

FROM *BRANCH MINISTRIES* TO SELMA: WHY THE INTERNAL REVENUE SERVICE SHOULD STRICTLY ENFORCE THE § 501(C)(3) PROHIBITION AGAINST CHURCH ELECTIONEERING

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I

INTRODUCTION

On Sunday, March 4, 2007, congregations in African American churches in Selma, Alabama, commemorated the forty-second anniversary of “Bloody Sunday,” the 1965 Selma voting-rights march.¹ Celebrating with them were Senators Hillary Rodham Clinton and Barack Obama, both candidates in the 2008 presidential election. Despite federal regulations prohibiting § 501(c)(3) nonprofit religious organizations from engaging in partisan political activities, Senators Clinton and Obama each made a campaign stop at prominent African American churches, delivering sermon-like speeches during Sunday services.

At Selma’s First Baptist Church, Senator Clinton proclaimed that the Voting Rights Act “giv[es] Senator Obama the chance to run for President of the United States. And by its logic and spirit, it is giving the same chance to Governor Bill Richardson, a Hispanic, and yes, it is giving me that chance, too.”²

Meanwhile, in a colloquial speech at Brown Chapel AME Church, Senator Barack Obama criticized the Department of Justice’s civil-rights record: “[T]he single most significant concern that this Justice Department under this administration has had with respect to discrimination has to do with affirmative action. That they have basically spent all their time worrying about colleges and

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1. Nedra Picker, *Clinton, Obama Honor Activists in Selma*, ASSOCIATED PRESS, Mar. 4, 2007; Trisha Henry & Mary Snow, *Obama, Clinton Mark Infamous Civil Rights Clash*, <http://www.cnn.com/2007/POLITICS/03/04/selma.democrats/> (last visited July 5, 2008).

2. Senator Hillary Clinton, Speech: Civil Rights: On the 42nd Anniversary of Bloody Sunday in Selma (Mar. 4, 2007), <http://www.hillaryclinton.com/news/speech/view/?id=1362> (last visited July 5, 2008).

universities around the country that are giv[ing] a little break to young African Americans and Hispanics to make sure that they can go to college, too."³

Although it is unclear if either Senator's campaign stop violated the Internal Revenue Service's (IRS) prohibition against religious-nonprofit participation in political activity, the March 4 speeches in Selma parallel alleged tax-code violations from the 1998 and 2004 national elections. Most importantly, the Selma speeches indicate that the regulations limiting political activity for § 501(c)(3) religious organizations will play an increasingly salient role in the 2008 presidential election. As churches and other nonprofit organizations test the boundaries of permissible political behavior, the IRS will continue to push back with organized enforcement mechanisms that may call into question, or at worst revoke, the tax-exempt status upon which nonprofit organizations so greatly depend.

Despite myriad criticisms, the IRS's enforcement of the prohibition against church electioneering is desirable from both nonprofit-policy and normative perspectives. Part I explains the history of tax-exempt organizations and the prohibition on political campaign activity, highlighting the development of IRS regulations and the constitutional paradigm under which tax-exempt organizations operate. Part II explores the rise in church electioneering after the pivotal *Branch Ministries* case, providing examples of alleged IRS Code violations in the 1998 and 2004 national elections. Part III looks at the Political Activities Compliance Initiative, an enforcement program that embodies the IRS's response to the rise in violations, and the criticism it has received in its original and revised forms. Part IV analyzes why the IRS's actions are desirable, from both nonprofit-advocacy and normative perspectives. Finally, Part V looks toward the 2008 presidential election and concludes that, if improved, the IRS's revised enforcement procedure may be the only comprehensive and constitutional means of mitigating impermissible church electioneering in the 2008 campaign.

II

§ 501(C)(3) TAX-EXEMPT ORGANIZATIONS AND THE PROHIBITION AGAINST POLITICAL CAMPAIGN ACTIVITY

A. Historical Perspective

In 1917, Congress enacted legislation codifying the first charitable income-tax deduction.⁴ Congress created the exemption to combat fears that the bill that raised federal tax rates to help finance World War I would deter private

3. Senator Barack Obama, Speech: Selma Voting Rights March Commemoration (Mar. 4, 2007), http://www.barackobama.com/2007/03/04/selma_voting_rights_march_comm.php (last visited Mar. 24, 2008).

4. JAMES J. FISHMAN & STEPHEN SCHWARZ, *NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* 874 (3d ed. 2006).

donations to charitable organizations, schools, hospitals, and churches.⁵ Implicit in this reasoning was the belief that private donations to charitable organizations were most often given from an individual's "surplus" income,⁶ which would have been reduced steeply by the 1917 federal tax increase.

Characterized as § 501(c)(3) nonprofit organizations under the Internal Revenue Code (IRC), churches⁷ benefit immensely from the charitable tax deduction. Contributions to churches, like donations to other § 501(c)(3) nonreligious charitable organizations, can be deducted from a donor's taxable income.⁸ In addition, churches are exempt from income and property taxes, and they have special access to tax-exempt bonds and benefits such as preferred postal rates.⁹

To receive and maintain tax-exempt status, churches, like other charitable organizations, must be "organized and operated exclusively for religious [or] charitable . . . purposes" that produce public benefit.¹⁰ Moreover, the IRC prohibits § 501(c)(3) organizations' net earnings from "inuring to the benefit of any private . . . individual" and requires that "no substantial part" of a § 501(c)(3)'s activities consist of attempts to influence legislation (lobbying).¹¹

In 1954, then-Senator Lyndon B. Johnson proposed, and Congress enacted, a legislative amendment prohibiting § 501(c)(3) organizations from participating in political activity.¹² At present, § 501(c)(3) organizations are "absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for

5. *Id.*

6. *Id.*

7. Here, the term "church" will be used according to IRS guidelines, which "use ['church'] in its generic sense as a place of worship including, for example, mosques and synagogues." INTERNAL REVENUE SERVICE, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS: BENEFITS AND RESPONSIBILITIES UNDER THE FEDERAL TAX LAW 2 (2006). In contrast, "religious organization" does not refer to churches, but rather to "nondenominational ministries, interdenominational and ecumenical organizations, and other entities whose principal purpose is the study or advancement of religion." *Id.*

8. John G. Simon, Harvey P. Dale & Laura B. Chisholm, *The Tax Treatment of Charitable Organizations*, in NONPROFIT ORGANIZATIONS, *supra* note 4, at 322–25. IRC § 170(c) allows taxpayers to deduct from their taxable income donations made to § 501(c)(3) nonprofit organizations, so long as those organizations comply with the restrictions promulgated in § 501(c), including the prohibition against intervening on behalf of, or in opposition to, political campaigns. See *Branch Ministries v. Rossotti*, 211 F.3d 137, 141–42 (D.C. Cir. 2000).

9. Simon, Dale & Chisholm, *supra* note 8, at 322–25.

10. FISHMAN & SCHWARZ, *supra* note 4, at 327.

11. *Id.* Churches meeting IRC § 501(c)(3) requirements are automatically deemed tax exempt; unlike other charitable organizations, churches are not required to apply to the IRS for tax-exempt status. INTERNAL REVENUE SERVICE, *supra* note 7, at 3.

