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NOTE

QUESTION: WHO SAYS $20 MILLION DOLLARS ISN'T SUBSTANTIAL? ANSWER: THE IRS DOES THE "SUBSTANTIAL" PROBLEMS WITH THE LAWS OF TAX EXEMPT ORGANIZATIONS

ROBERT SINGLETON*

INTRODUCTION

Recently there has been a lot of misconception and misunderstanding when it comes to the laws of tax-exempt organizations, specifically as they apply to churches. These misconceptions and misunderstandings are understandable once one goes to the Internal Revenue Code and reads the *seemingly* clear language in § 501(c)(3). Regarding churches, § 501(c)(3) says that any entity "organized and operated exclusively for religious . . . purposes . . ." shall be exempt from taxation.[1] The organizations listed in § 501(c)(3), including churches, are granted tax exemption because of their publicly desired charitable purposes and societal benefits.[2]

Churches and other § 501(c)(3) organizations reap tremendous economic benefits from their tax-exempt statuses.[3] First, they are exempt from federal income taxation, as well as federal unemployment tax.[4] They also qualify to receive tax-deductible contributions for income, estate, and gift tax purposes.[5] They may also issue tax-exempt bonds to finance some of their activities,[6] enjoy lower postage rates,[7] and qualify for exemption from multiple state and local taxes. This subsidy from the government is not

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1. I.R.C. § 501(c)(3) (2012).

2. Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1317 (2007).

3. 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, 43 (2004).

4. *Id.* at 43 & n.90.

5. *See* I.R.C. §§ 170, 2055, 2522 (2012).

6. *See* I.R.C. § 145 (2012).

available to other organizations or individuals that fall outside § 501(c)(3)'s coverage.[8]

While § 501(c)(3) grants a church its special tax-exempt status, it also imposes a restriction on a church's involvement in lobbying activities.[9] The lobbying restriction provides that "no substantial part of the [church's] activities . . . [can involve] carrying on propaganda, or otherwise attempting to influence legislation . . . ."[10] Further, a church or charity loses its tax-exempt status if it conducts or participates in one or more substantial non-exempt activities that are not dedicated "exclusively" to its charitable purpose.[11]

While this framework sounds fairly simple, there are many deficiencies in the laws of § 501(c)(3). One of the most recent and most publicized deficiencies in the laws of charities and I.R.C. § 501(c)(3) involved the Church of Jesus Christ of Latter-day Saints ("LDS" or "Mormon") and its significant role in supporting the passage of California's 2008 ballot initiative barring legal recognition of same-sex marriages in the state.[12] The ballot initiative is more popularly known as Proposition 8. After Proposition 8 passed in 2008, there was a large public outcry demanding an investigation of the Mormon Church for violating § 501(c)(3)'s restrictions on political lobbying.[13]

This Comment analyzes the facts surrounding the Mormon Church and its involvement in Proposition 8 to illustrate how deficiencies in § 501(c)(3) allow large charitable organizations to circumvent political lobbying restrictions. Ultimately, it is unclear whether the Mormon Church violated federal tax laws under § 501(c)(3). However, what is clear from the Mormon Church's involvement is that the current laws for tax-exempt organizations fail to limit multi-million dollar lobbying expenditures, so long as they are made by sufficiently massive non-profit organizations.[14] Qualified § 501(c)(3) organizations receive many benefits and have grown incredibly wealthy due to their tax-exempt statuses.[15] It makes no sense, however, to

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7. U.S. POSTAL SERV., PUB. 417, NONPROFIT STANDARD MAIL ELIGIBILITY: NONPROFIT AND OTHER QUALIFIED ORGANIZATIONS 2-2 (2006), *available at* http://pe.usps.gov/cpim/ftp/pubs/pub417/pub417.pdf.

8. Tobin, *supra* note 2, at 1342. *See also* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 544 (1983) (The Supreme Court stated that "[b]oth tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system.").

9. *See* I.R.C. § 501(h) (2012).

10. I.R.C. § 501(c)(3).

11. *See* Brian Galle, Colloquy, *The LDS Church, Proposition 8, and the Federal Law of Charities*, 103 Nw. U. L. REV. 370, 371 & n.5 (2009) ("[T]he presence of a single non-educational purpose, if substantial in nature, will destroy the exemption regardless of the number of importance of truly educational purposes." (citing Better Business Bureau of Washington, D.C., Inc. v. United States, 326 U.S. 279, 283 (1945))).

12. *Id.* at 370.

13. *Id.*

14. *Id.*

15. James, *supra* note 3, at 43 (citing ALFRED BALK, THE RELIGION BUSINESS 7 (1968)).

allow a § 501(c)(3) organization to leverage that same wealth to circumvent the lobbying restrictions imposed as a condition of their tax-exempt status. I will discuss how this failure to adequately limit such large lobbying expenditures, combined with the lack of guidelines governing lobbying by charities, not only creates ambiguity that makes adequate enforcement by the Internal Revenue Service ("IRS") difficult, but also provides for potential abuses from significantly large organizations, particularly churches. Ultimately, I argue that religious organizations should be subject to an absolute lobbying ban under § 501(c)(3).

Part I of this Comment provides the background and framework of § 501(c)(3) and the lobbying restrictions. Part II details the Mormon Church's involvement in Proposition 8 and analyzes the restrictions in § 501(c)(3) in relation to the church's involvement. Part III identifies several problematic issues that arise when churches get involved in politics through lobbying efforts, and offers potential solutions for alleviating them. Part IV concludes, arguing that if § 501(c)(3) cannot be updated to properly limit political lobbying by modern religious organizations, then Congress should impose an absolute ban on lobbying by these institutions.

I. THE BACKGROUND AND JUDICIAL FRAMEWORK OF I.R.C. § 501(C)(3).

The legislative history of § 501(c)(3) does not shed much light on the uncertainties in the laws of charities. The lobbying limitations imposed on charitable organizations were added to the federal tax law as part of the Revenue Act of 1934.[16] Pennsylvania Senator David A. Reed, the ranking minority member of the Senate Finance Committee, stated that the purpose of the amendment was to prohibit tax exemption for "any organization that is receiving contributions, the proceeds of which are to be used for propaganda purposes or to try to influence legislation."[17] He also said that the Committee on Finance proposed the amendment with the intent to deny deductibility of a contribution of a charitable gift "if it is a selfish one made to advance the personal interests of the giver of the money."[18] Mississippi Senator Byron Pat Harrison furthered this notion, stating that the intent of the Finance Committee, basically, was to stop deductible contributions for legislative ends.[19] Prior to 1934, § 501(c)(3) provided that the income tax should not apply "to any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual . . ."[20] Senator Harrison's provision was incorporated into the statute following the word "individual," adding the language "and

16. BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 640 (9th ed. 2007).
17. 78 CONG. REC. 5,861 (1934).
18. *Id.*
19. 78 CONG. REC. 5,959 (1934).
20. Chase Manderino, Comment, *Understanding the Lobbying Efforts of a Church: How Far*

no substantial part of the activities of which is participation in partisan politics or is carrying on propaganda, or otherwise attempting to influence legislation."[21]

When adopting the lobbying restriction, the Senate Finance Committee did express concern that the scope of the remedy generated by the provision was broader than the problem for which it was being enacted.[22] Citing "great difficulty in phrasing the amendment," Senator Reed stated, "this amendment goes much further than the committee intended to go."[23] However, while assessing the far-reaching consequences of the amendment, no concern for churches was ever expressed by the Senate. Rather, the concerns expressed by the Committee were focused on organizations that relied on "unselfishly motivated" contributions to further their charitable cause, such as charities aimed at preventing cruelty to children and animals.[24] Since concern about the effect of the provision as to churches was never expressed, a church would not be able to rely on the legislative intent behind the provision as a defense to the application of the lobbying restriction.[25]

The legislative history shows that lawmakers intended to prevent the government from subsidizing lobbying efforts by prohibiting "the funneling of money through a charity to influence legislation."[26] The provision appears to have been intended to apply to all charitable organizations.[27] It is highly doubtful that legislators intended only for the restriction to apply to economically small organizations while allowing an economically large organization to circumvent the law simply because the massive amount it contributes to lobbying is just small fraction of its overall budget.[28]

A. Alternative Theories for the Lobbying Restriction.

In spite of the limited congressional record, several commentators including Brian Galle[29] and Donald Tobin[30] have offered alternative theories

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is Too Far? 2009 BYU L. REV. 1049, 1054 (citing Act of Oct. 3, 1913, Pub. L. No. 63-16, 38 Stat. 172).

21. *Id.* (citing 78 CONG. REC. 5,861 (1934)).

22. *Id.* at 1055 (citing 78 CONG. REC. 5,861 (1934)).

23. 78 CONG. REC. 5,861 (1934).

24. *See id.*; *see also* HOPKINS, *supra* note 16, at 640 (showing the legislative purpose was to deny deductibility of a selfishly motivated charitable gift); Manderino, *supra* note 20 at 1055 ("[T]he concern focused on organizations that had a direct reliance on legislation to advance their charitable cause, such as the Society for the Prevention of Cruelty to Children and the Society for the Prevention of Cruelty to Animals.").

25. Manderino, *supra* note 20, at 1055.

26. *Id.* at 1065.

27. *See* 78 CONG. REC. 5,861 (1934); *see also* Manderino, *supra* note 20, at 1055 ("[A] plain reading of the statute does not distinguish between churches and other charitable organizations.").

28. Galle, *supra* note 11, at 378, 379.

29. *See* Galle, *supra* note 11, at 376–78.

30. Tobin, *supra* note 2, at 1320–41.

on the purpose and justification for lobbying limits as they pertain to tax-exempt organizations.[31] First, a large number of 501(c)(3) organizations are America's religious institutions, private universities, nursery schools, and humanitarian organizations.[32] Many of these organizations are very well respected and conduct activities that benefit their communities tremendously.[33] This general respect and admiration allows these organizations to be very influential over those who rely on them.[34] The influence exerted over their communities grants a § 501(c)(3) organization a significant amount of societal power that makes their participation in lobbying particularly problematic.[35] The lobbying restrictions, therefore, help to maintain charity "as a separate sphere from government."[36] Second, by restricting lobbying, the IRS is able to limit the amount of political influence wielded by the wealthy.[37] Since wealthy donors typically have more disposable income to give to charity, they are most likely to benefit from the charitable deduction.[38] The lobbying restrictions, therefore, preserve the balance of power between wealthy donors and the majority by disallowing charities from using deductible donations for lobbying.[39] While obviously having imperfections and various counter-arguments, these rationales offer some of the best principled explanations for the current lobbying restrictions.[40]

B. The Lobbying Restrictions in Section 501(c)(3).

Despite the many ways individuals and organizations lobby, the federal tax law recognizes two prohibited types of lobbying: direct lobbying and indirect, or grassroots lobbying.[41] "Direct lobbying" is any attempt to influence legislation through communication with any part of a legislative body, including its staff members.[42] Examples include presentation of testimony at public hearings held by legislative committees, correspondence and conferences with legislators, electronic communications, and publications advocating specific legislative action.[43] "'Grassroots lobbying' consists of appeals to the general public or segments of the general public to

31. *See* Galle, *supra* note 11 at 376–78.

32. Tobin, *supra* note 2, at 1319.

33. *Id.*

34. *Id.* at 1319–20.

35. *Id.*

36. Galle, *supra* note 11, at 377 (citing Tobin, *supra* note 2, at 1320–41).

37. *Id.*

38. *See* Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1406 (1988).

39. *See id.*; Galle, *supra* note 11, at 377.

40. *See* Galle, *supra* note 11, at 377.

41. *See* HOPKINS, *supra* note 16, at 641.

42. *See* Treas. Reg. § 56.4911-2(b)(1)(i) (2012).

43. *See* HOPKINS, *supra* note 16, at 641.

contact legislators or take other specific action" (also known as a *call to action*)[44] regarding legislative matters.[45]

Section 501(c)(3) states that "no substantial part" of a charity's activities can consist of "propaganda, or otherwise attempting to influence legislation."[46] The IRS attempts to clarify this instruction by providing guidance in its *Tax Guide for Churches and Religious Organizations*.[47] For purposes of measuring lobbying activities, churches are subject to a "substantial part test."[48] "Whether a church's or religious organization's attempts to influence legislation constitute a substantial part of its overall activities, [for the purposes of this test,] is determined on the basis of all the pertinent facts and circumstances in each case."[49] The IRS considers a variety of factors including the time devoted by paid workers or volunteers, money spent in relation to the organization's entire budget, "the amount of publicity the organization assigns to the activity, and the continuous or intermittent nature of the . . . [activity.]"[50] So, in light of all the facts and circumstances taken into consideration by the IRS, what exactly does the IRS deem to be substantial?

Case law provides little help in clearing up any ambiguity surrounding interpretation of the word "substantial." In the primary cases involving actual revocation of § 501(c)(3) status, the offending organization either engaged in persistent lobbying, or could not fulfill its purpose without lobbying.[51] Alternatively, in the primary case in which a court found the amount of lobbying permissible, the organization at issue was devoting less than five percent of its "time and effort" towards lobbying.[52] Since the violations, or lack of violations, in these cases were obvious, there is little guidance on how to resolve issues and scenarios where the outcome is less

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44. *See id.*; *see also* Treas. Reg. § 56.4911-2(b)(2)(iii) (The phrase encouraging the recipient to take action with respect to legislation means that the communication (1) states the recipient should contact a legislator or employee of a legislative body; (2) states the address, telephone number, or similar information of a legislator or employee of a legislative body; (3) provides a petition, tear-off postcard, or similar material for the recipient to communicate with a legislator or employee of a legislative body; or (4) specifically identifies one or more legislators who will vote on the legislation as opposing the communication's view with respect to the legislation).

