

## The African-American Church, Political Activity, and Tax Exemption

*Vaughn E. James\**

### ABSTRACT

Ever since its inception during slavery, the African-American Church has served as an advocate for the socio-economic improvement of this nation's African-Americans. Accordingly, for many years, the Church has been politically active, serving as the nurturing ground for several African-American politicians. Indeed, many of the country's early African-American legislators were themselves members of the clergy of the various denominations that constituted the African-American Church.

In 1934, Congress amended the Internal Revenue Code to prohibit tax-exempt entities—including churches and other houses of worship—from allowing lobbying to constitute a “substantial part” of their activities. In 1954, Congress further amended the Code to place an absolute prohibition on political campaigning by these tax-exempt organizations. While these amendments did not specifically target churches and other houses of worship, they have had a chilling effect on efforts by these entities to fulfill their mission. This chilling effect is felt most acutely by the African-American Church, a church established to preach the Gospel and engage in activities which would improve socio-economic conditions for the nation's African-Americans.

This Article discusses the efforts made by the African-American Church to remain faithful to its mission and the inadvertent attempts

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made by Congress to impede the fulfillment of this mission. The Article will propose a solution to the tug-of-war that would enable the Church to fulfill its mission while acting within the confines of the law. This proposal would allow the future involvement of the Church and other houses of worship in political activity, with these entities funding their involvement with taxable funds. The adoption of this proposal would allow the Church, for the first time since 1954, to fulfill its mission without fear of breaking the law or losing its tax-exempt status.

#### INTRODUCTION

Ever since its creation, the United States of America has revered the principle of separation of church and state. This separation principle flows from the First Amendment to the United States Constitution, which reads in part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>1</sup> A possible indication of just what the Founding Fathers meant by these phrases is found in Thomas Jefferson’s famous “Danbury Letter,” in which he advocated erecting “a wall of separation between church and state.”<sup>2</sup> Strict separationists may point out that Jefferson’s original letter called for “a wall of eternal separation” between church and state.<sup>3</sup>

In modern day America, any political activity by churches and other houses of worship is governed by Section 501(c)(3) of the Internal Revenue Code (“I.R.C.” or “Code”).<sup>4</sup> This statute imposes three requirements upon charitable organizations—including churches—if they are to retain their tax-exempt status.<sup>5</sup> These organizations must: (1) ensure that none of their earnings inure to the benefit of private individuals; (2) not devote a substantial part of their activities to lobbying; and (3) not “intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office.”<sup>6</sup> While the latter two prohibitions are applicable to all Ameri-

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<sup>1</sup> U.S. CONST. amend. I.

<sup>2</sup> Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins & Stephen S. Nelson, Comm. of the Danbury Baptist Ass’n in the state of Connecticut (Jan. 1, 1802) (on file with the Library of Congress). Jefferson circled a section of the letter for deletion. *Id.* In this section, he explained why he refused to proclaim national days of fasting and thanksgiving, as his predecessors, Adams and Washington, had done. *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> 26 U.S.C. § 501(c)(3) (2000).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

can churches and houses of worship, they appear to have a much more drastic effect on the African-American Church (“the Church”),<sup>7</sup> a church established to fight for the social, economic, and political equality and advancement of African-Americans.

This Article is divided into six parts. Part I will survey the history and development of the religious tax exemption provided for American churches by I.R.C. § 501(c)(3). Part II will discuss the lobbying and political activity restrictions of § 501(c)(3). Part III will survey the history and development of the African-American Church from its birth during slavery to the passage of the Voting Rights Act of 1965.<sup>8</sup> This part will also discuss the Church’s development of its mission throughout time. Part IV will discuss the chilling effect § 501(c)(3) has on the Church’s ability to fulfill its mission. This part will demonstrate that the dampening effect is evident in the way the Church has lost its militancy, ostensibly because it has had to distance itself from political activity, and thus from efforts to fulfill its mission, in order to maintain its vital tax-exempt status. Part V proposes a solution to the problem. It will discuss some alternatives to addressing the issue, and will present arguments in favor of the author’s solution. Part VI, the conclusion, will argue that if Congress and the African-American Church choose to adopt the author’s solution, the Church will, for the first time since 1954, be able to fulfill its mission, yet benefit from the tax exemption offered to all other churches, houses of worship, religious organizations, and non-religious charitable organizations.

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<sup>7</sup> This Article uses the term “African-American Church” in the sense used by C. Eric Lincoln and Lawrence H. Mamiya in C. ERIC LINCOLN AND LAWRENCE H. MAMIYA, *THE BLACK CHURCH IN THE AFRICAN AMERICAN EXPERIENCE I* (1990). Professors Lincoln and Mamiya limit the definition of the African-American Church to those seven independent, historic, and totally African-American controlled denominations founded after the Free African Society of 1787—the African Methodist Episcopal (A.M.E.) Church; the African Methodist Episcopal Zion (A.M.E.Z.) Church; the Christian Methodist Episcopal (C.M.E.) Church; the National Baptist Convention, U.S.A., Incorporated (N.B.C.); the National Baptist Convention of America, Unincorporated (N.B.C.A.); the Progressive National Baptist Convention (P.N.B.C.); and the Church of God in Christ (C.O.G.I.C.)—along with a scattering of smaller denominations. *Id.* Like Professors Lincoln and Mamiya, this Article does not use the term African-American Church to refer to local African-American congregations within predominantly Caucasian denominations. For example, while the First Community Baptist Church of Chicago, a member of the N.B.C., would be included within the African-American Church, the Martin Luther King Seventh-day Adventist Church in Lubbock, Texas, a local African-American congregation within a larger, predominantly Caucasian denomination, would not.

<sup>8</sup> 42 U.S.C. § 1973 (2000).

## I. HISTORY AND DEVELOPMENT OF THE RELIGIOUS TAX EXEMPTION

A. *Religious Tax Exemption in Colonial America*

From an American perspective, the story of the current religious tax exemption began from the moment the first Europeans crossed the Atlantic to establish colonies in the New World.<sup>9</sup> These European citizens who came to America during the early colonial period had differing religious motives for crossing the Atlantic. Some “came seeking religious freedom for themselves and were willing to grant it to others. On the other hand, others came to establish religious freedom for themselves and, where possible, to deny it to others.”<sup>10</sup> Accordingly, while some colonies granted religious tax exemptions, others did not.<sup>11</sup> Indeed, within those colonies where churches were accorded religious tax exemptions, only established (i.e., state-endorsed) churches qualified for those exemptions; dissident religions were taxed.<sup>12</sup> During this early colonial period, nine of the thirteen colonies provided direct tax aid to churches.<sup>13</sup> Of these nine, three—Massachusetts, Connecticut, and New Hampshire—supported the Congregational Church; the six others—New York, Maryland, Virginia, North Carolina, South Carolina, and Georgia—supported the Church of England.<sup>14</sup>

In those colonies with established churches, various statutes and constitutional provisions existed whereby these established churches either received direct governmental aid or benefited from some form of tax exemption. For example, Georgia and Maryland had constitutional provisions that permitted each individual to support the church of his or her preference with monies collected from a general assessment.<sup>15</sup> Meanwhile, in South Carolina, the state constitution declared Christian Protestantism as the state-established religion.<sup>16</sup> Massachusetts adopted two significant laws: one imposing a tax upon all citizens for the support of the clergy, and another disenfranchising non-members of the established church.<sup>17</sup> Connecticut instituted

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<sup>9</sup> See D.B. ROBERTSON, *SHOULD CHURCHES BE TAXED?* 42 (1968).

<sup>10</sup> *Id.*

<sup>11</sup> *See id.*

<sup>12</sup> John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363, 369 (1991).

<sup>13</sup> John K. Wilson, *Religion Under the State Constitutions 1776–1880*, 32 J. CHURCH & ST. 753, 754 (1990).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 756.

<sup>16</sup> *Id.*

<sup>17</sup> ROBERTSON, *supra* note 9, at 44–45.

an assessment to establish the Connecticut Congregational and Anglican churches, but (to the legislature's credit) provided for dissenting Baptists and Quakers to be exempted from such assessment.<sup>18</sup> Connecticut also enacted a series of exemptions and a certificate system allowing individuals to support their own churches; however, those not belonging to a church were required to support the established church.<sup>19</sup> In Virginia, governmental measures provided for the support of the clergy and required farmers to pay tithes to ministers.<sup>20</sup>

*B. Religious Tax Exemption in the Post-Revolutionary Period*

During the period leading up to the American Revolution, the religious situation in the colonies began to change—and dramatically at that—from what had existed during the early colonial period. The policy in the colonies moved from one of ecclesiastical establishment to one of disestablishment.<sup>21</sup> Thus, by the time the Revolution ended—or shortly thereafter—several of the colonies had disestablished their churches.<sup>22</sup> At least one church history scholar opines that this policy of disestablishment resulted from a realization among the colonists and new Americans that “[n]o one group had a sufficient majority to gain official recognition; [accordingly,] political and religious leaders saw the necessity, at least on a national level, of granting freedom to all groups and official establishment to none.”<sup>23</sup>

Yet, this new trend, even with the added support of the newly-ratified First Amendment providing for the separation of church and state and the non-establishment of a national religion,<sup>24</sup> in no way ended religious tax exemptions in the new nation. Notwithstanding the lack of federal or state mandates for the time-honored practice of granting religious tax exemptions, both the federal and state governments soon began enacting statutes granting, or recognizing, such exemptions. On the state level, Pennsylvania was the first to adopt a constitutional amendment specifically exempting church property

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<sup>18</sup> Wilson, *supra* note 13, at 760.

<sup>19</sup> See THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 180–82* (1986); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 41–42* (1986).

<sup>20</sup> ROBERTSON, *supra* note 9, at 47.

<sup>21</sup> *Id.* at 51; see also JAMES H. HUTSON, *RELIGION AND THE FOUNDING OF AMERICA 41–46* (1998).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> U.S. CONST. amend. I.

from taxation.<sup>25</sup> Virginia followed suit, restoring tax exemption to church property in 1840–41.<sup>26</sup>

On the federal level, some early tax statutes contained provisions granting federal tax exemption to charitable organizations, including churches. For example, “[i]n 1802 the 7th Congress enacted a taxing statute for the County of Alexandria . . . which provided tax exemptions for churches.”<sup>27</sup> Then, in 1813, “the 12th Congress refunded import duties paid by religious societies on the importation of religious articles.”<sup>28</sup> Two years later, in 1815, Congress imposed a tax on household furniture, but exempted therefrom the property of “any charitable, religious or literary institution.”<sup>29</sup>

Beyond these early statutes, Congress later provided for tax exemption of charitable organizations, including religious institutions. “The first federal income tax, imposed during the Civil War, exempted ‘[t]he income of literary, scientific, or other charitable organizations.’”<sup>30</sup> Then, “[i]n 1864, Congress enacted a five percent tax on gross receipts from lotteries, but exempted lottery receipts that were received by . . . ‘any charitable, benevolent, or religious association’ and that were used for ‘the relief of sick and wounded soldiers, or . . . some other charitable use.’”<sup>31</sup> Finally, Congress enacted a more comprehensive income tax statute, the Tariff Act of 1894,<sup>32</sup> which provided an explicit tax exemption for “corporations, companies, or associations organized . . . solely for charitable, religious or educational purposes . . . [and] stocks, shares, funds, or securities held by any fiduciary or trustee for charitable, religious, or educational purposes.”<sup>33</sup>

One year later, the Supreme Court of the United States declared the income tax system contained in the Tariff Act unconstitutional.<sup>34</sup> The Court’s decision, however, was based on reasons unrelated to the

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<sup>25</sup> See ROBERTSON, *supra* note 9, at 69.

