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# Morse Code, Da Vinci Code, Tax Code and ... Churches: An Historical and Constitutional Analysis of Why Section 501(c)(3) Does Not Apply to Churches

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# Morse Code, Da Vinci Code, Tax Code and . . . Churches: An Historical and Constitutional Analysis of Why Section 501(c)(3) Does Not Apply to Churches

Jennifer M. Smith<sup>♦</sup>

The First Amendment is often inconvenient. But that is beside the point. Inconvenience does not absolve the government from its obligation to tolerate speech.<sup>1</sup>

~Justice Anthony Kennedy

## I. INTRODUCTION

Much has been said about Internal Revenue Code § 501(c)(3) and its impact on churches. For decades, commentators have engaged in scholarly debate about the Internal Revenue Code's (the "Code") proscription that churches may not engage in substantial propaganda or influencing of legislation (the "lobbying limitation") or participate or interfere in any political campaigns (the "electioneering ban").<sup>2</sup> In particular, distinguished professors and other scholars have written on section 501(c)(3)'s lack of clarity and the peculiar problems, including historical voids and constitutional encroachments, encountered in the application of section 501(c)(3) to churches.<sup>3</sup>

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<sup>1</sup> *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 701 (1992).

<sup>2</sup> *See infra* note 37.

<sup>3</sup> *See, e.g.*, Boris Bittker, *Churches, Taxes, and the Constitution*, 78 YALE L.J. 1285 (1969); Wilfred R. Caron & Deirdre Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J.L. & POL. 169 (1985); Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145 (2006); Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Preamble IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733 (2001); Reka Potgieter Hoff, *The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise?*, 11 VA. TAX REV. 71 (1991); Stephen Schwarz, *Limiting Religious Tax Exemptions:*

Not only have scholars attempted to find solutions for the problems that develop surrounding the application of section 501(c)(3) to churches,<sup>4</sup> but all three branches of government have also wrestled with how to apply the lobbying limitation and electioneering ban (collectively, “political activity restrictions”) to churches. Congress has unsuccessfully introduced legislation to solve these problems,<sup>5</sup> and the courts have failed to find consistency in the meaning or scope of the Code’s political activity restrictions.<sup>6</sup> Meanwhile, the Internal Revenue Service (“IRS”) continues to try to clarify the Code so as to apply, interpret, and enforce it with some fairness and certainty.<sup>7</sup> Yet, there has been little success in solving this tax problem—America’s tax problem.

At this point, no part of section 501(c)(3) has escaped scholarly commentary.<sup>8</sup> Nevertheless, section 501(c)(3) continues to draw attention because of its uncomfortable and artificial interplay with churches. Due to America’s tug of war with the ever-changing principle of the separation of church and state,<sup>9</sup> the rise in the number of mega churches,<sup>10</sup> governments’ interest in securing additional funding sources,<sup>11</sup> and a sitting president’s power over the IRS to ensure audits for those churches that adversely

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*When Should the Church Render Unto Caesar?*, 29 U. FLA. L. REV. 50 (1976); Ellis West, *The Case Against A Right To Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL’Y 591 (1990).

<sup>4</sup> See *infra* notes 269-75 and accompanying text.

<sup>5</sup> See, e.g., Houses of Worship Free Speech Restoration Act, H.R. 235, 108th Cong. (2003); Houses of Worship Political Speech Protection Act, H.R. 2357, 107th Cong. (2001); Bright-Line Act of 2001, H.R. 2931, 107th Cong. (2001); see also Ann M. Murphy, *Campaign Signs and the Collection Plate—Never the Twain Shall Meet*, 1 PITT. TAX REV. 35, 36-37 (2003) (setting forth a brief history of the recent amendment, H.R. 235).

<sup>6</sup> Schwarz, *supra* note 3, at 69 (“In light of this obscure legislative history, it is not surprising that the courts have been unable to agree on the meaning and scope of the political limitations.”); see also Edward McGlynn Gaffney, Jr., *On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics*, 40 DEPAUL L. REV. 1, 29 (1990) (noting that the Supreme Court has not squarely decided on the constitutionality of section 501(c)(3) political activity restrictions).

<sup>7</sup> Mark W. Everson, Comm’r of Internal Revenue, Remarks at the City Club of Cleveland, Ohio (Feb. 24, 2006) (transcript available at <http://www.irs.gov/irs/article/0,,id=154788,00.html>) (“Our job at the IRS is to educate the public and charities about the law and to enforce it in a fair and even-handed manner.”).

<sup>8</sup> See *supra* note 3.

<sup>9</sup> See *infra* Part III(A).

<sup>10</sup> A “mega church” has an average weekly congregation attendance of 2000 persons or more in its worship services. There are over 1200 Protestant Christian mega churches in the United States and there have been substantial increases in attendance since the 1970s. See Hartford Institute for Religion Research, *Mega Church Definition*, at <http://hrr.hartsem.edu/megachurch/definition.html> (last visited Mar. 5, 2007).

<sup>11</sup> DEAN M. KELLEY, *WHY CHURCHES SHOULD NOT PAY TAXES* 1 (1977) (“Tax exemption of churches has recently become a subject of interest and controversy as municipalities and even states are increasingly pressed for revenue.”).

interfered in presidential campaigns,<sup>12</sup> the attention focused on section 501(c)(3) as applied to churches is not likely to wane. Nonetheless, one point continues to surface in discussion of section 501(c)(3): most scholars agree or acquiesce, even if by silence, that the Code's political activity restrictions were never directed at or intended for churches.<sup>13</sup>

This article is about the United States federal tax code and churches. In particular, it discusses the interplay between section 501(c)(3) and churches in America. Section II presents a background of the history of the tax exemption for churches and the judicial holdings relative to that exemption. Section III explores the historical development of the separation between church and state, tax exemptions, and section 501(c)(3). Section IV analyzes section 501(c)(3) under the Constitution's free speech and religion clauses. Section V proposes a recommendation, and Section VI is the conclusion.

This article recommends that the government, the courts and the IRS totally exclude churches from the political activity restrictions in section 501(c)(3). That is, leave churches alone. Do not tax them, do not regulate the content of their sermons and do not otherwise infringe upon their constitutional liberties of free speech and religion in any other way. Why? Although this article will explore various reasons and rationales for its recommendation that churches be left alone—constitutionally-based, policy-oriented and common sense-driven—the simplest answer is that the political activity restrictions in section 501(c)(3) were never intended for churches in the first place, and as a result, their application to churches ignores history and treads upon churches' constitutional liberties.

## II. BACKGROUND

In the 2004 electoral cycle, the IRS, which is the organization tasked with the initial interpretation, application, and enforcement of the Code,<sup>14</sup>

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<sup>12</sup> See, e.g., *Branch Ministries, Inc. v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000). The court upheld the revocation of the church's tax exemption, finding that in 1992, four days before the presidential election, Branch Ministries, Inc., a tax-exempt organization doing business as Church at Pierce Creek, took out a full-page ad in two national newspapers in which it expressed concern over the moral character of then Governor Bill Clinton, explicitly discouraged voting for Bill Clinton, whom the church believed supported abortion on demand, homosexuality and the distribution of condoms to public school teenagers, and concluded with the question: "How then can we vote for Bill Clinton?". See also *infra* note 48.

<sup>13</sup> See *infra* notes 169-70 and 198-99.

<sup>14</sup> *United States v. Euge*, 444 U.S. 707, 714-15 (1980) ("As early as 1911, this Court established the benchmarks for interpreting the authority of the Internal Revenue Service to enforce tax obligations

received an increase in complaints about charities' alleged involvement in proscribed political activities.<sup>15</sup> This increase led to an IRS report documenting the agency's findings and analysis of political campaign intervention by section 501(c)(3) organizations in the 2004 electoral cycle.<sup>16</sup> Following the report, the IRS concluded that the vast majority of charities, including churches, did not engage in politicking; however, the IRS nonetheless reported that its investigation confirmed a "disturbing amount of political intervention in the 2004 electoral cycle."<sup>17</sup> Thus, the IRS committed to providing "more and better guidance and mov[ing] quickly to address prohibited activities."<sup>18</sup>

Although this article could have focused on charities, in general, it focuses on churches, in particular, because of their key role in the foundation of American society.<sup>19</sup> Many of the principles upon which American jurisprudence rests are derived from the Bible.<sup>20</sup> Law and

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in holding that 'the administration of the statute may well be taken to embrace all appropriate measures for its enforcement, [unless] there is . . . substantial reason for assigning to the [phrases] . . . a narrower interpretation.'" (quoting *United States v. Chamberlin*, 219 U.S. 250, 269 (1911)).

<sup>15</sup> Richard W. Garnett, *A Quiet Faith? Taxes, Politics, And The Privatization of Religion*, 42 B.C. L. REV. 771, 780 (2000-01) (noting that because of the deeply-rooted belief that religion should stay out of politics, there should be no surprise as to the frequent allegations about religious groups entering the political fray and abusing their tax-exempt status); Press Release, Internal Revenue Service, IRS Releases New Guidance and Results of Political Intervention Examinations (Feb. 24, 2006), available at <http://www.irs.gov/newsroom/article/0,,id=154780,00.html> (The IRS examined the 2004 election cycle and unveiled new guidelines for the 2006 election season "following an increase in complaints about political activities during the 2004 election cycle."); Gillian Flaccus, *IRS Ensnared in Election-Year Politics*, FOXNews.com (Sept. 29, 2006), <http://www.foxnews.com/wires/2006Sep29/0,4670,ReligionIRS,00.html> (reporting that the founder of the website <http://www.ratoutachurch.org> referred several complaints against churches to the IRS in 2004). *But see* Mary Dalrymple, *IRS Finds "Disturbing" Political Activity by Charities in '04*, ORLANDO SENT., Feb. 25, 2006, at A12 (noting that IRS Commissioner Mark Everson explained that the amount of political intervention "is disturbing not because it is pervasive, but because it has the potential to really grow and have a very bad impact on the integrity of charities and churches").

<sup>16</sup> INTERNAL REVENUE SERVICE, FINAL REPORT, PROJECT 302, POLITICAL ACTIVITIES COMPLIANCE INITIATIVE, available at [http://www.irs.gov/pub/irs-tege/final\\_paci\\_report.pdf](http://www.irs.gov/pub/irs-tege/final_paci_report.pdf) (last visited Mar. 5, 2007) ("This report summarizes the 2004 Political Activity Compliance Initiative (PACI) project and the results, thus far, which have been used to develop procedures for the 2006 PACI program.").

<sup>17</sup> Internal Revenue Service, *supra* note 15.

<sup>18</sup> *Id.*

<sup>19</sup> In this article, "churches" refers to all places of worship, including churches, temples, synagogues, mosques, and also includes associations of churches and integrated auxiliaries of a church. *See* INTERNAL REVENUE SERVICE, PUBLICATION 1828 IRS TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 23, available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf> (last visited Mar. 5, 2007).

<sup>20</sup> *See* John W. Welch, *Biblical Law in America: Historical Perspectives and Potentials for Reform*, 2002 BYU L. REV. 611, 619 (2002) ("The Bible was nothing short of the underlying fabric upon which American society was founded."); Mark A. Noll, *The Bible in Revolutionary America, in*

religion have been intermingled since the beginning of our nation,<sup>21</sup> and religious beliefs are essential in shaping public attitudes on contentious political issues.<sup>22</sup> In the past, churches played an essential role in mobilizing communities to generate support for critical social causes, such as slavery, prohibition, and birth control.<sup>23</sup> Churches continue to play an important role in today's important public policy issues, including abortion, euthanasia, traditional marriage, stem-cell research, war and peace, and immigration reform.<sup>24</sup>

Moreover, churches have also had a special role nationally and globally in providing social services and public functions that are central to society as a whole, oftentimes services that the government would otherwise have to provide.<sup>25</sup> For example, churches are often involved in providing

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THE BIBLE IN AMERICAN LAW, POLITICS, AND POLITICAL RHETORIC 39-42 (James Turner Johnson ed., 1985) (discussing the Bible's influence on the Founding Fathers).

<sup>21</sup> STEPHEN L. CARTER, *GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS* 11 (2000) ("Religion has been inseparable from American politics for as long as America has had politics, and will likely remain inseparable as long as Americans remain religious."); BERTON DULCE & EDWARD RICHTER, *RELIGION AND THE PRESIDENCY* 1-11 (1962) (noting that the question of religion figured "prominently in an average of *one of every three* campaigns for the Presidency through 1960") (emphasis in original).

<sup>22</sup> Press Release, The Pew Research Center, Religion and Politics: Contention and Consensus 1 (Jul. 24, 2003), available at <http://pewforum.org/publications/surveys/religion-politics.pdf> ("Religion is a critical factor these days in the public's thinking about contentious policy issues and political matters.")

<sup>23</sup> See KELLEY, *supra* note 11, at 87 ("Throughout the history of the nation—and long before—churches have been active in helping to shape the public policy of the commonwealth in ways they believed God desired . . . . Churches were active in the effort to abolish slavery . . . . They have worked for laws advancing labor organizing, woman suffrage, civil rights, and family welfare."); LEO PFEFFER, *CHURCH, STATE AND FREEDOM* 230, 232-33 (1953) (discussing three different strategies that churches employed in organizing around three public issues: slavery, birth control and prohibition).

<sup>24</sup> See, e.g., Kate Santich, *Hope and Hard Work, Nuns' Efforts Aid Apopka Farmworkers*, ORLANDO SENT., July 3, 2006, at A1 (discussing nuns who helped organize the largest political demonstration in Orlando's history, a rally for immigrants' rights); Melanie Warner, *With Business Leading a Push, Liquor Comes to Dry Bible Belt*, N.Y. TIMES, Aug. 12, 2006, at A1 (discussing the opposition of churches in six Southern states to referendums legalizing alcohol sales in stores and restaurants, where churches believe that such referendums will bring moral decay but proponents argue that the referendums will increase the tax base and thus reduce the need to increase property taxes).

<sup>25</sup> *Waltz v. Tax Comm'n of New York*, 397 U.S. 664, 687 (1970) (Brennan, J., concurring) (noting that one reason why religious organizations received tax exemptions was because they "contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community"); H.R. REP. NO. 75-1860, at 19 (1938) (Charitable tax exemptions are "based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare."); KELLEY, *supra* note 11, at 2 (concluding that a tax exemption is an "optimal arrangement" for allowing churches to provide services and functions critical to all of society); Leif M. Clark, Note, *Church Lobbying: The Legitimacy of the Controls*, 16 HOUS. L. REV. 480, 481-85 (1979) (discussing the rationale for exemption of churches as one of public

emergency rescue assistance in times of national disasters.<sup>26</sup> They also contribute to our educational institutions.<sup>27</sup> Churches play key roles in protecting underrepresented groups, such as immigrants whose legal status may usher them into suffering in silence,<sup>28</sup> and churches continue to provide support to people whose addictions cause them to be marginalized in society.<sup>29</sup> Churches' loss of their tax exemptions would likely result in America losing a major voice, social services, and other values that emanate from our churches.<sup>30</sup>

The IRS and watchdog groups proffer gratuitously that if churches are allowed to be used as arms of political campaigns and political parties, then that involvement will "erode the public's confidence in these institutions"<sup>31</sup> and "[the church's] ability to witness to the community may be irrevocably damaged."<sup>32</sup> To the contrary, if churches fail to continue to

benefit); John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363, 388 (1991) (stating that proponents of the exemption argued that churches "dispense social benefits through their religious activities" and "discharge state burdens through their charitable activities").

