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## If You Are a Good Christian You Have No Business Voting for This Candidate: Church Sponsored Political Activity in Federal Elections

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# IF YOU ARE A GOOD CHRISTIAN YOU HAVE NO BUSINESS VOTING FOR THIS CANDIDATE: CHURCH SPONSORED POLITICAL ACTIVITY IN FEDERAL ELECTIONS

## I. INTRODUCTION

Politics and religion are two cornerstones of American culture.<sup>1</sup> Politics is the mechanism by which the voting public makes decisions and influences policy; for the devout, religion is a way to make decisions and policy influencing private life.<sup>2</sup> These worlds often overlap, as political candidates frequently stump at churches while on the campaign trail.<sup>3</sup> It is perhaps inevitable that the two are often in conflict<sup>4</sup> despite the fact that the Establishment Clause<sup>5</sup> was created to erect Thomas Jefferson's famous "wall of separation between church and State."<sup>6</sup>

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1. See generally A. JAMES REICHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* (1985).

2. For an illustration of the difference between the two, see Robert N. Bellah, *Civil Religion in America*, in *CHRISTIANITY AND MODERN POLITICS* 34–35 (Louisa S. Hulett ed., 1993) (using John F. Kennedy's 1960 inaugural address as an example). "[M]atters of his own private religious belief and of his relation to his own particular church . . . are not matters relevant in any direct way to the conduct of his public office." *Id.* The roles of religion and politics have also been described as "first giving the individual an explanation of his relationship to the totality of existence and a means of transcending his apparently inexorable mortal fate, . . . [and] second providing techniques and institutions for managing the social units through which humans have always sought material security and emotional satisfaction." REICHLEY, *supra* note 1, at 4.

3. See *Onward G.O.P. Soldiers*, N.Y. TIMES, July 14, 2004, at A22.

4. A September 2000 Pew Research Center study illustrates this unease. See *Religion and Politics: The Ambivalent Majority*, THE PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, Sept. 20, 2000, <http://people-press.org/reports/display.php3?ReportID=32>. While seventy percent of those surveyed wanted a religious president, half also expressed unease at the prospect of politicians publicly discussing those views. *Id.* Fifty-one percent of registered voters surveyed were in favor of allowing religious organizations and churches to express their views on political issues, while forty-five percent were against it. *Id.* However, sixty-four percent of registered voters surveyed believed it unacceptable for clergy to express political views from the pulpit. *Id.*

5. U.S. CONST., amend. I. For a discussion of the Establishment Clause as a structural restraint on government, not as a protector of individual religious rights, see Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Government Power*, 84 IOWA L. REV. 1 (1998). The author argues that viewing the Establishment Clause in this manner would prevent frequent clashes with the Free Exercise Clause. *Id.* at 12.

6. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) (citations omitted). Jefferson believed that there should be strict separation between religious belief, which should be protected by the government, and religious conduct, which should not. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, in *CHRISTIANITY AND MODERN POLITICS*, *supra* note 2, at 68 [hereinafter McConnell, *Free Exercise of Religion*]. Jefferson's belief developed into the strict separationist theory of church-state relations. Michael W. McConnell, *Why 'Separation' Is Not the Key to Church-State Relations*, in *CHRISTIANITY AND MODERN POLITICS*, *supra* note 2, at 183–84 [hereinafter McConnell, *Why 'Separation' Is Not the Key*]. Two other theories are the

This Note grapples with one of the federal government's current means of ensuring church-state separation, and argues that it must develop a more consistent way to enforce the prohibition on political campaign activity by tax-exempt churches and religious organizations.<sup>7</sup> Part II of this Note first explores the history of churches as tax-exempt organizations in the United States, then discusses enforcement issues and legislative reform proposals associated with the prohibition on political campaign activity.<sup>8</sup> Part III of this Note will analyze and critique those enforcement procedures, questioning whether the Internal Revenue Service ("IRS") effectively enforces the prohibition.<sup>9</sup>

Part IV will propose that the Federal Election Commission ("FEC") should have the power to work with the IRS to actively enforce the political campaign activity prohibition because it involves possible election influence.<sup>10</sup> Part IV will further recommend that the IRS' definition of "political activity" should be changed because of the negligible difference between allowable issue-related activities and prohibited express advocacy activities.<sup>11</sup>

## II. HISTORY

"Faith, government and religious institutions *are* intertwined—the important thing is to figure out how the law should define their *legal* parameters."<sup>12</sup> One such legal parameter is found in the Internal Revenue

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neutrality principle and accommodationism. *Id.* Under the neutrality principle, government action should offer "neither incentive nor disincentive to practice a faith." *Id.* at 186. Under accommodationist principles, governments should adjust facially neutral practices if the effect of those practices more severely burdens some beliefs or institutions than others. *Id.* at 187. Still other viewpoints include the social activist theory and the direct interventionist theory. *See* REICHLEY, *supra* note 2, at 3. Social activists believe in strict institutional separation of church and state, but also argue that churches and religious organizations should take an active political role in social justice issues. *Id.* At the other end of the spectrum, direct interventionists believe that the church and its leaders *should* play an active role in politics, with a relaxed view of separation between church and state. *Id.* (emphasis added). Lastly, subscribers to the equal separationist theory, similar to neutrality theorists, reject "all political or economic privilege, coercion, or disability based on religious affiliation, belief, or practice, or lack thereof," but believe the state should guarantee "to religiously motivated or affiliated individuals and organizations the *same* rights and privileges extended to other similarly situated individuals and organizations." Paul J. Weber, *Neutrality and First Amendment Interpretation*, in *EQUAL SEPARATION: UNDERSTANDING THE RELIGION CLAUSES OF THE FIRST AMENDMENT 5* (Paul J. Weber ed., 2003).

7. *See infra* Part IV.

8. *See infra* Part II.D.

9. *See infra* Part III.A.

10. *See infra* notes 145–148 and accompanying text.

11. *See infra* notes 157–165 and accompanying text.

12. JULIA K. STRONKS, *LAW, RELIGION AND PUBLIC POLICY* 36 (2002) (emphasis in original).

Code (the “Code”).<sup>13</sup> Religious and charitable organizations are exempt from taxation under section 501(c)(3) of the Code.<sup>14</sup> In exchange for this express statutory exclusion, organizations must refrain from participating or intervening in “any political campaign on behalf of (or in opposition to) any candidate for public office.”<sup>15</sup> Exempt organizations are also prohibited from lobbying or otherwise attempting to influence legislation as a substantial part of their activities.<sup>16</sup> Churches can participate in nonpartisan efforts to educate voters, including voter registration drives and discussion of current social issues.<sup>17</sup> Churches and other religious

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The Supreme Court has also acknowledged that “[n]o perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.” *Walz v. Tax Comm’n*, 397 U.S. 664, 670 (1970) (upholding property tax exemptions for churches and rejecting the argument that such exemptions are a violation of either the Establishment or Free Exercise Clauses of the First Amendment).

13. I.R.C. § 501(c)(3) (2000).

14. *Id.*

15. *Id.* The IRS standard for what constitutes a violation of the prohibition on political activity is unclear. The Treasury Department’s Subcommittee on Political and Lobbying Activities & Organizations suggests the IRS will find a violation “if a reasonable person would conclude, in light of all relevant facts and circumstances, that the organization’s conduct must have had, as one of its purposes, to improve or diminish, directly or indirectly, the prospects for any individual or group of individuals to be elected to public office.” INTERNAL REVENUE SERVICE, DEP’T OF TREASURY, *EO Committee of ABA Tax Section Offers Commentary on Politicking*, 11 EXEMPT ORG. TAX REV. 854, 856 (1995) [hereinafter *Commentary on Politicking*]. For a list of activities cautioned against as potentially prohibited, see Deirdre Dessingue Halloran & Kevin M. Kearney, *Federal Tax Code Restrictions on Church Political Activity*, 38 CATH. LAW. 105, 110–11 (1998) (cautioning Catholic organizations against “indirectly supporting or opposing candidates,” including the “[u]se of plus or minus signs to signify whether a candidate agrees or disagrees with an organization’s position” on individual issues).

16. I.R.C. § 501(c)(3) (2000). The IRS measures lobbying activities using either the substantial part test or the expenditure test. INTERNAL REVENUE SERVICE, U.S. DEP’T OF TREASURY, PUBL’N NO. 1828, *Tax Guide for Churches and Religious Organizations 6*, available at <http://www.irs.gov> (last visited Jan. 10, 2005) [hereinafter *Tax Guide for Churches*]. Because churches are not eligible for the expenditure test, the IRS uses the substantial part test to measure church lobbying activity. *Id.* This test is a fact sensitive inquiry, and factors taken into account include both the time and money spent on such activity. *Id.* On the other hand, a religious organization can elect to be evaluated under the expenditure test. *Id.*; see also I.R.C. § 501(h) (2000). The expenditure test is less subjective than the substantial part test. See Phil Harper & Larry Farmer, *Election-Year Political Activity and the Separation of Church and State*, CPA J. ONLINE, Aug. 2004, <http://www.nysscpa.org/cpajournal/2004/804/infocus/p20/htm>. Under the expenditure test, the amount an organization is allowed to spend on lobbying activities depends on its size, with a fixed cap of \$1,000,000. I.R.C. § 4911 (2000). Religious organizations, if they elect to use the expenditure test, can revoke this election and revert to the substantial part test at any time. *Id.*; see also Harper & Farmer, *supra*. However, what percentage of involvement in lobbying activities would constitute substantial participation is less clear. *Id.* The upper limit would most likely be fifteen percent of exempt purpose expenditures. *Id.* A more conservative estimate is five percent. Halloran & Kearney, *supra* note 15, at 108.