<sup>26</sup> *Id.*

<sup>27</sup> *Walz v. Tax Comm’n*, 397 U.S. 664, 677 (1970).

<sup>28</sup> *Id.* (citing 6 Stat. 116 (1813) (relating to plates for printing Bibles)).

<sup>29</sup> Act of Jan. 18, 1815, ch. 23, § 14, 3 Stat. 186, 190 (1815) (exempting from tax the property of any charitable, religious, or literary institution).

<sup>30</sup> John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 541 (1991) (quoting ROGOVIN, BACKGROUND OF THE PRESENT INCOME TAX EXEMPTION OF CHARITABLE ORGANIZATIONS 10 (quoting Act of Jan. 18, 1815, § 14, 3 Stat. 186, 190)).

<sup>31</sup> *Id.* (quoting Act of June 30, 1864, § 111, 13 Stat. 223, 279).

<sup>32</sup> Tariff Act of 1894, ch. 349, § 32, 28 Stat. 509, 556 (1894).

<sup>33</sup> *Id.*

<sup>34</sup> See *Pollock v. Farmers’ Loan and Trust Co.*, 158 U.S. 601, 637 (1895), *superseded* by U.S. CONST. amend. XVI.

statute's charitable exemption provisions. Therefore, the terms of that exemption were freely included in the Payne Aldrich Tariff Act of 1909<sup>35</sup> and the Revenue Act of 1913.<sup>36</sup>

## II. LOBBYING AND POLITICAL ACTIVITY RESTRICTION OF I.R.C. § 501(C)(3)

### A. *Current Law Governing the Religious Tax Exemption*

Tax exemption for churches and other houses of worship—as for all charitable organizations—is contained in I.R.C. § 501(c)(3).<sup>37</sup> The statute provides federal tax exemption for organizations “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals.”<sup>38</sup>

The term “religious purposes” as used in I.R.C. § 501(c)(3) has a very broad meaning. The term is not limited to traditional houses of worship, but rather extends to religious book publishers, broadcasters, organizations conducting genealogical research, and burial societies.<sup>39</sup> Unlike these other organizations, houses of worship are automatically entitled to tax exemption under § 501(c)(3) and to receive tax-deductible donations without even having to file an application for formal recognition from the Internal Revenue Service (“Service” or “IRS”).<sup>40</sup> Churches and other houses of worship are also exempt from most of the reporting requirements that the law places on other types of § 501(c)(3) organizations.<sup>41</sup>

### B. *Restrictions on Lobbying and Political Activity*

Tax exemption for houses of worship does not come without a price. The I.R.C. imposes three obligations on these institutions if they are to maintain their tax-exempt status.<sup>42</sup> Two of these are relevant here. First, houses of worship are prohibited from allowing propaganda or other attempts at influencing legislation (i.e., lobby-

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<sup>35</sup> Payne Aldrich Tariff Act, ch. 6, § 38, 36 Stat. 11, 112 (1909).

<sup>36</sup> Revenue Act, ch. 16, § II(G)(a), 38 Stat. 114, 172 (1913).

<sup>37</sup> 26 U.S.C. § 501(c)(3) (2000).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See LESTER M. SALAMON, AMERICA'S NONPROFIT SECTOR: A PRIMER 22–25 (1999).

<sup>41</sup> *Id.*

<sup>42</sup> 26 U.S.C. § 501(c)(3).

ing) from constituting a “substantial part” of their activities.<sup>43</sup> Second, the I.R.C. prohibits them from “participat[ing] in, or interven[ing] in . . . any political campaign on behalf of (or in opposition to) any candidate for public office.”<sup>44</sup>

### 1. The Restriction Against Lobbying

Although these two provisions are now enshrined in American law, they were not always a part of the legal landscape. In fact, throughout early American history—right up to the early twentieth century—churches and other houses of worship were free to engage in political activity without fear of losing their tax-exempt status. The first limitation on such conduct by these institutions—and other charitable organizations—came in 1919, when the Treasury issued a ruling limiting lobbying by these organizations.<sup>45</sup> Thereafter, the government frequently used this ruling as the basis for arguing that charitable organizations should not expend substantial resources for lobbying purposes.<sup>46</sup> This argument received judicial acceptance in *Slee v. Commissioner*,<sup>47</sup> in which the Second Circuit held that the American Birth Control League had failed to qualify for tax exemption because it had disseminated propaganda to both legislators and the public supporting the repeal of laws against birth control.<sup>48</sup> In 1934, four years after the *Slee* decision, Congress added the “no substantial part” lobbying limitation as a condition for the charitable tax exemption.<sup>49</sup>

Some commentators opine that the limitation codified Judge Hand’s *Slee* opinion.<sup>50</sup> However, although the congressional record reveals that the amendment was raised and discussed on the Senate floor, no record exists that its proponents even mentioned the pre-existing Service policy or the opinion in *Slee*.<sup>51</sup> What does seem clear

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919). The ruling stated in part: “[A]ssociations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute.” *Id.*

<sup>46</sup> *See, e.g.,* *Slee v. Comm’r*, 42 F.2d 184 (2d Cir. 1930).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 185.

<sup>49</sup> Revenue Act of 1934, Pub. L. No. 216, § 517, 48 Stat. 680, 760 (1934).

<sup>50</sup> *See* Laura B. Chisholm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 232 n.141 (1987–88); Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code’s Treatment of Legislative Activities*, 71 TEX. L. REV. 1269, 1285 (1993); Kevin M. Yamamoto, *Taxing Income from Mailing List and Affinity Card Arrangements: A Proposal*, 38 SAN DIEGO L. REV. 221, 230 n.40 (2001).

<sup>51</sup> *See* 78 CONG. REC. 5861 (1934).



is that Congress imposed the lobbying limitation as a result of extensive politicking by various members of Congress. Indeed, the story of the limitation's enactment weaves an interesting tale.

When Franklin D. Roosevelt ascended to the presidency of the United States in March 1933, he became president of a country undergoing the throes of the Great Depression. Yet, shortly before that, Congress, reacting to public opinion, passed an extremely generous benefits package for veterans of both the Spanish-American War and the First World War.<sup>52</sup> The package gave benefits to all veterans who had served in any capacity for the previous thirty years, including those who had fought abroad or served on the home front.<sup>53</sup> The package amounted to \$420 million a year, about one-seventh of the cost of running the federal government.<sup>54</sup>

Incoming President Roosevelt realized that he would have to reduce the veterans' benefits package for the government to retain money to finance the New Deal.<sup>55</sup> For a Democrat, the President received support from an unlikely source—corporate America and its allies. Foremost among these allies was a conservative tax-exempt charity called The National Economy League.<sup>56</sup> In opposition to the President and his allies stood the veterans' organizations themselves, with their champion, David Aiken Reed, the conservative Republican senator from Pennsylvania,<sup>57</sup> leading the charge. After months of lobbying and bitter wrangling, the Roosevelt Administration prevailed; the veterans' benefits program was scaled back.<sup>58</sup> As for the combatants, The National Economy League won the battle, and Senator Reed lost.<sup>59</sup> But this was not the end of the war.

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<sup>52</sup> *Senate Votes 51 to 39*, N.Y. TIMES, June 15, 1933, at 1.

<sup>53</sup> *Id.*

<sup>54</sup> Editorial, *How to Save \$400,000,000*, N.Y. TIMES, Jan. 11, 1933, at 18.

<sup>55</sup> See MARK HUGH LEFF, *THE LIMITS OF SYMBOLIC REFORM: THE NEW DEAL AND TAXATION, 1933–1939*, 97–119 (1984).

<sup>56</sup> Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 16 (2003). Organizations like the National Economy League were popular during that period. *Id.* A similar organization, the National Economic League, was a powerful advocate of fiscal conservatism. *Id.* Its membership included former attorneys general and a former vice president of the United States. *Id.* at n.82.

<sup>57</sup> Princeton University, *Rare Books and Special Collections, Description of David Aiken Reed Scrapbooks: Biographical Sketch*, available at [http://libweb.princeton.edu/libraries/firestone/rbsc/finding\\_aids/reed.html](http://libweb.princeton.edu/libraries/firestone/rbsc/finding_aids/reed.html) (last visited Dec. 13, 2006).

<sup>58</sup> Houck, *supra* note 56, at 20.

<sup>59</sup> *Id.*

On April 2, 1934, just as the veterans' benefits issue was reaching a head, the Senate Committee on Finance sent legislation to the full Senate amending the charitable contribution provisions of the Code.<sup>60</sup> According to the proposed legislation, for an organization to qualify as "charitable," no "substantial part" of its activities could involve "participation in partisan politics or in carrying on propaganda, or otherwise attempting to influence legislation."<sup>61</sup> When this language reached the Senate floor, Senator Reed, a Finance Committee member and the chief spokesman, explained, somewhat uncomfortably, that the proposed prohibition would apply to several "worthy institutions that [the Committee] do[es] not in the slightest mean to affect."<sup>62</sup> Senator Reed then continued:

There is no reason in the world why a contribution made to the National Economy League should be deductible as if it were a charitable contribution if it is a selfish one made to advance the personal interests of the giver of the money. That is what the committee were trying to reach; but we found great difficulty in phrasing the amendment. I do not reproach the draftsmen. I think we gave them an impossible task; but this amendment goes much further than the committee intended to go.<sup>63</sup>

Faced with the fact that the proposed prohibition would have unintended consequences, the Senate deferred the amendment.<sup>64</sup>

When the Senate returned to the amendment, the Finance Committee chairman explained that the committee was hoping that the amendment would put a halt to the practice of certain organizations receiving contributions in order to influence legislation and carry on propaganda.<sup>65</sup> For his part, Senator Reed reiterated that the committee was not proud of the language of the amendment; however, he urged its adoption to allow "better phraseology" to be offered in conference with the House.<sup>66</sup> Senator Reed's position did not receive unanimous support. One of his colleagues, Senator Robert LaFollette, opined that all such organizations should be disqualified from receiving tax exemption.<sup>67</sup>

When the conference committee met, it eventually adopted Senator LaFollette's position. In applying the blanket approach to

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<sup>60</sup> 78 CONG. REC. 5693, 5861 (1934).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* (statement of Sen. Reed).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> 78 CONG. REC. 5693, 5959 (1934) (statement of Sen. Harrison).

<sup>66</sup> *Id.* (statement of Sen. Reed).

<sup>67</sup> *Id.* (statement of Sen. LaFollette).

disqualification, the committee retained the Senate's language prohibiting "substantial" activities in "carrying on propaganda or otherwise attempting to influence legislation."<sup>68</sup> However, conceding that part of the prohibition was "too broad," the committee dropped the prohibition on "participation in partisan politics."<sup>69</sup> As if to confirm that the battle was really about the activities of the National Economy League, the IRS revoked the League's tax-exempt status just three months after Congress enacted the lobbying prohibition.<sup>70</sup> Thus, some members of Congress, annoyed by the activities of one group (i.e., the National Economy League) initiated legislation that has had a broad and significant impact on charitable organizations for over seventy years. For instance, although the targeted organization of the anti-lobbying legislation was not a church or other house of worship, today these institutions are bearing the burden of the legislation.

