand, if the affiliate did not qualify under section 501(c)(4), only the affiliate would lose its tax-exempt status. The religious activities of the Catholic Church would remain tax-exempt, and no judicial inquiry regarding the Church's activities would be required.

Since churches have "long been insisting that all attempts to delimit their lobbying activities constituted an impermissible intrusion of administrative regulation into the area of free expression of religion,"[144] creation of a separate affiliate may be the best solution. Any challenge to the tax-exempt status of the affiliate will involve no administrative inquiries, nor any judicial intrusion by the courts into the church organization.[145] Although there would still be some question whether the affiliate could be tax-exempt in the first place, an inquiry under section 501(c)(4) would only involve the financial records of the affiliate, not the church. Neither the IRS, nor the courts would have to investigate the financial records or the affairs of the church organization.

Not only will the policies of tax exemption and its limitations be met, but such a view would allow organizations to keep their religious and political activities separate, thereby preventing any constitutional questions that may otherwise arise. Since the involvement of the religion clause makes this issue more complex and difficult to address, such a practical solution would help solve the statutory issues without bringing religion in as a

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by contributors to the organization. Because most tax-exempt organizations rely on tax deductible contributions for support, this restriction may have the effect of limiting the usefulness of such an affiliate. Although an affiliate might be able to continue to operate with tax-exempt status as a lobbying entity, it can't be funded by tax-deductible contributions and therefore would require funding by some other source. However, if the affiliate is created by a parent organization who has the ability to fund the affiliate, such deductions may not be critical to the success of the organization.

144. *See* Clark, *supra* note 38, at 494-95. Based on these concerns, churches have opposed certain tax provisions like 501(h). *See supra* notes 94-95 and accompanying text.

145. *See supra* note 95.

major issue. Most importantly, such an approach will permit religious organizations to continue to speak out on issues of political and moral importance without violating the technical restrictions of the Code.

IV. Conclusion

The Catholic Church has been engaged in various types of political activity on the abortion issue. Indeed, the Church has played a significant role in shaping society's views regarding abortion. When the Church engages in a political program, however, designed to change abortion laws, the Church's activity crosses the line between what is religious and what is political.

In *Abortion Rights Mobilization, Inc. v. United States*, the Catholic Church faces a possible revocation of its tax-exempt status under the Internal Revenue Code. Legitimate arguments can be made that the Church has impermissibly attempted to influence legislation and participate in political campaigns. Different interpretations of section 501(c)(3), however, make it difficult to address the plaintiff's allegations. Various interpretations of the phrase "substantial part of the activities" lead to much uncertainty. Without further direction by Congress, the courts will have to consider new ways to deal with the problem of regulating religious organizations by interpreting the present language of the Code.

In spite of the restrictions on legislative activity, churches have always had a distinct role in shaping our nation's moral value system. In many instances, political activities by churches are welcome because of the positive influence they can inspire in a civilized society. In light of these policies favoring tax-exempt status for churches, Congress and the courts should reconsider their approach to the granting and revoking of tax-exempt status for religious organizations. In particular, they should emphasize a way to keep the political activities of churches separate from the religious activities for tax purposes. Any interference with the tax status of the Catholic Church, or any highly respected religious organization would ultimately require more justification than what the Code has provided. Until such justification is expressed by Congress, the courts are not in a position to second-guess congressional intent by revoking the tax-exempt status of the entire Catholic Church.

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