Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy

DONALD B. TOBIN*

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* Associate Dean for Academic Affairs and Associate Professor of Law, Moritz College of Law, The Ohio State University. The author wishes to thank Allan Samansky, Garry Jenkins, Edward Foley, Daniel Tokaji, Steven Huefner, Bradley Smith, Lloyd Mayer, Leigh Tobin, Kathy Hall, and his research assistants Derek Heyman and Daniel Everson for their thoughtful comments, research help, and advice. The author also wishes to extend a special thanks to Nancy Rogers, Dean of the Moritz College of Law, for all her support.

INTRODUCTION

Although the Internal Revenue Code is not usually viewed as a means of regulating elections, it significantly restricts the political activities of tax-exempt organizations.[1] Specifically, the Internal Revenue Code prohibits organizations that are tax-exempt under section 501(c)(3) from participating in or

1. There are several provisions in the Internal Revenue Code that regulate lobbying and the political activity of tax-exempt organizations. *See, e.g.*, I.R.C. § 501(c)(3) (2000) (charitable, educational and religious organizations); I.R.C. § 501(c)(4) (2000) (social welfare organizations); I.R.C. § 501(c)(5) (2000) (labor unions); I.R.C. § 501(c)(6) (2000) (business leagues); I.R.C. § 527 (2000 & Supp. II 2002) (political organizations). For a thorough discussion of electioneering and tax-exempt organizations, see Daniel L. Simmons, *An Essay on Federal Income Taxation and Campaign Finance Reform*, 54 FLA. L. REV. 1 (2002).

intervening in political campaigns for or against a candidate for public office.[2] This prohibition is absolute and all encompassing. 501(c)(3) organizations are not, however, completely prohibited from engaging in civic discourse. They are allowed to educate the public with regard to important policy issues and engage in an insubstantial amount of lobbying.

Many 501(c)(3) organizations, however, are either ignoring the political campaign ban or are using "issue discussion" or "lobbying" as a means of promoting candidates and testing the limits of the prohibition. During the 2004 presidential campaign, 501(c)(3) organizations, including religious institutions, were extremely politically active. Organization leaders gave speeches, published politically sensitive statements, and even endorsed candidates.[3]

In order to deal with the increase in alleged violations of the political campaign ban during the 2004 elections, the IRS instituted a compliance initiative. As part of the compliance initiative, the IRS examined 110 501(c)(3) organizations that were alleged to have violated the campaign ban. Of the 82 cases closed by the IRS at the time the report was issued, 59 (72%) were found to be in violation of the campaign prohibition.[4]

Many in the non-profit community have cried foul and complained about the IRS's enforcement efforts. They argue that the IRS should not be subjectively analyzing the content of these communications and that 501(c)(3) organizations should be given wide latitude with regard to the campaign prohibition.[5] Pastor Parsley, whose church was accused by other church leaders of improper intervention in a political campaign, asserted that the allegations were "un-American"

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2. 501(c)(3) organizations are organizations that are exempt from taxation under section 501(c)(3) of the Internal Revenue Code. Section 501(c)(3) provides that the following organizations are exempt:

> 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 . . . , or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . , and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

I.R.C. § 501(c)(3) (2000). Commentators often refer to nonprofit or exempt organizations when discussing the prohibition against intervening in political campaigns. But other exempt organizations receive more limited subsidies from the government and are not prohibited from intervening in campaigns on behalf of candidates. In fact, political organizations, which include candidate campaigns, are tax-exempt organizations under section 527. Unlike with 501(c)(3) organizations, however, donors may not deduct contributions to other tax-exempt organizations.

3. INTERNAL REVENUE SERV., FINAL REPORT, PROJECT 302: POLITICAL ACTIVITIES COMPLIANCE INITIATIVE 15–17 (2006), *available at* http://www.irs.gov/pub/irs-tege/final_paci_report.pdf (describing alleged acts of political campaign intervention in the 2004 election cycle).

4. *Id.* at 25. Churches in Maryland were so oblivious to the campaign intervention restriction that they actually made financial contributions to candidate campaigns. *See* John Fritze, *Political Gifts by Churches Break IRS Rules*, BALT. SUN, Feb. 26, 2006, at 1A.

5. Some 501(c)(3) organizations claim that they are not engaged in campaign advocacy and are just speaking out on issues. This relates more to the enforcement of the prohibition than to the legitimacy of the prohibition. *See* discussion *infra* Part III.

and that the intervention by the church was "not political, but rather spiritual, as they have their basis in biblical truth."[6]

In addition, some critics of the IRS's actions argue that the IRS is engaged in politically-biased enforcement and is using the Internal Revenue Code to attack opponents of President Bush.[7] These critics note that the IRS appears not to have initiated an inquiry into a letter favoring President Bush that Reverend Michael J. Sheridan, the Bishop of the Catholic Dioceses of Colorado Springs, sent to parishioners,[8] but it has initiated inquiries into left-leaning nonprofit organizations, including the NAACP and the All Saints Church.[9]

Organizations that oppose the current political intervention prohibition usually raise two arguments in support of their position that 501(c)(3) organizations should be allowed to intervene in political campaigns. First, opponents of the ban argue that 501(c)(3) organizations have a First Amendment right to intervene in a political campaign on behalf of a candidate, and that the Internal Revenue Code provision prohibiting intervention is a violation of that right. Non-religious organizations allege that the restriction is a violation of free speech, while religious organizations claim that it both violates free speech and burdens unduly the free exercise of religion.[10] Religious organizations claim that they have a religious duty to intervene in political campaigns and that their religious mission compels them to speak out on behalf of candidates who support the institution's religious mission or to speak against those who take stands inconsistent with those beliefs.[11]

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6. *See* Press Release, ALR Commc'ns, "Baseless and Without Merit": Pastor Rod Parsley Responds to Reported IRS Complaint by "Anonymous 31" (Jan. 20, 2005), *available at* http://www.centerformoralclarity.net/pdf/NewsRelease/2006-01-20.pdf [hereinafter ALR Press Release].

7. *See* Cynthia Blum, *The Flat Tax: A Panacea for Privacy Concerns?*, 54 AM. U. L. REV. 1241, 1268 (2005); Eric A. Lustig, *IRS, Inc.—The IRS Oversight Board—Effective Reform or Just Politics? Some Early Thoughts from a Corporate Law Perspective*, 42 DUQ. L. REV. 725, 732 (2004).

8. *See* Letter from Michael J. Sheridan, Bishop, Colo. Springs Diocese, to parishioners (May 1, 2004), *available at* http://www.cbsnews.com/htdocs/pdf/pastoralletter.pdf; Letter from Barry W. Lynn, Executive Dir., Ams. United for the Separation of Church & State, to Steven T. Miller, Dir., Exempt Orgs. Div., IRS (May 27, 2004), *reprinted in Group Asks IRS to Investigate Catholic Diocese*, TAX NOTES TODAY, May 28, 2004, LEXIS, 2004 TNT 104-24 (urging IRS to investigate Bishop Sheridan's letter).

9. *See* Letter to Mark. W. Everson, Comm'r, IRS (Jan. 15, 2006) (alleging violation of 501(c)(3) status by several Ohio organizations), *available at* http://moritzlaw.osu.edu/electionlaw/docs/church/Ohio-letter.pdf; *see also* Fred Stokeld, *Ohio Pastors Renew Call for IRS to Investigate Churches*, 111 TAX NOTES 159 (Apr. 10, 2006) (describing letter to Commissioner Everson). The Inspector General for Tax Administration investigated the charge of partisan bias and found no such bias. *See infra* note 218.

10. *See* Joseph S. Klapach, *Thou Shalt Not Politic: A Principled Approach to Section 501(c)(3)'s Prohibition of Political Campaign Activity*, 84 CORNELL L. REV. 504, 513 (1999) (discussing the contention that the political activity prohibition under section 501(c)(3) necessitates abandonment of First Amendment rights).

11. *See, e.g.*, THE PRESBYTERIAN CHURCH (U.S.A.), "GOD ALONE IS LORD OF THE CONSCIENCE": A POLICY STATEMENT AND RECOMMENDATIONS REGARDING RELIGIOUS LIBERTY ADOPTED BY THE 200TH GENERAL ASSEMBLY (1988), *reprinted in* 8 J.L. & RELIGION 331, 378 (1990) (describing participation by Christians in political dimensions of public life as "not only a constitutional right but also a religious responsibility"). A moral argument about the need to participate in elections is not confined to churches.

Second, opponents of the ban argue that even if the prohibition is constitutional, it should be removed on public policy grounds. Opponents claim that 501(c)(3) organizations play an essential role in informing the public about important issues.[12] They further argue that 501(c)(3) organizations, including churches, have an important moral role to play in political campaigns and that it is wrong, as a policy matter, to prohibit these organizations from supporting candidates.

With regard to the first argument, the opponents of the restriction are simply wrong. They do not have a First Amendment right to intervene in political campaigns. Because of their charitable purposes, 501(c)(3) organizations are generally exempt from tax. In addition, the Internal Revenue Code provides that donations to 501(c)(3) organizations are tax deductible by the donor.[13] Thus, 501(c)(3) organizations receive a dual tax subsidy. Their income is not taxed, and donations to them are deductible by donors. These tax benefits are considered a subsidy by society to 501(c)(3) organizations.[14] In order to ensure that this subsidy is not abused or misused, the Internal Revenue Code provides for very strict regulation of 501(c)(3) organizations. One such restriction is that 501(c)(3) organizations may not "intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office."[15] This prohibition is absolute, and even a smidgen of campaign activity is prohibited and can result in an organization losing its exempt status. The Supreme Court, in a slightly different context, has found that similar restrictions on nonprofit organizations are constitutional.[16]

In my view, the second claim—that religious institutions and other 501(c)(3) organizations have an important role to play in political campaigns, or that they have a duty to enter the political fray and the government should be supportive of that obligation—raises the greatest concern. This Article argues that it is a serious mistake to provide subsidized campaign speech to 501(c)(3) organizations over other entities and that such a policy would have grave consequences for our democratic system of governance.[17]

If 501(c)(3) organizations are allowed to intervene in political campaigns on behalf of candidates, the power of these organizations in comparison to other

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Other 501(c)(3) organizations might make a similar argument on moral grounds. They would argue that they are morally compelled by their exempt purpose to support candidates who support their mission.

12. *Cf.* Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 800 (2001) ("Religious communities are crucial sources for the kind of counter-speech that . . . free societies require.").

13. I.R.C. § 170(a)(1) (2000).

14. Regan v. Taxation with Representation of Washington, 461 U.S. 540, 544 (1983).

15. I.R.C. § 501(c)(3) (2000).

16. *Taxation with Representation*, 461 U.S. at 553.

17. For example, the government could provide that all contributions made to any organization or entity for the purpose of influencing a campaign would be tax deductible. While I do not support such a policy, it would at least treat all people and organizations equally. *See* John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 640–41 (2005); Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 107 (2004).

organizations will increase dramatically. They will become extremely powerful organizations and will have significant influence over public policy. Because they will be the only organizations to receive a subsidy for campaign speech, these organizations will become ideal entities for political campaign donors. As donations increase, 501(c)(3) organizations will become more powerful and will be able to exert more influence over candidates. Section 501(c)(3) organizations will become mechanisms or conduits for unlimited tax-deductible political contributions. Outside presidential campaigns, they will be the only organizations involved in political campaigns to receive a federal tax subsidy.[18] Congress clearly did not intend for 501(c)(3) organizations to become supercharged campaign organizations.[19]

Some may claim that 501(c)(3) organizations are a positive force and that their involvement in elections will strengthen democracy. But this ignores the serious potential for abuse that exists if 501(c)(3) organizations are allowed to intervene in political campaigns. If Congress decides that the federal government should subsidize contributions to political campaigns, it could do so on policy grounds, but it makes no sense to do so in a backhanded way that is rife for abuse.[20]

If one recognizes that the political campaign ban under section 501(c)(3) is both constitutional and meritorious, the next hurdle is designing a system that provides for adequate and fair enforcement of the provision. The IRS functions best when engaged in its core function—collecting revenue and protecting the fisc. It has no special expertise in the regulation of elections, and it has neither the staff nor the expertise to engage adequately in this function. In addition, laws designed to protect taxpayer privacy make enforcement in this area particularly problematic.

Absent disclosure by the taxpayer or revocation by the IRS, it is usually confidential whether an organization is being investigated and what the resolution of the investigation is. Thus, we do not know for sure whether an organization was audited by the IRS. Further, even if the IRS audits an organization and the fact of the audit becomes public, there is no public disclosure of the result of the audit. Secrecy regarding taxpayer information makes sense when it involves private return information, but it makes much less sense in the case of audits of organizations involved in political campaigns. Knowing that organizations are treated equally and knowing what behavior is punished helps create a level playing field and avoids the possibility of unequal treatment. Secrecy poses the risk that an administration will use pro-administration 501(c)(3) organizations to promote its causes and candidates while using the political intervention provision as a means of punishing anti-administration 501(c)(3) organizations.

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18. Presidential campaigns that agree to abide by certain rules may receive funding for their campaigns from the U.S. Treasury. *See* I.R.C §§ 9001–9009 (2000).

19. Ann M. Murphy, *Campaign Signs and the Collection Plate—Never the Twain Shall Meet?*, 1 PITT. TAX REV. 35, 40–65 (2003) (tracing the legislative history of the political campaign ban).

20. *See supra* note 17.

Secrecy and discriminatory subsidy are not good ingredients for a vibrant democracy.

Moreover, because the choice whether to audit an entity is within the administrative discretion of the IRS, individuals or organizations cannot bring legal action or file formal complaints against another entity for a violation of the Internal Revenue Code. One can complain to the IRS, but as discussed previously, there is no guarantee that the IRS will act on the complaint, and the complainant is not entitled to any information regarding the resolution of the case.[21] This raises the concern that the IRS will engage in discriminatory enforcement of the political intervention prohibition.[22]

This Article argues that taxpayer-subsidized 501(c)(3) organizations should not be permitted to intervene in political campaigns and that new procedures are necessary to ensure fair and adequate enforcement of this prohibition. Part I sets out the arguments for maintaining the political campaign ban and argues that subsidizing 501(c)(3) organizations that are involved in political campaigns poses a threat both to the democratic system in the United States and to the vitality of those organizations. Part II explains the current rules governing 501(c)(3) organizations and argues that the current system of enforcing the political intervention prohibition is flawed, and Part III suggests reforms for creating a more transparent, judicial, and fair method for enforcing campaign-related prohibitions in the Internal Revenue Code.

I. POLITICAL CAMPAIGNING BY 501(C)(3) ORGANIZATIONS HARMS 501(C)(3) ORGANIZATIONS AND THE DEMOCRATIC PROCESS

Most Americans are familiar with 501(c)(3) organizations. They are our religious institutions, our private universities, our nursery schools, and our humanitarian organizations. They preach to the masses, help the hungry, educate our children, and generally promote societal well-being. Policies that favor these organizations and further empower them generally do not appear harmful to our democratic system of governance. But providing these organizations with a subsidy to participate in political campaigns harms both 501(c)(3) organizations and our democratic process. First, allowing 501(c)(3) organizations to intervene in political campaigns will change the character of these organizations. They will no longer be the altruistic, charitable, religious, or educational type of organizations that currently exist.[23] Second, the fact that these organiza-

21. *See, e.g.*, Letter from Barry W. Lynn, Executive Dir., Ams. United for Separation of Church & State, to the IRS (July 19, 2006), *reprinted in Church Gave Money to Republicans, Group Says*, TAX NOTES TODAY, July 20, 2006, LEXIS, 2006 TNT 139-14 (asking the IRS to investigate a Texas church Lynn claims gave $1,500 to a local branch of the Republican Party).

22. *See* Frances R. Hill, *Auditing the NAACP: Misadventures in Tax Administration*, 49 EXEMPT ORG. TAX REV. 205, 205 (2005); *cf.* Christopher Quay et al., *NAACP Leaders React to IRS Inquiry*, 46 EXEMPT ORG. TAX REV. 282 (2004).

23. I recognize that some organizations formed under section 501(c)(3) as educational organizations may already be associated with political movements. These organizations, however, are still required to

tions *are* generally respected and often engage in activities designed to promote societal well-being makes them particularly effective in manipulating those who depend upon them. This dependence makes political intervention by 501(c)(3) organizations particularly inappropriate.