An identical scenario led to Congress's 1954 enactment of the prohibition on political campaigning by charitable organizations.

## 2. The Absolute Prohibition on Involvement in Political Activity

The enactment of the absolute prohibition on political campaigning by charitable organizations—including churches—came in the form of a 1954 amendment to the I.R.C.<sup>71</sup> The amendment's sponsor, then-Senator Lyndon B. Johnson (D. Texas), stated that the new rule was intended to "extend" the limitation of § 501(c)(3).<sup>72</sup> Yet, the congressional record is devoid of any statement explaining just what Senator Johnson meant. In fact, the legislative history on the amendment is minimal: no committee proposal was made; no treasury proposal was made; no committee hearings were held. Further, no record exists of any discussion of the amendment on the floor of either chamber. The congressional record merely reveals that on July 2, 1954, Senator Johnson was recognized from the Senate floor and the following colloquy occurred:

Mr. JOHNSON of Texas: Mr. President, I have an amendment at the desk, which I should like to have stated.

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<sup>68</sup> 100 CONG. REC. 9599, 9604 (1954).

<sup>69</sup> *Lobbying and Political Activities of Tax-Exempt Orgs.: Hearings Before the Subcomm. on Oversight of the Comm. on Ways and Means, 100th Cong.* 124, 139 (1987) (statement of William J. Lehrfeld) [hereinafter Lehrfeld Statement].

<sup>70</sup> *Id.*

<sup>71</sup> 26 U.S.C. § 501(c)(3) (1954).

<sup>72</sup> 100 CONG. REC. 8557, 9604 (1954).

The PRESIDING OFFICER: The Secretary will state the amendment.

The CHIEF CLERK: On page 117 of the House bill, in Section 501(c)(3), it is proposed to strike out "individuals, and" and insert "individual," and strike out "influence legislation," and insert "influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

Mr. JOHNSON of Texas: Mr. President, this amendment seeks to extend the provisions of section 501 of the House bill, denying tax-exempt status to not only those people who influence legislation but also to those who intervene in any political campaign on behalf of any candidate for any public office. I have discussed the matter with the chairman of the committee, the minority ranking member of the committee, and several other members of the committee, and I understand that the amendment is acceptable to them. I hope the chairman will take it into conference, and that it will be included in the final bill which Congress passes.<sup>73</sup>

The Johnson amendment formed part of the Internal Revenue Code of 1954.<sup>74</sup> In the absence of any legislative history explaining Senator Johnson's reasons for proposing the amendment, commentators have opined that Senator Johnson was motivated by his fear that nonprofit organizations were working on behalf of a campaign opponent to unseat him.<sup>75</sup> History supports these assertions.

As he prepared for the 1954 elections, Senator Johnson had every reason to be concerned. As an initial matter, he had won his first term by a razor-thin margin of eighty-seven votes, in circumstances that led some of his detractors to doubt that he had indeed won.<sup>76</sup> Additionally, Johnson was a Democrat in a Republican-controlled Senate, with a very popular Republican in the White House. Finally, no sooner had Johnson's chief rival for reelection, Texas Governor Allan Shivers, chosen not to run, than the slot was

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<sup>73</sup> *Id.*

<sup>74</sup> 26 U.S.C. § 501(c)(3) (1954).

<sup>75</sup> See, e.g., Sean Delaney, *Political Activity by Nonprofit Organizations*, 599 PLI/TAX 87 (2003); Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1 (2003); Wyatt McDowell, *How Religious Organizations and Churches Can Be Politically Correct*, 42 BRANDEIS L.J. 71 (2003); Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733 (2001).

<sup>76</sup> See ROWLAND EVANS & ROBERT NOVAK, LYNDON B. JOHNSON: THE EXERCISE OF POWER 73 (1966).

filled by Dudley T. Dougherty, a young, millionaire rancher-oilman with a conservative agenda.<sup>77</sup>

Now, during the early 1950s, American conservatives were greatly concerned about what they saw as the spread of Communism at home and abroad. Organizations that had formed in opposition to the New Deal sounded the alarm over the appeasement of Communism and international treachery.<sup>78</sup> One such organization was the Committee for Constitutional Government (“CCG”).<sup>79</sup>

In 1954, the CCG launched a campaign to distribute material supporting the Bricker Amendment, a proposal to limit the treaty-making authority of the President.<sup>80</sup> The CCG’s solicitation attached several articles from its magazine, *Spotlight on the Nation*, one of which was entitled “The Texas Story.”<sup>81</sup> From the outset, “The Texas Story” identified three groups that, according to the author, were threatening traditional America: Communists, Socialists, and Internationalists, supported by “numerous dupes who suffer from delusions induced by propaganda about ‘economic justice,’ ‘abundance for all,’ ‘world peace,’ or the ‘brotherhood of man.’”<sup>82</sup>

The article then went on to state how fortunate it was that “a sort of political Moses”—that is, Dougherty—had arisen in Texas with the courage to challenge a Senate incumbent who, in the view of “Nationalist-minded Texans,” was “a slavish partisan of Franklin Roosevelt,” a supporter of NATO (“the military phantom which, under the pretense that it protects us and our allies against the Kremlin, has cost us untold millions”), a supporter of the United Nations, and an opponent of the Bricker Amendment.<sup>83</sup> According to the article, “many Texans felt” that a vote for Senator Johnson would be a vote for Socialism in Washington, and a vote in favor of “covering up Communist infiltrators.”<sup>84</sup>

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<sup>77</sup> *Id.* at 72; see also ALFRED STEINBERG, *SAM JOHNSON’S BOY: A CLOSE-UP OF THE PRESIDENT FROM TEXAS* 383 (1968).

<sup>78</sup> Houck, *supra* note 56, at 25.

<sup>79</sup> Letter from Sumner Gerard to J.R. Parten, Chairman of the Bd., Fed. Reserve Bank of Dallas (May 1954), enclosed with Letter from J.R. Parten to Lyndon Johnson (May 27, 1954) (“Dudley Dougherty, June 1954,” 1954 General Files, LBJ Library).

<sup>80</sup> *Id.*

<sup>81</sup> Wallis Ballinger, *The Texas Story*, 11 HUM. EVENTS No. 15 (Apr. 14, 1954) (this story was reprinted by the CCG organ, SPOTLIGHT, at D-269 (on file with author)).

<sup>82</sup> *Id.* at 1.

<sup>83</sup> *Id.* at 1–2.

<sup>84</sup> *Id.* at 2.

In May 1954, the CCG came to Johnson's attention.<sup>85</sup> Concerned that the organization was illegally expending corporate funds for political purposes, Johnson asked his aide, George Reedy, to research the matter,<sup>86</sup> and sought an opinion on the legality of the CCG's actions from his counsel, Gerald Seigel.<sup>87</sup> Seigel concluded that by circulating an article in favor of Dougherty throughout Texas and by urging people to write to the candidate, the CCG had violated Texas election laws.<sup>88</sup> However, Seigel further concluded that because the prohibition in I.R.C. § 501(c)(3) (then contained in I.R.C. § 101(6)) concerned only legislation (i.e., lobbying), it was inapplicable here and the CCG had therefore not violated federal law.<sup>89</sup> Seeking to ensure that the actions of the CCG and similar groups would be prohibited, Johnson pursued the matter and, on July 2, 1954, introduced the amendment to I.R.C. § 501(c)(3).<sup>90</sup>

Thus it was that the absolute prohibition against involvement in political activity for tax-exempt organizations became the law of the land. One Texas Senator, with a grievance against one foundation, had Congress write into law an amendment that today has a profound effect on churches and other houses of worship and their activities. Because of this amendment, churches and other houses of worship—including the African-American Church—are unable to engage in political activity and keep their tax-exempt status. The African-American Church in particular finds itself unable to fulfill its mission.

Yet, history indicates that that same Texas Senator—when he became President of the United States—effectively championed the causes of the nation's African-Americans. Truly, “[i]n the twentieth century, with its eighteen American presidents, Lyndon Baines Johnson was the greatest champion that black Americans and Mexican-Americans and indeed all Americans of color . . . had in all the halls of government.”<sup>91</sup> When Johnson became president,

black men and women . . . still did not enjoy many of the rights which America supposedly guaranteed its citizens; they did not—

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<sup>85</sup> Letter from J.R. Parten to Lyndon Johnson, *supra* note 79.

<sup>86</sup> Memorandum from Dorothy to George Reedy (June 1, 1954) (on file with the Lyndon B. Johnson Library). The memorandum reads: “George, Senator wants you to handle this one.” *Id.*

<sup>87</sup> See Memorandum from Gerald W. Siegel to Lyndon Johnson (June 15, 1954) (on file with the Lyndon B. Johnson Library).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See 100 CONG. REC. 8557, 9604 (1954).

<sup>91</sup> ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE 715 (Alfred A. Knopf 2002).

millions of them, at least—enjoy even the most basic right, the right to vote, and thereby choose the officials who governed them. It was Lyndon Johnson who gave them those rights. It was the civil rights laws passed during his presidency—passed because of the inspiring words with which he presented them (“*We shall overcome*,” he said once as a Congress came cheering to its feet, and in front of television sets all over America, men and women of good will began to cry), and because of the savage determination with which he drove them to passage—that gave them the vote, and that made great strides toward ending discrimination in public accommodations, in education, in employment, even in private housing.<sup>92</sup>

Given these facts, it is difficult to imagine that President Johnson would have deliberately set out to hurt the African-American Church, or that he would necessarily be pleased with the effects his amendment is today having on the Church’s efforts to fulfill its mission.

### 3. Implications for American Churches of the I.R.C. § 501(c)(3) Restrictions

The restrictions imposed by I.R.C. § 501(c)(3) hold significant implications for America’s churches. In addition to risking the loss of its tax-exempt status, a church that expends its own funds on influencing “or attempting to influence the selection, nomination, [or] election . . . of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, [or] elected,” will face a tax imposed by I.R.C. § 527(f).<sup>93</sup> Also, any funds paid or debts incurred by the church in “participation in, or intervention in (including the publication or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office” will subject the church and its leaders to tax liability.<sup>94</sup> The Service may abate the taxes if it determines that the political expenditure was “not willful and flagrant” and the practice “was corrected within the correction period.”<sup>95</sup> If, however, the Service determines that the political expenditures were willfully or flagrantly made, it may terminate the taxable year of the church, assess any taxes, and seek an injunc-

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<sup>92</sup> *Id.*

<sup>93</sup> 26 U.S.C. 527(e)(2) (2002 & Supp. 2003); *see also* Rev. Rul. 81-95, 1981-1 C.B. 332.

<sup>94</sup> 26 U.S.C. § 4955(d)(1) (2000).