<sup>26</sup> See Matthew E. Berger, *Will Katrina Relief Bring Faith-Based Push*, JEWISH TIMES, Sept. 15, 2005 (quoting Rabbi David Saperstein, the director of the Washington-based Religious Action Center of Reform Judaism) ("Obviously, Katrina will focus attention on the role of the faith-based community, because they have so magnificently stepped up to the plate."); Michael Kunzelman, *On Gulf Coast, Faith-Based Groups Pick Up Government's Slack*, ASSOCIATED PRESS, Feb. 15, 2006, available at <http://www.socialpolicyandreligion.org/news/article.cfm?id=3882> ("With government agencies stretched thin by the massive scope of the Gulf Coast recovery effort, groups from every religious denomination are shouldering a heavy share of the workload.").

<sup>27</sup> See Steven G. Vegh, *Soliciting from Local Churches is Paying Off for NSU*, HAMPTON ROADS, Aug. 20 2006, available at <http://www.hamptonroads.com> (noting that despite its public funding, Norfolk State University solicited and received over \$232,500 in pledges from churches to the University over the span of five years).

<sup>28</sup> See Peter Prengaman, *Los Angeles' Cardinal Mahony Urges Support of Immigrants*, S.F. CHRON., Mar. 2, 2006 (The leader of the nation's largest Roman Catholic diocese called on his priests "to defy any law enacted that would try to force churches and other organizations to determine the legality of immigrants before giving them assistance."); Teresa Watanabe, *Catholic Leaders Hope to Sway Immigration Debate*, L.A. TIMES, Mar. 4, 2006, at B6 ("U.S. Roman Catholic bishops and other church organizations have launched a national campaign to press for new laws to promote legal status, strengthen public opinion about the positive contributions of immigrants and organize Catholic legal service networks to assist migrants.").

<sup>29</sup> See Erik Eckholm, *Help for the Hardest Part of Prison: Staying Out*, N.Y. TIMES, Aug. 12, 2006, at A1 (discussing the political leaders, police officers, correctional officers, churches, and community groups working together to assist repeat drug offenders from relapsing).

<sup>30</sup> But see DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 160 (1986) (asserting that "[m]any of the historical welfare functions of religious groups are now transferred to the state").

<sup>31</sup> INTERNAL REVENUE SERVICE, *POLITICAL ACTIVITIES COMPLIANCE INITIATIVE EXECUTIVE SUMMARY*, Feb. 22, 2006, available at [http://www.irs.gov/pub/irs-tege/exec\\_summary\\_paci\\_final\\_report.pdf](http://www.irs.gov/pub/irs-tege/exec_summary_paci_final_report.pdf).

<sup>32</sup> Marcus S. Owens & Douglas N. Varley, *Church Electioneering: Politics and the Pulpit*, at [http://www.au.org/site/PageServer?pagename=resources\\_politicsandpulpit](http://www.au.org/site/PageServer?pagename=resources_politicsandpulpit) (last visited Mar. 5, 2007).

participate fully in political discourse to advocate for social change consistent with their teachings, they will become insignificant and their doctrines will become meaningless.

Churches must continue to have an uncompromised voice in the political arena. Their voices must not be influenced by fear of losing their tax-exempt status because the sitting presidential administration approves or disapproves of their viewpoints, because the Code is unclear, because the Code reaches farther than congressional intent, or for any other reason.

The IRS has tried on numerous occasions to clarify the political activity restrictions to enable churches to understand their obligations under the Code, and the IRS is still trying to do this.<sup>33</sup> However, to date, it has not been done.<sup>34</sup>

#### A. Case Study

At the end of the 2004 presidential election season, the IRS investigated several churches and other tax-exempt organizations across the United States.<sup>35</sup> The IRS examined the churches to determine whether they may have violated the Code and thus compromised their tax status by engaging in proscribed political activities during the presidential campaign.<sup>36</sup>

The Code precludes churches from engaging in substantial lobbying activity and participating or interfering in any political campaigns. In particular, section 501(c)(3) provides tax-exempt status only to:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or

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<sup>33</sup> See Internal Revenue Service, *supra* note 15; INTERNAL REVENUE SERVICE, *supra* notes 16 and 31.

<sup>34</sup> See, e.g., Louis Sahagun, *Rector Ponders Next Move in IRS Showdown*, L.A. TIMES, Sept. 20, 2006, at B2 (reporting that Rev. Ed Bacon was forced to make the difficult decision of either surrendering parish records to the Internal Revenue Service or potentially losing his church's tax-exempt status). See also *infra* notes 77-83.

<sup>35</sup> See Internal Revenue Service, *supra* note 15.

<sup>36</sup> See Dalrymple, *supra* note 15.



individual, no *substantial* part of the activities of which is carrying on *propaganda*, or otherwise attempting, to *influence legislation*, and which does not *participate in*, or *intervene in* (including the publishing or distributing of statements), *any political campaign* on behalf of (or in opposition to) any candidate for public office.<sup>37</sup>

Consider an actual IRS investigation, in which the agency investigated a church to determine whether it had violated the political activity restrictions by allowing the sitting President's opponent to address the church's congregation during the presidential campaign season. In December 2004, the IRS opened an investigation into the alleged political activities of St. Mark African Methodist Episcopal Church ("St. Mark Church") because of a visit by Democratic vice-presidential candidate John Edwards during the 2004 national presidential campaign.<sup>38</sup> The IRS mailed a warning letter to the church, which stated:

Because a reasonable belief exists that St. Marks African Methodist Episcopal Church [sic] has engaged in political activities that could jeopardize its tax-exempt status as a church described in section 501(c)(3) and exempt under section 501(a),<sup>39</sup> this letter is notice of the beginning of a church tax inquiry described in IRC section 7611(a).<sup>40</sup> We are sending it because we believe it is necessary to resolve questions concerning your tax-exempt status as a church described in section 501(c)(3) and in section 170(b)(1)(A)(i) of the Code.<sup>41</sup>

Our concerns are based on a news article that appeared in *The Washington Times* on Monday, July 19, 2004, which reported John Edwards addressed the congregation of St. Marks African Methodist Episcopal Church [sic] during a

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<sup>37</sup> I.R.C. § 501(c)(3) (2006) (emphasis added).

<sup>38</sup> Letter from Internal Revenue Service to St. Mark Church (Dec. 8, 2004) (on file with St. Mark Church). This church tax inquiry was released and authorized for use in this article with the permission of St. Mark A.M.E. Church, Orlando, Fla.

<sup>39</sup> I.R.C. § 501(a) (2006).

<sup>40</sup> I.R.C. § 7611(a) (2006).

<sup>41</sup> I.R.C. § 170(b)(1)(A)(i) (2006).

church service as part of his 5 day solo campaign tour. The article reported the following:

Democratic vice-presidential candidate John Edwards yesterday pledged from the pulpit of a black church that Democrats will work hard to prevent a repeat of the 2000 election fiasco in Florida.

“We will get voters registered. We will get voters mobilized. We will get voters to the polls,” the senator from North Carolina told the congregation of St. Mark African Methodist Episcopal Church.

“The eyes of the world will be on Florida again this year,” Bishop McKinley Young said in introducing Mr. Edwards. In five days of solo campaigning, Mr. Edwards had been reaching out to minorities—Hispanics in Southern California, blacks here, as well as attending a round of fund-raisers in an effort to raise as much last-minute money as possible before the Democratic National Convention next week.

Blacks, who as a group voted overwhelmingly for Democrat Al Gore in 2000, say they were disproportionately affected by election abuses, including the failure to count thousands of votes, many of them in black neighborhoods. “We will get voters to the polls. We’re going to make sure that all those voters that go to the polls and cast their votes, that their votes are counted this time,” Mr. Edwards said to applause and shouts of approval from about 700 parishioners.<sup>42</sup>

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<sup>42</sup> Letter, *supra* note 38.

Thus began the church tax inquiry of St. Mark Church. After conferencing with several lawyers, the church convened a legal team to respond to the very serious allegations—after all, the loss of tax-exempt status for any church is potentially fatal.<sup>43</sup>

St. Mark Church responded to detailed questions from the IRS about the church service at which John Edwards spoke, which required church members to recall the specifics of the service.<sup>44</sup> Soon thereafter, the IRS closed the church tax inquiry, finding that St. Mark Church did not invite John Edwards to speak; instead, John Edwards's campaign had notified the church that the candidate would be attending the church service on a certain date. Moreover, the pastor of St. Mark Church explicitly stated throughout the service that the church did not endorse candidates for political office.<sup>45</sup> Thus, the IRS was satisfied that the church did not violate the Code.

Although the IRS found that St. Mark Church had not violated section 501(c)(3), it nevertheless cautioned—arguably threatened—the church that “future violations may result in a loss of tax-exempt status or subject [the church] to tax under section 4955.”<sup>46</sup> This IRS “caution” instilled such fear in various church members that when a subsequent political candidate

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<sup>43</sup> See LYNN R. BUZZARD & SHERRA ROBINSON, I.R.S. POLITICAL ACTIVITY RESTRICTIONS ON CHURCHES AND CHARITABLE MINISTRIES 61 (Christian Ministries Mgt. Assn. 1990) (likening loss of tax-exempt status to the “death penalty” for churches); Clark, *supra* note 25, at 480 (noting that churches may not be able to survive without tax exemptions); Garnett, *supra* note 15, at 772 (determining that loss of tax exempt status to a church is detrimental); see also Jeffrey M. Berry, *Who Will Get Caught in the IRS's Sights?*, WASH. POST, Nov. 21, 2004, at B3 (quoting Julian Bond, NAACP Board Chairman) (“It would be catastrophic” for the NAACP [charity] to lose its tax-exempt status.).

<sup>44</sup> The IRS required answers to questions such as the following: “During his speech to the congregation, did John Edwards solicit votes? Please provide a detailed explanation of his speech.” “Did the church invite any other candidate(s) seeking the same office to speak at the service held on Sunday, July 18, 2004? If so, please provide the name of the candidate(s) and provide a detailed explanation of what they communicated to the congregation.” “When a political candidate is invited to speak at St. Marks [sic], does the church have a policy to ensure that: It provides an equal opportunity for all political candidates seeking the same office to speak to the congregation. It does not indicate any support of or opposition to any candidate, and No political fundraising occurs. If so, please explain in detail the policy.” Letter, *supra* note 38.

<sup>45</sup> Letter from Internal Revenue Service to St. Mark Church (Mar. 17, 2005) (on file with St. Mark A.M.E. Church).

<sup>46</sup> *Id.*; I.R.C. § 4955 (2006). This section imposes an initial tax on an organization (church or religious organization) of ten percent of the political expenditure. If an initial tax has been imposed and the violation is not corrected, an additional tax equal to one hundred percent of the expenditures is imposed against the organization.

for a local election asked to speak to St. Mark Church's congregation, the church initially hesitated to allow the candidate to speak.<sup>47</sup>

But why did the IRS caution St. Mark Church even though it found the church in compliance with section 501(c)(3)? Was this done to intimidate the church? Was the IRS attempting to achieve indirectly what could not be achieved directly? Was the IRS attempting to make the church gun shy about accepting candidates' invitations to address the church congregation when such action is allowable under the Code? Was St. Mark Church targeted because the candidate who spoke was the opposing candidate to the sitting President?<sup>48</sup>

### *B. Modern Application of Section 501(c)(3) to Churches*

The IRS is increasingly encouraging churches to stop engaging in politics even though churches are merely doing what they have always done: educating the public on issues critical to the world, the nation, families, and individuals. But educating the public about social issues does not mean that section 501(c)(3) has been violated, even according to the IRS's own standards.<sup>49</sup>

Whether a church is violating the tax-exempt laws is a fact inquiry.<sup>50</sup> Under the Code, the IRS may initiate a church tax inquiry only if the IRS Director of Exempt Organizations, Examinations, reasonably believes, based upon a written statement of the facts and circumstances, that the church "may not qualify for the exemption" or "may not be paying tax on an unrelated business or other taxable activity."<sup>51</sup> Section 501(c)(3)

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<sup>47</sup> Interview with St. Mark Church member (Fall 2006).

<sup>48</sup> This IRS church tax inquiry was initiated by the IRS while the Republicans controlled the executive branch. However, similar inquiries have occurred while the Democrats controlled the executive branch. See Deirdre Dessingue Halloran & Kevin M. Kearney, *Federal Tax Code Restrictions on Church Political Activity*, 38 CATH. LAW. 105, 123-131 (1998) (describing an IRS church tax inquiry during the Clinton administration); see also *supra* note 12. But see Internal Revenue Service, *supra* note 15 (reporting that the procedures in the new guidance to prevent participation in politics and lobbying "reaffirm the agency's commitment that all examination and investigation decisions are made in a nonpartisan manner").

<sup>49</sup> I.R.S. Tech. Adv. Mem. 89-36-002 (Sept. 8, 1989), 1989 WL 596078 ("Educating the public is not inherently inconsistent with the activity of impermissibly intervening in a political campaign.").

<sup>50</sup> INTERNAL REVENUE SERVICE, *supra* note 16, at 1 ("The Code contains no bright line test for evaluating political intervention; it requires careful balancing of all of the facts and circumstances."); Judith E. Kindell & John Francis Reilly, *Election Year Issues*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2002, at 344 (2001), available at <http://www.irs.gov/pub/irs-tege/eotopic02.pdf> (similarly noting that there is no bright-line test).

<sup>51</sup> INTERNAL REVENUE SERVICE, *supra* note 19, at 22 (outlining the audit process for church tax inquiries in which Congress delineated special limitations for churches in IRC section 7611).

prohibits church participation in political campaigns and restricts their lobbying activity, as explained below.

### *1. Electioneering Ban*

Under the Code, churches may participate in the political process but not in political campaigns. According to section 501(c)(3), churches are not permitted to directly or indirectly participate or intervene in any political campaign for or against any candidate for elective public office.<sup>52</sup> This prohibition includes making contributions to political campaigns, engaging in fundraising, or making public statements of support or opposition for any candidate for public office.<sup>53</sup>

However, according to the IRS, churches are permitted to participate in activities designed to encourage people to partake in the electoral process.<sup>54</sup> If done in a non-biased or non-partisan manner, churches are allowed to sponsor voter-registration drives and get-out-the-vote drives, to publish voter education guides that explain candidates' positions on the issues, and to host public forums.<sup>55</sup> These activities must not promote, or have the effect of promoting, one candidate over another or opposing a candidate or group of candidates.<sup>56</sup> Candidates who attend church services are also allowed to generate support and enthusiasm for voter registration campaigns, as Senator John Edwards did at St. Mark Church when he encouraged voter registration in Florida.

The Code also permits churches to invite political candidates to speak at church events if the church takes steps to ensure that it provides a fair opportunity to other political candidates seeking the same office.<sup>57</sup> In doing so, the church must avoid showing bias toward any of the candidates, specifically when introducing the candidate and in any communications relating to the candidate's attendance, and should refrain from political fundraising.<sup>58</sup> If a political candidate is invited to speak in a non-candidate capacity, then the church does not have to provide equal access to all political candidates, but in that case they must ensure that no

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<sup>52</sup> *Id.* at 5.

<sup>53</sup> *Id.* at 7.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 7-8.

<sup>56</sup> *Id.* at 7.

<sup>57</sup> *Id.* at 8.

