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GOVERNMENTAL DEFINITION OF RELIGION: THE RISE AND FALL OF THE IRS REGULATIONS ON AN "INTEGRATED AUXILIARY OF A CHURCH"

EDWARD MCGLYNN GAFFNEY, JR.**

INTRODUCTION: THE NEED OF SOME GOVERNMENTAL DEFINITION OF RELIGION

Recent disclosures of the diversion of contributions to celebrated TV evangelists to their own private benefit has charged the atmosphere within which the delicate task of defining religion must be undertaken. For example, the Los Angeles Times reported in 1987: "The Internal Revenue Service has questioned scores of luxury items charged by PTL founders Jim and Tammy Faye Bakker to the ministry they founded [in Fort Mill, S.C.], ranging from a \$592,000 oceanfront condominium in Palm Beach, Fla., to an \$800 Gucci briefcase.... Such purchases are among \$1.3-million worth of items charged by the Bakkers to PTL between 1981 and 1983 and which IRS auditors have questioned as possible personal expenses in the course of their continuing audit into the finances of the tax-exempt organization...."¹ The government declined to prosecute Tammy Faye Bakker, but indicted and gained a criminal conviction of Jim Bakker for criminal violations of the tax code.

Several consequences flow from the Bakker case. First, community outrage -- or at least the outrage of the trial judge, Robert D. Potter -- against the conduct of the Bakkers is reflected in the imposition of a sentence of 45 years in prison and a fine of \$500,000, an unusually stiff sentence for a first-time

* ©1991 Edward McGlynn Gaffney, Jr. All Rights reserved. This article will appear as a chapter in the author's forthcoming volume, *SHOULD THE CHURCHES BE TAXED?* (Oxford University Press, 1992).

** Dean and Professor of Law, Valparaiso University School of Law. I would like to express my gratitude to many friends at Stanford Law School, including Paul Brest, Gerald Gunther, William Cohen, and John Hart Ely, for their gracious hospitality and warm collegiality during a sabbatical year during which this article was prepared. I would like to thank Dean M. Kelley for his thoughtful comments on a draft of this article. I would also like to thank the Earhart Foundation, the Stewardship Foundation, and the Institute on Religion and Public Life for generous financial support of my work during this sabbatical year.

1. *IRS Questions \$1.3 Million in Purchases Bakkers Charged to PTL*, L.A. Times, May 17, 1987, Part I, at 17, col. 1.

offender convicted of a white-collar crime of a similar nature.² Second, although the Bakkers' luxuriant lifestyle is by no means typical of religious ministers generally, the case will inevitably lead many members of the public to the false perception that luxury is rampant among the clergy. Third, the case has raised fresh concern within governmental agencies over the need for some kind of line-drawing between legitimate religious autonomy and violations of the tax code, including illicit appropriation of charitable contributions to a religious body for personal use. It is this third issue -- governmental definition of religion -- that forms the subject of this article.

This article explores both the need for governmental attempts to define religion as well as the danger of some of those efforts. The general issue explored here is the regulation³ of religious bodies that arises from the fact that

2. Without condoning any of the illegal activities of which Rev. Bakker was convicted, religious leaders in South Carolina voiced protest against the uncommonly harsh sentence imposed on Bakker. The Court of Appeals for the Fourth Circuit vacated the sentence on the ground that the trial judge violated due process by impermissibly taking his own religious characteristics into account. *United States v. Bakker*, 925 F. 2d 728 (4th Cir. 1991). During the sentencing hearing Judge Potter stated: "He [Bakker] had no thought whatever about his victims and *those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests.*" *Id.* at 740. This comment evidently persuaded the Fourth Circuit to vacate the sentence and remand the case "with genuine reluctance," since "courts cannot sanction perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it." *Id.*

3. Throughout this article, I use the term "regulation" generally to refer to all the administrative rules governing the subject under discussion. To be more precise, governmental pronouncements about tax matters descend through decreasing ranks or stages. First is the legislation itself, or the sections of the Internal Revenue Code. Then come the Regulations, which are issued under the authority of the Secretary of the Treasury, and which currently fill four large volumes. Next are Revenue Procedures, which may be promulgated by the Commissioner of Internal Revenue. Then come Revenue Rulings. Finally, there are Private Letter Rulings, or letters from the National Office of the IRS to a District Director of the Service stating an opinion as to how a tax matter should be resolved; with the deletion of the identification of the taxpayer or exempt organization, a private letter ruling may be "discovered" under the Freedom of Information Act but may not be cited as a precedent, unless the secretary otherwise establishes by regulation, IRC § 6110(j)(3) (West 1990), and is subject to change as the National Office sees fit. When all is said and done about this hierarchy, however, a rule looks like a rule and feels like one to a taxpayer or a regulated exempt organization, no matter what the status of the rule is within the pecking order of the IRS. The technical way of saying this is that administrative regulations have the same force of law as acts of Congress. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954). As a interloper in tax matters, the chief difference that I am able to discern among the graduated forms of rules is an inverse proportion between flexibility and the level of participation in the issuance of the rule in the first instance. Thus when the Service came to agree that its rules about an "integrated auxiliary of a church" -- that form the subject of this article -- were unfeasible, it could not change that rule even though it wanted to do so, because the offending rule had been issued in the form of a Revenue Regulation by the Secretary of the Treasury. Since there were hundreds of formal Regulations already in the hopper awaiting the attention of the Secretary, the best the Service could do under the circumstances was to offer to religious organizations a new Revenue Procedure, which is within the

they are exempt from various forms of taxation. For example, § 501 (c)(3) of the Internal Revenue Code, as well as the revenue statutes of the majority of states that track the federal definition of an exempt organization, regulate to a remarkable degree the activities of religious organizations relating to politics, principally their efforts to communicate moral convictions on matters of public concern to elected officials (lobbying activities)⁴ and their efforts to persuade voters of the correctness of their moral convictions on these matters (electioneering activities).⁵ Similarly, the Internal Revenue Service has construed this section of the Code to require the revocation of the exempt status of religiously affiliated schools which practice racial discrimination either in their student admission policies or in their policies relating to student discipline.⁶ The more specific focus of this article is on a particular instance of such an attempt to define religion: the legislative, administrative, and judicial involvement in unraveling the meaning of an "integrated auxiliary of a church."

Before exploring the particular issue of the tax regulations relating to an "integrated auxiliary," it might be helpful to situate this issue within the broader

authority of the Commissioner of Internal Revenue to promulgate, coupled with a promise to initiate the complicated process of changing the Regulation itself.

4. IRC, § 501 (c)(3) provides in relevant part that "no substantial part of the activities [of exempt organizations may constitute] carrying on propaganda, or otherwise attempting, to influence legislation...." See Treas. Reg. § 1.501 (c)(3)-1 (c)(3)(iii); and IRS Exempt Organizations Handbook § 3(10)1 (IRM 7751). For a critical discussion of the phenomenon of religious lobbyists, see A. HERTZKE, REPRESENTING GOD IN WASHINGTON: THE ROLE OF RELIGIOUS LOBBIES IN THE AMERICAN POLITY (1988); for a careful legal analysis of the restrictions on lobbying by exempt organizations, see Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L. J. 201 (1987); see also B. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 265-80 (5th ed. 1987); and literature cited *id.* at 280 n.95; and see Comment, *Church Lobbying: The Legitimacy of the Controls*, 16 HOUSTON L. REV. 480 (1979).

5. IRC, § 501 (c)(3) provides in relevant part that an exempt organization may not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." See the regulation and IRS Handbook cited *supra* note 4. For a discussion of the constitutional difficulties arising under these provisions, see Gaffney, *On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics*, 40 DEPAUL L. REV. 1 (1990); Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308 (1990); Caron & Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J.L. & POLITICS 169 (1985); and literature cited *id.* at 180 n.40, 181 n.41, 183 n.54. See also B. HOPKINS, *supra* note 5, at 281-93.

6. *Bob Jones University v. United States*, 461 U.S. 574 (1983). See Devins, *A Tax Policy Analysis of Bob Jones University v. United States*, 1 J. L. & POLITICS 275 (1984); Freed & Polsby, *Race, Religion, and Public Policy: Bob Jones University v. United States*, 1983 S. CT. REV. 1; Stephan, *Bob Jones University v. United States Public Policy in Search of Tax Policy*, 1983 S. CT. REV. 33; Cover, *Foreword: Nomos and Narrative (The Supreme Court, 1982 Term)*, 97 HARV. L. REV. 4, 26-33 (1983); Galvin & Devins, *A Tax Policy Analysis of Bob Jones University v. United States*, 36 VAND. L. REV. 1353 (1983); and Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools*, 60 TEXAS L. REV. 259 (1982).

context of a variety of governmental attempts at definition of religion. Since I take a sharply critical view of the performance of the IRS on the more particular matter explored in detail in this article, it would be well to state at the outset that I am generally sympathetic to the concerns of the IRS for developing useful criteria to assist them in the difficult task of administering the tax laws fairly.

In a line of cases that began with *Watson v. Jones*,⁷ the Supreme Court has clarified the principle of nonentanglement by the government in ecclesiastical matters. In *Watson*, Justice Miller stated: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of civil authority."⁸ Now acknowledged as constitutional in stature,⁹ this principle has been reinforced in subsequent decisions of the Court dealing with the limited authority of secular courts to probe into the affairs of religious bodies.

Although the general rule protects churches from needless governmental intrusion, that does not mean that the government may never become involved in the process of defining religion. For example, the government has a clear interest in defining religion when it has clear evidence of a case of fraud.¹⁰

Similarly, although the salaries that a church decides to pay its ministers should normally be of no concern to the government, some governmental inquiry into this matter may occasionally be warranted by the prohibition of personal benefit from contributions to an exempt organization.¹¹ This prohibition was at the heart of the government's successful, if highly controversial, prosecution

7. 80 U.S. (13 Wall.) 679 (1871).

8. *Id.* at 730.

9. *Watson* was a federal case because of the diversity of citizenship of parties to the case, some of whom lived in Kentucky and some in Ohio. It was decided before the religion clauses were deemed to be incorporated against the States through the due process clause of the fourteenth amendment, *see, e.g.*, *Cantwell v. Conn.*, 310 U.S. 296 (1940), and *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1 (1947). In *United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), the Court clarified that the principle announced in *Watson* is now binding on the States as a matter of constitutional law, not as a matter of "federal common law." *Id.* at 445-46.

10. *See, e.g.*, *United States v. Ballard*, 322 U.S. 78, 86-87 (1943); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929).

11. I.R.C. § 501(c)(3) (1986) provides in part that an organization is exempt from taxation if it is organized and operated in such a manner that "no part ... of [its] net earnings ... inures to the benefit of any private shareholder or individual." For further clarification of the private inurement rule, *see* B. HOPKINS, *supra* note 4, at 181-209.

of the Rev. Sun Myung Moon.¹²

The government has not always been as successful or even as zealous in prosecuting tax fraud cases involving religion. After losing a tax case in 1974 against the Universal Life Church,¹³ which issues a certificate of ordination to anyone who will send \$25 to the founding "Pastor," Kirby Hensley,¹⁴ the government took a seemingly casual approach for several years to the problem of mail-order ministry before it cracked down on this phenomenon in the 1980s.¹⁵

12. *United States v. Moon*, 718 F.2d 1210 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984). Scores of religious bodies of wide diversity, few of whom agree with the theological tenets of the Unification Church, filed briefs amicus curiae urging the Supreme Court to review this case. See C. SHERWOOD, *INQUISITION: THE PERSECUTION AND PROSECUTION OF THE REVEREND SUN MYUNG MOON* (1991).

13. *Universal Life Church, Inc., v. United States*, 372 F. Supp. 770 (E.D. Cal. 1974). In this case the trial judge wrote: "Neither this Court, nor any branch of this government, will consider the merits or fallacies of a religion. Nor will the Court compare the beliefs, dogmas, and practices of a newly organized religion with those of an older, more established religion. Nor will the Court praise or condemn a religion, however excellent or fanatical or preposterous it may seem. Were the Court to do so, it would impinge upon the guarantees of the First Amendment." *Id.* at 776. Although the court expressly relied upon *United States v. Ballard*, 322 U.S. 78, 86-87 (1944) for this view, it did not explore the very issue which the Supreme Court in *Ballard* had sent back to the trial court, *viz.*, the sincerity of the beliefs, as opposed to their truth or falsity. It is puzzling why the Government did not choose to litigate this issue vigorously in *Universal Life Church*. In a more recent case before the Tax Court, a judge took a much less benign view of the use of religion in a situation where a taxpayer had "literally bathed himself" in personal benefits: "[Our] tolerance for taxpayers who establish churches solely for tax avoidance purposes is reaching a breaking point. Not only do these taxpayers use the pretext of a church to avoid paying their fair share of taxes, even where their brazen schemes are uncovered many of them resort to the courts in a shameless attempt to vindicate themselves." *Miedaner v. Comm'r*, 81 T.C. 272 (1983).

14. Hensley has stated publicly that the principal purpose of the Universal Life Church is to avoid the payment of taxes by his mail-order "ministers." He hopes thereby to eventually force the elimination of the tax-exempt status of all religious organizations. See Whelan, "Church" in the *Internal Revenue Code: The Definitional Problem*, 45 *FORDHAM L. REV.* 885, 927 (1977).

15. In 1978 the State of New York revoked the sales tax exemption enjoyed by the Universal Life Church. In 1984 the IRS revoked the federal exempt status of the Universal Life Church; see IRS Announcements No. 84-90 and No. 85-169. The Universal Life Church challenged this revocation on the view that the IRS was collaterally estopped by the judgment entered in the 1974 decision, *supra* note 13, but the Court of Claims rejected this view, allowing the IRS to revoke an exemption where the ground for doing so differs from that asserted by the government in the prior proceeding. *Universal Life Church, Inc. v. United States*, 86-1 U.S.T.C. ¶ 9271 (Cl. Ct. 1986).

