

THE LAW AND FINANCIAL TRANSPARENCY IN CHURCHES: RECONSIDERING THE FORM 990 EXEMPTION

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Most tax-exempt organizations are required to file the IRS Form 990, an information return that is open to the public. The Form 990 is used by watchdogs and donors to learn detailed financial information about charities. However, churches are exempt from filing the Form 990 and need not disclose any financial information to the IRS, the public, or their donors. In December 2012, the Evangelical Council for Financial Accountability recommended to Senator Charles Grassley that Congress should preserve the exemption, despite recent financial scandals at churches.

Examining the legislative history, this Article argues that the primary function of the information return has become its utility to donors, and policymakers have recognized the role that public access can play in keeping nonprofits honest and efficient. Unfortunately, because churches do not have to be transparent or accountable, few of them are.

Using research and insights from sociology, this Article contends that because of their opacity and the unique nature of religious authority, churches are more likely to foster and shelter malfeasance. Churchgoers are unlikely to challenge leaders because doing so can endanger their position in the religious community, making it imperative that transparency be mandated by outside authorities. Ironically, increased transparency may actually be good for churches because, as studies suggest, it is likely to increase donations and because, by minimizing opportunities for financial improprieties, it may preserve the religious experience of churchgoers. In addition, transparency is consistent with the teaching of many Christian leaders and with the expressed preferences of a large portion of churchgoers.

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INTRODUCTION

Donors can see how charitable organizations spend their contributions by visiting Internet sites that post extensive financial information about these entities.¹ On these websites, donors can examine how much each charity pays its executives, what percentage of its money goes to overhead, how much it gives to each cause it supports, how much it pays fundraisers, and a host of other data useful for evaluating the charity. Charity watchdogs and the press also use this information to monitor tax-exempt organizations, asking follow-up questions and exposing corruption when they find it. These websites have access to this information because nonprofits are required to file publicly available returns with the Internal Revenue Service (IRS).

The idea that publicity will encourage honest dealing is the chief rationale behind the law that requires each exempt organization to release its Form 990, Return of Organization Exempt from Income Tax.² As the future Justice Louis Brandeis famously wrote, “Sunlight is said to

¹ The most well-known websites are GUIDESTAR, <http://guidestar.org>, which obtains and posts the actual Forms 990 submitted to the IRS, and CHARITY NAVIGATOR, <http://www.charitynavigator.org>, which uses information from the Form 990 to post summary information and ratings for many major charities.

² Section 6033 of the Internal Revenue Code requires nonprofits organized under section 501(a) to file annual “information returns” with the IRS that disclose details about the organizations’ gross income, revenue sources, assets, liabilities, net worth, expenses, disbursements related to exempt purposes, and compensation paid to directors, officers, and certain key employees. Treas. Reg. § 1.6033-2(a); IRS Form 990, Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2012) [hereinafter IRS Form 990]. Under current law, there are only three exceptions to this rule: (1) “churches, their integrated auxiliaries, and conventions or associations of churches”; (2) organizations whose gross receipts do not normally exceed \$5,000; and (3) “the exclusively religious activities of any religious order.” I.R.C. § 6033(a).

be the best of disinfectants; electric light the most efficient policeman.”³ The IRS counts on this electric police force to monitor the hundreds of thousands of existing charities that it cannot hope to oversee on its own.

Today, more than 950,000 public charities are registered with the IRS, in addition to almost 100,000 private foundations and nearly 500,000 other types of nonprofit organizations.⁴ These public charities control \$2.71 trillion in assets and have annual revenues of \$1.51 trillion.⁵ Donors gave \$298 billion to nonprofits in 2011.⁶ The largest percentage of this giving, thirty-two percent, went to religious organizations.⁷ In theory, the IRS can use the Form 990 as the basis for an audit of these organizations, ensuring that nonprofit insiders are not using their favored tax status to enrich themselves at the expense of taxpayers and donors. Donors and the press also use this information to monitor the efficiency and commitment of nonprofits. The Form 990 facilitates the process of maintaining an ethical and effective tax-exempt sector.

However, there is one giant exception to this financial transparency regime: the more than 330,000 churches in the United States.⁸ In 2010, contributions to Christian churches alone were estimated to total more than \$34 billion.⁹ For the most part, neither the IRS nor the public has any idea what these churches¹⁰ are doing with the donations they receive

³ LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1914).

⁴ *Quick Facts About Nonprofits*, URB. INST., NAT’L CENTER FOR CHARITABLE STAT., <http://nccs.urban.org/statistics/quickfacts.cfm> (last visited Feb. 7, 2013).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* This share includes giving both to churches and to other religious organizations.

⁸ NAT’L COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., *YEARBOOK OF AMERICAN & CANADIAN CHURCHES 2012* 377 (2012) (reflecting numbers from 2010).

⁹ *Id.* at 386.

¹⁰ This paper exclusively uses the word “church” and not temple, synagogue, or mosque because it is the term used in the Internal Revenue Code. The Code does not define “church,” nor do the Treasury Regulations, but the IRS has developed fourteen criteria that it uses to determine whether an entity qualifies as a church. These criteria were originally announced in a 1977 speech by the IRS Commissioner and have since been adopted by IRS manuals. BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 316 (9th ed. 2007). Some courts have followed these criteria in determining the existence of a church. *See, e.g.*, *Lutheran Soc. Serv. of Minn. v. United States*, 758 F.2d 1283, 1286–87 (8th Cir. 1985). The Tax Court has explicitly declined to adopt the Service’s criteria as a test, while acknowledging that they may be “helpful.” *Found. of Human Understanding v. Comm’r*, 88 T.C. 1341, 1358 (1987). The fourteen 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 other church or denomination;
- (7) an organization of ordained ministers;
- (8) ordained ministers selected after completing prescribed studies;
- (9) a literature of its own;
- (10) established places of worship;
- (11) regular congregations;
- (12) regular religious services;
- (13) Sunday schools for religious instruction of the young; and
- (14) schools for the preparation of its ministers.

because, under Internal Revenue Code section 6033, churches are exempt from the requirement to file a Form 990. In fact, at many churches, donors themselves do not even know what is happening to their money.

As a group, churches have less oversight than any other major institution in America today. Although some churches have voluntarily implemented different accountability mechanisms, others remain stand-alone organizations centered on magnetic personalities who control the purse strings and exercise tremendous sway over congregants through their charismatic leadership. Unlike at other nonprofits, church leaders can exert ostensible religious authority over their members. Some even point to passages in the Bible or other religious texts to argue that God has put them in their positions of authority and that their congregants have a God-appointed duty to submit to them. At the same time, some of these leaders are using charitable gifts to enrich themselves, pushing the legal boundaries of what is considered “reasonable compensation.”¹¹

In 2007, Senator Chuck Grassley sent letters to the leaders of six large Christian churches asking them to voluntarily disclose information that would normally appear on the Form 990.¹² Grassley,

Id. It is understood that not all criteria must be met, and the Service has left itself considerable discretion by noting that it will also consider “[a]ny other facts and circumstances which may bear upon the organization’s claim for church status.” *Id.* See generally Charles M. Whelan, “Church” in the Internal Revenue Code: The Definitional Problems, 45 *FORDHAM L. REV.* 885 (1977) (explaining how “church” was defined prior to the IRS’s fourteen criteria). Because churches still dominate the religious landscape in America today, a great deal more has been written about them, and this paper relies on these sources. However, many of the same policy considerations may also apply to mosques, synagogues, and other houses of worship that qualify as “churches.” But see Jeff Brumley, *Experts Say Financial Transparency, Accountability Key to Church Health: If Money Is Mishandled, the Effects Can Give a Bad Name to Entire Sects.*, *FLA. TIMES-UNION*, Aug. 16, 2009, at A1 (noting that many more mosques and synagogues are run by independent boards of directors).

¹¹ The Code prohibits charities from engaging in transactions that constitute private inurement. I.R.C. § 501(c)(3). In determining whether a private inurement transaction occurred, courts have considered factors such as “the lack of evidence that necessary services have been performed, the payment of compensation on an irregular basis, and payments that reflect not a contractual compensation arrangement, but rather a trustee’s need for funds.” DAVID G. SAMUELS & HOWARD PIANKO, *NONPROFIT COMPENSATION, BENEFITS, AND EMPLOYMENT LAW* 26 (1998). Charities can also be penalized for excess benefit transactions in which the economic benefit conferred on an insider exceeds the value of consideration. I.R.C. § 4958(c)(1)(A). See generally SAMUELS & PIANKO, *supra*, at 15–42. The Treasury Regulations define “reasonable compensation” as “the amount that would ordinarily be paid for like services by like enterprises (whether taxable or tax-exempt) under like circumstances.” *Treas. Reg.* § 53.4958-4(b)(1)(ii)(A).

¹² Press Release, Senator Chuck Grassley, Grassley Seeks Information from Six Media-based Ministries (Nov. 6, 2007), http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=12011. The ministries to which Grassley wrote were: Randy and Paula White of Without Walls International Church and Paula White Ministries of Tampa, Florida; Benny Hinn of World Healing Center Church, Inc. and Benny Hinn Ministries of Grapevine, Texas; David and Joyce Meyer of Joyce Meyer Ministries of Fenton, Missouri; Kenneth and Gloria Copeland of Kenneth Copeland Ministries of Newark, Texas; Bishop Eddie Long of New Birth Missionary

then the ranking member of the Senate Finance Committee, explained the purpose of his inquiry in a letter to each ministry:

Historically, Americans have given generously to religious organizations, and those who do so should be assured that their donations are being used for the tax-exempt purposes of the organizations. Recent articles and news reports regarding the possible misuse of donations made to religious organizations have caused some concern for the Finance Committee. Since your organization is not required to file Form 990 with the Internal Revenue Service, we are requesting that you answer the following questions and provide the following information for our review.¹³

The Iowa senator told the *New York Times* that the Senate Finance Committee selected the six churches based on investigative reports by local newspapers and tips from charity watchdog groups.¹⁴ However, he said there was nothing “magic” about the six, and the number could have been higher.¹⁵ Media reports about these ministries included lavish expenditures such as corporate jets, Rolls Royces, and \$23,000-marble-topped commodes.¹⁶

Despite the pressure from Grassley and Senator Max Baucus, only two of the churches timely responded to the senators’ request.¹⁷ Three others provided late and incomplete responses, and one refused to give any information.¹⁸ On January 6, 2011, Senator Grassley’s office released a report on the activities of the six churches that highlighted issues for further discussion.¹⁹ At the same time, he asked the Evangelical Council for Financial Accountability (ECFA) to consider the issues raised in his report and to make recommendations about how to address them.²⁰ In response, the ECFA formed the Commission on Accountability and

Baptist Church and Bishop Eddie Long Ministries of Lithonia, Georgia; and Creflo and Taffi Dollar of World Changers Church International and Creflo Dollar Ministries of College Park, Georgia.

¹³ Letter from Chuck Grassley, U.S. Senator, to Randy and Paula White, Without Walls Int’l Church (Nov. 5, 2007), available at <http://grassley.senate.gov/releases/2007/110620071.pdf>. The other letters are also available on Grassley’s website. Press Release, Senator Chuck Grassley, *supra* note 12.

¹⁴ Laurie Goodstein, *Senator Questioning Ministries on Spending*, N.Y. TIMES, Nov. 7, 2007, at A21.

¹⁵ *Id.*

¹⁶ *Id.*; Press Release, Senator Chuck Grassley, *supra* note 12.

¹⁷ Neela Banerjee, *Senator Awaiting Evangelistic Ministries’ Finance Records*, N.Y. TIMES, Dec. 24, 2007, at A14.

¹⁸ Press Release, Senator Chuck Grassley, Grassley Praises Ministry Accreditation by Evangelical Council for Financial Accountability (Mar. 12, 2009), http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=19780.

¹⁹ Press Release, Senate Finance Committee, Grassley Releases Review of Tax Issues Raised by Media-based Ministries (Jan. 6, 2011), <http://www.finance.senate.gov/newsroom/ranking/release/?id=5fa343ed-87eb-49b0-82b9-28a9502910f7>.

²⁰ *Id.*

Policy for Religious Organizations, which consists of representatives from various religious and other tax-exempt organizations.²¹

In December 2012, the Commission released a report in which it recommended that Congress “never pass legislation requiring churches to file Form 990 or any similar information return.”²² Instead, the Commission advised that “[c]hurches should, as a best practice, establish appropriate measures to verifiably demonstrate” financial oversight.²³ In other words, the Commission proposed the status quo.

This Article proceeds in four parts. Part I recounts the evolution of the current law mandating information returns and explains why churches have been exempt. The information return was first enacted as a precedent to the unrelated business income tax, but its purpose has evolved substantially since that time. The current law mandating information returns has two chief goals: (1) enabling the IRS to ensure that tax-exempt entities comply with the law; and (2) providing the public with information it needs to hold nonprofits accountable. These purposes apply with equal force to both churches and other tax-exempt organizations.

Part I also considers why Congress has failed to amend the statute to require churches to file a Form 990. Following several notable financial scandals at churches, religious leaders have come under attack by the media and have been questioned by Congress. At several times, bills have been drafted in Congress—or even passed by the House—that would have removed the exemption and required churches to file a Form 990. Yet the exemption has survived—not because of sound policy considerations but because doing anything that could conceivably be construed as attacking religion has been deemed politically dangerous, and elected representatives have been afraid to touch the issue. Part I concludes that the legislative history of section 6033 reveals no compelling reason for the church exemption and that its survival can be attributed to the political power of religious leaders.

Part II discusses recent developments, most notably the advent of the Internet, that make public transparency easier and more effective. Because Forms 990 are now more accessible to the public than ever before, if churches had to file the Form 990, churchgoers would have the ability to monitor how churches use their contributions. Indeed, churchgoers are well positioned and have good incentives to do so.

²¹ *Commission Overview*, COMMISSION ON ACCOUNTABILITY & POL’Y FOR RELIGIOUS ORGS., <http://religiouspolicycommission.org/Content/Summary-of-Commission> (last visited Dec. 28, 2012).

²² COMM’N ON ACCOUNTABILITY & POLICY FOR RELIGIOUS ORGS., ENHANCING ACCOUNTABILITY FOR THE RELIGIOUS AND BROADER NONPROFIT SECTOR 31 (Dec. 2012), available at <http://religiouspolicycommission.org/CommissionReport.aspx>.

²³ *Id.*

Part III explains why the current law is bad policy and should be amended to require churches to file the information return. Applying insights from sociology, it discusses the nature of religious authority and explains that power structures within churches make it difficult for churchgoers to seek transparency and accountability, making it even more important for the government to require such transparency. Many churchgoers want more transparency from churches and would like a say in how their donations are used. Not only would these churchgoers welcome government-mandated disclosure, but studies show that they would also give more generously in response. In addition, Part III contends that, contrary to the assertion of some religious leaders, financial transparency is consistent with the teaching of many churches.

Finally, Part IV briefly dismisses some constitutional objections and suggests that the current law itself may violate the Establishment Clause because it favors churches over other tax-exempt organizations.

I. LEGISLATIVE HISTORY

To understand why churches are exempt from filing the Form 990, it is first necessary to explore the legislative history of the statute that requires the information return. As described in detail below, the purpose of the Form 990 has changed since its inception, and it serves a function today that would probably have been inconceivable to the legislators who wrote the first statute requiring tax-exempt organizations to file an information return. As the purpose of the information return has evolved, Congress has, on several occasions, come close to passing bills that would have amended the statute to require that churches file a Form 990.

A. *Early Legislative History of the Information Return Requirement*

1. The Revenue Act of 1943

The requirement that tax-exempt organizations file an information return with the IRS is currently codified in section 6033 of the Internal Revenue Code. When it enacted the original version of this provision in 1943, Congress was concerned that nonprofit entities were using their privileged tax status to gain an unfair advantage in competition with for-profit enterprises.²⁴ Testimony before the House Committee on

²⁴ S. REP. NO. 78-627, at 21 (1943) (“[L]arge numbers of these exempt corporations and organizations are directly competing with companies required to pay income taxes These organizations were originally given this tax exemption on the theory that they were not

Ways and Means reported that some tax-exempt corporations were actively engaged in business operations unrelated to their tax-exempt purposes.²⁵ According to statements made before the Committee, such tax-exempt operations had an unfair advantage when competing with privately owned businesses subject to income tax because the exempt operations could retain and reinvest all their profits, growing their businesses at a much faster rate.²⁶ As a result, witnesses recommended

operated for profit, and that none of their proceeds inured to the benefit of shareholders. However, many of these organizations are now engaged in operation of apartment houses, office buildings, and other businesses which directly compete with individuals and corporations required to pay taxes on income derived from like operations.”); H.R. REP. NO. 78-871, at 24–25 (1943).

²⁵ *Hearings on Revenue Act of 1943 Before the H. Comm. on Ways & Means*, 78th Cong. 217 (1943) (statement of Morley Wolfe, New York City, National Lawyers’ Guild).

²⁶ In fact, the competitive situation is more complicated than this simple argument would suggest. At least one commentator has suggested that Congress was responding to a “paranoid delusion” and that for-profits were never under any real threat from nonprofits because nonprofits would have no incentive to increase output and reduce prices. William A. Klein, *Income Taxation and Legal Entities*, 20 UCLA L. REV. 13, 61–68 (1972); see also Boris I. Bittker and George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 319 (1976) (“[I]t was never made clear why the price level that had maximized both the pretax and after-tax profits of the enterprise before the change of ownership would not continue to maximize its profits thereafter.”). However, even Klein acknowledged the corporate-level tax may provide an incentive for nonprofits to acquire wholly-owned corporations that could, in “unusual circumstances” lead to a concentration of nonprofits in certain industries and injury to for-profits. Klein, *supra*, at 63 n.212. Others have agreed that corporate double taxation does give nonprofits a slight advantage. See Henry B. Hansmann, *Unfair Competition and the Unrelated Business Income Tax*, 75 VA. L. REV. 605 (1989) (arguing that, although nonprofit firms would enjoy a slight cost of capital advantage over for-profits, nonprofits would have incentives to expand slowly and would be unlikely to massively displace for-profits, and that a more important rationale for the UBIT is that it prevents the inefficient allocation of resources that would result because wholly-owned corporations held by exempt entities would face no corporate-level tax and could thus achieve a higher rate of return than investments in companies subject to pre-dividend taxation); Michael S. Knoll, *The UBIT: Leveling an Uneven Playing Field or Tilting a Level One?*, 76 FORDHAM L. REV. 857, 868, 876–77 (2007) (arguing that in the absence of UBIT, because of corporate double taxation, tax-exempt organizations actually *do* have an advantage when competing for assets otherwise held through corporate equity, but that the UBIT overcompensates, putting nonprofits in a *worse* position when competing for such assets because the UBIT does not tax passive investment income, which makes holding such investments relatively more profitable for exempt entities). In addition, Klein offered the caveat that if for-profit firms have trouble raising capital because of an inefficient capital market, nonprofits will have an advantage by being able to accumulate more retained earnings, but he found the argument’s “quantitative significance . . . open to question.” Klein, *supra*, at 66; see also Susan Rose-Ackerman, *Unfair Competition and Corporate Income Taxation*, 34 STAN. L. REV. 1017, 1023–24 (1982) (pointing out that, in the absence of UBIT, nonprofits will accumulate retained earnings faster but that the question of whether nonprofits will have an advantage over for-profits depends upon the efficiency of capital markets: as long as capital markets are efficient, nonprofits will have a smaller advantage). For another explanation of Congress’s rationale for imposing the UBIT, see Ethan G. Stone, *Adhering to the Old Line: Uncovering the History and Political Function of the Unrelated Business Income Tax*, 54 EMORY L.J. 1475 (2005) (arguing that Congress was aware that it was being inconsistent by imposing a tax on active unrelated income but not on active related income or passive income, and arguing that it did so out of political motivation to

that such corporations be taxed on the income derived from their unrelated trade or business.²⁷

Noting that it was “without sufficient data to act intelligently” on the issue because tax-exempt corporations were not required to file any reports with the IRS and the Committee thus had no data on the extent of such abuses, the House bill required that tax-exempt entities begin filing returns “stating specifically the items of gross income, receipts, and disbursements and such other information, and keep such records, as the Commissioner of Internal Revenue may prescribe.”²⁸ The House version of the bill exempted religious, educational, and charitable organizations from this filing requirement.²⁹

The Senate added several other exempt categories, including organizations for the prevention of cruelty to children or animals and Government-owned corporations.³⁰ These amendments appeared in the final version of the Revenue Act of 1943.³¹ The Act required all nonprofit organizations, other than those exempted, to file annual information returns with the IRS.³² Congress intended to revisit the issue of taxing unrelated business income after the IRS had used the data gathered from these information returns to document the prevalence of abuses. The Committee on Ways and Means held subsequent hearings on the issue in 1947 and 1948.³³

2. The Imposition of the Unrelated Business Income Tax in 1950

Convinced that there was a problem, Congress added a tax on the unrelated business income of otherwise tax-exempt organizations as part of the Revenue Act of 1950.³⁴ In the House floor debates, Representative Walter Lynch of New York declared that, after a detailed investigation, the Treasury Department and the Committee on Ways and Means had found that tax-exempt organizations were indeed operating businesses unrelated to their tax-exempt purposes and that this practice constituted an abuse of their tax-exempt privilege.³⁵ For

discourage charities from engaging in activities that conflict with the public notion of what nonprofits should be doing).