17. See INTERNAL REVENUE SERVICE, U.S. DEP’T OF TREASURY, 2004 IRS ELECTION YEAR ADVISORY: CHARITIES MAY NOT ENGAGE IN POLITICAL CAMPAIGN ACTIVITIES IR-2004-59, available at <http://www.irs.gov/newsroom/article0,,id=122887,00.html> (last visited May 15, 2006) [hereinafter 2004 IRS ELECTION YEAR ADVISORY]. Nonpartisan efforts can neither be conducted in cooperation

organizations that violate these rules risk harsh penalties, including loss of tax-exempt status<sup>18</sup> and a levy of excise tax on the amount of money spent on the prohibited political activity.<sup>19</sup> Although an indirect penalty, churches also risk losing donations when they lose tax-exempt status because contributions are no longer deductible to the donor.<sup>20</sup>

Non-profit corporations, including religious organizations, are organized under state law.<sup>21</sup> A non-profit corporation may also be eligible for federal tax exemption if the IRS determines that it qualifies as a charitable organization under § 501(c)(3).<sup>22</sup> To meet the § 501(c)(3) requirements, a church or other religious organization: (1) must be organized and operated exclusively for religious, educational, scientific, or other charitable purposes; (2) must not let net earnings inure to the benefit of a private individual or shareholder; (3) must not attempt to influence legislation as a substantial part of its activity; (4) must not intervene in

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with a campaign nor discuss a candidate's identity. See Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; To What End?*, 42 B.C. L. REV. 903, 911–13 (2001). Furthermore, church efforts cannot focus on a specific political party or support a particular candidate (or party) because his or her views coincide with those of the church. *Id.* at 912. This is in keeping with the idea that voter education activities are traditionally nonpartisan, unlike political campaign activity. BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 509 (7th ed. 1998). However, at least one court has held that a mere claim of nonpartisanship does not automatically render an activity one of voter education rather than campaign activity. See *Ass'n of the Bar of New York v. Comm'r*, 858 F.2d 876, 880 (2d Cir. 1988) (“[T]he statute and pertinent regulations thereunder are not limited in their application to the partisan campaigns of candidates representing recognized political parties.”). See also Rev. Rul. 78-248, 1978-1 C.B. 154 (holding that widely distributed voter guides that publish candidates' voting records on a narrow range of issues violate the campaign activity prohibition even if the guides are factual in nature and express no partisan opinions). But see Rev. Rul. 80-282, 1980-2 C.B. 178 (holding that a biased publication sent to a limited readership not in anticipation of a federal election does not violate the prohibition); Rev. Rul. 86-95, 1986-2 C.B. 73 (holding that voter education forums that were unbiased and treated candidates equally does not violate the prohibition). For a more complete description of allowable and disallowed voter education activities, see Ann M. Murphy, *Campaign Signs and the Collection Plate—Never the Twain Shall Meet?*, 1 PITT. TAX. REV. 35, 38–39 (2003).

18. Tax Guide for Churches, *supra* note 16, at 5–6.

19. I.R.C. § 4955 (2000). Note that the imposition of an excise tax because of a § 501(c)(3) organization's political expenditure does “not affect substantive standards for tax exemption.” Treas. Reg. § 53.4955-1(a) (2005).

20. See Tax Guide for Churches, *supra* note 16, at 3. While not a church, the NAACP, an established nonprofit organization, fears that loss of tax-exempt status would “devastate the group's fund raising.” See Kelly Brewington, *NAACP Refuses IRS Demand for Documents; Bond Calls Investigation Politically Motivated*, BALT. SUN, Feb. 1, 2005, at 1A.

21. See, e.g., INTERNAL REVENUE SERVICE, U.S. DEP'T OF TREASURY, FAQs ABOUT APPLYING FOR TAX EXEMPTION, <http://www.irs.gov/charities/article/0,,id=96590,00.html> (last visited Feb. 6, 2005) [hereinafter TAX EXEMPTION FAQs]. Although non-profit corporations are creations of state law, this Note is concerned with prohibited political activity in federal elections only. Any legal issues regarding church involvement in state elections are beyond the scope of this Note.

22. IRC § 501(c)(3) (2000); see also, e.g., *id.*

political campaigns; and (5) must not have a purpose or conduct activities that are illegal or violate “fundamental public policy.”<sup>23</sup>

Unlike other non-profit corporations, churches do not have to apply for federal tax-exempt status but are automatically considered such institutions.<sup>24</sup> In contrast, religious organizations that are not churches must formally apply for tax-exempt status.<sup>25</sup> Even though a church is automatically exempt, the IRS retains the power to revoke a church’s status if it violates any of the eligibility requirements.<sup>26</sup>

### A. Churches as Historically Tax-Exempt Institutions

The federal government granted tax-exempt status to nonprofit organizations, including religious organizations, as far back as 1894.<sup>27</sup> After the passage of the Sixteenth Amendment in 1913,<sup>28</sup> the government granted a special exemption to charitable organizations.<sup>29</sup> In 1934, tax-

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23. IRC § 501(c)(3); *see also* Tax Guide for Churches, *supra* note 16, at 3.

24. *Id.* The term “church” is not specifically defined by either the Internal Revenue Code or Treasury Regulations. *See* IRC § 501(c)(3) (2000); 26 CFR 301.7611-1; Douglas H. Cook, *The Politically Active Church*, 35 LOY. U. CHI. L.J. 457, 465 (2004). Instead, the IRS uses fourteen criteria to determine whether an organization is a church:

(1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregations; (12) regular religious services; (13) Sunday schools for religious instruction of the young; and (14) schools for the preparation of its ministers.

*See* *Spiritual Outreach Soc’y v. Comm’r*, 927 F.2d 335, 338 (8th Cir. 1991) (citing a speech given by former IRS Commissioner Jerome Kurtz). While a helpful guide, not all fourteen criteria are required. *Id.* However, special emphasis is placed on organized ministry, regular religious services, religious education, and dissemination of a doctrinal code. *Id.* at 339 (citing *Lutheran Soc. Servs. v. United States*, 758 F.2d 1283, 1287 (8th Cir. 1985)). According to the IRS, many churches apply for tax-exempt status even though they are not required to do so, in part to assure donors that their contributions are tax deductible. *See* Tax Guide for Churches, *supra* note 16, at 3.

25. Tax Guide for Churches, *supra* note 16, at 3. Note that religious organizations whose annual gross receipts do not exceed \$5,000 do not have to apply for tax-exempt status. *Id.*

26. IRC § 7611(d)(1) (2000).

27. HOPKINS, *supra* note 17, at 32. The 1894 Revenue Act, while later declared unconstitutional, was the first “comprehensive federal income tax law” and included exemptions for religious, educational, and charitable corporations. PAUL J. WEBER & DENNIS A. GILBERT, PRIVATE CHURCHES AND PUBLIC MONEY: CHURCH-GOVERNMENT FISCAL RELATIONS 31 (1981). The development of tax exemption for religious organizations can be traced as far back as the English Statute of Charitable Uses of 1601. *Id.* at 29. During American colonial times it was the norm to grant complete exemption to religious, educational, and other charitable institutions. *Id.* at 30. In post-Revolutionary War times, these organizations continued to be exempt from tax under state law and local ordinance, prior to the implementation of the federal income tax. *Id.*

28. U.S. CONST. amend. XVI.

29. *See* HOPKINS, *supra* note 17, at 12–14. The original regulations defined charitable activities

exempt organizations became legally prohibited from spending substantial time and resources on lobbying activities.<sup>30</sup> In 1954, then-Senator Lyndon B. Johnson introduced the prohibition on political campaign activity as an amendment to the Code.<sup>31</sup> The amendment was passed without any changes or debate.<sup>32</sup> This prohibition banned any involvement in political campaigns by any organization established under section 501(c)(3), including churches and religious organizations.<sup>33</sup> The prohibition involves four elements that all must be fulfilled to constitute a violation of the ban: (1) participation or intervention in a political campaign; (2) political activity that involves a specific political campaign; (3) such campaign involves a specific individual; and (4) such individual must be a candidate for public office.<sup>34</sup>

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as, among others, those activities giving “relief to the poor . . . and lessening of the burdens of government.” *Id.* at 12.

30. See generally Revenue Act of 1934, Pub. L. No. 73-216, 48 Stat. 680 (1934). See also Wyatt McDowell, *How Religious Organizations and Churches Can Be Politically Correct*, 42 BRANDEIS L.J. 71, 75 (2003) (describing this first formal limit on political activity as a prohibition against substantial lobbying activity or “carrying on propaganda.”); Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 21–24 (2003) (describing the legislative history of the lobbying prohibition, noting that, at that time, Congress specifically decided that a prohibition on charities’ participation in electoral campaigns would be too broad a restriction).

31. See Dessingue, *supra* note 17, at 905–06 (citations omitted).

32. See 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, 740 (2001). The author posits that there is no evidence that church-state separation concerns had anything to do with Johnson’s proposed ban on political activity. *Id.* at 768. Instead it well might have been retaliation against conservative, tax-exempt organizations in Texas that were opposed to the Senator’s candidacy prior to his election. *Id.* at 767–68. Note that the prohibition applies to organizations only and does not operate to restrict political activities of pastors or church members in their individual capacity. Dessingue, *supra* note 17, at 914. For an additional description of the context in which the political campaign activity prohibition was passed, see Houck, *supra* note 30, at 23–29. But see Murphy, *supra* note 17, at 54 (suggesting that McCarthyism, rather than Johnson’s personal political issues, was the real impetus for the passage of the prohibition of political activity).