The tougher judicial attitude reflected in the *Miedaner* case, *supra* note 13, is paralleled in the IRS Training Manual, which now contains a section focused expressly on the problem of "Mail Order Ministries." IRS Manual § 7(10)75. This approach to mail-order ministry is reflected in increased audits of such ministries by the IRS, which estimates, for example, that nearly 1,000 "ministers" of the mail-order Church of Universal Harmony owe the government over \$5 million in back taxes.

Tougher enforcement policies have resulted in stiffer sentences of offenders. For example, a federal judge in Los Angeles sentenced Louis Pugliani, a mail-order minister in the Universal Life

The government's more casual attitude during this period may have stemmed from the difficulty which IRS officials have acknowledged to be inherent in any governmental attempt to define religion.¹⁶ Notwithstanding this difficulty, however, the IRS has elaborated fourteen criteria for determining whether an organization is a church for tax purposes. Conceding the point that in any given application of its test, one or more of the criteria may be missing without adversely affecting a finding in favor of the religious status of an organization, the IRS will accord this status only if an organization has:

- (1) a distinct legal existence;
- (2) a recognized creed and form of worship;
- (3) a definite and distinct ecclesiastical government;
- (4) a formal code of doctrine and discipline;
- (5) a distinct religious history;
- (6) a membership not associated with any other church or denomination;
- (7) an organization of ordained ministers;
- (8) ordained ministers selected after completing prescribed studies;
- (9) a literature of its own;
- (10) established places of worship;
- (11) regular congregations;
- (12) regular religious services;
- (13) Sunday schools for religious instruction of the young; and
- (14) schools for the preparation of its ministers.¹⁷

These criteria illustrate the dilemma of governmental efforts to define religion. Without any effort to distinguish among religious claimants, the government seems to lack an effective way of enforcing the tax code against those who would cloak themselves with a patina of religiosity solely for the purpose of evading their fair share of the tax burden. Yet the attempt to

Church, to nine years in prison and imposed a fine of \$95,000 after he was found guilty on nineteen counts of preparing false tax returns. (RNS, Aug. 4, 1982). A federal judge in Sacramento, California, sentenced William Richardson, another mail-order pastor in the Universal Life Church, to nine years in prison for preparing false tax returns. (RNS, Nov. 30, 1983). A federal judge in Fort Worth, Texas, sentenced the "Pope" of the mail-order Basic Bible Church, Jerome Daly, to sixteen years in prison and imposed a fine of \$100,000 on him after Daly and seven other pilots with Braniff Airlines were convicted in a scheme of defrauding the government and filing false tax returns. In sentencing the defendants, the judge noted: "None of you were [sic] prosecuted for your religious beliefs. You were prosecuted for the use of religion to avoid individual taxes and to defraud the government." (RNS, May, 4, 1983). For a sociological study of mail-order religion, see Shupe, *'Disembodied Access' and Technological Constraints on Organizational Development: A Study of Mail-Order Religion*, 15 J. Sci. Stud. Relig. 177 (1976); for a brief and popular discussion of this problem, see Ponder, *Ring Around the Clerical Collar*, Liberty at 6-9, Sept. - Oct. 1982.

16. See, e.g., Address by Jerome Kurtz, Commissioner of IRS, "Difficult Problems in Tax Administration: Religion and Race," at Practising Law Institute Seventh Biennial Conference on Tax Planning for Foundations, Tax-Exempt Status and Charitable Contributions, Jan. 9, 1978, reprinted in, Daily Report for Executives, Jan. 11, 1978, at J.8.

17. As cited in Lutheran Social Serv. of Minn. v. United States, 758 F.2d 1283, 1286-87 (8th Cir. 1985).

articulate criteria for defining a church leaves no room for unrestricted or loosely structured religious societies, such as the Society of Friends (Quakers) or the Christian Scientists, who undoubtedly enjoy the protection of the First Amendment Religion Clause.¹⁸ The IRS criteria have been criticized on this score by scholars,¹⁹ but have been adopted by the courts with only slight recognition of the difficulties posed by the criteria.²⁰

As I mentioned above, this article explores both the necessity and the danger of governmental attempts to define religion by focusing the legislative, administrative, and judicial involvement in unraveling the meaning of an "integrated auxiliary of a church." The nub of the problem for religious organizations was put succinctly in a recent policy statement adopted by the Presbyterian Church (U.S.A.):

When the state grants exemption from taxes to religious organizations, the basic definition of what constitutes religious activity must be made by those organizations. With increasing frequency, taxing jurisdictions seek to collect taxes from religious organizations on particular property or activity in the face of statutory provisions exempting "churches, conventions, or councils of churches and their integrated auxiliaries" from tax liability. In such instances, the justification is most often that the property or activity is not sufficiently "religious" to qualify, although wholly owned, operated, controlled, and defined by the religious organization as a part of its life and work. We urge Presbyterians, when dealing with such situations, to recognize that the issue is not "whether the church should pay taxes." The issue is: "Who defines the church's nature and ministry?".... Presbyterians must resist any attempt by taxing authorities to define some of the properties and activities wholly controlled and defined by the church as nonreligious....

We concede that some properties and operations of religious organizations may be subjected to taxation by legislative act; but we will resist all efforts to do so by administrative determination, in the

18. See, e.g., *Feldstein v. Christian Science Monitor*, 555 F. Supp. 974 (D. Mass. 1983).

19. See Whelan, *supra* note 14, at 925-26; and see Worthing, "Religion" under the First Amendment, 7 PEPPERDINE L. REV. 313, 344-45 (1980).

20. See, e.g., *Lutheran Social Serv.*, 758 F.2d at 1287 (ruling that, in light of the IRS criteria, Lutheran Social Service of Minnesota is not a church). See also *American Guidance Foundation, Inc. v. United States*, 490 F. Supp. 304, 306 (D.D.C. 1980) (acknowledging that some of the IRS criteria are "relatively minor," but ruling that the foundation failed to meet the "central" and "minimal" standards of a church: organized ministry serving an established congregation with regular religious services and religious education for its young and dissemination of a doctrinal code).

face of statutes that exempt churches from taxation, that some properties or activities wholly controlled and operated by the church as part of its mission are "nonreligious."²¹

If the main problem for religious organizations is the improper classification of their ministries as "nonreligious," the solution must lie in coming to terms with that problem. Part of the difficulty in doing so was that the term "integrated auxiliary" is not grounded in the historical experiences of American churches. The term does not arise from the ecclesiological vocabulary of any of the major American religious bodies, with the possible exception of the Mormons, an exception to which I will return later. In short, most of us would increase our understanding of "integrated auxiliaries" if the IRS would catch one, perhaps in Utah, and put it in a cage so that we could get a nice long look at one and at least begin to appreciate what the government might have had in mind when it invented the phrase in 1969.

The failure of theology and church history to shed light on our theme might not be too discouraging if the term "integrated auxiliary of a church" were one rich in legal meaning, in the practical experience of the politicians who wrote the phrase into the tax code or of the officials in the IRS charged with administering the code. But with the possible exception of Senator Wallace Bennett, a Mormon from Utah who suggested the use of the term "auxiliary" at the time of the 1969 tax legislation, it seems clear from the legislative history that Members of Congress did not have any clear meaning of the term in mind.

Still more regrettably, the IRS officials in four successive administrations (those of Presidents Nixon, Ford, Carter and Reagan) demonstrated not only that they do not know with much clarity what an integrated auxiliary is, but that they had scant appreciation of the delicacy of the task in which they were engaged or of the fragility of the religious liberties at issue. To the contrary, they offered a wooden, clumsy, unworkable definition of the church and its mission that is a classic instance of inappropriate governmental intervention in religious affairs. I will return to this point at the conclusion of this article. Before reaching this conclusion, it is necessary to unravel the various attempts by the government to give content to the term "integrated auxiliary." The three sections of this article correspond to the tripartite separation of powers, legislative, executive, and judicial, found in our federal constitution.²²

21. "God Alone is Lord of the Conscience": A Policy Statement Adopted by the 200th General Assembly (1988) (Louisville: Office of the General Assembly, The Presbyterian Church (U.S.A.), 1989), pp. 37-39. This document is reprinted in 8 J.L. & RELIGION ____ (1990).

22. The division of the article along these lines does not mean to suggest that the three branches do not interact with each other. To the contrary, the executive branch has repeatedly claimed that it has been following the guidance of Congress on this matter, and it did not retreat from its position

I. THE LEGISLATIVE HISTORY OF CONGRESSIONAL ATTEMPTS TO DEFINE RELIGION

The regulations relating to integrated auxiliaries find their origin in the problem of whether an exempt organization should pay tax on income derived from business unrelated to the exempt purpose of the organization.²³ Ever since the inception of the federal income tax, Congress has consistently exempted religious organizations from the payment of this tax.²⁴ By 1943, however, it became apparent to Congress that several exempt organizations²⁵ were abusing the privilege of their exempt status by becoming involved in lease-back schemes (tax-exempt organization A buys commercial business B and rents it back to the owner for profit while B enjoys tax-exempt status)²⁶ or by using the exempt status to operate commercial businesses wholly unrelated to its charitable purposes in direct competition with taxpaying corporations.²⁷ In 1943 Congress enacted I.R.C. § 54(f) (§ 6033 under the current tax code) which required most exempt organizations to file an informational return (Form 990 and Schedule A); the statute expressly excused religious organizations from these filing requirements. The purpose of IRC § 54(f) was to monitor organizations which were using the unrelated business income loophole to determine whether and how they should be taxed.²⁸

In 1943 Congress required most exempt organizations to file an informational return (Form 990), but the statute expressly excused religious organizations from these filing requirements. The purpose of this filing requirement was to monitor organizations which were using the unrelated business income loophole to determine whether and how they should be taxed.²⁹

In 1950, Congress enacted § 411 (§ 511 under I.R.C. of 1954) which imposed a tax on unrelated business income on the organizations exempt under

until the judiciary had ruled in three cases that it was not doing so. See text accompanying *infra* notes 96-164.

23. For a detailed study of this problem, see J. GALLOWAY, *THE UNRELATED BUSINESS INCOME TAX* (1982).

24. See I.R.C. §§ 501(a), 501(c)(3) (1986).

25. There was no suggestion at the time of the 1943 legislation that religious organizations were involved in production of income from businesses unrelated to their exempt purpose. Worthing, *infra* note 27, at 931-32.

26. J. BAKER, *GOVERNMENT AND THE MISSION OF THE CHURCHES: THE PROBLEM OF INTEGRATED AUXILIARIES*, 3 (Staff Report, Baptist Joint Committee on Public Affairs, 1977) [hereinafter *GOVERNMENT AND MISSION OF CHURCHES*].

27. Worthing, *The Internal Revenue Service as a Monitor of Church Institutions: The Excessive Entanglement Problem*, 45 *FORDHAM L. REV.* 929, 931 (1977).

28. See Worthing, *supra* note 27, at 931-32.

29. I.R.C. § 54(f); (§ 6033 of the present Code). See Worthing, *supra* note 27, at 931-32.

§ 501(a), while exempting the unrelated income of “a church, a convention or association of churches.” Congress for the first time drew a curious distinction between a “church” (which was exempt from the new tax) and a “religious organization” (which was not exempt). Although it was clear, for example, that Congress intended to include schools and hospitals operated under church auspices within the new tax, the real implications of the distinction was far from clear in light of the structures of the various American churches.³⁰ According to Father Charles Whelan:

[T]he actual structure of American churches makes this distinction impossible to administer except at the extreme ends of the spectrum of church related organizations. If American churches had a uniform structure, with a readily identifiable nucleus “church” and a ring of satellite organizations that federal tax officials could easily distinguish from the nucleus, the post-1950 administrative task of Treasury and Internal Revenue Service would not have been so difficult. In actual fact, however the American churches have diverse, complex and confused structures. [E]ach church has a double structure; one internal, in its own ecclesiastical law, and the other external, in American civil law.³¹

It is fair to say, moreover, that Congress did not offer much guidance to the IRS in 1950 when it gave to the Service the difficult task of differentiating between a “church” and a “religious organization.”

The curious distinction between a church and a religious organization grew “curiouser” in 1954, when Congress inserted it into § 170 of the tax code, dealing with deductibility of charitable contributions.³² As originally passed by the House, § 170 allowed deductions for charitable contributions up to 30% when donated to “a church, a convention or association of churches,³³ or a religious order.”³⁴ When the bill reached the Senate Finance Committee, however, the Senators struck out the phrase concerning a “religious order” and explained this amendment of the House bill as follows:

30. Whelan, *supra* note 14, at 902.

31. Whelan, *supra* note 14, at 903.

32. Under I.R.C. § 170(b)(1) (1954), 68A Stat. 58, a taxpayer may make a deductible contribution of up to 30% of adjusted gross income to a church, but may contribute only up to 20% of adjusted gross income to a religious organization. Since few taxpayers, if any, contribute such sums to churches or religious organizations, the distinction probably has little or no practical significance either in terms of revenue collection or in terms of encouraging charitable contributions.

33. Congress exempted a “convention or association of churches” as well as churches to provide equal federal tax treatment for congregational and hierarchical churches. See Whelan, *supra* note 14, at 903 n.80.

34. *Id.* at 903.