²⁷ *Hearings on Revenue Act of 1943 Before the S. Comm. on Fin.*, 78th Cong. 866 (1943) (statement of Morley Wolfe, New York City, National Lawyer’s Guild).

²⁸ H.R. REP. NO. 78-871, at 24.

²⁹ H.R. 3687, 78th Cong. § 112 (as passed by House, Nov. 26, 1943).

³⁰ H.R. 3687, 78th Cong. § 112 (as passed by Senate, Dec. 21, 1943); S. REP. NO. 78-627, at 21 (1943).

³¹ S. REP. NO. 78-627, at 21.

³² Revenue Act of 1943, H.R. 3687, 78th Cong. § 117(a) (1943).

³³ 96 CONG. REC. 9365 (1950).

³⁴ Revenue Act of 1950, H.R. 8920, 81st Cong. § 301 (1950).

³⁵ 96 CONG. REC. 9365 (1950).

example, a tax-exempt university was operating a macaroni company, a piston ring factory, a leather company, and a chinaware maker.³⁶ Lynch decried the unfairness of allowing such subsidiaries to compete with private companies required to pay a tax of thirty-eight percent on their profits.³⁷ On the basis of that logic, the Revenue Act of 1950 made taxable the regular business activities of a tax-exempt organization that were unrelated to its tax-exempt purpose.³⁸ However, Congress exempted churches, though it subjected other religious organizations to the tax.³⁹

Significantly, the Revenue Act of 1950 also required, for the first time, that exempt organization information returns be made available to the public.⁴⁰ This amendment was added by the Senate Finance Committee, and it also expanded the scope of information that exempt organizations were required to disclose, mandating more extensive details on their sources of revenue, accumulation of income, expenses, and disbursements.⁴¹ The Senate delegated to the IRS the task of determining the manner in which this information would be made available to the public.⁴² The final version of the bill passed by both houses included a penalty for the willful failure to furnish information required, but it did not stipulate how this punishment would be imposed.⁴³ Congress required that information returns be available to the public in the belief that increased publicity would encourage compliance with the law.⁴⁴

3. Expanding the Information Return and Unrelated Business Income Tax in 1969

Congress and the Treasury found information returns useful for monitoring nonprofits, and Congress continued to expand the scope of the information return. In 1967, Representative Ryan introduced a bill in the House that would have required every tax-exempt organization, including churches, to file an annual information return with the IRS,

³⁶ *Id.* at 9366.

³⁷ *Id.*

³⁸ Revenue Act of 1950, H.R. 8920, 81st Cong. § 301 (1950).

³⁹ H.R. REP. NO. 81-2319, at 108 (1950); S. REP. NO. 81-2375, at 105-06 (1950).

⁴⁰ Revenue Act of 1950, H.R. 8920, 81st Cong. § 341 (1950).

⁴¹ S. REP. NO. 81-2375, at 125-26.

⁴² *Id.* at 126.

⁴³ Revenue Act of 1950, H.R. 8920, 81st Cong. § 341 (1950).

⁴⁴ *Federal Tax Laws Applicable to the Activities of Tax-Exempt Charitable Organizations: Hearings Before the Subcommittee on Oversight of the H. Comm. on Ways & Means, 103rd Cong. 12 (1993) [hereinafter *Hearings on Federal Tax Laws (1993)*] (statement of Margaret Milner Richardson, Comm'r of Internal Revenue).*

but the bill did not make it beyond the Ways and Means Committee.⁴⁵ This suggestion received more attention two years later.

In 1969, the Ways and Means Committee heard testimony of various abuses committed by tax-exempt foundations.⁴⁶ Incited by recent scandals involving private foundations,⁴⁷ a number of witnesses recommended that Congress amend section 6033 to facilitate greater oversight and public accountability. For instance, the president of the Council on Foundations suggested that Congress revise information returns “to require more complete disclosure” and “provide meaningful information for the public as well as for audit and review purposes.”⁴⁸ He advised that *all* foundations and charitable trusts file both the information return and an audit every year and that public access to these materials be improved.⁴⁹

At least one witness argued that Congress should eliminate *all* the exemptions in section 6033—including the exception for churches—and require that every nonprofit file an information return, to be available for public inspection.⁵⁰ In a paper submitted to the Committee, law professor Lawrence M. Stone urged:

[C]hurches and other heretofore privileged exempt organizations should be required to file the same information now generally required of most exempt organizations, and should be made subject to the unrelated business rules applicable to other exempt organizations. To this author it appears that basic equity between believers and non-believers requires that churches not be treated better than other charities.⁵¹

As a result of these and similar comments, the House did pass a bill that would have ended the exemption under section 6033 and required churches to file information returns.⁵²

The House bill also made two other notable changes affecting the disclosure requirement of section 6033. First, it required that more

⁴⁵ 113 CONG. REC. 6188 (1967); Sharon L. Worthing, Note, *The Internal Revenue Service as a Monitor of Church Institutions: The Excessive Entanglement Problem*, 45 *FORDHAM L. REV.* 929, 933 n.37 (1977).

⁴⁶ *Hearings on the Subject of Tax Reform Before the H. Comm. on Ways & Means*, 91st Cong. 12 (1969) [hereinafter *Hearings on the Subject of Tax Reform* (1969)].

⁴⁷ For instance, the Frederick W. Richmond Foundation, a tax-exempt foundation, was used by Frederick W. Richmond to finance Richmond's campaign for Congress in New York's 14th Congressional District. *Hearings on the Subject of Tax Reform* (1969), *supra* note 46, at 213–37 (statement of Rep. John J. Rooney (N.Y.)).

⁴⁸ *Id.* at 110 (statement of David F. Freeman, President, Council on Foundations).

⁴⁹ *Id.*

⁵⁰ *Id.* at 146 (statement of Prof. Lawrence M. Stone, School of Law, University of California, Berkeley).

⁵¹ *Id.* at 181–82.

⁵² Tax Reform Act of 1969, H.R. 13270, 91st Cong. § 101(d) (as passed by House, Aug. 7, 1969).

information be provided on the return, including the identities of directors and the salaries of highly compensated officers and employees.⁵³ Second, the House bill imposed a penalty of \$10 per day on organizations that did not timely file the return.⁵⁴

The Ways and Means Committee report explained the rationale for these amendments: experience since 1950 had convinced the Committee that “more information is needed, on a more current basis, from more organizations, and that this information must be made available to more people, especially state officials.”⁵⁵ Documented abuses and concerns about accountability had apparently convinced the House that no tax-exempt organizations were immune to scandals and that requiring more information to be made available more broadly would help enforce the tax laws. The Committee report noted that the new requirement effecting disclosure of compensation was “intended to facilitate meaningful enforcement of the limitations imposed by the bill.”⁵⁶

The Senate added two exceptions to the requirement that all tax-exempt organizations file information returns: “churches, their integrated auxiliary organizations, and organizations and associations of churches”; and small organizations having annual gross receipts of less than \$5,000.⁵⁷ The decision to add these exceptions was made by an executive session of the Senate Finance Committee.⁵⁸ The chairman of the Committee, Senator Russell Long of Louisiana, submitted into the Congressional Record a press release summarizing the actions of the Committee, which explained that the Committee had exempted churches “in view of the traditional separation of church and state.”⁵⁹ However, it noted that churches would nevertheless be required to report and pay the unrelated business income tax.⁶⁰

The conference committee approved the Senate’s version of the amendments to section 6033, with one modification: it also exempted the exclusively religious activities of any religious order from the filing requirement.⁶¹

Significantly, the Tax Reform Act of 1969 removed the unrelated business income tax exemption that churches had enjoyed.⁶² The Senate

⁵³ *Id.*; S. REP. NO. 91-552, at 53 (1969).

⁵⁴ S. REP. NO. 91-552, at 53. The penalty was codified under I.R.C. § 6652(d). *See* Tax Reform Act of 1969, H.R. 13270, 91st Cong. § 101(d). The same penalty could also be imposed on the individuals responsible for failing to file the return, but only after receiving notice from the IRS. *Id.*

⁵⁵ H.R. REP. NO. 91-413, at 36 (1969).

⁵⁶ *Id.*

⁵⁷ S. REP. NO. 91-552, at 52.

⁵⁸ 115 CONG. REC. 32148 (1969).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ H.R. REP. NO. 91-782, at 286 (1969).

⁶² Tax Reform Act of 1969, H.R. 13270, 91st Cong. § 121(a).

Report explained that, although in the past churches had not undertaken unrelated businesses, in recent years some churches had “begun to engage in substantial commercial activity.”⁶³ It noted: “Some churches are engaged in operating publishing houses, hotels, factories, radio and TV stations, parking lots, newspapers, bakeries, restaurants, etc.”⁶⁴ The Senate apparently saw no constitutional issues with extending the unrelated business income tax to churches.

Since 1969, Congress and the IRS have continued to expand and refine the law requiring that exempt organizations file an information return. In 1971, the IRS ruled that, for purposes of imposing a penalty under section 6652 for failure to file a Form 990, filing an incomplete return that lacked “material information” was tantamount to a failure to file.⁶⁵ The IRS noted, in explaining its rationale, that the legislative history made it clear that Congress intended “to ensure that information requested on exempt organization returns was provided timely and completely so that the Service would be provided with the information needed to enforce the tax laws.”⁶⁶ This ruling was later codified by Congress as part of the Revenue Act of 1987.⁶⁷

B. *Televangelist Scandals During the 1980s*

Certain religious leaders began to attract attention in the 1970s with the increasing popularity of religious broadcasting and the commensurate increase in financial resources available to these “televangelists.” A few ran into troubles with federal and state regulators. In 1973, Jerry Falwell’s church was investigated by the Securities and Exchange Commission for making “false and misleading” statements about property when it issued \$2.5 million in church bonds.⁶⁸ Around the same time, the progenitor of televangelism, Rex Humbard, was investigated by the Ohio Commerce Department for selling “securities” to fund construction projects that never materialized.⁶⁹ Other religious broadcasters used pitches that stopped short of illegality but still bore the stench of manipulation. For example, a popular tactic was periodically warning viewers that the ministry

⁶³ S. REP. NO. 91-552, at 67 (1969).

⁶⁴ *Id.*

⁶⁵ Rev. Rul. 77-162, 1977-1 C.B. 400.

⁶⁶ *Id.*

⁶⁷ Revenue Act of 1987, H.R. 3545, 100th Cong. § 10704(a) (1987). This amendment was codified at I.R.C. § 6652(c), which then provided a penalty for a failure to file or “a failure to include any of the information required to be shown on a return filed under section 6033(a)(1) or section 6012(a)(6) or to show the correct information.”

⁶⁸ STEVE BRUCE, *PRAY TV: TELEVANGELISM IN AMERICA* 147 (1990).

⁶⁹ *Id.* at 148.

would go out of business or cancel its station in “your area” if it did not receive a certain level of contributions.⁷⁰

Although well known to their viewers and to those federal and state regulators they had crossed, televangelists did not emerge as a social phenomenon until the late 1970s when some mainline churches began to criticize them.⁷¹ Sociologists of religion Jeffrey K. Hadden and Charles E. Swann argued that it was this criticism that propelled televangelists onto the national stage.⁷² These attacks and the financial improprieties of some televangelists soon attracted congressional attention.

In 1977, Senator Mark Hatfield warned that Congress would enact legislation if evangelical leaders could not develop a proposal to regulate themselves.⁷³ His chief legislative assistant told a gathering of Christian leaders that disclosure was needed and suggested that a voluntary program would “preclude the necessity of federal intervention into the philanthropic and religious sector.”⁷⁴ Congressman Charles Wilson had already drafted disclosure legislation in response to a scandal involving the misuse of funds raised by a Catholic religious order.⁷⁵ Wilson’s bill would have required churches to disclose essentially the same information required on the Form 990.⁷⁶ While Catholic and Protestant church leaders were vocal in their opposition to Wilson’s bill, they were more open to Hatfield’s suggestion that they develop a means to regulate themselves.⁷⁷ Thanks to Hatfield’s pressure, the Billy Graham Evangelistic Association and the Christian relief organization World Vision partnered to found the ECFA in 1979.⁷⁸ The ECFA began with 115 members, a number that included only one televangelist.⁷⁹ As the

⁷⁰ *Id.* at 142.

⁷¹ JEFFREY K. HADDEN & CHARLES E. SWANN, *PRIME TIME PREACHERS: THE RISING POWER OF TELEVANGELISM* 3 (1981).

⁷² *Id.* at 4.

⁷³ *Id.* at 123.

⁷⁴ *Id.*

⁷⁵ *Id.*; Rick Casey, *Pallottines Chief Topic of Meeting*, WASH. POST, Oct. 25, 1976, at B1.

⁷⁶ Robert Abelman, *In Conversation: Arthur C. Borden, Evangelical Council for Financial Accountability*, in *RELIGIOUS TELEVISION: CONTROVERSIES AND CONCLUSIONS* 185, 185 (Robert Abelman & Stewart M. Hoover eds., 1990); HADDEN & SWANN, *supra* note 71, at 123; Casey, *supra* note 75; *Protestants [sic] Groups Debate Fund-Raising Disclosure Bill*, L.A. TIMES, Dec. 10, 1977, at B5.

⁷⁷ David Johnston & Jennifer Leonard, *TV Charities: Let the Giver Beware*, L.A. TIMES, Jan. 20, 1985, at T3; James Robinson, *Churches Plan Fund Disclosure*, CHI. TRIB., Dec. 4, 1977, at 12; *Truth in Charity*, BOS. GLOBE, Dec. 12, 1977, at 18.

⁷⁸ HADDEN & SWANN, *supra* note 71, at 22, 123–24.

⁷⁹ *Id.*; Jim Bakker’s PTL would become part of the ECFA in 1981 but withdraw in 1986, refusing to submit its audited financial statements and claiming that it had sufficient accountability through its denomination. Abelman, *supra* note 76, at 189. From 1983 until its withdrawal from ECFA, the Council and PTL leaders had seven meetings to discuss ECFA concerns about tax compliance, overhead costs, the size of PTL’s board, conflicts of interest, the

coming decade would make painfully clear, there was a reason why many religious broadcasters opted out of this accountability enterprise. In addition, despite the fact that the ECFA was billed as a means for churches to police themselves, very few churches ever joined the organization.⁸⁰

The presidential election of 1980 brought renown to religious leaders like Pat Robertson and Jerry Falwell, who were prominent figures in Ronald Reagan's successful campaign.⁸¹ Falwell appeared on the cover of *Newsweek*, and his Moral Majority claimed credit for Reagan's election.⁸² The leaders of the "New Christian Right" enjoyed the limelight of political power while they and other evangelists continued to reap huge financial rewards with minimal federal oversight and no transparency.

By the mid-1980s, following revelations of embezzlement and tax evasion that ultimately ended with the imprisonment of Jim Bakker, the public began to question in earnest the activities of many charismatic television evangelists, and Congress again discussed the exemption for churches under section 6033.⁸³ By 1986, Bakker's ministry, PTL,⁸⁴ had been accused of misleading its viewers about the use of donations, was being investigated by the Department of Justice for fraud, and was under review by the IRS for tax evasion.⁸⁵ The next year, PTL revealed that it had been paying Bakker at least \$1.6 million annually, a figure that it had been unwilling to disclose for years, despite dogged attempts

culture of extravagance at PTL, and PTL's unwillingness to supply audited financial statements upon request. *Id.* at 190.

⁸⁰ For instance, a *Washington Post* story heralding the advent of the ECFA misleadingly proclaimed: "Fiscal Accountability Arriving for Churches." George W. Cornell, *Fiscal Accountability Arriving for Churches*, WASH. POST, July 27, 1979, at C18. A *Chicago Tribune* headline similarly declared: "Churches Plan Fund Disclosure." Robinson, *supra* note 77. Another piece in the *Chicago Tribune* noted that the ECFA was "founded to encourage church groups to voluntarily disclose their financial matters." Bruce Buursma, *What TV Is Doing to Religion*, CHI. TRIB., Dec. 7, 1980, at A1. Today, of the ECFA's 1,700 members, only about 150 are churches. ECFA, <http://www.ecfa.org> (based on a search of ECFA members with the category "Church: Local" or "Church: Multisite" on the ECFA website, eliminating duplicate results) (last visited Nov. 21, 2012).

⁸¹ HADDEN & SWANN, *supra* note 71, at 4-5.

⁸² *Id.* at 5-6.

⁸³ See *Federal Tax Rules Applicable to Tax-Exempt Organizations Involving Television Ministries: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 100th Cong. 250 (1987) [hereinafter *Hearing on Television Ministries* (1987)].

⁸⁴ PTL stands for either "Praise the Lord" or "People that Love," but sardonic critics began to suggest that it stood for "Pass the Loot" or "Pay the Lady," the latter referring to the large amount of blackmail hush money Bakker had paid to a woman with whom he had had a brief affair. *Praise the Lord and Pass the Loot*, ECONOMIST, May 16, 1987, at 25.

⁸⁵ Charles E. Shepard, *Bakker Misled PTL Viewers, FCC Records Show*, CHARLOTTE OBSERVER, Jan. 26, 1986, at 1A; Charles E. Shepard, *PTL in Tax Dispute with IRS, S.C. Agency*, CHARLOTTE OBSERVER, Mar. 24, 1986, at 1A.

by the *Charlotte Observer* and other media groups to make the organization accountable to the public.⁸⁶

Outraged by the scandal at PTL and questionable practices of other televangelists,⁸⁷ Congressman J.J. Pickle, chair of the Subcommittee on Oversight of the House Ways and Means Committee, convened a well-publicized 1987 hearing with witnesses from the IRS and the Treasury, as well as notable televangelists including Jerry Falwell and Oral Roberts.⁸⁸ In his message opening the hearing, Pickle noted that Congress and the executive “historically have been reluctant to look very closely at tax issues involving religious organizations” because of their political sensitivity.⁸⁹ His fears were not unfounded: at the hearing, D. James Kennedy, the leader of Coral Ridge Ministries, warned, “I think we need to be careful that we do not turn the IRS into a Department of Cults.”⁹⁰ In a fundraising letter, the executive director of the National Religious Broadcasters went further, accusing Congress of attacking religion by holding the hearings and calling them “the beginning of a new ‘inquisition.’”⁹¹

Most witnesses were more subdued in their criticisms of the Committee hearing, and they generally agreed that Congress was well within its constitutional authority when it had imposed the unrelated business income tax on churches.⁹² Church leaders disagreed about whether Congress should impose the Form 990 filing requirement on churches, with some opposing the suggestion and others favoring it.⁹³ Many insisted that they were able to police themselves, pointing to their

⁸⁶ BRUCE, *supra* note 68, at 147; Charles E. Shepard, *PTL '86 Payments to Bakkers: \$1.6 Million*, CHARLOTTE OBSERVER, Apr. 18, 1987, at 1A.

⁸⁷ Congressman Byron Dorgan of North Dakota noted: “[I]t is clear that at least some evangelists have not been able to maintain accountability for the vast sums that they have collected. The stories of million-dollar salaries, million-dollar jets, and houses from Malibu to Miami raise not only eyebrows but also some questions of reporting and accountability.” *Hearing on Television Ministries* (1987), *supra* note 83, at 8. At the time of the hearing, the IRS was investigating about thirty different evangelists. IRS commissioner Lawrence Gibbs noted: “Inurement has taken the form of payment of excessive salaries and benefits, including personal residences, automobiles, travel expenses, and loans, to those in control of the organization. Although funded by the general public through contributions, the cases under examination demonstrate a pattern of close control and incomplete or nonexistent disclosure to contributors of the actual uses made of their money.” *Id.* at 37.

⁸⁸ *See id.*

⁸⁹ *Id.* at 5 (statement of Rep. J.J. Pickle (Tex.)).

⁹⁰ *Id.* at 69 (statement of D. James Kennedy, President and Founder, Coral Ridge Ministries).

⁹¹ *Id.* at 265–70 (letter from Ben Armstrong, Exec. Dir., Nat’l Religious Broadcasters).

⁹² *See, e.g., id.* at 74, 128 (statements of D. James Kennedy & Jerry Falwell, President, The Old-Time Gospel Hour).