33. I.R.C. § 501(c)(3) (2000); see also McDowell, *supra* note 30, at 75 (theorizing that the prohibition was passed to “emphasize government neutrality while restating the objective that charitable and religious activity must be exclusively dedicated to their stated tax-exempt purpose”). A church or religious organization choosing not to organize under § 501(c)(3) is free to engage in unlimited lobbying efforts and campaign activity. See also *infra* note 59 for an in-depth discussion of the advantages and disadvantages of tax-exemption. Protection of non-§ 501(c)(3) organizations under the Free Exercise Clause is presumed valid and beyond the scope of this Note.

34. See McDowell, *supra* note 30, at 80. Participation or intervention includes “[p]ublication or distribution of printed or oral statements in support of or opposition to candidates.” Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (2005). These restrictions apply to all § 501(c)(3) organizations, not just churches and religious organizations. I.R.C. § 501(c)(3) (2000). Steffen Johnson argues that the government’s interest in prohibiting political activity of churches and religious organizations is only valid to the extent it applies to all tax-exempt entities. Steffen Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875, 893–94 (2001).

*B. The IRS Giveth, the IRS Taketh Away*

*Christian Echoes National Ministry, Inc. v. United States*<sup>35</sup> was a prominent, early case in which the IRS revoked a religious organization's tax-exempt status.<sup>36</sup> The IRS granted § 501(C)(3) tax-exempt status to Christian Echoes, an Oklahoma-based religious organization, in 1953,<sup>37</sup> but revoked it in 1964 because Christian Echoes attempted to influence the passage of legislation proposing restoration of prayer in public schools.<sup>38</sup> Christian Echoes paid the taxes assessed under protest and subsequently filed a refund suit against the IRS, claiming tax-exempt status.<sup>39</sup>

The court's opinion addressed whether the "limitation on attempts to influence legislation"<sup>40</sup> should be construed broadly or narrowly.<sup>41</sup> The Tenth Circuit Court of Appeals chose to construe the limitation broadly, noting that many of Christian Echoes' publications urged the public to act on certain political issues.<sup>42</sup> It went on to hold that merely failing to name a specific piece of legislation does not necessarily mean that an organization has not, in fact, attempted to influence a specific piece of legislation under the guise of affecting public opinion on a nonpartisan social issue.<sup>43</sup> The fact that Christian Echoes tried to shape public opinion as part of an "indirect campaign" to influence legislation was enough to violate the limitation.<sup>44</sup> Although Christian Echoes did not specifically endorse political candidates, it frequently attacked candidates who had opposite political leanings.<sup>45</sup>

Christian Echoes argued in the alternative that the denial of tax-exempt status was unconstitutional because it violated the Free Exercise Clause.<sup>46</sup> The court rejected this argument, holding that:

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35. 470 F.2d 849 (10th Cir. 1972).

36. See Houck, *supra* note 30, at 858.

37. *Id.* at 852.

38. *Id.* at 852–53.

39. *Id.*

40. *Id.* at 854.

41. *Id.* The lower court construed the limitation narrowly. *Id.*

42. *Id.* at 855. The Christian Echoes organization encouraged its readers to act by contacting members of Congress for the purpose of influencing their political decisions, getting involved in local politics, supporting the amendment restoring prayer in schools, withdrawing from the United Nations, and retaining the House Committee on UnAmerican Activities, among other things. *Id.* at 855.

43. *Id.*

44. *Id.*

45. *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 856 (10th Cir. 1972).

46. *Id.* The court went on to say that society must be protected against "political partisanship by Government employees." *Id.* at 857.

The free exercise clause of the First Amendment is restrained only to the extent of denying tax-exempt status and then only in keeping with an overwhelming and compelling Governmental interest: That of guarantying that the wall separating church and state remain high and firm.<sup>47</sup>

The court upheld the revocation of Christian Echoes' tax-exempt status, stating that, as a matter of principle, the government cannot directly or indirectly subsidize organizations who are substantially involved in political activity.<sup>48</sup>

The next major case involving revocation of a church's tax-exempt status was over twenty years later, in *Branch Ministries v. Rossotti*.<sup>49</sup> Branch Ministries ran a full page ad in two national newspapers four days prior to the 1992 presidential election which openly criticized candidate Bill Clinton.<sup>50</sup> The ad also stated that the church would gladly accept tax-deductible donations to defray the cost of running the ad.<sup>51</sup> Shortly thereafter, the IRS began a church tax inquiry into possible political expenditures by Branch Ministries.<sup>52</sup> A church tax inquiry is a special audit process for churches that the IRS can only begin if "a high-level Treasury official reasonably believes . . . that the church—(A) may not be exempt, by reason of its status as a church, from tax under section 501(a), or (B) may be carrying on activities subject to taxation, carrying on an unrelated trade or business . . . or otherwise engaged in activities subject to taxation under this title."<sup>53</sup> The church claimed that the ad was not political activity, but merely a warning to Christians concerning issues of the day.<sup>54</sup> The IRS, however, revoked the church's tax-exempt status, and the church in turn sued the government, alleging violations of the Religious Freedom Restoration Act, the First Amendment, and selective prosecution in violation of the church's Fifth Amendment equal protection rights.<sup>55</sup>

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47. *Id.*

48. *Id.*

49. 211 F.3d 137 (D.C. Cir. 2000).

50. *Id.* at 140. The ad's headline was "Christians Beware" and stated that Clinton's support of abortion rights and homosexuality "violated Biblical precepts." *Id.*

51. *Id.*

52. *Id.*

53. I.R.C. § 7611(a)(2) (2006). The facts and circumstances giving rise to that reasonable belief must be recorded in writing. *Id.* If the inquiry does not result in revocation of status, notice of deficiency of assessment, or a request that the church significantly change its operations, the IRS is barred from beginning another inquiry of that church for five years. *See Tax Guide for Churches, supra* note 17, at 22.

54. *Branch Ministries v. Rossotti*, 40 F. Supp. 2d 15, 18 (D.D.C. 1999).

55. *Branch Ministries v. Rossotti*, 211 F.3d 137, 139–41 (D.C. Cir. 2000). U.S. CONST. amend. I,

The IRS contended that although the church was a *bona fide* church,<sup>56</sup> it was not exempt under “[s]ection 501(c)(3) because it had published or distributed a statement in opposition to a candidate for public office.”<sup>57</sup> The Court dismissed the church’s argument that the IRS had no statutory authority to revoke its tax-exempt status,<sup>58</sup> and rejected the church’s claim that revocation of its tax-exempt status substantially burdened its free exercise of religion.<sup>59</sup>

### C. Constitutional Limits on Congressional Power over Church Activities

#### 1. The Free Exercise Clause

Congress is forbidden from passing any law that interferes with the free exercise of religion.<sup>60</sup> According to the *Branch Ministries* court, the IRS’s ability to grant or deny statutory tax-exempt status to churches is not a violation of the Free Exercise Clause.<sup>61</sup> The purpose of the Free Exercise Clause is only “to prevent the government from singling out religious

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V; Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993). The Act in addition to restoring the compelling interest test for Free Exercise clause claims, also provided a cause of action to “persons whose religious exercise is substantially burdened by government.” *Id.* § 2(5). The Act was later held unconstitutional by the Supreme Court in *Boerne v. Flores*, 521 U.S. 507, 536 (1997). The church may have had a stronger argument for selective prosecution than the court acknowledged. *See id.* at 144–45. In 1994, the IRS declined to investigate a Harlem church that reportedly expressed open support for Governor Cuomo during his re-election campaign. *See Harper & Farmer, supra* note 16. Rev. O’Neill Mackey of the Bethel African Methodist Episcopal Church in Harlem openly endorsed Governor Cuomo from the pulpit, saying “Mario Cuomo is our man.” Nicholas Goldberg, *Will Blacks Turn Out for Cuomo?*, *NEWSDAY*, Oct. 2, 1994, at A4.

56. The church tried to factually distinguish itself from the facts in *Christian Echoes* arguing that *Christian Echoes* was a religious radio network while the church in *Branch Ministries* was a church qua church, the church further argued that the IRS had “‘never revoked the tax exempt status of a church qua church before.’” *See Branch Ministries v. Rossotti*, 40 F. Supp. 2d 15, 20 (D.D.C. 1999) (internal citation omitted).

57. *Id.* at 21.

58. *Branch Ministries v. Rossotti*, 211 F.3d 137, 141–42 (D.C. Cir. 2000). The IRS conditions tax-exempt status for religious organization within the meaning of § 501(c)(3) on “non-intervention in political campaigns.” *Id.*

59. *Id.* at 142. “The sole effect of the loss of the tax exemption will be to decrease the amount of money available to the Church for its religious practices. [S]uch a burden ‘is not constitutionally significant.’” *Id.* (internal citations omitted). The court noted that as long as the church refrained from future political intervention, it could again hold itself out as tax-exempt and receive all benefits, or it could “form a related organization” that could legally engage in political activities. *Id.* at 142–43. The only substantial difference is that contributions to the related organization would not be tax deductible. *Id.* at 143. While donors may be less likely to contribute if their gifts are not deductible, this burden alone is not constitutionally significant. *Id.* at 142.