Your committee understands that "church" to some denominations includes religious orders as well as other organizations which, as integral parts of the church are engaged in carrying out the functions of the church whether as separate corporations or otherwise. It is believed that the term "church" should be all inclusive. To retain the phrase "or a religious order" in this section of the bill will tend to limit the term and may lead to confusion in the interpretation of other provisions of the bill relating to a church, a convention or association of churches.³⁵

When the bill went to Conference Committee, the committee accepted the Senate wording and explanation, leaving no doubt that "a church, a convention or association of churches" as used in § 170 included religious orders and other "integral parts" of a church. But the use of the word "church" in I.R.C. § 511 drew no such broad reading. In fact, Congress repeatedly stated that there was no substantive change in I.R.C. § 511 except with respect to some business leases and trusts.³⁶

In issuing regulations interpreting this legislation, the IRS combined the two provisions, adopting a very "churchy" definition of a church as an entity including:

a religious order or a religious organization if such order or organization (a) is an integral part of a church, and (b) is engaged in carrying out the functions of a church, whether as a civil law corporation or otherwise. In determining whether a religious order or organization is an integral part of a church, consideration will be given to the degree to which it is connected with, and controlled by, such church. A religious order or organization shall be considered to be engaged in carrying out the functions of a church if its duties include the ministration of sacerdotal functions and the conduct of religious worship.... What constitutes the conduct of religious worship or the ministration of sacerdotal functions depends on the tenets and practices of a particular religious body constituting a church. If a religious order or organization can fully meet the requirements stated in this subdivision, exemption from the tax imposed by § 511 will apply to all its activities including those which it conducts through a separate corporation or other separate entity which it wholly owns and which is not operated for the primary purpose of carrying on a trade or business for profit.³⁷

35. S. REP. NO. 1622, 83d. Cong., 2d Sess. 30 (1954) (emphasis added).

36. Whelan, *supra* note 14, at 909.

37. Treas. Reg. § 1.511-2(a)(3)(ii).

Thus the IRS clearly imagined that there are various types of religious orders, and decided that the congressional language defining "church" in § 170 also controlled the definition of a "religious organization" in § 511.³⁸

The next phase of the legislative journey occurred in 1969 when the religious community, represented by the National Council of Churches in the United States and by the United States Catholic Conference, requested that Congress eliminate the exemption which religious organizations had previously enjoyed from taxation of their unrelated business income.³⁹ The House Ways and Means Committee readily granted this request, but it also voted to eliminate the exemption from filing a Form 990 which religious organizations held under § 6033. The United States Catholic Conference and the National Conference of Churches responded by filing strong testimony before the Senate Finance Committee, demanding that churches retain their exclusion from filing the informational return.⁴⁰ The Senate voted to maintain the exemption in § 6033 for churches and conventions or associations or churches. Senator Wallace Bennett (R.-Utah) indicated to the Senate Finance Committee that he felt that the wording of this provision was too restrictive; and he urged expansion of the exemption to include "churches, their auxiliaries, conventions and associations of churches." The Committee accepted Senator Bennett's proposed language. As John Baker, then General Counsel of the Joint Baptist Committee for Public Affairs, wrote: "'Auxiliaries' was a term which had specific meaning for Senator Bennett and his church, the Church of Jesus Christ of Latter-Day Saints (Mormon), and was clearly intended to broaden rather than restrict the number of religious organizations which were excepted from filing."⁴¹ The Senate report contains only a single sentence of explanation of what that body had in mind in adding the term, "auxiliaries" to the bill:

Among the auxiliary organizations to which this exemption applies are the mission societies and the church's religious schools, youth groups, and men's and women's organizations, and interchurch organizations of local units qualifying as local auxiliaries.⁴²

At the request of the IRS the Conference Committee added the adjective "integrated" to the noun "auxiliaries," thus creating a hybrid known neither to

38. Whelan, *supra* note 14, at 910.

39. Staff of the relevant committees of Congress would be hard pressed to recall another instance where taxpayers had lobbied the Congress to be taxed.

40. Reed, *Integrated Auxiliaries, Regulations and Implications*, 23 CATH. LAW. 210, 211 (1978) [hereinafter *Integrated Auxiliaries*].

41. See GOVERNMENT AND THE MISSION OF THE CHURCHES, *supra* note 26, at 4. See also Whelan, *supra* note 14, at 915 n.125; Reed, *supra* note 40, at 211.

42. S. REP. NO. 552, 91st Cong., 1st Sess. 2, reprinted in 1969 U.S. CODE CONG. & ADMIN. NEWS, 2027, 2080.

church leaders nor to governmental officials. The final version of § 6033 provided a mandatory exemption from the filing requirement to “churches, their integrated auxiliaries, and conventions or associations of churches ... [and] the exclusively religious activities of any religious order.”⁴³

The Report of the Conference Committee concerning this provision stated:

The Senate Amendment provides two exceptions from this provision. First, it exempts churches and their integrated auxiliary organizations and associations or conventions of churches from the requirement of filing this annual information return (where the church or its auxiliary organization, etc. is engaged in an unrelated trade or business, however, it would still be required to file an unrelated business income tax return). The integrated auxiliary organizations to which this applies include the church’s religious school, youth group, and men’s and women’s clubs.... (As under the House bill, in addition to these two exempt categories the Secretary or his delegate can exempt other types of organizations from the filing requirement if he concludes that the information is not of significant value.)

The conference substitute ... follows the Senate amendment except that it also exempts from the filing requirement any religious order with respect to its exclusively religious activities (but not including any educational, charitable, or other exempt activities which would serve as a basis of exemption under section 501(c)(3) if an organization is required to report with respect to such activities).⁴⁴

One of the leading commentators on the provision dealing with an “integrated auxiliary of a church” charges that Congress drafted the phrase “in great haste and without sufficient attention to the complicated and diverse legal

43. I.R.C. § 6033(a)(2)(A) (1986); the first provision is in clause (i) and the provision on the exclusively religious activities of a religious order is in clause (iii).

44. CONF. REP. 782, 91st Cong., 1st Sess. 2, reprinted in 1969 U.S. CODE CONG. & ADMIN. NEWS 2392, 2400-01. According to George E. Reed, Acting General Counsel of the United States Catholic Conference in 1978, the language used in the report concerns two different issues. The first paragraph was meant to deal with the interpretation of § 6033 relating to “churches, their integrated auxiliaries, and conventions or associations of churches” while the language in the second paragraph resulted from an effort by the United States Catholic Conference to get legislative history associating religious orders with the term “church.” Instead of including religious orders under the definition of a church, the Conference Committee created a third category of organizations exempt from filing Form 990: “the exclusively religious activities of any religious order.” See *Integrated Auxiliaries*, *supra* note 40, at 211.

structures of American churches.”⁴⁵ It is fair to conclude from this account of the relevant legislative history that Congress gave to the IRS the exceedingly difficult task of making sense of a phrase which did not come into the tax code as one laden with meaning either in church history or legal history.

II. THE ELABORATION OF A CHURCHY DEFINITION OF THE CHURCH BY THE IRS

Against the background of this scarce legislative history, shot through as it is with confusing distinctions between a church and a religious organization, it is small wonder that the administrative efforts at interpreting this provision proved to be so unsatisfactory to American religious bodies. After a short-lived effort during the Nixon administration to issue regulations concerning the “integrated auxiliary” provision, the IRS abandoned the attempt to clarify the meaning of the enigmatic provision. The apparent position of the IRS was that it could avoid problems by saying nothing about the matter. The superficial allure of this policy, however, wore thin when religious bodies realized that they might be liable for penalties of up to \$5,000 per year for each related agency which failed to file Form 990 if in the eyes of the IRS the agency does not qualify under the one of the exemptions. The IRS, moreover, has a statutory duty to issue regulations explaining the tax code.⁴⁶ After considerable pressure from various Members of Congress to comply with this duty, the IRS in the Ford administration began the process of issuing regulations on the meaning of an integrated auxiliary.

The IRS had no previous experience with the concept before it was invented in 1969. Acknowledging a lack of familiarity with the concept, Meade Whitaker, then Chief Counsel of the IRS, turned to religious leaders in 1975 hoping to learn from them what the phrase meant within their polities. These leaders, however, were of little assistance to the government drafters for the simple reason that the phrase “integrated auxiliary” did not resonate in their experience either. Perhaps at that point the IRS should have gone back to Congress and said: “Nobody out here knows what an integrated auxiliary is. Nobody in the church groups knows what one is. And nobody in the Service does either. Could you please tell us what you had in mind when you invented the term?” But it is probably too much to expect in the age of specialized expertise in the administrative law state that the agency charged with implementation of a statute would admit that it didn’t know what a law means. In any event, no such letter to Congress ever issued from the Treasury Department. Instead, the IRS finally broke its silence on the matter of

45. Whelan, *Government Regulations and Tax Exemptions*, Origins (NC Documentary Service) vol. 8, no. 24 (Nov. 30, 1978), p. 383.

46. I.R.C. § 7805(a) (1986).

integrated auxiliaries in February of 1976, when it published proposed rules which, according to Dean Kelley, "bore no resemblance to the information supplied [to the IRS] by the churches." The proposed regulations defined an integrated auxiliary as follows:

In order for an organization to qualify as an integrated auxiliary of a church, it must be affiliated with a church, and it must have as its primary purpose the carrying out of the tenets, functions and principles of faith of a church and such purpose must directly promote religious activity within the church. To be affiliated with a church, the organization must be either controlled by the church or must share with the church a common religious bond or convictions.⁴⁷

The response from the churches was swift and unanimous. Eighty denominations and their agencies were unequivocally opposed to the proposed rules.⁴⁸ Overall, about 200 protests were made.⁴⁹ Four principal objections were raised. First, to accept the proposed rules would be tantamount to accepting governmental authority to define the role and mission of the church. Second, the informational requirements would require the IRS to monitor the internal workings of churches, associations of churches and integrated auxiliaries. Third, the proposed rules do not carry out the congressional intent to expand the organizations which can claim exemption from filing Form 990. And fourth, the proposed rules could have a detrimental impact on a number of programs which some churches consider to be integral parts of their religious missions.⁵⁰

On June 7, 1976, the IRS held a public hearing to try to field the complaints resulting from its proposed regulation.⁵¹ According to Mr. Reed, the IRS General Counsel overreacted to the churches' strong protests⁵² and "really whipsawed the speakers who spoke on behalf of the churches."⁵³ Referring to the language of the Conference Committee report, the IRS staff conducting the administrative hearing demanded that the church representatives explained the declarations in that report to the effect that colleges, universities and charitable organizations were not exempt;⁵⁴ and they asked the church representatives to reconcile the integrated auxiliary provision in clause (i) with

47. 41 Fed. Reg. 6073 (1976).

48. GOVERNMENT AND MISSION OF CHURCHES, *supra* note 26, at 5.

49. *Integrated Auxiliaries*, *supra* note 40, at 212.

50. GOVERNMENT AND MISSION OF CHURCHES, *supra* note 26, at 5-6. For further discussion of these arguments, see the treatment of the case law in Part III of this chapter.

51. Whelan, *supra* note 14, at 895.

52. *Id.* at 896.

53. *Integrated Auxiliaries*, *supra* note 40, at 212.

54. *Id.*

the provision on "the exclusively religious activities of any religious order" in clause (iii).⁵⁵ The Protestant religious leaders were at a loss to attempt a principled reconciliation of these two provisions because most of them, having no religious orders in their church structures, had not been concerned with clause (iii).⁵⁶ Mr. Reed suggests that Treasury was mistakenly equating the history of the integrated auxiliary exemption with the unrelated history of the religious order exemption.⁵⁷ Father Whelan, however, suggests a rational explanation for the concerns of the IRS:

[Treasury's] concern about reconciliation of clauses (i) and (iii) seems to have been based upon the following considerations: if clauses (i) and (iii) are read as mutually exclusive, it follows that "religious orders" are not "churches," not "integrated auxiliaries of churches," and not "conventions or associations of churches." And if clause (iii) is given its literal meaning, religious orders must file annual reports about their charitable, educational, health care and other welfare activities that are not "exclusively religious." Thus, a religious order of sisters that owns and operates a hospital would have to file annual financial reports with respect to the hospital. But a religious order is obviously very closely connected with the denomination to which it belongs, and it would seem absurd to require the religious order to report about its hospitals but not require the denomination to report about other hospitals that it operates independently of any religious order. In order, then, to achieve basic fairness and equality of treatment of all church-affiliated hospitals, orphanages, old age homes, etc., all such institutions should be excluded from the concept of "integrated auxiliaries" in clause (i) of section 6033(a)(2)(A).⁵⁸

Whichever view of the IRS concerns is correct, the IRS issued the final version of the regulations on January 4, 1977. In pertinent part the final regulations read:

- (i) For purposes of this title, the term "integrated auxiliary of a church" means an organization--
 - (a) Which is exempt from taxation as an organization described in § 501(c)(3);
 - (b) Which is affiliated with a church; and
 - (c) Whose principal activity is exclusively religious.
- (ii) An organization's principal activity will not be considered to be

55. Whelan, *supra* note 14, at 896.

56. *Integrated Auxiliaries*, *supra* note 40, at 212.

57. *Id.*

58. Whelan, *supra* note 14, at 896-97 n.59.

exclusively religious if that activity is educational, literary, charitable, or of another nature (other than religious) that would serve as a basic for exemption under § 501(c).

