

PROHIBITION IN SEARCH OF A RATIONALE: WHAT THE TAX CODE PROHIBITS; WHY; TO WHAT END?

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Abstract: Each Presidential election renews the thorny debate over the appropriate role of churches and other religious organizations in American political life. Although churches are subject to other restraints on political activity, the prohibition on church political activity under section 501(c)(3) of the Internal Revenue Code is the harshest in terms of penalties. Faced with the extraordinary scope of the prohibition as interpreted by the IRS, and perceived non-enforcement of egregious violations, churches tend toward one or two extremes: they either ignore the prohibition and endorse candidates or they avoid legitimate involvement with important policy issues.

[R]eligion . . . has no sphere, and the river of serious belief cannot be dammed. The waters will flow where the waters will flow, because the Lord will go where the Lord will go.¹

INTRODUCTION

In quadrennial cycle, Presidential elections renew the thorny debate over the appropriate role of churches and other religious organizations in American political life.² The 2000 election cycle in particular, witnessing the selection of Senator Joe Lieberman as the first Jewish candidate on a major party Presidential ticket, placed the issue front and center. This article explores, in the context of the larger debate, the prohibition on church political activity under section 501(c)(3) of the Internal Revenue Code ("Code"), its genesis, utility, and appropriateness.

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¹ STEPHEN L. CARTER, GOD'S NAME IN VAIN 112 (2000).

² The term "church," as used herein, encompasses all religious faiths, traditions, and denominations, and includes other religious organizations that may not constitute "church" within the technical meaning of section 170(b)(1)(A)(i) of the Internal Revenue Code.

Although churches are subject to other restraints on political activity—the Federal Election Campaign Act (FECA) and relevant restrictions under state and local law—the Code's prohibition is the most restrictive and the harshest in terms of penalties.³ Since the political activity prohibition is deemed absolute, any violation risks revocation of church tax-exempt status and consequent loss of deductible contributions.⁴ In addition, the IRS may impose excise taxes under section 4955 with respect to political expenditures made in contravention of the political activity prohibition.⁵ The IRS may also seek an immediate determination and assessment of income and excise taxes due on account of flagrant political expenditures, and bring injunc-

³ 2 U.S.C. §§ 431–455 (1994). From time to time, Federal Election Committee ("FEC") interpretations are included in this Article when they provide useful guidance that is compatible with IRS interpretations.

⁴ See EXEMPT ORGANIZATIONS HANDBOOK (IRM 7751) § 3(10)1(1). But see *Lobbying and Political Activities of Tax Exempt Organizations: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 100th Cong., 1st Sess. 96–97 (1987)* (statement of Lawrence Gibbs, IRS Commissioner). Gibbs stated that "some consideration may be given to whether, qualitatively and quantitatively, . . . the activity is so trivial it is without legal significance and, therefore, *de minimis*." In introducing the 1954 amendment, Senator Lyndon B. Johnson stated "[t]his amendment seeks to extend the provisions of § 501 of the House bill, denying tax-exempt status to not only those people who influence legislation but also to those who intervene in any political campaign on behalf of any candidate for any public office." 100 CONG. REC. S9604 (1954) (statement of Sen. Johnson). Of course, mere extension of the treatment accorded exempt organizations engaged in lobbying activities would have resulted in the imposition of a "substantiality" test for political activity rather than an outright prohibition.

⁵ The IRS has discretion to impose the excise tax penalty *in lieu* of revocation, depending on relevant facts and circumstances, including the nature of the political intervention and steps that have been taken to prevent recurrence. See Preamble, Final Regulations on Political Expenditures by § 501(c)(3) Organizations, 60 Fed. Reg. 62,209 (Dec. 5, 1995). Churches are subject to an initial 10% tax on each political expenditure. See I.R.C. § 4955(a)(1) (1994). The initial tax may be abated if the church establishes that its political expenditure was not willful and flagrant, and has been corrected. Treas. Reg. § 53.4955-1(d). If the expenditure is not corrected, an additional tax equal to 100% of the expenditure will be imposed. See I.R.C. § 4955(b)(1) (1994). In addition, a 2½% tax will be imposed on an "organization manager" who knowingly agrees to a political expenditure, unless such agreement is not willful or is due to reasonable cause. See *id.* § 4955(a)(2). An "organization manager" includes any church officer, director or trustee, or other individual with comparable responsibilities, as well as any church employee having authority or responsibility with respect to the political expenditure. See *id.* § 4955(f)(2). If the organization manager refuses to agree to correction, an additional 50% tax is imposed. See *id.* § 4955(b)(2). For any single political expenditure, the first-tier tax on the organization manager may not exceed \$5,000 and the second-tier tax may not exceed \$10,000. See *id.* § 4955(c)(2).

tive action to bar further political expenditures in a United States district court.⁶

I. PROHIBITION'S OBSCURE ORIGINS AND WIDE REACH

In the 1913 income tax provisions, an accommodation was made for exemption from taxation of religious, charitable, educational, and scientific organizations.⁷ This initial exemption, however, was not conditioned on abstinence from political campaign activity.⁸ In fact, the express prohibition on political campaign activity did not become part of the Code until 1954. This provision, which has had such significant impact on the role of tax-exempt organizations in the political sphere, was added without the benefit of hearings, testimony, or comment from affected organizations by then-Senator Lyndon B. Johnson during Senate floor debate on the 1954 Code. It is likely that, by means of the prohibition, LBJ sought to insure that the tax-exempt

⁶ See I.R.C. §§ 6852, 7409(a)(1) (1994). The IRS first must notify the church of its intention to seek an injunction unless the church immediately ceases its political expenditures. *See id.* § 7409(a)(2)(A). The IRS must also conclude that the violation of the political activity prohibition had been flagrant and that injunctive relief would be appropriate to prevent further political expenditures. *See id.* § 7409(a)(2)(B).

⁷ See BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 12-14 (7th ed. 1998).

⁸ Since 1934, the Internal Revenue Code has restricted the lobbying activities of section 501(c)(3) organizations, including churches. *See* Revenue Act of 1934 (codified at 31 U.S.C. § 3103). While political campaign activity is strictly prohibited, lobbying may not constitute more than an insubstantial part of an organization's total activities. *See* I.R.C. § 501(c)(3). Lobbying includes both contacting (direct lobbying) and urging the public to contact (grassroots lobbying) members of a legislative body, whether federal, state, or local, for the purpose of proposing, supporting, or opposing legislation, or advocating the adoption or rejection of legislation. *See* Treas. Reg. § 1.501(c)(3)-501(c)(3)(ii) (as amended in 1990). Legislation is defined to include any action: (1) by Congress, a state or local legislative body; or (2) by the public in a referendum, initiative, constitutional amendment or similar procedure. *See id.* The section 501(c)(3) lobbying limitation applies both to lobbying that is germane to a church's religious purposes and to lobbying that is not. *Cf.* Rev. Rul. 67-293, 1967-2 C.B. 185, 186. Neither the Code nor the regulations define what is "substantial." A few court cases suggest that the line between what is substantial and what is insubstantial lies somewhere between 5% and 15% of an organization's total activities, as measured by time, effort, expenditure and other relevant factors. *See* *Haswell v. U.S.*, 500 F.2d 1133, 1133 (Cl. Ct. 1974) (16-20% of budget *was* substantial); *Murray Seasongood v. Comm'r.*, 227 F.2d 907, 912 (6th Cir. 1955) (less than 5% time and effort *was not* substantial). The IRS does not endorse any particular percentage safe harbor, but would likely be more comfortable at the lower end of the spectrum. In 1976, Congress enacted section 501(h) of the Code, an elective provision that established a sliding scale of permissible lobbying expenditures based on the organization's total budget. *See* I.R.C. § 501(h) (1994). However, at their own request, churches, conventions or associations of churches, and integrated auxiliaries of churches were made ineligible to elect treatment under section 501(h). *See* I.R.C. §§ 501(h)(5), 4911(f)(2).

organizations that had supported Dudley Dougherty, his challenger in the 1954 primary election, would not do so again.⁹

The statutory language of section 501(c)(3) prohibits churches from participating or intervening in political campaigns on behalf of or in opposition to any candidate for public office.¹⁰ The regulations recite that "action organizations"—those that participate or intervene, directly or indirectly, in any political campaign on behalf of, or in opposition to, any candidate for public office—are not operated exclusively for exempt purposes and cannot qualify for tax exemption under section 501(c)(3).¹¹ The regulations define a "candidate" as one who offers himself or is proposed by others as a contestant for an *elective* public office, whether national, state or local.¹² Thus, a church may support or oppose a candidate for *non-elective* public office—a Supreme Court justice—without jeopardizing its tax-exempt status.¹³

When an individual "offers himself, or is proposed by others," and thus becomes a candidate for elective public office must be determined on the basis of all relevant facts and circumstances. Clearly, an individual who has announced his intention to seek election to public office is a candidate. Additionally, even an individual who has not formally announced an intention to seek elective office—and even if he never actually becomes a candidate—can in appropriate circumstances be considered a candidate for purposes of section 501(c)(3).¹⁴ Further, third parties may propose an individual as a candidate and take steps to urge his election. However, the mere fact that an individual is a prominent political figure is alone insufficient

⁹ See Deirdre Halloran & Kevin Kearney, *Federal Tax Code Restrictions on Church Political Activity*, 38 CATH. LAW. 105, 106–08 (1998). See generally, Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733 (2001).

