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A BRIGHT LINE POINTS TOWARD LEGAL COMPROMISE: IRS CONDONED LOBBYING ACTIVITIES FOR RELIGIOUS ENTITIES AND NON-PROFITS

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Introduction

Americans increasingly reference religion and faith in political debates, and a recent news source noted:

> [t]hose with the power to elect [American] presidents and congressman – and many who themselves get elected – believe that dinosaurs lived two upon two upon Noah's Ark, that light from distant galaxies was created en route to the Earth and that the first members of our species were fashioned out of dirt and divine breath, in a garden with a talking snake, by the hand of an invisible God. This is embarrassing.[1]

A delving into the canons of English literature reveals similar criticisms. Milton elucidated the possibility of a leaders' becoming a religious tyrant when "corrupt priests and flatterers" steer the leader away from true public service, and Milton praised the supremacy of the law and justice when he wrote, "[i]f men within themselves would be govern'd by reason, and not generally give up thir understanding to a double tyrannie, of Custom from without, and blind affections within, they would discerne better, what it is to favour and uphold the Tyrant of a Nation."[2] On the other side of the spectrum, some Americans would identify socio-cultural norms as the tyrant that governs the nation and advocate a religious resurgence in the political realm. Some religious leaders "encourag[e] [their] congregations to vote . . . but when they do they're neither predictably Republican or Democratic."[3] These tensions regarding the mingling of politics and religion reflect the tensions in legal scholarship and jurisprudence surrounding I.R.C. § 501(c)(3) restrictions on tax-exemptions for churches and religious non-profits who participate in politics.

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[1] Sam Harris, *The Case Against Faith*, NEWSWEEK, Nov. 13, 2006, at 42.

[2] MILTON, *The Tenure of Kings and Magistrates*, THE RIVERSIDE MILTON, 1057 (The Riverside ed., Houghton Mifflin Co. 1998) (1649).

[3] Lisa Miller, *An Evangelical Identity Crisis: Sex or Social Justice? The War Between the Religious Right and Believers Who Want to go Broader*, NEWSWEEK, Nov. 13, 2006, at 32.

In order for a § 501(c)(3) tax-exempt religious entity to retain that benefit, it may only participate in insubstantial lobbying activities and it may not directly support or oppose an electoral candidate or campaign. If the first prong of this test reads as ambiguous, then the readers scanning through this introduction have hit the controversy spot-on. How might a church or religious non-profit straddle the line between too little religious/political conversation and too much religious/political advocacy?

This Note recognizes the difficulties in an individual's separating his political and religious affinities and suggests an alternative to the current IRS policies regarding tax exemptions for churches and other non-profit organizations. This alternative strikes a compromise among: (1) IRS Code ambiguities; (2) court rulings which suggest little room for political activity and challenges to Code restrictions; and (3) the problem of governmental subsidies for religious views in the political arena. This Note argues for bright line rules regarding the kinds of lobbying activities that a church or non-profit might undertake, for the adoption of a § 501(c)(4) affiliate through which a church may filter more substantial lobbying activities and through which it may retain § 501(c)(3) tax exempt status, and for a church or non-profit's appeal to legislative representatives if those religious organizations oppose this proposed scheme.

Part I of this Note details the history of tax-exemptions for churches and religious organizations and presents the evolution of this practice in American society and the ideals which serve as its undercurrent. Part II parses out the restrictions on political behavior in § 501(c)(3) and court interpretations of that code. Part III scrutinizes a district court decision from Colorado and predicts acceptable political involvement for § 501(c)(4) affiliates. Part IV proffers an alternative model – using bright line rules codified in IRS Code – for determining denial or loss of § 501(c)(3) tax-exempt status. Finally, Part V concludes this Note.

I. Historical Overview of Tax Exemptions for Religious and Charitable Institutions

A. Origins

Most scholars bemoan their inability to pinpoint an exact date or source for a government's exempting a religious or charitable institution from taxation. Scholarship indicates a long tradition of such exemptions; the ancient worlds of Egypt, Sumeria, Babylon and Persia forgave priests and temples their taxes.[4] Among other favors, Constantine bestowed tax exempt

[4] Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 973-74 (1999) (discussing a government's motivation for religious taxation and identifying it as a "byproduct of a very uneasy relationship between palace and temple" and ultimately "a decision not to antagonize" the church and its authority.) In addition to legal scholarship, King looks to the Bible for records on taxation practices and finds "much evidence of ancient practices of tax exemption . . . scattered throughout the Old Testament." *Id.* at 1037 n.7. *See also* MARTIN A. LARSON & C. STANLEY LOWELL, PRAISE THE LORD FOR TAX EXEMPTION 10-11 (1969) (listing and explaining Old Testament references to tax exemptions).

In his article, Chris Kemmitt notes the uncertainty surrounding such ancient records, for "ancient Sumerian practices are more difficult to categorize because of the overlap between religious and civil institutions." *RFRA, Churches and the IRS: Reconsidering the Legal*

status on churches, and, while subsequent rulers revoked certain privileges, tax exemption remained.[5] Despite this history, the American tradition of tax exemption for religious institutions most directly grew out of its parent/child relationship with England and the English method of exempting charitable organizations from taxation.[6]

Drawing on the charitable activities in which religious institutions often participate, the English law of equity exempted those institutions from taxation.[7] The Statute of Charitable Uses, enacted in 1601, failed to reference religion and churches,[8] but many religious activities, such as that of providing relief to the sick and elderly, fell within its definition of charity.[9] On or

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Boundaries of Church Activity in the Political Sphere, 43 HARV. J. ON LEGIS. 145, 180 n.14 (Winter, 2006) (referencing John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB L. REV. 521, 524 (1992)). Kemmitt cautions against unquestioning belief in Bible records, but he references scholars who pinpoint those records as the first evidence of religious tax exemptions. *Id.* at 180 n.13. *See* Vaughn E. James, *Reaping Where They Have Not Sowed: Have American Churches Failed to Satisfy the Requirements for Religious Tax Exemption?*, 43 CATH. LAW. 29, 32-35 (2004).

[5] Kemmitt, *supra* note 4, at 180 n.12. Kemmitt attributes the Christian Church's receipt of tax exemptions during Constantine's reign to his conversion to Christianity. Constantine "granted a series of preferences to his newfound religion;" thus, Kemmitt's characterization of early religious tax exemptions reflects the influence of a ruler's personal loyalties. *Id.* (citing Robert E. Rhodes, Jr., *The Last Days of Erastianism: Forms in the American Church-State Nexus*, 62 HARV. THEOLOGICAL REV. 301, 317 (1969)). *See also* LARSON AND LOWELL, *supra* note 4; Alfred Balk, THE FREE LIST: PROPERTY WITHOUT TAXES 21 (1971). These implications coincide with an analysis of England's religious tax exemptions and the Crown's changing affiliation with Catholicism and Protestantism. *See infra* note 9. Therefore, scholars agree that monarchies allow for fluctuation in religious tax exemptions and in which religions receive the privilege.

[6] Kemmitt, *supra* note 4, at 147. *See also* King, *supra* note 4, at 976, 1037 n.19 (citing John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Principle?*, 64 S. CAL. L. REV. 363, 368-80 (1991) and John D. Colombo, *Why Is Harvard Tax Exempt (And Other Mysteries of Tax Exemption For Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 844 (1993) (Religious and educational institutions "were exempted from local taxes from the beginning")).

[7] Kemmit, *supra* note 4, at 148. The exemptions did not arise because of these institutions' religiosity. Kemmitt clarifies the Crown's reasoning for such exemptions; religious institutions, like charitable institutions, "dispensed certain social benefits." *Id.* at 148, 180 n.23 (referencing Witte, *supra* note 6, at 531-32).

[8] The act does mention "repair of churches." Kemmitt, *supra* note 4, at 148 (relying on 2 Restatement (Second) of Trusts § 368 cmt. A (1959) (quoting Statute of Charitable Uses, 1601, 43 Eliz., c. 4(Eng.))).

[9] Kemmitt, *supra* note 4, at 148. Scholars, like Sir Francis Moore, have attributed this omission to "the hope that such an exclusion would protect church property from government

before 1639, the phrase "religious uses" came to describe one type of charitable purpose, and later, it "comprise[d] one of the four principal divisions of charity in English law."[10] Equitable provisions do not represent the only channel through which a religious institution could gain tax exemption in England.