60. U.S. CONST. amend. I.

61. *Branch Ministries*, 211 F.3d at 137.

practice for peculiar disability.”<sup>62</sup> Under a neutrality view of church-state relations, government actions to neither encourage nor discourage religious practices, as long as the political activity restrictions treat comparable nonreligious institutions in the same manner, there is no Free Exercise Clause violation.<sup>63</sup> An analysis under the accommodationist view, which prohibits application of even a facially neutral government practice if it unfairly burdens religion, would produce the opposite result because the political activity prohibition does have the effect of restricting certain types of speech.<sup>64</sup> Regardless of which theory one favors, at least one author has criticized the *Branch Ministries* decision because it did not firmly establish a line between politics and religion.<sup>65</sup>

## 2. *The Establishment Clause*

Neither *Christian Echoes* nor *Branch Ministries* reached the possible Establishment Clause issue.<sup>66</sup> The Establishment Clause “is designed to prohibit the government from establishing a religion, or aiding a religion, or preferring one religion over another.”<sup>67</sup> Professor Oliver Houck raises the question of whether the political activity restrictions may be required by the concept of separation of church and state itself.<sup>68</sup> The answer to this question depends on whether one adopts a neutrality, separationist, or accommodationist theory of church-state relations.<sup>69</sup> Like the neutrality

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62. McConnell, *Free Exercise of Religion*, *supra* note 6, at 53.

63. See McConnell, *Why ‘Separation’ Is Not the Key*, *supra* note 6, at 186.

64. *Id.* at 187.

65. See Joan Elizabeth Clarke et al., *Recent Decisions of the United States Courts of Appeals for the District of Columbia Circuit: Constitutional Law*, 69 GEO. WASH. L. REV. 554, 564 (2001).

[T]he D.C. Circuit . . . did not provide guidance on where to draw the line between politics and faith, and thus left unanswered the question *What exactly constitutes religious conduct?* Without insight into its rationale, the D.C. Circuit characterized the Church’s conduct as engaging in electoral politics, as opposed to conduct mandated by religious belief. This seemingly arbitrary distinction ignores the fact that politics and faith are easily intertwined. Religious tenets may actually mandate that adherents participate in politics outside of the church.

*Id.*

66. See generally *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000); *Christian Echoes Nat’l Ministry v. United States*, 470 F.2d 849 (10th Cir. 1972). For a discussion of the development of Establishment Clause doctrine, see Houck, *supra* note 30, at 52–62 (arguing that the Founders’ intent, to prevent the establishment of religion has been undercut by permissive jurisprudence and the current favorable political climate).

67. HOPKINS, *supra* note 17, at 193.

68. See Houck, *supra* note 30, at 52.

69. *Id.* at 53.

As the dust settles, we have a line of cases permitting federal subsidies for religious activities on the basis of neutrality. On the other hand, another line keeps churches out of government

theorists described earlier in this section but unlike the accommodationists, separationists believe that religious organizations and churches should be treated the same as all other nonprofit institutions.<sup>70</sup> Professor Houck suggests that if “the potentially powerful influence of religious organizations on politics is perceived as an establishment threat to a secular democracy, then [secular charities] may be separated from the Christian Echoes National Ministry, and have [their leashes] removed.”<sup>71</sup>

The Supreme Court has adopted the neutrality approach to church-state relations.<sup>72</sup> This approach seems to be partially based on the rationale that tax exemption for religious and charitable organizations (including churches) is the effect of the federal government’s decision to subsidize these organizations.<sup>73</sup> Neutrality is perhaps the only approach that the Court can feasibly adopt, in light of the fact that it would be unconstitutional under both the Free Exercise and Establishment Clauses for the government to formulate a common law or statutory definition of “religion” and apply it to religious organizations.<sup>74</sup>

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decision making, for the very danger they pose to the American political system. Where between these two poles federal subsidies to religious institutions for political activity falls will depend in large part on how seriously one perceives the danger of that activity to be. Which, in turn, may depend on one’s own religious beliefs—the difficulty in a nutshell.

*Id.* at 61–62; *see also* CHRISTIANITY AND MODERN POLITICS, *supra* note 2, at 183–88 (citing MICHAEL W. MCCONNELL, WHY ‘SEPARATION’ IS NOT THE KEY TO CHURCH-STATE RELATIONS). Professor Garnett, on the other hand, argues that religious communities who take an active role in politics do not pose a danger to the government; in fact, he argues that such communities “are crucial sources for the kind of counter-speech that liberal governments should expect and free societies require.” Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 800–01 (2001). Professor Garnett also argues that federal tax exemption of churches and religious organizations may be seen as an attempt by the government to gain ultimate power over religion; that is, the power to destroy. *Id.* at 772.

70. *See supra* note 6.

71. Houck, *supra* note 30, at 88.

72. *See* HOPKINS, *supra* note 17, at 193. *See also* Walz v. Tax Comm’n, 397 U.S. 664, 669–70 (1970) (upholding tax exemption of religious properties). The government must avoid excessive entanglement and adhere to the “policy of neutrality . . . that has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.” *Id.*

73. Under the subsidy theory, the federal government grants tax exemption to those organizations that perform a role the government would otherwise need to perform. Murphy, *supra* note 17, at 63. The Supreme Court has held that both tax-exempt status and tax deductible contributions are forms of government subsidy. *Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983). The Court likened the effect of tax exemption to a cash grant by the federal government. *Id.* For a discussion of other theories explaining the tax exemption of churches and religious organizations see Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 981–87 (1999) (suggesting, as one rationale, that tax exemption is sensible because the government lacks an efficient means to track and tax these organizations).

74. HOPKINS, *supra* note 17, at 194. As is the case with the term “church,” there is no statutory or regulatory definition of the words “religion” or “religious” by the federal government. *Id.*; I.R.C.

#### *D. Church Activity in Recent Federal Campaigns*

In April 2004, the IRS issued an election-year advisory to charitable organizations as it had done for the three previous presidential elections.<sup>75</sup> The letter warns, in part:

These organizations cannot endorse any candidates, make donations to their campaigns, engage in fund raising, distribute statements, or become involved in any other activities that may be beneficial or detrimental to any candidate. Even activities that encourage people to vote for or against a particular candidate on the basis of nonpartisan criteria violate the political campaign prohibition of section 501(c)(3).<sup>76</sup>

There is no bright line standard for determining whether an organization has engaged in prohibited activity; instead, the individual facts and circumstances of each case are considered.<sup>77</sup>

Despite the IRS' warning, the 2004 presidential election appears to have wrought more apparent § 501(C)(3) violations than in previous years.<sup>78</sup> President Bush's re-election campaign actively sought to mobilize the political power of conservative Christians.<sup>79</sup> On the other hand, inner-city churches and churches with largely minority congregations openly supported John Kerry from the pulpit.<sup>80</sup>

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§ 501(C)(3) (2000) (lacking a definition of religion).

75. 2004 IRS Election Year Advisory, *supra* note 17.

76. *Id.*

77. *Id.*

78. *See* Jones, *infra* note 89.

79. *See* David D. Kirkpatrick, *Bush Allies Till Fertile Soil, Among Baptists, for Votes*, N.Y. TIMES, June 18, 2004, at A25. The Bush campaign paid for a "pastors reception" and collected signatures from ministers who promised to publicly endorse Bush's re-election. *Id.* The Bush campaign's goal was to mobilize the estimated four million conservative Christians who did not vote in the 2000 election. *Id.*

80. *See* Robert D. McFadden, *On the Final Sunday, Sermons Pulse With the Power of Spiritual Suggestion*, N.Y. TIMES, Nov. 1, 2004, at A22. Under the guise of merely "sharing the facts," the Bishop of the Baptist Worship Center in Philadelphia proclaimed that President Bush had "misled and mismanaged" the country, and that John Kerry had a plan for the future. *Id.* Such issues are nothing new. Even as the Clinton Administration in the late 1990s sought to encourage greater clarity and separation of church and state, President Clinton himself spoke during a worship service at New Psalmist Baptist Church in Baltimore—a service that was broadcast on live television just prior to the 1998 midterm congressional elections. *See* Randy Lee, *When a King Speaks of God; When God Speaks to a King: Faith, Politics, Tax Exempt Status, and the Constitution in the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 391, 391–95 (2000). Professor Lee draws parallels to the actions of New Psalmist Baptist Church and Branch Ministries, since Branch Ministries lost its tax-exempt status while the IRS did not even investigate New Psalmist:

Apart from simply mobilizing voters, however, some church officials skated even closer to the edge of prohibited political activity.<sup>81</sup> Several watchdog groups, believing that churches have indeed crossed the line, have asked the IRS to investigate alleged violations.<sup>82</sup> For example, Archbishop Raymond Burke of St. Louis publicly stated in 2004 that he “would not give communion to [John] Kerry because of the senator’s abortion-rights views.”<sup>83</sup> On October 1, 2004, Archbishop Burke published a Pastoral Letter entitled “On Our Civic Responsibility for the Common Good.”<sup>84</sup> In it, he characterized gay marriage, stem cell research, euthanasia, and abortion as intrinsically evil.<sup>85</sup> He further maintained that war and capital punishment, while also against church teaching and, therefore, rarely justifiable, may be justified in some circumstances and are, consequently, not equally troubling.<sup>86</sup> He then stated that there is no justification for “voting for a candidate who . . . endorses and supports the deliberate killing of the innocent, abortion, embryonic stem-cell research, euthanasia. . .,” or same-sex marriage.<sup>87</sup> In response to these statements by Archbishop Burke, Catholics for a Free Choice filed an IRS complaint against the Archdiocese of St. Louis.<sup>88</sup> The complaint alleged that the

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First, both churches issued a message that a text sacred to their faith favored or disfavored the policies of a particular candidate or party in an upcoming election. Second, both churches indicated to their believers that this relation between policies and sacred text required the believers to act with their vote in a particular manner. Third, both churches sent these messages at the height of the campaign season, only days before the election. . . .