¹⁰ The language "in opposition to" was added by the Revenue Act of 1987, Pub. L. No. 100–203, 10 Stat. 1330.

¹¹ Treas. Reg. § 1.501(c)(3)–501(c)(3)(iii) (as amended in 1990).

¹² See *id.*

¹³ Cf. *id.* However, if a non-elective appointment requires confirmation by a legislative body, church activities in support of or opposition to the appointment would be classified as lobbying activities subject to the insubstantiality limitation. See Gen. Couns. Mem. 39,694 (Jan. 21, 1988). In addition, the church may incur liability for tax under § 527 on account of such activities. See *infra* note 21. Elective positions in a political party—e.g., precinct committee members—are also considered "public offices" if they (1) are created by statute; (2) are continuing; (3) are not occasional or contractual; (4) possess fixed terms of office; and (5) require an oath of office. See Gen. Couns. Mem. 39,811 (June 30, 1989).

¹⁴ See Tech. Adv. Mem. 91–30–008 (July 26, 1991). For example, Hillary Rodham Clinton's famous "listening tour" of New York State, prior to her formal declaration as the 2000 Senatorial candidate of the Democratic Party, qualified her as a candidate.

to render him a candidate. "Some action must be taken to make one a candidate, but the action need not be taken by the candidate or require his consent."¹⁵

Despite the paucity of definitive guidance from either the legislative history or IRS regulations, the political activity prohibition has been interpreted broadly to include a range of activity beyond the obvious. A church may not, among other things, make statements that support or oppose a candidate for elective public office, slate of candidates, political party or political action committee¹⁶ ("PAC") in a sermon, church bulletin, on a church website or in an editorial in a church publication.¹⁷ In addition, churches may not *indirectly* support or oppose any candidates by characterizing candidates with anti-family or similar labels, using plus (+) and minus (-) signs, or other indications of candidates' agreement (or lack thereof) with the church's positions on particular issues.¹⁸

A church also may not establish a PAC nor may it provide or solicit financial support to or for any candidate, political party, or PAC.¹⁹

¹⁵ Judith E. Kindell & John F. Reilly, *Election Year Issues*, in 1992 IRS EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM, 408 [hereinafter *Election Year Issues*].

¹⁶ As used here, a political action committee is understood as a committee, whether organized as a separate organization or as a segregated fund of an existing organization, the purpose of which is to influence the election of any individual to public office.

¹⁷ As the Internet has become a potent information delivery system, many churches have come to rely on websites as a means of communicating their messages to members, parishioners, and the world at large. The political activity prohibition applies with equal force in cyberspace. The IRS is currently soliciting comments on how the prohibition should apply in particular Internet situations. See Announcement 2000-84, 2000-42 I.R.B. 385 (Oct. 16, 2000). Even without specific guidance, however, it is safe to predict that the following information posted on a church website would violate the political campaign activity prohibition: links to candidates, PAC or political party websites; candidate endorsements or statements of opposition; calls for members, parishioners or other users to support or oppose a particular candidate or party; biased voter guides or links thereto; and links to other organizations' statements in support of or opposition to candidates. *Cf. id.*

¹⁸ The IRS has taken the position, which has been upheld by the courts, that even nonpartisan rating of elective judicial candidates as "approved," "not approved," or "approved as highly qualified," on the basis of experience, professional ability, and character, constituted prohibited political campaign activity, despite the fact that in certain cases *all* candidates were "endorsed" as qualified. See *Ass'n of the Bar v. Comm'r*, 858 F.2d 876, 880-82 (2d Cir. 1988) (upholding IRS position); Gen. Couns. Mem. 39,441 (Sept. 27, 1985).

¹⁹ See Treas. Reg. § 1.527-6(g) (1980); *Election Year Issues*, *supra* note 15 at 437. A church may, however, establish a separate segregated fund to engage in limited "political" activities, such as supporting candidates for *non-elective* public office, e.g., Supreme Court justice or cabinet officer. See Gen. Couns. Mem. 39,694 (Jan. 21, 1988). However, if such a segregated fund were to engage in political campaign activities prohibited under section 501(c)(3), these activities would be attributed to the church and jeopardize exempt status.

This includes loans,²⁰ taking collections during worship services or at other church functions, and in-kind support, such as free or selective use of volunteers, paid staff, facilities, equipment, office supplies, mailing lists,²¹ or use of church letterhead.

Churches may not distribute, or authorize distribution of, campaign literature or biased voter education materials during worship services, whether through member mailings or by other means. Also prohibited is the placement of political signs or placards on church

In addition, a church that engages in activities to influence the selection or appointment of a candidate for *non-elective* public office may be liable for tax under section 527. Section 527 of the Code imposes a tax at the highest corporate rate on the political activities of section 501(c) organizations. See I.R.C. § 527(b). Section 527 political activities are defined as "the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state or local public office or office in a political organization." See I.R.C. § 527(e)(2). To avoid imposition of section 527 tax, an organization must form a separate segregated fund to make expenditures for political activities, although it may not use its own corporate funds to do so. See I.R.C. § 527(f). Based on its legislative history, section 527 has been interpreted as not applicable to section 501(c)(3) organizations. See S. Rep. No. 93-1357, 1975-1 C.B. 517, 534. The IRS, however, has indicated that section 527 can apply to section 501(c)(3) organizations in certain circumstances. The definition of political activities in section 527 is broader than that in section 501(c)(3), because it extends to *non-elective* public office, which is not restricted by section 501(c)(3). Thus, a section 501(c)(3) organization may establish a separate segregated fund for the limited purpose of conducting political activities within the meaning of section 527 provided these activities are not political campaign activities within the meaning of section 501(c)(3). If the fund meets the requirements of section 1.527-2(a), it will be treated as a political organization subject to the provisions of section 527.

²⁰ See Tech. Adv. Mem. 98-12-001 (Mar. 20, 1998), in which the IRS concluded that a loan can be considered a contribution jeopardizing section 501(c)(3) exempt status, even when market rate interest is charged and the loan is repaid.

²¹ Providing church mailing lists to candidates, political parties, or PACs on a preferential basis or without charge, or lending such lists to candidates, political parties, or PACs violates the political activity prohibition. However, the IRS has indicated that a section 501(c)(3) organization "that regularly sells or rents its mailing list to other organizations will not violate the political campaign activity prohibition if it sells or rents the list to a candidate on the same terms that the list is sold or rented to others, provided the list is equally available to all other candidates on the same terms." *Election Year Issues*, *supra* note 15, at 433. In addition, the rental of mailing lists to non-section 501(c)(3) organizations, including candidates, PACs, or political parties, may give rise to unrelated business income tax liability. See I.R.C. § 513(h)(1)(B). *But see* *Sierra Club v. Comm'r*, 86 F.3d 1526, 1536 (9th Cir. 1996) (concluding that income from one-time rentals of mailing lists constitutes non-taxable royalty income); *Common Cause v. Comm'r*, 112 T.C. 332, 347 (1999); *Planned Parenthood Fed'n of Am. v. Comm'r*, 77 T.C.M. (CCH) 2227 (1999). The IRS determined in late 1999 to stop litigating mailing list licensing cases unless the factual record clearly established that more than insubstantial services were provided by the exempt organization. See EOTR WEEKLY, Mar. 13, 2000, at 58. See also 27 EXEMPT ORG. TAX REV. 237, 237 (2000) (reporting on fifty-three public radio stations criticized for swapping donor lists during 1999 with the Democratic National Committee and other political organizations).

property, including church-owned parsonages or rectories.²² Since churches lack the ability to control access to adjacent public property, such as public streets and sidewalks surrounding church property, third-party distribution of partisan materials on public property generally is not attributed to the church. Although some court opinions relating to the distribution of leaflets in shopping malls and parking lots suggest a contrary conclusion, generally church parking lots are considered private property, since they are easily distinguishable, in terms of both use and access, from community shopping centers, malls, and similar public venues.²³ Accordingly, churches may not authorize the distribution of biased or partisan campaign materials in their parking lots.