English common law also recognized the service which many religious institutions provided, and beginning with the Reformation, this area of the law granted tax exemptions to those who "disposed of certain responsibilities that would otherwise fall to the government."[11] Through Tudor consolidation of sovereign authority over the church and the birth of religious establishment in England, the common law produced state-regulated churches, or churches which were "agenc[ies] of the state, and as such, [were] regulated by, and intended to serve, the state."[12] The Crown bestowed tax relief to churches and clergy of the established religion, as it did for other state institutions.[13]

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confiscation." *Id.* The Crown's changing religious affiliations made church property subject to its whims, because "property employed for religious purposes by the out-of-favor denomination could be seized . . . under the Chantries Act as property used for superstitious purposes." *Id.* at 149. Presumably, if a church claimed property under a provision in the Statute of Charitable Uses which exempted taxation on "religious" activities or holdings, then the Crown more easily could identify and confiscate that church's property, if the established religion in England did not include that church's denomination. *See* Witte, *supra* note 6, at 376 n.49 (quoting Moore, *Readings Upon the Statute of 43 Elizabeth*, in G. Duke, LAW OF CHARITABLE USES 131-32 (R. W. Bridgman ed. 1805)).

[10] Kemmitt, *supra* note 4, at 149, 180 n.31 (relying on Comm'rs v. Pemsel, 1891 A.C. 531, 574 (H.L.)).

[11] Kemmitt, *supra* note 4, at 147. Kemmitt notes the limitations on tax exemptions: "only state-established churches qualified for the exemption, the exemption did not include all taxes, and the exemption could be lifted in times of crisis." *Id.* at 180 n.17 (referencing Witte, *supra* note 6, at 368).

The rationale surrounding England's common law tax exemption coincides with the American modern day "social benefit theory," or, as discussed by David M. Andersen, the "subsidization model" for § 501(c)(3) tax exemptions under the Internal Revenue Code. *Political Silence at Church: The Empty Threat of Removing Tax-Exempt Status For Insubstantial Attempts to Influence Legislation*, 2006 B.Y.U. L. REV. 115, 143-45 (2006). Insomuch as churches provide a public purpose, the government may provide them with tax exempt status, for "the government enters into a quid-pro-quo relationship with tax-exempt entities by offering them a financial benefit 'to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind.'" *Id.* at 143 (quoting Bob Jones Univ. v. United States, 461 U.S. 574, 588 (1983)).

[12] Kemmitt, *supra* note 4, at 148. This history corresponds with King's assertion that tax exemptions "reflect the relative power of sovereign and church," but King's account emphasizes the threat to churches which the Crown's ability to tax produced. King, *supra* note 4, at 973, 975. For instance, Henry VIII "confiscated the vast wealth of the Church once he severed ties with Rome in the sixteenth century," and Oliver Cromwell taxed church property during his

In both English channels – the common law and the law of equity – religious institutions received tax breaks in return for their fulfilling a social need. While the American tradition of tax exemption for religious institutions derived from English practice, one also might attribute it to the country's foundation and its ideals.

B. America Evolves to § 501(c)(3)

Many view the relationship between the American government and religious institutions in light of the now famous commitment to "separation of church and state" in American constitutional law. Scholars have characterized this phenomenon as both a "kind of benevolent neutrality towards churches and religious exercise generally"[14] or "a wall of separation between church and state"[15] erected to "protect and preserve both religious liberty and the political

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reign. *Id.* at 975. This power dynamic not only illuminates England's subordination of the church, but it also shows the entanglement of church and state which American law – perhaps idealistically – seeks to avoid. Andersen discusses the inevitable overlap between religious thought and political interests in a discussion of the "entanglement model" and "the negative effect that such government encroachment on religion causes in the context of political speech restrictions." *Political Silence at Church*, *supra* note 11, at 149-150 (quoting Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 797-98 (2001)). Richard W. Garnett writes:

> Government evaluates and characterizes what churches say and do, and decides both what it will recognize as religious and what it will label as political. The identification of certain activities by religious associations as inappropriate irruptions of faith into the political sphere, and the criteria used to identify such irruptions, allow government to tame religion, and to "blunt [its] political saliency," by identifying what it is not.

A Quiet Faith? Taxes, Politics, and the Privatization of Religion, 42 B.C. L. REV. 771, 797-98 (2001)(quoting Gerard V. Bradley, *Dogmatomachy: A 'Privatization' Theory of Religion Clause Cases*, 30 ST. LOUIS U. L.J. 275, 277 (1986) (alteration in the original) (citation omitted)).

[13] Kemmitt, *supra* note 4, at 148.

[14] *Id.* at 150 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 676-77 (1970)).

[15] King, *supra* note 4, at 975 (quoting John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 524-28 (1991-92) (internal quotations omitted)).

arena."[16] By contrast, early colonies wedded church and state; like the Crown, those colonies recognized an established church and provided it and its members with tax advantages.[17]

The climate changed after the Revolution, and some scholars – even those contemporary to that break from England[18] – attribute the "disestablishment" of American churches to fears surrounding the intermingling of politics and religion.[19] With the advent and enactment of the First Amendment and the Establishment Clause, a state or the federal government's sponsoring one church became unconstitutional. This ban "did not prove fatal to churches' tax-exempt status;"[20] many states codified the benefit (for religious institutions generally) in their constitutions.[21] In addition, the federal government enacted a series of statutes which provided religious and charitable institutions with tax exempt status.[22]

The Wilson Tariff Act of 1894 represents the first of these statutes, and it formally exempted religious organizations from federal taxes.[23] The Sixteenth Amendment ensured the

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[16] *Id.*

[17] Kemmitt, *supra* note 4, at 149 ("American practices largely mimicked the English tradition of tax exemptions"). Although King notes the "considerable dispute" about an assessment of each colony's established church, one thing remains clear: "If one looks to states that disbursed tax revenue to a church or churches, in the years immediately following the revolution . . . nearly every state had a law establishing religion." *Tax Exemptions and the Establishment Clause* at 977 (referencing Jed Rubenfeld, *Anti-disestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2351 (1997) (internal quotations omitted)).

[18] King attributes the wall metaphor to Roger Williams, the Baptist founder of Rhode Island, who wrote a "hedge or wall of separation between the garden of the church and the wilderness of the world" need exist; otherwise, the "struggle for supremacy" between the sovereign and the church will continue. *Tax Exemptions and the Establishment Clause*, *supra* note 4, at 975 (quoting Robert S. Peck, *The Threat To The American Idea of Religious Liberty*, 46 MERCER L. REV. 1123, 1129 (1995) (internal quotations omitted)). Williams feared that the church would become subordinate to the state. King, *supra* note 4, at 976. Thomas Jefferson expressed the opposite fear in an 1802 letter to the Danbury Baptist Association. *Id.*

[19] King, *supra* note 4, at 975.

[20] Kemmitt, *supra* note 4, at 150.

[21] *Id. See also* King, *supra* note 4, at 978-79.

[22] Kemmitt, *supra* note 4, at 150-51. *See also* King, *supra* note 4, at 980-81.

[23] The language of the Wilson Tariff Act provides tax exemptions for "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes . . . [and] stocks, shares, funds, or securities held by any fiduciary or trustee for charitable, religious, or educational purposes." Tariff Act of 1894, ch. 349, § 32, 28 Stat. 509, 556 (1894). King refers to this act as the Revenue Act of 1894. *Tax Exemptions and the Establishment Clause*, *supra* note 4, at 980. Unlike the English law of equity, the Wilson Tariff act specifically

validity of federal income taxes,[24] and the Payne-Aldrich Tariff Act of 1909 included an income tax bill with exemptions similar to those mentioned in the Wilson Tariff Act.[25] These acts and subsequent federal income tax legislation serve as precursors for the Internal Revenue Code's § 501(c)(3) tax exemptions,[26] and a provision in the Revenue Act of 1921 codified individual deductions for charitable contributions,[27] now seen in § 170 of the IRS Code.[28] "Still revealing its English antecedents,"[29] the Revenue Act of 1921 and the Internal Revenue Service Code (IRS Code) incorporated the list of charitable organizations set forth in England's 1601 Statute of

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mentions religion; it does not incorporate religious institutions or purposes into a definition of charitable organizations, etc. *See, supra*, 3-5.