⁹³ *See id.* at 76, 128 (statements of D. James Kennedy & Jerry Falwell, opposing requiring churches to file Forms 990), 159, 198 (statements of Oral Roberts, Oral Roberts Evangelistic Association, & Paul Crouch, President, Trinity Broad. Network, supporting requiring churches to file Forms 990).

membership in the ECFA.⁹⁴ However, Oral Roberts contended that the ECFA lacked teeth and that it would be better for all organizations to file the Form 990 and submit to external audits.⁹⁵ Gordon Loux, the chairman of the board of the ECFA, defended his organization's failure to prevent the financial abuses at PTL by insisting that there are "inherent difficulties in self-regulation" because it is limited to those who consent to be regulated.⁹⁶ Loux agreed that the Form 990 was a "minimal requirement that ought to be met by those that are operating in the public service."⁹⁷

IRS and Treasury officials also testified alongside the televangelists. In his statement before the hearing, the Assistant Secretary of the Treasury for Tax Policy, O. Donaldson Chapoton, explained that, in the past, churches had not been subject to the requirements of section 6033 because of concern about government intrusion into religion.⁹⁸ The Commissioner of the IRS, Lawrence Gibbs, agreed with this explanation, but Congressman Charles Rangel of New York challenged it in a testy exchange with the Commissioner:

Mr. Rangel: Do you see where filing an annual report by churches would be in violation of the constitutional right of separation of church and state?

Mr. Gibbs: I have assumed, perhaps erroneously, that that was the reason—or certainly one of the prominent reasons—for specifically excluding them by statute in 1969.

Mr. Rangel: Well, why did you reach that assumption? You know, it is only a congressional decision. Has any court said that you cannot put limitations on the privilege of tax exemption? We do it in unrelated taxes. We do it in lobbying. We do it in political affairs. We do it in FCC control. What in God's name could be even remotely considered a violation of the constitutional rights of churches to say that they should file an annual report as to how much money they got and what they did with it?⁹⁹

In response to Rangel's questions, Gibbs agreed to submit for the record a statement of the IRS's official opinion on the matter. In that statement, the IRS took the position that there would be no constitutional problem

⁹⁴ *Id.* at 61, 132 (statements of D. James Kennedy & Jerry Falwell).

⁹⁵ *Id.* at 158 (statement of Oral Roberts).

⁹⁶ *Id.* at 207 (statement of Gordon Loux, Chairman of the Bd., ECFA).

⁹⁷ *Id.* at 235. However, the ECFA insisted in a 2009 letter to Senator Grassley that Gordon Loux did not intend to endorse the requirement that churches file a Form 990. Senate Finance Committee, Grassley-ECFA Correspondence 2009, <http://www.finance.senate.gov/newsroom/ranking/download/?id=abb25810-a26e-4329-a4ed-424e692eb34f> (last visited July 7, 2013).

⁹⁸ *Hearing on Television Ministries* (1987), *supra* note 83, at 22 (statement of O. Donaldson Chapoton, Assistant Sec'y of the Treasury for Tax Policy, Dep't of the Treasury).

⁹⁹ *Id.* at 54.

with requiring churches to file the Form 990.¹⁰⁰ It reasoned that other religious organizations did have to file the information return and that churches were subject to other federal requirements, including audits.¹⁰¹ Chapoton conceded that, although it was a “constitutional-type issue,” there was no constitutional impediment to requiring churches to file.¹⁰²

Both Chapoton and Gibbs agreed that having churches file the Form 990 would facilitate enforcement of the tax laws.¹⁰³ Gibbs also expressly linked the Form 990 to public accountability and voiced concern that churches lacked such accountability:

The Congressional purpose behind the public availability of Form 990 is that publicity itself is a great check against potential abuses. We believe this notion has great merit and a salutary effect on overall compliance with the tax laws in the exempt organization area. Therefore, when large organizations seeking funds from the general public are not required to file Form 990, the benefit of a public accounting no longer exists.¹⁰⁴

Not only did Congress intend the public inspection requirement to aid accountability but, as Gibbs indicated, the IRS agreed that it had actually achieved this effect.¹⁰⁵

The 1987 hearings ended without any changes to the law. Pickle’s subcommittee continued to monitor the activities of the televangelists, but regulatory enforcement in subsequent years was a less public affair.¹⁰⁶ Hadden asserted that the close relationship between the Christian Right and Republicans in the White House prevented further inquiries into churches during the 1980s.¹⁰⁷

¹⁰⁰ *Id.* at 55 (The IRS statement read: “We are of the opinion that there is not a constitutional prohibition on requiring churches to file Form 990 information returns. For instance, currently religious organizations that are not churches are required to file Form 990 and churches, as well as other religious organizations, are subject to detailed examinations of their books and records. We believe both of these current law requirements are constitutional and, with respect to examinations of books and records, can be considered more intrusive than the filing of the Form 990. The only constitutional problem we would foresee [*sic*] in this area would be if a statute differentiated between religious denominations in filing requirements in a manner that favored one denomination over another. However, we do note that the religious community would undoubtedly oppose any new requirement that churches file Form 990. While they may argue constitutional concerns, they will most likely emphasize the sensitivity of requiring extensive filing by churches as well as the failure to show an adequate change in circumstances sufficient to justify the requirement.” (citations omitted)).

¹⁰¹ *Id.*

¹⁰² *Id.* at 56.

¹⁰³ *Id.* at 22 (statement of O. Donaldson Chapoton), 33 (statement of Lawrence B. Gibbs Jr., Comm’r of Internal Revenue).

¹⁰⁴ *Id.* at 31 (statement of Lawrence B. Gibbs Jr.).

¹⁰⁵ *Id.*

¹⁰⁶ Jeffrey K. Hadden, *Policing the Airwaves: A Case of Market Place Regulation*, 8 *BYU J. PUB. L.* 393, 394 (1994).

¹⁰⁷ *Id.*

C. *Recent Legislative History of the Information Return*

In the past several decades, the policy rationale for information returns, and for amendments to the laws and regulations affecting them, has shifted even more to their importance for the public. Although the IRS still uses the Form 990 as the basis for its audits of exempt organizations, the significance of the information return to the public's assessment of charities and donors' ability to monitor the stewardship of their contributions has gained ascendancy.

1. The William Aramony Scandal and Aftermath

In 1992, an investigation at the United Way revealed that, in addition to drawing a \$463,000 salary, CEO William Aramony had diverted funds for his personal use and to finance luxuries for his teenage girlfriend.¹⁰⁸ That scandal and other reports of runaway executive compensation at charitable organizations prompted public outcry and a congressional investigation into the operations of the non-profit sector.¹⁰⁹ Excessive compensation, interest-free loans, and other

¹⁰⁸ Karen W. Arenson, *Former United Way Chief Guilty in Theft of More than \$600,000*, N.Y. TIMES, Apr. 4, 1995, at A1; Felicity Barringer, *United Way Head Is Forced Out in a Furor Over His Lavish Style*, N.Y. TIMES, Feb. 28, 1992, at A1.

¹⁰⁹ See, e.g., David Ballingrud et al., *Local Charities on the Defensive*, ST. PETERSBURG TIMES, Apr. 12, 1992, at 1B (interviewing local charity executives who are worried that donors do not understand why they make so much); Clarke Bustard, *"We've Been Waiting for this Call,"* RICHMOND TIMES-DISPATCH, Mar. 26, 1992, at A1 (investigating the executive salaries at Richmond-area nonprofits); Linda Eardley, *United Way Here Hiked Executives' Pay, in 1991 Spending \$844,560 over Income*, ST. LOUIS POST-DISPATCH, May 17, 1992, at 1D (criticizing local United Way for large increases in executive salaries while the organization operated in the red); Judith Nemes, *Hospital Executives' Pay Beginning to Raise Eyebrows*, MODERN HEALTHCARE, June 8, 1992 (detailing recent efforts in state legislatures to cap executive salaries at nonprofit hospitals); Dianne B. Piastro, *Questions to MDA Go Unanswered*, ST. LOUIS POST-DISPATCH, Aug. 31, 1991, at 4D (criticizing Muscular Dystrophy Association for refusing, in violation of federal law, to turn over recent Forms 990); Lynn Simross, *Charities in a Bind: Tough Questions in the Aftermath of the United Way Scandal*, WASH. POST, Apr. 28, 1992, at C05 (reporting that a Chronicle of Philanthropy survey revealed almost 25 percent of charities pay executives more than \$200,000); Marguerite T. Smith, *Which Charity Bosses Earn Their Keep*, MONEY, May 1992, at 142 (pointing out that many similarly-sized nonprofits pay their CEOs drastically different salaries). The committee also referred to a 1993 investigative series in the *Philadelphia Inquirer*, which examined 6,000 tax-exempt charities and found that many "make huge profits, pay handsome salaries, build office towers, invest billions of dollars in stocks and bonds, employ lobbyists and use political action committees to influence legislation." *Hearings on Federal Tax Laws* (1993), *supra* note 44, at 53. In light of such stories, Representative Mel Hancock of Missouri lamented:

extravagant perks uncovered in the investigation led to tough questions about the IRS's ability to monitor the nonprofit sector at hearings before the Subcommittee on Oversight in 1993.¹¹⁰ Noting the declining ability of the IRS to monitor the ballooning number of nonprofits,¹¹¹ the hearings focused much of their attention on how the law could be changed to make the Form 990 a more useful tool for the public. Introducing the first hearing, Chairman J.J. Pickle stated:

We want to know if Federal law is adequate to ensure compliance by public charities and to appropriately punish wrongdoing. *Most importantly, we want to know if the public is currently being provided access to the information necessary for them to make informed judgments about charitable giving.*¹¹²

In her statement before the hearing, the IRS Commissioner noted that the rationale behind the public inspection requirement was the “assumption that publicity alone is a check against potential abuses.”¹¹³ The report submitted to the Subcommittee by the IRS stated that the IRS's experience comported with this assumption, noting: “This requirement that public charities operate in the ‘sunshine’ advances the Service's overall goal of voluntary compliance.”¹¹⁴ As a result, the IRS recommended changes that would “enable the public to have greater knowledge of a public charity's operations.”¹¹⁵

One of the primary concerns raised at the hearings, and in contemporaneous news stories,¹¹⁶ was the issue of private inurement. The IRS Assistant Commissioner in charge of exempt organizations testified:

The abuses that we found in the examination program really center on the issue of inurement. Most of them get into the question of to what extent assets or other funds within the exempt organizations are going to the benefit of the people who control them.¹¹⁷

It just seems to me that many times we have situations all over the country where someone wants to do a lot of good for a lot of people as long as he is getting paid to do it. If he is not getting paid to do it, he is not interested in helping out these people. Charity used to be a good word. It is getting so it isn't such a good word any more.

Id. at 52.

¹¹⁰ *Hearings on Federal Tax Laws* (1993), *supra* note 44, at 6 (statement of Rep. J.J. Pickle (Tex.)).

¹¹¹ *Id.* at 42 (noting that, although some 30,000 new exempt organizations were being added each year, the number of IRS auditors devoted to nonprofits had declined since 1980).

¹¹² *Id.* at 7 (emphasis added).

¹¹³ *Id.* at 12 (statement of Margaret Milner Richardson, Comm'r of Internal Revenue).

¹¹⁴ *Id.* at 19.

¹¹⁵ *Id.* at 20.

¹¹⁶ See *supra* note 109.

¹¹⁷ *Hearings on Federal Tax Laws* (1993), *supra* note 44, at 61 (statement of John E. Burke, Assistant Comm'r, Emp. Plans and Exempt Orgs., IRS). Howard M. Schoenfeld, the Special

Pickle read through a litany of suspicious transactions uncovered in the 250 returns reviewed by his Subcommittee, which included bloated salaries (fifteen percent received more than \$200,000), executives paid by more than one organization, subsidized loans to insiders, extravagant expense accounts, lucrative construction contracts with companies controlled by board members, and questionable exchanges with taxable subsidiaries.¹¹⁸

The Subcommittee also discovered that many of the forms they examined were incomplete,¹¹⁹ confirming the results of a 1988 Government Accountability Office report which found that about half of Forms 990 were filled out incompletely.¹²⁰ The IRS representatives agreed with those findings and also with the concern that many organizations were refusing to allow the public to actually inspect their Forms 990.¹²¹ As a result of such complaints, the IRS was investigating ways to enhance public dissemination of the forms, including the possibility of electronic filing.¹²² The Assistant Commissioner agreed that increased public access to the forms would help its enforcement efforts.¹²³

The 1993 hearings prompted a 1994 report by the Department of the Treasury and subsequent 1996 amendments to the Internal Revenue Code. Penalties for failure to file the Form 990, or for incorrect or incomplete returns, were increased under the 1996 Taxpayer Bill of Rights.¹²⁴ Treasury had proposed this change in its 1994 report to the Subcommittee on Oversight, noting that many exempt organizations were filing incomplete or incorrect returns and suggesting that part of the reason for their sloppiness may have been that the existing penalties were too low.¹²⁵

The 1996 Taxpayer Bill of Rights also made two other important changes to the regulation of tax-exempt entities. First, it created

Assistant for Exempt Organization Matters, IRS, agreed with Burke: "The whole question of private inurement is a fundamental issue in any examination of a public charity exempt under section 501(c)(3)." *Id.* at 55.

¹¹⁸ *Id.* at 62-63 (statement of Rep. J.J. Pickle (Tex.)).

¹¹⁹ *Id.* at 63.

¹²⁰ *Id.* at 97 (statement of Bennett M. Wiener, Vice President, Philanthropic Advisory Serv., Council of Better Bus. Bureaus).

¹²¹ *Id.* at 65-66 (statement of Howard M. Schoenfeld).

¹²² *Id.* at 66.

¹²³ *Id.* at 69 (statement of John E. Burke).

¹²⁴ Taxpayer Bill of Rights, H.R. 2337, 104th Cong. § 1314 (1996). Penalties for small organizations (with gross receipts of less than \$1,000,000) were increased from \$10 to \$20 per day, and a new penalty of \$100 per day was imposed for large organizations. I.R.C. § 6652(c)(1)(A).

¹²⁵ *U.S. Department of the Treasury's Proposals to Improve Compliance by Tax-Exempt Organizations: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means, 103rd Cong. 13, 24 (1994)* [hereinafter *Hearing on Treasury's Proposals (1994)*] (statement of Leslie B. Samuels, Assistant Sec'y for Tax Policy, Dept. of the Treasury).

“intermediate sanctions” that could be imposed on exempt organizations that the IRS determined were guilty of private inurement transactions.¹²⁶ These sanctions impose excise taxes on individuals who receive “excess benefits” from nonprofit entities and on those managers responsible for knowingly approving such benefits.¹²⁷ Prior to 1996, the only penalty available if a nonprofit engaged in an excess benefit transaction was the draconian revocation of the entity’s exempt status.¹²⁸ Revocation was not even sure to punish the wrongdoers, making it a frequently meaningless penalty. It was also rarely used,¹²⁹ and the IRS Commissioner had noted in 1993 that having only this sanction made enforcement difficult.¹³⁰

Second, the 1996 act made changes that increased the public’s ability to access exempt organization information returns. It amended Code section 6104 to require, for the first time, that an organization mail a copy of its Form 990 to any party that requested it.¹³¹ Prior to the amendment, public inspection had been limited to those individuals willing to make a pilgrimage to the organization’s principal offices.¹³² The same act also increased the penalty for organizations that refused to make their Form 990 available to the public.¹³³

2. Recent Revisions to Form 990

During the last several years, the IRS has focused on redesigning the Form 990 for the first time in almost three decades. In June 2007, the IRS released a draft version of the redesigned Form 990, noting that the new form was intended to address three goals: improving transparency; promoting compliance with tax laws; and minimizing the burden on

¹²⁶ Taxpayer Bill of Rights, Pub. L. No. 104-168, § 1311 (1996) (codified at I.R.C. § 4958).

¹²⁷ I.R.C. § 4958(a). The Code defines an “excess benefit transaction” as “any transaction in which an economic benefit is provided by an applicable tax-exempt organization directly or indirectly to or for the use of any disqualified person if the value of the economic benefit provided exceeds the value of the consideration (including the performance of services) received for providing such benefit.” *Id.* § 4958(c).

¹²⁸ H.R. REP. NO. 104-506, at 54 (1996).

¹²⁹ *Hearings on Federal Tax Laws* (1993), *supra* note 44, at 59 (statement of John E. Burke) (noting that the IRS had been revoking the tax-exempt status of only about thirty organizations per year).

¹³⁰ *Id.* at 9, 11–12 (statement of Margaret Milner Richardson, Comm’r of Internal Revenue). Intermediate sanctions had been suggested by the Treasury as early as 1987. *See Hearing on Television Ministries* (1987), *supra* note 83, at 20 (statement of O. Donaldson Chapoton, Assistant Sec’y of the Treasury for Tax Policy, Dep’t of the Treasury).

¹³¹ Taxpayer Bill of Rights, Pub. L. No. 104-168, § 1313 (1996) (codified at I.R.C. § 6104).

¹³² *Hearing on Treasury’s Proposals* (1994), *supra* note 125, at 13–14 (1994) (statement of Leslie B. Samuels, Assistant Sec’y for Tax Policy, Dep’t of the Treasury).

¹³³ Taxpayer Bill of Rights, H.R. 2337, 104th Cong. § 1313 (1996) (codified at I.R.C. § 6104); H.R. REP. NO. 104-506, at 60.

filers.¹³⁴ In subsequent testimony before a congressional committee, the IRS Commissioner for exempt entities explained the importance of transparency and public access:

Our second priority is to enhance transparency of the nonprofit sector by requiring better data and making that data more publicly available. Transparency is the linchpin of compliance, but when the structure and operations of charitable organizations are visible to all, the possibility of misuse and abuse is reduced. Our transparency initiatives include the wholesale redesign of the Form 990 and expanded electronic filing.¹³⁵

That statement and the IRS's emphasis on improving public access to and understanding of the Form 990 again underscore how important the public's role has become in regulating nonprofits. Other testimony before the committee by nonprofit industry leaders reinforced the IRS's message.

For instance, Diana Aviv of Independent Sector, a coalition of hundreds of nonprofits, recommended that Congress mandate electronic filing to facilitate posting information online.¹³⁶ The president of the Council on Foundations agreed, noting that such laws also increase media scrutiny and that news organizations had been very diligent about investigating nonprofits in recent years.¹³⁷ Aviv recounted to the committee that a series in the *Boston Globe* prompted the formation of a group of twenty-four leaders to study the nonprofit sector, which turned into the Panel on the Nonprofit Sector at the instigation of the Senate Finance Committee.¹³⁸ The Panel released recommendations to Congress in 2005, which included mandatory electronic filing.¹³⁹ In addition, it convened two separate panels to offer

¹³⁴ Press Release, IRS, IRS Releases Discussion Draft of Redesigned Form 990 for Tax-Exempt Organizations (June 14, 2007), <http://www.irs.gov/uac/IRS-Releases-Discussion-Draft-of-Redesigned-Form-990-for-Tax-Exempt-Organizations>.

¹³⁵ *Hearing on Tax-Exempt Charitable Organizations Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 110th Cong. 11 (2007) [hereinafter *Hearing on Tax-Exempt Charitable Organizations* (2007)] (statement of Steven T. Miller, Comm'r, Tax Exempt and Gov't Entities Div., IRS).

¹³⁶ *Id.* at 74 (statement of Diana Aviv, President and Chief Executive Officer, Independent Sector).

¹³⁷ *Id.* at 90 (statement of Steve Gunderson, President and Chief Executive Officer, Council on Foundations) ("Hardly a month goes by when I'm not spending time with a new reporter just assigned to the philanthropic beat of their news agency. And hardly a week goes by when we don't hear from the *Washington Post*, the *New York Times*, the *Los Angeles Times*, or the *Wall Street Journal*.").

¹³⁸ *Id.* at 106 (statement of Diana Aviv).

¹³⁹ PANEL ON THE NONPROFIT SECTOR, REPORT TO CONGRESS AND THE NONPROFIT SECTOR ON GOVERNANCE, TRANSPARENCY, AND ACCOUNTABILITY 26 (June 2005), available at http://www.nonprofitpanel.org/Report/final/Panel_Final_Report.pdf; Press Release, Panel on the Nonprofit Sector, Nonprofit Panel Recommends More than 120 Actions to Strengthen Transparency, Governance, and Accountability in the Charitable Community (June 21, 2005), <http://www.nonprofitpanel.org/press/finalreport/index.html>.

additional recommendations on changes that “would improve [Form 990’s] value as a reliable and credible source of public information.”¹⁴⁰

At the hearing, IRS representatives generally agreed with the statements of other Committee witnesses, and the Commissioner noted that it was especially important that “obnoxious” expenditures for flashy perks show up somewhere on the Form 990 so that there can be a public reaction.¹⁴¹

Those statements all reflect the present importance of the Form 990 as a tool for public accountability. Recent congressional hearings have placed as much—or more—emphasis on its role in promoting public monitoring as on its role in IRS audits. The new Form 990 makes it more difficult for organizations to hide executive compensation and more effectively facilitates the public’s ability to decipher a complex disclosure document.¹⁴²

II. INCREASED PUBLIC ACCESS TO AND USE OF FORM 990 INFORMATION RETURNS

Although for a long time, the fact that information returns were open to public inspection meant little in practice, in recent years the effect of this publicity requirement has become significant. Until 1996, exempt organizations were only required to make the Form 990 available at their office.¹⁴³ Since few individual donors would actually take the time and effort to travel somewhere for the sole purpose of inspecting an organization’s information return, the only groups that regularly invoked the statute were reporters and charity watchdogs. Even when such individuals did seek to review the forms, they frequently met with delay, intransigence, and hostility.¹⁴⁴ Few organizations were eager to turn over their information returns, and some even refused outright to follow the law.

