

COMMENT

CHURCHES AND CAMPAIGN INTERVENTION: WHY THE TAX MAN IS RIGHT AND HOW CONGRESS CAN IMPROVE HIS REPUTATION

INTRODUCTION

If Jesus were to debate John Kerry and George W. Bush, Jesus would win.¹ At least, Jesus would win according to Reverend Dr. George F. Regas, former rector of All Saints Church in Pasadena, California. Regas made this claim as part of a sermon that he delivered as a guest preacher at the liberal² church two days before the 2004 presidential election.³ The sermon immediately became the center of controversy.⁴

During the sermon, Reverend Regas singled out President Bush for criticism eight times.⁵ Senator Kerry received no individual attention.⁶ At one point, Reverend Regas told churchgoers, “Jesus turns to President Bush again with deep sadness[:] ‘Is what I hear really true? . . . Are you really going to resume nuclear testing? That is sheer insanity. This only encourages nations to build their nuclear arsenal in defense against you. This is morally indefensible.’”⁷ Reverend Regas also addressed national security policy: “Mr.

¹ See Rev. Dr. George F. Regas, Rector Emeritus, All Saints Church, Sermon: *If Jesus Debated Senator Kerry and President Bush* (Oct. 31, 2004) (on file with author) [hereinafter *Sermon*], available at [http://aschu.convio.net/pdf/\(10-31-04\)%20If%20Jesus%20Debated.pdf](http://aschu.convio.net/pdf/(10-31-04)%20If%20Jesus%20Debated.pdf), at 1 (assuring churchgoers of the result of this hypothetical debate). IRS campaign-intervention investigations are necessarily fact-sensitive. See Rev. Rul. 78-248, 1978-1 C.B. 154. Thus, this Comment includes several direct quotes from Reverend Regas’s sermon in order to provide a comprehensive basis for assessing the IRS’s actions.

² All Saints’ liberal political bent is widely recognized. See, e.g., *id.* (referring to All Saints as liberal); James Sterngold, *Unwanted Allies Back Liberal Church in IRS Fight: Anti-War Sermon Led to Investigation*, S.F. CHRONICLE, Oct. 2, 2006, at A1 (same); Editorial, *God, Politics and Taxes*, ST. LOUIS POST-DISPATCH, Nov. 9, 2005, at B8 (same).

³ *Sermon*, *supra* note 1.

⁴ See, e.g., Josh Getlin, *Pulpits Ring with Election Messages*, L.A. TIMES, Nov. 1, 2004, at A1 (describing the sermon the following day).

⁵ See *Sermon*, *supra* note 1.

⁶ See *id.*

⁷ *Id.* at 2–3.

President, your doctrine of preemptive war is a failed doctrine.”⁸ Finally, just before telling congregants to “take all that [they knew] about Jesus, the *peacemaker*,”⁹ Reverend Regas addressed President Bush and lamented “the cost of *your* war.”¹⁰

The Internal Revenue Code (“IRC” or “Code”) prohibits tax-exempt organizations from “participat[ing] in, or interven[ing] in (including the publishing or distributing of statements) any political campaign on behalf of (or in opposition to) any candidate for public office.”¹¹ The restriction applies to all religious, charitable, and educational organizations that benefit from § 501(c)(3)’s tax exemption.¹²

One key aspect of the rule is what it does *not* govern. Section 501(c)(3) organizations may speak freely on matters of public concern, including controversial and timely political issues. A common question, then, is whether the restriction applies in a given situation. Does a sermon that forcefully denounces abortion violate the rule? The answer is most likely no, since churches may discuss *issues*, as long as they do not mention specific candidates or political parties. What if the clergyman also suggests to

⁸ *Id.* at 2.

⁹ *Id.* at 6 (emphasis added).

¹⁰ *Id.* at 1 (emphasis added).

¹¹ 26 U.S.C. § 501(c)(3) (2006). The campaign season begins January 1 and runs through November 30 of even-numbered years. IRS, POLITICAL ACTIVITY COMPLIANCE INITIATIVE, PROCEDURES FOR 501(C)(3) ORGANIZATIONS, available at http://www.irs.gov/pub/irs-tege/paci_procedures_feb_22_2006.pdf (2006) [hereinafter *PACI Procedures*]. The IRS defines a “candidate for public office” as “an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local.” 26 C.F.R. § 1.501(c)(3)-1(c)(3)(iii). The Federal Court of Appeals for the Tenth Circuit implicitly broadened the definition in 1972 to include incumbent elected officials who are not seeking reelection. See *Christian Echoes Nat’l Ministry, Inc. v. United States*, 470 F.2d 849, 856 (10th Cir. 1972); see also Scott W. Putney, *The IRC’s Prohibition of Political Campaigning by Churches and the Establishment Clause*, 64 FLA. B.J. 27, 28 (1990) (citing *Christian Echoes* for this proposition).

¹² 26 U.S.C. § 501(c)(3). The Code exempts the following organizations from taxation:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals

Id. Although the Code restricts the speech of all of those types of organizations, churches receive unique treatment in certain ways. See, e.g., 26 U.S.C. § 7611 (2006) (describing the procedure for investigating potential infractions by churches, which differs from that applied to other exempt organizations).

congregants that they review the church's voter guide, which identifies major candidates' stances on abortion?¹³ Even that may not violate § 501(c)(3).¹⁴

Historically, the restriction did not play a significant role in churches'¹⁵ decisionmaking or the Internal Revenue Service's ("IRS" or "Service") enforcement policies.¹⁶ A recent increase¹⁷ in investigations reflects the growth of an influential and politically active religious movement.¹⁸ The dual developments have ignited a political, social, and legal firestorm of constitutional dimensions.

¹³ Candidate voter guides accounted for seventeen percent of investigations during the 2004 election season. IRS, FINAL REPORT, PROJECT 302: POLITICAL ACTIVITIES COMPLIANCE INITIATIVE (2005), at 15–16, available at http://www.irs.gov/pub/irs-tege/final_paci_report.pdf [hereinafter PROJECT 302]. The typical voter guide describes the major candidates' stances on various issues and is promulgated by a single church. *See id.*

¹⁴ *See* Rev. Rul. 78-248, 1978-1 C.B. 154 (explaining that voter guides that include many topics will probably comply with § 501(c)(3), whereas those "concentrating on a narrow range of issues" will probably violate the campaign intervention restriction); *cf.* Rev. Rul. 80-282, 1980-2 C.B. 178 (holding that a monthly newsletter did not violate § 501(c)(3) because it neutrally presented the candidates' records).

¹⁵ Like § 501(c)(3), this Comment uses the term *church* generically to refer to all similarly situated houses of worship. *See* 26 U.S.C. § 501(c)(3) (2006). The Code does not define *church*, despite treating churches differently than other tax-exempt organizations, including religious organizations, in some ways. *See, e.g.,* 26 U.S.C. § 508(c)(1)(A) (2006) (exempting churches from the requirement that § 501(c)(3) organizations submit a formal application to receive tax-exempt status). For an analysis of the difficulty of defining *church* for IRC purposes, see Charles M. Whelan, "Church" in the Internal Revenue Code: The Definitional Problems, 45 FORDHAM L. REV. 885 (1977).

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, 47 (2004) (explaining that "the Service and the courts have not stringently enforced" the political speech limitations); Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308, 308 (1990) ("Since its addition to the Code . . . this qualification has generated little discussion."); Putney, *supra* note 11, at 28 ("The prohibition on political campaign activities has rarely been applied to withdraw tax-exempt status from religious organizations.").

¹⁷ *See* Letter from Mark W. Everson, Comm'r, IRS, to Dorothy S. Ridings, President, Council on Foundations, & Ellen Barclay, President, Forum of Reg'l Ass'ns of Grantmakers (Feb. 17, 2005) (on file with author), available at http://www.irs.gov/pub/irs-utl/cof-frag_response_letter.pdf [hereinafter Everson Letter] (explaining that the IRS had an "unambiguous obligation" to increase its vigilance because improper political speech during the 2004 election "appeared more prevalent" than in previous years); Mark W. Everson, Comm'r, IRS, Remarks at the City Club of Cleveland, Ohio (Feb. 24, 2006) (transcript available at <http://www.irs.gov/irs/article/0,,id=154788,00.html>) [hereinafter City Club Remarks] ("At the IRS we have stepped up our efforts and are vigorously enforcing the law.").

¹⁸ *See* Diana B. Henriques, *Religion Trumps Regulation as Legal Exemptions Grow*, N.Y. TIMES, Oct. 8, 2006, at A1 (describing an increase in state, local, and federal regulatory exemptions favoring religion). Additionally, the benefits associated with tax exemption have led to "an exponential rise of new religious groups" seeking to qualify for the status. John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363, 395 (1991) (discussing property tax exemption). Responding to these trends, the IRS designated "deter[ring] abuse within tax-exempt . . . entities" as one of four long-term goals. City Club Remarks, *supra* note 17.

At the heart of the restriction's constitutionality is the inherent conflict between the Free Exercise¹⁹ and Establishment²⁰ Clauses.²¹ Underlying the debate is the understanding that "political division along religious lines was one of the principal evils against which the First Amendment [religion clauses were] intended to protect."²² That fear has manifested itself in countless claims that the IRS's enforcement is politically motivated and inconsistent.²³

This Comment demonstrates first that the IRC's campaign intervention provision is constitutional. It then argues that, although the IRS has acted within the scope of its authority, amending the Code would benefit exempt organizations and enhance the process's legitimacy. Part I studies the history of the § 501(c)(3) political speech restriction, culminating with a discussion of the recent IRS investigation of All Saints. Part II examines the constitutionality of the § 501(c)(3) limitations on political speech. After analyzing the First Amendment religion clauses and the support that they provide to advocates on both sides, Part II concludes that the restriction is facially constitutional. Part III argues first that the IRS has enforced the Code fairly. It then proposes four changes to the Code that Congress should make to improve the process's legitimacy: (1) the imposition of a requirement that the IRS publish comprehensive reports of its investigations of churches; (2) the codification of the IRS's current practice of relying on independent referrals for discovering potential violations; (3) the formalization of § 501(c)(3)'s penalty scheme; and (4) the creation of a judicial remedy for IRS failures to follow the Code's enforcement procedures.

¹⁹ U.S. CONST. amend. I.

²⁰ *Id.*

²¹ See *Walz v. Tax Comm'n*, 397 U.S. 664, 668–69 (1970) (“[E]xpanded to a logical extreme, [each religion clause] would tend to clash with the other.”).

²² *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) (citing Paul A. Freund, Comment, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969)).

²³ See, e.g., *Branch Ministries v. Rossotti*, 211 F.3d 137, 140–41 (D.C. Cir. 2000) (considering a defendant's claim that an IRS inquiry was politically motivated); see also Deidre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; To What End?*, 42 B.C. L. REV. 903, 924–25 (2001) (arguing that “the IRS invites charges of selective enforcement” and “the perception of an uneven playing field persists”); Editorial, *supra* note 2 (“Those with suspicious, or perhaps cynical, minds will guess that the IRS has political motivations for singling out All Saints.”); Steve Lopez, *The IRS Works in Mysterious Ways*, L.A. TIMES, Sept. 24, 2006, at B1 (characterizing the IRS's enforcement of § 501(c)(3) as “arbitrary, fickle, and goofy”).

I. THE CAMPAIGN INTERVENTION PROHIBITION

A. *The Restriction's Origins*

1. *The Privilege of Tax Exemption*

The Code has exempted certain organizations, including churches, from income tax since its 1913 inception.²⁴ As a corollary to excusing the payment of taxes, the IRC permits taxpayers to make tax-deductible donations to churches and other qualifying organizations.²⁵ Plainly, tax exemption is a major advantage for its beneficiaries.²⁶

It is important to recognize that tax-exempt status is a privilege²⁷ that “is not perpetual or immutable.”²⁸ The Supreme Court has acknowledged that principle both expressly²⁹ and implicitly.³⁰

2. *The Section 501(c)(3) Campaign Intervention Restriction*

The campaign intervention restriction ensures that government subsidization of organizations through forbearance from tax collection does not

²⁴ See Revenue Act of 1894, ch. 349, § 34, 28 Stat. 509, 556 (creating tax exemption for the first time in a statute predating the 1913 introduction of the federal income tax). Tax exemptions have historical roots. See Witte, Jr., *supra* note 18, at 365 (“[E]xemptions were customarily accorded by the colonists, and they were sanctioned by Congress and state legislatures for more than two centuries.”).

²⁵ 26 U.S.C. § 170(a), 170(b)(1)(A)(i) (2006).

²⁶ Robert Maddox, *Churches & Taxes: Should We Praise the Lord for Tax Exemption?*, 22 CUMB. L. REV. 471, 476 (1992); see Terry L. Slye, *Rendering unto Caesar: Defining “Religion” for Purposes of Administering Religion-Based Tax Exemptions*, 6 HARV. J.L. & PUB. POL’Y 219, 221 (1983) (explaining that tax-exempt organizations “are enabled to devote resources . . . to their religious purposes which would otherwise be spent preparing returns and paying taxes” and noting that “[t]he deductibility provisions . . . encourag[e] individuals to make contributions”). *But see generally* 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 (2006) (arguing that popular and scholarly commentators regularly exaggerate the benefits of tax exemption). While tax exemption frees funds for religious purposes, the opposite is true of IRS investigations, which require churches to devote resources to defending their exemption. See Letter from Marcus S. Owens, Attorney, All Saints Church, to Linda E. Stiff, Acting Comm’r, IRS, at 8 (Sept. 21, 2007) (on file with author) (“[T]he Church has expended significant financial resources in defending against [the IRS] examination.”).