Although section 501(c)(3) provides a list of organizations exempt under the section, the organizations can generally be divided into two categories—"churches"[24] and other exempt organizations. I consider churches and other exempt organizations separately in this discussion because the Internal Revenue Code treats churches and other exempt organizations in slightly different ways.[25] Moreover, the political campaign ban is slightly more complicated with regard to churches because regulation of churches implicates the Free Exercise Clause and the Establishment Clause of the First Amendment.

A. PROBLEMS WITH RELIGIOUS INSTITUTIONS' DIRECT INVOLVEMENT IN POLITICAL CAMPAIGNS

In determining whether religious institutions should be subsidized to engage in political campaigns, we need to examine the impact that such intervention would have on churches and on society as a whole. Here I argue that the political campaign ban is beneficial public policy from both a secular and a religious perspective. Secularists generally oppose increased religious power and influence in our society.[26] From a secularist's perspective, the political intervention prohibition is essential to stop religion from becoming too powerful and corrupting the democratic system of governance.

Many religious individuals and groups, however, support the political intervention prohibition on drastically different grounds. These groups believe that the

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be nonpartisan. FRANCES R. HILL & DOUGLAS M. MANCINO, TAXATION OF EXEMPT ORGANIZATIONS ¶ 3.03[1] (2003) (discussing the requirements for an organization to be exempt as an educational organization).

24. The Internal Revenue Code does not provide a definition of *church*. The Code, however, refers to "churches, their integrated auxiliaries, and conventions or association of churches." I.R.C. § 508(c)(1) (2000). Moreover, in a General Counsel Memorandum the IRS indicated that it will consider fourteen different factors for determining whether an entity is a *church* under the Code. *See* Lutheran Social Service of Minnesota v. United States, 758 F.2d 1283, 1286 (1985); I.R.S. Gen. Couns. Mem. 36993 (Feb. 3, 1977) (listing the 14 factors). The IRS interprets the term *church* to apply to all places of prayer, including temples, mosques and synagogues. For clarity, I have adopted the IRS's usage here. *See also* Murphy, *supra* note 19, at 76–78 (discussing the problem of the definition of *church*); Charles M. Whelan, *"Church" in the Internal Revenue Code: The Definitional Problems*, 45 FORDHAM L. REV. 885 (1977).

25. Churches are treated differently than other 501(c)(3) organizations. *See, e.g.*, I.R.C. § 107 (2000 & Supp. II 2002) (excluding rental value of parsonages from ministers' gross income); I.R.C. § 170(f)(8) (2000) (requiring substantiation for deduction of intangible religious benefits); I.R.C. § 508(c)(1)(A) (2000) (exempting churches from having to file to receive recognition as a 501(c)(3) organization); 26 U.S.C.A. § 6033(a)(3)(A)(i) (West, Westlaw through Pub. L. No. 109-431) (exempting churches from having to file an informational return); I.R.C. § 7611 (2000) (establishing restrictions on church tax inquiries).

26. Bruce Ledewitz, *Up Against the Wall of Separation: The Question of American Religious Democracy*, 14 WM. & MARY BILL RTS. J. 555, 591 (2005).

churches' increased involvement with government is itself corrupting of religion. Moreover, religious supporters of the ban argue that keeping religion out of government fosters better church-state relations.[27] The debate surrounding the political intervention prohibition and churches is therefore not a debate between secularists and the religious, but is instead a debate between those who believe religion and religious organizations should be more involved in politics and government and those who do not.

Although the Establishment Clause does not appear to prohibit churches from being involved in political campaigns,[28] the history and literature surrounding the Establishment Clause provide support for the notion that churches and religion benefit when churches are not closely tied with a political candidate or government official.[29]

Early supporters of the Establishment Clause generally divided into two schools of thought. One, the theologians, saw the separation of church and state as essential for the continued vitality of the church.[30] They believed that a close connection between church and state would cause the state to corrupt religion and attempt to control it. Theologians, therefore, saw the separation between church and state as necessary to protect the vibrancy of the church. The other group, the rationalists, was more concerned with the impact that a state religion would have on individual freedoms. These theorists argued that religion was a private matter between man and God, and that government, via the church, should not force a particular belief upon man.[31] Roger Williams argued that separation was good for the state because compelling religious conformity would lead to repression and civil unrest, and separation was good for the

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27. *See* Letter from David Saperstein, Dir., Religious Action Ctr. of Reform Judaism, to Members of Congress (Sept. 27, 2002), *available at* http://rac.org/Articles/index.cfm?id=806&pge_prg_id=7037; *Review of Internal Revenue Code Section 501(c)(3) Requirements for Religious Organizations: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 107th Cong. 40 (2002) [hereinafter *Hearings*] (statement of Reverend C. Welton Gaddy, Ph.D., Executive Director, Interfaith Alliance).

28. These organizations are, however, still subject to campaign finance laws. As long as they comply with other election law provisions, churches that choose to forgo 501(c)(3) status would be able to participate or intervene in political campaigns.

29. Other pro-religion commentators reach the opposite conclusion. *See* THE PRESBYTERIAN CHURCH (U.S.A.), *supra* note 11, at 379 ("[I]t is a limitation and denial of faith not to seek its expression in both a personal and a public manner, in such ways as will not only influence but transform the social order. Faith demands engagement in the secular order and involvement in the political realm."); Steffen N. Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875, 886–87 (2001); Thomas L. Shaffer, *Review Essay: Stephen Carter and Religion in America*, 62 U. CIN. L. REV. 1601, 1604 (1994) (religious groups "are particularly situated to notice and say that the emperor is naked").

30. For an excellent discussion of this history, see Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 355–56 (1984).

31. *See, e.g.*, MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 17–19 (1965); JOHN LOCKE, *A Letter Concerning Toleration* (1689), *in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 211, 219 (Ian Shapiro ed., 2003); S. Gerald Sandler, *Lockean Ideas in Thomas Jefferson's* Bill for Establishing Religious Freedom, 21 J. HIST. IDEAS 110, 111 (1960).

church because it left the church free from co-option and better able to pursue its religious mission.[32]

Professor Carl H. Esbeck, in his work examining the breadth of the Establishment Clause, concludes that the jurisprudence surrounding the Establishment Clause came to recognize that it was a limitation on "mutual dependence."[33] Esbeck points out that Supreme Court opinions often recognize, albeit in dicta, that "the [E]stablishment [C]lause filters out improper involvement traveling in either direction."[34] Under this theory, the state was prohibited from interfering with the functions of the church, and the church was prohibited from attempting to control the actions of the state.[35] As the Court noted in *School District of Abington Township v. Schempp*, "'a union of government and religion tends to destroy government and to degrade religion.'"[36]

1. Intervention in Political Campaigns Is Not in the Best Interest of Churches

a. Churches May Be Co-opted by Government. Churches have flourished in the United States partially because religion and government have occupied independent spheres.[37] As churches become more political, there is serious risk that the churches involved in politics will be co-opted and destroyed.[38] Once a church decides to endorse a particular candidate, it becomes very difficult for the church to speak out against that candidate or to preach on issues that might discourage members from voting for that particular candidate. Thus, support of a particular candidate may put pressure on the church to change or deemphasize certain aspects of church doctrine.

For example, a church might be theologically opposed to both euthanasia and

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32. *See* Esbeck, *supra* note 30, at 357–58.

33. *Id.* at 349.

34. Esbeck, *supra* note 30, at 379 (explaining that the Establishment Clause's "first and most immediate purpose rested on a belief that a union of government and religion tends to destroy government and to degrade religion" (citing Engel v. Vitale, 370 U.S. 421, 431 (1962))); Larkin v. Grenel's Den, Inc., 459 U.S. 116, 122 (1982) ("The purposes of the First Amendment guarantees relating to religion were twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other Eighteenth Century systems. Religion and government, each insulated from the other, could then coexist.").

35. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 217 (1963) (stating that the First Amendment's purpose "was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion" (quoting Everson v. Bd. of Educ., 330 U.S. 1, 31–32 (1947))); *see also* SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 12 (Cooper Square Publishers, Inc. 1968) (1902); Esbeck, *supra* note 30, at 348 ("Those who were influential in our nation's history envisioned the churches and the state in a kind of parallelism, with neither subordinate to the other. Each should be guarded from being co-opted by the other, and each required to forbear from undue entanglement with the instrumentalities of the other.").

36. *Schempp*, 374 U.S. at 221 (quoting Engel v. Vitale, 370 U.S. at 431).

37. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 399 (Francis Bowen & Henry Reeve trans., 2d ed., Cambridge, Sever & Francis 1863) (1835) ("The American clergy . . . saw that they must renounce their religious influence, if they were to strive for political power; and they chose to give up the support of the state, rather than to share its vicissitudes.").

38. *Hearings*, *supra* note 27, at 38–39.

the death penalty, but it might believe that one issue is more important than the other. Thus, the church endorses a candidate who is anti-euthanasia but also pro-death penalty. Under the existing legal framework, the church could not endorse any candidate and would feel free to speak out on both issues. It would remain a moral voice on issues important to the church. But if the church endorses a candidate, it may lose its independence. It may feel constrained to speak out only on those issues that help the candidate. In a sense, the church becomes a part of the candidate's campaign and is no longer an independent voice. Moreover, this lack of independence also hurts the church's credibility on issues. The more the church is intertwined with the candidate, the more followers must question whether the position taken by the church is a theological or political one.

b. Candidates May Attempt To Intimidate Churches. The current political campaign ban also protects churches from intimidation by powerful politicians or political parties. Absent a ban, politicians may pressure churches to become involved in a political campaign. The prohibition helps churches avoid the pressure and intimidation that powerful politicians, both locally and nationally, may be able to place on local churches. If the ban were eliminated, those seeking government office, and those in power, would have every incentive to press churches to become involved in campaigns. Churches would face the uncomfortable proposition of either having to disappoint powerful politicians or reluctantly to endorse a particular candidate. Elimination of the political campaign ban would make it more difficult for churches to fend off this pressure.

For example, during the 2004 presidential campaign, the Bush campaign asked church leaders to provide it with church rosters and to assist the campaign in various ways.[39] Some church leaders may have been wary of intervening in the election but may have felt some pressure from the campaign to help. The political intervention prohibition provides churches with justification for denying campaign requests and it helps insulate churches from political intimidation.

c. Campaign Intervention by Churches May Create Politically "Preferred" Churches. Church involvement in political campaigns may also gravely impact the diversity of, and respect for, religion in the United States. If certain churches or religions become intertwined with political campaigns, there is a serious risk that some religions will find government favor, while others will receive government scorn. Government should not create an incentive system that increases the potential for a church that supports the winning candidate's campaign to become a "preferred" religion. Although this type of incentive system may not violate the Establishment Clause, the concerns that encouraged

39. Lisa Anderson, *Both Sides Putting Faith in Appeals to Religious Voters*, CHI. TRIB., Oct. 7, 2004, at C1. The article points out that this request "hasn't gone over well with some church leaders," and "the Pew Research Center and the Pew Forum on Religion & Public Life found that 69 percent of those surveyed said it was 'improper' for parties to ask for church rosters." *Id.*

the passage of the Establishment Clause are equally present when officeholders become intertwined with specific religious sects and those sects become "preferred" over others by those in power.[40]

Moreover, some religions or religious leaders may fear retribution if they do not support incumbents. These religions may face ostracism by government officials if they do not support the "correct" candidate. They may not receive government grants, or find themselves excluded from government discussions involving religion.[41] Even more problematic, these religions may find themselves unofficially blacklisted by government officials, and there may be public perception that these religions are disfavored.[42]

d. Political Intervention May Cause Divisions Within the Church. Finally, although public policy need not be paternalistic with regard to religion, churches benefit when they keep a reasonable distance from candidate elections. When a church discusses or promotes issues, it engages in its core moral and religious functions. Some parishioners may disagree with the church's teaching or even believe that a church is wrong in its teaching with regard to certain moral issues, but churches are within their traditional sphere when they are discussing moral and religious issues. Once a church moves from talking about issues to talking about candidates, it leaves the theological realm and enters the political one. Here, a church's activities can cause deep division and discord within its membership.

In most churches, people with similar theological beliefs can support different candidates. Almost no candidate's views will be identical to the theology of a particular church. When the church supports a particular candidate, it can ostracize large portions of its membership and cause deep divisions. These divisions make it much more difficult for the church to promote its traditional function of preaching to the masses and providing spiritual comfort to its members.

e. The Existing Framework and the Role of 501(c)(4) Organizations. In sections (a) through (d), I have outlined many of the problems for churches that will develop if the political campaign ban is eliminated. Some of the problems I outline above, however, may already exist because some churches are already involved in political campaigns through other organizations that are allied with

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40. *See* Esbeck, *supra* note 30, at 357–58 (discussion separationist philosophy).

41. *See, e.g.*, Elizabeth Bernstein, *All the Candidates' Clergy*, WALL ST. J., Aug. 13, 2004, at A1; Thomas B. Edsall, *Grants Flow to Bush Allies on Social Issues*, WASH. POST, Mar. 22, 2006, at A1; Ron Suskind, *Without a Doubt*, N.Y. TIMES MAG., Oct. 17, 2004, at 50, 106.

42. *See* Saperstein, *supra* note 27 (noting that "the erosion on constitutional safeguards is dangerous for everyone, especially houses of worship"). Professor Houck points out another difficulty with political intervention by churches—that issues based on god "do not lend themselves easily to debate, reason, or a search for consensus." Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 59 (2003).

the church. Under existing rules, a church can form a related 501(c)(4) organization, deemed a social welfare organization. Social welfare organizations may endorse candidates and may intervene in a political campaign on behalf of a candidate.[43] But contributions to 501(c)(4) organizations are not deductible by the donor, and the public fisc is therefore not subsidizing the donations to the organization.

Although allowing 501(c)(3) organizations to create related 501(c)(4) organizations may present some of the same problems discussed above, there is significantly less risk of oppression by the government when the political activities are done through a related, but independent, entity. Because a 501(c)(4) organization is a separate organization from the church, it cannot use a church's assets or resources to further its cause. It must be financially independent. It therefore is conducting its activities on par with those of the rest of society. Government is only minimally subsidizing the activity,[44] and there is therefore no preference given to the 501(c)(4) organization over other similarly situated organizations. There is thus no financial incentive to contribute to the 501(c)(4) organization over other organizations, so it is less likely that the 501(c)(4) organization will be used as a conduit for campaign contributions.[45] Because contributors must give independently to the 501(c)(4) organization, the church cannot use parishioners' resources to support a candidate unless the parishioner chooses to make a donation to the related 501(c)(4) organization.

Second, because the 501(c)(4) organization must be affirmatively set up by the church, there is considerably less risk that the church will be strong-armed into entering the political fray against its better judgment. Churches that set up 501(c)(4) organizations have already made the decision to become politically active.

Finally, although it may seem like a distinction without a difference, the fact that it is the 501(c)(4) organization and not the church itself that is engaging in this activity at least separates, to a degree, the theological and the political. The 501(c)(4) organization cannot preach during services, and it cannot use the power of the pulpit to tell people how to vote. While it does provide an avenue

43. A 501(c)(4) organization must have as its primary purpose the promotion of social welfare. The term social welfare does not include campaign activities. Thus a 501(c)(4) organization may engage in campaign activities as long as those activities do not make up more than 50% of the organization's activities. *See* Rev. Rul. 81-95, 1981-1 C.B. 332 (holding that 501(c)(4) organizations "primarily engaged in activities that promote social welfare" maintain their tax-exempt status). If a social welfare organization engages in political activity, then some of the organization's expenditures may be subject to tax under I.R.C. § 527(f). *See id.*

44. A 501(c)(4) organization still receives a tax subsidy because in many cases income of the organization is not taxed. In addition, contributions to the organizations are not considered income. A 501(c)(4) organization does not receive the additional subsidy provided to 501(c)(3) organizations under I.R.C. § 170. Contributions to 501(c)(4) organizations are not tax deductible.

45. There are, however, serious concerns that because 501(c)(4) organizations are not subject to disclosure provisions in I.R.C. § 527, they too may operate in secret and provide an opportunity for abuse. The risk is higher, however, when dealing with 501(c)(3) organizations because those organizations receive a greater subsidy from taxpayers.

for people active in a church to also be active in politics, churches themselves are not promoting or opposing a specific candidate. There is a significant difference between the pastor of church *X* saying that all good believers must vote for candidate *Y*, and the pastor, who is a member of a 501(c)(4) organization, endorsing candidate *Y*.[46] The former attempts to use the power of the pulpit and power of God to influence a person's vote while the latter attempts to encourage like-minded individuals to vote a certain way.