<sup>95</sup> 26 U.S.C. § 4962 (2000).

tion to prevent further political expenditures.<sup>96</sup> The Service could, at its discretion, take the ultimate step, and revoke the church's tax-exempt status.<sup>97</sup>

In fact, one recorded instance exists wherein the Service revoked the tax-exempt status of a church. On October 30, 1992, four days before the 1992 presidential election, Branch Ministries, Inc., doing business as The Church at Pierce Creek, ran an advertisement "express[ing] . . . concern about the moral character of" Arkansas Governor William Clinton, who was then the Democratic candidate for President.<sup>98</sup> The advertisement ran in the *Washington Times* and *USA Today*. It proclaimed: "Christians Beware. Do not put the economy ahead of the Ten Commandments."<sup>99</sup>

The rest of the advertisement asserted that Governor Clinton supported abortion on demand, homosexuality, and the distribution of condoms to teenagers in public schools.<sup>100</sup> The advertisement cited various biblical passages and stated: "Bill Clinton is promoting policies that are in rebellion to God's laws."<sup>101</sup> It concluded with the question: "How then can we vote for Bill Clinton?"<sup>102</sup> At the bottom of the advertisement, the Church included the following sentences: "This advertisement was co-sponsored by The Church at Pierce Creek, Daniel J. Little, Senior Pastor, and by churches and concerned Christians nationwide. Tax-deductible donations for this advertisement gladly accepted. Make donations to: The Church at Pierce Creek."<sup>103</sup> The advertisement then gave a mailing address for the church.<sup>104</sup>

The two advertisements did not go unnoticed. Rather, "they produced hundreds of contributions to the [sponsoring] [c]hurch from [individuals] across the country."<sup>105</sup> The advertisements also prompted two op-ed pieces in the *New York Times*. The day after the advertisements appeared, Peter Applebome discussed the role of the Religious Right in the 1992 presidential campaign, and cited the two

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Branch Ministries, Inc. v. Rossotti*, 40 F. Supp. 2d 15, 17 (D.D.C. 1999), *aff'd*, 211 F.3d 137 (D.C. Cir. 2000).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Branch Ministries*, 40 F. Supp. 2d at 17.

<sup>105</sup> *Branch Ministries, Inc. v. Rossotti*, 211 F.3d 137, 140 (D.C. Cir. 2000).



advertisements as a classic example of such a role.<sup>106</sup> Two months later, Anthony Lewis discussed the alleged use of tax-exempt money for political purposes, and cited the Church at Pierce Creek's advertisement in *USA Today* as an example.<sup>107</sup> Lewis suggested that the Church at Pierce Creek had "almost certainly violated the Internal Revenue Code."<sup>108</sup>

Thereafter, the Service informed the church that it was beginning an inquiry to determine whether the church could maintain its tax-exempt status.<sup>109</sup> According to the Service, the church might have paid or incurred political expenditures.<sup>110</sup> In response, the church asserted that it had not engaged in any political activity, but that the advertisement carried in the *Washington Times* and *USA Today* merely constituted "a warning to the members of the Body of Christ."<sup>111</sup>

In "Reaping Where They Have Not Sowed: Have American Churches Failed to Qualify for the Religious Tax Exemption?", this author maintained that the conduct of the Church at Pierce Creek "illustrated a clear violation of the political activity ban of § 501(c)(3)."<sup>112</sup> The author still believes that under current law, the Church at Pierce Creek was guilty of violating both the spirit and the letter of I.R.C. § 501(c)(3). Yet the author is concerned that with the Church at Pierce Creek as an unhappy reminder, churches who see their mission as being deeply involved in the social and political fabric of this country are now unwilling to venture into that realm for fear that they, too, will lose their tax-exempt status.

The next part of this Article will address this problem by looking at the history of the African-American Church and its mission to the African-Americans it serves, and examine whether the prohibitions of I.R.C. § 501(c)(3) have a chilling effect on the Church's efforts to fulfill its mission.

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<sup>106</sup> Peter Applebome, *Religious Right Intensifies Campaign for Bush*, N.Y. TIMES, Oct. 31, 1992, at A1.

<sup>107</sup> Anthony Lewis, *Tax Exempt Politics?*, N.Y. TIMES, Dec. 1, 1992, at A15.

<sup>108</sup> *Id.*

<sup>109</sup> See *Branch Ministries*, 40 F. Supp. 2d at 18.

<sup>110</sup> See *id.*

<sup>111</sup> *Id.*

<sup>112</sup> Vaughn E. James, *Reaping Where They Have Not Sowed: Have American Churches Failed to Qualify for the Religious Tax Exemption?*, 43 CATH. LAW. 29, 71 (2004).

## III. HISTORY AND MISSION OF THE AFRICAN-AMERICAN CHURCH

A. *The African-American Church—A Definition*

This author uses the term *African-American Church* in the sense used by Professors C. Eric Lincoln and Lawrence H. Mamiya in their book, *The Black Church in the African American Experience*.<sup>113</sup> Lincoln and Mamiya limit their definition of the African-American Church to those seven independent, historic, and totally African-American-controlled denominations founded after the Free African Society of 1787, along with a scattering of smaller denominations, most of which flowed out of the original seven.<sup>114</sup> These seven denominations are: the African Methodist Episcopal (A.M.E.) Church; the African Methodist Episcopal Zion (A.M.E.Z.) Church; the Christian Methodist Episcopal (C.M.E.) Church; the National Baptist Convention, U.S.A., Incorporated (N.B.C.); the National Baptist Convention of America, Unincorporated (N.B.C.A.); the Progressive National Baptist Convention (P.N.B.C.); and the Church of God in Christ (C.O.G.I.C.).<sup>115</sup> Like Professors Lincoln and Mamiya, this author does not use the term *African-American Church* to refer to local African-American congregations within predominantly Caucasian denominations.

B. *History and Mission of the African-American Church*

## 1. The African-American Church During Slavery

In all senses of the term, the African slaves who came to America suffered from culture shock—a shock that inflicted upon them nothing but pain and psychic disorientation.<sup>116</sup> In many ways, their captivity and trans-shipment to the New World as captives disrupted and practically ended their patterns of religion.<sup>117</sup> It was therefore necessary for them, in their new environment, to develop a new method of expressing their religious beliefs.<sup>118</sup>

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<sup>113</sup> LINCOLN & MAMIYA, *supra* note 7, at 1.

<sup>114</sup> *Id.* at 1.

<sup>115</sup> *Id.*

<sup>116</sup> For a discussion of the effects of captivity and slavery on the religious lives of the African slaves, see generally JAMES MELVIN WASHINGTON, *FRUSTRATED FELLOWSHIP: THE BLACK BAPTIST QUEST FOR SOCIAL POWER* (1986).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

This process of developing a new religious experience in a new world was neither orderly nor quick.<sup>119</sup> Indeed, it was not until after the Great Awakening of the 1730s and 1740s that the slaves were allowed to form anything resembling a church.<sup>120</sup> During the Great Awakening, masters sometimes permitted their slaves to attend revival services.<sup>121</sup> Many slaves accepted the evangelical faith they heard preached about by these first evangelical preachers:

[The slaves] found this new movement ethically and spiritually attractive. Evangelical preachers, by preaching damnation for the unregenerate, offered slaves a vision of God's inexorable justice, either now or in the future. Furthermore, by permitting demonstrative religious expression, these revivals fostered a union between the native religions of slaves and the mighty current of religious enthusiasm flowing through the white population. This evangelical ethos provided a new veneer behind which slaves could retain important fragments of their old faiths. And it provided a new source of psychic energy to help them meet the harsh challenge of the New World.<sup>122</sup>

Thus, it was that during the 1750s, in Virginia and Georgia, some slaves who had responded to the revivalists' calls for repentance came together to form their own churches.<sup>123</sup> According to one commentator, these slaves "believed that spiritual bondage was a greater affliction than material bondage, and that freedom from one might lead to freedom from the other. They knew that their churches were chattel arrangements. But they stubbornly trusted in the promises of the Bible that God is a liberator."<sup>124</sup>

Still, prior to the 1770s, only a few slaves—in Virginia, Georgia or elsewhere—freely joined churches.<sup>125</sup> However, the preaching of the new wave of revivalists who emerged during the Revolutionary Period emboldened these slaves to believe that maybe a few white people would assist them in establishing their own congregations.<sup>126</sup> With the help of white Christians willing to offer political protection and spiritual nurture to them, the slaves developed their own indigenous leadership and witnessed the membership of their congregations

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> WASHINGTON, *supra* note 116, at 7 (citation omitted).

<sup>123</sup> *Id.* at 8.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

rise.<sup>127</sup> For example, by 1803, the African-American Baptists in the Savannah, Georgia area numbered 850, up from fifty when the group began worshipping together in 1788.<sup>128</sup>

Being founded as it was during the period of slavery, a period during which church members had to live with the constant reality of racial discrimination, human bondage and their own desire for independence, the Church served as an agent for social change. Indeed, ever since its inception, the African-American Church has been involved “in a broad range of political activities, both reformist and radical.”<sup>129</sup> As one commentator states, “the story of the black church is a tale of variety and struggle in the midst of constant racism and oppression.”<sup>130</sup>

True to the mission of the African-American Church to be an agent for social change, during the period of slavery, African-American clergy, lay leaders, and churches in the South were involved in the Underground Railroad, working with white abolitionists to help Southern slaves escape to the North.<sup>131</sup> Among African-American clergymen who led the charge for social change was Bishop Richard Allen of Philadelphia, the country’s first A.M.E. bishop, who hid escaped slaves in the basement of his church, Mother Bethel A.M.E. Church.<sup>132</sup> Also, as a denomination, the A.M.E. Zion Church became known as “the freedom church” because it was the spiritual home for legendary figures of the African-American abolitionist movement such as Frederick Douglass, Harriet Tubman, Sojourner Truth, Reverend Jermain Louguen, and Reverend Thomas James.<sup>133</sup>

During that period, several African-American clergymen were motivated by the so-called “liberation tradition” that called for radical revolutionary activity, and in certain instances, even supported the use of violence to achieve freedom and justice.<sup>134</sup> It is not surprising, therefore, that the three largest slave revolts in American history were led by slave preachers who used their status as religious leaders to

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<sup>127</sup> *Id.*

<sup>128</sup> WASHINGTON, *supra* note 116, at 11.

<sup>129</sup> LINCOLN & MAMIYA, *supra* note 7, at 202.

<sup>130</sup> Laurie F. Maffly-Kipp, *An Introduction to the Church in the Southern Black Community*, <http://docsouth.unc.edu/church/intro.html> (last visited Dec. 13, 2006).

<sup>131</sup> LINCOLN & MAMIYA, *supra* note 7, at 202.

<sup>132</sup> *Id.*

<sup>133</sup> GAYRUND S. WILMORE, *BLACK RELIGION AND BLACK RADICALISM: AN INTERPRETATION OF THE RELIGIOUS HISTORY OF AFRO-AMERICAN PEOPLE* 121 (Orbis Books 1983).

<sup>134</sup> LINCOLN & MAMIYA, *supra* note 7, at 202–03.

mobilize thousands of slaves into action.<sup>135</sup> Because church meetings were the only types of gatherings permitted for African-Americans during slavery, the preachers used the worship services, prayer meetings, and Bible study sessions to plan these insurrections.<sup>136</sup> These preachers used the Old Testament narrative of the Exodus and the New Testament account of the Apocalypse to argue that God was indeed concerned about the freedom of the African-American slaves.<sup>137</sup> As far as these preachers were concerned, slavery was inconsistent with the will and character of God; through their preaching and teaching, these ministers ensured that this theme flowed throughout all slave religion.<sup>138</sup>

## 2. The African-American Church After Emancipation

After Emancipation, and especially during the Reconstruction Period (1867–77), African-American clergy began seeking political office. The first of these African-American clergymen to achieve that feat on a national level was Reverend Hiram Revels, an A.M.E. clergyman from Mississippi, who became the first African-American to serve in the United States Senate—or in either house of Congress, for that matter.<sup>139</sup> During that period, two other African-American ministers served in the United States House of Representatives: Reverend Richard H. Cain from 1873 to 1875 and again from 1877 to 1879,<sup>140</sup> and Reverend Jeremiah Haralson from 1875 to 1877.<sup>141</sup>

While these three clergy-politicians served on the national level, several other African-American clergy were involved in local and state politics.<sup>142</sup> Some were appointed to leadership positions; others were elected.<sup>143</sup> In *The History of the Negro Church*, Carter G. Woodson identifies about twenty African-American clergy who were active in politics during the Reconstruction Period.<sup>144</sup> Woodson also points out that clergy who were not directly involved in politics were nevertheless still

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<sup>135</sup> *Id.* at 203. Lincoln & Mamiya identify these three largest revolts and the slave preachers who led them as: Gabriel Prosser in 1800 near Richmond, Virginia; Denmark Vesey in 1822 in Charleston, South Carolina; and Nat Turner in 1831 in Southampton County, Virginia. *Id.*

<sup>136</sup> LINCOLN & MAMIYA, *supra* note 7, at 203.