45. *See* HOPKINS, *supra* note 16, at 641.

46. I.R.C. § 501(c)(3) (2012).

47. *See* I.R.S., PUB. NO. 1828, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS, (2009), *available at* http://www.irs.gov/pub/irs-pdf/p1828.pdf.

48. *Id.* at 6; *see also* Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (2012) (stating that lobbying is subject to the substantial part test when "attempting to influence legislation by propaganda or otherwise" is a substantial part of its activities).

49. I.R.S., PUB. NO. 1828, *supra* note 47, at 6.

50. I.R.S. Gen. Couns. Mem. 36,148, at 6 (Jan. 28, 1975).

51. *See* Galle, *supra* note 11, at 372 (citing Christian Echoes Nat'l Ministry v. United States, 470 F.2d 849, 855–56 (10th Cir. 1972); Kuper v. Comm'r, 332 F.2d 562, 563 (3d Cir. 1964); Haswell v. United States, 500 F.2d 1133, 1146–47 (Ct. Cl. 1974)).

52. *See* Galle, *supra* note 11, at 372 (citing Seasongood v. Comm'r, 227 F.2d 907, 912 (6th Cir. 1955)) (holding that 5 percent of an organization's lobbying activities were insubstantial and therefore did not have an adverse affect on the organizations tax-exempt status).

predictable.[53] This lack of guidance provides little help in determining close cases and presents a problem for practitioners attempting to advise their clients, thereby strengthening the case for an absolute lobbying ban.

In the context of determining whether an activity constitutes a "substantial unrelated non-exempt purpose (commercial activity)," courts have attempted to provide clearer guidance. The U.S. Tax Court held that a charity, whose non-exempt expenditures were around ten percent of its total revenue, was not engaging in a "substantial" amount of commercial activity.[54] However, courts have rejected using a bright-line "percentage test" or an absolute percentage safe harbor when determining what is or is not "substantial" enough to violate § 501(c)(3).[55] The court's reasoning for rejecting such safe harbors would likely have the same applicability in the context of lobbying since the "political-limitations language was originally a codification of an earlier appellate court decision, which itself was an interpretation of the 'exclusively' charitable requirement."[56] Also, like the courts, the IRS has opted out of using a bright-line percentage test and instead relies on all the facts and circumstances in question.[57]

Based on the existing enforcement and interpretation of § 501(c)(3), there is a great deal of uncertainty for courts, the IRS, § 501(c)(3) organizations, and legal practitioners. Because advisers rely on case law to advise taxpayers with regard to tests that depend on facts and circumstances, lawyers and accountants are faced with the very difficult task of trying to determine what is or is not a substantial lobbying activity.[58] Finally, practitioners are unable to counsel clients regarding prior practices of the IRS since those practices go undisclosed.[59] Again, this uncertainty highlights another strength for the argument for an absolute ban on lobbying.

C. The § 501(h) Election.

Charities wishing for more certainty than that provided by § 501(c)(3) can elect into that certainty under I.R.C. § 501(h).[60] Section 501(h) permits an organization to designate "up to $1 million in lobbying expenditures during a taxable year, based on a percentage . . . of expenditures for exempt

53. *See* Galle, *supra* note 11, at 372.

54. *See id.*; *see, e.g.*, World Family Corp. v. Comm'r, 81 T.C. 958, 967 (1983).

55. *See* Manning Ass'n v. Comm'r, 93 T.C. 596, 610–11 (1989).

56. Galle, *supra* note 11, at 372 n.11 (citing Haswell v. United States, 500 F.2d 1133, 1140–41 (Ct. Cl. 1974)) (citing Slee v. Comm'r, 42 F.2d 184 (2d Cir. 1930)).

57. SCOTT A. TAYLOR, THE LAW OF TAX-EXEMPT ORGANIZATIONS: IN A NUTSHELL 95 (2011); *see also* I.R.S. Gen. Couns. Mem., *supra* note 50 (suggesting that the Service should not adopt a percentage of total expenditures test).

58. Tobin, *supra* note 2, at 1358.

59. *See id.*

60. *See* Galle, *supra* note 11, at 372; *see also* I.R.C. § 501(h) (setting forth definite rules for evaluating lobbying expenditures).

purposes."[61] Section 501(h) also has an "amnesty" provision of sorts for organizations that exceed their limitation during a single year.[62] To lose its tax-exempt status, an organization must exceed the Treasury Regulation's 150% limitation over a four-year period.[63] Therefore, making a § 501(h) election gives a charitable organization a more predictable avenue for lobbying without jeopardizing its tax-exempt status.

Currently, however, churches cannot make a § 501(h) election.[64] Professor Galle suggests that, by disallowing churches from making a § 501(h) election, Congress's intentions were to discourage "*any* lobbying expenditures by religious organizations."[65] Further, some churches may reject the application of § 501(h) to their organization on the belief that a direct involvement in politics is not part of their mission and that application of § 501(h) "would condone some level of political activity by churches."[66]

II. The Law Applied to the Facts Surrounding Proposition 8 Exposes a Serious Hole in the Tax Laws of Charities.

In the weeks before and after the passage of Proposition 8 in November 2008, there was an enormous outcry from gay rights advocates, along with many others in the general public, calling for an investigation of the Mormon Church's involvement in the campaign.[67] Many argue that the Mormon Church violated the lobbying restrictions imposed by § 501(c)(3).[68] The following is an overview of the facts surrounding the Mormon Church's involvement in the Proposition 8 campaign. As other scholars examining the issue have also observed,[69] the facts reported by various major news outlets are not in dispute, application of the law certainly is.[70]

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61. Manderino, *supra* note 20, at 1065–66; *see also* I.R.C. § 501(h)(2)(B) (setting maximum level of lobbying expenditures at 150% of the "lobbying nontaxable amount . . . determined under section 4911"); I.R.C. § 4911(c)(2) (2012) (setting forth the method of determining the "lobbying nontaxable amount").

62. *See* Manderino, *supra* note 20, at 1066.

63. *See id.*; *see also* I.R.C. § 501(h)(1) (2012) (stating the rule that an organization will lose tax-exempt status if its lobbying expenditures are "normally" in excess of the maximum allowable amount); Treas. Reg. § 1.501(h)-3(b)(1)(i) (2012) (defining the term "normally" as the sum of lobbying expenditures averaged over a set of "base years"); Treas. Reg. § 1.501(h)-3(c)(7) (defining "base years" as a period of four years).

64. *See* I.R.C. § 501(h)(5).

65. Galle, *supra* note 11, at 376 n.32.

66. Manderino, *supra* note 20, at 1066.

67. *See* Galle, *supra* note 11, at 370.