(iii) For purposes of paragraph (g)(5) of this section, the term "affiliated" means either controlled by or associated with a church or with a convention or association of churches. For example, an organization, a majority of whose officers or directors are appointed by a church's governing board or by officials of a church, is controlled by a church within the meaning of this paragraph. An organization is associated with a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.⁵⁹

In overall effect the final regulations issued in 1977 were substantially the same as the proposed regulations announced in 1976.⁶⁰ Under both versions of the regulations an organization had to have a separate legal identity before it could be an "integrated auxiliary," for it had to be exempt from taxation under § 501(c)(3).⁶¹ Also, where the proposed regulations had a "primary purpose" test, the final regulations adopted a "principal activity" test,⁶² according to which the principal activity of an organization had to be "exclusively religious" before it could be an integrated auxiliary.⁶³ This test defines "integrated auxiliaries" through a "functional equivalence" standard, according to which a church-related organization would not be considered an integrated auxiliary for purposes of § 6033 if a secular organization performs the same services as the religious organization, but is tax exempt under § 501(c)(3) on other than religious grounds.⁶⁴ In addition, the examples listed in the final regulation are essentially the same as the examples given in the proposed regulation.

The churches reacted as negatively to the final regulations as they had to the proposed regulations; and they raised essentially the same objections as they had in opposition to the proposed regulations. The IRS, for its part, stood by its guns, stoutly maintaining that the final regulations were consistent with the congressional intent as evidenced in the legislative history of § 6033.

At an interreligious conference sponsored by the Baptist Joint Committee

59. Treas. Reg. § 1.6033-2(g)(5)(i)-(iii). 42 Fed. Reg. 767 (1977).

60. See Whelan, *supra* note 14, at 893-97 (for the view that the final regulations "differ substantially" from the proposed regulations).

61. *Id.* at 897. Example 6 given in the final regulations makes this clear by stating that an orphanage which has no legal identity separate from an exempt church and which is not itself an exempt organization is not an integrated auxiliary.

62. GOVERNMENT AND MISSION OF CHURCHES, *supra* note 26, at 7.

63. Treas. Reg. § 1.6033-2(g)(5)(i)(c).

64. T.D. 7545 (Oct. 13, 1976).

on Public Affairs in 1977, an IRS official explained that in developing its regulations, the Service looked to a statement by a Congressional committee explaining the policy behind making charitable organizations more accountable to the public, a comparison of the pre-1969 language of § 6033 with the new language, the examples of integrated auxiliaries in the reports that came out of the Congressional committees, and the statutory language confining the exemption of religious orders to the “exclusively religious activities” of those orders.⁶⁵

In narrowing the number of organizations excused from filing the information return, the staff of the Joint Committee on Internal Revenue Taxation had stated:

The Congress concluded that experience of the past two decades indicated that more information is needed on a more current basis from more organizations and that this information should be made more readily available to the public, including State officials.⁶⁶

The prior language of § 6033 specifically exempted religious organizations and exempt organizations “operated, supervised, or controlled by or in connection with a religious organization” from the filing of Form 990.⁶⁷ The IRS read the policy statement of the Joint Committee and compared it to the prior language of § 6033 and concluded that “Congress intended to excuse fewer religious organizations from the filing requirement than it had previously.”⁶⁸

Further, the IRS used the language of examples used in both the first and third paragraph of the Conference Committee report in defining “integrated auxiliaries.” But it used the examples in paragraph one (“the church’s religious school, youth group, and men’s and women’s club”)⁶⁹ as language of limitation, disregarding the word “includes” which indicated the list was intended to be nonexhaustive.⁷⁰

65. Lurie, *An Integrated Auxiliary is Not a Church*, in TAXATION AND THE FREE EXERCISE OF RELIGION: PAPERS AND PROCEEDINGS OF THE 16TH RELIGIOUS LIBERTY CONFERENCE (J. Baker ed. 1978) [hereinafter *Integrated Auxiliary Not a Church*].

66. General Explanation of the Tax Reform Act of 1969, 91st Cong., 2d Sess. 53 (1970).

67. Worthing, *supra* note 27, at 933.

68. *Integrated Auxiliary Not a Church*, *supra* note 65, at 16.

69. H. REP. NO. 91-782, 91st Cong., 1st Sess. 286 (1969).

70. For example, Mr. Lurie stated: “Note, if you will, that the examples listed by Congress include only mission societies, religious schools, youth groups, and men’s and women’s organizations of the church, and interchurch organizations of local units of the church. Nowhere, for instance, was a hospital or orphanage, or shelter, or other health welfare unit listed.” *Integrated Auxiliary Not a Church*, *supra* note 65, at 16. In the litigation which ensued over the integrated auxiliary matter, the National Council of Churches of Christ filed a Brief Amicus Curiae rebutting

Meanwhile, the Service used the language of the third paragraph to limit integrated auxiliaries to "exclusively religious" activities before they can be excused from filing Form 990.⁷¹ Part of the argument which the IRS advanced in support of using the language in this fashion appears to be based on the fairness argument which Father Whelan advanced in his article.⁷²

Finally, the IRS argued that Congress implicitly approved its definition of "integrated auxiliary" in the legislative history of § 501(h) in 1976. The 1976 legislation did not deal directly with § 6033, but focused on regulating political expenditures by tax exempt organizations. In that context the House Ways and Means Committee took advantage of the opportunity to comment on the proposed definition of an integrated auxiliary:

Because the proposed regulations have recently been published regarding the meaning of the term "integrated auxiliary" and because that term is used in this bill, your committee wishes to make it clear--in agreement with the conclusions of the proposed regulations--that theological seminaries, religious youth organizations and men's fellowship associations which are associated with churches would generally constitute integrated auxiliaries. Your committee also intends (in agreement with the conclusions in the proposed regulations) that hospitals, elementary schools, orphanages, and old-age homes are organizations which are frequently established without regard to church relationships and are to be treated for these purposes the same as corresponding secular, charitable, etc., organizations;) that is, such entities are not to be regarded as "integrated auxiliaries."⁷³

Mr. Lurie on this matter. See Brief Amicus Curiae at 12, *Lutheran Social Serv. v. United States*, 758 F.2d 1283 (8th Cir. 1985) [hereinafter Brief Amicus Curiae].

71. See Brief Amicus Curiae, *supra* note 70, at 12.

72. See text accompanying note 58 *supra*. See also Whelan, *supra* note 14, at 916 n.132, which suggests that the various terms used in the statute and in the legislative history probably contributed to the confusion of the IRS in its reading of the statute. For example the use of the term "any religious order" in § 6033(a)(2)(A)(iii) apparently indicated to the IRS that Congress was aware of the distinction which the Service had drawn between religious orders in Treas. Reg. § 1.511-2(a)(3)(ii). The choice of language in § 6033 may have been an attempt to keep Treasury from drawing the distinction it had made in an earlier regulation. If this is the case, there is nothing in the legislative history which repudiates the statement of the Staff of the Joint Committee on Internal Revenue which held that "religious orders" were to be included within the term, "church." Thus, the language of clause (iii) -- "the exclusively religious activities of any religious order" -- becomes superfluous, except as a precaution. In other words, if Congress included clause (iii) solely to emphasize to Treasury that they were not to differentiate among religious orders under § 6033, then clause (i) includes religious orders, and the "exclusively religious" test would apply to the organizations under that clause.

73. H. REP. NO. 94-1210, 94th Cong., 2d Sess. 15-16 (1976).

In the conflict that ensued between the IRS and the churches, the Service repeatedly cited this language as congressional approval of its regulations,⁷⁴ despite the fact that the Conference Committee explicitly refused to incorporate the language into its report.⁷⁵

The churches, on the other hand, raised several arguments in opposition to the IRS definition of an integrated auxiliary. The broadest attack on the regulation was a frontal assault on the very legitimacy of governmental definition of a church. The religious organizations argued that allowing the IRS to define the organizations which would not be considered to be part of the church is tantamount to allowing the government to define the goal and mission of the church through negative definition. The "exclusively religious" test puts the IRS in the position of defining the tenets, functions and mission of the church--a role which is beyond the power of the government in a society which values the separation of church and state--by requiring the IRS to decide whether the activities are "religious" in order to decide whether they are "exclusively religious." As John Baker put it:

Churches cannot accept the idea that any outside group can define their primary purposes or tell them to whom they must take their religious message. Under the Constitution as well as under the tenets of religious liberty each church is the sole source of the definition of its mission and that church alone is capable of determining those auxiliaries which are integral and integrated into that mission.⁷⁶

This argument has a great deal of rhetorical force, but it does not mean that the churches themselves should not accept the responsibility of articulating to outsiders, including governmental officials in appropriate circumstances, a clear statement of their own self-understanding, so that the outsiders may at least know what they should respect and, by implication, what they need not respect in the name of religious freedom.

The churches also pressed the argument that requiring the churches or their integrated auxiliaries to file information with the government would entangle the government excessively in religious matters.⁷⁷ The regulations require the

74. See, e.g., Letter from John E. Chapoton, Assistant Secretary for Tax Policy to Dean M. Kelley (Mar. 15, 1983) (discussing objections to the Treasury regulation). See also Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 9-10, *Lutheran Social Services v. United States*, 583 F. Supp. 1298 (D. Minn. 1984) [hereinafter Memorandum in Opposition].

75. H. REP. NO. 1515, 94th Cong., 2d Sess. 533 (1976).

76. GOVERNMENT AND MISSION OF CHURCHES, *supra* note 26, at 5-6.

77. See, e.g., *Walz v. Tax Comm'n*, 397 U.S. 664, 674-75 (1970).

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government to define the extent to which a separate legal entity that claims to be affiliated with a church is associated or controlled by that church. This, the churches claim, could involve "continuing examination of church books of account and/or extensive examination of church beliefs and organization."⁷⁸ According to Sharon Worthing, the filing of the informational return is not an incidental or trivial burden, but "constitutes the beginning of compulsory government monitoring of religious institutions."⁷⁹ By having to keep the government informed of their activities on a current basis through the informational forms, the churches believe that they are being forced to release intimate, confidential information concerning their activities which they maintain they should not be required to disclose to outsiders, and least of all to the government.⁸⁰ At least some of the churches felt that the annual filing of Form 990 would inevitably result in annual audits and government analysis of expenditures by religious bodies, leading to an impermissible degree of governmental involvement in religious matters.⁸¹

The churches also advanced the argument in opposition to the Treasury regulation is that the IRS position is unsupported by the legislative history.⁸² According to the churches, Congress completely withdrew the exemption for filing a Form 990 from all religious organizations when working on the Tax Reform Act of 1969. The churches, however, convinced Congress to reinstate that exception at least for "churches, and associations or conventions of churches." The addition of "integrated auxiliaries" to this list, the churches argue, indicates an intent not to constrict, but to enlarge the number of organizations exempt from filing Form 990.⁸³

In addition, the churches argued that the "exclusively religious" test was not intended to apply to "integrated auxiliaries." They suggested that a religious order is distinct from churches, their integrated auxiliaries, and associations or conventions of churches, and, as a consequence, the "exclusively religious"

78. GOVERNMENT AND MISSION OF CHURCHES, *supra* note 26, at 6.

79. Worthing, *supra* note 27, at 944.

80. *Id.* at 945.

81. In *Tilton v. Richardson*, 403 U.S. 672 (1971), a one-time cash grant was given to a church-related college for the construction of buildings to be used for educational purposes. The grant was made pursuant to the Higher Education Facilities Act of 1963 under which the government retained a twenty year interest in the buildings. The Supreme Court ruled that the grant did not involve excessive entanglement of church and state. In a plurality opinion Chief Justice Burger wrote that some of the factors which distinguished the grant from other cases where excessive entanglement was found included the lack of any continuing financial relationship, annual audits, and government analysis of expenditures to see if they were religious. *Id.* at 688. For a thoughtful review and critique of the excessive entanglement concern, see Ripple, *The Entanglement Test of the Religion Clauses - A Ten Year Assessment*, 27 UCLA L. REV. 1195 (1980).

82. GOVERNMENT AND MISSION OF CHURCHES, *supra* note 26, at 6.

83. GOVERNMENT AND MISSION OF CHURCHES, *supra* note 26, at 4, 7.

limitation should apply only to religious orders. In support of this conclusion, the churches pointed out that the examples of integrated auxiliaries given in the legislative history clearly demonstrate that Congress had no "exclusively religious" test in mind because the examples offered in that part of the report were not, in fact, exclusively religious.⁸⁴ *Lutheran Social Services v. United States*, 583 F. Supp. 1298 (D. Minn. 1984).

The churches further argued that the regulations would effectively inhibit churches from expanding into new areas of religious mission. "The threat of an ex post facto determination that a newly organized agency was not an integrated auxiliary would have an unconstitutional chilling effect on religion."⁸⁵ Whether or not this chill would arise from this regulation, there can be no serious doubt that the view that church and state should be kept separate is not simply a secular value in our republic, but is also a biblically based belief.⁸⁶

Finally, the churches rebutted the claim of the IRS that the legislative history of § 501(h) enacted in 1976 supports the IRS definition of an integrated auxiliary of a church. The churches argued that the Senate did not adopt the House approval of the regulations, and the Conference Committee report expressly declined to incorporate the House's approval into its report.⁸⁷ With his customary even-tempered accuracy Father Whelan had pointed out:

[T]he matter came to a draw. The churches were not successful in their efforts to persuade the conference committee to repudiate the proposed regulation on "integrated auxiliaries" and the Internal Revenue Service and other parties interested in a restrictive definition were not successful in their effort to secure legislative history for the Tax Reform Act of 1976 that would firmly support the proposed regulations.⁸⁸

84. See Plaintiff's Memorandum in Support of Motion for Summary Judgment at 9, *Lutheran Social Serv. v. United States*, 758 F.2d 1283 (8th Cir. 1985) [hereinafter Memorandum in Support].

