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Saving the Preachers: The Tax Code's Prohibition on Church Electioneering

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Saving the Preachers: The Tax Code’s Prohibition on Church Electioneering

*Nicholas P. Cafardi**

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I. INTRODUCTION

There has been a movement of late to create a legal basis for exempting churches from the Tax Code’s restrictions on electioneering.¹ As it stands, churches² may not participate at all in cam-

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1. See, e.g., Keith S. Blair, *Praying for a Tax Break: Churches, Political Speech and the Loss of Section 501(c)(3) Tax Exempt Status*, 86 DENV. U. L. REV. 405 (2009); Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145 (2006); Lloyd H. Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens and Institutional Free Exercise*, 89 B.U. L. REV. 1137 (2009); Allan J. Samansky, *Tax Consequences When Churches Participate in Political Campaigns*, 5 GEO. J.L. & PUB. POL’Y 145 (2007); Jennifer M. Smith, *Morse Code*,

paigns for elective public office, neither on behalf of, nor in opposition to, a candidate. Part I of this article will examine the history of this prohibition and the legal challenges to it. Then, Part II will take up the idea of tax exemption as a taxpayer subsidy. Part III will look at how the IRS has enforced this prohibition. Part IV will conclude with some recommendations.

II. HISTORY

A. *Origin of the Prohibition*

The electioneering prohibition, not just for churches, but for all organizations that get their exemption from federal income tax under § 501(c)(3) of the Tax Code, is absolute and is rather longstanding. It was initially added to the Code in 1954, when Congress was revising the Tax Code, in an amendment from the floor by then Texas Senator and minority leader Lyndon B. Johnson.³ Senator Johnson evidently believed that a Texas-based charitable foundation had been helping his opponent in the 1954 Texas Democratic primary election for U.S. Senator and wanted to put a stop to it. Since the language that he added to § 501(c)(3) of the Tax Code, granting 501(c)(3) status only to an organization “which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office,” has no clear legislative history, we

Da Vinci Code, Tax Code and . . . Churches: An Historical and Constitutional Analysis of Why Section 501(c)(3) Does Not Apply to Churches, 32 J.L. & POL. 41 (2007).

2. An explanation of terminology is appropriate at the outset. This article will use the word “church” not just to refer to Christian places of worship, but as a figure of speech to cover synagogues, mosques, temples, and so forth. This is not original with the author. The IRS also uses the word church in a generic sense. See INTERNAL REVENUE SERV., U.S. DEPT OF THE TREASURY, PUB. 1828, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 2 (2009), available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf>. In the article’s title, the word “electioneering” is as defined in NICHOLAS P. CAFARDI & JACLYN F. CHERRY, UNDERSTANDING NONPROFIT AND TAX EXEMPT ORGANIZATIONS § 6.05 (2006) (citing *Roberts Dairy Co. v. Comm’r*, 195 F.2d 948 (8th Cir. 1952) and *Am. Hardware & Equip. Co. v. Comm’r*, 202 F.2d 126 (4th Cir. 1953)) (“Electioneering is 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.”). Also in the article’s title, the word “preacher” is another figure of speech, meant to refer to priests, bishops, pastors, ministers, rabbis, imams and so on—in short, any person whose job it is to get up in a generic “church” and lead the service, usually by “preaching” to the “church” assembly.

3. See NICHOLAS P. CAFARDI & JACLYN F. CHERRY, TAX EXEMPT ORGANIZATIONS: CASES AND MATERIALS 189 (2d ed. 2008) (“The ban on electioneering was made part of the 1954 Tax Code at the motion of then Senator Lyndon Johnson of Texas.”).

can only guess at Johnson's motives.⁴ One thing is rather clear, however, namely that although churches as Section 501(c)(3) organizations were caught in Johnson's net, churches were not his direct target. It is almost a happenstance that the electioneering prohibition was placed on churches, but some, including this author, would say that it was a felicitous happenstance, one that benefits churches more than they perhaps realize—a *felix culpa*, to use a phrase that some theologians might understand.⁵

Since Johnson's time, the language of § 501(c)(3) has been altered only once, by the Revenue Act of 1987, which added the parenthetical language "(or in opposition to)" to the statute, arguably making the limitation on electioneering activity by a tax exempt organization even stronger.⁶ At this point, Congress certainly knew that these intensified § 501(c)(3) electioneering prohibitions would affect churches, as well as all other § 501(c)(3) organizations and made no attempt to exclude them.

Internal Revenue Code § 501(c)(3), as it currently reads, exempts from federal income taxation:

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 (except as otherwise provided in subsection (h)),

4. It has been suggested that Johnson's motives may not have been so personal, but lacking a clear record, history will never know. See Kemmitt, *supra* note 1, at 153 (citing Ann M. Murphy, *Campaign Signs and Collection Plate: Never the Twain Shall Meet?* 1 PITT TAX REV. 35, 49-55 (2003)) ("The [alternative] theory disputes the notion that Johnson acted out of political self-interest and suggests that, on the contrary, Johnson's proposal was a response to an intemperate, alternative proposal motivated by anti-Communist sentiment in Congress.")

5. The phrase is from the Roman Catholic Easter Vigil Mass: "*O felix culpa quae talem ac tantum meruit habere Redemptorem*," which translates to "[o] happy fault that merited such and so great a Redeemer." The reference is that Adam's sin was a *felix culpa*, a happy fault, since it caused Christ to come to redeem mankind. THE ENGLISH-LATIN SACRAMENTARY FOR THE UNITED STATES OF AMERICA 116 (1966).

6. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10711(a), 101 Stat. 1330, 1464.

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.⁷

Although Congress has not changed the language of § 501(c)(3) since 1987, it also created, in 1987, a new penalty for § 501(c)(3) organizations that violated the prohibition on electioneering, by adding § 4955 to the Tax Code.⁸ This section levies an excise tax, based on the amount expended for the impermissible electioneering activity, on both the organization and the organization's managers who approved the expenditure.⁹

7. I.R.C. § 501(c)(3) (2006).

8. § 10712, 101 Stat. at 1464.

9. I.R.C. § 4955 (2006) (added by § 10711(a), 101 Stat. at 1464) reads, in pertinent part:

(a) Initial taxes.

(1) On the organization. There is hereby imposed on each political expenditure by a section 501(c)(3) organization a tax equal to 10 percent of the amount thereof. The tax imposed by this paragraph shall be paid by the organization.

(2) On the management. There is hereby imposed on the agreement of any organization manager to the making of any expenditure, knowing that it is a political expenditure, a tax equal to 2 1/2 percent of the amount thereof, unless such agreement is not willful and is due to reasonable cause. The tax imposed by this paragraph shall be paid by any organization manager who agreed to the making of the expenditure.

* * *

(d) Political expenditure. For purposes of this section—

(1) In general. The term "political expenditure" means any amount paid or incurred by a section 501(c)(3) organization in any participation in, or intervention in (including the publication or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

(2) Certain other expenditures included. In the case of an organization which is formed primarily for purposes of promoting the candidacy (or prospective candidacy) of an individual for public office (or which is effectively controlled by a candidate or prospective candidate and which is availed of primarily for such purposes), the term "political expenditure" includes any of the following amounts paid or incurred by the organization:

(A) Amounts paid or incurred to such individual for speeches or other services.

(B) Travel expenses of such individual.

(C) Expenses of conducting polls, surveys, or other studies, or preparing papers or other materials, for use by such individual.

(D) Expenses of advertising, publicity, and fundraising for such individual.

(E) Any other expense which has the primary effect of promoting public recognition, or otherwise primarily accruing to the benefit, of such individual.

B. *Constitutional Challenges*

Johnson's language in the Internal Revenue Code denying tax exempt status to organizations that are electorally active¹⁰ has survived constitutional challenge in numerous instances, because exemption from taxation is a privilege, not a right, and like any government granted privilege, the government is free to put legitimate conditions on the grant of the privilege. The Tenth Circuit Court of Appeals explained in *Christian Echoes National Ministry, Inc. v. United States*, where a religious organization, operating much like a church, claimed that the Tax Code's electioneering restrictions violated its first amendment free speech rights:

In light of the fact that tax exemption is a privilege, a matter of grace rather than right, we hold that the limitations contained in Section 501(c)(3) withholding exemption from non-profit corporations do not deprive [taxpayer] of its constitutionally guaranteed right of free speech. The taxpayer may engage in all such activities without restraint, subject, however to withholding the exemption or, in the alternative, the taxpayer may refrain from such activities and obtain the privilege of exemption.¹¹

An alternative argument that a church has a first amendment free exercise right to tax exemption is also a non-starter, since it runs smack up against the Establishment Clause. As the U.S. Supreme Court said in *Texas Monthly v. Bullock*, a case which struck down as unconstitutional a state sales tax scheme that exempted from the tax “[p]eriodicals [that are] published or distributed by a religious faith [and that] consist wholly of writings promulgating the teaching of the faith and books [that] consist wholly of writings sacred to a religious faith.”¹²

In proscribing all laws “respecting an establishment of religion,” the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of reli-

10. I.R.C. § 501(c)(3) also contains a prohibition, but not a complete prohibition, on lobbying activities by (c)(3) organizations. It specifies that “no substantial part of the activities of [a 501(c)(3) organization can consist of] carrying on propaganda, or otherwise attempting, to influence legislation.” *Id.* (emphasis added). The lobbying activities of churches are not dealt with in this article.

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

12. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 1 (1989) (citations omitted).

gious beliefs or of religion generally. It is part of our settled jurisprudence that "the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such"¹³

And:

[N]othing in our decisions under the Free Exercise Clause prevents the State from eliminating altogether its exemption for religious publications. "It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." . . . The State therefore cannot claim persuasively that its tax exemption is compelled by the Free Exercise Clause in even a single instance, let alone in every case. No concrete need to accommodate religious activity has been shown.¹⁴

C. *The Effect of the Religious Freedom Restoration Act ("RFRA")*

In 1993, Congress passed the Religious Freedom Restoration Act ("RFRA")¹⁵ in response to the U.S. Supreme Court decision in *Employment Division v. Smith*,¹⁶ which undid the "compelling state interest" test when dealing with a "neutral law of general applicability."¹⁷ The "compelling state interest" test is derived from the case of *Sherbert v. Verner*,¹⁸ which held that "governmen-

13. *Tex. Monthly*, 489 U.S. at 8 (citations omitted).