²⁷ John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 565 (1992) (“[T]ax exemptions for religious institutions are a privilege and not a constitutional right.”).

²⁸ *Walz v. Tax Comm’n*, 397 U.S. 664, 672–73 (1970).

²⁹ See *id.*

³⁰ See *Bob Jones Univ. v. United States*, 461 U.S. 574, 585 (1983) (affirming the revocation of a religious educational institution’s tax exemption).

extend to certain partisan activity.³¹ The IRS walks a fine line as it enforces the rule. If the Service is overzealous, it risks placing an unconstitutional burden on churches' legitimate exercise of religion. Yet, "it seems irrefutable that continuation of the exemption . . . depends in part on the ability of the I.R.S. to police the exemption," both to protect exempt organizations and to comport with the First Amendment.³²

The campaign intervention restriction limits church representatives' political speech only to the extent that they are acting in an official capacity representing the church.³³ Although a pastor or rabbi may therefore support a candidate in his private capacity, the rule extends to situations where a church representative gives the mere *appearance* of church endorsement.³⁴ In practice, the distinction is not always clear, but comparing circumstances sheds light on the relationship. For instance, Reverend Regas's appearance at his former church suggested a high degree of endorsement because he retains the title of Rector Emeritus and the current clergy listened with the congregation. By contrast, there is less risk of perceiving endorsement by a university whose dean unilaterally sent an inappropriately political letter on school stationery.³⁵

³¹ See *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983) ("Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system."); *Bob Jones Univ.*, 461 U.S. at 591–92 (equating tax exemption with government subsidization). *But see Walz*, 397 U.S. at 690 (Brennan, J., concurring) (characterizing tax exemption and "general subsidies" as "qualitatively different"). However, whether because of the lack of legislative history or simply because the legislation did not contemplate the subsidization rationale, "there is no evidence that a subsidy theory of tax exemption was commonly accepted in 1954." Dessingue, *supra* note 23, at 917.

³² Slye, *supra* note 26, at 223.

³³ See Internal Revenue Service, *Publication 1828: Tax Guide for Churches and Religious Organizations* (2006), available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf>, at 8 (Example 3) [hereinafter *Publication 1828*] (explaining that a minister who publicly supported a candidate at an official campaign function did not violate the rule because the minister did "not make the endorsement at an official church function, in an official church publication or otherwise use the church's assets, and did not state that he was speaking as a representative").

³⁴ See *id.* at 7 (Example 2) (explaining that a minister who wrote in a church newsletter that in his "personal opinion," the congregants should vote for a particular candidate violated the restriction, despite having paid for the space with his personal money). Another scenario, which falls outside this Comment's scope, is when a candidate is a clergyman. See Janny Scott, *In 2000, a Streetwise Veteran Schooled a Bold Young Obama*, N.Y. TIMES, Sept. 9, 2007, at A1 (discussing United States Congressman and practicing minister Bobby Rush's opinion of presidential candidate Barack Obama).

³⁵ See Scott Helman & Michael Levenson, *Romney Camp Consulted with Mormon Leaders: Eyes Nationwide Network to Aid White House Bid*, BOSTON GLOBE, Oct. 19, 2006 (reporting that Steve Albrecht, associate dean of the Brigham Young University Marriot School of Management, had solicited support for Massachusetts governor and presidential candidate Mitt Romney in a letter sent on official school stationery).

3. *The IRS's Procedures for Investigating Potential Infractions*

Because IRS protocol for investigating potential infractions determines, to a large extent, § 501(c)(3)'s constitutionality, the enforcement provisions merit study.³⁶ The Code is lean in substance, offering minimal guidance for interpreting the scope of the campaign intervention restriction. Although Congress did not explicitly dismiss a bright-line rule for revocations, the IRS applies a fact-sensitive, case-by-case standard.³⁷

The IRS investigates potential infractions according to IRC § 7611.³⁸ Although courts generally defer to the IRS's judgment when assessing its enforcement of the Code, "[t]he unique status afforded churches by Congress requires that the IRS strictly adhere to [§ 7611] when delving into church activities."³⁹ The Code prescribes an initial "church tax inquiry," followed by an in-depth "church tax examination."⁴⁰ Section 7611 delineates requirements and restrictions for each step of the audit process.⁴¹ For example, the IRS must give proper notice to a church of the Service's belief that the church may not be tax-exempt.⁴²

However, the Code is silent on the most important, and controversial, aspect of the investigation process: how the IRS should select churches to investigate. In fact, the only hint as to when a church might be subject to investigation is the Code's inclusion of a "reasonable belief" standard.⁴³ This ostensible guide to the Service defines "reasonable belief" circularly: "[whether] an appropriate high-level Treasury official reasonably believes (on the basis of facts and circumstances recorded in writing)" that the church may have violated the § 501(c)(3) conditions for tax exemption.⁴⁴ It is not

³⁶ See discussion *infra* Part II.

³⁷ Rev. Rul. 78-248, 1978-1 C.B. 154 (explaining that the inquiry "depends upon all of the facts and circumstances of each case"). For an analysis of revocation as a penalty and other penalties at the IRS's disposal, see *infra* Part III.B.3.

³⁸ 26 U.S.C. § 7611 (2006).

³⁹ *United States v. Church of Scientology of Boston*, 739 F. Supp. 46, 49–50 (D. Mass. 1990) (citing *Church Audit Procedures Act: Hearing Before the S. Subcomm. on Oversight of the Internal Revenue Service*, 98th Cong., 1st Sess., 61 (1983) (testimony of Deputy Assistant Secretary of Treasury)).

⁴⁰ 26 U.S.C. § 7611(a) (church tax inquiry), 7611(b) (church tax examination).

⁴¹ See generally 26 U.S.C. § 7611.

⁴² 26 U.S.C. § 7611(a)(3), 7611(b)(3).

⁴³ See *id.* § 7611.

⁴⁴ 26 U.S.C. § 7611(a)(2); see also PROJECT 302, *supra* note 13 (describing reasonable belief requirement). Critics have complained that the IRS has delegated the "reasonable belief" determination to officers with insufficient experience. See Letter from Marcus Owens, *supra* note 26, at 5 (insisting that in its All Saints investigation, the IRS delegated the reasonable belief determination "to an official significantly less

surprising that such a nebulous, and patently subjective,⁴⁵ standard has engendered skepticism regarding the IRS's investigations.⁴⁶

Finally, apart from the standard's lack of clarity, the IRC does not provide a judicial remedy for the IRS's failure to follow the Code's procedures.⁴⁷ While organizations may judicially challenge adverse determinations,⁴⁸ they have no recourse if the IRS does not abide by the required method of investigation.⁴⁹ In cases where the IRS disobeys the Code, a court may go no further than to stay the enforcement proceedings, pending the Service's curing its noncompliance.⁵⁰

4. *IRS Efforts to Educate Exempt Organizations*

Despite dating to 1954, the political speech provision remains unclear to many affected organizations.⁵¹ For the most part, church officials know that

senior than a Regional Commissioner—in clear violation of both the statute and the Treasury Regulations”); Alan Cooperman, *IRS Reviews Church's Status; 2004 Antiwar Sermon Sparked Look at Tax Exemption*, WASH. POST, Nov. 19, 2005, at A3 (reporting that, according to All Saints' attorney Marcus Owens, the IRS had improperly delegated the reasonable belief determination to “mid-level officials”). Congress intended to curtail the IRS's latitude by requiring that all “facts and circumstances” be recorded in writing. *Church of Scientology of Boston*, 739 F. Supp. at 49–50 (citation omitted).

⁴⁵ OMB WATCH, SUPPLEMENT A: RESULTS AND PROCEDURES OF THE 2004 ENFORCEMENT PROGRAM 4 (2006), available at http://www.ombwatch.org/pdfs/paci_supp_a.pdf (referring to the reasonable belief standard as subjective) [hereinafter OMB WATCH].

⁴⁶ While most observers charge the Service with overzealous enforcement, others claim that the IRS is lackadaisical or politically sensitive in its oversight. See, e.g., 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, 739 (2001) (referring to “a certain slackness of enforcement” by the IRS); Stephen Schwarz & William T. Hutton, *Recent Developments in Tax-Exempt Organizations*, 18 U.S.F. L. REV. 649, 668 (1984) (“The IRS has been known to wink at this absolute [political speech] proscription, especially when it sees a violation by an established religious body.”); Dan Gilgoff, *Turning a Blind Eye, IRS Enables Church Politicking*, USA TODAY ONLINE, Jan. 29, 2007, http://blogs.usatoday.com/oped/2007/01/turning_a_blind.html (noting that “the IRS has never seriously enforced” the campaign intervention restriction).

⁴⁷ 26 U.S.C. § 7611(e)(2) (2006); *Music Square Church v. United States*, 218 F.3d 1367, 1370 (Fed. Cir. 2000), cert. denied, 531 U.S. 1013 (2000).

⁴⁸ E.g., *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000) (adjudicating a challenge to an adverse determination).

⁴⁹ See 26 U.S.C. § 7611(e)(2) (“No suit may be maintained, and no defense may be raised in any proceeding . . . by reason of any noncompliance by the [IRS] with the requirements of this section.”).

⁵⁰ *Id.* Additionally, qualified immunity protects IRS officers from personal liability unless they violate clearly established constitutional or statutory rights of which a reasonable person would know. Cf. *Anderson v. Creighton*, 483 U.S. 635, 638–40 (1987) (reversing holding that FBI agent was not entitled to qualified immunity in the face of suit for violating the Fourth Amendment search and seizure provision because the agent's actions were reasonable).

⁵¹ PROJECT 302, *supra* note 13.

they cannot explicitly endorse candidates.⁵² “[H]owever, some apparently [do] not realize that political intervention is much broader than just express endorsements.”⁵³ In a report detailing the IRS’s enforcement of the provision following the 2004 election season, the Service found that voter guides, other printed materials, and information on church websites accounted for the majority of violations.⁵⁴ The single most common infraction, however, was using the pulpit itself for impermissibly political purposes.⁵⁵

Seeking to raise awareness, the IRS publishes educational materials describing its interpretation of § 501(c)(3).⁵⁶ The IRS also publishes revenue rulings and private letter rulings to facilitate organizations’ interpretations of the Code.⁵⁷

The guides’ hypothetical situations are detailed and usually precise in their distinctions between permissible and impermissible conduct. For instance, one example demonstrates the significance of a clergyman’s physical presence when he endorses a candidate. The hypothetical describes a candidate’s full-page newspaper advertisement that identified five ministers, including their titles and church affiliations, as supporters.⁵⁸ In that case, the public endorsement did not constitute campaign intervention because (1) the candidate (as opposed to the ministers or their churches) paid for the advertisement; and (2) the advertisement specifically stated that “[t]itles and affiliations of each individual are provided for identification purposes only.”⁵⁹

However, another hypothetical minister did violate the rule when he preached about several topics during a sermon at his church.⁶⁰ In that situation, the minister preached: “It is important that you all do your duty in the election and vote for [fictitious] Candidate *W*.”⁶¹ The guide explains that “[s]ince Minister *D*’s remarks indicating support for Candidate *W* were *made*

⁵² See *id.* at 16.

⁵³ *Id.*

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See City Club Remarks, *supra* note 17 (“We spread this message every way we could: by press releases, speeches, workshops, IRS Nationwide Tax Forums, and even in a letter to seven national political parties.”); see also, e.g., Publication 1828, *supra* note 33. The IRS published similar guides preceding the 1996, 1998, and 2000 election seasons. James, *supra* note 16, at 72.

⁵⁷ See *infra* Part III.B.1 for a description of revenue rulings and private letter rulings.

⁵⁸ Publication 1828, *supra* note 33, at 7 (Example 1).

⁵⁹ *Id.*

⁶⁰ See *id.* at 8 (Example 4).

⁶¹ *Id.*

during an official church service, they constitute political campaign intervention attributable to [the church].”⁶²

B. *The IRS’s Application of the Campaign Intervention Restriction*

This section examines the IRS’s enforcement of § 501(c)(3) from a historical perspective, focusing on two churches’ alleged infractions. Both churches claimed that political bias motivated the IRS’s investigations. The section introduces the facts of the cases but reserves final judgment of the IRS’s enforcement for Part III. For its part, the IRS vehemently denies any irregularities in its investigations.⁶³

1. *Revoking Branch Ministries’ Tax-Exempt Status*

Between the law’s 1954 enactment and 1995, the IRS did not revoke the tax-exempt status of a single church for political activity. However, during that period, a few nonchurch religious organizations lost their exemptions for violating the rule.⁶⁴ The IRS also has revoked the tax exemption of churches for violating other, less polarizing restrictions.⁶⁵ Because *Branch Ministries* remains an outlying case, its facts demonstrate (1) how an IRS-church controversy proceeds; and (2) what an egregious violation entails.