85. GOVERNMENT AND MISSION OF CHURCHES, *supra* note 26, at 6.

86. Baptists are preeminent among those make this claim. The classical text cited for this view is the confrontation between Jesus and the chief priests over the payment of tribute to the Roman Empire. All three synoptic Gospels report the central element of Jesus' reply in virtually identical form: "Render unto Caesar the things that are Caesar's and to God the things that are God's." Matthew 22:21; Mark 12:17; Luke 20:25. For a thoughtful comment situating this passage in the context of other gospel accounts reflecting the approach of Jesus to the Roman social order and to political authorities within that order, see R. CASSIDY, *JESUS, POLITICS AND SOCIETY: A STUDY OF LUKE'S GOSPEL* at 55-62, 158-65 (1978). See also O. CULLMANN, *THE STATE IN THE NEW TESTAMENT* (1956).

87. H. REP. CONF. REP. NO. 1515, 94th Cong., 2d Sess. 533 reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 4118, 4230 (1976).

88. Whelan, *supra* note 14, at 921.

None of the arguments advanced by the religious bodies which participated in the administrative process was successful in persuading the IRS to modify its position during the Carter administration. With the inauguration of President Reagan in January of 1981, a new deregulatory era was promised. Big government was a problem, and the obvious solution was to get it off people's backs.⁸⁹ Amid much fanfare Vice-President George Bush was designated to head an inter-agency task force to eliminate unnecessary federal regulations.

In this feverish climate of expectation a major interfaith effort was mounted in 1982 to deal with the integrated auxiliary problem. The ad hoc group, known as the Coalition on Internal Revenue Definitions of Religious Bodies, forwarded a letter expressing its concerns to Vice-President George Bush, Edwin Meese III, White House Religious Liaison Morton Halperin, and various officials in the Treasury Department and the IRS, including Assistant Secretary of the Treasury for Tax Policy, John E. Chapoton. The letter objected to the government's definition of "church" which placed component organizations of denominational structures which had been considered part of the church for decades outside the definitional boundaries of a "church."⁹⁰ The Coalition also pointed to the lack of support in the legislative history for the "exclusively religious" test, and argued that distinguishing between organizations by the manner of their incorporation was to exalt form over substance.⁹¹ The Coalition also proposed an alternate regulation, which did not object to the requirement that an integrated auxiliary be a tax-exempt organization affiliated with a church, but urged that the "exclusively religious" test be abandoned. The coalition proposed alternative language: "the principal activity [of an integrated auxiliary] is integrated with the religious purposes of the church, convention or association of churches with which the organization is affiliated."⁹²

The response of the IRS to the Coalition letter came to full gestation nearly nine months after the letter was submitted. On March 15, 1983, Assistant Secretary Chapoton informed the Coalition that after reexamining the exclusively religious requirement of the regulation, the Treasury Department had concluded that "the position taken in the existing Treasury regulations correctly interprets Congress's intentions in modifying section 6033 in 1969."⁹³ Chapoton insisted

89. See, e.g., Inaugural Address of President Ronald Wilson Reagan, 17 WEEKLY COMP. PRES DOC. 1, Jan. 20, 1981, (intention of President to "curb size and influence of the Federal establishment") *Id.* at 2; (noting "intervention and intrusion in our lives that result from unnecessary and excessive growth of government") *Id.* at 3.

90. Letter from the Coalition on Internal Revenue Definitions of Religious Bodies to Vice-President George Bush (June 30, 1982).

91. *Id.* at 3.

92. *Id.* at 4.

93. Letter from John E. Chapoton, Assistant Secretary (tax policy) to Dean M. Kelley (Mar. 1983) (discussing objections to the Treasury regulation).

that Congress derived the phrase "integrated auxiliary" from the then-current Treasury regulation defining "church, convention or association of churches" to include a religious order or organization if it is "an integrated part of a church."⁹⁴ Chapoton also relied on the 1976 Report of the House Ways and Means Committee to support the conclusion that the "exclusively religious" test was mandated by Congress.⁹⁵ Further, Chapoton defended the IRS definition of a church by reference to the same committee report and to Congress's implicit approval in § 414(e)(3)(A) and (D), which contained language identical to that used in the regulation.⁹⁶

Such a letter repeating all the defenses of the government's position raised in 1977 could have been written in an hour or two if a low-level bureaucrat had worked diligently on the matter. To wait nine months to receive so definitive a repudiation of an effort to reach common ground of understanding from an Assistant Secretary was more than some of the churches could bear. In mild understatement Dean M. Kelley, the principal organizer of the Coalition, described the Chapoton response as "not very satisfactory."⁹⁷ Since the attempt to revise the definition of a church through the administrative process⁹⁸ had proved unproductive, two major denominations, the Lutherans and the Southern Baptists, felt obliged to take their case to court.

III. THE JUDICIAL EXAMINATION OF THE ADMINISTRATIVE REGULATIONS

The validity of the IRS regulations on integrated auxiliaries of a church

94. *Id.* at 1-2.

95. *Id.* at 2.

96. *Id.* at 2-3.

97. Memorandum from Dean M. Kelley to the Coalition on Internal Revenue Definitions of Religious Bodies (Mar. 28, 1983). Kelley includes a detailed account of his perspective on the integrated auxiliary episode in his forthcoming multi-volume treatise, *THE LAW OF CHURCH AND STATE IN THE UNITED STATES: A CHURCHSIDE VIEW*.

98. It is not the case that the IRS always construes its own regulations on an integrated auxiliary of a church with the rigidity manifested in the Chapoton letter. For example, Priv. Ltr. Rul. 84-02-014 is a decision of the National Office which is difficult to reconcile with the official line of the IRS on integrated auxiliaries. In that case, a separately incorporated organization which printed, published and distributed the official publication of "a newspaper conducted in the interests of informing the members of the diocese regarding all events of religious significance, and promoting the Christian perspective," sought a ruling that it was an integrated auxiliary. According to Gen. Couns. Mem. 39,106 (1983) the bulk of the newspaper consisted of "commercial advertisements, announcements, schedules of events, letters to the editor, sports results, movie reviews and news items of both general and secular interest." Finding that all the items in the newspaper were the typical "church news" items, the IRS ruled: "A publication of this nature is a valid method of disseminating information about church activities, improving communications between a church and its membership, and stimulating the religious interests of its readers. Such an activity classifies the organization as one which is being operated for exclusively charitable purpose by reason of substantially contributing to the advancement of religion."

were challenged in administrative proceedings before the IRS in several cases. Three of these cases reached the courts: *Tennessee Baptist Children's Homes, Inc. v. United States*,⁹⁹ *Lutheran Social Services v. United States*,¹⁰⁰ and *Lutheran Children and Family Services v. United States*.¹⁰¹ All three cases were resolved in favor of the church-related agency, but the conclusions reached in these decisions are very different, corresponding to different litigation strategies, different factual records, and different perceptions of the judicial role.

(a) *Tennessee Baptist Children's Homes, Inc. v. United States*

The first case to be filed in court involved the Tennessee Baptist Children's Homes (TBCH) in Nashville. TBCH is a separately incorporated child care facility of the Tennessee Baptist Convention (the Convention). Each of the directors on the board of TBCH is elected and may be dismissed by the Convention. Its charter and any amendments to it require approval by the Convention. TBCH relies on the Convention for funding, and receives no governmental funds.¹⁰²

TBCH operates four campuses in Tennessee. The children on each campus live in small groups (usually eight children) with two houseparents. Each cottage serves as a separate family unit wherein every effort was made to indoctrinate the children into the Baptist Faith. This is in accord with the express purpose of the TBCH as set out in its articles of incorporation. To assure that this purpose is carried out, all of the employees of TBCH must be Baptist, the houseparents must be Baptist in good standing with their congregations, and the administrative officers of the campuses are required to be Baptist ministers.¹⁰³

Against this factual background, the Southern Baptists were prepared to engage in litigation attempting to achieve status of integrated auxiliary for a church-related body by demonstrating that the related agency was engaged in activity that was "exclusively religious." On December 8, 1978, Dr. Evans Bowen, Executive Director and Treasurer of TBCH sent a letter to the IRS informing them that the Board of Trustees of TBCH had voted to not file Form 990 on the grounds that its principal activity was exclusively religious, or alternatively, because filing the informational form violated the religion clauses

99. 604 F. Supp. 210 (M.D. Tenn. 1984), *aff'd*, 790 F.2d 534 (6th Cir. 1986).

100. 583 F. Supp. 1298 (D. Minn. 1984), *aff'd in part and rev'd in part*, 758 F.2d 1283 (8th Cir. 1985).

101. Unreported, No. 83-5205 (E.D. Penn. 1986).

102. *Tennessee Baptist Children's Homes, Inc. v. United States*, 604 F. Supp. 210, 212 (M.D. Tenn. 1984).

103. *Id.* at 212-13.

of the First Amendment. The IRS responded by demanding the filing because TBCH's principal activity was child care which was not "exclusively religious" as that term is used in the IRS regulations. After an extended period of time during which TBCH continued to refuse to file the form, the IRS eventually assessed penalties against TBCH. TBCH paid the penalties and interest--amounting to \$29,665.12--and submitted a claim for refund.¹⁰⁴ The IRS denied the refund, so TBCH brought the case before the district court.¹⁰⁵

TBCH claimed refund on the grounds that it was either a church or an integrated auxiliary under § 6033. The court refused to grant the government's motion for summary judgment, and the case went to trial.¹⁰⁶ The IRS admitted that TBCH was exempt from taxes under § 501(c)(3) and its affiliation with the church. Thus, for the purposes of deciding whether TBCH was an integrated auxiliary, the only question for the jury was whether the principal activity was exclusively religious.¹⁰⁷

At the closing of the evidence, District Judge L. Clure Morton instructed the six jurors that they should presume that the assessment of the penalty against TBCH was correct, and noted that the plaintiffs had the burden of proving the incorrectness of the assessment by a preponderance of the evidence. On the issue of whether TBCH was a "church," the judge instructed the jury to consider the fourteen factors¹⁰⁸ used by the IRS to decide administratively whether an organization is a church, but also to use their common sense.¹⁰⁹ In instructing the jury on the integrated auxiliary issue, the court first clarified that the only question before the jury was whether the principal activity of the plaintiff was exclusively religious. The court added:

The "principal activity" of an organization is its most important, consequential or influential activity. It is commonplace for an organization to have more than one activity. In that event, you are to

104. *Id.* at 211-14.

105. *Id.* at 212.

106. The government insisted that it was entitled to judgment as a matter of law because, in the eyes of the IRS, the principal activity of TBCH was child care, an activity which would be deemed a charitable enterprise if undertaken by a secular enterprise. TBCH asserted that its principal activity was persuading the children in its charge to accept Jesus Christ as their Savior, and that it accepts children on a nonsectarian basis, but thereafter makes every effort to convert the children to the Baptist faith. This factual dispute over the principal activity of TBCH supports the correctness of Judge Morton's ruling on the government's motion for summary judgment. See FED. R. CIV. PROC. 56(c).

107. 604 F. Supp. at 212.

108. See text accompanying note 17 *supra*.

109. Frank Ingraham, the attorney for the plaintiffs advised the jury that TBCH did not consider itself a church, but suggested that the factual determination of whether TBCH met the IRS definition of a church was a legitimate question for the jury to decide.

identify the "principal activity" by selecting the activity which is the most significant, consequential or influential.

In this respect, the law states that an organization's principal activity will not be considered to be exclusively religious if that activity is educational, literary, charitable or of another nature (other than religious) that would serve as a basis for tax exemption under Section 501(c)(3) of the Internal Revenue Code.

The jury found that TBCH is not a church, but that it is an "integrated auxiliary of a church."¹¹⁰

In sustaining the jury's finding over a government motion for judgment notwithstanding the verdict, Judge Morton found two reasonable grounds for the finding. First, the jury could easily have concluded that the principal activity of TBCH was exclusively religious because the emphasis could have been placed on the adjective "principal." Accordingly, the principal activity could have been converting the children to the Baptist faith as opposed to a finding that "child care" was the principal activity.¹¹¹ Second, the jury could have found that child care was an exclusively religious activity because the motive was religious. According to Judge Morton:

The government's argument that act and motivation must be separated in determining whether an activity is exclusively religious is impracticable. Indeed, the court is at a loss to determine what distinguishes religious acts from other acts if it is not the motivation for action. The taking of bread and wine, for instance, may be an act of simple sustenance or the most profound sacrament depending on the participant's motivation.¹¹²

Thus, the court found that TBCH fell within the scope of the Treasury regulation as an organization whose "principal activity" was "exclusively religious." But more importantly for the churches and their related agencies, it held that the motivation of the organization can determine whether an activity which might not be religious at all for a secular organization might nonetheless be considered "exclusively religious" in the case of a religious organization like the TBCH.

Although the jury verdict was a victory for the church-related agency, the

110. The church noted that if the jury had found TBCH to be a church, it would have been compelled to enter judgment notwithstanding the verdict. 604 F. Supp. at 212 n.4.

111. *Id.* at 213.

