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COMMENT

THE 501(c)(3) CAMPAIGN PROHIBITION AS APPLIED TO CHURCHES: A CONSIDERATION OF THE PROHIBITION'S RATIONALE, CONSTITUTIONALITY, AND POSSIBLE ALTERNATIVES

Jeffrey Mikell Johnson†

I. INTRODUCTION

On October 31, 2004, just two days before the presidential election, the Rev. George Regas preached a politically-charged sermon at All Saints Episcopal Church in Pasadena, California.[1] Although Regas cautioned the audience that he did not intend to tell them how to vote, he proceeded to unabashedly criticize the Iraq War and incumbent President George W. Bush's policies on abortion, the economy, and various social issues.[2] Regas told the parishioners "to vote all [their] values" and admonished them to "[b]ring a sensitive conscience to that ballot box."[3]

The content of his message prompted the Internal Revenue Service ("IRS") to investigate the tax-exempt status of the church. In June 2005, the IRS sent the church a notification letter stating that it had a reasonable belief that All Saints may not be tax-exempt because of its intervention in an election campaign.[4] The letter revealed that Regas's sermon was the source of the IRS's concern.[5] In September 2006, the IRS served All Saints with a summons requesting the church to hand over numerous documents from the 2004 tax year, including parish newsletters, vestry meeting minutes, and information relating to Regas's involvement with the parish.[6]

One year later, the IRS sent All Saints a letter advising the church that it continued to qualify for tax exemption.[7] The IRS concluded, however, that

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1. Patricia Ward Biederman and Jason Felch, *Antiwar Sermon Brings IRS Warning*, L.A. TIMES, Nov. 7, 2005.

2. *Id.*

3. Pat McCaughan, *Pasadena Congregation to Challenge IRS Summons*, Episcopal News Serv., Sept. 21, 2006.

4. *Id.*

5. *Id.*

6. *Id.*

7. Letter from Marsha A. Ramirez, Director, EO Examinations, Internal Revenue Service, to All Saints Church (Sep. 10, 2007), *available at* http://www.allsaints-pas.org/site/DocServer/Letter_from_IRS_to_All_Saints_Church.pdf?docID=2541 (last visited Sept. 6, 2008).

Regas's sermon caused the church to "intervene[] in the 2004 Presidential election campaign."[8] This intervention did not cost All Saints its tax-exempt status because the IRS was satisfied the infraction was "a one-time occurrence" and because the church had "policies in place to ensure that the Church complies with the prohibition against intervention in campaigns for public office."[9] The letter warned All Saints to inform guest speakers of these policies.[10] The message from the IRS was clear: Don't let it happen again.

Section 501(c)(3) of the Internal Revenue Code ("I.R.C.") provides the criteria for organizations that are eligible for exemption from federal income tax and to whom tax-deductible contributions may be made.[11] One of the section's requirements is that exempt organizations, including churches, must not participate or intervene in a political campaign.[12] The confrontation between All Saints and the IRS over Regas's anti-war sermon is the latest example of an administration seeking to enforce the 501(c)(3) campaign prohibition against a religious organization that had voiced opposition to the president during his campaign.[13] Aside from questions of retaliatory prosecution that may exist,[14] this incident illustrates the danger churches face when they publicly denounce or criticize a candidate for public office. Although only one church has lost its tax-exempt status because of alleged campaigning,[15] the specter of an IRS investigation and the possible loss of tax exemption chill the speech of many congregations and religious leaders who otherwise would speak out at election time. The All Saints incident also demonstrates that this dilemma is not peculiar to churches of a particular ideology. Churches of all political persuasions potentially risk their tax-exempt status when they openly address issues relevant to their faith during a campaign season.

This situation has not escaped the notice of clergy, legal scholars, and members of Congress. These leaders have proposed several alternatives to

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8. *Id.* at *2.

9. *Id.* at *2.

10. *Id.* at *2.

11. 26 U.S.C. § 501(c)(3) (2000).

12. *Id.*

13. For other notable examples, see Christian Echoes Nat'l Ministry v. U.S., 470 F.2d 849 (10th Cir. 1973) (revocation of tax exempt status for Christian advocacy organization that had used its publications and broadcasts to criticize John F. Kennedy as being too liberal) and Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000) (revocation of tax exempt status for church that had published an advertisement in national newspapers warning Christians that Bill Clinton held unbiblical stances on issues).

14. The plaintiffs in both *Christian Echoes* and *Rossotti* unsuccessfully argued that they were the subject of arbitrary or selective prosecution.

15. *Rossotti*, 211 F.3d at 139.

correct the chilling effect the current tax law has on religious expression. Representative Walter Jones of North Carolina introduced one such measure in 2005.[16] Known as the Houses of Worship Free Speech Restoration Act (hereinafter "Houses of Worship Act" or the "Act"), this amendment to section 501 would protect a church from forfeiting its tax-exempt status based on the content of a sermon or other presentation in a worship service.[17] While the Houses of Worship Act would not remedy all the problems faced by churches in this area, it would ensure that clergy could comment on candidates in the context of their religious activities without fear of running afoul of tax laws.

This Comment assesses the validity of the 501(c)(3) campaign prohibition as applied to churches. Section II begins with an overview of the history of church tax exemptions, followed by a focus on the nature of such exemptions. This inquiry follows a line of Supreme Court decisions to determine how the Court has understood religious exemptions and how this understanding affects the validity of the campaign prohibition as applied to churches. Section III delves into the text, history, and rationales of the prohibition. Section IV analyzes the constitutionality of the prohibition as applied to churches under the First Amendment's Free Speech, Free Exercise, and Establishment Clauses. Finally, Section V considers various alternatives that have been offered to the current law, with an emphasis on the constitutionality and probable efficacy of the Houses of Worship Free Speech Restoration Act.

II. THE HISTORY AND NATURE OF CHURCH TAX EXEMPTION

A. A Historical Sketch of Tax Exemptions for Churches

The tax exemption of churches and other religious groups is not a new phenomenon. It is an enduring practice that has emerged in different cultures and time periods for different reasons.[18] For example, many ancient civilizations exempted their priests from taxation because of fear of reprisal from the gods or from the people, who held the clergy in high esteem.[19] In fact, this official reverence for the culture's religious leaders sometimes reflected an

16. H.R. 235, 109th Cong. §1 (2005); *see* Kelly S. Shoop, *If You Are a Good Christian You Have No Business Voting for This Candidate: Church Sponsored Political Activity in Federal Elections*, 83 WASH. U.L.Q. 1927, 1943 (2005).

17. *Id.* As of the date of this writing, the Houses of Worship Act has not been introduced in the 110th Congress. Section V of this article nonetheless contends that Congress should again consider the Act because its provisions are more workable and better able to withstand constitutional scrutiny than other proposals.

18. *See* John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 522-545 (1992).

19. *Id.* at 524-29.

understanding of the respective powers of state and religion. Emperor Cyrus of Persia "fully understood the first principle of statesmanship—that religion is stronger than the state . . . [and] showed a courteous respect for the deities of the conquered. . . ."[20] Of course, governments have not always been so benevolent and fair-minded in their use of the taxing power towards religion. During the Middle Ages, both Moslem and Christian states heavily taxed nonadherents, with Jews bearing a disproportionate share of the tax burden in medieval England.[21]

It naturally was the English legal tradition that most heavily influenced American tax exemptions.[22] This tradition can be traced through the lines of both common law and equity.[23] Under the common law, the 1601 Statute of Charitable Uses, created to enforce charitable trusts, provided the first working definition of charity.[24] The Statute did not list religion as a charitable use, likely out of concern that property donated to a religion deemed "superstitious" by the reigning state church might be confiscated, thus thwarting the purpose of the donor.[25] Later judicial decisions, however, confirmed that the advancement of religion was a valid purpose for charitable trusts.[26] In fact, religious uses were later considered one of "the four principal divisions of charity in English law."[27] These common law definitions of charity, which included religion, heavily influenced American tax law. Chief Justice Warren Burger observed that "the form and history of the charitable exemption and deduction sections of the various income tax Acts reveal that Congress was guided by the common law of charitable trusts."[28]

Similarly, under English laws of equity, churches enjoyed property tax exemptions because of their charitable use of such property.[29] While the common law simply included the advancement of religion within its definition of charity, equity focused on the benefits actually conferred by a church's activities to determine whether its property use was charitable.[30] The rationale

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20. *Id.* at 527 (quoting W. DURANT, OUR ORIENTAL HERITAGE 353 (1954)).