2. Intervention in Political Campaigns Is Inconsistent with Democratic Values

In addition to posing problems for churches, elimination of the political campaign ban is also inconsistent with democratic values. Subsidizing the entry of churches into politics artificially increases the power of religious institutions in society and poses serious problems for our current system of governance. This may allow churches, or their followers, to be overrepresented in political debates and political life.[47]

The public choice theory as applied to elections and the legislature points out some of the consequences of artificially increasing the power of any one group. Public choice theory examines the legislative process and government decision making through the lens of economic theory and models.[48] The premise is that government spending is an economic good and that interest groups will compete to obtain that good for themselves. Thus, groups with greater influence will be able to obtain a bigger piece of the pie.[49] Public choice theory usually involves

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46. The pastor, however, cannot use a 501(c)(4) organization as an alter ego of the church. If the pastor is giving a speech at an event sponsored by a 501(c)(4) organization, he still cannot tell participants that as a Pastor of Church *X* he believes that all good believers must vote for Candidate *Y*. In that instance, he would be speaking in his role as the leader of the 501(c)(3) organization, not as leader of the 501(c)(4) organization. He could, however, indicate that based on his personal moral views, he was going to vote for candidate *Y*.

47. Professor Houck notes that to some, "organized religion plays a dangerous role in American political life, and threatens basic principles of democracy: discourse, reason, and compromise." Houck, *supra* note 42, at 58–59 & n.351 (citing commentators).

48. For a discussion of public choice theory, see WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 54–60 (3d ed. 2001). *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1995) (discussing theories of collective action across various types of groups); WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE (1988) (examining democratic action from perspective of social choice theory); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983) (discussing economic theory of competition among pressure groups based on individual group characteristics and the deadweight cost of taxes and subsidies).

49. *See* Susan A. MacManus, *Taxing and Spending Politics: A Generational Perspective*, 57 J. POL. 607, 619 (1995) (discussing studies finding less support among older people than younger people for increased funding in public education); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 76 (1990) (arguing that public choice theory fails to adequately explain the legislative process); *see also* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 924–25 (1987) (noting that public choice theories are insufficient to explain the legislative process); Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV.

economic outcomes and is generally used to argue that interest groups with greater power will receive the economic spoils of legislation. When examining the political campaign ban, however, increased power does not necessarily lead to greater economic gains. Rather, the increased power gives particular groups more power to press their views on the whole polity. The increase in power often leads to the groups' particular issues being overrepresented, possibly at the expense of the will of the majority. Moreover, increased power can result in one minority group, the one that has gained more power, lashing out against other minority groups. This occurs because politicians may be reluctant to support initiatives from the powerful group that hurt large segments of society, but they may be more willing to cater to the group's demands when those demands impact only a small segment of the population.[50]

For example, many states and localities have laws regulating the hours of operation and sale of items on Sunday.[51] These laws may severely impact nondominant religions that observe Friday or Saturday as their Sabbath. These laws also prohibit secular individuals from shopping during those hours and allow religious groups to use the law to force others to follow their religious dictates.[52]

While these problems have been relatively minor in the United States, serious problems have arisen in other countries when religious parties gain too much power. In Israel, the religious parties wield significant influence based on the fact that religious parties often control the balance of power in the Knesset.[53] Thus, even though Israel is a democracy, religious institutions exercise significant control over personal autonomy. This practice dates back to the Ottoman Empire where Jewish religious courts handled many matters relating to personal

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279, 289–90, 298 (1984) (arguing that economic justification of legal action is not a good predictor of legislative outcomes).

50. The public choice model has been rejected by some scholars because it does not fully explain legislators' actions. Public choice theory tends to minimize a legislator's own political agenda. However, in this case, public choice theory may be a better theory for explaining behavior because here the politician and the organization share the same belief system. The organization is attempting to gain power because it expects the candidates it supports to support its issues.

51. *See, e.g.*, MISS. CODE ANN. § 67-3-65 (2005) (authorizing municipalities to make rules for opening and closing of stores); *see also* McGowan v. Maryland, 366 U.S. 420, 444 (1961) (rejecting an Establishment Clause challenge to a "Sunday Closing Law" and establishing the secular purpose of securing a common day of rest and relaxation to promote public well-being).

52. In an interesting book review, Professor Smolin discusses the conflict between liberal theorists and traditional theists. He notes that "traditionalist theists are willing to use the law to encourage and even force all persons to live according to certain minimum standards." Smolin adds, however, that the reverse is also true. He claims that if liberal theory prevails, "modernist liberals would bar traditionalist theists from relying on their religious and moral presuppositions in public life, while modernist liberals would be able to use the expanding scope of government to spread the 'gospel' of autonomous individualism and radical egalitarianism." David M. Smolin, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067, 1094 (1991); *see also* Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2330–31 (1997) (discussing Smolin's essay and modern liberalism).

53. *See* MARTIN EDELMAN, COURTS, POLITICS, AND CULTURE IN ISRAEL 52 (1994)

autonomy.[54] For example, the law controlling marriage and divorce is based on the rules of the specific person's religion.[55] This practice was continued during the British mandate period and was formalized upon the creation of the State of Israel.[56] Each recognized religion in Israel has its own court system that is charged with resolving disputes that impact upon personal autonomy. Non-religious individuals may not opt out of this system. Thus, in most cases, a non-religious Jew, Christian, or Muslim must follow the rules of marriage and divorce as interpreted by the respective courts for their particular religion. For Jews, this means that the strictest interpretation of Jewish law controls the marriage and divorce of all Jews in Israel, even if they are not Orthodox Jews.[57]

School funding in Israel is another area where the power of religious organizations impacts policy decisions. Religious groups in Israel have been able to obtain additional resources because of their political power. Schools run by ultra-Orthodox Jews in Israel have seen significant increases in funding even as the population in these schools has declined.[58] Ultra-Orthodox schools now receive significantly more funding per-pupil than non ultra-Orthodox schools. Thus, the religious parties in Israel have been able to use their political clout to both force their moral vision on others and to obtain a greater piece of the pie.[59]

Far more serious problems exist in countries such as Iran and Saudi Arabia, which are governed by theocracies.[60] These theocracies are often very intolerant of minority religions and are extremely intolerant of individuals who decide not to practice the state-sponsored religion.[61]

Democracy is strengthened when the rights of minorities are respected and protected and when all citizens have a reasonable opportunity to participate in the democratic process. A system that tips the scale in favor of one group over

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54. *See id.* at 48.

55. *See* S.I. Strong, *Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and the Potential for Violence*, 19 MICH. J. INT'L L. 109, 154–56 (1997).

56. *See* EDELMAN, *supra* note 53, at 52.

57. Despite the fact that this policy was instituted prior to the creation of the State of Israel, ultra-orthodox parties have used their political influence to stop efforts to liberalize these laws. *See id.* at 64, 72.

58. *Id.* at 60.

59. *See* Shimon Shetreet, *State and Religion: Funding of Religious Institutions—The Case of Israel in Comparative Perspective*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 421, 445–46 (1999) (explaining that the lack of separation between Israeli church and state has allowed the Israeli government to fund "religious institutions . . . at the expense of the general public"); *see also* EDELMAN, *supra* note 53, at 52 (explaining that the Israeli government has committed itself to maintaining the religious status quo since 1959).

60. *See generally* Donna E. Arzt, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, 14 WIS. INT'L L.J. 349 (1996) (discussing various government models in Muslim states and arguing that much of the persecution of the citizenry in various states is politically motivated by orthodox groups who use religion to maintain power); Strong, *supra* note 55 (discussing human rights violations in theocracies such as Iran).

61. Moreover, commentators on the separation of church and state in the United States note that similar abuses occurred in America prior to the Establishment Clause. *See* 2 JAMES BRYCE, THE AMERICAN COMMONWEALTH 1371–72 (Liberty Fund 1995) (1888); COBB, *supra* note 35, at 19–66.

another has the serious potential to challenge majority governance and to trample on the rights of minorities.

a. Political Intervention by Churches Increases the Potential for Political Corruption. As churches become more powerful and integrated into political campaigns, churches also become more vulnerable, and the potential for corruption increases.[62] As discussed earlier, the religion itself might be corrupted as politicians attempt to control the church, or as the church is forced to sacrifice its views for the benefit of the candidate that it supports.[63] Moreover, as churches lobby for federal funds and receive money from the federal government, there is a serious risk that church theology will be influenced by amounts received from the government. There is also a risk that church leaders will be "bought" or that government largess will entice religious leaders to promote their own interests over that of the religion. As one religious leader stated, "You want an endorsement? Give us a check, and you can take a picture of us accepting it."[64] A system whereby religious leaders meld their endorsement based on payments from candidates is neither good for democracy nor for religion.

Additionally, churches may want government grants or favors from government officials. Churches may believe that modifying their ideological views and endorsing certain politicians will increase the chances that they will receive funds. The potential for government grants increases the power that incumbent politicians have over churches, and church theology may be corrupted in the process. As conservative Grover Norquist has said in relation to President Bush's faith-based initiative, "[t]he danger is that any group that gets money from the government will end up serving the interests of the state rather than the constituencies they are trying to serve. The guy who writes the check writes the rules."[65]

Finally, church intervention in political campaigns may lead to increased corruption within the church. As more and more funds flow through church treasuries, there will be increased opportunities for religious leaders to profit from their churches' new-found power. Because current rules regulating churches provide for almost no financial disclosure, churches are particularly vulnerable to corruption. Just as a religious leader may seek money for his church in

62. BRYCE, *supra* note 61 at 1373 ("A church established by the state . . . would also be controlled by the State, and it would be exposed to the envy and jealousy of other sects.").

63. Peter Walston et al., *Bush Rewarded Black Pastors' Faith; His Stands, Backed by Funding of Ministries, Redefined the GOP's Image with Some Clergy*, L.A. TIMES, Jan. 18, 2005, at A1 (noting that African-American ministers have received entreaties to attend White House meetings or faith-based conferences, and have received grants, especially in political battleground states, as part of Republican strategy to make electoral gains among African-American voters).

64. Jason DeParle, *Hispanic Group Thrives on Faith and Federal Aid*, N.Y. TIMES, May 3, 2005, at A1 (noting that Baptist minister Luis Cortes voted for Nader in 2000, but after receiving over $10 million in federal grant money, voted for Bush in 2004).

65. Edsall, *supra* note 41.

exchange for an endorsement, so too might an individual member of the clergy seek money personally in exchange for an endorsement. Clergy might be hired on political campaigns, might receive consulting fees, or might receive other personal inducements. No one wins when political corruption and religion mix.

b. Churches Do Not Warrant Special Treatment. Some commentators argue that churches are special institutions and that political involvement is a necessary or at least permissible component of religious practice.[66] As discussed earlier, these commentators argue that political intervention or discussions about candidates may be a necessary component of the exercise of one's religion. As Professor Allan Samansky notes "[a]lthough religion should transcend politics, religious voices belong, and are needed, in politics."[67] Professor Samansky thus argues that "the religious faith may require that the moral lesson be articulated by persons speaking in their capacity as church or religious leaders."[68]

It is when a church engages in political debate or endorses a candidate because it believes that such action is theologically necessary that opponents of the political campaign ban are on their strongest ground. This still, however, raises three major questions. First, do churches have a right to both a government subsidy *and* the right to intervene in candidate elections? Second, would granting a special exemption for churches be constitutional? And third, even if a special exemption were constitutionally permissible in this particular instance, is a limited exemption a good idea?

First, churches do not have a right to both a government subsidy and the right to intervene in candidate elections. As discussed in Part II, the Supreme Court has clearly held that the government can condition the granting of tax-exempt status on an organization's willingness to comply with regulatory requirements, including the provision that prohibits 501(c)(3) organizations from engaging in substantial lobbying.[69] Thus, religious organizations do not have a constitutional right to both engage in candidate elections and receive a subsidy from the government. Therefore, if a church believes on theological grounds that it must intervene in an election on behalf of a candidate it can do so. It just cannot obtain the benefits of 501(c)(3) status.[70]

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66. *See* Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; To What End?*, 42 B.C. L. REV. 903, 916 (2001) (arguing that churches have a First Amendment right to participate in the political process); Allan J. Samansky, *Tax Consequences When Churches Participate in Political Campaigns*, 5 GEO. J.L. & PUB. POL'Y 145 (2007); *see also* Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308, 319–26 (1990) (arguing that political campaign ban is constitutionally questionable and contrary to free speech values).

67. Samansky, *supra* note 66, at 152.

68. *Id.* at 154.

69. *See* discussion *infra* Part II.

70. Professor Cook sets out an organizational structure that allows churches to do just that. He argues that churches can organize as tax-exempt 501(c)(4) organizations and forego the benefits of having contributions to the organization be tax deductible. He then argues that churches could create a separate charitable arm, organized under section 501(c)(3), through which they would conduct their

Second, granting a limited exemption to churches when they are engaging in advocacy for theological reasons is unworkable and unconstitutional. Such a policy likely would violate both the Establishment Clause and the Free Speech Clause of the First Amendment. Professor Samansky argues, however, that a limited exception that allows churches to communicate political messages about candidates to their followers would be consistent with the Establishment Clause and, in fact, might be required by the Free Exercise Clause.[71] Although a thorough discussion of the Establishment Clause and the Free Exercise Clause is outside the scope of this Article, it is highly questionable whether Congress could provide a special tax provision that only benefits religious organizations. Generally, the Establishment Clause has been read to prohibit the preference for religion over non-religion.[72] In some circumstances, the Supreme Court has recognized that government may provide special accommodations for religious exercise, even if those same accommodations are not available to people for non-religious purposes.[73] The government, however, can only accommodate religious needs. It cannot provide specific benefits that prefer religion over non-religion.

For example, Congress can require that prisons accommodate religious practices without providing similar accommodations to secular practices.[74] In *Cutter v. Wilkinson*, the Supreme Court held that providing religious accommodation to prisoners did not violate "the Establishment Clause because it alleviate[d] exceptional government-created burdens on private religious exercise."[75] *Cutter*

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charitable activities. *See generally* Douglas H. Cook, *The Politically Active Church*, 35 LOY. U. CHI. L.J. 457, 473–74 (2004). Although there are some technical problems with this proposal that would need to be worked out, it does at least indicate one method by which a church can engage in political intervention and still receive a subsidy for its non-political, charitable activity. But if the church decides to organize in this way, the government will not be providing a subsidy for the church's political activity. Moreover, because the church will organize as a social welfare organization, it will not receive deductible contributions and the power of the church will not be enhanced by the government subsidy. The church would be competing in the political marketplace on equal footing with other organizations involved in promoting or opposing candidates.

71. *See* Samansky, *supra* note 66, at 152–53.

72. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1412–13 (7th ed. 2004); *see also* Houck, *supra* note 42, at 56–57.

73. *See* Cutter v. Wilkinson, 544 U.S. 709, 713 (2005) ("This Court has long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause." (quoting Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144–45 (1987) (alteration in original))). In *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), the Court upheld an exemption to Title VII that allowed churches to discriminate in hiring on the basis of religion. The Court allowed this discrimination even if the employment did not appear to be related to the religious mission. The Court determined that the government was "lifting a regulation that burdens the exercise of religion" and that such burdens did not exist for secular organizations. *Id.* at 338.

74. The mere fact that there is an accommodation of religion does not necessarily mean that there is an improper benefit. *See Cutter*, 544 U.S. at 721 n.10. (noting that Congress may provide Kosher meals to Jewish prisoners even if Kosher meals are not made available to non-Jewish prisoners because the Kosher meals merely accommodated a religious practice and were no better than non-Kosher meals).

