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**POLITICKING FROM THE PULPIT: AN ANALYSIS OF THE IRS'S
CURRENT SECTION 501(c)(3) ENFORCEMENT EFFORTS AND
HOW IT IS COSTING AMERICA**

INTRODUCTION

On February 3, 2008, former president Bill Clinton made appearances at three churches in California on behalf of wife and presidential hopeful Hillary Clinton.¹ The former president endorsed his wife, Hillary Clinton, as a potential presidential nominee and emphasized the areas of concern that both the parishioners and his wife shared: “health care, help for Iraq war veterans, education and job creation.”² In November of 2007, Ms. Clinton personally made an appearance at Saddleback Church to speak during its Global Summit on AIDS and the Church.³ All of the leading presidential candidates were invited to speak at the summit.⁴ Barack Obama, John Edwards, John McCain, Mitt Romney, and Mike Huckabee sent taped messages to be viewed by attendees and nearly all made religious references or statements.⁵ Religion certainly played a major role in the 2008 election, and many commentators believe that religion had not influenced a campaign to this extent since the 1960 election of the first Catholic, President John F. Kennedy.⁶ Mitt Romney defended his Mormon faith more than once and even gave a speech

1. Scott Martelle & Mark Z. Barabak, *Bill Clinton Is Confrontive in Visits to Black Churches*, L.A. TIMES, Feb. 4, 2008, <http://articles.latimes.com/2008/feb/04/nation/na-trail4>; see also Michael R. Blood, *Bill Clinton Courts Black Voters at Los Angeles Churches (as Hillary's Poll Lead Erodes)*, FREE REPUBLIC, Feb. 3, 2008, <http://www.freerepublic.com/focus/f-news/1964289/posts>. It is ironic that former president Bill Clinton engaged in political campaigning at a church, as a political intervention in opposition to his presidential candidacy resulted in the revocation of a church's tax exempt status in the landmark case of *Branch Ministries v. Rossotti*, 211 F.3d 137, 139 (D.C. Cir. 2000). See *infra* text accompanying notes 146, 149.

2. Blood, *supra* note 1.

3. Art Moore, *Testing the Faith: Hillary Gets Standing Ovation at Rick Warren's Summit*, WORLDNETDAILY, Nov. 29, 2007, <http://www.worldnetdaily.com/index.php?fa=PAGE.view&pageId=44818>.

4. *Id.*

5. *Id.*

6. *Candidates' Religion a Factor in 2008 Race*, CNN.COM, <http://www.cnn.com/2007/POLITICS/07/30/politics.religion.ap/index.html> (last visited Oct. 6, 2008).

specifically addressing how his faith would not affect his potential presidency.⁷ Ms. Clinton was raised as a Methodist, and said “her faith helped her repair her marriage.”⁸ John Edwards, also a Methodist, stated that his political stance on gay marriage caused an inner conflict due to his religious beliefs.⁹ Barack Obama cleared any misconception that he was Muslim, openly stated that he had a “‘personal relationship’ with Jesus Christ.”¹⁰ John McCain is an Episcopalian and stated, “I do believe that we are unique and that God loves us,” while “Mike Huckabee, an ordained Baptist minister, emphasize[d] that ‘God created the heavens and the earth. To me, it’s pretty simple.’”¹¹ Only Rudy Giuliani was reluctant to speak out about his own Roman Catholic faith believing that it was “a private matter.”¹² While past elections did not have as much of a religious undertone, it was still present. Dan Quayle spoke at a Baptist church during the 1988 presidential campaign, and Al Gore made an appearance at a church nine days prior to the 1996 election.¹³ Ministers, such as Jesse Jackson and Pat Robertson, have also run in presidential elections.¹⁴

Religious statements made by political candidates may seem inappropriate, especially to those individuals who believe religion and politics should never overlap. However, religion and politics have been overlapping throughout history, and this interplay will likely continue. From the examples above, it is clear that political candidates frequently make religious statements, but what about religious individuals or churches making political statements? The concepts of separation of church and state and church tax exemption are familiar to most, but it is doubtful that many Americans understand the degree that church conduct or speech is limited in order to maintain tax exempt status. In fact, it is nearly impossible for normal citizens to understand the rights of churches and prohibited conduct when most churches, politicians, and legal scholars have difficulty drawing bright-line rules.

7. Michael Luo, *Romney, Eye on Evangelicals, Defends His Faith*, N.Y. TIMES, Dec. 7, 2007, at A1 (“I will serve no one religion, no one group, no one cause, and no one interest A president must serve only the common cause of the people of the United States.” (internal quotation marks omitted)); see *Candidates’ Religion a Factor in 2008 Race*, *supra* note 6.

8. *Candidate’s Religion a Factor in 2008 Race*, *supra* note 6.

9. *Id.*

10. *Id.* (suggesting that the misconception may have been rooted in the facts that Barack Obama’s middle name is Hussein and that he spent some of his youth in Indonesia).

11. *Id.*

12. *Id.*

13. Frank E. Lockwood, *Churches Lobby for Right to Back Candidates: Critics Say Speech Protection Act Would Threaten Church, State Line*, LEXINGTON HERALD-LEADER, Mar. 11, 2002, at A1.

14. *Id.*

While voters focused on the political candidates leading up to the 2008 election, the Internal Revenue Service¹⁵ (IRS) focused on ways to enforce the ban on political campaigning by Internal Revenue Code (I.R.C.) § 501(c)(3) organizations.¹⁶ These organizations include charities, hospitals, schools, churches, and many others.¹⁷ To appropriately examine the current political ban, it is necessary to have a basic understanding of the history of church-state relations in the United States. This history gives context to the § 501(c)(3) ban and can be more fully understood by examining case law.

Part I of this Comment will reflect on the history of church-state relations in this country, the statutory history of I.R.C. § 501(c)(3) and developments in tax jurisprudence. Part II will analyze the current IRS enforcement effort focusing on areas of concern, including the goals of the § 501(c)(3) ban, First Amendment rights, and the efficiency of enforcement. Part III will propose an alternative to address problems that current enforcement efforts are facing.

I. HISTORY

A. *The United States and Its Founding Principles*

John Locke, the British philosopher, is credited with influencing the Founders' traditional conception of separation of church and state.¹⁸ Locke thought that government should have no influence over "matters of [individual] conscience."¹⁹ The actual phrase "separation between Church &

15. The IRS is a bureau of the Department of the Treasury and has the statutory authority under I.R.C. § 7801 (2006) to fulfill the responsibilities of the Secretary of Treasury. The IRS was created by the Secretary to enforce the internal revenue laws. *See* Internal Revenue Serv., The Agency, its Mission and Statutory Authority, <http://www.irs.gov/irs/article/0,,id=98141,00.html> (last visited July 30, 2009).

16. I.R.C. § 501(c)(3) (providing tax exempt status to certain organizations organized under this subsection). I.R.C. § 501(c)(3) states:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation...and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Id.

17. *Id.*

18. NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 27 (2005).

19. *Id.* at 30.

State” was coined by Thomas Jefferson.²⁰ In a letter to the Danbury Baptists, he wrote:

Believing with you that religion is a matter which lies solely between man & his god, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof;” thus building a wall of eternal separation between Church & State.²¹

The separation of church and state was very important to many of the Founding Fathers, largely because they thought it necessary to protect religion from governmental interference.²² The original Constitution did not contain the religious protection that was subsequently granted via the First Amendment of the Bill of Rights.²³ In fact, the only religious provision in the early drafts of the Constitution was the prohibition of religious tests for any prospective holder of office.²⁴ To provide further protection for religious practices, the First Amendment was added, which states in part that “Congress shall make no law respecting an establishment of religion,²⁵ or prohibiting the free exercise thereof.”²⁶ The First Amendment is often broken down into two sections when analyzing religious issues: the Free Exercise Clause and the Establishment Clause. Whether these are read together or separately is not always clear and still causes problems for courts.²⁷ The Supreme Court acknowledged the difficulty it has had trying to “find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.”²⁸ Religious conduct often involves speech, such as preaching, and this can invoke further protection under the Free Speech Clause of the First Amendment.²⁹ Originally the Bill of Rights was only meant to apply to federal governments, but today it

20. Draft Letter from Thomas Jefferson to the Danbury Baptist Ass’n (Jan. 1, 1802) (Jefferson referencing the First Amendment in response to a letter from the Danbury Baptist Association in 1801), reprinted in James H. Hutson, *Thomas Jefferson’s Letter to the Danbury Baptists: A Controversy Rejoined*, 56 WM. & MARY Q. 776, 779 (1999), available at <http://www.loc.gov/loc/lcib/9806/danpost.html>.

21. *Id.*

22. THOMAS C. BERG, *THE STATE AND RELIGION IN A NUTSHELL* 5 (2d ed. 2004).

23. *Id.*

24. *Id.* at 4–5.

25. U.S. CONST. amend. I (the Establishment Clause).

26. *Id.* (the Free Exercise Clause).

27. BERG, *supra* note 22, at 5–6.

28. *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 668–69 (1970).

29. BERG, *supra* note 22, at 6.

applies to state and local governments via the Fourteenth Amendment.³⁰ States have the power to further restrict government action against religious conduct as long as such restrictions do not violate the Establishment Clause.³¹ This means that the state is free to protect religion, but this protection cannot go so far as to establish religion.

Religion is ingrained in this nation's history. In the early years of the United States and into the 1800s, Christianity was protected by the government.³² In *People v. Ruggles*, the Chancellor stated that "we are a christian people, and the morality of this country is deeply ingrafted upon christianity."³³ The Supreme Court has stated that Christianity is "part of the common law"³⁴ and as late as 1892 reiterated that "this is a Christian nation."³⁵

In the early 1900s, the population of the United States continued to grow and along with this growth came a wider variety of religious groups.³⁶ However, among the professional and academic classes, secularization began to dominate.³⁷ Still, over the next fifty years, the Supreme Court continued to protect religious freedoms, and the 1950s were seen as a time where traditional religious notions were again embraced and revitalized.³⁸ The Supreme Court even went so far as to state that "[w]e are a religious people whose institutions presuppose a Supreme Being."³⁹

While traditional religion was finding protection from the courts, it was being attacked on scientific and political fronts.⁴⁰ Darwinian evolution and Marxist socialism suggested an alternative to creation and other traditional Christian world views.⁴¹ During the 1960s and 1970s the government continued to shy away from protecting religion.⁴² State-sponsored prayer and bible reading in public schools, part of the public school curriculum since its

30. *Id.* ("[T]he Court has held that the religion and speech clauses are 'incorporated' into the Fourteenth Amendment as part of the provision prohibiting states from denying any person 'due process of law.'")

31. *Id.* at 9.

32. *Id.* at 58.

