

1977

"Church" in the Internal Revenue Code: The Definitional Problems

Charles M. Whelan

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Charles M. Whelan, *"Church" in the Internal Revenue Code: The Definitional Problems*, 45 Fordham L. Rev. 885 (1977).

Available at: <https://ir.lawnet.fordham.edu/flr/vol45/iss5/1>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

"Church" in the Internal Revenue Code: The Definitional Problems

Cover Page Footnote

Professor of Law, Fordham University School of Law. Father Whelan received his B.A., Ph.L. and S.T.L. from Woodstock College (Maryland) and his LL.B. and LL.M. from Georgetown University Law Center. He is a member of the bar of the District of Columbia and a member of the Jesuit order.

“CHURCH” IN THE INTERNAL REVENUE CODE: THE DEFINITIONAL PROBLEMS

CHARLES M. WHELAN*

I. INTRODUCTION

IN the last thirty years Congress has introduced a large number of religious distinctions into the Internal Revenue Code.¹ These distinctions do not relate to the content of any religious or church belief. Such distinctions would obviously be unconstitutional.² Rather, the distinctions are “organizational”: they relate to the structures and functions of various types of religious organizations, especially churches. Many of these distinctions draw lines based on the degree of “churchness” or “church-relatedness” of an organization.

These organizational distinctions may or may not be constitutional, depending on the purposes for which the distinctions are employed and the manner in which they are applied. The Supreme Court has repeatedly held that, in the tax classification area, the Constitution gives very broad discretion to Congress and the state legislatures. The leading case is *Bell's Gap Railroad Co. v. Pennsylvania*,³ in which the Court held that the equal protection clause did not invalidate a different method of valuation of corporate bonds, for purposes of the Pennsylvania personal property tax, from that employed for all other types of personal property. As Mr. Justice Bradley put it for the Court in this case, only “clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments” may prove to be

* Professor of Law, Fordham University School of Law. Father Whelan received his B.A., Ph.L. and S.T.L. from Woodstock College (Maryland) and his LL.B. and LL.M. from Georgetown University Law Center. He is a member of the bar of the District of Columbia and a member of the Jesuit order.

1. Some of these distinctions appeared in the Internal Revenue Code of 1939, ch. 2, 53 Stat. 1; most of them are the results of amendments to the Internal Revenue Code of 1954.

2. The religion clauses of the first amendment forbid the federal government to make distinctions based on the truth or falsity, orthodoxy or unorthodoxy of religious beliefs. *United States v. Ballard*, 322 U.S. 78, 86-87 (1944) (mail fraud prosecution); *Universal Life Church, Inc. v. United States*, 372 F. Supp. 770, 776 (E.D. Cal. 1974) (refund suit involving claim of exempt status as a section 501(c)(3) organization). The federal government, however, is not without power to prevent the exploitation of the first amendment by religious frauds. See *United States v. Kuch*, 288 F. Supp. 439, 443-44 (D.D.C. 1968) (one of the “LSD and marijuana church” cases).

3. 134 U.S. 232 (1890).

unconstitutional.⁴ In more recent years, Mr. Justice Douglas used similar language in the Court's opinion in *Lehnhausen v. Lake Shore Auto Parts Co.*,⁵ which held that Illinois could impose an ad valorem tax on the personal property of corporations without imposing the same tax on personal property held by individuals.⁶

The religious distinctions in the Code do not affect the qualifications of organizations, including churches, for the basic exemption from the federal income tax under section 501(a). Most religious organizations, including churches, qualify for the exemption under the criteria of section 501(c)(3).⁷ But for many other federal tax purposes, it matters greatly whether a section 501(c)(3) religious organization is itself a church or, if it is not, whether it has a close and substantial relationship, both in structure and function, to a section 501(c)(3) organization that is itself a church.⁸

4. *Id.* at 237.

5. 410 U.S. 356 (1973).

6. For one of the few cases in which such a discrimination has been found invalid, see *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968) (invalidating denial of equal exemption treatment, with respect to real property taxes, of foreign and domestic nonprofit corporations).

7. Section 501(c)(3) reads: "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 for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." Note that this section does not mention churches as such. The word "religious" in the section goes back to the Income Tax Act of 1894, ch. 349, § 32, 28 Stat. 556, and has been in the federal income tax laws continuously since the Int. Rev. Act of 1913, ch. 16, § 2G, 38 Stat. 172. Section 101(6) of the Int. Rev. Code of 1939, ch. 2, § 101(6), 53 Stat. 33 was the predecessor of section 501(c)(3) in the 1954 Code. No regulation issued by Treasury, either under the 1939 or the 1954 Code, has ever defined, explained or exemplified the word "religious." For relevant Revenue Rulings and cases, see 1 S. Weithorn, *Tax Techniques for Foundations and Other Exempt Organizations* §§ 4.01-.05 (1975). Certain religious organizations are exempt under section 501(d) rather than 501(c)(3). See notes 21 & 89 *infra*.

8. See text accompanying notes 29-38 *infra* for the principal tax areas in which the religious distinctions are important. It should not be inferred, however, that churches and their closely related institutions are the most preferred class of exempt organizations under the federal tax laws. Given the complexity of the Code, it would be very difficult to determine what the most preferred class is. In any event, tax-exempt schools enjoy certain excise tax exemptions not available to religious organizations, including churches. Int. Rev. Code of 1954, §§ 4041(g)(4), 4253(j) (as renumbered by the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1811). The definition of "school" in these sections permits a church that operates a school to claim the excise tax exemption with respect to the school's activities. Thus, when the pastor uses the parish telephone to talk about nonschool matters, the excise tax on communications must be paid, but when he uses the same phone to talk about school matters, no tax is due.

These "church distinctions" scarcely existed before 1950 in the federal tax laws.⁹ Now they permeate the Internal Revenue Code. They are causing considerable concern and confusion among church leaders, members of the bar, and the officials of the Treasury Department and the Internal Revenue Service who are responsible for their interpretation and enforcement. Although the term "church" has been important in federal tax law since 1950, there still is no Treasury regulation explaining the difference between a religious organization that is a church and one that is not.¹⁰

II. RELIGIOUS DISTINCTIONS IN THE CODE

The religious distinctions in the Code fall into certain main categories. The most important are "section 501(c)(3) religious organizations," "churches, their integrated auxiliaries, and conventions or associations of churches," and "religious orders." This summary, however, fails to reveal the true complexity of the Code distinctions. In reality, there are fifteen significant categories, each of which may or may not overlap with one or more of the others:

- (1) "religious purposes,"¹¹
- (2) "a religious organization described in section 501(c)(3);"¹²
- (3) "church,"¹³

9. For studies of the various religious distinctions that have long existed in state property tax laws, see Brancato, *Characterization in Religious Property Tax-Exemption: What Is Religion?—A Survey and a Proposed Definition and Approach*, 44 *Notre Dame Law. 60* (1968); Van Alstyne, *Tax Exemption of Church Property*, 20 *Ohio St. L.J. 461* (1959). There is no evidence that Congress paid any attention to these state property tax distinctions in constructing the religious and church distinctions in the federal tax laws.

10. In the course of administering the tax laws, the Internal Revenue Service has developed a number of criteria for determining whether a religious organization is a church. These criteria are listed in B. Hopkins & J. Myers, *The Law of Tax-Exempt Organizations 87* (1975) and are discussed in notes 164-72 *infra* and accompanying text.

11. Int. Rev. Code of 1954, §§ 170(c)(2)(B) and (4), 501(c)(3) and (10)(A), 642(c)(2), 2055(a)(2) and (3), 2106(a)(2)(A)(ii) and (iii), 2522(a)(2) and (3), 2522(b)(2), (3) and (4) and 3309(b)(1). Numerous crossreferences in the Code to sections 170(c) and 501(c)(3) make the concept of "religious purposes" important in many sections where the phrase does not explicitly appear.

12. Int. Rev. Code of 1954, §§ 3121(b)(8)(B), 3303(e), 3306(c)(8), 6033(a)(2)(C)(i) and (iv).

13. The word "church" occurs in the singular, without being paired with "a convention or association of churches," "plan" "agency," "integrated auxiliaries" or "duly ordained, commissioned, or licensed minister" in Int. Rev. Code of 1954, §§ 512(b)(12) ("individual church") and 7701(a)(19)(C)(v) ("church purposes"). The distinction suggested in section 512(b)(12) between an "individual church" and a "convention or association of churches" may be significant since the latter phrase occurs nearby in section 512(b)(14) (as renumbered by the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1839) and both phrases were added to section 512(b) by the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 539, 540. For the possible significance of the distinction, see the discussion in notes 164-67 *infra* and accompanying text of "church or convention or association of churches" as meaning "a religious denomination."

- (4) "a church or a convention or association of churches;"¹⁴
- (5) "church agency;"¹⁵
- (6) "church plan;"¹⁶
- (7) "integrated auxiliaries" of churches;¹⁷
- (8) section 501(c)(3) organizations that are "operated, supervised, or controlled by or in connection with a religious organization described in [section 501(c)(3)];"¹⁸
- (9) an organization "operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;"¹⁹
- (10) "duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry;"²⁰
- (11) "religious and apostolic association;"²¹
- (12) "religious order;"²²
- (13) "exclusively religious activities of any religious order;"²³
- (14) "member of a religious order in the exercise of duties required by such order;"²⁴

14. Int. Rev. Code of 1954, §§ 170(b)(1)(A)(i), 410(d), 414(e)(1)(A) and (3)(A), 508(c)(1)(A), 512(b)(14), 514(b)(3)(E), 3309(b)(1), 6033(a)(2)(A)(i), 6043(b)(1) and 7605(c). The phrase was also used in the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1721 (codified in section 501(h)(5)). "Integrated auxiliaries" occurs in four of these sections, sections 501(h)(5), 508(c)(1)(A), 6033(a)(2)(A)(i) and 6043(b)(1), but not in the others. It should be noted that there are numerous crossreferences in the Code to section 170(b)(1)(A) organizations, which include churches and conventions or associations of churches. One of the most important of these crossreferences is in section 509(a)(1) (definition of private foundation status).

15. Int. Rev. Code of 1954, § 414(e)(3).

16. Id. §§ 410(c)(1)(B) and (d), 411(e)(1)(B), 412(h)(4), 414(e) and 6057(c)(2).

17. Id. §§ 508(c)(1)(A), 6033(a)(2)(A)(i) and 6043(b)(1). The phrase is also used in new section 501(h)(5), created by the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1721. Churches and conventions or associations of churches are also mentioned in these sections.

18. Int. Rev. Code of 1954, § 6033(a)(2)(C)(iv).

19. Id. § 3309(b)(1)(B).

20. Id. §§ 1402(a)(8), (c)(4) and (e), 3121(b)(8)(A), 3309(b)(2) and 3401(a)(9). The reference to "the exercise of his ministry" does not occur in §§ 1402(a)(8) and (e). The regulations, however, incorporate the reference. Treas. Reg. § 1.1402(a)-11(a) (1963).

21. Int. Rev. Code of 1954, § 501(d). This provision was added to the Code in 1936 for the benefit of organizations like the House of David and the Shakers. See J. Seidman, *Legislative History of Federal Income Tax Laws (1938-1861)*, at 234 (1938).

22. The phrase "religious order" usually occurs in conjunction with "member . . . in the exercise of duties required by such order." See note 24 *infra*. "Religious order" occurs, without mention of the members of the order, in Int. Rev. Code of 1954, §§ 512(b)(12) and (15) and in the phrase "exclusively religious activities of any religious order." Id. § 6033(a)(2)(A)(iii).

23. Id. § 6033(a)(2)(A)(iii).

24. Id. §§ 1402(a)(8) and (c)(4), 3121(b)(8)(A), (i)(4), (r)(1) and (2), 3309(b)(2) and 3401(a)(9). See also the last sentence of § 1402(c) and § 1402(e)(1). The phrase "in the exercise of duties required by such order" does not occur in § 1402(a)(8), but is incorporated into that section by Treas. Reg. § 1.1402(a)-11(a) (1963).

(15) "religious sect."²⁵

In addition to these fifteen basic religious distinctions, the Code uses certain other religious terms. Section 107 speaks of a "minister of the gospel."²⁶ Section 512(b)(12) uses the terms "diocese," "province of a religious order," and "parish, individual church, district, or other local unit" of a diocese, province of a religious order, or a convention or association of churches. "Christian Science practitioner" appears in sections 1402(c)(5) and 1402(e). Section 7701(a)(19)(C)(v) includes "real property used primarily for church purposes" in the definition of a "domestic building and loan association."

Even a cursory inspection of the sections of the Code involved in these religious distinctions will suggest that Congress has used these distinctions for several significantly different tax purposes. In the special withholding and Social Security provisions for ministers of the gospel and members of religious orders, it would appear that Congress has been adjusting the tax concepts of "employment," "employee," and "wages" to traditional notions and current economic realities of clergymen and religious orders.²⁷ The exemption from Social Security taxes of religious sects like the Amish in section 1402(h), and the provision in section 501(d) that "religious and apostolic associations" shall be taxed like partnerships instead of corporations are also examples of Congressional accommodation to religious liberty interests.

25. Int. Rev. Code of 1954, § 1402(g) (exemption of the Amish and similar groups from payment of Social Security taxes).

26. Under Treas. Reg. § 1.107-1 (1963), because of its crossreference to Treas. Reg. § 1.1402(c)-5 (1963), the phrase becomes practically equivalent to "a duly ordained, commissioned, or licensed minister of a church . . . in the exercise of his ministry." The phrase "minister of the gospel" is obviously archaic from a constitutional point of view. In any event, despite the well publicized activities of the Universal Life Church (the mail-order ordination group; see note 169 infra and accompanying text), ordination as a minister does not, of itself, confer any special tax status or tax benefit. Ministers, priests and rabbis are not exempt from the federal income tax, not even with respect to payments (or "contributions") made to them specifically for religious services. Treas. Reg. § 1.61-2(a)(1) (1957). For a survey of the conditions that churches and other religious organizations have to meet to qualify for exemption under state property tax laws, see the Articles by Brancato and Van Alstyne, cited in note 9 supra.

