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Praying for a Tax Break: Churches, Political Speech, and the Loss of Section 501(c)(3) Tax Exempt Status

PRAYING FOR A TAX BREAK: CHURCHES, POLITICAL SPEECH, AND THE LOSS OF SECTION 501(C)(3) TAX EXEMPT STATUS

KEITH S. BLAIR[†]

INTRODUCTION

“Barack knows what it means to be a black man living in a country and a culture that is controlled by rich white people. Hillary can never know that.”¹ Those words were part of a Christmas morning sermon preached by the Reverend Jeremiah Wright who, at the time, was the senior pastor of the Trinity United Church of Christ in Chicago, Illinois.² The sermon was noteworthy for at least two reasons. One, then-Senator Barack Obama was a member of Trinity United Church of Christ. Partly because of that sermon, then-Senator Obama came under fire for Reverend Wright’s views,³ and subsequently had to respond with speech dealing with Reverend Wright’s sermons.⁴ More importantly for purposes of this piece, Reverend Wright put his church’s tax-exempt status in jeopardy with this sermon.

On October 31, 2004, two days before the presidential election, the Reverend George Regas preached a sermon at the All Saints Church in Pasadena, California entitled “If Jesus Debated President Bush and Senator Kerry.”⁵ That sermon precipitated a chain of events that endangered the All Saints Church’s tax-exempt status.

Bill Keller, an evangelist based in Florida, was under fire for comments made about Mitt Romney while Romney was a candidate to be the

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1. See Suzanne Sataline, *Obama Pastors’ Sermons May Violate Tax Law*, WALL ST. J., Mar. 10, 2008, at A1.

2. *Id.*

3. See Jeff Zeleny, *Obama Works to Shift Campaign Back to Domestic Issues*, N.Y. TIMES, Mar. 20, 2008, available at http://www.nytimes.com/2008/03/20/us/politics/20speech.html?_r=1&ref=politics&oref=slogin.

4. See generally Barack Obama, *A More Perfect Union*, Speech at the National Constitution Center (Mar. 18, 2008), available at <http://www.nytimes.com/2008/03/18/us/politics/18text-obama.html?em&ex=1206158400&en=8b748f91c621f76e&ei=5087%0A>.

5. George F. Regas, Rector Emeritus, All Saints Church, Sermon at the All Saints Church: If Jesus Debated Senator Kerry And President Bush (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).

Republican nominee for president. Americans United sent a letter to the Internal Revenue Service (IRS) requesting that it investigate Keller for stating that “if you vote for Mitt Romney, you are voting for Satan.”⁶ Reverend Keller has defended his statement, asserting that he was making a spiritual statement, not a political one.⁷ Reverend Keller will not be the person making that decision however.

These are but three examples of a situation that is becoming more problematic in American society—that of religious organizations, particularly churches,⁸ providing guidance to their parishioners on how to vote and for whom to vote. These churches and ministers that preside at the churches do not feel they are doing anything wrong. Rather, they believe that they are providing information to their parishioners on which candidates support issues that are important to the church. Critics of these churches and ministers contend that no matter how it is characterized, such speech violates the prohibition on tax-exempt organizations participating in the political process. Therefore, the critics maintain that those churches should lose their tax-exempt status.

Churches enjoy tax-exempt status pursuant to Section 501(c)(3) of the Internal Revenue Code.⁹ That section provides the parameters by which churches and other tax-exempt organizations may enjoy the benefits of tax exemption. One requirement is that they do not engage in political speech or otherwise entangle themselves with the political process.

Churches and houses of worship are unique entities in American society. They minister to their parishioners, run food banks, distribute food, offer job counseling and, generally, deliver services to the community at large. Indeed, the federal government has recognized that churches are necessary providers of these services, and has enabled churches and other religious organizations to receive funds under the “faith based initiative” of the 1996 welfare reform act.¹⁰ Some churches

6. See *Separation of Church and State and Tax Exemptions*, WASHINGTON POST, June 1, 2007, at A04.

7. *Id.*

8. Throughout the course of this article the word “church” will be used to reference church, temple, mosque, and other houses of worship. “Certain characteristics are generally attributed to churches. These attributes of a church have been developed by the IRS and by court decisions. They include: distinct legal existence; recognized creed and form of worship; definite and distinct ecclesiastical government; formal code of doctrine and discipline; distinct religious history; membership not associated with any other church or denomination; organization of ordained ministers; ordained ministers selected after completing prescribed courses of study; literature of its own; established places of worship; regular congregations; regular religious services; Sunday schools for the religious instruction of the young; schools for the preparation of its ministers. The IRS generally uses a combination of these characteristics, together with other facts and circumstances, to determine whether an organization is considered a church for federal tax purposes.” See INTERNAL REVENUE SERVICE, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS, 27, available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf>.

9. 26 U.S.C. § 501(c)(3) (2007).

10. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 104(A) and (B), 110 Stat. 2105. See also Michele Estrin Gilman, *If At First You*

also believe that part of their calling is to speak out on issues that affect their parishioners and their community. Accordingly, churches should be able to speak on any issue that is of interest and importance to its parishioners without fear of the loss of tax-exempt status.

This article explores the issues involved with churches and political speech. Part I examines the relationship between religion and the state starting with examples from the Christian Bible. It also briefly discusses the history of religious tax exemptions through modern times. This Part also examines how churches and religion have affected American life.

Part II examines Section 501(c)(3) of the Internal Revenue Code and discusses how the ban on political intervention came to be, and reviews *Branch Ministries v. Rossotti*,¹¹ the seminal case involving churches, political speech, and tax-exempt status. This Part will also review the Political Activities Compliance Initiative, a program started by the IRS to review alleged political intervention by tax-exempt organizations. The IRS, through this program, has investigated a number of organizations.

Part III explores the constitutional issues related to churches and political speech. Specifically, this Part will examine the interplay of the First Amendment and Section 501(c)(3) and whether the ban on political intervention poses any constitutional problems.

Part IV discusses the problems of the political intervention ban in Section 501(c)(3). It will also look at problems that are unique to churches and structural problems with Section 501(c)(3).

Part V will demonstrate how Section 501(c)(3) actually affects churches through a case study of the IRS's investigation of All Saints Church. The All Saints investigation provides a current and public example of what can happen if the IRS decides to investigate a church. All Saints Church has posted all of its correspondence with the IRS on its website. That has provided an unprecedented picture of how a church investigation is conducted. This Part will then propose a limited solution to the problem. Recognizing that there are legitimate reasons both for having a ban on political intervention by churches and for allowing churches to keep tax-exempt status despite making what is deemed political speech, I will propose that a small exception be carved out for churches. While my solution will likely not please either side in this debate, it is a reasonable and necessary step.

Don't Succeed, Sign An Executive Order: President Bush And The Expansion Of Charitable Choice, 15 WM. & MARY BILL RTS. J. 1103, 1104-06 (2007). Professor Gilman's article examines President Bush's charitable choice executive orders to determine whether the orders were constitutional.

11. 211 F.3d 137 (D.C. Cir. 2000).

I. AN EXAMINATION OF THE RELATIONSHIP BETWEEN CHURCHES AND THE STATE

A. *A Brief History of Churches and Tax Exemptions*

Religion and politics have had a close relationship since Biblical times. According to the Bible, ancient Israel was a theocracy which was ruled by a series of "judges" appointed directly by God.¹² Subsequently, when Israel demanded a king, God, through the prophet Samuel, chose Saul.¹³ Israel's fortunes were directly affected by its obedience to God's rule. For example, Israel was subject to three years of no rain until it rejected Baal and pledged allegiance to God.¹⁴ Israel's apostasy led to its captivity by ancient Babylon.¹⁵

Given the close relationship between religion and the state, it is not surprising that special privileges would be afforded to churches. The earliest tax exemptions for churches can be traced to the Roman Empire.¹⁶ Emperor Constantine, after he joined the early Christian church, granted preferences to the church. One of the preferences was a total exemption from all forms of taxation.¹⁷

England also has a history of tax exemption for churches dating back to the Middle Ages.¹⁸ The common law in England during the sixteenth century governed all aspects of church life.¹⁹ It dictated what was preached, where churches were located, the duties of its ministers, and corporate form of the church, among other things.²⁰ In addition to the governance of church operations, the English common law governed church taxation.²¹

Church property used for "religious" purposes was generally exempt from taxation.²² The rationale for this exemption apparently was that the church performed governmental functions and in exchange for

12. See, generally, the Biblical book of Judges for a description of the theocracy in ancient Israel.

13. 1 *Samuel* 10:1.

14. 1 *Kings* 16:32-33; 17:1; 18:1.

15. 2 *Chronicles* 36:16-17, 20.

16. See Vaughn E. James, *Reaping Where They Have Not Sowed: Have American Churches Failed to Satisfy the Requirements for the Religious Tax Exemption*, 43 *CATH. LAW.* 29, 35 (2004). Professor James discusses the question of whether churches in the United States are not complying with the requirements of Section 501(c)(3) of the Internal Revenue Code but still benefit by obtaining tax-exempt status. Ultimately, Professor James concludes that churches have been engaging in political activity and that Congress should amend Section 501(c)(3). See *id.* at 78-79.

17. *Id.* at 35-36 (citing ALFRED BALK, *THE FREE LIST: PROPERTY WITHOUT TAXES* 21 (1971)).

18. *Id.* at 36 (citing ROUNDELL, *ANCIENT FACTS AND FICTIONS CONCERNING CHURCHES AND TITHES* 194 (Macmillan and Company 1888)).

19. See John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 *S. CAL. L. REV.* 363, 369 (1991).

20. *Id.*

21. *Id.* at 371-72.

