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# THE POLITICAL ACTIVITY RESTRICTIONS OF I.R.C. SECTION 501(c)(3) AND WHY THEY MUST GO

JAMES S. GANTHER\*

Financial contributions are the lifeblood of tax-exempt organizations. Without such support, charitable organizations would be forced either to curtail their services to the public or cease to exist.<sup>1</sup> The laws governing the tax treatment of exempt organizations are contained in section 501 of the Internal Revenue Code (I.R.C. or Code).<sup>2</sup> The provisions under this section of the Code allow various types of tax exemptions for groups organized and operated exclusively for many purposes, including religious, charitable, and educational activities.<sup>3</sup> While the issues raised in this comment are important to groups organized for many different purposes, this comment will concentrate on the effects section 501(c)(3) has on religious bodies.

Section 501 exemptions are of two general types: those entities that qualify under section 501(c)(3) of the Code are exempt from any income tax; further, those individuals who contribute to such organizations may deduct the amount of any contribution from their taxable income, as provided in section 170(a) of the Code.<sup>4</sup> Donations to section 501(c)(3) organizations are also deductible for purposes of gift taxes and estate taxes.<sup>5</sup> Religious bodies generally fall under section 501(c)(3). Groups that qualify as section 501(c)(4) organizations are likewise exempt from income tax. Those who choose to contribute to section 501(c)(4) organizations may not, however, deduct their contributions from their taxable income.<sup>6</sup> Thus, the exemption under section 501(c)(3) is the more valuable,

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1. Caron & Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J. L. & POL. 169, 178 (1985).

2. I.R.C. § 501 (1986). Regulations clarifying this section can be found in Treas. Reg. §§ 1.501(a)-1 to 1.501(k)-1.

3. I.R.C. § 501(c)(3) (1986).

4. I.R.C. § 170(c)(2)(D) (1986).

5. I.R.C. §§ 2055(a)(2), 2522(a)(2) (1986).

6. See I.R.C. § 170(c).

because it enables an organization to better attract donations that are necessary for its success.<sup>7</sup>

Tax exemptions come with restrictions designed to prevent their abuse.<sup>8</sup> These limitations, however, implicate important constitutional considerations and have given rise to substantial litigation. The situation is made even more complex when the organization involved in a tax dispute is a church.<sup>9</sup> Such a situation dredges up the problems of interpreting the free exercise and establishment clauses of the first amendment, as well as the free speech clause.<sup>10</sup>

This comment will use the example of *Abortion Rights Mobilization, Inc. v. Baker*<sup>11</sup> to illustrate the deficiencies of the relevant Code provisions. Next, the comment will dissect the infirmities inherent in section 501(c)(3). It will then discuss the proper role of the religious voice in public policy debates and the relationship between churches and the state in that area. Finally, the comment will propose a workable and coherent replacement of I.R.C. section 501(c)(3).

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7. Amended Complaint at para. 37, *Abortion Rights Mobilization v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982) (No. 80 Civ. 5590). While donations are attracted more easily if they are deductible from the donor's taxable income, the importance of deductibility is difficult to measure. The studies of Dr. Douglas M. Lawton, Publisher of *The Philanthropic Trends Digest*, indicate that tax considerations "generally come toward the bottom of the list" of reasons for charitable giving. Lawton, *Tax Reform: A Blessing or Curse for Philanthropy?*, PACE, Mar. 1987, at 75.

8. The Code provides exemption from income tax to "[c]orporations . . . organized and operated exclusively for religious, charitable . . . or educational purposes . . . no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in [including the publishing or distributing of statements], any political campaign on behalf of any candidate for public office." I.R.C. § 501(c)(3) (1986) (emphasis added).

9. *Mueller v. Allen*, 463 U.S. 388 (1983).

10. U.S. CONST. amend. I.

11. 110 F.R.D. 337, 4 Fed. R. Serv. 3d (Callaghan) 960 (S.D.N.Y. 1986). *Abortion Rights Mobilization, Inc. v. Baker* is on hold pending resolution of a contempt citation against a non-party. That case, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 824 F.2d 156 (2d Cir. 1987), *rev'd* 108 S. Ct. 2268 (1988), is currently on remand to the Second Circuit.

I. THE EXAMPLE OF ABORTION RIGHTS MOBILIZATION,  
*INC. V. BAKER*

In a case originally styled *Abortion Rights Mobilization, Inc. v. Regan* (ARM I),<sup>12</sup> the plaintiff and twenty-eight other institutional, clergy, and private party plaintiffs sued then-Secretary of the Treasury Donald T. Regan. The plaintiffs demanded revocation of the section 501(c)(3) tax exempt status enjoyed by the Roman Catholic Church in the United States (the Church).<sup>13</sup> The plaintiffs claimed that the Church violated the prohibition on political activity that accompanies section 501(c)(3) legislation and that the Secretary of the Treasury derogated his duty by failing to enforce that prohibition against the Church.<sup>14</sup>

Section 501(c)(3) affords its benefits only to those organizations that qualify as to nature and purpose and that refrain from both lobbying and political activity.<sup>15</sup> The difference between the two restrictions that section 501(c)(3) imposes is important to highlight. The first restriction is to limit the influencing of legislation, that is, lobbying. This is not an absolute prohibition; only if a "substantial" part of the organization's activities are related to lobbying will that group run afoul of the Code.<sup>16</sup> The second restriction is on "political activity." The definition of "political activity" is not always clear; the line between compliance and violation is obscure.<sup>17</sup> The prohibition on political activity is absolute, and the penalties for violating it are severe.<sup>18</sup>

Abortion Rights Mobilization's (ARM) complaint centered on the Church's activities in relation to Catholic teaching on abortion.<sup>19</sup> The plaintiffs alleged that actions such as the following constituted "political activity" within the meaning of section 501(c)(3): (1) attacks against pro-abortion candidates

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12. *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982).

13. In the initial action, the Church, identified as the United States Catholic Conference (USCC) and the National Conference of Catholic Bishops (NCCB), was dismissed as plaintiff. *Id.* at 485.

14. *Id.* at 475.

15. I.R.C. § 501(c)(3) (1982). See text quoted *supra* note 8.

16. Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (1976).

17. Note, *Religion and Political Campaigns: A Proposal to Revise Section 501(c)(3) of the Internal Revenue Code*, 49 *FORDHAM L. REV.* 536, 543-44 (1981).

18. The penalty for violating the prohibition on political activity is loss of the organization's § 501(c)(3) status. Treas. Reg. § 1.501(c)(3)-1(2) (1986). See *supra* text accompanying note 4. For an example of a proposed remedy, see A.R.M.'s amended complaint.