Churches and church-operated schools frequently permit local election authorities to use their auditorium and gymnasium facilities as polling places on Election Day. Such activity is a manifestation of civic duty, is nonpartisan, and does not violate the section 501(c)(3) political campaign activity prohibition. To the extent political leafleting is permitted outside polling places under local election rules, it is not attributable to the church. In addition, from time to time churches may be asked to make their facilities available for partisan political activities, such as party conventions or caucuses and candidate rallies. This occurs particularly in areas of the country where alternative large-capacity venues are scarce. Such use of church facilities is not *per se* prohibited. However, to insure that any partisan activity is not attributed to the church, the following precautions should be followed: (1) the church facility must not be provided free or at a reduced charge; (2) if the facility ordinarily is made available only to church-related users, it should not be made available to candidates or parties; (3) if the facility ordinarily is made available to outside users, the facility may be made available to candidates/parties on the same basis; (4) the facility should be available for all candidates/parties, with no preferences for any particular candidate/party; and (5) the church should not advertise, promote, or provide other services in connection with any political event taking place in its facility.

²² The placement of political signs at personally owned clergy residences is likely permissible, but may trigger IRS inquiry.

²³ See, e.g., *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 341 (Cal. 1979), *aff'd*, 447 U.S. 74, 74 (1980); *N.J. Coalition Against War in Middle East v. J.M.B. Realty*, 650 A.2d 757, 760 (N.J. 1994). *But see* *Walmart, Inc. v. Progressive Campaigns, Inc.*, 85 Cal. App. 4th 679, 679 (2000) (holding supermarket has legal right to deny entry to private sidewalk for purpose of soliciting signatures for election ballot petitions).

Not all political involvement by churches is prohibited under the Code. During election campaigns, churches may educate candidates about the issues and attempt to change their positions on those issues, and may educate voters about the issues and candidates' positions on the issues.²⁴ This may be accomplished through a variety of means, including sponsorship of candidate forums and distribution of voter education materials on incumbents' voting records and the results of candidate polls or questionnaires. These voter education activities, if unbiased in content, structure, format, and context, do not violate the political activity prohibition.²⁵

For example, the IRS has concluded that a section 501(c)(3) organization that published and distributed, during an election campaign, the voting records of all members of Congress on a wide range of subjects did not violate the political activity prohibition. The voting records were distributed annually (not merely during election years), contained no editorial opinions, and contained no indication of approval or disapproval of incumbents' votes.²⁶ The IRS has suggested criteria for evaluating whether distribution of incumbents' voting records serves as an appropriate voter education activity, including: (1) whether incumbents are identified as candidates; (2) whether incumbents' positions are compared to the positions of other candidates; (3) whether incumbents' positions are compared to the church's positions; (4) the timing, extent, and manner of distribution; and (5) the breadth or narrowness of the issues presented in the voting record.²⁷

On the other hand, the IRS has concluded that the distribution during an election campaign of a *biased* voting record—one that indicated whether legislators voted in accordance with the sponsoring organization's position—avoids violating the political campaign activity prohibition only in very limited circumstances: (1) the voting record does not identify candidates for re-election; (2) its distribution is not timed to coincide with any election, but rather is one of a series of regularly distributed voting records; (3) the distribution is not targeted to areas where elections are occurring; and (4) the voting rec-

²⁴ If, however, a candidate is an incumbent legislator, these activities could constitute lobbying activity subject to the general insubstantiality limits of section 501(c)(3).

²⁵ The Code does not define "bias." As a general rule, however, activities or publications are considered biased if, upon review of all relevant facts and circumstances, they indicate or imply that a candidate agrees or disagrees with the church's positions, or vice versa.

²⁶ See Rev. Rul. 78-248, 1978-1 C.B. 154 (Situation 1).

²⁷ See *Election Year Issues*, *supra* note 15, at 419-20.

ord is not broadly disseminated to the electorate, but only to a limited group, such as organization members or subscribers to its publication.²⁸ Perhaps the most controversial IRS voter education ruling concluded that broad distribution of voting records or other voter education materials that do not cover a wide variety of issues violates the political activity prohibition, *even in the absence of overt bias*.²⁹

Distribution by churches of voter guides prepared by unrelated organizations was a particularly contentious issue during the last two Presidential election cycles, one that presents a number of potential difficulties. Because the church did not prepare them, it is difficult, if not impossible, for the church to evaluate whether the questionnaire or instrument used to compile information about the candidates was free from bias, whether there was improper contact between the preparing organization and any candidate, and whether the presentation accurately reflected candidates' positions on the issues. In addition, the organization preparing the voter guide frequently is not a section 501(c)(3) organization, and is not subject to the political activity prohibition. Thus, while distribution of these voter guides may pose no risk to the preparing organization, it may jeopardize the tax-exempt status of the distributing church. The problem is exacerbated when the outside voter guide is accompanied by a self-serving legal opinion assuring churches that the guide is "perfectly legal."

Churches must exercise care when they prepare their own voter guides based on candidate questionnaires. They must follow IRS criteria for determining whether publication of candidate questionnaire responses violates the political activity prohibition: (1) whether the questionnaire is sent to all candidates; (2) whether all responses are published; (3) whether the questions indicate bias toward the organization's preferred answer; (4) whether the responses are compared to the organization's positions on the issues; (5) whether the responses are published as received, without editing by the organization; and (6) whether a wide range of issues is covered.³⁰ The IRS has con-

²⁸ See Rev. Rul. 80-282, 1980-2 C.B. 178.

²⁹ See Rev. Rul. 78-248, 1978-1 C.B. 154 (Situation 4).

³⁰ See *Election Year Issues*, *supra* note 15, at 421; Rev. Rul. 78-248, 1978-1 C.B. 154 (Situation 4). In addition, no coordination, cooperation, or consultation with candidates or their committees may take place. See *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 45 (D.D.C. 1999) (concluding that a non-501(c)(3) organization's voter guides did not constitute coordinated expenditures prohibited under the FECA, despite the fact that the voter guides clearly indicated which candidates were preferred by the Christian Coalition); 11 C.F.R. § 114.4(c)(5) (as amended in 1996) (FECA rules on candidate coordination). It

cluded that an organization that published the positions of all candidates in a particular race on a wide variety of issues selected solely on the basis of their importance to the electorate as a whole did not violate the political activity prohibition, where neither the questionnaire nor the voter guide evidenced bias or preference in content or structure.³¹ Conversely, publication of responses to a candidate questionnaire that evidenced bias on certain issues *did* violate the political activity prohibition.³² When only one candidate responds, distribution of his responses is problematic. The IRS has offered no guidance on this issue, but the Federal Election Committee ("FEC") voter guide rules require participation of at least two candidates.³³

Both IRS and FEC rules permit churches to sponsor voter registration and get-out-the-vote drives, provided that no bias for or against any candidate, political party, or voting position is evidenced.³⁴ Voter registration or get-out-the-vote efforts should not be: (1) conducted in cooperation with any political campaign; (2) targeted according to the identity of the candidate; (3) based upon a candidate's or party's agreement or disagreement with the sponsoring church's positions; or (4) targeted toward members of a particular party. Targeting voter registration drives at historically disadvantaged groups, whether based on economic status, race, gender or language spoken, however, is generally deemed unobjectionable.³⁵ Churches may also sponsor unbiased public forums, debates, and lectures in which candidates explain their views to the public. Sponsoring churches may not insert their views on the issues being discussed, comment on candidates' responses, or in any other way indicate bias for or against a particular candidate, party or position.³⁶ The IRS has identified the following factors as important to a favorable determination on candidate fo-

must be remembered that FECA acceptability notwithstanding, Christian Coalition-type voter guides evidencing bias would violate section 501(c)(3).

³¹ See Rev. Rul. 78-248, 1978-1 C.B. 154 (Situation 2).

³² See *id.* at Situation 3.

³³ See 11 C.F.R. § 114.4(c)(5) (1996).

³⁴ See *id.* at §114.4(d). Bias could, among other things, be indicated by distribution of biased or partisan literature in connection with voter registration or get-out-the-vote drives, by targeting registration or get-out-the-vote drives toward individuals who support the church's positions or a particular candidate or party, or by coordinating with candidates or their committees.

