Notre Dame Journal of Law, Ethics & Public Policy

Volume 13
Issue 2 *Symposium on Law and Religion*

Article 12

February 2014

The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns

Erik J. Ablin

Follow this and additional works at: http://scholarship.law.nd.edu/ndjlepp

Recommended Citation

Erik J. Ablin, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 Notre Dame J.L. Ethics & Pub. Pol'y 541 (1999).
Available at: http://scholarship.law.nd.edu/ndjlepp/vol13/iss2/12

This Article is brought to you for free and open access by the Notre Dame Journal of Law, Ethics & Public Policy at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of Law, Ethics & Public Policy by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

THE PRICE OF NOT RENDERING TO CAESAR: RESTRICTIONS ON CHURCH PARTICIPATION IN POLITICAL CAMPAIGNS

Erik J. Ablin*

Table of Contents

Introduction 542
I. Religion Clauses 544
A. *The Establishment Clause* 545
B. *The Free Exercise Clause and Its Tension with the Establishment Clause* 546
II. Current Tax Law Regarding Religious Organizations 547
A. *Tax-Exempt Organizations Under I.R.C. § 501(c)* .. 547
B. *Premise for Tax Exemption* 549
C. *Guidelines on Church Political Activity* 550
1. Permissible Activities 550
2. Impermissible Activities 551
3. Gray Areas 551
III. Contemporary Controversies 553
A. *Christian Coalition Voter Guides* 554
1. Widespread Distribution of Voter Guides .. 554
2. Accusations of Bias 555
3. Opposition from Americans United for Separation of Church and State 556
4. Assessment 557
B. *Church at Pierce Creek, Vestal, New York* 558
C. *Reverend Jesse Jackson's 1988 Presidential Campaign and Black Churches* 559
D. *Catholic Pro-Life Activity and Literature* 561
IV. Constitutional Issues 563
A. *Constitutionality of Tax Exemption: The* Walz *Case* 563
B. *Restriction on Influencing Legislation: The "Substantial Part" Test and the* Regan *Case* 565

* B.S., B.A., 1992, Oral Roberts University; M.B.A., 1993, Northern Arizona University; J.D. Candidate, 1999, Notre Dame Law School; Thomas J. White Scholar, 1997-99. The author dedicates this Note to his family: his mother Lois Ablin, his sister Karyn Ablin, and his late father Henry Ablin. The author also thanks Rev. John H. Pearson, C.S.C. and Professors Gerard V. Bradley and Matthew J. Barrett for their valuable suggestions and comments.

C. *Assessment of Prohibiting Church Involvement in Political Campaigns* 566
1. Legislative History and Justifications for Restriction 566
2. Assessing the Constitutionality of the Electioneering Prohibition 567
V. CHURCHES AND POLITICAL ACTIVISM: HISTORY AND RATIONALE 570
A. *Historical Role of Churches in the Political Process* .. 571
B. *Justification for Church Political Activism* 573
C. *Problems with the § 501(c)(3) Restriction* 575
1. First Problem: Separating Deeply Held Religious Beliefs from Political Viewpoints 576
2. Second Problem: Distinguishing Between Issue Advocacy and Candidate Advocacy ... 577
D. *Assessing the § 501(c)(3) Restriction as a Policy* 579
VI. ALTERNATIVES 581
A. *Continue Current Standard* 581
B. *Completely Remove Restrictions on Campaigning* 582
C. *Partially Remove Restrictions on Campaigning* 583
1. Apply Federal Election Disclosure Rules ... 583
2. Adopt a "Substantial Part" Standard 584
3. Crane-Rangel Amendment: The Five Percent Rule 585
4. Assessment 586
CONCLUSION 587

INTRODUCTION

1. Prior to the November 1996 and 1998 elections, thousands of churches throughout the country received voter guides from the Christian Coalition for distribution to churchgoers on the Sunday prior to Election Day.[1] Before that Sunday arrived, many of these churches also received either mailings or e-mail messages from Americans United for Separation of Church and State, urging them not to distribute the guides. To do so, Americans United warned, would entail risking loss of their tax-exempt status.[2]

2. Prior to the 1992 presidential election, a conservative church in Vestal, New York ran an advertisement in *USA Today* that highlighted Governor Bill Clinton's positions on homosexuality and abortion and equated voting for Bill Clinton with sin.

1. *See infra* text accompanying notes 55-66.
2. *See infra* text accompanying notes 72-77.

Three years later, the Internal Revenue Service (IRS) revoked the church's tax-exempt status retroactive to 1992.[3]

3. In the 1988 presidential campaign, Reverend Jesse Jackson utilized the services of numerous black churches throughout the country to support his quest for the Democratic nomination. The churches provided him with substantial support in terms of a platform, facilities, and finances for his campaign activities. Americans United for Separation of Church and State and other groups criticized such activities as violations of the tax laws and asked the IRS to investigate.[4]

4. In 1980, several organizations and individuals that supported abortion rights sued the government and the United States Catholic Conference, seeking revocation of the Catholic Church's tax-exempt status. Because the Church had engaged in activity on behalf of pro-life causes and candidates, the plaintiffs complained, the IRS should revoke the Catholic Church's tax-exempt status.[5]

Christ's oft-quoted admonition to "[r]ender therefore to Caesar the things that are Caesar's, and to God the things that are God's,"[6] in addition to reminding us of our dual citizenship in two kingdoms—one earthly and one heavenly—is a practical instruction to citizens to pay their taxes. The Internal Revenue Code (I.R.C.) of 1986, however, exempts certain organizations from this duty. Most churches qualify as nonprofit charitable organizations under § 501(c)(3) of the I.R.C. Section 501(c)(3) entitles them to tax-exempt status and entitles their supporters to tax-deductible contributions. There is a price, however, for this privilege of not "rendering to Caesar": Section 501(c)(3) organizations are prohibited from participating or intervening in political campaigns on behalf of a candidate. To do so can jeopardize an organization's tax-exempt status.[7]

The four examples mentioned above illustrate the variety of controversies that can arise when the restriction against electioneering is applied to churches. This Note assesses the propriety of the § 501(c)(3) prohibition against participation in political campaigns by churches. To provide context for the unique church-state issues that arise from this electioneering ban, I

3. *See infra* text accompanying notes 79-87.

4. *See infra* text accompanying notes 88-92.

5. *See* Abortion Rights Mobilization Inc. v. Baker (*In re* United States Catholic Conference), 885 F.2d 1020, 1023 (2d Cir. 1989); *see also infra* text accompanying notes 100-04.

6. *Matthew* 22:21 (Revised Standard Version).

7. *See* I.R.C. § 501(a),(c)(3) (1994).

briefly discuss the legal framework for the problem in Parts I and II, including the Establishment and Free Exercise Clauses of the First Amendment, as well as current tax law governing religious organizations and the particular restrictions imposed upon them. Part III provides additional detail on the four sample controversies described in this Introduction. Next, Part IV attempts to assess the constitutionality of the political campaigning restriction in light of the pronouncements of the Supreme Court and a lower federal court.

Regardless of whether the restriction is constitutional, it is important to analyze *why* churches engage in political activism as well as the *policy* implications of the § 501(c)(3) electioneering prohibition. Thus, Part V provides some historical perspective on American religious political activism and explores the reasons churches frequently engage in public debate and take part in political campaigns. I also discuss some of the specific problems caused by the I.R.C.'s § 501(c)(3) provision and argue that public policy should not absolutely forbid churches from engaging in political campaigns.

Part VI then explores some alternatives for reform which could alleviate the problems posed by existing law, including a complete removal of the electioneering restrictions and several alternative partial removals: (1) Congress could adopt standards similar to the Federal Election Commission rules for financial disclosure and permit church campaign activities, so long as they do not rise to the level of "express advocacy"; (2) Congress could permit churches to engage in electioneering so long as those activities do not become a "substantial part" of churches' overall activities; and (3) Congress could adopt a "five percent rule" and allow churches to spend a certain designated percentage of their revenues to engage in de minimis campaign activities. I conclude this Note by summarizing the various problems created by the § 501(c)(3) electioneering restriction against churches, and then I advocate that Congress should implement any one of the proposed alternatives listed in Part VI to partially remove the restrictions on political campaigning.

I. Religion Clauses

The First Amendment of the Constitution begins, "Congress shall make no law respecting an establishment of religion nor prohibiting the free exercise thereof . . . ."[8] Often in tension with each other, the Establishment Clause and the Free Exercise

8. U.S. Const. amend. I.

Clause represent two very important but distinct principles in American law. Scholars and Supreme Court Justices have interpreted the clauses in numerous ways throughout the nation's history. Although this array of interpretations continues to this day, the First Amendment represents the basic principle of "separation of church and state," so coined by Thomas Jefferson in an 1802 letter written to the Danbury Baptist Association.[9]

A. *The Establishment Clause*

Vastly different theories have been articulated on the Establishment Clause's meaning, including strict separation, neutrality, and accommodation. One clear purpose of the Establishment Clause, however, was to prevent the formation of an official national church.[10] Beyond this, the debate over separation of church and state is generally one of degree, but at the very least, the Establishment Clause seeks to ensure religious freedom by prohibiting the government from promoting "any particular religious denomination or its theological positions."[11]

Though the Clause prohibits such preferential treatment of one sect over another, scholars disagree on how much and what kind of separation is required. One author has noted the *lack* of historical evidence for the view "that the First Amendment was intended to provide an *absolute separation or independence* of religion and the national state."[12] The same author also notes the lack of evidence for the view that the Founders intended the First Amendment to bar nondiscriminatory federal aid to religious institutions.[13]

For the past three decades, the Supreme Court has utilized the famous *Lemon* test, announced in *Lemon v. Kurtzman*,[14] to determine if a law comports with the Establishment Clause. The *Lemon* test demands that a law: (1) have a secular purpose; (2) have the principal effect of neither advancing nor inhibiting religion; and (3) not foster excessive government entanglement with

9. CHARLES B. SANFORD, THE RELIGIOUS LIFE OF THOMAS JEFFERSON 32 (1984) (citing Letter from Thomas Jefferson to a Committee of the Danbury, Conn., Baptist Assoc. (Jan. 1, 1802)).

10. *See* GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 93-95 (1987); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 5, 15 (1982).

11. KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 18 (1988); *see also* BRADLEY, *supra* note 10, at 55, 135; STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 115 (1993).

12. CORD, *supra* note 10, at 15 (emphasis in original).

13. *See id.*

14. 403 U.S. 602 (1971).

religion.[15] The Supreme Court, however, has not consistently applied the *Lemon* test and some Justices have on occasion argued for such tests as noncoercion and nonendorsement.[16]

B. *The Free Exercise Clause and Its Tension with the Establishment Clause*

Broadly speaking, the Free Exercise Clause protects people's freedom to worship and practice their religious beliefs as they choose, without government interference. Religious liberty was among the highest values in the founding of the country. Thomas Jefferson once called freedom of religion "the most inalienable and sacred of all human rights."[17]

At times, government lawmakers have granted individuals statutory exemptions from laws so that their religious beliefs and practices are not burdened. For example, Congress exempts conscientious objectors from military service.[18] At other times, individuals seek *judicial* relief from the requirements of laws not providing for religious-based exemptions.[19] At times, the Supreme Court has allowed such exemptions; for example, in *Wisconsin v. Yoder*,[20] the Supreme Court granted to Amish parents, based on their religious objections, an exemption from a compulsory school attendance law which required children to stay in school until age sixteen.

More recently, the Court announced a less accommodating decision in *Employment Division v. Smith*.[21] The case involved individuals of the Native American Church who became ineligible for unemployment benefits because they had smoked peyote as part of a Native American religious ceremony. The Court held that a generally applicable law that has the incidental effect of burdening a religion, as long as the law was not targeted at a religion, is constitutional and that the government need not grant an exemption.[22]

---

15. *See id.* at 612-13.

16. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573 (1989) (Kennedy, J., dissenting) (noncoercion); Wallace v. Jaffree, 472 U.S. 38 (1985) (nonendorsement).

17. CARTER, *supra* note 11, at 106 (quoting Thomas Jefferson, *Freedom of Religion at the University of Virginia, in* THE COMPLETE JEFFERSON 958 (Saul K. Padover ed., 1943)); *see also* SANFORD, *supra* note 9, at 23 ("Religious freedom was for Jefferson, then, the most important of the rights of man.").

18. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 1501 (12th ed. 1991).

19. *See id.* at 1556.

20. 406 U.S. 205 (1972).

21. 494 U.S. 872 (1990).

22. *See id.* at 878, 890.