19. Amended Complaint, *supra* note 7, at paras. 19-29.

in parish bulletins, (2) letters from Church officials promulgated via pulpit and paper supporting pro-life candidates by name, and (3) sermons that supported or opposed particular candidates for public office based on each candidate's position on the abortion issue. The plaintiffs further contended that many priests regularly urged their parishioners to donate to right-to-life committees, to obtain pro-life literature, and to sign the nominating papers of right-to-life candidates. Moreover, the plaintiffs alleged that many of the dioceses of the Roman Catholic Church in the United States have contributed substantial sums of money to political groups that oppose abortion.<sup>20</sup>

*Abortion Rights Mobilization* has already generated four reported decisions in the Southern District of New York,<sup>21</sup> one from the Second Circuit,<sup>22</sup> and most recently one from the United States Supreme Court.<sup>23</sup> These decisions have focused primarily on procedural matters. In its last decision, the district court for the Southern District of New York levied a fine of 100,000 dollars per day against the Church for refusing to comply with a discovery order. The court stayed the fine pending appeal of the case to the Second Circuit Court of Appeals. The Church and ARM argued before that bench in June of 1986. A divided panel of the Second Circuit affirmed the lower court's contempt decision 2-1 in August of 1987.<sup>24</sup> The Church petitioned the Supreme Court for review, which it granted on December 7, 1987. The high Court heard arguments concerning the contempt order on April 9, 1988. The Supreme Court handed down its decision on June 9, 1988—a partial victory for the Church—and remanded the case to the Second Circuit.<sup>25</sup> Until the contempt issue is decided, the fine will not accumulate against the Church. Should the plaintiffs prevail on the merits, the Church faces a drastic penalty: ARM demands

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20. *Id.* at para. 28.

21. *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982); 552 F. Supp. 364 (S.D.N.Y. 1982); 603 F. Supp. 970 (S.D.N.Y. 1985); *A.R.M. v. Baker*, 110 F.R.D. 337, 4 Fed. R. Serv. 3d (Callaghan) 960 (S.D.N.Y. 1986).

22. *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 824 F.2d 156 (2d Cir. 1987).

23. *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S. Ct. 2268 (1988) (reversing 824 F.2d 156 (2d Cir. 1987)).

24. *See supra* note 22.

25. *See supra* note 23.

judgment . . . ordering the Secretary [of the Treasury] and the Commissioner [of the Internal Revenue Service] to take all actions necessary or appropriate to enforce the Code . . . including without limitation, revoking the tax exemption of the Roman Catholic Church under section 501(c)(3) of the Code, assessing and collecting all taxes due thereby, and notifying or causing the Church to notify contributors to the Church that they are not entitled to deduct such contributions on their individual tax returns.<sup>26</sup>

For its part, the Church claims that the political activity restrictions violate the Constitution and, thus, should not be used to revoke its tax exemption. In an amicus brief filed on behalf of the United States Catholic Conference and eight other American religious bodies, the Church asserted that the free speech clause "protects churches no less than other concerned citizens or groups when they engage in political speech on matters of public concern."<sup>27</sup> Furthermore, the amici contend that the Code offends both the free exercise clause and the establishment clause of the first amendment. The free exercise clause "affords additional protection against conditioning the tax status of a religious body upon surrender of the church's right to announce sincerely held religious beliefs that relate to public policy questions."<sup>28</sup> The establishment clause is implicated because it "prohibits the government from implementing a tax policy which prefers religious bodies which are silent on public issues over religious bodies which speak out on matters of public concern."<sup>29</sup>

If *Abortion Rights Mobilization* is eventually resolved in the plaintiffs' favor, the results would be far-reaching and devastating for most organizations exempt under section 501(c)(3). Not only could the existence of every group that enters the political fray be threatened,<sup>30</sup> but the crucial voice of moral

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26. Amended Complaint, *supra* note 7, at Count Five. The relief that ARM seeks, however, may run afoul of the code provisions dealing with church audits. See I.R.C. § 7611 (Supp. IV 1986).

27. Amicus Curiae Brief of National Council of Churches of Christ in the U.S.A. at 25, *Abortion Rights Mobilization, Inc. v. Baker*, 824 F.2d 156 (2d Cir. 1987) (No. 86-6092) [hereinafter Amicus Curiae Brief].

28. *Id.* at 17. Some scholars disagree with this position and claim that the free exercise clause grants no additional protection beyond what the free speech clause already grants. See, e.g., West, *The Free Exercise Clause and the Internal Revenue Code's Restrictions on the Political Activity of Tax-Exempt Organizations*, 21 WAKE FOREST L. REV. 395, 425 (1986).

29. Amicus Curiae Brief, *supra* note 27, at 25.

30. Caron & Dessingue, *supra* note 1, at 178.

vision would be stifled from political debate. Both ARM's amended complaint and the amicus brief filed in opposition to it highlight the porous nature of the political activity restrictions of section 501(c)(3) and the severity of their implications.<sup>31</sup>

## II. THE TROUBLE WITH 501(C)(3)

Section 501(c)(3) of the Code is riddled with deficiencies. Aside from the friction with the first amendment alluded to above and developed in subparts II (A), (B), and (C) below, the restrictions on political activity are also suspect because of equal protection concerns, vagueness, lack of a remedy commensurate with the significance of the offense,<sup>32</sup> and their conflict with the historic trend in tax law.<sup>33</sup> Furthermore, the effect of an active enforcement of section 501(c)(3) as written would be to exclude much of the moral discussion necessary for responsible public policy from the debate surrounding the formation of such policy.

### A. *The Free Speech Clause*

To understand a discussion of the free speech implications of the current tax Code, the activities that the Code seeks to prohibit must first be understood. The Code reflects the policy that the Treasury Department should be neutral in political affairs.<sup>34</sup> Both tax exemptions and tax deductions have the same effect in the eyes of the law as a government subsidy,<sup>35</sup> and the government does not wish to subsidize attempts to influence legislation or elections.<sup>36</sup>

The late Stanley S. Surrey of the Harvard Law School was a champion of this view of tax exemptions as actual government subsidies.<sup>37</sup> He claimed that the net effect of *not* collecting taxes ("tax expenditures"), which the government could legally exact, is identical to directly subsidizing the exempt organizations from funds collected. While this is true in a bookkeeping sense—the money ends up in the same place via

31. See *supra* notes 26 and 27.

32. For a discussion of these issues as they apply to the ARM case, see Caron & Dessingue, *supra* note 1, at 181-97.

33. Note, *supra* note 17, at 540-41.

34. *Haswell v. United States*, 500 F.2d 1133 (Cl. Ct. 1974), *cert. denied*, 419 U.S. 1107 (1975).

35. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

36. See *supra* note 34.

37. Surrey, *supra* note 35.

exemption or subsidy—a significant difference exists between the two as far as the taxpaying public is concerned. Perception is frequently more important than reality. As Professor Peter Wiedenbeck of the University of Missouri School of Law stated:

The central thesis . . . is that, because of public perceptions, some social goals *cannot* be achieved through an explicit spending program as well or better than they can be through a tax expenditure. . . . Instead of seeing special tax allowances (exclusions, deductions, credits, deferral or rate reductions) as implicit expenditures of *public funds*, most taxpayers view such allowances as *reduced government confiscation*. . . . It simply would not be politically feasible to substitute direct expenditure programs for the existing tax expenditures.<sup>38</sup>

In other words, subsidies and tax expenditures are not so neatly interchangeable as Professor Surrey assumed.<sup>39</sup>

The range of activities falling under the Code's definition of intervention in "any political campaign on behalf of any candidate" is broad.<sup>40</sup> For example, voter education programs, including the dissemination of voting records, will constitute forbidden conduct unless the issues covered are of general interest to the voting public.<sup>41</sup> To illustrate, if an exempt organization concerned with the preservation of wildlife distributed to its members a report showing how certain congressmen voted on environmental issues, that action would amount to the type of activity the Code seeks to prevent. For such a voter education effort to pass Internal Revenue Service (IRS) muster, the issues covered must be broad and those who receive the results must not be limited to a narrow group.<sup>42</sup> Neither may the questions exhibit any bias for or against cer-

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38. Wiedenbeck, *Paternalism and Income Tax Reform*, 33 U. KAN. L. REV. 675, 678-79 (1985) (emphasis in original).