¹⁴⁰ PANEL ON THE NONPROFIT SECTOR, *supra* note 139, at 16.

¹⁴¹ *Hearing on Tax-Exempt Charitable Organizations* (2007), *supra* note 135, at 104 (2007) (statement of Steven T. Miller).

¹⁴² See Sacha Pfeiffer & Beth Healy, *New IRS Form Targets Charities’ Salaries*, BOS. GLOBE, June 17, 2007, at D1.

¹⁴³ See *supra* note 131 and accompanying text.

¹⁴⁴ See, e.g., George Rodrigue et al., *For America’s Nonprofit Sector, the Watchdog Seldom Barks*, NIEMAN REP., Mar. 22, 1998, at 50, 53 (reporting that in 1995, the National Committee for Responsive Philanthropy sought to collect the Forms 990 from 174 organizations, but its two-year effort was successful in obtaining full cooperation from only forty-seven nonprofits; ten refused outright to provide the Form 990 and seventy-six ignored repeated requests); Simross, *supra* note 109 (reporting that in 1992, many charitable organizations made *Chronicle of Philanthropy* investigators jump through hoops to see their Forms 990, including requiring special appointments and refusing access to copy machines); see also *supra* note 121 and accompanying text.

Their unwillingness was no doubt because the press had been—and continues to be—effective at uncovering examples of misdeeds and extravagances at charities, oftentimes beginning with information contained in a Form 990. Newspapers are littered with stories about organizations that misused donor funds to pay excessive salaries and perks, sometimes while failing to provide promised services. Many high-profile media investigations have incited the ire of Congress, prompting hearings or other investigations. A long *Washington Post* probe into the compensation paid to the head of the Smithsonian eventually led Senator Grassley to investigate the institution and put pressure on its board to moderate the excessive compensation paid to its CEO.¹⁴⁵ The institution's chief executive resigned in 2007 from the sustained public pressure.¹⁴⁶ Similarly, a 2003 series in the *Boston Globe* led the Senate Finance Committee to organize the Panel on the Nonprofit Sector in 2005.¹⁴⁷ Another 2003 series in the *Washington Post* led to a Senate investigation of the Nature Conservancy.¹⁴⁸

In other cases, media pressure alone has been sufficient to influence nonprofits to change their behavior. For instance, several October 2009 stories in the *Charlotte Observer* drove Franklin Graham, the CEO of both the Billy Graham Evangelistic Association and Samaritan's Purse, to take a huge pay cut after the newspaper revealed he had taken home \$1.2 million in 2008.¹⁴⁹

¹⁴⁵ Press Release, Senator Chuck Grassley, Grassley Works to Safeguard Smithsonian Resources (Feb. 26, 2007), http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=11438#. The *Washington Post* had looked into Lawrence Small's expenses as early as 2001, but at the time, Smithsonian officials lied to *Post* reporters, telling them that Small paid for his own charter airfare. A 2007 report by the Inspector General, issued after an investigation undertaken at Grassley's instigation, revealed the untruth. The report detailed other extravagant expenses including more charter flights, lavish gifts for friends and associates, and an overgenerous housing expense for Small that was based on a "hypothetical" mortgage set at above-market rates. James V. Grimaldi, *Smithsonian Head's Expenses 'Lavish,' Audit Says*, WASH. POST, Feb. 25, 2007, at A1.

¹⁴⁶ Jacqueline Trescott & James V. Grimaldi, *Smithsonian's Small Quits in Wake of Inquiry*, WASH. POST, Mar. 27, 2007, at A1.

¹⁴⁷ See *supra* note 138 and accompanying text. The *Boston Globe* investigation looked into the activities of some of the Boston area's largest private foundations and found that many provided opulent salaries to executives that bore little relation to the size of the foundations or their charitable activities. For instance, the Paul and Virginia Cabot Charitable Trust paid out \$400,000 to charities in 2001 while its CEO was paid \$1.4 million. Beth Healy et al., *Some Officers of Charities Steer Assets to Selves*, BOS. GLOBE, Oct. 9, 2003, at A1.

¹⁴⁸ Joe Stephens & David B. Ottaway, *Senate Panel Intensifies Its Conservancy Probe*, WASH. POST, Nov. 10, 2003, at A1. The *Washington Post* investigation revealed a variety of questionable practices: "Articles detailed how the charity had sold scenic properties to its state trustees, who reaped large tax breaks. Other stories disclosed that the charity engaged in multimillion-dollar business deals with companies and their executives while they sat on the charity's governing board and advisory council." *Id.*

¹⁴⁹ Tim Funk & Ames Alexander, *Graham: Take away BGEA Pay*, CHARLOTTE OBSERVER, Oct. 10, 2009.

Although in the past such monitoring was mostly restricted to the press, the situation has completely changed during the last decade, and Forms 990 are now widely available to the public, thanks to the Internet. In 1998, the charity watchdog organization Philanthropic Research—better known as GuideStar—began to collect and digitize Forms 990.¹⁵⁰ In that year, it published information on 60,000 nonprofits.¹⁵¹ The next year, it made the front page of the *New York Times* business section when it posted the Forms 990 from 200,000 organizations to its website.¹⁵² That action was hailed by another charity research agency as being the single “most important development ever in making charities accountable.”¹⁵³ Other organizations and academics had advocated posting all Forms 990 on the Internet, arguing that doing so would effectively encourage donors and private citizens to police the nonprofit sector.¹⁵⁴ Arthur Schmidt, the president of Philanthropic Research, declared, “We are on the verge of a whole new era of nonprofit accountability.”¹⁵⁵ He predicted, “The 990 will move rapidly from being this obscure, obnoxious reporting document to something informative and acceptable and transform itself into a useful document.”¹⁵⁶

With the 2007 redesign of the Form 990, which was motivated in large part by the desire to make the document more lucid to the general public,¹⁵⁷ Schmidt’s grand words have proven prescient. Today, GuideStar makes available on its website the information returns for all tax-exempt organizations that file with the IRS.¹⁵⁸ Several other organizations, such as Charity Navigator, use the Form 990 as a tool to evaluate charities and post ratings of major charities on their websites.¹⁵⁹ Thanks to the Internet’s unique ability to widely disseminate information, the congressional mandate requiring transparency is more effective today than ever before.

In addition to direct public oversight, there are a number of other advantages to having Forms 990 broadly available. For instance, some have argued that suspicious staff members are in a prime position to note false or misleading numbers on the information return and can act

¹⁵⁰ *GuideStar: A Brief History*, GUIDESTAR, <http://www.guidestar.org/rxg/about-us/history.aspx> (last visited Nov. 27, 2012).

¹⁵¹ *Id.*

¹⁵² *Id.*; David Cay Johnston, *Tax Returns Of Charities To Be Posted On the Web*, N.Y. TIMES, Oct. 18, 1999, at C1.

¹⁵³ Johnston, *supra* note 152.

¹⁵⁴ See, e.g., *id.*; Peter Swords, *The Form 990 as an Accountability Tool for 501(c)(3) Nonprofits*, 51 TAX LAW. 571, 580 (1998) (arguing that the Form 990 can be very useful for catching abuses like self-dealing).

¹⁵⁵ Johnston, *supra* note 152.

¹⁵⁶ *Id.*

¹⁵⁷ See *supra* note 135 and accompanying text.

¹⁵⁸ *GuideStar: A Brief History*, *supra* note 150.

¹⁵⁹ *FAQ for Donors*, CHARITY NAVIGATOR, <http://www.charitynavigator.org/index.cfm?bay=content.view&cpid=484> (last visited July 13, 2013).

as whistleblowers.¹⁶⁰ Likewise, board members have an incentive to pay closer attention to the organization's finances and to be more vigilant about their oversight role when they know that others can look over their back.¹⁶¹ Even when nothing illegal has occurred, nonprofit officers and directors are likely to be more conscientious about ensuring that organizations seem clean and efficient, and that compensation does not appear unreasonable.

Requiring churches to file a Form 990 would guarantee that both the public and churchgoers have access to financial information that would enable them to monitor how churches are using their donations. Such monitoring would make churches accountable to the public and to their donors.

III. CHURCHES SHOULD NOT BE EXEMPT FROM FILING FORM 990

The reason for exempting churches from filing the Form 990 has evolved since the requirement was first enacted. When private businesses complained to Congress about having to compete with the tax-free subsidiaries of charitable organizations, they were not complaining about churches.¹⁶² So in 1943, when Congress mandated the information return, it exempted churches and a variety of other charities that it did not consider problematic.¹⁶³ Likewise, when it later enacted the unrelated business income tax in 1950, churches were again exempt. However, churches lost the latter exemption in 1969 because they had begun to engage in commercial operations unrelated to their exempt purposes.¹⁶⁴ At the same time, they nearly lost their exemption from section 6033, saved only by a last-minute amendment in the Senate.¹⁶⁵ That amendment was added out of wariness that Congress not step near the line separating church and state.¹⁶⁶ However, given that lawmakers did impose the unrelated business income tax on churches at the same time, their concern seems incongruous.

Since 1969, talk of ending the exemption on churches has been politically unpopular with religious groups, who have accused members of Congress unwise enough to suggest it of being anti-religious.¹⁶⁷ Given

¹⁶⁰ Swords, *supra* note 154, at 582 n.36.

¹⁶¹ *Id.* at 582.

¹⁶² See *supra* note 63 and accompanying text.

¹⁶³ See *supra* notes 29–31 and accompanying text.

¹⁶⁴ See *supra* note 64 and accompanying text.

¹⁶⁵ See *supra* note 57 and accompanying text.

¹⁶⁶ See *supra* note 59 and accompanying text.

¹⁶⁷ See, e.g., Michael Isikoff, *Evangelists Defend Funding Tactics; Decry House Hearings as Dangerous Precedent*, WASH. POST, Oct. 7, 1987, at C1. Church leaders have also attacked the IRS. See *Church Institutions Told to File Informational Tax Returns*, WASH. POST., Jan. 14, 1977, at B14 (describing how eighty religious organizations have vehemently opposed proposed IRS

the sway that religion has in America today, few elected officials have been willing to touch the issue. Even Senator Grassley, who consistently receives perfect ratings on the scorecard of the conservative Christian Family Research Council,¹⁶⁸ was accused by some Christian leaders of endangering the First Amendment when he initiated his financial probe of six large churches.¹⁶⁹

Aside from political expediency, however, there are few sound reasons to justify the continued exemption for churches under section 6033. The argument that churches do not suffer from the same abuses witnessed at other nonprofits does not stand up to scrutiny, as witnessed by countless scandals at religious organizations over the last several decades. In fact, because of the unique form of control religious leaders exercise, churches might actually be *more* susceptible to abuses. In addition, as unpalatable as the suggestion may seem, there are strong reasons why many law-abiding churches should favor amending the law—it could do them good.

A. *Churches Are Especially Susceptible to Financial Abuses*

Two separate questions must be asked when evaluating the financial management of churches. The first is: Who makes the decisions about how money is spent, including the compensation paid to the pastor? The second is: What checks are in place to ensure that the money actually goes where it is supposed to be spent? The answer to the first question is important for minimizing concerns about private inurement and for ensuring that donors have some say in how their contributions are used. The answer to the second reveals whether there are opportunities for outright criminality in which a church leader might simply steal from the congregation's coffers. Both questions are connected insofar as the answers frequently reveal naïveté within religious institutions and suggest that many churches need to rethink how much power and control their leaders have. The trust accorded to these leaders is unrivaled in other sectors, and predictably leads to a climate in which abuse is easy and common. Examples of abuse are

regulations to narrow the definition of “integrated auxiliary” in I.R.C. § 6033, requiring more church-related groups to file information returns); *IRS Stirs up a Storm Among Church Leaders*, U.S. NEWS & WORLD REP., Aug. 9, 1976 (interviewing religious leaders opposed to new IRS regulations stripping religious schools and other non-churches of their exemption from the requirement to file a Form 990).

¹⁶⁸ For instance, Grassley received a rating of 100 percent for the 110th Congress. See VOTE SCORECARD 110TH CONGRESS, FAMILY RESEARCH COUNCIL ACTION (2008), available at <http://downloads.frcaction.org/EF/EF08I02.pdf>.

¹⁶⁹ Jacqueline L. Salmon, *Probe Biased, Televangelists Say*, WASH. POST, May 24, 2008, at B9 (reporting that almost two dozen leaders criticized Grassley's probe in a letter sent to the Senate Finance Committee).

rampant and make a compelling argument that churches should be subject to the same disclosure requirements as other nonprofits.

The first subsection below points out the lack of financial oversight in many churches and argues that the resulting high incidence of embezzlement shows that churches place too much trust in their leaders. The next four subsections explore whether and to what extent different forms of church governance encourage financial extravagances by church leaders, concluding that nearly all churches are vulnerable to financial abuse and that government-mandated financial transparency may be the only way to correct the situation.

1. Many Churches Lack Basic Forms of Oversight and Accountability, Revealing Too Much Trust in the Honesty of Religious People

Many churches have been victimized by embezzlement, a crime to which they are especially susceptible due to the level of trust inherent in relationships built on shared religious beliefs. A report released in 2007 by the Center for the Study of Church Management at Villanova University found that eighty-five percent of the Catholic dioceses responding to the survey reported being victimized by embezzlement during the previous five years.¹⁷⁰ Economist Charles Zech, the director of the center, stated:

Every church has the same problem of being too trusting of their priests and ministers and church workers. It's not unique to the Catholic Church No one would think that a priest would embezzle, and no one would think that a church worker would, so they don't put in the kinds of internal controls common in the business world.¹⁷¹

Another study found that in 2000, an estimated \$7 billion was embezzled by leaders of churches and religious organizations in the United States.¹⁷² Several other studies have suggested that about fifteen percent of all individual churches will suffer embezzlement.¹⁷³

Indeed, in many ways, the accountability structures at some churches encourage financial mishandling: very few churches have

¹⁷⁰ Tom Heinen, *More Financial Accountability Sought*, MILWAUKEE J. SENTINEL, May 16, 2008, at B1.

¹⁷¹ *Id.* As one pastor who was bilked by another told the *New York Times*, "We never doubted, because since he was a minister, we never thought he would lie to another minister." David Gonzalez, *A Pastor's Job Offers Become a Curse*, N.Y. TIMES, Apr. 23, 2010, at A21.

¹⁷² JANET T. JAMIESON & PHILIP D. JAMIESON, *MINISTRY AND MONEY: A PRACTICAL GUIDE FOR PASTORS* 117 (2009).

¹⁷³ John B. Duncan & Morris H. Stocks, *The Understanding of Internal Control Principles by Pastors*, 14 *NONPROFIT MGMT. & LEADERSHIP* 213 (2003).

sound financial management and accountability plans in place.¹⁷⁴ A survey of internal control mechanisms at 530 churches showed that most churches had weak internal controls, especially with respect to cash disbursements and reporting.¹⁷⁵ Another survey of 317 churches found that more than half of the respondents were missing a number of important control mechanisms.¹⁷⁶ For instance, at seventy percent of churches the same person was responsible for writing checks and reconciling bank statements.¹⁷⁷

Many church leaders do not know where to begin when it comes to financial management. As the executive director of the National Leadership Roundtable on Church Management, a nonprofit formed in 2005 to advise the Catholic Church on financial issues, noted: “Many priests . . . are not trained in management or finance or human resources development, and seminaries rarely offer this type of curriculum.”¹⁷⁸ Another survey of clergy found that only seven percent were satisfied with the financial training they received during seminary.¹⁷⁹ Yet only fifteen percent of those surveyed were interested in receiving more training on the subject.¹⁸⁰ Even when churches employ full-time staff to handle their finances, that staff is often untrained in accounting and lacks the skills necessary to design appropriate internal

¹⁷⁴ *Id.*; Denise Nitterhouse, *Financial Management and Accountability in Small, Religiously Affiliated Nonprofit Organizations*, 26 *NONPROFIT & VOLUNTARY SECTOR Q.* S101, S106–07 (1997). Consider these observations from an attorney regarding the level of financial management at many churches:

I have had significant experience in working with churches that have decided, after many years of operation, to establish their exempt status by filing a Form 1023 with the IRS. In virtually all of these cases, the hardest information to obtain was financial statements that made sense and actually balanced. This is because these churches operated, in many cases, out of a checkbook. Often, the treasurer was a volunteer with no experience in developing budgets or setting up financial statements.

Position Papers, COMMISSION ON ACCOUNTABILITY & POL’Y FOR RELIGIOUS ORGS., <http://religiouspolicycommission.org/PositionPapers.aspx?q=Recent> (last visited Dec. 28, 2012).

¹⁷⁵ Thomas C. Wooten, John W. Coker & Robert C. Elmore, *Financial Control in Religious Organizations: A Status Report*, 13 *NONPROFIT MGMT. & LEADERSHIP* 343, 362 (2003). For instance, one in five churches rarely required written documentation of expenses before reimbursement, and two-thirds of churches required only one signature on checks. *Id.* at 355; see also JASON BERRY, *RENDER UNTO ROME* 151 (2011) (examples of Catholic parishes where priests were able to approve their own expense reports).

¹⁷⁶ John B. Duncan, Dale L. Flesher & Morris H. Stocks, *Internal Control Systems in US Churches: An Examination of the Effects of Church Size and Denomination on Systems of Internal Control*, 12 *ACCT., AUDITING & ACCOUNTABILITY J.* 142, 151 (1999).

¹⁷⁷ *Id.*

¹⁷⁸ Katie Zezima, *Ministries Begin a Focus On Management Skills*, *N.Y. TIMES*, Dec. 15, 2007, at B5.

¹⁷⁹ Daniel Conway, *Clergy as Reluctant Stewards of Congregational Resources*, in *FINANCING AMERICAN RELIGION* 95, 97 (Mark Chaves & Sharon L. Miller, eds. 1999).

¹⁸⁰ *Id.* at 99.

controls.¹⁸¹ This lack of training and apparent disinterest in financial management predictably leads to poor financial controls, making it easy to abuse the system. Many churches have suffered the consequences of such a lax environment.¹⁸²

Although requiring churches to file a Form 990 would not magically prevent embezzlement or improve financial oversight, the redesigned Form 990 contains a number of questions regarding governance and accountability practices, including questions about the independence of directors, conflicts of interest, whistleblower protections, auditing, and disclosure.¹⁸³ Requiring churches to complete the Form 990 would force them to think through issues that many seem to have neglected. As some have noted, transparency alone has the capacity to influence organization behavior.¹⁸⁴ Arguably, making churches disclose their governance and accounting practices would pressure them into adopting practices recommended by the IRS.¹⁸⁵ Additionally, the lack of sophistication and undue level of trust revealed by the financial abuses in many churches presents a strong argument that churches are not equipped to police themselves. An environment of secrecy only exacerbates the situation and discourages questions that otherwise might uncover criminality.

2. Churches Where Power is Concentrated in the Hands of One Leader Provide the Ideal Structure for Financial Abuse

Churches vary widely in their management frameworks and in how financial and compensation decisions are made. Traditionally, formal church governing structures have been divided into three broad categories: episcopal, presbyterian, and congregationalist.¹⁸⁶ The first form is generally hierarchical, the second representative, and the third democratic, but there are wide variations within each category.¹⁸⁷ How budgeting decisions are made varies within and across denominations:

¹⁸¹ Wooten, Coker & Elmore, *supra* note 175, at 346, 351 (citing other studies).

¹⁸² See, e.g., Francis J. Butler, *Financial Accountability: Reflections on Giving and Church Leadership*, in GOVERNANCE, ACCOUNTABILITY, AND THE FUTURE OF THE CATHOLIC CHURCH 153, 154 (Francis Oakley & Bruce Russett, eds. 2004) (listing examples of large embezzlements suffered by the Catholic Church); ANSON SHUPE, SPOILS OF THE KINGDOM: CLERGY MISCONDUCT AND RELIGIOUS COMMUNITY 27–36 (2007) (recounting numerous examples of embezzlement, financial fraud, and other economic crimes perpetrated by church leaders).