14. *Id.* at 18 (citations omitted). See also *United States v. Washington*, 672 F. Supp. 167 (M.D. Pa. 1987), where the court said:

To violate the free exercise clause, the government must burden the defendant's practice of his religion by pressuring him to commit an act forbidden by the religion or by preventing him from engaging in conduct that the faith mandates. The burden must be more than an inconvenience and must interfere with a tenet or belief that is central to religious doctrine. It is clear that the Internal Revenue Code does not have that effect. A statute is not invalid simply because it affects a religious organization's operation. The fact that, because of income taxes, the church will receive less money does not rise to the level of a burden on the defendant's ability to exercise his religious beliefs. He may continue to donate the whole of his net income to the church and may continue to worship according to the dictates of his heart. Thus, we reject the defendant's free exercise defense.

Id. at 170 (citations omitted).

15. Pub L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)).

16. 494 U.S. 872 (1990).

17. *Smith*, 494 U.S. at 879 (citations omitted).

18. 374 U.S. 398 (1963).

tal actions that substantially burden a religious practice must be justified by a compelling governmental interest.”¹⁹ *Smith* held that this test should no longer be used to protect religiously-motivated persons from neutral laws of general applicability, saying:

[The compelling state interest rule] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this.²⁰

Note that “payment of taxes” is included in the Court’s list of neutral laws of general applicability.

The legislative history of RFRA confirms that its purpose was to return to the pre-*Smith* law, when *Sherbert*’s compelling state interest test was the controlling legal standard.²¹ The senate report on the draft legislation states that in interpreting RFRA, courts should rely on “free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened and the least restrictive means have been employed in furthering a compelling governmental interest.”²² In this regard, the senate report specifically cites two pre-*Smith* tax cases, *United States v. Lee*²³ and *Hernandez v. Commissioner*,²⁴ on whose jurisprudence the courts should rely to interpret RFRA.²⁵ As one scholar has explained:

19. *Smith*, 494 U.S. at 883 (citations omitted).

20. *Id.* at 888-89 (footnote omitted) (citations omitted).

21. The Senate Report says that “Congress also determines that the Supreme Court’s decision in *Employment Division v. Smith* eliminated the compelling interest test for evaluating free exercise claims previously set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and that it is unnecessary to restore that test to reserve religious freedom.” S. REP. NO. 103-111, at 14 (1993).

22. S. REP. NO. 103-111, at 8-9.

23. 455 U.S. 252 (1983).

24. 490 U.S. 680 (1989).

25. S. REP. NO. 103-111, at 8-9.

The legislative history shows that Congress sought to restore the “compelling governmental interest test” that it believed Smith had incorrectly eliminated for laws of general application that burdened religion. That history provides that Congress expected “that the courts will look to free exercise of religion cases decided prior to Smith for guidance in determining whether or not . . . the least restrictive means have been employed in furthering a compelling governmental interest” and that the compelling interest test “generally should not be construed more stringently or more leniently than it was prior to Smith.”²⁶

In the two U.S. Supreme Court cases referenced in the legislative history of the RFRA, *Lee* and *Hernandez*, the Court held that the maintenance of a uniform system of taxation is a compelling governmental interest.²⁷ In *Lee*, a member of the Old Order Amish, who had employed several other Old Order Amish to work on his farm, had failed to withhold their social security tax or to pay the employer’s portion thereof.²⁸ He did this, he said, based on his religion, which “not only prohibits the acceptance of social security benefits, but also bars all contributions by the Amish to the social security system.”²⁹ There was no doubt about Lee’s honestly-held religious belief as to the social security system,³⁰ but applying the principle that “[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest[,]”³¹ the Court found the “[g]overnment’s interest in assuring mandatory and continuous participation in and contribution to the social security system [to be] very high”³² and that accommodating Lee’s religious beliefs in this regard would “unduly interfere with fulfillment of the governmental interest.”³³

26. Mayer, *supra* note 1, at 1179, cites H.R. REP. NO. 103-88, at 6-7 (1993) and S. REP. NO. 103-111, at 8-9 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1897-98, to support his conclusion. Mayer, however, does not share my conclusion that RFRA did no more than restore the “compelling state interest test” from *Sherbert*.

27. *Lee*, 455 U.S. at 258-59; *Hernandez*, 490 U.S. at 699-700 (citing *Lee*, 455 U.S. at 260).

28. *Lee*, 455 U.S. at 254.

29. *Id.* at 255.

30. *Id.* at 257.

31. *Id.*

32. *Id.* at 258-59.

33. *Lee*, 455 U.S. at 259.

In *Hernandez*, the U.S. Supreme Court examined whether payments made to the Church of Scientology by its members for auditing and training sessions qualified as tax deductible charitable contributions under § 170 of the Internal Revenue Code.³⁴ The deductibility of these payments had been denied by the IRS,³⁵ the Tax Court,³⁶ and several Circuit Courts of Appeals.³⁷ Through auditing sessions, which are conducted by an auditor using an electronic device called an E-meter, new adherents to Scientology become aware of the spiritual being that Scientology teaches exists in every person.³⁸ In training sessions, Scientologists who have been through the auditing process learn additional church doctrine and qualify as auditors themselves.³⁹ The church charged a fixed fee structure for these auditing and training sessions,⁴⁰ and while a five percent discount was available for prepayment of these charges,⁴¹ the fees were never waived,⁴² even for poorer members of the church.⁴³ This was due to the church's doctrine of exchange "according to which any time a person receives something he must pay something back."⁴⁴

The IRS's position on the deductibility of a Scientologist's payments to the church for auditing and training sessions was that it represented a quid pro quo and so did not qualify "as a *voluntary transfer* of property by the owner to another *without consideration* therefor[.]"⁴⁵ which is the definition of a gift, charitable or otherwise. The taxpayers, who had paid for auditing and training sessions and wished to treat their payments as tax deductible gifts to the church, argued that "a quid pro quo analysis is inappropriate under [§] 170 when the benefit a taxpayer receives is purely religious in nature."⁴⁶ While the taxpayers' claims had establishment⁴⁷ and religious discrimination⁴⁸ aspects, which the Court

34. *Hernandez v. Comm'r*, 490 U.S. 680, 683-84 (1989); 26 U.S.C. § 170 (2006).

35. *Hernandez*, 490 U.S. at 686.

36. *Graham v. Comm'r*, 83 T.C. 575 (1984).

37. *Hernandez v. Comm'r*, 819 F.2d 1212, 1218 (1st Cir. 1987), *aff'd*, 490 U.S. 680 (1987); *Graham v. Comm'r*, 822 F.2d 844, 849 (9th Cir. 1987), *aff'd sub nom. Hernandez v. Comm'r*, 490 U.S. 680 (1989).

38. *Hernandez*, 490 U.S. at 684-85.

39. *Id.* at 685.

40. *Id.*

41. *Id.* at 686.

42. *Graham v. Comm'r*, 83 T.C. 575, 577 n.6 (1984).

43. *Id.*

44. *Hernandez*, 490 U.S. at 685 (citation omitted).

45. *Id.* at 687 (citations omitted) (internal quotation marks omitted).

46. *Id.* at 692 (emphasis omitted).

47. *Id.* at 695.

dismissed after a thorough analysis,⁴⁹ for purposes of this article, their free exercise claim is paramount.

The taxpayers claimed that "disallowance of their [§] 170 deductions violates their right to the free exercise of religion by 'placing a heavy burden on the central practice of Scientology.'"⁵⁰ While implying, but not deciding, that the denial of a § 170 tax deduction did not impose a substantial burden on the practice of Scientology, the Court cited *Lee* for the governing principle that "even a substantial burden would be justified by the 'broad public interest in maintaining a sound tax system,' free of 'myriad exceptions flowing from a wide variety of religious beliefs.'"⁵¹ Once this becomes the governing principle, of course, the taxpayer loses.

The suggestion has been made that the proper government interest to analyze in the electioneering prohibition, however, is not the overall maintenance of a uniform system of taxation, but rather, the availability to churches of tax deductible gifts under the Tax Code, which interest is "significantly attenuated because most donors probably do not deduct their contributions."⁵² Obviously, the lesser the government interest, the more accommodating the government should be under the *Sherbert* test restored by RFRA.

In the Tax Code's prohibition of church electioneering, however, there is a higher governmental interest involved than the need to police tax deductible gifts or even to maintain a uniform tax system. That much higher governmental interest is the separation of church and state. Allowing preachers to use tax subsidized funds to deliver a partisan electioneering message is the type of clear government endorsement of religion that the First Amendment prohibits.⁵³ This is Jefferson's wall of separation, and it is difficult to think of a higher or more compelling government interest to protect.⁵⁴

48. *Id.* at 700.

49. *Hernandez*, 490 U.S. at 695-98, 700-03.

50. *Id.* at 698 (quoting Brief for Petitioners at 47, *Hernandez*, 490 U.S. 680 (1989) (No. 87-963, 87-1616)).

51. *Id.* at 699-700 (quoting *United States v. Lee*, 455 U.S. 252, 260 (1983)).

52. Mayer, *supra* note 1, at 1184.

53. Recognition of an organization's ability to attract tax deductible gifts under I.R.C. § 170 (2006) marks that organization as "Government Approved." See *McGlotten v. Connelly*, 338 F. Supp. 448, 456 (D.D.C. 1972).

54. In detailing the history of the First Amendment, the U.S. Supreme Court has explained:

Of this [Constitutional] convention Mr. Jefferson was not a member, he being then absent as minister to France. As soon as he saw the draft of the Constitution pro-

It has also been argued that RFRA has changed the previously discussed constitutional jurisprudence on a church's free exercise rights, and that "requiring the courts to apply the *Sherbert/Yoder* balancing test in the tax context would require the government to introduce evidence and to *prove* that a tax provision represents the least-restrictive means of advancing a compelling government interest."⁵⁵ The validity of that argument, however, is not borne out by the post-RFRA cases. Let's examine these cases in chronological order.