68. *See id.*

69. *See id.* at 373.

70. *See id.*

A. Factual Background: Proposition 8 and the Mormon Church.

On May 15, 2008, the Supreme Court of California overturned a 2000 California law that established marriage as between a man and a woman in the case of *In re Marriage Cases*.[71] Following this decision, California residents opposing gay marriage prepared a ballot proposition. Proposition 8, was certified and placed on the ballot on June 2, 2008.[72]

Several churches supporting Proposition 8 formed a "coalition" in opposition to same sex marriage.[73] The Mormon Church joined the "coalition," just weeks after the California Supreme Court's decision, after being approached by the Roman Catholic archbishop of San Francisco.[74] On June 29, 2008, Mormon Church leadership announced its support for Proposition 8 in a letter drafted and sent to be read at all Mormon congregations in California.[75] In this letter, Mormon leaders from Salt Lake City urged church members to "do all you can to support the proposed constitutional amendment by donating of your means and time."[76]

In the weeks leading up to the vote, Mormon officials took part in a satellite broadcast from Salt Lake City to Mormons in California and Utah, as well as students at Brigham Young University.[77] In this broadcast, the Mormon leaders urged viewers to contact " 'friends, family and fellow-citizens in California' " and encourage them to support the initiative.[78] The broadcast also urged young Mormons to "use texting, blogging, videos,

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71. *See* In re Marriage Cases, 43 Cal.4th 757, 183 P.3d 384 (2008) (holding that a Family Code provision stating that "only marriage between a man and a woman is valid or recognized in California" is unconstitutional).

72. *See* Press Release, California Secretary of State, Secretary of State Debra Bowen Certifies Eighth Measure for November 4, 2008, General Election (June 2, 2008) *available at* http://www.sos.ca.gov/admin/press-releases/2008/DB08-066.pdf.

73. *See* Peggy Fletcher Stack, *Young Mormons Urged to Join Fight Against Gay Marriage in California*, SALT LAKE TRIB., Oct. 9, 2008, http://archive.sltrib.com/article.php?id=10671847&itype=NGPSID [hereinafter Stack, *Young Mormons*] (reporting the Protect Marriage Coalition as "an umbrella organization of several religious bodies including Catholics and Evangelicals); *see also* Jesse McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES, Nov. 14, 2008, http://www.nytimes.com/2008/11/15/us/politics/15marriage.html?pagewanted=all&_r=0 (describing the coalition as a group comprised of "Catholics, evangelical Christians, conservative black and Latino pastors, and myriad smaller ethnic groups with strong religious ties").

74. *See* McKinley & Johnson, *supra* note 73.

75. *See California and Same-Sex Marriage*, MORMON NEWSROOM, (June 20, 2008), http://www.mormonnewsroom.org/article/california-and-same-sex-marriage (Last visited Mar. 13, 2013).

76. *Id.*

77. *See* Stack, *Young Mormons*, *supra* note 73; *see also* Peggy Fletcher Stack, *LDS Church Woos Californians in Utah to Back Gay Marriage Ban*, SALT LAKE TRIB., Oct. 8, 2008, http://archive.sltrib.com/article.php?id=10664599&itype=NGPSID [hereinafter Stack, *LDS Church Woos Californians*] (describing the LDS Church's plans towards actively supporting Proposition 8).

78. Stack, *LDS Church Woos Californians*, *supra* note 77.

podcasts, Twitter, and Facebook to 'go viral' in support of [Proposition 8]."[79]

The Mormon Church's requests were substantial. L. Whitney Clayton, a Mormon General Authority, and member of the Church's First Quorum of the Seventy,[80] stated in the broadcast that the church was "looking for 30 people in every ward in California to commit 4 hours each until the election [on Proposition 8]."[81] A ward is what the Mormon Church calls its local congregations.[82] To put the numbers Clayton called for into perspective, there are 165 Mormon stakes in California.[83] Each stake consists of five to twelve wards.[84] For simplicity's sake, assuming an average of seven wards per stake, there are approximately 1155 wards in California.[85] Thirty members per ward, committing to four hours of volunteer time each, would equate to 138,600 hours of volunteer time. Based on the above estimates, an incredibly large amount of volunteer time and manpower went to work in response to the Mormon Church's requests.

Estimates suggest that "80% to 90% of the early volunteers who walked door-to-door in election precincts" were Mormons.[86] "[M]ormon wards in California . . . were assigned two ZIP codes to cover."[87] Scripts provided to volunteers by the Protect Marriage Coalition were incredibly specific.[88] If a voter believed that marriage was an institution of God, "church volunteers were instructed to emphasize that Proposition 8 would restore the definition of marriage that God intended."[89] Conversely, if a voter believed that marriage was a man-made institution, volunteers were instructed to stress, "that Proposition 8 was about marriage, not about attacking gay people, and about restoring into law an earlier ban struck down by the [California] Supreme Court."[90] There is no question that the instruction and effort of the Coalition, the Mormon Church, and their volunteers were very meticulous.[91]

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79. Stack, *Young Mormons*, *supra* note 73.

80. *Elder L. Whitney Clayton*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, http://www.lds.org/church/leader/l-whitney-clayton?lang=eng (last visited Dec. 28, 2012).

81. Stack, *Young Mormons*, *supra* note 73.

82. *What is a ward/stake/branch?*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, http://mormon.org/faq/ward-stake-branch. (last visited on Dec. 28, 2012).

83. ONLY MORMON, *California LDS Wards & Stakes*, ONLY MORMON, http://www.onlymormon.com/Stake-Directory/California/ (last visited Dec. 28, 2012).

84. *Id.*

85. *Id.* The estimations above are mine alone based on the range of wards in California reported by ONLY MORMON.

86. *See* McKinley & Johnson, *supra* note 73 (quoting Jeff Flint, strategist for the Protect Marriage Coalition).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

On top of the door-to-door campaigning, phone trees were established in California and Utah so that Mormon Church members could "call friends, family and fellow citizens in California to urge support of the effort to defend traditional marriage and see Proposition 8 pass."[92] The Church also set up preservingmarriage.org, a website featuring several "videos advocating passage of [Proposition 8]."[93]

Throughout all of their efforts, Mormon Church leaders were very conscious and strategic in their attempts to avoid excessive entanglement between the Church and the political lobbying efforts.[94] In one of the documents to its members, the church emphasized that "[n]o work will take place at the church, including no meetings there to hand out precinct walking assignments so as to not even give the appearance of politicking at the church."[95] The Mormon Church essentially told its members exactly what it wanted them to do and exactly how to go about doing it so as not to implicate the Church. In response to the Mormon Church's requests, it is estimated that Mormons contributed as much as $20 million in support of Proposition 8's passage.[96]

B. Applying the Laws of § 501(c)(3) to the Facts of the Mormon Church's Activities.

Based on the IRS's definition of the term "lobbying," both direct and grassroots, there is little doubt that the activities of the Mormon Church and its members appear to fall within that definition. However, whether or not the church's lobbying efforts can be "substantial" for purposes of potential revocation of its tax-exempt status is a much more difficult and problematic question.