12. Internal Revenue Service, Charities, Churches and Politics, <http://www.irs.gov/newsroom/article/0,,id=161131,00.html> (last visited Mar. 24, 2008). Senator Johnson's motivation for banning charitable organizations' participation in political activity is a subject of debate among scholars. Many argue that Johnson offered the amendment to prevent a political opponent from receiving campaign contributions from charitable organizations. 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, 152–53 (2006).

elective public office.”¹³ Violation of the prohibition on political activity can result in punishment, including the revocation of tax-exempt status (consequently threatening donors’ ability to deduct contributions),¹⁴ IRS warnings, or imposition of an excise tax of up to ten percent on political expenditures.¹⁵

B. Prohibition on Electioneering

The prohibition on church participation in political activity, often dubbed “electioneering,” extends to all facets of political engagement. The regulation prohibits religious leaders from “making partisan comments in official organization publications or at official church functions,”¹⁶ limits churches’ abilities to invite political candidates as event speakers,¹⁷ and prohibits church creation and distribution of voter guides as a covert means of favoring or opposing certain candidates.¹⁸ A church minister, for example, may not endorse (or oppose) a political candidate from the pulpit during a worship service. She may, however, endorse a particular candidate at a press conference at the candidate’s headquarters if she clearly conveys that she does not represent or speak on behalf of the church.¹⁹

Similarly, a church may invite political candidates to official events without jeopardizing tax-exempt status if it invites all candidates seeking the same office, refrains from endorsing or opposing a candidate, and abstains from political fundraising at the event.²⁰ A church may, for example, sponsor an educational voter forum. To determine the propriety of such an event, the IRS would look to factors such as discussion of a wide range of issues relevant to the elected office, equal time for each participant, and avoidance of “litmus test”-type questions for the candidates.²¹ Political candidates may also be invited to church events as noncandidates; this most often occurs when a candidate is already an elected official, celebrity, or other public figure. In such cases, the church is not required to provide equal access and opportunity to others, but neither the speaker nor the church officials may in any way discuss the speaker’s candidacy.²²

13. Internal Revenue Service, Political Campaign Activity, <http://www.irs.gov/charities/charitable/article/0,,id=163395,00.html> (last visited Mar. 24, 2008). In 1987, Congress amended the language prohibiting political activity to “clarify that the prohibition also applies to statements opposing candidates.” *Id.*

14. See INTERNAL REVENUE SERVICE, *supra* note 7, at 11.

15. *Id.* at 7; see also *id.* at 11.

16. *Id.* at 7.

17. *Id.* at 8.

18. *Id.* at 10. In 2004, the IRS made concerted efforts to clarify the prohibition on electioneering, which was for many years ambiguous to the extent that churches were unsure of exactly in which activities they could and could not engage. See discussion of IRS activities *infra* Part III.

19. See INTERNAL REVENUE SERVICE, *supra* note 7, at 8.

20. *Id.*

21. See *id.* at 8–9.

22. See *id.* at 9.

The prohibition on electioneering does not categorically preclude churches from producing and distributing educational voter guides during election season. But because some churches have used voter guides implicitly to support candidates, the IRS has advised that a voter guide is more likely to violate § 501(c)(3) regulations if it compares a candidate's policy position to that of the organization, if it does not include all candidates for the same office, or if the description of a candidate's position is biased.²³ Conversely, voter guides are less likely to jeopardize a church's tax-exempt status when they include all candidates and when they allow those candidates to describe their positions in their own words and to discuss a broad range of relevant issues.²⁴

Although the prohibition on electioneering necessarily precludes church participation in partisan activities, it does not, as many critics suggest, limit discussion of important policy issues. Church leaders can avoid institutional repercussions by clearly signaling comments made in an individual capacity and by restricting personal comments to nonofficial events and publications.²⁵ Indeed, IRS literature asserts that the prohibition on political activity "is not intended to restrict free expression on political matters by leaders of churches or religious organizations speaking for themselves, as *individuals*."²⁶ Moreover, religious leaders may discuss important policy matters during official services as long as the discussion does not endorse or oppose a particular candidate. Churches may also engage in a wide array of voter-education activities, such as candidate forums and voter-guide production, which comprehensively explain candidates' policy positions. Churches may even facilitate policy debates through candidate forums, so long as they do not circumvent regulations that prohibit favoring or opposing candidates.

C. Constitutional Paradigm: *Branch Ministries v. Rossotti*

Courts have consistently upheld the constitutionality of § 501(c)(3)'s prohibition on electioneering and the IRS's statutory authority to enforce it.²⁷ In so doing, courts have endorsed the idea that taxpayer dollars should not be used to subsidize—through a church's exemption from income and property taxes and receipt of other federal tax breaks—other citizens' public-policy and political preferences.²⁸ As the United States Court of Appeals for the District of Columbia Circuit explained in *Branch Ministries v. Rossotti*, the "Supreme

23. *Id.* at 10.

24. INTERNAL REVENUE SERVICE, *supra* note 7, at 10.

25. *Id.* at 7.

26. *Id.*

27. See *Branch Ministries v. Rossotti*, 211 F.3d 137, 137 (D.C. Cir. 2000); see also *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 856–57 (10th Cir. 1972) ("We hold that the limitations imposed by Congress in Section 501(c)(3) are constitutionally valid.").

28. See *Christian Echoes Nat'l Ministry, Inc.*, 470 F.2d at 854 ("The limitations in Section 501(c)(3) stem from the Congressional policy that the United States Treasury should be neutral in political affairs and that substantial activities directed to attempts to influence legislation or affect a political campaign should not be subsidized.").

Court has consistently held that, absent invidious discrimination, ‘Congress has not violated [an organization’s] First Amendment rights by declining to subsidize its First Amendment activities.’”²⁹

Moreover, abiding by § 501(c)(3)’s prohibition on political activity in exchange for organizational tax exemption does not infringe a church’s right to free exercise of religion. The United States District Court for the District of Columbia characterized this tradeoff in *Branch Ministries, Inc. v. Rossotti*: “Plaintiffs were offered a choice: they could engage in partisan political activity and forfeit their Section 501(c)(3) status or they could refrain from partisan political activity and retain their Section 501(c)(3) status. That choice is unconnected to plaintiffs’ ability to freely exercise their religion.”³⁰ *Branch Ministries*, in which the IRS “for the first time in its history . . . revoked a bona fide church’s tax-exempt status because of its involvement in politics,”³¹ has subsequently become the paradigm for modern constitutional analysis of § 501(c)(3) electioneering cases.

