

OF POLITICS AND PULPITS: A FIRST AMENDMENT ANALYSIS OF IRS RESTRICTIONS ON THE POLITICAL ACTIVITIES OF RELIGIOUS ORGANIZATIONS

STEFFEN N. JOHNSON*

Abstract: This Article explores some of the policy justifications offered in support of restricting the political activities of tax-exempt religious organizations. The author begins with an overview of the scope of current federal restrictions and then considers the contention that it is inappropriate for religious organizations to be involved in politics from their own standpoint. He argues that federal restrictions on the political activities of tax-exempt religious organizations raise a fundamental question of mission that must be resolved by each organization according to its conscience. The author also considers restrictions from the standpoint of public policy and constitutional law, with a focus on the government's interest in not compelling taxpayers to subsidize political speech with which they disagree, and its interest in preserving its ability to prevent the taking of tax deductions for contributions to political candidates. He concludes that appropriate respect for the values of free speech and free exercise warrants a narrowing construction of the restrictions in certain circumstances.

INTRODUCTION

When Reverend Herbert Lusk of the Exodus Baptist Church in Philadelphia addressed the Republican National Convention in the summer of 2000, his remarks provoked a firestorm of criticism. Standing at his pulpit and speaking via satellite, Reverend Lusk told the convention delegates and millions watching by television, "We are supporting Governor Bush because we know he gives faith a chance."¹

* Associate, Mayer, Brown & Platt, Chicago, Illinois; Lecturer in Law, University of Chicago Law School. I thank Greg Barton, David Fuller, Rick Garnett, Christine Lambrou Johnson, Michael Mosher, Mike Paulsen, and John Schmidt for thought-provoking discussions and insights as I prepared this article.

¹ See Editorial, *Keeping the Faith*, WALL ST. J., Aug. 2, 2000, at A22.

Some suggested that there was something *unseemly* about Reverend Lusk's statement of support for then-Governor Bush. Politics and religion, both controversial in their own right, ought not mix—at least not in such public ways. In an interview with Reverend Lusk, FOX News television commentator Bill O'Reilly questioned whether the Convention was the "right forum" for someone with the "special status" of a minister—"You shouldn't be there at the Republican Convention," he charged.²

Others claimed that Reverend Lusk's remarks were outright *illegal*. As pastor of a church with tax-exempt status, Reverend Lusk himself arguably was subject to federal restrictions on the "political campaign" activity of such organizations.³ By appearing to endorse a candidate on behalf of his church, these critics claimed, Lusk had crossed the line. As Reverend Barry Lynn of Americans United for Separation of Church and State alleged in a letter to Internal Revenue Service (IRS) Commissioner Charles O. Rossotti, "It appears that Reverend Lusk has violated federal tax law by announcing that we, meaning his church, are supporting candidate Bush."⁴

These responses to Reverend Lusk's remarks provide a welcome occasion for reflecting on the purposes served by federal restrictions on the political activities of tax-exempt charities, and in particular churches.⁵ If the Supreme Court's pronouncements are to be taken seriously, the area involves some unusually difficult questions of balancing. On the one hand, political and religious speech lie at the core of the expression protected by the First Amendment.⁶ As for politics,

² *The O'Reilly Factor: Personal Story: Preachers and Politicians* (FOX News broadcast, Aug. 9, 2000) (available at 2000 WL 6331313).

³ See 26 U.S.C. § 501(c)(3) (1976) (stating that, to qualify as a charitable entity, an organization must "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office").

⁴ See Jo Mannies et al., *Republican National Convention 2000: Church Endorsing Bush May Be Violating Tax Law*, ST. LOUIS POST-DISPATCH, Aug. 2, 2000, at A11.

⁵ For the sake of convenience, I use "church" in this Article as a shorthand for all houses of religious worship, and sometimes for all religious organizations.

⁶ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (noting the "practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. . . of course includ[ing] discussions of candidates").

our nation has demonstrated a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"⁷ and the Supreme Court has stated that protecting political speech is the "central meaning of the First Amendment."⁸ As for religion, free exercise has often been described as our "first freedom,"⁹ and the Court has observed that "a free-speech clause without religion would be Hamlet without the prince."¹⁰ On the other hand, regulation of political activities likewise protects significant public values—preventing illicit efforts to influence policy for personal gain; for example—and the Supreme Court historically has been quite deferential to congressional decisionmaking in those areas.¹¹ In sum, religion and politics enjoy an uneasy relationship in the law.¹²

In this Article, I explore some of the policy justifications commonly offered in support of restricting the political activities of tax-exempt religious organizations. After providing a brief overview of the scope of current federal restrictions (Part I), I consider the contention that it is inappropriate for religious organizations to be involved in politics from their standpoint (Part II). I argue that the federal restrictions raise a fundamental question of mission for religious organizations, one that ultimately must be resolved by each organization as a matter of conscience. I then consider the issue from the standpoint of public policy and constitutional law (Part III), with a particular focus on two policy justifications for the restrictions: the govern-

⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁸ *Id.* at 273; see also *First National Bank v. Bellotti*, 435 U.S. 765, 784–86 (1978).

⁹ See, e.g., THOMAS CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?*, 21 *CARDOZO L. REV.* 1243 (2000).

¹⁰ *Capitol Square Review & Advisory Bd. v. Pinnette*, 515 U.S. 753, 760 (1995).

¹¹ See, e.g., *Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."); *Madden v. Kentucky*, 309 U.S. 83, 87–88 (1940) ("The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . [T]he presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.").

¹² In this Article, I address the legal issues raised when religious officials and the like speak of politics. I have elsewhere addressed the legal issues raised when political officials (and in particular judges) speak of religion. See Michael Stokes Paulsen & Steffen N. Johnson, *Scalia's Sermonette*, 72 *NOTRE DAME L. REV.* 863 (1997). On that topic, see also Theresa S. Collett, *The King's Good Servant, But God's First: The Role of Religion in Judicial Decisionmaking*, 41 *S. TEX. L. REV.* 1277 (2000); Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 *DEPAUL L. REV.* 1047 (1990).

ment's interest in not compelling taxpayers to subsidize political speech with which they disagree, and its interest in preserving its ability to prevent the taking of tax deductions for contributions to political candidates. I conclude that the former justification is a makeweight, that the latter is more substantial, and that appropriate respect for the values of free speech and free exercise warrants a narrowing construction of the restrictions in certain circumstances.

I. A BRIEF OVERVIEW OF IRS RESTRICTIONS ON THE POLITICAL ACTIVITY OF TAX-EXEMPT CHARITABLE ORGANIZATIONS

To qualify as a tax-exempt entity under section 501(c)(3) of the Internal Revenue Code, a corporation must satisfy four basic requirements. Satisfying these requirements not only entitles an entity organized exclusively for charitable purposes to a tax exemption for its own income-generating activities, but also enables those who contribute to it to deduct those amounts from their own taxable income.¹³ As an initial matter, such entities must be organized and operated exclusively for a tax-exempt purpose, and they must not permit their net earnings to "inure[] to the benefit of any private shareholder or individual."¹⁴ In other words, tax-exempt entities are subject to the "private inurement" doctrine, which bars them from distributing any profit to those who control or support them.¹⁵ Being organized as a "nonprofit" entity, however, does not itself establish an organization's right to tax-exempt status under Section 501(c)(3); an organization must also serve some purpose that, in Congress's judgment, is socially valuable and thus warrants exemption from taxation.¹⁶

More important for present purposes, entities exempt under Section 501(c)(3) are subject to two distinct restrictions on their political activities.¹⁷ First, the Code provides that "no substantial part of the[ir]

¹³ 26 U.S.C. § 501(c)(3). See also BRUCE R. HOPKINS, CHARITY, ADVOCACY, AND THE LAW 16 (1992).