First, the letter sent out by the Mormon leadership appears to constitute a grassroots lobbying communication under § 501(c)(3).[97] The letter

92. Stack, *Young Mormons*, *supra* note 75; *see also* Peggy Fletcher Stack, *Prop 8: California gay marriage fight divides LDS faithful*, SALT LAKE TRIB., Oct. 26, 2008, http://www.sltrib.com/ci_10797630 (explaining that LDS leaders tapped every resource, including the church's built-in phone trees, e-mail lists and members' willingness to volunteer and donate money in order to pass Proposition 8).

93. Jesse McKinley, *Inquiry Set on Mormon Aid for California Marriage Vote*, N.Y. TIMES, Nov. 26, 2008, http://www.nytimes.com/2008/11/26/us/politics/26marriage.html; *see also* The Church of Jesus Christ of Latter-Day Saints, PRESERVING THE DIVINE INSTITUTION OF MARRIAGE, www.preservemarriage.org (last visited Dec. 28, 2012) (stating at the bottom of the website that the website is "An Official Web site of the Church of Jesus Christ of Latter-Day Saints").

94. *See* McKinley & Johnson, *supra* note 73.

95. *Id.*

96. *Id.*

97. *See* Treas. Reg. § 56.4911-2(b)(2)(ii) (2012) ("A communication will be treated as . . . grass roots lobbying . . . if . . . [it] . . . [r]efers to specific legislation[;] . . . [r]eflects a view on such legislation; and . . . [e]ncourages the recipient of the communication to take action . . ."); *see also* Treas. Reg. § 56.4911-2(b)(1)(iii) (2012) ("Where a communication refers to and reflects a view on a measure that is the subject of a referendum, ballot initiative or similar procedure, *the general public in the State or locality where the vote will take place constitutes the legislative body,* and

specifically made reference to and reflected the Church's support for Proposition 8.[98] The letter also encouraged members to take aggressive action with respect to the proposed legislation.[99] The donations, phone trees, and the door-to-door trekking done by volunteers, certainly fall within the definition of lobbying activities. Further, the massive amount of manpower and intense time commitment evidence the significant action taken by Church members in response to the instructions given to them in the letter from their leadership.

Determining whether the preservingmarriage.org website and videos were lobbying activities presents a more challenging analysis. While charities may engage in and present "nonpartisan" and "objective" analysis about pending legislation, they may not present one-sided information that does not represent a "full and fair exposition of the pertinent facts."[100] "Examinations and discussions of broad social, economic, and similar problems [are not] considered direct lobbying . . . or grassroots lobbying . . . ."[101] However, while a church is allowed to engage in public communication of an issue, it may not discuss "the merits of a specific legislative proposal . . . [or] directly encourage recipients to take action with respect to [the] legislation."[102]

Applying the law to the videos on preservingmarriage.org, it is most likely that they were grassroots lobbying communications as well. Preseveringmarriage.org features seven different video presentations that specifically discuss Proposition 8.[103] Each video also expressly encouraged the public to vote yes on the proposition.[104] Several videos addressed separate "consequences" that would result if Proposition 8 did not pass.[105] One could hardly consider the content of the videos as "nonpartisan" and "objective" and many argue that the entire vote yes campaign was "dishonest and divisive."[106] Thus, there is a strong argument that this website and video collection constitute a grassroots lobbying communication and possibly

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individual members of the general public area [constitute] legislators. Accordingly, if such a communication is made to one or more members of the general public in that state or locality, the communication is a direct lobbying communication . . .") (emphasis added).

98. *See California and Same-Sex Marriage*, *supra* note 75 ("On November 4, 2008, Californians will vote on a proposed amendment [Proposition 8] to the California state constitution that will . . . restore the March 2000 definition of marriage. . . . The church's teachings . . . on this moral issue are unequivocal.").

99. *Id.* ("We ask that you do all you can to support the proposed constitutional amendment [Proposition 8] by donating of your means and time . . . . Our best efforts are required . . .").

100. *See* Galle, *supra* note 11 at 373–74 (*citing* Treas. Reg. § 56.4911-2(c)(1)(ii)).

101. Treas. Reg. § 56.4911-2(c)(2).

102. *Id.*

103. McKinley, *supra* note 93.

104. *Id.*

105. *Id.*

106. McKinley & Johnson, *supra* note 73.

even a direct lobbying communication, therefore running afoul of § 501(c)(3).[107]

C. *A Significant Problem In the Way the Word "Substantial" is Interpreted in § 501(c)(3) is Exposed.*

Although the Mormon Church appears to have engaged in prohibited lobby activities regarding Proposition 8, was that activity "substantial" for the purposes of § 501(c)(3)? If viewed as a percentage of its overall activity under the "substantial part test," the church's involvement in Proposition 8 would easily fall below the 5–10% thresholds established by existing case law.[108] One of the advantages the Mormon Church has, as several commentators have already opined, is that the massive size of the Mormon Church makes it virtually impossible for its involvement in Proposition 8 to be considered "substantial."[109] Like many of America's organized religions, the Mormon Church is an economic behemoth.[110] The Mormon Church has approximately 14 million members and 28,784 congregations worldwide.[111] Though the Mormon Church's financial information is not publicly available, it's estimated that its annual revenues reach upwards of $5 billion.[112] To put these figures in perspective, the 1155 congregations in California, which contributed time volunteering, represent approximately four percent of the church's total congregation base. Furthermore, the estimated $20 million contributed by Mormons would be approximately less than one percent of the church's total revenues.

Having decided not to employ a percentage test, the IRS would consider all of the factors surrounding the church's Proposition 8 activities to "determin[e] whether its conduct is reconcilable with the requirement that it

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107. *See* Treas. Reg. § 56.4911-2 (b)(1)-(b)(2) (2012).

108. *See* Seasongood v. Comm'r, 227 F.2d 907, 912 (6th Cir. 1955) (holding that 5% of activities was not substantial); *see also* World Family Corp. v. Comm'r, 81 T.C. 958, 967 (1983) (holding that 10% of activities was not substantial).

109. Galle, *supra* note 11, at 374 (*citing* Janet I. Tu, *Mormon Church's Role in Prop. 8 Fight Debated*, SEATTLE TIMES, Nov. 14, 2008 at A12); John D. Columbo, *LDS Church, Proposition 8, and the Lobbying Limitation*, NONPROFIT LAW PROF BLOG (Nov. 18, 2008), http://lawprofessors.typepad.com/nonprofit/2008/11/lds-church-prop.html.