Some scholars assert that religious and charitable organizations remained exempt from taxes before passage of the Tariff Act in 1894; although the language of the first federal income tax, enacted during the Civil War, did not expressly mention an exemption, the policy existed. Kemmitt, *supra* note 4, at 150. *See* James, *supra* note 4, at 41.

[24] The Supreme Court effectively revoked the Wilson Tariff Act in 1895; the Court held direct taxes, like those implemented by the tariff, unconstitutional. Pollock v. Farmer's Loan & Trust Co., 157 U.S. 429 (1895), modified by 158 U.S. 601 (1895). Despite this ruling, the Wilson Tariff Act served as a "precedent for federal tax legislation in the coming decades," in part because the unconstitutionality of the act derived from "reasons unrelated to tax exemption." Kemmitt, *supra* note 4, at 151. Moreover, the Sixteenth Amendment "effectively overruled *Pollock*" when it sanctioned federal income taxes. *Id. See also* Ann M. Murphy, *Campaign Signs and the Collection Plate: Never the Twain Shall Meet?*, 1 PITT. TAX. REV. 35, 45 (2003).

[25] The incorporated income tax bill "exempted corporations and associations 'organized and operated exclusively for religious, charitable, or educational purposes.'" King, *supra* note 4, at 980 (quoting Corporate Income Tax of 1909, Act of August 9, 1909, ch. 6, § 38, 36 Stat. 112-13).

[26] The Underwood-Simmons Tariff Act, also termed the Revenue Act of 1913, ratified exemptions like those made in 1909. King, *supra* note 4, at 980 (referencing Revenue Act of 1913, Act of October 3, 1913, ch. 16, § 2(G), 38 Stat. 172).

[27] The Revenue Act of 1917 "partially corrected" the previous acts' omission of individual deductions for charitable donations, but such contributions were not fully recognized until 1921, when the legislature allowed for the deduction of direct and indirect contributions. Kemmitt, *supra* note 4, at 151. *See* Murphy, *supra* note 24, at 46. Jurisprudence reads text of the Revenue Act of 1921 as contributions "to or for the use of corporations, community chests, funds, or foundations organized and operated exclusively for charitable, etc. purposes [that] were deductible." *Id.* (relying on Rockefeller v. Comm'r, 76 T.C. 178, 185 (1981), aff'd 676 F.2d 35 (2d Cir. 1982)).

[28] King, *supra* note 4, at 980-81.

[29] Kemmitt, *supra* note 4, at 151.

Charitable Uses;[30] now the list has expanded to create an American definition of qualifying charitable and religious organizations.[31]

Although tax exemptions for charitable and religious organizations changed frequently in the late 1800s and the early 1900s, three tenets of federal and state income tax legislation remain clear: (1) American statutes that codified tax exemptions for religious institutions were derived from those in England; (2) American rationale for such exemptions drew on the English concept of giving back to those organizations that provide social benefits, and on additional ideals, such as the separation of church and state and a commitment to the democratic process; and (3) Tax exemptions for charitable and religious institutions have deep roots in American history.

II. Parsing Out 26 U.S.C. § 501(c)(3) and Relative Jurisprudence

A. Section 501(c)(3) Requirements and the Meaning of Tax Exempt

IRS Code § 501(c)(3) exempts non-profit entities, like churches and other religious institutions, from taxes, [32] and IRS Code § 170(c)(2)(B) allows for individuals who donate

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[30] *Id.* at 148 ("While the statute's provisions were largely ignored in practice, its preamble has proven to be hugely influential for the Internal Revenue Code's understanding of charitable organizations"). Kemmitt cites a direct connection between the English Statute of Charitable Uses and IRS Code, but other scholars are more conservative when describing the relationship. *See* Christine Roemhildt Moore, *Religious Tax Exemption and the "Charitable Scrutiny" Test*, 15 REGENT U. L. REV. 295, 298 n.19 (2003) ("Notice the *correlation* between the organizations listed and those qualifying under 26 U.S.C. § 501 (2001): churches, charities, scientific, literary and educational organizations" (emphasis added)).

[31] Kemmitt, *supra* note 4, at 151 (relying on Murphy, *supra* note 24, at 46). As discussed *supra* note 17, American rationale for tax exemptions, such as the social benefit/public purpose theory, mirrored that of England. American values also include freedom of religion and separation of church and state, and those values similarly influence tax exemption for charitable and religious organizations, as mentioned *supra* note 14-18. Moreover, Americans explain these exemptions, at least with regard to religious organizations, as a way to protect the variety of voices within American democratic society. King, *supra* note 4, at 982-983 ("In another articulation, the exempt entity's mere existence is a social good because it contributes to a diversity of viewpoints in the community"). This paternalistic description of tax exemptions conflicts with the wall of separation envisioned by early theorists and judges, *supra* note 18, inasmuch as the church participates in the political process by voicing its concerns and the state (albeit indirectly) supports a struggling religious institution. (This analysis assumes that a thriving religion, which receives donations, etc. from its members, would not need state support.)

[32] I.R.C. § 501(a) (2006) provides that "[a]n organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle," subject to some exceptions. Section 501(c)(3) details some of those exceptions; it places restrictions on the activities of tax-exempt organizations governed by that subsection. Any organization that does not comply with

monies to those entities to deduct their contributions from individual tax returns.[33] The IRS Code conditions these benefits on the church or religious non-profit's adhering to restrictions on political speech and activities.[34] If a church or non-profit were to loose its § 501(c)(3) status, the government could tax its income and individuals who later deduct donations to that entity would bear the burden of proving that the non-profit now adheres to IRS Code restrictions, should the IRS audit their tax forms.[35] This section of the Note details these provisions, their restrictions, and the possible effects of lost § 501(c)(3) status.[36]

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those restrictions falls within an exception to the general conferral of tax-exempt status. I.R.C. § 501(c)(3) (2006) states:

> Corporations and any community chest, fund or foundation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does 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.

[33] I.R.C. § 170(a)(1) (2006) states the general rule as "[t]here shall be allowed as a deduction any charitable contribution (as defined in subsection (c) payment of which is made within the taxable year." Read together with § 170(a)(1), I.R.C. § 170(c)(2)(B) (2006) allows for an individual to deduct a charitable contribution made to a church or religious non-profit organization; it describes a qualifying charitable organization as a "corporation, trust, or community chest, fund or foundation . . . organized and operated exclusively for religious" purposes, among other things.

[34] Although § 501(c)(3) identifies some permitted propagandizing or lobbying, detailed in I.R.C. § 501(h) (2006), this section excludes churches from the groups who may participate in such activities. I.R.C. § 501(h)(5) (2006) states "an organization is disqualified" from subsection (h) governance if the group is a church or a "convention or association of churches;" therefore, churches (and presumably other religious non-profit organizations) may not devote a limited portion of their income to lobbying activities, as may other qualifying organizations. *See* I.R.C. § 501(h)(4) (2006) for a list of qualifying organizations. *See also* I.R.C. § 501(h)(5) (2006) for organizations which the IRS prohibits from spending money on lobbying activities and other propaganda.

[35] In other words, a donor will not loose the ability to write-off his donation on an individual tax form if the church or religious non-profit stopped the offending political activity before the donor gave his money. *See infra* notes 44-45. It is not clear whether the church would have to pledge to refrain from subsequent political activity and/or whether later political activity would affect the deductibility of donations made in an interim period.

The federal government confers tax-exempt status on § 501(c)(3) nonprofit organizations, and the IRS Code's definition of a non-profit includes religious institutions.[37] This status provides two distinct tax benefits: (1) § 501(c)(3) organizations themselves do not pay taxes,[38] and (2) people who donate to those organizations may deduct the value of those donations on their individual tax returns.[39] For churches, Congress provided an additional benefit: "churches automatically qualify for tax-exempt status under § 501(c)(3)."[40] However, churches should seek formal IRS documentation of that status.[41] Despite the numerous special considerations

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[36] For an extensive analysis of the effects of lost § 501(c)(3) status on a church, *see* Michael Hatfield, *Ignore the Rumors – Campaigning from the Pulpit is Okay: Thinking Past The Symbolism of Section 501(c)(3)*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 125 (2006).

[37] I.R.C. § 501(c)(3) (2006) (outlining the requirements that "[c]orporations, and any community chest, fund, or foundation, organized and operated for religious [or other charitable] purposes" must fulfill). As history reveals, the IRS Code lumps religious and charitable organizations together, just as the English law of equity did, *supra* note 30; these § 501(c)(3) requirements apply to both religious and non-religious organizations.