39. *Id.*

40. See Rev. Rul. 78-248, 1978-1 C.B. 154. Noted constitutional scholar Laurence Tribe supports the opposite conclusion: "[T]he free exercise principle should be dominant when it conflicts with the anti-establishment principle. Such dominance is the natural result of tolerating religion as broadly as possible rather than thwarting at all costs even the faintest appearance of establishment." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1201 (2d ed. 1988).

41. See Horn & Conrad, Memorandum to the North Carolina Policy Council (September 30, 1986).

42. *Id.* See also Carron & Dessingue, *supra* note 1, at 176.



tain issues or candidates.<sup>43</sup> Lack of partisan motivation behind the styling of questions or selection of issues is immaterial.<sup>44</sup>

Oral statements supporting or opposing particular candidates are also beyond the pale of permissible behavior. "While presumably a sermon or series of sermons which touched upon political subjects would not amount to 'propaganda' as used in the statute, nothing in the statute prevents such an interpretation by the court."<sup>45</sup> An exempt organization is not entitled to publish or distribute statements,<sup>46</sup> give financial support to a campaign, or provide volunteers or facilities.

In *Christian Echoes National Ministry, Inc. v. United States*,<sup>47</sup> the Court of Appeals for the Tenth Circuit said that the prohibitions enumerated above did not violate the first amendment's free speech clause. The court in that case said that the appellee church had a simple choice: "engage in all such activities without restraint, subject, however, to withholding of the exemption or, in the alternative, the taxpayer may refrain from such activities and obtain the privilege of exemption."<sup>48</sup> While on paper that may not appear to restrict an organization's right to free speech, the judgment has that effect. If an exempt organization elects to state its position on a matter of public concern, it will lose more than its tax exemption. Because tax deductible contributions are the lifeblood of exempt organizations, a loss of that exemption could result in the demise of the organization. Thus, an exempt organization's survival could depend on its remaining mute even when that organization's purpose compels it to speak out. In short, the restrictions in section 501(c)(3) go too far to satisfy the requirements of the free speech clause of the first amendment. The Supreme Court declined to review the decision.<sup>49</sup>

When the Tenth Circuit decided *Christian Echoes*, it failed to address a Supreme Court precedent that was on point. In *Speiser v. Randall*,<sup>50</sup> the Court invalidated a provision of the California Constitution that conditioned receipt of a tax exemption on the nonadvocacy of overthrow of the government by

43. *Id.*

44. *Id.*

45. Comment, *Religion in Politics and the Income Tax Exemption*, 42 FORDHAM L. REV. 397, 420 n.172 (1973).

46. Treas. Reg. § 1.501(c)(3)-1(c)(3)(i-iii) (1986).

47. 470 F.2d 849 (10th Cir. 1972).

48. *Id.* at 857.

49. 414 U.S. 864 (1973).

50. 357 U.S. 513 (1958).

unlawful means.<sup>51</sup> The Court established the principle that the government may not withhold a public benefit because a person chooses to exercise a constitutional right. The California provision was not saved by its labelling the benefits "privileges" rather than "rights."

In situations such as that presented in *Abortion Rights Mobilization*, a strict interpretation of section 501(c)(3) would prohibit the Catholic Church from publicizing its views on a matter of great public concern and moral import, although individual Catholics could speak out on their own behalf. But this distinction runs counter to Supreme Court pronouncements on the value of political expression. The Court has acknowledged that

[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.<sup>52</sup>

Such discussion is rendered less effective when people are restricted from speaking out as part of a larger group. In the same year that the Tenth Circuit decided *Christian Echoes*, the United States Supreme Court handed down *Kusper v. Pontikes*.<sup>53</sup> In that case, a state law forbade an Illinois voter from voting in a party primary if she had voted in another party's primary within the previous two years.<sup>54</sup> In striking down that statute, the Court declared that "freedom to associate with others for the common advancement of political beliefs and rights" is a right guaranteed by the first amendment.<sup>55</sup> As written, section 501(c)(3) of the Code violates that first amendment right of assembly. The Code has the effect of stifling the type of group speech of which ARM complains, when religious views have practical political expression.

In 1976 the Supreme Court struck down the limits on individual and group campaign expenditures contained in the Federal Election Campaign Act.<sup>56</sup> The Court said that "[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the

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51. *Id.* at 529.

52. *Buckley v. Valeo*, 424 U.S. 1 (1976).

53. 414 U.S. 51 (1973).

54. *Id.*

55. *Id.*

56. *Buckley*, 421 U.S. at 1.

discussion of political policy in general or advocacy of the passage or defeat of legislation."<sup>57</sup> Yet this is the very type of protected activity that the Code has the effect of inhibiting.

Since its decision in *New York Times v. Sullivan*,<sup>58</sup> the Supreme Court has stressed a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."<sup>59</sup> In *Mills v. Alabama*,<sup>60</sup> the Court invalidated an Alabama law forbidding newspapers from endorsing candidates on election day. The decision of the Court stated that "there is practically universal agreement that a major purpose of [the first] Amendment was to protect the free discussion of governmental affairs. This of course includes discussion of . . . candidates."<sup>61</sup>

The Supreme Court applied this principle to religious bodies in *McDaniel v. Paty*.<sup>62</sup> In that case, a Tennessee statute prevented an ordained minister from holding any elected state post specifically because he was a minister. Justice Brennan wrote in concurrence:

[R]eligious ideas, no less than any other, may be the subject of debate which is "uninhibited, robust, and wide-open. . . ."

That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of its constitutional protection. The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, and political participation generally.<sup>63</sup>

In *First National Bank of Boston v. Bellotti*,<sup>64</sup> the plaintiff challenged a Massachusetts law forbidding corporations from spending money to influence voters before a referendum, if the referendum did not materially affect the corporation. Justice Powell wrote for the Court:

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57. *Id.* at 48.

58. 376 U.S. 254 (1964).

59. *Id.* at 270.

60. 384 U.S. 214 (1966).

61. *Id.* at 218.

62. 435 U.S. 618 (1978).

63. *Id.* at 640.

64. 435 U.S. 765 (1978).