27. Clergymen functioning as pastors or assistants in parishes are generally not considered "employees" of the parishes. The clergy has traditionally been considered a "profession" in this country. Similarly, members of religious orders (some but not all of whom are also duly ordained ministers in their churches) have been treated as professionals rather than ordinary employees in their religious activities, and thus there is no withholding on compensation for their services in a religious capacity.

Apart from deference to the professional status of clergymen and members of religious orders, Congress has also been concerned in the Code with adjusting the tax laws to the economic realities normally associated with these classes of taxpayers. These adjustments have been particularly numerous in the Social Security area. See Int. Rev. Code of 1954, §§ 1402(a)(8), (c)(4) and (e), 3121(b)(8)(A) and (B), (i)(4), (k) and (r).

Such accommodations do not result in any significant net expense to the government, and would appear perfectly compatible with the no establishment and free exercise clauses of the first amendment.²⁸

The most important and the most recent religious distinctions in the Code, however, cannot be explained or justified simply in terms of legitimate accommodation to religious interests. In making so many special provisions for churches and various categories of church agencies and institutions, Congress has departed significantly and persistently from section 501(c)(3)'s equal treatment of all exclusively religious, charitable and educational institutions.

All such institutions, it is true, are still exempt from the federal income tax (providing they meet all the section 501(c)(3) criteria). But the Code makes significant distinctions between them with respect to charitable contributions,²⁹ pension plans,³⁰ freedom to lobby for changes in the law,³¹ the necessity to apply to the Service for an exemption ruling in order to be entitled to treatment by the Service as

28. Two Supreme Court decisions stand for the principle that some adjustments of general tax laws are not only permissible, but mandated by the first amendment, in the interests of religious liberty. *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). Both cases held that Jehovah's Witness colporteurs could not be forced to pay local peddler's license taxes. *Sherbert v. Verner*, 374 U.S. 398 (1963), did not require an adjustment in the basic unemployment tax liability, but did mandate a change in the benefits provisions to accommodate a Seventh Day Adventist who was willing to work on any day but Saturday. (It is interesting to note that *Sherbert v. Verner* was decided the same day as *School Dist. v. Schempp*, 374 U.S. 203 (1963), the case in which the Supreme Court invalidated officially sponsored religious exercises in the public schools.) It seems unlikely, however, that the Supreme Court would hold that all of the religious distinctions that Congress has made in the Code are constitutionally necessary. It is much more likely that the Court would uphold some of them as legitimate and relatively inexpensive accommodations to religious freedom. Compare, in the non-tax area, *Zorach v. Clauson*, 343 U.S. 306 (1952), upholding a program under which public school children were released, at their parents' request, during part of the school day for religious instruction by their churches.

29. Int. Rev. Code of 1954, § 170(b)(1)(A)(i). Note, however, that there are many other ways in section 170(b)(1)(A) to qualify as a "50% deductible" organization (that is, an organization, contributions to which are deductible up to 50% of the taxpayer's contribution base). The existence of these other methods has prevented any significant discrimination, with respect to the deductibility of charitable contributions, between church and nonchurch religious organizations or between religious and nonreligious exempt organizations. "A church or a convention or association of churches" has been in section 170(b)(1)(A)(i) continuously since 1954.

30. Int. Rev. Code of 1954, §§ 410(c) and (d), 411(e)(1)(B), 412(h)(4) and 414(e). These sections come from the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 901, 912, 919, 926. The Act is commonly abbreviated to ERISA. This statute introduced "church plan" and "church agencies" into the language of the Code. See discussion at text accompanying notes 138-43 *infra*.

31. Int. Rev. Code of 1954, § 501(h). This section was added to the Code by the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1720.

an exempt organization,³² private foundation status,³³ liability for the tax on unrelated business income,³⁴ liability for state unemployment taxes,³⁵ the obligation to file annual financial reports,³⁶ and the obligation to report a liquidation, dissolution, termination, or substantial contraction.³⁷ And Congress has drawn many of these distinctions not simply between those religious organizations that are churches or closely connected with churches and those religious organizations that have no church status or connection, but also within the spectrum of church organizations themselves.³⁸

The meaning and constitutionality of these distinctions cannot be assessed in a vacuum. Fortunately, the current dispute between the Treasury, the Internal Revenue Service and the American churches over the meaning of the religious distinctions in section 6033 provides an apt illustration of the practical importance of the distinctions and the factual background against which their meaning and constitutionality must be assessed.

III. THE FOCUS OF CURRENT CONCERN: SECTION 6033

The current concern of church leaders and federal tax officials focuses on the religious distinctions in section 6033 of the Code, as amended in 1969. Section 6033 deals with the obligation of exempt organizations to file annual financial returns with the Internal Revenue Service. Before the enactment of the Tax Reform Act of 1969,³⁹ section 6033 gave a broad exemption from the annual filing requirement to all section 501(c)(3) religious organizations and to all other

32. Int. Rev. Code of 1954, § 508 (added by the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 494).

33. Int. Rev. Code of 1954, § 509 (added by the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 496).

34. Int. Rev. Code of 1954, §§ 511-14 (substantially modified by the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 536, especially with respect to churches and conventions or associations of churches). See also the special rule in section 7605(c) for unrelated business income tax audits of churches and conventions or associations of churches.

35. Int. Rev. Code of 1954, § 3309(b) (added by the Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 698).

36. Int. Rev. Code of 1954, § 6033 (substantially modified by the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 519).

37. Int. Rev. Code of 1954, § 6043(b)(1) (added by the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 530).

38. Some sections of the Code contain "churches and conventions or associations of churches" but not "integrated auxiliaries" of churches; other sections contain all three types of organizations. See notes 14 & 17 *supra*. And many Code sections refer explicitly to religious orders as a special category. See notes 22-24 *supra* and accompanying text.

39. Pub. L. No. 91-172, 83 Stat. 487.

section 501(c)(3) organizations that had some substantial connection with a section 501(c)(3) religious organization.⁴⁰

The Tax Reform Act of 1969 made extensive revisions in section 6033. As so amended, the section currently distinguishes between "churches, their integrated auxiliaries, and conventions or associations of churches,"⁴¹ the "exclusively religious activities of any religious order,"⁴² a religious organization described in section 501(c)(3),⁴³ and an organization described in section 501(c)(3), if such organization is "operated, supervised, or controlled by or in connection with" a religious organization described in section 501(c)(3).⁴⁴ The category into which the particular organization falls determines its filing requirement.⁴⁵

Obviously, if these four distinctions in section 6033 are taken in a mutually exclusive sense, enormous problems of interpretation arise. Even if the categories are taken as partially overlapping, there will still be serious interpretational problems. For example, into which category or categories does a Catholic parochial school or a Baptist bible college fit? Does it make any difference if the school or college is separately incorporated from the parent church? If it does, how much additional difference does it make what kind of control the educational institution's charter or bylaws reserves to the parent church? Does it matter if the school or college admits students without regard to their religious affiliation—or insists that all teachers and administrators profess the faith of the parent church? Where does a seminary, wholly owned and directly operated by the parent church, fit? Are the hospitals, child-care agencies, old age homes, thrift shops, pension boards and missionary agencies of a church in the same section 6033 category or categories as the church's educational institutions?

In 1971 Treasury promulgated new regulations under section 6033 to

40. The exact language of section 6033(a), in pertinent part, before the 1969 amendments was: "No such annual return need be filed under this subsection by any organization exempt from taxation under the provisions of section 501(a)—(1) which is a religious organization described in section 501(c)(3); or . . . (4) which is an organization described in section 501(c)(3), if such organization is operated, supervised, or controlled by or in connection with a religious organization described in paragraph (1)" Int. Rev. Code of 1954, ch. 61, § 6033(a), 68A Stat. 741.

41. Int. Rev. Code of 1954, § 6033(a)(2)(A)(i).

42. Id. § 6033(a)(2)(A)(iii).

43. Id. § 6033(a)(2)(C)(i).

44. Id. § 6033(a)(2)(C)(iv).

45. The organizations described in subparagraphs (A)(i) and (A)(iii) of section 6033(a)(2) do not have to file annual financial returns with the Internal Revenue Service. The organizations described in subparagraphs (C)(i) and (C)(iv) do not have to file such returns if their gross receipts in each taxable year are normally \$5000 or less. If their annual gross receipts are normally more than \$5000, such organizations must file unless excused by the Secretary of the Treasury or his delegate under the provisions of section 6033(a)(2)(B).

reflect the changes made by the Tax Reform Act of 1969. The new regulations cited "a men's or women's organization, religious school, mission society, or youth group" as examples of "an integrated auxiliary of a church."⁴⁶ But the regulations made no attempt to give a comprehensive explanation of "integrated auxiliary." And the regulations made no attempt at all to clarify the meaning of "churches," "conventions or associations of churches," or the "exclusively religious activities of religious orders."

In January, 1977 Treasury amended the section 6033 regulations with respect to "integrated auxiliaries," but again made no attempt to deal explicitly with "churches," "conventions or associations of churches," or the "exclusively religious activities of religious orders." The new regulations provide that to be an "integrated auxiliary," an organization must (1) be exempt from taxation under section 501(c)(3) of the Code, (2) be affiliated with a church, and (3) be engaged principally in an "exclusively religious" activity.⁴⁷ The new regulations repeat the earlier citation of men's and women's organizations, religious schools, mission societies and youth groups as examples of "integrated auxiliaries." But church-related hospitals, universities, old age homes and orphanages that are separately incorporated from their parent churches are specifically excluded from the concept of "integrated auxiliaries."

These new amendments to the section 6033 regulations cannot be adequately understood without careful examination of the section 6033 regulations that Treasury had proposed on February 11, 1976.⁴⁸ The regulations actually adopted in January, 1977 differ substantially from the regulations proposed a year earlier, and the differences are instructive. In paragraph (g)(5)(i) of the proposed regulations, Treasury explained an "integrated auxiliary" of a church as

an organization described in section 501(c)(3), (a) whose primary purpose is to carry out the tenets, functions, and principles of faith of the church with which it is affiliated, and (b) whose operations in implementing such primary purpose directly promote religious activity among the members of the church. Organizations considered to be integrated auxiliaries include men's and women's clubs, mission societies, and religious schools. Schools of a general academic or vocational nature are not considered to be integrated auxiliaries, even though they have a religious environment or promote the church's teaching.

46. Treas. Reg. § 1.6033-2(g)(1)(i), T.D. 7122, 1971-2 Cum. Bull. 397. For the legislative origin of these examples, see text accompanying notes 128-30 *infra*.

47. Treas. Reg. § 1.6033-2(g)(5)(i) (1977).

48. Proposed Treas. Reg. § 1.6033-2, 41 Fed. Reg. 6073 (Feb. 11, 1976). The definition of "integrated auxiliaries" proposed in this regulation applied to the use of that phrase in Int. Rev. Code of 1954, §§ 508(c) and 6043(b) as well as in § 6033. See Proposed Treas. Reg. § 1.6033-2(g)(5)(i).

Paragraph (g)(5)(ii) of the proposed regulation went on to explain the meaning of the term "affiliated" in paragraph (g)(5)(i)(a). To be affiliated, a church auxiliary had to be

either controlled by or associated with a church or with a convention or association of churches. For example, an organization, a majority of whose officers or directors are appointed by a church's governing board or by officials of a church is controlled by a church within the meaning of this paragraph. An organization is associated with a church or with a convention or association of churches if it shares common religious bonds and convictions with that church or with a convention or association of churches.

Paragraph (g)(5)(iii) concluded the proposed regulation with a series of seven examples of organizations that were and were not "integrated auxiliaries" of a church. In each example the organization was exempt under section 501(c)(3) and was affiliated with a church within the meaning of paragraph (g)(5)(ii) of the proposed regulation. Under these examples, the following organizations qualified as integrated auxiliaries of churches:

- (1) A separately incorporated theological seminary, whose sole purpose is to prepare students for the ministry of a particular church and most of whose graduates are ordained as ministers of that church;⁴⁹
- (2) A religious youth organization for young men and women;⁵⁰ and
- (3) A men's church fellowship association.⁵¹

According to the proposed regulation, then, the category of "integrated auxiliaries of a church" included at least these three examples and the "men's and women's clubs, mission societies, and religious schools" mentioned earlier in paragraph (g)(5)(i).

Other examples in the proposed regulation, however, excluded the following types of organizations from "integrated auxiliaries" because they did not meet the "purpose and function" test:⁵²

- (1) A church-related hospital that provides medical care for the entire community in which it is located;⁵³
- (2) A church-related orphanage dedicated to the service of the entire community in which it is located;⁵⁴
- (3) A church-related old age home that provides services exclusively to the elderly members of that church's denomination;⁵⁵ and
- (4) A parochial elementary school.⁵⁶ The exclusion of parochial

49. Proposed Treas. Reg. § 1.6033-2(g)(5)(iii) Example (1), 41 Fed. Reg. 6073 (Feb. 11, 1976).

50. *Id.* Example (5).

51. *Id.* Example (7).

52. *Id.* § 1.6033-2(g)(5)(i)(a) and (b).

53. *Id.* § 1.6033-2(g)(5)(iii) Example (2).

54. *Id.* Example (4).

55. *Id.* Example (6).

56. *Id.* Example (3). Although it was clear that the typical parochial school did not meet the

schools was consistent with the statement in paragraph (g)(5)(i) of the proposed regulation that "[s]chools of a general academic or vocational nature are not considered to be integrated auxiliaries, even though they have a religious environment or promote the church's teaching."