75. *Id.* at 720–21.

involved a claim by prisoners that Ohio was violating the Religious Land Use and Institutionalized Persons Act (RLIUPA) by failing to accommodate their religious exercise.[76] The State argued that RLUIPA violated the First Amendment's Establishment Clause by impermissibly advancing religion over non-religion.[77] The Court rejected the notion that accommodating religious practice violated the Establishment Clause.[78] Central to the Court's holding was that government confinement constrained the prisoner's ability to exercise his religion—RLUIPA eliminated a burden placed on the prisoner and was therefore a permissible accommodation, not a specific government benefit. The Court has recognized, however, that "[a]t some point, accommodation may devolve into 'an unlawful fostering of religion.'"[79]

The Supreme Court has addressed the intersection of tax subsidies and the Establishment Clause on two occasions. In *Waltz v. Tax Commission of the City of New York*,[80] the Court upheld a property tax exemption that exempted a wide-range of nonprofit organizations, including religious ones. Opponents argued that the exemption for religious organizations violated the Establishment Clause.[81] The Court rejected the Establishment Clause challenge and indicated that the provision did not advance religion. Justice Brennan, in a concurring opinion, indicated that the breadth of the statute negated "any suggestion that the State intend[ed] to single out religious organizations for special preference."[82]

Waltz, however, did not address whether a statute that provided a tax benefit only for religious organizations would violate the Establishment Clause. That question was answered by the Court in *Texas Monthly v. Bullock*, where the Court found that a sales tax exemption that existed only for religious publications violated the Establishment Clause.[83] Although there is no majority opinion in *Texas Monthly*, a majority of the Court concluded that when an exemption is provided exclusively to religious organizations or religiously inspired work, the "exemption runs afoul of the Establishment Clause."[84]

Professor Samansky's proposal, which allows churches but not other 501(c)(3) organizations to intervene in elections on behalf of a candidate, provides a statutory preference for "those who spread the gospel" that is not available to

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76. *Id.* at 712.

77. *Id.*

78. *Id.* at 713.

79. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334–35 (1987).

80. 397 U.S. 664, 680 (1970).

81. *Id.* at 667.

82. *Id.* at 689 (Brennan, J., concurring).

83. *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 2, 24 (1989) (plurality opinion).

84. *Id.* at 5; *id.* at 26–28 (Blackmun, J., joined by O'Connor, J., concurring) ("The Establishment Clause value suggests that a State may not give a tax break to those who spread the gospel that it does not also give to others who actively might advocate disbelief in religion. . . . A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable.").

other secular or non-religious organizations.[85] The first problem with this proposal is that Samansky is really advocating a classification of 501(c)(3) organizations into two types—non-religious organizations and super-501(c)(3) religious organizations. Creating a super-501(c)(3) category only for religious organizations provides a significant benefit to religion and therefore is impermissible.[86]

Another problem with Professor Samansky's proposal is that it may constitute unconstitutional viewpoint discrimination. The proposal creates a preference for religious speech as compared with non-religious speech. A religion that claims it needs to support a candidate on religious grounds would be allowed to do so, but a non-religious organization that also educated the citizenry on moral issues could not. Such a policy discriminates against non-religious speech in favor of religious speech.

In *Rosenberger v. Rector and Visitors of the University of Virginia*,[87] the Court rejected the University of Virginia's policy of prohibiting student activity fees expenditures on student run religious publications. It held that such a policy was viewpoint discrimination and violated the First Amendment.[88] The Court concluded that by funding non-religious publications, but refusing to fund religious ones, the University was improperly favoring one viewpoint over another.[89] Professor Samansky's proposal suffers the same flaw but in reverse. It promotes religious communication over non-religious communication because it allows churches to endorse candidates as part of their religious communication while preventing similar non-religious organizations from engaging in such communication.

Third, even if providing a limited exemption to churches were constitutional, doing so is simply a bad idea. Besides the substantive problems addressed earlier, it would be almost impossible to create a system that allowed for limited political activities by churches and only churches. Churches could use the limited exception to engage in almost unrestricted campaigning. For example, a church that believed proselytizing to others was theologically required might also argue that all of its campaign-related activities were simply spreading the message of the church. Or it might argue that it considered all citizens of the

85. *See* Samansky, *supra* note 66, at 153, 165–70.

86. *But see* Edward A. Zelinsky, *Are Tax "Benefits" for Religious Institutions Constitutionally Dependent on Benefits for Secular Entities?*, 42 B.C. L. REV. 805, 836 (2001) (recognizing that existing jurisprudence has been interpreted to require that tax exemptions for religious organizations must also be available to secular organizations, but concluding that such interpretations are wrong). I also recognize that churches already receive some benefits under section 501(c)(3) that are not available to other non-profit organizations. *See supra* note 25. These are administrative provisions designed to prevent the government from intervening in the administrative affairs of the church. They do not provide a major subsidy to the church and do not risk elevating churches above other 501(c)(3) organizations.

87. 515 U.S. 819 (1995).

88. *Id.* at 845.

89. *Id.* at 831.

United States to be parishioners.[90] In fact, Pastor Parsley appears to be saying just that when he claims that the interventions by the church were not "political, but rather spiritual, as they have their basis in biblical truth."[91]

In addition, because of the Establishment Clause, the government is very reluctant to question the veracity of a particular church's theology.[92] Thus, if churches are allowed to engage in political advocacy, new churches that are in substance political organizations will be formed. Because almost every political candidate's campaign includes issues that can be defined in moral terms, each candidate could create her own church. In the last election, we could have seen the Church of Bush and the Church of Kerry. The Bush church could have had as its theological underpinnings that it is pro-life, anti-tax, and anti-same-sex marriage. The church for theological reasons would then endorse Bush, and deductible contributions could then be used by the church to run ads for Bush. Another church could obviously have been set up to support Senator Kerry.

3. Even with a Vibrant Campaign Ban, Churches Still Have an Important Role To Play

A strong prohibition on churches being involved in political campaigns does not mean that churches do not have an important role to play in the political life and debate in our society. Churches play an important role in society and often bring important moral issues to the forefront. In fact, as Thomas Shaffer notes, churches "are particularly situated to notice and say that the emperor is naked."[93] Churches are not, however, well suited to say who the emperor should be. The restrictions in section 501(c)(3) do not prohibit the church from discussing important issues of the day. The political campaign ban merely places some regulation on 501(c)(3) organizations to ensure that the benefits the government provides to these charities are not abused.

As discussed in Part II, churches still have tremendous latitude to speak out on issues of national importance. The Religious Right has effectively promoted

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90. This would force the government into the very difficult role of determining the proper members of a religious organization.

91. *See* ALR Press Release, *supra* note 6.

92. *See, e.g.*, Found. of Human Understanding v. Comm'r, 88 T.C. 1341, 1357 (1987) (stating that in determining whether an organization is a church for tax purposes, "we must . . . assiduously avoid expanding our inquiry into the merits of petitioner's beliefs or risk running afoul of First Amendment religious protections"); Holy Spirit Ass'n for the Unification of World Christianity v. Tax Comm'n, 435 N.E.2d 662, 665 (N.Y. 1982) ("The articulation of the Supreme Court in foreclosing judicial inquiry into the truth or falsity of religious beliefs is equally applicable to judicial inquiry as to the content of religious beliefs."); INTERNAL REVENUE SERV., PUBL'N NO. 1828, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 23 (2006) [hereinafter IRS PUBL'N NO. 1828] (defining church and indicating that "the IRS makes no attempt to evaluate the content of whatever doctrine a particular organization claims is religious, provided the particular beliefs of the organization are truly and sincerely held by those professing them and the practices and rites associated with the organization's belief or creed are not illegal or contrary to clearly defined public policy"); *see also* Whelan, *supra* note 24, at 916, 926–28 (discussing the problems if government attempts to challenge the veracity of a church).

93. Shaffer, *supra* note 29, at 1604.

a pro-life, anti-tax, anti-same-sex marriage agenda. Its church leaders can and do speak out on these issues on a regular basis. In fact, in Ohio, churches were major players in passing one of the strictest same-sex marriage bans in the country.[94] The ban not only covers same-sex marriages, but also attempts to extend its reach to benefits and legal protections offered to same-sex couples.[95]

Similarly, African-American churches have for decades been at the forefront of the civil rights struggle. They have discussed issues of equality, discrimination, race, and social justice for years. These churches were central to the success of the civil rights movement and have been an important voice for justice in the United States.[96]

Nothing in the political campaign ban prohibits churches from continuing to promote their vision of a better world. What they cannot do is use those positions to support particular candidates. It may be that by preaching that abortion is evil or that the war in Iraq is unjust, the church tips the scale in favor of one candidate, but that is generally allowed. It is when churches use their resources, or the power of God, to argue that one candidate is better than another that they step over the line.

B. PROBLEMS WITH NON-RELIGIOUS 501(C)(3) ORGANIZATIONS' DIRECT INVOLVEMENT IN POLITICAL CAMPAIGNS

As discussed previously, the political campaign ban applies to both churches and other 501(c)(3) organizations. The arguments against intervention by other 501(c)(3) organizations are similar to those for churches, but slightly less complicated because we can ignore the Establishment and Free Exercise concerns and because churches play special roles in society. Here, one needs to examine the reasons behind why 501(c)(3) organizations are entitled to special status in the first place, and whether allowing them to participate or intervene in political campaigns is consistent with that status.

Generally, the subsidy to 501(c)(3) organizations is justified on either a charitable trust principle or public welfare theory. The idea is that charitable organizations are involved in promoting the public welfare and that a subsidy

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94. *See* Matthew Dolan & Frank Langfitt, *Voters Elect to Take Stand on Faith; Christians: In Ohio, the Delicate Mix of Religion and Politics Help Clinch Re-election for the President.; The Morality Factor*, BALT. SUN, Nov. 7, 2004, at 1A; Walter Shapiro, *Presidential Election May Have Hinged on One Issue: Issue 1*, USA TODAY, Nov. 6, 2004, at 6A; Marc Spindelman, *Homosexuality Horizon*, 54 EMORY L.J. 1361, 1392–96 (2005) [hereinafter Spindelman, *Homosexuality*]; Marc Spindelman, *The Honeymoon's Over*, LEGAL TIMES, June 12, 2006, at 66.

95. *See* Spindelman, *Homosexuality*, *supra* note 94, at 1392.

96. *See generally* C. ERIC LINCOLN AND LAWRENCE H. MAMIYA, THE BLACK CHURCH IN THE AFRICAN AMERICAN EXPERIENCE (1990); BLACK CHURCHES AND LOCAL POLITICS: CLERGY INFLUENCE, ORGANIZATIONAL PARTNERSHIPS, AND CIVIC EMPOWERMENT (R. Drew Smith & Fredrick C. Harris eds., 2005); LONG MARCH AHEAD: AFRICAN AMERICAN CHURCHES AND PUBLIC POLICY IN POST-CIVIL RIGHTS AMERICA (R. Drew Smith ed., 2004); NEW DAY BEGUN: AFRICAN AMERICAN CHURCHES AND CIVIC CULTURE IN POST-CIVIL RIGHTS AMERICA (R. Drew Smith ed., 2003); Frances R. Hill, *Auditing the NAACP: Misadventures in Tax Administration*, 49 EXEMPT ORG. TAX REV. 205 (2005).

from the government to 501(c)(3) organizations is thus appropriate.[97] Some argue that the subsidy to 501(c)(3) organizations is just a recognition that they are engaged in activities that the government would otherwise have to fund—what I call a forgone responsibility rationale.[98]

The common law charitable trust principle provides support for treating 501(c)(3) organizations as charitable entities and thus providing them special status in society. But nothing in charitable trust principles would suggest that contributions to the charitable organization should be tax deductible. Some have argued that intervening in a political campaign is consistent with the common law on charitable trusts as long as the intervention is consistent with the charitable mission of the organization.[99] But even if that were true, there is nothing in the common law to suggest that a charitable organization should receive a financial subsidy from the government *and* be allowed to invest that subsidy in attempting to elect the charity's preferred candidate.[100] Just as in the case of churches, intervention in political campaigns by a 501(c)(3) organization impacts their core mission and therefore undercuts the logic of providing special status to them in the first place.

The forgone responsibility rationale is also inconsistent with allowing 501(c)(3) organizations to intervene in political campaigns. In this case, the charity is not acting in the shoes of government. There is no indication that the charity is intervening in a campaign in order to take on an otherwise necessary government function. The government has not taken on the responsibility of funding candidate campaigns and certainly has not decided to provide a subsidy to 501(c)(3) organizations to do so.[101]

Moreover, allowing 501(c)(3) organizations to intervene in political campaigns is also inconsistent with the public welfare rationale because a 501(c)(3) organization's intervention in a campaign necessarily forces it to take sides. It may believe that such an action is in the best interests of the public, but surely the people on the other side disagree. When 501(c)(3) organizations discuss issues, they can at least argue that they are educating the public, but when they engage in partisan election activities, they are no longer independent, objective voices and a government subsidy is no longer appropriate.

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97. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 588 (1983). For a thorough examination of the history behind the exemption and the justifications for it, see Murphy, *supra* note 19, at 40–65.

98. This idea, however, works only in theory. There are thousands of 501(c)(3) organizations and the government would not choose to fund many of the activities of these organizations.

99. *See* Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217, 252–53 (1992).

100. For an excellent discussion of charitable trusts and political expenditures, see Houck, *supra* note 42, at 4–12.

101. As a policy matter, the government has decided not to provide a subsidy to most political campaigns except in very limited circumstances. The one exception is for presidential campaigns. The Presidential Election Campaign Fund provides funds to presidential candidates as long as they keep certain records and meet certain conditions. *See* I.R.C. § 9003 (2000).

1. Intervention in Political Campaigns Impacts an Organization's Independence

501(c)(3) organizations are often valued for their independence from the political establishment. Political parties often have no incentive to question the status quo, and there is not always an independent voice to provide a check on government power. Section 501(c)(3) organizations often fill this void by educating the public on important issues that politicians and political parties have overlooked. The non-partisan nature of 501(c)(3) organizations allows them to be independent voices on issues. If 501(c)(3) organizations intervene in elections, then they risk both co-option, discussed earlier with regard to churches, and their ability to be independent voices on issues. Just as with churches, a 501(c)(3) organization that supports a particular candidate may face pressure to be less vocal on some issues because it hurts a candidate that the organization supports.

2. Intervention in Political Campaigns Hurts the Objective Educational Mission of 501(c)(3) Organizations

Political parties and politicians have incentives to "spin" issues. Organizations operated as educational organizations, however, must at least attempt to provide fair and balanced information.[102] It may be that these organizations still have a biased slant on issues, but at least the information comes from a nonpartisan organization that is not trying to elect a candidate. The objectivity of information provided by 501(c)(3) organizations may already be called into question because some organizations attempt to use education and issue discussion as a means of promoting a political agenda, but at least there are some checks designed to provide that some level of objectivity is contained in the educational literature.[103]

3. Political Intervention in a Political Campaign Is Inconsistent with a 501(c)(3) Organization's Charitable Mission

One reason for providing a subsidy to 501(c)(3) organizations and awarding them special status is that they are engaged in charitable functions. The theory is that these are beneficial organizations performing benevolent acts to help society. This argument is weakened, however, when organizations are involved in political campaigns for a particular candidate because it is very hard to argue that political intervention is a charitable function. After all, competing candidates on both sides of an issue tend to believe that their policies support the public's welfare. They presumably have different ideas about what policies should be in place to do so.

While some scholars have argued that political intervention is not inconsis-

102. *See* HILL & MANCINO, *supra* note 23, at 3–21.

103. An organization may be educational even if it promotes a specific viewpoint as long as it presents a fair exposition of relevant facts as to allow the public to form an independent opinion. Treas. Reg. § 1.501(c)(3)-1(d)(3)(b) (as amended in 1990).

tent with the common law behind charitable trusts, and thus political intervention is appropriate,[104] I argue that political intervention is not consistent with our current and common definition of charitable. Charitable organizations are those designed to help the poor and needy, to provide comfort, or to support our communities. In *Bob Jones University v. United States*,[105] the Supreme Court examined at length the common law definition of "charitable." In examining English common law, the Court quoted the following definition as illustrative of the meaning of charitable:

> Charity, in its legal sense, comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.[106]

Using a charity's resources to promote a particular candidate, however, does not fit within this definition and calls the charitable mission of the charity into jeopardy.

I acknowledge, as some charities argue, that political intervention may be a means of promoting one's charitable mission, but charities are incorrect in assuming that any means of promoting a charitable mission must be charitable. At times, support of a political candidate may interfere with a charity's core mission.