[38] Andersen discusses the limitations of this benefit: "Although the nonprofit activities of churches are generally exempt, certain profit-making activities may be subject to the Unrelated Business Income Tax." Andersen, *supra* note 11, at 173 n.23 (relying on IRS, Tax Guide for Churches and Religious Organizations 5 (2003), *available at* http://www.irs.gov/pub/irs-pdf/p1828.pdf and IRS, Tax on Unrelated Business Income of Exempt Organizations (2005), *available at* http://www.irs.gov/pub/irs-pdf/p598.pdf). Therefore, § 501(c)(3) does not exempt a religious institution or other non-profit from all taxes; "tax exempt" is not an all-encompassing term.

[39] IRS Code limits the amount of these deductions to no more than fifty percent of the person's total income, if the contribution goes to a church. I.R.C. § 170(b)(1)(A) (2006).

[40] Andersen, *supra* note 11, at 122. Additionally, the IRS publishes a list of qualifying organizations, and taxpayers may rely on this list when preparing their tax returns. *See* Branch Ministries v. Rossotti (*Branch Ministries*), 211 F.3d 137, 139 (D.C. Cir 2000) (discussing "Publication No. 78" (internal quotations omitted)); Branch Ministries v. Rossotti (*Branch Ministries I*), 40 F.Supp.2d 15, 19 (D.D.C. 1999) ("A church may simply hold itself out as a church and claim tax-exempt status pursuant to Section 508(c)"). *See also* 26 U.S.C. § 508(c) (2006).

[41] The *Branch Ministries* court stated:

> [T]he IRS suggests that churches seek formal recognition of their status as 501(c)(3) organizations for the purpose of "assur[ing] . . . that the church is recognized" . . . The automatic qualification does not apply to "religious organizations" . . . [and those] that do not meet the IRS criteria of a church must apply for and obtain recognition of their 501(c)(3) status.

that a church enjoys under federal tax law, the government does restrict churches' (and religious non-profit organization's) tax exempt status.

The relevant restrictions for this analysis deal with the political speech and activities of a church or other non-profit organizations. IRS Code limits these organizations' political involvement in two ways: (1) they may not lobby (the lobbying restriction),[42] and (2) they may not participate or intervene in a political campaign (the campaign restriction).[43] If a church or non-profit violates these provisions, the organization loses its tax exempt status for the time during which the violations occurred.[44] The organization, however, may reapply for § 501(c)(3) status, conditioned upon its promise to cease the offending activities.[45]

Branch Ministries, 211 F.3d at 173 n.27. *See also* I.R.C. § 508(c)(1)(a); Tax Guide, *supra* note 38.

Additionally, "churches are subject to less stringent annual reporting and filing requirements, churches benefit from specific rules limiting the IRS's authority and opportunity to audit churches, and churches are exempt from certain unemployment taxes." Andersen, *supra* note 11, at 122-23. *See also Branch Ministries*, 211 F.3d at 139-40 (identifying a churches' stake in IRS tax exempt status, the special restrictions on IRS auditing procedures for churches, and the church tax examination); *Branch Ministries I*, 40 F.Supp.2d at 18-19 (discussing the statutory framework for IRS tax exemption for churches and the CAPA auditing processes). Andersen notes that courts have "asserted that the tax-exemption of churches is not a constitutional right but rather a matter of legislative grace." *Id.* at 173 n.29 (referencing Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 857 (10th Cir. 1972) ("[T]ax exemption is a privilege, a matter of grace rather than right.")). *See also* Regan v. Taxation with Representation of Washington, 461 U.S. 540, 549 (1983).

[42] I.R.C. § 501(c)(3) (2006) (providing "no substantial part of [the organization's] activities" may consist of "carrying on propaganda, or otherwise attempting, to influence legislation"). Many commentators have noted the ambiguity surrounding this provision, specifically with regard to the words "substantial part" and "influence legislation." *See* Andersen, *supra* note 11, at 130-36.

[43] I.R.C. § 501(c)(3) (2006) (restricting an organization from "participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office"). Scholars have noted the "relative harshness of the political campaign ban" and its strict construction. Andersen, *supra* note 11, at 117. *See also Branch Ministries*, 211 F.3d at 137 (holding that a newspaper advertisement funded by a church which referenced the upcoming presidential election, warned against a vote for candidate Bill Clinton, and solicited donations to pay for the ad violated the campaign restriction).

[44] The revocation of an organization's tax exempt status also affects those who contribute to it; "in the event of an audit, the taxpayer will bear the burden of establishing that the church [or nonprofit] meets the requirements of section 501(c)(3)." *Branch Ministries*, 211 F.3d at 139 (generally referencing Rev. Proc. 82-39, 1982-1 C.B. 759, § 3.04 and Rev. Proc. 80-24, 1980-1 C.B. 658, § 6). If the taxpayer cannot meet this burden, then he may deduct the contribution only in the following situation: "[i]f a listed organization has subsequently had its tax-exempt

Much jurisprudence centers on the scope of the lobbying restriction, while few cases exclusively deal with the relatively cut-and-dry campaign restriction. Irrespective of which type of prohibited activity a church or non-profit's actions constitute, § 501(c)(3) jurisprudence reflects many constitutional challenges to the viability of its restrictions.

B. Section 501(c)(3) in the Courts

Churches and other non-profit organizations have challenged the revocation of their tax-exempt status with a variety of constitutional claims and cited their rights to free exercise of religion,[46] to protection from selective prosecution,[47] and to freedom of political expression.[48]

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status revoked, contributions that are made to it by a donor who is unaware of the change in status will generally be treated as deductible if made on or before the date that the revocation is publicly announced." *Id.* (relying on Rev. Proc. 82-39, 1982-1 C.B. 759, §3.01). Otherwise, the taxpayer may not deduct the donation.

[45] The *Branch Ministries* court noted:

> As the IRS confirmed at oral argument, if the Church does not intervene in *future* political campaigns, it may hold itself out as a 501(c)(3) organization and receive all the benefits of that status. All that will have been lost, in that event, is the advance assurance of deductibility in the event a donor should be audited.

Branch Ministries, 211 F.3d at 142-43 (relying on 26 U.S.C. §508(c)(1)(A) and Rev. Proc. 82-39 §2.03 (emphasis added)). Here, the court gives a narrow description of a church's potential losses – a donor's inability to prove his donation's deductibility via the presumption of tax exempt status which the IRS usually reserves for churches. In other words, if audited, a donor must prove that the receiving church did not participate in activities which violate § 501(c)(3) tax-exempt status at the time of his contribution; the law does not presume that entity's exempt status. *See supra* note 44. The court explains its assessment by noting that "revocation of the exemption does not convert bona fide donations into income taxable by the Church," so a church will not be automatically liable for taxes on donations. *Branch Ministries*, 211 F.3d at 143 (referencing 26 U.S.C. § 102 and quoting "[g]ross income does not include the value of property acquired by gift"). A church merely will be liable for taxes on its income during the period in which it violated § 501(c)(3) restrictions, and its donors will be liable for taxes on contributions made during the same period. *See also* Hatfield, supra note 36, at 128 ("donations are not taxed as income"). Furthermore, the court advises, "we know of no authority . . . to prevent the Church from reapplying for a prospective determination of its tax-exempt status and regaining the advance assurance of deductibility – provided, of course, that it renounces future involvement in political campaigns." *Branch Ministries*, 211 F.3d at 143.

[46] The Supreme Court indirectly rejected this type of claim when it ruled that a church's having to pay general taxes (as opposed to any taxes administered only to churches or religious institutions) did not place a substantial burden on that church's ability to practice and preach. Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378, 391 (1990)("to the extent that imposition of a generally applicable tax merely decreases the amount of money

the appellant has to spend on its religious activities, any such burden is not constitutionally significant"). Circuit courts have relied on application of this holding when evaluating lost § 501(c)(3) benefits. *See Branch Ministries*, 211 F.3d at 142. Additionally, the Appellate Court for the District of Colombia Circuit noted "[t]he Church appears to assume that the withdrawal of a conditional privilege for failure to meet the condition is in itself an unconstitutional burden on its free exercise right." *Id.* The court hypothesized that such an act would be unconstitutional only if the condition to which the church or other entity refused to adhere were deemed unconstitutional. Such reasoning effectively eliminates First Amendment and Religious Freedom Restoration Act claims regarding lost § 501(c)(3) classification; previous Supreme Court rulings have dismissed claims charging violation of freedom of speech when a religious non-profit's tax exemptions had been lifted due to potential political involvement. *See* Regan v. Taxation with Representation of Washington, 461 U.S. 540, 546 (1983) ("Congress is not required by the First Amendment to subsidize lobbying"). Therefore, the condition upon which the IRS grants tax-exempt status – formal separation from the political arena - does not violate constitutional protections. *See also infra* notes 48-50.