The problems created by exemptions, offered by legislative bodies in an effort to not burden religion, reveal the tension between the Establishment Clause and the Free Exercise Clause. A government action that permits a religion to receive a particular benefit can prompt accusations that government is creating an establishment of religion. On the other hand, not allowing a religion to receive a benefit can prompt the opposite accusation that the government is burdening the free exercise of religion. One scholar has posed the question, "If a state must grant an exemption because of the 'free exercise' command, is it thereby granting a preference to religion in violation of the 'establishment' provision?"[23] Strict separationists would answer in the affirmative, but others take the opposite view: "To offer the religions the chance to win exemptions from laws that others must obey obviously carves out a special niche for religion, but that is hardly objectionable: carving out a special place for religion is the minimum it might be said that the Free Exercise Clause does."[24] Although the current tax code partially carves out such a niche for churches, the conditions it imposes upon them, arguably, serve simultaneously to burden religion and hinder its free exercise.

II. CURRENT TAX LAW REGARDING RELIGIOUS ORGANIZATIONS

A. *Tax-Exempt Organizations Under I.R.C. § 501(c)*

To grasp the problem, it is necessary to understand the current law governing churches and their tax-exempt status. Most churches qualify as nonprofit organizations under § 501(c)(3) of the I.R.C. Since the first modern internal revenue law in 1913, churches have been tax-exempt.[25] Section 501(c)(3) allows corporations that are organized and operated exclusively for religious, charitable, scientific, public safety, literacy, or educational purposes to be exempt from federal taxation and for contributions to these organizations to be deductible. In addition to the requirement of being organized exclusively for such a charitable purpose, the I.R.C. conditions § 501(c)(3) status on three additional provisions. First, the net earnings of the organization may not "inure[ ] to the benefit of any private shareholder or individual."[26] Second, the charitable organization may not devote a sub-

23. GUNTHER, *supra* note 18, at 1501.

24. CARTER, *supra* note 11, at 133-34.

25. *See* Scott W. Putney, *The IRC's Prohibition of Political Campaigning by Churches and the Establishment Clause*, 64 FLA. B.J. 27 (1990).

26. I.R.C. § 501(c)(3) (1994).

stantial part of its activities to influencing legislation.[27] The third and final condition, which is the focus of this Note, is that the organization 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."[28] A § 501(c)(3) organization that violates the provision against participation in political campaigns, in addition to risking loss of tax-exempt status, becomes subject to taxation on the amounts spent on political campaigns under § 527(f) of the I.R.C.[29]

Another type of nonprofit organization, the social welfare organization, may organize and operate under I.R.C. § 501(c)(4). Section 501(c)(4) organizations are either organized exclusively for social welfare purposes or are local employee associations. Such organizations must use their net earnings for charitable, educational, or recreational purposes.[30] While they are exempt from federal taxation, they differ from § 501(c)(3) organizations in that contributions to § 501(c)(4) organizations are not deductible. Furthermore, a § 501(c)(4) organization may devote a substantial amount of its activities to influencing legislation and may participate in political campaigns, so long as its primary aim is to promote a social welfare purpose.[31] One organization discussed extensively in this Note which claims § 501(c)(4) status is the Christian Coalition. The Christian Coalition, unlike a church, may devote a substantial part of its activities to lobbying and may also intervene in a political campaign without threatening its tax-exempt status.

For § 501(c)(3) organizations, however, the prohibition on electioneering is absolute, and organizations which intervene in political campaigns risk losing their tax-exempt status. Lest I

---

27. *See id.*

28. *Id.*

29. *See* I.R.C. § 527(f) (1994); *see also* Edward D. Coleman, *Lobbying Update and Advice for the Coming Election Year—Life Under Lobbying Regulations; Political Rules for (c)(3)'s; (c)(3)/(c)(4) Relationships; PACs*, C693 ALI-ABA 199, 215 (1991); Putney, *supra* note 25, at 27.

30. *See* I.R.C. § 501(c)(4) (1994).

31. *See* Treas. Reg. § 1.501(c)(4)-1 (1991); Treas. Reg. § 1.501(c)(3)-1(c)(3)(i)-(iv) (1991); Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217, 233-34 (1992) (citing Treas. Reg. § 1.501(c)(3)-1(c)(3)(i)-(iv) (as amended in 1990) and Rev. Rul. 91-95, 1981-1 C.B. 332). Although the Treasury Regulations state that participation in political campaigns is not included in the "promotion of social welfare," Rev. Rul. 91-95 declared that involvement in political campaigns is not entirely prohibited for § 501(c)(4) organizations. *Id.* at 234, n.104.

overstate the magnitude of the problem, revocation of tax-exempt status is, in practice, relatively infrequent. If the IRS chooses to penalize an organization for electioneering, it will probably impose intermediate sanctions on the organization in the form of "excise taxes" for those political expenditures.[32] Nevertheless, revocation is still a possibility, as evidenced by the Church at Pierce Creek.[33]

B. *Premise for Tax Exemption*

The premise for granting tax exemption to charitable organizations, including churches, is based in part on a general belief that the activities of such organizations benefit society and should be spared the burden of taxation. Although § 501(c)(3) aggregates religious organizations with a variety of other general charitable organizations, the First Amendment assigns special importance to religion. Because of this, special issues may surface with regard to religious organizations that might not apply to other types of charitable organizations.

The first premise for exempting religious organizations from taxation is that they contribute value to the community in nonreligious ways, thus partially relieving the government from supporting those activities.[34] For example, churches' facilities might be used to "promote antipoverty causes" or to "discuss public issues."[35] Second, religious organizations further the diversity and pluralism of America, offering a wider variety of associations and viewpoints.[36] Finally, in keeping with its tradition of separation of church and state, the nation has a long history of granting tax exemptions to religious organizations: Congress has been granting tax exemptions to religious organiza-

---

32. *See* I.R.C. § 4955. The IRS would impose on the organization a tax of 10% for the amount spent on the political activity. Further, the IRS would impose a tax of 2.5% on any manager of the organization who spent funds knowingly on political expenditures. If such taxes were not paid within the taxable period, the IRS would impose an additional tax of 100% on the organization and a 50% tax on the organization's manager if the manager did not pay for the correction. *See id; see also* Memorandum from Mark Chopko, United States Catholic Conference General Counsel, *Political Activity Prohibition* (June 26, 1992), *in Election-Year Actions of Tax-Exempt Organizations*, 22 ORIGINS 179, 183 (1992).

33. *See infra* text accompanying notes 79-87.

34. *See* Walz v. Tax Comm'n, 397 U.S. 664, 687 (1970) (Brennan, J., concurring); *see also* Charles Capetanakis, *Abortion Rights Mobilization and Religious Tax Exemptions*, 34 CATH. LAW. 169, 186 (1991).

35. *See Walz*, 397 U.S. at 688 (Brennan, J., concurring).

36. *Id.* at 689 (Brennan, J., concurring); *see also* Capetanakis, *supra* note 34, at 185.

tions since 1798, when it passed a real estate taxation procedure, but exempted religious organizations from the measure.[37] This tradition of exempting churches from taxes continues today.

C. *Guidelines on Church Political Activity*

Given the I.R.C.'s restriction on church participation in political campaigns, it is useful to discuss certain campaign activities that are permitted and some that are prohibited. However, not all activities clearly fall into one of these categories.

1. Permissible Activities

Although a church may not participate or intervene on behalf of or in opposition to a candidate for public office, a church may engage in numerous voter education and issue-oriented activities. A minister, for example, may speak openly about a ballot initiative or referendum from the pulpit, and a church may conduct non-partisan voter registration drives.[38] Neither of these activities, however, involves a campaign for a candidate seeking office. A church may also host a forum to which all candidates for a particular office are invited, as well as rent a mailing list or sell an ad to a candidate, so long as these opportunities are available to other candidates as well.[39] Finally, § 501(c)(3) permits a church to attempt to influence legislation, as long as those attempts are less than a "substantial part" of church activities. The law, therefore, allows a church to take positions on issues and engage in issue-oriented political activity.

Several religious organizations, including the National Council of Churches and the National Conference of Catholic Bishops, have published guidelines for their own constituencies concerning permissible political activity. In addition to including the above-mentioned permissible activities, the Catholic Bishops' guidelines encourage churches to share church teachings on human life, human rights, and justice, as well as to apply Catholic values to legislative and public issues.[40]

---

37. *See Walz*, 397 U.S. at 677 n.5.

38. *See* William J. Lehrfeld, *Government Relations: Federal Regulations of Lobbying and Political Activities Under the IRC and Regulations with Focus on Proposed Lobbying Rules*, 307 Practising L. Inst./ Corp. Pol. Activities 341, 351 (1990); David Waters, *Politics, Religion: Unruly Alliance?*, Com. Appeal (Memphis), Nov. 2, 1996, at A1.

39. *See* Lehrfeld, *supra* note 38, at 349; Waters, *supra* note 38, at A1.

40. *See* Julia McCord, *Election Guide Suit Sparks Debate About Election Guidelines*, Omaha World-Herald, Aug. 24, 1996, at 63SF.

2. Impermissible Activities

Section 501(c)(3) of the I.R.C. does not allow a church to participate in or directly oppose a candidate's political campaign for office. A church, then, is precluded from endorsing a particular candidate.[41] Various church organizations also distribute guidelines to instruct their member churches on what is impermissible, though such listings may occasionally go beyond what the law requires. Guidelines promulgated by the National Council of Churches instruct churches not to distribute campaign literature on church property, support a political action committee (PAC) for a candidate, financially or otherwise support a candidate, or use inflammatory labels in mentioning a candidate.[42] The United States Catholic Bishops' guidelines advise churches not to distribute partisan literature under "church auspices," arrange for groups to work for a candidate, or invite only selected candidates to a forum.[43] When the political activity revolves around particular candidates or even political parties, a church is more likely to risk violating the law.

3. Gray Areas

Although the IRS has issued clarifying guidelines on permitted and proscribed conduct for churches, certain political activities still render confusion as to their permissibility. Two of these subjects are the endorsement of candidates by pastors and the distribution of voter guides.

Although a church may not endorse a candidate, a pastor, as an individual and private citizen, may endorse a candidate.[44] Because the pastor typically speaks on behalf of the church, however, a public pastoral endorsement of a candidate might have the appearance of a church endorsement. Further, allowing a candidate to speak to a congregation suggests an implied endorsement unless the church gives other candidates the same opportunity.[45]

A church may validly distribute a voter guide or fact sheet about a candidate's stances or votes on various issues if the literature is educational and not partisan.[46] A church may also validly distribute a "nonpartisan" voter guide and other "unbiased voter

---

41. *See* Waters, *supra* note 38, at A1.

42. *See* McCord, *supra* note 40, at 63SF.

43. *See id.*

44. *See* Waters, *supra* note 38, at A1.

45. *See id.*

46. *See* Randy Frame, *Conservative Christians in the Cross Hairs?*, CHRISTIANITY TODAY, July 14, 1997, at 58; Lehrfeld, *supra* note 38, at 350.

education material."[47] The National Council of Churches' guidelines, for example, permit churches to send unbiased questions to candidates and to distribute the responses to their congregations. In addition, a church may distribute a candidate's voting record if it presents a variety of issues without bias to a candidate or party.[48]

The IRS, however, has been far from clear or comprehensive in its guidance on what constitutes a permissible voter guide. In a 1978 revenue ruling, the IRS provided several hypothetical situations in which the publication and distribution of voter guides either satisfied or violated the § 501(c)(3) standard. Determining whether an organization has improperly participated or intervened in a political campaign, the IRS said, depends upon the "facts and circumstances of each case."[49] In one hypothetical demonstrating impermissible voter education activity, the IRS described an organization that had sent to candidates a questionnaire which included biased questions on certain issues. The presence of biased questions made this a prohibited political activity. In a second example of impermissible activity, a hypothetical organization concerned only with a narrow range of issues compiled a list of incumbent voting records for distribution. The narrow issue range made the activity partisan in nature and therefore impermissible.[50]

However, in a 1980 revenue ruling, the IRS described an organization that intended to publish in its monthly newsletter a summary of incumbent voting records on issues which the organization considered important. The newsletter was also to include the organization's positions on those issues and would reflect whether each incumbent's voting record was consistent with the organization's position. Otherwise nonpartisan, the newsletter would not contain any express or implied endorsements or rejections, would not include references to challenger candidates, and would point out the "limitations of judging the qualifications of an incumbent on the basis of a few selected votes."[51] Though the publication in the 1980 fact pattern—like the hypothetical in the 1978 revenue ruling—contained only a narrow range of issues, the IRS ruled that printing such a newsletter did not constitute impermissible political activity.[52] Basing her opinion on the 1980 ruling, one commentator noted that some activity

47. Waters, *supra* note 38, at A1.
48. *See* McCord, *supra* note 40, at 63SF.
49. Rev. Rul. 78-248, 1978-1 C.B. 154.
50. *Id.* at 155.
51. Rev. Rul. 80-282, 1980-2 C.B. 178-79.
52. *Id.*

designed to influence voters is clearly now permitted; however, organizations have not been given any "indication of which combination of the many qualifying facts is dispositive," and are left to guess whether their particular activities are acceptable.[53]

Determining whether a voter guide distributed by a charitable organization is educational, nonpartisan, and unbiased is often rather difficult in light of the flexible but imprecise "facts and circumstances" standard. Given the absolute prohibition on participation in political campaigns and the difficulty in determining whether voter education materials constitute impermissible political activity, the widespread distribution of Christian Coalition voter guides in churches poses some interesting and potentially problematic implications. The next Part discusses some contemporary controversies which illustrate these problems.