Just before the 1992 presidential election, the Binghamton, New York church co-sponsored an advertisement that precipitated this chain of events.⁶⁶ Branch Ministries, operating as the Church at Pierce Creek, placed a full-page advertisement in *USA Today* and *The Washington Times*.⁶⁷ The conspicuous headline, “CHRISTIANS BEWARE” drew the attention of many readers

⁶² *Id.* (emphasis added).

⁶³ Cooperman, *supra* note 44 (“There is absolutely no place for politics in our consideration of [potential infractions].”) (quoting an IRS spokesperson).

⁶⁴ *See, e.g.,* Christian Echoes Nat’l Ministry, Inc. v. United States, 470 F.2d 849, 853 (10th Cir. 1972) (affirming the IRS’s revocation of a religious corporation’s tax-exempt status because “it had directly and indirectly intervened in political campaigns on behalf of candidates for public office”).

⁶⁵ *See, e.g.,* Universal Life Church v. United States, 13 Cl. Ct. 567 (1987) (affirming a revocation based in large part on the church having impermissibly provided tax advice to congregants); Church of Gospel Ministry, Inc v. United States, 640 F. Supp. 96 (D.D.C. 1986) (affirming revocation based on church’s failure to maintain comprehensive financial records).

⁶⁶ *Branch Ministries v. Rossotti*, 211 F.3d 137, 140 (D.C. Cir. 2000). The advertisement described the remaining co-sponsors as “churches and concerned Christians nationwide.” *Id.*

⁶⁷ *Id.* (emphasis added).

across the country.⁶⁸ Unfortunately for the church, the message that followed drew the attention of the IRS.⁶⁹

The Church at Pierce Creek warned readers that presidential candidate Bill Clinton's positions on "abortion, homosexuality, and the distribution of condoms to teenagers in schools violated Biblical precepts."⁷⁰ The advertisement also solicited tax-deductible donations for the explicit purpose of covering the advertisement's cost.⁷¹

When the IRS revoked Branch Ministries' tax-exempt status, the church claimed that the IRS's investigation was politically motivated.⁷² Because the IRS demonstrated that Branch Ministries had egregiously violated⁷³ § 501(c)(3), the D.C. Circuit affirmed the revocation.⁷⁴

2. *The 2004 Election Season and the IRS Investigation of All Saints*

Believing that tax-exempt organizations have increasingly engaged in proscribed campaigning, the IRS investigated a record number of religious institutions following the 2004 presidential election.⁷⁵ The increase in inquiries reflects both the proliferation of political activity by churches⁷⁶ and the IRS's desire to carefully enforce its mandate.⁷⁷

The IRS learns of potential violations almost exclusively through third-party referrals, including media reports.⁷⁸ This unscientific means of

⁶⁸ *Id.*; see also Peter Applebome, *Religious Right Intensifies Campaign for Bush*, N.Y. TIMES, Oct. 31, 1992, at A1 (citing Branch Ministries as an example of conservative churches' involvement in the election season); Anthony Lewis, *Tax-Exempt Politics?*, N.Y. TIMES, Nov. 30, 1992, at A15 (describing the advertisement as almost certainly having violated the Code).

⁶⁹ *Branch Ministries*, 211 F.3d at 140.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 144.

⁷³ James, *supra* note 16, at 71 (characterizing Branch Ministries' activities as a "clear violation" of the § 501(c)(3) political speech restriction).

⁷⁴ *Branch Ministries*, 211 F.3d at 140.

⁷⁵ Everson Letter, *supra* note 17.

⁷⁶ See Suzanne Sataline, *Obama Pastors' Sermons May Violate Tax Laws; Famous Parishioner Disavows Himself from Partisan Tilt*, WALL ST. J., Mar. 10, 2008, at A1 ("Scholars and attorneys say that a growing number of congregations are delving into issue advocacy and partisan politics . . .").

⁷⁷ *Id.*

⁷⁸ PROJECT 302, *supra* note 13, at 3 n.3 ("In the usual course of operations, the vast majority of, if not all, [§] 501(c)(3) organization examinations alleging political campaign intervention are the result of referrals."); see Sataline, *supra* note 76 ("An increasing number of complaints to the IRS over church politicking have triggered agency probes into both liberal and conservative religious groups."); see, e.g., Stephanie Strom, *Watchdog Group Accuses Churches of Political Action*, N.Y. TIMES, Oct. 26, 2006, at A19 (discussing two

monitoring church activity may be necessary,⁷⁹ but many critics insist that its seeming randomness encourages politically motivated enforcement.⁸⁰

a. The Facts of All Saints

All Saints presents a typical set of circumstances and a contemporary controversy as a case study. Unfortunately, however, the cloaked nature of the IRS's other investigations precludes a comparison between All Saints' and other churches' activities aimed at assessing whether the IRS illegitimately singled out All Saints.⁸¹ A thorough analysis of the All Saints investigation is only possible because of the church's own publication of nearly every relevant fact and document.⁸²

Like several of his peers, Reverend Regas prefaced the invocation of religious doctrine as a means of evaluating candidates for public office by explaining that he would not tell congregants which candidate to choose.⁸³ However, the reverend's juxtaposition of political issues, condemnation of

groups' advocacy for an IRS investigation into two churches for their role in the reelection of the Kansas Attorney General); Peter Slevin, *Trailing Badly, Republicans Take Long-Term Approach*, WASH. POST, Nov. 6, 2006, at A8 (reporting that fifty-six clergymen requested that the IRS investigate an Ohio church's support of a gubernatorial candidate); Jeffrey Lord, *Obama, UCC Draw IRS Complaint*, AM. SPECTATOR, Sept. 7, 2007, available at http://www.spectator.org/dsp_article.asp?art_id=11986 (reporting that the IRS received an anonymous complaint that the United Church of Christ improperly sponsored a campaign appearance by Senator Barack Obama, a candidate for President).

⁷⁹ See, e.g., Dessingue, *supra* note 23, at 924 (noting that the IRS "must" rely on media reports and third-party complaints in enforcing political speech restrictions). It is also relevant that, by relying on independent referrals, the IRS avoids the "continuing state surveillance" prohibited in *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1972). See also *infra* Part II.B (analyzing the political speech restriction under the Establishment Clause). Notably, however, that safeguard disappears when the referrer is himself a government actor; cf. Letter from Charles Grassley, U.S. Senator, to Randy & Paula White, Without Walls Int'l Church & Paula White Ministries (Nov. 5, 2007) (on file with author), available at www.senate.gov/~finance/press/Gpress/2007/prg110607a.pdf (requesting that church officials submit financial statements to the Senate Finance Committee based on suspicion that their churches improperly spent tax-exempt donations and noting that "[t]he [Senate] Finance Committee has a long tradition of reviewing tax-exempt organizations"); cf. also Laurie Goodstein, *Senator Questioning Ministries on Spending*, N.Y. TIMES, Nov. 7, 2007, at A21. See *infra* Part II for an analysis of the constitutionality of the IRS's procedures and Part III for a proposal to make independent referrals mandatory in most cases.

⁸⁰ See, e.g., Dessingue, *supra* note 23, at 924–25 (questioning the motivation behind IRS inquiries).

⁸¹ The Code requires the IRS to protect the privacy of charities and religious organizations by prohibiting the IRS from disclosing information about specific inquiries it conducts. See 26 U.S.C. § 6103 (2006). See Part III.B.1 for this Comment's proposed solution to the problem presented by the confidentiality requirement.

⁸² See generally All Saints Church Homepage, <http://www.allsaints-pas.org>. Because the analysis in *Branch Ministries* necessarily reflected the trial record, it, too, allows for study.

⁸³ *Sermon*, *supra* note 1, at 1; see PROJECT 302, *supra* note 13, at 22 ("[C]ircumstances often suggested that the [clergyman] made a conscious effort to avoid an express endorsement, yet made an indirect endorsement clearly conveying a message on behalf of, or in opposition to a candidate.").

President Bush, and interpretation of Christian doctrine sent a signal to his audience.⁸⁴ The next morning's *Los Angeles Times* described the sermon as a "searing indictment" of President Bush's Iraq policy and did not doubt the reverend's political motivation.⁸⁵ The IRS later cited the article as the catalyst for its All Saints investigation.⁸⁶

Addressing topics as disparate as abortion,⁸⁷ poverty,⁸⁸ American nuclear policy,⁸⁹ and war,⁹⁰ Reverend Regas did not conceal his contempt for President Bush's policies. In fact, despite characterizing his sermon as a debate between Jesus, President Bush, and Senator Kerry, Reverend Regas hardly mentioned Senator Kerry or his platform.⁹¹ However, there is no evidence that Reverend Regas's characterization of the sermon as objective was pretextual; in fact, the church's commitment to addressing policy issues is both deeply rooted in its faith⁹² and representative of churches of all denominations.⁹³

Addressing President Bush, Reverend Regas proclaimed: "[Y]ou have not made dramatically clear what have been the human consequences of the war in

⁸⁴ Getlin, *supra* note 4 (referring to the Sermon as a "searing indictment" of President Bush's Iraq war policy); Editorial, *supra* note 2 ("Father Regas avoided endorsing either candidate, though his condemnation of one candidate's policies was clear."); *see also* PROJECT 302, *supra* note 13, at 22 (noting that despite avoiding express endorsements, many clergymen "made an indirect endorsement clearly conveying a message on behalf of, or in opposition to a candidate").

⁸⁵ Getlin, *supra* note 4.

⁸⁶ Letter from R.C. Johnson, Director, Exempt Organizations, IRS, to All Saints Church (June 9, 2005) (on file with author), available at <http://aschu.convio.net/pdf/IRS%20Letter%20to%20All%20Saints.pdf>.

⁸⁷ *Sermon*, *supra* note 1, at 5 ("Under George W. Bush the number of abortions increased substantially. To anyone familiar with why most women have abortions, this would be no surprise. Two-thirds of women who have abortions cite inability to afford a child as their primary reason. Job losses and decreased average real income have added to the serious impact.").

⁸⁸ *Id.* ("Jesus has been hijacked and turned into the guardian of privilege instead of a champion of the dispossessed Poverty is a religious issue and it is central to this presidential election.").

⁸⁹ *See supra* note 7 and accompanying text.

⁹⁰ *See supra* note 8 and accompanying text.

⁹¹ Reverend Regas addressed his criticism toward Bush and Kerry jointly six times. *See Sermon*, *supra* note 1. By contrast, Regas addressed Bush alone eight times and did not single out Kerry for criticism a single time. *See id.* Of course, at the time of the Sermon, Bush had been president for four years, providing fodder for criticism that was not present in Kerry's case.

⁹² Rev. J. Edwin Bacon, Jr., Rector, All Saints Church, Sermon: *Neighbor Love is Never Neutral* (Sept. 17, 2006), available at www.allsaints-pas.org (follow "IRS Information" hyperlink; then scroll to "The IRS Returns" section and click on "Neighbor Love is Never Neutral" hyperlink) (last visited Jan. 24, 2007).

⁹³ *See* Ellis M. West, *The Free Exercise Clause and the Internal Revenue Code's Restrictions on the Political Activity of Tax-Exempt Organizations*, 21 WAKE FOREST L. REV. 395, 396 (1985) ("Many, if not most, churches and religious groups . . . consider their efforts to influence the making of public policy to be an integral part of their religious enterprise.").

Iraq Oh, the costs of *your* war.”⁹⁴ Despite fulfilling his promise to not tell congregants which candidate to choose, Reverend Regas made it dramatically clear which candidate he opposed.⁹⁵

b. IRS-All Saints Interactions

When the IRS first contacted All Saints, the Service offered to assign the church a “no change” designation without imposing any penalties.⁹⁶ The IRS requested that All Saints (1) admit that it had violated § 501(c)(3); and (2) agree to prevent future campaign intervention.

The “no change” offer was founded on past cases and the IRS’s reluctance to revoke an organization’s tax-exempt status for non-egregious violations.⁹⁷ For example, in 1983, The Way International, a nonchurch religious organization, sued the IRS for allegedly attempting to revoke its tax exemption improperly.⁹⁸ Eventually, the IRS permitted The Way to retain its tax exemption in exchange for The Way’s payment of back taxes covering the period during which the organization engaged in political activity.⁹⁹ Unlike The Way, All Saints rejected the IRS’s offer, insisting that it had not violated § 501(c)(3).¹⁰⁰

II. THE FIRST AMENDMENT RELIGION CLAUSES AND THE CAMPAIGN INTERVENTION RESTRICTION

Somewhat problematically, the Constitution informs colorable arguments in favor of maintaining a strict separation between church and state, while also supporting government-sponsored benefits to religion. This contradiction is

⁹⁴ *Sermon*, *supra* note 1, at 1 (emphasis added).

⁹⁵ Editorial, *supra* note 2 (“Father Regas avoided endorsing either candidate, though his condemnation of one candidate’s policies was clear.”).

⁹⁶ See *infra* Part III.B.3 (discussing “no change” status).