The American churches soon responded to the proposed regulation on "integrated auxiliaries" with a unanimous cry of outrage. Not since 1970, when the constitutionality of the traditional property tax exemption for churches was being litigated in the United States Supreme Court,⁵⁷ have the American churches been so united about a legal proposition. Mormons, Lutherans, Episcopalians, Methodists, Baptists and Roman Catholics, to mention only a few of the major denominations, were united in vigorous opposition to what they regarded as an attempt by Treasury and the Internal Revenue Service to "define" the churches almost out of existence, especially with regard to their charitable, educational and social welfare activities. In the written protests filed in response to the issuance of the proposed regulation and in the oral statements made at the public hearing conducted by the Internal Revenue Service on June 7, 1976, the American churches contended that the proposed regulation was unconstitutional, inconsistent with the intent of Congress, difficult to understand and apply, and a boon only to lawyers and accountants.⁵⁸

"purpose and function" test (*id.* § 1.6033-2(g)(5)(i)(a) and (b)), Example (3) created some ambiguity about the obligation of every such school to file an annual information return. The ambiguity arose from the description of the school in Example (3) as possessing "a legal identity separate from that of the church." What, then, if the school were directly owned and operated by the church? (In actual fact, most of the church-related elementary schools are directly owned and operated by churches; most of the high schools are separately incorporated.) For an oral clarification of the problem by the Commissioner of Internal Revenue, see note 58 *infra*. For the resolution of the problem by the final regulations promulgated in 1977, see note 63 *infra* and accompanying text.

57. *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), in which the Supreme Court upheld the constitutionality of the traditional inclusion of churches and other religious organizations in the exemption of many types of nonprofit organizations from property taxes.

58. The written protests are on file in the National Office of the Internal Revenue Service and are subject to public inspection and copying in accordance with 26 C.F.R. 601.702(d)(9) (1976). I was personally present at the public hearing on June 7, 1976. At the beginning of the hearing, Donald C. Alexander, Commissioner of Internal Revenue, stated that the proposed regulation would be amended to make it clear that in addition to meeting the "purpose and function" and "affiliation" tests, a church-related organization must be a "separate tax entity" from the church to qualify as an "integrated auxiliary."

Mr. Alexander's statement seemed to be a direct response to a point made in the written comments submitted on behalf of the Mormon Church by Robert W. Barker, its Authorized Agent, and on behalf of the United States Catholic Conference by Eugene Krasicky, its General Counsel. Mr. Krasicky stated: "Paragraph (g)(5)(ii) does not make it absolutely clear that to be 'affiliated' an organization must possess a separate legal identity (as a corporation, trust, or other definite and distinct tax entity) from the church with which it is affiliated. The point is very important because there are many church corporations (corporations that fit all the requirements

Some of the Internal Revenue Service officials at the public hearing were obviously nettled by the sharpness and vigor of the churches' protests. It is, after all, the responsibility of the Service to administer the Internal Revenue Code, and Congress has not made the task easy. Meade Whitaker, Chief Counsel of the Service, politely but persistently asked church spokesmen how they would reconcile clauses (i) and (iii) of section 6033(a)(2)(A).⁵⁹ Most of the church spokesmen were

of being churches in the tax sense) that directly own and operate schools, hospitals, orphanages, old age homes, and other charitable, educational and welfare institutions. In many instances these institutions have a popular name, a telephone number, and even a bank account that is separate from those of the church; but they have no separate legal identity. They are simply operations of the church, and the church is the only tax entity in existence. Nothing in the legislative history of the 1969 amendments to section 6033 indicates that Congress intended church corporations to have to file with respect to their educational, charitable and welfare activities." Letter from Eugene Krasicky to Donald Alexander, March 26, 1976, at 9-10, on file at Fordham L. Rev.

Robert W. Barker, counsel for the Mormon Church, made a similar point in his statement (letter from Robert W. Barker to Commissioner of Internal Revenue, March 17, 1976, at 1-4, on file at Fordham L. Rev.) and cautioned against making separate incorporation an automatic index of "auxiliary" status. He argued that, to be an "integrated auxiliary," a church organization must have a separate legal identity from that of the church, but that the mere possession of such an identity does not mean that the organization is an "auxiliary" rather than an "integral part" of the church. He interpreted the 1969 intent of Congress in section 6033 as follows: "The Church of Jesus Christ of Latter-day Saints maintains that Congress did not intend for the IRS to scrutinize every molecular, internal, departmental function of large, regional or national churches in order to determine whether such functions or activities themselves might be required to file information returns. Rather, Congress intended to exempt all churches from filing of information returns; and it further intended that the term church be given its ordinary, broad meaning. In addition to the exemption granted churches, Congress also intended to grant a further exemption to those separate entities closely affiliated with and complementary to churches which might meet the definition of "integrated auxiliaries of churches." *Id.* at 2. Mr. Barker's remarks are particularly significant because it was Senator Bennett of Utah, acting out of his concern for the Mormon Church, who led the fight in 1969 for the introduction of church "auxiliaries" into the text of section 6033. See note 125 *infra*.

59. The question took most of the church spokesmen by surprise. The proposed amendments to Treas. Reg. § 1.6033-2, T.D. 7122, 1971-2 Cum. Bull. 397, were directed solely to the meaning of "integrated auxiliaries" of churches in section 6033(a)(2)(A)(i). Clause (iii) of that section refers to the "exclusively religious activities of any religious order." Religious orders in the United States have been, until recently, almost exclusively a Roman Catholic phenomenon. (In recent years, a number of new "Eastern-style" religions in the United States have developed "religious orders" of their own. For a discussion of the problems that this new development has generated for the Internal Revenue Service, see notes 168-72 *infra* and accompanying text.) Because almost all religious orders have been Roman Catholic, the other denominations in the United States have felt no reason to be concerned about the meaning of clause (iii) in section 6033(a)(2)(A).

Mr. Whitaker's concern about the reconciliation of clauses (i) and (iii) seems to have been based upon the following considerations: If clauses (i) and (iii) are read as mutually exclusive, it follows that "religious orders" are not "churches," not "integrated auxiliaries of churches," and not "conventions or associations of churches." And if clause (iii) is given its literal meaning, religious orders must file annual reports about their charitable, educational, health care and other welfare

unfamiliar with the history of clause (iii)⁶⁰ and could not give a satisfactory answer. Charles Rumph, Special Assistant for Exempt Organization Matters, exhorted the churches to "let the sunshine in" by telling the government and the public about their financial affairs. At the conclusion of the meeting, Internal Revenue Service officials said that they would study the entire matter further.

After seven months of study, Treasury issued the materially different final regulations of January, 1977. The final regulations explicitly recognize that, to be an integrated auxiliary of a church, a church-related organization must first possess a legal identity in its own right as a section 501(c)(3) organization. Thus, an orphanage directly owned and operated by a church is not an integrated auxiliary but a "part" of the church.⁶¹ Secondly, the final regulations abandon the "purpose and function" test stated in the proposed regulations and substitute a new "principal activity" test. Under the proposed regulations, the primary purpose of an integrated auxiliary had to be to carry out the tenets, functions and principles of faith of a church, and the organization's activities had to directly promote religious activity among the members of the church. Under the final regulations, these criteria do not apply, but the "principal activity" of the organization must be "exclusively religious."⁶² Thirdly, the final regulations exempt all church-related elementary and secondary schools from filing annual information returns.⁶³

activities that are not "exclusively religious." Thus, a religious order of sisters that owns and operates a hospital would have to file annual financial reports with respect to the hospital. But a religious order is obviously very closely connected with the denomination to which it belongs, and it would seem absurd to require the religious order to report about its hospitals but not require the denomination to report about other hospitals that it operates independently of any religious order. In order, then, to achieve basic fairness and equality of treatment of all church-affiliated hospitals, orphanages, old age homes, etc., all such institutions should be excluded from the concept of "integrated auxiliaries" in clause (i) of section 6033(a)(2)(A).

Needless to say, the church leaders present at the public hearing on June 7, 1976 did not concede that the status of their agencies and institutions should depend on the special provisions in the Code relating to religious orders.

60. See text following note 130.

61. Treas. Reg. § 1.6033-2(g)(5)(iv) Example (6) (1977).

62. Id. § 1.6033-2(g)(5)(i)(c). For the explicit rejection by Treasury of the "purpose and function" tests in the proposed regulations, see the Preamble to T.D. 7454, 42 Fed. Reg. 767 (Jan. 4, 1977).

63. Treas. Reg. § 1.6033-2(g)(1)(vii) (1977). Note that example (2) of paragraph (g)(5)(iv) of these amendments to the section 6033 regulations excludes separately incorporated parochial schools from the category of "integrated auxiliaries" (on the ground that their principal activity is educational rather than "exclusively religious"), even though the school property is owned by the church, all supervisory and managerial personnel are appointed by church officials, and the school's budget is subject to approval by a church official responsible for the overall supervision of the school. But the Preamble to T.D. 7454 explains that the Secretary of the Treasury has

In some respects, the final regulations reflect concessions made to the objections raised by the American churches to the proposed regulations. The treatment of parochial schools is an obvious compromise. And the abandonment of the requirement that integrated auxiliaries "directly promote religious activities among the members of the church" seems to concede the contention of most American churches that they look outward as well as inward in their preaching and many other church activities.

Despite these concessions, it seems certain that the American churches will oppose the final regulations as vigorously as they resisted the proposed regulations. The fundamental vice remains: the regulations exclude the traditional educational, charitable and welfare activities of the churches from the tax concept of "church activities." Although the final regulations do not purport to define "church," they implicitly do so. It would be strange, indeed, if after having excluded hospitals, orphanages, old age homes and universities from the concept of "integrated auxiliaries," Treasury recognized such separately incorporated institutions as component "parts" of the churches and therefore exempt from filing annual information returns because they fall directly within the concept of "churches" or "conventions and associations of churches." The only sensible interpretation of the final regulations is that Treasury has excluded church-related charitable, educational and welfare institutions that are separately incorporated from their parent churches both from the category of "integrated auxiliaries" and the category of "churches and conventions or associations of churches."

In this respect, the classification of seminaries by the final regulations is instructive. Separately incorporated seminaries are "integrated auxiliaries."⁶⁴ American churches, however, would certainly classify

exercised his discretionary power under section 6033 to exempt from the annual filing requirements "educational organizations below college level that are associated with a church." 42 Fed. Reg. 768 (Jan. 4, 1977). By exercising his discretionary authority in this way, the Secretary of the Treasury may be trying to deflect a very powerful argument against the validity of the new regulations with respect to parochial schools. In a series of decisions in 1971, 1973 and 1975, the Supreme Court explicitly characterized the purpose of these schools as substantially religious and closely identified the schools with the mission of the churches that operate them. *Meek v. Pittenger*, 421 U.S. 349 (1975); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Given these decisions, it is unlikely that federal courts would agree with Treasury that these schools are not component "parts" of the churches that operate them, even when they are separately incorporated. For the constitutional distinctions between parochial schools and church-related colleges and universities, see *Roemer v. Board of Pub. Works*, 426 U.S. 736, 755 (1976), noted in 45 *Fordham L. Rev.* 979 (1977); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

64. *Treas. Reg.* § 1.6033-2(g)(5)(iv) (1977).

their own seminaries as component "parts" of their church structure, whether the seminaries were separately incorporated or not. If Treasury will not concede that a separately incorporated seminary is a "part" of its parent church, it certainly will not concede that a separately incorporated hospital, orphanage, old age home or university is such a "part."

The final regulations, therefore, carry the threat that mere separate incorporation by a church of one of its component parts will result in a refusal by Treasury and the Internal Revenue Service to treat that part as entitled to the tax status of a "church." Churches that have organized themselves as collectivities of controlled corporations rather than as single corporate entities will be certain to resist this aspect of the final regulations.

Besides implying a narrow and unhistorical definition of churches and posing a threat to multi-corporate churches, the final regulations create an extremely difficult interpretational problem by requiring that the "principal activity" of an integrated auxiliary be "exclusively religious." Church lawyers are familiar with the basic section 501(c)(3) requirement that an organization be "organized and operated exclusively for religious, charitable . . . or educational purposes," but they are not familiar with the concept of "exclusively religious activities." An organization can qualify under section 501(c)(3) as long as all of its purposes fall exclusively within the specified categories; it does not have to prove that it is "exclusively religious" or "exclusively educational." But paragraph (g)(5)(ii) of the final regulations requires that an integrated auxiliary's "principal activity" be "exclusively religious" in the sense that it is not also educational, charitable, or within one of the other section 501(c)(3) categories:

An organization's principal activity will not be considered to be exclusively religious if that activity is educational, literary, charitable, or of another nature (other than religious) that would serve as a basis for exemption under section 501(c)(3).

This requirement seems inconsistent with the regulations' recognition that separately incorporated church youth groups qualify as integrated auxiliaries. Many such youth groups could easily qualify, without any church affiliation, as section 501(c)(3) organizations. Moreover, once "exclusively religious" is defined as "not also charitable or educational," the realm of the "exclusively religious" becomes very narrow indeed. The churches are sure to insist that they themselves are not "exclusively religious" in the sense that the final regulations require of their "integrated auxiliaries."

By including the "exclusively religious activity" test in the definition of a section 6033(a)(2)(A)(i) "integrated auxiliary" of a church, Treasury has incorporated a term that appears nowhere else in the Code except

in section 6033(a)(2)(A)(iii), where it applies only to religious orders. Treasury may have deemed such a borrowing essential to make sense out of section 6033, but the vast majority of American churches do not have religious orders and will resist this narrowing of the concept of "integrated auxiliaries" by Code language that is unique to religious orders.