In the case of *Droz v. Commissioner*,⁵⁶ the taxpayer, Martin Droz sought exception from payment of the self-employment Social Security tax on the ground that such payments violated his sincerely held religious beliefs.⁵⁷ The Tax Court had already upheld the Commissioner's determination of a tax deficiency.⁵⁸ On appeal, the Court of Appeals for the Ninth Circuit pointed out that, in regard to Droz's free exercise claim, it was applying RFRA, which "restored the 'compelling interest' and 'least restrictive means' tests . . . used to consider free exercise challenges before *Smith* . . ." ⁵⁹ The court went on to say that, as a result of RFRA, it was rely-

posed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion, but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations. Five of the States, while adopting the Constitution, proposed amendments. Three—New Hampshire, New York, and Virginia—included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Accordingly, at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association, took occasion to say: 'Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. . . .' Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured.

Reynolds v. United States, 98 U.S. 145, 163-64 (1878) (citations omitted).

55. Michelle O'Connor, *The Religious Freedom Restoration Act: Exactly What Rights Does It "Restore" in the Federal Tax Context?*, 36 ARIZ. ST. L.J. 321, 377 (2004) (footnote omitted).

56. 48 F.3d 1120 (9th Cir. 1995).

57. *Droz*, 48 F.3d at 1121.

58. *Id.*

59. *Id.* at 1122 n.2 (citations omitted).

ing on pre-*Smith* decisions under the Free Exercise Clause, and that the controlling case in this arena was *United States v. Lee*, which was also a religiously based Social Security non-payment case.⁶⁰ *Lee*, the Ninth Circuit said, held that “the government had a compelling interest in enforcing participation in the Social Security system in order to insure the ‘fiscal vitality’ of [the] system”⁶¹ and that “this compelling interest . . . outweighed the burden that participation placed on [the taxpayer’s] religious beliefs.”⁶² In addition, the Ninth Circuit, again citing *Lee*, found that the narrow exception that Congress had carved out of the Social Security tax for self-employed members of a church which had a long-standing practice of providing for its dependent members⁶³ “was narrowly tailored to meet the government’s objective”⁶⁴ In a long quote from *Lee*, in what is now post-RFRA jurisprudence, the Ninth Circuit pointed out that:

The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious beliefs. Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.⁶⁵

In a minor case that referenced RFRA, *Steckler v. United States*,⁶⁶ the taxpayer claimed that the government’s requirement that he provide a social security number when he redeemed his treasury bonds or be subject to automatic withholding violated his religious beliefs.⁶⁷ In dealing with the plaintiff’s “not particularly well articulated claims,”⁶⁸ the court did consider RFRA’s application to the case but found that “RFRA reflected a stricter standard developed in the jurisprudence: a governmental action may substantially burden an individual’s free exercise of religion only if the government demonstrates that the action furthers a compelling governmental interest and is the least restrictive means of

60. *Id.* at 1122-23.

61. *Id.* at 1123 (citing *United States v. Lee*, 455 U.S. 252, 259-61 (1982)).

62. *Droz*, 48 F.3d at 1123 (citing *Lee*, 455 U.S. at 260-61).

63. I.R.C. § 1402(g) (2006).

64. *Droz*, 48 F.3d at 1123 (citing *Lee*, 455 U.S. at 259-60).

65. *Id.* (citing *Lee*, 455 U.S. at 259-60).

66. No. 96-1054, 1998 U.S. Dist. LEXIS 722 (E.D. La. Jan. 26, 1998).

67. *Steckler*, 1998 U.S. Dist. LEXIS 722, at *1 (footnote omitted).

68. *Id.*

furthering that interest.”⁶⁹ Lacking any coherent argument contra by the plaintiff, the court found that “the government’s interest in collecting taxes fairly, in administering its tax system properly, and in making sure all citizens participate in that system on equal terms is compelling.”⁷⁰ The court went on to find, on the central issue of whether automatic withholding was the least restrictive way for the government to accomplish this interest and again lacking any coherent argument contra by the plaintiff,⁷¹ that it was.⁷²

In the case of *Packard v. United States*,⁷³ the taxpayer was suing to recover automatic penalties collected by the IRS on her failure to pay her federal income taxes, due to her sincerely held Quaker beliefs in opposition to war which, she claimed, her income taxes were funding.⁷⁴ The taxpayer relied on the language of RFRA which says that the “[g]overnment may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”⁷⁵ Specifically, she argued that her case could not be decided on the government’s motion to dismiss for failure to state a claim, because the cited language of RFRA required the government to demonstrate facts (i.e., that automatic penalties were the least restrictive means to enforce her non-payment of income taxes) at trial.⁷⁶ The district court disagreed, saying:

To the extent that plaintiff has claimed that the RFRA supports her suit for return of penalties already collected, it is her burden to establish either that the assessment of such penalties was not a compelling government interest or that it was not the least restrictive means of furthering that Government interest.⁷⁷

69. *Id.* at *7.

70. *Id.* at *9 (citing *Lee*, 455 U.S. at 258-60).

71. *Id.*

72. *Steckler*, 1998 U.S. Dist. LEXIS 722, at *9.

73. 7 F. Supp. 2d 143 (D. Conn. 1998), *aff’d*, 1999 WL 500797 (2d Cir. June 1, 1999).

74. *Packard*, 7 F. Supp. 2d at 144.

75. *Id.* (quoting 42 U.S.C. § 2000bb-1 (2006)).

76. *Id.*

77. *Id.* at 146.

The court went on to hold that there was a compelling government interest in collecting taxes⁷⁸ and that the plaintiff's argument that there were less restrictive ways for the government to collect unpaid taxes than to impose a penalty, for example, by levying against her assets "would be opening [a] Pandora's Box to tax evasion because, in effect, plaintiff's argument says to all who will not pay taxes for religious, philosophical, moral, or other reasons that the Government must first levy before imposing a penalty. We refuse to accept such an impractical and unworkable system."⁷⁹

Similarly, in *Adams v. Commissioner*,⁸⁰ Priscilla Lippincott Adams had refused to pay her federal income taxes on the basis of her sincerely held Quaker religious beliefs that to fund the military was against the will of God.⁸¹ She was appealing a Tax Court determination that she "was not exempt from the payment of taxes under RFRA and was liable for the deficiencies and penalties assessed against her, relying on *United States v. Lee* and other case law preceding *Employment Division v. Smith*."⁸² The taxpayer conceded that the government had a compelling interest in collecting her taxes, but as in *Packard*, the taxpayer was arguing that, after RFRA, the government had "the burden . . . of proving that it could not accommodate her, that is, there [was] no less restrictive means of furthering the government's interest."⁸³ She had suggested, for example, that the government could direct her taxes "to a fund that supported only non-military spending . . ."⁸⁴ Since the Tax Court had not required such proof, she was appealing its judgment.⁸⁵

The Third Circuit did an extensive evaluation of the legislative history of RFRA.⁸⁶ It understood that "[i]n enacting RFRA, Congress specifically announced its intent to 'restore' the 'compelling interest' test set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* . . ."⁸⁷ The Third Circuit noted that, "[w]hile prior cases touched on one or more of the aspects of the RFRA test, these elements—substantial burden, compelling interest, least restrictive

78. *Id.*

79. *Packard*, 7 F. Supp. 2d at 146-47.

80. 170 F.3d 173 (3d Cir. 1999).

81. *Adams*, 170 F.3d at 174.

82. *Id.* at 175 (citations omitted).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Adams*, 170 F.3d at 176-78.

87. *Id.* at 176.

means—did not constitute a comprehensive standard, let alone a uniform or established test, prior to *Smith*.⁸⁸ Nonetheless, after examining RFRA's legislative history and the prior case law it sought to restore, the Third Circuit found that:

Viewing the requirements of RFRA through the helpful lens of pre-*Smith* case law, we conclude that the nature of the compelling interest involved—as characterized by the Supreme Court in *Lee*—converts the least restrictive means inquiry into a rhetorical question that has been answered by the analysis in *Lee*. The least restrictive means of furthering a compelling interest in the collection of taxes . . . is in fact, to implement that system in a uniform, mandatory way, with Congress determining in the first instance if exemptions are to built [sic] into the legislative scheme. The question of whether government could implement a less restrictive means of income tax collection surfaced in pre-*Smith* case law and was answered in the negative based on the practical need of the government for uniform administration of taxation, given particularly difficult problems with administration should exceptions on religious grounds be carved out by the courts.⁸⁹

Once the Third Circuit established this governing principle from the legislative history of RFRA and the prior case law, it had no trouble reaching its holding: “[i]n sum, we find that the Tax Court engaged in an appropriate analysis of [taxpayer’s] RFRA claim based upon *United States v. Lee*, and that that [the government] was not required to produce evidence under the ‘least restrictive means’ prong of RFRA in order to prevail.”⁹⁰

The case of *Browne v. United States*⁹¹ involved yet other Quaker taxpayers, Gordon and Edith Browne, who had refused to pay that portion of the income tax which they had calculated went to support the Department of Defense.⁹² They had lost at the district court level on a final judgment on the pleadings and had appealed to the Court of Appeals for the Second Circuit.⁹³ As the Second Circuit described their claim on appeal, “[r]elying on RFRA and

88. *Id.* (footnote omitted).

89. *Id.* at 179 (citing *United States v. Lee*, 455 U.S. 252, 260 (1983)).

90. *Id.* at 180.

91. 176 F.3d 25 (2d Cir. 1999).

92. *Browne*, 176 F.3d at 26.

93. *Browne v. United States*, 22 F. Supp. 2d 309, 313 (D. Vt. 1998), *aff'd*, 176 F.3d 25 (1999).

the First Amendment's guarantee of freedom of religion, the Brownes contend that the IRS must allow them to withhold a portion of their taxes and then collect it by levy without charging interest or a penalty.⁹⁴ This is basically the same argument that the taxpayer had made in the *Packard* case. As a matter of fact, the opinion of the district court in *Packard* had cited the district court in *Browne* to the effect that:

Allowing individuals like the plaintiffs to withhold a portion of their due taxes would encourage chaos in that every individual with an objection to a particular governmental expenditure would be able to unilaterally impose additional, time-consuming administrative burdens on the IRS. Furthermore, acceptance of the plaintiffs' arguments would encourage more governmental involvement in religious matters in that the IRS would be required to assess the genuineness of each tax protester's religious beliefs. Finally, it is difficult to imagine a means of compliance with the tax laws which is less restrictive than the voluntary compliance to which the plaintiffs object.⁹⁵

In an ironic swipe, the Second Circuit, citing *Employment Division v. Smith*, held that the Brownes' First Amendment claim failed "because they are required to comply with the tax laws despite religious-based disagreement with the allocation of certain funds."⁹⁶ As to their RFRA claim, that "must also fail because voluntary compliance is the least restrictive means by which the IRS furthers the compelling governmental interest in uniform, mandatory participation in the federal income tax system."⁹⁷

In a case mentioned later in this article on how the IRS has policed churches' electioneering activities,⁹⁸ *Branch Ministries v. Rossotti*,⁹⁹ the church raised a RFRA defense in the face of the IRS's revocation of its tax exempt status because of its electioneering activities.¹⁰⁰ Because the language of RFRA requires a substantial burden on free exercise rights before RFRA's protections

94. *Browne*, 176 F.3d at 26.