<sup>58</sup> *Id.*

campaign activity occurs in connection with the candidate's attendance and no mention is made of the speaker's candidacy or election.<sup>59</sup>

Unfortunately, the IRS tax guide, which advises churches on how to comply with the political activity restrictions, fails to advise them regarding their obligations when candidates ask to speak to their congregations, such as when Senator John Edwards informed St. Mark Church that he would be attending its church service on a certain date. However, there is guidance regarding the restrictions as to when churches invite candidates to speak, which may be the more common scenario.<sup>60</sup> Nevertheless, when candidates make a request to churches to speak before their congregations, churches should not have the same obligations of equal access to all political candidates, although they would have to present the candidates in an unbiased manner, presumably to comply with the Code.

The IRS recognizes that tax laws limiting political campaign activity are balanced against the free speech rights guaranteed to individuals by the First Amendment of the Constitution.<sup>61</sup> Therefore, the IRS guidelines permit ministers and other religious leaders to speak for themselves as *individuals* and make *personal* endorsements for candidates.<sup>62</sup> However, ministers may not make partisan comments at official church functions or in official church publications.<sup>63</sup> Church leaders must clearly indicate that their comments made as an *individual*, not a church leader, are *personal* and do not represent the views of the church.<sup>64</sup> For example, as the pastor at St. Mark did when John Edwards came to speak, church leaders should indicate that the church does not endorse candidates for political office.<sup>65</sup> However, even with the all of the required IRS qualifications being satisfied, it is difficult to divorce a church leader's endorsement of a

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<sup>59</sup> *Id.* at 9.

<sup>60</sup> *See id.* at 8; INTERNAL REVENUE SERVICE, FACT SHEET FS-2006-17, ELECTION YEAR ACTIVITIES AND THE PROHIBITION ON POLITICAL CAMPAIGN INTERVENTION FOR SECTION 501(C)(3) ORGANIZATIONS (Feb. 2006), available at <http://www.irs.gov/newsroom/article/0,,id=154712,00.html>.

<sup>61</sup> *See* INTERNAL REVENUE SERVICE, *supra* note 19, at pmbl. (acknowledging that Congress enacted special tax laws for churches, ministers, and religious organizations because of their unique status in society and their rights guaranteed by the First Amendment); Kemmitt, *supra* note 3, at 160 ("Given the importance of the First Amendment freedoms at stake, the IRS appears hesitant to revoke the tax-exempt status of a church in any situation which could conceivably be construed as non-partisan.").

<sup>62</sup> *See* INTERNAL REVENUE SERVICE, *supra* note 19, at 7 (emphasis added).

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

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

<sup>65</sup> *See supra* note 45.

candidate as an *individual* from his or her recommendation to the church as a leader.

The Code prohibits churches from supporting individuals as candidates for public office, as previously discussed.<sup>66</sup> However, the Code permits church leaders to speak about important issues of public policy.<sup>67</sup> Thus, pastors may continue to speak on public issues of interest to the community. Historically, such issues have included the abolition of slavery, gambling, child labor, prostitution, temperance, the death penalty, war, abortion and civil rights.<sup>68</sup> Today, such issues may include abortion, euthanasia, same-sex marriage and adoption, stem-cell research, anti-war sentiment and immigration reform.<sup>69</sup> Church leaders are permitted to take a stand on these political issues, either in favor of or against the particular issue, but as explained further below, this has some timing limitations.

The IRS report on the 2004 electoral cycle indicated that churches had some difficulty understanding the section 501(c)(3) language “does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) and candidate for public office.”<sup>70</sup> The IRS found that churches interpreted this prohibition to mean that they cannot *expressly* endorse or oppose candidates, and thus, most of the alleged campaign interferences by churches were *indirect* endorsements, which nonetheless clearly conveyed a message in favor of or against a candidate.<sup>71</sup>

Churches may not endorse a candidate,<sup>72</sup> but if a candidate is specifically tied to certain values or issues, does the IRS consider this to be a backdoor approach to supporting or opposing a candidate? This delineation can be awkward and confusing for churches because there is no clear distinction between advocacy for an issue versus advocacy in support of a candidate.<sup>73</sup>

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<sup>66</sup> INTERNAL REVENUE SERVICE, *supra* note 60, at 2.

<sup>67</sup> *Id.*

<sup>68</sup> KELLEY, *supra* note 11, at 87-88; *see also* CARTER, *supra* note 21, at 20.

<sup>69</sup> *See, e.g., supra* notes 22-23; *see also* Susan Page, *Churchgoing Closely Tied to Voting Patterns*, USA TODAY, June 3, 2004, at 1A, available at [http://www.usatoday.com/news/nation/2004-06-02-religion-gap\\_x.htm](http://www.usatoday.com/news/nation/2004-06-02-religion-gap_x.htm) (noting that debates over issues such as same-sex marriage, abortion, and other “values” issues exacerbate the divide between churchgoers and non-churchgoers).

<sup>70</sup> *See* INTERNAL REVENUE SERVICE, *supra* note 16, at 21.

<sup>71</sup> *Id.* at 22.

<sup>72</sup> Internal Revenue Service, *supra* note 15, at 8.

<sup>73</sup> Caron & Dessingue, *supra* note 3, at 199-200 (stating that being in favor of an issue constitutes political alignment with the candidates who favor the same issue); Steffen N. Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875, 882 (2001) (candidates are identified for their ideals and policy

Political parties are usually divided in their policy positions on many public issues. During the 2004 electoral cycle, the Republican campaign platform included “winning the war on terror,” “building an innovative, globally competitive economy,” “strengthening our communities,” and “protecting our families.”<sup>74</sup> On the other hand, the Democratic campaign platform included “promoting democracy, peace and security,” “reforming health care,” “improving education,” “creating good jobs,” “standing up for the great American middle class,” and “protecting our environment.”<sup>75</sup> IRS guidance states that tax-exempt organizations “must avoid any issue advocacy that functions as political campaign intervention.”<sup>76</sup> Therefore, presumably a church’s endorsement of issues that were aligned with the Republican campaign platform could have been construed as an indirect endorsement of President Bush, the Republican candidate.

In one notable example, the IRS warned a large, “liberal” church that its tax-exempt status may be in jeopardy for preaching an anti-war sermon two days before the 2004 presidential election.<sup>77</sup> The IRS described the sermon as a “searing indictment of the Bush administration’s policies in Iraq.”<sup>78</sup> Although the church and the pastor emphatically denied endorsing any presidential candidate, the IRS was not satisfied that the church did not violate the tax code.<sup>79</sup> The IRS offered to not revoke the church’s tax-exempt status if the church admitted to intervening in an election, but the church declined the offer.<sup>80</sup> The IRS ultimately requested all correspondence generated by the church during the 2004 election year

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stances); Kemmitt, *supra* note 3, at 160 (stating that there is no clear delineation between supporting an issue and supporting a candidate and noting that there is also confusion between advocacy by individuals within an organization and the organization itself); see also Paul Strand, *Pastors May Face IRS Over Political Squabble*, CBN NEWS, <http://www.cbn.com/CBNnews/politics/060203a.aspx> (clergyman complaining that the two Ohio churches sponsored events showcasing just one candidate and were engaged in “[v]ery specific activities, a very intentional campaign to highlight, to endorse . . . at least by implication . . . a single candidate . . .”) (emphasis added) (last visited Mar. 12, 2007).

<sup>74</sup> Republican National Committee, *2004 Republican Party Platform: A Safer World and a More Hopeful America*, <http://www.gop.com/media/2004platform.pdf> (last visited Mar. 5, 2007).

<sup>75</sup> Democratic National Convention Committee, *Strong at Home, Respected in the World – The 2004 Democratic National Platform for America*, <http://www.democrats.org/pdfs/2004platform.pdf> (last visited Mar. 5, 2007).

<sup>76</sup> INTERNAL REVENUE SERVICE, *supra* note 60, at 5.

<sup>77</sup> Sahagun, *supra* note 34.

<sup>78</sup> Patricia Ward Biederman & Jason Felch, *Antiwar Sermon Brings IRS Warning*, L.A. TIMES, Nov. 7, 2005, at A1.

<sup>79</sup> *Id.*

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



which referenced any candidates.<sup>81</sup> After a lengthy delay, the IRS finally sent a summons to the church and rector requesting details of the church's policies, procedures, manuals, financial records, and other information.<sup>82</sup>

Church parishioners were disturbed that a sermon promoting the value of peace in the midst of war would subject their church to a tax inquiry.<sup>83</sup> Because of the ambiguity of the language in section 501(c)(3), the IRS has too much latitude to selectively target churches that may have criticized the sitting administration.<sup>84</sup> If the church cannot publicly express its values at a time when it is relevant—in this case, promoting peace in times of war—then the church's speech is chilled. However, IRS Commissioner Everson has stated that the agency follows strict guidelines involving tax audits for tax-exempt organizations and uses career civil servants, not political appointees, for the tax audits, and therefore any hint that the IRS is succumbing to targeting certain organizations for political purposes is “repugnant and groundless.”<sup>85</sup> All Saints Church, however, has garnered support from conservative churches, which are aware of the dangers of the Code's ambiguous political activity restrictions language in the midst of partisan politics.<sup>86</sup>

Religion has traditionally represented the voice of morality, and churches believe that this is their role in society.<sup>87</sup> A church pastor

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<sup>81</sup> Scott Glover & Louis Sahagun, *Pasadena Church May Fight IRS Summons*, L.A. TIMES, Sep. 18, 2006, at A1.

<sup>82</sup> Summons from Internal Revenue Service to All Saints Church of Pasadena, Cal., and Rector (Sept. 29, 2006) (on file with All Saints Church) (requesting information such as financial records related to the maintenance of the church for October 2004, correspondence between the church and the guest preacher of the sermon in question, all vestry meeting minutes for the year 2004, and documents reflecting payments related to the guest preacher).

<sup>83</sup> Sahagun, *supra* note 34.

<sup>84</sup> Over thirty years ago, the Senate Finance Committee stated that IRC § 501(c)(3) presented selective enforcement problems because the standards are “too vague and thereby tend to encourage subjective and selective enforcement.” S. REP. NO. 938, pt. 2, at 80 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4030, 4104.

<sup>85</sup> See INTERNAL REVENUE SERVICE, FACT SHEET FS-2004-14, TAX-EXEMPT ORGANIZATIONS AND POLITICAL ACTIVITIES (Oct. 2004), *available at* <http://www.irs.gov/newsroom/article/0,,id=130652,00.html>.

<sup>86</sup> Lance Dickie, *The Tax Man vs. Religion*, SEATTLE TIMES, Dec. 2, 2005 (noting support to All Saints Church from “leaders of conservative, non-denominational mega-churches who are all appalled by what they see and can anticipate”), *available at* <http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=lance02&date=20051202&query=Dickie>.

<sup>87</sup> U.S. CATHOLIC BISHOPS, FAITHFUL CITIZENSHIP: CIVIC RESPONSIBILITY FOR A NEW MILLENNIUM (Oct. 1999) (stating that America's Catholic bishops believe that church leadership has a moral obligation to educate Catholics on moral dimensions of public life, so that Catholics may form their consciences in light of their faith), *available at* <http://www.priestsforlife.org/magisterium/bishops/faithfulcitizenship99.htm>.

preaching peace in the midst of war seems reasonable as an effort to bring biblical values to life. Did the church violate section 501(c)(3) when its pastor preached an anti-war sermon two days before the 2004 presidential election in which President Bush, who supported the war, was up for re-election? Maybe under this administration and maybe not—because of the ambiguity in section 501(c)(3), the answer depends on the facts and who analyzes the facts with the law.<sup>88</sup>

Although the IRS has attempted to provide guidance to clarify the ambiguities in section 501(c)(3), the guidance varies in its helpfulness. For instance, the IRS offers several examples in its guides. One is the following:

Candidate A and Candidate B are candidates for the state senate in District W of State X. The issue of State X funding for a new mass transit project in District W is a prominent issue in the campaign. Both candidates have spoken out on the issue. Candidate A supports [sic] the new mass transit project. Candidate B opposes the project and supports State X funding for highway improvements instead. P is the executive director of C, a section 501(c)(3) organization that promotes community development in District W. At C's annual fundraising dinner in District W, which takes place in the month before the election in State X, P gives a lengthy speech about community development issues including the transportation issues. P does not mention the name of any candidate or any political party. However, at the conclusion of the speech, P makes the following statement, "For those of you who care about quality of life in District W and the growing traffic congestion, there is a very important choice coming up next month. We need new mass transit. More highway funding will not make a difference. You have the power to relieve the congestion and improve your quality of life in District W. Use that power when you go to the polls and cast your vote in the

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<sup>88</sup> Peter Slevin, *Ohio Churches' Political Activities Challenged*, WASH. POST, Apr. 25, 2006 (reporting that a former director of the IRS office that regulates tax exemptions suspects that certain conservative churches are receiving IRS favoritism under the Bush administration).

election for your state senator.” C has violated the political campaign intervention as a result of P’s remarks at C’s official function shortly before the election, in which P referred to the upcoming election after stating a position on an issue that is a prominent issue in a campaign that distinguishes the candidates.<sup>89</sup>

This example is a clear violation of the Code, as the electioneering ban is interpreted by the IRS, but not as the ban is drafted. To be sure, P did not expressly tell the audience for whom to vote, but P’s message in a public speech mentioned the election and the specific issues on which the two candidates were divided; therefore P violated the Code by inference.

However, less clear examples would have discussed the specific obligation of churches when candidates invite themselves to address a church congregation, which is how John Edwards came to address St. Mark’s congregation, or situations where church leaders speak on public issues that happen to be platform issues of political candidates during an election cycle.<sup>90</sup> The confusion, then, appears to lie not only with Congress’s drafting of the political activity restrictions language, but also the IRS’s interpretation and the courts’ enforcement of the Code. The confusion appears to reside less with the churches, which may properly lobby in favor of or against legislation, as explained in the next section.

## 2. Lobbying Influence

Churches may engage in some lobbying on behalf of or in opposition to local, state, or federal legislation, as long as they do not devote more than a *substantial* part of their overall activities toward lobbying efforts.<sup>91</sup> The IRS has interpreted this language to mean that churches may participate in issues of public policy without the participation being considered “lobbying” if the church presents the issues in an educational context, such as conducting educational meetings or compiling educational materials.<sup>92</sup>

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<sup>89</sup> INTERNAL REVENUE SERVICE, *supra* note 60, at 6-7.

<sup>90</sup> See, e.g., Strand, *supra* note 73 (reporting that clergymen filed a complaint with the IRS because they believe that two Ohio pastors who oppose gay marriage and abortion sponsored events for the gubernatorial candidate who opposed gay marriage).

<sup>91</sup> INTERNAL REVENUE SERVICE, *supra* note 19, at 6; Dessingue & Kearney, *supra* note 48, at 110 (noting that the political activity restrictions do not apply to appointed positions, such as appointment for a Supreme Court Justice, but cautioning that the church may be subject to tax under section 527 of the Code unless an independent and distinct fund is used).

<sup>92</sup> INTERNAL REVENUE SERVICE, *supra* note 19, at 6.