United church opposition to the final regulations on "integrated auxiliaries" may produce some further changes in the regulations, especially under the new administration of President Carter. Regardless, however, of what happens to the "integrated auxiliaries" regulations, the central problem of what constitutes a "church" will remain. The phrase "integrated auxiliaries" occurs in only four subsections of the Code;⁶⁵ the word "church" or "churches" occurs in twenty-six.⁶⁶ Clearly, such religious distinctions in the Code raise serious constitutional and interpretational problems. Although none of the distinctions touches on the content of any religious belief, the practical difference between having to file an annual financial statement (especially on Form 990)⁶⁷ and not having to file such a report is sufficiently serious to demand constitutional justification when the difference is based on the "churchness" of an organization's religious activities and on the degree of an organization's structural identification with a church. Congress, as already noted, has extraordinary constitutional latitude with respect to classifications in the tax laws.⁶⁸ But even tax laws are subject to constitutional scrutiny by the Supreme Court, and in the last seven years the Court has twice taken cases concerned with the constitutionality of religious tax classifications.⁶⁹

However, before anything more can be sensibly said about the constitutionality of the Code distinctions between church and non-church religious organizations and within church organizations themselves, it is necessary to understand these distinctions as fully as they can be understood and to examine the reasons why Congress has made the distinctions. Unfortunately, the official legislative history of these distinctions is quite sparse. Still, it must be examined for whatever

65. See note 17 *supra* and accompanying text.

66. "Church" or "churches" occurs more frequently, if repetitions within a subsection are taken into account.

67. See Note, *The Internal Revenue Service as a Monitor of Church Institutions: The Excessive Entanglement Problem*, 45 *Fordham L. Rev.* 929, 935-361 (1977).

68. See text accompanying note 3 *supra*.

69. *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972), which was dismissed as moot because, during the pendency of the case in the Supreme Court, the Florida legislature changed the law under which the church's parking lot had been exempt from property taxes even though it was rented out during business hours to people working in the vicinity of the church; and *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), discussed in note 57 *supra*.

light it can shed on both the meaning and the constitutionality of the distinctions.

IV. LEGISLATIVE HISTORY OF THE CHURCH DISTINCTIONS

The religious distinctions in the Code fall into three broad groups: those concerned with whether an activity or purpose is "religious" or "exclusively religious";⁷⁰ those concerned with clergymen and members of religious orders;⁷¹ and those concerned with the various categories of church and church-related organizations, including religious orders.⁷² It is this last category that is responsible for the confusion about the meaning of the word "church" in the Code. Accordingly, I shall confine my discussion of the legislative history of the religious distinctions in the Code to the "church distinctions": that is, to those sections of the Code that deal with churches, their integrated auxiliaries, conventions and associations of churches, religious orders and other types of church-related organizations.

The history of the church distinctions begins in 1950 with the enactment of the tax on unrelated business income.⁷³ It ends, for the present at least, with recent legislation on pension funds⁷⁴ and lobbying by section 501(c)(3) organizations.⁷⁵ Unfortunately, there is no

70. The Code sections are cited in notes 11 & 23 *supra*.

71. The Code sections are cited in notes 20 & 24 *supra*.

72. The Code sections are cited in notes 12-19, 21, 22 & 25 *supra*.

73. Revenue Act of 1950, ch. 994, § 422, 64 Stat. 947. There is one minor exception to 1950 as the starting date for the church distinctions in the Code. Under section 1701(a) of the Int. Rev. Code of 1939, ch. 1, § 1701(a), 53 Stat. 190, churches and conventions of churches were exempt from the federal excise tax on admissions, but other religious organizations were not. The regulations under this section defined "convention or association of churches" as "a union of churches of the same denomination organized on a regional or other basis, or a union of churches of different denominations which meet and act in concert to further a particular religious purpose." Treas. Reg. § 101.15(b)(2)(ii) (1953). The regulations did not define "church" but stated: "Missions and missionary societies, Sunday School classes, choir groups or other associations forming a functional part of the organization of a church fall within the exemption." Treas. Reg. § 101.15(b)(2)(iii). Int. Rev. Code of 1954, § 4233(a)(1)(A)(i), ch. 736, 68A Stat. 498, corresponded to the section 1701(a) church exemption until Congress repealed the excise tax on admissions in 1965. Excise Tax Reduction Act of 1965, Pub. L. No. 89-44, 79 Stat. 145. There is no reference in the legislative history of the 1950 and post-1950 church distinctions in the Code to the provisions relating to the federal excise tax on admissions. It is clear, however, that there was at least this one legislative precedent for Congress' choice in 1950 of "a church, a convention or association of churches" to distinguish one class of section 501(c)(3) religious organizations from the rest.

74. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829, which added the categories of "church plans" and "church agencies" to the Code (codified at sections 410-14).

75. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1720 (codified in section 501(h)), which excluded churches, conventions and associations of churches, their integrated auxiliaries

single thread that develops continuously throughout the history. The tax problems have been so complex, and the political influences brought to bear on their solution so diverse and so fluctuating in strength, that Congress has made many ad hoc distinctions. Moreover, Congress has not taken the time carefully to record in its official documents all the reasons for its distinctions. Because Congress has never squarely faced the range of problems connected with the church distinctions in the Code, the legislative history of these distinctions is little more than a series of anecdotes.

In 1950 Congress imposed the tax on unrelated business income on certain classes of organizations that were otherwise exempt under section 501(a) from the federal income tax. In particular, Congress aimed the tax at the unrelated business income of charitable trusts and of colleges and universities that qualified for exemption by meeting the criteria of section 501(c)(3).⁷⁶ But Congress brought these and other charitable and educational organizations within the scope of the tax by language that has proven troublesome ever since for the churches and the Internal Revenue Service. Congress made all section 501(c)(3) organizations subject to the tax except "a church, a convention or association of churches."⁷⁷ Since section 501(c)(3) itself speaks of "religious" rather than "church" organizations, Congress had made its first major distinction between section 501(c)(3) religious organizations that were churches and those that were not.

In the House and Senate committee reports accompanying the 1950 legislation, Congress explained this distinction as meaning that churches themselves were exempt from the new tax but that religious, charitable and educational organizations under church auspices were not.⁷⁸ In the context of the 1950 legislation, it seems clear that Congress meant that church-related colleges and universities could not

and all members of affiliated groups containing one of the foregoing categories from electing coverage under the new rules relating to expenditures by section 501(c)(3) organizations to influence legislation. For a discussion of this legislation, see notes 144-53 *infra* and accompanying text.

76. Representative Lynch of New York was the floor manager of the House bill which eventually became the Revenue Act of 1950. His explanation, during the floor debate, of the background and purposes of the unrelated business income tax is particularly illuminating. 96 Cong. Rec. 9364-69 (1950). For other pertinent material on the background of the tax, see 1 S. Weithorn, *Tax Techniques for Foundations and Other Exempt Organizations* § 39.01 (1975).

77. Revenue Act of 1950, ch. 994, § 422, 64 Stat. 948, amending Int. Rev. Code of 1939, ch 1, § 101(6), 53 Stat. 33. This language was contained in the Int. Rev. Code of 1954, ch. 736, § 511, 68A Stat. 169, until deleted by the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 536 (codified in section 511).

78. H.R. Rep. No. 2319, 81st Cong., 2d Sess. 36, 108 (1950); S. Rep. No. 2375, 81st Cong., 2d Sess. 106 (1950).

escape the tax simply because they were church-related. Neither, presumably, could the other charitable and welfare agencies of a church, such as its hospitals, child-care agencies and old age homes, that strongly resembled secular exempt organizations performing substantially the same functions.

But the exact import of Congress' distinction between "churches" and "religious organizations under church auspices" was far from clear. As Treasury and the Internal Revenue Service were soon to discover, the actual structure of American churches makes this distinction impossible to administer except at the extreme ends of the spectrum of church-related organizations.⁷⁹ If American churches had a uniform structure, with a readily identifiable nucleus "church" and a ring of satellite organizations that federal tax officials could easily distinguish from the nucleus, the post-1950 administrative task of Treasury and the Internal Revenue Service would not have been so difficult. In actual fact, however, the American churches have diverse, complex and confused structures. They are more like molecules than atoms. Moreover, each church has a double structure: one internal, in its own ecclesiastical law, and the other external, in American civil law.

In their own ecclesiastical law, some of the American churches are congregational in structure; others are hierarchical. The Baptists are a prime example of a congregational type of church; the Roman Catholics exemplify the hierarchical type.

In the congregational churches, the faith and internal religious law of the denominations make each local congregation autonomous. The coordination of the various congregations' activities is a matter of voluntary agreement or "covenant." Each local congregation is usually a separate civil law corporation or trust. The local congregations establish still other civil law corporations or trusts to carry on the activities, such as the maintenance of a seminary or the propagation of the faith at home or abroad, that they have agreed to carry on in common. Thus there is no Baptist Church; there are only Baptist churches and Baptist conventions or associations of churches.⁸⁰

79. This spectrum includes the national headquarters of a church, its local congregations, state-wide, regional and national associations for various church purposes, seminaries, parochial schools, Sunday (or Sabbath) schools, missionary organizations, publishing houses, radio and television stations, newspapers and magazines, pension plans and trusts for the support of the clergy, youth clubs, men's and women's fellowship associations, religious orders, and the educational, charitable and welfare agencies of the church.

80. See the 1950 testimony of a Baptist spokesman during the hearings on the Revenue Act of 1950, quoted in text accompanying note 166 *infra*. By exempting "conventions and associations of churches" as well as "churches" from the unrelated business income tax in 1950, Congress provided equal federal tax treatment for congregational and hierarchical churches.

In the hierarchical churches, such as the Roman Catholic, Presbyterian, Eastern Orthodox and Mormon denominations, the faith and internal religious law create a single church authority with jurisdiction over all the members and branches of the church. Local congregations are divisions, not autonomous units. Thus it is entirely proper to speak of the "Roman Catholic Church" or the "Mormon Church."⁸¹

Regardless of their congregational and hierarchical structure, all of the American churches employ a multitude of civil law corporations and trusts to carry on their functions of worship, preaching, educating, healing and otherwise caring for the spiritual and corporal needs of their own members and of the general public. The churches have created uncounted thousands of civil law corporations and trusts for a variety of legal, historical and ecclesiastical reasons.⁸²

The resulting civil law structure of the American churches rarely corresponds closely with their internal ecclesiastical organization.⁸³ In the Roman Catholic Church, for example, the major internal structures are the Holy See, the papacy, the patriarchates, provinces, archdioceses, dioceses and parishes, and the religious orders.⁸⁴ Some of these divisions are territorial; others, and especially the religious orders, are "personal" in the sense that ecclesiastical jurisdiction does not depend upon geographical boundaries. In order to establish an

81. The Mormon Church is more properly known as the "Church of Jesus Christ of Latter-Day Saints." For a description of the structure of the Mormon Church, see W. Whalen, *The Latter-Day Saints in the Modern Day World* 139-49 (1964). The special position of the Mormon "auxiliary" organizations in the structure of that church became particularly important in the revision of section 6033 of the Internal Revenue Code by the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 519. See note 125 *infra*.

82. Some of these civil law corporations and trusts were organized to solve pressing civil law problems. See, for example, the account of the creation of "The Trustees of the National Council of the Congregational Churches of the United States" in M. Starkey, *The Congregational Way* 293-95 (1966). More often, churches have organized corporations and trusts in order to avoid civil law problems they would otherwise encounter in acquiring, managing and disposing of property. Many denominations have individually created hundreds of civil law entities, rather than operating under one "umbrella corporation," in an attempt to parallel the allocation of ecclesiastical authority within the parent church, to facilitate fund-raising, to comply with state laws regarding educational and charitable institutions, to qualify some of their educational and charitable institutions for federal and state financial assistance, and especially to benefit from the limits that multiple corporations create for liabilities for debts, torts and taxes.

83. This divergence of the civil law structure of American churches from their internal ecclesiastical structure has led the United States Supreme Court to formulate special constitutional rules for the settlement by state and federal courts of intra-church property disputes. The most recent case is *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), noted in 45 *Fordham L. Rev.* 992 (1977).

84. For a list of the component parts of the Roman Catholic Church in the United States, see the 1976 *Official Catholic Directory*. Many other American churches publish "yearbooks" or other lists of their component parts.

identity in American civil law, most of these ecclesiastical entities have created one or more civil law corporations or trusts.⁸⁵ But there is no American civil law counterpart to the ecclesiastical unity of the Roman Catholic Church. Some of the Roman Catholic corporations and trusts are interrelated by their governing instruments, but many are not. The fact that these diverse civil law entities generally work together harmoniously is the result of the internal hierarchical structure of the Roman Catholic Church, not the product of American corporate or trust law.

Thus, from a purely technical point of view, the Roman Catholic Church does not exist as such for federal tax purposes.⁸⁶ What does exist is a conglomeration (not a corporate conglomerate) of distinct taxable entities united in religious faith, worship and authority but not in civil law identity or control. Faced with the congressional distinction in 1950 between a "church" and "organizations under church auspices,"⁸⁷ the Internal Revenue Service had to decide which of the Roman Catholic corporations and trusts were comprised within the core of the Roman Catholic Church and which were simply "organizations under church auspices." And the Service faced the same problem with respect to all the other American churches.

In the case of the Roman Catholic Church, the problem of classification was particularly troublesome with respect to Catholic "religious orders." These organizations are made up of men and women who have devoted their entire lives to communal worship and service of

85. Not all of the organizations listed in the 1976 Official Catholic Directory are separate civil law entities. All, however, of the major units (archdioceses, dioceses, and religious orders) and many of the subsidiary units (parishes, high schools, colleges, hospitals, etc.) are separate corporations or trusts.