21. *Id.* at 529-30.

22. Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145, 149 (2006).

23. *Id.* at 147.

24. *Id.* at 148 (The author notes that the preamble to the Statute of Uses strongly influenced the Internal Revenue Code's understanding of charitable organizations).

25. Whitehead, *supra* note 18, at 533.

26. *Id.*

27. Kemmitt, *supra* note 22, at 149.

28. Bob Jones Univ. v. United States, 461 U.S. 574, 588 (1983).

29. Whitehead, *supra* note 18, at 535.

30. *Id.*

for the exemption was based upon the churches' involvement in beneficent social endeavors rather than upon their religious character.[31] Institutions deemed charitable received equitable privileges such as tax exemptions and subsidies, and government workers conducted annual inspections to determine the amount of such privileges.[32] Poorer charities generally received less aid than their wealthy counterparts.[33]

Favorable tax treatment of churches continued in the American colonies but in a much different setting than exists today. Nine of the thirteen original colonies had established churches.[34] In those colonies, the established churches received government aid, either through subsidies or tax exemptions; other religions were taxed.[35] A disestablishment trend began with the Revolution and continued up until the ratification of the Constitution.[36] Even so, church tax exemptions persevered as the states, beginning with Pennsylvania, adopted measures that protected church property from taxation.[37]

Throughout its history, the federal government also has made provisions for church tax exemption. In the early 1800s, these provisions included an exemption from a taxing statute in Alexandria County, Virginia, a refund of duties paid by religious groups on the importation of religious articles, and an exemption of church property from a federal tax on household furniture.[38] Later in that century, Congress exempted "religious associations" from a lottery tax and churches from a District of Columbia property tax.[39] In 1894, the Wilson Tariff Act excluded "corporations, companies, or associations organized and conducted solely for . . . religious . . . purposes."[40] Following the Sixteenth Amendment's provision for a federal income tax, Congress passed the Revenue Act of 1913, the foundation of the current tax system. That Act included an exemption for charitable organizations (including churches) that has been part of every edition of the tax code since then.[41]

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31. *Id.*
32. *Id.*
33. *Id.*
34. Kemmitt, *supra* note 22, at 149.
35. Whitehead, *supra* note 18, at 536.
36. Kemmitt, *supra* note 22, at 150.
37. *Id.*
38. *Id.*
39. Whitehead, *supra* note 18, at 541-42.
40. Kemmitt, *supra* note 22, at 150.
41. Whitehead, *supra* note 18, at 542.

B. The Nature of Church Tax Exemption: A Matter of Subsidy, Sovereignty, or Separation?

In light of its venerable history, is church tax exemption best understood (1) as a government subsidy, (2) as respect for churches' sectarian sovereignty, or (3) as a measure necessary to prevent excessive entanglement between the state and the church? Professor Edward A. Zelinsky proposes these three paradigms for viewing church tax exemptions, with a particular focus on whether tax benefits for religious institutions are dependent on similar benefits for secular entities.[42] The paradigms are also instructive in determining whether Congress may legitimately condition income tax exemptions on churches' non-participation in political campaigns. If exemption is a subsidy, Congress has the authority to withhold financial assistance from churches involved in campaigning. If exemption is a recognition of church sovereignty and thus a definition of the appropriate tax base, the campaign prohibition is impermissible because Congress lacks the authority to tax churches in the first place. If exemption is a means of avoiding entanglement between church and state, the prohibition is invalid because it actually fosters such entanglement.

These paradigms offer insightful and unique ways of viewing church tax exemptions. The sovereignty and separation paradigms are useful as possible normative arguments on why churches should be exempt from otherwise generally applicable taxes. None of Zelinsky's paradigms, however, adequately reflect the Supreme Court's jurisprudence on the relationship between churches and the taxing power. This Section suggests a fourth paradigm. Although this paradigm does not provide a rationale for all church tax exemptions, it is faithful to current constitutional jurisprudence and explains why the 501(c)(3) campaign prohibition violates the nature of the exemptions.

The fourth paradigm suggests that church tax exemptions are mandated only when church activity is protected by the First Amendment. This understanding reflects the development of Supreme Court jurisprudence in this area. Under this view, the campaign prohibition places an impermissible dilemma on churches; they must either surrender their federal tax exemption or their rights to free speech and free exercise. Moreover, the political cannot genuinely be separated from the spiritual in religious worship. Removing the 501(c)(3) prohibition from churches will not subsidize their speech but provide a constitutionally-mandated protection for their First Amendment rights.

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42. Edward A. Zelinsky, *Are Tax "Benefits" for Religious Institutions Constitutionally Dependent on Benefits for Secular Entities?*, 42 B.C. L. REV. 805, 808-12 (2001).

Zelinsky argues that, as a normative matter, church tax benefits should not depend on similar benefits being extended to secular organizations.[43] He believes that "it is most compelling to conceive of religious tax exemptions as the acknowledgement of sectarian sovereignty."[44] The basic idea is that because churches enjoy autonomy in their ecclesiastical affairs, they should be treated as non-taxable entities. Because secular organizations do not possess this sovereignty, they are not entitled to be excluded from the tax base. Zelinsky admits that the sovereignty paradigm does not comport with current Supreme Court jurisprudence.[45] Yet he does point to the 1940s cases of *Murdock v. Pennsylvania*[46] and *Follett v. Town of McCormick*[47] as indicative of that viewpoint.[48]

In *Murdock*, the Court struck down a city ordinance requiring a business license (and accompanying tax) for traveling salespersons as it applied to Jehovah's Witnesses who distributed religious materials in exchange for donations.[49] Justice Douglas, writing for the majority, described the fee as "a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights."[50] This is impermissible, the Court held, because "[a] State may not impose a charge for the enjoyment of a right granted by the federal constitution."[51] The right in question was (at least in part) the right to the free exercise of religion, "[a] privilege [which] exists apart from state [sovereignty]."[52] Thus, the Court concluded that the free exercise of one's religion is an activity beyond the taxing authority of the state; it echoed the familiar theme that "[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment" and that the city had no authority to suppress First Amendment rights by means of a license tax.[53]

The following year, the Court confronted a nearly identical fact pattern in *Follett v. Town of McCormick*; the only difference was that the plaintiff was a local resident who earned his living selling religious books rather than an itinerant evangelist who incidentally sold such materials.[54] The Court found the

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43. *Id.* at 807.
44. *Id.* at 841.
45. *Id.* at 834-35.
46. 319 U.S. 105 (1943).
47. 321 U.S. 573 (1944).
48. Zelinsky, *supra* note 42, at 835.
49. Murdock v. Pennsylvania, 319 U.S. 105, 106-07 (1943).
50. *Id.* at 113.
51. *Id.*
52. *Id.* at 115.
53. *Id.* at 112.
54. Follett v. Town of McCormick, S.C., 321 U.S. 573, 574-75 (1944).

distinction constitutionally insignificant, noting that the problem in both *Murdock* and *Follett* was the exaction of a tax as a condition to the exercise of First Amendment rights.[55] Justice Douglas again wrote for the majority and compared the tax to censorship or a prior restraint, stating: "[T]o say that [preachers and parishioners] like other citizens may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege."[56]