⁹⁷ See PROJECT 302, *supra* note 13, at 2 (referring to the mandatory nature of the existing sanctions as posing a “challenge[]” to the Service and recognizing that revocation “may not be in the public interest”); *Branch Ministries v. Rossotti*, 40 F. Supp. 2d 15, 22 (D.D.C. 1999), *aff’d*, 211 F.3d 137 (D.C. Cir. 2000) (describing the IRS’s settlement with The Way International, a non-church religious organization, whereby the organization paid back taxes but retained its exemption); James, *supra* note 16, at 73 (describing application of “no change” designation to a New York church).

⁹⁸ See *infra* note 118

⁹⁹ See *infra* note 118.

¹⁰⁰ Rev. J. Edwin Bacon, Jr., Rector, All Saints Church, Sermon: *The IRS Goes to Church* (Nov. 13, 2005), available at www.allsaints-pas.org (follow “IRS Information” hyperlink; then scroll to “Documents and Correspondence” section and click on “The IRS Goes to Church” hyperlink) (last visited Jan. 24, 2007).

rooted in the First Amendment religion clauses, which prohibit the state from “respecting an establishment of religion” (“Establishment Clause”), while also requiring the government to protect the right to freely exercise religious beliefs (“Free Exercise Clause”).¹⁰¹ Read independently, each clause represents a relatively clear mandate for the government. Viewed together, however, the clauses raise many questions.¹⁰² Fundamentally, it would be impracticable for the government to apply both clauses to their “logical extreme[s].”¹⁰³ Reality dictates that, in a country with diverse and rich religious traditions,¹⁰⁴ the state cannot completely refrain from touching religion’s many arms.¹⁰⁵ For that reason, the government imposes several secular laws that affect religion.¹⁰⁶ In each case, the law passes constitutional muster only if it navigates the tricky area between the Free Exercise and Establishment Clauses.¹⁰⁷

A. *The Free Exercise Clause*

The strongest argument against § 501(c)(3)’s constitutionality rests on the belief that an unrestricted freedom of political speech is fundamentally part of the free exercise of religion.¹⁰⁸

¹⁰¹ U.S. CONST. amend. I, cl. 1. The First Amendment applies to the states through the Fourteenth Amendment. Although incorporation is not relevant to the IRS or the federal income tax, it does apply to states’ imposition of property, sales, use, and other taxes.

¹⁰² See *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970) (describing the difficulty of squaring the clauses’ competing interests).

¹⁰³ *Id.*

¹⁰⁴ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 212, 214 (1963).

¹⁰⁵ See *Walz*, 397, U.S. at 670 (“No perfect or absolute separation [of church and state] is really possible.”); *United States v. Lee*, 455 U.S. 252, 259 (1982) (“To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good.”).

¹⁰⁶ See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 874 (1990) (rejecting a claim under the Religious Freedom Restoration Act and Free Exercise Clause that federal drug laws infringed the rights of certain Native Americans who ingest peyote as part of religious ceremonies).

¹⁰⁷ There is, of course, “room for play in the joints” between the two clauses. *Walz*, 397 U.S. at 669.

¹⁰⁸ See, e.g., Paul Asay, *Politics & the Pulpit*, GAZETTE (Colorado Springs), Oct. 22, 2006, at A1 (“The Rev. Steve Holt of the 3,000-member Mountain Springs Church said he sometimes *speaks politically because it’s what God wants him to do.*”) (emphasis added); Rev. J. Edwin Bacon, Jr., Rector, All Saints Church, Sermon: *Neighbor Love is Never Neutral* (Sept. 17, 2006), available at www.allsaints-pas.org (follow “IRS Update” hyperlink; then scroll to “The IRS Returns” section and click on “Neighbor Love is Never Neutral” hyperlink) (last visited Jan. 24, 2007) (“[W]e do not have a *choice* about whether or not to be neutral in the face of dehumanization, injustice, and violence. Our faith *mandates* [participation in the political process].”) (emphasis in original); Sherri Day, *Religion Spiced with Politics*, ST. PETERSBURG TIMES, Mar. 17, 2007, at 1B (referring to a “scriptural mandate to speak out” on political issues).

The extent to which the Free Exercise Clause insulates religion from state interference is unclear. But Supreme Court precedent does support a key notion underlying the constitutionality of the Code's campaign intervention prohibition: the Free Exercise Clause does not mandate tax exemption for religious organizations.¹⁰⁹

Recognizing tax exemption as a government subsidy, the prohibition on campaign intervention represents Congress's decision not to *fund* political speech by § 501(c)(3) organizations.¹¹⁰ Although "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs,"¹¹¹ the Supreme Court has expressly found this type of policy to be within a legislature's prerogative.¹¹² In *Regan v. Taxation with Representation*, the Court explained that "[w]e have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."¹¹³

It is axiomatic that "the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program *actually burdens* the claimant's freedom to exercise religious rights."¹¹⁴ The touchstone of a Free Exercise burden is whether the state puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs."¹¹⁵ To clergymen, like All Saints' Reverend Regas and Reverend Bacon, the political speech restriction stifles their prophetic duties.¹¹⁶ The political speech restriction clearly burdens religion, since there is no doubt that

¹⁰⁹ See *infra* Part II.A.

¹¹⁰ See *supra* note 30.

¹¹¹ *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (emphasis omitted).

¹¹² See *Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1997) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)) (holding constitutional the Code's restriction on tax-exempt organizations' lobbying activities).

¹¹³ *Id.* *Regan* held constitutional § 501(c)(3)'s lobbying restriction in the face of a challenge based on the First Amendment protection of free speech. *Id.*

¹¹⁴ *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985) (citing *United States v. Lee*, 455 U.S. 252, 256–57 (1982)) (emphasis added); see also *Thomas v. Review Bd.*, 450 U.S. 707, 717–18 (1981)).

¹¹⁵ *Thomas*, 450 U.S. at 718.

¹¹⁶ See Letter from J. Edwin Bacon, Jr., Rector & Robert A. Long, Senior Warden, All Saints Church, to Pat Schneiders, Exempt Organizations Specialist, IRS (June 24, 2005) (on file with author), available at <http://www.allsaints-pas.org/site/DocServer/1.4.pdf?docID=2601> (explaining that All Saints' religion "compels" the church to "engage in acts of social transformation" and that "[t]he [Sermon's] prophetic critique of the policies and positions of both George Bush and John Kerry . . . sought changes to those policies and practices so that they might conform to our biblical understandings"); see also Wyatt McDowell, *How Religious Organizations and Churches Can Be Politically Correct*, 42 BRANDEIS L.J. 71, 72 (2003) ("To the extent that the IRS continues to limit churches and religious organizations from political campaign activities, the church is diminished in both its priestly and prophetic roles.").

it pressures adherents to modify their behavior.¹¹⁷ From this perspective, such governmental interference with religion seems patently unconstitutional. Underlying the argument is the fact that the Constitution's Framers favored separation between church and state as a means of "protect[ing] religious liberty."¹¹⁸

However, the fact of a burden on an organization's religious rights does not mandate immunity from the restrictive government program.¹¹⁹ The Free Exercise Clause prohibits governmental burdens on religion only to the extent that they are not justified by a narrowly tailored and compelling state interest.¹²⁰ Finally, a law cannot impose a generally applicable and facially neutral condition as a prerequisite to receiving a benefit "upon conduct proscribed by a religious faith."¹²¹

1. *The Free Exercise Clause and § 501(c)(3)*

The Court has not directly addressed the political speech restriction's constitutionality. A handful of cases, however, suggest that the provision comports with the Free Exercise Clause. First, in *Bob Jones University v. United States*,¹²² the Court rejected the notion that the constitutional freedoms of speech and free exercise insulate tax-exempt organizations from public policy considerations.¹²³ Then, in *Jimmy Swaggart Ministries v. Board of Equalization*,¹²⁴ the Court upheld the application of a state sales-and-use tax to churches, rejecting the claim that the Free Exercise Clause mandated

¹¹⁷ See *Thomas*, 450 U.S. at 718 (identifying pressure on an adherent to modify his behavior as a constitutional burden on religion).

¹¹⁸ Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 232 (1963) (Brennan, J., concurring).

¹¹⁹ See *Lee*, 455 U.S. at 260 ("Because the broad public interest in maintaining a sound tax system is of such high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.").

¹²⁰ *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 384–85 (1990) (citing *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989)). In 1993, Congress passed the Religious Freedom Restoration Act (RFRA), imposing a "compelling interest" standard for any law that impinges on religious practice. 42 U.S.C. § 2000bb (2006). In *City of Boerne v. Flores*, the Court limited RFRA's impact by holding it unconstitutional as applied to state and municipal laws. See 521 U.S. 507, 516 (1997). RFRA continues to apply to federal statutes, including the Code. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (affirming, based on RFRA, the grant of a preliminary injunction to enjoin the government's application of a generally applicable and facially neutral law).

¹²¹ *Thomas*, 450 U.S. at 717–18; cf. Witte, Jr., *supra* note 18, at 414 ("Mainline religious groups have no inherent religious aversion to payment of taxes.") (citing multiple religious texts' commands to pay taxes).

¹²² 461 U.S. 574 (1983).

¹²³ See *id.* at 586.

¹²⁴ 493 U.S. 378 (1990).

exemption on religious grounds.¹²⁵ Finally, in the free speech context in *Regan v. Taxation with Representation*,¹²⁶ the Court held constitutional the § 501(c)(3) limitation on lobbying activity by tax-exempt organizations.¹²⁷ This section applies these holdings to § 501(c)(3) and concludes that the Free Exercise Clause does not invalidate the campaign intervention restriction.

a. *Bob Jones University and the Quid Pro Quo Model*

In *Bob Jones University*, the Court rejected a religious educational institution's claim that the Free Exercise Clause protected its right to impose racially discriminatory policies while maintaining tax-exempt status.¹²⁸ The IRS stepped beyond the specific rules of § 501(c)(3), insisting that, because racial discrimination violates public policy, tax exemption was inappropriate.¹²⁹ The university argued that the Free Exercise Clause protected its right to apply racially discriminatory policies because they rested on the university's sincerely held religious beliefs.¹³⁰ Rejecting that claim, the Court presented the university with a choice: forgo tax exemption or forgo the absolute free exercise of religion.¹³¹ Thus, the Court articulated a quid pro quo relationship between constitutional rights and legislative privileges such as tax exemption.¹³² Supporting this correlation's legitimacy is the fact that it is not unique to U.S. tax law.¹³³

¹²⁵ *See id.* at 396.

¹²⁶ 461 U.S. 540 (1997).

¹²⁷ *Id.* at 550. *Regan* analyzed the provision under the Free Speech Clause and the equal protection component of the Fifth Amendment, as the organization was *not* religious. *See id.* The analysis, however, applies with equal force to the religion clauses because of the Court's basic holding that Congress's conditioning of a financial benefit on the forbearance from exercising fundamental constitutional rights is constitutional. *See id.*

¹²⁸ *Bob Jones Univ.*, 461 U.S. at 585.

¹²⁹ *See id.* at 579.

¹³⁰ *Id.* at 602.

¹³¹ *See id.* at 585.

¹³² *Id.* at 586 (“[U]nderlying all relevant parts of the Code[] is the intent that *entitlement to tax exemption depends on meeting certain common law standards of charity . . .*”) (emphasis added). Commentators have joined the Court in recognizing this relationship. *See, e.g.,* Tiziana Dearing, *Nonprofits at the Nexus of Free Speech and Public Policy*, PHILANTHROPY NEWS DIG., Dec. 21, 2006, http://foundationcenter.org/pnd/commentary/co_item.jhtml?id=165300049 (“If . . . a church decides that it absolutely must work on behalf of a particular candidate, it also should be willing to forgo its tax-exempt status.”). Some organizations have not found the tradeoff to burden their goals. *See, e.g.,* Marcia Gelbart, *Black Clergy Yields the Floor Only to Evans*, PHILA. INQUIRER, Feb. 7, 2007, at B7 (describing a *non-exempt* clergy group's decision whether to endorse a candidate for mayor of Philadelphia).