For example, donors may support the mission of the charity but not support the charity's preferred political candidate. Thus, a donor to a food pantry might provide support because she supports the charitable mission of giving to the poor. That same food pantry may decide that it wants to endorse candidate *Y* because candidate *Y* cares about the poor. The food pantry thus uses funds given by the donor to support candidate *Y*. The donor, however, does not support candidate *Y* and wanted her donations to go to feeding the poor. The donor thus finds that her funds were used to support candidate *Y* and not to provide food to the hungry. The donor could place restrictions on her donations, but in truth, the charity used her donations for a purpose that, at least to the donor, was outside the charity's purpose.

Moreover, charities that support political candidates may find it harder to obtain funds and donations from outside sources. For example, a restaurant that is now willing to give excess food to a food kitchen would have to make a determination regarding the political activities of the organization and whether it wanted to be associated with those activities. Some might not give if organizations engage in political activities; others might give only if the organization endorsed the right candidate. In addition, just as in the church examples

104. *See* Carroll, *supra* note 99, at 252–53.

105. 461 U.S. 574 (1983).

106. *Id.* at 589 (citing Comm'rs v. Pemsel [1891] A.C. 531, 583).

discussed earlier, some donors and political candidates might attempt to coerce the organization to support candidates in exchange for contributions or future government favors.

C. ALLOWING CHURCHES AND OTHER 501(C)(3) ORGANIZATIONS TO INTERVENE IN POLITICAL CAMPAIGNS IS STRUCTURALLY UNSOUND

In addition to the general normative problems with allowing 501(c)(3) organizations to intervene in political campaigns, allowing political intervention by 501(c)(3) organizations is also structurally unsound. The current framework for the regulation of political campaigns, especially in the area of campaign finance, would be seriously undermined if 501(c)(3) organizations were allowed to intervene in political campaigns.

The central question here is whether 501(c)(3) organizations, including religious institutions, should be provided a taxpayer *subsidy* to participate in and intervene in political campaigns. If the prohibition were lifted and such a subsidy were granted, 501(c)(3) charities would then enjoy a preferred position over all other campaign organizations, including a candidate's campaign organization. These organizations would have a significant advantage in raising money and would inevitably become a subterfuge for campaign contributions.

The question thus facing policymakers is whether such a shift is beneficial as a policy matter. Imagine these not too far-fetched examples:

Example 1:

> Candidate *A* is a strong supporter of the pro-life position. Church *A* believes that all good Church *A* believers should vote for Candidate *A*. Church *A* engages in a massive campaign to encourage voters to vote for Candidate *A*. The Church raises millions in tax-deductible contributions. These contributions are not capped so unlimited amounts can be donated to the Church and spent on political campaigns.[107]

Because these organizations are still subject to general campaign finance laws, the organization above could not engage in express advocacy and accept unlimited contributions. They would also be required to disclose contributions if

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107. As long as the church engages in independent expenditures and its communication is not coordinated with a candidate's campaign, its expenditures on behalf of the candidate could not be limited. If it engaged in "express advocacy," contributions could be limited to $1,000. *See* Buckley v. Valeo, 424 U.S. 1, 58 (1976) (per curiam) (upholding contribution limitations for express advocacy). If the church were determined to be a PAC, contributions could be limited to $5,000. *See* 2 U.S.C. § 441a(a)(1)(C) (2000 & Supp. II 2002) (limiting individual contributions to PACs to $5,000); *Buckley*, 424 U.S. at 58. If the organization were a corporation, it might be prohibited from engaging in express advocacy, but this type of organization would likely not be subject to the ban on express advocacy by corporations. *See* Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263 (1986) (holding ban on express advocacy by corporations is unconstitutional as applied to certain nonprofit organizations).

they engaged in electioneering communication.[108] But absent a prohibition on campaign intervention, Church *A* could raise and spend millions promoting or opposing a particular candidate. For example, the following commercial would likely not violate federal election law:[109]

> Hello, I am the pastor of Church *A*. We believe that the killing of unborn children is the biggest crime facing humanity. It has to stop. Candidate *A* is a strong believer and opposes abortion. He is devout and you can trust him. All good believers can trust people like Candidate *A*. In November, you have a chance to ensure that God's work is done on earth.

Example 2:

> Candidate *B* is a strong opponent of the death penalty. Church *B* believes that the death penalty is a crime against God. The Church is especially concerned that the death penalty is applied in a discriminatory manner and provides for the death of innocent people.

Church *B* runs the following commercial:

> Hello, I am the pastor of Church *B*. We believe that America must stop killing its own people. We believe state-sponsored murder is against God's word. Candidate *B* agrees with our position. You cannot go to heaven if you support candidates that go against God's word. Candidate *A* takes positions that are against God's teachings. He supports the murder of Americans, even under a system that applies the death penalty in a discriminatory manner. Please pray that the American people recognize that our leaders should be true to God's word.

A hypothetical supporter of candidate *A* or *B* is now faced with the question of how to contribute her money in support of her chosen candidate. The supporter has a choice of donating $500,000 to a political organization that supports Candidate *A* or *B*, or $500,000 to Church *A* or *B*, whereupon, depending on Supporter's tax situation, Supporter will receive a $500,000 tax deduction.[110] Contributors in that situation will most surely contribute to the Church instead of the political organization. A person in the 35% tax bracket will save

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108. *Buckley*, 424 U.S. at 28. If it engaged in express advocacy, the organization would be subject to FECA's contribution restrictions.

109. If the commercial was "electioneering communication," then the organization would be subject to the disclosure provisions of the Bipartisan Campaign Reform Act of 2002. Electioneering communication is defined as broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal office that is made within 60 days of a general election and 30 days of a primary election and is targeted to the relevant electorate. *See* 2 U.S.C. § 434(f)(3)(A) (Supp. II 2002).

110. Under existing law, individuals may contribute unlimited amounts to section 527 political organizations. For a discussion of this issue, see Edward B. Foley & Donald B. Tobin, *Tax Code Section 527 Groups Not an End-Run Around McCain-Feingold*, 72 U.S.L.W. 2403 (Jan. 20, 2004).

$185,000 in taxes by donating to the Church instead of to the candidate or political organization.[111]

Thus, donations to a religious institution could give a donor more speech for her money, or at least make the same amount of speech cheaper.[112] A donor who itemizes deductions on her tax return will likely make her political contributions to the Church instead of to the candidate's campaign or other independent organization. There is simply no policy justification for encouraging and subsidizing contributions to 501(c)(3) organizations over candidates and other independent groups.[113]

As 501(c)(3) organizations become the favored mechanism for political contributions, they will find themselves more enmeshed in the political process. They will certainly gain more power and clout. They may even be able to elect their own slate of candidates. But as I discuss in the previous section, this increase in power and clout has negative consequences.

In addition to the structural deficiencies that create inequities due to the subsidy provided to 501(c)(3) organizations by the government, there is a second structural deficiency that makes it inappropriate for 501(c)(3) organizations to be involved in political campaigns. As currently crafted, the Internal Revenue Code provides very few mechanisms for ensuring that 501(c)(3) organizations would not abuse the financial power that increased campaign contributions would provide.[114]

Unlike other organizations involved in political campaigns, 501(c)(3) organizations, and especially churches, are not subject to detailed disclosure and reporting requirements. Churches are exempt from having to file even the most basic forms establishing their qualifications for 501(c)(3) status.[115] In addition, while 501(c)(3) organizations other than churches are required to file informational returns that are available to the public, these returns (referred to as 990s) contain only scant information about their activities. Churches are also not required to disclose the salaries of their employees, the salaries of their board members, their contributors or the amount of the contributions, or their expendi-

111. Contributions to candidates are capped at $2,000 so a contribution this large could not be made to a candidate. 2 U.S.C. § 441a(a)(1)(A) (2000 & Supp. II 2002). Contributions to section 527 organizations are not limited so a non-deductible contribution of that magnitude could be made to a section 527 political organization. *See supra* note 110.

112. For a thorough discussion of the economic benefits 501(c)(3) organizations receive and the impact of those benefits on electoral choice, see Richard J. Wood, *Pious Politics: Political Speech Funded Through IRC § 501(c)(3) Organizations Examined Under Tax Fairness Principles*, 39 ARIZ. ST. L.J. (forthcoming 2007).

113. *But see* Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843 (2001) (arguing subsidy is small because many contributors do not itemize their deductions).

114. For example, lobbyist Jack Abramoff used non-profit organizations to evade lobbying and other campaign laws. *See* MINORITY STAFF OF S. COMM. ON FINANCE, 109TH CONG., INVESTIGATION OF JACK ABRAMOFF'S USE OF TAX-EXEMPT ORGANIZATIONS (Comm. Print 2006).

115. I.R.C. § 508(c)(1)(A) (2000) (exempting churches from having to file for recognition as a 501(c)(3) organization).

tures.[116] It is almost impossible for private parties to provide any type of check on a church's activities. Thus, as more and more cash flows into these entities for political campaigns, there is significant potential for abuse. In fact, there are no mechanisms for the public to be sure that the money donated is spent on a proper purpose. It may be spent on other activities engaged in by the church, *or* it may go into the pocket of Pastor *A* or *B*. There is simply no way to tell.

Funneling more contributions to 501(c)(3) organizations, especially religious ones, creates a bizarre incentive to fund political campaigns through tax-exempt 501(c)(3) organizations, increases the potential for abuse and corruption in and through those organizations, and increases the political involvement and power of those organizations in a way that may be harmful both to religion and to our democratic system of governance.

II. THE POLITICAL CAMPAIGN BAN IS BOTH CONSTITUTIONAL AND MERITORIOUS, BUT STRUCTURAL CHANGES ARE NECESSARY FOR BETTER ENFORCEMENT

A. THE CURRENT POLITICAL CAMPAIGN BAN IS CONSTITUTIONAL

The political campaign ban is constitutional and does not violate either the Free Speech Clause or the Free Exercise Clause of the First Amendment. Opponents of the political campaign ban argue that the First Amendment protects their right to intervene in an election on behalf of a candidate. At times, these groups even go as far to claim that attempts to prohibit them from intervening in campaigns are "un-American."[117] The opponents might have an argument if they were attempting to engage in such activity without also seeking a special status from the government, but they are not seeking to enter the marketplace of ideas on even terms. Instead, they seek both a government subsidy and the right to intervene in elections. They do not have a constitutional right to both.[118]

Section 501(c)(3) organizations receive a subsidy from the government that is not available to organizations or individuals throughout society. In exchange for the benefit of this special status, the 501(c)(3) organizations must agree to abide by the restrictions placed on such organizations.[119] One such restriction is the

116. 26 U.S.C.A. § 6033(a)(3)(A)(i) (West, Westlaw through Pub. L. No. 109-431) (exempting churches from information return obligation).

117. Pastor Parsley, the pastor of World Harvest Church, responding to a complaint by pastors that his church was violating its 501(c)(3) status by intervening in political campaigns, claimed that the complaint was "un-American." Specifically, Pastor Parsley stated that it is "un-American for the [complainants] to seek to deny myself or any other clergy the right to be heard simply because they may not agree with our values." *See* ALR Press Release, *supra* note 6.

118. For an interesting examination of this issue, see Eugene Volokh, *Looking Backward, Looking Forward: The Legacy of Chief Justice Rehnquist and Justice O'Connor*, 58 STAN. L. REV. 1919 (2006) (discussing the different principles the courts have used in this area).

119. I have previously addressed this issue when considering the constitutionality of disclosure provisions in section 527 of the Internal Revenue Code. *See* Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 36 GA. L. REV. 611 (2003).

prohibition on participating or intervening in a political campaign. Similarly, section 501(c)(3) also prohibits organizations from engaging in a substantial amount of lobbying.

In *Regan v. Taxation with Representation of Washington* (TWR), the Supreme Court directly upheld provisions that conditioned the granting of 501(c)(3) status on an organization's willingness to accept limitations on certain activities protected under the First Amendment.[120] *Taxation with Representation* involved an organization that sought 501(c)(3) status even though the organization acknowledged that a major component of its activities would consist of attempting to influence legislation.[121] Because section 501(c)(3) specifically prohibits organizations from attempting to influence legislation, the IRS refused to grant TWR status as a 501(c)(3) organization.[122] TWR brought suit claiming that the prohibition against substantial lobbying was unconstitutional under the First and Fifth Amendments.[123]

The Court rejected TWR's claim and upheld the constitutionality of the provision. The Court recognized that TWR was not just seeking the right to lobby, but was explicitly seeking a subsidy in the form of a tax benefit for its lobbying activities.[124] The Court stressed that "[b]oth tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system."[125] The Court concluded that Congress did not deny TWR the right to receive deductible contributions for other purposes, nor did it deny TWR any independent benefit based on its intention to lobby.[126] Instead, Congress "merely refused to pay for the lobbying out of public monies."[127] The Court rejected TWR's assertion that it had a right to 501(c)(3) status and concluded that "[w]e again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'"[128]

In reaching this conclusion, the Court recognized that the situation would be different if Congress discriminated invidiously in the subsidies in such a way as to "aim[] at the suppression of dangerous ideas."[129] But the Court concluded that the action here regulated entities "regardless of the content of any speech they may use, including lobbying."[130] The Court noted that there was "no indication that the statute was intended to suppress any ideas or any demonstra-

120. 461 U.S. 540 (1983).
121. *Id.* at 541–42.
122. *Id.* at 542.
123. *Id.*
124. *Id.* at 543–44 n.6.
125. *Id.* at 544.
126. *See id.*
127. *Id.* at 545.
128. *Id.* at 546 (quoting Cammarano v. United States, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)).
129. *See id.* at 548 (citing *Cammarano*, 358 U.S. at 513 (Douglas, J., concurring)).
130. *Id.*

tion that it has had that effect."[131]

The Court reached this conclusion even though the organization would completely lose its exempt status, even for funds that were not used for lobbying. In reaching this conclusion, the Court implicitly recognized that TWR had another outlet to exercise its First Amendment rights.[132] Specifically, the Court noted that TWR's original structure consisting of two separate organizations—a 501(c)(3) organization that was mainly involved in educational activities and a 501(c)(4) organization that was involved in influencing elections—allowed TWR to lobby.[133] Under this structure, the 501(c)(3) organization would receive tax-deductible donations while the 501(c)(4) organization would not.[134]

In other words, TWR could organize its activities to avoid a broad sanction for lobbying. By separating into two organizations, TWR could ensure that it did not lose its entire tax exemption for engaging in lobbying. Under the scheme suggested by the Court, it could use donations that were not tax deductible to lobby through a 501(c)(4) organization and use tax-deductible donations for its education activities.[135] Because a similar scheme is available to 501(c)(3) organizations that want to intervene in political campaigns, the rule from *Taxation with Representation* should apply to the political intervention prohibition.

Taxation with Representation is consistent with a line of Supreme Court cases indicating that groups were not entitled to a government subsidy when they engaged in political activity. In *Cammarano v. United States*, the Court rejected a First Amendment challenge to a tax statue that prohibited businesses from deducting amounts they spent on lobbying. The taxpayers in *Cammarano* argued that the denial of the deduction violated their First Amendment rights. The Court rejected this argument, finding that the taxpayers were "not being denied a tax deduction because they [were] engag[ing] in constitutionally protected activities, but [were] simply being required to pay for those activities entirely out of their own pockets."[136] The Court recognized that the provision was not "'aimed at the suppression of dangerous ideas'" but was merely an attempt to put all parties on an even playing field.[137]

Similarly, in *Lewis Publishing Co. v. Morgan*,[138] the Court upheld provisions in the Post Office Appropriation Act[139] that required second-class mailers to

131. *Id.*

132. *See id.* at 544–45.

133. *Id.* at 543.

134. *Id.* The concurring opinion stressed that the escape valve of allowing a 501(c)(3) organization to lobby through a 501(c)(4) organization was essential in upholding the statutory scheme. *Id.* at 552–54 (Blackmun, J., concurring).

135. *Id.* at 544.

136. Cammarano v. United States, 358 U.S. 498, 513 (1959).

137. *Id.* (quoting Speiser v. Randall, 357 U.S. 513, 519 (1958)).

138. 229 U.S. 288 (1913).