22. *Id.*

those functions would receive a tax exemption.²³ In essence, there was a *quid pro quo* for the church performing functions that the state either could not or did not wish to perform.

B. Religious Tax Exemption in American Life

It should be no surprise that churches benefitted from tax exemptions in early American life. Prior to the American Revolution, nine of the thirteen colonies provided tax relief to established churches.²⁴ Congress as early as 1802 provided a tax exemption for churches.²⁵

When Congress enacted the first income tax during the Civil War, it exempted charitable organizations.²⁶ In the Tariff Act of 1894, Congress explicitly provided a tax exemption for entities organized for religious purposes.²⁷ In 1917, Congress added a provision allowing deductions to be taken for making a charitable contribution to organizations that operated exclusively for religious purposes.²⁸

In 1934, there was an attempt by Congress to enact a ban on political activity by tax-exempt organizations.²⁹ However, Congress was unable to come to an agreement on language that would have protected certain charitable organizations and the ban was not passed. A ban on lobbying by tax-exempt organizations was enacted.³⁰

C. The Importance of Churches in American Secular Life

Governments have given churches and religious organizations tax exemptions because of the value that these entities provide to society. Churches and religious leaders, however, are involved in numerous areas of social work and political discourse which do not, at first glance, appear to relate directly to the spiritual well-being of their congregants.

A recent study by the Pew Research Center found that 78% of American adults reported belonging to some Christian faith and 5% reported belonging to some other faith, leaving only 16% unaffiliated with

23. *Id.* at 375.

24. See John K. Wilson, Comment, *Religion Under the State Constitutions 1776-1880*, 32 J. CHURCH & ST. 753, 754 (1990).

25. See Vaughn E. James, *The African-American Church, Political Activity and Tax Exemption*, 37 SETON HALL L. REV. 371, 376 (2007).

26. *Id.*

27. *Id.*

28. See David M. Anderson, *Political Silence at Church: The Empty Threat of Removing Tax-Exempt Status for Insubstantial Attempts to Influence Legislation*, 2006 BYU L. REV. 115, 123-24 (2006). The exemption also applied to contributions made to organizations that were organized and operated exclusively for charitable, scientific or educational purposes.

29. See Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 23 (2003).

30. *Id.*

any particular religion.³¹ While not every person who reported being affiliated with a religion is a devout follower, it is not inconceivable that a large number of people get more than traditional “spiritual” guidance from their various denominations. These people receive guidance on issues affecting their entire lives, not just on traditional “spiritual” issues.³²

Clergy are speaking on a wide range of social issues.³³ Survey respondents who attended church services once or twice a month reported that their ministers spoke about the following issues from the pulpit: hunger and poverty, abortion, the war in Iraq, homosexuality, the environment, evolution, the death penalty, stem cell research, and immigration.³⁴ These are issues that touch all sectors of life in the United States. If a church believes that it has a social justice mission, it would not be a surprise that church leaders would want to speak on these issues.

Interestingly, the public is virtually evenly split on the question of whether churches should actually speak out on political and social issues. A survey conducted by the Pew Center found that 51% of respondents believed that churches should speak out on political and social issues.³⁵ This split is not surprising. The United States is not monolithic in its values. There are very few issues on which a solid majority agrees, absent a national crisis. Churches, like society, are not monoliths—some are conservative, some are liberal, and others cannot be labeled. The survey participants’ ambivalence on the issue of speaking out on political and social issues is a reflection of society.

D. Churches’ Influence on Society

Churches and ministers have been at the forefront of social and political change throughout the history of the United States. It is hard to imagine what our society would look like if churches had not been involved in social justice. From civil rights to abortion to the peace movement, churches have spoken out, marched, sat-in, and generally rallied our country around these issues. And, churches have taken varying positions on some of the issues, which has enriched the debate on the various issues.

31. See PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 10 (2008), <http://religions.pewforum.org/pdf/report-religious-landscape-study-chapter-1.pdf>. This survey examined the public’s acceptance of churches addressing topics than those that might be considered purely Biblical. The survey generally found that while most Americans found that religion was losing influence in the daily lives of Americans, religion was gaining influence in politics and government.

32. See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 73-74 (Basic Books 1993).

33. See generally THE PEW FORUM ON RELIGION & PUBLIC LIFE, *MANY AMERICANS UNEASY WITH MIX OF RELIGION AND POLITICS* 9 (Aug. 24, 2006), <http://pewforum.org/publications/surveys/religion-politics-06.pdf>.

34. *Id.*

35. *Id.* at 8.

1. Reverend Martin Luther King and the Civil Rights Movement

The Reverend Martin Luther King is probably the most prominent example of a religious leader who influenced social policy and the political process during the twentieth century. In 1955, Reverend King, while the pastor of the Dexter Avenue Baptist Church, organized the Montgomery bus boycott which was precipitated by Rosa Parks's refusal to give up her seat on a bus.³⁶ As a result of the boycott, the Supreme Court ended segregation in public transportation.³⁷ Reverend King further helped found the Southern Christian Leader Conference, a prominent civil rights organization in the 1950s and 1960s.³⁸

There can be little doubt that the "church" and the teachings of the "church" played a prominent role in Reverend King's leadership and in the lives of the thousands who participated in the civil rights movement because of him. It is not overstating the issue to say that the modern civil rights movement would not have been as successful were it not for the support of Reverend King's church and other black churches. Church members were mobilized by their ministers. They were informed of civil rights developments in church. The information shared in these churches was not strictly religious in nature. However, those messages were informed by shared beliefs grounded in the faith of those who gave the messages and those who heard them. None of this would have been possible were it not for the church.

2. President Bush's Faith-Based Initiative

The federal government is aware of the importance of churches in providing social services to their communities. President Bush made his "faith-based initiative" a centerpiece of his domestic policy. On January 29, 2001, he issued an Executive Order which created the White House Office of Faith-Based and Community Initiatives.³⁹ This office was created to facilitate the awarding of funds to faith-based organizations that wish to compete for federal funds to provide social services.⁴⁰ This initiative has been a major priority of President Bush. Since its inception in 2001, eleven federal agencies have participated in the program;⁴¹ and

36. See JOHN A. KIRK, MARTIN LUTHER KING JR., 19-36 (Pearson Education Limited 2005) (2005).

37. See Marc Brenman, *Transportation Inequity in the United States: A Historical Overview*, 34 HUM. RTS., Summer 2007, at 7, 9.

38. Southern Christian Leadership Conference, Our History, <http://sclcnational.org/net/content/page.aspx?s=25461.0.12.2607> (last visited Dec. 16, 2008).

39. Exec. Order No. 13,199, 66 Fed. Reg. 8,499 (Jan. 29, 2001), available at <http://www.whitehouse.gov/news/releases/2001/01/20010129-2.html>.

40. White House Faith-Based & Community Initiative <http://www.whitehouse.gov/government/fbci/president-initiative.html> (last visited Dec. 16, 2008).

41. *Id.*

more than \$2.1 billion in grants were awarded pursuant to this initiative in the 2005 fiscal year.⁴²

Religious organizations receiving funds under the initiative do not have to hide the fact that they are, indeed, religious entities when providing services.⁴³ They can retain religious symbols and icons in the facilities where they provide services. They also can take religion into account when making employment decisions.⁴⁴ They may not, however, perform “inherently religious” activities when providing social services pursuant to the federal grant. They also may not discriminate on the basis of religion against the recipients of the services that they are providing.⁴⁵ This appears to be an attempt by the administration to allow religious organizations to retain some of their religious identity while recognizing that separation of church and state must not be breached. It is also another example of how religious organizations are integrated into all areas of life, including those areas connected to politics.

Even absent the faith-based initiative, religious organizations remain major providers of social services in the United States. Organizations such as Catholic Charities and Adventist Community Services provide vital services to communities that local, state, and federal governments do not provide. These religious organizations provide job training, meals, day-care services, counseling services, and a host of other social services to their communities. These services do not involve teaching religious doctrine, but they are biblically based. Were it not for organizations like these, either the recipients of the services would do without, or local, state, and federal governments would have to provide them.

These are but a few examples of how churches and other religious organizations are an integral part of American life. Churches provide value and service to their communities that the local, state and federal governments do not and most likely cannot provide. Indeed, the federal government encourages churches to provide social services that it is not providing through the faith-based initiative.

Many Americans depend on their churches for guidance in all parts of their lives, including politics: “The truth—an awkward one for the guardians of the public square—is that tens of millions of Americans rely on their religious traditions for the moral knowledge that tells them how to conduct their lives, including their political lives.”⁴⁶ Given that so

42. Press Release, Office of the Press Secretary, Fact Sheet: Compassion in Action: Producing Real Results for Americans Most in Need (Mar. 9, 2006), <http://www.whitehouse.gov/news/releases/2006/03/20060309-3.html>

43. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, FAITH-BASED AND COMMUNITY INITIATIVES 2 (June 2006), available at <http://www.gao.gov/new.items/d06616.pdf>.

44. *Id.*

45. *Id.*

46. See CARTER, *supra* note 32, at 67.

many people rely on their faith to guide their daily living choices, it stands to reason that churches want to give that guidance.

The fact that churches touch on so many aspects of people's lives makes them different from other charitable and social justice organizations. A person might join Planned Parenthood or NARAL Pro-Choice America⁴⁷ because they agree with one of the groups' position on abortion. They might even vote for a political candidate based on whether the candidate's views on abortion conform to their own and the group's views. However, it is unlikely that either group will provide the range of social services, let alone the moral teachings, that churches provide.