¹³³ *See* Michael McKinnon & Matthew Franklin, *ATO Warns Greens over Politicking*, WEEKEND AUSTRALIAN, Feb. 17, 2007, at 5 (describing Australian government's investigations into fifteen environmental groups for impermissible political activity); Thomas Deichmann, *Just How 'Charitable' is*

Justice Powell's concurrence¹³⁴ and Justice Rehnquist's dissent¹³⁵ in *Bob Jones University* both reflect the Court's assumption that the campaign intervention rule is constitutional. Neither opinion challenged the majority's explanation of a quid pro quo relationship between constitutional rights and tax exemption.¹³⁶ Instead, both expressed doubt about the notion of an *uncodified* condition to tax exemption: "the *language itself* [of § 501(c)(3)] does not mandate refusal of tax-exempt status" based on racial discrimination.¹³⁷ Implying the constitutionality of the enumerated conditions, including the political speech restriction, Justice Powell wrote that "[§] 501(c)(3) should be construed as setting forth the *only criteria* Congress has established for qualification as a tax-exempt organization."¹³⁸

In dissent, Justice Rehnquist also evinced a comfort with the political speech restriction.¹³⁹ After listing the Code's requirements for tax exemption, including the political campaign restriction, Justice Rehnquist agreed that "[t]he IRS certainly is empowered to adopt regulations for the enforcement of *these specified requirements*."¹⁴⁰ Finally, Justice Rehnquist explained that, because "[t]here is no indication [of involvement in] lobbying activities *or political campaigns*," the university's tax exemption should stand.¹⁴¹

b. Jimmy Swaggart Ministries and Regan: Solidifying Congress's Authority to Impose Generally Applicable Restrictions on Constitutional Protections

In *Jimmy Swaggart Ministries*, the Court clarified a principle underlying the constitutionality of taxing churches: a generally applicable tax's financial burden on a church does not constitute a burden that violates the Free Exercise

Greenpeace?, SPIKED.COM, Feb. 12, 2007, <http://www.spiked-online.com/index.php?site/article/2843/> (Feb. 12, 2007) (describing the German government's potential revocation of Greenpeace's tax exemption based on the organization not providing a public benefit); Licia Corbella, *This is a Charity? The David Suzuki Foundation Is Supposed to Be Non-Partisan*, EDMONTON SUN, Feb. 28, 2007, at 11 (discussing application of Canada's analogous law to an exempt organization that had made overtly political statements).

¹³⁴ *Bob Jones Univ.*, 461 U.S. at 606 (Powell, J., concurring).

¹³⁵ *Id.* at 612 (Rehnquist, J., dissenting).

¹³⁶ *See id.* at 606 (Powell, J., concurring) (arguing that only the specifically delineated conditions for tax exemption should constitute cause for revocation).

¹³⁷ *Id.* (emphasis added).

¹³⁸ *Id.* (emphasis added).

¹³⁹ *See id.* at 617 (Rehnquist, J., dissenting).

¹⁴⁰ *Id.* (emphasis added).

¹⁴¹ *Id.* at 623 (emphasis added).

Clause.¹⁴² In *Jimmy Swaggart Ministries*, a church challenged the constitutionality of sales and use taxes levied on its sales of religious merchandise.¹⁴³ The Court held the taxes constitutional because they were generally applicable and did not single out religion.¹⁴⁴ Importantly, the Court explained that “to the extent that imposition of a generally applicable tax merely decreases the amount of money [that a church] has to spend on its religious activities, any such burden is not constitutionally significant.”¹⁴⁵

In upholding the § 501(c)(3) restriction on lobbying, the *Regan* Court cemented another fundamental principle: constitutional protections of fundamental rights—the Free Speech Clause in *Regan*—yield to congressional determinations that certain activities should not be subsidized through tax exemption.¹⁴⁶ In *Regan*, a tax-exempt organization argued that Congress could not restrict tax exemption to nonlobbying pursuits.¹⁴⁷ In a pronouncement similar to the holding in *Jimmy Swaggart Ministries*, the Court explained that by “merely refus[ing] to pay for the lobbying out of public monies,” Congress exercised legitimate authority.¹⁴⁸ Writing for the majority, Justice Rehnquist explained that “[t]his Court has never held that the Court must grant [tax exemption] to a person who wishes to exercise a constitutional right.”¹⁴⁹

Following *Bob Jones University*, *Jimmy Swaggart Ministries*, and *Regan*, the political speech restriction appears on firm constitutional ground. Like *Bob Jones University*, churches complaining about the campaign intervention rule have a choice: forgo tax exemption or forgo the right to endorse or oppose candidates. Supporting that notion is the fact that, unlike the public policy grounds in *Bob Jones University*, the political speech rule *is* codified.¹⁵⁰ Under

¹⁴² 493 U.S. 378, 391 (1990) (citing *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989)) (considering constitutionality of a sales and use tax).

¹⁴³ *Id.* at 380.

¹⁴⁴ *Jimmy Swaggart Ministries*, 493 U.S. at 389. The Court explained that, because the tax applied “neutrally to all retail sales of tangible personal property[,] . . . [the tax] is not a tax on the right to disseminate religious information, ideas, or beliefs *per se*.” *Id.* “[R]ather, it is a tax on the privilege of making retail sales . . .” *Id.*

¹⁴⁵ *Id.* at 391 (citing *Hernandez*, 490 U.S. at 699). It is well settled that taxation of a religious organization does not, alone, violate the Free Exercise Clause. *See id.*; *Parker v. Comm’r*, 365 F.2d 792, 795 (8th Cir. 1966).

¹⁴⁶ *Regan v. Taxation with Representation*, 461 U.S. 540, 545 (1997).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Compare* *Bob Jones Univ. v. United States*, 461 U.S. 574, 585 (1983) (affirming revocation based on public policy grounds not enumerated in § 501(c)(3) as a basis for revocation), *with* 26 U.S.C. § 501(c)(3) (2006) (delineating campaign intervention as grounds for revocation).

Jimmy Swaggart Ministries, the restriction's ultimate penalty, revocation of tax exemption, is not a constitutional burden because it merely imposes a generally applicable tax. Finally, *Regan's* approval of § 501(c)(3)'s lobbying restriction supports directly the constitutionality of the related political speech restriction.

B. The Establishment Clause and § 501(c)(3)

The Court's Establishment Clause jurisprudence has been inconsistent, resulting in a lack of clarity.¹⁵¹ In *Lemon v. Kurtzman*, the Court attempted to streamline the analysis by crafting a three-part test that incorporated earlier precedent.¹⁵² In order to be constitutional under *Lemon*, a law must (1) have a secular legislative purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) not foster an excessive entanglement with religion.¹⁵³

The clarity that the *Lemon* Court sought did not materialize, as subsequent cases conflated the factors.¹⁵⁴ Most recently, in *Agostini v. Felton*, the Court eliminated entanglement as a separate prong.¹⁵⁵ Instead, the Court subsumed the inquiry into the effect prong, arguing that it is one of three factors determining whether a law has the effect of advancing or inhibiting religion.¹⁵⁶ However, to further muddle the issue, the Court has since signaled a potential revival of the entanglement prong by referring to *Lemon's* "three familiar considerations."¹⁵⁷

This Part assesses the entanglement question separately from the effect prong because IRS oversight represents a close case of excessive

¹⁵¹ See JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 196 (2d ed. 2005) (referring to "[t]he increasingly wide disparities of logic and results in the Court's" Establishment Clause jurisprudence); Whitehead, *supra* note 27, at 548 (referring to "inconsistencies in recent Supreme Court decisions . . . regarding tax exemptions in the context of the Establishment Clause").

¹⁵² *Lemon*, 403 U.S. at 612–13 (1971) (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968), and quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

¹⁵³ *Id.*

¹⁵⁴ See *Agostini v. Felton*, 521 U.S. 203, 232–33 (1997) (assessing entanglement as an effect prong factor).

¹⁵⁵ *Id.* But see *McCreary County v. ACLU* 545 U.S. 844, 859 (2005) (suggesting a revival of the entanglement prong by citing *Lemon's* "three familiar considerations" as informing the Court's analysis).

¹⁵⁶ *Agostini*, 521 U.S. at 232–33. The Court's distillation of *Lemon* "was intended to be a less rigorous constitutional inquiry . . . and has to date proved less amenable to strict separationist readings." WITTE, JR., *supra* note 151, at 195. Ironically, entanglement's diminished weight detrimentally affects tax-exempt churches by allowing the IRS increased latitude in investigating potential violations of § 501(c)(3). See *infra* Part II.B.3.

¹⁵⁷ *McCreary County*, 545 U.S. at 859.

entanglement. However, since this Part finds that § 501(c)(3) does not excessively entangle the government in religious affairs, it is not necessary to determine the proper place for or weight to accord the analysis.

1. *The Purpose Prong and § 501(c)(3)*

Reflecting on the prong's place in Establishment Clause jurisprudence, the Court explained recently that the purpose inquiry "has been a common, albeit seldom dispositive, element of [Establishment Clause] cases."¹⁵⁸ Absent evidence undermining a law's stated secular purpose, the Court generally defers to the legislature.¹⁵⁹ As such, the purpose prong does not pose a high hurdle.

Even if the original legislative intent runs afoul of modern conceptions of the Constitution, a law may satisfy the purpose prong. In *McGowan v. Maryland*,¹⁶⁰ the Supreme Court upheld the constitutionality of Sunday-closing statutes because the government had abandoned the laws' original religious purpose.¹⁶¹ In *McGowan*, the initial purpose was openly religious, representing a prima facie violation of the Establishment Clause.¹⁶² However, the Court looked past the foundations of the various states' laws to the governments' later articulations of a permissible secular purpose.¹⁶³ Although *McGowan* predated *Lemon* by ten years, it remains good law. Thus, while the original legislative purpose is highly relevant, subsequent secular justifications may render a law in compliance with the Establishment Clause.

The campaign intervention provision satisfies the purpose prong because it does not intend to advance religion. In 1954, then-Senator Lyndon B. Johnson sponsored an amendment to § 501(c)(3) that created the statutory prohibition of certain political activity.¹⁶⁴ Unfortunately, the amendment "was added

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 864 ("[A] legislature's stated reasons will generally get deference."); see *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) ("[W]e find nothing here that undermines the stated legislative intent.").

¹⁶⁰ 366 U.S. 420 (1961). Justice Douglas cited *McGowan* in his *Lemon* concurrence. *Lemon*, 403 U.S. at 640 (Douglas, J., concurring).

¹⁶¹ *McGowan*, 366 U.S. at 453.

¹⁶² *Id.*

¹⁶³ *Id.* at 444 ("[A]s presently written and administered [Sunday-closing laws] are of a secular rather than of a religious character . . .").

¹⁶⁴ Internal Revenue Code of 1954, Pub. L. No. 83-591, § 501(c)(3), 68A Stat. 1, 163. While this was the first time that Congress formally codified the restriction, the IRS *had* previously "denied charitable exemptions on the basis of proscribed political activity *before* the Congress itself added such conduct as a disqualifying element." *Bob Jones Univ. v. United States*, 461 U.S. 574, 597 (1983) (citing *Treas. Reg.* 45, art. 517(1)).

without the benefit of hearings, testimony, or comment from affected organizations.”¹⁶⁵ The absence of legislative history hampers an analysis of the provision’s original purpose.

The rule is “principally defended on the ground that overtly political activity should be conducted with after-tax dollars.”¹⁶⁶ A less normative explanation lies in the theory that organizations’ political speech evidences the fact that the organizations “are not operated exclusively for exempt purposes and [therefore] cannot qualify for tax exemption under section 501(c)(3).”¹⁶⁷ In 1987, Congress amended the ban on campaign intervention to include speech “in opposition to” candidates.¹⁶⁸ The amendment’s legislative history attempted to clarify its original intent by explaining that “the U.S. Treasury should be neutral in political affairs.”¹⁶⁹

Many commentators contend that then-Senator Johnson introduced the legislation for, ironically, political reasons. Purportedly, Johnson hoped to prevent tax-exempt organizations from supporting a political opponent whose fundraising had traditionally flowed from tax-exempt entities.¹⁷⁰ Assuming the veracity of that account, the provision’s purpose was not to advance religion.¹⁷¹ If Johnson’s partisan motivation left any doubt, *McGowan* permits

(1921)) (emphasis added). However, unlike the § 501(c)(3) campaign intervention rule, previous denials of exempt status were based on the organization not conforming to other rules, such as being organized exclusively for religious purposes. See *supra* note 64.

¹⁶⁵ Dessingue, *supra* note 23, at 905.

¹⁶⁶ Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667, 1697 (2003) (citing *Branch Ministries v. Rossotti*, 211 F.3d 137, 144 (D.C. Cir. 2000)).

¹⁶⁷ Dessingue, *supra* note 23, at 906 (citing 26 C.F.R. § 1.501(c)(3)-1(a)(1) (1990)). A flaw in this argument is that it renders the campaign intervention restriction superfluous, as the “operated exclusively” requirement appears separately in the Code. See 26 U.S.C. § 501(c)(3) (2006) (requiring an organization both (1) to be organized and operated exclusively for exempt purposes; and (2) to refrain from intervening in a political campaign). Thus, if campaign intervention were mere evidence of an organization not being operated exclusively for exempt purposes, there would be no need to separately include the rule.

¹⁶⁸ H.R. REP. NO. 391, 100th Cong. 1st Sess. 1621, 1625 (1987), U.S. CODE CONG. & ADMIN. NEWS 1987, at 2313-1, 2313-1201, 2313-1205.

¹⁶⁹ *Id.*; see also Putney, *supra* note 11, at 28 (analyzing the original purpose of the § 501(c)(3) restrictions on political speech).

¹⁷⁰ See Dessingue, *supra* note 23, at 905–06 (discussing the common belief that Johnson introduced the bill for this purpose). *But see* Ann M. Murphy, *Campaign Signs and the Collection Plate—Never the Twain Shall Meet?*, 1 PITT. TAX REV. 35, 50 (2003) (attributing Johnson’s introduction of the bill to “an expression of McCarthyism”) (citing James B. Davidson, *Why Churches Cannot Endorse or Oppose Political Candidates*, 40 REV. RELIGIOUS RES. 16 (1998)).