110. ALFRED BALK, THE RELIGION BUSINESS 7 (1968) ("American organized religion has become an economic behemoth . . . [which] has assumed the broad characteristics of a business . . . .") (explaining that tax-exempt status has "enabled [churches like the Mormon Church] to become extremely wealthy.").

111. *Facts and Statistics*, MORMON NEWSROOM, http://www.mormonnewsroom.org/facts-and-statistics/ (last updated Dec. 31, 2011).

112. Galle, *supra* note 11 at 374 (*citing* RICHARD OSTLING & JOAN K. OSTLING, MORMON AMERICA: THE POWER AND THE PROMISE xvi (1999)); *see also* RICHARD OSTLING & JOAN K. OSTLING, MORMON AMERICA: THE POWER AND THE PROMISE 405 (rev. ed. 2007) ("The U.S. Mormon membership multiplied by the average U.S. Adventist Contribution would yield revenues of $4,903,875,402. The foreign Mormon membership would . . . yield $364,651,749. The projected annual worldwide LDS membership contributions would thus be roughly $5.3 billion as of 1995.").

operate exclusively for exempt purposes."[113] Even under this approach, the Mormon Church is shielded once again by its massive size. The Church can easily show that when compared to its overall religious activities, its lobbying for Proposition 8 was insubstantial.[114]

The Mormon Church's involvement in Proposition 8 exposes one of the larger problems in applying existing laws of tax-exempt organizations to modern religious institutions and other charities. While the Mormon Church's involvement was substantial under the plain meaning of the term, one can certainly present a very strong argument that it was not "substantial" for purposes of § 501(c)(3). Professor Galle accurately points out that to consider such a large, multi-million dollar lobbying expenditure to be lawful, simply because it is undertaken by an equally large organization, puts incredible strain on the meaning of "substantial."[115] If the word "substantial," as it's been interpreted in § 501(c)(3), cannot be reigned in to accurately reflect its plain meaning, then the law should be updated to eliminate any permissible lobbying by § 501(c)(3) organizations.

As it stands, the interpretation of the law "grants political influence only to the largest charities."[116] If only the largest § 501(c)(3) organizations are allowed to make significant lobbying expenditures, then the power of these organizations will dwarf that of the smaller organizations.[117] For example, application of the same facts surrounding the Mormon Church's lobbying activities for Proposition 8 to a smaller church, say one that consists of only 500 members with yearly revenues of $25,000, results in a much more clear and opposite conclusion. Based on the current interpretation of the lobbying rules, there is no way that the smaller church could do what the Mormon Church did without it being considered "substantial." To shield an organization from the law simply because of its massive size is a problem that runs counter to the original intent behind § 501(c)(3). Since large § 501(c)(3) organizations will be the only organizations to receive a subsidy for lobbying activity, these organizations will become "ideal entities for political campaign donors"[118] and possible legislative corruption.

In an effort to mitigate this issue, commentators have evaluated a modified § 501(h) test.[119] Essentially, under Professor Galle's approach, the

113. I.R.S. Gen. Couns. Mem., *supra* note 50, at 6; *see also* TAYLOR, *supra* note 57, at 95 (explaining that IRS applies a facts and circumstances test rather than a strict percentage test).

114. *See* TAYLOR, *supra* note 57, at 96 (explaining, based on IRS General Counsel Memo and related case law, that "organizations should view [a percentage of lobbying activities in relation to total activities] less than 5% as clearly insubstantial . . . .").

115. Galle, *supra* note 11, at 370, 376.

116. *Id.* at 370.

117. Tobin, *supra* note 2 at 1317–18.

118. *Id.*

119. Manderino, *supra* note 20, at 1066 (citing Galle, *supra* note 11, at 375) (suggesting employing § 501(h) valuation rules while recognizing that such an approach would not account for certain value added by nonprofit lobbyists).

"fixed limit" standard in § 501(h) would be modified for churches to "take into account not only actual expenditures, but also the intangible activities of a church."[120] Such intangibles would include things such as mailing lists and goodwill.[121] This test would "partially incorporate the 'fairness' provided by § 501(h)" by no longer permitting economically larger churches to "wield greater political influence" than a smaller church by contributing disproportionate amounts of money to lobbying.[122]

This test would also better reflect Congress's intent behind § 501(c)(3).[123] Professor Galle notes that one inference of that intent can be drawn from the structure of § 501(h).[124] By setting a maximum value of $1 million for lobbying expenditures under § 501(h), Congress either did not believe that $1 million was "permissible under the 'substantial' standard [of § 501(c)(3)]," or it did not want to promote expenditures greater than $1 million.[125] Regardless, § 501(h) appears to limit what is otherwise an unlimited interpretation of the word "substantial" in § 501(c)(3).[126]

Aside from the "excessive entanglement" issues that would inevitably arise while auditing and valuing the intangible assets of a church,[127] Professor Galle's § 501(h) approach also fails to resolve the detrimental societal impacts that result when churches engage in lobbying.

III. The Problematic Issues that Arise when § 501(c)(3) Organizations, Especially Churches, Engage in Lobbying Activities *at All*.

As discussed above, the current interpretation of § 501(c)(3) allows a large enough church to make sizeable lobbying contributions great enough to defeat any opposition, without jeopardizing their tax-exempt status.[128] Allowing such activity results in religious institutions becoming more powerful and exerting far too much influence over public policy.[129] The collection of churches that comprised the coalition in favor of Proposition 8 is a perfect illustration of the consequences that result when churches influence legislation. It also raises enough concern about the influential power of

120. *Id.* (citing Galle, *supra* note 11).

121. *Id.*

122. *Id.* at 1066–67 (citing Galle *supra* note 11, at 370, 376).

123. *See* Galle, *supra* note 11 at 376–77 ("If [501](c)(3) offers an opportunity for massive expenditures by massive organizations, then the § 501(h) safe harbor is useless for just those organization that are most in need of assurance—those that invest a large sum in lobbying.").

124. *Id.*

125. *Id.*

126. *Id.*

127. Manderino, *supra* note 20, at 1069–70 (noting the difficulty and inherent clarity issues that would come from quantifying the value of volunteer work, goodwill, and "phone lists used to solicit help and donations.").

128. Galle, *supra* note 11, at 370.

129. *See* Tobin, *supra* note 2, at 1317–18.

these organizations to consider an outright ban on lobbying by § 501(c)(3) organizations.