¹⁴ See 26 U.S.C. § 501(c)(3). See generally HOPKINS, *supra* note 13, at 130.

¹⁵ See 26 U.S.C. § 501(c)(2).

¹⁶ 26 U.S.C. § 501(c)(3) states that to qualify for tax-exempt status, corporations must be "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, 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"

¹⁷ In addition to restrictions imposed by the Internal Revenue Code, tax-exempt charitable entities are also subject to restrictions imposed by federal election law. See Federal Election Campaign Act of 1971, 2 U.S.C. § 431-55 (1999 Supp.).

activities" may constitute "carrying on propaganda, or otherwise attempting, to influence legislation."¹⁸ Second, such organizations must "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."¹⁹

The Internal Revenue Code thus conditions the tax-exempt status of charities upon their willingness to comply with limitations on their efforts to influence both legislation and elections for public office. The regulation of lobbying and that of political campaign activity, however, are distinct in scope. The Code's limitation on exempt organizations' efforts "to influence legislation"—on "efforts to communicate to elected officials their moral convictions on matters of public concern"²⁰—permits them to engage in something less than a "substantial" amount of lobbying activity. Although the meaning of "substantial" is far from clear, Section 501(h) of the Code provides a safe harbor—known as the "expenditure test"²¹—that (as a rule of thumb) permits organizations that elect to report their expenditures to the IRS to spend up to twenty percent of their gross expenses on direct lobbying,²² and up to five percent of gross expenses on grass roots lobbying,²³ without losing their exemption.²⁴ Moreover, efforts "to influence legislation" do not include, among other things, the provision of nonpartisan studies to public officials, communications regarding legislation that affects the organization's existence, communications with an organization's membership regarding proposed legislation (absent direct encouragement to lobby), routine communications with governmental officials, or discussions about social and

¹⁸ 26 U.S.C. § 501(c)(3).

¹⁹ *Id.*

²⁰ See Edward McGlynn Gaffney, Jr., *On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics*, 40 DEPAUL L. REV. 1, 3 (1990).

²¹ See generally HOPKINS, *supra* note 13, § 5.6 at 181-97.

²² Direct lobbying involves communicating a specific view on "specific legislation" to legislators, their staffs, and/or other governmental officials that participate in the formulation of legislation. Treas. Reg. § 56.4911-2(b)(1)(ii) (1990); see also 26 U.S.C. § 4911(d)(1)(B) (1976). This "includes the presentation of testimony at public hearings held by legislative committees, correspondence and conferences with legislators and their staffs, and publication of documents advocating specific legislative action." See HOPKINS, *supra* note 13, § 5.4 at 137-38.

²³ Grass roots lobbying involves communicating a specific view regarding legislation to members of the general public and urging them to take specific action regarding that legislation. Treas. Reg. § 56.4911-2(b)(2)(ii). See also HOPKINS, *supra* note 13, § 5.4 at 138.

²⁴ See 26 U.S.C. §§ 491, 501(h) (1994); Treas. Reg. § 1.501(h)-1(a)(3) (1990). See generally HOPKINS, *supra* note 13, §§ 5.3-5.10 at 133-228.

political problems upon which the legislature might be expected to act.²⁵

In contrast to section 501(c)(3)'s restriction on lobbying, the Code's regulation of exempt organizations' efforts to affect "political campaigns"—on their efforts "to persuade voters of the correctness of moral convictions that relate to candidates for public office"²⁶—is absolute. To be sure, there are definitional questions concerning what constitutes "participation" or "intervention" in a "campaign for public office" as well as who qualifies as a "candidate."²⁷ But those activities that come within the restriction are completely barred. Taken at face value, organizations that wish to enjoy the benefit of tax-exempt status may not say a word "on behalf of" or "in opposition to" a political candidate. The statute adopts a "zero tolerance" policy, and the IRS's regulatory interpretations of the Code are similarly restrictive.²⁸

Unfortunately, the formal legislative history of these provisions sheds little light on their purpose, let alone Congress's thoughts about their application to religious organizations. Both restrictions arose as Senate floor amendments, and neither had the benefit of congressional hearings.²⁹ The lobbying restriction, passed in 1934, was introduced by Senator David Reed of Pennsylvania. He spoke of restricting charitable donations "made to advance the personal interests of the giver of the money," but conceded that his proposed amendment went "much further than the [Committee on Finance] intended to go."³⁰ The campaigning restriction, passed in 1954, was introduced by then-Senator Lyndon B. Johnson, who was concerned about the efforts of two tax-exempt charities (Facts Forum and the Committee for Constitutional Government) that were helping to finance his opponent's election campaign.³¹ The official legislative record is virtually

²⁵ See HOPKINS, *supra* note 13, § 5.5 at 170 (summarizing these and other categories of "activities excluded from the term 'influencing legislation'").

²⁶ Gaffney, *supra* note 20, at 3.

²⁷ See HOPKINS, *supra* note 13, § 14.4 at 394–407 (explaining the various interpretive difficulties arising under this provision); *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972) (upholding revocation of the tax exemption of an organization that did not formally endorse or oppose candidates for office, but used publications and broadcasts to criticize incumbents and candidates, with little regard to whether this activity took place in the context of a political campaign).

²⁸ See generally HOPKINS, *supra* note 13, at chap. 14.

²⁹ See generally *id.* at § 5.2 at 131–32 & § 14.2 at 392–93.

³⁰ 78 Cong. Rec. 5861 (1934); see also *id.* at 5959 (statement of Senator La Follette).

³¹ See HOPKINS, *supra* note 13, § 14.2 at 392. See generally Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning By Churches*, 42 B.C. L. REV. 733 (2001).

silent.³² But as Patrick O'Daniel explains in his in-depth historical account of this legislation, two things are clear: the restriction on electioneering was motivated solely by Senator Johnson's calculated effort to protect his own political well-being, and he was not the least bit concerned with the activities of churches.³³ Indeed, Senator Johnson did not hesitate to coordinate support from churches when it was to his own political advantage.³⁴ Thus, to the extent that greater deference is owed to legislation supported by careful deliberation and consideration of its constitutionality,³⁵ section 501(c)(3)'s lobbying and electioneering restrictions are entitled to nothing more than the traditional deference owed to all federal statutes.

II. THE "UNSEEMLY" NATURE OF CHURCHES' INVOLVEMENT IN POLITICS

From the vantage point of the church, the argument that the restrictions imposed by the tax code are justified because it is *inappropriate* or *unseemly* for tax-exempt charities to engage in political activity raises a fundamental question of mission.³⁶ Many churches presumably feel a substantial responsibility to obey the law, even in the form of restrictions on their receipt of a "government benefit." Others simply have no interest in, or in fact oppose, political involvement.³⁷ Many churches, however, doubtless feel strong pulls in the other direction

³² 100 CONG. REC. 9604 (1954) (statement of Sen. Johnson) (explaining only that the purpose of the amendment was to "deny[] tax-exempt status to not only those people who influence legislation but also to those who intervene in any political campaign on behalf of any candidate for public office").

³³ See generally, O'Daniel, *supra* note 31.

³⁴ See *id.*

³⁵ See, e.g., *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 61 (1989) (noting that the Court "owe[s] some deference to Congress' judgment after it has given careful consideration to the constitutionality of a legislative provision"); *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (explaining that the presumption of constitutionality applies with greater force "when . . . Congress specifically considered the question of the Act's constitutionality").

³⁶ See Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 437 (1986) (observing that where "the government argues that the church . . . is not performing a religious function . . . [it] implicitly asserts that the government can define the scope of the church's mission").