III. Contemporary Controversies

Several contemporary controversies surrounding political campaign and election activity by § 501(c)(3) religious organizations serve to illustrate the problems posed by current law. The prohibition on electioneering for or against political candidates threatens churches with revocation of their tax-exempt status and very likely contributes to a "chilling effect" on religious and political expression. The controversies mentioned at the beginning of this Note are now explained in more detail.[54]

---

53. Carroll, *supra* note 31, at 245.

54. Several other organizations have engaged in activity that would be prohibited, or at least questionable, under § 501(c)(3). Such organizations include the New Psalmist Baptist Church of Baltimore, where Maryland Democratic Representative Elijah Cummings solicited campaign contributions for the 1998 campaign; the Hsi Lai Buddhist Temple in Los Angeles, which hosted Vice President Gore's infamous fundraiser in 1996; and the Old Time Gospel Hour, televangelist Jerry Falwell's broadcast ministry which solicited contributions for a political action committee to support certain congressional candidates in the mid-1980s. *See* Kevin Fedarko, *The Foreign Foul-Up*, TIME, Oct. 28, 1996, at 42 (Hsi Lai Buddhist Temple); *IRS Fines Falwell Group for Political Acts*, TAX EXEMPT ORGANIZATIONS, Apr. 19, 1993, at 415 (Old Time Gospel Hour); Alan C. Miller & Lisa Getter, *Clinton's Appearance Triggers New Church-State Controversy*, L.A. TIMES, Dec. 29, 1998, at A5 (New Psalmist Baptist Church); Gustav Niebuhr, *Court Upholds Ruling by IRS to Revoke Tax Exemption for Church*, SAN DIEGO UNION-TRIB., Apr. 1, 1999, at A8 (Hsi Lai Buddhist Temple). These organizations and their activities are not otherwise discussed in this Note. The controversial activities of these organizations, however, are further illustrations of the problems of an absolute prohibition on political campaign activity.

A. *Christian Coalition Voter Guides*

The Christian Coalition was first incorporated in 1989 under the leadership of evangelist Pat Robertson and conservative activist Ralph Reed. The articles of incorporation of the Christian Coalition describe the principal purpose of the organization: "to encourage active citizenship among people professing the Christian faith."[55] Other purposes include defending religious freedom, "teach[ing] concern for the sanctity of life, traditional family values, . . . self reliance, opposition to tyranny, and faith in God."[56] The group initially intended to accomplish these objectives through means such as education, literature, advocacy of public policy, and citizenship mobilization.[57] In a decade, the Christian Coalition has grown dramatically to claim organized chapters in all fifty states[58] and nearly two million members nationwide.[59]

The Christian Coalition is organized as a social welfare organization under § 501(c)(4) of the Internal Revenue Code, though the IRS continues to review the Coalition's application for tax-exempt status. As previously stated in Part II.A., a § 501(c)(4) organization is *permitted* to devote a substantial amount of its activities to influencing legislation, albeit not a substantial amount to partisan political activity; is free from political campaign disclosure requirements that apply to organizations such as campaign committees; and is tax-exempt, though contributions to § 501(c)(4) organizations are not deductible.

1. Widespread Distribution of Voter Guides

Since the Christian Coalition's emergence, one of its most significant activities has been the publication and the distribution of its voter guides in churches on the Sunday prior to elections. The Coalition distributes these voter guides to citizens and churches throughout the nation, though not in every congressional district. In 1994, the Coalition distributed 33 million voter guides and utilized volunteers from 60,000 churches.[60] In 1996 and 1998, the organization surpassed the prior total by distribut-

---

55. LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS 111 (1996) (quoting CHRISTIAN COALITION, ARTICLES OF INCORPORATION (1989)).

56. *Id.*

57. *See id.*

58. *See* Pat Robertson, *Welcome Message* (last modified Apr. 8, 1998) <http://www.cc.org/publications/ca/welcome/welcome1.html>.

59. *See* David Aikman, *Pilgrims' Progress*, POL'Y REV., July 17, 1997, at 40.

60. *See id.*

ing 45 million guides.[61] One Christian Coalition leader once referred to the voter guides as "the heartbeat of the Christian Coalition."[62] Another leader described the advantages of the guides by noting, "The beauty of voter guides is the efficient and effective means by which they allow us to communicate with the electorate, educate voters, and bypass an expensive and biased media."[63]

Unlike some traditional voter guides, Christian Coalition voter guides are simpler in their format, printed on handbill flyers and typically list no more than ten issues in large print inside a simple table. Traditional voter guides typically have been more complicated, including such items as a comprehensive voting record for incumbents in a format not easily read or understood.[64] The format utilized by the Christian Coalition greatly simplified the issues for the average voter.

In compiling the candidates' positions, the Christian Coalition sends questionnaires on various issues to candidates. According to Ralph Reed, in an interview in May of 1995, if the candidate responds to the survey, the Coalition will publish that response; if the candidate fails to return the survey, Christian Coalition staff will attempt to discern the position based on a voting record.[65] Furthermore, attorneys in Washington, D.C. review the final draft of the voter guides.[66]

2. Accusations of Bias

Because of the widespread distribution of the Christian Coalition voter guides in churches and the limitations on church political activity under existing law, many churches are concerned that distributing the voter guides may rise to the level of political campaign participation. As already explained, to pass muster under the I.R.C., voter guides must be educational, nonpartisan, and unbiased.

Much controversy surrounding the Christian Coalition's voter guides has stemmed from their alleged partisan nature. Many groups have accused the Christian Coalition of designing

---

61. *See* Peter Callaghan, *If Christian Coalition Hits Its Goals, Its Clout Would Be Enormous,* MORNING NEWS TRIB. (Tacoma, WA), Oct. 19, 1997, at B10; Stephen Huba, *Churches Offer Spiritual Guidance, Voter Guides,* CIN. POST, Oct. 31, 1998, at 6A.

62. SABATO & SIMPSON, *supra* note 55, at 127.

63. *Id.*

64. *See id.*

65. *See id.* at 131, n.23.

66. *See* Sue Kiesewetter, *Christian Coalition Quiz Irks Hopefuls,* CIN. ENQUIRER, Oct. 13, 1997, at B1.

its voter guides to implicitly endorse Republican candidates in many races. Such critics have faulted the Christian Coalition's voter guides for misrepresenting candidates' positions, targeting only selected contests, placing different issues on the guides in different contests to favor the Republican candidates, and coordinating distribution with the Republican campaigns. One scholar who studied the guides accused the Christian Coalition of "systematically rigging the content of its voter guides to help Republican candidates . . . ."[67]

In 1996, the Federal Election Commission (FEC) filed a lawsuit against the Christian Coalition, alleging that its voter guides were "'illegally' coordinated with the Republican Party."[68] The FEC believed the Christian Coalition's voter guide activity amounted to "express advocacy" for certain candidates, and was therefore subject to financial disclosure and certain campaign expenditure limits.[69] The Christian Coalition responded that the lawsuit was a "completely baseless and legally threadbare attempt by a reckless federal agency to silence people of faith and deny them their First Amendment rights."[70] At the time of this writing, the Christian Coalition had filed for dismissal of the case, and the outcome had not yet been determined.[71]

3. Opposition from Americans United for Separation of Church and State

The organization that has been the most vocal opponent of the Christian Coalition and its voter guides is Americans United for Separation of Church and State. Americans United was originally founded in 1947 by Protestant clergymen to oppose government support to Catholic parochial schools. The current emphasis of the organization, which claims about 50,000 members, is to prevent churches from becoming too politically active by encouraging the IRS to audit such churches.[72]

---

67. SABATO & SIMPSON, *supra* note 55, at 139.

68. Julian Bond, *Sample Ballots from Coalition Cause an Uproar*, PHILA. TRIB., Jan. 3, 1997, at 5D.

69. For the federal case that articulated the "express advocacy" test, see *Federal Election Commission v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997). The federal election disclosure requirements are found in 2 U.S.C. § 441b(a) (1994).

70. McCord, *supra* note 40, at 63SF.

71. See *FEC Case Groundless—Christian Coalition Files for Dismissal*, (Sept. 8, 1998) <http://www.cc.org/publications/fecdismiss.html>.

72. Elizabeth MacDonald & Jacob M. Schlesinger, *Group Targets Politically Active Churches for Audits*, WALL ST. J., Mar. 20, 1997, at A18.

Barry Lynn, Executive Director for Americans United, has called the Christian Coalition "nothing but a hardball Republican political machine with a thin veneer of religiosity."[73] Furthermore, Americans United has characterized Christian voter guides as "partisan political propaganda."[74] In an attempt to offset the impact of the Christian Coalition voter guides, in 1996 Americans United undertook an effort called "Project Fair Play" in which it warned churches via mail and e-mail that they risked losing their tax-exempt status if they distributed the Christian Coalition voter guides.[75] In 1998, Americans United repeated the operation and sent 80,000 similar letters to churches.[76] Christian Coalition Executive Director Randy Tate responded with a letter of his own to pastors, criticizing the scare tactics of Americans United and arguing for the legality of the guides.[77]

4. Assessment

If the Christian Coalition voter guides are biased and in violation of the I.R.C., Coalition critics are technically correct in their assertions that churches which distribute them risk losing their tax-exempt status, though revocation of a nonprofit organization's exempt status occurs relatively infrequently.[78] Many churches believe it is their religious, moral, and civic duty to be aware of current political issues, and to take part in encouraging participation in the electoral process. For this reason, revocation of a church's tax-exempt status—on which many churches depend for financial survival—because the church distributed independently prepared and somewhat biased voter guides would seem an extremely severe, if not unconstitutional, measure. In some situations, a voter guide will clearly portray some candidates more favorably than others because of the religious or political positions of the church and its parishioners. In such situations, some churches certainly will be more disposed than others to distribute the guides. Given the high value we place on

73. Thomas B. Edsall, *Robertson: Christian Coalition Should Emulate Tammany Hall*, WASH. POST, Sept. 18, 1997, at A2.

74. Pat Gilliland & Susan Parrott, *MetroChurch's Role in Election Questioned*, DAILY OKLAHOMAN, July 4, 1997, at 1.

75. *See* MacDonald & Schlesinger, *supra* note 72, at A18.

76. *See* Penny Bender, *Christian Coalition Sounds Off*, TENNESSEAN (Nashville), Nov. 1, 1998, at 2D.

77. *See* Liz Szabo, *Distribute Voter Guides at Risk of IRS, Churches Told Coalition Could Cost Churches Tax Exempt Status, Group Claims*, VIRGINIAN-PILOT & LEDGER-STAR, Oct. 29, 1998, at A1.

78. For example, from 1991 to 1992, the IRS revoked the tax exemption of just sixty organizations; only five of these revocations resulted from political activity. *See* Frame, *supra* note 46, at 58.

religious and political liberties, however, a limitation on voter guide content is quite disturbing. The voter guide controversy shows the inherent problems of conditioning tax-exempt status on refraining from political campaign activity. Alternative solutions to this problem are proposed in Part VI.

B. *Church at Pierce Creek, Vestal, New York*

Another recent controversy involving political activity by a religious organization also highlights the problem. In 1992, the Church at Pierce Creek in Vestal, New York ran an advertisement in *USA Today* and *The Washington Times* headlined "Christians Beware" which implied that voting for Bill Clinton would be a sin, given then-candidate Clinton's position on abortion, homosexual rights, and condom distribution in public schools. The ad also solicited readers for tax-deductible contributions to pay for the ad.[79] The church's pastor maintained, "We didn't violate the laws because we feel it's our role to warn people about participation in sin."[80]

The IRS felt otherwise and revoked the church's tax-exempt status in January 1995, making it retroactive to January 1992.[81] The church appealed the ruling in court, and won a preliminary round in federal district court, where the judge found support for the church's claim that it had been treated differently from other churches that engaged in political activity.[82] However, arguments were heard on October 29, 1998 as the church sought to have its tax-exempt status reinstated.[83] On March 30, 1999, the district court decided in the IRS's favor and denied the church's selective prosecution, free exercise, and political expression claims, finding "no other instance in which a church so brazenly claimed responsibility for a political advertisement in a national newspaper and solicited tax-deductible donations for that political advertisement."[84]

Jay Sekulow, attorney for the American Center for Law and Justice, which is representing the Church at Pierce Creek, argued

79. *See* Jim Drinkard, *Judge Backs IRS in Tax Fight over Church's Ads*, USA TODAY, Apr. 1 1999, at 1A.