[47] The plaintiff church in *Branch Ministries I* raised this claim, and after citing authority which required 1) a showing of discriminatory intent and 2) the establishment of that discriminatory intent by direct evidence or evidence of unequal application of the law, the District Court for the District of Colombia found no grounds for a selective prosecution claim. *See Branch Ministries I*, 40 F.Supp.2d at 21-22 (citing Branch Ministries v. Richardson, 970 F. Supp. 11, 17 (D.D.C. 1997); King v. Palmer, 778 F.2d 878, 881 (D.C.Cir.1985)). The plaintiff's analogies to decisions involving preaching at the pulpit or the behavior of religious corporations did not represent "substantially similar" actions to those of the plaintiff church and did not constitute a showing of skewed revocation of § 501(c)(3) tax-exempt status. *Id*. at 22. *See also* Branch Ministries v. Richardson, 970 F. Supp. 11, 16 (D.D.C. 1997); Christian Echoes National Ministry, Inc. v. United States *(Christian Echoes)*, 470 F.2d 849, 853 (10th Cir.), cert. denied, 414 U.S. 864, 94 S. Ct. 41, 38 L.Ed.2d 84 (1973).

[48] Under a claim supported by the Religious Freedom Restoration Act and the First Amendment, a plaintiff bears the initial burden of establishing that the complained-of behavior creates a substantial interference with the free exercise of religion. *Branch Ministries I*, 40 F.Supp.2d at 24. Only then must a defendant prove that his behavior represents the least restrictive means of fulfilling a compelling government interest. *Id*. Supreme Court precedent demonstrates that a church or religious institution's payment of taxes does not constitute a substantial interference with the free exercise of religion. *See supra* note 46. *See generally* Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378 (1990). Furthermore, courts have reasoned that even if revocation of tax-exempt status for churches and non-profit corporations substantially interferes with the free exercise of religion, the government retains several interests compelling § 501(c)(3) restrictions on political involvement, chief of which are the following: 1) maintaining the integrity of the tax system, Hernandez v. Commissioner, 490 U.S. 680 (1989); and 2) refraining from subsidizing partisan political activity, or in broader terms, maintaining the separation between church and state upon which our government was founded. *Christian Echoes*, 470 F.2d at 856-57 ("an overwhelming and compelling government interest . . .[t]hat of guaranteeing that the wall separating church and state remain high and firm"). For a more recent

Many of these claims have failed in the courts, and the rulings have enabled the IRS to at least moderate much political involvement by a church or non-profit organization.[49]

The most significant of these rulings occurred in 1970 when a Supreme Court decision provided the basis of authority on IRS tax-exemption practices and their restrictions on mingling

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case discussing the government's interest in maintaining the integrity of the tax system, *see* Adams v. Commissioner, 170 F.3d 173 (3rd Cir. 1999).

Some churches characterize church grounds as open public fora, and a place designated as such would carry heightened free speech protections. Courts have been reluctant to approve this designation and have flatly refused its application when the activity in question involved off-site behavior, such as contribution to a political campaign or payment for a newspaper advertisement which expressed an opinion about a political candidate. *Branch Ministries I*, 40 F.Supp.2d at 26. *See also Regan*, 461 U.S. at 546. For guidance on determining the relevant forum, *see* Cornelius v. NAACP Legal Defense and Ed. Fund., 473 U.S. 788, 800-02 (1985) ("in defining the forum we have focused on the access sought by the speaker . . . [where plaintiffs] seek access to a particular means of communication" the channel of communication, such as the newspaper in which an advertisement is printed, equals the forum). As a side note, the addition of forum bolsters the District Court for the District of Colombia's determination that cases involving political sentiments expressed in church do not represent substantially similar situations when compared to cases involving the publication of political advertisements in newspapers. *See supra* note 47. *See Branch Ministries I*, 40 F.Supp.2d at 22.

[49] The Supreme Court identified the Congressional purpose of § 501(c)(3)'s restriction on political activity as "ensuring that no tax-deductible contributions are used to pay for substantial lobbying." *Regan*, 461 U.S. at 544, n.6. Justice Blackmun noted, however, that "[b]ecause lobbying is protected by the First Amendment . . . § 501(c)(3) therefore denies a significant benefit to organizations choosing to exercise their constitutional rights." *Id*. at 552 (concurring opinion). For Justice Blackmun and those who joined him, a church or religious non-profit's choice of using a § 501(c)(4) affiliate for its lobbying activities rendered restrictions on § 501(c)(3) organizations' political behavior constitutionally legitimate. *Id*. at 553 (concurring opinion)("A § 501(c)(3) organization's right to speak is not infringed, because it is free to make known its views on legislation through its § 501(c)(4) affiliate without losing tax benefits for its nonlobbying activities"). In other words, Congress achieves its goal of prohibiting the use of tax-deductible monies for lobbying activities in a permissible way because it offers § 501(c)(4) affiliates as a voice through which organizations might exercise free speech. This model also protects the government from subsidizing or funding lobbying activities, since § 501(c)(4) organizations cannot use tax-deductible monies. Justice Blackmun cautioned that "any significant restriction on [the] channel of communication [between § 501(c)(3) and § 501(c)(4) organizations] would negate the saving effect of § 501(c)(4)." *Id*. at 553 (concurring opinion). Therefore, Congress likely cannot place restrictions on the lobbying activities of § 501(c)(4) entities and maintain the validity of § 501(c)(3) political activity restrictions for churches, religious and other non-profit organizations.

politics with religion.[50] Despite its approval, the *Walz* court noted the difficulties which a person might face in an attempt to bifurcate the personal and religious self from the political advocate in its opinion.[51] This concern characterizes many of the constitutional challenges to § 501(c)(3) restrictions.

Three years later, a religious non-profit organization brought this argument to the fore in the Tenth Circuit when it pleaded religious sincerity as a defense to its having participated in lobbying activities – actions which resulted in the organization's losing their § 501(c)(3) tax-exempt status.[52] This circuit decision represented the first time that a court had upheld an IRS revocation of tax-exempt status due to political involvement, but the Supreme Court did not rule on this issue until several years later.

In a much more conservative decision regarding IRS denial of tax-exempt status to a non-profit religious corporation,[53] the Supreme Court analyzed tax-exemption as a government subsidy and preserved the government's discretionary application of such a benefit.[54] The *Regan* court upheld the constitutionality of § 501(c)(3) restrictions on political activity by holding that the denial of tax-exempt status did not violate First Amendment freedom of speech rights, nor did it violate Fifth Amendment equal protection rights.[55] The *Regan* court cited precedent which allowed for the IRS to deny business write-offs which relate to lobbying activity.[56] This precedent distinguished between the IRS's prohibiting all business write-offs

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[50] Walz v. Tax Commission, 397 U.S. 664 (1970) (upholding the constitutionality of tax exemptions for religious institutions). This decision formally recognizes – at least as regards the American legal system - the long history of such practice, detailed in Part I of this Note.

[51] *Id*. at 670 ("Adherents of particular faiths and individual churches frequently take strong positions on public issues, including as this case reveals in the several briefs amici, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right").

[52] *Christian Echoes*, 470 F.2d 849 (10th Cir. 1983). For facts surrounding the non-profit's support of and opposition to several political candidates, *see id*. at 856. For facts surrounding the non-profits' lobbying vis-à-vis religious issues, *see id*. at 854.

[53] The activities of the nonprofit in *Christian Echoes* evidenced substantial political involvement in both 1) lobbying and 2) support and/or opposition of political campaigns. *See supra* note 52. The non-profit in *Regan*, however, had been recently formed and the IRS based its denial of § 501(c)(3) tax exemption on "its intended activities [which] would consist of attempts to influence legislation." Andersen, *supra* note 11, at 128. *See* Regan v. Taxation with Representation of Washington, 461 U.S. 540, 550-51 (1983).