³⁷ See generally *Legislative Activity By Certain Types of Exempt Organizations, Hearings Before the House Ways and Means Comm.*, 92nd Cong., 2d Sess. 282 (1972) [hereinafter *Legislative Activity*] (Statement of John W. Baker) ("Some religious entities believe that their religious faith commits them to a complete withdrawal from the secular world. Others are compelled by their faith into an active participation in nearly every aspect of that secular world. If they are to be good stewards of their religious influence these people sincerely believe they must be involved in the formulation of public policy.").

as well.³⁸ As long as anyone can remember, churches have raised society's consciousness regarding political issues.³⁹ They comment on the culture, rebuke its leaders, and boldly denounce its mores, as they deem necessary.⁴⁰ They have played integral roles in political struggles over slavery,⁴¹ taxation,⁴² women's suffrage,⁴³ prohibition,⁴⁴ civil rights,⁴⁵ war and weapons of mass destruction,⁴⁶ capital punishment,⁴⁷ and, perhaps most visibly in recent years, abortion.⁴⁸

Furthermore, there is no clear line between advocacy concerning issues and advocacy concerning candidates or statutes. To be an abolitionist was to advocate a change in the law on slavery. To support civil rights for blacks in the 1960s was to support the enactment of laws prohibiting racial discrimination. To be a Quaker is to oppose war. As the German theologian Johann Baptist Metz once observed, "It is im-

³⁸ See Jodi Wilgoren, *Just Before Election, Politics and Religion Mix Easily at a Michigan Church*, N.Y. TIMES, Nov. 6, 2000, at A23 ("There is a long and proud tradition linking politics and the black church, and never is it more apparent than on the Sunday before Election Day, as candidates for offices large and small parade across pulpits, urging people to vote—for them."); *id.* (noting that President Clinton summoned 100 black ministers to the White House "for help in getting out the vote").

³⁹ See *id.* (quoting the pastor of "a church steeped in politics" as stating from the pulpit: "We stand on the shoulders of forebears who stood up . . . of forebears who weren't afraid to challenge that which is wrong. . . . [E]ven during slavery, our forebears were still able to say, 'I look to the hills from whence cometh my help.'").

⁴⁰ See Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 802-03 (2001) (discussing the prophetic voice of the church in light of 1 Kings 18:17).

⁴¹ See, e.g., S. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 650, 699 (1972); G. BARNES, *THE ANTI-SLAVERY IMPULSE, 1830-1844* (1933); Charles S. McCoy, *The Churches and Protest Movements for Racial Justice*, in RELIGION AND SOCIAL CONFLICT 37, 39 (Robert Lee & Martin E. Marty eds., 1964).

⁴² See Gaffney, *supra* note 20, at 10-11.

⁴³ See Barbara B. Zikmund, *Biblical Arguments and Women's Place in the Church*, in THE BIBLE AND SOCIAL REFORM 85-104 (Ernest R. Sandeen ed., 1982).

⁴⁴ See AHLSTROM, *supra* note 41, at 870-71.

⁴⁵ See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW & POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 10 (1993) (noting that "the mass protest wing of the civil rights movement . . . was openly and unashamedly religious in its appeals as it worked to impose its moral vision on, for example, those who would rather segregate their restaurants").

⁴⁶ See, e.g., *WAR NO MORE? OPTIONS IN NUCLEAR ETHICS* (J. Walters ed. 1989).

⁴⁷ See, e.g., DAN VAN NISS, *CRIME AND ITS VICTIMS: WHAT WE CAN DO* (1986); CRIME AND THE RESPONSIBLE COMMUNITY (J. Stott & N. Miller eds. 1980).

⁴⁸ See generally JAMES A. REICHLIEY, *RELIGION IN AMERICAN PUBLIC LIFE* (1985); Gaffney, *supra* note 20, at 9-10, 16 (observing that "religious organizations have played a prominent role in the debates over social issues of the highest moment," that "[f]rom the beginning of the American experience there has been a vivid connection between religion and politics," and that there has been "a constant interaction between religion and politics on all the large issues confronted in American politics").

possible to privatize the eschatological promises of biblical tradition: liberty, peace, justice, reconciliation. Again and again they force us to assume our responsibility *towards society*."⁴⁹ A policy statement of the Presbyterian Church (U.S.A.) expresses a similar sentiment: "It is a limitation and denial of faith not to seek its expression in both a personal and a public manner, in such ways as will not only influence but transform the social order. Faith demands engagement in the secular order and involvement in the political realm."⁵⁰ In other words, for many (if not most) people of faith, it is theologically incoherent to require them to disconnect their faith from their political lives.

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. "McCarthyism" came to represent Senator Joseph McCarthy's chilling, anti-Communist crusades. "Reaganomics" came to represent President Ronald Reagan's unique brand of supply-side economics. And more recently, "McCain-Feingold" has come to represent a particular approach to campaign finance reform promoted by Senators John McCain and Russ Feingold. There will accordingly be 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. Although a full discussion of the various theological views on religious involvement in politics is beyond the scope of this Article, it nevertheless seems fair to say that it makes little theological sense for churches to cut off the most visible public figures—those running for public office—from any and all expressions of support or opposition.

Churches' involvement in political activity is also consistent with the idea that such bodies, like other voluntary associations that make up the fabric of civil society,⁵¹ are mediating institutions that act as

⁴⁹ Johann Baptist Metz, *The Church and World in the Light of a "Political Theology,"* in *THEOLOGY OF THE WORLD* 114 (1971) (emphasis added), *quoted in* Gaffney, *supra* note 20, at 17.

⁵⁰ PRESBYTERIAN CHURCH (U.S.A.), *GOD ALONE IS LORD OF THE CONSCIENCE: A POLICY STATEMENT ADOPTED BY THE 200TH GENERAL ASSEMBLY 48* (1989) [hereinafter *GOD ALONE*].

⁵¹ JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 367 (1996) ("Civil society is composed of those more or less spontaneously emergent associations, organizations, and movements that, attuned to

buffers between individuals and the state.⁵² Such institutions both instill a desire for civic engagement and serve as critics of the state's exercise of power. Accordingly, they stand as bulwarks against the excesses of majoritarian rule and, ultimately, strengthen our democracy.⁵³ During a period in our history when disengagement from public life is increasingly the norm,⁵⁴ it is discouraging to think that the state may effectively be silencing or co-opting the voice of one of the few remaining private spheres of influence—thus eliminating an important source of social capital and a check on democratic rule.⁵⁵ As Thomas Shaffer has expressed the point, churches “are particularly suited to notice and say that the emperor is naked.”⁵⁶

Some might fear that widening the doorway to churches' involvement in politics would tilt the public debate in a certain direction—skewing it, for example, either in favor of the Reverend Jesse Jackson or those who make up the “religious right.” Such concerns seem unfounded. Churches' views on political matters, and their approach to expressing them, vary widely. Some churches believe in isolating themselves from the government, other churches believe in submitting to the government, and still other churches believe in witnessing to the government.⁵⁷ Members of the National Council of

how societal problems resonate in the private life spheres, distill and transmit such reactions in amplified form to the public sphere.”).

⁵² See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 44 (J.M. Dent ed., 1910) (describing the “little platoons” in which people learn social obligations); Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Association*, 85 MINN. L. REV. 1841, 1869–71 (2001) (discussing the mediating and values-shaping role of religious institutions).

⁵³ See generally ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA (Philips Bradley ed., Alfred A. Knopf 10th prtg. 1966) (1835); Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 MINN. L. REV. 1639, 1666–68 (2001).

⁵⁴ See generally ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000) (describing and lamenting the decline in civic and political engagement in America).