80. MacDonald & Schlesinger, *supra* note 72, at A18.

81. *See id.*

82. *See* Branch Ministries, Inc. v. Richardson, 970 F. Supp. 11, 15 (D.D.C. 1997); Frank J. Murray, *Church Wins Round Against IRS After It Lost Tax Exemption*, WASH. TIMES, July 15, 1997, at A8.

83. *See* Ira Rifkin, *Attorneys Argue 'Landmark' Church Political Ads Tax Case*, Relig. News Serv., Nov. 2, 1998, *available in* 1998 WL 7661666.

84. Branch Ministries, Inc. v. Rossotti, 1999 U.S. Dist. LEXIS 4279, at *17 (D.D.C. Mar. 30, 1999); *see also* Drinkard, *supra* note 79, at 1A.

that the church did not violate the law because no financial benefit accrued to any political campaign. Furthermore, Sekulow argued that the ad "did not tell people whom to vote for, only that voting for Clinton would be a sin."[85] Sekulow promised to appeal the district court's ruling.[86] Both Sekulow and Richard Hammar, editor of the *Church Law and Tax Report*, doubt the constitutionality of the § 501(c)(3) restriction on political campaign intervention. "The Church at Pierce Creek may have crossed over the line, but it's a highly questionable line to begin with from a legal perspective," Hammar stated.[87] Like the Christian Coalition voter guide activity, the Church at Pierce Creek situation, though not completely resolved, demonstrates the problems posed by the political campaigning restriction in light of religious freedom.

C. *Reverend Jesse Jackson's 1988 Presidential Campaign and Black Churches*

Reverend Jesse Jackson's 1988 presidential campaign for the Democratic Party's nomination provides a third example of church political activism that encountered § 501(c)(3) difficulties. A leader in the black community and a previous presidential candidate in 1984, Jackson relied heavily on black churches and ministers for political and financial support in his 1988 campaign, enlisting an army of over 1500 clergy. These ministers provided Jackson with manpower and facilities for a wide variety of campaign services, including telephone banks and publicity events.[88]

Jackson also relied on these ministers and churches to organize a fundraising drive on January 31, 1988, the same Sunday as the National Football League's Super Bowl. Dubbed "Super Sunday," the campaign distributed posters and flyers in advance, requesting that church members bring campaign donations on Sunday; approximately 500 churches participated.[89] Collections were taken separately from the regular church offerings.[90]

The Jackson campaign drew criticism from both Americans United and People for the American Way, who characterized the

85. Frame, *supra* note 46, at 58.

86. Drinkard, *supra* note 79, at 1A.

87. Frame, *supra* note 46, at 58.

88. *See* Michael K. Frisby, *Black Clergy Play Key Role in Tuesday Vote*, BOSTON GLOBE, Mar. 6, 1988, at 22.

89. *See* David Treadwell, *'88 Church Drive Still On*, L.A. TIMES, Jan. 30, 1988, at 24.

90. *See id.*

practice as illegal. Jackson defended the legality of the event, so long as the contributions came from individuals and not the churches themselves.[91] Americans United reported the activity to the IRS and asked for an investigation.[92]

Although Reverend Jackson's presidential campaign may be the most visible example of the activism of black churches in political campaigns, black church involvement is widespread and frequent in state and local political contests as well.[93] Given that blacks have tended to vote overwhelmingly Democratic since the 1940s,[94] this involvement usually benefits Democratic candidates. Historically, black churches have inserted themselves into political campaigns to a much greater extent than white churches.[95] This political activity results from the church's historical central role in the black community. "For decades, churches were the only organizations that were tolerated for blacks."[96] Having suffered under slavery for decades and under segregation and racism for several more, the church served as the one institution where blacks could find acceptance.

According to Reverend Cameron M. Alexander, an Atlanta minister, the black church has meant everything to blacks: "It has been the black person's bank, the black person's chamber of commerce, the black person's Lion's Club[;] it's the black person's Sears and Roebuck; it's the black person's hospital; it's the place where you go when your rent is behind and you are about

---

91. *See Jackson to Pass Hat at Churches; Groups Say Political Effort May Be Illegal*, ORANGE COUNTY REG., Jan. 28, 1988, at A14.

92. *See IRS Asked to Probe Church Campaign Gifts*, S.F. CHRON., Feb. 13, 1988, at A8.

93. *See, e.g.*, Michael Booth, *Amazing Grace: Black Churches at Crossroads; Political Guidance Proffered from the Pulpit*, DENVER POST, Nov. 11, 1996, at A1; Waveney Ann Moore, *Candidates Reaching Out to Churches for Support*, ST. PETERSBURG TIMES, Mar. 19, 1997, at 1B; Patricia Rice, *Pastors Are Urged to Keep Gatherings Campaign-Free*, ST. LOUIS POST-DISPATCH, Feb. 9, 1997 at 7D; *Political Activism Runs High in Black Churches; Pastors Provide the Guiding Hand*, BALT. SUN, Jan. 12, 1992, at 1A; Peter Scott, *Churches in Politics at Tax Risk*, ATLANTA J. & CONST., Apr. 2, 1992, at D8.

94. *See* Richard Benedetto, *Trying for Black Vote, GOP Looks to Heaven*, USA TODAY, July 27, 1998, at 12A. Indeed, eighty to ninety-some percent of blacks consider themselves Democrats. *See* Tina A. Brown & David Lightman, *To Many Blacks, Justice on Trial*, HARTFORD COURANT, Oct. 8, 1998, at A1; Michael Griffin, *Where Have All the Florida Democrats Gone?*, ORLANDO SENTINEL, Aug. 30, 1998, at G1; Jim Wooten, Editorial, *Same Standard Should Apply to Both Parties*, ATLANTA J. & CONST., Nov. 11, 1998 at G5.

95. *See* Booth, *supra* note 93, at A1 (quoting Steve Klein, senior research associate at the Martin Luther King Jr. Center for Nonviolent Social Change in Atlanta).

96. *Id.* (again quoting Steve Klein).

to be put out."[97] Many black pastors view their involvement in political campaigns as their civic duty; they are looking out for their community's interest by helping the best candidate for their neighborhood.[98] This historic influential role of black churches served the civil rights movement well[99] and also has served many candidates well.

Though the black churches may view their involvement in campaigns as legitimate and crucial exercises of community responsibility, it is difficult to argue that taking up a campaign collection during a worship service does not violate the I.R.C.'s current restriction on "participating" and "intervening" in political campaigns. Thus, the extent of black church political involvement provides yet another example of religious activity that seems to conflict with the I.R.C.

D. *Catholic Pro-Life Activity and Literature*

One final controversial example of political activism by churches concerns the ongoing activity of the Catholic Church and its various associations in opposing abortion. Although § 501(c)(3) permits the Church to engage in lobbying so long as the lobbying does not constitute a substantial part of its activities, the Church has been accused of participating in the political campaigns of pro-life candidates. The controversy has existed for several years because of the Catholic Church's deeply held moral positions on abortion and the sanctity of human life.

For example, in 1980, Archbishop Humberto Cardinal Medieros of Boston, in a pastoral letter, wrote that Catholics voting for pro-choice candidates would be guilty of the "deadly sin" of abortion.[100] In another example from 1980, a Catholic newspaper in Texas published an editorial that presented the abortion positions of the presidential candidates headlined, "To the IRS—NUTS!!!" The editorial "concluded that Ronald Reagan alone was an acceptable candidate."[101]

While controversies such as these were brewing, in 1980 several pro-choice organizations and individuals filed a lawsuit against the government and the Catholic Church, challenging the Catholic Church's tax-exempt status for violating the political activity restrictions in the I.R.C. The Catholic Church was later

97. Frisby, *supra* note 88, at 22.

98. *See id.*

99. *See infra* text accompanying notes 158-60.

100. Carroll, *supra* note 31, at 220-21.

101. *Id.* at 221.

dismissed as a party to the suit.[102] The plaintiffs claimed, among other things, that the Church had "endorsed or supported pro-life political candidates and opposed pro-choice candidates by publishing articles in its bulletins, attacking or endorsing candidates from the pulpit, distributing partisan letters to parishioners, and urging its members to donate to and sign petitions of 'right to life' committees and candidates."[103] Because the IRS had not enforced the prohibition on political campaigning against the Catholic Church, the plaintiffs claimed, their own chances for electoral success were hindered: The Catholic Church had violated the law while maintaining its advantage of tax-exemption, compared to the plaintiffs, who had not similarly electioneered. The Second Circuit held that the plaintiffs lacked standing, rejecting their "competitive advocate" theory of standing, and dismissed the complaint.[104]

Despite such activity by Catholic Church organizations and officials, the National Conference of Catholic Bishops publishes voter guides of its own without engaging in some of the apparent controversial practices of the Christian Coalition. The Catholic Conference sends each candidate a questionnaire on which comments are submitted; the information is printed as received, edited only for length. Further, the Conference does not endorse any candidate and does not print the Church's positions in the guides. Candidate responses are printed in the organization's newspaper.[105]

Notwithstanding the less controversial nature of the Catholic Bishops' voter guides, much of the other activity, such as the newsletter endorsement of Ronald Reagan, would certainly violate the spirit and letter of the I.R.C. as written, even though such activities are conducted out of sincere religious convictions on a

102. *See* Abortion Rights Mobilization v. Baker (*In re* United States Catholic Conference), 885 F.2d 1020, 1023 (2d. Cir. 1989).

103. *Id.* at 1022.

104. *See id.* at 1030, 1031. Another interesting event, though not involving a specific campaign, took place in 1990, when New York Archbishop John Cardinal O'Connor issued a warning in an article in which he wrote that Catholic politicians were risking excommunication if they supported abortion rights. Excommunication for a Catholic would mean separation from the Church and from the sacraments. Then-Governor Mario Cuomo responded to O'Connor's warning, describing it as "upsetting," while Representative Charles Rangel characterized it as "mean-spirited." *See Catholic Politicians Assail Cardinal's Abortion Threat,* L.A. TIMES, June 16, 1990, at A2; Ari L. Goldman, *O'Connor Warns Politicians Risk Excommunication Over Abortion,* N.Y. TIMES, June 15, 1990, at A1.

105. *See* McCord, *supra* note 40, at 63SF.

serious moral issue. To place the Church at the risk of losing its tax-exempt status poses some serious constitutional issues.

IV. Constitutional Issues

Before assessing the constitutionality of the restriction on political campaigning against churches, it is beneficial first to review the constitutionality of the broader premise of tax exemption for religious organizations. Following the discussion of tax exemption, I examine the Supreme Court's pronouncements on the § 501(c)(3) restriction prohibiting *substantial lobbying* to gain insight into the reasoning the Court might apply to the *political campaign* restriction. After this, I assess the constitutionality of the electioneering prohibition itself.

A. *Constitutionality of Tax Exemption: The* Walz *Case*

The Supreme Court decisively upheld the constitutionality of tax exemptions granted to religious organizations in *Walz v. Tax Commission.*[106] In *Walz*, the plaintiff complained that a state property tax exemption for religious organizations violated the Establishment Clause by indirectly requiring him to support churches with his tax dollars. The Court upheld the exemption for religious organizations, calling it a neutral action that neither advanced nor inhibited religion. Writing for the Court, Chief Justice Burger held that the decision to grant the tax exemption was simply a government decision to leave religion alone and to spare it from the burden of paying taxes.[107]

Although some could argue, as the plaintiff did, that tax exemption creates an establishment of religion, the Supreme Court disagreed, maintaining that "religious tolerance and two centuries of uninterrupted freedom from taxation [have not] given the remotest sign of leading to an established church or religion . . . [and have] operated affirmatively to help guarantee the free exercise of all forms of religious belief."[108] "There is no genuine nexus between tax exemption and establishment of religion," Burger also wrote.[109] Though the Court recognized that either exemption or taxation would entail government involvement in church affairs and that government must be wary of excessive entanglement in either case,[110] it was quite clear in

---

106. 397 U.S. 664 (1970).
107. *See id.* at 673.
108. *Id.* at 678.
109. *Id.* at 675.
110. *See id.* at 674.