<sup>137</sup> WILMORE, *supra* note 133, at 53–63.

<sup>138</sup> LINCOLN & MAMIYA, *supra* note 7, at 204.

<sup>139</sup> *Id.* at 204; see ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION 180 (La. State Univ. Press, rev. ed. 1993).

<sup>140</sup> FONER, *supra* note 139, at 36.

<sup>141</sup> *Id.* at 94–95.

<sup>142</sup> CARTER G. WOODSON, THE HISTORY OF THE NEGRO CHURCH 198–223 (1972).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

able to wield tremendous political influence through their reputations as great preachers and church leaders.<sup>145</sup>

During the late nineteenth century, the influence of the African-American Church was so great that various political factions sought to influence the African-American vote by attempting to influence the Church leadership.<sup>146</sup> Some of these political leaders came to believe that the African-American Church essentially functioned as a political organization.<sup>147</sup> Hence, they believed if they had the support of the Church leadership, they would also gain the support of the general membership, who would religiously—maybe even blindly—follow their leaders.<sup>148</sup>

History is not clear as to whether these political leaders were correct. However, it is true that some nineteenth-century African-American clergy were viewed as being very radical ministers and politicians.<sup>149</sup> Maybe the most radical of these was Bishop Henry McNeil Turner of the A.M.E. Church in Georgia.<sup>150</sup> Bishop Turner served two roles, one political and one theological.<sup>151</sup> As a political leader, he was an organizer for the Republican Party.<sup>152</sup> In this role, he helped the Republican Party build an African-American political base in Georgia.<sup>153</sup> In his role as a theologian, he raised much controversy through his black nationalist liberation theology which began with the premise that “God is a Negro.”<sup>154</sup> Bishop Turner was, in his day, the sole voice among African-American clergy calling for reparations for slave labor.<sup>155</sup> He also supported the emigration movement of ex-slaves back to Africa.<sup>156</sup>

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<sup>145</sup> *Id.*

<sup>146</sup> See, e.g., John G. Van Deusen, *The Negro in Politics*, 21 J. NEGRO HIST. 256 (1936).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* Van Deusen opines that the African-American Church “was a kind of political organization and those who voted contrary to the direction of their spiritual guides were ostracized and sometimes expelled from the church.” *Id.* at 257.

<sup>149</sup> LINCOLN & MAMIYA, *supra* note 7, at 202.

<sup>150</sup> *Id.* at 205.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> LINCOLN & MAMIYA, *supra* note 7, at 205.

<sup>156</sup> See Melbourne S. Cummings, *The Rhetoric of Bishop Henry McNeil Turner*, 12 J. BLACK STUDIES 457, 465 (1982).

3. The African-American Church from *Plessy v. Ferguson* to the Civil Rights Movement

For all intents and purposes, the Reconstruction was a failure. For the ex-slaves in America in the late nineteenth century,

[t]he removal of the protection provided by federal troops, unrestrained Ku Klux Klan violence, economic discrimination, an ever-increasing number of restrictive black codes, and electoral obstacles such as poll taxes and frivolous registration procedures finally led to a virtually complete disenfranchisement of black voters in the South . . . .<sup>157</sup>

Things got worse when, in 1896, the Supreme Court of the United States legitimized segregation in its “separate but equal” doctrine announced in *Plessy v. Ferguson*.<sup>158</sup> From then until the passage of the Voting Rights Act of 1965,<sup>159</sup> African-American politics was mostly limited to church activity. In the South, church members expected the African-American clergy—particularly those who were employed full-time as ministers—to speak out about the pressing issues of the day, especially about the problems of racial discrimination.<sup>160</sup> As clergy receiving their wages from the churches, these preachers, unlike their congregants, were shielded from adverse economic retaliation for speaking out about social and political injustices, and therefore their congregants expected them to speak out, and to do so forcefully.<sup>161</sup>

Examples abound of African-American clergy who, during the first half of the twentieth century, were either politically active or, through their conduct, made “political statements.” For example, in 1935 Reverend Martin Luther King, Sr., led several hundred members of his Ebenezer Baptist Church in Atlanta, Georgia, to the courthouse where they registered to vote.<sup>162</sup> Meanwhile, in the North, many African-American clergy continued to play an active role in mobilizing African-American voters and providing a forum wherein political candidates could address members of the African-

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<sup>157</sup> LINCOLN & MAMIYA, *supra* note 7, at 205.

<sup>158</sup> 163 U.S. 537 (1896). The Court stated, “[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.” *Id.* at 552.

<sup>159</sup> 42 U.S.C. § 1973 (2000).

<sup>160</sup> LINCOLN & MAMIYA, *supra* note 7, at 207.

<sup>161</sup> *Id.*

<sup>162</sup> See TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–1963, 53 (1988). Branch provides various examples of how some of the leading African-American clergy in Atlanta continued to be politically active during the 1930s and 1940s. *Id.*

American community.<sup>163</sup> Some African-American preachers—with maybe Adam Clayton Powell, Jr., as the most notable—adopted more radical strategies and led their members in civil rights protests in the streets.<sup>164</sup> Reverend Powell, pastor of the 8000-member Abyssinian Baptist Church in Harlem, New York, was himself elected to the House of Representatives in 1944, becoming the first African-American from the Northeast to serve in Congress, and a significant post-Reconstruction political figure.<sup>165</sup>

Other African-American clergy, taking their lead from Reverends Powell and King, became emboldened to use their clerical positions to attain civil rights for African-American people. One of those was Reverend Oliver Leon Brown of St. Mark's A.M.E. Church in Topeka, Kansas. Believing that his nine-year-old daughter, Linda, and all other African-American children of the Topeka school district, had been harmed by the policy of segregation in the public schools, Reverend Brown sued the Topeka Board of Education.<sup>166</sup> The case wound its way to the Supreme Court which, in a landmark 1954 decision, held that “in the field of public education the doctrine of ‘separate but equal’ has no place.”<sup>167</sup>

In many ways, the Court's decision in *Brown v. Board of Education*<sup>168</sup> set in motion the civil rights movement that ultimately led to the enactment of the Voting Rights Act of 1965.<sup>169</sup> Indeed, in December 1955, a little more than a year after the Court decided *Brown*, African-American minister Dr. Martin Luther King, Jr. orchestrated the Montgomery bus boycott to protest segregation in the public transportation system in Montgomery, Alabama.<sup>170</sup> As the world now knows, Dr. King and his protestors were successful; after one year, the boycott achieved its goal and Montgomery's system of segregation in public transportation came to an end.<sup>171</sup>

The Montgomery bus boycott was indeed a high point of the civil rights movement. Yet, Dr. King could not have led this protest

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<sup>163</sup> LINCOLN & MAMIYA, *supra* note 7, at 209–10.

<sup>164</sup> *Id.* at 210.

<sup>165</sup> See ADAM CLAYTON POWELL, JR., *MARCHING BLACKS: AN INTERPRETATIVE HISTORY OF THE RISE OF THE BLACK COMMON MAN* 161–62 (Dial Press 1945).

<sup>166</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>167</sup> *Id.*

<sup>168</sup> 347 U.S. 483 (1954).

<sup>169</sup> 42 U.S.C. § 1973 (2000). For an opinion on *Brown's* role in kick-starting the civil rights movement, see LINCOLN & MAMIYA, *supra* note 7, at 211.

<sup>170</sup> LINCOLN & MAMIYA, *supra* note 7, at 211.

<sup>171</sup> *Id.*



action without the support of the African-American Church.<sup>172</sup> In many ways, the Church was the backbone of the movement.<sup>173</sup> Professors Lincoln and Mamiya describe the African-American Church's involvement in the civil rights movement as follows:

While King provided the public leadership, it was the black church women of the Women's Political Council in Montgomery who provided the network of organization and support. Two years [after the end of the Montgomery bus boycott] King organized the Southern Christian Leadership Conference as the political arm of the [African-American] Church. SCLC gave decisive focus and direction to local church involvement in the civil rights movement, and hundreds of black clergymen and their congregations made extraordinary sacrifices to move the cause forward.

Black churches were the major points of mobilization for mass meetings and demonstrations, and black church members fed and housed civil rights workers from SNCC, CORE, and other religious and secular groups. Most of the black people, who provided the bodies for the demonstrations, were members of black churches acting out of convictions that were religiously inspired. Black church culture also permeated the movement from oratory to music, from the rituals and symbols of protest to the ethic of nonviolence.<sup>174</sup>

In many ways, Dr. King's assassination in 1968 marked the demise of what Taylor Branch calls "the freedom surge."<sup>175</sup> From 1968 onwards, the African-American Church began to be concerned less with the attainment of civil rights in the sense of liberation from a discriminatory system, and more with education and better economic conditions for its members.<sup>176</sup> These two new additions to the Church's agenda did not change its mission. As this Article will show in Part IV, the Church is still dedicated to the call of fostering political and social change.

#### 4. Mission of the African-American Church—A Final Word

As the preceding sections reveal, the African-American Church was born out of a desire by African-Americans for liberation and social and political change. From its birth during slavery through to the passage of the Voting Rights Act of 1965, the African-American

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 211–12.

<sup>175</sup> BRANCH, *supra* note 162, at 922.

<sup>176</sup> LINCOLN & MAMIYA, *supra* note 7, at 212.

Church led most African-Americans in seeking a better way of life for themselves. The Church has had three roles in African-American society: (1) an agent of social change, (2) a force for community involvement, and (3) a political institution.<sup>177</sup> In fulfillment of these roles, the Church has contributed much to African-American society: economic investment in the community by purchasing real estate for church buildings; establishing Mutual Aid Societies after emancipation and throughout the nineteenth century, which eventually evolved into black-owned insurance companies; organizing African-American fraternal organizations which served both social and economic functions; organizing schools, helping to pay teachers, and providing scholarship funds to students; and producing and training individuals who eventually rose to political prominence.<sup>178</sup> More recently, the Church has been taking an active role in confronting the AIDS/HIV crisis.<sup>179</sup>

It appears, however, that the Church's influence is today not as strong as it once was. To be sure, in today's very secular society, few people—including African-Americans—make room in their lives for the Church and for religious teaching. However, this author wonders whether, in this era of the prohibitions of I.R.C. § 501(c)(3) and both formal and informal complaints being made against the Church, the Church has opted to less vigorously pursue its mission. In effect, this author wonders whether the prohibitions of I.R.C. § 501(c)(3) are negatively impacting the Church's efforts to fulfill its mission. The next part of this Article will explore this issue.