⁵⁵ William A. Galston, *The Legal and Political Implications of Moral Pluralism*, 57 MD. L. REV. 236, 247 (1998) (“[T]here seems little doubt that [religious organizations] have fostered political education and engagement to an extent few other kinds of associations can match, at a time when most social forces are pushing toward political and civic disengagement. As a general matter, then, the liberal democratic polity should not casually interfere with organizations that don't conduct their internal affairs in conformity with broader political norms.”) (footnote omitted).

⁵⁶ Thomas L. Shaffer, *Review Essay: Stephen Carter and Religion in America*, 62 U. CIN. L. REV. 1601, 1604 (1994) (reviewing CARTER, *supra* note 45).

⁵⁷ See Shaffer, *supra* note 56, at 1609–17 (defining three traditions: (1) “the Gathered Church,” which “teaches believers to get together and then get out of the way”; (2) “the Church of Christendom,” which “is in service to the civil order, but . . . need not worry about the state's becoming an idol, because the state itself is Christian”; and (3) “the Wit-

Churches⁵⁸ or the Jewish Community Relations Advisory Council⁵⁹ are likely to hold views quite different from those of the United States Catholic Conference.⁶⁰ Congregations in major metropolitan areas are likely to view political issues differently than those in rural areas, congregations in the suburbs are likely to have a different outlook than those in the inner city, and congregations made up of racial minorities are likely to favor different policies and candidates than those made up of whites. Thus, there is a healthy pluralism of approaches to involvement in politics in American churches—but remarkable agreement on the fact that faith has something to say about the policies and the people who appear on the political stage.

My own discussions with candidates confirm that churches have widely varying degrees of comfort with engaging in political activity. The experience of a friend who was recently a candidate for statewide office in Illinois is illustrative. He explains that in some churches he visited while campaigning—typically, larger, more formal congregations—those who introduced him would bend over backwards to insist that his presence at their service should not be interpreted as an endorsement of his candidacy. At the other end of the spectrum—typically, neighborhood-based parishes located on Chicago's South and West sides—the leaders would put their arms around him, tell the congregants that he was their man, and encourage them to get behind him.

In fact, some parishes relished the chance to mock the legal restrictions on their political campaign activities. In one parish, my friend recounts, the pastor got up and said (paraphrased): "Now, as a church, there are clear legal limits on our ability to endorse political candidates, and so I want to be clear that our guest's appearance here

nessing Church," which "bear[s] witness to the state on the church's terms" and "fashions its arguments . . . so that they will be heard and understood by nonbelievers as well as believers").

⁵⁸ See *Influencing Legislation by Public Charities, Hearing Before the House Ways and Means Comm.*, 94th Cong., 2d Sess. 81–82 (1976) (statement on behalf of the National Council of Churches of Christ in the U.S.A.) [hereinafter *Influencing Legislation*]. For the statement of one NCC member denomination, see GOD ALONE, *supra* note 50.

⁵⁹ See *Legislative Activity*, *supra* note 37, at 99 (statement of John W. Baker) ("Each of the affiliates of the National Jewish Community Relations Advisory Council regards its program as an expression of the tenets of the Jewish faith which it is organized to advance. Their activities are inspired by the Prophets' mandate to pursue justice. They believe that mandate governs [their lives] in all its aspects and requires those who adhere to the principles of Judaism to let their views be heard in support of justice for all.").

⁶⁰ See *Influencing Legislation*, *supra* note 58, at 90 (statement of the United States Catholic Conference).

today must not be construed as an endorsement of his candidacy." He then went on to say, however:

But I want you to know that if I *could* endorse a candidate, our guest would definitely be the man I would endorse. And it's really a shame that I can't endorse a candidate, because he would make a tremendous leader and I'd really love to endorse him if only I could.

One suspects that this happens—on both sides of the aisle—more often than is reported.

Different churches will therefore draw different conclusions about whether and how to participate in politics. Some oppose involvement in political causes, and thus have no problem abiding by the tax code's restrictions. Others conclude that their obligation to obey the law warrants caution and restraint.⁶¹ Still others will be compelled by conscience to take an activist role in the political arena, even at risk to their tax-exempt status. Regardless of how they resolve the issue, however, those who let their religious conscience guide their conduct are to be commended.⁶² This is not to say that those who act according to conscience will never have to "count the cost."⁶³ But from a theological perspective, the proper question is not only, "Is exercising our faith in the political arena consistent with the Internal Revenue Code?" but also, "Can the Internal Revenue Code's requirements for maintaining tax-exempt status be reconciled with the exercise of our faith?"⁶⁴

In the end, the notion that it is unseemly for churches to endorse candidates and act as lobbyists rests on the idea that such activities are not a legitimate part of their interests and influence.⁶⁵ Although it

⁶¹ Cf. *Matthew* 22:21 ("[R]ender unto Caesar the things that are Caesar's; and to God the things that are God's.").

⁶² Cf. *Acts* 4:18–20 (New American Standard Version) ("And when [the governing authorities] had summoned [Peter and John], they commanded them not to speak or teach at all in the name of Jesus. But Peter and John answered and said to them, 'Whether it is right in the sight of God to give heed to you rather than to God, you be the judge; for we cannot stop speaking what we have seen and heard.'"); *Daniel* 3:8–18.

⁶³ *Luke* 14:28.

⁶⁴ Cf. JOHN COURTNEY MURRAY S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION ix-x* (1960) ("The question is sometimes raised, whether Catholicism is compatible with American democracy. The question is invalid as well as impertinent; for the manner of its position inverts the order of values. It must, of course, be turned round to read, whether American democracy is compatible with Catholicism.").

⁶⁵ *Contra Legislative Activity*, *supra* note 37, at 305 (statement of J. Elliott Corbett) ("[T]he first amendment guarantees of 'the free exercise' of religion should not permit

does not say so explicitly, section 501(c)(3) seems to presume that churches (along with other tax-exempt charities) have little to lose by trading their ability to endorse candidates and lobby extensively for the ability to collect tax-deductible contributions. For many churches, that is undoubtedly true. But as Stephen Carter has stated, "If the state is able to manipulate the content of religious doctrine through its power to extend or deny the favored tax treatment, the religions are already well down the road to compromising their autonomy."⁶⁶

III. RESTRICTING THE POLITICAL ACTIVITIES OF CHURCHES VIEWED FROM THE STANDPOINT OF PUBLIC POLICY AND CONSTITUTIONAL LAW

In light of the restrictive effect of federal tax code restrictions on the speech and religious exercise of tax-exempt charities, one would expect to see weighty policy justifications proffered in their support. Few propositions are better established in American constitutional law than the maxim that the government may not discriminate against speech on the basis of its content.⁶⁷ Such discrimination is "presumptively invalid,"⁶⁸ and the government bears the burden of showing both that it is "necessary to serve a compelling state interest" and that it is "narrowly drawn to achieve that end."⁶⁹ The tax code's campaigning restriction (in contrast to the lobbying restriction)⁷⁰ clearly amounts to content-based discrimination: it targets a narrow subset of core political speech, and thereby insulates some of the most visible

the state to tell the church when it is being 'religious' and when it is not. The church must be permitted to define its own goals in society in terms of the imperatives of its religious faith. Is the Christian church somehow not being religious when it works on behalf of healing the sick, or for the rights of minorities, or as peacemaker on the international scene? No, *the church itself must define the perimeters of its outreach on public policy questions.*" (emphasis added).

⁶⁶ CARTER, *supra* note 45, at 147.

⁶⁷ See, e.g., *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); *accord* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83, 391–92, 395 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117–18 (1991); *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

⁶⁸ *R.A.V.*, 505 U.S. at 382; *accord* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–43 (1994).

⁶⁹ See *Simon & Schuster*, 502 U.S. at 117–18 (quoting *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 231 (1987)).