In that case, a § 501(c)(3) tax-exempt organization, Branch Ministries, Inc.,³² financed full-page advertisements in the *Washington Times* and *USA Today* opposing Bill Clinton’s 1992 candidacy for President.³³ The advertisements, published four days before the 1992 presidential election, announced: “Christian Beware. Do not put the economy ahead of the Ten Commandments.”³⁴ They continued, citing biblical passages and proclaiming that “Bill Clinton is promoting policies that are in rebellion to God’s laws . . . How then can we vote for Bill Clinton?”³⁵ Significantly, the advertisement included the following notice: “This advertisement was co-sponsored by The Church at Pierce Creek, Daniel J. Little, Senior Pastor, and by churches and concerned Christians nationwide. Tax-deductible donations for this advertisement gladly accepted.”³⁶ The notice, displayed in fine print at the bottom of the advertisement, also provided a mailing address for donations.³⁷

In response, the IRS initiated a Church Tax Inquiry pursuant to IRC § 7611.³⁸ On January 15, 1995, after a multi-year investigation into the church’s political activities—and those of its nonprofit parent, Branch Ministries—the IRS revoked Branch Ministries’ § 501(c)(3) tax-exempt status, retroactive to January 1, 1992.³⁹ Specifically, the IRS alleged that by placing, in its official

29. 211 F.3d at 143–44 (quoting *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 552–53 (1983) (Blackmun, J., concurring)).

30. *Branch Ministries, Inc. v. Rossotti*, 40 F. Supp. 2d 15, 25 (D.D.C. 1999).

31. 211 F.3d at 139.

32. Branch Ministries operated as the Church at Pierce Creek in Binghamton, New York. See Amy Keller, *Bill Would Allow Clergy to Mix Religion and Politics*, ROLL CALL, Aug. 8, 2002.

33. See *Branch Ministries, Inc.*, 40 F. Supp. 2d at 15–18.

34. *Id.* at 17.

35. *Id.*

36. *Id.*

37. *Id.*

38. See discussion of § 7611, *infra* note 78.

39. *Branch Ministries, Inc.*, 40 F. Supp. 2d at 17–18.

capacity, a political advertisement in two national newspapers and by soliciting funds to finance those advertisements, the church “undertook partisan political activity in direct violation of [§] 501(c)(3).”⁴⁰

Branch Ministries challenged the IRS’s ruling, asserting that revocation of the church’s tax-exempt status infringed its right to free exercise of religion pursuant to the First Amendment and the Religious Freedom Restoration Act (RFRA).⁴¹ The D.C. District Court rejected Branch Ministries’ argument since the church did not claim that “withdrawal from electoral politics would violate its beliefs,” thus substantially burdening its free exercise of religion.⁴² Instead, the court found that “the sole effect of the loss of the tax exemption will be to decrease the amount of money available to the Church for its religious practices,”⁴³ since losing its § 501(c)(3) tax-exempt status would prevent the church from providing tax deductions to charitable donors under IRC § 170(c).

Refuting Branch Ministries’ free-exercise claim, the D.C. District Court offered two illustrations of substantial burdens on religion that would *not* pass constitutional muster: cases “where the government ‘put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs,’ or where the government forces an individual to ‘choose between following the precepts of her religion and forfeiting benefits, on one hand, and abandoning one of the precepts of her religion.’”⁴⁴ Because Branch Ministries could follow its religious beliefs *and* receive § 501(c)(3) tax benefits by refraining from intervention in favor of, or in opposition to, political candidates, the D.C. District Court granted summary judgment in favor of the IRS.⁴⁵ One year later, the D.C. Circuit affirmed that decision, holding that “the revocation of the Church’s tax-exempt status neither violated the Constitution nor exceeded the IRS’s statutory authority.”⁴⁶

III

THE RISE IN CHURCH ELECTIONEERING POST-*BRANCH MINISTRIES*

Although Branch Ministries’ tax-exempt status was revoked in 1995 for an action that took place in 1992, the litigation surrounding the IRS’s decision extended through 1999. Yet even after media coverage of this highly visible case—which represented the IRS’s first revocation of a church’s tax-exempt status because of church electioneering⁴⁷—§ 501(c)(3) tax-exempt churches continued to engage in prohibited political activity.

40. *Id.* at 20.

41. 42 U.S.C. § 2000bb; *Branch Ministries, Inc.*, 40 F. Supp. 2d at 24.

42. *Branch Ministries, Inc. v. Rossotti*, 211 F.3d 137, 141 (D.C. Cir. 2000).

43. *Id.*

44. *Branch Ministries, Inc.*, 40 F. Supp. 2d at 25 (quoting *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

45. *Branch Ministries, Inc.*, 40 F. Supp. 2d at 27.

46. *Branch Ministries, Inc.*, 211 F.3d at 145.

47. *See id.* at 139.

In 1998, the Clinton Administration Department of Justice, together with the IRS, began enforcing the prohibition of tax-exempt religious organizations' participation in "partisan political activity."⁴⁸ Ironically, three days after the Clinton Department of Justice argued the *Branch Ministries* case in the D.C. Circuit, and only two days before the 1998 midterm elections, President Clinton visited Baltimore's New Psalmist Baptist Church.⁴⁹ Speaking to the Church during a televised worship service, President Clinton introduced Democratic state and national political candidates, all of whom were in attendance, and exhorted the congregation to elect more Democrats to Congress.⁵⁰ Employing partisan rhetoric, President Clinton juxtaposed New Psalmist's congregation against others who would vote in the upcoming midterm election, saying that "all over America today there are people in other churches who have a different view[,] [w]ho believe that their principles require them to vote only for people at the extreme right wing of the Republican Party."⁵¹ The President extolled his position as the "alternative"; he had "done everything [he] could to bring this country together, to reconcile the American people to one another so we could go forward together."⁵²

Although New Psalmist Baptist Church could have invited President Clinton to speak in his capacity as a public official, President Clinton's partisan rhetoric encouraging reelection of Democratic candidates almost certainly violated § 501(c)(3)'s prohibition on electioneering. Yet even if the church's advocacy, via President Clinton's speech, did not contravene § 501(c)(3), other elements of the President's visit patently violated the code. Most notably, Congressman Elijah Cummings, who represented the district where the church was located, had arranged President Clinton's visit and secured its funding by soliciting \$1,000 political contributions from supporters.⁵³ In exchange, the financial backers were invited to a "meet and greet" session and photographic opportunity with President Clinton after the service.⁵⁴ Even more indicative of the church's impropriety was that the White House could not use federal tax dollars to finance the event because it was deemed inherently political.⁵⁵

It is unclear whether the IRS initiated an investigation into the New Psalmist Baptist Church's political activities, despite similarities to the *Branch Ministries* case. That the New Psalmist's activities included patent § 501(c)(3) violations, such as fundraising at an official church function,⁵⁶ renders the

48. Randy Lee, *When God Speaks to a King: Faith, Politics, Tax Exempt Status, and the Constitution in the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 391, 391 (2000).

49. *See id.* at 395.

50. *Id.*

51. *Id.*

52. *Id.* at 395-96.

53. *See Lee, supra* note 48, at 396.

54. *See id.*

55. *Id.* It is interesting that, although the White House knew about Representative Cummings' fundraising plan in advance, the church did not. *Id.*

56. *See* INTERNAL REVENUE SERVICE, *infra* note 75, at 17 (deeming § 501(c)(3) organizations' contributions to candidates a "type of political intervention . . . easy to document").

Clinton Justice Department's prosecution in the *Branch Ministries* ironic and perhaps hypocritical.