Walz that tax exemption for a religious organization is neither an advancement, sponsorship, nor establishment of religion.[111]

In fact, one can argue that taxation of churches violates the Free Exercise Clause of the First Amendment because it allows the government to become excessively entangled with the financial affairs of churches, and thus burdens the practice of religion. In *Walz*, Burger noted that all fifty states grant tax exemptions to houses of worship and that churches have been exempt from taxes since the country's infancy.[112] The principle of "benevolent neutrality toward churches" is "deeply embedded in the fabric of our national life."[113] Indeed, Burger noted the dangers of hostility that can accompany taxation, and that exemptions serve to "guard against those dangers."[114] Thus, *Walz* unequivocally establishes the constitutionality, propriety, and desirability of exempting religious organizations from taxation.

Another significant point about *Walz* is the position which the Court took on the question of whether a tax exemption to a religious organization constitutes a subsidy. Although the Chief Justice acknowledged the "indirect economic benefit" that churches receive from tax exemption,[115] he distinguished a tax exemption as an indirect benefit, from a grant of a money subsidy in which the government would be directly financing churches.[116] The former does not amount to government sponsorship of religion; it is rather the government decision to "[abstain] from demanding that the church support the state"; the latter approach of direct subsidies, however, would entail substantial government involvement with a church, "the kind of involvement we seek to avoid."[117] The *Walz* opinion, therefore, demonstrates the view that tax exemptions are not subsidies.[118]

---

111. *See id.* at 672, 673, 675.
112. *See id.* at 676-77 n.4.
113. *Id.* at 676.
114. *Id.* at 673.
115. *Id.* at 674.
116. *See id.* at 675.
117. *Id.*
118. *See* Derek Davis, *The Supreme Court, Public Policy, and the Advocacy Rights of Churches*, *in* THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY 101, 116 (James E. Wood, Jr. & Derek Davis eds., 1991). Though the Court in subsequent decisions has noted the similar effect of exemptions and direct subsidies, *see, e.g.*, Regan v. Taxation with Representation, 461 U.S. 540, 544 (1983) ("A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income."), it has continued to distinguish an exemption from a subsidy, *see, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 590 (1997) ("[The *Walz*] holding rested, in part, on the premise that there is a constitutionally significant difference between subsidies and tax exemptions.");

B. *Restriction on Influencing Legislation: The "Substantial Part" Test and the* Regan *Case*

Although this Note focuses on § 501(c)(3)'s prohibition on church participation in political campaigns, the Supreme Court has never ruled on the constitutionality of that provision. It has, however, issued a ruling on the parallel restriction on substantial lobbying in *Regan v. Taxation with Representation of Washington.*[119] Reviewing the Court's pronouncement in that case provides insight into how the Court might view the electioneering restriction.

In *Regan,* the IRS denied a nonprofit public interest corporation's application for tax exemption under § 501(c)(3) because the corporation had devoted a "substantial part" of its activities to lobbying. The corporation then attacked the constitutionality of the substantial lobbying restriction in court. The Supreme Court upheld the restriction as constitutional. Important to the Court's opinion was the view it took on whether exemptions are subsidies.

Justice Rehnquist, writing for the Court, declared that "[b]oth tax-exemptions and tax-deductibility are a form of subsidy" and that exemptions have "much the same effect as a cash grant. . . . In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other [nonprofit] activities . . . ."[120] Further, a government "decision not to subsidize the exercise of a fundamental right does not infringe the right."[121]

Thus, in contrast to the *Walz* opinion, the Court in *Regan* interpreted a tax exemption to be a subsidy. It viewed substantial lobbying simply as non-subsidized activity, and upheld the restriction. Had the *Regan* Court not viewed tax exemption as a subsidy, but rather as a right instead of a privilege,[122] the Court might have struck down the substantial lobbying restriction because of the doctrine of unconstitutional conditions. Under this doctrine, "the government may not deny a benefit to a person because he exercises a constitutional right."[123] However,

---

Regan, 461 U.S. at 544 n.5 ("In stating that exemptions and deductions, on one hand, are like cash subsidies, on the other, we of course do not mean to assert that they are in all respects identical.").

119. 461 U.S. 540 (1983).

120. *Id.* at 544; *see also* Davis, *supra* note 118, at 116; Howard M. Schoenfeld, *Current Tax Issues Affecting Religious Organizations* 36 CATH. LAW. 335, 340 (1996) (citing *Regan,* 461 U.S. at 544).

121. *Regan,* 461 U.S. at 549.

122. *See* Schoenfeld, *supra* note 120, at 340.

123. *Regan,* 461 U.S. at 545 (citing *Speiser v. Randall,* 357 U.S. 513 (1958)); *see also* Georges Nahitchevansky, *Free Speech and Government Funding: Does the*

because the Court in *Regan* viewed exemptions as subsidies, there was no requirement that the government pay for the lobbying activities, and the Court upheld the restriction on substantial lobbying.

C. *Assessment of Prohibiting Church Involvement in Political Campaigns*

1. Legislative History and Justifications for Restriction

Despite the fact that tax exemptions for religious organizations were originally included in the Revenue Act of 1913,[124] the specific restriction on participating in political campaigns did not appear in the tax code until 1954. At that time, then-Senator Lyndon B. Johnson added the provision as a floor amendment in an effort to curb the activities of a private foundation that was believed to have contributed indirectly to his opponent's campaign in a primary election.[125]

Though the apparent original purpose of the provision was to silence a political opponent, government bodies have since offered more official rationales. In *Taxation with Representation v. United States*,[126] the Fourth Circuit held that there is a legitimate interest in preventing tax-deductible contributions from supporting political activity by exempt charities.[127] When Congress later amended subsection 501(c) in 1987 as part of the Omnibus Budget Reconciliation Act (OBRA), it offered a rationale for the prohibition on political campaigns that the "U.S. Treasury should be neutral in political affairs."[128]

Thus, the restriction on church activity in political campaigns prevents the purported government subsidization of church political activity via tax exemptions and tax-deductible contributions.[129] Although the Supreme Court has upheld the parallel substantial lobbying restriction in *Regan*, it has never explicitly ruled on the constitutionality of the electioneering restriction.[130]

Government Have to Fund What It Doesn't Like, 56 BROOK. L. REV. 213, 223-232 (1990).

124. *See* Craig v. Commissioner, 11 B.T.A. 193, 199 (1928); Sand Springs Home v. Commissioner, 6 B.T.A. 198, 215 (1927).

125. *See* Putney, *supra* note 25, at 28 n.24. (citing BRUCE HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 281 (5th ed. 1987)).

126. 585 F.2d 1219 (4th Cir. 1978).

127. *See* Putney, *supra* note 25, at 28-29.

128. Carroll, *supra* note 31, at 228-29 (citing H.R. REP. NO. 391(II) Omnibus Budget Reconciliation Act, *reprinted in* 1987 U.S.C.C.A.N. 378, 1205).

129. *See* Putney, *supra* note 25, at 28.

130. *See id.*

2. Assessing the Constitutionality of the Electioneering Prohibition

The § 501(c)(3) restriction on political campaigns sharply illustrates the tension between the Establishment and Free Exercises Clauses. Those individuals and organizations that feel compelled, as a religious matter, to electioneer claim that the restriction is an unconstitutional violation of freedom of religion—a burden on free exercise. However, without the restriction, opponents argue that the government would be lending its hand to establishing religion by allowing and even helping to finance church politicking for candidates.

Though the Supreme Court has never issued an opinion on the constitutionality of the restraint on political activity, the Tenth Circuit ruled on the collective § 501(c)(3) provisions in the 1972 opinion of *Christian Echoes National Ministry, Inc. v. United States.*[131] In *Christian Echoes,* a religious organization that was engaged in broadcasting, publishing, and conference-hosting, had its tax-exempt status revoked by the IRS in 1964 because it had participated substantially in influencing legislation and had intervened in political campaigns for certain candidates.[132] Christian Echoes argued that the revocation of exempt status was an infringement on its free exercise rights. Although Christian Echoes won its case at the trial court level, the government ultimately prevailed in the case. Though the opinion focused mostly on the organization's activity to influence legislation, the Tenth Circuit did note that Christian Echoes had intervened in political campaigns,[133] and upheld the § 501(c)(3) provisions as constitutional. Free exercise "is restrained only to the extent of denying tax exempt status" but this was justified by a "compelling Government interest: [t]hat of guarantying that the wall separating church and state remains high and firm."[134] Neither did the § 501(c)(3) restrictions violate free speech rights, the court noted.[135]

In addition to the Tenth Circuit's opinion in *Christian Echoes,* the *Regan* opinion—because it upheld the substantial lobbying provision—might also seem to support the constitutionality of the electioneering restriction, though the plaintiff in *Regan* was a tax lobbying organization and not a church or religious organiza-

131. 470 F.2d 849 (10th Cir. 1972).

132. *See id.* at 853.

133. *See id.* at 856.

134. *Id.* at 857.

135. *See id.*

tion.[136] Because of religion's unique place in society and the separate treatment given to religious organizations in constitutional law, we cannot be certain that the Court would rule similarly for a church which wished to challenge the § 501(c)(3) electioneering prohibition, particularly in light of *Walz*.[137]

Furthermore, the true constitutionality of the measure may hinge on whether a tax exemption is a subsidy. The *Walz* and *Regan* opinions present two different perspectives on this issue, the former indicating a negative answer and the latter an affirmative one. If tax exemptions are subsidies as Rehnquist's *Regan* opinion suggested, then the exemptions would likely violate the second prong of the *Lemon* test because the principal effect of such a subsidy is to advance religion.[138] Alternatively, if an exemption is not a subsidy, one could argue that the electioneering restriction is an unconstitutional condition. Because political speech and religious exercise are fundamental rights and the § 501(c)(3) prohibition conditions tax exemption on refraining from fully exercising these rights, the provision is perhaps unconstitutional, notwithstanding the Tenth Circuit's opinion in *Christian Echoes*.

Illustrative of this principle is *Thomas v. Review Board*.[139] In *Thomas*, an employee who had voluntarily left his job because of religious beliefs was denied unemployment benefits. The Supreme Court held that the state may not compel an employee to choose between the exercise of a First Amendment right and participation in an otherwise available program. Further, the Court held that when the state conditions receipt of important benefits upon refraining from conduct which is mandated by religious beliefs, a burden on religion is imposed, and the state must prove a compelling interest to justify the restriction or must allow an exemption.[140]

In addition to the issues of subsidy and the unconstitutional conditions doctrine, the *Regan* opinion noted that the plaintiff organization could still engage in substantial lobbying if it established a separate § 501(c)(4) affiliate organization as it had utilized in the past. Though contributions to the § 501(c)(4) affiliate would not be deductible, tax exemption would be retained and contributions would still be deductible for the

136. *See* Dean M. Kelley, *The Rationale for the Involvement of Religion in the Body Politic*, *in* THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY 159, *supra* note 118, at 183.

137. *See id.*

138. *See* Davis, *supra* note 118, at 117.

139. 450 U.S. 707 (1981).

140. *Id.* at 717-18.

§ 501(c)(3) organization.[141] The concurring opinion written by Justice Blackmun, joined by Justices Brennan and Marshall, indicated that these justices would have dissented on grounds of free speech if not for the § 501(c)(4) option.[142] Although none of these justices remain on the Court today, the concurring opinion may be evidence that an absolute prohibition on political campaign participation by nonprofit organizations is not completely warranted as a constitutional matter.

Although these above-mentioned factors would weigh against the constitutionality of the electioneering restriction, few discussions of potential burdens on religion would be complete without applying *Employment Division v. Smith,*[143] one of the Supreme Court's more significant pronouncements on free exercise law. The Court in *Smith* held that a generally applicable law that has the incidental effect of burdening a religion, so long as the law was not targeting a religion, is constitutional and the government need not show a compelling interest.[144] Further, though the government may grant an exemption, it is not required to do so.[145]

Applying the *Smith* case to the § 501(c)(3) prohibition on electioneering might indicate that the restraint is valid as a generally applicable law not aimed at any one particular religion or even religion in general. Section 501(c)(3) applies to many types of nonprofit organizations and not merely religious organizations or churches. An exemption against the electioneering restriction, based on free exercise, therefore, would not likely be mandated. However, exempting churches from the provision could still be *permissible* under a *Smith* analysis.

Thus, several constitutional arguments can be made against the prohibition on participation in political campaigns, though the *Smith* and the *Christian Echoes* holdings argue in favor of its legality. In light of *Smith,* "one simply cannot say with any certainty whether the Supreme Court might use the Free Exercise Clause to invalidate the limitations on political activity set forth

---

141. *See* Regan v. Taxation with Representation, 461 U.S. 540, 544 (1983).