⁷⁰ As discussed below, *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), and subsequent decisions, indicate that the Court does not view the lobbying restriction as imposing a content-based restriction on speech. See *infra* notes 77–86 and accompanying text.

and powerful public figures from criticism. Given the Supreme Court's expressed commitment to ensuring that "debate on public issues" is "uninhibited, robust, and wide-open"—even when the debate involves "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"⁷¹—those seeking to justify the tax code's restrictions on charities' efforts to convey their moral convictions regarding candidates for public office would seem to bear quite a heavy burden.

At least in theory, the requirement of content neutrality applies as fully to taxation and government benefit schemes as to other forms of government regulation.⁷² As the Court explained in *Simon & Schuster, Inc. v. New York Crime Victims Board*, "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."⁷³ The leading Supreme Court decision in this regard is *Speiser v. Randall*, which held that the state of California violated the First Amendment in denying tax benefits to veterans who refused to forswear advocacy of the violent overthrow of the government.⁷⁴ In his opinion for the Court, Justice Brennan observed:

To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech.⁷⁵

⁷¹ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

⁷² *Rosenberger*, 515 U.S. at 828 (holding that "the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression"); accord *Arkansas Writers' Project*, 481 U.S. at 230; *FCC v. League of Women Voters*, 468 U.S. 364 (1984); see also *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001) (observing that government "may not design a subsidy to effect [a] serious and fundamental restriction on advocacy"). Cf. Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 102 (1998) ("It is, of course, unconstitutional for the state to condition tax exemptions, welfare benefits, and some forms of non-policy public employment on refraining from engaging in otherwise protected speech unrelated to the purpose of the governmental program. But what looks like an unconstitutional condition from one angle may look strikingly like government speech, or government support of its own activities and policies, from another.").

⁷³ 502 U.S. at 115.

⁷⁴ 357 U.S. 513 (1958).

⁷⁵ *Id.* at 518.

Thus, as with other content-based restrictions, the government must show that its "discriminatory financial treatment" of speech satisfies strict scrutiny.⁷⁶

The Court, to some degree, backed away from *Speiser* in *Regan v. Taxation with Representation of Washington* (*TWR*), which unanimously rejected free speech and equal protection challenges to the tax code's restrictions on charities' lobbying activities.⁷⁷ The challengers in *TWR* premised their claims in part on the fact that veterans' organizations are exempt from the lobbying limitations to which section 501(c)(3) organizations are subject.⁷⁸ The Court's opinion pays lip service to the doctrine of unconstitutional conditions,⁷⁹ but it also contains language suggesting that strict scrutiny is inapplicable to decisions regarding government benefits⁸⁰ absent some indication that the government's withholding of subsidies is "aimed at the suppression of dangerous ideas."⁸¹ This aspect of the opinion is subject to question in light of subsequent decisions. The Court has since held that a party seeking to establish content-based discrimination need not prove an "improper censorial motive,"⁸² and that the First Amendment bars both "subtle" and "blatant" forms of content-based discrimination.⁸³ More important, however, subsequent decisions also make clear that the Court in *TWR* did not view the subject restrictions as involving any content-based discrimination whatsoever.⁸⁴ As the Court explained in

⁷⁶ See *Simon & Schuster*, 502 U.S. at 117-18 (quoting *Arkansas Writers' Project*, 481 U.S. at 231).

⁷⁷ 461 U.S. 540 (1983).

⁷⁸ *Id.* at 546.

⁷⁹ *Id.* at 545.

⁸⁰ See *id.* at 549 (rejecting as "not the law" the argument "that strict scrutiny applies whenever Congress subsidizes some speech, but not all speech"); *id.* ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.")

⁸¹ *Id.* at 550.

⁸² See *Arkansas Writers' Project*, 481 U.S. at 228; accord *Simon & Schuster*, 502 U.S. at 117; *Lethers v. Medlock*, 499 U.S. 439, 463 (1991).

⁸³ See *Rosenberger*, 515 U.S. at 830 (rejecting the argument that the First Amendment bars only "ideologically driven attempts to suppress a particular point of view"); *R.A.V.*, 505 U.S. at 391-92.

⁸⁴ There are some statements to that effect in the Court's opinion in *TWR*, but they are oblique, seem to focus on the absence of discriminatory intent, and appear in the equal protection portion of the Court's analysis. See 461 U.S. at 548 ("We find no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect. The sections of the Internal Revenue Code here at issue do not employ any suspect classification."). As noted in the text, the absence of discriminatory intent or motive does not insulate content-based discrimination from challenge under the First Amendment.

Rosenberger v. Rector of University of Virginia, "Regan relied on a distinction based on preferential treatment of certain *speakers*—veterans organizations—and *not* on a distinction based on the content or messages of those groups' speech."⁸⁵ Viewed in that light, the restriction on charities' campaigning activities would clearly seem to warrant more exacting scrutiny than the Court applied in *Regan*, as it is difficult to view a restriction on statements supporting or opposing political candidates as anything other than content-based.⁸⁶

Against this backdrop, I will examine two public policy rationales commonly offered to explain the tax code's limitations on the political activities of charities, primarily as those limitations relate to churches. I will focus mainly on the campaigning restriction—the constitutionality of which has not been addressed by the Supreme Court—which is content-based and more restrictive in scope than the lobbying restriction.

A. *The State's Interest in Avoiding Compulsory Subsidization of Political Advocacy*

One possible justification for regulating the political advocacy of tax-exempt charitable organizations is the state's interest in not compelling taxpayers to "subsidize" political speech with which they disagree.⁸⁷ The notion is that politics is controversial, that each person should be free to reach his own political conclusions, and that allowing the use of tax-exempt funds for political speech would, in effect, require taxpayers to share in the cost of advancing political views they find objectionable. As Thomas Jefferson expressed the point, "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."⁸⁸

Setting aside whether it makes sense to view tax exemptions for charitable organizations as a "subsidy,"⁸⁹ the state's interest in avoid-

⁸⁵ 515 U.S. 819, 834 (1995).

⁸⁶ It is not my position, however, that the campaigning restriction is *viewpoint*-based, as the restriction applies to statements supporting or opposing candidates. 26 U.S.C. § 501(c)(3).

⁸⁷ Michael McConnell has described this notion as one of "political disestablishment." See generally Michael W. McConnell, *Political and Religious Disestablishment*, 1986 BYU L. REV. 405 (1986).

⁸⁸ See *Everson v. Bd. of Educ.*, 330 U.S. 1, 28 (1947) (Rutledge, J., dissenting) (quoting the *Virginia Bill for Establishing Religious Freedom* (1786)).