33. *People v. Ruggles*, 8 Johns. Cas. 290 (N.Y. Sup. Ct. 1811).

34. *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892); *Vidal v. Mayor of Phila.*, 43 U.S. (1 How.) 127, 197 (1844); *see Updegraph v. Commonwealth*, 11 Serg. & Rawle 394, 394, (Pa. 1824).

35. *Holy Trinity Church*, 143 U.S. at 471.

36. BERG, *supra* note 22, at 64.

37. *Id.*

38. *Id.* at 64–66.

39. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

40. BERG, *supra* note 22, at 63.

41. *Id.*

42. *Id.* at 67.

inception, were prohibited.⁴³ Moreover, in 1973, abortion rights were recognized by the Supreme Court despite heartfelt objections from religious pro-lifers.⁴⁴

Today, it is difficult to determine the number of churches in the United States because there is no official directory.⁴⁵ However, it is estimated that there are 335,000 religious congregations.⁴⁶ That number is constantly changing because churches are opening and closing regularly.⁴⁷ While there are a large number of religious congregations, fifty-two percent of Americans actually believe that religious influence is declining in the United States.⁴⁸ Fewer than fifty percent of citizens attend worship services at least once a month.⁴⁹ Whatever the cause, religion is clearly being moved out of the public sphere. Displays of the Ten Commandments in courthouses have been deemed unconstitutional.⁵⁰ Cases brought before the Supreme Court in the last decade have examined whether the words “under God” in the Pledge of Allegiance or the words “In God We Trust” on our currency violate the Constitution.⁵¹ While churches may have been afforded extra protection in the past, the tide has certainly changed. As one commentator has noted, “[t]oday, instead of separation of church and state, we have suppression of the church by the state.”⁵²

B. Tax Exempt Status: Its Development and Codification

1. Tax Exemption

Tax exemption for charitable organizations is an ancient notion dating back to biblical times.⁵³ Most countries have always had some form of tax

43. See *Engel v. Vitale*, 370 U.S. 421, 424 (1962); see also *Sch. Dist. of Abington Twp. v. Schempp*, 347 U.S. 203, 205 (1963).

44. See *Roe v. Wade*, 410 U.S. 113, 160–61, 164–65 (1973).

45. Hartford Inst. for Religion Research, Fast Facts About American Religion, http://hrr.hartsem.edu/research/fastfacts/fast_facts.html (last visited July 30, 2009).

46. *Id.*

47. *Id.*

48. Ass’n of Religion Data Archives, Quick Stats, http://www.thearda.com/quickstats/qs_46.asp (last visited July 30, 2009).

49. Ass’n of Religion Data Archives, Quick Stats, http://www.thearda.com/quickstats/qs_105.asp (last visited July 30, 2009); Hartford Inst. for Religion Research, *supra* note 45.

50. See *McCreary County v. Am. Civil Liberties Union*, 545 U.S. 844 (2005).

51. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 5 (2004); *Newdow v. Congress*, 435 F.Supp.2d 1066, 1070 (2006).

52. Rod Parsley, *Restore Free Speech to Preachers: Endorsing Political Candidates Should Not Put a Church’s Tax-Exempt Status at Risk*, CHARLOTTE OBSERVER, May 16, 2005, at 15A.

53. NICHOLAS P. CAFARDI & JACLYN FABEAN CHERRY, UNDERSTANDING NONPROFIT AND TAX EXEMPT ORGANIZATIONS 1 (2006).

exemption for charities or churches, and the United States is no different.⁵⁴ When the United States was first settled, taxes had to be paid to churches, but individuals were allowed to select the church that received their money.⁵⁵ This practice was eventually outlawed, and as an alternative, churches were granted tax exempt status.⁵⁶ Virginia settlers spurred the movement towards tax exemption, believing “that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.”⁵⁷ Thus, the first federal income tax statute codified this precedent and exempted “corporations, companies, or associations organized and operated solely for charitable, religious, or educational purposes.”⁵⁸ This tax exemption remains in effect in all fifty states.⁵⁹

Several theories have been propounded to support tax exempt status for these institutions. The “public benefit theory” states that the work of these tax exempt organizations helps the government and bears part of the burden of the social welfare of citizens, thus justifying the legislative grace.⁶⁰ The “pluralism theory,” championed by Justices Brennan and Powell,⁶¹ states that

54. *See id.*

55. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–11, 10 n.8 (1947). The Court in *Everson* noted that “[a] large portion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches,” and that although “[a]lmost every colony exacted some kind of tax for church support” generally, “[t]he imposition of taxes to pay ministers’ salaries and to build and maintain churches and church property aroused [the colonists’] indignation. It was these feelings which found expression in the First Amendment.” *Id.* (footnote omitted).

56. *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 393 (1990) (quoting *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 666–67, 668, 674–75 (1970)). Paying taxes to support a church effectively means that the state is supporting the church with government funds, and this is ultimately an establishment of religion. Great problems are caused by state-sponsored churches, which may indicate the favoring of one religion over another. *Id.* (“The Establishment Clause prohibits ‘sponsorship, financial support, and active involvement of the sovereign in religious activity.’” (quoting *Walz*, 397 U.S. at 668)); CAFARDI & CHERRY, *supra* note 53, at 11.

57. *Everson*, 330 U.S. at 11.

58. CAFARDI & CHERRY, *supra* note 53, at 1 (quoting The Revenue Act of 1894, ch. 349, § 32, 28 Stat. 509, 556 (repealed 1895) (internal quotation mark omitted)).

59. *Walz*, 397 U.S. at 685.

60. *See* *Trinidad v. Sagrada Orden de Predicadores*, 263 U.S. 578, 581 (1924); *Christian Echoes Nat’l Ministry v. United States*, 470 F.2d 849, 854 (10th Cir. 1972) (“[T]he Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare.”) (citing H.R. REP. NO. 1860, at 19 (1939)); *McGlotten v. Connally*, 338 F. Supp. 448, 457–58 (D.D.C. 1972).

61. *See* *Bob Jones Univ. v. United States*, 461 US 574, 606–09 (1983) (Powell, J., concurring) (citing *Walz*, 397 U.S. at 689 (Brennan, J., concurring)).

these organizations are tax exempt because they provide diverse opinions and act as a counterweight to government authority.⁶² In *Regan v. Taxation with Representation of Washington*, Justice Rehnquist wrote that a tax exemption is a form of a subsidy paid by the government to the organization.⁶³ Yet another theory holds that tax exemption is the result of the potential difficulty faced by a not-for-profit or public service organization if it were required to pay taxes; additionally, if the organization were forced to pay taxes, such payments would only take money away from the public receiving the services.⁶⁴ There are also less prominent theories that discuss the economics of running tax exempt organizations and the individuals who donate to them.⁶⁵ Finally, some argue the real reason the exemption continues to exist is simply the result of tradition.⁶⁶

In *Walz v. Tax Commission of New York*, the Supreme Court stated that there is no perfect separation of church and state, but tax exemption seems to provide the best option to keep the two entities separate.⁶⁷ Section 501(c)(3) allows tax exempt organizations to receive tax deductible donations from individuals and exemption from state and local income taxes, property taxes, and federal income taxes.⁶⁸ To qualify for tax exempt status under the I.R.C., there are four tests that usually must be met, and each organization must receive recognition from the IRS that it is tax exempt.⁶⁹ However, a church⁷⁰ does not have to formally request recognition of its tax exempt status from the IRS like other tax exempt organizations.⁷¹ Churches are presumed to be tax

62. *Id.*

63. 461 US 540, 544 (1983).

64. CAFARDI & CHERRY, *supra* note 53, at 55.

65. *Id.* at 56–58 (referring to the capital subsidy theory and the donative theory).

66. *Id.* at 59.

67. *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 673 (1970) (“Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms—economic, political, and sometimes harshly oppressive. Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable guard and balanced attempt to guard against those dangers.”).

68. I.R.C. § 501(c)(3) (2006); CAFARDI & CHERRY, *supra* note 53, at 60.

69. CAFARDI & CHERRY, *supra* note 53, at 63 (noting that the four tests are organizational, operational, private inurement, and political activities).

70. “Church” is not specifically defined in the Code, but there is a fourteen-point test that was used in *Am. Guidance Found. v. United States*, 490 F. Supp. 304, 306 (1980). CAFARDI & CHERRY, *supra* note 53, at 106 & n.41. The Tax Court uses an associational test, and the IRS usually uses the private inurement test when organizations seek to qualify as a “church” by filing Form 1023. *Id.* at 106–10.

71. I.R.C. § 508(c).

exempt upon inception. Further, churches do not need to file tax returns, but they must keep records of money received and distributed.⁷²

2. Maintaining Tax Exempt Status and the Political Campaigning Ban

The Revenue Act of 1934 included the first limitation placed on tax exempt organizations.⁷³ The restriction stated that a substantial part of the activities of the organization could not be “carrying on propaganda or otherwise attempting, to influence legislation.”⁷⁴ In 1954, Senator Lyndon B. Johnson made his now famous proposal to the Senate.⁷⁵ There was little debate on the proposal, so legislative history is nearly devoid of Congress’s intended purpose for the enactment of the new amendment.⁷⁶ At the time of the proposal, Senator Johnson was frustrated with two particular tax exempt organizations which were supporting a political opponent.⁷⁷ However, churches were not the target of Senator Johnson’s proposal.⁷⁸ In fact, he had no issue with using his own religious affiliation to advance politically.⁷⁹ History indicates that “as the sponsor of the amendment that made such conduct problematic, [Senator Johnson] clearly had no compunction against using such tactics to advance his own political candidacy.”⁸⁰ The proposal was not “in response to any public outcry” against religious groups engaging in

72. INTERNAL REVENUE SERV., TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS, 28, 17, 20–21, available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf> (last visited Nov. 10, 2008).

73. *Christian Echoes Nat’l Ministry v. United States*, 470 F.2d 849, 854 (10th Cir. 1972) (“The case which led to the 1934 legislation was *Slee v. Commissioner of Internal Revenue* [sic], 42 F.2d 184 (2nd Cir. 1930). There the Court held that the American Birth Control League was not entitled to a charitable exemption because it disseminated propaganda to legislators and the public aimed at the repeal of laws preventing birth control. The IRS denied tax exempt status because the Birth Control League’s purposes were not exclusively charitable, educational or scientific.”).

74. David M. Anderson, Comment, *Political Silence at Church: The Empty Threat of Removing Tax-Exempt Status for Insubstantial Attempts to Influence Legislation*, 2006 BYU L. REV. 115, 124 (2006) (quoting The Revenue Act of 1934, § 101(6), Pub. L. No. 73-216 (1934)) (internal quotation marks omitted).