The members of individual churches also share strong religious bonds that members of other organizations might not share.⁴⁸ These bonds can shape a congregant's life in all aspects, from making moral choices, marriage decisions and, ultimately, the decision for whom to vote. While other tax-exempt organizations have members that are passionate about them, those organizations just do not touch on as many areas of their members' lives as churches do.

II. HOW AND WHY SECTION 501(C)(3) OF THE INTERNAL REVENUE CODE LIMITS WHAT CHURCHES MAY SAY

In 1954, circumstances occurred which led to the passage of the ban on political activity as we now know it. Although there is little legislative history, it is generally accepted that the following facts probably led to the ban.⁴⁹ In 1954, Senator Lyndon Johnson was running for reelection in his home state of Texas.⁵⁰ Senator Johnson faced a primary challenge from one Dudley Dougherty, a rancher-oilman, who also happened to be a millionaire. Dougherty was supported by the Committee for Constitutional Government ("Committee"). The Committee, a conservative political group, produced material which, among other things, advocated limiting the treaty-making authority of the President.⁵¹ The material also advocated voting for Senator Johnson's opponent, Dougherty, and against Johnson.⁵²

Senator Johnson became aware of the material, and asked his counsel, Gerald Siegel, for an opinion on its legality.⁵³ Siegel informed John-

47. Formerly The National Abortion and Reproductive Rights Action League.

48. See Allan J. Samansky, *Tax Consequences When Churches Participate in Political Campaigns*, 10-11 (Ohio State Pub. Law and Legal Theory, Working Paper No. 76, 2006), available at <http://ssrn.com/abstract=924770>.

49. 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 (2006).

50. See Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 24 (2003).

51. *Id.* at 25.

52. *Id.* at 25-26.

53. *Id.* at 27.

son that while the materials violated Texas law, they did not violate federal law as there was no prohibition against directly or indirectly attempting to influence a political campaign.⁵⁴ Senator Johnson subsequently introduced an amendment to Section 501(c)(3) that would prohibit tax-exempt organizations from attempting to influence political campaigns.⁵⁵ The present ban, codified in Section 501(c)(3) of the Internal Revenue Code, resulted.

A. *Section 501(c)(3) of the Internal Revenue Code and How it Affects Churches*

The Internal Revenue Code provides tax exemptions for more than thirty types of organizations. These organizations are usually governed by one of five sections of the Code: 501(c)(3); 501(c)(4); 501(c)(5); 501(c)(6); and 527. Each of these sections controls a different type of organization.

Section 501(c)(3) provides the guidance for “charitable organizations.”⁵⁶ A charitable organization is one “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals”⁵⁷ Section 501(c)(3) organizations are prohibited from undertaking any political campaign activity and may only engage in a *de minimis* amount of lobbying activity.⁵⁸ No other tax-exempt organizations have this limitation.

Entities receiving a tax exemption pursuant to Section 501(c)(4) are generally referred to as “social welfare” organizations. These organizations bear some similarity to those governed by Section 501(c)(3), but there are some significant differences. First, Section 501(c)(4) organizations are prohibited from receiving tax-exempt contributions, while Section 501(c)(3) organizations have no such prohibition.⁵⁹ Second, Section 501(c)(4) entities are not as limited in the amount of political activity that they may undertake, while Section 501(c)(3) organizations have strong limitations.⁶⁰

Section 501(c)(5) organizations are described as labor, industrial, or horticultural organizations.⁶¹ Section 501(c)(6) organizations are described as “business leagues, chambers of commerce, [and] real-estate

54. *Id.*

55. *Id.* at 28-29.

56. 26 U.S.C. § 501(c)(3) (2007).

57. *Id.*

58. *See id.*

59. 26 U.S.C. § 501(c)(3)-(4).

60. *Id.*

61. 26 U.S.C. § 501(c)(5).

boards . . .” among others.⁶² Section 527 organizations are political organizations created for the purpose of accepting political contributions.

Generally speaking, the Internal Revenue Code exempts religious (and charitable) organizations from the payment of taxes.⁶³ There are three conditions that must be met in order to receive the exemption. First, no part of net earnings of the entity may benefit any private shareholder or individual. Second, no substantial part of the organization’s activities may consist of lobbying or attempting to otherwise influence legislation. Finally, the entity may not participate in or intervene in a political campaign for any political office—state, local, or federal.⁶⁴ Taxpayers that contribute to these organizations are able to deduct those contributions on their individual income tax returns.⁶⁵

The Internal Revenue Code mandates that religious organizations seeking to obtain tax-exempt status from the IRS apply for a determination that they do, indeed, meet the requirements for tax-exempt status.⁶⁶ Churches, however, are exempt from this advance filing requirement. A church may simply hold itself out as tax-exempt.⁶⁷ In addition, churches are relieved from reporting requirements that other tax-exempt organizations face.⁶⁸ Nevertheless, in order to maintain their tax-exempt status, churches and other religious organizations must comply with the prohibition against political lobbying and participating or intervening in political campaigns.⁶⁹

B. Political Activity

The Internal Revenue Code prohibits 501(c)(3) entities from “participating in, or intervening in” political campaigns “on behalf of (or in opposition to) any candidate for public office.”⁷⁰ Section 501(c)(3) gives no further guidance as to what exactly “participating” or “intervening” in a political campaign actually is. The regulations accompanying Section 501(c)(3) are similarly unhelpful. The regulations simply state that “the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate” are prohibited activities.⁷¹

62. 26 U.S.C. § 501 (c)(6).

63. 26 U.S.C. § 501 (c)(3).

64. *Id.*

65. 26 U.S.C. § 170(a) (2007).

66. 26 U.S.C. § 508(a) (2007).

67. 26 U.S.C. § 508(c)(1)(A).

68. *See James, supra* note 25, at 377.

69. Although the focus of this paper is not on lobbying, a brief discussion on lobbying is instructive. Section 501(c)(3) states that “no substantial part” of a tax exempt organization’s activities may be lobbying, which is described as “carrying on propaganda, or otherwise attempting to, influence legislation.” 26 U.S.C. § 501(c)(3) (2007).

70. 26 U.S.C. § 501(c)(3) (2007).

71. *See* Treas. Reg. §1.501(c)(3)-1(c)(3)(iii) (as amended in 2008).

The IRS has issued a revenue ruling which attempts to clarify the situations for tax-exempt organizations because the Code and the regulations are so vague.⁷² The revenue ruling describes twenty-one situations and, in each hypothetical situation, attempts to answer the question of whether the entity has intervened in a political campaign.⁷³ The IRS makes the obvious and somewhat unhelpful statement that “whether an organization is participating . . . , directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case.”⁷⁴ The situations described in the revenue ruling are grouped into various categories of activities.

The first type of activity analyzed is voter education, voter registration and “get out the vote” drives.⁷⁵ Section 501(c)(3) entities are allowed to engage in these activities as long as the activity is non-partisan. The activities must not favor or oppose one candidate over another.⁷⁶

The revenue ruling next considers individual activities by leaders of a 501(c)(3) organization. The IRS recognizes that the leaders have expression rights separate and apart from the organization that they represent, and thus there is no restriction on these individuals taking part in a political campaign. However, these individuals cannot make partisan statements in any organization publication or at official functions of the organization.⁷⁷

The next activity tackled is candidate appearances. Candidate appearances have become a major issue over the last few election cycles. A 501(c)(3) organization may invite a candidate to speak and keep its tax-exempt status. If a candidate is invited to speak in his or her capacity as a candidate, the IRS will look at a number of factors to determine whether the entity is impermissibly intervening in a political campaign. The three factors⁷⁸ listed in the revenue ruling are: 1) whether the organization provided an equal opportunity for other candidates for the same office to participate; 2) whether the organization indicated either support or opposition to the candidate; and 3) whether fundraising occurred at the event.⁷⁹ No one factor is dispositive of the issue.

A timely example of the seriousness of this issue is the recent IRS investigation into the United Church of Christ, the denomination to

72. See Rev. Rul. 2007-41, I.R.B. 25 (2007).

73. *Id.* at 1421.

74. *Id.*

75. *Id.* at 1422.

76. *Id.*

77. *Id.* at 1422-23.

78. Although the Revenue Ruling indicates that the list is not exhaustive, no other factors are listed as guidance for organizations. *Id.* at 1423.

79. *Id.*

which then-Senator Barack Obama belongs.⁸⁰ While the revenue ruling states that whether other candidates are given an equal *opportunity* to participate is a factor that the IRS will consider, the letter from the IRS to the United Church of Christ states: “If a candidate is invited to speak in his or her capacity as a candidate, then other candidates running for the same office *must also be invited to speak* and there should be no indication of support for, or opposition to, any candidate by the organization.”⁸¹

This inconsistency between the ruling’s text and its application is also reflected in one of the examples in the revenue ruling for Section 501(c)(3). In the example, a minister invites a candidate to preach at her church during worship services and invites no other candidates. The example states that “by selectively providing church facilities to allow Candidate X to speak in support of his campaign, Church O’s actions constitute political campaign intervention.”⁸² What was listed as one factor that the IRS will consider has become, in the same revenue ruling, an absolute ban on inviting a sole candidate to make an appearance. This inconsistency provides no guidance to churches and other organizations that wish to invite a candidate to speak. Admittedly, given the example in the revenue ruling, a church might determine that the safest course of action would be to invite all candidates for a political office to speak. The IRS’s letter to the United Church of Christ would certainly seem to reinforce that belief. But the revenue ruling’s text is inconsistent with its examples, and an organization could make a legitimate argument that inviting multiple candidates is not required.