*Id.* at 397.

81. For example, Cardinal Justin Rigali of Philadelphia has gone so far to state that the concept of church-state separation is in itself “a misinterpretation of the Constitution.” David D. Kirkpatrick, *Battle Cry of Faithful Pits Believers Against Unbelievers*, N.Y. TIMES, Oct. 31, 2004, § 1, at 24.

82. Americans United for Separation of Church and State (“Americans United”) is one such organization. It describes itself as a “religious liberty watchdog group” whose mission is to “educate[] Americans about the importance of church-state separation in safeguarding religious freedom.” Americans United: Our Issues, <http://www.au.org/site/PageServer?pagename=issues> (last visited Apr. 5, 2006). The group advocates absolute neutrality on the part of the government in all religious issues. *Id.*

83. See Julie Poppen & Todd Hartman, *Directive Divides Faithful; Communion Letter Stirs Debate Among Catholic Electorate*, ROCKY MOUNTAIN NEWS (Denver), May 15, 2004, at 3A. Closer to the election, Archbishop Burke also declared, along with Archbishops John J. Myers of Newark and Michael J. Sheridan of Colorado Springs, “that the obligation to oppose abortion outweigh[ed] any other issue.” David D. Kirkpatrick & Laurie Goodstein, *Group of Bishops Using Influence to Oppose Kerry*, N.Y. TIMES, Oct. 12, 2004, at A23.

84. Pastoral Letter from Raymond L. Burke, Archbishop of St. Louis, *On Our Civic Responsibility for the Common Good*, available at [http://www.archstl.org/commoffice/2004/letters/10-01-04-civic\\_responsibility.pdf](http://www.archstl.org/commoffice/2004/letters/10-01-04-civic_responsibility.pdf) (last visited May 15, 2006) [hereinafter “Burke Letter”].

85. *Id.* ¶¶ 23–25, 28.

86. *Id.* ¶ 30.

87. *Id.* ¶ 39.

88. See Press Release, Catholics for a Free Choice, Catholics for a Free Choice Files IRS

Pastoral Letter offers specific instructions on how to vote, which violated the prohibition on political campaign activity.<sup>89</sup>

Such a voting mandate highlights the problem of separating issue advocacy from express advocacy of specific candidates, which Congress addressed in the Bipartisan Campaign Reform Act (“BCRA”) of 2002.<sup>90</sup> BCRA abolished the election law distinction between issue advocacy and express advocacy in favor of a new category of “electioneering communications.”<sup>91</sup> Under this definition, a campaign ad does not have to use a candidate’s name in order to qualify as a regulated electioneering

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Complaint Against Archdiocese of St. Louis (Oct. 26, 2004) (statement of Frances Kissling, President, Catholics for a Free Choice), *available at* <http://www.catholicsforchoice.org/news/pr/2004/2004102birscomplaintStLouis.asp> (last visited May 15, 2006).

89. *Id.* Catholics for a Free Choice has filed complaints with the IRS about the political activities of several other religious organizations in recent months, including the Archdiocese of Denver, Priests for Life, the Culture of Life Foundation, and Catholic Answers “for their flagrant violations of their tax-exempt status.” *Id.*; *see also infra* note 115 (describing the organization and its mission). In a press release announcing the Denver Complaint, Catholics for a Free Choice alleges that the Archdiocese provided “clear guidance” to voters on acceptable candidates. Press Release, Catholics for a Free Choice, *Catholics for a Free Choice Files IRS Complaint Against Denver Archdiocese* (Oct. 25, 2004), *available at* <http://www.catholicsforchoice.org/news/pr/2004/20041025irscomplaintdenver.asp> (last visited May 15, 2006).

This Note will concentrate on the Archdiocese of St. Louis as a representative example of a larger issue. However, the St. Louis Archdiocese is far from the only alleged offender of the prohibition on political activity, and Catholics for a Free Choice is not the only group filing complaints with the IRS. *See* Tim Jones, *Pulpits rev up in campaign; Ohio churches’ activity prompts complaints to IRS*, CHI. TRIB., Apr. 30, 2006, at C3 (“[N]early three-quarters of 82 investigations by the IRS of church and charitable activity in 2004 uncovered prohibited political activity. . . .”). In July 2004, the Campaign Legal Center “sent a letter to the Commissioner of the IRS and filed a complaint with the Federal Election Commission” alleging that Jerry Falwell Ministries, Inc., a § 501(c)(3) organization, openly endorsed George W. Bush for re-election on its website and asked for contributions to a federal political action committee, Campaign for Working Families. Press Release, Campaign Legal Center, *Legal Center Files Complaints Against Falwell Ministries* (July 27, 2004), *available at* <http://www.campaignlegalcenter.org/IRS-154.html> (last visited Apr. 6, 2006). As of this writing, there is nothing to indicate that Falwell Ministries is in danger of losing its tax-exempt status. *See also infra* note 111 and accompanying text. It should be noted however, that the Falwell Ministries’ website is sponsored by the Liberty Alliance, a 501(c)(4) not-for-profit. *See* [www.falwell.com](http://www.falwell.com). 501(c)(4) corporations are allowed to lobby and influence legislation. IRC § 501(c)(4).

90. Pub. L. No. 107-155, 116 Stat. 81 (2002). BCRA abolished the express advocacy magic words standard for defining types of campaign communications arising from the landmark Supreme Court decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). *See* Dennis F. Thompson, *Law and Democracy: A Symposium on the Law Governing the Democratic Process: Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1060–61 (2005). *Buckley* upheld the Federal Election Campaign Act’s power to regulate “expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.” *Id.* at 44. Such express terms include “‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat’ or ‘reject.’” *Id.* at 44 n.52. BCRA instead defined a new term, of “electioneering communications.” Bipartisan Campaign Reform Act, Pub. L. No. 107-155, § 201(a)(3), 116 Stat. 88–89 (2002); *see also infra* note 92.

91. *See generally* Pub. L. No. 107-155, 116 Stat. 81 (2002). *See* Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147, 155–56 (2004).

communication.<sup>92</sup> In an article preceding the passage of BCRA, Steffen Johnson suggests that it is next to impossible to truly separate issue advocacy from candidate advocacy: “Compounding the difficulty of separating advocacy concerning political issues from advocacy concerning candidates is the fact that candidates come to be known for their ideals and policy stands. Indeed, policy stances are sometimes identified so closely with particular politicians that the stances take on the name of the politician.”<sup>93</sup>

Believing that issue advocacy is not only separate from candidate advocacy but a constitutionally protected right, the plaintiffs in *McConnell v. Federal Election Commission*<sup>94</sup> challenged the adoption of the electioneering communications standard.<sup>95</sup> They argued that case precedent “drew a constitutionally mandated line between express advocacy and . . . issue advocacy” because viewpoint speech is protected

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92. Electioneering communications are defined as “any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office . . . [and] is made within . . . 60 days . . . [of that candidate’s general election] or . . . 30 days before [that candidate’s] primary . . . election. . . .” Bipartisan Campaign Reform Act, Pub. L. No. 107-16, § 201(a)(3)(A), 116 Stat. 81 (2002). In certain circumstances, a communication is an electioneering communication if it attacks or supports a candidate, regardless of whether it expressly names or advocates for or against a candidate, if it is so suggestive that there is no other plausible conclusion other than that the communication targets a specific candidate. *Id.* § 201(a)(3)(A)(ii). The IRS, despite the urging of Treasury lawyers in 1994 and earlier, declined to adopt *Buckley*’s now-defunct express advocacy standard to determine whether or not an action by a § 501(c)(3) organization violated the prohibition on political campaign activity. *See Commentary on Politicking, supra* note 15, at 856.

93. *See* Johnson, *supra* note 34, at 883. Johnson further argues that there are “times when there is no effective way for religious bodies to speak about political issues they care about without expressing support for, or opposition to, the candidates who embody positions on those issues.” *Id.* For example, in a race between an openly pro-life candidate and an openly pro-choice candidate, any election communication dealing with abortion would invariably endorse or disclaim a particular candidate. *See* Fed. Election Comm’n v. Massachusetts Citizens for Life, 479 U.S. 238, 249 (1986). In this case the court held that a nonprofit organization’s election publication asking voters to vote pro-life accompanied by photographs of thirteen favorable candidates with their voting records on the issue provided an “explicit directive” to vote for a particular candidate. *Id.* at 241–44, 249. “The fact that this message is marginally less direct than ‘Vote for Smith’ does not change its essential nature.” *Id.* at 249. Johnson contends that political activity restrictions on churches “amounts to content-based discrimination[] because it targets a narrow subset of core political speech. . . .” with the effect of insulating “public figures from criticism.” Johnson, *supra* note 34, at 887–88. He goes on to argue that such restrictions, like other financially burdensome restrictions, should be subject to strict constitutional scrutiny. *Id.* at 889.

94. 540 U.S. 93 (2003). *McConnell*, filed on the day the bill was passed, challenged the constitutionality of a number of BCRA’s provisions. For a brief description on the background of the lawsuit, see *The Campaign Finance Guide: A History of Money and Politics*, THE CAMPAIGN LEGAL CENTER, <http://www.campaignfinanceguide.org/guide-36.html> (last visited May 15, 2006). The Federal Election Commission (“FEC”) is the enforcement agency for federal election law. About the FEC, <http://www.fec.gov/about.shtml> (last visited Apr. 7, 2006).