¹⁸³ See IRS Form 990, *supra* note 2; James J. Fishman, *Stealth Preemption: The IRS's Nonprofit Corporate Governance Initiative*, 29 VA. TAX REV. 545, 567–78 (2010).

¹⁸⁴ See Evelyn Brody, *Sunshine and Shadows on Charity Governance: Public Disclosure as a Regulatory Tool*, 12 FLA. TAX REV. 183, 213 (2012).

¹⁸⁵ See Fishman, *supra* note 183, at 568.

¹⁸⁶ EDWARD LEROY LONG, JR., PATTERNS OF POLITY: VARIETIES OF CHURCH GOVERNANCE 2 (2001).

¹⁸⁷ *Id.* at 8–9.

in some churches, the pastor controls the budget; others have a board or similar committee; and sometimes the congregation approves the budget.¹⁸⁸

However, even when congregations have the opportunity to vote on the budget, they may have only a vague knowledge of what they are approving because of the ubiquitous secrecy attendant to church finances.¹⁸⁹ As two sociologists studying church giving observed: “It is our impression that many people who give money [to churches] have the uneasy feeling that their money disappears into a black hole.”¹⁹⁰ In a significant number of churches, no information is available about the pastor’s salary, and sometimes even the level of congregational giving is entirely secret.¹⁹¹

A fourth category of church government is the nondenominational church, or the sole evangelist, who may not have to answer to anyone and may operate in near total secrecy.¹⁹² Although no religious denomination, regardless of governing structure, is immune from financial abuses, particular concern should be paid to institutions in the latter grouping.¹⁹³

The structure and history of a number of churches, especially those churches operating outside an established denomination, suggest that lead pastors exert extraordinary influence over financial management. For instance, some churches were founded by, or experienced dynamic growth under, a charismatic leader whose identity is inextricably tied to

¹⁸⁸ DEAN R. HOGE ET AL., *MONEY MATTERS: PERSONAL GIVING IN AMERICAN CHURCHES* 36 (1996). For instance, Baptist and Lutheran congregations vote to approve the church budget. *Id.* Budget decisions at Catholic parishes are always made by the clergy, but thirty percent of parishes have a lay council to advise the priest even though the priest has the final say. *Id.*; LONG, *supra* note 186, at 23. Presbyterian churches have a rule that the church’s board must approve the budget, but it is not consistently followed. HOGE ET AL., *supra* at 36. In Assemblies of God churches, sometimes the pastor has total control, but at other times a board or the congregation approves the budget. *Id.* But see Werner Cohn, *When the Constitution Fails on Church and State: Two Case Studies*, 6 RUTGERS J. LAW & RELIG. 2 (2004) (“Most people who have been members of any of the main-line churches and synagogues have observed that the formal democracy enshrined in the official documents is little more than window-dressing. The decisions are frequently made by the small group of leaders.”).

¹⁸⁹ HOGE ET AL., *supra* note 188, at 7.

¹⁹⁰ CHRISTIAN SMITH & MICHAEL O. EMERSON, *PASSING THE PLATE: WHY AMERICAN CHRISTIANS DON’T GIVE AWAY MORE MONEY* 185 (2008).

¹⁹¹ HOGE ET AL., *supra* note 188, at 7. The president of the ECFA has also stated that churches usually do not disclose their pastor’s salary. Eric Gorski, *The Gospel of Prosperity*, DENVER POST, Oct. 8, 2006, at A-01.

¹⁹² LONG, *supra* note 186, at 8; WARREN COLE SMITH, *A LOVER’S QUARREL WITH THE EVANGELICAL CHURCH* 216 (2008); Peter Dobkin Hall, *Accountability in Faith-Based Organizations and the Future of Charitable Choice* (Nov. 2002) (unpublished paper presented at the 2002 Association for Research on Nonprofit Organizations and Voluntary Action (ARNOVA) conference), available at <http://www.hks.harvard.edu/fs/phall/ARNOVA-FB0%20ACCOUNTABILITY.pdf>.

¹⁹³ See HOGE ET AL., *supra* note 188, at 5; ANSON SHUPE, *IN THE NAME OF ALL THAT’S HOLY: A THEORY OF CLERGY MALFEASANCE* 4–6 (1995).

the church itself.¹⁹⁴ Sociologist Nancy Ammerman found that members of a conservative church she studied described themselves as being part of “Pastor Thompson’s church,” rather than by the name of the church.¹⁹⁵ Fellow sociologist Jackson W. Carroll reported that conservative Protestant and historically black churches have a “long tradition of charismatic and often autocratic leaders who make most decisions about congregational life.”¹⁹⁶ Although some of those churches have been becoming more democratic in recent years, the old style of leadership still persists.¹⁹⁷

In many notable instances, the pastor and a hand-picked cabal, which may include family members, control the reins of the church.¹⁹⁸ J. Lee Grady, the editor of a national magazine devoted to writing about charismatic churches, has observed:

¹⁹⁴ See, e.g., Jeff Sharlet, *Inside America’s Most Powerful Megachurch*, HARPER’S MAG., May 2005, at 40–54 (New Life Church in Colorado Springs was founded by Pastor Ted Haggard out of his basement and grew to 11,000 members). Even after a scandal forced Haggard out, the church’s amended bylaws vested full control in the senior pastor and a board of elders nominated solely by the senior pastor himself. NEW LIFE CHURCH, BYLAWS OF NEW LIFE CHURCH (AMENDED AND ADOPTED MAY 13, 2008), available at http://www.newlifechurch.org/db_images2/NLCBylaws51308.pdf; John Blake, *Bishop’s Charity Generous to Bishop: New Birth’s Long Received \$3 Million*, ATLANTA J.-CONST., Aug. 28, 2005, at A1 (Bishop Eddie Long grew his church from a 300-member church to a 25,000-member megachurch); *About Us*, HERITAGE CHRISTIAN CENTER, <http://heritagechristiancenter.com/about> (last visited Sept. 14, 2012) (Bishop Dennis Leonard expanded his church from his basement to a \$15 million, 150,000-square-foot facility). Anson Shupe notes that abuse is especially likely to run unchecked in such congregations, escalating over time, and may be stopped only when secular agencies intervene. SHUPE, *supra* note 193, at 104.

¹⁹⁵ E. BROOKS HOLIFIELD, *GOD’S AMBASSADORS: A HISTORY OF CHRISTIAN CLERGY IN AMERICA* 338 (2007).

¹⁹⁶ JACKSON W. CARROLL, *GOD’S POTTERS: PASTORAL LEADERSHIP AND THE SHAPING OF CONGREGATIONS* 132 (2006).

¹⁹⁷ *Id.*

¹⁹⁸ This is how the ministries queried by Grassley are organized. Press Release, Senator Chuck Grassley, *supra* note 12. For instance, Kenneth Copeland’s church bylaws give him veto power over board decisions, and the board consists almost entirely of his friends and family. Some board members are also paid. Eric Gorski, *Relatives of Televangelist Prosper*, USA TODAY, July 27, 2008, available at http://usatoday30.usatoday.com/news/nation/2008-07-26-1101161740_x.htm. Similarly, the *New York Times* reported that the National Baptist Convention, then headed by the disgraced Henry Lyons, “has given its presidents such autonomy that they have been able to run the convention’s business—including millions of dollars in membership money—from a briefcase.” Rick Bragg, *A Preacher’s Faithful Back Both Sinner and Felon*, N.Y. TIMES, Mar. 1, 1999, at A14; see also Michelle Boorstein, *In Va., a Powerful and Polarizing Pastor, A Loudoun Minister Inspires Loyalty From Followers, Anger From Ex-Members With Torn Lives and Moral Pain*, WASH. POST, Nov. 16, 2008, at A1, (Sterling, Virginia pastor Star Scott has controlled all finances at his megachurch since 1996); Molly Worthen, *Who Would Jesus Smack Down?*, N.Y. TIMES MAG., Jan. 11, 2009, at 20 (Seattle megachurch pastor Mark Driscoll effectively excommunicated elders who disagreed with his plans to consolidate power in his own hands).

There are many independent churches out there today that are accountable to no one. Their board structures are controlled by a few insiders and no one can bring correction. That is not healthy.¹⁹⁹

Similarly, Edward LeRoy Long, an expert on church governance, has written that many individual evangelists have no one to answer to and do as they please, “without regard to the responsibilities that attend institutional definition.”²⁰⁰

Bishop Eddie Long, one of the ministers investigated by Grassley, has made no secret of the fact that he controls every decision at his church. In his book *Taking Over*, he wrote about how he became frustrated with the deacon board’s “gripping the purse strings” at his church and subsequently took full control.²⁰¹ Many of the most notorious televangelists likewise dominated their churches; Robert Tilton even reorganized his ministry as a sole proprietorship so that he would have unfettered access to its finances.²⁰²

Even those independent churches that make overtures toward financial accountability cannot always be trusted. Bishop Dennis Leonard, the pastor of a megachurch in Denver that once owned a corporate jet, claimed that an outside independent board set his salary, but he refused to disclose who sat on the board.²⁰³ According to a former elder, Leonard used to receive \$750,000 per year.²⁰⁴ The financial extravagances and fundraising abuses of the Bakkers were approved by the “yes-men” who served on their board.²⁰⁵ Many other televangelist churches also had boards, but in nearly every case, the pastor maintained the authority to appoint and dismiss board members at whim.²⁰⁶

In a recent study, sociologist Christopher P. Scheitle found that the presence of a governing board did nothing to restrain the compensation paid to leaders of evangelistic organizations named for those leaders: Their compensation averaged \$24,000 more than the leaders of other similar nonprofits.²⁰⁷ As Scheitle observed: “[M]any governing boards may just serve as symbolic structures without any real power.”²⁰⁸ When

¹⁹⁹ Blake, *supra* note 194.

²⁰⁰ LONG, *supra* note 186, at 8.

²⁰¹ Blake, *supra* note 194.

²⁰² SHUPE, *supra* note 193, at 74.

²⁰³ Gorski, *supra* note 191.

²⁰⁴ *Id.*

²⁰⁵ JEFFREY K. HADDEN & ANSON SHUPE, *TELEVANGELISM: POWER AND POLITICS ON GOD’S FRONTIER* 11 (1988); SHUPE, *supra* note 193, at 71.

²⁰⁶ HADDEN & SHUPE, *supra* note 205, at 129.

²⁰⁷ Christopher P. Scheitle, *Leadership Compensation in Christian Nonprofits*, 70 *SOC. OF RELIGION* 384, 403–04 (Winter 2009).

²⁰⁸ *Id.* at 403.

power is instead concentrated in the hands of charismatic leaders, they are able to increase their compensation beyond accepted norms.²⁰⁹

Unsurprisingly, such concentrated power has a tendency to corrupt. In addition to the notorious abuses during the age of televangelist empires, contemporary examples of financial extravagances and improprieties persist, despite the tight secrecy over finances at many such institutions. For instance, Bishop Eddie Long also controls several non-church charitable organizations, which the *Atlanta Journal-Constitution* reported gave him more than \$3 million in compensation over a four-year period, including the use of a \$350,000 Bentley.²¹⁰ Virginia pastor Star Scott exercised his complete control over church finances to purchase a fleet of racing cars for his personal use, prompting an IRS investigation.²¹¹ In addition to criticism over his bloated salary, Bishop Dennis Leonard received media scrutiny after allegations of a “kick-back scheme” at a nonprofit operated by his church led the Department of Housing and Urban Development to temporarily suspend its partnership with the nonprofit.²¹²

Abuses encouraged or allowed by the governing structures of these churches are only exacerbated by their opacity. Churches of all kinds have a reputation for secrecy²¹³—like the Catholic Church, which long covered up sexual abuse by priests and the use of church funds to settle related lawsuits.²¹⁴ However, as sociologist Anson Shupe has argued, at churches with a congregationalist-type structure in which there is no authority higher than the individual church’s own pastor, malfeasance is more likely to be “normalized,” and those who know about abuses are more likely to act as accessories than to impose any check on the behavior.²¹⁵ For example, the Bakkers and Robert Tilton had a number of individuals in their organizations who knew about their fraudulent financial dealings, yet chose not to challenge their leaders and instead joined in and profited from the illegalities.²¹⁶ In hierarchical churches, even though improprieties may be covered up in the short-term, they are more likely to be corrected in the long-run.²¹⁷ In churches that have no higher governing authority, abuses are more likely to run unchecked

²⁰⁹ *Id.* at 405.

²¹⁰ Blake, *supra* note 194.

²¹¹ Michelle Boorstein, *IRS Is Investigating Finances, Pastor of Sterling Church Says*, WASH. POST, July 31, 2009, at B03.

²¹² Gorski, *supra* note 191.

²¹³ HOGE ET AL., *supra* note 188, at 7.

²¹⁴ Jack McCarthy, *The Ingredients of Financial Transparency*, 36 NONPROFIT & VOLUNTARY SECTOR Q. 156, 157 (2007). See generally SHUPE, *supra* note 193, at 79–116 (describing how Catholic bishops and other Church leaders lied to, threatened, paid off, and otherwise coerced complainants of sexual abuse into silence).

²¹⁵ SHUPE, *supra* note 193, at 59–77.

²¹⁶ *Id.* at 71–76.

²¹⁷ *Id.* at 59–60.

until outside intervention by the press or the government puts an end to such behavior.²¹⁸

3. Even at Churches with More Independent Boards, Leaders Still Maintain Undue Influence

Compared to the above examples of churches where decisions are made solely by the pastor and self-appointed cronies, the control exercised by religious leaders in other church polities seems benign. However, even at churches where compensation is set by an ostensibly independent committee—as it might be at many Presbyterian churches²¹⁹—scholarship in management theory suggests that these pastors likely still have a great deal of personal influence over boards.

For instance, recent studies have argued that setting executive compensation is not an “arm’s-length” transaction and that, rather, managerial power has a strong influence over compensation levels approved by directors.²²⁰ Some of the reasons why managers can exert this influence also apply to the church context. First, studies show that the psychological forces of friendship and collegiality make directors unlikely to disagree with executives on compensation matters.²²¹ This influence will be even stronger within the church structure, where those setting the pastor’s compensation have probably known the pastor for a substantial period and interact as friends in a variety of contexts.

Second, directors are used to deferring to the CEO’s vision and guidance, which makes them less able to be objective when deciding on compensation.²²² Again, the tendency to defer to the leader will be even greater in a church context where the pastor is also a spiritual leader.²²³

Finally, if the CEO has also had a role in appointing directors to the board, empirical studies have shown that the resulting sense of loyalty makes them even more likely to unquestioningly approve outsized compensation packages.²²⁴ Thus, if the pastor is perceived to have a large role in choosing lay leaders, they will be psychologically inclined to

²¹⁸ *Id.* at 62.

²¹⁹ LONG, *supra* note 186, at 64.

²²⁰ See, e.g., LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004); Lucian A. Bebchuk & Jesse M. Fried, *Pay Without Performance: Overview of the Issues*, 17 J. APPLIED CORP. FIN. 8 (Fall 2005).

²²¹ Bebchuk & Fried, *supra* note 220, at 13.

²²² *Id.*

²²³ See *infra* Part III.A.4.

²²⁴ Brian G.M. Main, Charles A. O’Reilly III & James Wade, *The CEO, the Board of Directors and Executive Compensation: Economic and Psychological Perspectives*, 4 INDUS. & CORP. CHANGE 293–332 (1995).

defer to his judgment. This is especially true at some churches where the pastor personally selects all of the members of the board.²²⁵

Other studies have shown that CEOs with longer tenures generally have higher compensation, and some authors have hypothesized that the longer CEOs have been in control of their companies, the more influence they will have over the board because they will have had a role in selecting more directors.²²⁶ Thus, an entrenched CEO can build up support on the board. Likewise, a long-serving pastor has likely garnered significant loyalty and power. Consistent with that suggestion, Scheitle's study of compensation paid to charismatic evangelists showed that the presence of a governing board did nothing to restrain compensation.²²⁷

Still other scholars have suggested that the correlation between tenure and compensation may be due to the control over information that more established executives have; they are more able to dictate the agenda and to withhold negative information.²²⁸ Again, those factors will play with at least equal force inside a church, where veteran pastors will have become almost institutionalized in their roles and where, for many, the pastor is the church. In addition, even at Presbyterian churches ostensibly governed by lay leaders, the pastor presides over meetings and can therefore set the agenda.²²⁹

Finally, some academics have suggested a correlation between the incomes of board members themselves and compensation provided to the executive.²³⁰ In setting the CEO's salary, the members of the compensation committee may be inclined to define "reasonable" remuneration in comparison to their own salaries.²³¹ This effect may be even more pronounced on nonprofit boards, where directors are just as likely as corporate directors to have high incomes and be members of the elite, and where they have fewer incentives to engage in oversight,

²²⁵ See, e.g., NEW LIFE CHURCH, *supra* note 194 (only the pastor has the power to nominate elders); Nick Pinto, *Lead Us Not Astray, Reverend James Cooper*, VILLAGE VOICE, Dec. 12, 2012, at 1 (rector of Trinity Wall Street must annually reappoint all members of the vestry and chooses the committee that nominates new vestry members).

²²⁶ See Sydney Finkelstein & Donald C. Hambrick, *Chief Executive Compensation: A Study of the Intersection of Markets and Political Processes*, 10 STRATEGIC MGMT. J. 121, 124, 129–30 (1989).

²²⁷ Scheitle, *supra* note 207, at 403–04.

²²⁸ See Charles W.L. Hill & Phillip Phan, *CEO Tenure as a Determinant of CEO Pay*, 34 ACAD. MGMT. J. 707, 708–09 (1991).

²²⁹ LONG, *supra* note 186, at 71.

²³⁰ See Charles A. O'Reilly III, Brian G. Main & Graef S. Crystal, *CEO Compensation as Tournament and Social Comparison: A Tale of Two Theories*, 33 ADMIN. SCI. Q. 257, 261–62, 270–71 (1988).

²³¹ *Id.*

less training in board management, and fewer regulations.²³² Since survey data suggests that, for most denominations, those congregants chosen to serve in lay leadership are usually wealthier than average, they may be more inclined to approve high pastoral compensation because it is similar to their own.²³³ In contrast, if all lay members were aware of the pastor's salary, it would be less likely to be set as unreasonably high as if it were set by a committee composed only of wealthy members with no oversight or transparency.

4. The Nature of Spiritual Leadership Gives Church Pastors Extraordinary Power

The problems with independence and objectivity noted above are only exacerbated within the context of church leadership because congregants place greater trust in their spiritual leaders and the power dynamic is even more unequal. Sociologists of religion have identified aspects of spiritual leadership that make its power dynamics particularly troubling. For instance, Shupe has offered five reasons why religious power is particularly strong.²³⁴

First, power in religious hierarchies is more unequal than in other institutions, and Shupe has identified at least three reasons for this inequality.²³⁵ The first reason is that religious leaders generally have special training or certification, and many denominations teach that

²³² See Consuelo Lauda Kertz, *Executive Compensation Dilemmas in Tax-Exempt Organizations: Reasonableness, Comparability, and Disclosure*, 71 TUL. L. REV. 819, 853-54 (1997).

²³³ The U.S. Congregational Life Survey, conducted in 2001, surveyed 300,000 attendees at churches across the country. One of the questions it asked was: "Do you currently have any of the following roles here? Member of the governing board." For most denominations, the percentage of attendees answering "Yes" to this question rose as income rose, with the highest percentage of "Yes" answers coming from those making more than \$100,000 per year. This trend was observed at the Church of the Nazarene, "fast growing" Presbyterian churches, Seventh Day Adventist churches, and United Church of Christ churches. It was also true in the random sample drawn from all of the survey respondents. At Lutheran churches, non-fast growing Presbyterian churches, and ethnic Presbyterian churches, the percentage of "Yes" answers rose steadily with income until the top bracket, when it dropped slightly. In the Southern Baptist churches, the highest percentage of "Yes" responses came from the top income bracket, but the next highest income bracket (\$75,000 - \$99,999) was slightly lower than the one below it (\$50,000 - \$74,999). The United Methodist Church was the only denomination that did not exhibit a positive correlation between income and service on the governing board. *Data Archive*, ASS'N OF RELIGION DATA ARCHIVES, <http://www.thearda.com/Archive/browse.asp> (last visited July 17, 2013). More information on the U.S. Congregational Life Survey can be found on its own website. *About U.S. Congregations*, U.S. CONGREGATIONS, <http://www.uscongregations.org/aboutus.htm> (last visited Nov. 28, 2012). It is not necessarily the case that these governing boards set, or even know, the pastor's salary.

²³⁴ SHUPE, *supra* note 193, at 27-31.