Similarly, if an organization invites a candidate to speak as a non-candidate, but the candidate is “publicly recognized” by the organization, then the IRS will consider the following factors in determining whether there has been an impermissible intervention in a political campaign: 1) whether the individual has been chosen to speak solely for reasons unrelated to his candidacy; 2) whether the individual is speaking in a non-candidate capacity; 3) whether either the individual or organization makes mention of the political candidacy; 4) whether any campaign activity occurs in connection with the appearance; 5) whether there is a “nonpartisan atmosphere” at the event where the candidate is present; and 6) whether the organization indicates the capacity the individual is appearing and does not mention the individual’s candidacy.⁸³ It appears

80. See Letter from Marsha Ramirez, Dir., Exempt Orgs., Examinations, to United Church of Christ (Feb. 20, 2008), available at <http://www.ucc.org/news/pdf/lettrirs.pdf>. Then-Senator Obama spoke at the United Church of Christ’s biennial General Synod at the Hartford Civic Center on June 23, 2007. Additionally, a number of volunteers to the Obama campaign staffed tables outside the event promoting then-Senator Obama’s candidacy.

81. *Id.* (emphasis added).

82. See Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

83. *Id.*

that as long as the individual's candidacy is not mentioned the IRS will not find that the inviting entity intervened in a political campaign.

The next category of activities is issue advocacy. Section 501(c)(3) organizations may take positions on issues as long as they do not favor one candidate over another.⁸⁴ The IRS lists a number of factors that it will consider when making a determination on whether an organization intervened in a political campaign on this basis.⁸⁵ Although "all facts and circumstances need to be considered," the communication will probably be deemed an intervention in a campaign if it makes reference to candidates or an upcoming election.⁸⁶

The IRS also scrutinizes business activities and website links, but these activities are beyond this paper's scope and will not be discussed.

C. Branch Ministries v. Rossotti

The seminal case dealing with churches and political speech is *Branch Ministries v. Rossotti*. The defendant, Branch Ministries, Inc., operated the Church at Pierce Creek, in Binghamton, New York. It placed advertisements in *USA Today* and the *Washington Times* four days before the 1992 presidential election. The advertisements, which bore the headline "Christians Beware," asserted that Bill Clinton's positions on abortion, homosexuality, and condom distribution to teenagers were contrary to the Bible and urged all Christians not to vote for him.⁸⁷ At the bottom of the advertisement was a statement informing the reader that the advertisement was co-sponsored by the Church at Pierce Creek and other unnamed churches and concerned Christians nationwide. It further stated that tax-deductible donations for the advertisement would be accepted and gave a mailing address for donations.⁸⁸

A newspaper article in the *New York Times* mentioned that the advertisement was scheduled to run in 157 more newspapers.⁸⁹ Not only did the *New York Times* take note of the advertisement, but the IRS also noticed. On November 20, 1992, the Regional Commissioner of the IRS notified Branch Ministries that he had authorized a "church tax inquiry"⁹⁰ because there was "a reasonable belief . . . that you may not be

84. *See id.*

85. *Id.*

86. *Id.*

87. *Id.* at 140.

88. *Id.*

89. Peter Applebome, *Religious Right Intensifies Campaign for Bush*, N.Y. TIMES, Oct. 31, 1992, at A1.

90. The Internal Revenue Service can initiate a "church tax inquiry" pursuant to Section 7611 of the Internal Revenue Code. The inquiry can only be "initiate[d] . . . if the Director, Exempt Organizations, Examinations reasonably believes . . . that the [church]: (a) may not qualify to be tax-exempt; or (b) may not be paying tax on an unrelated business or other taxable [entity]." *See* INTERNAL REVENUE SERVICE, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS, at 26, available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf>.

tax-exempt or that you may be liable for tax.”⁹¹ As part of the inquiry, the IRS summoned information from Branch Ministries. Branch Ministries refused to fully comply with the summons.⁹² The IRS then began an examination of Branch Ministries. The examination proved to be unproductive, and as a result the IRS revoked the churches tax-exempt status. Branch Ministries subsequently sued over the loss of its tax-exempt status.⁹³

In district court, the church asserted that the revocation of its tax-exempt status violated its right to free speech and free exercise of religion, and the Religious Freedom Restoration Act of 1993. The church also asserted that the IRS engaged in selective prosecution in violation of the Fifth Amendment’s Equal Protection Clause.⁹⁴ The district court eventually granted the United States’ motion for summary judgment.⁹⁵

On appeal, the D.C. Circuit dealt with three arguments raised by Branch Ministries. First, it rejected the argument that the IRS did not have the statutory authority to revoke Branch Ministries’ tax-exempt status.⁹⁶ Branch Ministries made the somewhat clever argument that the statutory language of Section 501(c)(3) refers to religious organizations, not churches, and that Section 508(c)(1)(A) exempts churches from applying in advance for tax-exempt status.⁹⁷ Therefore, according to Branch Ministries, a church’s tax-exempt status flows from the fact that there is no provision in the tax code for the taxation of churches.⁹⁸ The D.C. Circuit rejected this argument stating that although every religious organization is not a church, every church is a religious organization. Therefore, Section 501(c)(3) applied to Branch Ministries.⁹⁹ Additionally, Branch Ministries applied for and received an advance determination from the IRS that it indeed was a church.¹⁰⁰

The court next dismissed Branch Ministries’ free-exercise claim, finding that the revocation of its tax-exempt status did not “substantially burden” its right to practice religion.¹⁰¹ Specifically, the court found that withdrawing from electoral politics would not impact the church’s religious beliefs. 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.”¹⁰² The court also found that the

91. See *Branch Ministries v. Rossotti*, 211 F.3d 137, 140 (D.C. Cir. 1998).

92. *Id.*

93. *Id.*

94. *Id.* at 141.

95. See *Branch Ministries v. Rossotti*, 40 F. Supp. 2d 15, 27 (D.D.C. 1999).

96. See *Branch Ministries v. Rossotti*, 211 F.3d 137, 141 (D.C. Cir. 1998).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 142.

102. *Id.*

church could establish a separate organization under Section 501(c)(4) of the Internal Revenue Code, and have that organization set up a political action committee to engage in political speech.¹⁰³ Finally, the court rejected the church's claim that the government violated the Fifth Amendment of the U.S. Constitution by engaging in selective prosecution. The court stated that the church did not show it was similarly situated to the other churches.¹⁰⁴

While the *Branch Ministries* court came to the correct result given the facts of the case, it is likely it reached that result for the incorrect reasons. As noted earlier, 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."¹⁰⁵ The court was probably correct in recognizing that the church would have less money available to it.

However, the court appears to have taken the position that this loss would be irrelevant to whether the church could continue in its ministry. That view does not give enough weight to the effect of losing tax-exempt status. It is hard to imagine that a church would be able to minister to its congregants and provide pastoral care and services at the same level if the amount of money available to it were to decrease. Loss of the tax exemption would directly impact how a church is able to exercise its religion.

III. THE FIRST AMENDMENT AND TAX EXEMPTIONS

Although churches are bound by the same ban on political activity as other tax-exempt organizations in Section 501(c)(3), they differ from other tax-exempt and social justice organizations. The first major difference between churches and other charitable organizations is that religion is specifically mentioned and protected in the U.S. Constitution.¹⁰⁶ The Free Exercise Clause and the Establishment Clause set religion and churches apart from other charitable and social justice organizations. It is instructive that protection for religion was included in the very first amendment to the Constitution. The First Amendment contains provisions that the government shall not establish a state religion, the Estab-

103. *Id.* at 143. The Court did note that the Section 501(c)(4) organization would need to be separately incorporated and maintain records that demonstrated that no tax-exempt donations were used to support the political action committee.

104. *Id.* at 144. In order to prevail in a claim of selective prosecution, it must be shown that (1) the party was singled out for prosecution from others that were singularly situated; and (2) the prosecution was improperly motivated. The Court found that Branch Ministries did not show that other churches had placed advertisements in national newspapers and solicited donations to pay for the advertisements. It appears that the scope of the political speech by Branch Ministries played a role in the Court's reasoning.

105. *Id.* at 142. The Court also stated that it thought that the impact of the decrease in money was "overstated." The IRS asserted, and the Court agreed, that the Church may hold itself out as a 501(c)(3) organization in the future and that donors would be tax deductible as long as the donors established that the Church met the requirements of Section 501(c)(3). *Id.* at 142-43.

106. U.S. CONST. amend. I.

lishment Clause, and that citizens shall be able to freely exercise their religion, the Free Exercise Clause.¹⁰⁷

The First Amendment is an acknowledgement that, for many, religion is an important part of American life. The First Amendment protects those who value religion from those that do not and, just as important, it protects those who do not value religion from those that do. While the NAACP, ACLU, and NRA are important parts of the lives of those who are members of those organizations, these organizations do not receive the explicit protection that churches do through the First Amendment.

A. *Establishment Clause*

The Establishment Clause provides that the government may not prefer one religion over another.¹⁰⁸ The seminal Establishment Clause case is *Lemon v. Kurtzman*.¹⁰⁹ In *Lemon*, taxpayers in Rhode Island and Pennsylvania challenged statutes that gave state aid to non-public schools.¹¹⁰ In Rhode Island, the state provided a salary supplement to teachers in non-public schools at which the average expenditure per student on secular education was less than the average in the state's public school.¹¹¹ At the time of the trial, 250 teachers had applied for the supplement, all of whom were employed in Roman Catholic schools.¹¹² A federal district court found the Rhode Island statute unconstitutional as a violation of the Establishment Clause.¹¹³

Similarly, a Pennsylvania statute allowed non-public schools to be directly reimbursed for teacher salaries, textbooks, and instructional materials.¹¹⁴ However, it limited reimbursement to "secular" subjects and prohibited reimbursement for a course that contained materials expressing religious teaching.¹¹⁵ A Pennsylvania federal district court found that the Pennsylvania statute did not violate the Free Exercise Clause or the Establishment Clause.¹¹⁶ The U.S. Supreme Court decided to consolidate the two cases.¹¹⁷

The Supreme Court held that both statutes were unconstitutional and articulated a three-part test for the analysis of cases which impacted the religion clauses. First, a statute must have a secular purpose; second,

107. *Id.*

108. *Id.*

109. 403 U.S. 602 (1971).