95. 7 F. Supp. 2d 143, 147 (D. Conn. 1998) (citation omitted) (quoting *Browne*, 22 F. Supp. 2d at 313), *aff'd*, 1999 WL 500797 (2d Cir. June 1, 1999).

96. *Browne*, 176 F.3d at 26.

97. *Id.* (citation omitted).

98. *See infra* Part IV.A.

99. 40 F. Supp. 2d 15 (D.D.C. 1999), *aff'd*, 211 F.3d 137 (2000).

100. *Branch Ministries*, 40 F. Supp. 2d at 18.

kick in,¹⁰¹ the court said, “[i]f, and only if, plaintiffs can demonstrate a substantial burden, then the government has the burden under RFRA of establishing that the revocation [of tax exempt status] serves a compelling governmental interest and that revocation is the least restrictive means of accomplishing that compelling interest.”¹⁰² In a devastating deconstruction of the alleged burden on the church’s free exercise, the court basically says, “Your only loss is the money that you are using for non-religious purposes.” The court states that:

As an initial matter, plaintiffs have failed to establish that the revocation of the Church’s Section 501(c)(3) tax-exempt status substantially burdened its right to freely exercise its religion. A substantial burden exists where the government put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs, or where the government forces an individual to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion. Plaintiffs have provided no evidence that the revocation of Section 501(c)(3) status by the IRS was in any way connected to plaintiffs’ refusal to violate their religious beliefs or abandon a precept of their religion. Instead, the revocation was undertaken because of plaintiffs’ involvement in partisan political activity . . .

..

In fact, the only way in which the revocation of Section 501(c)(3) status has had any effect on plaintiffs’ exercise of religion is that the Church may now have less operating money to spend on religious activities because it is a taxable entity. The fact that plaintiffs may now have less money to spend on their religious activities as a result of their participation in partisan political activity, however, is insufficient to establish a substantial burden on their free exercise of religion.¹⁰³

And of course, why should money for electioneering purposes be important to the churches, except for the earthly power that it gives their preachers in helping to slant elections for public office? There is something extremely wrong with that syllogism, and it

101. 42 U.S.C. § 2000bb-1 (2006).

102. *Branch Ministries*, 40 F. Supp. 2d at 24 (citations omitted).

103. *Id.* at 25 (citations omitted) (internal quotation marks omitted).

seems that the courts and the IRS understand the true purpose of a church better than the churches do. But the court in *Branch Ministries* did not limit itself to the above observation. It also dealt with the government's compelling interest in preventing tax exempt organizations from using taxpayer subsidized dollars for electioneering purposes:

Even if plaintiffs could establish a substantial burden, the government has met the compelling interest standard. The government has a compelling interest in maintaining the integrity of the tax system and in not subsidizing partisan political activity, and Section 501(c)(3) is the least restrictive means of accomplishing that purpose. Plaintiffs therefore cannot prevail on their free exercise claims.¹⁰⁴

Note that last part. As I explained earlier, there is a higher compelling governmental interest at stake in these cases than the need to police tax deductible gifts or even the need to maintain a uniform tax system. That much higher governmental interest is the separation of church and state, as the court in *Branch Ministries* recognized.

In *United States v. Indianapolis Baptist Temple*,¹⁰⁵ the church ("IBT") argued that it was exempt from the federal employment tax laws, due to its belief that it was a sin for the church to pay taxes.¹⁰⁶ IBT had lost at the district court level on summary judgment¹⁰⁷ and was now appealing to the Court of Appeals for the Seventh Circuit.¹⁰⁸ In applying RFRA (the constitutionality of which the court noted even "as applied to the federal government is not without doubt"¹⁰⁹) the court said:

IBT proceeds as though [RFRA] somehow overturned the Supreme Court's decision in *Smith*—that neutral laws of general application cannot be attacked on Free Exercise grounds—and reinstated the pre-*Smith* standards for evaluating Free Exercise challenges. RFRA did not (and could not) do this. RFRA simply established an independent statutory regime

104. *Id.* at 25-26 (citations omitted).

105. 224 F.3d 627 (7th Cir. 2000).

106. *Indianapolis Baptist Temple*, 224 F.3d at 628.

107. *United States v. Indianapolis Baptist Temple*, 61 F. Supp. 2d 836, 837 (1999), *aff'd*, 224 F.3d 627 (2000).

108. *Indianapolis Baptist Temple*, 224 F.3d at 627.

109. *Id.* at 629 n.1.

essentially prohibiting the enforcement of laws that cannot satisfy the pre-*Smith* standards.

Even if IBT's misguided attempts to invoke RFRA as a constitutional standard are construed generously as an effort to seek relief on statutory grounds, IBT's challenge to the federal employment tax laws must still be rejected. Under RFRA, laws that substantially burden the free exercise of religion cannot be enforced unless the burden furthers a compelling government interest and is the least restrictive means of furthering that interest. In several pre-*Smith* Free Exercise challenges to the application of federal tax laws, the Supreme Court and various courts of appeals concluded both that maintaining a sound and efficient tax system is a compelling government interest and that the difficulties inherent in administering a tax system riddled with judicial exceptions for religious employers make a uniformly applicable tax system the least restrictive means of furthering that interest. The cases that have been decided under RFRA reach the same conclusion. We find this authority persuasive and see no reason to reach a different conclusion.¹¹⁰

In *United States v. Philadelphia Yearly Meeting of the Religious Society of Friends*,¹¹¹ the Yearly Meeting was sued by the government for its refusal to honor a levy on the wages of its employee, Priscilla Lippincott Adams.¹¹² This was the same Adams who had litigated and lost *Adams v. Commissioner*,¹¹³ described above. The Yearly Meeting argued that RFRA prevented the IRS from making the Yearly Meeting cooperate in the collection of Ms. Adams's back taxes.¹¹⁴ Also at issue was a fifty percent penalty that the IRS had assessed against the Yearly Meeting for its failure to honor the IRS's levy on Ms. Adams's wages.¹¹⁵

The district court did find that the levy and the penalty substantially burdened the Yearly Meeting within the meaning of RFRA, in that it placed serious pressure on the Yearly Meeting to abandon its religiously based support for Ms. Adams's position that to fund the military through her taxes was against the will of

110. *Id.* at 629-30 (footnote omitted) (citations omitted).

111. 322 F. Supp. 2d 603 (E.D. Pa. 2004).

112. *Phila. Yearly Meeting*, 322 F. Supp. 2d at 604-05.

113. 170 F.3d 173 (3d Cir. 1999).

114. *Phila. Yearly Meeting*, 322 F. Supp. 2d at 605.

115. *Id.* This penalty is created by I.R.C. § 6332(d)(2) (2006).

God.¹¹⁶ Since the Yearly Meeting had established a substantial burden on its free exercise rights, the court said that “the burden shifts to the Government to show that enforcement of the levy furthers a compelling interest by the least restrictive means.”¹¹⁷

The government argued that, under *Adams*, it need not demonstrate that the levy furthered a compelling interest.¹¹⁸ The district court refused to give *Adams* that effect, saying, “the precise nature of the Government’s ‘compelling interest’ in these [levy] powers is an issue of first impression.”¹¹⁹ The court then performed a perfunctory review of cases interpreting § 6332 of the Tax Code,¹²⁰ which it said were condensed in the holding of *United States v. National Bank of Commerce*¹²¹ as follows:

The underlying principle justifying the administrative levy is the need of the government promptly to secure its revenues. Indeed, one may readily acknowledge that the existence of the levy power is an essential part of our self-assessment tax system, for it enhances voluntary compliance in the collection of taxes. Among the advantages of the administrative levy is that it is quick and relatively inexpensive.¹²²

Having established the government’s compelling interest in a wage levy on an employer of a tax delinquent as a way of quickly and inexpensively discharging a tax deficiency, the district court then turned to whether the wage levy was the least restrictive means of achieving the government’s interest.¹²³ On this point, the Yearly Meeting argued that the government did not discharge its burden, because there were two other ways of getting its tax money from Adams, neither one of which involved a wage levy: (1) it could have honored the Yearly Meeting’s policy of withholding taxes from its employees who did not wish to pay federal income taxes and placed them in a separate account subject to the government’s levy; or (2) the government could have located and levied other property of Ms. Adams.¹²⁴

116. *Phila. Yearly Meeting*, 322 F. Supp. 2d at 608-09.

117. *Id.* at 609.

118. *Id.*

119. *Id.* at 610.

120. I.R.C. § 6332 (2006).

121. 472 U.S. 713 (1985).

122. *Phila. Yearly Meeting*, 322 F. Supp. 2d at 610 (quoting *Nat’l Bank of Commerce*, 472 U.S. at 721).

123. *Id.*

124. *Id.* at 610-11.

For numerous reasons, the district court found these suggestions either impossible or impractical.¹²⁵ While hedging its analysis by saying, “[w]e . . . acknowledge that RFRA might have required a different result” if the Yearly Meeting’s suggested alternatives to a wage levy had been possible, the court concluded that “on the record actually before us . . . the levy on Ms. Adams’s wages was the least restrictive means of achieving the Government’s compelling interest in satisfying her tax delinquency.”¹²⁶ However, the court did throw out the fifty percent penalty that the government had laid on the Yearly Meeting on the grounds that: (1) the regulation implementing I.R.C. § 6332(d)(2) says that the penalty should not apply where a bona fide dispute exists concerning the legal effectiveness of the levy¹²⁷ and (2) that the Yearly Meeting had “raised novel and important questions about the reach of RFRA in the aftermath of *Adams*.”¹²⁸

Each of these post-RFRA cases, in which the federal courts have heard a RFRA challenge to a taxing statute, have relied on the reasoning of *United States v. Lee*,¹²⁹ which was cited in the legislative history of RFRA for the principle that the government’s interest in maintaining a uniform tax system is so high that any alleged free exercise right must fall before it.¹³⁰ Importantly, the *Branch Ministries* case, at least when it comes to the Tax Code’s prohibition on electoral speech by § 501(c)(3)¹³¹ churches, recognizes an even more compelling governmental interest—one present at the founding of our country and fundamentally basic to it—the separation of church and state.¹³²

D. Ongoing Constitutional Analysis

The recent U.S. Supreme Court case, *Snyder v. Phelps*,¹³³ appears to put another nail in the argument that churches have First Amendment religious freedom rights that somehow make their speech more privileged than that of other organizations. In

125. *Id.*

126. *Id.* at 612.