75. *Id.*; Patrick L. O’Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733, 740 (2001).

76. Kay Guinane, *Wanted: A Bright-Line Test Defining Prohibited Intervention in Elections by 501(c)(3) Organizations*, 6 FIRST AMENDMENT L. REV. 142, 160 (2007).

77. Steffen N. Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875, 880 (2001) (noting that the two organizations that were campaigning in opposition to Senator Johnson were Facts Forum and the Committee for Constitutional Government.).

78. O’Daniel, *supra* note 75, at 768.

79. *Id.* at 769.

80. *Id.*

political campaigning.⁸¹ The record is void of any evidence “regarding such politicking.”⁸²

Congress prohibited § 501(c)(3) tax exempt organizations (including churches) from intervening in political campaigns by codifying Senator Johnson’s proposal in the I.R.C. which disqualifies such organizations from the exemption if they “participate in, or intervene in (including the publicizing or distributing of statements), any political campaign on behalf of any candidate for political office.”⁸³ In 1987, Congress added the words “in opposition to,” to clarify that campaigning against a candidate would also violate the § 501(c)(3) ban.⁸⁴

Once an organization is granted tax exempt status, they must maintain it. This means that the organizations cannot violate any of the four tests the IRS uses to grant tax exempt status.⁸⁵ The political activities test is the most controversial test applied to tax exempt organizations. Enforcement is difficult and what constitutes a violation usually falls into a gray area leaving the IRS to resolve very difficult, sometimes constitutional, questions. Two types of political activities that are prohibited under § 501(c)(3) include, substantial amounts of lobbying and electioneering.⁸⁶ Electioneering is defined as “the participation in a political campaign for elective office, either by endorsing and working on behalf of a candidate or by campaigning against a particular candidate.”⁸⁷ Under the political activities test, if an exempt organization lobbies or electioneers it will no longer meet the requirements of § 501(c)(3).⁸⁸

81. *Id.*

82. *Id.* at 769. “Although the involvement of churches in political campaigns did not spur Johnson’s amendment, such involvement did figure in his actual candidacy. . . . Certainly, Johnson did not disdain to use religion as a wedge when it suited his purposes or to neutralize certain religious elements that might prove to be potentially hostile.” *Id.* at 768–769.

An examination of history of the prohibition indicates that it was passed in 1954 with little thought by Congress, or even by its sponsor . . . Senator Lyndon Baines Johnson, concerning its effects on churches. In any event the prohibition was not the product of a change in public opinion, but instead appears to have been proposed by Johnson as a way to squelch certain unsavory campaign tactics targeted at him by a few tax-exempt entities. *Id.* at 739–740.

83. INTERNAL REVENUE SERV., POLITICAL ACTIVITIES COMPLIANCE INITIATIVE EXECUTIVE SUMMARY (2006), available at http://www.irs.gov/pub/irs-tege/exec_summary_paci_final_report.pdf [hereinafter PACI EXECUTIVE SUMMARY].

84. *Id.*

85. See CAFARDI & CHERRY, *supra* note 53, at 81 (stating, for example, that under § 501(c)(3) an organization’s intervention in a political election is considered an “egregious” violation of § 501(c)(3), thus it will fail the political activities test and lose its tax exempt status).

86. *Id.*

87. *Id.* at 74. See generally *Am. Hardware & Equip. Co. v. Comm’r*, 202 F.2d 126 (4th Cir. 1953); *Roberts Dairy Co. v. Comm’r*, 195 F.2d 948 (8th Cir. 1952).

88. CAFARDI & CHERRY, *supra* note 53, at 81 (noting that Congress also added § 4955 to the code which imposes “intermediate sanctions” for less serious violations of electioneering.)

The restrictions of § 501(c)(3) are deemed constitutional because tax exempt organizations have an alternative channel of communication by forming an organization under § 501(c)(4), and this allows tax exempt organizations to voice political opinions through the § 501(c)(4) counterpart.⁸⁹ The restriction under § 501(c)(4) is that no charitable dollars may pass from the § 501(c)(3) to the § 501(c)(4) organization.⁹⁰ Section 501(c)(4) organizations are still exempt from federal income taxes but may not receive tax deductible donations.⁹¹ Usually, if an organization cannot meet the requirements under § 501(c)(3) upon creation, it will become a § 501(c)(4) organization.⁹² Conversely, if a § 501(c)(3) organization violates one of the requirements of § 501(c)(3), it may not then obtain § 501(c)(4) status.⁹³ This means that when an organization is being created, if it does not meet the requirements of § 501(c)(3), it can then become a § 501(c)(4) organization. However, if a § 501(c)(3) organization violates one of the requirements to maintain their tax exempt status which can result in penalties and more severely, loss of their tax exempt status, Congress has opted not to allow them to become a § 501(c)(4) organization because the organization would still be afforded exemption from federal income taxes.⁹⁴ Without this interplay between the two rules, allowing misbehaving § 501(c)(3) organizations to become § 501(c)(4) organizations would undermine the § 501(c)(3) requirements.

As stated, courts have held that the political ban under § 501(c)(3) is constitutional because free speech is not limited completely due to § 501(c)(4).⁹⁵ However, it is not as easy for a church to form a § 501(c)(4) organization as the courts believe.⁹⁶ The main barrier for a church forming a § 501(c)(4) organization is the difficulty of separating political messages from religious messages and tracking the funding for each activity.⁹⁷

89. Douglas H. Cook, *The Politically Active Church*, 35 LOY. U. CHI. L.J. 457, 472 (2004) (citing *Regan v. Taxation Without Representation*, 461 U.S. 540 (1983)).

90. *Id.* (quoting *Regan*, 461 U.S. at 544).

91. *Id.* at 470.

92. See CAFARDI & CHERRY, *supra* note 53, at 191.

93. *Id.* at 59; see also INTERNAL REVENUE SERV., TAX EXEMPT STATUS FOR YOUR ORGANIZATION (2008), available at <http://www.irs.gov/pub/irs-pdf/p557.pdf>.

94. *Id.*

95. *Branch Ministries v. Rossotti*, 211 F.3d 137, 143–44 (D.C. Cir. 2000); see *infra* text accompanying note 146.

96. Meghan J. Ryan, *Can the IRS Silence Religious Organizations?*, 40 IND. L. REV. 73, 89–91 (2007).

97. *Id.* at 90–91.

3. How to Determine if a Violation has Occurred

An investigation to determine if the church has violated the political activities test usually is performed once a complaint has been filed with the IRS. The Church Audit Procedures Act (CAPA) protects churches during an audit by the IRS.⁹⁸ Only ranking individuals in the IRS may order an audit of a church and there must be a reasonable belief that the church is not exempt per § 501(c)(3).⁹⁹ The church is then notified in writing of the reason for the inquiry and explained its rights in the process.¹⁰⁰ The IRS regional counsel has to be given notice of the audit and fifteen days must pass from the time the church was notified of the inquiry before the records of the church can be examined.¹⁰¹ Regional counsel has the right to object to the audit during those fifteen days.¹⁰² The church also has the opportunity, upon request, to meet and discuss the complaint.¹⁰³ The examination of the records of the church is limited to those records needed to determine the extent of tax liability.¹⁰⁴ Usually, the IRS has two years to conduct its investigation from the time it sends its notice.¹⁰⁵ The IRS regional counsel must approve whatever determination is made as a result of the audit.¹⁰⁶

4. Result of Investigation

The IRS has stated that if a church has engaged in any prohibited activity, it faces losing its tax exempt status and is subject to an excise tax¹⁰⁷ based on the amount of money spent on that prohibited activity.¹⁰⁸ If the IRS determines that the tax exempt status of a church should be revoked, the consequences are severe and broad—affecting the church, its employees, and donors.¹⁰⁹ If a church has its tax exempt status revoked, it may appeal the

98. I.R.C. § 7611 (2006); *see Tax-Exempt Status Lost Through Participation in Political Campaign*, 65 PRAC. TAX STRATEGIES 43, 44 (2000).

99. *Id.* § 7611(a)(2).

100. *Id.* § 7611(a)(3)(B).

101. *Id.* § 7611(b)(2)(A).

102. *Id.* § 7611(b)(3)(C).

103. I.R.C. § 7611(b)(2)(B).

104. *Id.* § 7611(b)(4) (“[T]he Secretary may examine any church records or religious activities which were not specified in the examination notice to the extent such examination meets the requirement of subparagraph (A) or (B) of paragraph (1) (whichever applies).”).

105. *Id.* § 7611(c)(1)(A).

106. *Id.* § 7611(d)(1).

107. An excise tax is a tax on the performance of an act or particular conduct. *See Waxenberg v. Comm’r*, 62 T.C. 594, 604 (1974) (quoting *Callaway v. City of Overland Park*, 508 P.2d 902, 907 (Kan. 1973)).

108. *See* I.R.S. News Release IR-2004-59 (Apr. 28, 2004), <http://www.irs.gov/newsroom/article/0,,id=122887,00.html>.

109. CAFARDI & CHERRY, *supra* note 53, at 364.

decision via the federal courts.¹¹⁰ However, if a tax exempt organization disagrees with the IRS on whether a certain activity or transaction is tax exempt, the organization cannot obtain judicial review of this issue unless they perform the activity or transaction in question and are penalized.¹¹¹ “Therefore, an organization that disagrees with the IRS on whether a particular activity is exempt, must engage in that activity, have its exemption revoked or be subject to an excise tax before it can seek judicial relief.”¹¹²

C. *Jurisprudential History*

There are numerous challenges a church or individual can make if their First Amendment rights are restricted. Specifically, challenges brought under the Free Exercise Clause, the Establishment Clause, and the Free Speech Clause which are all under the purview of the First Amendment, are key. When courts are asked to review certain statutes, there are different standards the court will consider in order to test their constitutionality. Originally, statutes that infringed upon First Amendment religious rights were reviewed under the compelling interest test which provided the most protection for religious rights and freedoms and gave the least deference to the government.¹¹³ The compelling interest test focuses on whether the individual is substantially burdened by the applicable statute.¹¹⁴ If a substantial burden is found concerning the individual’s Free Exercise rights, the individual’s rights are deemed violated unless the government can show it has a compelling interest that is being implemented in the least restrictive means possible.¹¹⁵ Early cases protected the individual’s free exercise rights and would often hold that religious exercise was substantially burdened,¹¹⁶ often finding that the statute was unconstitutional. Yet, more recent cases have held that the government’s compelling interest outweighed the individual’s substantial burden and have upheld the statute as constitutional.¹¹⁷

1. Free Exercise Clause Challenges

Employment Division v. Smith was a landmark case that opted not to apply the compelling interest test and instead stated that a “neutral, generally applicable” law would be upheld without a further showing of a compelling

110. *Id.*

111. *Id.*

112. *Id.* § at 365.