95. *McConnell*, 540 U.S. at 190.

by the First Amendment, and thus, cannot be regulated.<sup>96</sup> The Court rejected this argument, holding that the express advocacy restriction previously developed in *Buckley v. Valeo*<sup>97</sup> was a restriction based on statutory, not constitutional, construction.<sup>98</sup> The First Amendment does not create “a rigid barrier between express advocacy and so-called issue advocacy.”<sup>99</sup> In effect, BCRA eliminated important loopholes in existing campaign finance regulation.<sup>100</sup>

Congress in recent years has made several attempts to relax the prohibition on political campaign activity for churches. In 2001, Rep. Walter Jones of North Carolina proposed the Houses of Worship Political Speech Protection Act.<sup>101</sup> This Act would have removed churches, but not other tax-exempt organizations, from the absolute prohibition on political activity.<sup>102</sup> Under the proposed legislation, churches would be able to participate in candidate-specific campaign activity in a limited manner, as long as it was not a substantial part of their activities.<sup>103</sup> The bill was defeated in the House of Representatives by a wide margin in late 2002.<sup>104</sup>

The bill was redrafted and introduced as the Houses of Worship Free Speech Restoration Act in 2003.<sup>105</sup> In a modification from the previous proposal, the legislation would allow churches to conduct campaign-related political activity as long as it occurred in the “content, preparation, or presentation of any homily, sermon, teaching, dialectic, or other presentation made during religious services or gatherings.”<sup>106</sup> Having

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96. *Id.*

97. *Buckley v. Valeo*, 424 U.S. 1 (1976).

98. *McConnell*, 540 U.S. at 190–92.

99. *Id.* “[T]he unmistakable lesson from the record in this litigation . . . is that Buckley’s magic-words requirement is functionally meaningless.” *Id.* at 193. The Court further notes that the express advocacy standard “has not aided the legislative effort to combat real or apparent corruption. . . .” *Id.* at 194. For an more in-depth analysis of *McConnell*’s holdings and the implications for future campaign finance reform and regulation, see Briffault, *supra* note 92. The author writes that the *McConnell* decision “indicated that Congress should play a leading role in balancing the multiple competing political and constitutional concerns implicated by a campaign finance regulation.” *Id.* at 149.

100. See Richard Briffault, *The Future of Reform: Campaign Finance After the Bipartisan Campaign Reform Act of 2002*, 34 ARIZ. ST. L.J. 1179, 1181 (2002).

101. H.R. 2357, 107th Cong. § 1 (2001).

102. *Id.*; Cook, *supra* note 24, at 467.

103. *Id.* at 467–68. The substantiality standard described for the purpose of this legislation is the same one currently used to measure acceptable lobbying activities of § 501(c)(3) organizations. *Id.* at 468.

104. *Id.*

105. H.R. 235, 108th Cong. § 1 (2003).

106. *Id.* This legislation would allow ministers or other religious leaders to endorse or attack a specific candidate for office as long as the statement was made from the pulpit without endangering tax-exempt status. H.R. 2357, 107th Cong. § 1 (2002). See also Murphy, *supra* note 17, at 65–66.

failed to come to a vote last term, Rep. Jones re-introduced the bill in January 2005.<sup>107</sup>

A second legislative proposal on this subject occurred in the last Congressional session, via proposed amendment to the American Jobs Creation Act of 2004.<sup>108</sup> The amendment would have allowed churches three unintentional violations of the political activity prohibition before risking tax-exempt status.<sup>109</sup> The amendment was removed during a committee meeting before the final bill came to a vote.<sup>110</sup>

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Professor Murphy argues that allowing churches to engage in this behavior is more problematic than allowing similar rights to other 501(c)(3) organizations. Murphy, *supra* note 17, at 75–76. A church can hold itself out as a tax-exempt organization without first applying to the IRS. I.R.C. § 508(C)(1)(A) (2000); *see also* Murphy, *supra* note 17, at 75–76. There is no definition of church in the Code or Treasury regulations. Murphy, *supra* note 17, at 76. The IRS cannot police church political activity because there is a multitude of churches and no church is required to register with the IRS. Murphy, *supra* note 17, at 76. Surprisingly, this bill did not have the support of all church groups. For example, Texas Baptists Committed expressed concern not only about the separation of church and state but also concern that the bill would run contrary to the spirit of BCRA’s reduction of soft money influence on elections. *See Jones Bill Comingles Church and State*, TEX. BAPTISTS COMMITTED NEWSLETTER (Texas Baptists Committed, San Angelo, Tex.), Apr. 2003, <http://www.txbc.org/2003Journals/April2003/Apr03JonesBill.htm>. *See also* Mark Coppenger, *First Person: HR 235: Ending An Absurdity*, BAPTIST PRESS, July 29, 2003, <http://www.bpnews.net/bpnews.asp?id=16391> (“What the church, in turn, should not stand is the government conceit that it can penalize such [political] speech while proclaiming itself defender of the biblical sermon.”)

107. H.R. 235, 109th Cong. § 1 (2005). There are several grassroots organizations actively working to ensure that the bill passes in this session. WallBuilders is an organization dedicated to restoring America to the “constitutional, moral, and religious foundation upon which [it] was built.” WallBuilders.com, WallBuilders-About Us, <http://www.wallbuilders.com/aboutus/index.htm> (last visited Apr. 7, 2006). The WallBuilder’s website provides instructions on contacting Congressmen and tracking the bill’s status. WallBuilders.com, WallBuilders’ Resources: Houses of Worship Free Speech Restoration Act, <http://www.wallbuilders.com/resources/search/detail.php?ResourceID=66> (last visited Apr. 7, 2006); *see also* HR235.org, Returning Freedom of Speech to America’s Churches, <http://www.hr235.org> (last visited Apr. 9, 2006). As of this writing it has been referred to the House Ways and Means Committee. *See* Bill Summary and Status for 108th Congress, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.00235>: (last visited Apr. 7, 2006).

108. Pub. L. No. 108-357 (2004).

109. Editorial, *Congress Toys with Forgiveness*, N.Y. TIMES, Jun. 14, 2004, at A18. Like the Houses of Worship Free Speech Restoration Act, the safe harbor provision would apply only to churches and not to other exempt organizations. *Id.*

110. Alan Cooperman, *House Panel Drops ‘Safe Harbor for Churches’ Measure*, WASH. POST, June 16, 2004, at A25. In addition to the safe harbor provision, the amendment also would have expressly allowed clergy members to participate in political campaigns as private citizens as long as they were not acting as an official functionary of the church. *Id.* This amendment, had it become law, still does not clarify whether Archbishop Burke’s Pastoral Letter, which he wrote as a church official and not as a private citizen, would be protected. *See supra* notes 84–87 and accompanying text. Equally unclear is whether a priest’s decision to refuse communion to a political candidate can fairly be said to be the actions made in a personal capacity. *See Tax Guide for Churches, supra* note 16, at 9.

### III. ANALYSIS

Although subject to limitations churches cannot be prohibited from engaging in political activity *per se*.<sup>111</sup> However, the reality is that very few, if any, churches would choose to forgo the benefits of tax exemption in order to gain freedom from the prohibition on political activity.<sup>112</sup> At present, there seems to be no real need for any church to do this; with few exceptions, churches can blatantly ignore the prohibition with little or no legal consequence.<sup>113</sup>

#### A. *The IRS Unevenly Applies its Enforcement Power*

One problem is that the IRS does not currently police potential violations by churches.<sup>114</sup> Potential violations only come to light when watchdog groups such as Catholics for a Free Choice and Americans United for Separation of Church and State report them.<sup>115</sup> Though such a

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111. See *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 857 (10th Cir. 1972). See also Cook, *supra* note 24, at 458; McConnell, *Free Exercise of Religion*, *supra* note 6, at 53 (No matter which approach one takes to the Free Exercise Clause, "it is unconstitutional for the government to inflict penalties on religious practices as such.").

112. See McDowell, *supra* note 30, at 77 (arguing tax-exempt status is "essential" in order for churches to "accomplish their religious and ethical obligations."); see also Garnett, *supra* note 69, at 798 (suggesting that prohibiting political activity as a condition of tax exemption "domesticates the churches' evangelical vocation" and changes the idea of what religious believers' faith requires).

113. See *supra* notes 79–80 and accompanying text. See also *supra* notes 84–87 and accompanying text. Short of a full page ad in a major newspaper, as was the case in *Branch Ministries*, there seems to be little real penalty for violating the § 501(c)(3) rules unless a third party makes a strong enough complaint to the IRS with enough proof to warrant a serious investigation.