127. 26 C.F.R. § 301.6332-1(b)(2) (2006); *Phila. Yearly Meeting*, 322 F. Supp. 2d at 612-13.

128. *Phila. Yearly Meeting*, 322 F. Supp. 2d at 613.

129. 455 U.S. 252 (1983).

130. See H.R. REP. NO. 103-88, at 4 n.13 (1993); S. REP. NO. 103-111, at 4 n.5 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1894 n.5.

131. I.R.C. § 501(c)(3) (2006).

132. 40 F. Supp. 2d 15, 25-26 (D.D.C. 1999), *aff'd*, 211 F.3d 137 (2000).

133. 131 S. Ct. 1207 (2011).

the *Snyder* case, the Westboro Baptist Church was contesting a federal district court verdict against it for \$2.9 million in compensatory damages and \$8 million in punitive damages for intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims, resulting from its picketing of the funeral of Marine Lance Corporal Matthew Snyder, who had died in Iraq.¹³⁴ Some of the picket signs said "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "God Hates Fags," "You're Going to Hell," and "God Hates You."¹³⁵

The U.S. Supreme Court overturned the verdict against the Westboro Baptist Church on free speech grounds:

Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to "special protection" under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."¹³⁶

This speech by the members of the Westboro Baptist Church was unquestionably religiously motivated. As Chief Justice Roberts' opinion states, "[t]he picket signs reflected the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment The church's congregation believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military."¹³⁷ The Westboro Baptist Church has, over the last twenty years, picketed nearly six hundred military funerals.¹³⁸ So clearly the church was demonstrating out of religious motivation.

Nevertheless, *Snyder* was not a free exercise case, but a free speech case, thus showing that in matters of speech, including electoral speech, religious liberty is protected by free speech, not by free exercise. As Justice Scalia wrote in *Smith*:

134. *Snyder*, 131 S. Ct. at 1213-14.

135. *Id.* at 1213. Other picket signs carried messages that said "Pope in Hell" and "Priests Rape Boys." *Id.* The anti-Catholic references were evidently thrown in because Matthew Snyder's funeral was being held at a Catholic church. *Id.*

136. *Id.* at 1219 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

137. *Id.* at 1213.

138. *Id.*

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have not involved the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press¹³⁹

This is an important distinction to make when considering the churches' argument that they have a constitutional free exercise right to intervene in elections that other § 501(c)(3) organizations do not have. Churches have no such constitutional free exercise right. At best, they could argue a free speech right, but if that were the case, then non-church tax exempt organizations must have exactly the same free speech right to endorse a candidate as tax exempt churches do. However, this is not the churches' argument.

III. TAX EXEMPTION AS A SUBSIDY

Underlying the Courts' upholding of the electioneering restrictions on all 501(c)(3) organizations, including churches, is the premise that these organizations operate on federal subsidy. As early as 1933, the Brookings Institution wrote that:

Tax exemption, no matter what its form, is essentially a government grant or subsidy. Such grants would seem to be justified only if the purpose for which they are made is one for which the legislative body would be equally willing to make a direct appropriation from public funds equal to the amount of the exemption. This test would not be met except in the case where the exemption is granted to encourage certain activities of private interests, which, if not thus performed, would have to be assumed by the government at an expenditure at least as great as the value of the exemption.¹⁴⁰

This tax subsidy is provided to churches in two ways: (1) their exemption from federal income taxation under I.R.C. § 501(c)(3) and (2) their ability to attract tax deductible gifts under I.R.C. §

139. *Emp't Div. v. Smith*, 494 U.S. 872, 881 (1990) (citations omitted).

140. *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 709 (1970) (Douglas, J., dissenting) (quoting BROOKINGS INST., REPORT ON A SURVEY OF ADMINISTRATION IN IOWA: THE REVENUE SYSTEM 33 (1933)).

170.¹⁴¹ As the U.S. Supreme Court said in *Regan v. Taxation with Representation of Washington*:

Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions. The system Congress has enacted provides this kind of subsidy to nonprofit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying. In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare.¹⁴²

Some courts have described the situation as a trade-off of political activity in exchange for the benefits of tax exemption:

[A]n understanding of two pertinent sections of the Code is necessary, as a preliminary matter, to appreciate what is at stake in this litigation. As noted, the Catholic Church and organizational plaintiffs ARM and NWHN are tax-exempt under § 501(c)(3). That section states that qualifying religious or civic public interest organizations need not pay federal taxes. The trade-off for the benefit of this exemption is that no substantial part of the organization's activities may include "carrying on . . . propaganda, or otherwise attempting, to influence legislation . . . [nor may it] participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." Thus, the *quid pro quo* for § 501(c)(3) tax-exemption is a restraint on an organization's right to try to influence the political process. This limitation has been held constitutional. Section 501(c)(3) status is advantageous to the supporters of an organization as well as the organization itself because § 170 of the Code permits donors to § 501(c)(3) entities to claim a deduction for their contributions. This deduction gives the donor an economic incentive to contribute.

141. I.R.C. §§ 501(c)(3), 170 (2006).

142. 461 U.S. 540, 544 (1983) (footnotes omitted).

For example, a donor in a 28 percent tax bracket actually pays only 72 cents for every dollar contributed to the Catholic Church because of the deduction. Consequently, organizations like the Church and plaintiffs ARM and NWHN have enhanced fundraising abilities because they are able to offer donors the lure of the § 170 deduction.¹⁴³

The implication of these decisions is very clear: if a § 501(c)(3) organization, such as a church, accepts the tax subsidies of I.R.C. §§ 170 and 501(c)(3), then it is also bound by the restrictions that the tax law carries with it—namely the inability to be politically active, and specific to this article, the inability to electioneer on behalf of or against a candidate for public office.

The gift sums being dealt with here are not insignificant. In 2010, the last year for which figures are available, churches and religious organizations received \$100.63 billion tax-deductible dollars from U.S. taxpayers.¹⁴⁴ That amount counts for thirty-five percent of all charitable contributions in the U.S. for that year.¹⁴⁵ This sum is available to the churches as a result of I.R.C. §§ 170 and 501(c)(3)¹⁴⁶ and does not include other church income, e.g., endowment or investment income, which is also untaxed under I.R.C. § 501(c)(3) and is thought to be many times annual gift income. Exact numbers are impossible to come by, however, since churches need not file the annual informational tax return, Form 990, with the federal government, which would list investment income.¹⁴⁷ This \$100.63 billion dollar figure also does not include the financial benefits to churches that tend to “piggyback” on their federal tax exemption, such as exemption from state income taxes, state sales and use taxes, and local property taxes. While the exemption from federal income taxes granted by I.R.C. § 501(c)(3) to churches does not automatically carry these ancillary benefits with it, very often the requirements for these other state and local tax exemption benefits are so similar to the § 501(c)(3) require-

143. *In re* U.S. Catholic Conference, 885 F.2d 1020, 1021-22 (2d Cir. 1989) (citations omitted).

144. GIVING USA FOUND., GIVING USA 2011: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2010 6 (2011).

145. *Id.*

146. I.R.C. §§ 170, 501(c)(3) (2006).

147. I.R.C §§ 501(c)(3), 6033(a)(3)(A).

ments that, if the church meets the federal requirements, it will meet the state and local requirements as well.¹⁴⁸

If one goes searching for a reason why churches should be tax exempt, the answer does not lie in the fact that they are churches and cannot be taxed under the First Amendment's guarantee of free exercise. In fact, if churches were granted a federal tax exemption simply because they were churches, the opposite might be the case. This might be the endorsement of religion, which is prohibited by the Establishment Clause of the First Amendment.¹⁴⁹ Rather, churches are exempt from federal income taxation because they are part of a larger group of organizations, listed in I.R.C. § 501(c)(3), that Congress has determined to be beneficial to society. This is sometimes referred to as the "public benefit" theory.¹⁵⁰ A scholar in the field described this theory as follows:

Since medieval times, certain activities rating high in the scale of contemporary values have been accorded tax exemption. From the time when old world culture was first transplanted to America, charitable activities have been granted various forms of tax favors. The basic motive for these tax favors has been a wish to encourage activities that were recognized as inherently meritorious and conducive to the general welfare. In some cases it was also true that the exempted organizations performed activities that the government would otherwise be forced to undertake, but it is believed that governmental saving has not been the decisive factor influencing the exemption of charitable activities from tax.¹⁵¹

This explanation, at least as to charities that the Tax Code allows to attract tax deductible gifts, was validated in *McGlotten v. Connelly*:¹⁵²

The rationale for allowing the deduction of charitable contributions has historically been that by doing so, the Government relieves itself of the burden of meeting public needs

148. See, e.g., *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 667 n.1 (1970) (quoting N.Y. TAX LAW § 420(1) (McKinney 1969)).

149. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 8-9 (1989).

150. CAFARDI & CHERRY, *supra* note 2, § 5.02.

151. Chauncey Belknap, *The Federal Income Tax Exemption of Charitable Organizations: Its History and Underlying Policy*, in IV RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS 2025, 2039 (Judith G. Smith ed., 1977).