In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. . . . If a legislature may direct business corporations to “stick to business,” it may also limit other corporations—religious, charitable, or civic—to their respective “business” when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment. Especially where, as here, the legislature’s suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.<sup>65</sup>

In spite of what appears to be clear guidance on the issue from the highest court in the land, the current Code does nothing to foster the type of widespread discussion that the Court seeks to encourage in our society. Neither does the Code make room for the fact that charitable organizations enjoy the same right as individuals to engage in the political fray.<sup>66</sup>

For the government to legitimately infringe on so fundamental a right as that of free speech (or, for that matter, freedom of religion or equal protection), it bears the burden of first showing a compelling state interest to be served by the infringement and then demonstrating that the means employed to achieve that end are the least restrictive possible. No such interest has been demonstrated. The claim that allowing tax deductible dollars to influence legislation goes against sound public policy is undermined by the fact that such expenses are indeed deductible under other sections of the Code. In addition, the manner of effecting the restriction of first amendment freedoms is not the least restrictive means possible. The importance the Supreme Court has placed on allowing only the least restrictive means of attaining a demonstrated compelling state interest can be seen in its decision in *Cantwell v. Connecticut*,<sup>67</sup> the first great case in modern religion clause jurisprudence. In *Cantwell*, the Court struck down an ordinance that forbade religious solicitation without a license.<sup>68</sup> The Court held that the license requirement would unduly burden the free exercise of religion, because the state could come up with a less

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65. *Id.* at 785 (citation omitted).

66. *Id.*

67. 310 U.S. 296 (1940).

68. *Id.* at 306.

restrictive means of achieving the desired end of preventing fraud.

Even assuming that a compelling state interest exists for reigning in political activity by religious groups, the penalty contained in the Code could hardly be considered the least restrictive means of attaining that end. Indeed, a restriction more total than an absolute prohibition of any political activity by a section 501(c)(3) organization, especially where "political activity" is as broadly defined as in the current Code, is difficult to imagine.<sup>69</sup>

### B. *The Free Exercise Clause*

Although the free speech considerations surrounding section 501(c)(3) of the Code are substantial, they are by no means the only constitutional infirmities affecting that section. The free exercise clause ensures that religious bodies may exercise their beliefs without fear of governmental interference.<sup>70</sup> The Supreme Court has already held that the government may not employ the taxing power to inhibit the dissemination of particular religious views.<sup>71</sup> "Preaching religious beliefs, therefore, is not only protected by the free speech guarantee of the first amendment . . . but has the additional protection of the *free exercise clause*. Thus, the right to engage in religiously motivated political proselytizing rests on a strong constitutional foundation."<sup>72</sup>

The Supreme Court has not yet decided whether the political activity prohibition of section 501(c)(3) violates the free exercise clause.<sup>73</sup> As in the case of state actions that inhibit free speech, a government regulation that places a burden on the free exercise of religion can withstand constitutional scrutiny only if that regulation serves a compelling state interest. Having already discussed the absence of any such compelling interest, the question becomes, can political activity be considered a valid exercise of religion?<sup>74</sup>

The answer to that question, without doubt, is an unqualified "yes." The National Conference of Catholic Bishops

69. Amicus Curiae Brief, *supra* note 27, at 15.

70. L. TRIBE, *supra* note 40, at 1203. For an excellent treatment of the free exercise clause, see *id.* at § 14-8.

71. *Sherbert v. Verner*, 374 U.S. 398 (1963).

72. Note, *supra* note 17, at 554.

73. Caron & Dessingue, *supra* note 1, at 189.

74. For an analysis of just what can amount to religious practice, see *Thomas v. Review Bd.*, 450 U.S. 707 (1981), and *Sherbert v. Verner*, 374 U.S. 398 (1963).

(NCCB) declared in its recent statement on political responsibility:

[I]t is the Church's role as a community of faith to call attention to the moral and religious dimension of secular issues, to keep alive the values of the Gospel as a norm for social and political life, and to point out the demands of the Christian faith for a just transformation of society.<sup>75</sup>

The Catholic Church is not the only religious body that sees a political dimension to its religious imperatives. In testimony before the House Ways and Means Committee, a witness on behalf of the United Methodist Church put forth the following opinion quoting the Methodist General Conference:

"We believe that churches have the right and duty to speak and act corporately on those matters of public policy which involve basic moral or ethical issues and questions. Any concept of church-government relations which denies churches this role in the body politic strikes at the very heart of the religious liberty. The attempt to influence the formation and execution of public policy at all levels of government is often the most effective means available to churches *to keep before modern man the ideal of a society in which power and order are made to serve the ends of justice and freedom for all people.*"<sup>76</sup>

Professor Leo Pfeffer, perhaps the pre-eminent scholar on the separation of church and state in America, takes a different view of the matter. In his opinion, *absolute* separation of church and state is the greatest guarantee of free exercise.<sup>77</sup> To his mind, American churches should not poke their noses into the affairs of Caesar, and the formation of public policy is one such affair.<sup>78</sup> Professor Pfeffer sees the principle of separation and freedom as a unitary principle.<sup>79</sup> "Notwithstanding occasional instances of apparent conflict, separation guarantees freedom, and freedom requires separation . . . religious freedom is most

75. UNITED STATES CATHOLIC CONFERENCE, POLITICAL RESPONSIBILITY: CHOICES FOR THE 1980s, A STATEMENT OF THE ADMINISTRATIVE BOARD, UNITED STATES CATHOLIC CONFERENCE 4 (rev. ed. Mar. 22, 1984).

76. *Legislative Activity by Certain Types of Exempt Organizations: Hearings on H.R. 13720 Before the House Ways and Means Comm.*, 92d Cong., 2d Sess. 303 (1972) (statement of Dr. J. Elliott Corbett, Board of Christian Social Concerns, United Methodist Church).

77. L. PFEFFER, CHURCH, STATE AND FREEDOM 727 (1967). For an opposing viewpoint, see Part III of this comment, *infra*.

78. L. PFEFFER, *supra* note 77, at 727.

79. *Id.*

secure where church and state are separated and least secure where church and state are united.”<sup>80</sup> The question of separation thus becomes where to mark the border between the realms of Church and State. The NCCB would allow participation in political activity, while such actions would lie beyond the pale of Pfeffer’s view. The Supreme Court has yet to squarely address the question and draw the line.

The Supreme Court has to date declined to define the meaning of protected religious belief or practice. In *Thomas v. Review Board*,<sup>81</sup> a member of the Jehovah’s Witnesses appealed from an Indiana Supreme Court decision denying him unemployment benefits. Mr. Thomas claimed that he quit the job manufacturing tanks, because the production of armaments violated his religious beliefs. The initial review board findings accepted his testimony. The Indiana Supreme Court reversed, saying Mr. Thomas merely made a “personal philosophical choice rather than a religious choice.”<sup>82</sup> The Indiana high court decided that Mr. Thomas’ choice was not a religious one in part because the plaintiff was “struggling” with his beliefs and he was not able to “articulate” his belief precisely.<sup>83</sup>

In reversing the Indiana decision, the Court said that “Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs. . . .”<sup>84</sup> The Court went on to hold that a person may not be compelled to choose between a first amendment right and participation in an otherwise available public benefit.<sup>85</sup> The Indiana law did not *compel* a violation of conscience. That is the effect, however, when the state conditions receipt of a public benefit on the performance of an action proscribed by a religious belief or on forbearance of an action required by a religious belief. When pressure is applied on believers to modify their behavior and violate their beliefs, “a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.”<sup>86</sup>

Thus, even *indirect* burdens on the free exercise of religion are invalid under the Constitution. The restrictions contained in section 501(c)(3) amount to such a burden. An impermissi-

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80. *Id.*

81. 450 U.S. 707 (1981).

82. *Id.* at 714.

83. *Id.* at 715.