[54] *Regan*, 461 U.S. at 544 ("Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare").

[55] *Id*. at 546, 549.

[56] Cammarano v. United States, 358 U.S. 498, 513 (1949).

and the IRS's refusal to allow write-offs for lobbying expenses.[57] The court permitted the latter and analogized it to § 501(c)(3) restrictions on political activity, but it reasoned that the former would be unconstitutional.[58] The court also reasoned that a statute which discourages the expression of a particular political view would be unconstitutional, but the court found that § 501(c)(3) was not "intended to suppress any ideas" and did not find "any demonstration that it has had that effect."[59] Therefore, the court decided that the "sections of the Internal Revenue Code . . . at issue [§ 501(c)(3), among others] [did] not employ any suspect classification,"[60] were subject to rational basis review, and had to compete with the Legislature's "broad latitude in creating classifications and distinctions in tax statutes."[61] This decision represents the most recent Supreme Court review of denied § 501(c)(3) tax-exempt status, and the decision indicated that churches and religious non-profits likely would not fair better in the future.[62]

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[57] *Id*.

[58] *Regan*, 461 U.S. at 546.

[59] Regan v. Taxation with Representation of Washington, 461 U.S. 540, 548 (1983).

[60] *Id*. at 548.

[61] *Id*. at 547.

[62] The Supreme Court's use of the "subsidization model" when reviewing § 501(c)(3) indicates the theoretical framework into which legal scholars and professionals should place IRS tax-exemptions for churches and non-profit organizations. *See supra* note 11. However, the *Regan* court dealt with a non-profit organization, and as Andersen points out, "the decision is not entirely conclusive as to religious entities because the nonprofit organization in *Regan* was not a church and had no religious purpose." *Political Silence*, *supra* note 11, at 129. If one takes Andersen's cautionary words a step further, one notes that the marriage of religious tenets and political feelings – coupled with the difficulty religious advocates face when trying to draw a bright line between their religious self and their political self – may change the Supreme Court's theoretical framework as applied to a church and its lobbying activities in a dispute regarding § 501(c)(3) tax-exempt status. In other words, one cannot be sure that the subsidization model would still be appropriate, nor can one be sure that the Supreme Court would uphold the constitutionality of the IRS's withdrawing tax benefits.

This Note contends that churches and religious non-profit organizations likely would not sustain a challenge to § 501(c)(3) restrictions, given the strict adherence to *Regan* court reasoning in subsequent circuit court decisions. Another hurdle for § 501(c)(3) challengers is the following: a church or religious non-profit citing Fifth Amendment equal protection rights likely must find a similarly situated organization who may lobby and use tax-deductible donations to support that activity. The religious corporation in *Regan* pointed to veterans' organizations which the IRS "permitted to lobby as much as they want[ed] in furtherance of their exempt purposes." *Regan*, 461 U.S. at 546. The *Regan* court cited a plethora of reasons, based on the IRS Code, which cut down on the similarities among churches, religious nonprofits, and veterans' organizations. *Id*. at 546 n.8. In fact, the *Regan* court noted that donors to § 501(c)(3)

Scholars and legal professionals might look to circuit court and state court decisions for guidance in analyzing how future courts likely will handle outstanding questions regarding application or denial of § 501(c)(3) tax exemptions. One such decision, which scholars have scrutinized in this manner, dealt with a church's political advertisement, published in a newspaper, and the IRS's subsequent revocation of its tax-exempt status.[63] In 2000, the Court of Appeals for the D.C. Circuit upheld a lower court's ruling that lost § 501(c)(3) status did not violate constitutional protections, but rather than focusing on tax-exemption as a government subsidy provided because a church fulfills a public purpose, the court emphasized (1) the special consideration already granted to a church within IRS and other tax procedures, and (2) the church's clear violation of a constitutional condition for tax benefits provided to churches and other non-profit organizations.[64] Moreover, the court laid out an alternative for the church in the

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organizations likely stood in a better position than those who donate to veterans' organizations, for the former may deduct up to fifty percent of their adjusted gross income. *Id*. The latter may only deduct twenty percent of their adjusted gross income. *Id*. This difference, added to the service to our country that veterans have already supplied, may account for the legislature's decision to allow veterans' organizations to use tax-deductible donations to fund lobbying activities. *See id*. at 550-51. At any rate, the *Regan* court concluded "[i]f it were entitled to equal treatment with veterans' organizations, [the religious corporation] would, of course, be entitled only to the benefits they receive, not to more." *Id*. This statement cautions churches and religious non-profits against bringing frivolous claims and making loose comparisons to other groups, for such action might reduce the benefits provided to them by the IRS Code. *See also supra* notes 40-41 for discussion on special IRS treatment with regard to churches. Churches may stand to loose these benefits if they draw analogies to organizations who do not receive the same perks.

As a final word on the matter, the *Regan* court cited precedent for the proposition that the federal constitution does not provide an entitlement to funds necessary for carrying out a fundamental right; rather, it alone grants fundamental individual rights. *Regan*, 461 U.S. at 550 ("the Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom,'" quoting Harris v. McRae, 448 U.S. 297, 318, 100 S. Ct. 2671, 2688 (1980)).

In *Regan*, Justice Rehnquist delivered the opinion, and Justice Blackmun filed a concurring opinion in which Justice Brennan and Justice Marshall joined. No Justice filed a dissent, another indicator of the decision's force. *See Regan*, 461 U.S. 540 (1983).

[63] *Branch Ministries*, 211 F.3d 137 (D.C. Cir. 2000).

[64] In other words, the government's reasoning for providing such a benefit did not factor into the court's analysis as explicitly as it did in *Regan*. Instead, the *Branch Ministries* court focused on the church's choice – implicitly at the appellate level and explicitly in the district court opinion. *See Branch Ministries I*, 40 F.Supp.2d at 25 ("Plaintiffs were offered a choice: they could engage in partisan political activity and forfeit their Section 501(c)(3) status or they could refrain from partisan activity and retain their Section 501(c)(3) status. That choice is unconnected to plaintiffs' ability to freely exercise their religion"). In the face of judicial precedent establishing the constitutionality of conditional IRS tax benefits, the church did not comply with that condition and in retrospect, argued that such a condition violated free speech and free exercise

form of a § 501(c)(4) affiliate organization[65] which may provide essential means of communication among the church, Christian followers, and lawmakers without disturbing the church's tax exempt status.[66] The circuit court's nod to the § 501(c)(4) option harkens back to the *Regan* court's analysis and suggests that churches and other non-profit organizations who exhibit good faith efforts to filter their lobbying activities through an affiliate § 501(c)(4) organization will fair better in the courts.

In the midst of such conservative case law regarding denial or loss of § 501(c)(3) tax-exempt status, churches and religious non-profits need a legal option which differs from their failed constitutional claims. Courts and some legal scholars argue that a pairing of § 501(c)(3) and § 501(c)(4) organizations provides a viable legal alternative.[67] One might find further

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protections. The court distinguished this church's actions from those where the activity in question fell into a grey area. *See Branch Ministries*, 211 F.3d at 144 ("None of the reported activities involved placement of advertisements in newspapers with nationwide circulations opposing a candidate and soliciting tax deductible contributions to defray their cost"). Here, the court implies that the church had acted in bad faith and knowingly violated the condition upon which its tax-exemption rested, and this attitude did not further the church's cause. Andersen notes the ambiguity surrounding application of the lobbying restriction. *Political Silence, supra* note 11, at 130. The church, then, may have relied upon that ambiguity when publishing the advertisement. However, the advertisement's reference to Bill Clinton and its attempt to influence fellow Christians to vote against him more neatly fall into the relatively pointed campaign restriction. *See supra* note 43.

[65] I.R.C. § 501(c)(4) (2006) governs and provides tax-exemptions to, "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, . . . and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes." The court noted that a § 501(c)(4) organization remains "subject to the ban on intervening in political campaigns . . . [but] it may form a political action committee ("PAC") that would be free to participate in political campaigns" and presumably, lobbying activities. *Branch Ministries*, 211 F.3d at 143. *See* 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii) (1999). *See* 26 C.F.R. § 1.527-6(f),(g). These organizations also enjoy tax-exempt status, but donors may not deduct contributions made to those organizations from their individual tax returns. *Branch Ministries*, 211 F.3d at 143. Therefore, churches who choose this route must 1) ensure that the § 501(c)(4) organizations have incorporated separately, and 2) keep careful records showing that the § 501(c)(4) organization does not use tax-deductible donations or mingle their funds with those held by the church. *Id*. The *Regan* court found that such filings did not constitute an undue burden. *Regan*, 461 U.S. at 544 n.6.