86. The point is technical, but could become important in connection with various federal tax provisions, such as the assessment and collection of a tax deficiency under the unrelated business income tax or the enforcement of the restrictions against political activities in section 501(c)(3). So far as the status of Roman Catholic corporations and trusts as section 501(c)(3) organizations is concerned, and for certain other purposes, the Internal Revenue Service simplifies its administrative problems by annually issuing a "group ruling" to the United States Catholic Conference. A key paragraph in the 1976 ruling reads as follows: "Based on all the information submitted [by the United States Catholic Conference], we conclude that the agencies and instrumentalities and educational, charitable, and religious institutions operated, supervised or controlled by or in connection with the Roman Catholic Church in the United States, its territories or possessions appearing in the Official Catholic Directory for 1976 are exempt from Federal income tax under section 501(c)(3) of the Code." Determination Letter from Gerald G. Portney, District Director, Internal Revenue Service, to the United States Catholic Conference, July 14, 1976, on file at Fordham L. Rev. Thus, for certain purposes, the Internal Revenue Service deals with the Roman Catholic Church as a unit. The group ruling itself, however, recognizes that many separate taxable entities are involved.

87. See text accompanying note 78 *supra*.

God.⁸⁸ The members of the order express their commitment by vows of poverty, chastity and obedience. Each order lives a communal life, somewhat similar to that of a section 501(d) "religious and apostolic association."⁸⁹ The Roman Catholic Church recognizes religious orders as component parts, like dioceses and archdioceses, of the total church. The religious orders do not have territorial boundaries like dioceses or archdioceses, but they carry on a wide variety of religious, charitable and educational activities in diocesan and archdiocesan institutions and in institutions that the orders themselves have established.

Neither the text nor the legislative history of the unrelated business income tax in 1950 resolves the question whether the word "church" in that legislation includes religious orders. Neither of the committee reports explicitly mentions religious orders. The only discussion on the floor of Congress that came close to the "church" status of religious orders was a brief colloquy between Representative Johnson of California and Representative Lynch of New York. Mr. Lynch was the floor manager of the House version of the Revenue Act of 1950. The colloquy is as follows:

Mr. OHNSON [sic]. I would like to ask this question about semiprivate schools: Christian Brothers, a Catholic order, has a winery and vineyard and a lot of other agricultural operations out in my district, and they sell their products throughout the United States; do they come under this provision [imposing the tax on unrelated business income], or are they tax-exempt?

Mr. LYNCH. This bill does not apply to churches. It does apply to charitable and educational institutions organized under church auspices that engage in unrelated business activities. I do not know whether the Christian Brothers to whom the gentleman refers maintain a college in that area or not.

Mr. JOHNSON. They have a college.

Mr. LYNCH. I would assume that if they maintained a college and taught the liberal arts and went into the business of manufacturing wine—I can see no connection between the two—and entered into competition with other wineries, they would be taxed.

Mr. JOHNSON. Let me ask the gentleman another question: They do own St. Mary's College where they teach liberal arts, engineering, and many other subjects, but they also have a farm in Napa County, a school to train the brothers. In connection with that they have all these agricultural operations, including a winery.

Mr. LYNCH. If it is in connection with the school that has to do with the

88. The charitable and educational organizations that Catholic religious orders have founded in the United States are so well known that it is often forgotten that prayer and worship are primary functions of these orders. There is an important distinction between a religious order itself and the institutions which it conducts. When, however, a religious order directly owns and operates hospitals and universities instead of separately incorporating these institutions, the distinction becomes blurred, especially for federal tax purposes.

89. The members of section 501(d) organizations, however, do not profess celibacy as a religious obligation. Moreover, the members of section 501(d) organizations regularly engage in such businesses as farming in order to support their religious way of life.

development of agriculture, under those circumstances I would say that it was not taxable. If, on the other hand, there was a school there for the purpose of training the Christian Brothers and they engaged in this outside work of wine production, having no relation to the school, it seems to me under those circumstances they would rightly be taxed.⁹⁰

Representative Rabaut then asked Mr. Lynch whether wine produced for religious services (like the Roman Catholic mass) would be taxed. Mr. Lynch replied:

Under those circumstances I do not believe it would be taxed, but that is a point of administration really for the Internal Revenue Department to determine, whether the wine is being produced for religious purposes or, as I see the advertisements in the cars and hear them over the radio about this Christian Brothers wine, it seems to me they are in the competitive wine business.⁹¹

A minute or so later in the discussion, Representative Dondero suggested to Mr. Lynch that the matter ought to be clarified in the House bill, so that the Bureau of Internal Revenue would know the intent of Congress. Mr. Lynch responded:

It is not possible to define in the bill exactly every case that is going to be covered. We have drawn it so that there is a certain amount of discretion for the determination of questions of fact as to whether or not a certain matter comes within the purview of the bill.⁹²

In the next few years the Internal Revenue Service resolved the "questions of fact" against the Christian Brothers and the Service's position was eventually upheld by a federal district court.⁹³ In the meantime, however, Congress introduced the phrase "a church or a convention or association of churches" into the section of the Code dealing with the deductibility of charitable contributions, and the status of religious orders as "churches" or component parts of "churches" became an even more complicated question.

In 1954 Congress decided to make extensive revisions in the Internal Revenue Code of 1939, as theretofore amended, and to substitute for it a new code, the Internal Revenue Code of 1954. One of the most important changes established two different classes of organizations with respect to the upper limits on the deductibility of charitable contributions. Congress put "a church, or a convention or association of churches" in the same category with schools and hospitals; a preferred category, contributions to which were deductible up to 30%

90. 96 Cong. Rec. 9367-68 (1950).

91. *Id.* at 9368.

92. *Id.*

93. *De La Salle Institute v. United States*, 195 F. Supp. 891 (N.D. Cal. 1961) for the details of this decision, see notes 112-21 *infra* and accompanying text.

of an individual taxpayer's adjusted gross income.⁹⁴ Contributions to other types of section 501(c)(3) organizations, including religious organizations that were not churches or conventions or associations of churches, were deductible only up to 20% of adjusted gross income.⁹⁵

In the original 1954 version of section 170, however, the question of whether religious orders were included in the concept of "a church or a convention or association of churches" was not left to a factual determination by the Internal Revenue Service. In the House version of H.R. 8300 (which eventually became the 1954 Code), section 170 allowed the deduction of up to 30% of adjusted gross income for contributions to "a church, or a convention or association of churches, or a religious order." When the House version reached the Senate, the Senate Finance Committee held hearings. Mr. Eugene Butler, then Director of the Legal Department of the National Catholic Welfare Conference,⁹⁶ testified as follows:

To classify separately religious orders would indicate that they are not considered a part of or come within the meaning of the term "church." To do so ignores facts and pertinent church law resulting in a legislative determination of what is or is not a church. This the Congress has never done. This would be a dangerous precedent.⁹⁷

In response to this testimony, the Senate Finance Committee deleted the phrase "or a religious order" from the section 170 amendment and inserted the following language in its report:

Your committee understands that "church" to some denominations includes religious orders as well as other organizations which, as integral parts of the church are engaged in carrying out the functions of the church whether as separate corporations or otherwise. It is believed that the term "church" should be all inclusive. To retain the phrase "or a religious order" in this section of the bill will tend to limit the term and may lead to confusion in the interpretation of other provisions of the bill relating to a church, a convention or association of churches. Accordingly, your committee believes that the section of the bill will be clarified by this amendment.⁹⁸

The Senate adopted the change recommended by its Finance Committee. When the proposed versions of the 1954 Internal Revenue Code

94. Int. Rev. Code of 1954, ch. 736, § 170(b)(1), 68A Stat. 58. In 1969, Congress amended this section and raised the limit to 50% of a taxpayers' "contribution base." Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 551 (codified in section 170(b)(1)(A)).

95. Int. Rev. Code of 1954, ch. 736, § 170(b)(1)(B), 68A Stat. 58. This section was also modified by the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 551 (codified in section 170(b)(1)(B)).

96. This organization was the predecessor of the United States Catholic Conference (referred to in notes 58 & 86 *supra*).

97. Hearings on H.R. 8300 Before the Senate Finance Comm., 83d Cong., 2d Sess. 1028 (1954).

98. S. Rep. No. 1622, 83d Cong., 2d Sess. 30 (1954).

went to conference, the conferees adopted the Senate version of this part of section 170.⁹⁹ In February, 1955 the staff of the Joint Committee on Internal Revenue Taxation published its general explanation of the 1954 Code. With particular reference to the addition of the phrase "a church or a convention or association of churches" to the language of section 170, the staff of the Joint Committee explained:

The term "church" is intended to include religious orders as well as other organizations which, as integral parts of the church, are engaged in carrying out the functions of the church, whether as separate corporations or otherwise.¹⁰⁰

Thus the 1954 legislative history of section 170 makes it absolutely clear that the term "church" in that section is not monocellular but embraces religious orders and the other "integral parts" of a church, whether or not they are separately incorporated under civil law. There is, however, no comparable discussion of the term "church" in the 1954 legislative history of the changes made by H.R. 8300 in the tax on unrelated business income.¹⁰¹

Both the House and Senate versions of H.R. 8300 continued the exemption of churches and conventions or associations of churches from this tax. But there is no discussion in the committee or conference reports of the meaning of "church" in section 511. The House report on H.R. 8300 states that the only substantive changes made with respect to the unrelated business income tax deal with the treatment of employees' stock bonus, profit-sharing and pension plans and the definition of a business lease.¹⁰² The Senate report recommends some minor changes in the House amendments, but generally follows the House version.¹⁰³ The conference report adopts the Senate text.¹⁰⁴ In its explanation of the 1954 changes in the unrelated business income tax, the staff of the Joint Committee on Internal Revenue Taxation mentions only business leases and qualified employees' stock bonus, pension and profit-sharing trusts.¹⁰⁵

99. The conference report states: "An amendment is also made in the definition of churches for purposes of the additional 10 percent limitation. The words 'a religious order' in the House bill have been deleted." H.R. Rep. No. 2543, 83d Cong., 2d Sess. 29 (1954).

100. Staff of the Joint Comm. on Int. Rev. Taxation, Summary of the New Provisions of the Internal Revenue Code of 1954 (H.R. 8300) as Agreed to by the Conferees (Public Law 591, 83d Cong.) 19 (Comm. Print 1955).

101. Int. Rev. Code of 1954, ch. 736, §§ 511-14, 68A Stat. 169-76.

102. H.R. Rep. No. 1337, 83d Cong., 2d Sess. 51, A165, A170-71 (1954).

103. S. Rep. No. 1622, 83d Cong., 2d Sess. 311-13 (1954).

104. H.R. Rep. No. 2543, 83d Cong., 2d Sess. 48-49 (1954).

105. Staff of the Joint Comm. on Int. Rev. Taxation, Summary of the New Provisions of the Internal Revenue Code of 1954 (H.R. 8300) as Agreed to by the Conferees (Public Law 591, 83d Cong.) 71-72 (Comm. Print 1955).

The absence of any discussion of the term "church" in the 1954 legislative history of the unrelated business income tax creates the possibility that Congress did not intend the meaning of that term in section 170 to carry over into section 511. That possibility is reinforced by the consistent statements in the committee and conference reports that there were no substantive changes in the unrelated business income tax except with respect to business leases and certain types of trusts.

However, in their pursuit of the Christian Brothers for the tax on the unrelated business income from their wine and brandy business, Treasury and the Internal Revenue Service did not opt for different meanings of "church" in sections 170 and 511. Instead, in 1958 Treasury promulgated a regulation under section 511 that classified some religious orders as "integral parts of churches" and denied the classification to other religious orders.¹⁰⁶ To emphasize the identity of meaning of "church" in sections 170 and 511, Treasury put a cross-reference in the regulations under section 170 to the explanation of "church" in the regulations under section 511.¹⁰⁷

The pertinent part of the regulation promulgated in 1958 under section 511 is as follows:

(ii) The term "church" includes a religious order or a religious organization if such order or organization (a) is an integral part of a church, and (b) is engaged in carrying out the functions of a church, whether as a civil law corporation or otherwise. In determining whether a religious order or organization is an integral part of a church, consideration will be given to the degree to which it is connected with, and controlled by, such church. A religious order or organization shall be considered to be engaged in carrying out the functions of a church if its duties include the ministration of sacerdotal functions and the conduct of religious worship. If a religious order or organization is not an integral part of a church, or if such an order or organization is not authorized to carry out the functions of a church (ministration of sacerdotal functions and conduct of religious worship) then it is subject to the tax imposed by section 511 whether or not it engages in religious, educational, or charitable activities approved by a church. What constitutes the conduct of religious worship or the ministration of sacerdotal functions depends on the tenets and practices of a particular religious body constituting a church. If a religious order or organization can fully meet the requirements stated in this subdivision, exemption from the tax imposed by section 511 will apply to all its activities, including those which it conducts through a separate corporation (other than a corporation described in section 501(c)(2)) or other separate entity which it wholly owns and which is not operated for the primary purpose of carrying on a trade or business for profit.¹⁰⁸

This regulation is patently clear only to those familiar with Louisi-

106. Treas. Reg. § 1.511-2(a)(3), T.D. 6301, 1958-2 Cum. Bull. 222-23.

107. Treas. Reg. § 1.170-2(b)(2) (1958) (still effective with respect to tax years commencing before the effective date of the Tax Reform Act of 1969).

108. Treas. Reg. § 1.511-2(a)(3)(ii), T.D. 6301, 1958-2 Cum. Bull. 222-23.

ana and federal politics in 1958. The regulation was artfully designed to make the Christian Brothers (none of whom is ordained as a priest) pay the unrelated business income tax on their wine and brandy business, but exempt the income of station WWL-TV, a commercial television station operated by Loyola University, a Jesuit institution in New Orleans.¹⁰⁹ The Jesuit order includes priests as well as brothers, so that it satisfies the "sacerdotal functions" test in the regulation. More importantly, Loyola University in New Orleans was regarded in high favor by Representative Hale Boggs, Jr., an influential member of the House Ways and Means Committee, and by Senator Russell Long, an influential member of the Senate Finance Committee. Treasury and the Internal Revenue Service could not touch the income of WWL-TV without antagonizing these key members of the House and Senate tax committees. The Christian Brothers enjoyed no comparable political protection.