142. *See id.* at 553 (Blackmun, J., concurring). Although Justice Blackmun's concurrence blesses a § 501(c)(3) organization which creates a separate § 501(c)(4) organization to engage in *substantial lobbying,* we cannot be certain that the same blessing would apply if a § 501(c)(4) organization was established to engage in *political campaign activity. See* Chopko, *supra* note 32, at 184. Nevertheless, the opinion does not explicitly prohibit such a § 501(c)(4) organization.

143. 494 U.S. 872 (1990).

144. *See id.* at 878, 884-85.

145. *See id.* at 890.

in section 501(c)(3)."[146] Although the political campaign provision is not necessarily unconstitutional, neither is it clearly constitutional.

V. Churches and Political Activism: History and Rationale

Even if the § 501(c)(3) provision is legitimate as a constitutional matter—an uncertain proposition itself—the wisdom of a policy that restricts church political activity is a separate matter. In other words, simply because a legislative provision may be constitutional does not mean the provision is wise policy. In addition to the constitutional-versus-legislative policy distinction, it is important to separate the *church* policy question of whether churches should engage in political campaigns from the *government* policy question of whether churches should be absolutely barred—as a condition of tax-exempt status—from doing so. Noted scholar, former Protestant minister, and now Catholic priest Richard John Neuhaus has criticized *excessive* politicking in the church, noting that religion often does not provide clear answers to political questions and that politicizing certain issues can dilute the impact of the gospel message:

> It's bad for religion because it dilutes the credibility of the religious force. If you say, "Thus says the Lord" in respect to everything, including those things on which the Lord has not expressed [H]is will, you throw into doubt the words you have to speak when you are authorized to say, "Thus says the Lord."[147]

Neuhaus is no doubt correct that a church's message can be diluted if packaged too tightly with one political viewpoint; one can imagine many scenarios in which it might be unwise for a church to engage in a political campaign. Indeed the teachings of some churches prohibit political involvement. Nevertheless, this does not justify an absolute prohibition on church participation in campaigns—extending so far as to forbid the distribution of a voter guide that may reflect a degree of bias. This Part of the Note will briefly discuss some historical examples of church participation in political issues and campaigns. It will then explore why churches become involved in the political process and some particular policy problems presented by the current restrictions of the I.R.C.

---

146. Davis, *supra* note 118, at 113.

147. Daniel J. Lehmann, Editorial, *Politics and Religion: Line Dividing Them Has Gotten Blurred in This Year's Campaign*, Chi. Sun-Times, Sep. 25, 1988, at 45.

A. *Historical Role of Churches in the Political Process*

Contrary to the beliefs and desires of some, the Establishment Clause does not prohibit churches from participating in public debate. Churches very often articulate strong viewpoints in the public arena and have the right to do so.[148] Churches, in fact, have played an active role in the political process throughout the country's history.

For example, churches vigorously participated in the debate over slavery, an issue that dominated political discussion in the mid-1800s. Abolitionist churches in the North decried the evils of the institution, while pro-slavery churches in the South defended the practice.[149] Churches were "among the first groups in the country to oppose [slavery], and the most fervent and persistent."[150] They provided both the "moral determination" and the members for organizations such as the American Anti-Slavery Society; these churches initiated "petitions and pleas" against slavery and ultimately advocated civil war.[151] Given that the Republican Party was founded in the 1850s to oppose slavery and its expansion,[152] many religious leaders and organizations with abolitionist positions took part in partisan politics and assisted specific candidates,[153] a practice that the current I.R.C. forbids.

The temperance movement provides an historical example of intense church political involvement in the late 1800s and early 1900s. Churches led the effort to outlaw the manufacture and sale of alcohol by establishing the Anti-Saloon League, which ultimately led to the passage of the Eighteenth Amendment.[154] The fact that the Twenty-First Amendment later repealed the Eighteenth is not at issue here; the important item of note is that religious people and religious organizations were chiefly responsible for passing a law addressing a highly important political issue at the time. The constitution of the Ohio Anti-Saloon

148. *See Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970).

149. *See* Kelley, *supra* note 136, at 162.

150. *Id.*

151. *Id.* at 162-63.

152. *See* THOMAS A. BAILEY & DAVID M. KENNEDY, THE AMERICAN PAGEANT 388 (8th ed. 1987).

153. *See* Michael E. Smith, *Religious Activism: The Historical Record*, 27 WM. & MARY L. REV. 1087, 1092 (1986) (citations omitted) ("As a result of their commitments to particular causes, such as prohibition or abolition, and also because of broader allegiances, religious groups and their leaders at times have involved themselves in partisan elections. Major occasions for religious partisanship have included the presidential candidacies of Thomas Jefferson, Andrew Jackson, Grover Cleveland, William Jennings Bryan, Alfred E. Smith, and John F. Kennedy.").

154. *See* Kelley, *supra* note 136, at 161-62.

League, for example, declared that it would "combine and concentrate the various churches, temperance organizations and individuals" to oppose saloons.[155] Though the Ohio organization did not seek affiliation with a particular political party, it sought to "secure the support of the individual members and officers of all the political organizations of the state."[156] Like abolitionists, the prohibition forces utilized the assistance of churches and rallied around candidates who supported their agenda, something seemingly "prohibited" under § 501(c)(3) of today's I.R.C.

In addition to abolition and prohibition, churches were active participants in several other issues in the first 150 years of the nation. One interesting nineteenth-century political struggle in which churches were involved was the drive to ban the historical gentlemen's practice of dueling to settle arguments. Shortly after the famous duel in 1804 in which Aaron Burr shot Alexander Hamilton, preachers began delivering sermons against the practice of dueling. After much pressure from churches acting corporately, many states finally drafted legislation to criminalize the practice, and by the mid-1800s, dueling had disappeared throughout the country. One famous preacher at the time, Lyman Beecher, called on his followers to refrain from supporting candidates for political office who dueled.[157]

The civil rights movement provides probably the most prominent twentieth-century example of church involvement in political affairs. It is well-known that black churches in the South provided the infrastructure for the civil rights struggle in the 1950s and 1960s. Hubert Humphrey once remarked that the landmark Civil Rights Act of 1964 would never have passed without the support of churches and synagogues.[158] Black clergymen, including Martin Luther King, Jr., led the movement; churches financially supported the NAACP; and the movement used blatantly religious arguments in advocating civil rights.[159] The purpose of Martin Luther King Jr.'s "Letter from Birmingham Jail" was to enlist white churches in supporting the civil rights movement.[160]

155. Howard H. Russell, *The Anti-Saloon Conflict* (visited Nov. 23, 1998) <http://www.history.ohio-state.edu/projects/prohibition/Russell_on_asl.htm>.

156. *Id.*

157. *See* Kelley, *supra* note 136, at 163-64.

158. *See id.* at 161.

159. *See* Michael J. Sandel, *The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues*, 66 FORDHAM L. REV. 1, 12 (1997).

160. *See* Douglas Laycock, *Freedom of Speech That is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 802 (1996).

The point in mentioning these examples of abolition, prohibition, anti-dueling, and civil rights is not to create a comprehensive historical list of church political activism. Such a task is beyond the scope of this writing. Rather, these examples document the central role played by religious organizations in the formation of public policy. Political activism by churches for both issues and candidates is not a new phenomenon that first emerged in the last two decades.[161] On the contrary, church political activism has been part of the American political landscape since its inception and merely continues to be so today. As Mike Hammar, editor of the *Church Law and Tax Report* states, "The practice of churches and clergy engaging in political rhetoric and activity is something that predates the Constitution."[162]

B. *Justification for Church Political Activism*

While not all churches advocate participation in politics, it is certainly not an infrequent occurrence. The reasons that churches engage in politicking are many. One key justification for church involvement is the responsibility they feel to influence politics with their values. David Beckmann, a pastor who heads the Christian organization Bread for the World, which engages in lobbying efforts to combat world hunger, has said, "the Christian faith and moral teaching have implications for politics. Churches should be active in bringing those values to bear in political life."[163] Indeed, some proponents of various religious traditions, Judaism and Christianity in particular, hold that members incur an obligation to become active in the political arena.[164]

As part of their mission, churches have an interest in seeing that justice is carried out in society.[165] The result of pursuing justice as a "religious obligation" is that a collective body of believers will speak out on contemporary political issues to influence the political system with the values of the religion. "Justice is not something that can be attained solely by individuals in their relationships with other individuals, but is a systemic attri-

161. *See* Smith, *supra* note 153, at 1093-94 (citations omitted) ("[E]ven in the heyday of evangelical privatism, Southern Baptists, Methodists, and Presbyterians were propelled into the political arena by their commitment to personal reform through law, and in particular to Prohibition. They also actively promoted the election of upright Christian candidates for public office.").

162. Frame, *supra* note 46, at 61.

163. McCord, *supra* note 40, at 63SF.

164. *See* Kelley, *supra* note 136, at 168.

165. *See id.* at 175.

bute of social structures that must be attained by affecting those structures."[166]

According to Roswell P. Barnes in *Under Orders: The Churches and Public Affairs*, the Christian church "must be involved in public affairs because it must stand for God's work in the world through Christ. . . . The church has no choice but to be concerned with men's personal relations with one another . . . . The church is also concerned with what the structures and processes of society do to people . . . ."[167] In other words, it has the "responsibility to guide its members in distinguishing right from wrong, whether practical in, or out of government."[168] Hence, churches have a responsibility to be actively involved in the society to which they proclaim their message. Participation in the political arena is thus part of their religious mandate to be "salt" and "light."[169]

Another justification for church involvement in politics, though related to the obligation of churches to influence society, is to function as an intermediate institution that mediates between the government and citizens—to provide an "independent moral voice," in essence a check against government power.[170] Such a function for churches in society serves to preserve freedom by limiting the authority the state may have over the individual.[171] In this respect, then, churches serve as "autonomous communities of resistance and as independent sources of meaning."[172] By intervening in the political arena, the church becomes an important political actor that can serve as a uniquely qualified moral critic to the policies of government.

While some might question the propriety of a church's participation in politicking as a violation of the Establishment Clause, the Supreme Court validated a church's right to have a voice in society in the *Walz* case. Chief Justice Burger wrote that churches and their adherents "frequently take strong positions on public issues including . . . vigorous advocacy of legal and constitutional provisions. . . . Churches as much as secular bodies

---

166. *Id.* at 171.

167. ROSWELL P. BARNES, UNDER ORDERS: THE CHURCHES AND PUBLIC AFFAIRS 25 (1961); *see also* Kelley, *supra* note 136, at 173.

168. Tony Maggio, Editorial, *Churches Help Distinguish Right, Wrong*, DAILY OKLAHOMAN, July 26, 1997, at 6.

169. *Matthew* 5:13-16. Christ's explanation to His followers that they are the "salt of the earth" and the "light of the world" captures His directive to make a difference for His sake in a world of evil and darkness.

170. CARTER, *supra* note 11, at 36-37.

171. *See id.* at 38.

172. *Id.* at 40.

and private citizens have that right."[173] Indeed, in *Harris v. McRae*,[174] the plaintiffs argued that a law which included restrictions on abortion was unconstitutional because its passage had been influenced by religious organizations. The Supreme Court resoundingly rejected this argument, writing that a law is not unconstitutional solely because it coincides with the religious beliefs of a church.[175]

Along similar lines, in 1941 the Third Circuit considered whether it could deny a tax deduction for a bequest made to a religious organization because the organization had tried to influence legislation, an activity that the tax commissioner considered non-charitable. The Court responded in the negative, and wrote that it was "perfectly natural" for the religious not only to attempt to influence others, but to seek to "secure the sanctions of organized society for or against outward practices thought to be essential . . . ."[176]

In his book *Religious Convictions and Political Choice*, Kent Greenawalt maintains that political activity by religious groups is constitutionally protected and should be considered "a healthy part of a liberal democracy."[177] Conceding that such activity "is sometimes divisive" he maintains that "churches and related organizations represent both particular interests that warrant advocacy and deep strains of conscience."[178]

Thus, American history and the Supreme Court have validated the right of a church and religious individuals to participate in the political debate. Furthermore, the Court has

> never held as a matter of law that it is improper, or a violation of the separation of church and state for religious leaders (or followers) to preach, teach, persuade, organize, agitate, or mobilize citizen support for (or against) public policies, or even for (or against) candidates for public offices.[179]

C. *Problems with the § 501(c)(3) Restriction*

Stephen Carter has likened the supposed "tradeoff" between tax-exemption and restrictions on political activity to a "Faustian

173. *Walz*, 397 U.S. at 670; *see also* Kelley, *supra* note 136, at 178.
174. 448 U.S. 297 (1980).
175. *See id.* at 319.
176. Kelley, *supra* note 136, at 181 (citing *Girard Trust Co. v. Commissioner*, 122 F.2d 108, 110-11 (1941)).
177. GREENAWALT, *supra* note 11, at 251.
178. *Id.*
179. Kelley, *supra* note 136, at 180.

bargain."[180] In describing such a bargain as "Faustian," he implies that the churches have sold out to the government and believes that they have now become "addicted to government aid."[181] He partially blames the churches for letting government become too involved in their affairs in their eagerness to gain exempt status. Such a bargain opens them up to regulation by the state.[182] Whether his metaphor of a bargain accurately describes the situation, it certainly illustrates the dilemma churches face regarding their ability to participate actively in the political process.