However, churches are barred from substantially participating in influencing legislation.<sup>93</sup> The IRS considers “legislation” to be any action by local, state or federal legislatures, but not actions by executive, judicial, or administrative bodies.<sup>94</sup> The lobbying limitation is presumably a limit on a church’s ability to influence legislation—to perhaps change laws—in a substantial manner and obviously in a particular way. However, churches may effect changes of law in other ways, including appearing in court or administrative proceedings.<sup>95</sup> Nevertheless, to determine whether a church’s attempt to influence legislation is a “substantial” part of the church’s activities, the IRS considers various facts and circumstances of each case.<sup>96</sup> For example, the IRS considers the time and expenditures devoted by the church to the organization or activity, including time devoted by volunteers and paid workers.<sup>97</sup>

### 3. *Fact-Driven Inquiry*

Because the church tax inquiry is fact-driven,<sup>98</sup> the IRS has discretion as to how it applies the Code to tax-exempt organizations. Increasingly, the IRS has been accused of selectively enforcing the Code against churches depending upon the content of the speech or the activity.<sup>99</sup> The IRS can

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<sup>93</sup> *Id.* at 5-6.

<sup>94</sup> *Id.* at 6 (defining legislation to include acts by local, state and federal legislatures, such as acts, bills, resolutions, legislative confirmation, public referendum, ballot initiative, or constitutional amendment).

<sup>95</sup> See Thomas Troyer, *Charities, Law-Making, and the Constitution: The Validity of Restrictions on Influencing Legislation*, 31 N.Y.U. INST. ON FED. TAX 1415, 1422 (1973) (comparing the law of charitable trusts and its allowance of influencing legislation as a permissible means of carrying out charitable purposes with tax law, and noting that before the 1934 amendments charities could use legislative activities to advance their purposes just as if they were using any other acceptable means).

<sup>96</sup> INTERNAL REVENUE SERVICE, *supra* note 19, at 6 (referring to the “substantial part test”).

<sup>97</sup> As the IRS explained,

Churches must use the “substantial part test” since they are not eligible to use the “expenditure test” whereby other religious organizations may elect the expenditure test under IRC section 501(h) as an alternative method for measuring lobbying activity. Under the expenditure test, the extent of an organization’s lobbying activity will not jeopardize its tax-exempt status, provided its expenditures, related to such activity, do not normally exceed an amount specified in IRC section 4911. This limit is generally based upon the size of the organization and may not exceed \$1,000,000.

*Id.*

<sup>98</sup> INTERNAL REVENUE SERVICE, *supra* note 16, at 1.

<sup>99</sup> Liberals accuse conservatives of unfair church tax inquiries and conservatives accuse liberals of biased church tax inquiries depending upon the viewpoint expressed by the churches. Jerry Falwell, *Barry Lynn is Trying to Scare Churches . . . Again* (Jul. 22, 2004), at <http://www.newsmax.com/>

target whomever it chooses. For example, the IRS considers timing in terms of what is within the realm of the electioneering ban.<sup>100</sup> Timing is important because churches can participate in the political process, but they cannot intervene in any political campaigns.<sup>101</sup> The IRS has stated that timing may be a factor that it considers in determining whether a violation has occurred, but presumably the IRS would only target a church for violating the electioneering ban when an election was underway.<sup>102</sup>

The IRS may also be politically influenced through the referrals it receives from watchdog groups that have emerged to monitor churches' political activities. One watchdog group, the Mainstream Coalition, had volunteers monitoring church services in which the sermons suggested amending the U.S. Constitution to ban gay marriage.<sup>103</sup> Unless the church service is recorded, the facts and circumstances are relayed as interpreted by the watchdog group.<sup>104</sup> Although the IRS does its own tax inquiry, watchdog groups refer particular cases to the agency.<sup>105</sup> That is, watchdog organizations have their own political agenda, and thus they refer cases to the IRS based upon the issues they are monitoring.<sup>106</sup>

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archives/articles/2004/7/22/103118.shtml; Press Release, Liberty Counsel Alert, Pastors Should Use a Megaphone Rather than a Muzzle When it Comes to Political and Moral Issues (July 20, 2004), available at [www.lc.org/libertyalert/2004/la072004.htm](http://www.lc.org/libertyalert/2004/la072004.htm); see also Slevin, *supra* note 88; John W. Whitehead, *Churches and Corrupting Influence of Politics* (Jul. 26, 2006), at [http://www.rutherford.org/articles\\_db/commentary.asp?record\\_id=292](http://www.rutherford.org/articles_db/commentary.asp?record_id=292).

<sup>100</sup> See INTERNAL REVENUE SERVICE, *supra* note 49.

<sup>101</sup> See INTERNAL REVENUE SERVICE, *supra* note 19, at 7.

<sup>102</sup> *But see* Clark, *supra* note 25, at 498 n.124 (“With respect to taking positions on candidates, it is noteworthy that, at the time . . . John Kennedy was three years away from the next election. It is difficult to believe that the regulations intended to stretch the meaning of ‘campaign’ to include the entire period of office of a politician who may or may not run for re-election.”).

<sup>103</sup> The First Amendment Center, First Amendment Topics, *Watchdog Group Monitors Politics in the Pulpit* (Jul. 20, 2004) (reporting that a hundred volunteers from the Mainstream Coalition, a Kansas-based organization, visited area churches during June 2004 to ensure they were adhering to the political activity restrictions regarding the debate over the definition of marriage), at <http://www.firstamendmentcenter.org/news.aspx?id=13748>.

<sup>104</sup> See Flaccus, *supra* note 15 (reporting that the IRS relies upon material gathered by “outsiders”).

<sup>105</sup> *Id.*

<sup>106</sup> Mary Giunca, *Group for Separation of Church and State Hopes to Grow, Despite its Small Number*, WINSTON-SALEM J., Apr. 22, 2006 (“The chapter brings in speakers and members write letters to the editor about church/state issues. During the 2004 election, the organization sent letters to all the churches in Forsyth County, Weston said. The letter reminded churches that they could not retain their tax-exempt status if they endorsed specific candidates from the pulpit.”), available at [http://www.journalnow.com/servlet/Satellite?pagename=WSJ%2FMGArticle%2FWSJ\\_BasicArticle&c=MGArticle&cid=1137835530133](http://www.journalnow.com/servlet/Satellite?pagename=WSJ%2FMGArticle%2FWSJ_BasicArticle&c=MGArticle&cid=1137835530133); Strand, *supra* note 73 (reporting that a group of Ohio pastors filed a complaint with the IRS against two mega-church pastors for allegedly supporting a candidate for governor who proposed an amendment protecting traditional marriage in Ohio).

With or without the assistance of watchdog organizations, fair application of the Code is difficult because the IRS's process assesses the facts and circumstances of each case, which will inevitably lead to an arbitrary and perhaps unfair application of the Code.<sup>107</sup> Finally, the IRS is limited in its resources available to fairly and effectively apply the Code's limitation on political activity by churches and other nonprofits, which leads to selective enforcement.<sup>108</sup>

#### 4. Penalties

Tax inquiries have a chilling effect upon churches because of the harsh financial penalties that may result from violations of the Code and because a tax inquiry also brings an attendant threat of litigation, and thus high litigation costs. These chilling effects are heightened as a result of the indeterminate outcomes of the fact-driven inquiry. That is, determining what is and what is not proscribed by the Code is more gray than black or white. Even with the IRS's tax guides and other interpretive guidelines, many organizations are unaware of their boundaries in participating in political discourse in America.<sup>109</sup> As a result, some churches simply opt not to participate in America's political discourse, rather than potentially facing harsh penalties or exposing themselves to a tax inquiry, with all of the uncertainties and biases. Political involvement is thereby effectively curtailed.<sup>110</sup> A church that violates section 501(c)(3) may face an

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<sup>107</sup> See INTERNAL REVENUE SERVICE, *supra* note 60, at 1 (providing a fact sheet to clarify the political activity restrictions during election season for section 501(c)(3) organizations); Beth A. Sabbath, *Tax Exempt Political Educational Organizations: Is The Exemption Being Abused?*, 41 TAX L. 847, 860-63 (1987-88) (examining the challenges the IRS faces in enforcing the lobbying limitations for charitable organizations); see also House of Representatives Committee on Ways and Means, *Statement of James Bopp, Jr., Bopp, Colson & Bostrom, Terre Haute, Indiana* (May 14, 2002) (asserting that churches avoid addressing social and moral issues in election years because the IRS could find that the churches' communication violated the political activity restrictions), available at <http://waysandmeans.house.gov/legacy/oversite/107cong/5-14-02/records/boppjames.htm>.

<sup>108</sup> Jeffrey M. Berry, *Inquiry by IRS into NAACP Irks Nonprofits*, ORLANDO SENT., Dec. 19, 2004, at G1 (reporting that the IRS's tax-exempt unit operates with just 800 employees who monitor one million nonprofits and approximately 350,000 churches, and concluding that policing of charities and churches with such limited resources likely results in arbitrary application of the law); see also Sahagun, *supra* note 34.

<sup>109</sup> Dalrymple, *supra* note 15; see also W. Peter Burns, Note, *Constitutional Aspects of Church Taxation*, 9 COLUM. J.L. & SOC. PROBS. 646, 680 (1973) (noting that the law was so unsettled in 1973 that a church could not know what the boundaries were, which resulted in the church not doing anything).

<sup>110</sup> See Burns, *supra* note 109, at 680. *But see* Schwarz, *supra* note 3, at 71 (suggesting that the political activity restrictions have rarely been threatening to churches because churches either did not participate in political pursuits or, if they did, they tied their activity in with their religious purpose).

injunction to prohibit the proscribed conduct or speech, loss of its tax-exempt status, and payment of excise taxes.

With respect to an injunction, the IRS may enjoin a church from making further political expenditures or speeches, or from engaging in other “political” activity, irrespective of whether 501(c)(3) status is revoked.<sup>111</sup> Clearly, the notion of “free speech” is offended because the church would be required to cease any further conduct that the IRS considered proscribed political activity or else lose its tax-exempt status.

The Supreme Court has declared that the First Amendment protects the four “indispensable democratic freedom[s].”<sup>112</sup> One of those freedoms is the freedom of speech. Thus, silencing the church’s political speech presumably violates the First Amendment. Moreover, this silencing would effectively exclude the church from most, if not all, political discourse and debate.<sup>113</sup> Therefore, the vessel that has been the traditional compass of American social and moral policy would be dead.

The IRS may also revoke a church’s tax exemption for the current or immediately preceding taxable year if the church makes political expenditures that constitute “flagrant” violations of the prohibition against political activities.<sup>114</sup> Revocation prevents the church from being eligible to receive tax-deductible contributions,<sup>115</sup> which would seriously hurt churches financially.<sup>116</sup> Churches are not only houses of prayer, but also provide many other social services, such as soup kitchens, schools, and counseling facilities.<sup>117</sup> Revocation of churches’ tax-exempt status would presumably jeopardize these other social services as well.

The Code also allows for two tiers of excise taxes to be imposed, in lieu of or in addition to revocation, on section 501(c)(3) organizations involved

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<sup>111</sup> I.R.C. § 7409(a)(1) (2006).

<sup>112</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”); *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945).

<sup>113</sup> Bopp, *supra* note 107 (arguing that Section 501(c)(3), as currently interpreted, silences churches by preventing them from discussing social and moral issues that are at the center of public policy debate).

<sup>114</sup> I.R.C. § 6852 (2006).

<sup>115</sup> See BUZZARD & ROBINSON, *supra* note 43, at 61; INTERNAL REVENUE SERVICE, *supra* note 19, at 11 (“When it participates in political campaign activity, a church or religious organization jeopardizes both its tax-exempt status under IRC section 501(c)(3) and its eligibility to receive tax-deductible contributions.”).

<sup>116</sup> INTERNAL REVENUE SERVICE, *supra* note 19, at 11.

<sup>117</sup> *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 687 (1970) (“We find it unnecessary to justify the tax exemption on the social welfare services or ‘good works’ that some churches perform for parishioners and others—family counseling, aid to the elderly and the infirm, and to the children. Churches vary substantially in the scope of such services.”).

in proscribed political activities.<sup>118</sup> The first-tier tax equals ten percent of the cost of each political expenditure, as long as the IRS determines that the expenditure was not flagrant or willful.<sup>119</sup> The second-tier tax is a one hundred percent excise tax on the amount of the political expenditure. This heavy penalty is imposed if the church does not correct the expenditure within the taxable period.<sup>120</sup> Churches found to have participated substantially in lobbying may lose their tax-exempt status for that year, and thus subject all of their income to taxation.<sup>121</sup>

Finally, litigation is costly.<sup>122</sup> The high cost of litigation is also a deterrent that silences churches. When the IRS initiates a church tax inquiry, the church would be wise to hire counsel to respond to the inquiry and hopefully avoid litigation. Even if the church prevails in a church tax inquiry and the matter never reaches a court, the church may have already spent a significant amount of money paying lawyers to respond to the IRS inquiry. If the church cannot recoup its costs, then the church, in essence, loses by having to spend money to defend itself in the tax inquiry.

### III. HISTORICAL ANALYSIS OF SECTION 501(C)(3)

#### A. *Church and State*

The driving force behind the current interpretation, application, and enforcement of section 501(c)(3) appears to be the familiar metaphor of a “wall of separation between church and state.” This metaphor is not in the United States Constitution, Bill of Rights, or any other official government document.<sup>123</sup> Nonetheless, some commentators suggest that a majority of Americans believe that this particular metaphor rests on a firm foundation as stated within our nation’s essential documents.<sup>124</sup>

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<sup>118</sup> INTERNAL REVENUE SERVICE, *supra* note 19, at 11.

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

<sup>120</sup> *Id.*; Kindell & Reilly, *supra* note 50, at 355.

<sup>121</sup> Internal Revenue Service, *supra* note 15, at 6.

<sup>122</sup> STEPHEN C. YEAZELL, CIVIL PROCEDURE 287 (6th ed. 2004) (noting that litigation is quite costly).

<sup>123</sup> See AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, BASIC DOCUMENTS RELATING TO THE RELIGIOUS CLAUSES OF THE FIRST AMENDMENT (1965) (relying upon three documents, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, in THE WRITINGS OF JAMES MADISON 183-91 (Gaillard Hunt ed., Putnam’s Sons 1900); BILL FOR ESTABLISHING RELIGIOUS FREEDOM, in 12 HENING STATUTES OF VIRGINIA 84-86 (1823); and Letter from Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802), in 16 THE WRITINGS OF THOMAS JEFFERSON 281-82 (Andrew Lipscomb ed., Memorial ed. 1904), to suggest support for the familiar metaphor).

<sup>124</sup> See DAVID BARTON, THE MYTH OF SEPARATION 7 (1993).



The actual metaphor originated in Protestant theology, but it is popularly associated with Thomas Jefferson.<sup>125</sup> When he was president, Jefferson used the phrase in a letter to the Danbury Baptist Association regarding whether the federal government should establish a particular denomination of Christianity as the nation's official denomination.<sup>126</sup> The letter stated, in pertinent part:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" thus building a *wall of separation between Church and State*.<sup>127</sup>

This "wall of separation between Church and State" language, which referenced the First Amendment of the Constitution,<sup>128</sup> was repeated by the Supreme Court in a 1947 decision.<sup>129</sup> Since then, the First Amendment has taken on a new spirit, as evidenced by the Supreme Court deciding several cases that related to either the "Establishment" Clause or the "Free Exercise" Clause (collectively "Religion Clauses") of the First Amendment.<sup>130</sup>

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<sup>125</sup> CARTER, *supra* note 21, at 75 ("The true origin of the metaphor, as Mark DeWolfe Howe pointed out in the 1960s and most legal scholars have accepted since, does not lie with Thomas Jefferson's coinage, which occurred over a decade after the First Amendment was adopted. Rather, its origin is in Protestant theology."); *see also* KELLEY, *supra* note 11, at 43 (suggesting that the original wording of the First Amendment was intended to preclude Congress from establishing a national church or interceding with the several state establishments that already existed).