113. *See Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (applying the compelling interest test); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (applying the compelling interest test).

114. *Wisconsin*, 406 U.S. at 214, 228.

115. *Id.* at 221, 236.

116. *See Id.* at 219, 236.

117. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *United States v. Lee*, 455 U.S. 252, 260 (1982).

government interest.¹¹⁸ However, under the First Amendment, a “neutral, generally applicable law” may not be applied to a Free Exercise challenge coupled with another constitutional rights challenge, such as freedom of speech.¹¹⁹ This is referred to as a hybrid claim.¹²⁰

The result in *Smith* was met with opposition from civil and religious groups who pushed for Congress to pass the Religious Freedom Restoration Act of 1993 (RFRA), which reinstated the compelling interest test.¹²¹ In 1997, the Supreme Court held that the RFRA did not apply to state and local governments per *City of Boerne v. Flores*.¹²² Cases subsequent to *Boerne* have upheld Congress’ power to apply RFRA to federal laws.¹²³

2. Establishment Clause Challenges

Establishment cases focus on excessive entanglement between government and churches.¹²⁴ Issues arise when accommodations appear to be the establishment of religion by the government.¹²⁵ Accommodations have been more readily upheld when they apply to both religious and non-religious organizations while court decisions have varied when an exemption has only applied to a religious organization.¹²⁶

In 1971, the Supreme Court set out a three-part test in *Lemon v. Kurtzman* for purposes of satisfying the Establishment Clause.¹²⁷ The Court found that aid going to parochial school teachers who were forbidden to teach religion in their classes was unconstitutional because enforcing the law “would require a ‘comprehensive’ and ‘continuing’ surveillance of the teachers’ activities. The result would be an ‘excessive entanglement of church and state.’”¹²⁸ While the *Lemon* test struck down the aid going to the teachers, one case has used the test to strike down the regulation of a religious organization.¹²⁹ In *NLRB v.*

118. 494 U.S. 872, 879, 885–89 (1990).

119. *Id.* at 881.

120. *Id.* at 882.

121. BERG, *supra* note 22, at 132.

122. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); BERG, *supra* note 22, at 132.

123. BERG, *supra* note 22, at 136.

124. *See Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 674 (1970); *see also* BERG, *supra* note 22, at 30–36 (discussing excessive entanglement in regards to the various tests implemented by the Court in Establishment Clause cases).

125. *See Walz*, 397 U.S. at 674; *see also* BERG, *supra* note 22, at 33–34 (discussing the importance the Court has placed upon the government implementing policies reflecting religious neutrality).

126. BERG, *supra* note 22, at 143; *see also Walz*, 397 U.S. at 672–73 (holding that a New York tax exemption applicable to both churches and secular public service groups does not violate the Establishment Clause).

127. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *see* BERG, *supra* note 22, at 30.

128. BERG, *supra* note 22 at 130.

129. *See NLRB v. Catholic Bishop*, 440 U.S. 490 (1979).

Catholic Bishop, the Court did not explicitly hold that the regulation would violate the First Amendment.¹³⁰ Instead the Court focused on the “significant risk” of unconstitutional entanglement and the fact that Congress had not expressed an “affirmative intention” to give the board jurisdiction over parochial school teachers when it denied the aid.¹³¹ Recent cases have allowed regulation in the area of federal minimum wage laws and state sales tax, holding that these did not constitute excessive entanglement because there were only “administrative and recordkeeping requirements” and this was not “intrusive into religious affairs.”¹³² The sales and use tax was allowed because the state was not looking at the *content* of items sold or the motivation behind the items.¹³³

The three-part test set forth in *Lemon* has been mostly abandoned by courts today due to its subjectivity and the fact that later courts believed the test overlooked the principle of neutrality intended by the Founders.¹³⁴ Over the last couple of decades courts have attempted to formulate other tests, such as “no sect preference,” “no endorsement” of religion, “non-coercion,” and “neutrality as equal treatment.”¹³⁵ Although no single approach has gained universal acceptance, it is clear that separation of church and state methodology is in decline.¹³⁶

3. Free Speech

Free speech analysis usually takes into account the forum where the speech restriction is being applied and tries to determine if the limitation on speech imposed content-neutral time, place, and manner restrictions.¹³⁷ If it is a public forum, the government must have a significant reason for imposing this limitation and also allow for “ample alternative channels for communication.”¹³⁸ Free speech challenges have been an area of controversy for churches wishing to voice political opinions, but the political ban has been deemed constitutional because there is an alternative channel of

130. *Id.* at 507.

131. *Id.* at 502–06.

132. *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 394–95 (quoting *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 305–06 (1985)).

133. *Id.* at 396.

134. BERG, *supra* note 22, at 31–32; *see also* *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 694 (1970) (Harlan, J., concurring) (“[T]he Government must neither legislate to accord benefits that favor religion over nonreligion, nor sponsor a particular sect, nor try to encourage participation in or abnegation of religion.”).

135. BERG, *supra* note 22, at 33–35.

136. *Id.* at 36.

137. *Hill v. Colorado*, 530 U.S. 703, 710–711 (2000) (internal quotation marks omitted).

138. *Id.* at 726.

communication available to churches via § 501(c)(4) organizations.¹³⁹ Free speech claims alone are still an avenue to protect religious speech and can be coupled with Free Exercise claims to bring a hybrid claim.¹⁴⁰ Thus, free speech is a very relevant area in the IRS's § 501(c)(3) enforcement efforts and current challenges.

4. Challenges to § 501(c)(3) Ban

In *Christian Echoes National Ministry, Inc. v. United States*, the court held that revocation of the Ministry's tax exempt status was constitutional.¹⁴¹ In *Christian Echoes*, the defendant continuously and substantially attempted to influence legislation and public opinion.¹⁴² The defendant also publicly attacked candidates, who were generally thought to be very liberal.¹⁴³ The court held that the political ban found in § 501(c)(3) was constitutional:

Tax exemptions are matters of legislative grace and taxpayers have the burden of establishing their entitlement to exemptions. The limitations in Section 501(c)(3) stem from the Congressional policy that the United States Treasury should be neutral in political affairs and that substantial activities directed to attempts to influence legislation or affect a political campaign should not be subsidized.¹⁴⁴

Upholding the constitutionality of the restrictions found in § 501(c)(3), the court stated that the Free Exercise Clause was only burdened by the loss of tax exempt status and that the government's compelling interest of keeping church and state separate far outweighed the burden felt by the defendants.¹⁴⁵

The most recent case upholding the constitutionality of § 501(c)(3) was *Branch Ministries v. Rossotti*.¹⁴⁶ In *Branch Ministries*, a church was deemed to have engaged in political campaigning, and the IRS revoked the church's tax exempt status.¹⁴⁷ The court upheld the IRS's authority to do so.¹⁴⁸ The prohibited conduct included two advertisement spaces purchased in *The*

139. See *Branch Ministries v. Rossotti*, 211 F.3d 137, 143 (D.C. Cir. 2000) (noting that the restriction placed on a § 501(c)(3) organization's ability to advocate its political goals was not unconstitutional when the organization was permitted to create a § 501(c)(4) affiliate, which constituted an alternate means of communication, by which it could "pursue its charitable goals through lobbying").

140. *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990).

141. *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 856–57 (10th Cir. 1972).

142. *Id.* at 855.

143. *Id.* at 856.

144. *Id.* at 854 (citation omitted).

145. *Id.* at 857.

146. *Branch Ministries v. Rossotti*, 211 F.3d 137, 139 (D.C. Cir. 2000).

147. *Id.* at 139–140.

148. *Id.* at 139, 144.

Washington Times and *USA Today*, respectively.¹⁴⁹ The advertisements bore the heading “Christian Beware,” and then stated that presidential nominee Bill Clinton’s views on abortion, homosexuality, and the distribution of condoms to teenagers were in opposition to Biblical text, which was cited in the advertisement.¹⁵⁰ The advertisements asked, “[h]ow then can we vote for Bill Clinton? . . . Tax-deductible contributions for this advertisement gladly accepted’ and requested that donations be made to The Church at Pierce Creek.”¹⁵¹ This was electioneering by the church¹⁵² and thus, a violation of § 501(c)(3).¹⁵³ The court concluded that the IRS had the statutory authority to revoke the tax exempt status of a church that engaged or participated in any political campaign on behalf of or in opposition to a candidate for public office.¹⁵⁴ The court also stated that the restrictions placed on § 501(c)(3) organizations were viewpoint neutral and therefore constitutional.¹⁵⁵ Further, the court did not determine the government’s compelling interest in the case because the revocation of the church’s tax exempt status was not considered a substantial burden.¹⁵⁶

In 2004, an anti-war sermon in a California church triggered an IRS investigation.¹⁵⁷ In the sermon, the pastor declaimed President Bush for the war in Iraq.¹⁵⁸ After an initial inquiry, the IRS offered the church a chance to settle and maintain its tax exempt status if it admitted it had engaged in

149. *Branch Ministries, Inc. v. Richardson*, 970 F. Supp. 11, 13 (D.D.C. 1997). *Branch Ministries, Inc. v. Richardson* was brought in 1997 by Commissioner Margaret M. Richardson, and at the time of appeal in 2000 a new commissioner, Commissioner Charles O. Rossotti was appointed. The facts of both *Branch Ministries*, 970 F. Supp. 11 and *Branch Ministries*, 211 F.3d 137, remain the same.

150. *Branch Ministries*, 970 F. Supp. at 13.

151. *Id.*

152. See CAFARDI & CHERRY, *supra* note 53, at 81 (“While Section 501(c)(3) organizations may, under the statute, lobby to an insubstantial degree, they may not participate in an electoral campaign, for or against a candidate, in any way.”).

153. *Branch Ministries v. Rossotti*, 211 F.3d at 139 (D.C. Cir. 2000).

154. *Id.* at 141–42.

155. *Id.* at 144.

156. *Id.* at 142–44.

157. Alan Cooperman, *IRS Reviews Church’s Status: 2004 Antiwar Sermon Sparked Look at Tax Exemption*, WASH. POST, Nov. 19, 2005, at A3.

158. *Id.* The *Washington Post* provided the following description of the incident:

The sermon that drew the IRS’s attention was delivered on Oct. 31, 2004, by the Rev. George F. Regas, All Saints’ rector emeritus. It was an imaginary debate between Jesus on one side and Sen. John F. Kerry (D-Mass.) and President Bush on the other. At the outset, the retired pastor told his listeners that ‘I don’t intend to tell you how to vote.’ Then he went on to describe Jesus as deeply saddened by the war in Iraq and poverty in the United States.