1. First Problem: Separating Deeply Held Religious Beliefs from Political Viewpoints

It is often difficult to separate people's religious views from their positions on political issues. Indeed, if such a separation were required in the public debate, it would tend to penalize the most devout of believers, because one's religious convictions and teachings are obviously vital and provide purposeful meaning to their lives. Devout individuals are likely to have stronger views on those issues which are simultaneously political and religious. "For the religiously devout citizen, faith may be so intertwined with personality that it is impossible to tell when one is acting, or not acting from religious motive . . . ."[183]

Although some may argue that citizens should exclude purely religious arguments and present arguments in only secular terms,[184] other scholars have disagreed.[185] Michael J. Perry, in discussing the role of religion in public debate, notes the importance of religiously based arguments, advocating that "we should welcome the presentation of religiously based moral arguments in all areas of our public culture, including public debate specifically about contested political choices."[186]

Given the right of religious believers to publicly present religious arguments, the contributions that religious viewpoints can make to political culture, and the centrality of religious beliefs to personality, it is unfair and often impossible to separate one's religious perspective from one's political viewpoint. Indeed, many current political issues are determined or influenced by

180. CARTER, *supra* note 11, at 147-52.

181. *Id.* at 152.

182. *See id.* at 147, 152.

183. *Id.* at 111.

184. *See generally, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM (1993).

185. *See generally, e.g.*, Laycock, *supra* note 160; Michael J. Perry, *Religious Arguments in Public Political Debate*, 29 LOY. L.A. L. REV. 1421 (1996).

186. Perry, *supra* note 185, at 1421.

religious doctrine or convictions.[187] The Catholic Church's view of abortion as objectively gravely immoral is a notable example. Other examples include the positions of various churches on homosexuality, racism, military action, and public assistance.

Individuals and churches who are unable to separate or who choose not to separate their religious convictions from their voting decisions will vote, or will encourage their congregations to vote, according to their religious doctrines. Obviously, if a political issue also concerns a moral or religious teaching of a church, these individuals will tend to vote for candidates who maintain positions that most closely coincide with their religious doctrines. Thus, "[i]t is both impossible and undesirable to completely separate religion and politics in discussing issues and national and world events."[188]

Key issues often rise to the forefront of societal debate to define an election contest. Abolition in the early and middle 1800s, prohibition in the early 1900s, civil rights in the middle and late 1900s, and abortion in the late 1900s can all claim this status. All of these issues were religious concerns, featured intense involvement by religious organizations, and became defining campaign issues; this activism by religious organizations influenced the electorate and helped to shape public policy. Such religious concerns frequently play central roles in political campaigns and become litmus-tests for individual voters and organizations in the voting decision.

2. Second Problem: Distinguishing Between Issue Advocacy and Candidate Advocacy

Under existing law a charitable organization may devote some of its activities to influencing legislation, so long as it is less than a "substantial part."[189] A charitable organization, then, is permitted to articulate opinions on public issues and attempt to influence public opinion.[190] It may advocate specific issues and distribute materials as part of its normal activities. This includes tracking voting records on substantive issues, though organizations cannot expand the distribution of materials at election time beyond their usual audiences.[191]

187. Some religions might maintain that some issues are not really political issues at all, but absolute moral issues. *See, e.g.*, Capetanakis, *supra* note 34. For purposes of this Note, this distinction will not be made.

188. Putney, *supra* note 25, at 30.

189. I.R.C. § 501(c)(3) (1994); Treas. Reg. § 1.501(c)(3)-1(b)(3)(i) (1991).

190. *See* Treas. Reg. § 1.501(c)(3)-1(d)(2) (1994).

191. *See* Lehrfeld, *supra* note 38, at 353.

Although issue advocacy is permitted, candidate advocacy is not. Participating or intervening in an election on behalf of or in opposition to a candidate is prohibited under § 501(c)(3). Such a restriction includes financial support as well as "in-kind" contributions of services, publicity, advertising, and use of facilities. This restriction encompasses the explicit and implicit endorsement of candidates and extends to the publication or distribution of literature for or against a candidate, including partisan voter guides.[192]

If a church publishes a statement that says, "Vote for candidate X," it clearly violates current law. However, determining whether a church has implicitly endorsed a candidate is more difficult. For example, if a church allows a candidate friendly to its views to speak in a Sunday morning service about her positions on the campaign issues, has it endorsed the candidate? Under IRS rules, such a practice would seem to be permissible if other candidates are offered the same opportunity.[193] Has the church made an implicit endorsement if it allows a candidate to deliver the Sunday morning sermon without mentioning the campaign? In practical effect, quite possibly, though it appears no technical violation of the law occurs. More than likely the case would be determined by applying the IRS's "fact and circumstances" standard.[194]

The same problems exist with voter guides. As discussed in Part II, a church can distribute voter guides so long as they are educational, unbiased, nonpartisan, and present a variety of issues. As noted, a church can speak out on political *issues*. A voter guide can attempt to educate by presenting candidates' positions on a variety of issues, including those of special concern to a church. Yet the voter guide might make one candidate look more favorable to a church based on her positions. The voter guide might look like an implied endorsement to some individuals, but could be considered unbiased and nonpartisan by others; the situation could legitimately be argued either way. Again, one might need to resort to the "facts and circumstances" standard.

Thus, the line between advocating issues and candidates is a rather murky one. Consider three situations in which a minister engages in the following actions: (1) encourages his church to oppose abortion and to vote in the upcoming election; (2) encourages his church to vote for pro-life candidates; (3) encour-

---

192. *See id.* at 344-45, 349-50.

193. *See id.* at 351.

194. *See* Rev. Rul. 78-248, 1978-1 C.B. 154; *supra* text accompanying note 49.

ages his church to vote for candidate X, who opposes abortion. The effect in the three situations is substantially the same, although the law treats them differently. Under existing law, scenario one is clearly legal and scenario three is clearly illegal. Scenario two is a gray area, though it is perhaps legal because no specific candidate is involved. The three hypotheticals illustrate that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application."[195] The reason for this is because "[d]iscussion of issues and events inevitably involves political candidates."[196]

D. *Assessing the § 501(c)(3) Restriction as a Policy*

To summarize the foregoing discussion, a church's religious doctrine will tend to shape its stance on political issues, which in turn will influence its opinion on candidates in an election. An election may feature a clear choice, in which one candidate is viewed as taking the "right" stands on the issues, and another candidate is viewed as taking the "wrong" stands. Naturally, a church will be inclined toward the former candidate. The current polarization over the abortion issue is a prime example of this concept.

It is therefore not surprising that a church might be inclined, in a sincere attempt to carry out its view of scripture, to assist the campaign of one candidate and oppose the efforts of another candidate. However, current tax rules would restrict the church from doing this and might pose a threat to its exempt status. Should a religious organization be threatened with losing tax-exempt status because it expresses a preference for a candidate with whom it agrees on a significant moral issue such as racism or abortion, or if it expresses an opinion against the opposing candidate? Should a church be threatened with loss of its tax-exempt status if it distributes voter education literature that shows some candidates' positions as being more consistent with the church's religious teachings?

Loss of tax exemption is an unduly severe measure for churches that engage in minimal campaign activities, particularly if those activities are based on sincere moral or religious convictions. The controversies cited in Part III—church distribution of Christian Coalition voter guides, the Church at Pierce Creek's advertisement about Bill Clinton, the involvement of black churches in political campaigns, and Catholic activity in favor of

195. Buckley v. Valeo, 424 U.S. 1, 42 (1976).
196. Putney, *supra* note 25, at 30.

pro-life candidates—are all situations in which religious organizations participated in the political process out of a sense of civic, religious, or moral responsibility to influence their culture. Even if the activities resulted in overstepping the line between issue advocacy and candidate advocacy, the law should not penalize such activities when the Constitution places so great a value on religious freedom. Though an individual church must act responsibly with regard to campaign participation, it should not have to look over its shoulder for crossing a line that is a questionable boundary in the first place.

Although the I.R.C's restriction against church participation in political campaigns is absolute and the penalty for its violation is potentially severe, the standard for determining what constitutes participation in a political campaign is ambiguous. Ascertaining whether voter education literature is biased can be a difficult task, dependent on the "facts and circumstances." Questions to be considered in making a determination of bias might involve analyzing the number and types of issues placed on the guide, whether the issues are presented or questions are asked in a biased manner, whether the distributing organization's positions are included on the guide, and whether guides are regularly printed at that time.[197] These numerous factual circumstances can make a determination of bias rather complicated and serve to demonstrate the vagueness of the standard for participation in a political campaign.

One should also note that a "biased" voter guide or advertisement that allegedly favors one candidate over another, might be just as useful to the opposing candidate. For example, suppose a voter guide lists two candidates: X, who opposes the expansion of homosexual rights, and Y, who supports it. Passed out in an evangelical or fundamentalist church, candidate X will benefit more. However, changing the setting to a denominational church that advocates homosexual rights, candidate Y may be the beneficiary. Because denominations take different positions on social issues, a different church could distribute the same voter guide and make the "wrong" candidate look favorable to its parishioners. Even if such a guide was prepared to purposefully favor candidate X, candidate Y can benefit in a different setting.

---

197. *See* Rev. Rul. 80-282, 1980-2 C.B. 178-79.

VI. Alternatives

Given the lack of clarity posed by the existing prohibition against electioneering by churches, the implication for religious liberties, and the serious financial risks posed for churches who feel compelled to speak out on particular issues or candidates, Congress should strongly consider amending § 501(c)(3). Although the advantages of existing law should be considered, several other options merit discussion as well. If Congress does decide to alter existing law, it must decide also whether to alter the law only for religious nonprofit organizations or for all nonprofits. Because of the First Amendment's specific affirmation of religious freedom, perhaps Congress is warranted in implementing a separate set of laws unique to religious organizations. The discussion below does not assess the merits of altering existing law for other non-religious § 501(c)(3) organizations. Rather it addresses a change in law only with regard to *church* involvement in political campaigns.[198]

A. *Continue Current Standard*

Maintaining the current absolute prohibition on the participation by nonprofit organizations in political campaigns is certainly one course of action (or more properly, inaction). One can argue that current law has *not* produced an inordinate number of problems and that any changes would produce more complications. This argument might be summarized by the cliche, "better the devil we know than the devil we don't." Furthermore, supporters of the current restriction can argue based on the subsidy view of tax exemptions and deductions—that by allowing nonprofit organizations to participate in political campaigns, the government is contributing to partisan politics and violating its interest in neutrality.[199]

The key disadvantage of maintaining the current ban, as discussed throughout this Note, is its restrictiveness on churches who wish to participate in the political debate because of legitimate religious or community concerns and a sincere sense of obligation. Because of the financial penalty churches could suf-

198. Some may argue that separate treatment of religious organizations would violate the Establishment Clause, particularly in light of the fact that the property tax exemption upheld in *Walz* was also available to other non-religious entities. *See Walz*, 397 U.S. 664, 673 (1970). Even if such a separate scheme were unconstitutional, however, Congress could simply apply a change in the tax law to other charitable organizations. Nevertheless, the discussion that follows in the text, like this entire Note, is written with religious organizations, namely churches, in mind.

199. *See supra* text accompanying notes 124-30.

fer if they cross the line, they may withdraw from the debate, even though they can add a valuable perspective to the political landscape.[200] A further problem is the standard's ambiguity. Whether voter guides are biased or whether advertisements "intervene" in a candidate's campaign is often difficult to discern.

Hence, allowing the law to remain on the books as currently written is not the best alternative. Although the debate over the restriction on political activity will continue regardless of whether or how the law is changed, a more equitable law can be crafted for the sake of churches who feel morally compelled to speak on contemporary issues which may sometimes "dissolve" into candidates.