³⁵ See Priv. Ltr. Rul. 92-23-050 (Mar. 10, 1992) (grants for registering homeless people to vote did not constitute political activity for private foundation); Milton Cerny, *Campaigns, Candidates and Charities: Guideposts for All Charitable Institutions*, 19 N.Y.U. CONF. ON TAX PLANNING FOR 501(C)(3) ORG. 5:13-17 (1991).

³⁶ Cf. Rev. Rul. 66-256, 1966-2 C.B. 210.

runs: (1) all legally qualified candidates are invited to participate;³⁷ (2) questions are prepared and presented by an independent nonpartisan panel; (3) topics discussed cover a broad range of issues of interest to the public; (4) each candidate has an equal opportunity to present his or her views on the issues discussed; and (5) the moderator does not comment on questions or otherwise imply approval or disapproval of any candidate.³⁸

The IRS also has indicated that whether a church may invite a candidate to speak at a sponsored event depends upon all the facts and circumstances surrounding the invitation, and whether the candidate is invited in his capacity as a candidate or in his individual capacity. If the individual is invited as a candidate, the criteria for public forums, debates and the like apply. The IRS has further indicated that the nature of the event to which a candidate has been invited will be considered in determining whether the candidate has been provided requisite equal access. For example, if one candidate is invited to address the full congregation from the pulpit during a regular worship service, and the opposing candidate is invited to speak at a small prayer breakfast attended by only a handful of people, the church would likely be found not to have provided equal access. The IRS has suggested that a similar conclusion would be reached if a church were to invite two opposing candidates "with the knowledge and expecta-

³⁷ There are circumstances in which candidates may be excluded. For example, a primary election debate may be limited to legally qualified candidates seeking the nomination of a particular political party. See, e.g., *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 630 (2d Cir. 1989). Further, the FEC has indicated that if the field of legally qualified candidates is large, the sponsoring organization may limit participation based upon "pre-established objective criteria." Any debate must include at least two candidates and must not promote or advance one candidate over another. See 11 C.F.R. § 110.13(b) (1996). In addition, for a general election, the sponsoring organization may not use nomination by a particular political party as the sole objective criterion for participation. The IRS has suggested the following criteria for determining whether the failure to invite all legally qualified candidates violates the political activity prohibition: (1) whether inviting all legally qualified candidates was impractical; (2) whether the sponsoring organization adopted reasonable, objective criteria for determining which candidates to invite; (3) whether the criteria were applied consistently and non-arbitrarily to all candidates; and (4) whether other relevant factors indicate the debate was conducted in a neutral, nonpartisan manner. See *Election Year Issues*, *supra* note 15 at 424. For example, the IRS has approved a candidate forum with participation limited to two major party candidates plus up to four additional candidates posting at least 15% popular support, as determined by an independent statewide poll. See Priv. Ltr. Rul. 96-35-003 (Aug. 30, 1996).

³⁸ See Rev. Rul. 86-95, 1986-2 C.B. 73, 74; *Election Year Issues*, *supra* note 15, at 423.

tion that one would not accept the invitation because of well-known opposing viewpoints."³⁹

If a candidate is invited to speak in his capacity as a public figure or expert, it is not necessary to provide equal access to other candidates.⁴⁰ The following precautions, however, should be observed to avoid violating the political campaign activity prohibition: (1) the candidate must speak only in his capacity as expert or public figure; (2) no mention should be made of his candidacy; (3) no campaign activity should occur in connection with the candidate's appearance; and (4) all publicity regarding the candidate's attendance should identify the expert or public-figure capacity in which he is appearing and should not mention his candidacy. The IRS has also indicated that if the primary purpose of an invitation is to showcase an individual's candidacy, the organization may be found to violate the political campaign activity prohibition, even in the absence of campaign activity.

II. INDIVIDUAL POLITICAL ACTIVITY

It cannot be over-emphasized that the political activity prohibition applies to churches as tax-exempt organizations. The prohibition, however, does not purport to curtail the political activities of church members or church leaders acting in their individual capacities. Nevertheless, care must be taken to avoid confusion as to whether individuals, particularly church leaders, are acting in their organizational or individual capacities. The 1991 IRS-approved press release, which announced its settlement with Jimmy Swaggart Ministries regarding political activity conducted during the 1986 presidential campaign, provided clarification on this attribution issue.⁴¹ Generally, if an endorsement (or statement of opposition) takes place during an official church function, or is included in the church's official publication, the endorsement will be attributed to the

³⁹ See *Election Year Issues*, *supra* note 15, at 431.

⁴⁰ If an invitation is extended to a candidate on a public-figure basis, payment of a customary honorarium ordinarily will not result in a violation of the political campaign activity prohibition, unless the payment is intended to support the candidate's campaign. See *id.* at 431-32.

⁴¹ See Jimmy Swaggart, President, Jimmy Swaggart Ministries, Public Statement (Dec. 7, 1991) [hereinafter *Swaggart Statement*].

church.⁴² In addition, church members, employees, or leaders, may "not in any way utilize the [church's] financial resources, facilities or personnel" in the course of engaging in individual political activity, and must "*clearly and unambiguously* indicate that the actions taken or statements made are . . . not [those] of the [church]."⁴³ Church leaders acting in their individual capacities are permitted to use their official titles to identify themselves, "so long as they make it clear that they are acting in their individual capacity, that they are not acting on behalf of the [church], and that their association with the [church] is given for identification purposes only."⁴⁴

The FEC has concluded that directors of an exempt organization may, in their individual capacities, establish an independent PAC, that is, one unconnected with the organization.⁴⁵ The IRS has identified the following factors that suggest a PAC is not truly independent: (1) similarity between the name of the PAC and the exempt organization; (2) excessive overlap of directors; and (3) sharing of facilities between the exempt organization and the PAC.⁴⁶

⁴² See *Election Year Issues*, *supra* note 15, at 436 ("Actions and communications by the officials of the organization that are of the same character and method as authorized acts and communications of the organization will be attributed to the organization.").

⁴³ *Swaggart Statement*, *supra* note 41 (emphasis added). Agency principles apply in evaluating authorization issues. Actions of church employees within the scope of their employment generally will be treated as having been conducted with the church's authorization. In addition, individual actions will be attributed to a church if the church either ratifies or fails to disavow individual actions performed under the church's apparent authority. See Gen. Couns. Mem. 39,414 (Feb. 29, 1984); *Election Year Issues*, *supra* note 15, at 436.

⁴⁴ *Election Year Issues*, *supra* note 15, at 435.

⁴⁵ See Op. FEC 1984-12 (1984).

⁴⁶ See *Election Year Issues*, *supra* note 15, at 438. Similar attribution issues are raised when a church proposes to create a related section 501(c)(4) organization to conduct prohibited political activity either directly or through a related PAC. In order to avoid "conduit" pitfalls, the church and any related section 501(c)(4) organization must maintain separate books and records, and must insure that no tax-deductible church contributions are used to support the political activities of the section 501(c)(4) organization or its PAC. See *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 540 (1983); *Branch Ministries v. Rossotti*, 211 F.3d 137, 143 (D.C. Cir. 2000) (clarifying the availability of a section 501(c)(3)-501(c)(4)-PAC organizational triad for church political expression); Priv. Ltr. Rul. 98-50-025 (Dec. 11, 1998). A section 501(c)(4) organization may engage in political activity that is prohibited for a section 501(c)(3) organization, provided it is not its primary activity. See Rev. Rul. 81-95, 1981 C.B. 33. The IRS has identified the following potential areas of abuse in tandem (c)(3)-(c)(4) relationships: (1) sharing of staff, facilities, or other expenses between the (c)(3) and (c)(4) organizations; (2) conduct of joint activities requiring an allocation of income and expenses; and (3) joint fund raising that utilizes the (c)(3) organization's name or goodwill. See *Election Year Issues*, *supra* note 15, at 439-40; Cerny, *supra* note 35, at 5.38-44.