Id.

political intervention.¹⁵⁹ While this issue was never heard before a judge, the church did fight back and refused to admit any wrongdoing.¹⁶⁰ Marcus Owen, who was the church's attorney and former head of the IRS division that was then conducting the investigation, commented on the ban stating, "I think the law is unconstitutional and too subjective."¹⁶¹ In September of 2007, the church received a letter from the IRS stating that the examination would be closed.¹⁶² An audit never took place, but the letter stated "without explanation that the sermon in question constituted intervention in the 2004 Presidential election."¹⁶³ The church maintained their tax exempt status, and no penalties were imposed; however, the church remains mystified as to the reasoning of the IRS and continues to pursue the matter.¹⁶⁴

Currently, there has never been a judicial decision stating that tax exemptions violate the Establishment Clause,¹⁶⁵ and the Supreme Court has yet to rule on the constitutionality of the political ban. Further, based on recent precedent, a church is going to have a difficult time showing that they are substantially burdened.

II. WHERE § 501(C)(3) STANDS TODAY

A. *Recent Investigation Results and Reactions*

The Tax Exempt and Government Entities Division (TEGE) is the department of the IRS that is currently charged with the responsibility of enforcing and investigating the § 501(c)(3) political campaigning ban.¹⁶⁶ While the political campaigning ban has not always been enforced except in the case of blatant violations, this changed during the 2004 presidential election.¹⁶⁷ In that particular election cycle,¹⁶⁸ the IRS investigated

159. Patricia Ward Biederman & Jason Felch, *Antiwar Sermon Brings IRS Warning*, L.A. TIMES, Nov. 7, 2005, at A1, available at 2005 WLNR 18177404.

160. Louis Sahagun, *Church Votes to Fight Federal Probe*, L.A. TIMES, Sept. 22, 2006, at B1.

161. James Sterngold, *Unwanted Allies Back Liberal Church in IRS Fight: Anti-War Sermon Led to Investigation*, S.F. CHRON, Oct. 2, 2006, at A1.

162. Press Release, All Saints Church, Pasadena Demands Correction and Apology from the IRS (Sept. 23, 2007), available at http://www.allsaints-pas.org/site/DocServer/IRS_Press_Release_Sept_23_2007.pdf?docID=2521 (last visited July 30, 2009).

163. *Id.*

164. *Id.* ("The Church remains committed to pursuing answers in this case, believing it has no choice but to clarify the IRS's inconsistent and vague guidance.")

165. See *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 678 (1970) ("[A]n unbroken practice of according the exemption to churches . . . is not something to be lightly cast aside").

166. INTERNAL REVENUE SERV., CHARITIES, CHURCHES AND POLITICS <http://www.irs.gov/newsroom/article/0,,id=161131,00.html> (last visited July 30, 2009).

167. See Siri Mielke Buller, *Lobbying and Political Restrictions on § 501(c)(3) Organizations: A Guide for Compliance in the Wake of Increased IRS Examination*, 52 S.D. L. REV. 136, 136 n. 3 (2007) (discussing the "sharp increase in prohibited political activity" which

approximately 110 tax exempt organizations and found violations in 59 of the 82 cases it reviewed.¹⁶⁹ The IRS noted that the violations “covered the full spectrum of political viewpoints.”¹⁷⁰ The types of violations included: endorsing candidates through websites, distributing materials and voter guides rating candidates, displaying signs, and allowing certain candidates to come speak.¹⁷¹ At the time of the report however, only five cases included cash contributions to political candidates.¹⁷² After the violations in 2004, the IRS wanted to be prepared for the 2006 election cycle.¹⁷³ To help aid this effort, the IRS began the Political Activities Compliance Initiative (PACI).¹⁷⁴ In the 2006 election cycle, the IRS received 237 referrals and selected 100 § 501(c)(3) organizations for examination.¹⁷⁵ Investigations are still underway, but the IRS has issued written advisories in twenty-six cases.¹⁷⁶ No recommendations for revocation have been made.¹⁷⁷

The types of violations the IRS encountered and the 2008 election probably prompted Revenue Ruling 2007-41, which was issued in June 2007.¹⁷⁸ In the ruling, the IRS laid out twenty-one situations of potential violations by a tax exempt organization of the political campaigning ban.¹⁷⁹

led to the IRS’s strong imposition of § 501(c)(3) during the 2004 election cycle) (quoting Stephanie Strom, *I.R.S. Finds Sharp Increase in Illegal Political Activity*, N.Y. TIMES, Feb. 25, 2006, at A8)).

168. The period covers July 30, 2004 to November 30, 2004. Press Release, Internal Revenue Serv., IRS Releases New Guidance and Results of Political Intervention Examinations, (Feb. 24, 2006), <http://www.irs.gov/newsroom/article/0,,id=154780,00.html>.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. See INTERNAL REVENUE SERV., 2006 POLITICAL ACTIVITIES COMPLIANCE INITIATIVE I (2006), http://www.irs.gov/pub/irs-tege/2006paci_report_5-30-07.pdf [hereinafter 2006 COMPLIANCE INITIATIVE]. The PACI effort sought to reduce the time of investigations. *Id.* A sub-project, the Political Contribution Sub-Project, was also created at that time, and spent all its time surfing the internet to find campaign contributions. *Id.*

174. INTERNAL REVENUE SERV., PROJECT 302—POLITICAL ACTIVITIES COMPLIANCE INITIATIVE FINAL REPORT 1 (2004), http://www.irs.gov/pub/irs-tege/final_paci_report.pdf [hereinafter PROJECT 302].

175. 2006 COMPLIANCE INITIATIVE, *supra* note 173, at 3 (reporting that forty-four of the organizations were churches and fifty-six were non-churches); see also Internal Revenue Serv., Charities, Churches and Politics, <http://www.irs.gov/newsroom/article/0,,id=161131,00.html> (last visited July 30, 2009) (summarizing the findings reported in the 2006 COMPLIANCE INITIATIVE).

176. Internal Revenue Serv., Charities, Churches and Politics, *supra* note 175.

177. *Id.*

178. Rev. Rul. 2007-41, 2007-25 I.R.B. 1421. Revenue rulings are statements issued by the IRS National Office and are published for the guidance of taxpayers, IRS officials, and other relevant parties.

179. See *id.* at 1421–26.

Situation 9¹⁸⁰ and Situation 21¹⁸¹ consider the possibility of a church intervening in a political campaign. The revenue ruling also stated that while tax exempt organizations may take up public issues, they have to be careful that this “issue advocacy” is not seen as a political campaign violation.¹⁸² These organizations must refrain from favoring or opposing a candidate.¹⁸³ The ruling noted that each situation of alleged political campaigning requires a fact-by-fact determination.¹⁸⁴ While revenue rulings do not have the force and effect of law, if a case arises with similar facts to those stated in the ruling, the court may, and often does, look to the ruling for guidance.¹⁸⁵ In fact, the first restriction on lobbying by charitable organizations came from an IRS regulation, which Congress then codified by prohibiting exempt organizations from engaging in substantial lobbying.¹⁸⁶

180. Situation 9 reads:

Minister *F* is the minister of Church *O*, a section 501(c)(3) organization. The Sunday before the November election, Minister *F* invites Senate Candidate *X* to preach to her congregation during worship services. During his remarks, Candidate *X* states, “I am asking not only for your votes, but for your enthusiasm and dedication, for your willingness to go the extra mile to get a very large turnout on Tuesday.” Minister *F* invites no other candidate to address her congregation during the Senatorial campaign. Because these activities take place during official church services, they are attributed to Church *O*. By selectively providing church facilities to allow Candidate *X* to speak in support of his campaign, Church *O*’s actions constitute political campaign intervention.

Id. at 1423.

181. Situation 21 reads:

Church *P*, a section 501(c)(3) organization, maintains a web site that includes such information as biographies of its ministers, times of services, details of community outreach programs, and activities of members of its congregation. *B*, a member of the congregation of Church *P*, is running for a seat on town council. Shortly before the election, Church *P* posts the following message on the web site, “Lend your support to *B*, your fellow parishioner, in Tuesday’s election for town council.” Church *P* has intervened in a political campaign on behalf of *B*.

Id. at 1426.

182. *Id.* at 1424.

183. Rev. Rul. 2007-41, 2007-25 I.R.B. 1424.

184. *Id.*

185. See Brent M. Johnston, Comment, *The Federal Tax Personality of Disregarded LLCs* [Littriello v. US, 484 F.3d 372 (6th Cir. 2007)], 47 WASHBURN L.J. 203, 233 n.306 (2007). Revenue rulings do not have the force and effect of Treasury Regulations, but they may be used as precedent. *Id.* They are best used when the facts and circumstances are most similar to those in the ruling. *Id.*

186. See CAFARDI & CHERRY, *supra* note 53, at 75.

B. Current Enforcement Problems and the Cost to Taxpayers

Even those who support the political ban note the difficulties of enforcement and the lack of expertise in First Amendment law by the IRS.¹⁸⁷ “The IRS functions best when engaged in its core function—collecting revenue It has no special expertise in the regulation of elections, and it has neither the staff nor the expertise to engage adequately in this function.”¹⁸⁸ The IRS acknowledges the same challenges, stating the prohibited activities “also raise legitimate concerns regarding freedom of speech and religious expression.”¹⁸⁹ The IRS further notes the lack of a bright-line rule to follow.¹⁹⁰ Other problems include the vast amount of § 501(c)(3) organizations and the lack of a paper trail as most political interventions are not recorded.¹⁹¹ Lastly, the IRS stresses the dearth of remedies at its disposal once it determines that a violation has occurred. This is largely because penalties are assessed on the amount of money spent in the activity in question, “which is often de minimis,” while the other option, revoking the tax exempt status of the organizations, seems a bit extreme.¹⁹²

The IRS has sought to speed up the investigation of alleged violations for § 501(c)(3) organizations.¹⁹³ In 2004, the IRS used a “fast track” method, which entailed a quick response by the IRS and educating the organizations to prevent future noncompliance.¹⁹⁴ Cases in 2006 were divided into Type A, B, or C cases.¹⁹⁵ Type A cases were categorized as single issue/noncomplex; Type B cases were multiple issue/complex, and Type C cases included egregious/repetitive political intervention.¹⁹⁶ As of March 30, 2007, no proposed or final revocations had been made for any church based on the investigations of the 2004 and 2006 election cycles.¹⁹⁷ Most of the violations found in the 2006 election merely resulted in a written advisory.¹⁹⁸ The IRS

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

188. *Id.* at 1318.

189. PROJECT 302, *supra* note 174, at 1.

190. *Id.*

191. *Id.* at 2. In 2006, there were over one million § 501(c)(3) organizations. 2006 I.R.S. DATA BOOK 56 tbl. 25 (2006), available at <http://www.irs.gov/pub/irs-soi/06databk.pdf>.