[66] *Branch Ministries*, 211 F.3d at 143 (relying on Regan v. Taxation With Representation of Washington, 461 U.S. 540, 552-53 (1983) where "three members of the Supreme Court stated that the availability of such an alternate means of communication is essential to the constitutionality of section 501(c)(3)'s restrictions on lobbying").

[67] For judicial support of this premise, *see Regan*, 461 U.S. at 544 n.6; Justice Blackmun's concurring opinion in *Regan*, 461 U.S. at 552-54. For scholarly support, *see* Douglas H. Cook, *The Politically Active Church*, 35 LOY. U. CHI. L.J. 457, 468 (Winter 2004)("If a church were to

support of the judicial branch's respect for the separateness of § 501(c)(3) and § 501(c)(4) organizations in a recent case decided in federal court but dealing with Colorado state law; there, the Colorado Right to Life Committee ("CRLC"), a religious non-profit organization, prevailed in a dispute which dealt with state campaign finance reform and which turned on the non-profit's political involvement.[68] The next section of this Note discusses CRLC's activities in detail, reviews the ways in which those activities may fall within the lobbying and campaign restrictions on § 501(c)(3) tax-exempt status, and focuses on the ways in which the creation of a § 501(c)(4) affiliate may provide a means for circumventing IRS limitations on a church or non-profit's political involvement.

III. The Politics of § 501(c)(4) Affiliates

A. Separate and Unequal: The Relationship Between A § 501(c)(3) and A § 501(c)(4) Organization

In its objection to state campaign finance reform and several state constitutional amendments, CRLC sought to raise as-applied challenges to those amendments' regulation of and disclosure requirements for electioneering communications.[69] On behalf of a § 501(c)(3)

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organize and operate as a section 501(c)(4) organization rather than as a 501(c)(3) organization, these ends [of political candidate activity and lobbying] could be accomplished"); Alan L. Feld, *Rendering Unto Caesar or Electioneering for Caesar? Loss of Church Tax Exemption For Participation in Electoral Politics*, 42 B.C. L.REV. 931, 935-36 (2001)(discussing parallel § 501(c)(4) organizations, allowed political involvement under the IRS definition of an "action organization," and the surviving restriction on direct participation in electoral campaigns); Ann M. Murphy, *supra* note 24, at 68-69, 82-83 (discussing a § 501(c)(4) affiliate's ability to participate in political activities and suggesting a triad arrangement which includes a § 501(c)(3), a § 501(c)(4) and a § 527 organization and which allows for all levels of political participation, including direct participation in a candidate's campaign).

[68] CRLC challenged the constitutionality of a state constitutional amendment which "limit[ed] the influence of money on state elections, particularly money from corporations and special interest groups." Colorado Right to Life Committee, Inc. v. Davidson (*Colorado Right to Life*), 395 F.Supp.2d 1001, 1006 (D.Colo.2005). *See* C.R.S.A. Const. Art. 28. While the case outwardly deals with campaign finance reform at the state level, a short portion discussed CRLC's designation as a § 501(c)(4) affiliate organization and its relationship to the Colorado Right to Life Committee Education Fund ("CRLCEF"), a § 501(c)(3) organization. *Id*. at 1018. Of interest to this Note are the following: 1) the court's recognition of each organization's independent legal designation and the effect of that designation on allowable activities, and 2) the court's description of CRLC's political involvement and by extension, the possibilities that an affiliate § 501(c)(4) organization may open up for churches and non-profits not wishing to loose § 501(c)(3) tax-exempt status.

[69] *Colorado Right to Life*, 395 F.Supp.2d at 1018. The disclosure requirements asked "any person who expends one thousand dollars or more per calendar year on electioneering communications" to make "certain disclosures" and the court characterizes this language as

internal fund named Colorado Right to Life Committee Education Fund ("CRLCEF"), CRLC complained that the fund's communications remained subject to federal restrictions on political involvement[70] and that state regulation of those communications represented an improper use of sovereign power.[71] The court dismissed this portion of the complaint, finding no standing for CRLC to assert grievances on behalf of CRLCEF.[72] With this dismissal, the court emphasized the separateness of 1) section § 501(c)(3) and § 501(c)(4) corporations, 2) the regulations placed on them, and 3) the use of their capital.

B. Colorado Right to Life Committee As Representative of Allowable § 501(c)(4) Activity

CRLC's designation as a § 501(c)(4) organization does place some restrictions on its political involvement; section 501(c)(4) status does not represent a "get-out-of-jail-free" card or authorize a non-profit corporation to spend its money indiscriminately on political endeavors.[73]

"regulat[ing] the funding, not the making, of electioneering communications." *Id*. (internal quotations omitted).

[70] As a § 501(c)(3) organization, CRLCEF may not participate in activities covered under either the 1) lobbying restriction, or 2) the campaign restriction. *See supra* notes 42-43. CRLCEF may not support a candidate; the organization may not donate monies to or otherwise provide support for a political campaign. *See* 26 U.S.C. § 501(c)(3). CRLC disclosed that CRLCEF paid for "banquet programs mention [sic] political candidates as speakers or persons whom [sic] have helped sponsor the banquet," so CRLCEF monies do not remain totally unconnected with political workings and candidates for office. However, these activities do fall outside § 501(c)(3) restrictions.

[71] *Colorado Right to Life*, 395 F.Supp.2d at 1018 ("CRLC . . . argues that such communications should be protected from regulation").

[72] *Colorado Right to Life*, 395 F.Supp.2d at 1018. The court outlined the requirements for standing as a showing of actual injury, a causal connection between the injury and the complained-of regulation, and redressibility. *Id*. (relying on Horstkoetter v. Dept. of Public Safety, 159 F.3d 1265, 1279 (10th Cir. 1998)). In its application of this standard, the court found that CRLC did not prove actual injury for an injury felt by CLRCEF, even though CLRCEF represents a fund internal to CRLC. *Id*. ("[CRLC] does not indicate how requiring CRLCEF to make disclosures required by Section 6(1) causes CRLC – which is not funding the communications – actual injury"). The two organizations represent separate and distinct legal bodies vis-à-vis regulation and money distribution, even when the two are linked internally or otherwise affiliated.

[73] A § 501(4)(c) non-profit corporation may not engage itself in or affiliate itself with a specific political agenda or candidate. *See* 26 U.S.C. § 501(c)(4) (2006). Moreover, the court described CRLC as "hav[ing] a policy of not contributing to, accepting contributions from, or engaging in express advocacy regarding, political parties or candidates. Likewise . . . it is not aware of ever receiving donations at the request of, or solicited by, a political candidate, party or elected

CRLC does participate in activities which have a distinct connection to the political arena and which the IRS likely would not permit for tax-exempt § 501(c)(3) organizations.[74] In fact, some CRLC activities substantially resemble the newspaper advertisement at issue in *Branch Ministries* and prohibited for the § 501(c)(3) church in that case.[75] Based on the *Colorado Right*

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official." *Colorado Right to Life*, 395 F.Supp.2d at 1007. CRLC likely complied with the restriction which prohibits direct involvement in or opposition to political campaigns for both § 501(c)(3) and § 501(c)(4) organizations. *See supra* note 49. These organizations' refraining from such direct involvement protects the Congressional purpose of preventing tax-deductible donations to support political candidates and substantial partisan political activity. *See* Regan v. Taxation with Representation of Washington, 461 U.S. 540, 544 n.6 (1983).

[74] CRLC produces a newsletter, normally distributed to its members and sometimes distributed to non-members, which publishes candidate names and their positions on life issues. *Colorado Right to Life*, 395 F. Supp. 2d at 1008. The opinion offered no information on whether the newsletter includes all candidates or selective candidates; in other words, the court did not speculate on whether CRLC targeted candidates in order to oppose or discredit them, as did the church in *Branch Ministries*. *See supra* note 64. There, the court noted the text of the advertisement at issue, which read: "Christian [sic] Beware. Do not put the economy ahead of the Ten Commandments. Bill Clinton is promoting policies that are in rebellion to God's laws. How then can we vote for Bill Clinton?" *Branch Ministries I*, 40 F.Supp.2d at 17 (internal quotations omitted). Furthermore, the *Colorado Right to Life* court does not mention any solicitation of donations like that found at the bottom of the advertisement bashing Bill Clinton in *Branch Ministries*. Despite these remaining questions, a § 501(c)(4) organization, such as CRLC, likely may publish and distribute political newsletters to both members of the organization and non-members.