Yet President Clinton's visit to New Psalmist Church was not the only instance of churches jeopardizing their tax-exempt status through seemingly political activities. Also in 1998, President Clinton appeared with Senator Chuck Schumer in New York City's Saint Sebastian's Church Parish Center.⁵⁷ Schumer's staff deemed the appearance a "campaign stop"⁵⁸—a definition that would appear inherently political to most observers. Similarly, in 1998 Vice President Al Gore appeared with Representative Dennis Kucinich and Democratic gubernatorial candidate Lee Fisher at Mount Sinai Baptist Church in Cleveland, Ohio.⁵⁹ During the visit, Vice President Gore urged the crowd, "[I]t's so important that you elect Lee Fisher as your next governor!"⁶⁰ Representative Kucinich responded, "Governor Lee Fisher. Say Amen! . . . The Democratic ticket. Say Amen!"⁶¹ Like Representative Cummings' unabashedly political fundraiser at New Psalmist Church, Vice President Gore's and Representative Kucinich's forthright advocacy in favor of a gubernatorial candidate appears to egregiously violate § 501(c)(3)'s prohibition on electioneering.

Church participation in electioneering has not, however, been limited to congregations supporting Democratic political candidates. By 2004, a presidential election year, the IRS saw a marked increase in complaints alleging church electioneering.⁶² Investigations of more than one hundred complaints after the 2004 election yielded a "'disturbing' amount of illegal politicking in churches and charities."⁶³ Two prominent examples stem from complaints filed against World Harvest Church and Fairfield Christian Church in Columbus, Ohio—a major battleground state for President Bush in the 2004 presidential election.⁶⁴ Both churches were accused of intervening on behalf of J. Kenneth Blackwell, the Republican candidate for Secretary of State.⁶⁵ One complaint alleged that the churches engaged in electioneering by allowing Blackwell to appear at official church events more than two dozen times, while other candidates were not invited or did not attend.⁶⁶ Another alleged that World Harvest Church promoted Blackwell's candidacy by improperly allowing use of

57. Lee, *supra* note 48, at 397.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Patrice Hill, *Church Politicking 'Disturbing' to IRS*, WASH. TIMES, Feb. 25, 2006, at A1.

63. *Id.*; see also discussion of 2004 PACI report *infra* Part III.

64. See Peter Slevin, *Ohio Churches' Political Activities Challenged: Clergy Members Are Pressing the IRS to Investigate Whether Partisan Support Violated Tax-Exempt Status*, WASH. POST, Apr. 25, 2006, at A3.

65. *Id.*

66. *Id.*

church facilities—specifically by permitting Blackwell to use the church’s private plane for three separate trips to events opposing same-sex marriage.⁶⁷

At the other end of the political spectrum, All Saints Church in Pasadena, California, provoked great consternation when its Rector Emeritus vehemently criticized President Bush in a sermon only days before the 2004 presidential election.⁶⁸ In a sermon titled “If Jesus Debated Senator Kerry and President Bush,” Reverend Dr. George F. Regas posited,

Jesus continues: “Mr. President, your doctrine of preemptive war is a failed doctrine. Forcibly changing the regime of an enemy that posed no imminent threat has led to disaster.” . . . Jesus turns to President Bush again with deep sadness. “Is what I hear really true? Do you really mean that you want to end a decade-old ban on developing nuclear battlefield weapons, as well as endorsing the creation of a nuclear ‘bunker-blasters’ bomb? Are you really going to resume nuclear testing? That is sheer insanity.” . . . Everything I know about Jesus would have him uttering those words.⁶⁹

Six months after the 2004 presidential election, the IRS initiated a Church Tax Inquiry into All Saints’ activities as part of what would become a much larger enforcement initiative.⁷⁰

IV

A FEDERAL RESPONSE: THE IRS PUSHES BACK

A. 2004 Political Activities Compliance Initiative

Despite prominent examples of churches violating the prohibition against political activity in the 1998 and 2004 elections, the IRS did not heighten its examination of alleged violations until June 2004,⁷¹ less than five months before the 2004 presidential election. To that end, the IRS implemented a two-pronged approach to alleviate the problem of church electioneering. First, it initiated an educational campaign, using press releases, workshops, forums, and speeches to remind churches of the prohibition.⁷² Through these communications, the IRS

67. *Id.* As of April 2006, the IRS was unable to confirm or deny that it had initiated an investigation based on these complaints. *Id.*

68. See FISHMAN & SCHWARZ, *supra* note 4, at 546.

69. Reverend Dr. George F. Regas, Rector Emeritus, Sermon at All Saints Church, Pasadena, Cal. (Oct. 31, 2004), available at [http://www.allsaints-pas.org/sermons/\(10-31-04\)%20If%20Jesus%20Debated.pdf](http://www.allsaints-pas.org/sermons/(10-31-04)%20If%20Jesus%20Debated.pdf).

70. See Stephanie Strom, *Group Seeks I.R.S. Inquiry of 2 Ohio Churches Accused of Improper Campaigning*, N.Y. TIMES, Jan. 16, 2006, at A9, in FISHMAN & SCHWARZ, *supra* note 4, at 548.

71. IRS enforcement of the prohibition on § 501(c)(3) political activity was markedly more lenient before the *Branch Ministries* case in 1992. There was, consequently, a stark contrast between the reality of churches’ political involvement (and alleged violations) and the strict statutory prohibition of such activities. See Jerome P. Prather, *Note: Tax Exemption of American Churches and Other Nonprofits: One Election Cycle After Branch Ministries v. Rossotti*, 94 KY. L.J. 139, 142 (2005–2006); Lee, *supra* note 48, at 392.

72. Mark W. Everson, IRS Commissioner, Remarks at the City Club of Cleveland, Ohio (Feb. 24, 2006), available at <http://www.irs.gov/irs/article/0,,id=154788,00.html> (last visited Mar. 24, 2008).

reached out to churches and other nonprofit organizations to explain and clarify the consequences of violating the ban on political activity.⁷³

Second, the IRS created a “dedicated enforcement program,”⁷⁴ the Political Activities Compliance Initiative (PACI), to “promote compliance with the IRC § 501(c)(3) prohibition against political campaign intervention,”⁷⁵ and to quickly identify and remedy “credible allegations of wrongdoing.”⁷⁶ The PACI was also created to examine potential § 501(c)(3) violations “during—not after—the election cycle”⁷⁷ in order to decrease prohibited activities in the course of the election season. Importantly, the PACI was charged with evaluating allegations for *all* § 501(c)(3) charitable organizations, which include both religious and secular nonprofit organizations. Accordingly, the PACI reviewed allegations of church electioneering pursuant to IRC § 7611, which regulates how the IRS “may conduct civil tax inquiries and [the] examination of churches.”⁷⁸

The IRS’s 2004 PACI report presents a compelling snapshot of § 501(c)(3) organizations’ compliance with the prohibition against intervention in political campaigns. Of 110 total cases reviewed by the IRS, sixty-three (representing fifty-seven percent) involved nonchurches, while forty-seven (representing forty-three percent) involved churches.⁷⁹ By February 26, 2006, the most recent update on the 2004 PACI, “[n]early three-quarters of the [82] examinations completed to date . . . concluded that the tax-exempt organizations, including churches, engaged in some type of prohibited political activity.”⁸⁰ Of the eighty-two cases closed, forty churches and forty-two nonchurches⁸¹ engaged in a range of prohibited activities that included distributing printed materials (such as church bulletins or inappropriate voter guides),⁸² endorsing a candidate, endorsing candidates on the organization’s website, placing election signs on the organization’s property, conferring preferential treatment upon a candidate invited to speak at the organization’s event, making monetary donations to political campaigns, and permitting religious leaders to endorse or oppose a

73. *Id.*

74. *Id.*

75. INTERNAL REVENUE SERVICE, FINAL REPORT, PROJECT 302: POLITICAL ACTIVITIES COMPLIANCE INITIATIVE (2006), available at http://www.irs.gov/pub/irs-tege/final_paci_report.pdf (detailing the results of the 2004 PACI).