<sup>126</sup> *See* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, *supra* note 123, at 4; KEN I. KERSCH, *FREEDOM OF SPEECH: RIGHTS AND LIBERTIES UNDER THE LAW* 198-99 (2003) (noting that the Establishment Clause was originally understood as preventing the creation of a national church); Welch, *supra* note 20, at 618 (recognizing that the strict separation of church and state is "strictly a post-enlightenment phenomenon").

<sup>127</sup> Letter to Danbury Baptist Association, *supra* note 123, at 281-82 (emphasis added).

<sup>128</sup> U.S. CONST. amend. I.

<sup>129</sup> *Everson v. Board of Education*, 330 U.S. 1, 16, 18 (1947) (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878)) (quoting the "wall of separation" metaphor from Thomas Jefferson's 1802 letter to the Danbury Baptist Association).

<sup>130</sup> U.S. CONST. amend. I.

The Supreme Court has purportedly expanded the “wall” between church and state by repeatedly invalidating state action that seemed to endorse religion. For example, the Supreme Court has ruled that religious instruction in public schools violates the Establishment Clause,<sup>131</sup> and that applicants for public office cannot be required to swear that they believe in the existence of God.<sup>132</sup> The Court has also held that any kind of prayer developed by public schools is an unconstitutional government sponsorship of religion,<sup>133</sup> that posting the Ten Commandments in schools is unconstitutional,<sup>134</sup> and that a nativity scene displayed within a public building violates the Establishment Clause.<sup>135</sup> Additionally, the Court declared that a student who earned a state scholarship to attend any accredited state school may be denied the right to utilize the scholarship to earn a theology degree,<sup>136</sup> and that the Ten Commandments posted in Kentucky county courthouses violated the Establishment Clause because the displays were installed with the central goal to advance religion.<sup>137</sup>

However, these cases present evidence that the Supreme Court has ignored the framers’ intent with regard to the relationship between church and state. Thomas Jefferson was president at the time when property tax exemptions were given to Washington churches.<sup>138</sup> Additionally, James Madison, who is also viewed as supporting the “wall of separation between church and state,” sat in sessions of the Virginia General Assembly when property tax exemptions for churches were passed in the Commonwealth of Virginia.<sup>139</sup> Thus, in *Walz v. Tax Commission of the City of New York*,<sup>139</sup> the seminal case on tax exemptions and religious organizations, Justice Brennan<sup>140</sup> concluded that neither Thomas Jefferson nor James Madison, two prolific writers of important issues of their time,<sup>141</sup> were particularly

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<sup>131</sup> *Illinois ex rel. McCollum v. Bd. of Educ.* 333 U.S. 203 (1948).

<sup>132</sup> *Torcaso v. Watkins*, 367 U.S. 488 (1961).

<sup>133</sup> *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>134</sup> *Stove v. Graham*, 449 U.S. 39 (1980).

<sup>135</sup> *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

<sup>136</sup> *Locke v. Davey*, 540 U.S. 712 (2004).

<sup>137</sup> *McCreary County v. ACLU*, 545 U.S. 844 (2005).

<sup>138</sup> See *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 687 (1970) (Brennan, J., concurring) (noting this fact as part of his analysis to infer Thomas Jefferson’s stance on the separation between church and state).

<sup>139</sup> *Id.*

<sup>140</sup> KERSCH, *supra* note 126, at 189 (labeling Justice Brennan a “devout strict separationist” who was also a “major force behind removing prayer from the public schools”).

<sup>141</sup> See, e.g., *Walz*, 397 U.S. at 684 n.5 (Brennan, J., concurring) (citing Fleet, *Madison’s Detached Memoranda*, 3 WM. & MARY Q. (3d ser.) 534, 555-562 (1946)) (noting that when Madison left office, well after the passage of the Virginia exemption and the adoption of the Establishment Clause, he

concerned with this idea of separation of church and state specifically as it related to churches' tax exemptions.<sup>142</sup> That is, "[t]he adoption of the early exemptions without controversy . . . strongly suggests that they were not thought incompatible with constitutional prohibitions against involvements of church and state."<sup>143</sup>

Today, some people believe that the wall of separation between church and state is a myth,<sup>144</sup> although others believe that it is a bedrock American principle and that our country must ensure that this separation remains impregnable.<sup>145</sup> Still others regard the wall of separation as one-directional only, protecting the church from governmental intrusion, not vice versa.<sup>146</sup> Others conclude that even though church and state are separated, the church should not be prevented from influencing the state.<sup>147</sup> Many people agree, however, that an absolute divide between church and state is unsupported by history<sup>148</sup> and unavoidable.<sup>149</sup> Nevertheless, it is this

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argued in an essay against tax exemptions for churches and other separations between religion and law); AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, *supra* note 123, at 2-3 (noting James Madison's leadership in formulating the religious clauses in the First Amendment); KERSCH, *supra* note 126, at xv-xvi (noting that Thomas Jefferson was largely behind the penning of the core statement of principle in the Declaration of Independence of 1776, which reads: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."); John C. Jeffries & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 297 (2001) (suggesting that the real development of the modern Establishment Clause should not be fully accredited to the utterances of Jefferson and Madison, but rather in the political experiences that made aid to religious education difficult); Murphy, *supra* note 5, at 43-44 (noting that after Madison left office, he penned thoughts against exemptions for churches).

<sup>142</sup> *Walz*, 397 U.S. at 684-85.

<sup>143</sup> *Id.* at 685.

<sup>144</sup> See *Wallace v. Jaffree*, 472 U.S. 38, 92, 106 (1985) (Rehnquist, C.J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of Constitutional history . . . . [T]he establishment clause had been expressly freighted with Jefferson's misleading metaphor for nearly 40 years . . . . There is simply no historical foundation for the proposition that the framers intended to build the 'wall of separation' [between church and state] . . . .").

<sup>145</sup> See AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, *supra* note 123.

<sup>146</sup> See BARTON, *supra* note 124, at 42.

<sup>147</sup> See BRUCE R. HOPKINS, CHARITY, ADVOCACY AND THE LAW 577 (1992).

<sup>148</sup> Jeffries & Ryan, *supra* note 141, at 292 (noting that when the First Amendment was adopted, no state would have been found to be in compliance with the current understanding of separation of church and state, except perhaps for Rhode Island; other states used various means to support Christian religion, including government-sponsored churches); Jay Alan Sekulow & Jeremy Tedesco, *The Story Behind Vidal v. Girard's Executors: Joseph Story, The Philadelphia Bible Riots, and Religious Liberty*, 32 PEPP. L. REV. 605, 645-46 (2005) (noting that *Vidal v. Girard* "seriously undermines the proposition that complete, unyielding separation of church and state is supported by this nation's history").

<sup>149</sup> See *Walz*, 397 U.S. at 670 ("Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional

amorphous notion of the wall of separation that is the driving force behind the modern IRS interpretation, application, and enforcement of section 501(c)(3) with regard to churches.

### *B. Tax Exemptions and the Development of Section 501(c)(3)*

The historical development of section 501(c)(3) provides better guidance to assist in the modern interpretation, application and enforcement of section 501(c)(3) than the “wall” metaphor. History shows that churches have been exempt from sharing their income with the government since the birth of our nation.<sup>150</sup> For example, the 1894 income tax specifically included an exemption for a corporation or organization operating exclusively for religious, educational, or charitable purposes.<sup>151</sup> The Supreme Court struck down this statute as unconstitutional.<sup>152</sup> However, the church tax exemption principle survived by reemerging in the 1913 tax act,<sup>153</sup> and it has been included in every other income tax act adopted by Congress.<sup>154</sup>

As shown below, section 501(c)(3) was not initially concerned with lobbying and electioneering. Indeed, the church has always played a pivotal role in ensuring that social issues were considered in political

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positions. Of course, churches as much as secular bodies and private citizens have that right.”); see also *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (“Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.”); Clark, *supra* note 25, at 525 (noting the impossibility of an absolute separation of church and state).

<sup>150</sup> *Walz*, 397 U.S. at 678 (stating that church tax exemptions resulted from an “unbroken” history that “covers our entire national existence and indeed predates it”); KELLEY, *supra* note 11, at 70; John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 541 (1991-92) (citing John W. Baker, *Introduction to TAXATION AND FREE EXERCISE OF RELIGION, PAPERS AND PROCEEDINGS OF THE SIXTEENTH RELIGIOUS LIBERTY CONFERENCE* viii (John W. Baker ed., 1978)); see also PFEFFER, *supra* note 22, at 210 (dating the history of tax exemption of church property “at least to early Biblical days”); Vaughn E. James, *Reaping Where They Have Not Sowed: Have American Churches Failed to Satisfy the Requirements for the Religious Tax Exemption?*, 43 CATH. LAW. 29, 32-42 (2004) (setting forth the historical development of the religious tax exemption).

<sup>151</sup> Tariff of 1894, ch. 349, § 32, 28 Stat. 556 (1894); see also BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 13 (8th ed. 2003) (noting this Tariff Act provided exemption for charitable, religious, educational organizations, and other entities).

<sup>152</sup> *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601, 637 (1895) (holding unconstitutional the direct tax imposed by certain portions of the Act of 1894 concerning the income of real estate and of personal property).

<sup>153</sup> Elias Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 439, 444 (1960) (citing the Tariff of 1913, ch. 16 § 2, 38 Stat. 172 (1913) current version at 26 U.S.C. § 501(2006)).

<sup>154</sup> Whitehead, *supra* note 150, at 542 (noting that the tax exemption has been included in each subsequent income tax enacted by Congress).

discourse.<sup>155</sup> For years, churches were a central meeting place for organization and opposition to or advancement of social issues.<sup>156</sup> The tax exemptions did not require churches to abstain from political activity, or to choose between political activity and a tax exemption.<sup>157</sup> But in 1934, Congress added a lobbying limitation to section 501(c)(3)<sup>158</sup> in an effort to preclude wealthy donors from receiving tax deductions for advancing their own personal interests.<sup>159</sup> Specifically, Senator David A. Reed of Pennsylvania stated that contributions made to charitable organizations should not be deductible “as if it were a charitable contribution if it is a selfish one made to advance the personal interests of the giver of the money.”<sup>160</sup>

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<sup>155</sup> KELLEY, *supra* note 11, at 86 (finding that churches are obligated by their mission—their obedience to God—to speak out on moral issues and that they were doing this long before legislatures or lobbies, and they will continue to do so, irrespective of the obstacles, as long as churches exist).

<sup>156</sup> The civil rights movement was driven largely by clergy, for example. See, e.g., CARTER, *supra* note 21, at 35, 71 (recognizing that Martin Luther King, Jr., as a leader of the civil rights movement, never tried to conceal the religiosity in his speeches and credited his Christianity for inspiring him to lead and strengthening him to continue, and stating that many people believed that the “ideal place for political activity is the church”); Martin Luther King, Jr., *The March on Washington Address* (Aug. 28, 1963), *reprinted in THE AMERICAN READER* 331, 333-34 (Diane Ravitch ed., 1990); *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 52-53, 328 (James Melvin Washington ed., 1986).

<sup>157</sup> See *Slee v. Comm’r*, 42 F.2d 184 (2d Cir. 1930) (holding that the charity’s lobbying was not an activity that Congress intended to support by granting tax-exempt status); Clark, *supra* note 153, at 445-46 (citing Treas. Reg. § 45, art. 517 (1919), in T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1920) (stating that “associations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute”)) (noting that before 1934, none of the tax statutes directly referenced political activity restrictions, but stating that cases and regulations acknowledged that political activity was grounds for denying tax exemptions).

<sup>158</sup> Revenue Act of 1934, ch. 277, §§ 23(o), 101(6), 48 Stat. 680, 690, 700 (1934); see also S. REP. NO. 558 at 26 (1934).

<sup>159</sup> 78 CONG. REC. 5959 (1934) (Statement of Sen. Harrison) (“I may say to the Senate that the attention of the Senate committee was called to the fact that there are certain organizations which are receiving contributions in order to influence legislation and carry on propaganda. The committee thought there ought to be an amendment which would stop that, so that is why we have put this amendment in the bill.”); BUZZARD & ROBINSON, *supra* note 43, at 37 (noting that *Slee v. Comm’r of Internal Revenue*, 46 F.2d 184 (2d Cir. 1930) was the impetus for lobbying restrictions); KELLEY, *supra* note 11, at 70; see also *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550 (1983) (affirming that Congress enacted the 1934 limitation because it was concerned that charities may use tax-deductible contributions to promote the private interests of the donors); Clark, *supra* note 25, at 483, 488 (noting that the IRS’s concern about charitable entities engaging in profit-making activities prompted the 1934 amendment to limit lobbying); O’Daniel, *supra* note 3, at 758 n.110; Gregory E. Robinson, Note, *Charitable Lobbying Restraints and Tax Exempt Organizations: Old Problems, New Directions?*, 1984 UTAH L. REV. 337, 350 (noting Congress’s concern that donors making charitable contributions were “for lobbying purposes intended to advance the selfish personal interests of the donors”).

<sup>160</sup> 78 CONG. REC. 5861 (1934).

The limitation was not intended to curb all lobbying activities, evidenced by the fact that in Congressional deliberations, the phrase “participation in partisan politics” was removed from the draft language and thus did not become part of the 1934 amendment.<sup>161</sup> The actual language for the broad lobbying limitation was more a result of poor draftsmanship, rather than actual policy considerations.<sup>162</sup> Indeed, Senator Reed stated in pertinent part, “[W]e found great difficulty in phrasing the amendment. I do not reproach the draftsmen. I think we gave them an impossible task; but this amendment goes further than the committee intended to go.”<sup>163</sup> In drafting this amendment, Congress prohibited “substantial” lobbying activity. However, as one scholar noted over forty years ago, the word “substantial” is imprecise, and thus the courts have been free to interpret it as they see fit.<sup>164</sup>

In 1954, the prohibition against the electioneering ban was added to section 501(c)(3) as a result of then-Senator Lyndon B. Johnson’s desire to prevent his opponent from gaining an advantage from support by private foundations.<sup>165</sup> The history of this amendment is leaner than the history of the 1934 amendment, but is sufficient enough to understand the impetus for the amendment.<sup>166</sup> During the Senate floor debate, Senator Johnson introduced an amendment to the Internal Revenue Code:

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

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<sup>161</sup> H. Rep. No. 1385, at 17 (1934); 78 CONG. REC. 7831 (1934); Note, *Income Tax Advantages of Political Activities*, 57 COLUM. L. REV. 273, 277 (1957) (“With the introduction in 1934 of the ban on exemptions and deductions when any ‘substantial part of the [organization’s] activities . . . is carrying on propaganda, or otherwise attempting to influence legislation,’ Congress clearly did not intend to affect all forms of political activity.”) (footnote omitted).

<sup>162</sup> Clark, *supra* note 153, at 447.

<sup>163</sup> 73 CONG. REC. 5861 (1934); *see also* KELLEY, *supra* note 11, at 70 (“But in 1934 a curious curtailment was introduced into that arrangement—one which has since expanded and rigidified to a degree alarming to its victims and not intended by its originators.”).