152. 338 F. Supp. 448 (D.D.C. 1972).

which in the absence of charitable activity would fall on the shoulders of the Government. “The Government is compensated for its loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from public funds.”¹⁵³

Perhaps the best validation of the public benefit justification for the exemption of churches from local property taxes, as well as federal taxes under § 501(c)(3), is in *Walz*:

The legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its ‘moral or mental improvement,’ should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes. It has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest.¹⁵⁴

Because the benefits that tax exempt organizations confer, or are thought to confer on the public is the reason they are subsidized by the tax laws, it makes sense that any of their activities that do not contribute to the public benefit should not be subsidized. Although he was dealing with the lobbying restriction and not the electioneering restriction in *Slee v. Commissioner*,¹⁵⁵ Judge Learned Hand’s observation is apt here as well. “Political agitation as such,” Hand wrote, “is outside the statute, however innocent the aim, though it adds nothing to dub it ‘propaganda,’ a polemical word used to decry the publicity of the other side. Contro-

153. *McGlotten*, 338 F. Supp. at 456 (citation omitted).

154. *Walz*, 397 U.S. at 672-73.

155. 42 F.2d 184 (2d Cir. 1930).

versies of that sort must be conducted without public subvention; the Treasury stands aside from them.”¹⁵⁶

The basis for the tax exemption of churches is not that they are churches (which would be an indefensible establishment of religion),¹⁵⁷ but because they are members of a “broad class” of organizations that the State “considers . . . as beneficial and stabilizing influences in community life.”¹⁵⁸ Consequently, their tax exempt status confers no more rights on them, as for example the right to intervene in elections, than it confers on other § 501(c)(3) organizations, which proposition is supported by *Snyder*.¹⁵⁹

IV. IRS POLICING OF THE CHURCH ELECTIONEERING PROHIBITION

A. Cases

Although the restriction against electioneering seems rigorous, it has not been rigorously policed by the Internal Revenue Service. In fact, since Johnson’s addition to the statute, there have been only two reported cases dealing with the loss of a church’s or religious organization’s tax exemption due to its electioneering. Both cases are well known and egregious.

The first case, *Christian Echoes National Ministry, Inc. v. United States*,¹⁶⁰ dates back to 1972. Although it is sometimes cited as a “church” case, and although the organization sounds a lot like a church, (for example, it had “Articles of Faith” and maintained a radio and television outreach ministry),¹⁶¹ the Christian Echoes National Ministry is consistently referred to as a “religious organization” and not as a “church” in the reported decision.¹⁶² These are different terms with different meanings. Churches receive many more tax benefits than religious organizations do.¹⁶³ Nevertheless, this religious organization did lose its tax exempt status, both for improper levels of lobbying and for violating the electioneering prohibition.¹⁶⁴ As the Court of Appeals for the

156. *Slee*, 42 F.2d at 185.

157. *See Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 8-9 (1989).

158. *Walz*, 397 U.S. at 672-73.

159. *See Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

160. 470 F.2d 849 (10th Cir. 1972).

161. *Christian Echoes Nat’l Ministry*, 470 F.2d at 851.

162. *See, e.g., id.* at 854.

163. *See CAFARDI & CHERRY, supra* note 2, § 8.03(C), at 112.

164. *Christian Echoes Nat’l Ministry*, 470 F.2d at 856.

Tenth Circuit said regarding the organization's electioneering activities:

In addition to influencing legislation, Christian Echoes intervened in political campaigns. Generally it did not formally endorse specific candidates for office but used its publications and broadcasts to attack candidates and incumbents who were considered too liberal. It attacked President Kennedy in 1961 and urged its followers to elect conservatives like Senator Strom Thurmond and Congressmen Bruce Alger and Page Belcher. It urged followers to defeat Senator Fulbright and attacked President Johnson and Senator Hubert Humphrey. The annual convention endorsed Senator Barry Goldwater. These attempts to elect or defeat certain political leaders reflected Christian Echoes' objective to change the composition of the federal government.¹⁶⁵

The politicians mentioned are pretty much a "who's who" of 1960's personalities, with the organization's slant being very much in favor of the conservative side of the American political spectrum of the times and against the left. While the district court had overturned the IRS's revocation of § 501(c)(3) tax exempt status as to Christian Echoes,¹⁶⁶ in what can most charitably be called a case of "home-cooking," the Tenth Circuit had no trouble finding that the political activities restrictions of § 501(c)(3)—no substantial lobbying and no electioneering at all—had been violated by the organization, meriting its loss of tax exempt status.¹⁶⁷

The second "church" case is more recent. In *Branch Ministries v. Rossotti*,¹⁶⁸ the Church at Pierce Creek, doing business as "Branch Ministries," placed full page ads in the Washington Times and USA Today four days before the 1992 presidential election.¹⁶⁹ As the court describes it:

The advertisement proclaimed "Christian Beware. Do not put the economy ahead of the Ten Commandments." It asserted that Governor Clinton supported abortion on demand, homosexuality and the distribution of condoms to teenagers in public schools. The advertisement cited various Biblical passages

165. *Id.*

166. *Id.* at 853.

167. *See id.* at 856.

168. 40 F. Supp. 2d 15 (D.D.C. 1999), *aff'd*, 211 F.3d 137 (2000).

169. *Branch Ministries*, 40 F. Supp. 2d at 17.

and stated that “Bill Clinton is promoting policies that are in rebellion to God’s laws.” It concluded with the question: “How then can we vote for Bill Clinton?” At the bottom of the advertisement, in fine print, was the following notice: “This advertisement was co-sponsored by The Church at Pierce Creek, Daniel J. Little, Senior Pastor, and by churches and concerned Christians nationwide. Tax-deductible donations for this advertisement gladly accepted. Make donations to: The Church at Pierce Creek,” and provided a mailing address.¹⁷⁰

It was probably that last tweak—“[t]ax-deductible donations for this advertisement gladly accepted”—that drew the IRS’s ire, and rightly so. This was about as flagrant an act of prohibited electioneering as a purported § 501(c)(3) church could engage in. The court had no trouble rejecting Branch Ministries’ rather strange argument that the IRS could not revoke its tax exempt status unless it first showed that Branch Ministries was not a bona fide church.¹⁷¹ The rather easy response to that was: you may be a church, but unless you adhere to the restrictions of § 501(c)(3), you are not a tax exempt church.¹⁷²

B. *Other IRS Policing Activities*

After years of very light policing of the electioneering prohibition as to churches, and § 501(c)(3) organizations in general, the IRS announced during the 2004 presidential campaign a “Political Activities Compliance Initiative,” or PACI.¹⁷³ The purpose of this initiative was “to promote compliance with the I.R.C. § 501(c)(3) prohibition against political campaign intervention by reviewing and addressing allegations of political intervention . . . by tax exempt organizations on an expedited basis during the 2004 election year.”¹⁷⁴ The program was referral driven, that is to say the IRS did not go out looking for violations of the electioneering prohibition, but rather dealt with “allegations of political campaign intervention by IRC § 501(c)(3) organizations referred to the

170. *Id.*

171. *Id.* at 20.

172. *Id.* at 21.

173. See INTERNAL REVENUE SERV., U.S. DEPT OF THE TREASURY, FINAL REPORT, PROJECT 302, POLITICAL ACTIVITIES COMPLIANCE INITIATIVE (2006), available at http://www.irs.gov/pub/irs-tege/final_paci_report.pdf.

174. *Id.* at 1.

IRS.”¹⁷⁵ The standard that the IRS used for deciding whether to investigate a complaint was “whether [the allegation] supports a reasonable belief that the organization may have violated the prohibition of § 501(c)(3) that it not participate in, or intervene in (including the publishing or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”¹⁷⁶ Any allegations involving churches were “conducted according to the church tax inquiry and examination procedures of IRC § 7611.”¹⁷⁷

Unsurprisingly, churches accounted for 47 of the 110 cases that the IRS examined for the 2004 elections, constituting close to half (forty-three percent) of the total.¹⁷⁸ Of the forty-seven church cases, as of the Final Report, forty had been closed.¹⁷⁹ It was found that churches had committed such violations as endorsing candidates in church bulletins or inserts in church bulletins, that church officials had made statements either endorsing or opposing candidates during services, that candidates spoke at church functions, and that churches had distributed biased voter guides.¹⁸⁰

The IRS explained that none of its 2004 examinations resulted in the revocation of an organization’s tax exempt status,¹⁸¹ although one organization was assessed the § 4955 tax on political expenditures.¹⁸² In other situations, the § 4955 penalty was not imposed, because “the amount involved fell below internal tolerance levels.”¹⁸³ Three cases, or eight percent of the church cases, resulted in no change in status, and thirty-four cases, or eighty-four percent, resulted in an IRS advisory only.¹⁸⁴

The IRS also did a PACI for the 2006 mid-term elections.¹⁸⁵ In 2006, the IRS received 237 referrals or allegations of improper political activity by § 501(c)(3) organizations, and selected for examination 100 of those.¹⁸⁶ Of those 100, 44 were church cases.¹⁸⁷

175. *Id.* at 2.

176. *Id.* at 3.

177. *Id.* at 2.

178. INTERNAL REVENUE SERV., *supra* note 173, at 9.

179. *Id.* at 14.

180. *Id.* at 16.

181. *Id.* at 18.

182. *Id.* at 18 n.6.

183. INTERNAL REVENUE SERV., *supra* note 173, at 18 n.6.

184. *Id.* at 21.

185. See INTERNAL REVENUE SERV., U.S. DEPT OF THE TREASURY, 2006 POLITICAL ACTIVITIES COMPLIANCE INITIATIVE (2007), available at http://www.irs.gov/pub/irs-tege/2006paci_report_5-30-07.pdf.

186. *Id.* at 3.

The allegations of improper political activity were basically the same as in 2004. Similar to 2004, there were no revocations and most cases were closed with a written IRS advisory.¹⁸⁸ Although the Director of Exempt Organizations announced in a letter dated April 17, 2008 that the IRS would do a PACI for the 2008 elections and that a report would be due by March 31, 2009,¹⁸⁹ no such report has issued.

That in itself is very interesting since a number of Christian preachers went out of their way in the 2008 presidential election to challenge the IRS's authority on this question. The Alliance Defense Fund, a conservative Christian organization, organized "Pulpit Freedom Sunday" on September 28, 2008, in which it recruited thirty-three pastors to violate the Tax Code's ban on church electioneering by endorsing candidates from the pulpit.¹⁹⁰ That number increased on "Pulpit Freedom Sunday" on September 27, 2009, when eighty-three churches participated.¹⁹¹ On September 26, 2010, the Alliance Defense Fund claimed that 100 pastors participated in "Pulpit Freedom Sunday."¹⁹² And for "Pulpit Freedom Sunday" in 2011, the Alliance website listed 539 committed church participants.¹⁹³ All but three of the churches listed in the 2011 participant list are Protestant Christian, primarily conservative evangelical organizations.¹⁹⁴

These pastors are obviously trying to goad the IRS into action, in the hope that a test case will provide the Alliance Defense Fund

187. *Id.*

188. *Id.* at 5.