139. Post Office Appropriation Act, ch. 389, § 2, 37 Stat. 539, 553–54 (1912).

disclose the names and addresses of the editor, managing editor, publisher, business managers, owners (including stockholders), bondholders, and other security holders.[140] The Act also required that all advertisements in the publications be plainly marked as advertisements.[141] The Court rejected the publishers' First Amendment challenge, holding that in creating a reduced rate (i.e., second-class mail) for publishers, Congress had bestowed a privilege on publishers that discriminated in their favor.[142] The Court determined that the provision merely affixed conditions upon publishers to receive the benefits of second class mail status.[143]

The Court has recognized, however, that the denial of a tax exemption cannot be used as a punishment for engaging in a First Amendment protected activity. Thus, if 501(c)(3) organizations were being denied a deduction as penalty the provision would likely be unconstitutional. In *Speiser v. Randall*,[144] the Court struck down a California law that conditioned a special property tax credit for veterans on the veteran's willingness to sign a declaration that he did "not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means."[145] The Supreme Court of California construed this language as denying the tax exemptions only to taxpayers who engaged in speech that could be criminally punished consistent with the First Amendment, and for purposes of the case, the Court assumed that the California Supreme Court was correct.[146] The Court, however, overturned the California constitutional provision, holding that the procedures set forth were insufficient to protect a taxpayer's speech.[147] According to the Court, the California constitutional amendment did not adequately protect a taxpayer's rights in that it placed the burden on the taxpayer to prove he had not engaged in improper speech.[148] The Court reasoned that when "the constitutional right to

140. *Lewis Publ'g Co.*, 229 U.S. at 296–97. Disclosure was not required of persons owning less than 1% of the total amount of stocks, bonds, or mortgages. *Id.*

141. *Id.* at 297.

142. *Id.* at 303–04. The Court noted that second class mail was eighty times cheaper than first class mail. *Id.* at 304.

143. *Id.* at 314–16. *See also* Rust v. Sullivan, 500 U.S. 173 (1991). In *Rust*, the Court held constitutional a provision that prohibited organizations that receive family planning funds from discussing abortion as an option. The Court noted that the failure to grant a subsidy for speech was not a penalty; it was merely a decision by the Government not to subsidize specific speech. *Id.* at 193. *But see* Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001). In *Velazquez*, the Court struck down a funding provision limiting a Legal Services Corporation lawyer from challenging existing welfare laws. *Id.* at 536–37. The Court held that Congress "may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary." *Id.* at 544. The Court recognized that Congress could decide not to fund legal services for the poor, but once it provided the legal services it could not do so in a way that provided a person with only partial representation. *Id.* at 548.

144. 357 U.S. 513 (1958).

145. *Id.* at 514–15.

146. *Id.* at 519–20.

147. *Id.* at 528–29.

148. *Id.* at 529.

speak is sought to be deterred by a State's general taxing program due process demands that the speech [be] unencumbered until the State comes forward with sufficient proof to justify its inhibition."[149] The Court also noted that the denial of a tax exemption for engaging in certain speech "will have the effect of coercing the claimants to refrain from the proscribed speech."[150] The Court then claimed that such a denial was aimed at "dangerous ideas."[151]

The Court in *Taxation with Representation* and *Cammarano* implicitly relied on the greater powers doctrine and distinguished *Speiser*, claiming "petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets."[152] A thorough discussion of the greater powers doctrine and the unconstitutional conditions doctrine is outside the scope of this work,[153] but it is clear that, in *Speiser*, the provision attempted to provide a benefit to those who were willing to follow the government's preferred belief system. In that context, the tax benefit was being used as a way of controlling the particular content of the speech and was punishing individuals for engaging in unpopular speech. In *Speiser*, all veterans who refrained from engaging in the "wrong" type of speech received the benefit.

Here, there is an outright ban on intervention in a political campaign regardless of the issues addressed or the people running for office. Congress is not punishing 501(c)(3) organizations for engaging in politics, nor is it trying to control the content of the political discourse. It is merely attempting to ensure that all individuals engaged in political campaigns are kept on even footing. It would be unfair to allow 501(c)(3) organizations to engage in subsidized campaign activities while not allowing other campaign organizations to receive the same subsidy. Unlike in *Speiser*, there is no punishment rationale here. Thus, the political intervention prohibition does not violate the free speech rights of 501(c)(3) organizations.

Moreover, churches' claims that the political intervention prohibition violates

149. *Id.* at 528–29.

150. *Id.* at 519.

151. *Id.* In a series of cases, the Court also has rejected discriminatory taxes on newspapers, finding that these taxes burden rights protected under the First Amendment. *See* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 227 (1987) (holding that Arkansas's tax on receipts from the sale of tangible personal property violated the First Amendment by exempting some, but not all, magazines). The Court believed that tax was "particularly repugnant" because the "magazine's tax status depend[ed] entirely on its *content*." *Id.* at 229; Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 576 (1983) (finding that a specific tax imposed only on the cost of paper and ink used by newspapers violated the First Amendment); Grosjean v. Am. Press Co., 297 U.S. 233, 249 (1936) (stating that a tax on a newspaper's gross receipts from advertising, if newspaper's circulation exceeded 20,000, violated the First Amendment). *But cf.* Leathers v. Medlock, 499 U.S. 439, 448 (1991) (holding that an Arkansas sales tax on receipts that exempted newspapers but not cable companies was constitutional).

152. Cammarano v. United States, 358 U.S. 498, 513 (1959).

153. I have considered this issue at length in the context of section 527 organizations. *See* Tobin, *supra* note 119, at 640–41.

their rights to free exercise of their religion fails for similar reasons. Even under the Free Exercise Clause, churches are not entitled to be subsidized by the government in the exercise of their religion. In fact, as discussed earlier, a subsidy by the government for the purpose of encouraging the free exercise of religion would violate the Establishment Clause.

In this situation, however, even absent the subsidy rationale in *Taxation with Representation*, the Free Exercise claim would fail. In *Employment Division v. Smith*, the Court determined that neutrally-crafted generally applicable laws are constitutional even if they impact the free exercise of religion.[154] Here, the political campaign ban contained in section 501(c)(3) applies to all exempt organizations and was not created to restrict the free exercise of religion.[155] Thus, the claim by 501(c)(3) organizations that the campaign ban violates the First Amendment clearly fails.

Some scholars have argued that the Religious Freedom Restoration Act of 1993 (RFRA), which was passed by Congress to overrule part of the holding in *Smith*, changes the analysis here and requires the government to prove that the political campaign ban is the least restrictive means of advancing a compelling government interest.[156]

RFRA, however, cannot modify the constitutional right at issue. RFRA does not amend the Constitution. Instead, RFRA presents a statutory question: whether provisions in RFRA requiring the government to use the least restrictive means of advancing a compelling interest trumps the prohibition in section 501(c)(3).[157]

In this Article, I argue that the political campaign ban is important and positive as a policy matter and that it is constitutional. Nothing in RFRA changes that analysis. RFRA, however, has the potential to make the campaign ban unenforceable with respect to certain religions in certain specific instances. If RFRA is interpreted to do so, it is because Congress, as a policy matter, has spoken on this issue, and not because churches have a First Amendment right to engage in campaign intervention.

In any event, it is unlikely that RFRA would forestall enforcement of the political campaign ban, and if it did, it would do so only under very limited circumstances. RFRA only applies when the government statute places a substan-

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154. 494 U.S. 872, 878 (1990); *see* Samansky, *supra* note 66, at 176–77 & n.182.

155. For a discussion of the Free Exercise Clause and its neutral application, see NOWAK & ROTUNDA, *supra* note 72, at 1408–67.

156. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b) (2000). A thorough discussion of the free exercise issues presented here are outside the scope of this Article. For arguments that the denial of 501(c)(3) status to a church that intervenes in an election violates the Free Exercise Clause, see Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145, 145 (2006) (arguing that the political campaign ban "infringes upon the free exercise rights" guaranteed by RFRA); Samansky, *supra* note 66, at 152–53 (same). *See generally* 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 (2004) (exploring RFRA in the tax context).

157. *See* Volokh, *supra* note 118, at 1962–63.

tial burden on religion. As discussed earlier, the political campaign ban does not place a substantial burden on religion.

First, a religious organization has an outlet to engage in political campaign activity; it just may not engage in that activity and receive a tax subsidy from the government. This is very different from other RFRA cases in which the religious activity at issue would have been completely prohibited.[158]

Second, the political campaign ban does not prohibit churches from discussing issues important to them. It is the issue discussion, not the endorsement of a candidate, that is central to the free exercise of most religions. I concede, however, that it is possible that a religion might be able to argue that endorsement of a candidate is central to its religious beliefs. In such a case, the court would have to determine, with regard to that particular church, whether the political campaign ban violates the statutory test in RFRA.

Finally, uniformly applicable tax statutes have generally survived the compelling interest standard set out in RFRA. In examining tax cases pre- and post-*Smith*, tax statutes of general applicability have been upheld even under a compelling interest-type standard. Thus, individuals and churches have been required to pay social security taxes despite religious objections.[159] Quakers have been required to pay income taxes despite the fact that some of those taxes fund the military,[160] and members of the Church of Scientology have been denied deductions for certain religious activities.[161]

Moreover, in *Branch Ministries v. Rossotti*, the Court of Appeals for the District of Columbia Circuit upheld the constitutionality of the political campaign ban.[162] Branch Ministries, Inc. operated a church that was recognized as a 501(c)(3) organization.[163] Four days before a presidential election, the church

158. *See* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 126 S.Ct. 1211, 1213 (2006) (applying RFRA to allow a religious sect to use a controlled substance).

159. United States v. Lee, 455 U.S. 252, 252 (1982) (holding that the requirement that the Amish pay social security taxes does not violate the Free Exercise Clause (pre-*Smith*)); United States v. Indianapolis Baptist Temple, 224 F.3d 627, 629 (7th Cir. 2000) (holding that the requirement that members of the Indianapolis Baptist Temple pay social security taxes does not violate the Free Exercise Clause (post-*Smith*)).

160. Nelson v. United States, 796 F.2d 164, 165 (6th Cir. 1986) (rejecting a Free Exercise Clause challenge for withholding portion of income taxes that the taxpayer believed went to national defense (pre-*Smith*)); Browne v. United States, 176 F.3d 25, 26 (2d. Cir. 1999) (same (post-*Smith*)).

161. Hernandez v. Comm'r, 490 U.S. 680, 680–81 (1989) (disallowing deduction to Scientologist for the religious practice of "auditing and training" because taxpayer received a benefit from the "auditing and training," and finding that the denial of the deduction did not violate the Establishment Clause (pre-*Smith*)). The IRS later decided to allow the deduction administratively. *See* Closing Agreement Between IRS and Church of Scientology, *reprinted in* TAX NOTES TODAY, Dec. 31, 1997, LEXIS, 97 TNT 251-24 [hereinafter Closing Agreement] (reprinting unofficial text); *see also* Rev. Rul. 93-73, 1993-2 C.B. 75 (declaring obsolete a Revenue Ruling, Rev. Rul. 78-189, 1978-1 C.B. 68, which denied deductions for auditing and training). For a thorough discussion of this issue, see Allan J. Samansky, *Deductibility of Contributions to Religious Institutions*, 24 VA. TAX REV. 65 (2004).

162. 211 F.3d 137, 142 (D.C. Cir. 2000); *see also* Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 857 (10th Cir. 1972) (upholding the constitutionality of the revocation of a religious corporation's tax-exempt status).

163. *Branch Ministries*, 211 F.3d at 140.

placed large advertisements in national newspapers warning "Christians Beware" and stating that presidential candidate Bill Clinton's positions on "abortion, homosexuality, and the distribution of condoms to teenagers in schools violated Biblical precepts."[164] The advertisement then solicited "tax-deductible donations" to the church.[165]

The IRS revoked the church's tax-exempt status, and the church appealed the IRS's decision.[166] The church argued, among other things, that the political campaign ban violated the Free Exercise Clause.[167] The court rejected the church's claim, holding that the political campaign ban was not a substantial burden on the church's right to free exercise of religion.[168] The court, relying on *Taxation with Representation*, noted the church could communicate its message through a related 501(c)(4) organization and that there was no evidence that "withdrawal from electoral politics would violate its beliefs."[169]

B. PERMISSIBLE POLITICAL ACTIVITIES OF 501(C)(3) ORGANIZATIONS

Part I.A argues that 501(c)(3) organizations should not be permitted to participate in or intervene in a political campaign on behalf of or in opposition to a candidate. This limitation, however, does not prohibit 501(c)(3) organizations from discussing important public issues or from educating the public.[170] It would not stop the NAACP from discussing the war in Iraq or important civil rights issues, and it would not stop Pastor Parsley from speaking out against gay marriage.[171]

The IRS has concluded that the determination whether an organization has engaged in a prohibited activity is based on all the facts and circumstances of each case.[172] In a recent announcement, the IRS indicated that "political cam-

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164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 140–41.

168. *Id.* at 143.

169. *Id.* at 142. Professor Samansky argues that this statement recognizes that there might be a Free Exercise problem if withdrawing from politics violated the church's belief. *See* Samansky, *supra* note 66, at 163; *see also* Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 857 (10th Cir. 1972) (upholding the constitutionality of the revocation of a religious organization's tax-exempt status); Ass'n of the Bar of the City of New York v. Comm'r, 858 F.2d 876 (2d Cir. 1988) (upholding denial of 501(c)(3) status to the Association of the Bar of New York because it rated candidates and therefore intervened in a political campaign).

170. For an in-depth analysis of the rules related to 501(c)(3) organizations and political campaigns, see Steven H. Sholk, *A Guide to Election Year Activities of Section 501(c)(3) Organizations*, *in* 6 TAX STRATEGIES FOR CORPORATE ACQUISITIONS, DISPOSITIONS, SPIN-OFFS, JOINT VENTURES, FINANCINGS, REORGANIZATIONS & RESTRUCTURINGS 837 (2006).

171. Organizations, however, may not use *sham issue advocacy* as a means of intervening in a campaign. *Sham issue advocacy* was a term coined for campaign commercials that allegedly discussed issues but were really designed to advocate for or against a candidate. *See* Richard L. Hasen, *Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265, 268 (2000). The term could also apply to attempts by 501(c)(3) organizations to intervene in elections on behalf of a candidate by discussing issues in a particular way.

172. *See, e.g.*, Rev. Rul. 78-248, 1978-1 C.B. 154.

paign intervention includes any and all activities that favor or oppose one or more candidates for public office."[173] Prohibited activities include making endorsements, providing campaign funds, using an organization's assets or facilities to support a candidate, and making statements that refer to issues in a way designed to promote or attack a candidate.[174] Although the IRS examines the facts and circumstances of each case, its published guidance appears to indicate that two considerations are the most important. The first is whether the activity, often a public communication, is biased, partisan, or clearly designed to influence voters in an election.[175] For example, the IRS has determined that 501(c)(3) organizations may conduct voter registration, get-out-the-vote activities, or distribute voter guides as long as they are nonpartisan in nature and show no preference for a candidate or party.[176]

Second, the IRS has also indicated that the timing of advertisements is an important consideration in determining whether the ads constitute an intervention in a political campaign.[177] In a case involving a group's advertisements right before the 1984 election, the IRS noted, "[t]he timing of the release of the ads so close to [a] November vote . . . [was] troublesome."[178] The timing of an ad close to an election, however, is not necessarily determinative. In the same case noted above, the IRS ultimately concluded that the organization "probably did not intervene in a political campaign."[179]

The facts and circumstances approach has been widely criticized and poses significant problems for 501(c)(3) organizations. As discussed in section C, there is very little precedential guidance with regard to the test, and there are almost no published decisions. It thus is very difficult for 501(c)(3) organizations to know how far they can go before their activities will be deemed

173. I.R.S. Fact Sheet FS-2006-17 (Feb. 2006), *available at* http://www.irs.gov/newsroom/article/0,,id=154712,00.html. The IRS issued its guidance in this regard as a Fact Sheet. A Fact Sheet is guidance to taxpayers and reflects the IRS's interpretations of tax laws. *Id.* It is not precedent and the IRS can change a Fact Sheet at any time. The IRS, however, does not take legal positions contradicting its own interpretations in litigation absent an announced change. Therefore, practitioners usually rely on this guidance as the IRS's interpretation of the law. Prior to the Fact Sheet, the IRS provided some guidance in this area in Revenue Ruling 2004-6, which applied to section 527 organizations and indicated whether an activity was political campaign activity under section 527.

174. *Id.*

175. *See* Rev. Rul. 78-248, 1978-1 C.B. 154 (stating that voting records that show no bias or preference are allowed); Rev. Rul. 86-95, 1986-2 C.B. 73, 74 (stating that a forum for educating and informing voters which is fair and impartial and "does not promote or advance one candidate over another" is allowed); I.R.S. Tech. Adv. Mem. 89-36-002 (Sept. 8, 1989), 1989 WL 596078 (indicating that timing was an important, but not a definitive factor).