#### IV. I.R.C. § 501(C)(3)'S CHILLING EFFECT

Admittedly, the question of the role of religion in the country's political life in light of I.R.C. § 501(c)(3)'s prohibitions is not unique to the African-American Church. Indeed, it is an issue faced by all religions in America, and especially so for those who advocate social responsibility. However, because the African-American Church, among all American churches and religious groups, was established to be a medium for advocating the social, political, and economic improvement of the country's African-American people, the current laws find their most significant negative impact on that body. That notwithstanding, even after the enactment of the Johnson-initiated amendment to the Internal Revenue Code of 1954 ("the Johnson Amend-

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<sup>177</sup> See ANDREW BILLINGSLEY, *MIGHTY LIKE A RIVER: THE BLACK CHURCH AND SOCIAL REFORM* 8–11 (1999); LINCOLN AND MAMIYA, *supra* note 7, at 199–229.

<sup>178</sup> BILLINGSLEY, *supra* note 177, at 8.

<sup>179</sup> *Id.* at 110–18.

ment”), the African-American Church continued to be a voice for its people and for African-American causes. Today, however, that voice seems to be growing ever softer. This section will illustrate how I.R.C. § 501(c)(3) has negatively impacted the African-American Church.

A. *The African-American Church in 1954, the Year of Brown v. Board of Education and the Lyndon Johnson Amendment to the Internal Revenue Code*

The year 1954 was a very important one in the life of the African-American Church. In that year, two events occurred which would have significant effects on the role of the Church in African-American society.

It was in 1954 that the Supreme Court decided *Brown v. Board of Education*, issuing a landmark opinion which stated in part that “in the field of public education the doctrine of ‘separate but equal’ has no place.”<sup>180</sup> By ending legal segregation in public education, the *Brown* decision further emboldened ministers of the African-American Church—as leaders in the African-American community—to intensify the fight for racial equality in all aspects of American life.<sup>181</sup>

It was also in 1954 that then-Senator Lyndon B. Johnson pushed through an amendment to the Internal Revenue Code of 1954 imposing an absolute ban on churches (among other charitable organizations) being involved in political campaigning.<sup>182</sup> Although Senator Johnson did not design his amendment to target the African-American Church, the Johnson Amendment has nevertheless had a significant impact on the Church’s efforts to fulfill its mission.

B. *Political Activities of the African-American Church After 1954*

This Article has already chronicled the political activities of the African-American Church from its birth to 1965.<sup>183</sup> However, prior to the enactment of the Johnson Amendment, Congress had not banned political activity by churches. Hence, any political activity by the African-American Church prior to 1954 would not have jeopardized the individual churches’ tax-exempt status—unless the churches adopted lobbying activities as a “substantial” part of their activities. After 1954, however, any activity by a church that the Service could

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<sup>180</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>181</sup> *Id.*; LINCOLN & MAMIYA, *supra* note 7, at 211.

<sup>182</sup> 26 U.S.C. 501(c)(3) (1954).

<sup>183</sup> *See supra* Part III.

have viewed as an intervention in a political campaign could have been grounds for the revocation of that church's tax-exempt status.<sup>184</sup>

1. Activities from 1954 to 1984

In the years immediately following 1954, the African-American Church continued to press for social and political change that would benefit African-Americans and, indeed, the entire country. For example, Dr. Martin Luther King, Jr. orchestrated and led the year-long Montgomery bus boycott, organized the Southern Christian Leadership Conference as the political arm of the African-American Church, and led the March on Washington in 1963.<sup>185</sup> Meanwhile, the various churches occupied themselves in mobilizing the masses for action in support of the agenda of the civil rights movement.<sup>186</sup> Yet, the churches did not openly support or oppose political candidates. Accordingly, they were not engaging in any political activity forbidden by the Johnson Amendment.

2. The Jesse Jackson Presidential Campaign

That scenario changed when Reverend Jesse Jackson made his bid for the Democratic Party nomination in the 1984 presidential election.<sup>187</sup> Reverend Jackson turned to the African-American Church for mobilizing the African-American vote on his behalf and for raising funds for his campaign.<sup>188</sup> Professors Lincoln and Mamiya describe the African-American Church's involvement in Reverend Jackson's campaign as follows:

The black church was an important element in the Jackson campaign. Black ministers frequently emerged as chairmen of local Jackson organizations. Virtually everywhere, black ministers solicited both the financial and organizational support from their congregations, often through the simple expedient of "passing the plate" during a service. The national Jackson for President Campaign Committee even sent a memorandum to thousands of black ministers in March [1984] detailing how they could raise funds for the candidate without violating federal election law. The first Sunday in April was set aside as "A Jackson for Jackson

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<sup>184</sup> 26 U.S.C. 501(c)(3) (1954).

<sup>185</sup> LINCOLN & MAMIYA, *supra* note 7, at 211.

<sup>186</sup> *Id.* at 211-12.

<sup>187</sup> *Id.* at 214.

<sup>188</sup> *Id.*

Day,” a plea for individual contributions in black churches across the nation.<sup>189</sup>

Arguably, the conduct of the African-American Church in support of Reverend Jackson’s 1984 campaign violated the letter of the law as stated in I.R.C. § 501(c)(3). Yet, when one considers that Reverend Jackson was continuing to uphold the tradition of the African-American slave preachers and others who had through time fought for a better way of life for all African-Americans, we are led to wonder whether the Church was violating the *spirit* of the law.

### 3. Reverend Floyd Flake and Community Mobilization

Two years after Reverend Jackson made his first bid for the Democratic Party’s presidential nomination, the sixth congressional district of New York City elected to Congress Reverend Floyd Flake, pastor of Allen A.M.E. Church in Queens, New York.<sup>190</sup> In many ways, Reverend Flake was more than a minister, and much more than a clergy-politician. He was a “community mobilizer.”

In 1976, Reverend Flake left his position as university chaplain and dean of students at Boston University to become pastor of the Allen A.M.E. Church in Jamaica, Queens, New York.<sup>191</sup> Over the next decade, Reverend Flake used his position as a minister of religion to develop the community in which his church was located. He “set up a church-sponsored housing corporation that rehabilitated 10 stores in the neighborhood, a housing development fund, a home care agency, a 300-unit, \$11 million complex for senior citizens, and a 480-pupil elementary school.”<sup>192</sup>

Being as active as he is in the community, it is not surprising that Reverend Flake has no quarrel with the argument that nothing is inherently wrong with the Church being involved in politics. According to Reverend Flake:

[p]olitics is a reality of our structure and our lives; to suggest that religion and politics have no plane on which they can reside together would be a bit foolish. Those decisions that are made by politicians affect the lives of the people who are the ‘saved or the

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<sup>189</sup> Thomas E. Cavanaugh & Lorn S. Foster, *Jesse Jackson’s Campaign: The Primaries and Causes*, ELECTION ’84 REPORT #213 (1984).

<sup>190</sup> Unless otherwise indicated, this account of Reverend Flake’s activities is taken from LINCOLN & MAMIYA, *supra* note 7, at 217–19.

<sup>191</sup> Unless otherwise indicated, this account of Reverend Flake’s activities is taken from LINCOLN & MAMIYA, *supra* note 7, at 217–19.

<sup>192</sup> LINCOLN AND MAMIYA, *supra* note 7, at 257; *see also* Brenda Huger Hazel, *Gospel Balance . . . It’s Happening in Jamaica, New York*, in *THE CORNERSTONE* 10–12 (1985).

unsaved.’<sup>193</sup>

Reverend Flake further states that the minister “must have a clear perspective and a clear vision of [his or her] role. There must be some coalescing, [of church and politics], in order to garner for our people the things which are rightfully theirs . . . as taxpayers, as a people.”<sup>194</sup>

It was this belief that eventually got Reverend Flake into trouble with the Service. By the 2000 presidential election campaign, Reverend Flake had already been deeply involved in politics. It had all begun in 1984 when he was elected as a Reverend Jesse Jackson delegate to the Democratic Party Convention.<sup>195</sup> In fact, Reverend Flake had helped lead the local Jackson effort by mobilizing African-American voter registration.<sup>196</sup> In 1986, Reverend Flake was elected to Congress, where he remained until he decided not to run for re-election in the 1996 congressional elections.<sup>197</sup>

After 1996, Reverend Flake remained active in politics even though he was no longer in Congress. During the 2000 presidential election campaign, he openly endorsed Vice President Al Gore from the pulpit, urging his congregants to support the then-Vice President’s campaign to become the next president of the United States.<sup>198</sup> Reverend Flake’s open and public endorsement of Vice President Gore from the pulpit caught the Service’s attention. After a series of meetings between Reverend Flake and Service agents, Reverend Flake admitted his “mistake” and signed a statement agreeing that in exchange for Allen A.M.E. not losing its tax-exempt status, he would never again endorse political candidates from the pulpit.<sup>199</sup>

As regards Reverend Flake’s capitulation, it appears that the law had won. After all, Senator Johnson’s 1954 amendment to the I.R.C. had triumphed, just as it had in *Branch Ministries*, and another church had agreed to stay out of politics. But in the final analysis, who had really won? In fact, had anyone won? After all, as this Article has shown, the African-American Church was born out of a desire by African-Americans to bring about social and political change that would

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<sup>193</sup> Hazel, *supra* note 192, at 11.

<sup>194</sup> *Id.*

<sup>195</sup> LINCOLN & MAMIYA, *supra* note 7, at 218.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Barry W. Lynn, *The Ten Commandments for Mixing Religion and Politics*, GOTHAM GAZETTE, available at <http://www.gothamgazette.com/commentary/57.lynn.shtml> (last visited Dec. 13, 2006).

<sup>199</sup> *Id.*

improve their lives and—although they did not know it then—ultimately the lives of all Americans. If the Church must now stay away from political activities in order to maintain its tax-exempt status, will it be able to remain true to its mission?

*C. Pressing Issue for the African-American Church*

On the one hand, one can argue that the question of the role of the church in light of I.R.C. § 501(c)(3)'s prohibitions is not unique to the African-American Church. Rather, this argument would maintain, it is an issue faced by all religions in America, and especially so for Judaism, Christianity, and Islam, which find their roots in the Old Testament scriptures. After all, Moses, a former prince of Egypt, returned to Egypt after years in exile to lead the Hebrews out of slavery,<sup>200</sup> in effect, to bring about political and social change. Years later, the Jewish prophet Isaiah described his mission as follows: “[T]he Lord . . . hath anointed me to preach good tidings unto the meek; he hath sent me to bind up the brokenhearted, to proclaim liberty to the captives, and the opening of the prison to them that are bound.”<sup>201</sup> Surely, Isaiah’s mission as a teacher of the Jews was to bring about social and political change. Even later, Jesus Christ, the One upon whom Christianity is founded, referred to Isaiah’s statement in the process of taking on Isaiah’s mission as His own and making the bold claim that He, the Christ, was the fulfillment of Isaiah’s prophecy.<sup>202</sup> Six hundred years later, the Prophet Muhammad emerged, teaching that all men were equal without distinction to class or race.<sup>203</sup> That, too, was a political statement.

While it is true that America’s major religions all have the same mission, i.e. to foster social and political change,<sup>204</sup> it is also true that only one sector of these religious bodies was born out of oppression. The African-American Church developed its roots during slavery, a period when a slave was, by law, counted as three-fifths of a person.<sup>205</sup> Although the white slave masters visited unspeakable cruelty upon their allegedly inferior charges, they attended to their religious du-

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<sup>200</sup> *Exodus* 2:10–6:13 (King James).