110. *Id.* at 606-07.

111. *Id.* at 607.

112. *Id.* at 608.

113. *Id.* at 609.

114. *Id.*

115. *Id.* at 610.

116. *Id.* at 611.

117. *See id.* at 606 ("These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools.")

the statute must neither advance nor inhibit religion; and finally, the statute in question must not cause an “excessive entanglement” with religion.¹¹⁸ The Court found that both the Pennsylvania and Rhode Island statutes had an impermissible entanglement with religion.

B. *Free Exercise Clause*

The more interesting part of the religion clauses when it comes to an analysis of churches and political speech is the Free Exercise Clause. The Free Exercise Clause provides that “Congress shall make no law . . . prohibiting the free exercise [of religion] . . .”¹¹⁹ First and foremost, “The free exercise of religion means . . . the right to believe and profess whatever religious doctrine one desires.”¹²⁰ Because an argument can be made that the current prohibition on political activity by churches prevents them from exercising their religious rights, a free exercise analysis must be undertaken.

The Supreme Court’s current jurisprudence regarding the Free Exercise Clause is explained in *Employment Division v. Smith*.¹²¹ In *Smith*, the government fired two men from their jobs for using peyote, a hallucinogenic drug, during ceremonies at their Native-American church. The employees were subsequently denied unemployment benefits because of a state law barring persons from receiving unemployment benefits if they were fired for misconduct. The men sued the state asserting that the denial of benefits violated their First Amendment right to free exercise of their religion. The Supreme Court subsequently held that the state statute did not violate the Free Exercise Clause.

The Court, however, stated that a statute that not only infringed on the Free Exercise Clause but also implicated another First Amendment right could be unconstitutional.¹²² An example of this “hybrid” type of claim is one that involves a Free Exercise claim and a freedom of speech claim. Because *Smith* only involved a Free Exercise claim, it was not subject to analysis under the hybrid claim analysis and the statute in question was upheld.

C. *First Amendment Analysis of Section 501(c)(3)*

Section 501(c)(3) of the Internal Revenue Code is a blanket prohibition on entities that wish to remain tax-exempt from undertaking any political activity.¹²³ This prohibition implicates both freedom of speech and freedom of religion and, therefore, is subject to analysis under *Smith*.

118. *Id.* at 612-13.

119. U.S. CONST. amend. I.

120. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).

121. *Id.* at 874.

122. *Id.* at 881.

123. *See* 26 U.S.C. § 501(c)(3) (2007).

1. Freedom of Speech

There should be no doubt that Section 501(c)(3) impacts the free speech rights of churches. Religious speech and political speech can be hard, or sometimes impossible, to differentiate.¹²⁴ Where one person might assert that a minister is making a political statement, another might say the minister is making purely religious remarks.

For example, a minister might preach a sermon on the New Testament parable of the Good Samaritan.¹²⁵ The minister might use the parable to encourage his congregation to help all people regardless of their differences. That would be a fairly benign use of the parable and would not implicate Section 501(c)(3).

But suppose the minister wished to use the parable to make the case that a candidate running for public office advocated positions which ran counter to the church's position on helping all. Or, what if the pastor wished to point out that another candidate advocated positions which would have made it easier to minister to people of different nationalities or ethnicities? Including either of those facts into a sermon might invite an inquiry from the IRS.

Could the sermon be given without reference to either of the candidates? Yes, of course it could. Would it be as effective? That is a question that only the minister can answer. Would a minister omit the references to the candidates in order to avoid an investigation by the IRS? Clearly, there are some churches and pastors that do not let the threat of an IRS investigation deter them; that is why this issue is growing in visibility and significance. However, there are some churches that may be deterred from speaking out on issues because of the fear of losing tax-exempt status.¹²⁶ This is a colorable infringement on speech that should trigger a hybrid claim under *Smith*.

2. Free Exercise

For a church that believes that it has a social justice mission, speaking out on matters that may be deemed political in nature may be an es-

124. See Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; To What End?*, 42 B.C. L. REV. 903, 907, 911 (2001).

125. *Luke* 10:25-37. In the parable of the Good Samaritan, a Jewish traveler is accosted by robbers along a road and left for dead. A priest and a Levite see the traveler but do not stop to help. A Samaritan sees the traveler, stops, and helps the man to a place of safety. The significance of the parable is that Samaritans and Jews were enemies.

126. A real-life example of this occurred in the controversy over the remarks made by Reverend Jeremiah Wright and then-Senator Obama's subsequent speech in response to the furor. Then-Senator Obama's speech occurred just days before Easter Sunday, and some ministers thought that would be an appropriate time to address the issues of race raised by then-Senator Obama. Some ministers, however, were afraid to speak on the subject for fear of triggering an investigation by the Internal Revenue Service. See Laurie Goodstein and Neela Banerjee, *Obama's Talk Fuels Easter Sermons*, N.Y. TIMES, Mar. 23, 2008, at A1.

sential part of its ministry.¹²⁷ The moral issues that churches in particular and society in general care about cannot be spoken about solely by referencing the Bible or the Koran or any other religious book. These messages must have context, and that context is society at large. This "mixed message" is important for churches. If a church is precluded from speaking on an issue because it fears the loss of its tax-exempt status, that is an arguable infringement on the church's free exercise rights.¹²⁸

For example, a church wishing to teach on the abortion issue will not only instruct its congregants from the Bible (or Koran) but will also speak about the effect that abortion has on the parties involved and on society. The church might also want to speak on the legality of abortion in this country and, presumably, the positions that politicians have taken on the issue.

Consider again the hypothetical of the church that wishes to preach on the Good Samaritan and reference political candidates. In that situation, a minister has two options.¹²⁹ One option is to preach the sermon with references to the candidates and let the chips fall where they may. There are churches that choose this option, but it cannot be expected that all churches would do so. Churches, after all, are organizations that believe in keeping the law. While some churches do advocate civil disobedience in certain circumstances, this might not be the issue that forces a church into civil disobedience.

A second option would be for the minister to preach the sermon but forego making reference to the candidates. The sermon would still give instruction to the congregants on Biblical teaching, but the decision is being made because the church does not want to lose its tax-exempt status. In other words, the church is limiting its speech in order to obtain a governmental benefit. That is an infringement on speech colorable enough to implicate a hybrid claim under *Smith*.

IV. PROBLEMS WITH THE LAW

It should be apparent that Section 501(c)(3) provides enforcement problems both for the IRS and for churches, although both issues are intermingled to some extent.

127. See Megan J. Ryan, *Can the IRS Silence Religious Organizations*, 40 IND. L. REV. 73, 92 (2007).

128. See *id.*; see also Deirdre Dessingue Halloran & Kevin M. Kearney, *Federal Tax Code Restrictions on Church Political Activity*, 38 CATH. LAW. 105, 129-30 (1998).

129. There actually might be a third option. The Church could operate a separate entity under Section 501(c)(4) and make all of its "religious" pronouncements through that organization. There are problems with this approach, however. Setting up a separate entity under Section 501(c)(4) may be less attractive for churches and religious organizations because contributions to 501(c)(4)s are not deductible for the donor. There may also be extensive record-keeping issues and problems associated with determining how to account for a pastor's time who both preaches for a 501(c)(3) and advocates for a 501(c)(4).

A. *Problems for Churches*

For many people, their religious faith touches on all aspects of their lives.¹³⁰ These people rely on their religious faith to govern who they marry, where they educate their children, how they invest their money, and all aspects of their lives. It would be heretical to expect these people to make a life decision, be it major or minor, without their faith playing a role in the decision. For a few, adherence to religious principles is just as or more important than adherence to civil laws.¹³¹ Given the importance of faith in their lives, some church members might want their church to give guidance on issues that touch on politics.

Churches also have an important role in society. They can provide moral clarity to issues that are problematic to society as a whole. Also, churches of various denominations may take differing positions on issues and provide more voices for society to hear.

The ban on churches engaging in political speech deprives society of a voice that adds diversity to the dialogue on issues important to society.¹³² Churches have a distinct voice, and the public square is diminished when churches avoid speaking because of the ban in Section 501(c)(3).¹³³ While every person might not want to hear the voice of the church, churches still need to be heard.

Additionally, the ban on political activity forces churches to make a distinction between what is “purely religious” and what is “political.”¹³⁴ This distinction ignores the fact that a church’s message goes further than its religious doctrine. Many churches take to heart the call to social activism in the Christian Bible and call on their members to feed the hungry, clothe the naked, and help the poor.¹³⁵ These churches, when they see an injustice in society, will combat that injustice by sitting in, marching, and yes, speaking out. Sometimes that speech will necessarily call out a politician that the church believes can and should do more to help.

All churches, however, do not feel a “social justice” call. There are many churches that do not feel it is their place to do so, and it is their

130. See Mark Totten, *The Politics of Faith: Rethinking the Prohibition on Political Campaign Intervention*, 18 STAN. L. & POL’Y REV. 298, 310 (2007).

131. See Eduardo Moisés Peñalver and Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1130 (2007).

132. See Richard Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 799-800 (2001). Garnett argues that by restricting a church’s political involvement the government is interpreting the means by which religious groups live out their faith and reinforcing the notion that religion is and should be kept merely a private matter and in essence privatizes religion. This treatment encourages non-believers to view religion as a private matter and reinforces the government’s own view of the nature of religion to the detriment of faith communities.