Although the *Murdock* and *Follett* opinions did not extensively analyze the government taxing authority vis-à-vis religious groups, the Court in both cases found that requiring a citizen to pay a tax for the privilege of religious exercise operated as a prior restraint and an undue burden under the First Amendment.[57] These holdings were premised on the assumption that the religious speech in question was not taxable at all. Justice Douglas made clear that the result did not turn on the amount of the tax or the burden it placed on the particular speakers.[58] Douglas emphasized that to inquire whether the tax in question actually controlled or suppressed speech is to disregard the nature of the tax; he admonished: "[I]t may not be said that proof is lacking that these license taxes either separately or cumulatively have restricted or are likely to restrict petitioners' religious activities. On their face they are a restriction of the free exercise of those freedoms which are protected by the First Amendment."[59]

Professor Zelinsky characterizes the exemptions in *Murdock* and *Follett* as "judicially-created" based on the Court's understanding of the First Amendment, and he opines that the exemptions were "exclusively for religious activity."[60] It is true that the exemptions were judicially imposed in the sense that they were provided only as the result of the Court's holdings. They were created, however, by the Constitution, and it is not at all certain that the holdings apply only to religious speech. The *Murdock* opinion, for example, several times described the right at issue as also involving freedom of the press.[61] If the plaintiffs in those cases had been distributing political treatises in exchange for contributions, they still would have prevailed; Justice Douglas strongly suggested this when he reminded readers "that the pamphlets of Thomas Paine were not distributed free of charge."[62]

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55. *Id.* at 577.
56. *Id.* at 577-78.
57. Murdock v. Pennsylvania, 319 U.S. 105, 114 (1943); *Follett*, 321 U.S. at 577.
58. *Murdock*, 319 U.S. at 112-13.
59. *Id.* at 113-14.
60. Zelinsky, *supra* note 42, at 813.
61. *Murdock*, 319 U.S. at 114-15, 117.
62. *Id.* at 111.

It is unclear whether Professor Zelinsky interprets these cases as a pure sovereignty issue or primarily an issue of entanglement.[63] The fact that the exemption likely would have been available to non-religious actors is crucial because it becomes difficult to interpret the *Murdock* and *Follett* cases as recognizing sectarian sovereignty as the source of the tax exemption. It is likewise difficult to see how the entanglement theory applies to these cases because their rationale would apply to First Amendment situations that do not involve religious exercise. Either way, Zelinsky argues that these cases view exemptions not as subsidies but as dependent on the appropriate tax baseline. This general approach is faithful to the cases; it is clear that the majority opinions did not treat exemption as a subsidy. The majority in both *Murdock* and *Follett* contrasted their holdings with the concerns of the dissenters, who feared the Court was merely underwriting religious activity. Justice Reed, in his *Follett* concurrence, took pains to note that the exemptions would not act to subsidize religion but would "give substance to the constitutional right of religious freedom."[64]

Thus, it appears that none of Zelinsky's three paradigms adequately address these decisions. The problem with the city license taxes was not that they interfered with sectarian sovereignty; indeed, the Court carefully distinguished the taxes in question from a generally applicable income or property tax, which could properly be assessed against a preacher or church.[65] It was not that the taxes engendered excessive entanglement with religion; their vice was that they acted as a prior restraint (which would be impermissible with any First Amendment activity).[66] And the Court certainly did not view the constitutionally mandated exemptions as subsidies.

A fourth paradigm is needed. Subsequent Supreme Court decisions confirm that none of Zelinsky's three approaches can adequately provide a consistent understanding of church tax exemptions. No Supreme Court decision has adopted the sovereignty paradigm as mandating exemptions for churches. It is questionable whether the entanglement paradigm can mandate an exemption; it is possible that it could do so where a tax is so onerous or difficult to enforce

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63. *See* Zelinsky, *supra* note 42, at 835 (stating that *Murdock* and *Follett* "indicate that exemption is constitutionally compelled for sectarian entities and undertakings when taxation intrudes too deeply upon the autonomy of religion") and at 813-14 (noting that *Murdock* and *Follett* reasoned in terms of entanglement).

64. *Follett*, 321 U.S. at 579.

65. Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943); Follett v. Town of McCormick, S.C., 321 U.S. 573, 577-78 (1944).

66. *Murdock*, 319 U.S. at 114; *Follett*, 321 U.S. at 577.

that it necessitates excessive government intrusion into church matters,[67] but the Court has yet to find a case where that applies. The subsidy paradigm under current Establishment Clause jurisprudence would never mandate an exemption; it could only strike an exemption down.

Therefore, it is best to say that tax exemptions are mandatory where the tax would infringe on the religious organization's First Amendment rights. In that respect, the Constitution demands the exemption. The "exemption" is merely an outcome required by the Bill of Rights—an outworking of free speech and free exercise principles. In this sense, one could argue that it is a matter of sovereignty, but the cases do not treat it as such. It is not that the church *qua* church is tax-exempt. It is that a tax is invalid as applied to a church insomuch as it abridges the church's First Amendment privileges.

Dean Herbert W. Titus argues that the free-exercise principle must "absolutely protect religion from the taxing power of the state."[68] Titus points to James Madison's definition of religion as "the duty that we owe to our Creator" and states that "religion is an unalienable right that man may neither give away nor take from another."[69] He notes that religious duties are objectively detached from civil jurisdiction, making "the propagation of opinions, religious and secular, . . . free from the state's taxing power . . . ."[70] From this understanding, sovereignty is bound up within the nature of church activity. Religion is "sovereign" in the sense that it is an objective duty that can neither be encouraged nor suppressed by civil government. Thus, religion is sovereign to the extent that it consists of a First Amendment right, a thing against which the Constitution (by recognition of the natural right) has circumscribed the government's authority to act. Under this paradigm, the 501(c)(3) campaign prohibition is against the nature of exemption because it attempts to suppress fundamentally religious speech.

Later Supreme Court cases bear out this understanding of the exemption. In *Walz v. Tax Commission*, the Court, in an 8-1 decision, upheld the constitutionality of church property tax exemptions in New York City.[71] In that case, the petitioner, an owner of real estate within the tax commission's jurisdiction, sought an injunction preventing the commission to grant

67. Jimmy Swaggart Ministries v. Bd. of Equalization of Calif., 493 U.S. 378, 392 (1990) (noting that "it is of course possible to imagine that a more onerous tax rate, even if generally applicable, might effectively choke off an adherent's religious practices").

68. Herbert W. Titus, *No Taxation or Subsidization: Two Indispensable Principles of Freedom of Religion*, 22 CUMB. L. REV. 505, 516 (1992).

69. *Id.* at 517.

70. *Id.* at 519.

71. Walz v. Tax Comm'n of the City of New York, 397 U.S. 664 (1970).

exemptions to religious organizations for properties used exclusively for religious worship.[72] The petitioner's argument was that the exemption in essence required him to make a contribution to the exempted religious groups in violation of the First Amendment's Establishment Clause.[73]

The Court rejected the petitioner's challenge on the grounds that a property tax exemption neither advances nor inhibits religion but is instead a "reasonable and balanced attempt to guard against [the] dangers" of government hostility towards religion.[74] Justice Burger's majority opinion reflected a non-entanglement stance; he recognized that either taxing or exempting churches would lead to some level of involvement between church and state.[75] He concluded that in either case the question is one of degree, and that exemption is less intrusive than taxation.[76]

Professor Zelinsky notes that the entanglement analysis employed in *Walz* is qualitatively different from that used in *Murdock* and *Follett*.[77] In those earlier cases, Justice Douglas found tax exemption to be constitutionally required, while Justice Burger in *Walz* simply finds that exemption is constitutionally permissible.[78] Zelinsky interprets the differences as owing to the relative degrees of entanglement theory applied; he sees Douglas as using a stronger form of the theory and Burger employing a weaker strain.[79] The differences among the cases, however, are clearer from a First Amendment perspective. In *Murdock* and *Follett*, the taxes were applied directly to a religious practice, and an exemption was necessary to preserve the free press and free exercise privileges at stake. In *Walz*, the exemption was from a property tax that was not levied against any particular expressive activity, religious or otherwise. Burger found that the exemption was permissible because it did not excessively enmesh the state in religious affairs, or vice versa. Thus, *Murdock* and *Follett* utilize a First Amendment paradigm, while *Walz* is best understood in terms of entanglement.