²³⁵ *Id.* at 28.

leaders have been “called” by God.²³⁶ Second, followers are prone to a “group-think” mentality, believing that their leaders have superior spiritual wisdom, and become accustomed to deferring to them.²³⁷ Third, even the vocabulary employed by many Christian congregations in which the leader is the “shepherd” and the lay members are the “flock” creates a dynamic in which the leader can lay sole claim to the vision of the institution.²³⁸

Second, this power gap inevitably gives leaders exaggerated authority, sometimes including a monopoly over religious sacraments.²³⁹ For instance, Catholic Church leaders have used the threat of sacramental sanctions to pressure laity into obedience.²⁴⁰

Third, churches are “trusted hierarchies,” meaning that subordinates generally “trust or believe in the good intentions, nonselfish motives, benevolence, and spiritual insights/wisdom of those in the upper echelons (and often are encouraged or admonished to do so).”²⁴¹ For instance, when the Southern Baptist Convention (SBC) was confronted with calls for the laity to have a role in church leadership, it responded by admonishing the laity that they were to “obey the pastor.”²⁴² The president of the SBC went so far as to accuse the laity of being “anti-pastor” for wanting some say in the leadership of the church.²⁴³

Fourth, these hierarchies create the perfect environment for leaders to exploit those under their trust because the structures make malfeasance easy to commit and to hide.²⁴⁴ Most pastors, even those inside of organized denominations, operate without supervision and do not have to report to anyone.²⁴⁵ Psychologists warn that the ministry field is “hazardous,” and that the stressful and isolating job of being a pastor, combined with an environment of trust, can easily lead to transgression.²⁴⁶ In a recent survey of 180 seminaries, many agreed that clergy malfeasance was a “significant issue.”²⁴⁷ Survey results on incidence of clergy sexual abuse are particularly troubling. In a

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 28–29.

²⁴⁰ Michael P. Hornsby-Smith, *Some Sociological Reflections on Power and Authority in the Church*, in GOVERNANCE AND AUTHORITY IN THE ROMAN CATHOLIC CHURCH 12, 14 (Noel Timms & Kenneth Wilson, eds. 2000).

²⁴¹ SHUPE, *supra* note 193, at 29.

²⁴² HOLIFIELD, *supra* note 195, at 338.

²⁴³ *Id.*

²⁴⁴ SHUPE, *supra* note 193, at 29.

²⁴⁵ LARRY A. WITHAM, WHO SHALL LEAD THEM? THE FUTURE OF MINISTRY IN AMERICA 170 (2005).

²⁴⁶ *Id.* at 169. See generally PAUL DAVID TRIPP, DANGEROUS CALLING: CONFRONTING THE UNIQUE CHALLENGES OF PASTORAL MINISTRY (2012).

²⁴⁷ WITHAM, *supra* note 245, at 169.

confidential survey from the mid-1980s, twelve percent of respondents admitted to having had sex with someone under their pastoral care.²⁴⁸ This rate exceeds comparable numbers for professional psychologists and psychiatrists, suggesting that churches as institutions have not done enough to curb such abuse.²⁴⁹ Other surveys have found similarly high rates of clergy admitting to affairs or other inappropriate sexual behavior with congregants; in a few studies, as many as a quarter of pastors admitted to such behavior.²⁵⁰ Clergy counselor John O. Lundin cautioned that misconduct is nearly inevitable and that when handled secretly and not confronted, it only grows.²⁵¹ Yet most churches lack accountability structures to investigate or stem such misconduct.

Fifth and finally, Shupe has argued that the existence of trusted hierarchies “systematically provides opportunities . . . for such deviance and, indeed, makes deviance likely to occur.”²⁵² In other words, abuse “is ‘normal’ to religious hierarchies in a social structural sense.”²⁵³ Similarly, historian Philip Jenkins has contended that the lack of internal and external controls in many religious institutions encourages clergy deviance.²⁵⁴ The numbers on clergy sexual abuse cited above bear testimony to the truth of arguments that churches, as institutions, do indeed foster malfeasance.

Besides sociologists and church history scholars, Christian counselors and theologians have also noted that trusted religious leaders exhibit a proclivity to abuse, which is exacerbated by the dynamics of religious authority.²⁵⁵ The position of trust and respect held by the abuser makes it easier to manipulate and silence victims.²⁵⁶ Those who confront pastors about sexual abuse, financial improprieties, or even theological concerns may be told that they are “unsubmissive” or “disloyal.”²⁵⁷ Clever abusers turn the conversation away from the

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ SHUPE, *supra* note 182 at 9–10; Jeff T. Seat, James T. Trent & Jwa K. Kim, *The Prevalence and Contributing Factors of Sexual Misconduct Among Southern Baptist Pastors in Six Southern States*, 47 J. OF PASTORAL CARE 363 (1993).

²⁵¹ WITHAM, *supra* note 245, at 172.

²⁵² SHUPE, *supra* note 193, at 30.

²⁵³ *Id.* at 31.

²⁵⁴ Philip Jenkins, *Creating a Culture of Clergy Deviance*, in *WOLVES WITHIN THE FOLD* 118, 120, 131 (Anson Shupe ed., 1998).

²⁵⁵ See, e.g., DAVID JOHNSON & JEFF VANVONDEREN, *THE SUBTLE POWER OF SPIRITUAL ABUSE* (1991) (explaining how religious leaders use “spiritual abuse” to manipulate those under their control); JAMES NEWTON POLING, *THE ABUSE OF POWER: A THEOLOGICAL PROBLEM* (1991) (discussing the problem of confronting sexual abuse in the Protestant church, including the many ways that religious leaders use their positions to both take advantage of victims and keep them silent).

²⁵⁶ POLING, *supra* note 255, at 23, 36.

²⁵⁷ JOHNSON & VANVONDEREN, *supra* note 255, at 68–69; SHUPE, *supra* note 182, at 72–73.

legitimate problem and onto the person confronting the leader, accusing that individual of various spiritual problems.²⁵⁸

Richard Laughlin, in a study of financial accountability in the Church of England, observed that this pattern of spiritual manipulation makes it difficult for lay people to call for their leaders to be financially accountable.²⁵⁹ He reported:

[C]ongregational members both constitute parishes as well as being the supplier of parochial resources yet they are reluctant to call for greater accountability from their clergy and parish leaders more generally—somehow this is deemed unspiritual and inappropriate.²⁶⁰

Laughlin stated that because of this attitude, lay pressure to make churches more accountable is “largely impossible.”²⁶¹ If church members are unable or unwilling to call for more accountability, then increased transparency and accountability can only come from pressures outside the church.

Both theory and practice present a strong argument that churches, as they currently exist, actually foster and shelter malfeasance. The dynamics of religious leadership discourage laypeople from pressing for financial accountability even in more democratic polities, suggesting that it is imperative for the government to apply the same laws to churches that mandate transparency for other nonprofits.

5. Hierarchical Churches also Lack Proper Financial Oversight, and Lay Members Have Little Say in Accountability

Decisions in the Catholic Church are made in a top-down fashion in which bishops are in total control over their dioceses.²⁶² As an editorial in the *National Catholic Reporter* lamented: “Bishops answer to Rome, and, presumably, to God, but not to [priests] and certainly not to the people in the pews.”²⁶³ Indeed, the Catholic Church is the least democratic of the major denominations, and its finances are largely opaque.²⁶⁴ Yet despite the higher degree of centralized control, the Catholic and Episcopal churches have been at least as victimized by embezzlement as their slightly more democratic counterparts.²⁶⁵ These

²⁵⁸ JOHNSON & VANVONDEREN, *supra* note 255, at 19–20.

²⁵⁹ Richard Laughlin, *A Model of Financial Accountability and the Church of England*, in *MANAGING THE CHURCH? ORDER AND ORGANIZATION IN A SECULAR AGE* 49, 71 (G.R. Evans & Martyn Percy eds., 2000).

²⁶⁰ *Id.* at 71 n.5.

²⁶¹ *Id.* at 71.

²⁶² LONG, *supra* note 186, at 14.

²⁶³ BERRY, *supra* note 175, at 113.

²⁶⁴ HOGE ET AL., *supra* note 188, at 7, 36.

²⁶⁵ See *supra* note 170 and accompanying text.

observations are consistent with the observations of those who have studied accountability structures within these churches. In fact, as Shupe has argued, the hierarchical model may actually increase incidence of malfeasance in the short-run because such church leaders are adept at preventing word of abuse from leaking out beyond the church.²⁶⁶ Consistent with this argument, religion scholars Eugene Bianchi and Rosemary Radford Ruether reported:

One can point to the Vatican bank scandals a few years ago or to the cover-up of pederasty . . . In both cases, secrecy and nondisclosure ruled the day. Tragic events came to light only after years of hidden abuse. Full accountability concerning the use of money and property on all levels of the church does not obtain. This or that church leader may be accountable to the people, but specific structures of accountability are lacking. Catholic monarchy lends itself to secrecy and nondisclosure. . . . The wider community of the laity is to pay and obey, but not be privy to the inner sanctum of church finances and decisions about property.²⁶⁷

Such emphasis on obedience and rhetoric about placing the interests of the Church above that of the individual²⁶⁸ have left a laity that is too often cowed into obedience by “autocratic” pressure from bishops and priests.²⁶⁹

Unequal power in religious hierarchies underscores the importance of putting into place sound systems of financial accountability. As Shupe has urged:

[C]hurches and denominations are unequal hierarchies of power that provide the context for all the malfeasance. That’s our given. Thus, are we not going to need some internal realignments of power?²⁷⁰

Indeed, a first step to realigning power within churches should be removing the asymmetries of information. Lack of knowledge is disempowering, and transparency may be the first step towards greater accountability. However, an understanding of the dynamics at work in

²⁶⁶ SHUPE, *supra* note 193, at 59–60.

²⁶⁷ Eugene C. Bianchi & Rosemary Radford Ruether, *Toward a Democratic Catholic Church*, in *A DEMOCRATIC CATHOLIC CHURCH* 248, 258 (Eugene C. Bianchi & Rosemary Radford Ruether eds., 1992).

²⁶⁸ Peter C. Phan, *A New Way of Being Church: Perspectives from Asia*, in *GOVERNANCE, ACCOUNTABILITY, AND THE FUTURE OF THE CATHOLIC CHURCH* 178, 181 (Francis Oakley & Bruce Russett eds., 2004) (During the sexual abuse crisis, bishops often placed the supposed interests of the Church, including the preservation of its reputation, above those of the individual victims.); WITHAM, *supra* note 245, at 63 (Massachusetts Attorney General Thomas F. Reilly observed after an investigation of the Archdiocese of Boston, “When they had a choice between protecting children and protecting the church, they chose secrecy to protect the church.”).

²⁶⁹ Hornsby-Smith, *supra* note 240, at 14.

²⁷⁰ SHUPE, *supra* note 193, at 146.

religious institutions makes it seem implausible that this impetus for transparency will come from within the church. Instead, it reinforces the argument that some churches may only adopt transparency measures if required to do so by law.

B. *Churches Themselves Would Benefit from Increased Transparency and Accountability*

For the churches that do handle their money with integrity, requiring greater transparency for *all* churches could help the honest ones in at least three ways. First, it would give donors greater confidence, making them more willing to give. Second, it would help avoid the fallout that accompanies news of scandals at similar churches, which almost invariably impacts donor giving, even to innocent institutions. Finally, it would mitigate the damage that is done to religious faith when clergy misconduct is discovered.

1. Greater Transparency May Increase Donations

A number of studies have demonstrated that donors are more willing to give to organizations when they believe their contributions are being well-spent.²⁷¹ Several surveys have made similar findings in the specific context of churches.

In a 2006 study, sociologists Christian Smith and Michael Emerson surveyed churchgoing Christians regarding their giving practices and beliefs.²⁷² Nearly one in ten *churchgoers* reported that a primary reason why they did not give more was that “I do not trust those to whom I would give money to spend it wisely, there would be too much waste and abuse of donations.”²⁷³ In written responses and interviews, others also expressed reservations about the lack of transparency in their churches or denominations.²⁷⁴ After comparing those results with other data on American attitudes about giving, Smith and Emerson concluded:

²⁷¹ Kertz, *supra* note 232, at 859–60; Margaret F. Sloan, *The Effects of Nonprofit Accountability Ratings on Donor Behavior*, 38 NONPROFIT & VOLUNTARY SECTOR Q. 220 (2009) (finding that “pass” ratings from the Wise Giving Alliance had a statistically significant effect on the amount of donations received, though the effect of a “did not pass” rating was insignificant); Sally Beatty, *How Charities Can Make Themselves More Open*, WALL ST. J., Dec. 10, 2007, at R1 (reporting that a study at the Center on Philanthropy at Indiana University showed that wealthy Americans would give more to charities that tightly controlled administrative costs and more effectively used donations).

²⁷² SMITH & EMERSON, *supra* note 190, at 7.

²⁷³ *Id.* at 79.

²⁷⁴ *Id.* at 79–81.

[A] significant increase in the public transparency, accountability, and institutionalized credibility of the many religious and charitable causes and organizations to which American Christians might consider giving money would have the real effect over time of considerably increasing the amount of money they give.²⁷⁵

In interviews conducted by Smith and Emerson, some pastors also expressed concern that scandals involving religious leaders had made it more difficult for parishioners to trust churches and therefore more hesitant to give.²⁷⁶

In another recent study, sociologists Brandon Vaidyanathan and Patricia Snell noted that several of the churchgoers they interviewed emphasized the importance of knowing how their donations were being spent.²⁷⁷ For those respondents, knowledge regarding how their churches were spending money was an important consideration in their decisions to attend a particular church and to give to that church.²⁷⁸ Vaidyanathan and Snell concluded that for some respondents, knowledge that their contributions were being carefully stewarded served as an incentive for giving.²⁷⁹

In a study funded by the Lilly Endowment that sought to learn why Catholic giving had declined relative to that of other faiths, researchers determined that giving rates within the Catholic Church varied in proportion to transparency and accountability.²⁸⁰ As Francis J. Butler, the president of Foundations and Donors Interested in Catholic Activities, Inc., summarized the results:

[I]t was a question of participation. Catholics in generous parishes, Lilly found, invariably had a strong sense of belonging and church ownership and those parish cultures were administratively and pastorally transparent.²⁸¹

²⁷⁵ *Id.* at 143.

²⁷⁶ *Id.* at 106.

²⁷⁷ Brandon Vaidyanathan & Patricia Snell, *Motivations for and Obstacles to Religious Financial Giving*, 72 SOC. OF RELIGION 189, 202–03 (2011).

²⁷⁸ *Id.* One respondent stated:

We know very clearly where [the money] is going. We sit in a congregational meeting and we see the budget and we can see what a huge percentage of the money goes directly to mission. . . . That's what I like about [the church], because I really trust what they are doing with [the money] here.

Id. at 203. Another stated: "I definitely have a heart for missions and want to make sure that . . . people in our local community have that support, especially with the economic crisis that's happening now." *Id.*

²⁷⁹ See *supra* note 278.

²⁸⁰ Butler, *supra* note 182, at 153, 157.

²⁸¹ *Id.*; see also CHARLES E. ZECH, WHY CATHOLICS DON'T GIVE . . . AND WHAT CAN BE DONE ABOUT IT 82–89, 128–29 (2006).

Commenting on the same study, Zech wrote: "People who believe that they have some say in the Catholic Church, who believe what they say is valued, give more."²⁸² In fact, another study found that forty percent of Catholic parishioners believe that churchgoers should withhold donations from the Church until they have more say about finances.²⁸³ For those laypeople, increased transparency and accountability would certainly translate into more donations.

The results of those studies mirror findings from the 1992 Economic Values Survey, conducted under the direction of sociologist Robert Wuthnow, which asked respondents a series of questions about whether if a church made various changes, those changes would make the respondent more or less likely to give to the church. Nearly forty-eight percent of respondents said that they would be more likely to give to a church "if [they] understood better what the church does with its money."²⁸⁴ The only other prompt that resulted in a higher percentage (sixty-two percent) saying they would be more likely to give was "if the church were doing more to help the needy."²⁸⁵ Those prompts trumped all others, including a number of self-interested suggestions such as "if the preacher gave better sermons" (nineteen percent), "if my family were benefiting more from the church's programs" (thirty-five percent), and "if I had fewer economic needs myself" (forty-seven percent).²⁸⁶

Similar results from numerous studies strongly suggest that churchgoers would give more money to churches if they knew where their contributions were going, and if they had some voice in decisions about the use of those funds.²⁸⁷

²⁸² Butler, *supra* note 182, at 158. That recommendation is consistent with earlier recommendations made by sociologist Andrew Greeley who contended, on the basis of research completed during the 1980s, that Catholic laity would be more generous if they had a say in deciding how their contributions were spent. See ANDREW GREELEY & WILLIAM MCMANUS, CATHOLIC CONTRIBUTIONS: SOCIOLOGY AND POLICY 81-83 (1987).

²⁸³ NAT'L LEADERSHIP ROUNDTABLE ON CHURCH MGMT., THE CHURCH IN AMERICA: LEADERSHIP ROUNDTABLE 2004 79 (2004), available at <http://www.nlrcm.org/TLR/documents/Final%20Report.pdf>.

²⁸⁴ *Economic Values Survey, 1992*, ASS'N OF RELIGION DATA ARCHIVES, http://www.thearda.com/Archive/Files/Codebooks/ECON_CB.asp (last visited July 17, 2013).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ If it is true that congregants would give more to churches that are transparent and where congregants have a voice in financial decisions, then why do churches not voluntarily make themselves transparent and accountable? First, it should be noted that some do. Obviously, at least some churches in the Lilly Endowment study were more open than others. Second, there are costs associated with transparency and accountability. For instance, joining the ECFA requires churches, depending upon size, to have independently prepared financial statements and periodically obtain outside audits, which may be a cost that outweighs the benefit in the mind of church leaders. *ECFA Annual Accreditation Requirements*, ECFA, <http://www.ecfa.org/Content/Membership-Requirements> (last visited Nov. 30, 2012). Likewise, filing the Form 990 is an added cost, requiring time and proper record-keeping. Third, church leaders may be worried that laypeople will not like what they see when the books are opened. Although there may be a popular perception that ministers sacrifice a lot to lead their congregations, many of

2. Requiring Transparency Would Mitigate the Inevitable Fall in Donations from Scandals at Similar Institutions

The second reason why churches would benefit from widespread transparency is that donations nearly always fall in the wake of a financial scandal, as donors become skeptical not just of the guilty organization but also of similar organizations.²⁸⁸ Inasmuch as government-mandated transparency could minimize such scandals at churches, it would be a boon to those churches that operate with integrity.

A brief survey of news stories yields numerous examples of declining charitable contributions in the wake of revelations that donors' money is not being handled with integrity.²⁸⁹ Churches

them do quite well financially. Most pastors probably make more than the majority of those in their congregation, which may lead some individuals to decrease their giving. For instance, the average compensation to senior pastors in 2009 was more than \$80,000 per year, with nearly twenty-five percent making more than \$100,000 (including both salary and benefits). RICHARD R. HAMMAR, *THE 2010-2011 COMPENSATION HANDBOOK FOR CHURCH STAFF* 24 (2010). This amount far exceeded the median *household* income, which was only about \$50,000. U.S. CENSUS BUREAU, *INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008 7* (2009), available at <http://www.census.gov/prod/2009pubs/p60-236.pdf>. Considering that about half of pastors make even more than the average, and sometimes quite a bit more, concerns about jealous laypeople may cause pastors to keep this information secret. (Of course, if the laity would in fact decrease their level of giving if they knew how much the pastor actually made, this presents an even stronger argument that the exemption from filing the Form 990 favors religion, violating the Establishment Clause. See *infra*, Part IV.) And if pastors are more concerned about maximizing their own salary than they are about maximizing donations to their church, then transparency will probably not be in their own interest—even if it is in the interest of their church and those they claim to serve (the classical principal-agent problem). Fourth, as noted *supra* Part III.A.1, church leaders are rarely sophisticated when it comes to financial matters, and even if added transparency might lead to more donations, pastors may not be quick to change long-standing practice.

²⁸⁸ Donations also fall in the wake of other scandals. For instance, the Catholic Church saw a drop in giving following the clergy sexual abuse scandals. See ZECH, *supra* note 281, at 141.