84. *Id.*

85. *Id.* at 717-18.

86. *Id.*

ble burden on religion is clearly imposed when religious groups are forced to choose between their tax-exempt status and the opportunity to engage in political activities demanded by their beliefs. The restriction on political activity contained in section 501(c)(3) is certainly more than just an indirect burden on religion such as the one struck down in *Thomas*, and it should therefore be ejected from the Code as a violation of the free exercise clause.

### C. *The Establishment Clause*

The first amendment to the Constitution declares that Congress "shall make no law respecting an establishment of religion."<sup>87</sup> Interpreting just what that phrase means in a given situation has produced judicial headaches for nearly forty years. Chief Justice William Rehnquist has referred to "our oft-repeated statement that the Establishment Clause presents especially difficult questions of interpretation and application. It is easy enough to quote the few words comprising that [clause]. It is not at all easy, however, to apply this Court's various decisions construing the Clause. . . ."<sup>88</sup>

The establishment clause does more than forbid the actual establishment of a state church. The clause prohibits even any law *respecting* an establishment of religion. A law may be one "respecting" the establishment of religion while still falling far short of actually attaining that forbidden end.<sup>89</sup> "A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the first amendment."<sup>90</sup>

According to the Supreme Court, the establishment clause was included in the first amendment to protect against three main evils: state sponsorship of religion, state financial support to religious groups, and active involvement of the sovereign in religious activity.<sup>91</sup> To guard against these perceived evils, the Supreme Court has adopted a three-part test to measure state action to see whether that action amounts to a "law respecting the establishment of religion." First, the statute in question must have a secular legislative purpose. Second, the principle or primary effect of the legislation must not be the encourage-

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87. U.S. CONST. amend. I.

88. *Mueller v. Allen*, 463 U.S. 388, 392 (1983).

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

90. *Id.* (emphasis in the original).

91. *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).



ment or enhancement of religion. Finally, the statute must not foster an excessive entanglement of government in religion.<sup>92</sup> Given this as the current mind of the Court, section 501(c)(3) will be scrutinized under this three-pronged analysis. For state action to be valid under the establishment clause, all three tests must be satisfied.

Analyzing the legislative intent behind the insertion of the political activity restrictions into section 501(c)(3) is nearly impossible. The Supreme Court accords great deference to the legislature's stated intent when it enacts bills, provided no extrinsic evidence shows that the legislature meant something else.<sup>93</sup> This practice is of little help in the case of the political activity restrictions found in section 501(c)(3), however. As those restrictions were inserted as a floor amendment without comment, they have hardly any legislative history.<sup>94</sup> In such a situation, one may reasonably impute upon the legislature the intention to bring about the effects that would naturally follow from its enactment.

The principle of primary effect of active enforcement of section 501(c)(3) as written is far easier to ascertain. As discussed above, enforcement of the political restrictions would force an unacceptable choice upon religious bodies: refrain from religiously inspired involvement in the body politic or forfeit the tax-exempt status which contributes to the organization's success.<sup>95</sup> This clearly has the effect of inhibiting religion—one of the prime evils against which the first amendment was drafted to protect.

Although the free exercise clause provides substantial protection of conduct grounded in religious belief, not all burdens on religion are automatically unconstitutional. The state may impose some restrictions on religious liberty, provided that such restrictions are essential to accomplish an overriding governmental interest.<sup>96</sup> In past cases, religiously-motivated activities such as polygamy<sup>97</sup> and racial discrimination<sup>98</sup> have been

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92. *Lemon*, 403 U.S. at 612. For a critique of the wisdom and utility of the *Lemon* test, see Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L.J. 205 (1980).

93. *Lemon*, 403 U.S. at 613.

94. Caron & Dessingue, *supra* note 1, at 186.

95. *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 857 (10th Cir. 1972).

96. L. TRIBE, *supra* note 40, at 1251. See generally *id.* at § 14-13.

97. *Reynolds v. United States*, 98 U.S. 145 (1878).

98. *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983).

classified as involving an overriding governmental interest. It would do violence to reason, however, to place religiously motivated political speech in the same category as those practices.

Just as the establishment clause demands that the government not promote or inhibit religion in general, neither may the government favor one religion over another. The basic purpose of the establishment clause is that "no religion be sponsored or favored, none commanded, and none inhibited."<sup>99</sup> The effect of the Code is to violate this command of the Constitution. The restrictions on political speech contained therein favor religious bodies that are silent on public issues over those that speak out on matters of public concern.<sup>100</sup> As William Thompson, a former official of the Presbyterian Church, said in testimony before the House Ways and Means Committee, "[W]hen government grants tax exemption to church bodies which are silent on public issues, while denying or threatening to deny, such exemption to those which are not silent, it is discriminating for the former and against the latter in violation of the prohibition against an establishment of religion."<sup>101</sup>

That argument can cut both ways. In *Abortion Rights Mobilization*, the clergy plaintiffs claimed that the government's failure to enforce the restrictions of section 501(c)(3) against the Catholic Church violated the establishment clause. This is so, those plaintiffs insisted, because while they enjoy the same tax benefit as the Church, they do not engage in political activity for fear of losing their exemption.<sup>102</sup> The Supreme Court, however, explained in *Bob Jones* "that state action does not necessarily violate the establishment clause merely because it happens to coincide with the tenets of some or all religions."<sup>103</sup>

The final element of the Supreme Court's three-prong analysis is the prevention of "excessive entanglement" between government and religion. This condition is based on the belief that the barrier between religion and the state is better a wall high and strong than a semi-permeable membrane. The political activity restrictions in section 501(c)(3) fail this test as well.

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99. *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970).

100. Amicus Curiae Brief, *supra* note 27, at 25.

101. *Influencing Legislation by Public Charities: Hearings on H.R. 13500 Before the House Ways and Means Comm.*, 94th Cong., 2d Sess. 82 (1976)(statement of William Thompson, former official of the Presbyterian Church).

102. Amended Complaint, *supra* note 7 at 13, para. 42.

103. *Bob Jones Univ.*, 461 U.S. at 604.

The exemptions in question are not of themselves an entanglement of government in religion. As former Chief Justice Burger said, in a case concerning the tax exemptions enjoyed by religious bodies:

There is no genuine nexus between tax exemption and the establishment of a religion . . . . The exemption creates only a minimal and remote involvement between church and state and far less than the taxation of churches. It restricts the fiscal relationship between church and state, and tends to compliment and reinforce the desired separation insulating each from the other.<sup>104</sup>

Although granting tax exemptions does not constitute an excessive entanglement of government with religion, monitoring compliance with the restrictions on those exemptions would be. The case of *United States v. Dykema*<sup>105</sup> provides an example of what that entanglement looks like. In *Dykema*, a church pastor challenged the discovery the IRS demanded in an action to determine the tax-exempt status of his church, as well as his individual tax liability. On appeal to the Seventh Circuit, the court held that in connection with an investigation of whether a church has operated exclusively for religious purposes or has engaged in forbidden activity, the IRS could observe the organization's activities and receive testimony from those connected with the activities. Furthermore, the IRS could freely examine church bulletins, programs, and other publications, as well as minutes, memoranda, and financial books and records.<sup>106</sup>

This decision of the Seventh Circuit is hard to square with other Supreme Court holdings. In *Lemon v. Kurtzman*,<sup>107</sup> for example, the Court invalidated Pennsylvania and Rhode Island statutes that provided aid to non-public schools because the programs would require "restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role and the state supervision of nonpublic school accounting procedures required to establish the cost of secular as distinguished from religious education."<sup>108</sup> If such entanglement as *Lemon* forbids is too much for the Constitution to bear, then the far greater entanglement required for the strict enforcement of section 501(c)(3) as it currently exists should also be invalid.