A. Increased Political Influence Minimizes the Public Choice.

In his 2007 article, Professor Donald B. Tobin applied the "public choice theory" to a religious institution's political campaigning activities in an effort to examine various issues that arise when a church's entry into the political arena is subsidized.[130] Public choice theory generally holds that "government spending is an economic good and that interest groups will compete to obtain that good for themselves."[131] Therefore, groups wielding more power and influence are better positioned to "obtain a bigger piece of the pie."[132] Though typically used as an economic theory, Tobin notes that the gain in power resulting from a church's subsidized political campaigning activity "does not necessarily lead to greater economic gains."[133] Instead, the church's subsidized activity leads to its agenda getting pushed on society, possibly against society's will.[134]

Tobin's application of this theory to § 501(c)(3) organizations exposes one of the many problematic issues that arises when these entities, especially churches, get involved in lobbying, or enter the political arena at all. As stated earlier, § 501(c)(3) organizations are generally well-respected within their particular communities and are often "valued for their independence from the political establishment."[135] Churches, in particular, provide a tremendous benefit to society. However, as distinguished from other highly regarded § 501(c)(3) organizations, churches are held in a very deep, personal, and spiritual position and have an extremely loyal, trustful following. A church is therefore better positioned to influence its members and others who depend on them.[136] Further, a church's message to its members likely has a greater impact than the same message from someone else.[137] After all, a church's supporters and members are also its primary beneficiaries.[138] Professor Tobin concludes that a religious organization's subsidized entry into politics, therefore, unnaturally results in an increase in that organization's power, presence, and position in the political arena.[139]

While Tobin's theory is unquestionably a controversial one, its application to the lobbying restrictions and the Mormon Church's activities surrounding Proposition 8 appears to perfectly illustrate the significant power

130. *Id.* at 1326.
131. *Id.*
132. *Id.*
133. *Id.* at 1326–27.
134. *See* Tobin, *supra* note 2, at 1327.
135. *Id.* at 1337.
136. *Id.* at 1319–20.
137. Galle, *supra* note 11, at 375.
138. Gergen, *supra* note 38, at 1434.
139. *See* Tobin, *supra* note 2, at 1326.

and influence a church can wield over the political process, against the will of the majority. With less than a month before the November 2008 vote, support for Proposition 8 still trailed the opposition.[140] In response, Protect Marriage's chief strategist, Frank Shubert, sent an e-mail pleading for "money to save traditional marriage from 'cardiac arrest'" to the 92,000 people registered with the Coalition's web site.[141] Mr. Schubert emailed his "executive committee" comprised of top members of the Catholic, Evangelical, and Mormon churches.[142] At this point, the strongest push for Proposition 8 was made.

Particular to the Mormon Church, great efforts were made to influence the outcome for Proposition 8. Its leadership pleaded to students at Brigham Young campuses to "go viral" in support of the California ballot initiative, stating, "God will bless you as you do your part."[143] Later, another official within the church, L. Whitney Clayton, made a plea to its members in California stating, "[w]e are looking for 30 people in every ward in California to commit 4 hours each until the election."[144] Finally, Clayton voiced need for participants in an additional "100-hour program" November 1–4, 2008—the last weekend before the election.[145]

While churches by no means agree with one another about many of the issues on today's public agenda, they certainly have the power to form a formidable theological front when they do agree on something.[146] Within a matter of days after the urgent appeal from the coalition and the Mormon Church, the campaign raised more than $5 million.[147] The funds raised included a single $1 million donation from Alan C. Ashton, the grandson of David O. McKay, a former president of the Mormon Church.[148] The coalition effectively pushed its position to victory, perhaps against the will of the majority.[149]

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140. McKinley & Johnson, *supra* note 73.

141. *Id.*

142. *Id.*

143. Stack, *Young Mormons*, *supra* note 73.

144. *Id.*

145. *Id.*

146. Johnny Rex Buckles, *Is the Ban on Participation in Political Campaigns by Charities Essential to Their Vitality and Democracy? A Reply to Professor Tobin*, 42 U. Rich. L. Rev. 1057, 1107 (2008) (arguing that "Churches as a whole plainly do not form a united theological front . . . ."); Peggy Fletcher Stack, *Prop 8 Involvement a P.R. Fiasco for LDS Church*, SALT LAKE TRIB., November 21, 2008, http://www.sltrib.com/news/ci_11044660 [hereinafter Stack, *Prop 8 Involvement*] (quoting Evangelical Rev. Jim Garlow, "Our theological differences with Mormonism are, frankly, unbridgeable, but these are our friends and neighbors . . . ." while reporting that Mr. Garlow said that the Proposition 8 campaign deepened his relationship with Mormons.).

147. McKinley & Johnson, *supra* note 73.

148. *Id.*

149. *See* Tobin, *supra* note 2, at 1327.

B. Moral Advocacy v. Lobbying From the Pulpit.

While Professors Galle and Tobin both provide thoughtful discussion on the benefits of restricting churches from politically campaigning and lobbying, neither scholar thoroughly examines the negative effects that campaigning or lobbying from the pulpit have on a church's member base. Some of the effects, which I will examine further, are troubling enough themselves to warrant an absolute ban on lobbying by churches.

Neither § 501(c)(3) nor the Internal Revenue Code prohibits churches from advocating a moral stance on a particular issue.[150] However, they should not use their powerful position to influence legislation.[151] Though a church's position on a political candidate or a piece of legislation can generally be inferred from its stance on issues such as abortion, contraception, or same-sex marriage, this is allowed.[152] However, it is inappropriate for churches to "use their resources, or the power of God" to argue in favor of a specific political candidate[153] or a piece of legislation.

There is a distinct line between moral advocacy and political lobbying, and that line is blurred when letters or sermons urging members to act upon a specific political matter are read from the pulpit. The pulpit is where clergymen deliver inspiration in the form of sermons, lessons, and other strong and powerful words of wisdom. When members are urged to act on a political matter from that same clergyman, standing at that same pulpit, that message is too easily construed as the will of the church.

When lobbying takes place from the pulpit, an incredible personal burden is placed on devout members who may not agree with their church's position on the particular issue that they are being urged to act upon. It was reported that during the Proposition 8 campaign some Mormon wards in California asked its members for "hefty financial donations, based on [the Church's religious] tithing."[154] Some wards even went so far as to ask its members "to stand or raise their hands to publicly indicate their support" during services.[155] One Mormon columnist even likened Proposition 8's opponents "to those who sided with Lucifer against Jesus in the pre-mortal existence," in one of his writings for an online Mormon magazine.[156] Members felt divided and alienated from a church that many consider their sanctuary.[157] Such burdens and alienation are the inexcusable result of the type

150. Tobin, *supra* note 2, at 1335.

151. *Id.*

152. *Id.*

153. *Id.*

154. Peggy Fletcher Stack, *Prop 8: California Gay Marriage Fight Divides LDS Faithful*, SALT LAKE TRIB., Oct. 26, 2008, http://www.sltrib.com/ci_10797630.

155. *Id.*

156. *Id.*

157. *Id.*

of undue influence that makes a religious organization's involvement in political lobbying problematic and inappropriate.

When a letter is read from the pulpit asking members to "*do all you can* to support the proposed constitutional amendment by donating of your means and time . . . [*o*]*ur* best efforts *are required* to preserve the sacred institution of marriage,"[158] members are too easily misled into believing that they are campaigning with their church rather than independently as an individual. Specifically, with regard to their efforts with Proposition 8, "[b]ecause the LDS Church routinely asks its members to give time and money [for religious and humanitarian purposes, its members] are 'uniquely situated to be mobilized into politics . . . [b]ut they only get mobilized when a match is lit."[159] In this case, that particular match was lit at the pulpit.