The concurrences of Justices Brennan and Harlan in *Walz* have had a more enduring effect than has the majority opinion.[80] These Justices upheld the property exemptions to churches because they were part of a broader exemption

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72. *Id.* at 666.
73. *Id.* at 667.
74. *Id.* at 673.
75. *Id.* at 674.
76. *Id.* at 674-75.
77. Zelinsky, *supra* note 42, at 817.
78. *Id.*
79. *Id.*
80. *Id.* at 835.

scheme that included other nonprofit organizations which promoted community welfare.[81] The fact that the tax commission had a broad scheme of which churches were only a part indicated a secular purpose.

What is clear from both the majority and concurrences in *Walz* is that they did not view exemption as a subsidy. Justice Burger explicitly stated: "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."[82] Justice Brennan also emphasized that "[t]ax exemptions and general subsidies . . . are qualitatively different."[83] The former relieves an entity from the burden of supporting the government while the latter involves the direct transfer of public money to private enterprise.[84] This type of entanglement/accommodation theory, like sovereignty theory, views exemptions as part of the tax base definition.

Justice Burger's view of exemption as an exclusion from the tax base would soon be chipped away. In 1983, the Court decided *Regan v. Taxation With Representation of Washington*, in which it held that the 501(c)(3) prohibition on substantial lobbying by nonprofit groups did not violate the Free Speech Clause.[85] Justice Rehnquist clearly stated that tax exemptions are "a form of subsidy that is administered through the tax system. . . . [with] much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income."[86] Rehnquist applied the subsidy theory in determining that Congress simply "chose not to subsidize lobbying as extensively as it chose to subsidize other activities that non profit organizations undertake to promote the public welfare."[87]

During the same term as *Regan*, the Court decided the more famous case of *Bob Jones University v. United States*, in which it upheld the revocation of tax-exempt status for two private Christian schools that employed racial criteria in their admissions policies.[88] Justice Burger stated that the rationale behind exemptions for non-profit organizations focuses on the public benefits the organizations provide; they are not taxed because they provide a benefit which the community is unwilling or unable to provide or "which supplements and

81. Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 687 (1970).
82. *Id.* at 675.
83. *Id.* at 690.
84. *Id.* at 690-91.
85. Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983).
86. *Id.* at 544.
87. *Id.*
88. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

advances the work of public institutions already supported by tax revenues."[89] Because the non-profit charities are, in Burger's reasoning, social agents of the state, they are allowed exemptions even though the exemptions act as indirect donations by other taxpayers.[90]

Several years later, the Court in *Texas Monthly, Inc. v. Bullock* struck down on Establishment Clause grounds a sales tax exemption provided only for religious periodicals.[91] Justice Brennan authored the majority opinion and, for the most part, adopted the same type of reasoning he employed in *Walz*. Just as he had upheld the property tax exemption in *Walz* because it extended to a broader class that included secular beneficiaries, Brennan ruled against the Texas exemption because it applied only to religious publications.[92] It thus lacked a valid secular purpose and had the effect of endorsing religion, Brennan concluded.[93]

Contrary to his concurrence in *Walz*, however, Brennan made the striking statement that "[e]very tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become 'indirect and vicarious' donors."[94] Yet it is important to note that even a subsidy theory cannot justify all tax burdens on religious entities. Brennan implied that there exist situations where the Free Exercise Clause requires a subsidy, such as when it removes "a significant state-imposed deterrent to the free exercise of religion . . . ."[95]

The following year, the Court decided *Jimmy Swaggart Ministries v. Board of Equalization*,[96] where it held that the application of a sales and use tax to a religious organization did not violate the Free Exercise or Establishment Clauses.[97] The ministry argued that the *Murdock* and *Follett* decisions stood for the proposition that a state may not apply a sales or use tax to the distribution of evangelical materials.[98] Justice O'Connor, writing for a unanimous Court, disagreed, noting that those cases involved "flat license taxes that operated as a prior restraint on the exercise of religious liberty."[99] O'Connor then held that the concern present in those cases does not exist where a tax has general application and is not imposed as a precondition to expressive

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89. *Id.* at 591.
90. *Id.*
91. Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).
92. *Id.* at 14-15.
93. *Id.* at 14-16.
94. *Id.* at 14 (quoting Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983)).
95. *Id.* at 15.
96. 493 U.S. 378 (1990).
97. *Id.* at 378.
98. *Id.* at 385.
99. *Id.* at 386.

activity.[100] The Court also rejected the ministry's contention that the tax imposed a substantial burden on its free exercise of religion.[101] O'Connor stated that a burden is not constitutionally significant merely because it reduces the amount of money an organization has to spend on its religious activities.[102]

Neither did the tax violate the Establishment Clause, the Court held, because it did not foster excessive entanglement with religion. "The sorts of government entanglement that we have found to violate the Establishment Clause," O'Connor observed, "have been far more invasive than the level of contact created by the administration of neutral tax laws."[103] Thus, the Court did not find any applicable rationale—including the First Amendment paradigm—that would mandate a sales/use tax exemption for religious materials.

If these cases can be harmonized at all, the trend seems to be this: the Supreme Court has made the subtle but important distinction between viewing a tax exemption as passively declining to place a burden on an entity and as affirmatively granting a benefit to that entity. The Court's more recent decisions in this area adopt the view that exemption is a subsidy. Because exemption is a subsidy, it is never mandated (except perhaps in the rare situation where the application of a tax would impose a prior restraint on First Amendment activity). The Constitution does not require Congress to pay for private activity. Further, in keeping with the subsidy theory, exemptions for religious entities are impermissible unless they are part of a broader exemption scheme that includes secular groups. In light of this trend, the 501(c)(3) provisions, including the campaign prohibition, merely establish the terms by which Congress is willing to subsidize charitable organizations. Unless the prohibition imposes the type of First Amendment burden found in *Murdock* and *Follett*, it is consistent with the Court's understanding of exemptions. Section IV examines the validity of the prohibition under the First Amendment.

III. THE 501(C)(3) ELECTIONEERING PROHIBITION: ITS HISTORY, RATIONALE, AND CHILLING EFFECT

The ban on non-profit campaigning did not find its way into the tax code until 1954, when Senator Lyndon B. Johnson offered it as a floor amendment.[104] It passed without debate, a hearing, or any other form of

100. *Id.* at 390.
101. *Id.* at 390-91.
102. *Id.* at 391.
103. *Id.* at 395-96.
104. 100 Cong. Rec. 9604 (1954).

legislative history.[105] The prevailing theory seems to be that Johnson introduced the amendment out of frustration over an opponent's receipt of contributions from a charitable fund during Johnson's previous election campaign.[106] Another theory is that Johnson was concerned about organizations with communist views receiving federal tax exemptions.[107] Whatever his motive, Johnson's purpose likely was not to limit the political activities of churches, as he himself took advantage of church support.[108] Regardless, the legislative record provides scant evidence of any rationale behind the restriction.

As it now stands, Section 501(c)(3) of the Internal Revenue Code exempts the following types of organizations from taxation:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for *religious*, charitable, scientific, testing for public safety, literary, or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation (except as otherwise provided in subsection (h)), *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.*[109]

This section grants exemption from the federal income tax; donations to organizations that qualify under this section are deductible.[110] This ability to

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105. *Id. See* Shawn A. Voyles, *Choosing Between Tax-Exempt Status and Freedom of Religion: The Dilemma Facing Politically-Active Churches*, 9 REGENT U. L. REV. 219, 234 (1997); Scott W. Putney, *The IRC's Prohibition of Political Campaigning by Churches and the Establishment Clause*, 64-MAY FLA. B.J. 27, 28 (1990); Steffen N. Johnson, *Of Politics and the Pulpit: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875, 880-881 (2001).