The Treasury distinctions in Regulation section 1.511-2(a)(3)(ii) between religious organizations that are churches and those that are not turn on two key concepts: being "an integral part of a church," and being engaged in carrying out "the functions of a church." The regulation explains "integral part" in terms of the degree of control by and connection with a church. The regulation explains "the functions of a church" as "the ministration of sacerdotal functions and the conduct of religious worship." These distinctions and explanations have never been adequately tested in the federal courts. Indeed, there is only one case in which this regulation was subjected to serious judicial scrutiny: the Christian Brothers wine and brandy case.¹¹⁰

The Christian Brothers had hoped that the inclusion of "religious orders" within the concept of "churches" in section 170 of the 1954 Code¹¹¹ would protect them as a "church" against the section 511 tax on unrelated business income. As is already evident from the discussion of the section 511 regulation that Treasury issued in 1958, their hopes were in vain. Treasury pressed for the taxes. The Christian Brothers paid some under protest and sued for a refund. The United States District Court for the Northern District of California decided the case against the Brothers in July, 1961.

In the decision, Judge Halbert pointed out that there was a distinction between the Christian Brothers Order as a religious entity in the Roman Catholic Church and the civil law corporations that the Order

109. The Internal Revenue Service had issued a private ruling, holding that the income of WWL-TV was not subject to the unrelated business income tax. The ruling is mentioned in *De La Salle Institute v. United States*, 195 F. Supp. 891, 896, 905 (N.D. Cal. 1961)

110. *De La Salle Institute v. United States*, 195 F. Supp. 891 (N.D. Cal. 1961)

111. See notes 96-100 *supra* and accompanying text.

had created in California to carry on its activities.¹¹² De La Salle Institute had to stand on its own corporate feet. Its own by-laws characterized it as "an educational and benevolent institution."¹¹³ De La Salle Institute's corporate activities included operating a school for the training of Christian Brothers, some Catholic elementary and secondary schools, some homes for Christian Brothers, and a winery and distillery. So far as Judge Halbert was concerned, it was obvious that this kind of corporation was not what Congress had in mind by the word "church" in 1950.¹¹⁴ Moreover, Judge Halbert ruled that the events connected with the introduction of the word "church" in 1954 into section 170 of the Code were not relevant in determining the meaning of the word "church" in section 511. To support this ruling Judge Halbert relied on the fact that the committee reports directly referring to section 511 of the 1954 Code stated "that there was no substantial change in the exemption."¹¹⁵ Judge Halbert's concept of a church embraced only parish churches and entire denominations, not organizations like the Christian Brothers.¹¹⁶ Moreover, Judge Halbert agreed with Treasury that the legislative history of the unrelated business income tax in 1950 put many religious (and especially educational) functions outside the scope of "church functions." He explicitly held that the educational and religious functions of the Christian Brothers Order (not just of the De La Salle Institute corporation) were not "church functions" within the meaning of section 511.¹¹⁷

In their arguments before Judge Halbert, the Christian Brothers relied upon the private ruling that the Internal Revenue Service had issued to Loyola University, holding it exempt from the unrelated business income tax with respect to its income from WWL-TV. Judge Halbert disposed of the ruling as neither controlling nor persuasive.¹¹⁸ More importantly, he declared invalid the part of Regulation section 1.511-2(a)(3)(ii) upon which the ruling was based. That part stated that a religious order that was an integral part of a church and that was engaged in the ministration of sacerdotal functions and the conduct of religious worship was exempt from the unrelated business income tax with respect to all of its activities:

112. 195 F. Supp. at 901.

113. *Id.* at 893.

114. *Id.* a 901-02.

115. *Id.* at 906. But see text accompanying notes 101-07 *supra* for the actual statements in the 1954 committee and conference reports and a different interpretation of "church" in sections 170 and 511 by Treasury and the Internal Revenue Service.

116. 195 F. Supp. at 901, 904.

117. *Id.* at 905-06.

118. *Id.* at 905.

including those which it conducts through a separate corporation (other than a corporation described in section 501(c)(2)) or other separate entity which it wholly owns and which is not operated for the primary purpose of carrying on a trade or business for profit.¹¹⁹

Judge Halbert held this language invalid as in clear violation of the Congressional purpose in 1950 and 1954 to tax "religious, educational or charitable organizations organized under church auspices, which are not themselves 'churches.'"¹²⁰

Although Judge Halbert stated his holdings with considerable vigor, he authorized both parties to make an immediate appeal because he believed that his order in the case involved "a controlling question of law as to which there is substantial ground for difference of opinion" ¹²¹ Neither the Christian Brothers, however, nor the United States appealed the case. In anticipation of an adverse decision, the Christian Brothers had reorganized their wine and brandy business in the late 1950's to put it on a regular taxpaying basis. After losing in the district court, the Christian Brothers negotiated a settlement with the government. The Treasury did not acquiesce in Judge Halbert's invalidation of the last sentence in Regulation section 1.511-2(a)(3)(ii). The sentence remained in the regulation, and Treasury did not attempt to tax the income from WWL-TV.

With the Christian Brothers case safely out of the way, there was a period of quiet from 1961 to 1969. Although Treasury had put a crossreference in the section 170 regulations to the explanation of "church" in the section 511 regulations, there was no flare-up over the deductibility of contributions to religious orders. The most important reason for this is that very few individual taxpayers come close to donating 20%, much less 30%, of their adjusted gross income. Moreover, schools and hospitals qualified under section 170 of the original 1954 Code for the 30% limit, so there was no practical problem when an individual wished to deduct a larger contribution to a religious order than he could deduct to a religious organization that was not a "church or convention or association of churches." The donor could always give the money to one of the religious order's churches, schools or hospitals.

In the Tax Reform Act of 1969, however, Congress considerably increased the number of sections in the Code in which it makes a difference whether a religious organization is or is not a church or a convention or association of churches.¹²² Most importantly, Congress

119. Treas. Reg. § 1.511-2(a)(3)(ii), T.D. 6301, 1958-2 Cum. Bull. 223.

120. 195 F. Supp. at 905.

121. *Id.* at 906-07 n.12.

122. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 495, 496, 497, 539, 540, 545, 520.

added a new religious category to the Code: "integrated auxiliaries" of churches.¹²³ Congress also removed one religious distinction from the Code: churches and conventions or associations of churches lost their exemption from the tax on unrelated business income.¹²⁴ With regard to all of these changes except those relating to "integrated auxiliaries," there is nothing in the legislative history of the Tax Reform Act of 1969 to illuminate what Congress meant by the distinction between church and nonchurch religious organizations.

The legislative history of "integrated auxiliaries" is to be found in the Senate and conference reports with respect to the 1969 amendments to section 6033. The House version of the Tax Reform Act of 1969 completely abolished the prior mandatory exemption of all section 501(c)(3) religious organizations and all their section 501(c)(3) agencies from the requirement of filing annual financial information returns with the Internal Revenue Service. This action by the House of Representatives was consistent with the judgment by many members of Congress that more information was needed about exempt institutions, including churches and church-related agencies. When, however, the churches and other section 501(c)(3) religious organizations learned what the House of Representatives had done, they sought relief in the Senate.

The Senate chose a middle course between the pre-1969 law and the total abolition of mandatory exemptions. To achieve this result, the Senate Finance Committee substituted the phrase "churches, their integrated auxiliaries, and conventions or associations of churches" for the broad language in pre-1969 section 6033 exempting all section 501(c)(3) religious organizations and all their section 501(c)(3) agencies. The phrase "integrated auxiliaries" evolved from discussions among members of the Senate Finance Committee, the Joint Committee on Internal Revenue Taxation, and representatives of major American churches. The phrase was deliberately designed to cover more organizations than Treasury was expected to recognize as "churches or conventions and associations of churches" under the definitions it had

530, 548 (codified in sections 508(c)(1)(A), 509(a)(1) and (3), 512(b)(12) and (14), 514(b)(3)(E), 6033(a)(2)(A), 6043(b)(1) and 7605(c)). The Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 540 (codified in section 512(b)(15)) also made a special statutory provision for continuing the exemption of the income of WWL-TV from the unrelated business income tax.

123. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 495, 520, 530 (codified in sections 508(c)(1)(A), 6033(a)(2)(A)(i) and 6043(b)(1)).

124. The Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 536, subjected all section 501(a) exempt organizations (except federal instrumentalities) to the tax on unrelated business income. The National Council of Churches of Christ in the United States and the United States Catholic Conference had petitioned Congress to terminate the exemption of churches from the tax. For the text of their petition, see 15 Catholic Law. 104 (1969).

developed for that phrase in connection with the tax on unrelated business income.¹²⁵ Interestingly, although "integrated auxiliaries" occurs in conjunction with "churches and conventions or associations of churches" in several sections of the Code as amended by the Tax Reform Act of 1969,¹²⁶ it does not appear in any of the church and convention or association of churches amendments that the same law made to the tax on unrelated business income.¹²⁷

The Senate Finance Committee's choice of "integrated auxiliaries" as one of the new operative phrases in the Code was not a triumph of legislative draftsmanship. The phrase had no legal history, no established meaning, in either civil or ecclesiastical law. Moreover, the Senate Finance Committee Report to Accompany H.R. 13270 (the Tax Reform Act of 1969) makes no attempt to define "integrated auxiliaries." The Report does give some examples:

Among the auxiliary organizations to which this exemption applies are the mission societies and the church's religious schools, youth groups, and men's and women's organizations, and interchurch organizations of local units qualifying as local auxiliaries.¹²⁸

At the conference on the House and Senate versions of the Tax Reform Act of 1969, the conferees adopted the Senate amendments to section 6033. The conference report on the amendments, however, is very brief: "The integrated auxiliary organizations to which this applies include the church's religious school, youth group, and men's

125. Senator Bennett of Utah was particularly concerned that Treasury and the Internal Revenue Service would not recognize the Mormon Church "auxiliaries" as falling within the concept of "churches and conventions or associations of churches." Unlike most other American churches, the Mormon Church has an official category of "Auxiliary Organizations" in its ecclesiastical structure. The Mormon priesthood is limited to men; the auxiliary organizations provide activities mostly for women and children. The auxiliary organizations include the Women's Relief Society, the Young Men's Mutual Improvement Association, the Young Women's Mutual Improvement Association, the Primary (for children under 12 years of age), the Deseret Sunday School Union, the Genealogical Society, the Welfare Committee, and the Board of Education. For a description of the activities of these organizations, see T. O'Dea, *The Mormons* 181-85 (1957). Many other American churches have comparable organizations, but do not call them "auxiliaries." Neither the Mormon Church nor any other American church, however, uses the phrase "integrated auxiliaries." The adjective "integrated" seems to have been added to "auxiliaries" in the Senate Finance Committee deliberations in order to require a substantial connection with the parent church as a condition of exempting such organizations from filing annual financial returns.

126. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 495, 520, 530 (codified in sections 508(c)(1)(A), 6033(a)(2)(A)(i) and 6043(b)(1)).

127. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 539, 540, 545, 548 (codified in sections 512(b)(12) and (14), 514(b)(3)(E) and 7605(c)).

128. S. Rep. No. 91-552, 91st Cong., 1st Sess. 52 (1969).

and women's clubs."¹²⁹ The explanation of the 1969 changes prepared by the staff of the Joint Committee on Internal Revenue Taxation after enactment of the Tax Reform Act of 1969 simply repeats the explanation of "integrated auxiliaries" provided in the Senate Finance Committee report.¹³⁰

The Tax Reform Act of 1969 also introduced the phrase "the exclusively religious activities of any religious order" into section 6033(a)(2)(A). The phrase appears as a separate and independent clause in that paragraph thus raising the possibility that Congress intended a clear-cut distinction between "religious orders" and "churches, their integrated auxiliaries, and conventions or associations of churches." The phrase, however, does not appear in either the Senate or the House version of the Tax Reform Act of 1969. It was inserted at the last minute during the conference committee deliberations. With respect to this insertion, the conference report states:

The conference substitute . . . follows the Senate amendment except that it also exempts from the filing requirement any religious order with respect to its exclusively religious activities (but not including any educational, charitable, or other exempt activities which would serve as a basis of exemption under section 501(c)(3) if an organization which is not a religious organization is required to report with respect to such activities).¹³¹

Despite this language, Treasury and the Internal Revenue Service have made no effort since 1969 to require religious orders to report under section 6033 on their activities that are not "exclusively religious." The interpretational problems caused by the statutory language and the conference explanation are enormous, and Treasury and the Service have been deferring them in the interest of settling more important problems.¹³²

The extensive changes the Congress made in the Code by the Tax Reform Act of 1969 necessitated equally extensive changes in the

129. H.R. Rep. No. 91-782, 91st Cong., 1st Sess. 286 (1969).

130. Staff of the Joint Comm. on Int. Rev. Taxation, 91st Cong., 1st Sess., General Explanation of the Tax Reform Act of 1969, at 53 (Comm. Print 1970).