<sup>164</sup> Clark, *supra* note 153, at 449 (“Because the word ‘substantial’ lacks precise content, the courts have been able to invoke it to liberalize the overall restriction.”); *see also* KELLEY, *supra* note 11, at 72 (“The undefined word ‘substantial’ thus stands as an enigmatic threat to any public charity contemplating action on any legislative issue, and often has the ‘chilling effect’ of persuading it that the only really safe course is to refrain from such activity entirely.”).

<sup>165</sup> HOPKINS, *supra* note 151, at 584 (stating that the amendment was offered out of concern that a charitable foundation was providing funds to finance the campaign of Senator Johnson’s opponent in a primary election); O’Daniel, *supra* note 3, at 740 (noting that the amendment seemed to be Johnson’s way to suppress unsavory campaign tactics directed at him by some tax-exempt organization and that Johnson was not responding to public opinion).

<sup>166</sup> Schwarz, *supra* note 3, at 69.

The Presiding Officer: The Secretary will state the amendment.

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

Mr. Johnson of Texas: Mr. President, this amendment seeks to extend the provisions of section 501 of the House bill, denying tax-exempt status to not only those people who influence legislation but also to those who intervene in any political campaign on behalf of any candidate for any public office. I have discussed the matter with the chairman of the committee, the minority ranking member of the committee, and several other members of the committee, and I understand that the amendment is acceptable to them. I hope the chairman will take it to conference, and that it will be included in the final bill which Congress passes.<sup>167</sup>

Because Johnson’s language was added to the Code without hearings, testimony, or other comment, there is not much to glean from his addition to the Code.<sup>168</sup> However, it seems clear that the intent of the drafters was to specifically exclude churches from the political activity restrictions.<sup>169</sup> Indeed, commentators believe that this language was added in response to support given by a certain private foundation to Johnson’s presidential challenger, Dudley Dougherty, in the 1954 primary election, and that the

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<sup>167</sup> 100 CONG. REC. 9604 (1954).

<sup>168</sup> See *id.*; see also HOPKINS, *supra* note 151, at 584 (“This provision forbidding political campaign activity by charitable organizations was added to the federal tax law in 1954, without benefit of congressional hearings, in the form of a floor amendment adopted in the Senate.”).

<sup>169</sup> H.R. REP. NO. 83-2681, at 1 (1954); O’Daniel, *supra* note 3, at 768 (“There is no evidence that a religious element played a significant part in Johnson’s decision to ban certain tax-exempt entities—including churches—from intervening in support of a political candidate. Rather, Johnson saw a cabal of national conservative forces, led by tax-exempt educational entities fueled by corporate donations, arrayed against him and wanted to put a stop to the meddling of these foreign interlopers.”).

language was not aimed at churches.<sup>170</sup> The electioneering bar was also considered an extension of the lobbying limitation.<sup>171</sup> Thus, there is simply no evidence of congressional intent to include churches in the political activity restrictions.

To be sure, in 1954 this same congressional body also amended the Pledge of Allegiance by adding the words “under God.”<sup>172</sup> The congressional report accompanying the legislation noted that, “From time to time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.”<sup>173</sup> Although the amendment originated from Congress’s desire to send a message to Communist Russia, had the 1954 congressional body believed in this impregnable wall between church and state, it seems unlikely that this body would have amended the Pledge by adding the words “under God.”<sup>174</sup>

Neither the lobbying limitation included in 1934 nor the electioneering ban included in 1954 was specifically directed at churches, nor was either enacted to maintain a separation between church and state. Yet both

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<sup>170</sup> Halloran & Kearney, *supra* note 48, at 107 (George Reedy, Johnson’s chief aide, said that he was “confident that Johnson would never have sought restrictions on religious organizations, but that is only an opinion and I have no evidence.”); Kemmitt, *supra* note 3, at 153 (“Whatever the reason for Johnson’s action, it is clear that his motivation was unrelated to the activities of religious organizations.”); O’Daniel, *supra* note 3, at 758 n.110 (quoting Letter from Lyndon Johnson to T.R. Bateman (May 22, 1954) (on file with LBJ Library: Dougherty, Dudley – May 1954 file) (“Yes, I have seen the propaganda issued by the [Committee for Constitutional Government]. This organization is composed, as I understand, of men who are against just about every piece of progressive legislation that has been enacted during the last twenty years. I know the organization is supported by some of the richest men in the country who are anxious to gain acceptance for their own ultra-conservative political views. It is natural, of course, that they should oppose me.”)); Schwarz, *supra* note 3, at 69 (“It is understood that Senator Johnson was attempting to curb the activities of a private foundation that he believed had provided indirect financial support to his opponent in a Texas election.”). *But see* Murphy, *supra* note 5, at 55 (suggesting that the 1954 amendment was not a way to silence then-Senator Johnson but rather a result of the “interesting historical time”).

<sup>171</sup> Schwarz, *supra* note 3, at 69 (citing 100 CONG. REC. 9604 (1954) and H. CONF. REP. NO. 2543, 83d Cong., 1st Sess. 46 (1954)) (stating that the 1954 amendments were intended to “extend” the limitations of section 501(c)(3)).

<sup>172</sup> Act of June 14, 1954, ch. 297, 68 Stat. 249 (1954).

<sup>173</sup> H.R. REP. NO. 83-1693, at 2 (1954).

<sup>174</sup> 100 CONG. REC. 8618 (1954) (statement of Sen. Ferguson incorporating President Eisenhower’s signing statement wherein he states that “this law and its effect today have profound meaning. In this way we are reaffirming the transcendence of religious faith in America’s heritage and future: in this way we shall constantly strengthen those spiritual weapons which forever will be our country’s most powerful resource, in peace or in war.”); *see also Under God*, WASH. TIMES, Apr. 11, 2004, available at <http://www.washtimes.com/op-ed/20040410-114513-5006r.htm> (“Congress added the phrase ‘under God’ to the pledge in 1954, meaning to distinguish clearly between the religious heritage of the United States and the atheistic principles of Communism.”).



limitations are rigidly enforced against churches today under the modern development of the “wall between church and state.”<sup>175</sup>

#### IV. CONSTITUTIONAL ANALYSIS OF SECTION 501(C)(3)

##### A. Freedom of Speech

Although some scholars believe that contemporary free speech has developed into a quagmire of doctrinal complexity,<sup>176</sup> one point is clear: political speech, including political contributions, is “high-value” speech and should therefore be accorded the highest protections of strict scrutiny under the First Amendment.<sup>177</sup> In fact, the Court is very critical of content-based regulations of political speech because they “distort the proper functioning of the marketplace of ideas.”<sup>178</sup> Most recently, in *Randall v. Sorrell*<sup>179</sup> the Court affirmed the seminal authority with regard to campaign finance regulations, *Buckley v. Valeo*, which held that political contributions are a form of constitutionally protected speech.<sup>180</sup>

*Buckley v. Valeo* applied the Court’s strict scrutiny test and determined that political contributions—the amount that candidates for office may spend on their campaigns (“expenditure limits”) and the amount that individuals, organizations, and political parties may contribute to those campaigns (“contribution limits”)—implicate fundamental First Amendment interests, namely the freedoms of political expression and

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<sup>175</sup> Edward A. Zelinsky, *Are Tax “Benefits” for Religious Institutions Constitutionally Dependent on Benefits for Secular Entities?*, 42 B.C. L. REV. 805, 840 (2001) (citing Diamond, *Efficiency and Benevolence: Philanthropic Tax Exemptions in Nineteenth Century America*, in PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD (Evelyn Brody ed., 2001) (stating that because of “the irregular nature of taxation in colonial times,” tax exemptions are viewed differently then than now)).

<sup>176</sup> *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 720 (1981) (Rehnquist, J., dissenting) (acknowledging that First Amendment jurisprudence is “muddied waters”); KERSCH, *supra* note 126, at 36 (“Contemporary free speech law has grown into a tangled garden of bewildering doctrinal complexity.”).

<sup>177</sup> KERSCH, *supra* note 126, at 206 (explaining that high-value speech includes political speech and “stands at the core of the First Amendment”).

<sup>178</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (stating that the general advocacy of ideas is protected under the constitution as part of the nation’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”); KERSCH, *supra* note 126, at 195.

<sup>179</sup> *Randall v. Sorrell*, 126 S. Ct. 2479 (2006).

<sup>180</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976). *But see* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 664 (1997) (arguing that “the better way to resolve the anomalies created by *Buckley v. Valeo* may well be not to impose new expenditure limits on political campaigns but rather to eliminate contribution limits”).

political association.<sup>181</sup> Nonetheless, the Court treated expenditure limits differently than contribution limits because it found that the restrictions involved in the limits were different. The Court found that expenditure limits reduced “the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached” in violation of the First Amendment.<sup>182</sup> On the other hand, the Court held that although contribution limits were a “marginal restriction upon the contributor’s ability to engage in free communication,” they nevertheless left the contributor “freedom to discuss candidates and issues.”<sup>183</sup> The Court held that the contribution limits were “closely drawn” to a sufficiently significant interest—preventing corruption and the appearance of corruption in federal elections.<sup>184</sup> That is, the government interest in avoiding corruption or its appearance was sufficient to impose contribution limits.

Thirty years later, the Court had an opportunity to overrule *Buckley* but declined to do so. In *Randall v. Sorrell*, voters, campaign contributors, political candidates, and political parties sued state officials who were responsible for enforcing Vermont Act 64, which included low expenditure limits and contribution limits.<sup>185</sup> With regard to the expenditure limits, the Court noted that, like those in *Buckley*, the limits consisted of a dollar limit imposed upon a candidate’s expenditures.<sup>186</sup> Also similar to *Buckley*, Vermont’s rationale for imposing the limits under Act 64 were similar to Congress’s rationale for the *Buckley* limits: preventing corruption or the appearance thereof.<sup>187</sup> Thus, the court followed *Buckley* and its progeny and held that Act 64’s expenditure limits violate the First Amendment.<sup>188</sup> With respect to the contribution limits, however, the Court held that they were not “closely drawn” because they were so low as to “work more harm to protect First Amendment interests than their anticorruption objectives could justify.”<sup>189</sup> Thus, political contributions—both expenditure limits and contributions limits—are protected under the First Amendment.

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<sup>181</sup> *Buckley*, 424 U.S. at 15.

<sup>182</sup> *Id.* at 19.

<sup>183</sup> *Id.* at 20-21.

<sup>184</sup> *Id.* at 55.

<sup>185</sup> *Randall*, 126 S.Ct. at 2485-86.

<sup>186</sup> *Id.* at 2486.

<sup>187</sup> *Id.* at 2492.

<sup>188</sup> *Id.* at 2500.

<sup>189</sup> *Id.* at 2491-92.

Like political contributions, lobbying of legislators is also protected under the First Amendment.<sup>190</sup> However, the Court has nevertheless allowed Congress to restrict churches' right to engage in political speech—this high-value speech. Why? In *Regan v. Taxation With Representation*,<sup>191</sup> the Court held that statutes may be held to a higher level of scrutiny if they infringe upon a fundamental right, such as free speech. However, the Court also stated that “a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus, is not subject to strict scrutiny.”<sup>192</sup> But *Regan* seems misplaced as applied to section 501(c)(3) and churches.<sup>193</sup>

In *Regan*, the organization Taxation With Representation (“TWR”) proposed to advocate its viewpoint before Congress, the Judiciary, and the Executive Branch by influencing legislation.<sup>194</sup> When TWR applied for tax-exempt status under section 501(c)(3), the IRS denied the application because it determined that a substantial part of TWR’s activities would consist of attempting to influence legislation in violation of section 501(c)(3).<sup>195</sup> TWR responded by attacking the lobbying limitation in section 501(c)(3) as a violation of the First Amendment and the Fifth Amendment’s equal protection clause.<sup>196</sup>

*Regan* seems misplaced for several reasons. *Regan*, which involved a charitable organization, not a church, stated that the legislature could decide that it did not want to subsidize substantial lobbying by charities. However, history demonstrates that the legislature never intended to apply section 501(c)(3) restrictions to churches.<sup>197</sup> As shown earlier, at the time when the 1934 and 1954 amendments were enacted, churches were heavily

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<sup>190</sup> *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1968) (“While the term ‘lobbyist’ has become encrusted with invidious connotations, every person or group engaged, as this one allegedly has been, in trying to persuade Congressional action is exercising the First Amendment right of petition.”).

<sup>191</sup> *Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

<sup>192</sup> *Id.* at 549.

<sup>193</sup> *Id.* at 545-46 (holding that the lobbying restriction, as opposed to the electioneering ban, did not place a content-based restriction on speech); see also Gaffney, *supra* note 6, at 32-33 (noting that the subsidy argument is weak because (1) the Court has determined that the government may not “purchase one’s constitutional rights by extending a grant under the spending power,” (2) *Regan* ignores precedential authority in *Walz*, where the Court rejected the idea that property tax exemptions were impermissible subsidies, and (3) *Regan* did not involve a religious group trying to advance a religious message on issues of public concern).

<sup>194</sup> *Regan*, 461 U.S. at 541-42.

<sup>195</sup> *Id.* at 542.

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

<sup>197</sup> See *supra* Part III(B).

interwoven in every aspect of politics. There was no decision on Congress's part to include churches within the political activity restrictions of section 501(c)(3). To the contrary, Congress specifically decided to exclude churches from the political activity restrictions. The legislative history seems quite clear:

We have limited ourselves in the scope of our inquiry, in order not to scatter over the entire, gigantic field. We urge, however, that the proposed continued inquiry cover those sections which we have perforce omitted. Among them is that of organizations which have religious names, or some connection with religion or a religious group, which have engaged in political activity. There is evidence that such groups exist in all three major sects. The right of a minister, priest or rabbi to engage in political activity is clear enough. When such activity takes place, however, under the shelter of a tax-exempt organization *which is not in itself a church*, we question its permissibility.<sup>198</sup>

Churches were never intended to be excluded from full, active participation in the political process.<sup>199</sup> Instead, the legislators serving during the time when the 1954 amendment was enacted clearly intended to exclude churches from political activity restrictions. Congress decided not to subsidize charities, but it did not decide this with respect to churches. Thus the subsidy argument, as set out in *Regan*, applied to a charity, not a church. As applied to churches, therefore, the subsidy argument is historically unsound.<sup>200</sup>

Moreover, the subsidy argument is unconvincing and violates the First Amendment when applied to churches because unlike other charitable

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<sup>198</sup> H.R. REP. NO. 83-2681, at 1, 220-21 (1954) (emphasis added); see also Murphy, *supra* note 5, at 53 (acknowledging that the majority of the Committee "had no qualms about churches, and only churches, having some political power").

<sup>199</sup> O'Daniel, *supra* note 3, at 768 (noting that there was no evidence that Johnson intended to include churches in his 1954 amendment to ban tax-exempt organizations from interfering in political campaigns).