⁸⁹ For constitutional purposes, I have no quarrel with the proposition that a tax exemption is a form of "subsidy." See *Regan*, 461 U.S. at 544 ("Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. A tax ex-

ing compulsory financial support of political speech merits serious consideration where a program compels support for a narrow range of views. In *Abood v. Detroit Board of Education*, for example, the Supreme Court held that the First Amendment prohibited a public school teachers' union from using mandatory service fees imposed on nonunion employees "to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative."⁹⁰ The union understandably did not support a wide range of political viewpoints, and there was no opportunity for dissenters to direct the relevant portion of their fees to the candidate or expression of their choice.⁹¹ Similarly, in *Keller v. State Bar of California*, the Court struck down a state bar association's use of mandatory fees to fund its political expression.⁹² Here again, the organization could

emption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income."). But cf. Edward A. Zelinsky, *Are Tax "Benefits" for Religious Institutions Constitutionally Dependent on Benefits for Secular Entities?*, 42 B.C. L. REV. 805 (2001) ("In the final analysis, tax exemption does not subsidize churches, but leaves them alone."); *id.* at 837 ("An exemption is a subsidy only if it deviates from a normative tax base. . . . The reflexive invocation of the 'subsidy' label, explicitly or implicitly, thus assumes away the key issue, i.e., whether tax exemption is a proper acknowledgment of the sovereignty of sectarian institutions. If so, the resulting tax benefits are not subsidies since they implement, rather than deviate from, a normative tax base."). Such an understanding of subsidies accords with the notion that the denial of a benefit may constitute a penalty. See, e.g., *Speiser*, 357 U.S. at 513; *Simon & Schuster*, 502 U.S. at 117-18. And what matters most is that terms such as "subsidy" and "exemption" are used consistently (i.e., with reference to a consistent baseline). See generally William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

That said, treating "exemptions" as "subsidies" has certain statist connotations, since it seems to presume that everything that is not taxed is not taxed as a matter of legislative grace. Moreover, I question whether most Americans think of tax exemptions as subsidies, and the Supreme Court itself has rejected the notion that a religious organization's participation in a generally available tax exemption amounts to a "subsidy" of that organization for Establishment Clause purposes. See *Walz v. Tax Comm'n*, 397 U.S. 1, 674-75 (1970) ("Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. . . . The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."). Resolution of this issue, however, is beyond the scope of this Article.

⁹⁰ 431 U.S. 209, 234 (1977).

⁹¹ *Id.* at 235-36. The Court's ruling also rested on its conclusion that much of the expressive political activity of the union was not "germane" to its purpose as exclusive bargaining representative of the employees. *Id.* at 235. This standard has proven difficult to apply. See *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); see also *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 232 (2000) (noting the Court's "difficulties" in determining "what expressive activity was or was not germane to the mission of the association").

⁹² 496 U.S. 1, 16 (1990).

speak with just one collective voice, and compulsory funding of political speech thus interfered with objectors' right *not* to speak.

The state's interest in avoiding compulsory funding of political activities has much less force where contributions fund not one or a few select political viewpoints, but a wide array of speech. The Court's decision in *Board of Regents of the University of Wisconsin System v. Southworth*⁹³ is instructive in this regard. *Southworth* involved a challenge to the University of Wisconsin's collection of mandatory student activity fees, which were used in part "to support student organizations engaging in political or ideological speech."⁹⁴ Relying on the Court's decisions in *Keller* and *Abood*, a group of objecting students claimed that compelling them to support organizations whose expression was "offensive to their personal beliefs" violated the First Amendment.⁹⁵

The Court disagreed. It acknowledged that many student groups were heavily engaged in "political activity"—including activities "best . . . described as political lobbying"⁹⁶—and that it would "infringe[] on the speech and beliefs of the individual to be required . . . to pay subsidies for the objectionable speech of others without any recognition of the State's corresponding duty to him or her."⁹⁷ The mandatory fee, however, was administered in a viewpoint-neutral manner: the University sought "to stimulate the whole universe of speech and ideas."⁹⁸ Given the University's "important and substantial" interest in "facilitating the free and open exchange of ideas,"⁹⁹ the Court held that its constitutional duty was fully satisfied by ensuring "viewpoint neutrality in the allocation of funding support."¹⁰⁰

Viewed in light of *Abood*, *Keller*, and *Southworth*, the state's interest in not compelling taxpayers to subsidize the political expression of 501(c)(3) corporations seems remarkably weak. Such organizations number more than 50,000¹⁰¹—indeed, churches alone presumably account for tens of thousands of them—and they are anything but

⁹³ 529 U.S. 217 (2000).

⁹⁴ *Id.* at 221.

⁹⁵ *Id.* at 227.

⁹⁶ *Id.* at 223.

⁹⁷ *Id.* at 231.

⁹⁸ *Southworth*, 529 U.S. at 232.

⁹⁹ *Id.* at 231, 229.

¹⁰⁰ *Id.* at 233.

¹⁰¹ See "Tax-Exempt Entities" and "Other Entities," listed on the Exempt Organization Business Master File, by Type of Organization and Internal Revenue Code Section, Fiscal Years 1996-1999, 1999 IRS DATA BOOK, available at http://www.irs.gov/prod/tax_stats/soi/other_ia.html (File No. 99DB27EO.XLS) (Table 26) (visited June 19, 2001) (noting the approval of 52,773 applications for tax-exempt status as 501(c)(3) corporations).

politically homogeneous. Some are heavily Democratic; some are heavily Republican; some are mixed. Some are vigorous advocates of civil rights; others are vigorous advocates of lower taxes. Some are "pro-choice"; others are "pro-life." Some are "conservative"; others are "liberal." In other words, churches and other tax-exempt charities represent "the whole universe of speech and ideas."¹⁰²

It follows that permitting use of tax-exempt monies for political speech by 501(c)(3) organizations only remotely implicates First Amendment values. Taxpayers are not being compelled to subsidize one or a narrow range of objectionable viewpoints (as in *Abood* and *Keller*), but every imaginable viewpoint (as in *Southworth*). That is, taxpayers are supporting tax-exempt organizations' speech in only the most attenuated manner, and any particular organization's political speech is not fairly attributable to the taxpayer (or the government). This is not to say that avoidance of compulsory taxation for objectionable political speech is an irrelevant policy consideration. But it is insubstantial when compared with the constitutional interest in protecting core political and religious speech. Accordingly, in considering whether current law constitutes good public policy, we must look to other policy justifications.

B. *The State's Interest in Preventing Taxpayers From Deducting Contributions to Political Candidates*

A second policy justification commonly offered in support of restricting churches' political activity is the state's interest in ensuring that churches do not become conduits through which otherwise non-deductible political contributions become deductible. The concern is that, if only certain entities are exempted from the tax code's restrictions, it becomes more difficult to enforce them. This concern may be heightened if only churches are exempted, because the government must draw distinctions between activities that are primarily religious (and thus exempted) and those that are primarily political (and thus regulated), which is no easy task. If the restrictions are not applied evenhandedly to all tax-exempt charities, the argument goes, activities that cannot be funded by tax-deductible contributions when carried out by other organizations might become the primary focus of some churches—thereby creating an uneven playing field and enabling

¹⁰² See *Southworth*, 529 U.S. at 232.

churches to circumvent otherwise applicable taxation while functioning as political organizations.¹⁰³

Although this concern can be overstated, it is certainly an important public policy consideration.¹⁰⁴ If a church is transformed into a candidate's campaign headquarters (or a grass roots lobbying organization),¹⁰⁵ the government has a significant interest in ensuring that donations to the church are taxed to the same extent as donations to other organizations engaging in such activity.¹⁰⁶ That said, however, it is inappropriate to generalize in this regard. To cite an easy example, the risk that a church's support for a candidate will undermine the government's ability to enforce the rules on deductibility of political contributions is much greater where the church serves as a conduit for financial support of a candidate than where a minister merely speaks about the moral qualifications of candidates as part of regularly scheduled worship services. In other words, not all types of restricted political activity pose the same threat to the government's ability to enforce the rule that contributions to political candidates are not tax-deductible.

¹⁰³ A discussion of the Establishment Clause dimensions of this issue is beyond the scope of this Article. See *generally* Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (holding that provisions that single out religious entities for a special exemption or benefit must relieve a burden on religious exercise).