²⁸⁹ For instance, the William Aramony scandal and a few other, more minor problems at local chapters of the United Way had significant and protracted impacts on donor generosity. See, e.g., Dave Berns, *Local United Way Weathering National Scandal*, LAS VEGAS REV.-J., Oct. 27, 1994, at 1F (Las Vegas-area donations fell seventeen percent short of expectations in aftermath of Aramony scandal); Bruce Kauffman, *United Way's New Mission: Make Itself Accountable to Donors*, SAN DIEGO BUS. J., Dec. 4, 2006, at 45 (donations to the United Way of San Diego fell twenty-five percent, partly in response to Aramony scandal); Ellen M. Perlmutter, *A United Front: Donations in Annual Charity Drive Bounce back after Some Rough Times*, PITTSBURGH POST-GAZETTE, Dec. 1, 1996, at F8 (donations in the Pittsburgh area took four years to return to normal following Aramony scandal); Lori Rodriguez, *Wake-Up Call Answered: Diversity in Fund Raising Pays off for United Way*, HOUS. CHRON., Sept. 15, 1996, at 33 (donations in Houston took three years to return to normal following Aramony scandal); Jeffrey Rose, *United Way May Slash Charities' Money*, SAN DIEGO UNION-TRIB., Nov. 10, 1992, at A-1 (charitable organizations in the San Diego area received cuts of as much as fifty-three percent because of shortfall at United Way following scandal); Jacqueline L. Salmon & Peter Whoriskey, *Problems Behind Us, Charity Says; United Way Partnership Divides Area Employees*, WASH. POST, Aug. 13, 2003, at B01 (problems at the United Way of the National Capital Area, including \$1.5 million in questionable payments to its CEO, led large companies

themselves experienced the power of public distrust following the well-publicized televangelist scandals of the late 1980s.

The reputations of evangelical ministries were seriously tarnished by scandals during that period, and even those that were innocent did not escape public aspersion. A 1986 Gallup poll showed that few Americans trusted Christian broadcasting, and the study's authors surmised that "there have been extravagances and questionable tactics, and surely this has soured people's attitudes toward giving and toward Christianity."²⁹⁰ Even religious broadcasters that had experienced no scandals saw donations drop as much as thirty-three percent.²⁹¹

In 1987, a Harris poll found that sixty-nine percent of Americans thought television preachers did more harm than good, with even forty-one percent of the viewers of such programming agreeing.²⁹² A majority (fifty-four percent) of those same followers also agreed that the preachers were only in it for the money.²⁹³ Compared to before the scandals, all television preachers became less popular, even those that had been untouched by scandal.²⁹⁴ The secular media, meanwhile, racked up record ratings in their coverage of the disintegrating televangelist empires.²⁹⁵ Jeffrey K. Hadden argued that these fallen televangelists fulfilled the *Elmer Gantry* stereotype and that they did serious damage to the ministries of even upright preachers.²⁹⁶ The

like ExxonMobil and Giant Food stores to scale back their donation programs); Troy Segal & Christina Del Valle, *They Didn't Even Give at the Office*, BUS. WK., Jan. 25, 1993, at 68 (some local chapters raised fifteen percent less in donations in wake of scandal); Charles E. Shepard, *A Year Later, United Way Still Faces Investigations, Morale Problems*, WASH. POST, Mar. 10, 1993, at A4 (national United Way has slashed budget from \$30 million to \$21 million and donations have fallen about \$92 million in light of Aramony scandal); Deborah Sontag, *Affiliates Feeling Pinch of United Way Scandal*, N.Y. TIMES, Apr. 22, 1992, at A1 ("unprecedented numbers" of employees at companies in the New York area canceled pledges after news of scandal); Steve Twedt, *Divided Way? The Rise in Donations Earmarked for Specific Charities Troubles United Way*, PITTSBURGH POST-GAZETTE, Oct. 27, 2002, at A1 (reports of abuse have led increasing numbers of skeptical donors to earmark United Way funds for specific charities); Todd Wallack, *PipeVine Scandal Deters Giving*, S.F. CHRON., June 10, 2003, at B1 (donations to local United Way down eighteen percent after its contractor misused funds); *Marketplace: United Way Announces New Guidelines to Help Local Chapters Define their Mission and Improve Accountability* (Minnesota Public Radio, Mar. 30, 2005) (donations to United Way are still down despite overall rise in charitable giving because of several high-profile scandals in the organization, beginning with Aramony).

²⁹⁰ Robert Abelman, *The Selling of Salvation in the Electronic Church*, in RELIGIOUS TELEVISION: CONTROVERSIES AND CONCLUSIONS, *supra* note 76, at 173, 179.

²⁹¹ *Id.*

²⁹² *Praise the Lord and Pass the Loot*, *supra* note 84, at 26.

²⁹³ *Id.*

²⁹⁴ HADDEN & SHUPE, *supra* note 205, at 16.

²⁹⁵ Jeffrey K. Hadden & Anson Shupe, *Elmer Gantry: Exemplar of American Televangelism*, in RELIGIOUS TELEVISION: CONTROVERSIES AND CONCLUSIONS, *supra* note 76, at 13, 17–18.

²⁹⁶ *Id.* at 18–19.

skepticism bred from these scandals has had a long-term negative impact on the public's perception of television preachers.²⁹⁷

3. Financial and Other Scandals, Caused or Exacerbated by Lack of Transparency, Have the Potential to Damage the Spiritual Lives of Churchgoers

A lack of transparency fosters an environment in which abuses can flourish, and the ensuing scandals are bad for churches financially and spiritually. As Shupe has observed, the impact of financial and sexual scandals “can subvert and shatter individuals’ faith and cause great emotional and social damage.”²⁹⁸ For instance, in the fallout from a recent scam perpetrated by a pastor in Brooklyn, many of those victimized left the church.²⁹⁹ The leader of another church lamented, “I am concerned people are walking away saying you can’t trust preachers.”³⁰⁰ Sociologist and Methodist minister Jackson W. Carroll has noted that it is “tragically” painful when the person who proves untrustworthy is supposed to be “God’s representative.”³⁰¹ It is not hard to imagine the damage that such a scandal can do to the faith of churchgoers who have placed so much trust in their pastor.

For church leaders genuinely interested in their congregation’s spiritual health and conscious of the inherent temptations to abuse power and money, transparency may be one of the best guards against the damage such scandals inevitably cause.

C. *Many Churchgoers Would Likely Welcome More Financial Transparency*

Congregants would also welcome more financial transparency at their churches. As Zech wrote with respect to his research on giving:

We asked the question in a number of different ways, and each time the answer came out the same. Parishioners want more say about how their parishes are run. . . . They want to be consulted and have direct input into decision-making processes. In parish financial matters they expect accountability and transparency.³⁰²

²⁹⁷ Hadden, *supra* note 106, at 408.

²⁹⁸ SHUPE, *supra* note 193, at 6.

²⁹⁹ Gonzalez, *supra* note 171.

³⁰⁰ *Id.*

³⁰¹ CARROLL, *supra* note 196, at 154.

³⁰² ZECH, *supra* note 281, at 128–29.

Those observations may seem obvious to most donors but, as noted above, such accountability and transparency is lacking in most Catholic dioceses and many Protestant churches.

Many Catholic parishioners called for greater financial transparency in the wake of the clergy sexual abuse scandals, pointing out that the financial secrecy of the church was one of the factors that allowed leaders to keep the magnitude of the scandal quiet for as long as they did.³⁰³ A 2002 Gallup poll found that sixty-five percent of Catholics agreed that the church should be more accountable for its finances, and seventy-nine percent wanted bishops to give a complete account of the financial impact of sexual abuse victim settlements.³⁰⁴ A study conducted by the National Leadership Roundtable on Church Management found that a majority of Catholics wanted “full financial disclosure” from the church, and eighty percent believed that lay people should have a say in how their donations are spent.³⁰⁵ Some Catholic leaders have even spoken out on this subject, advocating more transparency. James L. Heft, a priest and the founding director of the Institute for Advanced Catholic Studies at the University of Southern California, has written:

I believe that all bishops should annually publish an audit of the financial status of the diocese, including the amount paid to victims of sexual abuse. Laity who are expected to donate to the church need to know that their donations will be used for the purposes for which they are given. All these practices call for a greater honesty on the part of at least some bishops than has been the case.³⁰⁶

When the church has been more transparent, church donors have welcomed it. As the Lilly Endowment study found, parishioners value it when their leaders are more open and when the laity believes that they have a voice in church affairs.³⁰⁷

³⁰³ Robert West & Charles Zech, *Internal Financial Controls in the U.S. Catholic Church*, 9 J. OF FORENSIC ACCT. 129 (2008).

³⁰⁴ Butler, *supra* note 182, at 156.

³⁰⁵ NAT'L LEADERSHIP ROUNDTABLE ON CHURCH MGMT., *supra* note 283, at 79.

³⁰⁶ James L. Heft, *Accountability and Governance in the Church: Theological Considerations*, in GOVERNANCE, ACCOUNTABILITY, AND THE FUTURE OF THE CATHOLIC CHURCH 121, 125 (Francis Oakley & Bruce Russett eds., 2004).

³⁰⁷ Butler, *supra* note 182, at 157. In general, there have been pushes for greater democracy within the Catholic Church in recent years. See Jay P. Dolan, *The Desire for Democracy in the American Catholic Church*, in A DEMOCRATIC CATHOLIC CHURCH, *supra* note 267, at 113, 126 (“This desire for democracy in the church has resurfaced once again. Behind this new surge of democracy is a theology of church that is much more populist than the monarchical, clerical model of church that has prevailed since the mid-nineteenth century. This new theology has produced such phenomena in the church as collegiality, parish councils, and pastoral letters written in an open, consultative manner.”); Hornsby-Smith, *supra* note 240, at 24 (summarizing research on the Catholic Church in Britain during the 1970s and 1980s that found many lay people desired more democratic decision-making in the Church).

In its struggle to recover credibility following revelations of sexual abuse, the Roman Catholic Archdiocese of Boston commissioned a “Financial Transparency Project.”³⁰⁸ Under the leadership of new Archbishop Sean O’Malley, it sought to “open the books,” utilizing a commission of lay volunteers as well as professional auditors.³⁰⁹ In his review of this project fostering unprecedented transparency, Jack McCarthy noted that the public reaction has been “overwhelmingly positive.”³¹⁰

Considering how invested many laypeople already are in their churches, attending weekly services and probably also volunteering outside time,³¹¹ they are not likely to be deterred by the small costs of some basic research on their church. About half of Catholics and a third of churchgoers in many Protestant denominations want more power in financial decisions;³¹² these individuals would surely be interested in additional information about church finances. Before choosing a church to attend and before deciding how much of their money to donate, at least some churchgoers would look up the Form 990, if it were available.³¹³

David M. Schizer has argued that such private monitoring is one of the principal benefits government derives from charitable deductions.³¹⁴ Because average donors have little or no influence on the organizations to which they give, they are “unlikely to invest the time” in monitoring them.³¹⁵ More meaningful monitoring is provided by large donors and those that concentrate their giving and give regularly.³¹⁶ Although only a few donors at each church will fit Schizer’s first criterion, many are likely to fit the latter two since for average churchgoers, their church is

³⁰⁸ McCarthy, *supra* note 214, at 158.

³⁰⁹ *Id.* at 159.

³¹⁰ *Id.* at 162.

³¹¹ The amount of volunteering for the local church varies across denominations. Hoge et al. found that the average hours volunteered each month ranged from 2.2 (for Catholics) up to 5.6 (for Baptists). HOGUE ET AL., *supra* note 188, at 55.

³¹² *Id.* at 42.

³¹³ Little empirical research has been done on why individuals choose to attend particular churches. Even in the studies that exist, financial transparency has not been considered. However, one study suggested that “[h]ow openly the church deals with disagreements and conflict” is the sixth-most important factor out of ten in predicting whether an attendee will stay at a particular church. Daniel V.A. Olson, *Church Friendships: Boon or Barrier to Church Growth?*, 28 J. FOR SCI. STUDY RELIGION 432, 440 (1989). This variable might be considered a proxy for how much individuals value transparency in their churches, suggesting that it is at least somewhat important. Of course, compared to the individual’s decision about whether to donate to a particular nonprofit, the decision whether to go to church is a good deal more complex.

³¹⁴ David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals*, 62 TAX L. REV. 221, 256–67 (2009).

³¹⁵ *Id.* at 260–61.

³¹⁶ *Id.* at 261, 263.

annually the single largest recipient of their gifts.³¹⁷ Many such donors are interested in more financial information from their churches and providing them with such information would improve accountability for churches.

Thus, far from a group that should be excepted from the information return requirement, churches seem like the *ideal* organization to benefit from transparency. Donors to churches are not writing a check and putting in the mail to send to some far-off place; they are placing money in the collection plate at a building where they worship every Sunday. In numerous surveys, a significant number of churchgoers have expressed a desire for more transparency and accountability in their churches. Many of them care what happens to that money and have good incentives to monitor it.³¹⁸

D. *Financial Transparency is Consistent with the Teachings of Many Churches*

Some charismatic church leaders have become notorious for preaching to congregations that God has ordained for them to be in power and that churchgoers should unquestioningly submit to their authority. For instance, Bishop Eddie Long told the *Atlanta Journal-Constitution* that a biblical leader should not have to answer to a board, and in his autobiography he called governmental checks like a board “ungodly.”³¹⁹ Others have emphasized that they are accountable only to God and should not have to answer to the public.³²⁰ However, the proclamations made by these preachers are outside the mainstream of Christian teaching.

Billy Graham, perhaps the Twentieth Century’s most famous evangelist, took a very different stance on accountability, outlined in an agreement he and several friends made in 1948 known as the “Modesto Manifesto.”³²¹ Graham had asked for advice on how he could navigate the temptations that had toppled other famous evangelists.³²² His friends and associates advised that, among other things, he needed to

³¹⁷ HOGE ET AL., *supra* note 188, at 50.

³¹⁸ Although churchgoers may be unwilling to brazenly confront religious authority figures, they are probably still willing to engage in private monitoring that does not entail confrontation—certainly those who expressed a desire for greater financial transparency and accountability to pollsters would be likely to do so. Even knowing that donors are paying attention would probably cause at least some leaders to better steward those resources.

³¹⁹ Blake, *supra* note 194.

³²⁰ Abelman, *supra* note 76, at 192.

³²¹ BILLY GRAHAM, JUST AS I AM: THE AUTOBIOGRAPHY OF BILLY GRAHAM 128, 679 (1997); Laurie Goodstein, *Billy Graham Activates a Global Electronic Pulpit*, WASH. POST, Mar. 14, 1995, at A1.

³²² GRAHAM, *supra* note 321.

avoid greed by being financially accountable.³²³ As a result, Graham's organization went beyond the IRS's disclosure requirements, publishing annual audits of ministry finances and buying newspaper advertisement space in local papers to publish audits following major evangelistic campaigns.³²⁴ In 1979, Graham also partnered with another large Christian ministry to start the ECFA, an organization that accredits applicants who have demonstrated adherence to certain financial standards and best practices.³²⁵ Graham's biographer noted that one of Graham's strengths was that "he has never thought that he was beyond temptation or that anything he wanted to do was all right."³²⁶ Unlike other televangelists such as Jim Bakker or Jimmy Swaggart, Graham tried to surround himself with people who were not afraid to tell him "no," and he thought this was part of his Christian duty.³²⁷

Graham's views continue to be espoused by two of the organizations he helped create, the ECFA and *Christianity Today*, the leading evangelical Christian magazine. The ECFA has grown substantially since its founding in 1979, currently boasting about 1,700 members with \$20 billion in combined revenue.³²⁸ Members are required to comply with the ECFA's "Standards of Responsible Stewardship,"³²⁹ which mandate practices such as board oversight, transparency, audited financial statements, truth in fundraising, and sound conflicts of interest policies.³³⁰ When noncompliance is suspected—either through one of the more than 180 on-site field reviews the ECFA conducts each year³³¹ or through donor complaints—the ECFA investigates, and if it determines that the organization is noncompliant, the ECFA may suspend or terminate its membership.³³² The ECFA is clear that it believes financial disclosure is a central part of the Christian faith:

Financial disclosure is not only an accepted, expected, and required form of accountability in society at large, but it also represents the even higher standard of openness for Christian

³²³ *Id.*

³²⁴ Darren Barbee, *Reverend Graham Has History of Financial Openness, Accountability*, FORT WORTH STAR-TELEGRAM, Oct. 13, 2002.

³²⁵ *Id.* More information on the ECFA is available on its website. ECFA, <http://www.ecfa.org> (last visited Sept. 5, 2013).

³²⁶ Barbee, *supra* note 324.

³²⁷ LONG, *supra* note 186, at 8; Goodstein, *supra* note 321.

³²⁸ *About ECFA*, ECFA, <http://www.ecfa.org/Content/About> (last visited Nov. 30, 2012).

³²⁹ ECFA, GUIDING PRINCIPLES FOR COMPLIANCE DETERMINATION, *available at* <http://www.ecfa.org/pdf/GuidingPrinc.pdf>.

³³⁰ ECFA, ECFA'S SEVEN STANDARDS OF RESPONSIBLE STEWARDSHIP, *available at* http://www.ecfa.org/PDF/ECFA_Seven_Standards_of_Responsible_Stewardship.pdf.

³³¹ *Field Review Program*, ECFA, <http://www.ecfa.org/Content/2MembManFieldReviewProgram> (last visited Aug. 2, 2013).

³³² ECFA, *supra* note 329.

organizations operating in the forum of the Church. . . . [T]he reputation of the Christian ministry in general is at stake.³³³

Unfortunately, despite the fact that the ECFA was originally aimed at promoting voluntary financial accountability for churches, today only about 150 churches are accredited members of the ECFA,³³⁴ an infinitesimal fraction of the more than 330,000 churches in the United States.³³⁵

Christianity Today has a record of publishing articles reporting on financial abuses by Christian ministries and churches, and it has consistently advocated the value of transparency. The magazine has published a number of updates on the activities of the ECFA, including news about organizations that have been suspended by the accountability organization.³³⁶ In a 2003 editorial, the magazine urged that all Christian organizations should operate with open books, including churches.³³⁷ The editors wrote, “Although churches . . . aren’t legally required to make financial statements available, they are morally obligated to do so.”³³⁸ The editorial directed harsh criticism at church-based ministries that declined to voluntarily file a Form 990, noting that they were shortsighted, ignorant of reality, and out of step with their “higher obligation” to be transparent in all their doings.³³⁹ Similarly, in a 2012 editorial denouncing Ponzi schemes that had been endorsed by pastors, the editors concluded that “[v]isible, public accountability” was essential for the success of Christian ministry.³⁴⁰

Other Christian leaders and organizations have also actively urged greater transparency. For instance, Wall Watchers is a smaller

³³³ *ECFA Standard 5 – Transparency*, ECFA, <http://www.ecfa.org/Content/Comment5> (last visited July 24, 2013).

³³⁴ Search of ECFA members with the category “Church: Local” or “Church: Multisite” on the ECFA website, eliminating duplicate results, ECFA, <http://www.ecfa.org> (last visited Nov. 21, 2012).

³³⁵ NAT’L COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., *supra* note 8, at 377.

³³⁶ See, e.g., Marshall Allen, *Naïve’ Bookkeeping*, CHRISTIANITY TODAY, Aug. 2003, at 19–20 (reporting on the ECFA’s investigation of the Christian Research Institute for lack of internal controls and excessive salaries and benefits); *Double-entry Accountability*, CHRISTIANITY TODAY, May 2004, at 27 (summarizing programs at the ECFA and another Christian watchdog organization); *ECFA Grows, but Loses Some Well-known Names*, CHRISTIANITY TODAY, Oct. 8, 1990, at 59 (naming organizations that have resigned from ECFA either because they were under investigation or because they claimed the organization was duplicative of other accountability systems already in place); Elizabeth Lawson, *Accountability for Growth*, CHRISTIANITY TODAY, Sept. 2007, at 20–21 (describing new ECFA membership option for small ministries and churches); Kim A. Lawton, *ECFA Cites Problems at Samaritan’s Purse*, CHRISTIANITY TODAY, Aug. 17, 1992, at 47 (discussing the ECFA’s suspension of Franklin Graham’s organization because of lack of board oversight).

³³⁷ *Open-book Ministry*, CHRISTIANITY TODAY, Jan. 2003, at 30–31.

³³⁸ *Id.* at 30.

³³⁹ *Id.* at 31.