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104. *Walz*, 397 U.S. at 676.

105. 666 F.2d 1096 (7th Cir. 1981).

106. *Id.* at 1100.

107. 403 U.S. 602 (1971).

108. *Id.* at 603.

The restrictions on religiously-motivated political activity contained in section 501(c)(3) thus fail at least two of the three relevant tests that determine a violation of the establishment clause. Section 501(c)(3) without those restrictions would be free of this constitutional infirmity. Far from amounting to an establishment of religion as the plaintiffs in *Abortion Rights Mobilization* insist, the less restrictive tax policy would widen the safety zone between the spheres of religion and government. As former Chief Justice Warren Burger opined in *Walz v. Tax Commission*:

Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious beliefs. Thus, it is hardly useful to suggest that tax exemption is but the "foot in the door" or the "nose of the camel in the tent" leading to an established church.<sup>109</sup>

Professor Pfeffer sees tax exemptions for religious bodies as more than just the camel's muzzle in the tent. He agrees with the *Walz* Court that the establishment clause means "no religion be sponsored or favored."<sup>110</sup> But, because he also subscribes to the Surrey theory that tax exemptions are actually subsidies in disguise, such exemptions amount to the very sponsorship of religion he claims the establishment clause was written to prevent.<sup>111</sup>

### III. THE ROLE OF RELIGION IN THE PUBLIC DEBATE

#### A. *The Importance of Moral Considerations*

The government may not enact any law that stifles the vitality of religious activity without a compelling state interest. Far from there being a compelling reason to limit the role of religion in the public debate, every reason exists to encourage the expression of religiously-motivated opinion. The best interests of the republic are served by fostering the participation of *all* divergent points of view in the body politic. But even

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109. *Walz*, 397 U.S. at 678.

110. *Id.* at 669.

111. L. PFEFFER, *supra* note 77.

in a debate where discussion is "uninhibited, robust, and wide-open," the voice of religion deserves special attention.<sup>112</sup>

Worth noting too is the distinction between where churches *can* participate in the body politic and where they *should*. Although churches have the constitutional right to express their religious views in public policy debates and the political process generally, the virtue of prudence dictates that they do so carefully.<sup>113</sup> The impact of religious voices can be diluted through overuse; credibility dwindles at the hands of those who cry wolf too often or in the wrong context.<sup>114</sup> When a religious body or leader condemns the Panama Canal Treaty or recognition of Mainland China as a violation of God's will, the public may question the importance of such speech. But to allow an example of one speaker's lack of prudence as "proof" is an *ad hominem* argument.

To consider the proper place of morality in the formation of public policy, one must first lay to rest two popular myths: first, that morality is strictly a private affair and, second, that policy formation should be a matter of strictly secular concern.<sup>115</sup> To slay the first dragon, the language of morality is laced with the term *ought*.<sup>116</sup> *Ought* implies action, and humans necessarily act in society. What one believes is a moral imperative will be reflected in one's actions; one's actions, in turn, will affect the surrounding society. As with morality, so too does religious belief have its outward direction. Christian Scriptures tell us that faith without action behind it is dead.<sup>117</sup> "Religion is relevant to the life and action of society. Therefore religious freedom includes the right to point out this social relevance of religious belief."<sup>118</sup> To live with morals confined within the boundaries of one's skin is nearly impossible and hardly realistic.

To say that policy formation is strictly a secular matter is also unrealistic. Moral considerations permeate nearly every significant policy question facing our society, and these factors

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112. *Symposium: The Religious Leader and Public Policy*, 2 J.L. & REL. 367 (1985).

113. McBrien, *Religion and Politics in America*, AM. MAG., Nov. 1, 1986, at 254.

114. *Symposium, supra* note 112, at 376.

115. *Id.* at 367.

116. Boyle, *A Catholic Perspective on Morality and the Law*, 1 J.L. & REL. 227 (1985).

117. *James* 2:17.

118. Vatican Council II, *Declaration on Religious Freedom*, in THE DOCUMENTS OF VATICAN II 683 n.11 (1963).

must be taken into consideration when deciding those questions. For example, fiscal policy may seem far removed from the realm of morality, or at least from any arena where religious voices may competently and prudently speak. But consider: what if that policy requires the termination of programs for the homeless, the hungry, the mentally ill? What if that policy improves our domestic economy at the expense of developing countries? To formulate policy without the input of a moral vision is to build upon a foundation with several important bricks missing. Joseph Cardinal Bernardin put it this way:

[T]he distinctive mark of human genius is to order every aspect of contemporary life in light of moral vision. A moral vision seeks to direct the resources of politics, economics, science, and technology to the welfare of the human person and the human community.<sup>119</sup>

So morality is a valid factor in the formation of public policy. But how important is this factor? Moral norms are of critical importance; such norms are the most fundamental requirements of what John Finnis calls "practical reasonableness," the most basic normative demands.<sup>120</sup> As such, they cannot be trumped by any other practical considerations. If this is true—if moral norms are the ultimate principles for practical reasonableness—then law must have its foundation in moral principles.<sup>121</sup> Thus, all law worthy of our allegiance is a moral undertaking, and all debate surrounding the formation of that law should be shot through with implicit or explicit consideration of moral values.

One could question the legitimate place of morality in the public debate when the demands of morality are often unclear. What is morally proscribed for one person may well be morally required of another. Some moral views may be common to nearly all of society, for instance, that the taking of an innocent life is wrong. Society splits, however, on the moral issue of whether abortion amounts to the taking of an innocent life. The fact remains, however, that decisions in such areas where values are not shared is a decision between competing moral visions, not between morality and amorality.

If morality has so key a role on the stage of public debate, the separation of church and state must not be seen as a means to exclude the voice of religion from that stage, because that voice most frequently focuses public attention on moral consid-

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119. *Symposium, supra* note 112, at 370 (remarks of Cardinal Bernardin).

120. J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

121. Boyle, *supra* note 116.

erations. Rather, proper separation should provide room for the insights of each religious tradition to be set forth and tested.<sup>122</sup>

The voice of morality is a necessary ingredient for the creation and continued vitality of a democratic society. A difference exists between a separation of the institutions of church and the institutions of state and the separation of religiously-based morality from discussion of public policy.<sup>123</sup>

The government must leave ample room for the expression of religious values as they apply to matters of public concern. Those who proclaim the paramount importance of moral concerns—whether religious bodies, religious leaders, or private citizens—must help foster the informed public opinion necessary for self-government. Moral voices should be more than just tolerated in the milieu; they should be given as free a rein as possible to perform a function vital to the formation of a more just society. To quote Reverend Richard J. Neuhaus, a noted church-state scholar:

The . . . public square is at best a transitional phenomenon. It is a vacuum begging to be filled. When the democratically affirmed institutions that generate and transmit values are excluded, the vacuum will be filled by the agent left in control of the public square, the state. In this manner, a perverse notion of the disestablishment of religion leads to the establishment of the state as religion.<sup>124</sup>

Joseph Cardinal Bernardin echoes this concern. In an address before the American Bar Association, he said: “[t]he exclusion of the moral factor from the policy debate is purchased at a high price not only for our values but also in terms of our interests. . . . To ignore the moral dimension of public policy is to forsake our constitutional heritage.”<sup>125</sup>

### B. *How the Government Has Accommodated Religion Through the Tax System*

Churches (as well as other kinds of organizations covered by section 501(c)(3)) are exempt from taxation because of the benefit society receives from their operation. This benefit is based on the theory that “the government is compensated for

122. *Symposium, supra* note 112, at 372 (remarks of Cardinal Bernardin).