192. PROJECT 302, *supra* note 174, at 2.

193. *Id.* (The IRS must follow I.R.C. § 7611 (2006) procedures when investigating churches).

194. *Id.*

195. 2006 COMPLIANCE INITIATIVE, *supra* note 173, at 2.

196. *Id.*

197. *Id.* at 5.

198. *Id.* at 7 (noting that sixty-five of the ninety-two cases only received written advisories).

also implemented a program to review organizations that previously received written advisories for any further political intervention.¹⁹⁹

Even with a “fast track” method, administratively enforcing this statute is a nightmare. First, the initial report of the violation can be a problem from maintaining neutrality because a potential bias could exist due to the fact that people who report violations usually disagree with the statement that was made. Next, the IRS must follow CAPA for church audits.²⁰⁰ This is a long, drawn-out process, and while it affords churches protection, it does not allow for a quick investigation or decision.²⁰¹ Besides the administrative hassle, there is little tax revenue involved in the process.²⁰² Another problem with the current approach is that it fails to recognize America’s religious heritage. Further, churches lack an immediate remedy if they disagree with an IRS position or revenue ruling. If a church disagrees with any of the IRS’s views on what constitutes political campaigning, it must engage in the prohibited conduct, have its tax exempt status revoked, and only then can the church seek judicial review of the IRS’s actions.²⁰³ Penalties, revocation of tax exempt status, investigations, litigation: all of these things are very costly and do not always produce the best result for taxpayers or churches.

1. It Is Not Economically Feasible to Pursue Most Violations

According to IRS data, only five cases in the 2004 election cycle included cash contributions for political candidates.²⁰⁴ There was no revocation of tax exempt status and only minor penalties assessed.²⁰⁵ The penalties are minor because they are only imposed on the amount of money used in the political intervention, and since the 2004 election, there are only five documented cases where that happened; thus not much revenue is being produced.²⁰⁶

In 2004, the IRS collected approximately \$2 trillion from corporations, individuals, employment, estate and gift, and excise taxes.²⁰⁷ In 2005, the IRS

199. *Id.* at 5 (noting that the program is the Review of Operations (ROO) and quarterly internet research is done in order to determine if any further violations have occurred).

200. *See* PROJECT 302, *supra* note 174, at 2 (explaining that “church cases were conducted according to the church tax inquiry and examination procedures of IRC § 7611.”).

201. *See supra* text accompanying notes 98–106.

202. *See supra* text accompanying note 192.

203. CAFARDI & CHERRY, *supra* note 53, at 364.

204. PROJECT 302, *supra* note 174, at 17 (identifying seven alleged instances where an organization contributed its own funds to a campaign but only found political intervention in five cases).

205. INTERNAL REVENUE SERV., 2004 POLITICAL ACTIVITIES COMPLIANCE INITIATIVE SUMMARY OF RESULTS (2006), http://www.irs.gov/pub/irs-tege/one_page_statistics.pdf [hereinafter 2004 PACI SUMMARY OF RESULTS].

206. *See supra* text accompanying note 172.

207. 2005 I.R.S. DATA BOOK 1 tbl. 1 (2005), available at <http://www.irs.gov/pub/irs-soi/05 databk.pdf> (reporting that the exact figure for 2004 was \$2,018,502,103,000).

collected \$250 billion more than that amount, and in 2006, the IRS collected over \$2.5 trillion.²⁰⁸ This seems like an outrageous amount of money being amassed, but in 2004, former IRS Commissioner Charles Rossotti estimated that \$300 billion of tax revenue was not being collected.²⁰⁹ Over the last several years, there has been approximately a twenty percent decrease in IRS staff and the former commissioner stated that “the IRS does not have the capacity to deal with even the most obvious cheaters.”²¹⁰ When asked in which areas the most tax abuse occurs, Mr. Rossotti listed tax-shelters that generate facetious losses and the earned income tax credit as targets for abuse.²¹¹

The excise taxes²¹² on political expenditures and excess lobbying expenditures reported by charities, private foundations, and split-interest trusts for 2004 were about \$15,000.²¹³ In 2005, the amount was around \$167,000,²¹⁴ and in 2006, about \$218,000.²¹⁵ The organizations included in this data are § 501(c)(3) organizations as well as § 501(c)(4)–(9) organizations.²¹⁶ This data most likely includes the excise taxes attributed to direct financial contributions by non-churches in the amount of \$299,812, and churches in the amount of \$44,151.²¹⁷

If the IRS is understaffed, lacks adequate technology, and as stated by Mr. Rossotti, lacks “the capacity to deal with even the most obvious cheaters,” it seems that given the small amount of revenue, the IRS should only investigate

208. 2006 I.R.S. DATA BOOK 3 tbl. 1 (2006), available at <http://www.irs.gov/pub/irs-soi/06databk.pdf> (reporting that the exact figure for 2005 was \$2,268,895,122,000 and 2006 was \$2,518,680,230,000).

209. Interview by Linda Wertheimer with Charles Rossotti, Former IRS Commissioner, *Budget Cuts Hurt Tax Enforcement* (NPR radio broadcast Apr. 10, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=1832281> [hereinafter *Budget Cuts*].

210. *Id.*

211. *Id.*

212. Excise taxes should include any penalties that § 501(c)(3) organizations had to pay due to a political intervention violation.

213. See INTERNAL REVENUE SERV., EXCISE TAXES REPORTED BY CHARITIES, PRIVATE FOUNDATIONS, AND SPLIT-INTEREST TRUSTS ON FORM 4720 (2004), <http://www.irs.gov/pub/irs-soi/04pf00et.xls> (\$15,026).

214. INTERNAL REVENUE SERV., EXCISE TAXES REPORTED BY CHARITIES, PRIVATE FOUNDATIONS, AND SPLIT-INTEREST TRUSTS ON FORM 4720 (2005), <http://www.irs.gov/pub/irs-soi/05pf00et.xls> (\$166,789).

215. INTERNAL REVENUE SERV., EXCISE TAXES REPORTED BY CHARITIES, PRIVATE FOUNDATIONS, AND SPLIT-INTEREST TRUSTS ON FORM 4720 (2006), <http://www.irs.gov/pub/irs-soi/06pf00et.xls> (\$217,763).

216. Internal Revenue Serv., SOI Tax Stats—Charities & Other Tax-Exempt Organizations Statistics, <http://www.irs.gov/taxstats/charitablestats/article/0,,id=97176,00.html>.

217. 2006 COMPLIANCE INITIATIVE, *supra* note 173, at 6. (noting the Political Contributions Sub-Project (PACI-PC) was the group credited with recovering these funds.); I.R.C. §§ 527, 4955, 4911, 4912 (2006) (all have the ability to impose an excise tax on a political expenditure).

the most blatant violations of § 501(c)(3) or forgo investigating them altogether.²¹⁸ Further, the date concerning the excise taxes on political expenditures are for six different types of organizations, and yet the IRS wants to increase efforts to investigate only § 501(c)(3) organizations.²¹⁹

Recently, “[t]he IRS has been very public about its desire to close . . . the tax gap, the estimated difference between taxes owed and taxes collected.”²²⁰ Yet, the collection of the excise taxes on political expenditures will not put a dent in the tax gap. When Mr. Rossotti stated areas of abuse, he did not mention funds spent by tax exempt organizations for political campaigns, much less statements made by church leaders urging members to vote for a particular candidate.²²¹ The net tax gap was believed to be \$290 billion in 2001 and in 2004 near \$300 billion.²²² The composition of the tax gap consisted of 70% of individual income tax, and over 80% of the gap attributed to underreporting.²²³ This means that to close the tax gap, enforcement, education, and compliance should focus on the individual income tax, especially the self-employment tax and areas where income is not subject to third-party reporting or withholding requirements.²²⁴

During 2006, the IRS operated under a \$10.5 billion budget.²²⁵ This money was used to process approximately 140 million individual, partnership, and corporate income tax returns as well as 1.5 billion information returns.²²⁶ The IRS also had the responsibility to uphold tax law, provide guidance to taxpayers or preparers, and collect trillions in tax revenue.²²⁷ Due to limited resources, staff, and technology, “[t]he IRS can address only a small part of the tax gap each year through its enforcement activities.”²²⁸ The IRS stated that even if current programs are operating at efficient levels, it would not be enough to reduce the tax gap because information reporting needs to be

218. See *Budget Cuts*, *supra* note 209 and accompanying text.

219. See *supra* text accompanying notes 166–169.

220. Jeanne Sahadi, CNNMONEY.COM, *IRS Enforcement Efforts Raise Record Revenue: A Government Report Shows Audits Increased Across the Board in Fiscal Year 2006*, Nov. 14, 2006, http://money.cnn.com/2006/11/14/pf/taxes/gao_irs_audits/index.htm.

221. *Budget Cuts*, *supra* note 209.

222. U.S. DEP’T OF TREASURY, OFFICE OF TAX POL’Y, *A COMPREHENSIVE STRATEGY FOR REDUCING THE TAX GAP 5* (2006), available at <http://www.ustreas.gov/press/releases/reports/otptaxgapstrategy%20final.pdf> [hereinafter REDUCING THE TAX GAP]; see also Meah Rothman Tell, *Circular 230: Beware the Jabberwock!*, FLA. BAR J., Jan. 2006, at 39, 39. (“U.S. Senators Charles E. Grassley and Max Baucus estimated the ‘tax gap’ to be approximately \$311 billion . . .”).

223. REDUCING THE TAX GAP, *supra* note 222, at 5.

224. *Id.*

225. *Id.* at 12.

226. *Id.* at 12–13.

227. *Id.*

228. REDUCING THE TAX GAP, *supra* note 222, at 13.

expanded, and a refinement is needed in the detection programs as well as an increase in examinations for areas that are targets of abuse.²²⁹

2. Section 501(c)(3) Enforcement Has Potential to Infringe on First Amendment Rights

Churches are afforded protection under the Free Exercise Clause, the Establishment Clause, and receive further protection under the Free Speech Clause.²³⁰ The importance of churches has long been recognized. Christianity in America has been credited with influencing numerous social debates and bringing about positive social change.²³¹ As Justice Brennan observed, “[d]uring their ordinary operations, most churches engage in activities of a secular nature that benefit the community; and all churches by their existence contribute to the diversity of association, viewpoint, and enterprise so highly valued by all of us.”²³² The § 501(c)(3) ban is forcing churches to refrain from speaking out on important issues for fear of revocation or penalties.²³³ The word that has been used to describe the bans effect on pulpits has been “chilling.”²³⁴

In *Branch Ministries*, the court stated that Congress does not violate a church’s First Amendment rights by choosing not to subsidize its activities.²³⁵ The violations in *Branch Ministries* were blatant and directed at the public,²³⁶ and Justice Rehnquist has said that a tax exemption is the equivalent of a subsidy.²³⁷ However, Justice Brennan thought differently, stating:

Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the

229. *Id.*

230. *See* U.S. CONST. amend. I. There are other constitutional challenges that churches can make. This comment, however, limits the scope of the discussion and focuses on the First Amendment issues.