133. See Goodstein and Banerjee, *supra* note 126, at A1.

134. See Kemmitt, *supra* note 49, at 167.

135. See *Matthew* 25:34-40.

right under the First Amendment to refrain from this mission if they do not feel they are called to it. However, there are many churches that feel the call to social justice, and they should not be prohibited from heeding that call because of the threat of losing tax-exempt status.

The fear of losing tax-exempt status most certainly raises free exercise issues for churches. The loss of tax-exempt status for engaging in speech or activities that churches feel are mandated by their religious beliefs effectively forces churches to change their behavior in order to receive tax-exempt status. "Churches that convey a religious message . . . are taxed; churches who abstain are not."¹³⁶ As one commentator stated, "Section 501(c)(3) . . . pays churches through tax-exempt status to be silent on issues deemed by the state to be political."¹³⁷

Churches face the false choice of choosing to retain tax-exempt status or to exercise their faith in the manner they feel they are called to do.¹³⁸ Very few churches have the wherewithal and financial ability to engage the IRS in a battle over whether their activities are tax-exempt.¹³⁹ Thus, most churches will most likely not choose to forego tax-exempt status, but rather will not engage in arguably "political" activity.

Some commentators claim that lifting the ban on political activity might be a free exercise violation because it would be a "subsidy" by the government to churches to practice religion.¹⁴⁰ Setting aside the issue of whether tax-exempt status truly is a subsidy, that claim ignores the fact that even with the prohibition on political activity, the government is providing a "subsidy" to churches to engage in the free exercise of religion, albeit absent political activity.

The harm that would be the most catastrophic for churches is also the one most difficult to measure—the loss of contributions by congregants because of the loss of tax deductibility. If a church loses its tax-exempt status, donations to that church are no longer tax deductible.¹⁴¹ Most of a church's income is derived from donations.¹⁴² The best statistics indicate that thirty percent of taxpayers itemize their deductions.¹⁴³ What is unknown is how many church-goers itemize their deductions. It

136. See Kemmitt, *supra* note 49, at 171.

137. Randy Lee, *When A King Speaks Of God; When God Speaks To A King: Faith, Politics, Tax Exempt Status, And The Constitution In The Clinton Administration*, 63 LAW & CONTEMP. PROBS., Spring 2000, at 391, 434.

138. Dessingue, *supra* note 124, at 920.

139. See Halloran & Kearney, *supra* note 128, at 131.

140. See Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1347 (2007).

141. 26 U.S.C. § 170(c) (2007).

142. See Ellen Aprill, *Churches, Politics and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 844-45 (2001); see also Michael Hatfield, *Ignore the Rumors—Campaigning from the Pulpit is Okay: Thinking past the Symbolism of Section 501(c)(3)*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 125, 155 (2006). Aprill and Hatfield cite statistics that estimate that religious organizations receive either 84% (Hatfield) or 94 % (Aprill) of their revenue from donations.

143. Aprill, *supra* note 142, at 845.

would not be unreasonable to believe that church-goers itemize at the same rate as the rest of the taxpaying public.¹⁴⁴ However, the real, and for churches the frightening, unknown is how many of the donors would stop donating if a church were to lose its tax-exempt status. That is a question whose answer can only be known if, and when, a church loses its tax-exempt status. Congregants may assert they are contributing because of their religious convictions, but until those congregants are faced with the loss of the deductibility of their donations, and potentially higher tax liabilities, there is no way to know what they will do.

Given that churches are so dependant on donations, the loss of even a small portion of their revenue could be problematic. It stands to reason that a church would have to cut back on the services that it offers. The choice might come down to scaling back the services that a church provides to its members or scaling back the services that it provides to its community.

B. *Structural Problems*

The IRS must necessarily monitor church services and communications to ensure that their content does not cross the line into political advocacy.¹⁴⁵ It must also determine who spoke, when the speech took place, if anyone else was invited to speak, and what was said. This examination into the affairs of Section 501(c)(3) organizations is intrusive, at best. This examination of churches runs dangerously close to an entanglement between the government and churches that violates the Free Exercise Clause.¹⁴⁶

Less apparent, but equally serious, are confidentiality issues.¹⁴⁷ Section 6103 of the Internal Revenue Code prohibits the IRS from disclosing taxpayer information in almost every circumstance.¹⁴⁸ This prohibition was enacted to protect taxpayer privacy.¹⁴⁹ However, the prohibition also means that the public is unaware when or if a church is being investigated for a possible violation of Section 501(c)(3) unless, of course, the church discloses the fact that it is being investigated. This confidentiality poses unique problems in this circumstance.

Because of the confidentiality requirement, churches do not have clear guidance regarding the circumstances under which an investigation will be started or what activities are permissible or impermissible.¹⁵⁰ Moreover, because these investigations involve politics, there is suspicion that the investigations are, or at least might be, politically moti-

144. Hatfield, *supra* note 142, at 157.

145. See Samansky, *supra* note 48, at 28.

146. *Id.* at 49.

147. See 26 U.S.C. § 6103 (2007); see also Tobin, *supra* note 140, at 1355-56.

148. 26 U.S.C. § 6103(a) (2007).

149. Tobin, *supra* note 140, at 1355.

150. *Id.* at 1356.

vated.¹⁵¹ And, because of Section 6103, the IRS cannot defend itself against charges of selective or politically motivated investigations.¹⁵²

Additionally, given the intensively factual nature of these investigations, there is no bright-line test for churches on what is and is not permissible. Section 501(c)(3) is vague and the regulations do not add much, if any, clarity to the discussion. Add to that the fact there is a scarcity of case law and that creates a sea of uncertainty for churches.¹⁵³

An additional problem is that the law has historically not been stringently enforced. There has only been one court case where a church has lost tax-exempt status for violating the ban on political activity.¹⁵⁴ However, in 2004, the IRS started what it called the "Political Activities Compliance Initiative."¹⁵⁵ In a report issued on the initiative, the IRS stated that the objective of the initiative was to "promote compliance with the IRC § 501(c)(3) prohibition against political campaign intervention by reviewing and addressing allegations of political intervention by tax-exempt organizations on an expedited basis during the 2004 election year."¹⁵⁶ The initiative focused on the 2004 election cycle and covered referrals through November 2004.¹⁵⁷

The IRS initially assigned 132 cases to the field for examination, but determined during an initial review that twenty-two of them would be closed without contacting the organization, resulting in 110 actual examinations.¹⁵⁸ Of the remaining 110 examinations, forty involved churches.¹⁵⁹ Within the forty church examinations, the IRS found that thirty-seven churches intervened in a political campaign and were either issued an advisory by the IRS that the church had impermissibly intervened or had an excise tax assessed.¹⁶⁰ Given the vast number of churches in the United States and the seemingly large number of churches that appears to, at the least, dabble in politics this enforcement appears to be minimal.

This lax enforcement by the IRS is definitely counter-intuitive. It would be easy to believe that the churches are being investigated constantly for violating the ban on political intervention in Section 501(c)(3). However, that is not the case, despite the perceived level of

151. *Id.*

152. *Id.*

153. *Id.* at 1357-58.

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

155. *See* INTERNAL REVENUE SERVICE, FINAL REPORT, PROJECT 302, POLITICAL ACTIVITIES COMPLIANCE INITIATIVE (2004), available at http://www.irs.gov/pub/irs-tege/final_paci_report.pdf.

156. *Id.* at 1.

157. *Id.*

158. INTERNAL REVENUE SERVICE, 2004 POLITICAL ACTIVITY COMPLIANCE INITIATIVE (PACI), SUMMARY OF RESULTS (Feb. 16, 2004), available at http://www.irs.gov/pub/irs-tege/one_page_statistics.pdf.

159. *Id.*

160. *Id.*

non-compliance with the statute.¹⁶¹ Lax enforcement by the IRS may result in more churches that may feel emboldened to violate the ban given the low number of investigations of churches.¹⁶² While this article calls for Section 501(c)(3) to be amended, it does not call for widespread flouting of the law.

The IRS's minimal enforcement of Section 501(c)(3) undoubtedly leads to enforcement that is at best inequitable for similarly situated churches.¹⁶³ While a high-profile church might be investigated for an alleged violation of Section 501(c)(3), a church with a lower profile might engage in the same conduct and not draw the attention and scrutiny of the IRS. Because of the confidentiality rules of Section 501(c)(3), neither church might be aware of the disparate treatment. While there were very few examinations of churches during the 2004 election cycle and fewer determinations of noncompliance, it is likely that noncompliance with Section 501(c)(3) was more widespread.

V. REAL LIFE EXAMPLES AND A PROPOSED SOLUTION

While hypothetical examples can show the problems of the current law regarding tax-exempt status, there is a real-life example that shines a light on the issue.

A. *The All Saints Investigation*

Two days before the 2004 election, the Reverend George Regas preached a sermon entitled, "If Jesus Debated President Bush and Senator Kerry."¹⁶⁴ Reverend Regas is the Rector Emeritus and former pastor of the All Saints Church. In the sermon, Reverend Regas immediately stated two things: 1) that Jesus wins; and 2) that he (Reverend Regas) does not intend to tell anyone how to vote.¹⁶⁵ Reverend Regas then proceeded to preach a sermon touching on the peace movement, poverty, and abortion. At times, the sermon used hypothetical questions from Jesus addressing both President Bush and Senator Kerry. Other times, the questions were addressed solely to President Bush. At another point, Reverend Regas took on conservative politicians who allegedly have more compassion for fetuses than for children after they were born. Reverend Regas then closed the sermon with the following words: "When you go into the voting booth on Tuesday, take with you all that you know about Jesus, the peacemaker. Take all that Jesus means to you. Then vote your deepest values. Amen."¹⁶⁶

161. See Lloyd Hitoshi Mayer, *Grasping Smoke: Enforcing the Ban on Political Activity by Charities*, 6 FIRST AMENDMENT. L. REV. 1, 4 (2007).