B. *Completely Remove Restrictions on Campaigning*

A completely opposite alternative would be to entirely eliminate the restriction on churches' intervention in political campaigns. One can argue that the current ban on electioneering has caused a chilling effect on religion. In addition, it can be argued, current law has caused excessive entanglement because the government must make a determination as to whether a church's activities have risen to the level of campaign participation. Removing the restriction would eliminate this excessive entanglement because the IRS would no longer need to monitor a reported church's activities or financial affairs.[201]

Opponents of removing restrictions might point to the *Employment Division v. Smith*[202] case and argue that the current ban on electioneering is constitutional because § 501(c)(3) should be viewed as a generally applicable law from which the government is under no duty to grant an exemption. Opponents might also contend that eliminating the restrictions would result in government improperly "subsidizing" electioneering activity, instead of maintaining its neutrality. Further, *completely* removing the restriction on electioneering could potentially open the floodgates to abuse. Organizations might incorporate on their face as religious even though the intent of the organizers might be to primarily engage in electioneering. Although this could violate another § 501(c)(3) requirement of being "exclusively religious," such scenarios might be difficult to police. Finally, regardless of how legislators might feel about the current restric-

200. *See* Davis, *supra* note 118, at 110-11; *see also supra* text accompanying notes 163-79.

201. *See* Putney, *supra* note 25, at 30.

202. 494 U.S. 872 (1990).

tions, such a drastic change—from absolute prohibition to absolute permission—might be difficult to pass politically. Perhaps a more incremental approach is warranted.

C. *Partially Remove Restrictions on Campaigning*

A third alternative is to lessen the restrictions on electioneering, allowing for *some* participation in campaigns within certain parameters. Specific options within this alternative include (1) adopting the federal election disclosure rules regarding "express advocacy"; (2) prohibiting only "substantial" participation in political campaigns; or (3) permitting a minimum quantifiable percent of revenues to be used for political campaigns, as proposed in a bill sponsored by Representatives Phil Crane and Charlie Rangel in 1996.

1. Apply Federal Election Disclosure Rules

The IRS regulations governing an organization's tax-exempt status are markedly different from the Federal Election Commission (FEC) laws that govern campaign finance disclosure. Under federal election rules, an organization that speaks out on behalf of a "clearly identified" electoral candidate must disclose its expenditures if the statement, advertisement, or literature is considered "express advocacy."[203] In *Federal Election Commission v. Christian Action Network*,[204] a Christian advocacy organization ran a television advertisement in 1992 that linked Bill Clinton to a pro-homosexual agenda. The FEC sued the organization for failing to disclose its spending on the ad. However, the Fourth Circuit, in an effort to allow leeway and not to burden First Amendment rights ruled in favor of the Christian Action Network, holding that only those expenditures for communications that use explicit words of candidate advocacy come under the regulation. Because the ad did not use explicit words such as "don't vote for Clinton" it was appropriate for the organization not to disclose expenditures.[205]

As can be seen from the results in this case, the FEC "express advocacy" disclosure rule presents a brighter line between permitted and prohibited actions than the IRS rules. Adopting a

---

203. Carroll, *supra* note 31, at 259-60. Professor Laura Brown Chisholm has proposed that nonprofit organizations be prohibited only from engaging in activity that would fall under the disclosure rules of the Federal Election Campaign Act (FECA): those expenditures for activities in which the organization engaged in "express advocacy." *See* 2 U.S.C. § 441b(a); Buckley v. Valeo, 424 U.S. 1 (1976).

204. 110 F.3d 1049 (4th Cir. 1997).

205. *Id.* at 1064.

similar "express advocacy" standard and applying it to the permissibility of church conduct—as opposed to the disclosure of spending as in federal election rules—would allow wider latitude in discussing campaign issues before incurring any penalties. A church organization could distribute some "biased" voter guides that presented one candidate more favorably and still not trigger any IRS corrective action because the church would not be engaged in "express advocacy." In contrast, under current IRS rules, such an action could potentially result in IRS review and possible revocation of an organization's exempt status, though intermediate sanctions would likely be applied first.

An argument against such a standard is that it might lead to excessive implicit campaigning. Under this proposal, there would be no limit on the *quantity* of activity, only limits on the *degree*. As long as a church did not explicitly endorse or oppose a candidate, it could make as many favorable or unfavorable statements about a candidate as it wished. In the view of many people, this proposal would allow too much leeway for church politicking. Nonetheless, it would promote a more open discussion of the issues and candidates.

2. Adopt a "Substantial Part" Standard

A second alternative for allowing some church participation in campaigns would apply the same § 501(c)(3) standard currently in effect for lobbying: a church could participate in political campaigning without the threat of exempt status being revoked so long as electioneering was not a substantial part of its activities. As one critic of current law has noted, "It is far more practical to judge whether a church has engaged in substantial political campaigning than it is to absolutely ban such conduct."[206]

One key argument against this proposal would be the problem of the "substantiality" determination. When do the activities of a church become substantial? The IRS might need to resort to a "facts and circumstances" standard, which could lead to criticisms of discriminatory application of the standard.[207] The IRS would likely have to develop some criteria for determining what constitutes "substantial."

206. Putney, *supra* note 25, at 30.

207. *See* Branch Ministries, Inc. v. Richardson, 970 F. Supp. 11, 15-16 (D.D.C. 1997).

3. Crane-Rangel Amendment: The Five Percent Rule

In an effort to alleviate the constitutional and enforcement difficulties posed by the prohibition on electioneering and the difficulties in determining whether a substantial amount of activity is devoted to lobbying, in 1996 Representatives Philip Crane, Republican of Illinois, and Charles Rangel, Democrat of New York, proposed the Religious Political Freedom Act. This Act, if passed, would have amended § 501(c)(3) of the Internal Revenue Code to permit churches to spend up to five percent of their gross revenues on political campaigning (for or against candidates) and up to twenty percent of their revenues on influencing legislation, so long as the combined amount spent on electioneering and lobbying does not exceed twenty percent.[208] As proposed, the scope of the bill would be limited to churches; other nonprofit organizations would not be eligible.[209] One of the advantages of such an amendment is that allegations of electioneering, including the distribution of biased or partisan voter guides, would not risk the loss of the church's tax-exempt status in most situations, unless the church had engaged in enough campaigning to surpass the threshold dollar amount.

Crane argues that a minimum amount of political activity is appropriate. "Is allowing a candidate to come into a church to speak from the pulpit, or allowing a meeting of a candidate's volunteers in the church basement, really something we want to prohibit?"[210] Citing religious freedom concerns, Crane writes:

> With an ambiguous law and news stories such as those describing the fate of the Church at Pierce Creek, churches understandably are intimidated. The well-intentioned actions of a single church member could endanger the entire congregation.
>
> . . . The Religious Political Freedom Act seeks to expand participation in the political process. Allowing churches to exercise their First Amendment rights without fearing the loss of their tax-exempt status is not a partisan issue. America's churches are as politically diverse as their

208. Bill Tracking Report, H.R. 2910, 104th Congress, 2d Session, LEXIS-NEXIS (Jan. 31, 1996); *see also* Philip M. Crane, *Q: Should Churches Be Able to Lobby Congress and Support Candidates? Yes: Churches Have a Constitutional Right to Promote Candidates They Endorse,* INSIGHT MAG., Nov. 18, 1996, at 24; Laurie Goodstein, *Church Leaders Grow Anxious About IRS Scrutiny of Politics,* COM. APPEAL (Memphis, TN), June 1, 1996, at A13; Joan Lowy, *National Tax-Exempt Groups Come Under Fire for Lobbying,* PLAIN-DEALER (Clev.), Feb. 9, 1997, at 22A.

209. *See* Crane, *supra* note 208, at 24.

210. Eliza Newlin Carlin, *Rites Fight: 'God's Laws' v. the IRS's,* NAT'L. J., June 15, 1996, *available in* 1996 WL 10107786.

> membership. With the modest legislative change I am proposing, the primary function of churches will remain religious, not political.[211]

Crane thus sees his proposal as a means to protect freedom of religion and the religious character of churches as well as a means to eliminate controversy when some campaign involvement takes place in a church.

Crane also asserts that enforcement of the *current* prohibition on political campaigning by churches can easily be influenced by partisan politics, resulting in Democratic administrations enforcing the rules more strictly against Republican-friendly churches and vice versa.[212] Despite the introduction of the Religious Political Freedom Act, the measure never came out of committee during the 104th Congress, and a similar provision was not reintroduced in the 105th Congress.

4. Assessment

Any of these three "partial" options would provide at least some relief for churches that believe it is their duty to influence society through civic participation. Although the first option, adopting the FEC "express advocacy" standard, differs in effect from the latter two, all three alternatives would likely be an improvement over existing law. Each of the policies would allow a church to distribute voter guides without fear of losing its tax-exempt status because of arguably biased statements about a candidate. A church also would have the right to prepare voter guides that included a very limited scope of issues.

All three alternatives would allow a church more freedom to discuss candidate stances on controversial issues like abortion. The second and third options would even allow a church to urge members to vote for particular candidates. The lessening of restrictions would provide churches relief from what may be infringements on their free exercise and free speech rights. Further, such a policy would seem to be consistent with the Court's opinion in *Regan* on the substantial lobbying prohibition, because churches could more easily participate in the political process, but with limits. Airing campaign ads, engaging in political discussion, and supporting certain candidates with similar concerns or backgrounds would be permissible for a church, though not necessarily wise. Yet, because a church still would be limited in the extent to which it could engage in electioneering,

---

211. Crane, *supra* note 208, at 24.

212. *See* Carlin, *supra* note 210; *see also* Branch Ministries, Inc. v. Richardson, 970 F. Supp. at 15-16.

fears of encroaching too closely upon the separation of church and state would be alleviated. A lessening of the restrictions without an absolute removal also would be more feasible politically, because this would reduce concerns about widespread abuse by churches who engage in substantial politicking.

Arguments against partially easing the restrictions on electioneering include the same concerns as mentioned for the complete removal of restrictions, but to a lesser extent: Establishment Clause concerns and the potential for abuse. Society would undoubtedly require time to adjust to the new rules, especially in cases in which churches crossed the new brighter, but pushed-back line. Though some individuals and organizations will oppose any measure that leads to greater church participation in the political process, the nation's history and the Supreme Court have affirmed the right of churches to speak vigorously on public issues.[213]

CONCLUSION

Section 501(c)(3) of the I.R.C. currently conditions tax exemption for religious organizations on refraining from participating in political campaigns. Many churches, however, feel obligated to influence society by engaging in the public debate. Such religious participation can add value to the political process and enhance the quality of public discussion. Very often, churches will take strong positions on certain issues that are simultaneously religious and political. These positions lead them to favor those candidates advocating the same positions.

Under current law, however, campaigning by a church for a candidate is illegal, potentially threatening a church's tax-exempt status. Technically, the prohibition against electioneering encompasses such activities as distributing biased voter guides. Because the Supreme Court has never ruled on the I.R.C.'s provision forbidding participation in political campaigns for candidates, the measure's constitutionality is uncertain; it may depend in part on whether the policy of tax exemptions and deductible contributions should be considered a subsidy or merely a decision to leave churches alone, lest the free exercise of religion be inhibited.

Even if the § 501(c)(3) measure is constitutional, it is not sound public policy because it restricts the ability of some key actors in society from fully participating and contributing to the political process. Churches exist in part to teach morality and

213. *See* Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970).

influence behavior. Though it may not always be wise for a church to become politically active, at times a church will feel compelled to become involved in its pursuit of justice. Churches have, after all, played a significant part in influencing public policy and political campaigns throughout the nation's history.

The current provision in § 501(c)(3) of the I.R.C. which prohibits charitable organizations from participating in political campaigns on behalf of or against a particular candidate for public office should be amended. While completely removing the restriction is unlikely and would raise concerns about abuse and eroding the wall of separation, a partial easing of the restrictions is warranted. Though Congress has various options, it should consider implementing either: (1) an "express advocacy" rule, in which political discussion and communication are allowed, so long as the church does not engage in the literal advocacy or defeat of a candidate; (2) a "substantial part" rule, in which churches could participate in political campaigns, as long as the activities do not constitute a substantial part of the church's activities; or (3) a "five percent" rule, where a church could spend up to five percent of its revenues on political campaigning activities. Whatever course will be taken will be left to the legislators, and ultimately, to the voters. Any of these alternatives will alleviate some substantial constitutional concerns as well as some coercive conditions on religious activity. A change in the law will help reduce the possibility that a church will lose its tax exempt status because it participated in a political campaign out of a sense of religious, moral, or civic duty. In a society whose Constitution and traditions place a preeminent value on religious freedom, easing the restrictions on church participation in the political process is to be encouraged and applauded.