176. *See* IRS PUBL'N NO. 1828, *supra* note 92; *see also supra* note 175.

177. I.R.S. Tech. Adv. Mem. 89-36-002 (Sept. 8, 1989), 1989 WL 596078.

178. *Id.*

179. *Id.* In what is hardly a ringing endorsement the IRS stated, "[t]aking into account all facts and circumstances, especially that it is arguable that the ads could be viewed as nonpartisan, we reluctantly conclude [that the 501(c)(3) organization] probably did not intervene in a political campaign on behalf of or in opposition to [a] candidate for public office." *Id.*

prohibited political activities.[180]

The prohibition on election activities relates only to the 501(c)(3) organization. Individual members of the organization, including its leaders, may speak out in their individual capacities.[181] They may speak out against a particular issue or politician and may actively support a candidate for public office. These activities, however, must be conducted in their personal capacities; the members cannot use their organization as a means of "amplifying" their speech. Thus, the individual cannot intervene in an election by using sermons, letters in the organization's publications, or organizational resources to promote or oppose a candidate.[182]

An organization that runs afoul of these rules may lose its tax exemption and may be subject to an excise tax on the amount spent on the activity, and the board members of the organization may also be subject to a penalty on the amount spent on the activity.[183]

Although the IRS's statements have been fairly stringent regarding what an organization may or may not do, the reported cases and rulings rarely provide for revocation of an organization's exempt status.[184] The IRS typically revokes an organization's exempt status when it is blatantly engaged in electioneering. For example, the IRS successfully revoked a church's tax-exempt status because the church ran newspaper ads urging Christians to vote against then-candidate Governor Clinton.[185] Similarly, it also revoked the exempt status of a church that attacked liberal politicians and endorsed conservative ones.[186]

It declined, however, to seek revocation of the exempt status of an organization that funded an advertising campaign to coincide with the 1984 presidential debates, even though the ads urged audiences to "[t]hink about [nuclear war] when [they] vote [in] November" and stated, "This November. . . . vote. . . . Our future depends on it" and the "[c]hoice is ours this fall. . . . Something has to

180. The IRS has attempted to rectify this situation by publishing Fact Sheet 2006-17. The fact sheet contains twenty-one different examples of various activities conducted by 501(c)(3) organizations and indicates the IRS's view as to whether each activity is prohibited or not. *See* I.R.S. Fact Sheet FS-2006-17, *supra* note 173. The fact sheet is designed to provide something close to case law that practitioners can use to advise clients about prohibited activity. *See id.*

181. *See* IRS PUBL'N NO. 1828, *supra* note 92, at 7.

182. *See id.* at 7–8; Rev. Rul. 78-248, 1978-1 C.B. 154.

183. *See* I.R.C. § 4955 (2000); IRS PUBL'N NO. 1828, *supra* note 92, at 11.

184. INTERNAL REVENUE SERV., POLITICAL ACTIVITIES COMPLIANCE INITIATIVE: EXECUTIVE SUMMARY 3 (2006), *available at* http://www.irs.gov/pub/irs-tege/exec_summary_paci_final_report.pdf. The IRS initiative recommended revocation for three out of the eighty-two organizations to be found in violation. *Id.* It is unclear, however, how many of those organizations will actually have their exempt status revoked.

185. *See* Branch Ministries v. Rossotti, 40 F. Supp. 2d 15, 17, 21 (D.D.C. 1999), *aff'd*, 211 F.3d 137 (D.C. Cir. 2000).

186. *See* Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 856 (10th Cir. 1972). According to the Tenth Circuit, Christian Echoes National Ministry attacked President Kennedy, President Johnson, and Senator Humphrey, urged supporters to defeat Senator Fulbright, and supported Senator Strom Thurmond and Congressmen Bruce Alger and Page Belcher. *Id.*

change."[187] The IRS concluded that the advertisements presented a "close call because, while the ads could be viewed as focusing attention on issues of war and peace during the 1984 election campaign, individuals listening to the ads would generally understand them to support or oppose a candidate in an election campaign."[188] It "reluctantly" concluded, however, that the organization "probably did not intervene in a political campaign."[189]

1. Candidate Invitations

An organization may invite candidates to speak to the organization, but the organization may not show preference for one candidate over another and must provide an equal opportunity to candidates seeking the same office.[190] Finally, no fund-raising may occur at the event.[191]

A candidate may be invited to speak in his official (incumbent) capacity or what the IRS refers to as "speaking as a non-candidate."[192] This occurs when the candidate is also a public figure and is speaking in his official role. When a candidate speaks in a "non-candidate" capacity, the institution is not required to provide equal opportunity to other candidates.[193] However, the individual must only speak in his non-candidate role, no mention may be made of his candidacy, and no campaign activity may occur at the event.[194]

2. Voter Education Drives

Charitable organizations may engage in non-partisan voter education drives including voter guides, get-out-the-vote campaigns, and voter registration drives.[195] Whether an activity is partisan or not is determined by the facts and circumstances of each case.[196] For example, in the context of voter guides, the IRS has ruled that a charitable organization may distribute guides listing all the major votes of members of Congress.[197] Charitable organizations may not,

187. I.R.S. Tech. Adv. Mem. 89-36-002 (Sept. 8, 1989), 1989 WL 596078 (alteration to the original in the quoted text) (internal quotation marks omitted).

188. *Id.*

189. *Id.* For an in-depth discussion of 501(c)(3) organizations and political advocacy, see Murphy, *supra* note 19.

190. *See* I.R.S. Fact Sheet FS-2006-17, *supra* note 173; I.R.S. PUBL'N NO. 1828, *supra* note 92, at 8. In Fact Sheet 2006-17, the IRS sets out several steps an organization "must" take to ensure that the invitation does not violate the campaign ban. These actions include: 1) providing an equal opportunity to political candidates seeking the same office and 2) stating at the appearance the fact that the organization does not support or oppose the particular candidate. I.R.S. Fact Sheet FS-2006-17, *supra*.

191. I.R.S. Fact Sheet FS-2006-17, *supra* note 173; I.R.S. PUBL'N NO. 1828, *supra* note 92, at 8.

192. I.R.S. PUBL'N NO. 1828, *supra* note 92, at 9; *see* I.R.S. Fact Sheet FS-2006-17, *supra* note 173.

193. *See* I.R.S. PUBL'N NO. 1828, *supra* note 92, at 8–9.

194. *Id.* at 9. A candidate may also be invited to speak based on the candidate's support for a ballot issue or referendum. Because 501(c)(3) organizations may promote ballot issues, a candidate might be invited to an event as a supporter of a ballot initiative. The IRS has not provided any guidance regarding how such visits should be handled.

195. *See* I.R.S. Fact Sheet FS-2006-17, *supra* note 173.

196. Rev. Rul. 78-248, 1978-1 C.B. 154.

197. *Id.*

however, widely distribute a voter guide that is a "compilation of incumbents' voting records on [a narrow range of issues]."[198]

In order for a voter registration or a get-out-the-vote campaign to be non-partisan, the campaign must not be identified with any specific candidate or political party.[199] Moreover, the IRS has indicated that it will consider several factors in determining whether a voter registration or get-out-the-vote drive runs afoul of the political intervention restriction. These factors include: 1) whether a candidate's name is mentioned in the material; 2) whether a political party is mentioned in the material in addition to the party affiliation of the candidates; 3) whether the communication is limited to urging people to register or to vote; and 4) whether all material and services are made available to everyone.[200]

3. Educational Activities

Section 501(c)(3) specifically recognizes that an organization may be exempt if it is formed for an educational purpose. Thus, a primary function of many 501(c)(3) organizations is educational. Some organizations argue that their activities are not political intervention but instead are educational activities designed to disseminate information to the citizenry. Educational activities are defined as "[t]he instruction of the public on subjects useful to the individual and beneficial to the community."[201] An organization may be educational even if it promotes a specific viewpoint as long as it presents a fair exposition of the relevant facts so as to allow the public to form an independent opinion.[202] The IRS has identified several factors for determining whether an activity is educational. Factors indicating an activity is not educational include: 1) presentation of views unsupported by facts; 2) distorted facts; 3) use of disparaging terms that evoke an emotional reaction rather than an objective evaluation; and 4) failure to serve an educational function because the communication does not consider the knowledge or experience of the audience with the subject matter.[203]

4. Issue Advocacy

For some organizations, issue discussion may be consistent with the organization's purpose. This often occurs when an organization is a religious or educational organization. The IRS has listed key factors that it considers when deciding whether a communication is political campaign intervention. These factors include: 1) whether the statement identifies a candidate for a given

198. *Id.*

199. Treas. Reg. § 1.527-6(b)(5) (1980).

200. Judith E. Kindell & John Francis Reilly, *Election Year Issues*, *in* EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION (CPE) TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2002, at 335, 379 (2002), *available at* http://www.irs.gov/pub/irs-tege/eotopici02.pdf.

201. Treas. Reg. § 1.501(c)(3)-1(d)(3)(b) (as amended in 1990).

202. *Id.*

203. Rev. Proc. 86-43, 1986-2 C.B. 729.

office; 2) whether the statement expresses approval or disapproval for a candidate; 3) whether the statement is made close to the election; 4) whether the statement advocates voting or makes reference to the election; 5) whether the issue raised in the communication is an issue in the campaign and distinguishes the candidates; 6) whether the communication is part of a campaign by the organization that has been going on independent of an election; and 7) whether the communication is related to an issue before a government body urging someone to vote for or against the issue.[204] The purpose of considering these factors is to try to determine whether the organization is really trying to engage in discussion about important issues, or whether the organization is trying to use issue discussion as a guise for campaign intervention.[205]

C. PROBLEMS WITH THE CURRENT SYSTEM

Although the political intervention prohibition benefits both 501(c)(3) organizations and democracy, the current system for enforcing the prohibition is inadequate. The current enforcement regime creates uncertainty and has the potential for political manipulation. It improperly places the IRS in the unenviable position of having to judge the political motivations and content of communications. The IRS's expertise is in tax administration, not election law. The following section outlines the problems with the current enforcement regime, and Part III sets out my ideas for reform.

1. 501(c)(3) Organizations' Activities Are Often Secret

There are over one million 501(c)(3) organizations in this country.[206] These organizations are generally created as entities under state law and then apply to the IRS for recognition as 501(c)(3) organizations by filing Form 1023.[207] Churches are not required to file Form 1023 and are automatically recognized as 501(c)(3) organizations.[208]

Although Form 1023 is very lengthy, it provides only basic information to the IRS about the actual activities of the organization. Organizations must disclose information regarding the officers of the organization, the five most highly paid

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204. *See* I.R.S. Fact Sheet FS-2006-17, *supra* note 173.

205. Some have argued that the facts and circumstances test is unworkable and that the IRS should propose clearer standards. *See* Letter from Ellen Aprill, Professor, Loyola Law Sch., to the Comm'r of the Internal Revenue Serv. (Nov. 29, 2005), *reprinted in Loyola Professor Suggests IRS Issue Guidance on Charities and Political Activity*, TAX NOTES TODAY, Dec. 2, 2005, LEXIS, 2005 TNT 231-18, *and in Loyola Professor Proposes Safe Harbors for Political Campaign Activity by 501(c)(3) Groups*, TAX NOTES TODAY, Dec. 2, 2005, LEXIS, 2005 TNT 231-19. In this Article, I propose ways to improve enforcement of the current test. A thorough discussion of ways to improve the current test is outside the scope of this Article.

206. *See* INTERNAL REVENUE SERV., DATA BOOK 2005: PUBLICATION 55B, at 40 (2005), *available at* http://www.irs.gov/pub/irs-soi/05db22eo.xls.

207. See I.R.C. § 508(a)(1) (2000); Treas. Reg. § 1.508-1(a) (as amended in 1995).

208. *See* I.R.C. § 508(a)(1), (c)(1)(A) (2000) (exempting churches from having to file for recognition as § 501(c)(3) organizations).

individuals and contractors, a statement of the organization's revenues and expenditures, the general purpose of the organization, and the general activities that the organization plans on conducting to further that exempt purpose.[209] The IRS also requires organizational documents and supporting information to be included with the application.[210] The Form 1023, however, provides the IRS with little information regarding the ongoing activities of 501(c)(3) organizations.

In addition to Form 1023, a 501(c)(3) organization that is not a church is required to file a Form 990, which is a yearly informational return.[211] A 501(c)(3) organization must disclose general financial information, achievements consistent with the organization's exempt purpose, and financial information, including compensation and loans to board members and key employees.[212] The Form 990 does not, however, contain detailed information about either the expenditures of, or the donations to, the organization.[213] Moreover, because churches are not required to file a Form 990, the government and the public have almost no information regarding the financial affairs of churches.

Because there is very little verifiable information regarding the financial affairs of 501(c)(3) organizations, they are very attractive mechanisms for influencing elections. It is very difficult to trace how money is spent by the 501(c)(3) organizations, or even what specific activities they are involved in.

2. IRS Actions Are Secret

Not only are 501(c)(3) organizations not required to provide substantial information to the public, but the IRS is also prohibited by statute from disclosing information it receives.[214] The restriction on disclosure of taxpayer information in this context severely hampers efficient administration of the political campaign ban and raises concerns in the public about the fairness of the enforcement process.

Under section 6103 of the Internal Revenue Code, the IRS is prohibited from releasing taxpayer information in all but very limited circumstances.[215] The purpose of section 6103 is to ensure that taxpayer privacy is respected, and that return information is not disclosed to the public.[216] The IRS is therefore

209. IRS Form 1023: Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code (OMB No. 1545-0056) (Rev. June 2006), *available at* http://www.irs.gov/pub/irs-pdf/f1023.pdf.

210. *Id.*

211. *See* 26 U.S.C.A. § 6033(a)(3)(A)(i) (West, Westlaw through Pub. L. No. 109-431) (exempting churches from annual return requirement); Treas. Reg. § 1.6033-2(g)(i) (as amended in 1995); *see also* IRS Form 990: Return of Organization Exempt From Income Tax (OMB No. 1545-0047) (2006), *available at* http://www.irs.gov/pub/irs-pdf/f990.pdf.

212. *See* IRS Form 990, *supra* note 211.

213. *See id.*

214. *See* 26 U.S.C.A. § 6103(a) (West, Westlaw through Pub. L. No. 109-431).

215. *Id.*

216. S. REP. No. 94-938, at 315–30 (1976), *as reprinted in* 1976 U.S.S.C.A.N. 3438, 3744–59.

prohibited from disclosing whether a particular 501(c)(3) organization is being investigated or, if it is, the resolution of any case. The secrecy surrounding individual cases and the lack of published case law or a fact-based legal test makes it very difficult for 501(c)(3) organizations to understand the boundaries of the exemption. In addition, the secrecy regarding which organizations are actually being investigated makes it both easier for an administration to manipulate the provision to serve partisan interests and much more difficult for an administration to provide the necessary information to refute such an allegation. So even if an administration enforces the law equitably, it will be very difficult for the administration to make that case to the public.

During the 2004 election, the IRS was accused of selective enforcement with regard to the political campaign ban.[217] Without full information, there was confusion about why some organizations were investigated and others were not.[218] If the IRS could disclose both the parties being investigated and the explicit reasons for the investigation, the public would be better informed and there would be less likelihood of political manipulations of the process.

3. Compliance Problems

In addition to problems with secrecy, there are also significant compliance problems with regard to the political campaign ban. The compliance problems lead to sporadic and potentially uneven enforcement of the provision.