162. See *id.* at 16, 19-20.

163. See Tobin, *supra* note 140, at 1356.

164. Regas, *supra* note 5, at 1.

165. *Id.* at 1.

166. *Id.* at 6.

It is clear that the Reverend—in all likelihood because he was aware of the prohibition against campaigning in church—attempted make his sermon as neutral as possible. But, it is also clear that the sermon, despite best efforts, was more critical of President Bush than Senator Kerry. News of the sermon spread fast. The day following the sermon, an article appeared in the *Los Angeles Times* regarding the sermon.¹⁶⁷ The IRS became aware of the sermon through the article and sent All Saints a “Tax Inquiry Letter,” stating that it was commencing an investigation into the sermon, and that All Saints might have violated the prohibition against political campaigning.¹⁶⁸ Attached to the letter was a series of questions.¹⁶⁹

Ed Bacon, the pastor of the All Saints Church, informed the congregation of the investigation on November 6, 2005.¹⁷⁰ The day following the announcement of the investigation to the congregants, the church issued a press release regarding the IRS investigation.¹⁷¹

The IRS summons issued to All Saints started out by seeking the organizing documents for All Saints. It, however, quickly got to the heart of the matter and sought the following documents: 1) a copy of all electronic recordings of Reverend Regas’s sermon; 2) a copy of all electronic recordings made of remarks to the church after the Reverend Regas’s sermon which referenced the sermon; and 3) a copy of all writings which referenced Reverend Regas’s sermon.¹⁷² All Saints did not comply with the summons.

All Saints subsequently heard nothing from the Internal Revenue Service until September 10, 2007, when the IRS informed the church that it had concluded its investigation.¹⁷³ The IRS’s letter to All Saints stated that All Saints had, indeed, intervened in the 2004 presidential campaign,

167. Josh Getlin, *The Race for the White House: Pulpits Ring with Election Messages*, L.A. TIMES, Nov. 1, 2004, at A1.

168. Tax Inquiry Letter from R. C. Johnson, Dir., Exempt Org., Examinations, to All Saints Church (June 9, 2005), <http://aschu.convio.net/pdf/IRS%20Letter%20to%20All%20Saints.pdf>.

169. *Id.*

170. The All Saints website describes the day as one that was both joyful and sad as the Reverend Desmond Tutu preached at the church on that particular Sunday. The announcement to the congregants stated that All Saints church was “self identified” as a “peace church” since 1987. The announcement further stated that the church would “continue from a nonpartisan perspective to teach and proclaim with vigor the core values of Christianity as we stand in the prophetic tradition of Jesus the peacemaker.” See All Saints Church News and Actions, http://www.allsaints-pas.org/site/PageServer?pagename=IRS_Exam_splash (last visited Dec. 16, 2008).

171. PRESS RELEASE, ALL SAINTS CHURCH (Nov. 4, 2005) <http://aschu.convio.net/pdf/IRS%20PressRelease.pdf>. The Church’s tax counsel was quoted in the press release. The counsel is the former director of the IRS Exempt Organizations Division.

172. SUMMONS FROM INTERNAL REVENUE SERVICE, TAX EXEMPT AND GOVERNMENT ENTITIES DIVISION, TO ALL SAINTS CHURCH at 1 (Sept. 15, 2006), <http://www.allsaints-pas.org/site/DocServer/IRS-Summons.pdf?docID=503>.

173. See LETTER FROM MARSHA A. RAMIREZ, DIR. EXEMPT ORGS., INTERNAL REVENUE SERVICE, TO MARCUS S. OWENS, COUNSEL FOR ALL SAINTS CHURCH 1 (Sept. 10, 2007), www.allsaints-pas.org/site/DocServer/Letter_from_IRS_to_All_Saints_Church.pdf?docID=2541.

but that the intervention appeared to be a one-time occurrence and All Saints still qualified for tax-exempt status.¹⁷⁴

This development, while a good one for the All Saints Church, should be unsatisfying to both opponents and proponents of the Section 501(c)(3) ban. For those supporting the ban, the good news is that the IRS found that All Saints intervened in the 2004 campaign. The bad news is that the IRS concluded that the intervention was a one-time event and allowed All Saints to keep its tax-exempt status. Given that All Saints has self-identified as a peace church, it is probable that the sermon by Reverend Regas was not the only time that All Saints has spoken out on issues that touched on politics and candidates.¹⁷⁵ Because All Saints did not comply with the IRS's summons and the IRS did not attempt to compel compliance, the IRS could not have conducted a complete investigation into All Saints' past practices. The IRS was probably unable to make a determination that could have sustained a revocation of All Saints' tax-exempt status.

Opponents of the ban most likely cheer the fact that All Saints did not lose its tax-exempt status—but that is probably all they are cheering about. The IRS found that All Saints intervened in a political campaign. The IRS very easily could have stripped All Saints of its tax-exempt status, as it did Branch Ministries. This fact was not lost on All Saints. Subsequent to receiving the closing letter from the IRS, All Saints called on the IRS to apologize and issue a correction.¹⁷⁶ Specifically, Reverend Bacon, quoted in a press release distributed by All Saints, stated that

[w]hile we are pleased that the IRS examination is finally over, the IRS has failed to explain its conclusion regarding the single sermon at issue. Synagogues, mosques, and churches across America have no more guidance about the IRS rules now than when we started this process over two long years ago. The impact of this letter leaves a chilling effect cast over the freedom of America's pulpits to preach core moral values. We have no choice but to demand clarification on this matter with the IRS.¹⁷⁷

Reverend Bacon recognized the very reason the conclusion of the investigation was unsatisfactory: There was no indication from the IRS

174. *Id.*

175. It should be noted that the author has no evidence that the situation described above was *not* an isolated incident.

176. See LETTER FROM ALL SAINTS CHURCH, TO IRS (Sept. 21, 2008), http://www.allsaints-pas.org/site/DocServer/Letter_to_IRS_Commissioner_092107.pdf?docID=2542.

177. See PRESS RELEASE FROM ALL SAINTS CHURCH, ALL SAINTS CHURCH, PASADENA DEMANDS CORRECTION AND APOLOGY FROM THE INTERNAL REVENUE SERVICE, 1 (Sept. 23, 2007) http://www.allsaints-pas.org/site/DocServer/IRS_Press_Release_Sept_23_2007.pdf?docID=2521.

All Saints also alleged in the press release that IRS might have breached confidentiality rules by discussing the case with "high-level Department of Justice personnel" and that the alleged discussions indicate that the All Saints investigation might have been politically motivated. All Saints referred its concerns to the Treasury Inspector General for Tax Administration.

as to what exactly in Reverend Regas's sermon was objectionable. All Saints, and other houses of worship, can draw no instruction from the All Saints investigation on what is objectionable speech and what is allowable speech. This is troubling and unwelcome news for churches that wish to speak out on issues that touch society in general and politics specifically.

B. A Legislative Fix to Section 501(c)(3) is Necessary

Given the numerous problems with Section 501(c)(3)—as applied to churches and other religious organizations—that the All Saints investigation illustrates, Section 501(c)(3) should be amended to repeal the ban on churches “intervening” in politics. Legislation is the preferred means of lifting the ban in Section 501(c)(3) so that churches will have some certainty as to the legality of their actions. Having the IRS or a federal court find that a particular church did or did not violate Section 501(c)(3) does not solve the problems of the statute.

The All Saints situation is an example of the problems with Section 501(c)(3) and why it should be amended. An amendment to Section 501(c)(3) is preferable to a judicial remedy. A judicial remedy in the All Saints case most likely would have determined whether All Saints impermissibly intervened in a political campaign; it likely would not have dealt with the issue of whether the ban in Section 501(c)(3) was a good policy decision. Additionally, a federal court would not have found Section 501(c)(3) unconstitutional.¹⁷⁸ Therefore, Congress should amend Section 501(c)(3) to allow churches to engage in political speech in limited circumstances.

Since 2001, there have been numerous pieces of legislation introduced in both the House and the Senate to amend Section 501(c)(3). None of the pieces of legislation has been enacted. An analysis of some of the legislation follows.

1. H.R. 2931—The Bright-Line Act of 2001

Representative Phillip M. Crane introduced the “Bright-Line Act of 2001” (“Bright-Line Act”) to “clarify the restrictions on the lobbying and campaign activities of churches.”¹⁷⁹ The Bright-Line Act would have allowed a church to expend up to 5% of its gross revenues each year to participate in political campaigns and up to 20% of its gross revenues on lobbying efforts.¹⁸⁰ A church could only spend an aggregate of 20% of its gross revenues on lobbying and participating in political campaigns.

178. See Totten, *supra* note 130, at 317-318.

179. See Bright-Line Act of 2001, H.R. 2391, 107th Cong. Preamble (2001), available at http://rwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h2931ih.txt.pdf.

180. *Id.* § 2.

The bill was referred to the House Ways and Means Committee which received comments and held a hearing on the bill on May 14, 2002.¹⁸¹ The Ways and Means Committee did not hold a vote on the bill.¹⁸²

While the Bright-Line Act was a noble attempt at solving the problem, it had flaws. The main problem was that by setting a limit on the amount of expenditures that can be made for “political activity” and for lobbying, it would have required the IRS to examine the financial records of a church to determine if the church had exceeded the limits in the bill. This would still have the IRS making an intrusion into the internal affairs of a church. Additionally, after the threshold has been reached, the IRS would be in the same situation as it currently is in—examining religious activities to determine if a violation of Section 501(c)(3) occurred. Given that the current statute has numerous problems, the Bright-Line Act would only have been a band-aid.