<sup>201</sup> *Isaiah* 61:1 (King James).

<sup>202</sup> *Luke* 4:16–21 (King James).

<sup>203</sup> See generally MUHAMMAD HAMIDULLAH, INTRODUCTION TO ISLAM (Centre Cultural Islamique 1969).

<sup>204</sup> See JIM WALLIS, THE SOUL OF POLITICS: BEYOND “RELIGIOUS RIGHT” AND “SECULAR LEFT” 38 (1995).

<sup>205</sup> U.S. CONST. art. I, § 2, cl. 3.

ties, sometimes justifying their trafficking in human beings by their faith and religiosity.<sup>206</sup>

It was in an effort to at least mentally escape from such a system that African-Americans banded together to form the African-American Church. Even after Emancipation, the Church still had a need to protect the rights of the ex-slaves. In today's society, the Church still needs to advocate for and protect the rights, hopes, and aspirations of African-Americans and to help them achieve more social, economic, and political justice.

In American society, however, such goals can best be pursued through the political process. Leaders of the African-American Church recognize that fact. In a 2001 study conducted by Professor Corwin E. Smidt,<sup>207</sup> eighty-five percent of African-American clergy reported that they had taken stands on political issues outside the pulpit; seventy-three percent reported that they had, as private citizens, openly supported political candidates; ninety-eight percent reported that they approved of clergy taking public stands on moral issues; eighty-five percent approved of clergy taking public stands on political issues; and sixty-four percent supported the notion of clergy participating in protest marches.<sup>208</sup> In that same survey, forty-seven percent of African-American clergy questioned reported that they had endorsed political candidates from the pulpit; fourteen percent of Evangelical Protestant and five percent of Roman Catholic clergy reported engaging in the same activity.<sup>209</sup> In short, more than in any other religious body, clergy of the African-American Church still see their mission as influencing society through political activity.

Yet, I.R.C. § 501(c)(3) warns them that should they engage in efforts to fulfill this mission, their churches stand to lose their tax-exempt status. While it is true that tax-exemptions are a matter of congressional grace, it is also true that the tax exemptions offered by the I.R.C. are offered not only to churches, houses of worship, and

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<sup>206</sup> See, e.g., LINCOLN AND MAMIYA, *supra* note 7, at 25. Having revealed that slaves who wanted to worship had to do so clandestinely, Professors Lincoln and Mamiya state that in 1845, the Baptists split over the issue of slavery. *Id.* Eventually, they point out, northern African-American Baptists separated from white Baptist churches to form their own African-American Baptist congregations. *Id.*

<sup>207</sup> Paul B. Henry Chair in Christianity and Politics, Calvin College, Grand Rapids, Michigan.

<sup>208</sup> CORWIN E. SMIDT, PRESENTATION AT INAUGURAL INTERNATIONAL RELIGIOUS LIBERTY INSTITUTE, Andrews University, Berrien Springs, MI (June 27, 2005) (Survey on file with author).

<sup>209</sup> *Id.*



other religious organizations, but to all “charitable” organizations.<sup>210</sup> However, among this list of organizations, only churches and houses of worship have a mission to foster social and political change. It would appear, therefore, that the I.R.C. inadvertently places a chilling effect on these organizations’ efforts to fulfill their mission, while allowing others—which do not share the same or a similar mission—to function without fear of losing their tax-exempt status. This chilling effect is felt most acutely by the African-American Church.

#### V. A SOLUTION: A CHURCH WITH TWO FACES

In order for the African-American Church to fulfill its mission, this situation must be reversed. While the ultimate responsibility for such a reversal appears to be vested in Congress, it goes without saying that Congress may not enact a solution that would allow only the African-American Church to participate in lobbying and other political activity; after all, such a solution would run afoul of the Establishment Clause.<sup>211</sup> What is needed, then, is a solution that would allow the African-American Church to fulfill its mission while allowing other churches and houses of worship with political agendas—even where those churches and houses of worship were not formed to be catalysts for social change—to likewise fulfill their missions. In today’s America, though, with churches and other religious organizations becoming increasingly politically active, the implementation of such a solution would require much creativity.

The current section of this Article will explore four alternate solutions to this vexing problem: (1) completely disallowing tax exemption for churches and religious organizations; (2) completely removing the current restrictions on political activity by churches and religious organizations; (3) partially removing the restrictions on the political activity of churches and religious organizations; and (4) allowing political activity by churches and religious organizations, but having these organizations use non-tax-exempt funds for such activity. After discussing these alternatives, this section will identify the author’s preference and explore how it may be implemented.

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<sup>210</sup> 26 U.S.C. § 501(c)(3) (2000). The statute grants tax exemption to: Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals. *Id.*

<sup>211</sup> U.S. CONST. amend. I.

A. *Completely Disallowing Tax-Exemption for Churches and Religious Organizations*

One way to deal with the current problem would be for Congress to enact legislation disallowing tax-exemption for all churches and religious organizations. After all, the exemption is a matter of congressional grace, which can be withheld by Congress if it so desires. A complete revocation of the exemption would allow churches and other religious organizations to engage in lobbying and political activity without any fear of losing their tax-exempt status—which they would, in any event, not have!

This alternative presents two problems. First, whether Congress were to remove only churches and religious organizations from the list of tax-exempt entities covered by I.R.C. § 501(c)(3)—while continuing the exemption for other charitable organizations—or to revoke the exemption for all charitable organizations, the lawmakers would be ignoring a basic policy underlying the granting of the tax exemption in the first place: these charitable organizations are tax-exempt because they provide society with services the government is either unwilling or unable to provide. Unless the government is ready to provide services to “feed the souls” of Americans, or to provide society with the services provided by the Red Cross and other humanitarian organizations, it would be foolhardy for Congress to abolish the charitable tax exemption.

As a second matter, unlike Professor Hatfield, who argues that federal income tax exemption and its derivative benefits are “not necessarily worth much to many churches” and religious organizations,<sup>212</sup> this author—an African-American minister of religion—maintains that the tax exemption is very important to churches and religious organizations. Whether they own real estate, operate schools, hospitals, or soup kitchens, or are merely small, sometimes storefront operations, African-American churches provide valuable social services in America’s inner cities. To remove the tax exemption from these bodies would not in any way be sound public policy.

In sum, then, a proposal to revoke the tax exemption either for churches and religious organizations only, or for all charitable organizations in general, would be unsound. This author does not endorse such a proposal.

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<sup>212</sup> See Michael Hatfield, *Ignore the Rumors—Campaigning from the Pulpit is Okay: Thinking Past the Symbolism of Section 501(c)(3)*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 125, 128 (2006).

*B. Completely Removing the Current Restrictions on Political Activity by Churches, Other Houses of Worship, and Religious Organizations*

Another alternative would be for Congress to completely remove the current restrictions on political activity by churches, other houses of worship, and other religious organizations. In fact, this was the thrust of the proposed Houses of Worship Political Speech Protection Act, introduced in the House in 2001.<sup>213</sup> The bill was unsuccessful, garnering only 178 yeas, as opposed to 239 nays.<sup>214</sup>

Proponents of this alternative argue—as does this author—that the current restrictions have a chilling effect on religion.<sup>215</sup> The author adds that the chilling effect is felt most profoundly by the African-American Church. However, a complete elimination of the restrictions will not be beneficial to the African-American Church or to the body of churches and houses of worship. As one commentator notes, “[c]ompletely removing the restriction on electioneering could potentially open the floodgates to abuse. Organizations might incorporate on their face as religious even though the intent of the organizers might be to primarily engage in electioneering.”<sup>216</sup> Thus, eliminating the current restrictions would cause more problems than it would solve; a better solution is required.

*C. Partially Removing Restrictions on Political Activity*

A third alternative would be to allow limited participation in political activity by churches and religious organizations. This was the thrust of the Religious Political Freedom Act proposed by Representatives Philip Crane (R., Ill.) and Charles Rangel (D., N.Y.) in 1996.<sup>217</sup> The Act would have amended I.R.C. § 501(c)(3) to permit churches and other houses of worship to spend up to five percent of their gross revenues on political campaigning (for or against candidates) and up to twenty percent of their revenues on influencing legislation, so long as the combined amount spent on electioneering and lobbying would not exceed twenty percent of total revenues.<sup>218</sup> As proposed, the Act’s

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<sup>213</sup> Houses of Worship Political Speech Protection Act, H.R. 2357, 107th Cong. (2001).

<sup>214</sup> See 148 CONG. REC. H6929, H6931 (2002).

<sup>215</sup> See, e.g., Erik J. Ablin, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 541 (1999).

<sup>216</sup> *Id.* at 582.

<sup>217</sup> Religious Political Freedom Act, H.R. 2910, 104th Cong. (1996).

<sup>218</sup> *Id.*

benefits would have been limited to churches; other nonprofit entities would not have been afforded the same privileges.<sup>219</sup> The Crane-Rangel Bill never came out of Committee in the 104th Congress, and the two representatives did not reintroduce a similar provision in the 105th Congress.

Although the Crane-Rangel Bill would have allowed churches to play a greater role than is currently allowed in the country's political process—something that would definitely have benefited the African-American Church—the Bill posed some serious problems. First, if passed into law, the Act would have singled out churches for this special treatment, not affording similar treatment to the many other charitable organizations that are restricted in their involvement in the political sphere by the current provisions of I.R.C. § 501(c)(3). Second, the Act would have created an Establishment Clause nightmare, for in determining whether the churches were limiting their lobbying and political activities to the prescribed percentage limits, the Service would have had to excessively entangle itself in the running of religious organizations—something disallowed by the Supreme Court's holding in *Lemon v. Kurtzman*.<sup>220</sup>

In any event, as stated earlier, the Religious Political Freedom Act never became law. Without doubt, the country would benefit from a better alternative.

*D. Allowing Political Activity by Churches and Other Houses of Worship Through the Use of Taxable Funds*

The best alternative would be to allow churches and other houses of worship to participate in political activity, but for them to do so using taxable funds. Along with the author's suggestions, this alternative would incorporate the principles underlying separate proposals put forward by two other writers. The first of these is what Professor Hatfield calls the "Taxable Church."<sup>221</sup> According to Hatfield, a "Taxable Church" would be taxed on its income,<sup>222</sup> and its

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<sup>219</sup> See Philip M. Crane, *Q: Should Churches Be Able to Lobby Congress and Support Candidates? Yes: Churches Have a Constitutional Right to Promote Candidates They Endorse*, *INSIGHT MAGAZINE*, Nov. 18, 1996, at 24.

<sup>220</sup> 403 U.S. 602 (1971).

<sup>221</sup> Hatfield, *supra* note 212, at 139–40. Professor Hatfield notes three ways in which a church could be a Taxable Church. *Id.* First, the church could choose this status upon incorporation; second, the church could become taxable upon the Service's revocation of its tax-exempt status; and, third, the church could choose to "convert" from a "Tax Exempt Church" to a "Taxable Church." *Id.* at 139.

<sup>222</sup> *Id.* at 128. Professor Hatfield argues that such a church would in fact not incur any tax liability because (1) eighty-four percent of annual revenues for churches con-

donors would not be able to deduct their donations.<sup>223</sup> In return, the church would be free to engage in political activity.<sup>224</sup> The second proposal, put forward by Chris Kemmitt, would be to allow churches to engage in political activity so long as they avoided spending tax-exempt money on those activities.<sup>225</sup> In his words, the IRS should create a bright-line rule “defining the limit of permissible partisan activity to end at the expenditure of tax-exempt money for partisan purposes.”<sup>226</sup> Kemmitt’s proposal, although he does not so state, envisages a church with both taxable and tax-exempt funds.