189. Letter from Lois G. Lerner, Director, Exempt Organizations, to Marsha Ramirez, Director, Examinations, Rob Choi, Director, Rulings & Agreements, and Bobby Zarin, Director, Customer Education & Outreach (Apr. 17, 2008), (available at http://www.irs.gov/pub/irs-tege/2008_paci_program_letter.pdf).

190. Julia Duin, *Churches to Defy IRS on Sermons*, WASH. TIMES, Sept. 27, 2008, <http://www.washingtontimes.com/news/2008/sep/27/churches-to-defy-irs-on-sermons/?page=all>.

191. *Participation in Second Annual Pulpit Freedom Sunday More than Doubles from Last Year*, ALLIANCE DEF. FUND (Oct. 5, 2009), <http://www.alliancedefensefund.org/News/PRDetail/3180>.

192. ALLIANCE DEF. FUND, *Pastors Ready for Third-Annual Pulpit Freedom Sunday on Sept. 26*, ALLIANCE ALERT (Sept. 23, 2010), <http://www.alliancealert.org/2010/09/23/pastors-ready-for-third-annual-pulpit-freedom-sunday-on-sept-26/>.

193. ALLIANCE DEF. FUND, *Pulpit Freedom Sunday 2011 Church Participants*, ALLIANCE DEF. FUND MEDIA, http://www.adfmedia.org/files/PFS_2011_Participant_List.pdf (last visited Feb. 9, 2012).

194. *See id.* The three exceptions are Catholic: the Oratory of St. Philip Neri in the Diocese of Pittsburgh, Pennsylvania; St. Augustine Church, an independent, "Old Roman Catholic" parish located in Fort Worth, Texas, and St. Mary Church in the Diocese of Peoria, Illinois. *Id.* There are no Jewish temples or synagogues and no Islamic mosques on the 2011 list. *See id.*

with the chance to challenge the long-settled constitutionality of the language of § 501(c)(3), which prohibits tax exempt churches from any electioneering.

C. *The IRS's Lenient Approach*

Yet there are some who would say that the IRS is already too lenient on preachers and their political activities. Some good examples of the IRS's leniency appear in the *Tax Guide for Churches and Religious Organizations*.¹⁹⁵ In that publication, the IRS gives four examples of what kind of electioneering is permissible and what is not permissible for preachers acting as individuals.¹⁹⁶ Those examples are:

Example 1: Minister A is the minister of Church J, a section 501(c)(3) organization, and is well known in the community. With their permission, Candidate T publishes a full-page ad in the local newspaper listing five prominent ministers who have personally endorsed Candidate T, including Minister A. Minister A is identified in the ad as the minister of Church J. The ad states, "Titles and affiliations of each individual are provided for identification purposes only." The ad is paid for by Candidate T's campaign committee. Since the ad was not paid for by Church J, the ad is not otherwise in an official publication of Church J, and the endorsement is made by Minister A in a personal capacity, the ad does not constitute political campaign intervention by Church J.¹⁹⁷

Example 2: Minister B is the minister of Church K, a section 501(c)(3) organization, and is well known in the community. Three weeks before the election, he attends a press conference at Candidate V's campaign headquarters and states that Candidate V should be reelected. Minister B does not say he is speaking on behalf of Church K. His endorsement is reported on the front page of the local newspaper and he is identified in the article as the minister of Church K. Because Minister B did not make the endorsement at an official church function, in an official church publication or otherwise use the church's assets, and did not state that he was speak-

195. See INTERNAL REVENUE SERV., *supra* note 2.

196. *Id.* at 7-8.

197. *Id.* at 7.

ing as a representative of Church K, his actions do not constitute political campaign intervention by Church K.¹⁹⁸

Example 3: Minister C is the minister of Church I, a section 501(c)(3) organization. Church I publishes a monthly church newsletter that is distributed to all church members. In each issue, Minister C has a column titled "My Views." The month before the election, Minister C states in the "My Views" column, "It is my personal opinion that Candidate U should be reelected." For that one issue, Minister C pays from his personal funds the portion of the cost of the newsletter attributable to the "My Views" column. Even though he paid part of the cost of the newsletter, the newsletter is an official publication of the church. Because the endorsement appeared in an official publication of Church I, it constitutes political campaign intervention by Church I.¹⁹⁹

Example 4: Minister D is the minister of Church M, a section 501(c)(3) organization. During regular services of Church M shortly before the election, Minister D preached on a number of issues, including the importance of voting in the upcoming election, and concluded by stating, "It is important that you all do your duty in the election and vote for Candidate W." Because Minister D's remarks indicating support for Candidate W were made during an official church service, they constitute political campaign intervention by Church M.²⁰⁰

The circle limiting a preacher's prohibited electioneering activity, as drawn by the IRS, is very generous. It prohibits only those electoral activities of the preacher that could be deemed "official"—on behalf of the church.²⁰¹ In the first example, the preacher, identifying himself/herself as a preacher, is able to publicly endorse a candidate, as long as the church does not pay for the ad.²⁰² In the second, the preacher gets his/her name in the newspaper, making an endorsement, but because it does not happen in church or at a church funded function, that is permissi-

198. *Id.*

199. *Id.* at 8.

200. INTERNAL REVENUE SERV., *supra* note 2. There are other examples in this IRS publication, but these four deal with the focus of this article—the specific activity of the preacher himself/herself.

201. *Id.* at 7.

202. *Id.*

ble.²⁰³ Only in examples three and four, where the preacher makes his/her endorsement in an official church publication or during the actual service, does the IRS draw a line and say “no.”²⁰⁴

The distinction that the IRS is drawing here is very clear. In the first two examples, the preacher is acting in his/her individual capacity, even though he/she is publicly identified as a preacher. Thus, the electioneering activity is permissible. In the third and fourth, the preacher is using a church platform—the newsletter and the pulpit; hence, the electioneering activity is prohibited. The difference is easy to see—what is said in the church bulletin, what is said in the church pulpit—are tax-subsidized activities, and our taxes should not be used to subsidize partisan electoral activity, or, to quote Learned Hand, “[c]ontroversies of that sort must be conducted without public subvention; the Treasury stands aside from them.”²⁰⁵

Those who would say that the IRS was being too lenient point to examples one and two above, which the IRS would allow under current tax law, and would ask, when is a preacher, if he or she is pronouncing in public, not a preacher and not acting for or on behalf of the church that employs him or her? Can we even separate a preacher’s “unofficial” preaching (public pronouncements) from his or her “official” preaching? As one scholar in the field has written:

[T]he members of a church are often willing to accept authority and thus are more amenable to guidance from leaders and clergy. One consequence is that a minister or leader of the church cannot speak unofficially. If the minister believes that tenets of a religion suggest or require that adherents vote a certain way, her communication of that conclusion to her congregants has the authority of her position and learning. A suggestion that the statement is unofficial will either trivialize the message or be meaningless. In fact, the religious faith may require that the moral lesson be articulated by persons speaking in their capacity as church or religious leaders.²⁰⁶

Under this standard, even examples one and two above would involve impermissible electioneering by the preacher, and that is a

203. *Id.*

204. *Id.* at 8.

205. *Slee v. Comm’r*, 42 F.2d 184, 185 (2d Cir. 1930).

206. Samansky, *supra* note 1, at 154.

much more acceptable result. When preachers speak in public, they are still preaching to their church, and the electioneering prohibition should apply.

D. Lack of Adequate Penalties

The biggest problem that the IRS has in policing the church electioneering prohibition is the lack of adequate policing alternatives, which may, in turn, explain the IRS's perceived leniency. At present, the IRS has a choice of two different sanctions when a preacher violates the electioneering prohibition. It can revoke the church's 501(c)(3) status, which is the nuclear option, or it can impose the § 4955 excise taxes, which is the fly-swatter option.²⁰⁷ There is nothing in between, and that is the problem. Sanctions need to be created in the middle ground—ones that do not terminate the organization's tax exempt status, but that make it highly unlikely that similar breaches of the electioneering prohibition will occur again. This would, of course, require Congressional action, but given the increasing annual numbers in the Pulpit Freedom Sunday event, that action is overdue.

V. SAVING THE PREACHERS

A. What the Numbers Show

The very odd thing about preachers electioneering from the pulpit is that, as preachers insist more and more on this right, their congregations turn them off more and more. Just before the first Pulpit Freedom Sunday in 2008, the Pew Research Center did a study on church endorsement of candidates for political office.²⁰⁸ The results are revealing. When asked if churches should endorse one candidate over another, the Pew poll found that, in the total population, 29% of those polled said "yes," but 66% said "no."²⁰⁹ When the breakdown was by groups, the results are as follows: among white Protestants, 29% said "yes," and 68% said "no."²¹⁰ Among white Protestant Evangelicals, 34% said "yes," and 64%

207. I.R.C. §§ 501(c)(3), 4955 (2006).

208. *Despite Pastors' Protest, Most Americans Are Wary of Church Involvement in Partisan Politics*, PEW RESEARCH CTR. PUBLS. (Oct. 1, 2008), <http://pewresearch.org/pubs/981/church-involvement-in-politics>.

209. *Id.*

210. *Id.*

said “no.”²¹¹ Among mainline Protestants, 23% said “yes,” and 73% said “no.”²¹² Among African American Protestants, 36% said “yes,” and 55% said “no.”²¹³ Among all Catholics, 30% said “yes” and 67% said “no.”²¹⁴ Among white, non-Hispanic Catholics, 26% said “yes,” and 70% said “no.”²¹⁵ Those are rather overwhelming numbers from the flock—of whatever denomination—indicating that preachers who do electioneering are working against their own interests. Their people do not want to hear them.