III. PROHIBITION IN SEARCH OF A RATIONALE

Because of the paucity of legislative history, attribution of rationales to the political activity prohibition has been largely an exercise in projection. The prohibition has thus evolved, at least as far as church activity is concerned, into something of a constitutional-philosophy Rorschach test. This is no more evident than in the organized efforts of "watchdog" groups like Americans United for the Separation of Church and State to report alleged church violations of the political activity prohibition.⁴⁷ Supported by "wall of separation" rhetoric, such efforts pander to public misperception that it is the First Amendment that prohibits church political activity.⁴⁸

Although the political activity prohibition may coincide with the strict separationist view, it is not constitutionally mandated. To the contrary, the right to participate in the political process is a fundamental liberty protected by the First Amendment. This right extends to churches no less than to secular institutions and private citizens.⁴⁹ Pluralistic society depends on a "profound national commitment to the principle that debate on public issues . . . be uninhibited, robust, and wide-open," and on debate that embraces "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."⁵⁰

If, in fact, church political activity *were* constitutionally prohibited, one would expect a political activity prohibition applied solely to churches. (Such an application would, of course, fail to pass constitu-

⁴⁷ In March 1996, Americans United announced "Project Fair Play," an election year initiative designed to bring churches and religious groups into compliance with the tax code. See Press Release, Americans United for Separation of Church and State, *IRS Urged to Investigate Influential Fundamentalist Church* (Mar. 19, 1996). This effort continued through the 2000 campaign cycle. See, e.g., J. Christine Harris, *Americans United to Counter Christian Coalition's Voter Guides*, 30 EXEMPT ORG. TAX REV. 135, 135 (2000); Fred Stokeld, *Group Complains to IRS About Falwell's Fund-Raising Letter*, 28 EXEMPT ORG. TAX REV. 464, 464 (2000); Fred Stokeld, *IRS Asked to Investigate Falwell's Voter Registration Drive*, 28 EXEMPT ORG. TAX REV. 195, 195 (2000); Press Release, Americans United for Separation of Church and State, *Priests for Life Political Campaign Raises 'Serious Legal Questions,' Says Church-State Watchdog Group* (July 18, 2000).

⁴⁸ Thomas Jefferson's inaccurate and misleading metaphor has become standard shorthand for interpretation of the religion clauses of the First Amendment. See THOMAS JEFFERSON, 1802 Letter to Danbury Baptist Churches in 8 THE WRITINGS OF THOMAS JEFFERSON 113 (Wash. ed. 1961). Future Chief Justice Rehnquist challenged reliance on this metaphor in his dissent in *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985).

⁴⁹ See *Walz v. Comm'r*, 397 U.S. 664, 670 (1970).

⁵⁰ *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964); see *Mills v. Alabama* 384 U.S. 214, 218-19 (1966).

tional muster on the grounds that it evidenced hostility toward religion.) Whatever can be discerned about LBJ's motivation for introducing the political activity prohibition, there has never been an intimation that silencing churches was intended or even considered.⁵¹ To the contrary, the political activity prohibition is inclusive of *all* section 501(c)(3) organizations. Just as Establishment Clause challenges to church tax exemptions have failed because churches had not been singled out for exemption but were granted exemption among a wide array of nonreligious groups, so the political activity prohibition is defended against Free Exercise Clause challenges on the same grounds—its neutral applicability to *all* section 501(c)(3) organizations.⁵²

Another rationale for the political activity prohibition is that government must not subsidize partisan political activity. The prohibition "stem[s] from Congressional policy that the United States Treasury should be neutral in political affairs and that substantial activities directed to attempts to influence legislation or affect a political campaign should not be subsidized."⁵³ This rationale is premised on an understanding of tax exemption as a "subsidy." However, there is no evidence that a subsidy theory of tax exemption was commonly accepted in 1954. Indeed, in a 1970 church property tax exemption case, *Walz v. Commissioner*, the Supreme Court concluded that "[t]ax exemptions and general subsidies . . . are qualitatively different."⁵⁴ In tax exemption, the government does not transfer its funds to churches, but merely "abstains from demanding that the church sup-

⁵¹ George Reedy, LBJ's chief aide, recalling events relating to the 1954 amendment, related to the author his belief that "Johnson would never have sought restrictions on religious organizations, but that is only an opinion, and I have no evidence." See Letter from George Reedy to Deirdre Dessingue (Oct. 11, 1985) (on file with author). See generally O'Daniel, *supra* note 9.

⁵² See *Walz*, 397 U.S. at 670 n.52, as reinterpreted by *Tex. Monthly v. Bullock*, 489 U.S. 1, 12 (1989) (emphasizing wide applicability); cf., *Employment Div. v. Smith*, 494 U.S. 872, 872 (1990) (concluding right of free exercise did not relieve obligation to comply with valid or neutral law of general applicability even if it requires conduct contrary to religious practice).

⁵³ *Christian Echoes Nat'l Ministry, Inc. v. U.S.*, 470 F.2d 849, 854 (10th Cir. 1972) (emphasis omitted). Christian Echoes was a nonprofit religious organization founded in 1951 by Dr. Billy James Hargis. The persuasiveness of this argument is eroded by the fact that the political activities of other groups are to one degree or another subsidized by government, for example, the tax exemptions for PACs (I.R.C. section 527) and section 501(c)(4) organizations.

⁵⁴ Compare *Walz*, 397 U.S. at 690 (Brennan, J., concurring) with *id.* at 705 (Douglas, J., dissenting) ("[a] tax exemption is a subsidy.").

port the state."⁵⁵ Dean M. Kelley, a noted First Amendment scholar, has identified additional distinctions between subsidy and tax exemption.⁵⁶ First, there is no subsidy *amount* predetermined by government. Rather, the value of tax exemption depends on the level of contributions to and expenditures by the exempt organization. Second, there is an element of compulsion involved in a subsidy, through the appropriation and taxation process, that is absent in tax exemption. Third, there is no periodic review by government to approve, renew, or maintain tax exemption, as is the case with subsidy. Finally, tax exemption does not convert an exempt organization to an agent of "state action," whereas government subsidy may. "No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.'"⁵⁷

Within a dozen years, however, this conceptual distinction was abandoned. The Supreme Court concluded in *Regan v. Taxation with Representation* that both tax exemptions and tax deductions *were* subsidies, and as such could be conditioned upon certain behaviors, here, refraining from substantial lobbying.⁵⁸ In *Bob Jones University v. United States*, the Supreme Court held that as subsidy, exemption could even be conditioned on adoption of policies contrary to an organization's religious beliefs.⁵⁹ In *Texas Monthly v. Bullock*, an Establishment Clause challenge to a sales tax exemption solely for religious publications, the Supreme Court reaffirmed the exemption-as-subsidy concept, and clarified its holding in *Walz*, stating that the breadth of property tax exemption at issue had been an essential element in its conclusion that the exemption for churches did not violate the Establishment Clause.⁶⁰

⁵⁵ *Id.* at 675.

⁵⁶ DEAN M. KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES 32-34 (1977).

⁵⁷ *Walz*, 397 U.S. at 675.

⁵⁸ See 461 U.S. 540, 544 (1983).

⁵⁹ See 461 U.S. 574, 591-92 (1983) (upholding the denial of tax exemption under section 501(c)(3) on account of the university's racially discriminatory policies, which were found to be contrary to fundamental public policy). The university was a pervasively religious educational institution. The Court specifically reserved application of its holding to "churches or other purely religious institutions." *Id.* at 604 n.29.

⁶⁰ See 489 U.S. at 12. Justice Scalia, writing for the dissent, disagreed, stating that the *Walz* property tax exemption was justified because exemption constituted a reasonable governmental attempt to avoid the "latent dangers" of state hostility toward religion that inhere in property taxes. *Id.* at 37 (Scalia, J., dissenting, quoting *Walz*, 397 U.S. at 673). Breadth of coverage would be required constitutionally only where exemption was not

A third rationale supporting the ban asserts that political activity is incompatible with section 501(c)(3) exempt purposes.⁶¹ Neither political activity nor lobbying activity is inherently charitable or religious. Such activities nonetheless may be the *means* to accomplish exempt purposes. There is no logical reason to distinguish political activity, which is prohibited entirely, from lobbying activity, which is merely limited, and litigation activity, which is deemed an appropriate means of achieving exempt purposes.⁶²

IV. LESSONS IN FREE EXERCISE

The First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."⁶³ Traditional Free Exercise analysis had maintained that facially neutral laws or regulations may violate the First Amendment if they unduly burden the free exercise of religion.⁶⁴ The critical issue was "whether government ha[d] placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifie[d] the burden."⁶⁵

This traditional compelling-state-interest standard for evaluating Free Exercise cases was largely dismantled in *Employment Division v. Smith*, in which the Supreme Court held that the Free Exercise Clause did not relieve an individual of the obligation to comply with a neutral, generally applicable criminal statute against the use of peyote

specifically or exclusively justified as "an intentional and reasonable accommodation of religion." *Id.* at 39-40 (Scalia, J., dissenting).