This Article takes these two ideas one step further: churches themselves and members of Congress should allow these religious entities to choose to create two entities, one taxable and one tax-exempt, and allow the churches to use their taxable funds for political activity while reserving their tax-exempt funds for religious activity. Of course, for this alternative proposal to succeed, the churches and houses of worship desiring to be politically active would have to commit to significant changes in the way they operate, and Congress would have to amend the I.R.C. so that both large and small churches and other houses of worship would be able to benefit from the new regime. The first step, though, would be for the religious entities to create taxable and tax-exempt “components.”

#### 1. Taxable and Tax-Exempt Components of Religious Entities

Current law prohibits churches and religious organizations from engaging in political activity if they are to maintain their tax-exempt status.<sup>227</sup> However, the law does not frown upon such organizations

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sist of donations which are not taxable, and (2) the remaining sixteen percent of revenue is covered by deductions for operating expenses. *Id.* Moreover, he contends, because churches tend to spend almost all of their revenue each year, many, if not most, taxable churches would operate at a tax loss each year. *Id.* Alas, Professor Hatfield bases his premises on incorrect assumptions. It is very true that today’s churches are big businesses; they operate hospitals, schools, soup kitchens, health food stores, bookstores, and even used-clothing stores. Hatfield, *supra* note 212, at 128. Most—if not all—of these churches do not operate at a loss. After twenty-three years in ministry, this author can attest to the fact that he has never worked with, or served at, a church that incurred a net loss in any one year. In most instances, this favorable result was a function of the churches’ receipts of the direct and derivative benefits of the tax exemption allowed by I.R.C. § 501(c)(3).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145, 179–80 (2006).

<sup>226</sup> *Id.* at 176.

<sup>227</sup> I.R.C. § 501(c)(3) (2000).

having tax-exempt and taxable “components,” as long as these “components” are incorporated separately and function separately. That is why, for example, the Service, in 1957, forced the National Association for the Advancement of Colored People (“NAACP”) to formally separate from the NAACP Legal Defense and Educational Fund, Inc. (“the Fund”) because of concerns that the latter’s association with the NAACP, which had evolved into a major political pressure organization, would have jeopardized the Fund’s tax-exempt status.<sup>228</sup> Likewise, in 1999, after the Service denied tax-exempt status to the Christian Coalition, the organization announced that it would set up two separate and distinct organizations: the for-profit Christian Coalition International, which would have been free to endorse political candidates on state and local levels and make financial contributions to candidates, and the tax-exempt Christian Coalition of America, which would have continued the religious functions of the original organization.<sup>229</sup>

In light of these two examples, denominations within the African-American Church that wish to engage in political activity should form separate entities: for-profit entities which would engage in political activity, and tax-exempt entities which would continue to address spiritual concerns, operate soup kitchens, schools and hospitals, distribute clothing to the needy, and provide the many other social services churches and religious organizations provide in today’s American society. The entities would have separate boards of directors, although the same individuals would serve on both boards. They would have different accountants and auditors, and would keep their finances separate. As regards funding, the for-profit entities would be funded by various fund-raising activities and by contributions from people who were fully aware that they were contributing to politically-oriented organizations. Hence, in their advertisements and statements, these for-profit entities would, like the Christian Coalition does today, clearly identify themselves as political organizations.<sup>230</sup> Meanwhile, the tax-exempt entities would continue to be funded through the tithes and offerings of the faithful members and other fund-raising activities clearly identified as being for religious purposes.

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<sup>228</sup> NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PAPERS OF THE NAACP xi (John H. Bracey, Jr. & August Meier, eds., University Publications of America 1997).

<sup>229</sup> Thomas B. Edsall & Hanna Rosin, *Christian Coalition, Denied Tax-Exempt Status, Will Reorganize*, WASH. POST, June 11, 1999, at A4.

<sup>230</sup> See Christian Coalition of America, <http://www.cc.org> (last visited June 13, 2006).

While this proposal would work well for larger churches and religious organizations, it may pose problems for the smaller religious bodies within the African-American Church: those independent churches which operate out of storefronts and rented halls, whose income—in the form of tithes, offerings, and other faithful contributions—is just enough to cover the cost of rent, utilities, and other operating costs. Should these churches wish to become involved politically, even under the proposed alternative, they would not be able to do so—at least not unless Congress enacted some additional statutes or amended I.R.C. § 501(c)(3).

## 2 A Role for Congress

While the larger African-American Churches could well establish separate for-profit and tax-exempt entities, the smaller churches—those operating out of storefronts and rented halls, in particular—would find it difficult to do the same. For them, and for all similarly-situated churches, houses of worship, and other charitable organizations, Congress should amend I.R.C. § 501(c)(3) to allow such entities to raise funds for religious and political activities and to spend such funds on a *pro rata* basis with funds designated for political purposes being used in the year following their receipt. Hence, for example, a church that raises twenty percent of its revenue in any one year from political contributors would be able to allocate twenty percent of its expenditure in the following year to political activity. Churches which qualify for this method of allocating political expenditures would report their revenue, its sources, and their expenditures on a new income tax return form designed by the Service.

Such a rule would not involve the Service in the excessive governmental entanglement prohibited by *Lemon*. After all, the churches involved would report their revenue and expenditures to the Service on their tax returns. In fact, just as is the case today where the Service examines a church's tax-exempt status only if the church makes a brash and bold *Branch Ministries* type of political statement, or a member of the public reports the church to the Service, under the new regime, the Service would challenge and investigate churches' tax-exempt status only under similar circumstances. However, considering that the churches that would be afforded the opportunity to make political expenditures on a *pro rata* basis would be small, the Service might well find it not worth the effort and financial outlay to pursue reports of misconduct.

This observation leads to a significant issue that would have to be resolved under this proposal: what *would* constitute a “small” church?

Indeed, the question arises as to whether church size is a function of membership, outreach, community activities, assets, equity, or revenue. All factors considered, church size should be determined in terms of annual revenue, as measured by receipts of tithes, offerings, other charitable contributions, and income from religious activities such as operating hospitals or schools. In fact, using operating revenues as a guidepost, the Episcopal Diocese of Texas has developed three categories of Episcopal churches in that state: large, medium, and small.<sup>231</sup> Pursuant to this categorization, a large church has annual operating revenue of at least \$600,000; a medium church has annual operating revenue of at least \$220,000; and a small church at least \$100,000.<sup>232</sup> Using the Episcopal Diocese of Texas as a guide, Congress could decree that churches and houses of worship with \$100,000 or less in annual operating revenue would be designated "small," and would therefore be able to prorate their political expenditures in relation to their political revenue. Other churches and houses of worship would have to form separate for-profit politically-oriented entities and tax-exempt religious entities.

Another issue that arises is whether, under the proposed rules, churches would be able to allow politicians to campaign from their pulpits, and whether ministers would be able to endorse politicians from the pulpit. On both counts, the answer is no. As this author stated in a previous article:

[P]olitical campaigning is simply too divisive for the Church. In any given congregation, some members are Republicans, some Democrats, some Greens, and some belong to other political parties and groups. For a church to use tithes, offerings, and other funds provided by its members to support or intervene in a political campaign in support of any candidate is wrong.<sup>233</sup>

Indeed, while the preacher may preach on issues touching society and even raise political concerns, he or she ought not to endorse candidates from the pulpit. By the same token, the pulpit, the sacred desk entrusted to the preacher, should not be used for political campaigning by political candidates. These activities should rightly be carried out within the political for-profit entities established by the churches or, in the case of small churches not required to form separate entities under the proposed rule, at non-religious events.

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<sup>231</sup> Episcopal Diocese of Texas, *Diocesan Operating and Missionary Budgets*, available at [http://www.epicenter.org/edot/Budgets\\_Missionary\\_and\\_Diocesan.asp?SnID=284](http://www.epicenter.org/edot/Budgets_Missionary_and_Diocesan.asp?SnID=284) (last visited June 16, 2006).

<sup>232</sup> *Id.*

<sup>233</sup> James, *supra* note 112, at 76.



### 3. A Final Word: A Realistic Proposal

Readers of this Article may well believe that Congress would not, under any circumstances, enact the legislation being suggested here. Yet, considering the current composition of Congress and the political climate of the country, the author believes that the proposed legislation has an excellent chance of becoming law. Indeed, the author believes that the proposal would win support from members of Congress on both sides of the aisle. As an initial matter, African-American members of Congress, coming as they do from “Church” backgrounds, would most likely support the proposal. Next, liberal members of Congress who simply support the notion of a politically active African-American Church would likewise lend their support. Finally, the proposal would even win the support of the Religious Right! After all, while the proposal would benefit the African-American Church, it would also benefit all churches and houses of worship which choose to be politically active. Given the Religious Right’s desire to be even more politically active than it is currently, one would expect the Right to embrace the author’s proposal. With such broad support in Congress, the proposal stands a very strong chance of becoming law.

## VI. CONCLUSION

Admittedly, tax exemptions are a matter of congressional grace, and Congress can indeed attach conditions for the granting of tax-exempt status to organizations. In granting tax exemption to charitable organizations—including churches and houses of worship—Congress has imposed conditions prohibiting these organizations from (1) allowing lobbying to constitute a substantial part of their activities, and (2) engaging in political campaigning. Yet, some churches and houses of worship, unlike the other charitable organizations granted tax-exempt status by I.R.C. § 501(c)(3), were established, and today exist, to foster social and political change. Accordingly, I.R.C. § 501(c)(3) serves as a dampener—albeit an inadvertent one—on the efforts of these entities to fulfill their respective missions. The chilling effect is felt most acutely by the African-American Church. After all, the African-American Church was established during slavery to serve as a medium of emotional release for the slaves and, in most instances, served as the center of militancy against slavery and all it stood for. After emancipation and through the years, the Church has continued to be a catalyst for political, economic, and social change aimed at improving the lot of this country’s African-Americans.

Yet, faced with today's prohibitions imposed by I.R.C. § 501(c)(3), the Church finds itself unable to fulfill its mission. Even if Congress were willing to grant the Church some relief, the Establishment Clause and other law would prevent the enactment of any legislation that would benefit only the African-American Church, and no other religious entities. By the same token, Congress must be careful not to enact legislation that would either abolish the religious and charitable tax exemption—because of the good that society receives therefrom—or to create a system that would be open to abuse by those who would incorporate as churches and religious organizations while intending to really be political organizations. The current situation demands urgent action by both the African-American Church and Congress. As regards the Church, those larger denominations and independent churches who wish to become politically active should each create two entities, one for-profit entity which would be politically active, and another tax-exempt entity which would continue to provide solely religious services and all that entails. Meanwhile, Congress should enact legislation to allow smaller churches—that is, those with annual revenues not exceeding \$100,000—to expend a pro-rata share of their revenues, based on the percentage thereof acquired through taxable political contributions and fundraisers and non-religious contributions, for political activity, and to be taxed thereon.

While this proposed solution would benefit some churches and houses of worship that do not fall under the umbrella of the African-American Church, the Church would undoubtedly benefit and, for the first time since 1954, be able to pursue and ultimately fulfill its mission.