114. See Murphy, *supra* note 17.

115. Catholics for a Free Choice, <http://www.catholicsforchoice.org> (last viewed May 15, 2006). Catholics for a Free Choice was established in 1973, the year *Roe v. Wade* legalized a woman's right to obtain an abortion. *Id.*; see generally *Roe v. Wade*, 410 U.S. 113 (1973). It advocates for a woman's right to choose and has filed complaints with the IRS asking for investigations into the political activities of several tax-exempt religious organizations. About Catholics for a Free Choice, <http://www.catholicsforchoice.org/about/default.asp>; Press Releases 2006, <http://www.catholicsforchoice.org/news/pr/default.asp>; see also *supra* notes 86–89 and accompanying text, Americans United Home page, <http://www.au.org/site/PageServer> (last visited Apr. 8, 2006). Like Catholics for a Free Choice, Americans United is very vocal about keeping church and state absolutely separate, including upholding the political activity prohibition for tax-exempt organizations. Recently, it reported that evangelist Dr. James Dobson's Focus on the Family organization allegedly violated its tax-exempt status by publishing an allegedly biased comparison of George W. Bush and John Kerry during the 2004 election. Posting of Rob Boston, *Focus on Politics: IRS Asked to Review Dobson Electioneering*, [http://blog.au.org/2005/02/focus\\_on\\_politi.html](http://blog.au.org/2005/02/focus_on_politi.html) (Feb. 3, 2005, 13:56 EST). The article complained of, published in Focus on the Family's flagship magazine, *Citizen*, compared the candidates' positions on only three topics: stem-cell research, abortion, and same-sex marriage. *Id.* Karla Dial, *What's At Stake*, *CITIZEN*, Nov. 2004, <http://www.family.org/cforum/citizenmag/coverstory/a0034350.cfm>. Focus on the Family contends that the article was published under the auspices of the organization's political arm that was established under § 501(c)(4). *Id.* section 501(c)(4) organizations are allowed to

system begs the question of whether enforcement is fair,<sup>116</sup> it should be noted that, at least for the 2004 election, a special audit of the IRS' handling of complaints revealed no evidence of improper bias or political motive in § 501(C)(3) enforcement.<sup>117</sup> However these auditing organizations may have agendas of their own that could skew results toward a particular political bias.<sup>118</sup> Even the appearance of such bias could leave the IRS vulnerable to charges of selective prosecution.<sup>119</sup>

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participate in political activity. I.R.C. § 501(c)(4) (2000). Americans United counters that *Citizen* is, and has always been, published by the § 501(c)(3) organization. See Boston, *supra*. “[T]he very issue that contained the Bush-Kerry comparison article also listed this statement: ‘Published monthly by Focus on the Family, a nonprofit organization recognized for tax-deductible giving by the federal government.’” *Id.* In fall 2004, Americans United filed an IRS complaint asking for an investigation into pro-Kerry rallies sponsored by Ohio and Pennsylvania churches. See Press Release, Americans United for Separation of Church and State, Churches Continue to Violate Federal Tax Law with Partisan Events, Says Americans United (Oct. 26, 2004), [http://www.au.org/site/News2?abbr=pr&page=NewsArticle&id=7021&security=1002&news\\_iv\\_ctrl=1241](http://www.au.org/site/News2?abbr=pr&page=NewsArticle&id=7021&security=1002&news_iv_ctrl=1241) (last visited Feb. 6, 2005).

116. The IRS does investigate potential criminal violations of the Code through its Criminal Investigation Unit. See INTERNAL REVENUE SERVICE, DEP'T OF TREASURY, *Criminal Investigation (CI) At-a Glance*, available at <http://www.irs.gov/irs/article/0,,id=98398,00.html> (last visited Apr. 8, 2006). The IRS published a Fact Sheet detailing the procedures it follows after receiving complaints about tax-exempt organizations from third parties. INTERNAL REVENUE SERVICE, DEP'T OF TREASURY, Fact Sheet 2002-10, IRS TREATMENT OF THIRD-PARTY INFORMATION RELATING TO TAX EXEMPT ORGANIZATIONS, Mar. 29, 2002, available at <http://www.irs.gov/pub/irs-news/fs-02-10.pdf>. However, the IRS currently cannot disclose whether it has initiated an examination of the exempt organization or the result of that examination. I.R.C. § 6103 (2000).

117. Department of the Treasury, Reference No. 2005-10-035, Review of the Exempt Organizations Function Process for Reviewing Alleged Political Campaign Intervention by Tax Exempt Organizations (Feb. 17, 2005), <http://www.treas.gov/tigta/auditreports/2005reports/200510035fr.pdf>. This audit report reviewed the IRS' Exempt Organizations process for reviewing allegations of prohibited involvement in political campaign activity in its entirety. *Id.* at 2. In 2004, the IRS implemented a fast track process designed to evaluate complaints within seven to ten days, as opposed to the customary sixty days. *Id.* The fast track process also attempted to address recurring violations by the same organizations. *Id.* at 2. Despite this fast track process, the first contact letter sent to any organization only was mailed six weeks before the 2004 presidential election. *Id.* at 3. The audit report found this delay generated concern that the IRS was acting under improper political influence itself. *Id.* However, the audit also found that the fast track efforts were hampered by a “lack of clear guidance” as well as “inadequate resources.” *Id.* at 9.

118. Some supporters of the Houses of Worship Free Speech Restoration Act believe that this is already the case. Mark Coppenger, a Chicago area Baptist minister, claims that the bill will free the conservative pulpit from the prohibition on political activity, whereas “the liberal pulpit has enjoyed a de facto exemption from the beginning.” Coppenger, *supra* note 106.

119. For example, the Church at Pierce Creek argued that the IRS engaged in selective prosecution in violation of the Fifth Amendment's Equal Protection Clause. *Branch Ministries v. Rossotti*, 211 F.3d 137, 144 (D.C. Cir. 2000). To succeed on a claim of selective prosecution, the church had to “‘prove that (1) [it] was singled out for prosecution from among others similarly situated and (2) that [the] prosecution was improperly motivated, i.e., based on race, religion or another arbitrary classification.’” *Id.* (quoting *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983)) (modification in original). The court rejected the church's claim in part because, although it submitted proof of other churches and pastors specifically endorsing candidates who suffered no adverse consequences, it did not offer proof that another church placed “advertisements in newspapers with nationwide circulations opposing a candidate and soliciting tax deductible contributions to defray

By contrast, the FEC actively enforces federal campaign finance laws and regulations.<sup>120</sup> It has a third-party complaint process similar to Treasury procedures, but it also actively monitors organizations and takes referrals from other government agencies regarding potential violations.<sup>121</sup> The FEC, unlike the IRS, has a clear objective of limiting the effect of money in elections based on the principle of fairness.<sup>122</sup>

*B. Issue Advocacy Is as Meaningless a Standard Under the Tax Code as It Is Under Federal Election Law*

Archbishop Burke's Pastoral Letter<sup>123</sup> and other recent actions by churches and religious organizations<sup>124</sup> are good examples of the inherent difficulty in separating issue advocacy from candidate advocacy.<sup>125</sup> The Pastoral Letter, for instance, does not specifically refer to any candidate or political party.<sup>126</sup> However, when coupled with his public refusal, as a representative of the Archdiocese and the greater Catholic Church, to serve communion to John Kerry during a political campaign because of Kerry's support for abortion rights,<sup>127</sup> the public message is clear. Statements of this nature blur the "traditional distinction between political campaign activity and voter education activity . . . that the latter is *nonpartisan*."<sup>128</sup>

Regardless of one's opinion on the need for such a distinction, any regulation or prohibition of speech gives rise to First Amendment concerns. The application of the prohibition on political activity to

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their cost." *Id.* at 144. However, if enough of these disparate cases arise and if most involve supporters of one particular political party, a selective prosecution claim could have more weight. One aspect of these cases to consider is that the majority of them seem to involve political activity by conservative religious factions, which almost always support the Republican Party. *See supra* notes 35–55, 89 and accompanying text.

120. *See* FEC.gov, FEC Enforcement Matters, <http://www.fec.gov/em/em.shtml> (last visited Apr. 9, 2006).

121. *Id.* Like the IRS, the FEC takes referrals from other government agencies. *See* FEC.org, Filing a Complaint Brochure, <http://www.fec.gov/pages/brochures/complain.shtml> (last visited Apr. 9, 2006). Unlike the IRS, a complaint to the FEC about possible campaign finance violations must be signed and sworn. *Id.* In addition to Matters Under Review ("MUR"), a confidential review process, the FEC also has an alternative dispute resolution program to settle alleged campaign finance law violations. *See id.*

122. *See* Houck, *supra* note 30, at 72.

123. *See supra* notes 84–89 and accompanying text.

124. *See supra* note 80 and accompanying text; *see also supra* note 89.

125. *See supra* notes 90–95 and accompanying text.

126. *See supra* notes 84–87 and accompanying text.

127. *See supra* note 83 and accompanying text.

128. HOPKINS, *supra* note 17, at 509 (emphasis in original).

religious organizations is no different.<sup>129</sup> Churches, especially evangelical denominations,<sup>130</sup> often feel it is part of their theological mission to influence societal values and public policy.<sup>131</sup> The prohibition on political activity has been criticized as highly intrusive on churches' constitutional rights:

'[T]he IRS interpretations [of the political campaign prohibition] make compliance extremely difficult and are highly intrusive on 'free exercise' and other constitutional rights. In particular, churches must act at their peril as they attempt to walk the obscure line between loss of exemption and faithfulness to the obligation to speak out on the moral dimension of important social issues.'<sup>132</sup>

If properly and consistently enforced, it is difficult to see how an absolute prohibition on political campaign activity is an "obscure line." The above critique also fails to acknowledge that there is no *per se* restriction on political speech or political activity as long as churches are willing to forgo tax-exemption.<sup>133</sup> Forgoing these clear financial advantages, while not easy, is a fair option. In addition, whether, precisely because of First Amendment issues, the government can permanently deny tax-exempt status to churches at all is unclear.<sup>134</sup> Moreover, churches are not singled out for the political activity prohibition; but are merely one of many types of tax-exempt organizations subject to the same restriction.<sup>135</sup>

Each piece of recently proposed legislation to modify or abolish the prohibition on political activity has been problematic.<sup>136</sup> The 2001 Houses of Worship Political Speech Protection Act, as drafted,<sup>137</sup> would potentially be unconstitutional under the Establishment Clause; a

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129. See *supra* notes 60–73 and accompanying text.