<sup>200</sup> KELLEY, *supra* note 11, at 11 (arguing that treating exemptions as "subsidies" ignores the history of exemptions in federal tax law).

organizations, churches are dually protected under the Religion Clauses.<sup>201</sup> That is, churches have more constitutional protections than other charities.<sup>202</sup> They have the additional right to be free from unconstitutional entanglement with the state: entanglement between church and state “must be ‘excessive’ before it runs afoul of the Establishment Clause,” according to a recent Supreme Court opinion.<sup>203</sup> Years ago, the Supreme Court acknowledged in *Walz* that taxation or exemption of churches “occasions some degree of involvement with religion,” but that “[g]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them.”<sup>204</sup> The *Walz* Court analyzed taxation and exemption by considering “whether the involvement is excessive” and whether it calls for “official and continuing surveillance [by the government] leading to an impermissible degree of entanglement.”<sup>205</sup> The Court concluded that “a direct money subsidy would be a relationship pregnant with involvement,” and would likely also require detailed administrative oversight, but that “[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.”<sup>206</sup>

The *Regan* Court held that a tax exemption to a charity was equivalent to a subsidy.<sup>207</sup> However, as the *Walz* Court had earlier stated with regard to church exemptions, exempting churches from taxation is a lesser form of entanglement than a subsidy would be. Thus, the subsidy argument advanced in *Regan* for a charity lacks the dual protections afforded to churches.

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<sup>201</sup> See Bittker, *supra* note 3, at 1290 (warning that once tax exemptions became treated as privileges or gifts from the legislature, they would be one step from being labeled a “loophole,” “preference,” and “subsidy”); Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 993 (1999) (discouraging the current tendency of courts to casually refer to tax exemptions as “subsidies” without considering that when viewed as subsidies, tax exemptions become the same as cash and thus unconstitutional under the Establishment Clause); Zelinsky, *supra* note 175, at 838-841 (arguing that tax benefits should not be viewed as “subsidies of the sectarian” but that the First Amendment is “best understood as permitting governments to refrain from taxation to accommodate the autonomy of religious actors and activities,” and thus a “tax exemption does not subsidize churches, but leaves them alone”).

<sup>202</sup> Gaffney, *supra* note 6, at 35 (noting that religious bodies are afforded additional constitutional protection because of their religious nature).

<sup>203</sup> *Agostini v. Felton*, 521 U.S. 203, 233 (1997).

<sup>204</sup> *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 687 (1970).

<sup>205</sup> *Id.* at 675.

<sup>206</sup> *Id.*

<sup>207</sup> *Regan*, 461 U.S. at 545-46.

In addition, Congress has periodically chosen to “subsidize” veterans’ organizations because of their very significant and important past contributions to the country.<sup>208</sup> It is not far-fetched to assume that Congress also chose to support churches’ significant contributions by not taxing them throughout our nation’s history. The historical contributions of churches in providing essential social services suggest as much, making it clear that churches were not intended to be included in the political activity restrictions imposed on other section 501(c)(3) organizations.<sup>209</sup>

Furthermore, part of the Court’s analysis in *Regan* rested on the fact that the tax exempt organization could establish a section 501(c)(4) lobbying affiliate and overcome the section 501(c)(3) lobbying limitations,<sup>210</sup> but this is not a reasonable option for churches. The Code defines a section 501(c)(4) organization as a “social welfare organization,” which is allowed to engage in lobbying activities and still remain exempt from taxation, although contributions to a section 501(c)(4) are not tax-deductible for the contributor.<sup>211</sup> However, a section 501(c)(4) lobbying affiliate is limited in interfering in a political campaign, and thus such an affiliate will not overcome the problems associated with the electioneering ban.<sup>212</sup> The promotion of social welfare does not include participation or intervention in political campaigns.<sup>213</sup> Thus, a section 501(c)(4) entity is not a satisfactory option for churches.<sup>214</sup> Therefore *Regan*’s suggestion of 501(c)(4) as an alternative is misplaced, and even if not, its reach only

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<sup>208</sup> *See id.* at 550-51 (“It is also not irrational for Congress to decide that, even though it will not subsidize substantial lobbying by charities generally, it will subsidize lobbying by veterans’ organizations . . . . Our country has a longstanding policy of compensating veterans for their past contributions by providing them with numerous advantages.”); Robinson, *supra* note 159, at 359 (“Because of the special status of veterans, promotion of veteran lobbying in order to enhance legislative awareness of veteran’s concerns is a substantial justification for the extension of lobbying subsidies to the veteran’s organizations.”); Ellis M. West, *The Free Exercise Clause and the Internal Revenue Code’s Restrictions on the Political Activity of Tax-Exempt Organizations*, 21 WAKE FOREST L. REV. 395, 406 (1985-86) (acknowledging that the federal government subsidizes the political activities of businesses, veterans’ groups, and political parties).

<sup>209</sup> *See supra* Part III.

<sup>210</sup> *Regan*, 461 U.S. at 544.

<sup>211</sup> I.R.C. § 501(c)(4) (2006) (providing tax exemption for “[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare”).

<sup>212</sup> *See HOPKINS*, *supra* note 151, at 334 (noting that the prohibition on political campaign activities for social welfare organizations is not absolute, and any breach may subject the organization to tax imposed by I.R.C. § 527(f) on expenditures for political activities that come within the meaning of I.R.C. § 527(e)(2)).

<sup>213</sup> Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (2005).

<sup>214</sup> Caron & Dessingue, *supra* note 3, at 193 (concluding that section 501(c)(4) is not a viable option to overcome the constitutional infirmities of the electioneering ban); Gaffney, *supra* note 6, at 34-35 (finding that section 501(c)(4) does not apply to religious organizations).

extends to the lobbying limitation. The Court has not determined whether the electioneering ban—an absolute ban—would pass constitutional scrutiny.<sup>215</sup>

The subsidy argument advanced in *Regan* is not applicable to churches for the reasons stated above. Indeed, section 501(c)(3) regulates core political speech on the basis of its content, and thus the most exacting scrutiny should be required to determine whether the restrictions imposed are narrowly tailored to promote a compelling government interest. Therefore, the government must seek to use a less restrictive alternative that would serve its purpose if one is available.<sup>216</sup> Content-based regulations trample upon freedom of speech, and therefore, are strongly presumed to be invalid.<sup>217</sup> In applying the strict scrutiny test, the Court determines whether there is a compelling governmental interest in limiting speech.<sup>218</sup> The government bears the burden to show that its actions of restricting speech are constitutional.<sup>219</sup> The justification for the legislation must come from the legislative body that passed the legislation.<sup>220</sup>

The legislative history surrounding the 1934 and 1954 amendments to section 501(c)(3) indicates that the legislature enacted the political activity restrictions to prevent wealthy donors from advancing their personal agendas by using “sham” section 501(c)(3) organizations and to abort campaign funds intended for presidential nominee Johnson’s opponent, respectively.<sup>221</sup> Neither amendment was intended to deter political intervention of churches in political campaigns. Thus, restricting

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<sup>215</sup> Johnson, *supra* note 73, at 890 (noting that the constitutionality of the electioneering ban has not been addressed by the Supreme Court).

<sup>216</sup> *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (“If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”).

<sup>217</sup> *Ashcroft v. ACLU*, 535 U.S. 564, 591 (2002) (Kennedy, J., concurring) (stating that content-based regulations “are presumptively invalid abridgments of the freedom of speech”).

<sup>218</sup> *Playboy*, 529 U.S. at 813 (“If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest.”); Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 201 (1994) (noting Justice O’Connor’s opinion in *Simon and Schuster, Inc. v. New York State Crime Victims Board*, wherein she stated that the First Amendment precludes content-based speech restrictions unless the government can show that the regulation is needed to achieve a compelling government interest).

<sup>219</sup> *Playboy*, 529 U.S. at 816 (“When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government’s obligation to prove that the alternative will be ineffective to achieve its goals.”).

<sup>220</sup> *Watchtower Bible and Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 170 (2002) (conurrence) (rejecting the dissent’s reason of “crime prevention” as appropriate to uphold the ordinance where the legislators never stated that “crime prevention” was a justification for enacting the ordinance). *But see* West, *supra* note 208, at 406 (noting that the government interests served by section 501(c)(3) “are neither clear nor compelling”).

<sup>221</sup> *See supra* Part III(B).

churches' speech does not satisfy the compelling governmental interest. Moreover, as discussed throughout this article, the legislative history clearly shows that churches were not the intended targets of the amendment. The amendments therefore cannot pass constitutional muster as applied to churches.

The federal government is using section 501(c)(3) to regulate what churches can and cannot say. The political activity restrictions encroach upon churches' freedom of speech, but this effect was never intended or contemplated by the government. That is, from a review of the history and development of the political activity restrictions in section 501(c)(3),<sup>222</sup> it seems clear that the restrictions developed inadvertently, in an effort to restrict the activities of wealthy donors and private foundations, not churches. Yet the political activity restrictions—tax laws—are seriously impacting the core values of the First Amendment.

The Sixteenth Amendment of the United States Constitution authorizes Congress to “lay and collect taxes on incomes, from whatever source derived.”<sup>223</sup> It allows Congress to tax or not to tax, but it does not allow Congress to restrict speech based upon content. The Sixteenth Amendment does not authorize Congress to use the amendment to encroach upon the fundamental rights given in the First Amendment.

The Supreme Court has occasionally stated, quite unabashedly, that the First Amendment has a special place in America, so much so that freedom of speech presumably trumps all other amendments.<sup>224</sup> Free exercise has frequently been described as America's “first freedom.”<sup>225</sup> Although not all Supreme Court justices have accepted this “preferred position” theory, the Court has nevertheless accorded the First Amendment special treatment. The Court has used various devices to express this preferred position, as listed by one author:

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<sup>222</sup> *See id.*

<sup>223</sup> U.S. CONST. amend. XVI.

<sup>224</sup> *See, e.g., Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 26-28 (1989) (Blackmun, J., concurring) (charging other justices with preferring one First Amendment value over another); *New York Times Co. v. United States*, 403 U.S. 713, 713 (1971) (holding that “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity”); *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 115 (1943) (stating that “[f]reedom of press, freedom of speech, freedom of religion are in a preferred position”).

<sup>225</sup> Johnson, *supra* note 73, at 877 (citing as examples THOMAS CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986), and Michael W. McConnell, *Why is Religious Liberty the “First Freedom”?*, 21 *CARDOZO L. REV.* 1243 (2000)).



[the] clear and present danger test; narrowing of the presumption of constitutionality; strict construction of statutes to avoid limitation of first amendment freedoms; the prohibitions against prior restraint and subsequent punishment; relaxation of the requirement of standing to sue where first amendment issues are involved; and generally higher standards of procedural due process where these freedoms are in jeopardy.<sup>226</sup>

A federal tax *qua* tax may be a valid exercise of the taxing power, but it may be invalid considering specific constitutional limitations, such as the Fifth Amendment prohibition against self-incrimination.<sup>227</sup> Similarly, federal taxation, though valid as a taxing power, may be invalid for Congress to pursue under the First Amendment with respect to churches. In other words, is the Sixteenth Amendment subject to First Amendment limitations?

If free speech is in a preferred position under the First Amendment because free speech is described in absolutist terms, then the Sixteenth Amendment would certainly be subject to the First Amendment limitations.<sup>228</sup> In addition, most of the justices of the Supreme Court have agreed that the values protected by the religion clauses are fundamental principles of liberty in America and must be protected from federal and state interference.<sup>229</sup> It stands to reason, then, that it is beyond Congress's power to tax churches under the authority of the Sixteenth Amendment where such taxation encroaches upon the First Amendment freedoms.<sup>230</sup> That is, the IRS should not be able to revoke the tax-exempt status of a church simply because the church pastor tells the congregation not to vote for candidate X because the candidate favors abortion or gay marriage. Such a statement is electioneering *and* church doctrine.

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<sup>226</sup> Robert B. McKay, *The Preference for Freedom*, 34 N.Y. L. REV. 1182, 1184 (1959).

<sup>227</sup> JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 5.5, at 230 (7th ed. 2004) (citing *Marchetti v. United States*, 390 U.S. 39 (1968)).

<sup>228</sup> *Id.* at 1150-51 (suggesting that if free speech is an absolute right then it is surely in a preferred position to those rights in the Constitution which are not expressed in absolute terms).

<sup>229</sup> *Id.* at 1412 (noting that a majority of Supreme Court justices have held that "the values protected by the religion clauses are fundamental aspects of liberty in our society and must be protected from both state and federal interference").

<sup>230</sup> See *Walz v. Tax Comm'n of the City of N.Y.*, 397 U.S. 664, 687 (1970) (noting that since enactment of the Sixteenth Amendment, federal income tax acts have consistently exempted charities and churches from paying tax).

In 1819, in his famous opinion in *McCulloch v. Maryland*, Chief Justice Marshall declared that “the power to tax involves the power to destroy.”<sup>231</sup> Marshall’s declaration is a truism as applied to churches—the federal government’s taxation of churches involves the power to destroy them.

### B. *Freedom of Religion*

Not only does section 501(c)(3) encroach upon churches’ freedom of speech, but it also encroaches upon their freedom of religion, particularly the Free Exercise Clause. In the backdrop of discussing section 501(c)(3) and churches, one has to acknowledge that the Religion Clauses—both cast in absolutes—tend to conflict with each other when reasonably stretched to their extremes.<sup>232</sup> It seems, then, that there has to be some flexibility to accommodate the proscription against governmentally established religion or governmental interference with religion,<sup>233</sup> which appears to be what the First Amendment requires.<sup>234</sup>

The initial starting point, then, is to determine whether section 501(c)(3) violates the Establishment Clause. The Supreme Court’s three-part inquiry for testing possible violations of the Establishment Clause was laid out in *Lemon v. Kurtzman*, as follows: 1) the government action must have a secular purpose, 2) which primary purpose must not be to inhibit or advance religion, and 3) no *excessive* entanglement between government and religion must exist.<sup>235</sup> However, in the religious area, entanglement is the central focus.<sup>236</sup>

The Court addressed the nature of government entanglement as it relates to churches a year before establishing the *Lemon* test. In *Walz*, the Court

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<sup>231</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) (holding a state tax unconstitutional as applied to the federal government).

<sup>232</sup> *Walz*, 397 U.S. at 668-69 (“The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.”).

<sup>233</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (“Our decisions recognize that ‘there is room for play in the joints’ between the Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause.”).

<sup>234</sup> *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 720-21 (1981) (Rehnquist, J., dissent) (noting that the “tension” between the Religion Clauses is fairly recent and was unknown to the framers of the Constitution at the time of the adoption of the First Amendment).

<sup>235</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *see also Thomas*, 450 U.S. at 725 (Rehnquist, J., dissent) (noting that the Court moved from the mechanical “no-aid-to-religion” approach and recognizing the *Lemon* three-part test to determine constitutionality of government aid to religion); NOWAK & ROTUNDA, *supra* note 227, at 1413-14 (concluding that the “Court in *Agostini* ‘repackaged’ the three part purpose-effect-entanglement test that had been used from 1971 to 1997”).