131. H.R. Rep. No. 91-782, 91st Cong., 1st Sess. 286 (1969).

132. The use of the phrase "any religious order" instead of "religious orders" in Int. Rev. Code of 1954, § 6033(a)(2)(A)(iii) suggests that the conference committee for the Tax Reform Act of 1969 was aware of the distinctions between religious orders that Treasury had drawn in the 1958 regulations on the unrelated business income tax (see text accompanying notes 106-10 supra). Thus, clause (iii) in section 6033(a)(2)(A) may be nothing more than a precaution against any application by Treasury of that distinction with respect to annual reporting requirements. There is nothing in the 1969 legislative history to indicate that Congress intended clause (iii) to repudiate its 1954 recognition that religious orders are "integral parts" of churches (see text accompanying notes 96-100 supra). As such, they should be covered by clause (i), of section 6033(a)(2)(A), and clause (iii) becomes superfluous (except as a precaution).

regulations issued under the Code. During the early 1970's, Treasury issued a large number of proposed and final regulations dealing with the 1969 changes. Some of the proposed regulations were dropped after Treasury had received persuasive objections from the public. One such regulation dealt with the meaning of "church" in section 170.¹³³

In all essentials the language of this proposed regulation on "church" in section 170 was identical with the 1958 regulation on "church" under section 511.¹³⁴ The American churches had not protested strongly against the 1958 regulation, but when they saw Treasury extending its narrow concept of church into other areas of the Code, they asked Treasury to withdraw the proposed regulation. After listening to their objections, which were based on the legislative history of section 170, the history of the churches themselves, and constitutional considerations of religious freedom and equal treatment for all churches, Treasury acquiesced.

In 1973 Treasury issued a final regulation that avoided the definitional problem in section 170 by explaining that "a church or a convention or association of churches" meant "a church or a convention or association of churches."¹³⁵ Moreover, for tax years beginning after December 31, 1969, Treasury eliminated the pre-1969 reference in the regulations under section 170 to the church regulations under the unrelated business income tax. Post-1969 amendments, however, to the section 511 regulations did not change the restrictive meaning that the 1958 regulation had established for churches and conventions or associations of churches.¹³⁶ Thus, as the matter now stands, "church" may mean one thing to the Treasury in sections 511-14 and another in section 170.¹³⁷

So far, however, as the American churches are concerned, the most important immediate question is the meaning of "churches, their integrated auxiliaries, and conventions or associations of churches" in section 6033. The churches also have serious problems with the meaning of "church," "church plan" and "church agencies" in the exemption provisions of the Employee Retirement Income Security Act

133. Proposed Treas. Reg. § 1.170A-9(a), 36 Fed. Reg. 9298 (May 22, 1971).

134. Cf. notes 106-07 *supra* and accompanying text.

135. Treas. Reg. § 1.170A-9(a) (1973), which reads as follows: "(a) Church or a convention or association of churches. An organization is described in section 170(b)(1)(A)(i) if it is a church or a convention or association of churches." All that section 170(b)(1)(A)(i) says is: "a church or a convention or association of churches."

136. Treas. Reg. § 1.511-2(a)(3)(i), (ii) and (iii), T.D. 7183, 1972-1 Cum. Bull. 155

137. Owing, however, to the many types of exempt organizations that can qualify for section 170(b)(1)(A) status, it is unlikely that there will be any significant friction between Treasury and the American churches over the meaning of "a church or a convention or association of churches" in section 170(b)(1)(A)(i).

of 1974.¹³⁸ These pension plan problems, however, are not as urgent as the section 6033 problem, because the transitional period that Congress provided for church agencies (as distinguished from churches) to adjust their pension plans to ERISA runs until December 31, 1982.¹³⁹ After that date, "church plans" will still be fully exempt (unless the church elects coverage);¹⁴⁰ "church agency plans" will not.¹⁴¹

Even though Congress used "church agencies" rather than "integrated auxiliaries" in the language of ERISA, American churches have good reason to be concerned about an "overflow" of the meaning of "church" in section 6033 into the meaning of "church" in the ERISA sections of the Code. In the amended regulations under section 6033, Treasury has classified a seminary as an "integrated auxiliary."¹⁴² The implication is that the seminary is not a church itself or an integral part of a church. If the same definition is carried over into the ERISA sections of the Code, a "church plan" that included the administrators, faculty and other employees of the seminary might well lose its exemption from the funding, vesting and participation requirements of ERISA.¹⁴³

Congress' most recent contribution to the meaning of "integrated auxiliaries" comes from the legislative history of the Tax Reform Act of 1976.¹⁴⁴ The contribution, however, does nothing to clarify the meaning of the term. What it does do is illustrate the subtle and complex maneuvers that tax lobbyists of all kinds must engage in to secure their objectives.

The Tax Reform Act of 1976 adds a new section, 501(h), to the Internal Revenue Code. This section, which establishes new rules for the effect of lobbying activities on the exempt status of most types of section 501(c)(3) organizations, is the fruit of many years of effort by many such organizations. Prior to the Tax Reform Act of 1976, any section 501(c)(3) organization stood to lose its exempt status if it devoted a "substantial part" of its activities to efforts to influence

138. Pub. L. No. 93-406, 88 Stat. 901, 912, 919, 926, 944 (codified in sections 401(c) and (d), 411(e)(1)(b), 412(h)(4), 414(e)(1)(A) and (3), and 6057(c)).

139. Int. Rev. Code of 1954, § 414(e)(3)(C).

140. Id. § 410(d).

141. The conference report on ERISA makes it clear that church-related schools and hospitals fall within the concept of "church agency," but does not deal with the question under what circumstances such institutions are to be considered as "integral parts" of a church. H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 261 (1974).

142. Treas. Reg. § 1.6033-2(g)(5)(iv) (1977).

143. Int. Rev. Code of 1954, § 414(e)(3)(C).

144. Pub. L. No. 94-455, 90 Stat. 1520.

legislation.¹⁴⁵ No one, however, was quite sure how to measure the relative substantiality of such activities against the total activities of an exempt organization.¹⁴⁶ During the student anti-Vietnam war demonstrations of the 1960's, colleges and universities were particularly concerned about the effect on their tax-exempt status of making their facilities available for such demonstrations. Similarly, many exempt organizations that wanted to help the civil rights movement were cautioned by their attorneys to support judicial enforcement of existing laws but to give only carefully limited assistance to promote new legislation. And in many instances in which proposed legislation would significantly affect the exempt institutions themselves, it was not entirely clear how far the organizations could go in supporting or opposing the legislation without seriously jeopardizing their status as exempt section 501(c)(3) organizations.

Not all section 501(c)(3) organizations, however, wanted clarification of the existing 501(c)(3) prohibition against devoting a "substantial part" of an organization's activities to efforts to influence legislation. In particular, most American churches preferred living with the existing ambiguities until such time as they might persuade Congress to remove the restriction altogether or the courts to declare the restriction unconstitutional.¹⁴⁷ The churches, therefore, generally opposed the bills that were introduced in Congress to clarify the "substantial part" language in section 501(c)(3).

The other section 501(c)(3) organizations, however, were successful in persuading the 94th Congress that something should be done, at least for them. Accordingly, in an effort to satisfy both groups, Congress enacted new section 501(h), which is entitled "Expenditures by Public Charities to Influence Legislation." Section 501(h)(5) excludes from the new rules all churches and conventions or associations of churches, their integrated auxiliaries and all members of an "affiliated group of organizations"¹⁴⁸ if one of the members of the group is a church, a convention or association of churches, or an

145. The relevant part of the criteria for exemption in Int. Rev. Code of 1954, § 501(c)(3) is: "no substantial part of the activities of which [organization] is carrying on propaganda, or otherwise attempting, to influence legislation"

146. See 1 S. Weithorn, *Tax Techniques for Foundations and Other Exempt Organizations* § 34.06 (1975).

147. The constitutionality of the restriction, as applied to a section 501(c)(3) religious organization, was upheld in *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973). In the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1722, Congress explicitly withheld approval or disapproval of this decision.

148. Int. Rev. Code of 1954, § 4911(f)(2) defines affiliated groups of organizations. This section, like section 501(h), was added to the Code by the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1726, 1720.

integrated auxiliary thereof. Section 501(h)(3) permits most other section 501(c)(3) organizations¹⁴⁹ to elect coverage under the new rules relating to expenditures by such organizations to influence legislation.

H.R. 13500, which eventually became new Code section 501(h), did not really start moving through the 94th Congress until after the Internal Revenue Service had proposed the new regulation on "integrated auxiliaries" under section 6033.¹⁵⁰ Accordingly, the House Ways and Means Committee, the Senate Finance Committee and the Conference Committee had an opportunity to express their agreement or disagreement with the interpretation given in the proposed regulation. To the consternation of the American churches, the House Ways and Means Committee included the following language in its report to accompany H.R. 13500:

Your committee's bill excludes from the new rules not only churches and conventions or associations of churches, but also integrated auxiliaries of churches or of conventions or associations of churches. Because proposed regulations have recently been published regarding the meaning of the term "integrated auxiliary" and because that term is used in this bill, your committee wishes to make it clear—in agreement with the conclusions of the proposed regulations—that theological seminaries, religious youth organizations, and men's fellowship associations which are associated with churches would generally constitute integrated auxiliaries. Your committee also intends (in agreement with the conclusions in the proposed regulations) that hospitals, elementary grade schools, orphanages, and old-age homes are organizations which frequently are established without regard to church relationships and are to be treated for these purposes the same as corresponding secular charitable, etc., organizations;] that is, such entities are not to be regarded as "integrated auxiliaries." (See H. Rept. 91-782, p. 286, the conference report on H.R. 13270, the Tax Reform Act of 1969.) However, in a given case, a hospital, school, orphanage or home may nevertheless be excluded from election under this bill because it is a member organization of an affiliated group which includes a church. Members of affiliated groups, which include churches, et cetera, are treated the same as churches, et cetera, for purposes of this bill.¹⁵¹

Part of the lobbyist's expertise is to get language into committee

149. Int. Rev. Code of 1954, § 501(h)(4), which defines the organizations permitted to elect coverage, speaks in terms of section 170(b)(1)(A) and section 509(a)(2) and (3) organizations, rather than in terms of section 501(c)(3) organizations. Most section 501(c)(3) organizations, however, other than those disqualified by section 501(h)(5) and private foundations, will be able to meet the criteria of section 501(h)(4).

150. Proposed Treas. Reg. § 1.6033-2, 41 Fed. Reg. 6073 (Feb. 11, 1976). For a discussion of this proposal, see notes 48-61 *supra* and accompanying text.

151. H.R. Rep. No. 94-1210, 94th Cong., 2d Sess. 15-16 (1976). The reference in the text to the conference report on the Tax Reform Act of 1969 may be somewhat misleading. All that the conference report on the Tax Reform Act of 1969 says about "integrated auxiliaries" is: "The integrated auxiliary organizations to which this [section] applies include the church's religious school, youth group, and men's and women's clubs." H.R. Rep. No. 91-782, 91st Cong., 1st Sess. 286 (1969); see text accompanying note 129 *supra*.

reports that he cannot succeed in getting into the actual text of the laws. Obviously, the parties interested in restricting the meaning of "integrated auxiliaries" were highly successful in this House report. The Senate report on the provision that eventually became section 501(h) does not contain similar language or any language explaining the meaning of "integrated auxiliaries."¹⁵² The churches, however, were successful in counterattacking the House report by persuading the conference committee to include the following language in the conference report on H.R. 10612, the Tax Reform Act of 1976:

Conference agreement.—The conference agreement follows the Senate amendment. The conferees observe that . . . the report of the Committee on Finance on this provision . . . is an abbreviated version of the report of the Committee on Ways and Means accompanying H.R. 13500 (H. Rept. 94-1210). The conferees do not wish the passage of this provision to be construed as a rejection of the matters contained in the House Committee Report accompanying H.R. 13500 and therefore specifically incorporate the additional matters contained in such report and not in the report of the Committee on Finance by reference, except for the following paragraph contained in the House report accompanying H.R. 13500 with respect to which the conferees specifically take no position: [repeating the language quoted above from the House report].¹⁵³

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

As Judge Halbert said in the *Christian Brothers* case with respect to the "religious order" maneuvers in the legislative history of the original text of the Internal Revenue Code of 1954:

Second, there are various kinds of legislative history—some legislative history gives a good indication of legislative intent, and some does not. . . . Committee reports made well after the enactment of legislation cannot determine the meaning of that legislation [citations omitted].¹⁵⁴

It is unfortunate that the legislative history of the church distinctions in the Code ends on such an inconclusive note. It is time for Congress to address itself to the subject in a systematic and comprehensive way, so that the wasteful skirmishing between the churches and federal tax officials will come to a halt. The skirmishing produces no revenue or useful data for the government, heightens the inevitable tension between church and state, and distracts both churchmen and tax officials

152. S. Rep. No. 94-938, 94th Cong., 2d Sess., Pt. 2, at 79 (1976).

153. H.R. Rep. No. 94-1515, 94th Cong., 2d Sess. 533-34 (1976).

154. *De La Salle Institute v. United States*, 195 F. Supp. 891, 905 (N.D. Cal. 1961).

from rendering more useful services to their constituencies and to the general public. In the hope of contributing to a fair and constitutional clarification of the church distinctions in the Code, the following conclusions and recommendations are offered.

V. CONCLUSIONS AND RECOMMENDATIONS

There is little in the official legislative history of the Code to explain the reasons why Congress has introduced so many religious distinctions into the Code. Nevertheless, it is possible to discern, at least vaguely, four separate considerations that may have been important to Congress:

- (1) preservation of the fiscal separation of church and state;
- (2) accommodation of the Code, where possible without significant net expense to the government, to individuals in special religious situations and to religious organizations with a distinctive economic system;
- (3) continuation of the tradition, so far as the basic tax exemption is concerned, of classifying religious organizations in common with exempt nondenominational and secular institutions;
- (4) innovation, so far as certain corollaries of tax exempt status are concerned, by creating new classifications that will equalize the tax status of church-related institutions that serve the general public (*e.g.*, hospitals) with the tax status of their secular counterparts but that will not eliminate all distinctions between churches and exempt secular organizations.

The first of these considerations may or may not have been important in the actual deliberations of Congress. The second and the third demonstrably were.¹⁵⁵ It is the fourth consideration, however, that seems to have been the foundation of most of the church distinctions that Congress has introduced into the Code through the 1950 amendments, the Tax Reform Act of 1969, the Employee Retirement Income Security Act of 1974, and the Tax Reform Act of 1976.