106. Johnson, *supra* note 105, at 880-81.

107. Kemmitt, *supra* note 22, at 153.

108. *Id.* Also, one commentator notes that the Majority Report for the bill including Senator Johnson's amendment stated: "The right of a minister, priest or rabbi to engage in political activity is clear enough. When such activity takes place, however, under the shelter of a tax-exempt organization which is not in itself a church, we question its permissibility." Allan J. Samansky, *Tax Consequences When Churches Participate in Political Campaigns*, 5 GEO. J.L. & PUB. POL'Y 145, 157 (2007).

109. 26 U.S.C. § 501(c)(3) (2000) (emphasis added).

110. 26 U.S.C. § 170 (2000).

attract tax-deductible donations is extremely valuable for many non-profits as the benefit of deductibility greatly helps them in gathering donors.[111]

Section 501(c)(3) establishes four major requirements that organizations must meet to qualify for the tax exemption.[112] First, the non-profit must be organized and operated exclusively for one of the enumerated charitable purposes.[113] Religion has been considered a valid charitable use since the days of the common law and is one of the qualifying purposes.[114] Second, no part of the organization's earnings may inure to the benefit of a stockholder or any other individual.[115] The rationale behind this requirement is obvious: Congress did not establish the exemption as a means for people to channel or generate personal income through a tax-free entity. Third, no substantial part of the organization's activity can consist of lobbying.[116] This requirement was inserted in 1934 by Senator David Reed of Pennsylvania as a measure to restrict charitable donations "made to advance the personal interests of the giver of the money . . . ."[117] Fourth, the organization is absolutely prohibited from participating or intervening in any political campaign for public office.[118]

Several rationales have been offered for the 501(c)(3) campaign prohibition. The major rationale suggested is that Congress has made a determination not to subsidize non-profit political activity.[119] This explanation appeared when Congress, in amending 501(c) in 1987 as part of the Omnibus Budget Reconciliation Act ("OBRA"), declared the policy that "the U.S. Treasury should be neutral in political affairs."[120] A related justification that has been offered is that Congress has an interest in ensuring that non-profits do not become a "loophole" by which otherwise non-deductible donations become deductible.[121]

These rationales are not strong enough to justify keeping the prohibition as it is. Given the venerable history of church tax exemption and church political involvement, an absolute ban with no legislative history and no official explanation (except one mentioned in passing several decades later) should be replaced with a more thoughtful provision. Also, the campaign prohibition is

111. Voyles, *supra* note 105, at 222.
112. 26 U.S.C. § 501(c)(3) (2000).
113. *Id.*
114. *See* Whitehead, *supra* note 18, at 533.
115. 26 U.S.C. § 501(c)(3) (2000).
116. *Id.*
117. Johnson, *supra* note 105, at 880.
118. 26 U.S.C. § 501(c)(3) (2000).
119. Johnson, *supra* note 105, at 890-93.
120. Voyles, *supra* note 105, at 234-35.
121. Johnson, *supra* note 105, at 893.

not sufficiently tailored to accomplish the Congressional purpose of avoiding loopholes. As Steffen N. Johnson points out, the deductibility issue is a lesser concern "where a minister merely speaks about the moral qualifications of candidates as part of regularly scheduled worship services."[122] He is undoubtedly correct in noting that "not all types of restricted political activity pose the same threat" to the integrity of the tax scheme.[123]

Churches are concerned about the prohibition because it has a chilling effect on their speech. As the late pastor Dr. D. James Kennedy put it, the rule "effectively silence[s]" clergy who, feeling compelled to speak on political subjects for conscience's sake, remain silent for fear of jeopardizing their ministries' 501(c)(3) status.[124] Some might argue that religious leaders should quit worrying so much about the financial constraints associated with a lack of 501(c)(3) designation and instead should speak their consciences without concern for tax consequences. Although that may be sound spiritual advice, it does not address the issue of whether Congress is legally justified in conditioning tax exemption on a church's self-censorship.

Others might insist that churches oppose the prohibition because these objecting congregations feel the balance of political power currently is in their favor. Under this view, churches actually would favor the ban if some dominant religious group were using an exemption to preach a message antithetical to their own. As the investigation into All Saints Episcopal Church illustrates, however, this is not an issue championed within one denomination or ideological circle. Leaders of many religions and political persuasions have come to the defense of All Saints—a politically liberal, mainline Protestant church.[125] Moreover, history illustrates that the IRS under both Republican and Democratic administrations has pursued churches for 501(c)(3) violations after those churches opposed the President during his campaign.[126] The push by churches to remove the campaign prohibition is not designed to enhance the

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122. *Id.* at 894.

123. *Id.*

124. Letter from D. James Kennedy, Ph.D. to Representative Walter Jones of North Carolina (Sep. 20, 2001), *available at* 145 CONG. REC. H6246 (daily ed. Sep. 12, 2002).

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

126. *See* Christian Echoes Nat'l Ministry v. U.S., 470 F.2d 849 (10th Cir. 1973) (revocation of tax exempt status for Christian advocacy organization that had used its publications and broadcasts to criticize John F. Kennedy as being too liberal); Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000) (revocation of tax exempt status for church that had published an advertisement in national newspapers warning Christians that Bill Clinton held unbiblical stances on issues).

political power of one party or faith but to allow all religious groups to preach freely during election seasons without fear of reprisal from the IRS.

The history and proffered rationales of the current 501(c)(3) campaign prohibition demonstrate that it is an ill-conceived measure with an unintended impact on churches' freedom of worship. Not only is the limitation poor policy, there are serious questions about its constitutionality.

IV. CONSTITUTIONALITY OF THE 501(C)(3) ELECTIONEERING PROHIBITION AS APPLIED TO CHURCHES

A. Free Speech

One constitutional argument against the prohibition is that it violates the First Amendment's Free Speech Clause by conditioning an organization's receipt of a government benefit on the surrender of its right to speak out on political issues. In *Speiser v. Randall*, the Supreme Court examined California's denial of tax benefits to veterans who would not foreswear advocacy of the violent overthrow of the government.[127] Justice Brennan found that this was an impermissible content-based restriction: "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for the speech."[128]

In *Regan v. Taxation With Representation of Washington*,[129] the Court declined to apply the *Speiser* rationale to the denial of tax exemption for an organization that would be substantially engaged in lobbying.[130] Justice Rehnquist stated that that case did not fit the *Speiser* model because Congress in 501(c)(3) simply decided not to subsidize lobbyists.[131] Rehnquist seemed to argue that lobbying is an activity not included within the enumerated charitable purposes. In other words, Rehnquist viewed the case not as Congress's conditioning tax exemption on groups' promises not to lobby but as a definition of the tax base that excluded lobbying organizations. This distinction between *Speiser* and *Regan* is quite ephemeral; it assumes one can distinguish a government benefit conditioned on the surrender of a First Amendment right from a government benefit denied to those who exercise that right.

The 501(c)(3) campaign prohibition is a content-based restriction that fits within the *Speiser* model. The prohibition is absolute; an exempt organization

127. Speiser v. Randall, 357 U.S. 513 (1958).
128. *Id.* at 518.
129. 461 U.S. 540 (1983).
130. *Id.* at 540.
131. *Id.* at 545-46.

that is deemed to have intervened or participated in a political campaign is disqualified. Based on the IRS and courts' interpretation of the prohibition, a church would violate 501(c)(3) and lose its tax-exempt status if the pastor preached a sermon about the moral failings of a political candidate or if he warned parishioners that it could be a sin to vote for that candidate. On the other hand, if that same pastor used non-political illustrations to make a point about moral decay in contemporary culture, the church clearly would remain exempt. Thus, a church's continued eligibility for the tax exemption depends on the content of its speech. Such a content-based restriction passes constitutional muster only if it satisfies strict scrutiny.

Under strict scrutiny, the prohibition is valid only if it is narrowly tailored to further a compelling governmental interest. It is possible that preserving the integrity of the tax code is a sufficiently compelling interest. The prohibition, however, is not narrowly tailored. In fact, it is about as extreme as it possibly could be. As mentioned previously, *any* statement or act deemed to be intervention or participation in a campaign is grounds for revocation of exemption. There exists a multitude of less restrictive means Congress could adopt to accomplish its purpose of preventing campaign donors from using non-profits as a vehicle for getting tax deductions.