76. Everson, *supra* note 72.

77. *Id.*

78. INTERNAL REVENUE SERVICE, *supra* note 7, at 22. Through § 7611, Congress limits IRS church-related tax inquiries to cases in which “the Director, Exempt Organizations, Examinations reasonably believes, based on a written statement of the facts and circumstances, that the organization: (a) may not qualify for the exemption; or (b) may not be paying tax on an unrelated business or other taxable activity.” *Id.*

79. INTERNAL REVENUE SERVICE, *supra* note 75, at 8.

80. Press Release, Internal Revenue Service, Internal Revenue Service Releases New Guidance and Results of Political Intervention Examinations (Feb. 24, 2006), <http://www.irs.gov/newsroom/article/0,,id=154780,00.html> (last visited Mar. 24, 2008).

81. INTERNAL REVENUE SERVICE, *supra* note 75, at 18.

82. *Id.* at 16.

candidate from the pulpit.⁸³ Although these activities were not carried out exclusively by churches, each category of offense was committed by at least one church.⁸⁴

As a result of the 2004 investigation, eighty-four percent of church case examinations ended with the IRS issuing advisories⁸⁵ indicating that the organization impermissibly intervened in a political campaign, but that it was “of a one-time, nonrecurring nature[,] . . . was taken in good faith reliance on advice of counsel, . . . was otherwise shown to be an anomaly,” or that the organization corrected the violation “and established that it had taken steps to prevent any future political intervention.”⁸⁶ Only eight percent of the church cases resulted in “no change,”⁸⁷ a determination that the organization did not violate the conditions of § 501(c)(3).⁸⁸

The IRS made several significant findings through the PACI. First, although many of the allegations yielded evidence of wrongdoing, the 2004 PACI Report points out that there are “over one million [§] 501(c)(3) organizations” and that “media reports on the activities of a small representation of those organizations can, rightly or wrongly, create an impression of widespread noncompliance.”⁸⁹ So although it is true that the IRS can justify undertaking increased measures to identify and remedy church electioneering, it is also true that the media may disproportionately emphasize stories about the relatively small sphere of offenders.

Second, the IRS identified ambiguity in the IRC language instructing that § 501(c)(3) nonprofits “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.”⁹⁰ Because textual confusion led many organizations—especially churches—to interpret the prohibition as “limited to *expressly* endorsing or opposing candidates,” many religious leaders “made a conscious effort to avoid an express endorsement, yet made an indirect endorsement clearly conveying a message on behalf of, or in opposition to, a candidate.”⁹¹ Consequently, churches may not have realized that implicit political interventions, such as preferential treatment to political candidates at official church functions, violate the statute in the same way a verbal endorsement from the pulpit would.

83. Press Release, Internal Revenue Service, *supra* note 80.

84. INTERNAL REVENUE SERVICE, *supra* note 75, at 15–18.

85. *Id.* at 21.

86. *Id.* at 18.

87. *Id.* at 21.

88. *Id.* at 18. Notably, a “no change” finding does not signify a total lack of culpability. Many allegations of nonprofit political intervention that ultimately resulted in a “no change” finding “appeared to be actions of the organization, but . . . were shown, upon examination, to be attributable to someone other than the organization.” *Id.* at 22.

89. INTERNAL REVENUE SERVICE, *supra* note 75, at 2.

90. *Id.* at 21.

91. *Id.* at 21–22 (emphasis added).

B. 2006 Revision and Application

It was in this context—a combination of newfangled enforcement and confusion—that the IRS decided to revise the PACI. In a February 2006 speech, then-IRS Commissioner Mark Everson unveiled revised examination procedures—based on best practices from the 2004 PACI—for the 2006 election cycle.⁹² In his speech, Everson proposed improvements for the 2006 PACI: use information gleaned from the 2004 election cycle to educate and inform churches leading up to the 2006 midterms, begin enforcement procedures earlier in the election cycle, publicize enforcement efforts, and expand human capital so more teams can be trained to identify and examine alleged violations.⁹³

By unveiling procedures for the 2006 PACI in February—more than eight months before the November midterm election—the IRS put churches and other § 501(c)(3) nonprofit organizations on notice of the agency's intention to continue enforcing the ban on electioneering. Moreover, introducing revised procedures in February allowed the IRS to educate organizations before the most intense campaign months preceding the November election. One nonprofit director remarked, "They're getting information out early this year, before we get into the heat of an election year. By releasing data on the findings, they're moving toward more transparency."⁹⁴

In fact, the IRS's modified PACI did increase transparency. By issuing reports and other educational materials, such as fact sheets,⁹⁵ the IRS clarified § 501(c)(3) by illustrating categories of prohibited activities and by providing examples of activities that would and would not be acceptable under the Code. For example, the IRS's *Tax Guide for Churches and Religious Organizations*, revised in September 2006, explains the policy regarding churches' inviting political candidates to speak at official functions, then provides two hypothetical scenarios. In the first example,

Minister E invited the three Congressional candidates for the district in which Church N is located to address the congregation, one each on three successive Sundays, as part of regular worship services. Each candidate was given an equal opportunity to address and field questions on a wide variety of topics from the congregation. Minister E's

92. See *IRS Releases New Guidance, Results of Political Intervention Examinations*, US FED NEWS, Feb. 24, 2006 ("As the 2006 electoral season approaches, we are going to provide more and better guidance and move quickly to address prohibited activities.") (quoting IRS Commissioner Mark Everson). Everson also provided the context for the IRS's increased vigilance over churches violating the prohibition on political intervention: one of the IRS's stated objectives for the years 2005–2009 is "deter[ring] abuse within tax-exempt and governmental entities and misuse of such entities by third parties for tax avoidance and other unintended purposes." Everson, *supra* note 72.

93. Everson, *supra* note 72.

94. Stephanie Strom, *I.R.S. Finds Sharp Increase in Illegal Political Activity*, N.Y. TIMES, Feb. 25, 2006, at A8 (quoting Liz Towne, director of advocacy programs for the Alliance for Justice).