⁶¹ Early American common law did not insist on abstention from political activity as a prerequisite to charity. This view generally developed only after charitable organizations were accorded tax "benefits." See, e.g., John Michael Clear, Note, *Political Speech of Charitable Organizations Under the Internal Revenue Code*, 41 U. CHI. L. REV. 352, 367 (1974); Edward W. Wachtel, *David Meets Goliath in the Legislative Arena*, 9 SAN DIEGO L. REV. 944, 947-48 (1972). Although a trust to promote the success of a particular political party is not considered charitable, the charity of a trust promoting a particular cause is not defeated by the fact that a political party advocates the same cause. See RESTATEMENT (SECOND) OF TRUSTS § 374 cmt. k (1959); IVA SCOTT ON TRUSTS § 374.6 (4th ed. 1989); Note, *Charitable Trusts for Political Purposes*, 37 VA. L. REV. 988, 989-93 (1951). At least one early decision recognized the charity of a trust supporting a political party if its goal was to support a particular cause by this means. See *Buell v. Gardner*, 83 Misc. 513, 519-20 (N.Y. Sup. Ct. 1914).

⁶² See Gen. Couns. Mem. 37,661 (Aug. 30, 1978); Rev. Rul. 80-278, 1980-2 C.B. 175 (organization engaged in environmental litigation qualified for exemption under section 501(c)(3)).

⁶³ U.S. CONST. amend. I.

⁶⁴ See *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

⁶⁵ *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989).

that only incidentally burdened religious exercise.⁶⁶ In the Court's view, only if prohibiting the exercise of religion were the object of the statute would the First Amendment be offended.⁶⁷ *Smith* essentially eliminated the requirement that government justify burdens on religious exercise by compelling interests. The Religious Freedom Restoration Act ("RFRA") was enacted in 1993 to restore the least-restrictive-means/compelling-state-interest standard that existed prior to *Smith*.⁶⁸

Against this background, the political activity prohibition unquestionably burdens free exercise of religion, which includes the right to preach, teach, and proselytize, by requiring churches to choose between engaging in essential religious activities and the benefits of tax-exemption.⁶⁹ This burden is increased by the prohibition's broad scope as interpreted by the IRS, and the lack of clear standards for determining the boundaries of prohibited activity. Although an outright ban on religious speech would violate the Free Exercise Clause, the political activity prohibition does not operate as such a ban.⁷⁰ It does not claim to "deprive [the organization] of its constitutionally guaranteed right of free speech. The taxpayer may engage in all such activities without restraint, subject, however, to withholding of the exemption, or, in the alternative, the taxpayer may refrain from such activities and obtain the privilege of exemption."⁷¹

Churches find the reality of their choice—between the burdens of taxation and protected religious exercise—to be fundamentally repugnant. Their dilemma, however, engenders little judicial sympathy. In recent cases, judicial reaction to church arguments essentially has been that churches "protest too much," that the burdens on free exercise imposed by taxation of religion have been overstated. For example, in *Jimmy Swaggart Ministries v. Board of Equalization*, the Supreme Court unanimously upheld the constitutionality of a neutrally-applied sales and use tax on mail order sales of religious publica-

⁶⁶ See 494 U.S. 877, 882 (1990).

⁶⁷ See *id.* at 877-78.

⁶⁸ RFRA provided that "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that the application of the burden . . . is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C.A. § 2000bb-1(b) (1994). RFRA was found unconstitutional as applied to the states in *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997).

⁶⁹ See *McDaniel v. Paty*, 435 U.S. 618, 626 (1978).

⁷⁰ Cf. *Follett v. McCormick*, 321 U.S. 573, 578 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105, 114 (1943). In these cases, the imposition of a license fee as a condition of proselytizing or selling religious books, operating in effect as a prior restraint on religious speech, was found to violate the Free Exercise Clause.

⁷¹ *Christian Echoes Nat'l Ministry, Inc. v. U.S.*, 470 F.2d 849, 857 (10th Cir. 1972).

tions.⁷² Echoing its earlier decision in *Hernandez v. Commissioner*, a tax-deductibility case, the Court determined that taxation, which merely decreases the amount of money available for religious activities, does not impose a constitutionally significant burden on religious exercise.⁷³ Only if a flat tax were to operate as a prior restraint on the exercise of religious belief would the Free Exercise Clause require tax exemption.⁷⁴ Evaluation of the burdens resulting from revocation of section 501(c)(3) exemption evoked a similar reaction: "Because of the unique treatment churches receive under the Internal Revenue Code, the impact of the revocation is likely to be more symbolic than substantial."⁷⁵

No matter how the burden is calculated, however, it must be weighed against the state's interest in imposing it. Despite the fact that prevention-of-subsidy played no role in enactment of the political activity prohibition, exemption-as-subsidy is solidly ensconced in judicial precedent, with scant likelihood it will be dislodged. Thus, within this framework, the government successfully asserts a compelling state interest in not subsidizing political activity. In addition, maintenance of a sound tax system was enshrined in the compelling state interest pantheon in *United States v. Lee*, an unsuccessful Free Exercise challenge to the Social Security tax brought by an Amish employer.⁷⁶ Assertion of these state interests virtually guarantees failure of Free Exercise (or RFRA) challenges to the political activity prohibition.

Although earlier free-exercise and free-speech challenges to the political activity prohibition had been unsuccessful, none had dealt directly with the prohibition's application to churches *qua* churches. Any illusion that churches would prevail in an encounter between the protections afforded by the Free Exercise Clause and the tax code were dispelled, however, in *Branch Ministries v. Rossotti*.⁷⁷ Branch Ministries operated the Church at Pierce Creek in Vestal, New York. Shortly before the 1992 Presidential election, the Church placed full-page ads

⁷² 493 U.S. 378, 390 (1990).

⁷³ 490 U.S. 680, 680 (1989).

⁷⁴ See *Jimmy Swaggart Ministries*, 493 U.S. at 388.

⁷⁵ *Branch Ministries v. Rossotti*, 211 F.3d 137, 142 (D.C. Cir. 2000). Under section 508 (c)(1)(A) of the Code, churches are not required to apply for tax-exempt status. They may simply hold themselves out as a section 501(c)(3) organization and receive all the benefits of such status, provided they refrain from prohibited political activity. Further, even if section 501(c)(3) is revoked, bona fide contributions would likely be classified as gifts, not includible in gross income under the provisions of I.R.C. section 102.

⁷⁶ 455 U.S. 252, 260 (1982).

⁷⁷ 211 F.3d at 142-43.

in *USA Today* and the *Washington Times*, exhorting Christian readers not to vote for Bill Clinton, and requesting donations to defray the cost of the ads. The IRS revoked the Church's exemption on the grounds that it violated the political activity prohibition. The Church filed suit, asserting that revocation of its tax-exempt status violated statutory provisions, both the Free Exercise and Free Speech Clauses of the First Amendment, and RFRA. In addition, the church charged that the IRS had engaged in selective prosecution.⁷⁸ In a unique argument, characterized by the court as "more creative than persuasive," the Church also argued that the prohibition did not apply to a church, since the statute refers only to a "religious organization."⁷⁹ The court ruled against the Church on all counts, concluding that the IRS's revocation of the Church's exempt status neither violated the Constitution nor exceeded its statutory authority.⁸⁰

Further legal challenges offer dim prospects of success, except as they might erode the prohibition's edges to limit IRS interpretations of its meaning and scope, as these currently preclude far more than outright endorsements or statements of opposition.⁸¹ To the extent the prohibition infringes on the ability of churches to engage in issue education or regulates the issue content of homilies, sermons and other communications with church members, it stands on shakier

⁷⁸ The Church's selective prosecution claim was based upon evidence of numerous candidate pulpit appearances during the 1992 election cycle, including "Reverend Jesse Jackson, Senators Al Gore, Charles Robb, Frank Lautenberg and Tom Harkin, Senate candidates Oliver North and Harvey Gantt, Governors Bill Clinton, Mario Cuomo and Douglas Wilder, gubernatorial candidates James Gilmore, III and Don Beyers, Jr., Mayors Marion Barry, Kurt Schmoke and Rudolph Guiliani, and numerous others." *Branch Ministries v. Rossotti*, 40 F. Supp. 2d 15, 21-22 (D.D.C. 1999), *aff'd* 211 F.3d 137 (D.C. Cir. 2000).