B. Free Exercise

A second possible constitutional argument against the prohibition is that it violates churches' right to free exercise of religion. Religious organizations have not been successful in the few cases that have dealt with this issue. In *Christian Echoes National Ministry, Inc. v. United States*, an evangelistic organization contested the propriety of its tax exemption revocation.[132] The IRS revoked the ministry's exempt status because it determined that the organization was involved in substantial lobbying activities, in violation of the 501(c)(3) limitation.[133] Christian Echoes argued that the withdrawal of its tax exemption was an infringement of its First Amendment free exercise rights.[134]

The United States Court of Appeals for the Tenth Circuit disagreed, largely because it viewed tax exemptions as a matter of legislative grace rather than of right.[135] The court saw no problem with the choice Christian Echoes had between enjoying the exemption and pursuing its lobbying activities.[136]

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132. *Christian Echoes*, 470 F.2d at 849.
133. *Id.* at 853.
134. *Id.* at 856.
135. *Id.* at 857.
136. *Id.*

Moreover, the court found that the government had a compelling interest in enforcing the restriction: "That of guarantying that the wall separating church and state remain high and firm."[137] Although the *Christian Echoes* case involved the lobbying restriction rather than the campaign prohibition, its rationale could just as easily apply to the campaigning issue, provided that one accepts the court's assumptions: namely, that it is permissible to force religious groups to choose between free speech and tax exemption and that separation of church and state is a compelling interest.

The only case that has directly applied the Free Exercise clause to the revocation of a church tax exemption because of political campaigning is *Branch Ministries v. Rossotti* from the District of Columbia Circuit.[138] On October 30, 1992, four days before the presidential election, the Church at Pierce Creek in Binghamton, New York placed a full-page advertisement in major American newspapers warning Christians of then-Governor Bill Clinton's views on controversial social issues such as abortion, homosexuality, and the distribution of condoms to teenage students.[139] The headline of the advertisement, "Christians Beware," indicated its tone, and the advertisement's message intimated that it would be sinful for believers to vote for Clinton.[140] The newspaper ad prompted the IRS to review and later revoke the church's tax-exempt status because it alleged the publication of these anti-Clinton sentiments constituted prohibited intervention in a political campaign.[141]

The church filed suit, claiming, among other things, that the revocation violated its right to the free exercise of religion.[142] The circuit court held that the church failed to show how the revocation substantially burdened its religious exercise.[143] The court was not impressed with the church's argument that conditioning exemption on non-participation in political campaigns was itself an unconstitutional burden. Senior Circuit Judge Buckley wrote:

> The Church appears to assume that the withdrawal of a conditional privilege for failure to meet the condition is in itself an unconstitutional burden on its free exercise right. This is true, however, only if the receipt of the privilege (in this case the tax exemption) is conditioned "upon conduct proscribed by a religious faith, or . . . denie[d] . . . because of conduct mandated by religious

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137. *Id.*
138. Branch Ministries v. Rossotti, 211 F.3d 137, 137 (D.C. Cir. 2000).
139. *Id.* at 140.
140. *Id.*
141. *Id.*
142. *Id.* at 140-41.
143. *Id.* at 142.

> belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs."[144]

The court did not find such an instance with the Church at Pierce Creek because the church did not "maintain that a withdrawal from electoral politics would violate its beliefs."[145] The court further held that a loss of financial revenues due to the lack of exemption does not rise to the level of a "constitutionally significant" burden.[146]

The *Rossotti* court did not consider the *Murdock/Follett* or *Speiser* First Amendment theories. Under the *Murdock/Follett* theory, religious expression is not taxable in the first place. Under the *Speiser* theory, the state cannot condition a benefit on the surrender of a constitutional right. The condition imposes a *per se* burden. According to *Rossotti*, a state can hold out the carrot of tax exemption to churches who give up their right to speak on political candidates; alternatively, it may wield the stick of revocation if a church goes too far with its criticism or praise of political actors.

Yet the political cannot be neatly sifted from the religious in church doctrine and corporate worship. As one commentator puts it: "Many churches, perhaps most, consider it part of their mission to speak out and instruct on matters of public policy and morality. Undoubtedly some consider issues involving public policy—whether a position on abortion, going to war, or helping the underprivileged—among their most important tenets."[147] Because a church's application of Scriptural truths and moral codes, and indeed its social conscience, may require it to take a stand on issues espoused by candidates or even the candidates themselves, it is a substantial burden to demand that a church sacrifice that component of its religious exercise.

C. Establishment Clause

A third constitutional argument against the campaign prohibition is that it violates the Establishment Clause of the First Amendment, which provides: "Congress shall make no law respecting an establishment of religion . . . ."[148] The Supreme Court has articulated a three-part test to determine whether a law violates the Establishment Clause: first, the law must have a secular purpose; second, the law must have the primary effect of neither advancing or inhibiting

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144. *Id.* (quoting Jimmy Swaggart Ministries v. Bd. of Equalization of Calif., 493 U.S. 378, 391-92 (1990)).

145. *Id.*

146. *Id.*

147. Samansky, *supra* note 108, at 150-51.

148. U.S. CONST. amend. I, cl. 1.

religion; third, the law must not foster an excessive entanglement with religion.[149] A statute in violation of any one of these prongs is unconstitutional.[150]

It is difficult to argue that the campaign prohibition, within the larger context of 501(c)(3), lacks a secular purpose. The section mentions religion only to indicate that entities organized for religious purposes qualify for the exemption. The campaign prohibition, like all other provisions of the section, applies equally to religious and secular organizations. Scott W. Putney argues that the prohibition's purpose is to stifle disfavored political expression.[151] He also points to *Murdock* and *Follett* for the proposition that government cannot use the taxing power as a means of censorship.[152]

Putney's arguments on these points are ill-founded. Because there is no legislative history for the Senate floor amendment that inserted the campaign prohibition, Putney relies on historical theories about Senator Lyndon Johnson's personal motives for proposing the amendment.[153] Putney seems to reason that: (1) Johnson's motive was to suppress opponents' speech, including expression from dissenting religious groups; (2) his motive was imputed to the rest of Congress in passing the bill; and (3) this Congressional purpose is not secular because of its application to churches. The flaws in this reasoning are evident. Even if Johnson's personal agenda was to hamstring his political opponents, a theory that is not universally accepted,[154] his motivation cannot be attributed to every Congressperson who voted for the measure. More importantly, the fact that the amendment was designed to limit political expression by exempt groups would be a violation of the Free Speech Clause, not the Establishment Clause. Although the prohibition has been applied to ministries and churches, it has also been applied to secular organizations.

Similarly, Putney's reliance on *Murdock* and *Follett* is misplaced. The Court in those cases struck down city ordinances as applied to religious canvassers because they acted as prior restraints in violation of the colporteurs' right to the free exercise of their religion. The Court never suggested that the ordinances themselves lacked a secular purpose. In sum, Putney rightly critiques the policy rationales of the campaign prohibition, but to say that a law is misguided does not mean that its purpose is not secular.

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149. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
150. Stone v. Graham, 449 U.S. 39, 40-41 (1980).
151. Putney, *supra* note 105, at 28.
152. *Id.*
153. *Id.*
154. Kemmitt, *supra* note 22, at 153.

Putney next argues that the prohibition has the primary effect of both advancing and inhibiting religion.[155] He contends that the bar against church campaigning actually advances the "religion of secularism" while inhibiting other types of religious expression.[156] Quoting the Supreme Court's opinion in *Abingdon School District v. Schempp*, Putney observes that "affirmatively opposing or showing hostility to religion" is tantamount to establishing the religion of secularism.[157] Many churches refrain from political activity for fear of losing their tax-exempt status, thus secularizing the political arena to some degree. The prohibition, however, does not "affirmatively oppose" or "show hostility" to churches; it simply applies to them as well as every other organization exempt under 501(c)(3). Just as it is true that the prohibition has the practical effect of discouraging religious speech on political matters, it is just as likely that it stifles political speech from tax-exempt, anti-religious groups. As noted earlier, this effect on speech is unconstitutional in other ways, but it cannot be said to have the primary effect of advancing or inhibiting religion.