123. R. NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* 84 (1984).

124. *Id.* at 86.

125. *Symposium, supra* note 112, at 371 (remarks of Cardinal Bernardin).

the loss of revenue by the relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare."<sup>126</sup>

Professor Pfeffer rejects this rationale for church tax exemptions. He asserts that exemptions cannot be justified by the claim that the government would have to shoulder additional burdens if exempt organizations ceased their services.<sup>127</sup> Pfeffer submits that while this may be true concerning certain social programs, such a rationale would not support exemptions for property used exclusively for worship, or the income of clergy.<sup>128</sup>

Professor Pfeffer's interpretation of the establishment clause is wrong. First, as explained in subpart II(A) above, the conception of tax exemptions on which he depends is incomplete. Not all benefits to society as a whole can be reduced to monetary terms, such as the benefit society derives from the promotion of virtue. More fundamentally, however, he fails to properly balance the two religion clauses contained in the first amendment. Either clause, taken to its logical extreme, tends to erode the other.<sup>129</sup> Professor Pfeffer places too much emphasis on the establishment clause, to the detriment of the free exercise of religion.

The federal government has recognized the tangible and intangible benefits to the general welfare that religion promotes since the very genesis of the nation. Tax exemptions for churches were not among the evils which the framers and ratifiers of the establishment clause sought to avoid.<sup>130</sup> Within a decade of the ratification of the Bill of Rights, at least four states enacted statutes granting tax exemptions for churches. In 1802, the District of Columbia—governed by the federal government—passed a bill exempting places of worship from property taxes.<sup>131</sup> Such exemptions from property tax became the norm, and today they exist in all fifty states and the District of Columbia.<sup>132</sup> Commenting on the rationale behind the Virginia Bill for Religious Liberty, Justice Hugo Black said, "[t]he people there, as elsewhere, reached the conviction that individual liberty could be achieved best under a government that was

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126. H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1939).

127. L. PFEFFER, *supra* note 77.

128. *Id.*

129. *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

130. *Id.* at 664.

131. *Id.* at 677.

132. *Id.* at 676.



stripped of all power to tax, to support, or otherwise assist any or all religions."<sup>133</sup>

Churches have been immune from income taxation as well since that tax first appeared on the national scene in 1894. In 1917, individuals were first allowed to deduct the amount of any contribution to an exempt organization from their taxable income, provided the contribution was used exclusively for the purposes for which the organization was granted the exemption.<sup>134</sup> The Revenue Code of 1926 added a similar deduction for estate taxes.<sup>135</sup>

The first hint of the coming restrictions came in 1919, when the Treasury Regulations contained a prohibition on "controversial" or "partisan" political activity.<sup>136</sup> Congress intensified that prohibition in the 1934 Code, where one of the prohibitions currently in the Code first appeared. That version of the Code introduced the prohibition against a "substantial" amount of activity directed toward the influence of legislation (that is, lobbying), or "carrying on propaganda."<sup>137</sup>

The original restrictions on political activity were created to ensure neutrality of the Treasury in political matters and to clip the wings of what one Senator described as "organizations that are receiving contributions in order to influence legislation and carry on propaganda."<sup>138</sup> In other words, some exempt organizations were becoming little more than fronts to promote the political designs of the contributor. For this reason, the restrictions applied only to those organizations that devoted a "substantial" amount of their efforts toward influencing legislation. Courts continued to employ a broad definition of the term *substantial* to avoid having to apply the severe penalty to organizations where lobbying was closely related to their exempt purpose. The statute allowed for some "play in the joints" for exempt organizations to participate in the body politic without fear of losing the tax status often necessary for their survival.

The restriction on substantial lobbying entered the Code on the heels of the Second Circuit's decision in *Slee v. Commissioner*.<sup>139</sup> In that case, the court held that the American Birth Control League's attempt to repeal anti-birth control legisla-

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133. *Everson v. Board of Educ.*, 330 U.S. 1, 11 (1947).

134. Note, *supra* note 17, at 545.

135. *Id.*

136. *Id.*

137. *Id.* at 546.

138. *Id.*

139. 42 F.2d 184 (2d Cir. 1930).

tion in the United States removed it from the Code's definition of a charitable organization, as that activity was beyond the scope of the purpose for which the exemption was granted.<sup>140</sup> The court of appeals noted, however, that in many cases such lobbying could be within the purpose of an organization's exemption. For example, a group devoted to the prevention of child abuse could support laws to achieve that end; educational institutions could lobby for state aid; literary groups could push for a relaxation of standards of censorship. In those cases, the court said, "the agitation is ancillary to the end in chief, which remains the exclusive purpose of the association."<sup>141</sup>

The absolute prohibition on campaign intervention came in 1954 as a floor amendment to the Code. Senator Lyndon B. Johnson of Texas sponsored the amendment and introduced it with little comment. Thus, no legislative history exists to clarify the precise evil it was intended to prevent.<sup>142</sup> One commentator, however, suggests that Senator Johnson introduced the amendment to frustrate the efforts of a group in Texas that he "believed had provided indirect financial support to a campaign opponent."<sup>143</sup> A similar prohibition on political activity had been voted down in the senate in 1934, at the same time that the original restrictions on "substantial" lobbying were approved.<sup>144</sup>

Whatever the reasoning behind Senator Johnson's amendment, current tax policy no longer supports it. In 1954, the Treasury Department did not allow tax exemptions for any political activity. Eight years after the enactment of the restriction on campaign activity, Congress revised section 162(e) of the Code to allow businesses to deduct expenses incurred in

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140. *Id.*

141. *Id.* at 185.

142. At the time Congress was considering the legislation that became the Internal Revenue Code of 1954, and while that legislation was before the United States Senate, Senator Lyndon B. Johnson offered an amendment to prohibit political campaign activity by charities. Although the record [88 *Cong. Rec.* 9128 (1954)] does not reflect his motive, he was unhappy because a charitable foundation in Texas was (ostensibly) channeling some funds into the campaign of an opponent and he wished to end that practice. This amendment also survived and remains embodied in I.R.C. § 501(c)(3) today with the original language.