95. See, e.g., Internal Revenue Service, *Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations*, Feb. 17, 2006, <http://www.irs.gov/newsroom/article/0,,id=154712,00.html> (last visited Mar. 24, 2008).

introduction of each candidate included no comments on their qualifications or any indication of a preference for any candidate.⁹⁶

According to the report, Church N's actions are permissible and do not constitute political campaign intervention.⁹⁷ The report provides a second example to illustrate impermissible activity:

Minister F is the minister of Church O. The Sunday before the November election, Minister F invited Senate Candidate X to preach to her congregation during worship services. During his remarks, Candidate X stated, "I am asking not only for your votes, but for your enthusiasm and dedication, for your willingness to go the extra mile to get a very large turnout on Tuesday." Minister F invited no other candidate to address her congregation during the Senatorial campaign. Because these activities took place during official church services, they are attributed to Church O. By selectively providing church facilities to allow Candidate X to speak in support of his campaign, Church O's actions constitute political campaign intervention.⁹⁸

In addition to these two examples, the report offers pairs of contrasting illustrations for individual activity by religious leaders, candidate forums, public officials' speaking as noncandidates, and publishing voter guides.⁹⁹

C. Criticisms and Responses

Despite efforts to increase transparency and understanding through the 2006 PACI, the IRS still faces critics who object to the agency's enforcement activities on both substantive and procedural grounds. Substantively, Congress's prohibition on church electioneering provokes criticism that limiting speech in churches infringes on parishioners' First Amendment rights to freedom of speech and free exercise of religion.¹⁰⁰

These critics, however, contravene well-established precedent¹⁰¹ and discount § 501(c)(3)'s policy implications. Although it is true that churches may not directly or indirectly intervene in political campaigns, they may still discuss important social-justice and public-policy issues.¹⁰² Critics of the IRS regulations make a false distinction: neither Congress nor the courts have proscribed religious Americans from participating in public-policy debates; instead, they have only prohibited political activities under official church leadership, on state-subsidized land, with clergy whose salaries are indirectly subsidized by federal tax dollars.

96. INTERNAL REVENUE SERVICE, *supra* note 7, at 9.

97. *Id.*

98. *Id.*

99. *See id.* at 7–10.

100. *See Lee, supra* note 48, at 393 (“[W]hen the state forecloses churches from attempting to serve as a conscience to power, the state violates the Establishment Clause, because one of the real values of the Establishment Clause is guaranteeing that churches in America retain an unrestricted voice worthy of listening to.”). *See also* discussion of *Branch Ministries*, *supra* Part I.

101. *See* discussion of the constitutionality of § 501(c)(3)'s limitations, *supra* Part I.

102. *See* Stephanie Innes, *Churches Must Toe IRS Line During Elections*, ARIZ. DAILY STAR, Oct. 29, 2006, at A1 (providing examples of the broad range of permissible activities, including handing out voting guides and hosting candidate forums).

On a substantive level, critics also allege that to enforce § 501(c)(3), the IRS must examine the content of churches' speech, thus threatening First Amendment protections.¹⁰³ Such criticism is, however, misplaced. IRS documents categorically forbid examiners from reviewing religious content in the course of tax evaluation:

The courts have interpreted the First Amendment as providing for an absolute freedom of religious belief. Thus, IRS personnel engaged in church tax inquiries or examinations may not question or evaluate the content of a religious belief. However, actions undertaken as a result of religious beliefs are subject to government regulation, including taxation, when such actions implicate a compelling government interest.¹⁰⁴

In addition to substantive constitutional concerns, many critics are apprehensive of the IRS's procedures for enforcing § 501(c)(3). Naysayers complain that ascertaining political intervention is a precarious task. Admittedly, "the Code contains no bright line test for evaluating political intervention."¹⁰⁵ Even so, there *is* a bright-line rule in many cases of alleged electioneering. Some actions, when undertaken by a church, clearly violate the IRC. Candidate endorsements, candidate opposition, voter guides that obviously favor one candidate over another, and campaign contributions to a candidate clearly defy the conditions for maintaining tax-exempt status.¹⁰⁶ That one side of the bright line—the permissibility of a church's website content, educational voter guides, or candidate forums¹⁰⁷—is more difficult to discern does not signify the total absence of boundaries. Surely, a carefully organized education and enforcement program is preferable to a total lack of IRS enforcement.

Opponents of the IRS's enforcement methods also allege that the agency selectively enforces the ban on electioneering by relying on the opinions of IRS political appointees.¹⁰⁸ This, too, is misunderstood: IRS career civil servants—not political appointees—manage and investigate complaints filed with the PACI.¹⁰⁹ In fact, following the 2004 investigation into political remarks made by

103. Prather, *supra* note 71, at 156.

104. IRS, Section 7: Church Tax Inquiries and Examinations—IRC § 7611, <http://www.irs.gov/irm/part4/ch53s07.html> (last visited Mar. 24, 2008). *See also id.* ("[IRS] examination of churches . . . [is] subject to special procedures because of the rights guaranteed by the First Amendment of the United States Constitution and the restrictions imposed by the Internal Revenue Code (IRC). In carrying out the IRS's obligation to enforce the tax laws applicable to churches and organizations claiming to be churches, IRS personnel must be aware of the sensitive nature of the church-state relationship and observe the restrictions on examinations of churches.").

105. INTERNAL REVENUE SERVICE, *supra* note 75, at 1.

106. *See* Jocelyne Miller & Harvey Berger, *Problems at the Polls: It's Nearly Election Time—Are You Ready?*, NON-PROFIT TIMES, Apr. 1, 2006, at 3. *See also* Prather, *supra* note 71, at 156 ("Admittedly, overtly partisan political activity is somewhat easier to identify and categorize than issue-related activity.").

107. *See* Miller & Berger, *supra* note 106, at 3.

108. Prather, *supra* note 71, at 156.

109. *See IRS Releases New Guidance, Results of Political Intervention Examinations*, *supra* note 92 ("To ensure fairness and impartiality, the issues examined stretched across the political spectrum. Further, IRS career civil servants handled the cases without regard to political affiliation.").