⁷⁹ *Branch Ministries*, 211 F.3d at 141. The court responded that "[t]he simple answer, of course, is that whereas not every religious organization is a church, every church is a religious organization." *Id.*

⁸⁰ In reaching its conclusion, the Court emphasized the Church's ability to communicate its sentiments about candidates for public office through alternate means, specifically, by establishing a related section 501(c)(4) organization, which in turn may establish a PAC. *See id.* at 143. Indeed, this "alternative voice" for political expression was considered essential to the constitutionality of the section 501(c)(3) lobbying restriction. *See Regan v. Taxation with Representation*, 461 U.S. 540, 552 (1983) (Blackmun, J., concurring).

⁸¹ The exceptionally broad scope of the political activity prohibition contrasts with the FECA standard, which regulates communications only to the extent they "expressly advocate the election or defeat of a clearly identified candidate." *Buckley v. Valeo*, 424 U.S. 1, 80 (1976). The United States Catholic Conference has argued, unsuccessfully, for application of a similar standard for interpreting the political activity prohibition of section 501(c)(3). *See Lobbying and Political Activities of Tax Exempt Organizations Before the House Subcomm. on Oversight, House Comm. on Ways and Means*, 100th Cong., 1st Sess. 418, 428 (1987) (statement of U.S. Catholic Conference).

ground.⁸² While the prohibition itself may be constitutional, every IRS interpretation is not.

V. RELIGION HAS NO SPHERE

It is naive to assume that church political activity will cease with *Branch Ministries v. Rossotti*. Churches have played a pivotal role in every important political struggle since (and including) national independence: the abolition of slavery, gambling, child labor, prostitution, temperance, the death penalty, the war in Vietnam, abortion, and civil rights.⁸³ They will continue to do so because they must. America's Catholic bishops have stated that "leaders of the Church have the right and duty to share the Church's teaching and to educate Catholics on the moral dimensions of public life, so that they may form their consciences in light of their faith."⁸⁴

In their involvement in public life, churches offer unique contributions. They speak with prophetic witness, address moral dimensions of civic life, and maintain a voice set in opposition to political interests and secular cultural influences. This is what faith demands and society deserves. "The exclusion of the moral factor from the policy debate is purchased at a high price not only for our values but also in terms of our interests. . . . To ignore the moral dimensions of public policy is to forsake our constitutional heritage."⁸⁵ Through the relig-

⁸² Church pulpit activities present difficult issues. Such activities constitute official church action, and during political campaigns news media invariably report appearances by political candidates from church pulpits. Even if outright endorsement does not take place, the appearance of endorsement is inevitable. In some instances, churches evidence a "wink and nod" approach to the prohibition. See Ceci Connolly, *Gore Gets Important Blessing at Ex-Congressman's Church*, WASH. POST, Feb. 14, 2000, at A4 (quoting Rev. Floyd Flake: "I don't do endorsements from across the pulpit because I never know who's out there watching the types of laws that govern separation of church and state. But I will say to you this morning and you read it well: This [Al Gore] should be the next president of the United States."). One court concluded, without elaboration, that candidates speaking from church pulpits was "substantially dissimilar" from the purchase of anti-candidate newspaper ads. See *Branch Ministries*, 40 F. Supp. 2d at 22. The IRS recently ruled that a section 501(c)(3) organization that conducted joint mailings with a political candidate violated the political activity prohibition by providing him with a forum for his political views. See Tech. Adv. Mem. 20-00-44038 (Nov. 3, 2000). Pulpit access provides a similar "forum" for political candidates.

⁸³ See generally KELLEY, *supra* note 56 at 87-88; CARTER, *supra* note 1, at 4-5.

⁸⁴ *Faithful Citizenship: Civic Responsibility for a New Millennium*, Statement of the Administrative Board of the U.S. Catholic Bishops 12 (1999) [hereinafter *Civic Responsibility*].

⁸⁵ Joseph Cardinal Bernardin, Archbishop of Chicago, *Role of the Religious Leader in the Development of Public Policy*, Address at the ABA Annual Convention, Chi., Ill. (Aug. 4, 1984).

ious liberty protections engraved in the First Amendment, the Founders intended a society that would honor the tensions of religious pluralism, not eliminate them. The "wall" of separation between church and state is merely metaphor.⁸⁶ "Religion cannot . . . be confined by a legal fiction."⁸⁷

Yet this is exactly the sort of confinement fostered by the political activity prohibition. Churches are pressured to vacate the public sphere entirely or to alter their message in conformity with interpretations of the tax law. To do otherwise risks drawing the twin penalties of loss of tax-exempt status and deductible contributions. The clash between church and state on the field of tax exemption is unfortunate and unworkable. The IRS is ill-equipped for front-line duty in an area fraught with constitutional implications. Relying, as it must, on media reports, and complaints filed by groups determined to eliminate church participation from public life in the name of separation of church and state, or interest groups with contrary policy views, the IRS invites charges of selective enforcement.⁸⁸ Interest group politics played a significant role in the 1980 lawsuit filed by abortion clinic operators and certain clergy challenging the tax-exempt status of the United States Catholic Conference for allegedly engaging in prohibited political activity as part of its efforts to educate the public concerning its views on abortion.⁸⁹ Despite the conclusion by the Joint

⁸⁶ "A rule of law should not be drawn from a figure of speech." *McCollum v. Board of Educ.*, 333 U.S. 203, 247 (1948) (Reed, J., dissenting). "The concept of a 'wall of separation' is a useful figure of speech . . . [b]ut the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). See generally CARTER, *supra* note 1, at 74-79.

⁸⁷ CARTER, *supra* note 1 at 74.

⁸⁸ I.R.C. section 7611 establishes safeguards against the IRS' conduct of church tax inquiries or examinations. Generally, section 7611 provides that the IRS may begin a church tax inquiry only upon reasonable belief, based on facts and circumstances recorded in writing and with high-level approval, that a church may not qualify for tax exemption or may be engaged in taxable activities. Special notice requirements, time limits for the duration of church examinations, and safeguards against repetitive inquiries are included. Originally enacted as section 7605(c), these provisions were specifically intended "to protect churches from unnecessary tax audits in the interest of not interfering with the internal financial matters of churches." S. REP. NO. 91-551, 91st Cong. 1st Sess. (1969), 1969-3 C.B. 468. Indeed, in *Branch Ministries*, the Church at Pierce Creek argued that the IRS enforced the political activity prohibition unfairly against churches to the right of the political spectrum. See 211 F.3d 137, 144 (D.C. Cir. 2000). Charges of discriminatory enforcement were also raised in *Christian Echoes Nat'l Ministry, Inc. v. U.S.*, 470 F.2d 849, 857 (10th Cir. 1972).

⁸⁹ See *Abortion Rights Mobilization v. Bales*, 885 F.2d 1020, 1021 (2d Cir. 1989). Since the suit was dismissed for lack of standing, no decision was reached on the merits.

Committee on Taxation, after a three-year investigation, that there was no credible evidence of political bias in IRS' grant of tax exemption or selection of tax-exempt organizations for audit, the perception of an uneven playing field persists.⁹⁰

VI. PROPHET OR POWER BROKER?

Church political involvement comes at a considerable price in terms of integrity and independence. In addressing the moral dimensions of policy issues, churches are fulfilling their unique prophetic role. In endorsing a particular candidate, party, or political platform, however, they jeopardize that distinctive prophetic voice. A church engaged in partisan politics becomes indistinguishable from myriad interest groups competing in the political arena. The impact of such loss is incalculable, because to the extent churches forfeit their distinctiveness, they forfeit as well their claim to special constitutional protection. Professor Carter argues that "religions . . . will almost always lose their best, most spiritual selves when they choose to be involved in the partisan, electoral side of American politics."⁹¹ Catholic bishops have expressly disavowed such involvement, stating that "[a]s bishops, we do not seek the formation of a religious voting bloc, nor do we wish to instruct persons on how they should vote by endorsing or opposing candidates."⁹²

To the extent that churches venture into the realm of partisan electoral politics, they also jeopardize their institutional autonomy, an essential component of religious liberty.⁹³ Partisan politics pulls toward power. Power corrupts. To obtain and maintain power requires compromise. A compromised church no longer "speaks truth to power." A politicized church has lost its independence.⁹⁴ Much has

⁹⁰ See Ryan J. Donmoyer, *IRS Cleared of Bias Charges Levied by Conservative EOs*, 28 EXEMPT ORG. TAX REV. 14 (2000).

⁹¹ CARTER, *supra* note 1, at 1.

⁹² *Civic Responsibility*, *supra* note 84, at 12; see also Statement on Political Neutrality, Office of the First Presidency, Church of Jesus Christ of Latter-Day Saints (Oct. 19, 1999) ("[i]n this election year we reaffirm the policy of strict political neutrality for the Church. The Church does not endorse political candidates or parties in elections nor does it advise its members how to vote.").