¹⁷¹ See *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (defining a secular purpose as one that does not advance religion).

Congress's subsequent assertion of a secular purpose to settle the question.¹⁷² In sum, the campaign intervention restriction does not violate the *Lemon-Agostini* purpose prong because it was not intended to advance religion.

2. *The Effect Prong and § 501(c)(3)*

The second prong, which asks whether a law has the impermissible effect of advancing or inhibiting religion, calls for a more difficult inquiry.¹⁷³ The Court has wavered in interpreting the effect prong, but one constant principle requires the state to remain neutral in religious affairs.¹⁷⁴

The campaign intervention provision does not raise suspicion of state *advancement* of religion. Instead, the rule might have the impermissible effect of *inhibiting* religion. However, it is difficult to imagine circumstances where a law does not violate the Free Exercise Clause, but impermissibly inhibits religion.¹⁷⁵ This observation rests on the fact that a law that comports with the Free Exercise Clause inherently does not unconstitutionally burden religion.¹⁷⁶ Finally, it is worth noting that although tax exemption plausibly has the impermissible effect of advancing religion, the Court has made clear that that effect does not violate the Establishment Clause.¹⁷⁷

3. *Excessive Entanglement and § 501(c)(3)*

Regardless of the proper place for the excessive entanglement inquiry, § 501(c)(3) does not violate its mandate. To be sure, the IRS's enforcement conceivably represents excessive entanglement between the state and religion. Indeed, in *Lemon*, the Court found excessive entanglement based on

¹⁷² See *McGowan v. Maryland*, 366 U.S. 420, 453 (1961) (holding constitutional state legislatures' articulations of secular purposes for Sunday closing laws which were conceived for religious purposes).

¹⁷³ *Bowen v. Kendrick*, 487 U.S. 589, 604 (1988).

¹⁷⁴ See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963) (referring to "wholesome neutrality"); *Walz v. Tax Comm'n*, 397 U.S. 663, 674 (1970) ("benevolent neutrality"); *Lemon*, 403 U.S. at 612–13 ("strict neutrality"); *Bd. of Educ. of Kiryas Joel Village v. Grumet*, 512 U.S. 687, 705 (1994) ("neutrality").

¹⁷⁵ See *supra* Part II.A for analysis of why § 501(c)(3) does not violate the Free Exercise Clause.

¹⁷⁶ Cf. 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION* 6 (2006) ("Nonestablishment cannot be the overarching value, because it is largely a means to serve free exercise. A thesis that every valid consideration reduces to free exercise is more plausible."). For an analysis of the political speech restriction under the Free Exercise Clause, see *supra* Part II.A.

¹⁷⁷ *Hernandez v. Comm'r*, 490 U.S. 680, 696 (1989) (holding that tax deductibility of donations to religious organizations does not violate the *Lemon-Agostini* effect prong).

procedural oversight similar to what § 501(c)(3) requires of the IRS.¹⁷⁸ However, since *Lemon*, the Court has held that procedural oversight alone does not constitute excessive entanglement.¹⁷⁹ The Court has even addressed the specific context of taxation, finding that routine tax oversight does not constitute prohibited entanglement.¹⁸⁰ The only way for a procedural rule to rise to the level of excessive entanglement is if a law requires the state to parse the religious nature of a party's actions.¹⁸¹

a. *Walz: "Official and Continuing" Surveillance*

As the qualifying term "excessive" suggests, entanglement may exist without infringing the Establishment Clause.¹⁸² In *Walz v. Commissioner*, the Court described excessive entanglement as requiring "official and continuing surveillance" of church activities.¹⁸³ Applying this standard, four subsequent cases pave the way for determining that the campaign intervention restriction does not cause excessive church-state entanglement.

In *Bowen v. Kendrick*,¹⁸⁴ the Court found no excessive entanglement, despite a law's requirements that the government (1) review adolescent counseling programs set up by religious institutions; (2) review the materials used by the institutions; and (3) periodically visit the program to ensure the institutions' use of the funds was proper.¹⁸⁵ Similarly, in *Roemer v. Board of*

¹⁷⁸ Compare *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) (finding excessive entanglement when a statute "provide[d] for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education"), with 26 U.S.C. § 501(c)(3) (2000) (requiring the IRS to consider whether a church (1) is "exclusively organized and operated" for religious purposes; and (2) impermissibly intervenes in a political campaign).

¹⁷⁹ See *Agostini v. Felton*, 521 U.S. 203, 234 (1997) (finding no entanglement despite requirement of monthly state supervision of religious schools); *Bowen*, 487 U.S. at 616–17 (finding no entanglement despite state's role in reviewing religious educational materials to ensure secular use of funds); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 763–64 (1976) (finding no entanglement despite annual state audits of religious universities' use of state subsidies).

¹⁸⁰ *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 21 (1989) (plurality) (quoting *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 305 (1985)) (sales and use tax).

¹⁸¹ See *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 396 (1990) ("Most significantly, the imposition of the sales and use tax . . . does not require the State to inquire into the religious content of the items sold or the religious motivation for selling or purchasing the items . . .").

¹⁸² See *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984) ("Entanglement is a question of kind and degree."); *Agostini*, 521 U.S. at 233 ("Entanglement must be 'excessive' before it runs afoul of the Establishment Clause.") (citing *Bowen*, 487 U.S. at 615–17).

¹⁸³ *Walz v. Comm'r*, 397 U.S. 663, 674–75 (1970).

¹⁸⁴ 487 U.S. 589 (1988).

¹⁸⁵ *Id.* at 616–17.

Public Works,¹⁸⁶ the Court found no excessive entanglement when a law required the government to conduct annual audits of religious universities to ensure that they did not use grants to spread religious messages.¹⁸⁷ *Jimmy Swaggart Ministries* required “on-site continuing inspection of . . . day-to-day operations” before government surveillance reached an impermissible level.¹⁸⁸ Finally, in *Agostini*, the Court built on *Bowen* and *Roemer* by finding that state supervisors’ unannounced monthly visits to parochial schools did not constitute excessive entanglement.¹⁸⁹

In each of these cases, the Court distanced itself from *Lemon*, which found excessive entanglement based on ongoing state-church interaction.¹⁹⁰ The campaign intervention restriction benefits from those holdings because it contemplates government oversight only based on cause. Neither § 501(c)(3) nor § 7611 requires that IRS officers visit churches in any official capacity before demonstrating to their superiors a reasonable belief that the church has supported or opposed a political candidate.¹⁹¹ Further, neither envisions regular, ongoing supervision of church activities.¹⁹² This enforcement scheme contemplates less onerous oversight than the state’s review of a religious school’s teaching materials in *Bowen*, annual audits in *Roemer*, the on-site observation of day-to-day operations discussed in *Jimmy Swaggart Ministries*, and monthly visits in *Agostini*.

¹⁸⁶ 426 U.S. 736 (1976).

¹⁸⁷ *Id.* at 763–64.

¹⁸⁸ *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 395 (1990).

¹⁸⁹ *Agostini v. Felton*, 521 U.S. 203, 234 (1997).

¹⁹⁰ *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971) (invalidating as unconstitutional two laws because they required “comprehensive, discriminating, and continuing state surveillance”).

¹⁹¹ See 26 U.S.C. §§ 501(c)(3), 7611 (2006). In its closing letter to All Saints, the IRS commended the church’s stated policy of not endorsing or opposing candidates. Letter from Marsha A. Ramirez, Director, Exempt Organizations Examinations, IRS, to All Saints Church (Sept. 10, 2007) (on file with author), available at http://www.allsaints-pas.org/site/DocServer/Letter_from_IRS_to_All_Saints_Church.pdf?docID=2541. In a passage that demonstrates the fine line between excessive entanglement and the IRS’s legitimate role of providing guidance as to permissible behavior, the IRS advised All Saints to “be mindful of that policy when posting information that makes reference to specific candidates on your website during future election campaigns.” *Id.* While that admonition represents a state actor advising a church how to conduct its internal affairs, it steers clear of the impermissible continuing state surveillance and religious interpretation prohibited under the Establishment Clause. See *Walz v. Commissioner*, 397 U.S. 663, 674–75 (1970) (prohibiting “official and continuing [state] surveillance”); *Jimmy Swaggart Ministries*, 493 U.S. at 395 (prohibiting state interpretation of religious materials).

¹⁹² See *supra* Part I.A.3.

b. No Government Interpretation of Religion

*Jimmy Swaggart Ministries*¹⁹³ also emphasized another proposition: a law requiring the state to interpret religion creates excessive entanglement. In *Jimmy Swaggart Ministries*, a church insisted that a California sales and use tax¹⁹⁴ caused excessive entanglement because it required protracted, on-site government audits of the church's accounting records.¹⁹⁵ The Court disagreed, focusing on the nature of the relationship between the state and church in the context of sales-tax collection.¹⁹⁶ The unanimous holding in *Jimmy Swaggart Ministries* was largely based on the fact that the procedural oversight did not require the state to assess whether the church's transactions were religious.¹⁹⁷ Accordingly, the Court intimated that a law requiring the government to assess the religiosity of an organization's actions would violate the Establishment Clause.

Applied to the political speech restriction, *Jimmy Swaggart Ministries* thus favors a secular test that the IRS can apply without having to assess the religious nature of an organization's speech. Without such an objective examination, the IRS could find itself parsing gospel to determine whether a church's speech is sufficiently related to its faith.¹⁹⁸

Because the IRS's current procedures avoid such an inquiry, they do not violate the Establishment Clause's prohibition of excessive entanglement.¹⁹⁹ In support of this conclusion, it is relevant to compare the church-state interactions incident to the political speech restriction with those of another § 501(c)(3) condition for exemption. Section 501(c)(3) requires organizations

¹⁹³ 493 U.S. 378 (1990).

¹⁹⁴ Sales, use, and property taxes are substantively distinguishable from income tax. *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943). However, any differences in the taxes' character are insufficient to render Supreme Court First Amendment precedent irrelevant. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 593 n.20 (applying *Walz*, a sales tax case, in income tax context) (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 672–73 (1970)).

¹⁹⁵ *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 392 (1990).

¹⁹⁶ *Id.* at 394.

¹⁹⁷ *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 336 (1987) (“[I]t is a significant burden on a religious organization to require it . . . to predict which of its activities a secular court will consider religious.”).

¹⁹⁸ *Cf. Jimmy Swaggart Ministries*, 493 U.S. at 396 (holding the tax constitutional because it “does not require the State to inquire into the *religious content* of the items sold or the [church's] *religious motivation*”) (emphasis added).

¹⁹⁹ This result is not affected by whether the excessive entanglement is subsumed within the effect prong. *See Agostini v. Felton*, 521 U.S. 203, 232–33 (1997) (treating entanglement as a factor affecting the effect prong).

to be “operated exclusively” for religious, or other qualifying, purposes.²⁰⁰ Thus, it inheres in the Code that the IRS is authorized to reject tax-exempt status for an organization purporting to be a church, but which the IRS determines is not “operated exclusively” for religious purposes.²⁰¹ That authority necessarily demands IRS scrutiny of churches’ activities, with an express focus on their religious nature.²⁰² Yet, courts have applied the provision without questioning its constitutionality.²⁰³ Because the campaign intervention restriction requires a less intrusive inquiry into religious doctrine than the “organized exclusively” rule, the former does not run afoul of the entanglement prong.

III. THE TAX MAN IS RIGHT, BUT AMENDING SECTION 501(C)(3) WOULD IMPROVE HIS REPUTATION AND EFFICACY

Section 501(c)(3)’s facial constitutionality does not settle the question of whether the IRS properly enforces the provision. Similarly, its constitutionality does not foreclose the potential for improvement. This Part argues that while the IRS implements § 501(c)(3) properly, minor changes could reduce concerns over political motivation and draconian penalties. Thus, the Part first explores the IRS’s enforcement and finds that the IRS implements the campaign intervention restriction not only well but also impartially. Then, the Part proposes four changes to the Code that would reduce legitimate criticism.

A. *The IRS Enforces § 501(c)(3) Properly*

Using the facts of the All Saints investigation as an example of the IRS’s enforcement, this section demonstrates the Service’s impartial and proper role in implementing § 501(c)(3). The circumstances surrounding All Saints prove particularly apt in this regard because the controversial sermon represents a

²⁰⁰ 26 U.S.C. § 501(c)(3) (2006).

²⁰¹ See 26 U.S.C. § 7611(b)(1)(B) (permitting the IRS to examine a church’s activities “to the extent necessary to determine whether an organization claiming to be a church is a church”); see also *Universal Life Church v. United States*, 13 Cl. Ct. 567, 585 (1987) (affirming the revocation of a church’s tax-exempt status based on an IRS investigation finding the church engaged in substantial non-exempt activity).

²⁰² See *Universal Life Church*, 13 Cl. Ct. at 585 (affirming the revocation of a church’s tax-exempt status when a church engaged in substantial non-religious activity); see also Slye, *supra* note 26, at 221 (“The IRS must distinguish the truly religious from the sham, the faithful from the fakers.”).