Chairman Julian Bond of the National Association for the Advancement of Colored People (NAACP) (a § 501(c)(3) tax-exempt organization, albeit not a religious one), then-IRS Commissioner Mark Everson requested an examination into allegations that the IRS initiated the investigation for political reasons.¹¹⁰ In the NAACP case, Bond allegedly “distribut[ed] statements in opposition of George W. Bush for the presidency.”¹¹¹ Upon concluding the investigation, which cleared the NAACP of wrongdoing, the Inspector General at the Department of Treasury Office of Tax Administration found that “the IRS had set up proper procedures and followed them,” flatly rejecting allegations of “inappropriate actions, such as political influence.”¹¹²

Even though the Inspector General’s report did not find evidence of political strong-arming, the IRS does face a monumental task in fairly enforcing and prosecuting offenders. To identify and prosecute every offender, the government would, according to one author, have to monitor the “sermons, liturgies, newsletters, literature distributions, and other communications of those 250,000 churches [synagogues, mosques, and other houses of worship] to constantly determine whether any prohibited political activity was being carried on within (or outside) the church walls.”¹¹³ Critics are understandably opposed to a society in which a government agency constantly monitors religious nonprofits’ activities. And yet, that fear is short-sighted, since it fails to recognize the IRS’s larger policy goals of education and deterrence. The IRS does not need to selectively seek out churches that violate § 501(c)(3); community members who identify abuse of their tax dollars or who feel uncomfortable attending an overtly political religious service refer cases of potential abuse to the agency.¹¹⁴ By pursuing credible allegations of wrongdoing,¹¹⁵ the IRS raises awareness of the problem and educates other organizations about how to avoid impermissible actions. The IRS neither intends to, nor realistically can, identify and investigate every case of church electioneering nationwide. As with all regulatory bodies, the IRS promotes education and compliance by investigating the most prominent and egregious § 501(c)(3) violations.¹¹⁶

110. See Albert B. Crenshaw, *No Political Motives Found in IRS Probes*, WASH. POST, Feb. 18, 2005, at A27.

111. Gail Perry, *IRS, Charities Clashing Over Possible Political Activities*, ACCOUNTING TODAY, Apr. 3, 2006, at 3.

112. Crenshaw, *supra* note 110.

113. Prather, *supra* note 71, at 157.

114. See INTERNAL REVENUE SERVICE, *supra* note 75, at 2 (“PACI was a comprehensive examination program of limited-scope examinations focusing on allegations of political campaign intervention by IRC § 501(c)(3) organizations referred to the IRS.”).

115. See *id.* at 3 (“The standard for determining if the information [referrals] warranted further IRS action is whether it supports a reasonable belief that the organization may have violated the prohibition of § 501(c)(3) that it not participate in, or intervene in (including publishing or distributing of statements), a political campaign on behalf of (or in opposition to) any candidate for public office.”).

116. See *id.* at 1 (“The objective of the project was to promote compliance with the IRC § 501(c)(3) prohibition against political campaign intervention by reviewing and addressing allegations of political intervention (PI) by tax exempt organizations This would not only deter organizations contacted

V

ANALYSIS: WHY IRS ENFORCEMENT AND THE PACI ARE DESIRABLE

A. The Perspective of Nonprofit Advocates

The IRS's recent enforcement, vis-à-vis the PACI, of the prohibition against church electioneering achieves the dual goals of protecting nonprofits' missions and maintaining their integrity. Then-IRS Commissioner Mark Everson highlighted these policy concerns in his February 26, 2006, speech announcing a revised PACI. First, "if individuals and organizations that should be taxed masquerade as charities, over time there will be an erosion of our nation's revenue base."¹¹⁷ Second, "if Americans lose faith in charities because of abuses, they will stop giving[,] and those in need will suffer."¹¹⁸ In other words, if the public loses faith in charities, private donations to nonprofits will decrease, rendering charities ineffective at providing the social assistance government traditionally relies on (and that it indirectly subsidizes through tax exemptions). Ultimately, distrust of charitable giving will increase government involvement in social services, thus minimizing the role of community-based organizations (including § 501(c)(3) churches) and increasing costs for taxpayers.¹¹⁹

To prevent distrust and, indeed, to assure Americans that churches and other nonprofits are "above the political fray,"¹²⁰ § 501(c)(3) organizations need clear guidance regarding the activities that may jeopardize their tax-exempt status. From the perspective of a nonprofit advocate, then, the PACI embodies the IRS's efforts to act transparently and to effectuate the purpose of § 501(c)(3). As one nonprofit trade publication points out, "[a]dvocates for nonprofit groups praised the [2004 PACI] report, saying it was unusually clear and straightforward."¹²¹ This statement demonstrates a marked improvement over the concerns expressed by a nonprofit expert in a 2003 letter to the editor: "We found that the typical executive director of a § 501(c)(3) has little understanding of what the law actually says. . . . The law is a patchwork of

under the program from continuing noncompliance, but also would serve to establish IRS enforcement presence and reinforce the IRS education efforts."). *But see* Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 776-77 (2001) (expressing concern that "the premises of the conditional exemption scheme, the labeling it invites, and the monitoring of the distinctions it creates will tame religion by saying what it is and identifying what it is not, tempt religion to revise its conception of itself and of its mission, and convince religious consciousness to internalize the state's own judgment that faith simply does not belong in politics").

117. Everson, *supra* note 72.

118. *Id.*

119. *See* Miller & Berger, *supra* note 106 ("[P]rotection of the charitable community's image justifies enforcement of the ban. . . . [I]f the public loses faith that its charities are above the political fray charitable donations will dwindle. If this occurs, organizations may have to terminate charitable operations that they can no longer sustain, thus increasing pressure on the government to provide services formerly provided by the charities.").

120. *Id.*

121. Strom, *supra* note 94.

confusing, contradictory, and unworkable provisions.”¹²² Overall, the IRS is taking a crucial—and unprecedented—step toward increased compliance by promoting understanding of prohibited activities.

Most important, the IRS has not frustrated the core purpose of nonprofit organizations or churches by enforcing § 501(c)(3).¹²³ An Arizona minister recently expressed concern that “if we [clergy] can’t speak out on issues of injustice, that flies in the face of our whole Judeo-Christian tradition.”¹²⁴ In fact, religious organizations may participate in a broad scope of permissible political activity, including discussions of community injustice and the policies that should generally address it. Even the leader of a prominent anti-electioneering advocacy group agrees: “It’s not illegal to talk about issues. This has nothing to do with speaking out on moral issues. This is only about maintaining a complete and clearly understood prohibition against candidate endorsements.”¹²⁵

Churches have broad latitude¹²⁶ in their ability to discuss salient policy issues “ranging from abortion, gay rights[,] and gun control to poverty, civil rights[,] and the death penalty.”¹²⁷ They may engage in aforementioned voter-education activities, such as hosting candidate forums and producing voter guides, so long as the actions do not cross the line into political intervention. Indeed, data show that educational efforts such as distributing voter guides are among the least likely to trigger a violation.¹²⁸

Alternately, a church may establish a separately incorporated § 501(c)(4) organization¹²⁹ to pursue lobbying and electoral activities that would not be permissible under § 501(c)(3). And if that level of participation were not sufficient, a church could always forego its tax-exempt status to engage in unlimited partisan political activities. Regardless of a church’s level of chosen activity, preventing § 501(c)(3) organizations from impermissibly engaging in

122. Jeffrey M. Berry, Letter to the Editor, *The Lobbying Law Is More Charitable Than They Think*, WASH. POST, Nov. 30, 2003, at B1.

123. *But see* Garnett, *supra* note 116, at 779, 799 (asserting that tax exemption is the government’s paying churches not to talk and “[t]hat the government’s assignment of its own meanings to what churches do, and what government and law say about the place of religion in public life, threaten to further denude the ‘public square’ and weaken the much-remarked structures of civil society”).

124. Innes, *supra* note 102 (quoting Reverend David Wilkinson of Tucson’s St. Francis in the Foothills Church).

125. Keller, *supra* note 32 (quoting Americans United for Separation of Church and State Executive Director Reverend Barry Lynn).