In *American Grace: How Religion Divides Us and Unites Us*,²¹⁶ one of the most well-researched studies of religion and politics in recent years, the authors explain:

The politicization of religion has triggered a negative reaction among some, mostly young Americans. They have pulled away from religion precisely because they perceive it as an extension of partisan politics with which they do not agree. They see religion tied up with conservative politics, and their aversion to the latter has led them to reject the former.²¹⁷

If more proof is needed of this phenomenon, an article by Dr. William V. D’Antonio is helpful.²¹⁸ A number of Catholic bishops became active in the 2008 presidential election against Candidate Barack Obama, ostensibly because he was “pro-abortion.”²¹⁹ They actively indicated to their flocks that no practicing Catholic could vote for Obama because of this.²²⁰ In surveys after the election among voters in the cities where these bishops were politically active, the Democratic ticket prevailed, anywhere from a low of 54-45% to a high of 78-22%.²²¹ Although these numbers are not broken down by the religion of the voter, the over-all Catholic vote in the 2008 elections went for Obama, 54-45%,²²² which was a

211. *Id.*

212. *Id.*

213. *Despite Pastors’ Protest*, *supra* note 208.

214. *Id.*

215. *Id.*

216. ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES US AND UNITES US* (2010).

217. *Id.* at 434.

218. William V. D’Antonio, *Catholic Bishops and the Electoral Process in American Politics*, in *VOTING AND HOLINESS* 50 (Nicholas P. Cafardi ed., 2012).

219. *Id.* at 54.

220. *Id.*

221. *Id.* at 90.

222. *How the Faithful Voted*, PEW FORUM ON RELIGION & PUBLIC LIFE (Nov. 10, 2008), <http://www.pewforum.org/Politics-and-Elections/How-the-Faithful-Voted.aspx>.

seven percentage point swing from 2004, when Catholic voters went for Bush over Kerry by 52-47%.²²³ The Catholic bishop's document, *Forming Consciences for Faithful Citizenship*,²²⁴ which is a non-partisan voter guide for Catholics,²²⁵ was only known to sixteen percent of all Catholics in the 2008 election,²²⁶ which tends to indicate that what the preachers say about elections is, by and large, less relevant than what they may think it is. In other words, most of the people in the pews do not want to hear about politics from the pulpit, or from their preachers, and when they do hear it, some very good evidence indicates that they ignore it. The Pulpit Freedom Sunday initiative thus may, in its attempt to restore what the Alliance Defense Fund believes are the free exercise rights and political influence of preachers, have the opposite effect.

B. The Politically Divisive Effects of Religion

But one effect that it may have, or is already having, could be even worse. As the famous philosopher and student of religion, Martin E. Marty has written:

Yet religion, a force for ennobling life and giving it meaning, can also be used to justify the ugliest of human ventures. Crusaders and conquistadores, claiming to have read or heard the word of God, find themselves righteous as they stab "infidels." Both sides in holy wars regularly feel that they are acting out a divine drama that finds God on their side.²²⁷

None of the major Abrahamic faiths is without its tendency to violence against those who are not counted among the true believers. In the Jewish Scriptures, in the Book of Deuteronomy, the Lord says:

223. Mark Silk & Andrew Walsh, *A Past Without a Future*, AMERICA (Nov. 3, 2008), <http://www.americamagazine.org/content/article.cfm?articleid=11181>.

224. U.S. CONFERENCE OF CATHOLIC BISHOPS, *Forming Consciences for Faithful Citizenship* (2011).

225. Churches are allowed to publish truly non-partisan voter guides, and that is not considered to be electioneering. See INTERNAL REVENUE SERV., *supra* note 2, at 12-13.

226. MARK M. GRAY, *CARA CATHOLIC POLL 2011: FORDHAM CENTER ON RELIGION AND CULTURE QUESTIONS 3* (2011).

227. MARTIN E. MARTY, *PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA* 46 (1984).

If there is found among you, in one of your towns that the Lord your God is giving you, a man or a woman who does what is evil in the sight of the Lord your God, and transgresses his covenant by going to serve other gods and worshipping them . . . then you shall bring out to your gates that man or woman who has committed this crime and you shall stone the man or woman to death.²²⁸

Even Jesus of Nazareth said, “[d]o not think that I come to bring peace to the earth. I have not come to bring peace, but a sword.”²²⁹ Most Christians forget that Jesus had the apostles bring swords to the Garden of Gethsemane on the night he was arrested.²³⁰ And Marty’s comments, quoted above, about the crusades and conquistadores are, of course, out of Christian history. One of history’s most infamous quotes occurred during the Catholic crusade against the Albigensians, when the crusading troops were about to attack Beziers, a town where there were known to be both Albigensian “heretics” and “faithful” Catholics—“[m]assacre them for the Lord knows his own,” advised Arnaud Amaury, the Abbot of Citeaux.²³¹ And if we would look for a modern Christian statement of hatred for those who do not have the “truth,” one need only look to the Westboro Baptist Church.

Islam has given rise to similar dicta. “Slay [unbelievers] wherever you find them. Drive them out from the places from which they drove you.”²³² And “[s]ay to the unbelievers, ‘You shall be overthrown and driven into Hell—an evil resting place!’”²³³ And “[h]e that denies God’s revelations should know that swift is God’s reckoning.”²³⁴ And “[w]e suddenly smote them [i.e., the unbeliev-

228. *Deuteronomy* 17:2-5 (New Revised Standard Version). On the other hand, Hillel the Elder, one of the sources for modern, rabbinic Judaism, taught, “[w]hat is hateful to you, do not do to your fellow: this is the whole Torah; the rest is explanation; go and learn.” *Shabbat* 31a.

229. *Matthew* 10:34 (New Revised Standard Version).

230. *Luke* 22:38 (New Revised Standard Version). To be fair, he also said, “[l]ove your enemies, do good to those who hate you.” *Luke* 6:27 (New Revised Standard Edition). The question is which part of his message his followers hear, and some Christians can be very selective, e.g., the Westboro Baptist Church.

231. Malcolm Lambert, *THE CATHARS* 103 (1998) (quoting *DIALOGUS MIRACULORUM* (Joseph Strange ed., 1851) (“*Caedite eos. Novit enim Dominus quo sunt eius.*”)).

232. Koran 2:191.

233. Koran 3:12.

234. Koran 3:19.

ers] and they were plunged into utter despair. Thus were the evil-doers annihilated. Praise be to God, Lord of the Universe!”²³⁵

As noted above, the list of 359 churches participating in Pulpit Freedom Sunday in 2011 did not include any synagogues or mosques. What if the list of those “churches” seeking to evade the Tax Code’s prohibition on electioneering was not predominantly a Christian one? What if the majority of them were mosques? Would the reaction be the same? In this primarily Christian country, would we expect the IRS to be so tolerant of their “rights”? Would the Alliance Defense Fund be there to defend them?

C. “O, Felix Culpa”

Faith is a powerful motivation, for good and for ill. Its mixture with politics can be toxic. Jefferson, a staunch defender of religious liberty, knew this, which is why he talked of the “wall of separation.” In 1800, he wrote to Jeremiah Moor, “[t]he clergy, by getting themselves established by law and ingrafted into the machine of government, have been a very formidable engine against the civil and religious rights of man.”²³⁶ And in a letter to Baron Von Humboldt in 1813, he said, “[h]istory, I believe, furnishes no example of a priest-ridden people maintaining a free civil government. This marks the lowest grade of ignorance of which their civil as well as religious leaders will always avail themselves for their own purposes.”²³⁷

And while Jefferson may have been the first to use the phrase “separation of church and state” in his letter to the Danbury Baptists,²³⁸ Madison also used a similar phrase, speaking specifically of the U.S. Constitution: “[s]trongly guarded as is the separation between Religion and Government in the Constitution of the United States, the danger of encroachment by Ecclesiastical Bodies, may be illustrated by precedents already furnished in their short history.”²³⁹

235. Koran 6:44-45. Muslim scholars today would say that these verses only authorize defensive actions. See RAJ BHALA, UNDERSTANDING ISLAMIC LAW 1313 (2011).

236. Letter from Thomas Jefferson to Jeremiah Moor (Aug. 1800), in THE JEFFERSONIAN CYCLOPEDIA 146 (John P. Foley ed., 1900).

237. Letter from Thomas Jefferson to Baron Von Humboldt (Dec. 1813), in THE JEFFERSONIAN CYCLOPEDIA, *supra* note 236, at 827.

238. See *Reynolds v. United States*, 98 U.S. 145, 163-64 (1878) (citations omitted).

239. James Madison, *Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments*, 128 HARPER’S MAG. 489, 492 (1914).

Of course, we know that Jefferson was not at the Constitutional Convention, but James Madison was. They were both founding members of the same political party, then called the Democratic-Republican party—a counter-weight to the much more establishment-prone Federalists.²⁴⁰ Madison, who did help to draft the Constitution and the Bill of Rights, had views similar to Jefferson's on the mix of religion and politics. In his *A Memorial and Remonstrance Against Religious Assessments* opposing legislation that would create an established church for the Commonwealth of Virginia, he wrote:

In some instances [clergy] have been seen to erect a spiritual tyranny on the ruins of the Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty, may have found an established Clergy convenient auxiliaries.²⁴¹

In the *Federalist Papers* arguing for the adoption of the Constitution, Madison wrote of religiously based factionalism:

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government and many other points . . . have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.²⁴²

Strong words by men with strong opinions, perhaps, but they make a point: Americans, from our founding, have not wanted our preachers or our churches meddling in our politics. Although it may have been a happenstance that Lyndon Johnson's 1954 amendment caught the churches in the electioneering prohibition, it has redounded to America's benefit. It is a major reason why

240. WILLIAM NISBET CHAMBERS, *POLITICAL PARTIES IN A NEW NATION: THE AMERICAN EXPERIENCE, 1776-1809* at 81-98 (1963).

241. JAMES MADISON, *Petition of James Madison to the Virginia General Assembly (June 20, 1875)*, in *SELECTED WRITINGS OF JAMES MADISON* 21, 24-25 (Ralph Ketcham ed., 2006).

242. *THE FEDERALIST* No. 10, at 53-54 (James Madison) (Henry Cabot Lodge ed., 1892).

Washington, D.C. has not become a Beirut or a Cairo, with religious violence in the streets. It has also redounded to the preachers' and the churches' benefit. It keeps them on message. It keeps them among those "beneficial and stabilizing influences in community life"²⁴³ that merit the support of a public subsidy. Jefferson's wall does this. That wall is reinforced by our Tax Code. We should all, preachers included, consider that a *felix culpa*.

243. *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 672-73 (1970).