231. *See* BERG, *supra* note 22, at 59.

232. *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 692–93 (1970) (Brennan, J., concurring).

233. Guinane, *supra* note 76, at 154 (reporting that after noting the “absurdity of the current IRS approach,” Marcus Owens, former Director of the IRS Exempt Organizations Division and current attorney representing tax exempt organizations in PACI investigations, suggested that the current IRS enforcement “has made 501(c)(3) organizations afraid to speak out on important issues, such as the war in Iraq or global warming”). Ryan, *supra* note 96, at 85 (“Research demonstrates that many § 501(c)(3) organizations cower in fear of the IRS and avoid any kind of advocacy, even that which might be permitted.” (citing Jeffrey M. Berry, *Who Will Get Caught in the IRS’s Sights?*, WASH. POST, Nov. 21, 2004, at B3)).

234. John Berlau, *Churches Must Follow IRS Gospel*, INSIGHT ON THE NEWS, Oct. 22, 2001, at 18.

235. *Branch Ministries v. Richardson*, 211 F.3d 137, 143–44 (D.C. Cir. 2000).

236. *See supra* text accompanying notes 146–151.

237. *See supra* text accompanying note 63.

subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. . . . Tax exemptions, accordingly, constitute mere passive state involvement.²³⁸

Courts have also been quick to strike any legislation where the government investigates the religious content of an activity.²³⁹ When the ban in § 501(c)(3) was proposed, enforcement efforts were not certain. Today, however, the IRS seems to be investigating the religious content of an activity, the exact conduct that if known, would have caused the courts to strike the ban. Generally, courts will uphold legislation, unless it facially discriminates, but if the IRS is challenged, it is possible that the courts would consider striking the enforcement effort as unconstitutional or find that the statute has been misinterpreted. It is also possible a hybrid claim could strike the ban. The ban has been upheld for many reasons, and one mentioned commonly is that the ban is a neutral tax that applies to all tax exempt organizations.²⁴⁰ However, even a neutral tax does not authorize the IRS to determine religious content.

Further, the main reason behind the original exemptions was to prevent excessive entanglement between the state and churches.²⁴¹ The restriction on political campaigning was not introduced until 1954.²⁴² It was not actively enforced until the last few decades, and it is possible that the IRS's enforcement efforts could constitute continuing surveillance.²⁴³ The exemption was meant to allow church and state to coexist without unnecessary interaction.²⁴⁴ The current § 501(c)(3) enforcement cuts against this original purpose. The ban requires the IRS to draw lines between religious and political speech, and this entails investigating the content of sermons. There is no longer much fear of theocracy in the United States. The ban merely provides super-heightened protection from any religious influence, and it is unnecessary. Secular America is safe, but our churches are not. It is now possible for the content of sermons to come under the scrutiny of tax experts. Churches have always spoken out on moral and social issues, and this ban deprives not only church leaders and members, but society of diverse and open debate. Free speech scholars stress the need for unrestricted political speech in

238. *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 690–91 (1970) (Brennan, J., concurring).

239. Kenneth C. Halcom, *Taxing God*, 38 MCGEORGE L. REV. 729, 754 (2007).

240. *See Walz*, 397 U.S. at 669.

241. *See supra* text accompanying note 128.

242. *See supra* text accompanying notes 76–79, 81–82.

243. Berlau, *supra* note 234.

244. *See supra* text accompanying note 67.

the democratic process because government is unaccountable if its citizens are uninformed.²⁴⁵

3. Violations Come to Light Through Referrals

The § 501(c)(3) ban saw little action until President Bill Clinton came into office.²⁴⁶ Once Clinton was elected as president, his IRS Commissioner appointee Charles Rossotti enforced the ban against Branch Ministries who ran ads in opposition to his presidency, and a subsequent revocation was upheld.²⁴⁷ Conservative churches felt that the IRS turned a blind eye to more liberal or democratic churches during the Clinton administration.²⁴⁸ Former IRS Commissioner, Don Alexander, stated, “I think there was selective enforcement during the Clinton years, when a church against Clinton was audited and its exemption revoked, [but] Clinton and Gore making political speeches from the pulpits . . . has been ignored.”²⁴⁹

Needless to say, the IRS has been accused of bias in its enforcement efforts. Largely, this has to do with the process by which the IRS learns of the alleged violations. A referral is “a communication received by the [Exempt Organizations] function from an internal or external source relating to potential noncompliance with the tax law by an exempt organization, political organization, taxable entity, or individual.”²⁵⁰ While blatant violations directed at the public are easy to detect, the only way violations that take place on church property or during services are discovered is if an individual with an opposing viewpoint or from another political party disagrees with the message and reports it. Thus, if the alleged violation is being reported, there is some immediate bias involved.

III. PROPOSAL

The current approach to enforcing the political campaign ban is inefficient. The way violations are reported, investigated, and decided, involve much subjectivity. The constitutionality of the exemption granted to churches has been challenged, and upheld, so it is not a viable option to entirely eliminate it.²⁵¹ Not only would the elimination of tax exemption “expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosure, and the direct confrontations and conflicts that follow

245. Guinane, *supra* note 76, at 156, (citing ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948)).

246. Berlau, *supra* note 234.

247. *See id.*

248. *Id.*

249. *Id.* (alteration in original).

250. PROJECT 302, *supra* note 174, at 1 n.1.

251. *See Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 673 (1970).

in the train of those legal processes,²⁵² but churches would be free to engage in political campaigning, being subject only to the restrictions under the Federal Election Campaign Act and the Federal Corrupt Practices Act.²⁵³ To enforce the current political ban among all tax exempt organizations,²⁵⁴ disregarding the amount of finances it would require for a moment, would entail an organization large enough to police the one million plus § 501(c)(3) organizations. Now, realistically, if Congress has been cutting the IRS staff over the past decade, it is doubtful that TEGE currently has enough manpower to effectively police tax exempt organizations.²⁵⁵ Therefore, a balance must be struck so that churches can speak openly to members and the IRS can focus resources in other areas.²⁵⁶ Some commentators merely want a bright-line rule for separating issue advocacy and a political intervention; others want safe harbor exceptions for minor violations.²⁵⁷ Further suggestions would give deference to churches in determining what constitutes religious and political activity.²⁵⁸ All of these approaches have merit, but each only partially addresses the issues.

Therefore, in the alternative, this comment proposes a revision of § 501(c)(3) that creates a bright-line rule, thus allowing a cut back on enforcement and promotion of a more efficient system. The proposal offered in this comment is similar to the Houses of Worship Political Speech Restoration Act, proposed by U.S. Representative Walter B. Jones, which would have allowed churches to engage in partisan politics.²⁵⁹ However, this comment's proposal differs in a few important ways. The suggested proposal

252. *Id.* at 674. The Court in *Walz* only discusses the risk of entanglement for eliminating the exemption for property taxes. To tax churches fully, the exemption for state and federal income taxes would also be eliminated, and this would most likely violate the Establishment Clause due to excessive entanglement.

253. CAFARDI & CHERRY, *supra* note 53, at 83.

254. I.R.S. DATA BOOK, *supra* note 191, at 56 tbl.25.

255. *Budget Cuts*, *supra* note 209.

256. *Walz*, 397 U.S. at 676 (“The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.”).

257. See Lloyd Hitoshi Mayer, *Grasping Smoke: Enforcing the Ban on Political Activity by Charities*, 6 FIRST AMEND. L. REV. 1, 31 (2007); see also Guinane, *supra* note 76, at 142.

258. See Ryan, *supra* note 96, at 75–76.

259. Houses of Worship Free Speech Restoration Act, H.R. 235, 108th Cong. (2003). The Houses of Worship Free Speech Restoration Act sought to amend the IRC so that churches would not lose their tax exempt status “because of the content, preparation, or presentation of any homily, sermon, teaching, dialectic, or other presentation made during religious services or gatherings.” *Id.* § 2; see also ERIKA LUNDER ET AL., CONG. RESEARCH SERV., CAMPAIGN ACTIVITY BY CHURCHES: LEGAL ANALYSIS OF HOUSES OF WORSHIP FREE SPEECH RESTORATION ACT 1 (2004) (providing a summary and analysis of the Act); Sterngold, *supra* note 161 (discussing the Act in light of an IRS investigation).

would extend to all § 501(c)(3) organizations, to non-religious and religious organizations. The proposal would involve a system where only political interventions aimed at the public would be investigated and subjected to penalties or revocation. Examples of items that would typically be investigated would include: signs on church property, websites, newspaper ads, and any other communication that was meant to influence public political opinion. Funding for political campaigns and excess expenditures for lobbying expenses would still be considered political intervention and subject to penalties or revocation. This proposal envisions churches speaking freely, on church property, to its members. There would be no investigations of the content of a sermon, if a political candidate spoke at a church function, or if any pamphlets were distributed to members. To avoid abuse, by § 501(c)(3) organizations, the bright-line rule would focus on whether or not speech was made to members on the organization's property versus whether the speech was directed at the public. This proposal may seem extreme, but it does not contradict precedent, history, or public policy.

A. *Why the Proposal Would Work*

1. History

The Founding Fathers were concerned with protecting freedom of religion. Historically, separation of church and state were important concepts, not only to keep government protected but to also protect churches from government interference.²⁶⁰ Churches have been influential throughout history in the abolition of slavery and the civil rights movement.²⁶¹ Tax exempt status was originally granted to churches restriction free.²⁶² When the political ban was enacted in 1954, it was not aimed at silencing churches.²⁶³ Lyndon B. Johnson was frustrated with two tax exempt political organizations which were raising funds and publicly speaking out against him.²⁶⁴ This proposal would satisfy his original intent of enacting the ban. No funds could be raised by tax exempt organizations to engage in any political intervention. Tax exempt organizations would remain unable to address the public with any statements that may be considered political. It is unlikely that the original goals of the Founding Fathers and Johnson are being promoted as intended. It is difficult

260. *See supra* text accompanying note 22.

261. BERG, *supra* note 22, at 60 ("As a pervasive force in American culture, Christianity also deeply influenced political and social debates. The religious revivals spawned Christian reform movements for a host of causes, including temperance, education, relief for the poor, and the abolition of gambling and slavery.").

262. *See supra* text accompanying notes 53–58.

263. *See supra* text accompanying notes 76–79, 81–82.