126. *See* Hon. Timothy E. Wirth, President, United Nations Foundation, *Mobilizing for Social Change: Impacting Policy, Politics and the Legislative Agenda*, Mar. 22, 2005 (on file with author) (“[T]here is a broad latitude to engage in public education efforts that promote a point of view, again just so long as you don’t engage in partisan politics.”).

127. AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, RELIGION, PARTISAN POLITICS AND TAX EXEMPTION: WHAT FEDERAL LAW REQUIRES AND WHY (2006), *available at* <http://projectfairplay.org/brochure/> (last visited Mar. 24, 2008).

128. *See* OMB WATCH, REPORT: IRS POLITICAL ACTIVITIES ENFORCEMENT PROGRAM FOR CHARITIES AND RELIGIOUS ORGANIZATIONS: QUESTIONS AND CONCERNS, SUPPLEMENT A: RESULTS AND PROCEDURES OF THE 2004 ENFORCEMENT PROGRAM 21 (July 2006).

129. *See* Branch Ministries, Inc. v. Rossotti, 211 F.3d 137, 143–44 (D.C. Cir. 2000) (describing the advantages of a church’s creating a separate § 501(c)(4) organization for lobbying purposes).

political activity maintains, from a nonprofit perspective, the integrity and the mission of those organizations.

B. Normative and Policy Arguments

Although IRS Commissioner Everson highlighted two of the main policy rationales for strictly enforcing § 501(c)(3), he failed to mention two persuasive arguments. First, American taxpayers should not be forced to indirectly subsidize political activity antithetical to their own beliefs. Normatively, the government has a compelling and desirable reason to enforce the ban against church electioneering: “that of guarant[ee]ing that the wall separating church and state remain high and firm.”¹³⁰ The idea that the federal government could fund partisan political activity through church tax exemptions is contrary to the very notion of church and state separation. Moreover, it would foster divisiveness within the religious community¹³¹ by discouraging parishioners of one political persuasion from attending services at, or contributing to, churches that support only political ideas adverse to theirs. It would also foster divisiveness outside the religious community by polarizing different congregations based on perceived political persuasion. Such a result is certainly not desirable for religious Americans, many of whom attend church—at least in part—for a political respite.

Second, allowing churches to participate in political activities would result in dramatic *de facto* campaign finance reform—enabling parishioners to make tax-exempt donations to churches, which in turn could finance television ads, campaign stops, and other electoral activities. Because contributions to political campaigns are not currently tax deductible, conferring a tax deduction upon parishioners (or even nonmembers) who make contributions to churches—ostensibly used for political activities—would mark a serious circumvention of campaign-finance laws.¹³²

In addition to affecting campaign-finance laws substantially, this loophole would negatively affect churches and other § 501(c)(3) nonprofits. If contributors could permissibly donate money to nonprofits, expecting it to be used for political activities, other donors might halt contributions out of fear that their money would be used for campaigns instead of for serving the organization’s mission. Of course, the ultimate victim of this domino effect is the beneficiary of whatever services the § 501(c)(3) previously provided. Allowing § 501(c)(3) churches to spend money on political activities is simply untenable.

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

131. *See AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE*, *supra* note 127.

132. *See id.*

VI

CONCLUSION: LOOKING TO 2008

A. Improvements in IRS Enforcement Procedures

Looking toward the 2008 election cycle, the IRS should consider improvements to the PACI process. Although the IRS has “taken an important and constructive step forward”¹³³ by creating the PACI and by educating § 501(c)(3) organizations, it should continue to assess the program’s efficacy.

Specifically, the IRS should consider three reforms. First, it should clarify the propriety of political activities, whose status for § 501(c)(3) purposes many churches find confusing or ambiguous. For example, the agency should improve guidance on what, if any, political content a § 501(c)(3) organization may post on its website.¹³⁴ By providing examples of permissible content and impermissible activity, such as posting links to candidate websites, the IRS will improve compliance and deter violations caused by good-faith confusion. In addition, the IRS should clarify the consequences when an invited guest who is not part of an organization’s leadership makes unanticipated political statements at an official organization event.¹³⁵

Second, the IRS should consider and pursue a new category of penalties for church electioneering. The 2004 PACI report points out that “the existing sanctions are limited to assessing penalties based on the amount spent on the intervention, which is often de minimis, or revocation, which may not be in the public interest.”¹³⁶ Although a new penalty would require congressional legislation, it would provide a moderate enforcement option between the revocation of tax-exempt status and a proverbial slap on the wrist. A more moderate option would serve as a stronger deterrent than the prospect of a mere advisory letter and would equip the IRS with meaningful enforcement mechanisms, since revocation of tax-exempt status is so rarely utilized.

Finally, the IRS should educate political candidates, perhaps through the Federal Election Commission, to explain the consequences of political activity at official § 501(c)(3) organization functions. Currently, there is a double standard for enforcing the ban on political activity in nonprofit organizations: § 501(c)(3) organizations are prohibited from contributing to, or intervening in, political campaigns, but “the law does not prohibit candidates from accepting contributions from charitable organizations.”¹³⁷ Consequently, there is a disincentive for candidates to help churches comply with § 501(c)(3) regulations. Moreover, because of First Amendment concerns, the government

133. See OMB WATCH, *supra* note 128, at 16.

134. See Miller & Berger, *supra* note 106.

135. See *id.* (“Guidance on the level of encouragement required to create control [for nonleader political statements] would help charities understand their responsibilities in this area.”).

136. INTERNAL REVENUE SERVICE, *supra* note 75, at 2.

137. Perry, *supra* note 111.

may not be able to regulate a candidate's acceptance of contributions from § 501(c)(3) organizations. As a result, the IRS should extend education efforts to national political candidates, at the least, to prevent well-meaning candidates from jeopardizing churches' tax-exempt status because of impermissible political activity.

B. Selma and Beyond

To be sure, the IRS can and should improve its enforcement technique and process. Yet the IRS has succeeded in implementing an unprecedented enforcement program. According to one advocacy-group director, "It's no longer possible for critics to say that the I.R.S. is blind or toothless, because this announcement [regarding the PACI] is a pretty major indication that they are serious about educating charities and about imposing appropriate penalties."¹³⁸

Even so, Hillary Clinton and Barack Obama's March 4, 2007, speeches in Selma, Alabama, suggest that political candidates will utilize church congregations as campaign stomping grounds unless churches self-regulate or the IRS comprehensively enforces the ban on church electioneering. It is too early to determine if the IRS will investigate the churches that allowed Hillary Clinton to promote her presidential candidacy and Barack Obama to criticize the Bush Department of Justice. Regardless of the IRS's enforcement of the churches in Selma, the agency will continue to face the constitutional tensions that arise when churches and speech are regulated. With improved implementation, however, the line-drawing perpetuated by the PACI may reconcile these tensions and help § 501(c)(3) churches comply with the conditions necessary to maintain tax-exempt status while maintaining their integrity as nonprofit organizations.

138. Strom, *supra* note 94 (quoting Barry W. Lynn, executive director of Americans United for Separation of Church and State).