The IRS's enforcement of the campaign ban is hampered by strict rules regarding audits and by resource constraints. Enforcement of the political campaign ban falls on the Exempt Organizations Division at the IRS. This office is charged with oversight of all exempt organizations. This includes 501(c)(3) organizations but also includes, among others, labor unions, social welfare organizations, business leagues, veterans organizations and political organizations. The Exempt Organizations Division examines new applications, grants or denies those applications, reviews informational returns, and generally oversees compliance with the law relating to Exempt Organizations. The Ex-

217. *See* Press Release, Rep. Charles B. Rangel, Comm. on Ways & Means, U.S. House of Representatives, Skeptical Members of Congress Demand Details, Rationale in IRS Probe of NAACP (Oct. 29, 2004), *reprinted in House Leaders Request Explanation for NAACP Investigation*, TAX NOTES TODAY, Nov. 1, 2004, LEXIS, 2004 TNT 211-66 (alleging NAACP audit was an effort to intimidate members of the NAACP); Letter from Sen. Max Baucus, Finance Comm., U.S. Senate, to Mark W. Everson, Comm'r, IRS (Oct. 29, 2004), *reprinted in Baucus Asks Everson About IRS Audit of NAACP*, TAX NOTES TODAY, Nov. 1, 2004, LEXIS, 2004 TNT 211-59 (indicating concerns about the NAACP audit); Alan Cooperman, *IRS Reviews Church's Status*, WASH. POST, Nov. 19, 2005, at A3; Stephanie Strom, *Nonprofit Groups Question Motive for Federal Actions*, N.Y. TIMES, Mar. 21, 2005, at A10; Donald B. Tobin, The IRS and Secret Campaign Regulation (Nov. 22, 2005), http://moritzlaw.osu.edu/electionlaw/comments/2005/051122.php.

218. *See* INSPECTOR GEN. FOR TAX ADMIN., DEP'T OF THE TREASURY, REVIEW OF THE EXEMPT ORGANIZATIONS FUNCTION PROCESS FOR REVIEWING ALLEGED POLITICAL CAMPAIGN INTERVENTION BY TAX EXEMPT ORGANIZATIONS (2005), *available at* http://www.treas.gov/tigta/auditreports/2005reports/200510035fr.pdf [hereinafter TREASURY REPORT] (finding no political manipulation in the 501(c)(3) compliance process).

empt Organizations Division lacks the time and resources to take a proactive role in enforcing the political campaign ban. Moreover, there is no evidence that the IRS does random audits of 501(c)(3) organizations for purposes of enforcing the political campaign ban, and it is statutorily prohibited from auditing churches unless certain requirements are met.[219] The IRS therefore relies on others to bring problems to its attention. IRS inquiries in these areas are usually based on press reports or citizen complaints.

As discussed earlier, the IRS compliance activities are often kept secret. Because compliance activities are secret, it is often impossible to know which organizations are being investigated and what actions the IRS is taking. This means that other organizations are not deterred by the IRS's actions. The IRS often relies on the publicity from one investigation to deter others. But if the investigations and results are kept private, the IRS's enforcement activities do not deter others from engaging in similar activities.

In addition, some 501(c)(3) organizations are incredibly powerful entities, and the IRS may be reluctant to take them on. In the 2004 election, citizens complained about, among others, the Catholic Church and the NAACP. Both organizations have significant political power and the IRS may be reluctant to take enforcement action against them.[220]

Finally, the facts and circumstances test employed by the IRS makes it difficult for the IRS to draw clear lines regarding what is and what is not prohibited. A fact-based test leads to uneven enforcement even if all actors are acting properly and makes it more difficult for the IRS to take action in situations that are close to the line. In addition, because the test is fact-based, there is serious risk that the IRS's determinations will be second-guessed by federal courts. The risk of adverse decisions likely means that the IRS will only want to pursue litigation in the most serious of cases. While the threat of an audit will certainly be a deterrent for most organizations, others may be willing to push the line hard knowing the IRS will ultimately only take strong action in cases it believes it will likely win in court.

4. The Lack of Judicial Decisions and IRS Rulings Provides 501(c)(3) Organizations with Very Little Guidance

As discussed earlier, there have been only a few cases addressing the political campaign ban, and the reported cases have generally been ones with reasonably

219. I.R.C. § 7611 (2000) (providing that the IRS may not begin a church tax inquiry unless a high-ranking Treasury official determines that there is reasonable belief that the church may not be exempt or is engaging in activities subject to tax).

220. Although the IRS opened an investigation into a speech by the President of the NAACP, the IRS later decided not to continue with enforcement proceedings. This raises the question whether the IRS has the wherewithal to continue pressuring powerful groups on this issue. Moreover, the political pressure placed on the IRS after the NAACP announced the IRS's action was tremendous. *See, e.g.*, *supra* note 217.

clear facts.[221] Because practitioners generally use case law to advise taxpayers with regard to tests that rely on facts and circumstances, the dearth of cases makes it very difficult for a practitioner to determine what is, and what is not, permissible political activity. Moreover, because the IRS's actions are not disclosed, the practitioner also cannot advise his client based on past practices of the IRS.

The IRS has recognized this problem and has released a Fact Sheet, discussed earlier, that is designed to provide practitioners with some guidance.[222] The Fact Sheet provides various factual scenarios with the IRS's conclusions whether each of the scenarios violates the prohibition. These announcements, however, are not legal precedent. They are the IRS's view of the law. The IRS claims that using a Fact Sheet is the most effective means of providing guidance because it can be a "living document."[223] The Fact Sheet, however, does not provide help in close cases. The results in most of the examples provided by the IRS are fairly obvious to most practitioners in the area and appear to be taken out of several previous IRS publications. In other words, they do not really provide guidance for the tough cases.

5. Taxpayers Lack Standing To Bring Complaints

The IRS is charged with enforcing the tax laws and therefore is the federal agency with discretion over whether to begin an examination of a 501(c)(3) organization. State law may provide state governments with an additional avenue to contest an organization's status if the organization is organized under state law.[224] Taxpayers, candidates, and other interested parties, however, have been found not to have standing to bring a complaint against an organization.[225] Thus, parties who believe a 501(c)(3) organization is violating the political campaign ban send information to the IRS notifying it about the alleged violation. This type of notification is no different than if a person notified the IRS that a neighbor was cheating on her taxes. Once a party informs the IRS about allegedly improper activity, the third party presumably has no further involvement with the complaint. The third party has no idea what happens with the information, and is not informed about the resolution of the complaint. All

221. *See supra* note 162.

222. IRS Fact Sheet FS-2006-17, *supra* note 173.

223. *Id.*

224. In most states, either the Secretary of State or the Attorney General has the authority to police nonprofit organizations.

225. *See* United States Catholic Conference v. Baker, 885 F.2d 1020 (2d Cir. 1989) (finding that pro-choice organizations did not have standing to bring suit alleging that the Catholic Conference violated the requirements of section 501(c)(3) by intervening in political campaigns); Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217, 238–39, 248–49 (1992); Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 246 n.200 (1988); Norman Leon, *The Second Circuit's Application of Standing in* In re United States Catholic Conference*: Another Plea for Clarity and Consistency*, 57 BROOK. L. REV. 429 (1991).

information regarding the complaint is protected information under section 6103. Because the information is all protected information, there is no way of knowing whether the IRS took the complaint seriously or whether it ignored the complaint for political reasons.

The secrecy surrounding both the organizations and the audit process, the fact that the IRS is not required to act on complaints, and the absence of third-party standing creates a serious risk that an administration will enforce the political campaign ban in a partisan way. A system that allows political actors to make politically sensitive decisions in secret, with little accountability, is a system destined to be abused by those in authority.

III. EQUITABLE AND TRANSPARENT ENFORCEMENT OF THE POLITICAL CAMPAIGN BAN

In Part I, I outlined the reasons the political campaign ban benefits both 501(c)(3) organizations and our democratic system. In Part II, I outlined the current legal standards and the problems with enforcing the political campaign ban. In this section, I outline several solutions for improving enforcement, transparency, and equity in the enforcement of the current provision.[226]

A. INDEPENDENT COMMISSION

The IRS is generally charged with enforcing the nation's tax laws. Historically, this role has involved collecting duties and collecting revenue from businesses and individuals. Enforcement of the political campaign ban, however, is different. Decisions involving the political campaign ban are highly political and often highly partisan. The role of enforcer of the ban places the IRS in the unenviable position as the campaign regulator of tax-exempt organizations. This not only distracts the IRS from its traditional role as revenue collector, but also puts the IRS's reputation at risk. [227]

Because of the sensitive political nature of enforcement in this area, the IRS has taken steps to limit partisan influence on the enforcement process.[228] The Exempt Organizations Division within the IRS has set up panels of career employees that are charged with determining whether reasonable cause exists that an organization has violated the political intervention prohibition.[229] Although this is a credible attempt to deal with the issue, it does not insulate the

226. The purpose here is to set out a roadmap for reform in very general terms. This is a conceptual description of a new method of enforcing the prohibition. It is outside the scope of this Article to present a detailed proposal on how the independent commission would operate.

227. For some discussion of this topic in the context of section 527 political organizations, see Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. (forthcoming June 2007), *available at* http://ssrn.com/abstract=925529.

228. INTERNAL REVENUE SERV., POLITICAL ACTIVITIES COMPLIANCE INITIATIVE: PROCEDURES FOR 501(C)(3) ORGANIZATIONS (2005), *available at* http://www.irs.gov/pub/irs-tege/paci_procedures-feb_22_2006.pdf.pdf.

229. For a detailed explanation of the compliance initiative, see *id.* For a detailed evaluation of the compliance initiative, see TREASURY REPORT, *supra* note 218.

process from political manipulation, nor does it provide for any type of transparency regarding enforcement.

Here, I examine three different models that are used to insulate government decision-making from political pressure. The first attempts to take away decision-making from politically motivated individuals. An example of this would be career employees in an independent agency or judges in the federal court system. The key trait of this system is the involvement of individuals who are not beholden to partisan interest. A second model would be one in which the political parties were equally represented. The Federal Election Commission is an example of this type of organizational structure. In this model, both political parties are equally represented with the hope that there would be a check on purely political enforcement. The criticism of this model is that it works well when the decisions are obvious but is problematic when the decisions have significant political ramifications. A final model is one that combines the characteristics of both of the above models and includes both political and non-political appointments. Examples of this hybrid form include the Australian Electoral Commission and the Federal Open Market Committee, which sets monetary policy for the United States.

The hybrid approach is particularly valuable when the issues involved implicate both strong governmental interests and highly partisan interests. For example, because monetary policy and interest rates have a significant impact on the economy and thus on elections, there is a serious risk that politicians will attempt to use political power to influence monetary policy. From an economic perspective, however, this would encourage short-term monetary policies that in the end could harm economic well being. The Open Market Committee is therefore structurally designed to reduce the potential for political influence. It is set up with both political and non-political members; it contains seven members who are appointed by the President, confirmed by the Senate, and serve fourteen year terms, as well as five Regional Federal Reserve Bank presidents.[230] The combination of political and non-political appointees, as well as the long term of office for the political appointees, helps insulate the Open Market Committee from political pressures while still allowing it to be responsive to the citizenry.[231]

Another area where partisanship may play a particularly influential role is redistricting. In Australia, redistricting is done by an independent electoral commission, the Australian Electoral Commission.[232] The Commission consists of three members—the Chair, who must be a federal judge or a retired federal

230. 12 U.S.C. §§ 241, 263 (2000); BD. OF GOVERNORS, FEDERAL RESERVE SYSTEM 14–15 (1974). The regional Federal Reserve bank presidents are appointed by their respective boards of directors.

231. For an interesting discussion regarding the workings of the Federal Reserve, see WILLIAM GREIDER, SECRETS OF THE TEMPLE: HOW THE FEDERAL RESERVE RUNS THE COUNTRY (1987).

232. Commonwealth Electoral Act, 1918, § 6 (Austl.), *available at* http://www.comlaw.gov.au. *See, e.g.*, Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1390–94 (2005).

judge, an Electoral Commissioner, and a non-judicial member, who must be a high-ranking (non-political) government official. The Chair and the non-judicial member are appointed by the Governor-General, and the Electoral Commissioner is appointed by the Prime Minister.[233] The structural design of the Commission—using judges and a high ranking government official, usually the Australian Statistician—partially insulates the Commission from partisan pressures.

Relying on these hybrid models, I suggest that an independent commission be created outside the IRS and charged with enforcing the political campaign ban.[234] This would both remove the IRS from having to engage in highly partisan decisions that are outside its expertise and allow the IRS to concentrate on its core function—the collection of revenue. The Commission would be made up of both partisan and non-partisan members. For example, the Commission could contain seven people. Two of the individuals would be recommended by the President, and two by the Majority or Minority Leader in the Senate, whomever was in the opposite party of the President. The remaining three members of the Commission would be IRS career employees in the Exempt Organizations Division of the IRS who had ten or more years of experience at the IRS. These employees would be picked at random from a list of qualified employees who were willing to sit on the Commission.[235] This would set up a structure of political and non-political experts to hear cases involving the political campaign ban and would provide confidence that the decisions were not reached for political reasons.

B. ADMINISTRATIVE PROCEDURES FOR THE NEW COMMISSION

Any new system created to enforce the political campaign ban must be fair and transparent. Under the new system, individuals, groups, or the IRS could forward complaints to the Commission. The Commission would have a staff in place to review complaints, and the complaints would be separated by staff into three categories. The first category would include those complaints that the staff determined to be most serious. The second would be complaints that the staff thought raised issues of concern, but were not serious enough to be included in the first category. The third category would be complaints that the staff believed were dilatory or insubstantial.[236]

Complaints in the first or second category would be presented to the Commis-

233. Commonwealth Electoral Act § 6.

234. The Commission could also be charged with making decisions regarding lobbying and the political activities of other exempt organizations.

235. There would obviously have to be some method of screening out employees who were unwilling or unable to serve on the Commission.

236. The Federal Election Commission (FEC) has a similar process for prioritizing complaints. When complaints are received by the FEC, they are given a Matter Under Review (MUR) score. Complaints are then given priority based on that score. The enforcement and complaint procedures are generally set out by statute. *See* 2 U.S.C. § 437g (2000); 11 C.F.R. § 111.1 (2006); FED. ELECTION COMM'N, FILING A COMPLAINT (1998), *available at* http://www.fec.gov/pages/brochures/complain.shtml.

sion for a decision regarding further action. The Commission could either authorize further investigation by the staff, or determine that the staff's recommendation was incorrect and that the complaint should not be dismissed. The Commission could also determine that the complaint should be moved from one category to another. The category would determine the priority the staff of the Commission would place on the collection of information.[237]

Complaints in the third category would be handled on a more informal and expedited basis. The staff would make an initial recommendation regarding the disposition of the case without a basic examination. The Commission would meet to determine whether further investigation was necessary or whether the complaint could be dismissed. If the Commission believed further investigation was necessary, the complaint would be moved to category one or two. Complaints in category three would ideally be handled very quickly to ensure that the complaint process was not abused by those seeking to use it as a means of harming opponents.

Once the Commission determined that a complaint required further investigation, the staff would engage in additional discovery. The Commission would then hear evidence from the parties and reach a decision on the case. All decisions of the Commission, including a summary of the factual record necessary to reach the decision, would be publicly available. Parties who disagreed with the Commission's determination could appeal the decision to the District Court of the District of Columbia and receive de novo review of their case.

The Commission and complaint process outlined above would eliminate many of the problems with the political campaign ban outlined in Part II. It would help insulate the decision makers from partisan pressures, reduce the risk that enforcement will be undertaken for political reasons, and provide nonprofits with information regarding how the political campaign ban is enforced. Although this is just a brief outline of a regulatory structure that might make the ban easier to enforce and more effective, it does provide a roadmap for a better system.

CONCLUSION

Section 501(c)(3) organizations play an important role in our society. They are often the front-line organizations helping the poor and needy. They educate our citizenry and are often the groups willing to speak out in support of the poor and disenfranchised. They are organizations worthy of our support. Section 501(c)(3) organizations are not, and should not be, political campaign advocates.

The political campaign ban contained in section 501(c)(3) is good for 501(c)(3) organizations and good for the country. It protects taxpayer-subsidized 501(c)(3)

237. The Federal Election Commission is required to find "reason to believe" that a violation has occurred or is about to occur before proceeding to an investigation. 2 U.S.C. § 437g(a)(2) (2000).

organizations from being corrupted, co-opted or coerced. It protects the public treasury by ensuring that taxpayer subsidies are not used for political campaigns. And it protects democracy by keeping all groups on a level playing field. The government should not put its finger on the scale in favor of one group over another.

Although the ban continues to play an important role in limiting campaign abuses, the current structure and enforcement of the ban creates its own problems. As political campaigns get more sophisticated and highly charged, there is a need for stricter enforcement of the ban and clearer rules surrounding what is and what is not permissible. The plan I suggest here is designed to create a system that provides a transparent and fair method of enforcing campaign-related provisions in the Internal Revenue Code. An equitably enforced and transparent political campaign ban will help ensure the integrity of 501(c)(3) organizations and the election process in the United States.