The tax purpose involved in this fourth consideration seems unobjectionable from a constitutional point of view and probably desirable as a matter of public policy. There is no necessity to give all church-related institutions the best of both possible tax worlds. On the other hand, by attempting to distinguish between church-related institutions on the basis of their "churchness" or degree of church-relatedness, Congress, Treasury and the Internal Revenue Service have doomed a

155. *E.g.*, the inclusion of "religious" in Int. Rev. Code of 1954, § 501(c)(3), the treatment of "religious and apostolic organizations" in section 501(d), and the exemption of the Amish and similar sects from Social Security taxes in section 1402(h).

legitimate legislative purpose to certain practical frustration¹⁵⁶ and possible unconstitutional applications. The American churches are extremely complex organizations with widely different structures, significantly different self-definitions of their religious missions, and an enormous variety of traditional functions.

It should be easier than it has been for Congress and federal tax officials to understand the utter astonishment of the American churches at being told that their educational, charitable and welfare organizations are not integral parts of their church structures. Most American churches would prefer to retain the traditional exemption of these institutions from having to file annual financial reports with the Internal Revenue Service. But they would not fight the imposition of such a reporting requirement nearly as hard if the requirement were imposed by legislative language that did not distinguish between the traditional component parts of American churches in terms of their "churchness" or "church-relatedness."¹⁵⁷

If, after careful consideration,¹⁵⁸ Congress judges it desirable to

156. In particular, the 1950 Congressional distinction between "churches" and "organizations under church auspices" (see notes 78-87 *supra* and accompanying text) is administratively useless in the light of the actual complexities of church organization in the United States. If "church" in this distinction is taken in the sense of "denomination," as the Tax Court has suggested in *Chapman v. Commissioner*, 48 T.C. 358 (1967) (see discussion in note 165 *infra*), the distinction becomes totally meaningless because many organizations "under church auspices" are as much a part of any given denomination as its local congregations. If "church" is taken in the sense of an organization whose functions include "the ministrations of sacerdotal functions and the conduct of religious worship" (the sense suggested by Treasury in 1958; see text accompanying note 108 *supra*), a great variety of organizations "under church auspices" still qualify as "churches." If "church" is taken in the sense currently given to it by the Internal Revenue Service (see note 164 *infra*), organizations that most American churches separately incorporate "under church auspices," such as seminaries, belong among the component parts of the "church" itself. Because the distinction has proven administratively useless, Congress should abandon it permanently.

157. Many church agencies already routinely make financial reports to various state and federal agencies, either in connection with applications for governmental contracts, grants or loans or in connection with the disbursement of governmental funds. American church agencies are understandably reluctant to have to file another and distinctly different type of report with the Internal Revenue Service, but many would be willing to do so if their church status and functions were not being denied by the laws and regulations imposing the reporting requirement.

158. Many factors should be carefully considered before Congress decides to impose any new reporting requirements on any classes of exempt organizations. Paperwork is expensive in time and money, both for exempt organizations and the government. In the world of commercial business, Richard D. Wood, Chairman of the Board of Eli Lilly and Company, recently testified to the Commission on Federal Paperwork that Lilly spends "more man-hours filling out government reports than it does in research for cancer and heart disease combined," and that the cost of complying with federal paperwork requirements added "about 50 cents to the price of every prescription for a Lilly medicine" sold in the United States. *N.Y. Times*, June 21, 1976, at 28, col. 3. Any policy decision to impose more federal paperwork in the business or nonprofit world should be justified by a careful cost/benefit and priorities analysis. Financial and informa-

impose the reporting requirements of section 6033 on church-related colleges, universities, hospitals, orphanages, old age homes and similar charitable, educational and welfare organizations, Congress should revise section 6033 along the following lines. Churches and all of their traditional component organizations would remain exempt from the reporting requirements except for those institutions that both serve the general public and derive a substantial percentage of their current operating budget from state or federal sources.¹⁵⁹ It should make no difference, for reporting requirement purposes, whether the charitable, educational or welfare organization is separately incorporated from the parent church or directly owned and operated by the church corporation.¹⁶⁰ If, however, the charitable, educational or welfare organization is not separately incorporated, any audit of the financial return should be limited to the organization with respect to which it was filed.¹⁶¹

Similar adjustments should be made in other sections of the Code where the purpose of the church distinctions is to treat church-related charitable, educational and welfare organizations like their secular exempt counterparts. In this way, the Code will cease to threaten the traditional freedom of the American churches to define their mission and functions within acceptable public policy limits. Congress will achieve its purpose without truncating the churches.

Until Congress has made such a revision of the church distinctions in the Code, the Secretary of the Treasury should use his discretionary authority¹⁶² to exempt from the annual filing requirements all section 501(c)(3) religious organizations (other than private foundations) that are covered by a group exemption letter issued to a central or parent church organization.¹⁶³ In the case of those churches that do not have such group exemption letters, Treasury should exempt all organizations

tional reports to the government are obviously necessary in some cases and beneficial in many. See Weaver, *That Crusade Against Federal Paperwork Is a Paper Tiger*, 94 *Fortune* 118, 120-21 (November, 1976). But the temptation of some bureaucrats to build paper empires needs perennial resistance.

159. The percentage should be specified in the statute, to avoid useless fights about the meaning of "substantial." It would seem reasonable to regard 15% or more as "substantial."

160. Congress should follow the precedent of the treatment of church-related schools with regard to the excise tax on communications. See note 8 *supra*.

161. In this respect, Congress should follow the precedent in Int. Rev. Code of 1954, § 7605(c) (carefully limited audit of churches in connection with the tax on unrelated business income). Note, however, that Treasury retains a broad audit power under section 6001 to determine taxpayer compliance with the Internal Revenue Code.

162. Int. Rev. Code of 1954, § 6033(a)(2)(B).

163. Treasury has already done so, through the Commissioner of Internal Revenue, with respect to taxable years beginning in 1975. Fed. Reg. Doc. 76-12211, 41 Fed. Reg. 17553 (April 27, 1976).

certified by the churches as component parts of their structure. Any resulting temporary loss of financial data about exempt religious institutions will be more than offset by the abatement of the steadily increasing tension between the American churches and Treasury and Internal Revenue Service officials. When Congress has redrawn the church distinctions in the Code properly, there will be ample time to accumulate the desirable financial data.

In the meantime, the Internal Revenue Service must continue to make day-by-day determinations (for various tax purposes) of whether a particular religious organization is a church or not. Over the last twenty years the National Office of the Service has developed a set of criteria for answering this question.¹⁶⁴ To one familiar with religious and tax developments in the last twenty years, these criteria seem based much more on the Service's defensive tactical policy than on empirical and traditional concepts of churches. In effect, the criteria require a religious organization to be a highly developed denomination before it can qualify as a church.¹⁶⁵ There are two difficulties with this requirement. It tends to eliminate new, small churches from the tax treatment that large, established denominations receive; and it ignores the structural complexity of the established denominations themselves. As one Baptist spokesman testified to Congress in 1950:

There is no Baptist Church in the sense in which we speak of the Lutheran Church or

164. The criteria are set out in B. Hopkins & J. Myers, *The Law of Tax-Exempt Organizations* 87 (1975). The criteria are: "(1) a distinct legal existence, (2) a recognized creed and form of worship, (3) a definite and distinct ecclesiastical government, (4) a formal code of doctrine and discipline, (5) a distinct religious history, (6) a membership not associated with any church or denomination, (7) a complete organization of ordained ministers ministering to their congregations and selected after completing prescribed courses of study, (8) a literature of its own, (9) established places of worship, (10) regular congregations, (11) regular religious services, (12) Sunday schools for the religious instruction of the young, and (13) schools for the preparation of its ministers." Obviously, these criteria are well constructed to exclude "instant churches," itinerant evangelists, religious orders and ecumenical organizations. Equally obviously, however, they go far beyond the traditional and empirical criteria of creed, cult, congregation, clergy and continuity. In some private rulings that I have seen, the Internal Revenue Service has not insisted that an organization satisfy all the criteria in order to qualify as a "church," but it has insisted upon a high score on the profile that the criteria construct.

165. The Service has some support for this requirement in *Chapman v. Commissioner*, 48 T.C. 358, 363 (1967): "It is our opinion that Congress did not intend that the word 'church' be used in a generic or universal sense. We think that this conclusion is buttressed in particular by the fact that in explaining the deletion of the phrase 'or a religious order' the concept of 'church' [in section 170(b)(1)(A)(i)] appears to be synonymous with the concept of 'denomination.' In addition, phrases appearing throughout the quoted legislative history, such as 'under church auspices' and 'as integral parts of the church' lend credence to our view that the term is intended to be synonymous with the terms 'denomination' or 'sect' rather than to be used in any universal sense. This is not to imply, however, that in order to be constituted a church, a group must have an organizational hierarchy or maintain church buildings."

the Episcopal or Methodist or Catholic Church. Every local Baptist church is completely autonomous. It is independent of every other Baptist church. They have no central organization and recognize no ecclesiastical authority or overlordship.¹⁶⁶

If any single Baptist congregation were to apply for a ruling that it is a "church" for federal tax purposes, it would not be able to satisfy many of the criteria that the Service has been using. The single congregational type of church simply does not have, taken in isolation, the complex structure and functions that the criteria demand.

This is not to suggest, of course, that the Service would ever hold that a Baptist or other congregational church is not a "church" for federal tax purposes. Rather, the congregational type of structure illuminates the necessity for recognition by the Service of the fact that most American churches have component parts. It is impossible to isolate the "church" from these "parts" without mutilating the church. Some parts will be directly concerned with preaching and worship, some with administration, some with the formation of church leaders and the religious education of the young, and still others with the rest of the traditional church functions in the United States. In some churches these parts will be separate corporations; in others they will not. But all of the churches rightly regard all of the parts as integral to the identity of the church.

The Internal Revenue Service would probably concede as much, if it were not for certain "fringe problems" connected with the churches and the federal tax laws. There is definitely a conceptual and historical problem, for example, in determining whether an organization like Billy Graham's "Christian Crusade" is a church for tax purposes.¹⁶⁷ The absence of a stable congregation and the fact that the organization crosses denominational lines are significant departures from traditional concepts of a church.

The most important fringe problems, however, are concerned with the fairly recent arrival on the American scene of new religious organizations that draw their inspiration from atheism, from Eastern religions or from a syncretism of Eastern and Western religions.¹⁶⁸ Some of these organizations seem bona fide; others may well be fraudulent and spurious. Some, like the Universal Life Church of Modesto, California, were founded as anti-churches, deliberately designed to exploit the tax status of churches to the fullest in the hope of

166. Hearings on H.R. 8920 Before the Committee on Finance, United States Senate, 81st Cong., 2d Sess. 216 (1950).

167. Compare *Mordecai F. Ham Evangelistic Ass'n v. Matthews*, 300 Ky. 402, 189 S.W.2d 524 (1945).

168. E.g., the Divine Light Mission (led by Guru Maharaj Ji), the Hare Krishna movement, and the Unification Church (led by Dr. Sun Myung Moon).

eventually persuading the Congress and the states to terminate all religious tax exemptions.¹⁶⁹

Some of these new religious organizations have been causing problems for the Internal Revenue Service and for traditional religious orders by forming religious orders of their own in an effort to secure the benefits of the "vow of poverty" ruling¹⁷⁰ and to avoid withholding on wages and the payment of Social Security taxes.¹⁷¹ The Internal Revenue Service has been tenaciously uncooperative with these attempts. Mindful, however, of the constitutional mandate to treat all religions equally, the Service has compensated by tightening up on the traditional religious orders.¹⁷²

There are no simple solutions to the kinds of problems the Internal Revenue Service is facing with the "fringe" religions and churches. Indeed, there may not be any solution at all except to wait for time to winnow out the true from the false or at least the sincere from the fraudulent. In any event, it clearly is not the function of the Internal Revenue Service, or of any governmental agency, to protect the American public from new messiahs. Such protection, if protection be needed, is firmly committed by the religion clauses of the first amendment to the people, not to the federal government or the states.

To the extent that Congress, the Treasury and the Internal Revenue Service may have been trying in recent years to discourage new religions and new churches, their action is unconstitutional. Such official discouragement becomes particularly objectionable when it takes the form of a general retrenchment on well established and demonstrably bona fide religious orders and churches. In the day-by-day administration of the Internal Revenue Code, the Service should rely on its general auditing power under section 6001 and on the criteria (especially the prohibition against private inurement of funds) in section 501(c)(3). And Congress, in its efforts to respect traditional relationships between the American churches and the federal government and at the same time equalize the tax treatment of certain types

169. Rev. Kirby Hensley, the founder of the Universal Life Church, gave this explanation of the origin and purpose of the church in a television interview on "Midday" (WNEW-TV, New York) on October 6, 1976. The Universal Life Church's claim to federal tax status as a church was upheld in *Universal Life Church, Inc. v. United States*, 372 F. Supp. 770 (E.D. Cal. 1974). On April 13, 1976 the Service issued a private ruling to the Universal Life Church recognizing its status as a church for federal tax purposes.

170. O.D. 119, 1 Cum. Bull. 82 (1919). This decision attributes compensation paid for the services of a member of a religious order as a parish priest to the order's income, not to the individual member's income.

171. See note 27 *supra*.

172. E.g., Rev. Rul. 76-323, Int. Rev. Bull. No. 1976-35, at 5 (Aug. 30, 1976); Rev. Rul. 76-341, Int. Rev. Bull. No. 1976-36, at 13 (Sept. 7, 1976).

of church institutions with their secular counterparts, should redraw the church distinctions in the Code in a way that will not amputate charitable, educational and welfare activities from the federal tax concept of a "church."