⁹³ See Mark E. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 GEO. WASH. L. REV. 645, 660-65 (1992). "The concept of institutional autonomy for the Religion Clauses is summed up in the following sentence: The government has no religious role; religious institutions enjoy no secular governance." *Id.* at 662.

⁹⁴ Similar concerns are raised about Bush Administration proposals for faith-based initiatives. See Thomas B. Edsall, *Charity Aid Worries Some Conservatives*, WASH. POST, Feb. 17, 2001, at A10; Thomas B. Edsall, *Jewish Leaders Criticize 'Faith-Based' Initiative*, WASH. POST,

been written of the alignment of conservative Christian churches with the Republican Party and of African-American congregations with Democrats, from the standpoint of gains to the respective political parties.⁹⁵ Little has been written of what churches have lost in the process.

A document from the Second Vatican Council expresses the Catholic understanding: "The Church, by reason of her role and competence, is not identified in any way with the political community nor bound to any political system. She is at once a sign and a safeguard of the transcendent character of the human person."⁹⁶ "The primary purpose of any church is religious. As it pursues its religious mission, the church is guided by its own transcendent vision of how society should be structured. As a God-given vision, it admits of no compromise. Yet compromise is the *sine qua non* of politics. For this reason, "politics is a very dangerous place for institutions concerned with spiritual matters that transcend ordinary human striving."⁹⁷ In choosing involvement in electoral politics, the church risks compromise, co-option, and collusion. A religious message without integrity is no message at all.⁹⁸

CONCLUSION

After almost fifty years, it is tempting to assume that the political activity prohibition has always been part of the law. It has not. Steeped in separationist rhetoric, it is tempting to assume that the political activity prohibition is constitutionally mandated. It is not. Imbued with free exercise fervor, it is tempting to insist that rights to political expression always be fully exercised. For churches, they should not.

It is ironic that the political activity prohibition, perceived in many church circles as an unjustifiable and offensively intrusive burden on free exercise of religion, might actually serve the interests of religious freedom and pluralism precisely because it provides an ob-

Feb. 27, 2001, at A4; *In Good Faith, A Dialogue on Government Funding of Faith-Based Social Services* 14, Feinstein Center for American Jewish History (2001). But see Thomas B. Edsall & Dana Milbank, *Blunt Defense of 'Faith-Based' Aid*, WASH. POST, Mar. 8, 2001, at A8.

⁹⁵ See, e.g., William Raspberry, *At the Church of the Democratic Party*, WASH. POST, Dec. 18, 2000, at A27 ("I think . . . that the Democratic Party has become a sort of secular Baptist church for African Americans."); CARTER, *supra* note 1, at 35-39.

⁹⁶ PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD ¶ 76 (1965).

⁹⁷ CARTER, *supra* note 1, at 6.

⁹⁸ See CARTER, *supra* note 1, at 57 (quoting Cal Thomas: "If people claim to follow Jesus and his kingdom gets too cozy with government, it won't be government that gets injured. It will be the church that gets compromised.").

stacle to church participation in partisan electoral politics. Threat of loss of tax-exempt status is not an absolute bar to partisan electoral politics. Yet it presents serious enough consequences to require churches to pause and weigh carefully what is to be gained and what is to be lost by a decision to endorse or oppose candidates, to insist that one party has the corner on God's agenda, to instruct their faithful that a vote for one candidate is pleasing to God, a vote for the other sinful. Whether such partisan involvement improves society is debatable. That it would harm churches is not.

Absent the political activity prohibition, churches would be free to endorse candidates, to support political parties and their agendas and to tell members how they should vote.⁹⁹ Yet, there is little indication that religious congregations *want* to be told how to vote by their churches or religious leaders. A Pew Research Center study indicates that members generally reject such a role by their churches, as a majority disapproved clergy discussing politics from the pulpit.¹⁰⁰ The Center for Applied Research in the Apostolate has reported an even stronger negative reaction among Catholics. Only 13 percent of those polled wanted priests to urge support or opposition for specific candidates.¹⁰¹

The fate of H.R. 2910, a 1996 bill that would have amended section 501(c)(3) to permit churches and certain religious organizations to engage in limited political expenditures, suggests that churches may understand this message.¹⁰² The bill failed to garner significant

⁹⁹ To be sure, certain forms of political activity would continue to be prohibited. For example, churches that are incorporated would continue to be prohibited under FECA from making contributions to political candidates. In addition, they could not operate for the private benefit of candidates without jeopardizing tax exemption under section 501(c)(3). See *Am. Campaign Acad. v. Comm'r*, 92 T.C. 1053, 1075 (1989) (operation of the campaign school provided more than incidental benefit to Republican entities and candidates). In addition, campaign reform legislation currently under consideration in Congress would place additional restrictions on political contributions and issue advertising.

¹⁰⁰ Sixty-four percent of voters polled believed it was wrong for clergymen to discuss politics from the pulpit. See *Religion and Politics: The Ambivalent Majority*, Pew Research Center for the People & the Press Campaign 2000 Typology Survey 5 (2001).

¹⁰¹ See *Political Preferences of American Catholics on the Eve of the 2000 Elections—American Catholic in the Public Square*, CARA, Georgetown Univ., 36 (Oct. 2000). Forty-nine percent approved priests addressing the Church's teaching on particular issues.

¹⁰² H.R. 2910, 104th Cong. (2d Sess. 1996) was introduced by Congressmen Crane and Rangel to clarify the restrictions on lobbying and political activities of churches. The new provision would have applied to churches and certain other religious organizations described in section 501(h)(5) that are ineligible to make the section 501(h) lobbying elec-

support among church denominations and was not enacted. The primary deficiency of this seemingly well-intentioned legislative effort was its failure to consider that churches might not perceive the ability to endorse political candidates as a beneficial outcome. In their 1995 Statement on Political Responsibility, Catholic bishops recognized the risks of following the political path, when they asserted that telling people how to vote "would be in our view, pastorally inappropriate, theologically unsound, and politically unwise."¹⁰³ Would churches instructing people how to vote be any *less* pastorally inappropriate, theologically unsound, or politically unwise if it were not prohibited by the tax laws? I think not.

This is not, however, a brief for the status quo. Even if one accepts the premise that church involvement in partisan electoral politics is not a good thing, there is nonetheless much that is wrong with section 501(c)(3).¹⁰⁴ IRS interpretations of the political activity prohibition are unacceptably vague and extend far beyond the range of reasonableness, particularly as applied to voter education. Because the political activity prohibition impinges on the free exercise rights of churches, it is incumbent upon the IRS to interpret the provision narrowly, clearly, and impartially. The prohibition should be limited to explicit endorsements of or opposition to political candidates and other clear and unambiguous support, financial or otherwise. Discussion of issues should never constitute prohibited political activity. The obligation of churches to address the moral implications of policy issues is not suspended during political campaigns, even if discussion of issues invariably involves candidates aligned on one side or another. Voter education materials should not constitute prohibited political activity unless they contain explicit statements of support for or opposition to a candidate, rate candidates as acceptable or unacceptable, or contain specific voting instructions.

The current situation is untenable. Faced with the extraordinary scope of the prohibition as interpreted by the IRS, and perceived non-

tion. See H.R. 2910, 104th Cong. (2d Sess. 1996). Expenditures would have been limited generally to 5 percent of gross revenues. *Id.*

¹⁰³ *Political Responsibility: Proclaiming the Gospel of Life, Protecting the Least Among Us, and Pursuing the Common Good*, A Statement of the Administrative Board of the United States Catholic Conference 7 (Sept. 1995).

¹⁰⁴ See Commentary on IRS 1992 CPE Text, prepared by individual members of the Subcomm. on Political and Lobbying Activities and Org., Comm. on Exempt Org., A.B.A. Sec. Tax'n (Feb. 21, 1995), 11 EXEMPT ORG. TAX REV. 854 (1995); Deirdre Dessingue & Wilfred R. Caron, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J.L. & POL. 169, 200 (1985).

enforcement of egregious violations, such as broadly publicized visits of high-profile candidates to church pulpits and collection baskets passed to benefit candidates, churches tend toward one of two extremes: they either ignore the prohibition and endorse candidates because of misguided confidence in First Amendment immunity or IRS inaction or they avoid legitimate involvement with important policy issues during campaign periods, out of unwarranted fear of IRS reprisals. Neither response is beneficial for church or society.