130. See generally Coppenger, *supra* note 106.

131. HOPKINS, *supra* note 17, at 507.

132. *Id.* at 507–08 (citing Wilfred R. Caron & Deirdre Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of 'Political' Activity Restrictions*, 2 J.L. & POL. 169, 178 (1985)).

133. See *supra* note 59.

134. See Johnson, *supra* note 34, at 893.

135. I.R.C. § 501(c)(3) (2000). See also Johnson, *supra* note 34, at 893–94 and accompanying text. Moreover, a church also has the option of forming a sister 501(c)(4) organization, which is not bound by either the substantial lobbying restriction or political campaign activity prohibition. See Cook, *supra* note 24, at 472–74. Having two organizations would require two completely separate financial schemes. *Id.* at 473. Money could not flow from one to the other, because contributions to the § 501(c)(3) would still be tax deductible while contributions to the 501(c)(4) social welfare organization would not be deductible. *Id.* at 474. The author suggests that in this way churches could engage in "a variety of political activities consistent . . . with [the churches'] religious mission." *Id.* at 477 (referencing a church's Sunday bulletin).

136. See *infra* notes 137–144.

137. H.R. 2357, 107th Cong. (2001).

reasonable interpretation of a repeal of the prohibition on political activity for churches but not other § 501(c)(3) organizations is state-sponsored encouragement of religion.<sup>138</sup> The currently pending Houses of Worship Free Speech Restoration Act<sup>139</sup> is also troubling. If it becomes law, churches will obtain preferential tax treatment with less restriction than similarly situated organizations.<sup>140</sup> Because the bill includes “other presentation[s]” made during a religious service, the pulpit would be open to partisan stump speeches by political candidates.<sup>141</sup> Finally, the so-called “safe harbor” amendment to the American Jobs Creation Act of 2004 would have only given “safe harbor” to those churches and religious organization so inclined to break the law.<sup>142</sup> The rate of actual revocation of tax-exempt status for § 501(c)(3) churches and religious organizations is already minimal.<sup>143</sup> Proving an organization intentionally violated the prohibition, especially if the act in question could be framed as addressing an issue rather than a specific candidate, would be very difficult.<sup>144</sup> A more likely scenario is that politically inclined churches and religious organizations would store up their three chances and “spend” them as needed. In practice, the prohibition on political activity would be reduced to a voluntary guideline.

#### IV. PROPOSAL

In order for the prohibition on political activity to be truly effective, the government should more actively enforce it. Because the prohibition concerns political campaign activity and can therefore potentially involve improper influence on political campaigns, the FEC should play a cooperative role in investigating allegations of prohibited political activity. The FEC already has procedures in place for dealing with campaign finance regulations.<sup>145</sup> These procedures include active policing of the

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138. See Murphy, *supra* note 17, at 78–81.

139. H.R. 235, 109th Cong. (2005).

140. See Murphy, *supra* note 17, at 74.

141. H.R. 235, 109th Cong. (2005). While political campaign speeches during worship services would be the antithesis of a wall of separation between church and state, this may not be the slippery slope that it appears to be. Americans have shown a preference for leaving partisan politics at the church door. See *supra* note 4.

142. See Cooperman, *supra* note 110, at A25. Pub. L. No. 108-357 (2004).

143. As of 1998, thirty cases were reported as pending at the IRS “involv[ing] violations or alleged violations of the prohibition on political campaign activity.” Halloran & Kearney, *supra* note 15, at 120. However, the only reported case of revocation in the intervening years is *Branch Ministries*. *supra* notes 49–59 and accompanying text.

144. See *supra* note 17 and accompanying text.

145. See *supra* notes 120–121 and accompanying text.

campaign finance laws in addition to receiving third-party complaints.<sup>146</sup> Currently, the IRS depends on third-party referrals before it begins an investigation of religious organizations or churches if a third party files a complaint.<sup>147</sup> The FEC could use its pre-existing investigative powers<sup>148</sup> to act as a powerful, consistent, third-party referral system for the IRS. The policy goal of campaign finance regulations is to prevent corruption of the political system by improper financial means.<sup>149</sup> The policy goal of the prohibition on political activity for churches and religious organizations is to prevent improper use of tax-free money.<sup>150</sup> Both are concerned with not only corruption but the appearance of corruption.<sup>151</sup> Tax experts have suggested that where Treasury and FEC regulations share a similar purpose, equal standards should be used.<sup>152</sup>

Alternatively, the IRS should adopt a policy of active enforcement on its own. The examples cited in this Note of questionable campaign activity by religious leaders acting in an official capacity,<sup>153</sup> churches,<sup>154</sup> and other religious organizations<sup>155</sup> are by no means exhaustive. The IRS, by its own estimate, investigated over one hundred claims during the 2004 election cycle from referrals alone.<sup>156</sup> While there are legitimate funding issues involved in moving to a proactive, rather than referral, regime, it is a plan worth exploring. Because the flow of allegations tend to match the election cycle, current Treasury employees could temporarily shift their responsibilities to a special task force once every four years. The IRS may also be able to hire investigators on a temporary basis, thereby minimizing

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146. *Id.*

147. *See supra* note 116 and accompanying text.

148. *See supra* notes 120–121 and accompanying text.

149. *See supra* notes 97–98 and accompanying text.

150. *See* Murphy, *supra* note 17, at 62–64. Under the subsidy theory of tax exemption, churches and religious organizations receive this exemption in exchange only for providing services the government would otherwise need to furnish. *Id.* at 64. As Professor Murphy points out, there is “no evidence of a shortage of groups that campaign on behalf of candidates for public office.” *Id.* The passage of BCRA is further proof that rather than a shortage, the opposite situation is in fact the case. *Id.* at 64–65.

151. *See supra* note 99.

152. *See* Commentary on Politicking, *supra* note 15, at 855, 859, 862. Tax lawyers have urged the IRS to adopt definitions used by the FEC to “reduce the number of situations in which the same conduct is considered political for tax purposes and not political for election law purposes.” *Id.* at 859.

153. Burke Letter, *supra* notes 84–87 and accompanying text; *see also* Goldberg, *supra* note 55, at A4.

154. *See supra* notes 50–54 and accompanying text; Kirkpatrick, *supra* note 79; McFadden, *supra* note 80.

155. *See supra* notes 36–39 and accompanying text.

156. *See* Brewington, *supra* note 20, at A1.

the budget cost of extra workers. If the IRS utilized their power to impose excise taxes on offenders, it could pay for some of the enforcement costs.

Second, the IRS definition of political activity should be revised to address the problem of improper political activity cloaked in the guise of allowable “voter education.”<sup>157</sup> As evidenced by events of the 2004 election,<sup>158</sup> this distinction lacks teeth. It is not substantially different from the issue advocacy versus express advocacy problem addressed by Congress in the BCRA.<sup>159</sup> Voter education activity via churches ideally should be limited to voter registration drives and education on the right to vote.<sup>160</sup> While the government cannot regulate speech by individuals acting in a private capacity,<sup>161</sup> it can substantially limit actions taken by religious organizations, churches, and those individuals acting in an official capacity on these organizations’ behalf.<sup>162</sup> Voter education activities by churches and religious organizations can be limited to the mechanics of voting and truly nonpartisan encouragement of voter turnout.<sup>163</sup> The message should be to encourage participation, not partisanship. Voter guides should be discouraged unless they are regularly published and clearly unbiased.<sup>164</sup> Churches wishing to obtain the benefits of § 501(c)(3) tax-exempt status should refrain from using the official church platform to state their views on candidates, whether overt or cloaked in disapproval of certain key issues.<sup>165</sup>

## V. CONCLUSION

There is a constant tension between religion and politics, in part because of the inherently competing public policies of church-state and freedom of religious expression.<sup>166</sup> However, churches and other religious organizations should not have the benefit of using tax-free dollars to influence the political process.<sup>167</sup> They should also not be able to skirt the prohibition on political activity because of a loose interpretation of “issue

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157. See *supra* note 17 and accompanying text.

158. See Burke Letter, *supra* notes 84–87 and accompanying text; *supra* note 79 and accompanying text; *supra* notes 81–89 and accompanying text.

159. See *supra* notes 90–92 and accompanying text.

160. See *supra* note 17 and accompanying text.

161. U.S. CONST. amend. I.

162. See *supra* notes 22–26 and accompanying text.

163. See *supra* note 17 and accompanying text.

164. See *supra* note 17.

165. See Burke Letter, *supra* notes 84–87 and accompanying text; see also Dessingue, *supra* note 17, at 914–15.

166. See *supra* note 4 and accompanying text.

167. See *supra* notes 73, 148 and accompanying text.

education” and inconsistent enforcement of the prohibition itself.<sup>168</sup> Even setting aside the church-state separation concerns, organizations subsidized by the government should not be able to use those dollars to advance a partisan agenda.<sup>169</sup> The FEC is the logical body to assist the IRS in this case, working to ensure the proper use of tax-free dollars.<sup>170</sup>

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168. *See supra* notes 116–117 and accompanying text.

169. *See supra* note 73, 148 and accompanying text.

170. *See supra* notes 148–150 and accompanying text. There are legitimate concerns associated with the involvement of any other government agency in enforcement of the Code. However, these concerns can be minimized because the FEC would merely be an investigative arm for possible political acts, not improper accounting or other technical violations. Any actual enforcement would be the purview of the IRS only.

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