²⁰³ See, e.g., *Universal Life Church*, 13 Cl. Ct. at 585 (affirming a revocation based in large part on the church having impermissibly provided tax advice to congregants); see also *supra* note 31 and accompanying text (discussing necessity of basic IRS oversight to maintaining a viable tax system).

tough, gray area in the Code. Applying the “reasonable belief” standard, the IRS must determine whether All Saints “intervene[d] . . . in opposition to” President Bush.²⁰⁴

The Service could decide that the church’s history of political speech and the sermon’s focus on peace and charity demonstrate its compliance with § 501(c)(3). Or, the investigation could exonerate All Saints by determining that Reverend Regas’s visiting status removed any sense that the church endorsed the sermon. After factoring in these considerations, this section concludes that, while not an egregious violation, the sermon belongs in the category of impermissible campaign intervention.

1. The 2004 Season: A Statistical Overview

An independent, but IRS-commissioned, report detailing the IRS’s § 501(c)(3) enforcement during the 2004 election season supports the notion that IRS investigations were evenhanded.²⁰⁵ According to the report, third parties referred 131 instances of potential violations. To put that number in perspective, consider that roughly 1,500,000 organizations are tax-exempt.²⁰⁶ Of the referrals, the IRS determined that ten did not warrant a church tax inquiry and that forty-one did not merit a further church tax examination. These figures demonstrate two points: (1) independent parties identified potential violations accurately, with 92% of referrals satisfying the “reasonable belief” standard required for a church tax inquiry; and (2) the IRS rejected many of the claimed infractions, refusing to initiate more intrusive church tax examinations in nearly one-third of the cases.

Of the remaining eighty referrals, thirty-four were churches and forty-six were other exempt organizations.²⁰⁷ Here, the numbers tell inconsistent stories. First, the fact that the majority of investigations targeted nonchurch organizations demonstrates the prohibition’s general applicability in practice. However, it is also true that in comprising forty-three percent of cases, churches disproportionately represented investigation targets.

²⁰⁴ See 26 U.S.C. §§ 7611 (creating “reasonable belief” standard), 501(c)(3) (prohibiting tax-exempt organizations from “intervene[ing] on behalf of (or in opposition to) candidates for public office”). See *supra* Part I.A.2–3 for a description of § 501(c)(3) and the IRS’s procedures for investigating potential violations.

²⁰⁵ See IRS FINAL AUDIT REPORT, REVIEW OF THE EXEMPT ORGANIZATIONS FUNCTION PROCESS FOR REVIEWING ALLEGED POLITICAL CAMPAIGN INTERVENTION BY TAX-EXEMPT ORGANIZATIONS 9 (2005) (on file with author) [hereinafter AUDIT REPORT] (finding no political motivation).

²⁰⁶ City Club Remarks, *supra* note 17.

²⁰⁷ AUDIT REPORT, *supra* note 205, at 7.

The report exonerated the IRS against charges of political motivation, finding that the IRS “followed a consistent process when reviewing the information items, regardless of the source of the allegation or the potential political activity.”²⁰⁸

2. *All Saints’ Close Case*

The preceding figures include the IRS’s investigation of All Saints. As discussed, Reverend Regas told voters that “[g]ood people of profound faith will be for either George Bush or John Kerry for reasons deeply rooted in their faith.”²⁰⁹ Such a disclaimer will not, alone, make the sermon comply with § 501(c)(3).²¹⁰ The text of the sermon, combined with media reports, satisfied the fact-sensitive “reasonable belief standard.”²¹¹ After all, the statute only requires that “an appropriate high-level Treasury official reasonably believe[] (on the basis of facts and circumstances recorded in writing)” that a church has publicly supported or opposed a candidate.²¹² Here, a panel of three experienced IRS officers considered the facts before determining that they satisfied the “reasonable belief” standard.²¹³

The All Saints sermon satisfied the reasonable belief standard in a few ways. First, the sermon identified President Bush by name.²¹⁴ Although Reverend Regas could have discussed the Iraq war and poverty, two of the sermon’s cornerstone topics, his repeated, direct criticism of President Bush permitted officials to reasonably believe that he opposed a particular candidate.²¹⁵ If Reverend Regas had omitted the candidates’ names from his sermon, the claim that All Saints violated § 501(c)(3) would probably fail. The sermon could have addressed the candidates by name, as long as it avoided

²⁰⁸ *Id.* at 8. The report did find that the IRS failed to keep to the expedited timetable’s strict deadlines. *Id.* at 9–11.

²⁰⁹ *Sermon*, *supra* note 1, at 1.

²¹⁰ *See* Non Docketed Serv. Advice Rev. 2001 I.R.S. N.S.A.R. 0918R (revoking tax exemption, despite the fact that the violative voter guides disclaimed that “the voter guide is provided for educational purposes only and is not to be construed as an endorsement of any candidate or political party”); McDowell, *supra* note 116, at 84 (noting that “a ‘corrective disclaimer’ is not sufficient to undo the endorsement”).

²¹¹ *See supra* notes 43–44 and accompanying text.

²¹² 26 U.S.C. § 7611(a)(2) (2006).

²¹³ A 2006 IRS publication describing the Service’s investigatory procedure requires the Director of Exempt Organizations and the Director of Exams to review cases before church tax inquiries may begin. *PACI Procedures*, *supra* note 11.

²¹⁴ *Cf.* Sataline, *supra* note 76 (reporting that a law professor considered a particular set of sermons to “clearly” constitute a violation because “[t]hey’re naming names”).

²¹⁵ *See supra* note 83.

clear condemnation of one, while barely mentioning the other.²¹⁶ But the text of the sermon led the IRS to believe otherwise.

In a demonstration of why Congress should amend the Code,²¹⁷ the IRS concluded its high-profile investigation by summarily notifying All Saints that the church had, indeed, violated the campaign intervention provision.²¹⁸ Despite finding a violation, however, the IRS chose not to impose any sanction on the church.²¹⁹ The IRS explained its decision and urged the church to prevent future violations in a single paragraph:

We learned that All Saints Church invited the Reverend Dr. George F. Regas, Rector Emeritus, to preach a sermon on October 31, 2004, which you then posted on your internet website. Based on the existing record, the Church's actions lead us to the conclusion that the Church intervened in the 2004 Presidential election campaign. We note that this appears to be a one-time occurrence and that you have policies in place to ensure that the Church complies with the prohibition against intervention in campaigns for public office. We advise you to inform guest speakers of your policy and to be mindful of that policy when posting information that makes reference to specific candidates on your website during future election campaigns.²²⁰

B. *How Congress Can Improve the Code*

The first step in determining how Congress can improve the Code is identifying its faults. Although the IRS properly executes § 501(c)(3), the appearance of impropriety warrants changes.²²¹ Critics insist that the IRS is—or at least that several of its investigations have been—politically motivated²²²

²¹⁶ *Id.*; see also Sataline, *supra* note 76 (explaining that churches are prohibited from “engag[ing] in a ‘pattern or practice that is designed to support one candidate over another.’”) (quoting Donald Tobin, Associate Dean of The Michael E. Moritz College of Law at The Ohio State University) (emphasis added).

²¹⁷ See *infra* Part III.B.

²¹⁸ See Letter from Marsha A. Ramirez, Director, Exempt Organization Examinations, IRS, to All Saints Church (Sept. 10, 2007) (on file with author), available at http://aschu.convio.net/site/DocServer/Letter_from_IRS_to_All_Saints_Church.pdf?docID=2541.

²¹⁹ See *id.*

²²⁰ *Id.*

²²¹ See *supra* note 23. The IRS recognizes this common perception, and attributes it to the Service's failure to expedite investigations according to new procedures for the 2004 election season. AUDIT REPORT, *supra* note 205, at 9.

²²² *Id.* Critics have targeted other government agencies with similar claims. See, e.g., Kate Phillips, *Group Reaches Settlement with F.E.C. over 2004 Campaign Advertising*, N.Y. TIMES, Mar. 1, 2007, at A16 (reporting an advocacy group's claim that the Federal Election Commission investigated Republican organizations and ignored complaints against Democratic groups).

and that the Code is vague.²²³ One cause of the former is that the Code's penalty structure prevents the IRS from consistently imposing case-appropriate sanctions.²²⁴ Further, the seriousness of revocation calls attention to § 7611's vagueness. Finally, the lack of a judicial remedy for IRS misconduct projects the damaging image of an untouchable state actor.²²⁵

Several IRS church-tax investigations have drawn claims of political bias.²²⁶ Even the IRS has acknowledged the trend.²²⁷ This section argues that four changes to the Code could deflect such claims. First, Congress should require the IRS to publish reports of every investigation that it undertakes. Second, Congress should codify the IRS's current practice of relying on independent referrals in selecting organizations to investigate.²²⁸ Third, the Code should include a well-defined penalty structure tied to particular violations.²²⁹ Finally, Congress should create a judicial remedy for IRS misconduct.²³⁰ As the following sections make clear, these proposals will effect much-needed change, while imposing only minimal costs on the IRS and the enforcement process as a whole.

²²³ See, e.g., Letter from Adam B. Schiff & Walter Jones, U.S. Congressmen, to Henry Paulson, Treasury Secretary, and Mark Everson, IRS Comm'r (Sept. 18, 2006) (on file with author) ("The 'facts and circumstances' test that is used to determine if a violation has occurred is far too vague to ensure that not-for-profits understand their limitations on speech."); Dessingue, *supra* note 23, at 928 (referring to the IRS's interpretation of the Code as "unacceptably vague"). Other sections of the Code are equally difficult to understand. See, e.g., Strom, *supra* note 78 (explaining that many organizations do not understand what the IRC requires of their tax returns).

²²⁴ See *supra* note 97.

²²⁵ See *supra* notes 47–50 and accompanying text.

²²⁶ See, e.g., *Branch Ministries*, 211 F.3d at 140–41 (charging an IRS inquiry with being politically motivated); Cooperman, *supra* note 44 ("I'm very interested to know whether the IRS is taking a look only at churches that are critical of the war in Iraq, or also at the churches that are supportive of the war and the president I have no evidence that the investigation is politically motivated, but I do wonder whether it is.") (quoting Reverend J. Edwin Bacon, Jr., All Saints Church); Press Release, All Saints Church, All Saints Church, Pasadena Demands Correction and Apology from the IRS (Sept. 23, 2007), available at http://aschu.convio.net/site/DocServer/IRS_Press_Release_Sept_23_2007.pdf?docID=2521 (arguing that "the exam may have been influenced by partisan political considerations"); see also Dessingue, *supra* note 23, at 924–25 (noting that "the IRS invites charges of selective enforcement" and "the perception of an uneven playing field persists"); Editorial, *supra* note 2, at A3 ("Those with suspicious, or perhaps cynical, minds will guess that the IRS has political motivations for singling out All Saints").

²²⁷ AUDIT REPORT, *supra* note 205, at 2 (explaining that both the IRS Commissioner and Commissioner of the Tax-Exempt and Government Entities Division had requested a report studying the allegations of political motivation).

²²⁸ See *supra* note 78.

²²⁹ See *supra* note 97.

²³⁰ See *supra* notes 47–50.

1. *Congress Should Require the IRS to Publish Reports of Every Investigation that It Undertakes*

An infrequently discussed deficiency is the investigation process's lack of transparency.²³¹ The IRS maintains the confidentiality of its investigations, including the manner by which it learns of possible infractions.²³² While implemented in the name of privacy,²³³ the IRS's commitment to secrecy impairs the transparency of the revocation process and diminishes observers' faith in the Service's enforcement.²³⁴

Congress should require the IRS to make reports of its investigations publicly available. This Comment proposes mandatory reports describing (1) the information referred to the IRS about a church's potential violation; (2) the results of IRS factfinding; (3) the IRS determination of whether the church violated § 501(c)(3); and (4) in the case of a violation, the sanction that the IRS imposed. These reports would protect organizations' privacy by avoiding reference to the identities of institutions and their leaders.²³⁵

Currently, the IRS publishes generalized reports of its findings following each election season.²³⁶ The Service also creates internal case files that document each investigation.²³⁷ Thus, a requirement that the IRS publish reports would entail just one additional step: ensuring the anonymity of the organization. Because the IRS already maintains the privacy of parties in its revenue rulings, private letter rulings, and other treasury determinations, this proposal's feasibility is settled.²³⁸

²³¹ Critics rarely discuss the process' lack of transparency as a source of political-bias allegations. However, one prominent study of the IRS's 2004 election-season enforcement cited transparency as a flaw. See OMB WATCH, *supra* note 45.

²³² See *supra* note 81.

²³³ See 26 U.S.C. § 6103 (2006) (protecting privacy of charities and religious organizations by prohibiting the IRS from disclosing information about specific inquiries it conducts).

²³⁴ OMB WATCH, *supra* note 45.

²³⁵ Cf. 26 U.S.C. § 6110(c) (2006) (requiring the IRS to remove all identifying information about a party prior to publishing all revenue materials).

²³⁶ See PROJECT 302, *supra* note 13.

²³⁷ See AUDIT REPORT, *supra* note 205, at 8 (referring to the IRS practice of documenting investigations in case files).