264. *See supra* text accompanying notes 76–79, 81–82.

to envision that the Internal Revenue Service, an organization created solely to collect taxes, would be charged with investigating church sermons and determining whether speech was political or religious.

2. Enforcement of Proposal Is Much Easier

If only statements addressed to the public and political fundraising are considered violations, the IRS could spend a lot less time investigating alleged violations and more time closing the tax gap. Statements addressed to the public are generally in the form of newspaper ads, signs on property, website or television. These statements are much easier to regulate compared to statements taking place during a church sermon, and most likely statements aimed at the public include a record. The IRS simply needs to be aware of its surroundings: glance through newspapers, surf the web, and turn on the television. A record of the conduct in question also allows for a more accurate decision by the IRS, rather than a “he said/she said” investigation.

Raising funds for a political candidate or campaign should continue to be a concern for the IRS. Because churches enjoy tax exempt status, they should not raise funds for any political candidates. However, investigation of this issue would not be difficult. Political candidates are regulated, and they would have to maintain and produce records of fundraising activities. Political funds contributed from churches would have to be reported, and this would subject the candidate to penalties.²⁶⁵ This approach is a deterrent in a monetary form. There is also the possibility of losing votes by this dishonest behavior, which is even more costly to a political candidate than a monetary penalty.

3. The Treasury Can Still Appear Neutral

The Court has stated that the government has an interest in not subsidizing political speech and insisting on the appearance of neutrality with regard to the Treasury in political matters.²⁶⁶ In other words, the government does not want to allow churches or other tax exempt organizations to make political statements, which the public could perceive as being made by the government. This subsidy argument has been advanced by courts as the reason the government can place restrictions on these tax exempt organizations. Under this theory, a tax exemption is basically a subsidy granted by Congress, and Congress can place any restrictions on recipients of this tax exemption subsidy. However, “[t]he subsidy argument, even if accepted, does not provide much support for substantial enforcement against minor, albeit possibly widespread, violations because such violations are unlikely to create much of a subsidy

265. 2006 COMPLIANCE INITIATIVE, *supra* note 173, at 6 (“Candidates and political organizations that support candidates file reports of contributions and expenditures with state campaign finance offices.”)

266. *See supra* text accompanying note 141.

problem for the simple reason that they do not involve a significant use of tax-deductible funds.²⁶⁷ As the Court in *Walz* pointed out, the grant of a tax exemption does not involve government funds being transferred to churches but merely allows churches to refrain from supporting the state.²⁶⁸

Allowing churches to make statements to their own members is highly unlikely to cause those members to attribute that speech to the government. It is obvious that statements made by a church leader are his or her beliefs. The members do not believe that the religious or political views espoused by a church leader are also those of the government. Further, the views expressed in churches cover the entire political spectrum so no party has a real advantage through this proposal, and as no political funds can be raised, the Treasury maintains its neutrality. By permitting churches to speak to members on religious and political topics, the government would not be subsidizing partisan political activity by giving churches this freedom. It would merely be allowing churches to carry on as they have for centuries.

4. Inviting Political Candidates to Speak

Currently, if a church invites a political candidate to speak at the church, it must allow political candidates expressing opposing views equal speech time. Proponents of this approach seem to be aware of the fact that most churches will either not invite the opposing candidate or, at the very best, stop speaking out on issues so that they do not have to invite those with opposing views, in effect silencing churches.²⁶⁹

It is unlikely that a church that is required to allow its constituents to voice a viewpoint contrary to its own on a matter of public interest will honor that obligation. If Justice Holmes' aphorism is taken as gospel, it is more likely that churches will react in essence similarly to rational broadcasters and limit the publication of issues that raise their constituents' hackles.²⁷⁰

Allowing a political candidate time to address a church congregation raises objections and concerns by proponents of the current ban. However, most of these concerns are unfounded. The main concern is the multiplier effect, which holds that any facilities or dollars used by these tax exempt

267. Mayer, *supra* note 257, at 22.

268. *Walz v. Tax. Comm'n of N.Y.*, 397 U.S. 664, 675 (1970).

269. Vickramjit Sharma, Comment, *The Fairness Doctrine as an Alternative to Enforcing the Ban on Political Intervention by Churches*, 6 CONN. PUB. INT. L.J. 299, 320–21. (2007) (discussing the Fairness Doctrine). The Fairness Doctrine is very similar to what the IRS already proposes, which is that political candidates with varying views must be invited to speak, but the speech can not be partisan under the IRS model. *Id.* at 321. Here, the author is saying that speech can be partisan as long as it is not political intervention and a rebuttal is given with equal airtime. *Id.* It seems the author's views are more liberal than IRS's current position, yet the author acknowledges that this model would either not work or silence churches. *Id.*

270. *Id.* at 321.

organizations is a greater benefit than compared to those dollars or facilities that are taxed.²⁷¹ This causes an unfair effect between high- and low-income taxpayers as well as those who contribute to § 501(c)(3) organizations.²⁷² The multiplier effect for tax free dollars is a real concern, and therefore the proposal includes a ban against political fundraising. However, it may not be as severe because the political views expressed by these tax exempt organizations are diverse and there is no dominant party. Furthermore, it is not only religious organizations that engage in this behavior. In the 2004 election cycle, the IRS data showed that there were sixty-three churches and sixty-nine non-churches that were suspected of violating the ban.²⁷³ The most complex, multi-issue cases were that of non-churches, and the five cases determined involve cash contributions to a political candidate's campaign included both churches and non-churches.²⁷⁴ Therefore, it seems that the concerns over the multiplier effect swaying an election is more a fear than a reality.

5. First Amendment Issues and Concerns

The recent IRS enforcement efforts raise important concerns among First Amendment scholars. The courts have only been confronted with § 501(c)(3) violations a handful of times, and each time the political ban was upheld as constitutional.²⁷⁵ While § 501(c)(3) is a "neutral, generally applicable law," it is possible that churches could start challenging the statute using the hybrid approach discussed in *Smith*, by bringing Free Exercise and Free Speech claims, thus forcing courts to use the compelling interest test to examine the statute.²⁷⁶ It is possible that the ban could be struck down under the compelling interest test due to the substantial burden on churches when the IRS is investigating its sermons.²⁷⁷ Furthermore, the enforcement of the ban and the IRS's interpretation of the ban leave much to be desired in the terms of constitutionality. The few cases that serve as precedent only dealt with blatant and continuous violations of the political ban directed at the public.²⁷⁸ However, the courts have yet to deal with whether statements in a sermon

271. See Richard, J. Wood, *Pious Politics: Political Speech Funded Through I.R.C. § 501(c)(3) Organizations Examined Under Tax Fairness Principles*, 39 ARIZ. ST. L.J. 209, 210 (2007).

272. *Id.* at 246.

273. 2004 PACI SUMMARY OF RESULTS, *supra* note 205.

274. See *id.*; PACI EXECUTIVE SUMMARY, *supra* note 83, at 4 (noting that the five determined cases included both charities (non-churches) and churches).

275. See *supra* text accompanying notes 137–164.

276. See *supra* text accompanying notes 119–120.

277. See Ryan, *supra* note 96, at 83–94 (laying out a hybrid analysis and strongly arguing that the government's compelling interest does not outweigh the substantial burden § 501(c)(3) causes).

278. See *supra* text accompanying notes 137–164.

solely directed at church members or by political candidates invited to speak violate the ban. The IRS does not appear to be certain in its position either. In 2007, the IRS opted not to fight the church in Pasadena over statements made during a sermon.²⁷⁹ No audit was ever performed, no revocation mentioned, and no penalties assessed.²⁸⁰ The IRS must have doubts as to whether the law is on its side in this area because they wisely chose not to litigate the matter and receive a court ruling which could have struck IRS enforcement efforts as unconstitutional or as misinterpreting the political ban. Therefore, the IRS may continue policing church sermons for now. Still, due to the controversy surrounding the ban, if the IRS continues this investigation effort, they will most likely end up in court, a risky proposition. The Supreme Court stated:

It is no business of courts to say what is a religious practice or activity for one group is not religion under the protection of the First Amendment. Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings. Sermons are as much a part of a religious service as prayers.²⁸¹

If courts should not analyze sermons, the IRS certainly should not. If the IRS's enforcement efforts are challenged and the court rules against them, its investigations will be greatly and justifiably limited.

Still, judicial relief for churches has been limited. While courts were quick to offer religious protection fifty plus years ago, today courts can manipulate the compelling interest test by stating that the church suffers no substantial burden of their Free Exercise rights. If courts do find that the church suffers a substantial burden, they will usually attempt to find a stronger government compelling interest and uphold any statute or action that infringes upon these rights. This is the correct approach taken by the courts when applying the compelling interest test. The courts should defer to the legislature by upholding its statutes and actions. Matters of state-church interaction should be determined by the people through their duly elected representatives, not unelected judges.

That is why Congress must act. The best alternative to this inefficient system is for Congress to step in and allow churches to fully exercise their First Amendment rights by stating that church services and property will not be subject to these political investigations by the IRS. This would entail church leaders having the ability to speak freely to their members about political issues and even inviting political candidates to come speak at church services. This would not include fundraising for the particular candidate. If Congress drew a line where only political speech or conduct directed at the public

279. *See supra* text accompanying notes 157–164.

280. *See supra* text accompanying notes 162–164.

281. *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953).

constituted a political intervention, the system would operate much more efficiently and within the limits of history and the Constitution.

CONCLUSION

Currently, the IRS appears to have been charged with maintaining the wall of separation of church and state, and it is costing all of America. Many scholars already believe that the IRS and § 501(c)(3) restriction are violating First Amendment rights. The IRS must decide whether speech is political or religious, a nonsensical proposition considering most courts refrain from making such a distinction. Moreover, the surveillance and investigation that is required to enforce the § 501(c)(3) ban does not comport with the First Amendment. Separation of church and state will remain even if churches are permitted to speak to members on political issues. In fact, many church leaders do not intend to discuss political matters anyway, but feel that it is a church's decision whether or not to speak on these issues, not the IRS's.²⁸²

The current enforcement of the § 501(c)(3) political ban dismisses the history of this country and the protection afforded to churches. It is not a governmental agency's place to infringe on churches' First Amendment rights. Churches should be allowed to speak freely during services. This has always been church practice, and only now does it seem that the IRS is attempting to gradually regulate and monitor speech within the church. Church opinions are being pushed from the public sphere. The United States has always valued its diversity, and by denying churches the freedom to speak on issues for fear that the speech could be construed as favoring a particular candidate or making a candidate's identity known is unprecedented, un-American, and legally unsound.

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282. See e.g., Lockwood, *supra* note 13; Sterngold, *supra* note 161.

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