Putney makes his strongest arguments when he states that the prohibition fosters excessive entanglement with religion.[158] In articulating its Establishment Clause test, the Court in *Lemon* held that a law fosters such entanglement if it requires "a comprehensive, discriminating, and continuing state surveillance" to ensure compliance.[159] Putney notes two major ways in which the campaign prohibition constitutes impermissible government oversight of the church. First, it requires IRS agents to distinguish political speech from genuine religious speech, a task that is beyond the authority and competence of civil government.[160] A religious leader has the duty to call public figures to accountability and to admonish parishioners of the spiritual consequences of their civic involvement.[161] This religious calling cannot be neatly separated from what auditors might consider campaign activity.

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155. Putney, *supra* note 105, at 29.

156. *Id.* at 29-30.

157. *Id.* (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963)).

158. *Id.* at 30.

159. Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

160. Putney, *supra* note 105, at 30.

161. Professor Wyatt McDowell said it well: "The church's very capacity to be the church, to be faithful to its moral traditions and sense of mission requires an engagement with society that may be threatened by extreme or discriminatory application of [IRS] lobbying or campaign regulations." Wyatt McDowell, *How Religious Organizations and Churches Can Be Politically Correct*, 42 BRANDEIS L.J. 71 (2003).

Second, the supervision necessary to determine whether a church has violated the prohibition is too intrusive.[162] Enforcement of the prohibition against churches necessarily requires governmental inquiry into the content of worship services, sermons, and religious publications. The Supreme Court has cautioned: "'[P]ervasive monitoring' for 'the subtle or overt presence of religious matter' is a central danger against which we have held the Establishment Clause guards."[163] The natural corollary of that principle is that attempting to filter the political from the religious in the context of church practice is equally offensive to the First Amendment. Government oversight that necessitates inquiry into religious doctrine or "detailed monitoring and close administrative contact" between the state and the church runs afoul of the nonestablishment principle.[164] Due to the high degree of entanglement it fosters, Putney persuasively argues, courts should view the 501(c)(3) prohibition unconstitutional as applied to churches.

V. POSSIBLE ALTERNATIVES TO THE CURRENT SCHEME

Because of the policy concerns and constitutional problems surrounding the current I.R.C. campaign regulations, scholars and Congresspersons have proposed various amendments or alternatives to the current 501(c)(3) standard. Each of these proposals has benefits and drawbacks, and none of them offers a complete solution. The Houses of Worship Act, however, represents the best effort at reconciling religious freedom with the integrity of the tax scheme.

A. Repeal

One alternative would be to simply remove the campaign prohibition.[165] After all, the prohibition is an addition made to the tax code without much foresight or discussion, and Congress has done little since its adoption to provide a comprehensive rationale for it. Yet it seems that Congress does have a legitimate, rational basis for not granting tax exemptions to campaign

162. Putney, *supra* note 105, at 30.

163. Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 694 (1989).

164. Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 451 (1969); *Aguilar v. Felton*, 473 U.S. 402, 414 (1985).

165. *See, e.g.*, H.R. 2275, 110th Cong. § 1 (2007). H.R. 2275 is the most recent effort of Representative Walter Jones of North Carolina to remedy the unconstitutional effect of the application of 501(c)(3)'s campaign prohibition to churches. The resolution provides in pertinent part: "Paragraph (3) of section 501(c) of the Internal Revenue Code of 1986 (relating to list of exempt organizations) is amended by striking ', and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.'" *Id.*

organizations. Regardless of whether one views exemption as a subsidy or as a definition of the tax base, it is reasonable for Congress to make campaign groups pay their way like everyone else.

Congress could take the lesser step of excluding only churches and other religious organizations from the prohibition.[166] This would eliminate the Establishment Clause problems associated with enforcement and give churches the freedom to pursue their mission without having to sacrifice tax exemption.[167] Yet that move might itself violate the Establishment Clause; opponents likely would argue that it lacks a secular purpose and has the primary effect of promoting religion. Avoiding entanglement with religion is a valid secular purpose, but granting churches a tax benefit unavailable to similar, secular charities likely violates current Establishment Clause jurisprudence.[168] An exception for churches might also "open the floodgates to abuse," as one commentator has said, as campaign organizations would have an incentive to incorporate as nominally religious groups to gain a tax advantage.[169]

B. A "Substantiality" Test

A second alternative would be for Congress to adopt a "substantiality" test like the one it currently has in place for lobbying activities.[170] This would allow churches and religious groups to comment on political actors and issues, and even to engage in some active campaigning, so long as such activity did not constitute a substantial part of their affairs. As Putney observed, "It is far more

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166. *See, e.g.*, The Religious Freedom Act, S. 178, 110th Cong. § 2(a) (2007). To those organizations that fall within its ambit, the Religious Freedom Act would provide: "[N]o organization described in subsection (b) may be denied its Federal tax exemption under the Internal Revenue Code of 1986 by administrative or judicial action, nor shall donors to such organization be denied the deductibility of their contributions under such Code, because such organization engages in an activity that is protected by the United States Constitution, including comment on public issues, election contests, and pending legislation made in the theological or philosophical context of such organization." *Id.* Only religious organizations such as churches, mosques, synagogues, and temples qualify for the Act's protection. *Id.* at § 2(b).

167. The Religious Freedom Act of 2007, however, might actually *cause* problems of excessive entanglement, as the IRS would have to determine if a given religious organization meets its criteria for protection, which include factors such as the organization's "ecclesiastical government," "formal code of doctrine and discipline," "religious history," ordination of ministers, literature, services, and outreach programs. S. 178, 110th Cong. § 2(b) (2007).

168. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 1 (1989).

169. Erik J. Albin, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 582 (1999).

170. 26 U.S.C. § 501(c)(3) (2000).

practical to judge whether a church has engaged in *substantial* political campaigning than it is to absolutely ban such conduct."[171]

The key difficulty under this standard would be to determine when church campaigning becomes substantial, and the familiar IRS "facts and circumstances" test would rear its ugly, inconsistent head.[172] Although IRS regulations and rulings eventually would provide some guidance,[173] churches still would be in the position of wondering whether a particular sermon series, cultural ministry, or evangelism rally violated the restrictions. A substantiality standard would be subject to the same (if not greater) entanglement problems associated with enforcement because it would require auditors to examine not only the content of the act in question but the overall ministry of the church to see whether campaigning was a substantial part of church activities.

Moreover, a substantiality test still would operate as a content-based restriction on church speech and a substantial burden on the free exercise of their religion. The focus would still be on the content of the religious program, requiring an investigation of an even larger scale. Thus, a substantiality test would only move the margins back and would present all the infirmities of the current law.

C. *A Percentage Test*

In 1996, Representatives Philip Crane and Charles Rangel proposed the Religious Political Freedom Act, which would have amended 501(c)(3) to allow churches to spend a specified percentage of their gross revenues on political campaigning.[174] The Act would have permitted churches to spend up to five percent of gross revenues on campaigning and up to twenty percent of gross revenues on lobbying, so long as the combined campaigning and lobbying amounts did not exceed twenty percent.[175] Crane explained the proposed bill as an encouragement for political participation and a protection of religious liberty: "[The Act] seeks to expand participation in the political process. Allowing churches to exercise their First Amendment rights without fearing the loss of their tax-exempt status is not a partisan issue."[176]

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171. Putney, *supra* note 105, at 30 (emphasis included).

172. Ablin, *supra* note 168, at 584.

173. *Id.*

174. *Id.* at 585.

175. *Id.*

176. *Id.* (quoting Philip M. Crane, *Q: Should Churches Be Able to Lobby Congress and Support Candidates? Yes: Churches Have a Constitutional Right to Promote Candidates They Endorse*, INSIGHT MAG. Nov. 18, 1996, at 24).