*Lobbying and Political Campaign Activities of Tax-Exempt Organizations: Hearings Before the Subcomm. on Oversight of the House Ways and Means Comm., 100th Cong., 1st Sess. (1987) (statement of Bruce R. Hopkins).*

143. *Id.*

144. *Id.*

direct lobbying efforts.<sup>145</sup> Although the Code does not allow deductions for any campaign activity by businesses and labor unions, businesses are permitted to operate political action committees (PACs). PACs are groups established to influence legislation and support political candidates favorable to the views of the organization that established them. The income of these PACs is tax deductible, so the Code provisions have the effect of allowing business or labor organizations to deduct expenses incurred in directly attempting to influence legislation or elect particular candidates.<sup>146</sup> The option of an affiliated PAC, however, is not available to organizations exempt under I.R.C. section 501(c)(3).<sup>147</sup> And while the use of a PAC for speaking out on political matters is impossible for section 501(c)(3) religious groups, the use of a section 501(c)(4) affiliate is impracticable. To return to the *Abortion Rights Mobilization* example, the activities of which the plaintiffs complain are generally confined to the teaching and preaching associated with worship services. The notion of a priest deferring to a section 501(c)(4) representative (or identifying himself as such) whenever a sermon touched upon a moral issue with political implications should illustrate the impracticality of setting up an affiliated section 501(c)(4) to be responsible for all actions that could fall under the Code's broad definition of political activity. Such would be, in any case, a triumph of form over substance.

The trend of Congress over the past four decades has been to use the tax Code to encourage as many voices as possible to actively participate in the formation of public policy.<sup>148</sup> Given these facts, it seems that section 501(c)(3) is a step backward, because it places the voice of religiously-motivated morality at a disadvantage when competing for attention in the public square. Congress should rewrite section 501(c)(3) to eliminate its shortcomings.

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145. Note, *supra* note 17, at 548.

146. *Id.*

147. The fact that § 527 imposes a tax on the political expenditures of § 501(c) organizations and permits such organizations to establish separate segregated funds to make political expenditures does not sanction these activities by § 501(c)(3) organizations. Proposed Treas. Reg. § 1.527-f(f) (1976); see Priv. Ltr. Rul. 7904064 (Oct. 15, 1978), where the IRS held that a 501(c)(19) organization could establish a PAC because the Code and Regulations were silent as to the extent of political activity permissible for such organizations.

148. Note, *supra* note 17 at 548-551.

## IV. A PROPOSED REVISION

Congress has attempted to bring some clarity to the situation via section 501(h) of the Code. Under this provision, an exempt organization may elect to spend up to certain defined amounts on lobbying without fear of losing its exempt status.<sup>149</sup> In effect, section 501(h) defines "substantial" lobbying. But the section leaves no more room than does section 501(c)(3) for "political activity" and goes no further towards defining political activity.<sup>150</sup> Less than one percent of all charitable groups eligible to elect under section 501(h) have exercised that option;<sup>151</sup> religious groups are specifically prohibited from doing so. Section 501(h) may be a "safe harbor" but the harbor is too small and the safety it provides too little.

To create a coherent replacement for the current law the IRS should incorporate the following suggestions into the Code:

1. Limit the definition of "lobbying" to express advocacy of specific legislation. This would settle the greatest area of uncertainty concerning lobbying. Any limitation on grass roots lobbying communications short of such express advocacy should be eliminated. A communication should be deemed educational so long as it does not urge its reader to take some legislative action with respect to specific legislation. In other words, only express advocacy of specific legislation should be limited to an "insubstantial" amount of the organization's activities.

2. Define exactly what *substantial* means in this context. "Substantiality" should be measured in a simple and straightforward manner, by the percentage of expenditures actually devoted to express lobbying. "Insubstantial" expenditures could be taxed according to section 501(h).

3. Limit the definition of *intervention* in a political campaign to communications or other activities expressly supporting or opposing a particular candidate or party. This would allow charitable and educational organizations to discuss public policy issues without fear of losing tax-exempt status, so long

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149. Section 501(h), set forth below, was adopted in 1976. Regulations have yet to be published clarifying this section. I.R.C. § 501(h) (1986).

150. As Representative J.J. Pickle of the 10th District of Texas put it, "[c]lear-cut definitional rules relating to lobbying and political activity are lacking in the law, and difficult to develop. There seems to be more grey than clear areas in the law." *Lobbying and Political Campaign Activities of Tax-Exempt Organizations*, *supra* note 142 (statement of Chairman Pickle).

151. *Id.* (statement of Alan P. Dye).

as the communication takes no position with respect to whether the reader should support or oppose a particular candidate.<sup>152</sup>

The substantive changes to section 501(c)(3) should apply to all organizations exempt under that section except for religious groups. For churches, both the restrictions on lobbying and those on political activity require a separate remedy. *Black's Law Dictionary* defines *worship* to include exhortation to obedience or following of the mandates of the Divine Being.<sup>153</sup> The "offenses" that make up ARM's case against tax exemption for the Catholic Church clearly fall within this definition, and therein lies the rub.<sup>154</sup> Viewed in this light, government prohibition or taxation of such activity is certainly inappropriate, which points to the proper approach to those restrictions as they apply to churches: eliminate them.

Such an approach would seem to trade one headache for another. No longer would the IRS or exempt organizations have to ponder what is "substantial," or what behavior is forbidden. Rather, the courts would be saddled with the task of deciding what groups are properly called churches and which are merely political organizations wrapped in simulacra of religion. But the judicial system already has this task. In *Africa v. Commonwealth of Pennsylvania*,<sup>155</sup> for instance, the Court of Appeals for the Third Circuit set forth a three-part test for determining whether a plaintiff's goals are religious. The test addresses the questions of (1) whether the beliefs address fundamental and ultimate questions concerning the human condition, (2) whether the beliefs are comprehensive in nature and constitute an entire system of belief instead of merely an isolated teaching, and (3) whether the beliefs are manifested in external forms.<sup>156</sup>

Such judgments may not be easy, but are made none the less. And, they must be made, for "religious bodies are afforded additional constitutional protection precisely because of their religious character."<sup>157</sup> The free exercise clause applies only to those persons or groups whose religion is burdened. As they stand, the political restrictions of section 501(c)(3) status are a mighty burden indeed.

152. *Id.*

153. BLACK'S LAW DICTIONARY 1440 (5th ed. 1979).

154. See Amended Complaint, *supra* note 7.

155. 662 F.2d 1025 (3d Cir.), *cert. denied*, 456 U.S. 908 (1982). See also *Church of The Chosen People v. United States*, 548 F. Supp. 1247 (D. Minn. 1982).

156. 662 F.2d at 1032.

157. Amended Complaint, *supra* note 7, at 17.

## V. CONCLUSION

For the reasons set forth above, the political activity restrictions of the current version of section 501(c)(3) are unconstitutional, unwise, and in disagreement with the modern trend in tax law. The net effect of these deficiencies is a restriction of the voice of religion and its cry for moral action in the public square, which is the debate that accompanies the formation of public policy. The proposed changes in section 501(c)(3) should rectify this situation and help restore the voice of morality to its essential position in the marketplace of ideas.

The words of Oliver Cromwell to dismiss the Long Parliament apply equally well to the political activity restrictions of section 501(c)(3): "You have sat too long here for any good you have been doing. Depart, I say, and let us have done with you. In the name of God, go."<sup>158</sup>

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158. Quoted by Leo Amery, 360 *PARL. DEB. H.C.* (5th ser.) 1150 (1940).