²³⁸ See, e.g., I.R.S. Priv. Ltr. Rul. 200645025 (Nov. 10, 2006) (denying an exemption to a charitable organization because the organization was not operated exclusively for exempt purposes); I.R.S. Priv. Ltr. Rul. 200634046 (Aug. 25, 2006) (revoking exemption because an organization was "operat[ed] for the private benefit of the for-profit fundraising companies"). Neither the IRS nor exempt organizations may cite private letter rulings as precedent. 26 U.S.C. § 6110(k)(3). Taxpayers and exempt organizations must affirmatively request private letter rulings. Rev. Proc. 2007-1 I.R.B. 5. Revenue rulings answer specific questions by discussing the facts of a case and the IRS's interpretation of the Code. E.g., Rev. Rul. 86-95, 1986-2 C.B. 73

A reporting requirement would follow several government agencies' practices. The Federal Election Commission publishes reports of its findings and determinations on potential violations of campaign finance laws.²³⁹ Similarly, the Securities and Exchange Commission reports case determinations as no-action letters or releases.²⁴⁰ Moreover, the IRS already publishes private letter rulings and revenue rulings that do not reveal the parties' identities, but which inform taxpayers of the IRS's interpretation of the Code.²⁴¹

By requiring the IRS to publish similar, but more detailed, reports of every investigation, Congress can provide a check on the Service's enforcement. Like the foregoing agencies' practices, comprehensive reports describing the basis for each investigation, the IRS's factfinding, the result, and the penalty (if any) would serve an educational role.²⁴² Such a practice also would permit outsiders to analyze the IRS's enforcement practices.

2. Congress Should Require the IRS to Rely on Independent Referrals

By formalizing the IRS's current procedure for selecting organizations to investigate, Congress can assure observers that churches' sanctity will remain inviolate. One source of the politically based mistrust is the fact that § 501(c)(3) does not instruct the IRS as to how to select organizations to investigate.²⁴³ Congress can solve this problem by adding a provision to § 7611 that requires the IRS to rely solely on independent referrals. The only exception to this general rule should be a reasonableness requirement that would allow an IRS officer to respond to potential violations that the officer inadvertently learns of on his own. Without such an exception, a categorical rule would not allow an IRS agent to take official notice of a violative sermon in his own church, and such a result would pose an unjustified limitation on the Service's enforcement.

(holding that particular types of public forums for congressional candidates do not violate the campaign intervention restriction).

²³⁹ E.g., Statement of Reasons, Office of the Comm'n Sec., Fed. Elec. Comm'n, *In re Custom Concrete Cutting* (May 29, 2003), available at <http://eqs.nictusa.com/eqsdocs/00002F32.pdf> (describing findings and determination that two corporations did not violate campaign finance laws, as alleged by an independent referral). FEC materials do not maintain the parties' privacy. See *id.*

²⁴⁰ E.g., N.Y.S.E. Application, Unregistered Debt Sec. Exemption Release No. 34-54766, File No. S7-06-05 (Nov. 16, 2000).

²⁴¹ See *supra* note 81.

²⁴² Cf. Press Release, *supra* note 226 ("We have no more guidance about the IRS's rules than when we started this process over two long years ago.") (quoting Reverend Bacon).

²⁴³ See *supra* Part I.A.3.

Like several federal agencies, the IRS already relies on independent referrals for the bulk of its investigations.²⁴⁴ Unlike many of its counterparts, however, the IRS does not have a formal conduit for such referrals.²⁴⁵ One result of the informal nature of the referral system is that churches and other tax-exempt organizations do not appear familiar with it.²⁴⁶ By formally requiring this method, Congress would achieve twin goals. First, the IRS would be more efficient by formalizing a process for observers to alert the Service of potential infractions. Second, tax-exempt organizations could rest assured that IRS officers are not clandestinely visiting churches in attempts to discover violations.²⁴⁷ Because this proposal does not alter the substance of the investigation process, it will prove easy to implement.

3. Congress Should Formalize the Penalty Structure

The IRS has broad authority to assess penalties for impermissible campaign intervention. Section 7611 provides the Service with two courses of action: (1) apply excise taxes on political expenditures; and (2) revoke the organization's tax exemption.²⁴⁸ Commonly, however, the Service assigns violating organizations "no change" status.²⁴⁹

Under the "no change" designation, organizations must agree to take steps to prevent future violations.²⁵⁰ In exchange for admitting wrongdoing and ensuring its nonrepetition, organizations retain their exemption and avoid

²⁴⁴ See *supra* note 78.

²⁴⁵ See, e.g., 2 U.S.C. § 437g(a)(1) (2006) (prescribing procedure for independent complaints of potential campaign finance violations); see also, e.g., Complaint in re Byrum for Congress (1999), available at <http://eqs.nictusa.com/eqsdocs/000034EC.pdf> (requesting that the FEC investigate a campaign for potentially violating campaign finance laws).

²⁴⁶ Cf. Gilgoff, *supra* note 46 ("IRS experts outside the agency say a . . . stumbling block to enforcement is the American cultural taboo against government intrusion into churches . . .").

²⁴⁷ See *id.* ("It's not like we're sitting in the pews It's the honor system plus some third-party oversight.") (quoting an IRS spokesperson).

²⁴⁸ 26 U.S.C. § 7611 (2006). The IRS has two additional courses of action in the case of political expenditures. 26 U.S.C. §§ 6852 (describing assessments that § 501(c)(3) organizations incur if they make flagrant political expenditures), 7409 (providing IRS with the right to seek an injunction in federal district court enjoining further political expenditures) (2006). However, political expenditures are legally distinct from campaign intervention. 26 U.S.C. §§ 501(c)(3), 6852.

²⁴⁹ PROJECT 302, *supra* note 13, at 19 fig.9 (reporting that the IRS applied the "no change" designation in twenty-two percent of all 2004 exemption cases). However, churches only received "no change" status eight percent of the time. *Id.* at 21 fig.9B.

²⁵⁰ *Id.* at 18. The IRS has also referred to this response as a "written advisory." *PACI Procedures, supra* note 11, at 5.

excise taxes.²⁵¹ While this practice favors organizations by permitting unintentional and unknowing violations to go unpunished, the Code does not require, or even make available, its application. An additional concern is that the IRS sometimes assigns “no change” status when revocation or excise taxes would be more appropriate. Thus, in addition to codifying the general practice, the Code should carefully delineate the proper grounds for its invocation.

Undoubtedly, the fact-sensitive nature of the investigation requires latitude.²⁵² But Congress should clarify the proper application of the statutory penalties. For instance, the Code is sufficiently clear in explaining that excise taxes are appropriate to punish organizations’ political expenditures. In contrast, the law is silent as to which violations merit revocation.²⁵³ The Service has recognized the extreme nature of revocation, conceding that it is not always in the public interest.²⁵⁴ Therefore, Congress should more precisely define revocation’s reach.

One benchmark should be the organization’s intent and willingness to violate the political speech rule. Currently, the IRS considers willingness in making the revocation determination, but Congress should officially recognize this distinction for the public benefit.²⁵⁵ Implementing a formal, bright-line rule would improve the IRS’s credibility because willing and knowing violations would receive consistent treatment.

4. *Congress Should Create a Judicial Remedy*

This Comment’s final proposal seeks to assure the public that the IRS adheres closely to the Code’s enforcement provisions. Currently, § 7611’s express grant of immunity negatively affects the enforcement process in two

²⁵¹ An IRS publication insists that in certain cases “taxpayers are *not* required to admit wrongdoing.” *PACI Procedures*, *supra* note 11, at 5 (emphasis added). However, the same guide renders this assertion less reliable when it contrasts that class of cases with those “in which taxpayers do *not* agree a violation of the prohibition occurred.” *Id.* at 6 (emphasis added).

²⁵² *See supra* note 1.

²⁵³ While the applicability of the various penalties is not always clear, IRS materials do explain the absolute nature of the campaign intervention regulation. *See, e.g.*, I.R.S. Tech. Adv. Mem. 199907021 (Feb. 19, 1999) (“The prohibition against participation or intervention in a political campaign is absolute. Therefore, it is not material that the intervention is an insubstantial part of an organization’s activities or that other activities would, by themselves, support exemption under section 501(c)(3) of the Code.

²⁵⁴ *See supra* note 97.

²⁵⁵ The Code does explicitly treat willful violations differently in some situations. *See, e.g.*, 26 U.S.C. § 4955(a)(2) (2006) (exempting church managers from personal liability for non-willful violations); *see also* 26 U.S.C. § 6852 (creating special category for “flagrant” political expenditures).

ways.²⁵⁶ First, victims of IRS noncompliance suffer administrative and, in some cases, public relations burdens in responding to IRS charges. Second, § 7611 does not motivate the IRS to adhere ardently to its provisions.

This proposal presents the difficult task of choosing an appropriate remedy. Assessing money damages would be vexing because of the nature of the violation. Unlike IRS over-collection of taxes, where money damages are unambiguous, ascertaining damages resulting from IRS violations of § 501(c)(3) would prove difficult. However, this proposal is achievable, and Congress can look to the IRC itself for guidance.

The Code already provides civil remedies to victims of IRS noncompliance in other enforcement areas.²⁵⁷ For instance, if the IRS fails to adhere to strict rules in preparing revenue materials, the United States is liable.²⁵⁸ Like those procedural violations, § 501(c)(3) enforcement violations potentially damage an organization's reputation and surely command the target's administrative attention. Under the rules governing preparation of revenue materials, victims of IRS noncompliance receive a minimum of \$1000 in money damages, attorneys' fees, and costs.²⁵⁹ Applied to § 501(c)(3), such a scheme would afford judges more discretion by expanding their possible responses beyond the current stay remedy.²⁶⁰ Additionally, the rule would compensate organizations more appropriately for the time and effort required by IRS noncompliance.

CONCLUSION

In 1822, James Madison expressed a preference for “a perfect separation between ecclesiastical and civil matters” because “religion [and gov[ernmen]t will both exist in greater purity, the less they are mixed together.”²⁶¹ Many modern clergymen recognize that principle and believe that strict separation benefits religion.²⁶²

²⁵⁶ See *supra* notes 47–50 and accompanying text.

²⁵⁷ *E.g.*, 26 U.S.C. § 6110(j) (2006) (providing a civil remedy for IRS failures to follow procedures for maintaining confidentiality in all publications).

²⁵⁸ *Id.* § 6110(j)(2).

²⁵⁹ *Id.*

²⁶⁰ See *supra* notes 47–50.

²⁶¹ Letter from James Madison to Edward Livingston (July 10, 1822), in 9 THE WRITINGS OF JAMES MADISON, 1819–1836, at 102 (Gaillard Hunt ed., 1910).

²⁶² See generally, *e.g.*, GREGORY A. BOYD, THE MYTH OF A CHRISTIAN NATION: HOW THE QUEST FOR POLITICAL POWER IS DESTROYING THE CHURCH (2005) (advocating a strong separation of church and state as

Applied here, keeping churches out of political campaigns affords churches benefits beyond tax exemption. Protecting freedom of religion, the theory goes, requires prohibiting certain political speech. In the absence of the rule, excessive political-religious speech could incite Congress to further regulate religious practice. As such, the campaign intervention restriction limits churches' participation in a narrow range of activities as a means of insulating religion from the dangers of a slippery slope.

As this Comment demonstrates, the sometimes amorphous First Amendment religion clauses do not invalidate the political speech restriction.²⁶³ However, the rule's lack of clarity has led critics to support legislation removing it altogether.²⁶⁴ Given the provision's constitutionality and the increasingly blurred lines between churches and politics, that response represents overreaction.

It is true, however, that the present system of enforcing the rule is imperfect. The continuous flow of claims accusing the IRS of politically biased enforcement reflects weaknesses in the Code.²⁶⁵ Congress can shore up these deficiencies by (1) requiring the IRS to publish comprehensive, but anonymous, reports of its investigations; (2) codifying the current practice of relying on independent referrals for discovering potential violations; (3) formalizing and describing the penalty scheme; and (4) creating a judicial remedy for IRS failures to follow the Code's enforcement procedures.²⁶⁶

While these changes will not eliminate criticism completely, they will go a long way in educating tax-exempt organizations and diffusing claims of IRS impropriety. Under such a regime, questions of willingness and the

the best course for religion); ROBERT EDGAR, *MIDDLE CHURCH: RECLAIMING THE MORAL VALUES OF THE FAITHFUL MAJORITY FROM THE RELIGIOUS RIGHT* (2006) (same).

²⁶³ See *supra* Part II.

²⁶⁴ Legislators have attempted to remove the restriction several times. See, e.g., Religious Freedom Act of 2006, S. 3957, 109th Cong. (2006) (bill seeking to remove all restrictions on campaign intervention currently imposed on tax-exempt organizations); Houses of Worship Free Speech Restoration Act, H.R. 235, 108th Cong. (2003) (same); Houses of Worship Political Speech Protection Act, H.R. 2357, 107th Cong. (2002) (same).

²⁶⁵ See *supra* note 23.

²⁶⁶ See *supra* Part III.B.

appropriate application of the revocation penalty will replace accusations of political motivation and the rule's general lack of clarity as debate-starters.

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