Although the Act died in committee and was not reintroduced the following term, it has a significant appeal because it provides a bright-line rule. Under its terms, churches would be free to pursue political endeavors so long as their political expenditures did not exceed the stated percentage. This would promote consistency, predictability, and confidence in an otherwise unsettled and arbitrarily enforced area of law. Moreover, it would not provide an incentive for candidates or parties to form sham religious organizations to gain tax advantages.

Because the Act's scope is limited to churches, it invites the criticism that it has a religious purpose and the primary effect of advancing religion, in violation of the Establishment Clause. Providing the same lobbying and campaign freedoms to all 501(c)(3) groups would fix that, but Congress might be reluctant to grant such a sweeping provision, taking such a corporately large percentage of political activity out of the tax base.

D. Using FEC Guidelines in the Tax Context

Some legal scholars have advocated that Congress apply the standards of the Federal Election Campaign Act (FECA) to determine what political activities are permitted for tax-exempt organizations.[177] FECA requires organizations that communicate on behalf of "clearly identified" candidates to disclose their expenditures if the communication constitutes "express advocacy."[178] The Supreme Court has defined express advocacy to include only unambiguous statements that encourage citizens to vote for or against a candidate.[179] An example of the application of this narrow definition can be seen in *FEC v. Christian Action Network*, where the Fourth Circuit ruled that a Christian advocacy organization did not violate FECA by failing to report expenditures related to a television commercial it aired during the 1992 presidential election campaign.[180] The television advertisement sought to link Bill Clinton to "the homosexual agenda."[181] The court held that it was appropriate for the organization not to disclose its expenditures because the ad did not use explicit instructions such as "don't vote for Clinton."[182]

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177. *See* Laura B. Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308, 362 (1990); 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, 259-63 (1992).

178. Ablin, *supra* note 168, at 583.

179. *Buckley v. Valeo*, 424 U.S. 1, 42-45 (1976).

180. *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997).

181. *Id.* at 1057.

182. *Id.*

An application of this standard to the tax code would allow churches to participate in political activities that do not amount to express advocacy. Although a FECA-based test would present a brighter line than the current I.R.C. provision, it would not completely eliminate questions about whether a minister's stinging chastisement of a candidate from the pulpit amounts to prohibited conduct. In the case of All Saints Episcopal Church, for example, Reverand Regas's hypothetical, accusatory conversation with President Bush followed by his admonition to the audience to vote their values and conscience might fit even within the narrow definition of express advocacy.

Some would argue that a FECA-based test would go too far in allowing churches and religious groups to do everything but say "vote for candidate x."[183] Others would contend that such a rule does not go far enough.[184] If a pastor is truly motivated by his faith to warn parishioners not to vote for a candidate, why should he have to couch his admonition in "issue advocacy" language? In short, the FECA definitions do not fully accommodate religious freedom.

E. *The Houses of Worship Free Speech Restoration Act*

In 2005, Representative Walter Jones of North Carolina offered a definitional solution in H.R. 235, entitled "The Houses of Worship Free Speech Restoration Act."[185] H.R. 235 would have amended Section 501 of the I.R.C. by adding the following provision as subsection (p):

> An organization described in section 170(b)(1)(a)(1) or section 508(c)(1)(A) (relating to churches) shall not fail to be treated as organized and operated exclusively for a religious purpose, nor shall it be deemed to have participated in, or intervened in any political campaign on behalf of (or in opposition to) any candidate for public office, for purposes of subsection (c)(3), or section 170(c)(2), 2055, 2106, 2522, or 4905 because of the content, preparation, or presentation of any homily, sermon, teaching, dialectic, or other presentation made during religious services or gatherings.[186]

Its solution is definitional in that it does not propose an exception or addition to any other provision of the tax code. Rather, it explains that religious speech is included within the definition of "religious purpose" and clarifies that such

183. Albin, *supra* note 168, at 584.
184. Kemmitt, *supra* note 22, at 177-78.
185. H.R. 235, 109th Cong. §1 (2005).
186. *Id.*; *see also HR235.org*, http://www.HR235.org, (last visited Sept. 6, 2006).

speech is not included within the meaning of "participation" or "intervention" in a political campaign.

In this sense, the Houses of Worship Act is unremarkable. It seems unthinkable that a church could be deemed not to operate exclusively for a religious purpose based on the content of a religious service. Yet the IRS investigation of All Saints Episcopal Church demonstrates that such an idea is not far-fetched. Although the Act would not provide absolute protection for all of a church's political activity, it would shield core religious functions from serving as the basis for a revocation of tax exemption. It would alleviate the blatant First Amendment violations that plague the current prohibition. And it would provide a bright-line rule that allows ministers and congregations to admonish one another in the faith, even in the subject of civic duties.

1. Judging the Probable Effect of the Houses of Worship Act

The Houses of Worship Act would clarify the rationale behind tax exemptions for churches because it constitutes an effort to further define the applicable tax base. In other words, the fact that religious expression cannot serve as the basis for a tax revocation indicates that it is non-taxable activity rather than subsidized activity. It is outside the authority of Congress to penalize an entity for exercising a First Amendment right. The Act takes a step in the right direction by defining religious expression as excluded from IRS evaluation.

In so doing, the Act eliminates the content-based restriction in 501(c)(3) as applied to religious speech. Under the current code, every church, at least in theory, retains or forfeits its tax-exempt status every week based on the content of the sermon, homily, or teachings. If a minister preaches on themes in no way touching on current political campaigns, he remains within the permitted scope of religious activity. If he, however, uses a sermon illustration that praises or criticizes current candidates, or even delves too deeply into social issues that are deeply associated with a candidate, he runs the risk of "intervening" in the campaign. The Act does away with this content-based distinction. At the same time, it eliminates the entanglement problem associated with the current prohibition. IRS agents no longer have cause to investigate or monitor the religious conduct of churches in an effort to glean the political from the sacred.

It is important to note that the Houses of Worship Act is not a cure-all for church concerns in this area. Even if the Act had been the law during the Church at Pierce Creek investigation, the church likely would have lost its tax-exempt status anyway. This amendment would only cover religious speech that occurs in the context of a worship service or similar gathering; it would not protect financial expenditures or speech outside of a strict ecclesiastical context.

One could argue that the measure does not accomplish enough. The Church at Pierce Creek urgently contended that it was part of its religious duty to warn other Christians about the sinful approaches Bill Clinton was taking to major moral issues.[187] While this argument is not without merit, the Act shields those core ecclesiastical functions that have been traditionally protected under the Constitution. Although it may not be a perfect solution, it is a good example of how Congress can act incrementally to address a problem.

2. Judging the Constitutionality of the Houses of Worship Act

Some critics opine that the Houses of Worship Act violates the Establishment Clause because it applies only to churches. Indeed, this is the major problem with the Crane/Rangel amendment and other alternatives that provide a benefit to churches that is denied other non-profit organizations. Yet the Act does not confer a benefit at all. It is not providing an exemption or exception that is unavailable to other groups. It simply gives a definition of terms already used in 501(c). The definitions are needed particularly to eliminate entanglement concerns that do not exist outside the church context. The Act is thus an appropriate and constitutional measure to combat the evils of the current 501(c)(3) campaign prohibition in its application to churches.

VI. CONCLUSION

The I.R.C. prohibition on the campaign activities of religious organizations is a controversial issue that needs Congress' immediate attention. Congress should amend the prohibition to respect the religious freedom of the church. The history of church tax exemption reveals that it is a practice deeply rooted in the legal history of America. The nature of tax exemptions for churches involves a recognition that churches, at least in their core functions of religious expression, are outside of the appropriate tax base. Congress has no authority to condition exemptions on a surrender of the right to this expression because such a condition clearly violates the Free Speech Clause, even if not violating the Free Exercise and Establishment Clauses of the First Amendment. Several alternatives are available to the current scheme, but the Houses of Worship Act best eliminates the policy and constitutional concerns associated with the prohibition without raising significant problems in its own right.

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187. Branch Ministries v. Rossotti, 211 F.3d 137, 140, 142 (D.C. Cir. 2000)