112. *Id.*

narrowness of the victory must be underscored. First, the factual record in this particular case was very different from the typical financial picture in the vast majority of church-related colleges and hospitals, many of which could simply not function without large amounts of state and federal financial support. As Judge Morton stated: "this was a very close case. It turned on the facts peculiar to it."¹¹³

Second, the district court did not invalidate the IRS regulations as either inconsistent with the intent of Congress or as violative of the constitution. To the contrary, Judge Morton indicated in dicta that although he did not have to reach the issue of whether the Treasury regulations were inconsistent with the Code he would have upheld the regulations if the case had called for a decision on that point. According to Judge Morton, the regulations were a "well-crafted attempt to effectuate the intent of Congress."¹¹⁴

Finally, the district court denied the motion of TBCH for their costs, including attorney fees, under the federal statute which allows recovery of these fees in suits of this nature.¹¹⁵ In fact, Judge Morton delivered a mini-sermon to the Baptists for resorting to the court to vindicate their view of separation of church and state after the administrative process had failed them: "the plaintiffs went looking for a fight and found one. In our litigation-clogged society, that is not the kind of behavior that should be encouraged."¹¹⁶

The government appealed the portion of Judge Morton's decision holding that TBCH is an integrated auxiliary of a church, and TBCH cross-appealed the denial of attorney fees. With one exception the arguments on appeal were the same as those presented in the district court. The most notable exception was the insistence during the oral argument by the Justice Department lawyer representing the IRS that religion must be defined very narrowly to include only the conduct of worship.¹¹⁷ The court of appeals did not adopt this position, but affirmed the judgment of the district court in all respects.

Circuit Judge Robert Krupansky wrote an opinion for a unanimous panel

113. *Id.*

114. *Id.*

115. The Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, 94 Stat. 2325-2330, sets forth guidelines for awards of attorney fees in litigation involving the United States. The provision regarding general civil litigation is codified at 28 U.S.C. § 2412 (1990).

116. 604 F. Supp. at 214.

117. See, e.g., Palen, *IRS Announces New Procedures for Integrated Auxiliaries*, Baptist Press, May 8, 1986, at 4; Editorial, *TBCH's Efforts Support Religious Liberty*, Baptist and Reflector, May 19, 1986. The District Court in *Lutheran Social Serv. of Minn. v. United States*, 583 F. Supp. 1298, 1302-03 (D. Minn. 1984) adopted a similarly narrow cultic view of the church. See note 131 *infra*.

of the United States Court of Appeals for the Sixth Circuit. The court of appeals noted that since the record disclosed a genuine conflict of material fact as to the principal activity of TCBH, it was appropriate for a properly instructed jury to decide this factual matter. The appellate court was unwilling to set aside the factual determination of the jury that TBCH passed the "exclusively religious" test of the IRS regulation.¹¹⁸ The court of appeals likewise rejected the government's claim that it was entitled to summary judgment as a matter of law because of the strong similarity between the facts in this case and a hypothetical orphanage described in one of the examples included in the IRS regulations. Judge Krupansky noted: "examples incorporated into the Treasury regulations are generally considered illustrative only and are not to be considered as dispositive of controversial issues."¹¹⁹ Without adopting the extremely restrictive definition of religion urged by the Justice Department lawyer during oral argument, the court of appeals upheld the determination that TBCH is an integrated auxiliary and found it unnecessary to consider TBCH's challenges to the validity of the regulations or the statute. Finally, the court denied the request of TBCH for an award of attorney fees, concluding that "under the facts and circumstances presented by the controversy the Government's good faith prosecution of the novel issues raised was reasonable and substantially justified and the district court did not abuse its discretion in denying attorney fees and costs to plaintiffs."¹²⁰

(b) *Lutheran Social Services of Minnesota v. United States*

On May 10, 1979, the Lutheran Council in the USA, an agency serving all major synods of the Lutheran church, adopted a report on § 6033 outlining the difficulties which the churches had with the IRS regulations defining integrated auxiliaries. The report concluded by recommending that the Lutheran churches should seek a statutory change which would recognize the religious character of the churches' ministries through their various agencies and institutions. Particularly, the report encouraged the churches to "urge selected agencies and institutions to initiate a court test of the present definition of 'integrated auxiliaries.'"¹²¹

Following the recommendation, several test cases were initiated. One test case involved Lutheran Social Services of Minnesota (LSS), a separately

118. *Tennessee Baptist Children's Homes, Inc. v. United States*, 790 F.2d 534, 537-38 (6th Cir. 1986).

119. 790 F.2d at 539, citing *Nico v. C.I.R.*, 565 F.2d 1234, 1238 (2d Cir. 1977); *1210 Colvin Avenue, Inc., v. United States*, 81-1 U.S. Tax Case. (CCH) par. 9474 at 87,383 (W.D.N.Y. 1981); *Solomon v. C.I.R.*, 67 T.C. 379, 386 (1976).

120. 790 F.2d at 540.

121. LUTHERAN INVOLVEMENT IN THE DEFINITION OF CHURCH, 10 (1979).

incorporated social service ministry owned and controlled by the Northern, Southeastern and Southwestern Districts of the American Lutheran Church; the Minnesota and Red River Valley Synods of the Lutheran Church in America; and the Minnesota North and Minnesota South Districts of the Lutheran Church-Missouri Synod. The services provided by LSS include child care; adoption services; residential treatment services for the emotionally disturbed, the mentally retarded, and young male felons; nutritional programs for the aging; a camp for mentally and physically impaired individuals; community counseling programs; resettlement programs; and a chaplaincy program.

The original Lutheran strategy for getting the test cases into federal court called for LSS to file Form 990 late, pay the assessed penalty, then file a claim for refund of the penalty on the grounds that the ministry was an "association of churches" and/or an "integrated auxiliary" of the church. The Lutherans hoped that the IRS would deny the refund which would allow the Lutherans to bring the test case before the federal courts.¹²² LSS filed the Form 990 for the 1978 tax year two months after the form had been due. The IRS assessed a \$700 late filing penalty against LSS.¹²³ On January 2, 1980, LSS paid the penalty. On January 18, 1981, LSS filed a claim for refund. Unexpectedly, the IRS allowed the claim and refunded the money on February 16, 1981.¹²⁴ Shortly thereafter an article appeared in the Washington Star, stating: "The Internal Revenue Service has ruled that Lutheran Social Services of Minnesota is an 'integrated auxiliary' of the Lutheran Church in America and does not have to file an informational tax return." In response to this article, the IRS decided to reassess the penalty, apparently to demonstrate that the IRS was not conceding the basic issues.¹²⁵ On March 4, 1982, LSS filed a second claim for refund, but this time asserted only that LSS was an "association of churches."¹²⁶

In refusing the second claim for refund, the IRS examined not only whether LSS was an association of churches, but also whether LSS was an interchurch

122. *Id.* at 11.

123. *See* I.R.C. § 6652(d) (1986).

124. The Lutheran Church did not regard the refund as a conclusive IRS determination which could be relied upon. So the Lutherans decided to try a second strategy in a new test case. This strategy called for a ministry, upon receiving a notice that the IRS was planning a field audit of its books, to refuse the IRS access to its records on the single ground that it was an "association of churches." This would result in an IRS subpoena, which the ministry could then challenge in an enforcement proceeding. LUTHERAN INVOLVEMENT, *supra* note 121, at 12.

125. *Id.* at 12.

126. Priv. Ltr. Rul. 82-40-011. Relying on the "plain meaning" of the phrase "association of churches," and on the guidance afforded in Rev. Rul. 74-224, the Lutheran Council sought to show that LSS is an association of churches because its members are churches. This argument was rejected by the district court and by the Eighth Circuit in the LSS case.

organization of local units of a church and an integrated auxiliary of a church. The IRS ruled that LSS is not an integrated auxiliary of a church because its activities are not "exclusively religious." Indeed, the IRS decided not only that the activities of LSS were not "exclusively religious," but that, with the exception of the chaplaincy services, the activities of LSS were not "religious" at all. The IRS defined "religious" in this context as requiring the organization to "directly involve itself in sacerdotal services; or in spiritual or other morally oriented instruction; or it must be reasonably expected to inform or instruct the people most affected by it with some more or less specific set of beliefs about the essential nature of man or the subject of some higher power." LSS was denied classification as an "association of churches" for the same reason.

On January 11, 1983, LSS filed suit in the United States District Court in Minnesota, seeking a refund on the ground that it was not required to file Form 990 because it was an integrated auxiliary of a church or churches and/or a convention or association of churches.¹²⁷ Both parties filed motions for summary judgment. The government defended the regulations as a valid reading of congressional intent, and argued that the activities of LSS were not "exclusively religious."¹²⁸ The government also argued that LSS was not an association of churches because "church" was to be defined by common meaning and usage, and a social service agency could not become an "association of churches" through mere religious affiliation or some religious activity.¹²⁹ LSS, on the other hand, raised several arguments that it had not made on the administrative level concerning the validity of the IRS regulations.¹³⁰

District Judge Harry MacLaughlin granted the government's motion for summary judgment and wrote an opinion upholding the validity of the IRS regulations and rejecting all of the church's statutory and constitutional claims. First, the court found that LSS was not an "association of churches" based on

127. Complaint at 3, *Lutheran Social Services v. United States*, 583 F. Supp. 1298 (D. Minn. 1984).

128. Memorandum in Opposition, *supra* note 74, at 13-15.

129. *Id.* at 16-18.

130. At the administrative level, LSS had contended only that it fell within the definition of "association and churches" under § 6033. In the district court, LSS challenged the regulations under § 6033 both as inconsistent with the statute and as unconstitutional. This appears to have been part of the Lutheran strategy to be sure to get to court, but it nearly backfired on LSS when the IRS challenged the court's jurisdiction to hear the arguments which were not raised at the administrative level. Memorandum in Opposition, *supra* note 74, at 4-7. Nevertheless, the court decided to hear the arguments on the ground that the arguments challenging the regulation were implicit when plaintiff contended it was an "integrated auxiliary" under § 6033. "[T]he taxpayer need only set forth information sufficient to enable the IRS to make an intelligent review of the claim." *Lutheran Social Serv.*, 583 F. Supp. at 1306.

the government's argument that "church" must be read in the light of the "common understanding" of the word.¹³¹ Second, the court held that LSS was not an "integrated auxiliary" because its activities were not "exclusively religious."¹³² Third, the court held that the "exclusively religious" test was not "plainly inconsistent with the revenue statutes," and therefore was not invalid.¹³³

Although Judge MacLaughlin was not obliged to reach the constitutional challenges which LSS had raised to the "exclusively religious" test,¹³⁴ he decided to discuss the constitutional claims of LSS, rejecting all of them. First, he rejected the argument that to require church-affiliated organizations such as LSS to file the informational return while exempting those organizations which are not separately incorporated unconstitutionally discriminated between

131. 583 F. Supp. at 1302-03. Thus Judge MacLaughlin's notion of religion became the "common understanding" of "church," and his view, it seems, was narrow. According to the judge, social services could not be considered "ministration of sacerdotal functions" because there was no evidence that LSS "holds worship services." *Id.* at 1303. By adopting his own notion of "church," Judge MacLaughlin rendered an even narrower definition of the church than that contained in the criteria which the Service had been using for several years under T.R. § 1.511. See text accompanying note 17 *supra*.

132. 583 F. Supp. at 1303. This result was not surprising because LSS had not litigated this matter vigorously. For example, it had not advanced an argument that it was exempt under the IRS regulation since its original request for refund in 1981.

133. *Id.* at 1304-06. LSS argued that the language in the legislative history of § 6033 does not support the "exclusively religious" text, and that the examples of "integrated auxiliaries" in the history indicate no such test was warranted because none of these examples could be described as an "exclusively religious" organization. Memorandum in Support, *supra* note 84, at 7-11. The court rejected these arguments by examining the history of I.R.C. § 501(h) (1976), enacted into the Code in the Tax Reform Act of 1976. The court stated that the House report included language supporting the Treasury regulation, but the Senate was silent and the Conference Committee took "no position." The court reasoned that the legislative history was ambiguous and the "exclusively religious" test was not "plainly inconsistent" with the language of the statute. 583 F. Supp. at 1306. The court quickly disposed of the argument that "exclusively religious" was intended to apply to religious orders by noting that while the intent of Congress in passing § 6033 in 1969 was ambiguous, there was nothing in the language which precludes application of the test to integrated auxiliaries. *Id.* at 1306.

134. It is a familiar principle of interpretation that courts should not reach the constitutional aspects of a case unless they have to. For example, as early as 1804, Chief Justice Marshall wrote in *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 450, 452 (1804) that an act of Congress ought not to be construed to violate the federal constitution if any other possible construction remains available. This principle was restated in a famous concurring opinion by Justice Brandeis in *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936). And the Supreme Court has recently followed this rule of construction in cases involving the application of federal labor legislation to religious bodies. See, e.g., *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780-88 (1981) (construing the Federal Unemployment Tax Act to exempt personnel of church-related schools); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-01 (1979) (construing the National Labor Relations Act to exclude jurisdiction of the N.L.R.B. over teachers in church-operated schools).

churches and created a denominational preference for the latter in violation of the Due Process clause.¹³⁵

Next, the court disposed of the Establishment Clause challenge to the regulation, examining this claim in light of the familiar three-part test of *Lemon v. Kurtzmann*.¹³⁶ The court ruled that the informational form served a legitimate secular purpose of collecting information from charitable corporations which receive government funds to help support their work. It viewed the burden on the churches as minimal in that the regulation only required those churches which are separately incorporated to file Form 990. Accordingly, the regulations did not inhibit those who had to file nor materially advanced those which did not. Despite the argument of the church-related agency that the filing would result in "continuing intimate surveillance by the IRS" which should be struck down because it serves as a "warning signal" of an unconstitutional relationship,¹³⁷ the court ruled that the entanglement between church and state would not exceed permissible limits.¹³⁸

Finally, the court rejected the Free Exercise claims advanced by LSS, on the view that the governmental interest in collecting basic financial information on church-affiliated organizations outweighed the "incidental burden" imposed on these organizations by the filing requirement.¹³⁹

135. Memorandum in Support, *supra* note 84, at 13-14. This claim could have been presented as a violation of the Establishment Clause, for prohibition of preference for one religious group over another is at the very core of that provision. See, e.g., *Larson v. Valente*, 456 U.S. 228 (1982), *reh'g denied*, 457 U.S. 1111 (1982). Rather than pursue that line of reasoning, the district court took the posture of judicial deference to Congress. Citing *Regan v. Taxation with Representation*, 459 U.S. 819 (1983), for the proposition that Congress has especially broad latitude in drawing classifications in the tax area, which may be invalidated only on the lack of any conceivable rational basis, the court ruled that the distinction based on separate incorporation was a "clear and appropriate dividing line." 583 F. Supp. at 1306-07. The court added: "Any other dividing line—such as one that turned on the closeness of the affiliation between a church and its related organizations—would present difficult administrative problems." *Id.* at 1307. Administrative difficulty is not normally thought of as a compelling governmental interest, and the deference to Congress begged the question of whether the IRS had faithfully construed congressional intent in issuing the regulations.

136. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U.S. 602, 612-13 (1971).

137. Memorandum in Support, *supra* note 84, at 16.

138. 583 F. Supp. at 1307-08.

139. 583 F. Supp. at 1307. For the view that this filing requirement is more burdensome than Judge MacLaughlin imagined, see *Worthing*, *supra* note 27, at 930 n.19 (citing testimony of James E. Wood, Jr., Executive Director, Baptist Joint Committee on Public Affairs, at IRS Hearing, June 7, 1986). See also Form 990. Some of the information on this form has nothing to do with unrelated business income. For example, it probes whether a § 501(h) organization is engaging in political speech which, despite the restrictions of § 501(c)(3), is at least arguably protected by the First Amendment. See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (Brennan, J.,

In May of 1984 LSS appealed Judge MacLaughlin's decision to the United States Court of Appeals for the Eighth Circuit. The briefs of LSS¹⁴⁰ and of the government¹⁴¹ raised the same arguments before the court of appeals that it raised in the lower court. In my view the most interesting argument raised in the district court, but abandoned on appeal, was the contention of LSS that in the wake of *Bob Jones University v. United States*,¹⁴² the IRS regulations placed religious organizations in an impossible catch-22 situation. In *Bob Jones* the Court had ruled that an organization could not be exempt under § 501(c)(3) if it were "exclusively religious." Chief Justice Burger wrote that exempt organizations had to be "charitable" in the common law sense of "conferring a public benefit." Thus if LSS conceded that it confers a public benefit, LSS would presumably fail the "exclusively religious" test in clause (c) of the IRS regulations. But if LSS insisted, as TBCH had done in its litigation, that its activities were exclusively religious, it would presumably fail the requirement under clause (a) that it be an exempt organization.¹⁴³ Neither the government nor the district court responded to this argument, and LSS did not raise it in the court of appeals.

In the appellate court LSS attacked the approach to definition of religion according to "common understanding." The government had persuaded Judge MacLaughlin to adopt this approach, but the court of appeals declined to discuss the issue,¹⁴⁴ ruling simply that LSS was not a church because its primary function was to provide social service benefits to the public at large. According to the court:

Such services are secular in nature when performed by secular organizations, and cannot be transformed into "ministrations of the sacerdotal functions" merely because they are performed by a

concurring) (religious discussion, association, or political participation not in less preferred status than such rights generally); and *Widmar v. Vincent*, 454 U.S. 263 (1981) (rejecting view that religious speech is entitled to less protection than other forms of expression).

140. LSS contended that it was a "church," "an association of churches," or an "integrated auxiliary of a church or churches." Appellant's Brief at i, *Lutheran Social Serv. v. United States*, 758 F.2d 1283 (8th Cir. 1985). On its integrated auxiliary claim, LSS argued that the dictionary meaning of the term supported its position, *id.* at 22-23; the "exclusively religious" test was unsupported by the legislative history, *id.* at 23-24; the examples of integrated auxiliaries given in the legislative history indicate that no "exclusively religious" test was intended, *id.* at 24-26; the "exclusively religious" test was to be required only of religious orders. *Id.* at 26-28; and the regulations were unconstitutional, *id.* at 31-35.

141. The government also raised the same defenses it had raised in the district court plus a new defense that the examples given in the legislative history of § 6033 were "exclusively religious." Appellee's Brief at 28-29, *Lutheran Social Serv. v. United States*, 758 F.2d 1283 (8th Cir. 1985).

142. 461 U.S. 574 (1983).

143. Memorandum in Support, *supra* note 84, at 12.

144. 758 F.2d at 1287 n.4.

religiously affiliated social service organization like LSS.¹⁴⁵

Thus, the court concluded, a social service agency cannot be regarded as an integral part of a church merely by being closely affiliated with a church. Not only does this kind of definition of a church smack of the catch-22 dilemma sketched above; as Dean Kelley has observed, it also has a pernicious effect on the church and on society:

The effect of [the IRS regulation denying church status to a religious organization which has a "secular counterpart"] is to split off a church-related college or hospital from the church and to treat it as more college than church, or more hospital than church, just because there are other colleges or hospitals that are not related to churches, even though the church-related institutions may be, and often are, much older. In other words, a church may institute a college or hospital to help carry out its mission, and may consider that institution an integral part of its work. But if other colleges or hospitals spring up nearby, often in imitation of the church-related prototype, but are themselves unrelated to any church, then the late-comer secular institution pre-empts the field, and the church-related college or hospital is legally assimilated to the "secular counterpart" rather than remaining more akin to the founding church....¹⁴⁶

The court of appeals likewise rejected the claim that LSS was an "association of churches." Turning to the history of the provision in the tax code on unrelated business income,¹⁴⁷ the court observed that the phrase "association of churches" had been added to the code to include language corresponding to the organizational structure of congregational churches. Since there was no support in the legislative history indicating another meaning for the term, the court concluded that LSS was not a protected "association of churches."¹⁴⁸

The court of appeals, however, agreed with LSS in its claim to be an integrated auxiliary of a church or churches, and reversed the district court on this issue. One of the tools available to judges is to divert attention from the substantive issue under discussion by focusing on the standard of review

145. *Id.* at 1287.

146. DEAN M. KELLEY, *THE LAW OF CHURCH AND STATES IN THE UNITED STATES: A CHURCHSIDE VIEW* (forthcoming).

147. I.R.C. § 511 (1986).

148. 758 F.2d at 1288.

appropriate for the decision.¹⁴⁹ The court of appeals adopted this strategy by choosing a lesser standard of deference to be given to IRS regulations than that adopted by the district court:

[W]e cannot “rubber-stamp” the regulation if it will “frustrate the congressional policy underlying the statute.” ... A Treasury regulation that is inconsistent with the statute upon which it is based cannot be sustained (emphasis added).¹⁵⁰

On this standard of review the court of appeals agreed with LSS that the examples of integrated auxiliaries found in both the Senate and Conference Committee reports demonstrated a consistent understanding of those terms. The examples themselves, the court decided, portrayed organizations which were not “exclusively religious” which demonstrated such a test was not intended by Congress.¹⁵¹ Also, the court agreed with LSS’s contention that the use of “exclusively religious” in connection with religious orders in § 6033(c) but not with 6033(a) indicated no intent to apply the test to “integrated auxiliaries.”¹⁵² Quoting the district court decision at length, the court of appeals noted that Judge MacLaughlin had relied heavily upon “ambiguities in the legislative history of a subsequent and unrelated statute” in finding the Congressional intent unclear. Citing *Consumer Product Safety Commissioner v. GTE Sylvania*,¹⁵³ the Eighth Circuit rejected this methodology.¹⁵⁴

Thus, as in *Tennessee Baptist Children’s Homes, the Lutheran Social Services of Minnesota* case ended with a judicial finding that a religious social service agency was an integrated auxiliary of a church. The major difference between the cases is that the Eighth Circuit clearly decided that the regulation requiring the activities of an integrated auxiliary to be exclusively religious was inconsistent with the congressional intent. Having decided that much, the court felt no need to discuss the constitutionality of the “exclusively religious” test.

(c) *Lutheran Children and Family Services v. United States*

The *Tennessee Baptist* case serves as binding legal authority for similar

149. For example, in equal protection analysis, discussion of minimal scrutiny, middle scrutiny, and strict scrutiny has virtually completely overshadowed more serious considerations in the search for equality and personal dignity.

150. 758 F.2d at 1289. The district court, by contrast, had followed *Commissioner v. Portland Cement*, 450 U.S. 156, 169 (1981) (Treasury Regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statute).

151. *Id.* at 1291.

152. *Id.* at 1289.

153. 447 U.S. 102, 117-18 (1980).

154. 758 F.2d at 1289-90.

cases which arise in the four states within the Sixth Circuit.¹⁵⁵ The precedential effect of the Lutheran Social Service case is limited to the eight states within the Eighth Circuit.¹⁵⁶ Since the Solicitor General did not seek review of either of these cases in the Supreme Court, there is no definitive ruling on the scope or validity of the IRS regulations on integrated auxiliaries of a church. Perhaps in an effort to achieve a definitive judicial interpretation on these matters by provoking a conflict among the federal courts of appeals,¹⁵⁷ the Lutheran Council pressed forward with another case in the Third Circuit.

The third test case to reach the courts was brought by the Lutheran Children and Family Service of Eastern Pennsylvania [LC&FS]. LC&FS is a separately incorporated ministry affiliated with the Pennsylvania Synod of the Lutheran Church in America. The principal activities of this organization are social service programs.¹⁵⁸ LC&FS clearly met the first two requirements in the IRS regulation for exemption from the requirement of filing Form 990: exempt status and affiliation with a church. Unlike the TBCH case, there was no factual dispute over whether the principal activities of LC&FS are "exclusively religious." LC&FS acknowledged: "it has always been clear that LC&FS could not satisfy [the] 'exclusively religious' test, because its activities have always been charitable as well as religious."¹⁵⁹

The only dispute in this case was over the validity of the "exclusively religious" test, which LC&FS challenged as inconsistent with the plain language of § 6033 and as contrary to the legislative history of the statute.¹⁶⁰ In an

155. Kentucky, Michigan, Ohio, and Tennessee.

156. Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

157. See Sup. Ct. R. 17.1(a).

158. In an unreported opinion issued on July 9, 1986, the district court enumerated these programs as follows:

Foster Care - Domestic, Indochinese Foster Care, Adoption, Family Life Services, Bucks County Life Center, Pregnancy Counseling Mother and Child Program, Action Crisis Treatment Center, Anchor House, Cross County Community School, Group Homes, Refugee Resettlement, Vietnamese Programs, Indochinese Shelter and Social Services, Park Chapel and Indochinese Center, Title XX Indochinese Programs, Indochinese Youth, Prison Arts and Haverford Center, and Professional Parents' Grants.

159. Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment at 2, *Lutheran Social Serv. v. United States*, 758 F.2d 1232 (8th Cir. 1985).

160. LC&FS noted in its opening brief in support of its motion for summary judgment that constitutional arguments were not presented in that brief, but would be presented at trial if the court denied its motion for summary judgment. In the unreported opinion of July 9, 1986 the district court noted that the complaint "advances no constitutional challenges. In any event, this court's resolution of the statutory issue presented obviates the need to consider any constitutional claims." Slip Op., n.3. This aspect of the case is instructive to practitioners, who are advised that despite the general liberality of the provision allowing amendment of pleadings, FED. R. CIV. PROC. 15(a), F.R. Civ.P., it is better practice to provide adequate notice in the complaint of any constitutional

unreported decision announced on July 9, 1986, District Judge Clifford Green noted that the challenge to the government's definition of an integrated auxiliary was a case of first impression in the Third Circuit. LC&FS had obviously relied on the view advanced by the Eighth Circuit in the Lutheran Social Service case invalidating the "exclusively religious" test, and the government attacked that opinion as "plainly erroneous." Judge Green expressly adopted the rationale of the Lutheran Social Service case and held that the "exclusively religious" test is inconsistent with the legislative history of § 6033 and could not be relied upon by the IRS to deny exempt status to LC&FS. Having already announced a new revenue procedure designed to "improve relations with the church community,"¹⁶¹ the government did not appeal the decision of Judge Green.

(d) The Modification of the Rules on Integrated Auxiliaries

As long as major litigation was still being actively pursued, the government was not prepared to compromise on its position on integrated auxiliaries. After losing the trial court decision in Tennessee Baptist Children's Homes and the appellate ruling in Lutheran Social Service, the government indicated to the religious coalition mentioned above a willingness to reconsider the IRS regulations on integrated auxiliaries with a view to reaching an accord with the religious community. The churches made plain that the "exclusively religious" test was the most significant obstacle to progress, and after negotiations between the coalition and officials in the IRS, on May 6, 1986, the Service announced Revenue Procedure 86-23.

It remains only to state what this announcement does and does not do. First, the Revenue Procedure involves a religious body in the process of identifying those organizations which it deems to be affiliated with itself.¹⁶² The government no longer purports to define in the first instance the relationship between a church and an agency undertaking the mission of that church, but asks the church to do so. As I mentioned above, one of the reasons why religious bodies found the IRS regulations objectionable was that, in John Baker's words,

claims which they may wish to litigate. The district court, however, did not accept the government's attack upon the court's jurisdiction on the ground that no statutory or constitutional challenge had been advanced in the administrative proceedings. As did the district court in *Lutheran Social Services of Minnesota*, *supra* note 100, 583 F. Supp. at 1304, Judge Green found that LC&FS had implicitly brought these issues into play by contending that it is an integrated auxiliary of a church.