³⁴⁰ *Pastors’ Ponzis*, CHRISTIANITY TODAY, Apr. 2012, at 65.

complement to the ECFA.³⁴¹ The organization runs the website MinistryWatch.org, and publishes an annual “Donor Alert List” of the Christian ministries whose financial dealings are the most worrisome.³⁴² In addition to the transparency and oversight concerns raised by ECFA, Wall Watchers warns donors about outsized executive salaries and disproportionate fundraising expenses.³⁴³

In a book on church finances, a seminary professor and an accounting professor warned church leaders: “There is no place for secrecy within the church.”³⁴⁴ The authors cautioned that money, power, and secrecy are a toxic combination, and they recommended full financial transparency, down to the details of every financial transaction, including the pastor’s salary.³⁴⁵ They made it clear that, not only is such transparency good management, but it is also consistent with Christian teaching on money.³⁴⁶

Theologians within the Catholic Church have also embraced transparency. In its 1993 letter on pastoral stewardship, the U.S. Conference of Catholic Bishops wrote that the laity “ought to have an active role in the oversight of the stewardship of pastoral leaders.”³⁴⁷ James L. Heft has noted: “Long before this current crisis . . . a clear doctrinal basis has existed for a more effective inclusion of the laity in the life of the church and for structures that support that inclusion.”³⁴⁸ Eugene C. Bianchi and Rosemary Radford Ruether also found a doctrinal basis for transparency and accountability in the principle that Christians must wisely steward the gifts God has given them, and in the belief that the church consists of fallible sinners at all levels, including in the leadership.³⁴⁹

Indeed, the earliest example of financial accountability in the church can be found in the New Testament, where the apostle Paul instructed the Corinthians to select trusted individuals from among them to deliver their financial gifts to the church in Jerusalem; Paul declined to personally take the money.³⁵⁰ On the basis of Paul’s example, seminary professor Craig L. Blomberg commented: “Christians in all

³⁴¹ *Double-entry Accountability*, *supra* note 336, at 27.

³⁴² *Donor Alert Ministries*, MINISTRY WATCH, <http://www.ministrywatch.com/ministries/ministryarticles.aspx?type=alert> (last visited Sept. 5, 2013).

³⁴³ *Double-entry Accountability*, *supra* note 336, at 27.

³⁴⁴ JAMIESON & JAMIESON, *supra* note 172, at 117.

³⁴⁵ *Id.* at 118–19.

³⁴⁶ *Id.* at 119, 129–30 (“[The pastor] can demonstrate disarming of the power of money by insisting that clear, forthright salary information about his compensation package be presented in the financial statements.”).

³⁴⁷ Butler, *supra* note 182, at 155–56. However, many bishops have refrained from actually embracing this idea when it matters. For instance, the Archdiocese of New York has long refused public financial accountability.

³⁴⁸ Heft, *supra* note 306, at 126.

³⁴⁹ Bianchi & Ruether, *supra* note 267, at 258–59.

³⁵⁰ 1 *Corinthians* 16:3–4.

times and places should know what other believers are doing with their finances in ways that help to hold them accountable for good stewardship.”³⁵¹

Once one has accepted that even church leaders are sinners and that churchgoers have a moral obligation to ensure that their contributions are used wisely, it is axiomatic that churches must be open and accountable about their finances. Indeed, a policy of transparency would be consistent with the moral teachings professed by many Christian churches.

E. *Self-Regulation Is Insufficient to Prevent Financial Abuse*

As noted above, the Commission on Accountability and Policy for Religious Organizations, organized by the ECFA, has recommended that Congress not require churches to file the Form 990.³⁵² The Commission’s recommendation comes as no surprise given that the ECFA, despite its professed belief in the importance of transparency, has consistently opposed requiring churches to file the Form 990.³⁵³ The position taken by the ECFA and many church leaders has been that churches and other religious organizations are capable of regulating themselves. However, history has proven them wrong.

Most conspicuously, PTL was a member of the ECFA during much of the 1980s, right up until just before the scandal broke. Although the ECFA had concerns about PTL’s finances, it was unable to effect any change in the governance of the organization, and it was powerless to prevent the massive financial fraud that had been taking place at PTL during much of the time that PTL had been a member of the ECFA.³⁵⁴ As Gordon Loux, then the chairman of the board of the ECFA, noted in defense of the ECFA’s failure to prevent the scandal: there are inherent limits to self-regulation, especially when such regulation depends upon the consent of the regulated.³⁵⁵ The obvious import of that observation is that the ECFA cannot sufficiently regulate churches because the bad actors will never submit to the ECFA’s regulation.

Ironically, as explained above, the ECFA was originally created in 1979 in response to financial scandals at churches, and it was billed as a regulatory body for churches. Yet today only about 150 churches are

³⁵¹ CRAIG L. BLOMBERG, *NEITHER POVERTY NOR RICHES: A BIBLICAL THEOLOGY OF POSSESSIONS* 196 (2000).

³⁵² See *supra* note 22 and accompanying text.

³⁵³ See, e.g., Senate Finance Committee, Grassley-ECFA Correspondence 2009, <http://www.finance.senate.gov/newsroom/ranking/download/?id=abb25810-a26e-4329-a4ed-424e692eb34f> (last visited July 7, 2013).

³⁵⁴ *Hearing on Television Ministries* (1987), *supra* note 83, at 207.

³⁵⁵ *Id.*

accredited by the ECFA, and Congress is still having conversations with church leaders about the need to do something to prevent the financial scandals that regularly engulf churches. Clearly, the ECFA has not solved the problem, nor is it conceivable that any regulatory regime that depends upon churches voluntarily submitting to regulation will ever be able to adequately ensure financial transparency and accountability.

F. *The Public Has a Right to Know What Happens to Taxpayer Money Funneled to Churches*

Unfortunately, not all church members care what happens to their donations. Zech has found that church members are frequently too trusting of their pastors.³⁵⁶ Even in the midst of scandals, some supporters continue to blame negative press on “a liberal media controlled by Satan.”³⁵⁷ Such reactions are consistent with Shupe’s argument that religious institutions are usually “trusted hierarchies,”³⁵⁸ and that reality presents a strong case that self-policing in churches will never be sufficient. Even if the church laity will not—or cannot—act to hold their leaders accountable, because churches are subsidized by taxpayer money, the public also has a right to know what happens to it.

IV. CONSTITUTIONAL ISSUES

Some religious leaders have suggested that there would be a constitutional barrier to imposing the requirements of section 6033 on churches.³⁵⁹ For instance, in its correspondence with Senator Grassley, the ECFA indicated that it believes requiring churches to file the Form 990 would be unconstitutional.³⁶⁰ Perhaps unsurprisingly, most of the legal experts chosen to advise the Commission on Accountability and Policy for Religious Organizations share that view.³⁶¹ However, their arguments misunderstand the First Amendment’s separation of church and state, and they ignore the ways in which churches are already

³⁵⁶ Brumley, *supra* note 10.

³⁵⁷ WITHAM, *supra* note 245, at 178–79.

³⁵⁸ See *supra* note 241 and accompanying text.

³⁵⁹ See *supra* note 90 and accompanying text.

³⁶⁰ Senate Finance Committee, Grassley-ECFA Correspondence 2009, <http://www.finance.senate.gov/newsroom/ranking/download/?id=abb25810-a26e-4329-a4ed-424e692eb34f> (last visited July 7, 2013).

³⁶¹ *Position Papers*, COMMISSION ON ACCOUNTABILITY & POL’Y FOR RELIGIOUS ORGS., <http://religiouspolicycommission.org/PositionPapers.aspx?q=Recent> (last visited Dec. 28, 2012).

regulated by the IRS and other state and local laws.³⁶² In fact, the special treatment that churches currently receive under the Internal Revenue Code, including the exemption for churches under section 6033, may be a violation of the First Amendment's Establishment Clause.

A. *Removing the Exemption Would Not Violate Free Exercise*

The First Amendment prohibits Congress from making any "law respecting an establishment of religion, or prohibiting the free exercise thereof."³⁶³ Courts have long struggled to balance the Establishment and Free Exercise Clauses, allowing religion to be practiced freely while prohibiting the state from doing anything that would establish a particular religion, or religion in general.³⁶⁴ Those religious leaders who oppose removing the exemption from section 6033 protest that requiring churches to file Forms 990 would violate their rights under the Free Exercise Clause. In other words, they contend that the Free Exercise Clause requires an exemption for churches.

The Supreme Court has stated that a free exercise inquiry begins by asking "whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."³⁶⁵ The Free

³⁶² One practitioner noted:

The amenability of churches to some governmental regulation is not seriously disputed. For example, few would protest the application to churches of laws prohibiting fraud in the sale of securities, requiring donated funds to be expended for the purposes represented, protecting copyright owners against infringement, or prohibiting activities that cause physical harm, property damage, or material disturbance to others. Similarly, churches routinely comply with municipal building codes and zoning regulations in the construction and location of worship facilities.

Michele Estrin Gilman, "Charitable Choice" and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses, 55 VAND. L. REV. 799, 877 n.383 (2002) (citing RICHARD R. HAMMAR, FEDERAL INCOME TAX ISSUES IN RELIGIOUS INSTITUTIONS AS NONPROFIT ENTITIES: ISSUES OF ACCESS, SPECIAL STATUS, AND ACCOUNTABILITY § 9-01 (N.Y.U. Sch. Of Law, The Nat'l Ctr. on Philanthropy & the Law ed., 1983)).

³⁶³ U.S. CONST. amend. I.

³⁶⁴ See, e.g., *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989) ("[T]he Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally."); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) ("[T]his Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion." (citing *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1 (1947) (citations omitted)); *Walz v. Tax Comm'n. of N.Y.*, 397 U.S. 664 (1970).

³⁶⁵ *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) (citing *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141-42 (1987); *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 717-19 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972)).

Exercise Clause does not stop the government from imposing laws on religious organizations that may prove burdensome, if the state has a compelling interest in doing so.³⁶⁶ In upholding the denial of tax benefits to Bob Jones University because of its ban on interracial dating, the Court acknowledged that the government's action would have a "substantial impact" on the operation of such religious institutions, but the action encountered no constitutional barrier because it "will not prevent those schools from observing their religious tenets."³⁶⁷

More recently, the Court rejected similar arguments made by the state of Texas in defense of a sales tax exemption for religious materials.³⁶⁸ The state argued that removing the exemption would violate the Free Exercise Clause, but the Court strongly rejected that argument: "It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights."³⁶⁹ To meet that test, the state would have needed to produce evidence that the sales tax would "offend their religious beliefs or inhibit religious activity," which it did not do.³⁷⁰ Similarly, in *Jimmy Swaggart Ministries v. Board of Equalization of California*, the Supreme Court rejected the argument that the Free Exercise Clause required that religious publications be exempt from state sales tax.³⁷¹ The Court concluded that the collection and payment of a generally applicable tax imposed no constitutionally significant burden on religious belief or practice.³⁷²

It is difficult to see how requiring churches to file the Form 990 would impose any burden on religious belief or practice. Moreover, even if a church were to successfully argue that disclosure violated its religious beliefs, a court could still conclude that the government interest in collecting the information on the Form 990 justified the burden. The Supreme Court has rejected arguments that individuals should be exempt from certain taxes on the basis that those taxes violate their religious beliefs, noting that "[t]he tax system could not function if denominations were allowed to challenge the tax system' on the ground

³⁶⁶ See *supra* note 365 and the cases cited therein; see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983) ("However, '[n]ot all burdens on religion are unconstitutional The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.'" (quoting *United States v. Lee*, 455 U.S. 252, 257-58 (1982))).

³⁶⁷ *Bob Jones Univ.*, 461 U.S. at 603-04.

³⁶⁸ *Tex. Monthly, Inc.*, 489 U.S. at 18.

³⁶⁹ *Id.* (quoting *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985)).

³⁷⁰ *Id.*

³⁷¹ *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 392 (1990).

³⁷² *Id.*

that it operated 'in a manner that violates their religious belief.'³⁷³ For all of the reasons considered in Part III, the government interest in collecting the information on the Form 990 is indeed compelling.

Unfortunately, many arguments against requiring churches to file the Form 990 are premised on far-fetched theories about how the IRS could use the Form 990 to regulate religious beliefs and persecute believers. Even several of the position papers prepared by the Commission on Accountability for Religious Organizations contained such arguments.³⁷⁴ Assertions by religious leaders that requiring churches to file the Form 990 would violate the Free Exercise Clause frequently depend upon appealing to anti-government phobia rather than constitutional law.³⁷⁵ It is concerns about the political impact of such fears, more than any legitimate constitutional issue, that seems to have ossified religious preferences in the Internal Revenue Code.³⁷⁶

B. *The Current Exemption May Violate the Establishment Clause*

Some commentators have argued that the Supreme Court's jurisprudence in *Texas Monthly v. Bullock*³⁷⁷ suggests that the Court would view the special treatment of churches in the Internal Revenue Code, including the exemption from filing the Form 990, as unconstitutional violations of the Establishment Clause.³⁷⁸

In *Texas Monthly*, the Court was asked to decide whether a Texas sales tax exemption on religious publications violated the Establishment Clause.³⁷⁹ The Court held that it did.³⁸⁰ Finding that the special

³⁷³ *Hernandez v. Comm'r*, 490 U.S. 680, 700 (1989) (quoting *United States v. Lee*, 455 U.S. 252, 260 (1982)).

³⁷⁴ See, e.g., the position papers authored by Michael P. Mosher ("What if the leaders in power were in fact hostile to religion? . . . [A] plethora of opportunities would abound for potential discrimination and persecution. . . . [I]t invites and allows for misuse and discriminatory practices by government insiders such as regularly practiced in other less religiously tolerant countries.") and Thomas J. Winters ("Who will protect those same church members from the government? Newton's third law of motion states that forces always occur in opposite pairs, i.e. for every action there is an equal and opposite reaction. The action of imposing on churches annual disclosures through the Form 990 will inherently result in the opposite reaction, a loss of religious liberties and surrendering a measure of control over our religion."), *supra* note 361.

³⁷⁵ See, e.g., *supra* notes 90-91 and accompanying text (statements made by D. James Kennedy, President and Founder, Coral Ridge Ministries and Ben Armstrong, Exec. Dir., Nat'l Religious Broadcasters, with respect to the 1987 hearing on television ministries).

³⁷⁶ See *supra* note 100 and accompanying text.

³⁷⁷ *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

³⁷⁸ See Cohn, *supra* note 188; Reka Potgieter Hoff, *The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise?*, 11 VA. TAX REV. 71 (1991); Wendy Gerzog Shaller, *Churches and Their Envidable Tax Status*, 51 U. PITT. L. REV. 345 (1990).

³⁷⁹ *Tex. Monthly, Inc.*, 489 U.S. at 5 (plurality opinion).

³⁸⁰ *Id.*

treatment for religious literature under the Texas statute lacked any secular purpose that could justify the preference, and that it endorsed religious belief in general, the Court ruled the state law unconstitutional.³⁸¹ Justice Brennan, writing the plurality opinion, did not mince his words, declaring the exemption a “blatant endorsement of religion.”³⁸²

Likewise, the Form 990 exemption for churches lacks any secular purpose and favors religion, suggesting that it might also be unconstitutional under the reasoning in *Texas Monthly*.

C. *Requiring Churches to File the Form 990 Would Not Be Excessively Entangling*

In its opinion in *Texas Monthly*, the Court applied the standard originally articulated in *Lemon v. Kurtzman*, which set out a tripartite test for evaluating whether a law violates the Establishment Clause:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster “an excessive government entanglement with religion.”³⁸³

The state of Texas argued that this latter clause would be implicated if it had to tax religious publications, but the Court disagreed.³⁸⁴ In fact, the Court found that the exemption produced a *greater* entanglement with religion because it required the state and the courts to determine what should be exempt.³⁸⁵ Similarly, the exemption for churches under section 6033 requires greater entanglement because courts and the IRS must determine what is and is not a “church.” To do so, the IRS and the courts must wade into intensely religious questions such as whether an organization has a recognized creed, an ecclesiastical government, a religious literature, and a distinct religious history.³⁸⁶ If there were no

³⁸¹ *Id.* at 17.

³⁸² *Id.* at 20.

³⁸³ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (citations omitted).

³⁸⁴ *Tex. Monthly, Inc.*, 489 U.S. at 20.

³⁸⁵ *Id.*; see also *Hernandez v. Comm’r*, 490 U.S. 680, 696 (1989) (rejecting petitioners’ argument that their payments to the Church of Scientology, despite the quid pro quo nature of the payments, should be considered deductions because they were part of a religious service, noting that such an interpretation would require the IRS to distinguish between “secular” services and “religious” services and may be excessively entangling).

³⁸⁶ See *supra* note 10; see also, e.g., *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304 (D.D.C. 1980) (dissecting the practices, doctrine, teachings, worship, governance, congregation, etc. of purported church); *Good v. Comm’r*, 104 T.C.M. (CCH) 595 (2012) (same); *Chambers v. Comm’r*, 101 T.C.M. (CCH) 1550 (2011) (same); *Richardson v. Comm’r*, 70 T.C.M. (CCH) 14 (1995) (same); *VIA v. Comm’r*, 68 T.C.M. (CCH) 212 (1994) (same); *First Church of In Theo v. Comm’r*, 56 T.C.M. (CCH) 1045 (1989) (same).

exemption for churches, there would be no need for the IRS or the courts to try to answer such questions.³⁸⁷

In 1989, after it decided *Texas Monthly*, the Supreme Court held in *Hernandez v. Commissioner* that disallowing those charitable deductions to the Church of Scientology that were actually disguised quid pro quo transactions was not excessively entangling, despite the fact that it required the IRS to examine the prices, services, payments, and other details about the transactions.³⁸⁸ The Court held that “routine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no ‘detailed monitoring and close administrative contact’ between secular and religious bodies, does not of itself violate the nonentanglement command.”³⁸⁹

Requiring churches to file the Form 990 would stop well short of the level of IRS involvement in examining the transactions in *Hernandez*. If a detailed examination of the prices and services exchanged as part of a religious practice is not excessively entangling, then surely asking churches to complete a tax form once a year is not entangling, and it does not involve any inquiry into religious doctrine. Indeed, it is hard to imagine a more “routine regulatory interaction.”³⁹⁰

CONCLUSION

This Article has explained the history of the exemption from filing Form 990 that churches enjoy under Code section 6033, and it has argued that the original purpose for the exemption no longer applies and that there are compelling reasons for Congress to amend the law to require church filing. As demonstrated by ongoing revelations of scandals and the egregious way in which several religious ministers refused Senator Grassley’s recent requests for financial information, this issue is as relevant today as it has ever been. Indeed, because many of the fastest-growing and largest churches in America are independent,

³⁸⁷ Ironically, given its opposition to requiring churches to file the Form 990, the Commission on Accountability and Policy for Religious Organizations wrote in its final report: “Applying and administering discriminating criteria for a filing exception [to the Form 990] would ensnare the government in a constitutionally problematic quagmire of inherently religious judgments, and would require probing into the depths of each religious organization’s structure, governance, and practices to determine whether the criteria are met.” *COMM’N ON ACCOUNTABILITY & POLICY FOR RELIGIOUS ORGS.*, *supra* note 22, at 32. That the government is already ensnared in such a “constitutionally problematic quagmire of inherently religious judgments” was somehow lost on the Commission. The only way out of that quagmire is to end the Form 990 exemption and other special exemptions for churches.

³⁸⁸ *Hernandez*, 490 U.S. at 696.

³⁸⁹ *Id.* at 696–97 (citations omitted).

³⁹⁰ *See id.*

non-denominational churches—which have less accountability than any other type of church—and because such churches make up an increasingly large percentage of the church landscape, financial transparency may be more important now than ever before.³⁹¹

Not only do the problems that necessitate accountability continue unabated, but the potential power of transparency has increased enormously during the last decade. The Internet has enabled the possibility of public monitoring that was once only theory. In seconds, donors can gain access to valuable financial information that provides them with data about where their contributions will be best spent. The knowledge that this information is so easily obtained by donors and by the press means that the Form 990 has power to check wayward nonprofits that it never before possessed.

Requiring churches to file the Form 990 would increase their transparency and accountability, both to the IRS and to the public. Donors to churches themselves may have the most to gain from such reform since they are the ones whose contributions may be misspent and whose religious experiences may be tarnished by greedy leaders whose only real religion is profit.

In summarizing the Court's jurisprudence on the Establishment Clause, Chief Justice Burger wrote that the disputed statute must possess "a secular legislative purpose" and that "its principal or primary effect must be one that neither advances nor inhibits religion."³⁹² On its face, the exemption under section 6033 seems to advance religion, excepting churches from disclosure and limiting public oversight. However, it may in fact *inhibit* religion—allowing charlatans to hide their unscrupulous financial misdeeds behind a cloak of religious fervor. It is time for Congress to remove this exemption.

³⁹¹ BARRY A. KOSMIN & ARIELA KEYSAR, AMERICAN RELIGIOUS IDENTIFICATION SURVEY 2008 SUMMARY REPORT 5 (2009), available at http://commons.trincoll.edu/aris/files/2011/08/ARIS_Report_2008.pdf (the percentage of Christians attending a non-denominational church has ballooned from 0.1 percent in 1990 to 1.2 percent in 2001 and 3.5 percent in 2008); WARREN COLE SMITH, *supra* note 192, at 39 (twenty-five percent of the nation's 1,300 megachurches are nondenominational); Ed Stetzer, *Life in Those Old Bones*, CHRISTIANITY TODAY, June 2010, at 24 (many of the best known churches today have no denominational affiliation and nondenominational churches continue to grow steadily while mainline denominations are shrinking).

³⁹² *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).