Some have argued that while Mormon leadership merely asked its members to do something, "the actual 'doing' [was] left to the individual and their agency."[160] However, such an argument seems disingenuous. Mormons are consistently recognized for being "among the most devout religious groups in the country."[161] Mormons believe that their leadership is comprised of apostles and prophets of God to be viewed in the same light as Abraham, Moses, Isaiah and the apostles in the day of Jesus Christ.[162] They also believe that these apostles and prophets receive divine "revelation and inspiration [from God] to guide the [Mormon] Church as a whole."[163] Therefore, when a respected Mormon leader speaks, Church members listen to his words very intently.

It would also be disingenuous to argue that, through the Mormon hierarchy's satellite broadcasts through its local leadership, church members were simply given "suggestions" on the types of actions they *could* take, such as the call centers, "viral" campaigning, monetary donations, and going door-to-door.[164] The Church cannot "suggest" that its members take action that it is expressly prohibited by law from taking itself. Such actions taken by the Mormon Church are grassroots lobbying at its finest.[165]

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158. *California and Same Sex Marriage*, *supra* note 75 (emphasis added).

159. Stack, *Prop 8 Involvement*, *supra* note 146 (quoting David Campbell, a political science professor at the University of Notre Dame.).

160. *Mormonism and Politics/California Proposition 8*, THE FAIR WIKI, http://fairmormon.org/Mormonism_and_politics/California_Proposition_8 (last modified Nov. 5, 2012).

161. Ryan Tobler, *Major New Study of Religion Has Much to Say About Mormons*, MORMON NEWSROOM BLOG (Nov. 15, 2010), http://www.mormonnewsroom.org/article/major-new-study-of-religion-has-much-to-say-about-mormons.

162. *Prophets*, MORMON NEWSROOM, http://www.mormonnewsroom.org/article/prophets (last visited April 4, 2013).

163. *Id.*

164. Stack, *Young Mormons*, *supra* note 73.

165. *See* Treas. Reg. § 56.4911-2(b)(2)(ii-iii) (2012) ("A grass roots lobbying communication is any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof.").

Finally, "lobbying from the pulpit" also creates confusion amongst church members regarding exactly who or what they are donating to. Do they believe they are donating directly to the church or do they believe they are donating to a political lobbying campaign? I.R.C. § 162(e) expressly disallows deducting lobbying and political expenditures.[166] Members that are unclear as to what they are donating for, or members that mistakenly believe that they are donating to the church, may be deducting these donations as charitable contributions. Assuming that these members are itemizing their deductions, this effectively creates the type of government subsidy that § 501(c)(3) was designed to preclude.

C. Congress Should Impose an Absolute Ban on Lobbying by Churches.

Congress should eliminate the problems caused by churches lobbying from the pulpit by imposing an absolute ban on lobbying by § 501(c)(3) organizations. This ban would be similar to the "individual participation" restrictions found in the political campaign activity prohibitions for § 501(c)(3) organizations. Under I.R.C. § 501(c)(3), "churches and religious organizations are *absolutely* prohibited from" involving themselves in the activities of a political candidate's campaign.[167] This includes contributing money or publicly stating its position on a particular candidate.[168] However, in an effort to protect a religious leader's freedom of expression to engage in political activities as an individual, the law distinguishes between activities done in a leader's "official" capacity and those that are "personal."[169] Since religious leaders are prohibited from making partisan comments in their official church capacity, leaders are responsible for clarifying whether their comments are representative of their personal views, or the organization's.[170]

The political campaign prohibition still allows a § 501(c)(3) organization to advocate its moral position, but "they must avoid any issue advocacy that functions as political campaign intervention."[171] Examples of advocacy that might be considered intervention in a political campaign include statements that favor or oppose a particular candidate, identify a candidate by name or picture, refer to political party affiliations, or other distinctive fea-

166. "No deduction shall be allowed . . . for any amount paid or incurred in connection with—(A) influencing legislation, (B) participation in, or intervention in, any political campaign on behalf of (or in opposition to) any candidate for public office, (C) any attempt to influence the general public, or segments thereof, with respect to elections, legislative matters, or referendums, or (D) any direct communication with a covered executive branch official in an attempt to influence the official actions or positions of such official." I.R.C. § 162(e) (2012).

167. I.R.S., PUB. NO. 1828, *supra* note 47, at 7 (emphasis added).

168. *Id.*

169. HOPKINS, *supra* note 16, at 686.

170. I.R.S., PUB. NO. 1828, *supra* note 47, at 7.

171. *Id.* at 8.

tures of a candidate's platform or biography.[172] By applying these same absolute restrictions to lobbying, a church could still morally advocate its position on a particular issue. However, churches would be prohibited from "officially" making statements that advocate for or against a specific piece of legislation or identify a piece of legislation by name. Such a restriction on churches would not only enhance the purpose behind the lobbying restrictions, but it would alleviate the potential for abuse and undue influence over members since members would be able to better distinguish their leader's personal message from the Church's. An absolute restriction on lobbying would also better protect churches by providing a more bright-line rule that remedies the ambiguities of the "substantial part" test.

CONCLUSION

There are clearly some holes within the laws of tax-exempt organizations. Existing precedent does not seem consistent with the legislative intent behind these laws. Continuing to compare a church's lobbying activities to its overall size is not an appropriate way to analyze and enforce the lobbying restrictions. Doing so places churches and charities on an unequal playing field. It also allows taxpayer subsidies to not only be used to impose the will of one church over another, but also over those taxpayers who are in essence subsidizing the efforts. The current standards also fail to consider the important role that all § 501(c)(3) organizations play in our society. The lobbying restrictions imposed on these organizations are good for the organizations, their members, donors and society. If applied to churches, an absolute ban would help prevent potential division and alienation within the church caused by differing viewpoints of the church and its members on legislative issues. Finally, the restrictions help avoid the problematic entanglement between a church and government by creating a clear line between moral advocacy and political lobbying.

When legislators proposed the lobbying restrictions in 1934, they likely did not anticipate the immense economic size of the modern day § 501(c)(3) organization. There would be no better time for congress to re-evaluate § 501(c)(3) and bring it up to date in order to reflect the reality that is modern, multi-million dollar, tax-exempt organizations. The Mormon Church's involvement in Proposition 8 presents a unique circumstance that illustrates this problem with the current standards of § 501(c)(3). Judicial precedent suggests that the Church's size almost certainly guards it from any serious threat of losing its tax-exempt status.[173] However, that does not mean that its actions were not problematic or undeserving of some level of scrutiny.

172. *Id.*

173. Galle, *supra* note 11, at 378.