161. IRS News Release, May 6, 1986, announcing Rev. Proc. 86-23.

162. Rev. Proc. 86-23, Sec. 4 provides that

an organization is affiliated with a church or a convention or association of churches if [it] is covered by a group exemption letter ... or [if it] is operated, supervised, or controlled by or in connection with ... a church or convention or association of churches, or [if] relevant facts and circumstances show that it is so affiliated.

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"Under the Constitution as well as under the tenets of religious liberty each church is the sole source of the definition of its mission and that church alone is capable of determining those auxiliaries which are integral and integrated into that mission."¹⁶³ Baker may have overstated the case in making the church the sole source of defining its mission, but it is surely appropriate that the church should be recognized as the primary source of such definition.¹⁶⁴ One corollary of this position is that the churches themselves should accept the responsibility of articulating to outsiders, including governmental officials in appropriate circumstances, a clear statement of their own self-understanding, including identifying those groups with which it is related in activities which it deems religious in character.

Second, the Revenue Procedure establishes a test according to which an affiliated agency is assumed to be internally supported by a church unless it both:

- 1) Offers admissions, goods, services, or facilities for sale, other than on an incidental basis, to the general public..., and
- 2) Normally receives more than 50 percent of its support from a combination of governmental sources; public solicitation of contributions (such as through a community fund drive); and receipts from the sale of admissions, goods, performance of services, or furnishing of facilities in activities that are not unrelated trades or businesses.¹⁶⁵

Derived from the sensible recommendation of Father Whelan in his 1977 article in the *Fordham Law Review*,¹⁶⁶ this rule allows the government to have some objective measure of the relationship between a church and an affiliated agency.

Finally, it should be noted that this Revenue Procedure does not formally replace the Treasury Regulation which the coalition found offensive. There is a hierarchy among IRS rules, ranging from Treasury Regulations at the top to Private Letter Rulings at the bottom.¹⁶⁷ A Treasury regulation may be altered only with the formality of a rules project requiring approval of the Secretary of Treasury. Since changing the regulation itself is a complicated process which might require years to come to fruition, the IRS proposed using the less formal

163. GOVERNMENT AND MISSION OF CHURCHES, *supra* note 26, at 5-6.

164. Since the domestic relations law of most states establishes a formal process for parental acknowledgement even of their illegitimate children, it seems appropriate to allow a churches at least some kind of voice in acknowledging those entities which are related to it.

165. Rev. Proc. 86-23, sec. 5 1986-1 C.B. 564.

166. Whelan, *supra* note 14, at 924.

167. See note 3 *supra*.

route of administering § 6033 by means of a Revenue Procedure, which does not require involvement of the Treasury Department.

To reassure the coalition of the good faith of the government, five days after the Sixth Circuit affirmed the district court in Tennessee Baptist Children's Homes, the General Counsel of the IRS wrote to the Secretary of the coalition, Dean Kelley, informing him that a new rules project had been opened to revise the regulation in accordance with the revenue procedure. Even though this project might take decades to complete, the religious organizations can be grateful that an accommodation of their interests has been achieved, not only because of the persistent efforts of the coalition, but also because of the sympathetic hearing which the coalition received from career officials in the IRS such as Milton Cerney in the Exempt Organizations branch. After a decade of confrontation between church and state over governmental definition of religion, both sides have worked out a compromise that they could live with.

CONCLUSION: THE DANGER OF GOVERNMENTAL DEFINITION OF RELIGION
WITHOUT THE PARTICIPATION OF RELIGIOUS GROUPS

Many serious scholars have urged that any attempt by the government to define religion should be resisted as an unconstitutional infringement of the rightful autonomy of religious bodies. For example, the distinguished constitutional scholar, Milton Konvitz, has written: "Not only should the question of religious truth or falsity and sincerity or hypocrisy of religious professions be beyond the cognizance of government, but even the very meaning or definition of 'religion,' as the term is used in the First Amendment, should be outside the area of governmental inquiry."¹⁶⁸

For several reasons I cannot agree with Professor Konvitz and other commentators who have adopted this position. First, although I acknowledge the clear danger of giving to the government much power to draw the line between authentic and inauthentic religious experience, I am persuaded that the demands of religious liberty and conscience are satisfied by excluding governmental inquiry into the truth or falsity of religious experience and meaning, but not precluding some probing of the sincerity of religious beliefs and practices.¹⁶⁹ From the religious perspective the test of sincerity may make

168. M. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE: A CONSTITUTIONAL INQUIRY 50 (1968).

169. See, e.g., *United States v. Ballard*, 322 U.S. 78 (1944); *Sherbert v. Verner*, 374 U.S. 398 (1963); and see also *General Council on Finance and Administration v. Superior Court*, 439 U.S. 1355 (1979) (Opinion of Rehnquist, J.).

costly demands upon religious adherents.¹⁷⁰ From the governmental perspective, however, the test of sincerity is a relatively low threshold of inquiry which need not be very intrusive. For that reason I do not believe that it is necessary to religious freedom in America that the insincere and the hypocritical be afforded the same benefits extended to sincere religious convictions of a very wide variety.

Second, although it is most emphatically not the duty of the government to protect the American public from the false messiahs or pseudo-prophets which arise in our culture with disturbing frequency,¹⁷¹ the government surely has a significant interest in fair administration of the tax laws. Indeed, protection against tax fraud may fairly be regarded as a "compelling" interest, to use the code word from Free Exercise Clause analysis.¹⁷² As I mentioned in the Introduction to this article, the government has legitimate concerns with investigating the phenomena of lavish private benefits inuring to TV evangelists from exempt charitable contributions and of transparent schemes of tax evasion through mail-order ministry. These phenomena demonstrate the necessity of clear criteria which the government may employ in an evenhanded fashion to distinguish between sincere religion convictions and manifest fraud.

Third, the very fact that the term "religion" is found in the text of the constitution leads in my view to an opposite conclusion from that adopted by Professor Konvitz, namely to the inevitability that the term will in fact be subject to interpretation of some sort. It is better that such interpretation be thoughtful and critical rather than wooden and mechanical. If scholars like Konvitz do not lend their erudition to the process of defining religion,¹⁷³ the task will not be avoided, but will often be left to the simple-minded or to the well-meaning but ill-informed.

Although I have concluded that the definition of religion is imperative in

170. See, e.g., D. BONHOEFFER, *THE COST OF DISCIPLESHIP* 35-47 (1959). For example, persons opposed to participation in war in any form "by reason of their religious training or belief," 50 U.S.C. app. § 456 (j) (1981), typically were required to demonstrate the sincerity of their convictions during the Vietnam War by performing menial tasks at low wages in some form of alternative public service as a condition of being granted exemption from military training and service. This statutory provision was given a very broad construction in *United States v. Seeger*, 380 U.S. 163 (1965). See also *Welsh v. United States*, 398 U.S. 333 (1970).

171. See, e.g., *Whelan*, *supra* note 14, at 927.

172. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); *Thomas v. Review Board*, 450 U.S. 707, 718-19 (1981).

173. For an example of a thoughtful attempt to deal with this problem, see Jesse H. Choper, *Defining 'Religion' in the First Amendment*, 1982 U. ILL. L. REV. 579. See also *Worthing*, *supra* note 27; and *Note, Reinterpreting the Religion Clauses: Constitutional Construction and Conceptions of the Self*, 97 HARV. L. REV. 1468 (1984).

our constitutional order, that by no means requires the conclusion that the specific efforts of the IRS to do so which have been discussed in this article were successful. To the contrary, these efforts were seriously flawed from the outset by insensitivity to the religious convictions which matter most to religious organizations. When eighty national religious bodies in the United States agree on anything, that should be major news. At the very least the government ought to have given a more respectful hearing to the concerns voiced by the groups which protested the regulations concerning an integrated auxiliary proposed by the IRS in 1976. Still more regrettably, the IRS involvement on the issue of defining an integrated auxiliary of a church have been marked with stubborn intransigence. It required nearly a decade of costly lobbying and still more costly litigation before the IRS finally agreed in 1986, after losing three major test cases, that it could achieve its valid governmental objectives without drawing lines in the clumsy manner it had previously employed. As Professor Tribe has observed: "If the state is to be prevented from intruding too deeply into ... the autonomy of intimate religious communities or associations, one pattern of constitutional doctrine is greater deference to religion."¹⁷⁴

Attention should also be paid to nonadversarial communication between church leaders and governmental officials. The integrated auxiliary issue proved to be a decade-long confrontation between church and state. Much of the tension in this conflict could have been diminished if the representatives of the religious bodies had been as willing as Fr. Whelan was, in his Fordham Law Review article, to acknowledge that religious bodies are not constitutionally entitled to the best of all possible tax worlds.¹⁷⁵ It would have helped, too, if there had been clearer communication of the central concerns of the churches¹⁷⁶ to the governmental officials involved in the stand-off. For example, it seems clear the Lutheran Council was far less concerned with the actual filing of an informational return by related agencies of the church than with the heavy-handed insistence of the government that social service is not part of the mission of the church. If that message had been communicated clearly to the IRS, perhaps the stand-off could have terminated earlier, for the normal bureaucratic impulse is to facilitate compliance with a governmental regulation. In this instance the net result for the IRS would have been that a taxpayer would willingly comply with the requirement of filing Form 990 if it did not have to concede to the government an erroneous statement of its self-understanding. That should have been enough for the government to end its dubious battle with

174. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 884 (1978).

175. Whelan, *supra* note 14, at 922.

176. High on my list of difficulties with the IRS definition of a church in the integrated auxiliary episode would be the government's attempt to distinguish among "church-related institutions on the basis of their 'churchness' or degree of church-relatedness." Whelan, *supra* note 14.

religious organizations over their mission in the world.

Finally, it should be recalled that the IRS did not invent the term "integrated auxiliary of a church." Congress did. Hence it is appropriate in my view for the churches and to go back to the appropriate committees of Congress with a plain, clear message along the following lines:

It has now been over twenty years since the term "integrated auxiliary of a church" was coined. With only one exception (the Mormons), none of us even knew what a "church auxiliary" was before the term appeared in 6033 of the tax Code in 1969. With no exceptions, all of us have found offensive various attempts of the IRS to make sense of this term. For over a decade we were unsuccessful in persuading the IRS to avoid a governmental definition of religion at odds with our own self-understanding. Not only have we found their regulations destructive of our religious freedom. We have discovered that their internal rulings conflict with their regulations.

When we turned to the courts, we found that the judiciary was not that helpful either. Whatever is meant by an "integrated auxiliary," general comprehension of the term was certainly not improved much as a result of expensive litigation. One Circuit thinks that the IRS may not tell us that our activity is to be treated differently by the government if the IRS does not think it is "exclusively religious," but another Circuit upheld the regulations issued by the IRS and simply found that Baptist childrens' homes in Nashville complied with those regulations. Chief Justice Marshall was right in stating that "It is emphatically the province and duty of the judiciary to say what the law is."¹⁷⁷ But the judiciary has not said what the law is on this matter with much clarity.

So we are turning to you, the Congress, for help. We are turning to you for help because we understand that federal judges do not like to strike down an act of Congress, especially a tax law, on constitutional grounds if that can be avoided. We understand this because not a single one of the courts to which we turned was willing to take our free exercise concerns seriously. But that doesn't mean that you Members of Congress shouldn't take our constitutional concerns seriously when you enact legislation. You take the same oath of office that federal judges take, so we have a right to expect that you will act with at least as much concern for religious freedom as judges

177. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

(and, for that matter, officials in the executive branch) should.

We have no notion what use, if any, is ever made of all the information gathered in the thousands of copies of Form 990 filed every year by our agencies. Perhaps you might press the Commissioner of Internal Revenue for an explanation of the utility of this mountain of paperwork. As far as we can tell, the filing of all those documents by schools, hospitals and other social service agencies not deemed exempt from this requirement has created little perceptible improvement of the administration of the tax laws. One thing we do know. The filing requirement has added considerably to the costs of providing services to the community which we have been doing for centuries before this government came into being.

Many of us do not even object to providing all that information to the government every year. We give you the benefit of the doubt that the information is useful. But we all remain firm that it is our task to reflect about our mission in the world, and that it is not your job to tell us whether we view service to others as religious or not. And we want to let you know unequivocally that we are offended when we are told that our service to others does not qualify as religious if our secular counterparts provide similar services without religious motivation for doing so. Through persistent efforts we have finally struck a compromise with the IRS. They will let us tell them in the first instance which agencies we regard as integral components of the church carrying out our mission in the world. For our part we will not object to filing of the informational returns by agencies which serve the general public and which receive over half of their funding from the government or other outside sources. It is not the best of solutions, but it is one we can live with.

In the light of our experience with § 6033 of the tax code, we urge you to amend this section to reflect the concerns we have raised. We trust that you will do so with greater awareness of the difficulties posed for religious organizations when an unfamiliar term such as "integrated auxiliary of a church" is crafted without the consultation of the very organizations that the term purports to describe. Back in 1969 the Congress acted in great haste and with little attention to the enormous diversity that exists among religious bodies in America, both in our organizational structures and in our sense of purpose and mission in the world. It is time now to act more serenely and reflectively. We stand ready to assist you in the process of drafting legislation that is responsive to legitimate needs that the government might identify, but that is sensitive to our need for religious freedom.

If the religious bodies of America were to raise a concerted voice to Congress along the lines sketched above, they would in my view have learned something useful from the integrated auxiliary episode and they may even succeed in bringing to pass the hope expressed by Fr. Whelan:

In this way, the Code will cease to threaten the traditional freedom of the American churches to define their mission and functions within acceptable public policy limits. Congress will achieve its purpose without truncating the churches.¹⁷⁸

178. Whelan, *supra* note 14, at 924.