2. S. 2886—The Houses of Worship Political Speech Protection Act

In 2002, Senator Bob Smith of New Hampshire introduced the Houses of Worship Political Speech Protection Act, which would have amended section 501(c)(3) to “ensure the religious free exercise and free speech rights of churches and other houses of worship to engage in an insubstantial amount of political activities.”¹⁸³ The bill was referred to the Senate Finance Committee, where, apparently, no action was taken.

This bill, which was better than the Bright-Line Act because it omitted the “gross revenues” provision, also had a major problem. The bill would have allowed political activity as long as it was “insubstantial.”¹⁸⁴ However, nowhere in the bill was “insubstantial” or “substantial” defined. Currently, the word substantial is not well-defined in the tax code.¹⁸⁵ There is no bright-line rule for what “substantial” means in the Internal Revenue Code. There is some indication that between five and fifteen percent of an organization’s activities as measured by time, effort, expenditures, and other relevant factors is “insubstantial.”¹⁸⁶ Likewise, a comprehensive definition of “substantial” might have alleviated some of the problems with this bill. However, a church would then be subject to

181. See *Review Of Internal Revenue Code Section 501 (c)(3) Requirements For Religious Organizations: Hearing Before The Subcomm. on Oversight of the Comm. on Ways and Means, 107th Cong. (2002)*, available at <http://waysandmeans.house.gov/legacy.asp?file=legacy/oversite/107cong/5-14-02/107-69final.htm>. The hearing had eight witnesses on both sides of the issue. There also were written submissions by numerous individuals and organizations on both sides of the issue.

182. See Mayer, *supra* note 161, at 4 n.8.

183. See Houses of Worship Political Speech Protection Act, S. 2886, 107th Cong. Preamble (2002), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:s2886is.txt.pdf.

184. *Id.* § 2.

185. See Anderson, *supra* note 28, at 125.

186. See Halloran & Kearney, *supra* note 128, at 108 n.18.

the same government entanglement in its affairs that implicate the Free Exercise Clause.

3. H.R. 235—The Houses of Worship Free Speech Restoration Act of 2005

On January 4, 2005, Representative Walter Jones of North Carolina introduced the Houses of Worship Free Speech Restoration Act of 2005.¹⁸⁷ This bill would have allowed a church to maintain tax-exempt status even if they intervened on behalf of or in opposition to a candidate for public office in the course of a “homily, sermon, teaching, dialectic, or other presentation made during religious services or gatherings.”¹⁸⁸ It also would have allowed church members and leaders to express their personal views on political matters at religious services “as long as those views are not disseminated beyond the members and guests assembled together at the service.”¹⁸⁹

This bill most likely was unsatisfactory to both those who opposed the current ban and those who supported the current ban. Obviously, those who supported the current ban would have felt that no change was necessary in the first place. This bill would have allowed political intervention at any church service that was primarily intended for church members and for personal views on politics to be given at those services. This undoubtedly would not have been acceptable to those who support the current ban.

Those who opposed the ban might not have been happy that the bill was relatively narrow. The bill would have limited political activity to religious services and the activity must have been targeted primarily to members. While those that opposed the ban likely would have been happy that the ban was relaxed, they likely would have wished that the limitation on speaking primarily to members was not present.

4. S. 178—The Religious Freedom Act of 2007

The most recent attempt to amend Section 501(c)(3) was by Senator James Inhofe, who introduced the Religious Freedom Act of 2007.¹⁹⁰ The goal of the act was “to protect freedom of speech exercisable by houses of worship or meditation and affiliated organizations.”¹⁹¹ The act

187. See Houses of Worship Free Speech Restoration Act of 2005, H.R. 235, 109th Cong. (2005), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h235ih.txt.pdf. Representative Jones also introduced bills which would have relaxed the political activity ban for churches in 2001. See, e.g., Nonprofit Political Speech Act, H.R. 355, 107th Cong. (2001), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h355ih.txt.pdf.

188. H.R. 235 §. 2(a).

189. *Id.* § 3.

190. See The Religious Freedom Act of 2007, S. 178, 110th Cong. (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s178is.txt.pdf.

191. *Id.* at Preamble.

would prohibit the government from denying churches, and their donors, tax exempt status if the churches engaged in “comment on public issues, election contests, and pending legislation made in theological or philosophical context of such organization.”¹⁹² The act was referred to the Senate Finance Committee, which took no action on it.

This act was not an amendment of Section 501(c)(3) but rather a separate bill. It was the most far-reaching of the proposed legislation. It would have completely allowed churches and church leaders to engage or comment on political issues. Interestingly, the act declared that such activity is constitutionally protected activity.¹⁹³ This act was very broad and would have allowed churches the virtually unfettered ability to speak on political issues if they believed that this was part of their theological mission.

C. A Limited Proposal

There is no proposal that will completely satisfy those who want to allow churches the freedom to engage in political activity. However, an incremental step would provide churches with more freedom to speak on issues that are important to the church.

None of the proposed bills examined earlier is completely suitable as a replacement for the current ban. One bill, however, could probably satisfy proponents of lifting the ban. Section 2 of the Houses of Worship Free Speech Restoration Act of 2005 would have allowed churches to maintain tax-exempt status and engage in political activity so long as the activity was in a “homily, sermon, teaching, dialectic, or other presentation made during religious services or gatherings.”¹⁹⁴ That is a fairly broad area in which churches would be able to speak freely to members regarding issues that touch on politics.

Allowing churches to communicate with its members in religious services and other meetings is not an unheard of proposition.¹⁹⁵ A similar, though not identical, proposal has been advocated by other commen-

192. *Id.* § 2(a).

193. *Id.*

194. *See* Houses of Worship Free Speech Restoration Act of 2005, H.R. 235, 109th Cong. § 2(a) (2005), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h235ih.txt.pdf. This paper is not advocating that Section 3 of the Act be adopted. The personal views of the members and leaders of a church really are irrelevant. The ability of the church to teach according to its religious principles is what is at issue, not the personal views of particular members.

195. *See* Samansky, *supra* note 48, at 27, 28 (2006). Professor Samansky’s proposal allows churches and religious leaders to communicate freely about political candidates with their members as long as the church or religious leaders do not officially endorse a candidate for public office. Churches would not be allowed to undertake activities they don’t usually engage in and as long as the activity in question is not targeted at nonmembers. Any communication must take place as a routine part of a church’s activity geared primarily toward members and the hope is that this will “reduce entanglement of the government and religion.”

tators.¹⁹⁶ There are several benefits to this limited proposal. First, the proposal only applies to churches, and not to other religious organizations. Second, the proposal is limited to regularly scheduled religious services which should calm fears about churches taking out advertisements endorsing candidates.¹⁹⁷ Third, the proposal eliminates the “restraint on the issues a religious leader might address.”¹⁹⁸ In other words, churches would be able to freely discuss issues of importance to the members of the church without fear of an IRS investigation or loss of tax-exempt status.

Limiting the exception to religious services resolves a number of issues with the current ban. First, churches would be allowed to speak directly to their members about issues that the church leaders believe are an integral part of religious life without fear of an investigation. Churches would also be allowed to freely compare candidates, as was done in the sermon preached at All Saints Church before the 2004 election. Churches would also be able to examine how a candidate’s position on various issues conforms to its positions on issues without fear of losing tax-exempt status. The IRS would no longer be allowed to scrutinize sermons and other church teachings and make determinations on whether the sermon or teaching was “religious” in nature.

The proposal is also appealing because the communication must be intended primarily for church members. Therefore, a sermon or church bulletin would not be subject to review. And, because the communication must be intended primarily for members, churches would be prevented from running campaign events for the community and still expect to keep tax-exempt status.

An added benefit is that enforcement issues will go away. Because the IRS will have fewer opportunities to investigate churches, concerns about lax and uneven enforcement would be alleviated. Even though the IRS has historically conducted relatively few investigations, the number of investigations is sure to rise in the future given the increased interplay between religion and politics. This proposal is one way to eliminate most investigations.

Even without the above benefits, the proposal still should be enacted as an acknowledgement of the special role churches have in society. As discussed above, churches have played a unique role in American life. Because of this unique role and the fact that what some might consider political speech cannot be separated from “purely religious” speech, churches should have the ability to meet their unique mission. Absent a change to Section 501(c)(3), churches that believe their mission

196. See Totten, *supra* note 130, at 321-22. Totten’s proposal would only apply to oral, not written, communications.

197. *Id.*

198. *Id.* at 322.

is to speak out on social justice issues will not be able to do so if that speech touches on “political activity.”

CONCLUSION

Allowing churches to speak directly to their members on matters that walk the line between purely “religious” and purely “political” would allow them to fulfill their religious mission. It would allow a community of faith to reason together and discuss issues that are important to them as a community without fear of the government infringing on their free expression rights.

Churches play a unique and complicated role in American society. Amending Section 501(c)(3) would be an acknowledgment of that role. An amendment of Section 501(c)(3) would also allow churches to fulfill their theological mission if they feel that the mission requires them to speak out on social issues.

The proposal set forth in this paper is not perfect and will not please everyone. It is not likely that Congress will act on the issue of churches, tax-exempt status and political speech given the history of prior pieces of legislation. A discussion is needed, however, on churches and their role in society and politics and my hope is that this article will add to the discourse.