¹⁰⁴ Related to the government's interest in preventing deductions for contributions to political candidates is its interest in regulating efforts to influence the political process for private gain. This is sometimes referred to as an interest in preventing "corruption." See *generally* Buckley v. Valeo, 424 U.S. 1, 26 (1976) (discussing the state's interest in preventing corruption and the appearance of corruption). For example, the Supreme Court has held that Congress may constitutionally regulate campaign contributions on the theory that they unduly influence politicians (and thus threaten the integrity of the democratic process). See *id.* ("To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (expressly reaffirming *Buckley*). The prospect of candidates vying for endorsements of influential tax-exempt organizations could potentially raise similar issues. See 78 CONG. REC. 5861 (1934) (statement of Sen. Reed) (describing the lobbying restriction as designed to restrict charitable donations "made to advance the personal interests of the giver of the money," but conceding that the restriction went "much further than the [Committee on Finance] intended").

¹⁰⁵ I am not suggesting that a church is not functioning as a church simply because it is engaged in political activity. See *supra* Part II. My point is simply that the church's religiously motivated political activities may nonetheless be subject to regulation, depending upon the strength of the state's public policy interests.

¹⁰⁶ It is established that expenditures on political activities such as lobbying are subject to taxation in various circumstances. See *Cammarano v. United States*, 358 U.S. 498, 512-13 (1959) (rejecting First Amendment challenge to provision disallowing the deduction of lobbying expenditures as business expenses); cf. *Buckley*, 424 U.S. at 26.

I do not believe that there is always a bright line between reasonable and unreasonable applications of the restrictions on tax-exempt organizations' political activity. Reasonable people can disagree about the importance of the various state interests that underpin tax and election policy. Accordingly, I offer no definitive theory for defining the legitimate scope of federal restrictions on churches' political activities. Rather, I simply wish to propose a range of hypothetical cases in hopes of shedding some light on the issues and the policy considerations that inform them. Some cases are harder than others, and it is instructive to consider what distinguishes the hard cases from the easy ones.

Case One: *In his weekly sermon, Pastor Christiansen of First Lutheran Church preaches that, in God's eyes, any supposed distinction between public and private morality is a myth. To illustrate, he states that in light of recently validated reports that Governor Jones has had an extramarital affair, the Governor is not fit to serve in public office and is unworthy of anyone's vote. Governor Jones has announced his intention to seek reelection.*

Pastor Christiansen's speech presumably would fall directly within the campaigning prohibition, which expressly bars the making of "statements[] . . . in opposition to[] any candidate for public office."¹⁰⁷ It seems to me, however, that it would be quite unreasonable for the IRS to attempt to revoke the Church's tax-exempt status for this conduct. Pastor Christiansen's remarks are independent of any organized effort to rally political opposition to the Governor. There is no reason here to suspect that he is attempting to curry favor with the Governor's opponent, or that he is making a calculated effort to win influence with a candidate for private gain. Nor has the Church expended any funds beyond what it would normally spend in conducting its worship service. To be sure, Pastor Christiansen's remarks might have an incidental effect on the voting behavior of members of his congregation, but they are intended to illustrate a *theological* point—that public and private character cannot be separated in God's sight.

Moreover, preaching on moral issues and critiquing the conduct of societal leaders is part and parcel of virtually every church's pulpit ministry, and current political events are a fertile source of relevant sermon analogies. Indeed, there is no question that a pastor could make the very same remarks about an *unelected* public official—or even an elected official, outside of campaign season—without risk to

¹⁰⁷ 26 U.S.C. § 501(c)(3) (1994).

the church's tax-exempt status. Nor is it illegal for churches explicitly to address moral issues that have a clear relationship to public policy issues, even during election years, when candidates are closely identified with positions on such issues. Thus, to the extent that the campaigning prohibition is concerned with preventing any use of tax-deductible contributions that will redound to the benefit of public officials, it is vastly underinclusive. If remarks on issues of moral character are out of bounds simply because they are directed toward those whose political fortune depends upon the voting public, Congress has effectively penalized a vital part of tax-exempt churches' speech and religious exercise.¹⁰⁸

Case Two: Rabbi Klein invites Mr. Smith, a candidate for the United States Senate, to address her Reformed Jewish congregation on the Sabbath. She introduces him as "someone who has done a lot for the community" and "a welcome antidote to the current political climate." Mr. Smith speaks about the importance of public service and exhorts the congregation to "get involved" in civic causes. No other candidate is given the same opportunity.

At first glance, it is not entirely clear that the synagogue here has made a "statement" in support of Mr. Smith's candidacy. Rabbi Klein's remark that he is a "welcome antidote" to the status quo presumably qualifies as such a statement, but it is a less explicit endorsement than, say, "Vote for Mr. Smith." Of course, it undeniably "says" something to the synagogue's members that Mr. Smith was the only candidate invited to address them, and it is difficult to view Rabbi Klein's invitation as anything other than an endorsement under such circumstances.¹⁰⁹ But it is unclear whether this means of expressing approval of a candidate constitutes a "statement[] in support of . . . [a] candidate for public office"¹¹⁰ within the meaning of the Internal Revenue Code.

However that issue is resolved, it is important to bear in mind that section 501(c)(3) prohibits not only "statements" supporting or opposing political candidates, but *any* form of "participat[ing] in, or interven[ing] in . . . any political campaign on behalf of (or in opposition to) any candidate for public office."¹¹¹ Judged by this standard, it is more difficult to argue that the activity here does not fall within the campaigning prohibition. The synagogue has given Mr. Smith a

¹⁰⁸ Cf. Luke 13:32 (wherein Jesus Christ refers to King Herod as a "fox").

¹⁰⁹ I have elsewhere argued that holding someone out as a leader itself conveys a message that one approves of that person's character. See Johnson, *supra* note 53, at 1662-64.

¹¹⁰ 26 U.S.C. § 501(c)(3).

¹¹¹ *Id.*

platform to introduce himself and his views on involvement in public life to a temple filled with people who could cast votes for him. To be sure, the synagogue's conduct falls short of distributing leaflets, putting up signs, and rallying the troops to vote. But providing a forum for a candidate to give a speech on civic issues—thereby increasing his name recognition and raising awareness of his views—is a common campaign strategy. The argument that this does not amount to "participating" in a political campaign on behalf of a candidate is quite unlikely to carry the day.

Whether it would be reasonable for the IRS to revoke a synagogue's tax exemption on the basis of such activity is a more difficult question. On the one hand, in contrast to Case One—in which the pastor's remarks were an integral part of his effort to address a moral issue and independent of any organized campaign activity—the rabbi here coordinated the appearance of a candidate and allowed him to deliver his own campaign speech. Accordingly, there is a stronger argument that the synagogue is directly engaged in a campaign to rally political support for Mr. Smith (as opposed to an effort to address moral issues or educate the congregation), a higher likelihood that these efforts will influence the voting behavior of the congregation's members, and a greater risk that the synagogue is serving as a conduit through which otherwise nondeductible donations are being used to assist a political candidate.

On the other hand, the synagogue has not spent any funds beyond what it would ordinarily spend in conducting its normal worship service. Nor has it taken steps to coordinate activities such as pamphletting or canvassing of neighborhoods to generate support for Mr. Smith. The possibility that inviting a candidate to speak at a service itself amounts to an illicit effort to circumvent the nondeductibility of contributions to political campaigns seems fairly remote. Moreover, as a rule of thumb, houses of worship are more likely to be affected by the decisions of local officials than by politicians who make policy on a national (and international) scale. Had Rabbi Klein shared the lectern with a candidate for the local zoning board during the pendency of the synagogue's application to expand its parking lot, there would be greater cause for concern that it was involved in an improper attempt to influence policy for private gain.

Case Three: An independent, community-oriented congregation in the inner city believes that God has called it to combat poverty and crime in its midst. Accordingly, the church regularly supports public policy initiatives designed to improve life in the inner city, prepares pamphlets highlighting which political candidates hold policy positions consistent with those of the church,

and invites candidates who share its commitments to address the congregation on Sunday mornings. Members and leaders of the congregation regularly campaign for these officials, using the church as the base for efforts including calls to voters and distributing signs and pamphlets to homes throughout the neighborhood.