<sup>236</sup> *Grutka v. Barbour*, 549 F.2d 5, 8 (7th Cir. 1977) (“In the religious area, the essence of First Amendment inquiry is entanglement.”).

held that the legislative purpose of property tax exemptions for churches was neither to advance nor to inhibit religion.<sup>237</sup> Rather, permitting exemptions, as compared to denying them, was the lesser intrusion upon entanglement between church and state.<sup>238</sup> Indeed, allowing the exemptions actually complimented and reinforced the wall between church and state. Thus, the *Walz* Court determined that tax exemptions for churches did not violate the Establishment Clause.<sup>239</sup>

However, if churches are treated differently than other tax-exempt organizations, will the Establishment Clause be violated? The answer is probably not. Historically, churches have been treated differently, perhaps because of their significant contributions to America and the world. Since this country's founding, churches have been accorded a special place in society.<sup>240</sup> In addition, the government treats churches differently with respect to the IRS tax inquiry. The IRS has developed special rules for churches' tax inquiries that are distinct from the rules applied to other tax-exempt organizations.<sup>241</sup> Congress also carved out exceptions to section 501(c)(3) for other categories of organizations, such as labor unions,<sup>242</sup> business leagues,<sup>243</sup> and veterans.<sup>244</sup>

Finally, it seems that the framers of the Constitution expected that churches would be treated differently—treated with more protection than non-church organizations—as evidenced by the Religion Clauses.<sup>245</sup> Although some commentators argue that continuing to treat churches differently may be unconstitutional,<sup>246</sup> the opposite seems more convincing: treating churches the same as other tax-exempt organizations, which do not have the dual protections of the Religion Clauses, may be

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<sup>237</sup> *Walz*, 397 U.S. at 672.

<sup>238</sup> *Id.* at 675-76.

<sup>239</sup> *Id.* at 680.

<sup>240</sup> Kemmitt, *supra* note 3, at 154 (noting that churches are not treated similarly to other tax-exempt entities); Murphy, *supra* note 5, at 69 (stating that churches are treated differently under the Code due to their "special status" in society, but recommending that churches be treated the same as other tax-exempt organizations under the Code).

<sup>241</sup> Church Audit Procedures Act, 26 U.S.C. § 7611 (2004); *see also* Branch Ministries v. Rossotti, 211 F.3d 137, 142 (acknowledging that churches receive "unique" treatment under the I.R.C.).

<sup>242</sup> I.R.C. § 501(c)(5) (2006).

<sup>243</sup> I.R.C. § 501(c)(6); HOPKINS, *supra* note 151, at 21 (noting that the justification for business leagues and trade organizations was that these organizations "function to promote the welfare of a segment of society: the business, industrial, and professional community").

<sup>244</sup> I.R.C. § 501(c)(19).

<sup>245</sup> *See* U.S. CONST. amend. I.

<sup>246</sup> Murphy, *supra* note 5, at 83 (concluding that legislation permitting churches to participate in political activity may be unconstitutional). *But see* Zelinsky, *supra* note 175, at 841 (finding that tax benefits extended solely to religious institutions "pass constitutional muster").

unconstitutional. That secular entities are not accorded the same benefits as churches does not mean that the Establishment Clause is violated.<sup>247</sup>

Nevertheless, laws which may violate the Establishment Clause may nonetheless be upheld if they appear necessary to accommodate the Free Exercise Clause.<sup>248</sup> But section 501(c)(3) does not hold up under a Free Exercise Clause analysis. The Court has stated that:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.<sup>249</sup>

Section 501(c)(3), then, requires that churches choose between either receiving a tax exemption, on the one hand, or discussing social and moral issues during campaign periods or discussing religious issues that have an impact on current public policy. The government's limitation on lobbying and absolute ban on electioneering is clearly an infringement of—a burden upon—the Free Exercise Clause.

In order to satisfy the First Amendment, the government must show that legislation which encroaches on religion is the least restrictive means to achieve a compelling governmental interest. As stated earlier, the history of section 501(c)(3) shows that the legislature enacted the political activity restrictions to prevent wealthy donors from advancing their personal agendas by using "sham" section 501(c)(3) organizations and to abort the campaign funds of presidential nominee Johnson's opponent, but that the restrictions were not intended to include churches. The restrictions preclude churches from fully engaging in the political process as they had been doing before, during, and after the 1934 and 1954 amendments. Thus, section 501(c)(3) as applied to churches is not the least restrictive

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<sup>247</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (finding that religious accommodations need not come bundled with benefits to secular entities); *see also* Schwarz, *supra* note 3, at 57 ("[C]hurches should enjoy no special immunity from these limitations apart from a certain sensitivity to their status under the First Amendment.").

<sup>248</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 601 n.51 (1989) ("Government efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion.").

<sup>249</sup> *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981).

means to achieve the purposes behind the enactments of the two amendments.<sup>250</sup> A less restrictive avenue would be for the IRS to enforce section 501(c)(3) against these *donors* who are using the tax code as a “sham” to receive tax deductions to which they are not entitled.

## V. RECOMMENDATION

The United States Constitution declares that “Congress shall make no law . . . abridging the freedom of speech.”<sup>251</sup> *Buckley* and *Randall* maintain that political speech, including political contributions, is a core American value which Congress cannot regulate unless to prevent corruption.<sup>252</sup> Allowing Congress to condition the grant of tax exemptions on the surrender of a constitutional right is constitutionally infirm.<sup>253</sup>

History confirms that the political activity restrictions enacted in 1934 and 1954 developed inadvertently.<sup>254</sup> As stated earlier, Congress imposed the political activity restrictions for reasons other than to preclude churches from full and open participation in the political process.<sup>255</sup> Congress did not intend for either enactment to apply to churches.<sup>256</sup> Indeed, during both enactments, churches were intricately involved in the American political process, without limitations.<sup>257</sup> Churches’ intimate involvement in politics

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<sup>250</sup> Gaffney, *supra* note 6, at 37 (stating that it is hard to find a more restrictive ban than an “absolute prohibition on any participation by a 501(c)(3) organization in a political campaign”).

<sup>251</sup> U.S. CONST. amend. I.

<sup>252</sup> See *supra* Part IV.

<sup>253</sup> CARTER, *supra* note 21, at 215-16 (disagreeing with the notion that it is the state’s responsibility, acting through the tax code, to protect religions from themselves); West, *supra* note 208, at 406 (allowing tax exemptions is an attempt by the government to do indirectly what it could not do directly). As Richard Rubin argues,

The main basis for judicial hostility toward unconstitutional conditions is that a government should not be allowed to do indirectly what it may not do directly—prevent the exercise of constitutional rights. This idea becomes increasingly persuasive in an age where an ever expanding bounty of governmentally granted privileges and benefits are dispersed to a significant percentage of the populace . . . . To allow modern governments to exact, as the price of obtaining these benefits, the waiver of constitutional rights would be to allow government a substantial power to buy up unpopular rights.

Richard L. Rubin, Note, *The Resurrection of the Right-Privilege Distinction? A Critical Look at Maher v. Roe and Bordenkircher v. Hayes*, 7 HASTINGS CONST. L.Q. 165, 181-82 (1979).

<sup>254</sup> See *supra* Part III.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

has contributed to the marketplace of ideas in society, which is what the Court seeks to encourage by its unforgiving conditions placed on content-based restrictions of political speech and other high-value speech.

Although the restrictions were enacted to avoid improper donor activity, the IRS looks solely to the donee's activity in the IRS's application, enforcement, and interpretation of section 501(c)(3).<sup>258</sup> This approach is inappropriate. The IRS should enforce section 501(c)(3) against donors—individuals or organizational—who are using the tax code as a “sham” to receive tax deductions to which they are not entitled. That is the only legitimate argument for section 501(c)(3): apply it to the original intended targets that prompted the enactment of the political activity restrictions. Churches were not the original intended targets.

In further support of this recommendation, the IRS has found that most churches do not violate the political activities restrictions, which is why there have been few IRS church audits.<sup>259</sup> Thus, the time, money, and scholarly analyses devoted to aggressively attacking churches seem misplaced.

Finally, according to one scholar, many individuals who give to churches can deduct these contributions, but most church donors do not itemize their income tax deductions.<sup>260</sup> Thus, because church donors choose to take the standard deduction, they do not enjoy the benefit of a tax break.<sup>261</sup> More interestingly, taxpayers in the low-income brackets are the most likely to contribute to churches.<sup>262</sup> Therefore, the “targets” who prompted the enactment of the political activity restrictions—wealthy donors and a private foundation comprised of “some of the richest men in the country”—are not those who are most affected by the political activity restrictions.<sup>263</sup> Wealthy donors contribute more often to hospitals,

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<sup>258</sup> Note, *Tax Treatment of Lobbying Expenses and Contribution*, 67 HARV. L. REV. 1408, 1413 (1954) (“Though it seems improper to determine these tax consequences by solely mechanical criteria, a literal reading of the Code seems to permit no other result since section 23(o), in classifying contributions, looks only to the donee's activity.”).

<sup>259</sup> Everson, *supra* note 7 (stating that most churches do not engage in politicking). *But see* Murphy, *supra* note 5, at 68 (stating that the IRS performs few audits because they seek to respect free speech and freedom of religion).

<sup>260</sup> Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C.L. REV. 843, 845 (2001).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 846.

<sup>263</sup> O'Daniel, *supra* note 3, at 758 n.110.

museums, and the arts.<sup>264</sup> Thus, the political activity restrictions are not narrowly tailored to achieve the legislative goal.

The federal government must seek to resolve this tax problem—America’s tax problem—in terms of what is constitutional for the government to do and not to do. Section 501(c)(3) places content-based restrictions on political speech. That the Court has labeled tax exemptions a “subsidy” seems too “conclusory and unconvincing.”<sup>265</sup> IRS audits of churches for proscribed political activity present serious entanglement problems, which supports the *Walz* Court’s acceptance of property tax exemptions for churches as a lesser form of entanglement between church and state.<sup>266</sup> Actual IRS enforcement of the political activity restrictions would seem to excessively entangle church and state.<sup>267</sup> The United States cannot allow freedom of speech and religion to be chilled simply because it has a tax problem.

This article recommends total exclusion of churches from section 501(c)(3) and its political activity restrictions because the Court attempts to avoid constitutional issues when it is able to do so.<sup>268</sup> Acknowledging the historical development of section 501(c)(3)—that churches were never intended to be included within section 501(c)(3)—would avoid unconstitutional encroachment on the First Amendment.

Other commentators have recommended various proposals to solve America’s tax problem with regard to section 501(c)(3) and churches. Some of the suggestions call for clarifying and limiting the scope of the political activity restrictions,<sup>269</sup> rejecting any legislation that seeks to

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<sup>264</sup> Aprill, *supra* note 260, at 846.

<sup>265</sup> Zelinsky, *supra* note 175, at 841.

<sup>266</sup> *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 674 (1970).

<sup>267</sup> See Alan L. Feld, *Rendering Unto Caesar or Electioneering for Caesar? Loss of Church Tax Exemption for Participation in Electoral Politics*, 42 B.C. L. REV. 931, 938-39 (2001) (stating that the enforcement of the electioneering restriction would create undue entanglements).

<sup>268</sup> *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (stating that the Court abides by “a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision”).

<sup>269</sup> See, e.g., Feld, *supra* note 267, at 939; see also Joel E. Davidson, Note, *Religion in Politics and the Income Tax Exemption*, 42 FORDHAM L. REV. 397, 423 (1973-74) (suggesting that section 501(c)(3) should be revised to create “more reasonable standards;” that Congress should revise the individual contributor’s deduction so that no deductions would be given for donations to tax-exempt organizations where their lobbying could result in legislation that may advance the economic interests of the donee; and that deductions be allowable only where the donor stipulated that the donation not be used for lobbying or only used for certain exempt purposes); James, *supra* note 150, at 74 (suggesting the elimination of the ambiguous term “substantial part” in the lobbying limitation and insertion of a clear definition of what constitutes participation or intervention in a political campaign); Judy Ann Rosenblum, Note, *Religion and Political Campaigns: A Proposal to Revise Section 501(c)(3) of the*

overturn the political campaign ban,<sup>270</sup> or narrowly construing the political campaign restrictions in certain circumstances.<sup>271</sup> Other commentators recommend allowing a bright-line test that allows churches to engage in partisan activity but does not allow use of tax-exempt funds to support partisan activity,<sup>272</sup> thoroughly redrafting sections 501 and 170,<sup>273</sup> and reconsidering the political activity restrictions because they violate the Free Speech and Free Exercise clauses of the First Amendment.<sup>274</sup> One scholar proposed no solution “other than caution.”<sup>275</sup>

Scholars, Congress, and other interested parties will likely continue to propose solutions to America’s tax problem until it is solved. And they should, because by a slight margin the majority of Americans believe that “churches and other houses of worship should express their views on day-to-day social and political questions.”<sup>276</sup> The fact remains, however, that peculiar problems arise when applying the political activity restrictions to churches because the restrictions were never intended to apply to them. This article concludes that, based upon an historical and constitutional analysis, section 501(c)(3) does not apply to churches at all. Rather than taxing churches, the IRS should instead enforce section 501(c)(3) against donors seeking to advance their individual agendas through donations and should also disallow particular contributions by individual donors receiving tax exemptions, rather than taxing churches. In short, the donors should lose their tax exemptions, not the churches.

## VI. CONCLUSION

From an historical and constitutional perspective, section 501(c)(3) was never intended to apply to churches. The application of this section of the

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*Internal Revenue Code*, 49 FORDHAM L. REV. 536, 555-60 (1981) (suggesting that the law be revised to allow separate tax treatment for religious organizations).

<sup>270</sup> Murphy, *supra* note 5, at 75-83.

<sup>271</sup> Johnson, *supra* note 73, at 899.

<sup>272</sup> Kemmitt, *supra* note 3, at 179-80.

<sup>273</sup> Donna D. Adler, *The Internal Revenue Code, The Constitution, And The Courts: The Use Of Tax Expenditure Analysis In Judicial Decision Making*, 28 WAKE FOREST L. REV. 855, 916-17 (1993) (likening tax exemptions to direct spending and analyzing such under the Constitution).

<sup>274</sup> Gaffney, *supra* note 6, at 50-51.

<sup>275</sup> Garnett, *supra* note 15, at 802.

<sup>276</sup> Press Release, The Pew Research Center, Religion and Politics: Religion A Strength and Weakness for Both Parties 13 (Aug. 30, 2005), available at <http://pewforum.org/publications/surveys/religion-politics-05.pdf> (reporting also that less than a majority of Americans believe that clergy should discuss issues or political candidates from the pulpit, but support for this practice among Americans is greater now than it was forty years ago).



Code to churches ignores history and tramples churches' rights under the First Amendment. Constitutional red flags should be raised in the government's regulation of churches' expression, but not the churches' expression itself.<sup>277</sup> The government can say what is deductible and what is not, but it cannot dictate what is religious. If the government is concerned with what is deductible, then it should address tax deductions, not speech content. The government also should not regulate speech content through taxation. As one commentator has noted, "It should not be for the state to label as electioneering, endorsement, or lobbying what a religious community considers evangelism, worship, or witness."<sup>278</sup> Instead of trying to determine the parameters of religion, the courts, Congress, and the federal government should focus on ensuring that section 501(c)(3) is not being abused by donors—wealthy donors—seeking to use it for their personal agendas. After all, that was the original purpose behind the enactment of the political activity restrictions in section 501(c)(3).<sup>279</sup>

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<sup>277</sup> Richard W. Garnett, *Campaigning From the Pulpit: Why Not?*, USA TODAY, Apr. 16, 2006, available at [http://www.usatoday.com/news/opinion/editorials/2006-04-16-forum-religion\\_x.htm](http://www.usatoday.com/news/opinion/editorials/2006-04-16-forum-religion_x.htm).

<sup>278</sup> *Id.*

<sup>279</sup> The author recognizes that there are several other issues surrounding section 501(c)(3) that affect charities and churches, such as the claim that section 501(c)(3) standards are vague, are overbroad, and encourage selective enforcement by the IRS (which may consider re-organizing itself as an independent agency rather than remaining an executive agency to avoid partisan politics), but those issues are outside the scope of this article.