Case Three presents the strongest case for applying the campaigning restriction. The church essentially uses the promise of direct political support to influence potential office-holders to adopt policies that benefit the church's constituency. Select candidates who hold certain policy positions receive favored treatment in the church's literature and may address the congregation at worship services.¹¹² The church spends tax-deductible donations to support the direct campaigning efforts of these candidates. In sum, the church's efforts directly influence voting behavior, it spends more than incidental amounts of tax-exempt donations directly on campaigns, and there is a substantial possibility that candidates will be influenced to adopt policy positions different from those that they would otherwise adopt for fear of losing the church's support.

Here too, however, there are arguments on both sides. Even assuming the church uses its influence in an effort to convince political leaders to adopt policies that aid the poor in their community, this is not the prototypical "quid pro quo"—political support in exchange for aid to the poor—that one normally associates with improper efforts to influence policymakers for private gain.¹¹³ Nor does this hypothetical present a case in which the church has ceased to function as a church. To be sure, it is engaged in what the law understandably regards as substantial campaign activity. But efforts to help the poor are *also* a foundational part of Christian ministry,¹¹⁴ and churches have a strong constitutional interest in exercising their faith in that arena.¹¹⁵ If churches must suffer the loss of their tax-exempt status on account of their concerted political efforts to aid the disadvantaged, that constitutes a substantial penalty on their religious exercise. This is not to say that the state lacks an important interest in ensuring that all enti-

¹¹² See *Buckley*, 424 U.S. at 26 (expressing concern regarding the existence of "large contributions . . . given to secure a political quid pro quo from current and potential office holders . . .").

¹¹³ See, e.g., *Mark* 10:17-23; *Isaiah* 61:1-3.

¹¹⁴ Cf. *Good News Club v. Milford Cent. Sch.*, 121 S. Ct. 2093, 2099 (2001) ("We disagree that something that is 'quintessentially religious' or 'decidedly religious in nature' cannot *also* be characterized properly as the teaching of morals and character development from a particular viewpoint." (emphasis added)).

ties that function as political organizations are equally subject to taxation. My point is simply that there are substantial constitutional interests on the other side of the scale warranting consideration.

In sum, wherever one draws the line, these hypothetical cases demonstrate that insofar as the government is concerned with preserving its ability to prevent tax deductions for political contributions, its interest in imposing the restrictions of section 501(c)(3) on churches varies with the circumstances. Some efforts that presumably fall directly within the campaigning prohibition are inextricably intertwined with a church's efforts to address moral issues and involve no expenditures beyond those needed to provide that church's normal array of services. Given that these efforts often represent a vital part of a church's constitutionally protected speech and religious exercise, a narrowing construction of the prohibition is warranted in at least these circumstances.¹¹⁵

Perhaps the IRS is aware that enforcement of the campaigning restriction in certain cases could unjustifiably interfere with constitutionally protected activity. There are few reported decisions in this area, and those that exist involve somewhat atypical facts.¹¹⁶ That said, the IRS's approach to enforcement raises other concerns. Many churches simply ignore the campaigning prohibition precisely because it is so rarely enforced. Other churches, by contrast, are always looking over their shoulder, for fear that *any* political activity will place them in violation of the Code and at risk of losing their tax-exempt status.¹¹⁷ The restriction thus has an *in terrorem* effect, and the IRS's lack of enforcement creates a tremendous disparity between churches who take the requirement seriously and those who think it is

¹¹⁵ It merits reemphasis that however great the government's interest in requiring tax-exempt churches to refrain from campaigning—an issue, I have noted, about which people can reasonably disagree—the basis for that interest cannot be that churches have no legitimate interest in participating in the political process. See *supra* Part II and accompanying text; see also Garnett, *supra* note 40, at 783-93 (arguing that it is not within the competence of government to define the proper scope of the religious sphere). Rather, the government's interest in regulating the political campaign activity of churches is valid only to the extent that it applies to *all* tax-exempt entities that engage in such activity.

¹¹⁶ See *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000) (upholding revocation of the tax exemption of a church that placed full-page advertisements in *USA Today* and the *Washington Times* urging opposition to then-Governor Bill Clinton's presidential candidacy and soliciting contributions for further advertisements); *Christian Echoes Nat'l Minisry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972) (upholding revocation of the tax exemption of an organization that used broadcasts to criticize incumbents and candidates).

¹¹⁷ See Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why? To What End?* 42 B.C. L. REV. 903, 928-29 (2001).

a joke. The remedy for this, of course, is not overactive enforcement of the restriction but rather clarification of the law to indicate what sorts of activities are likely to put a church's tax exemption at risk.

Given the "all or nothing" quality of the campaigning restriction—the prohibition is absolute, and the penalty for its violation is revocation of tax-exempt status—Congress would also be well advised to consider whether a less drastic sanction might just as well serve the restriction's purpose. In the private inurement context, Congress recently adopted a provision under which the remedy for violating the prohibition on "excess benefit transactions"—transactions that unreasonably benefit directors, employees, or other persons who exercise control over the organization¹¹⁸—need not be a loss of tax-exempt status, but rather a requirement that the money be repaid to the organization as well as payment of taxes on the amount of the excess benefit.¹¹⁹ The provision, known as the "intermediate sanctions" rule,¹²⁰ reflects the fact that many violations of the prohibition are isolated and do not indicate that an organization has ceased to function as a bona fide charity.¹²¹ Congress understandably determined that it may be appropriate to penalize only those who are responsible for engaging in excess benefit transactions, rather than the entity as a whole and its supporters. Insofar as the same considerations apply to enforcement of the campaigning restriction, this approach deserves consideration in that setting as well.

CONCLUSION

Few subjects give rise to deeply held opinions and strong emotions as well as politics and religion. Both topics are personal, both are controversial, both involve powerful claims for allegiance, both involve value judgments, both involve efforts to persuade others of

¹¹⁸ An "excess benefit transaction" is one in which a tax-exempt corporation provides an economic benefit for the use of certain "disqualified persons," such as those who are (or recently were) "in a position to exercise substantial influence over the organization." See 26 U.S.C. § 4958 (1994).

¹¹⁹ *Id.*

¹²⁰ See generally Excise Taxes on Excess Benefit Transactions, 66 Fed. Reg. 2144, 2155 (Jan. 10, 2001).

¹²¹ H.R. REP. NO. 104-506, at 59 n.15 (1996) ("In general, the intermediate sanctions are the sole sanction imposed in those cases in which the excess benefit does not rise to a level where it calls into question whether, on the whole, the organization functions as a charitable or other tax-exempt organization. In practice, revocation of tax-exempt status, with or without the imposition of excise taxes, would occur only when the organization no longer operates as a charitable organization.").

one's view, and both have a profound effect on society. It should thus come as little surprise that when politics and religion mix, it often causes a stir.

From the standpoint of the church, the degree to which it is *appropriate* for religion and politics to mix raises a fundamental question of mission. Different churches will answer this question in different ways, but those that treat it as a matter of religious conscience are to be commended.

From the standpoint of public policy and constitutional law, the extent to which the state may regulate churches' participation in politics simply depends upon the strength of its public policy interests. I have focused on two policy justifications commonly offered to support current restrictions on 501(c)(3) corporations: the government's interest in not compelling taxpayers to subsidize objectionable political speech, and its interest in preserving its ability to prevent tax deductions for contributions to political candidates. In my view, the former justification is insignificant while the latter is more substantial. Given the significant speech and free exercise interests on the other side of the scale, however, appropriate respect for those constitutional interests warrants a narrowing construction of the restrictions in certain circumstances.