In addition to its newsletter, CRLC partnered with the Christian Coalition and "sent form letters to registered pro-life voters . . . [detailing] candidates views on abortion." *Colorado Right to Life*, 395 F. Supp. 2d at 1009. This Note further speculates that a § 501(c)(4) organization may send political information to registered voters.

[75] CRLC communicated with voters via "voter guides, radio ads and pre-recorded phone messages, and direct-mail and email" prior to an election, and these messages have included statements of candidate positions, candidates' responses to CRLC surveys on life issues, results of candidate questionnaires, and pleas to ask a pro-choice candidate to "abandon his pro-abortion views" and to "thank [a pro-life candidate] for defending unborn children." *Colorado Right to Life*, 395 F.Supp.2d at 1008-09 (internal quotations omitted). These messages still lack the solicitation of donations present in the *Branch Ministries* newspaper ad, but their content exhibits similarly skewed political messages. It seems a § 501(c)(4) organization may advocate one political view, but whether it may solicit donations remains unclear, shown in the paragraph below.

While the *Branch Ministries* court considered the advertisement's solicitation of donations in its analysis and deemed it indicative of the church's violation of § 501(c)(3) restrictions, the court did not explicitly state that the violation turned on the presence of the solicitation text. *Branch Ministries I*, 40 F.Supp.2d at 21 ("Plaintiffs have pointed to no other instance in which a church so brazenly claimed responsibility for a political advertisement in a

to Life case, § 501(c)(4) organizations likely could do the following: (1) publish a newsletter which is political in nature and distribute it to the organization's members and non-members; (2) send an informative letter that targets issues of interest to the organization and discusses electoral candidates' positions on those issues to registered voters; (3) communicate with voters via radio, phone, mail and email; (4) identify the names of both the § 501(c)(4) affiliate and the § 501(c)(3) church or religious non-profit in any publication; and (5) possibly solicit donations for the § 501(c)(4) organization (although this last proposition is precarious).[76] This list shows that churches and religious non-profits might engage in substantial political activity – albeit without direct participation in a campaign and without flat opposition to an electoral candidate – through a § 501(c)(4) affiliate.

For tax-exempt churches and religious non-profits, § 501(c)(4) affiliates provide an essential outlet for religious/political expression. "No perfect or absolute separation [between church and state] is really possible; the very existence of Religion Clauses is an involvement of sorts – one that seeks to mark boundaries to avoid excessive entanglement,"[77] so some judges, legal scholars, and social theorists argue that the IRS should allow churches and religious non-profits some form of political advocacy without revoking their tax-exempt status, due to either

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national newspaper and solicited tax-deductible donations for that political advertisement"). *See also Branch Ministries*, 211 F.3d at 144. The court's discussion inextricably linked the church's political message with the presence of solicitation, so whether the ruling turned on either of these factors alone or on the combination of both factors continues to be unclear. Questions also remain about whether the court's condemnation of solicitation would extend to § 501(c)(4) organizations, since the court found that activity so miscreant in *Branch Ministries* (which dealt with a § 501(c)(3) organization).

A review of the list of CRLC activities reveals that most, if not all, of their publications contained a reference to the organization. *Colorado Right to Life*, 395 F.Supp.2d at 1008-09. Therefore, § 501(c)(4) organizations may identify themselves in their publications, and the IRS may permit them to reference any § 501(c)(3) affiliates. Justice Blackmun discusses this possibility and contends that any restriction on it would be an unconstitutional restriction on free speech rights:

> Should the IRS attempt to limit the control these organizations exercise over the lobbying of their § 501(c)(4) affiliates, the First Amendment problems would be insurmountable . . . Similarly, an attempt to prevent § 501(c)(4) organizations from lobbying explicitly on behalf of their § 501(c)(3) affiliates would perpetuate § 501(c)(3) organizations' inability to make known their views without incurring unconstitutional penalty. Such restrictions would extend far beyond Congress' mere refusal to subsidize lobbying . . . In my view, any such restriction would render the statutory scheme unconstitutional.

Regan, 461 U.S. at 553-54 (concurring opinion).

[76] *See infra* notes 73-75.

[77] Walz v. Tax Commission of City of New York, 397 U.S. 664, 670 (1970).

the social benefit that those bodies provide[78] or to this country's commitment to freedom of religion.[79] The next section of this Note proposes a compromise that will allow the IRS to achieve its purpose – the proscription of using tax-deductible funds to support substantial lobbying activities – and that will provide religious advocates a small and regulated (but still viable) voice in the political arena.

IV. Bright Line Rules About Tax-Exempt Religious Education – A Compromise, Not Governmentally Subsidized Advocacy

A. The Absent Middle Ground

Many legal scholars have suggested methods with which to interpret the current IRS Code and its relative jurisprudence in a way that would achieve balance between a group's abuse of the label "religious" and its concurrent use of tax-exempt dollars for lobbying on the one hand and a flat-out ban on political activity and expression by tax-exempt religious entities on the other. Some writers have gone as far as suggesting that "[s]imply allowing churches to engage in political activity so long as they avoid spending tax-exempt money on those activities solves all . . . problems" arising from § 501(c)(3) restrictions.[80] Other scholars have cautioned against such liberality, for "[a]lthough absolute separation is unworkable, our ever-expanding concept of government cannot, consistent with the vision of the framers of the Establishment Clause, justify an infinitely expanding collection of permissible incidental benefits."[81] These opinions represent the extremes on either side of the § 501(c)(3) interpretational continuum.

Some scholars have identified themselves as moderates, or as falling on or near the middle of the continuum, when a close scrutiny of their proposals reveals that they are anything but moderate. One tax expert proposed a triad of affiliated organizations which would provide churches and religious non-profits with differing levels of political involvement,[82] but others have criticized the model as being representative of "complex corporate structures" which do not provide for endorsing a candidate from the pulpit and which would cause "[c]hurches interested in campaigning [to] lose a considerable amount of their moral authority."[83] One scholar

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[78] Discussed *supra* note 11. Also discussed *infra* 58-59.

[79] Discussed *supra* note 12.

[80] Kemmitt, *supra* note 4, at 170.

[81] King, *supra* note 4, at 1036. King identified the nagging question in § 501(c)(3) debates: "The question must ultimately be whether the distinction between religious non-profits and non-religious non-profits can stand; whether – assuming at least some accommodation (in the sense of exemption from the burden imposed by others) is permissible even when not required by the Free Exercise Clause – there exists" a workable solution. *Id*. at 1035.

[82] Murphy, *supra* note 24, at 82-83.

[83] Hatfield, *supra* note 36, at 145-46.

advocated a "narrow interpretation of the lobbying restrictions that [would] protect the relationship between a church and its members,"[84] and proposed that such an interpretation would allow for (1) the filing of briefs amici, (2) communications among church attorneys, church lobbyists, other church officers and legislators, (3) the issuance of church statements of principle on political issues in the form of press releases or other publication, and (4) the participation via monetary donation to non-profit advocacy groups or via letters authored by church members and submitted to legislators in states considering ballot initiatives, public referenda, and other legislative processes.[85] Although this scholar dubs his reading a narrow interpretation of § 501(c)(3) restrictions on political activity, the above list belies that classification. Most of these activities properly fall to a church or religious non-profit's § 501(c)(4) affiliate. Andersen did offer an instructive statement regarding activities in which the IRS might allow churches and religious non-profits to engage; he asked the government to recognize "the reality that '[c]hurches exist in part to teach morality and influence behavior.'"[86] Keeping this suggestion in mind, this Note imagines a compromise which focuses on the educational lobbying efforts which churches and other non-profits may expend.

B. A Moderate Proposal

With regard to § 501(c)(3) churches and religious non-profits, the IRS Code proscribes substantial lobbying activities; the relevant language - "no substantial part of the activities of which is carrying on propaganda or otherwise attempting the influence legislation" – leaves room for some educational efforts which do not rise to the level of propaganda or which do not attempt to influence legislation directly.[87] Many legal scholars remark on the ambiguities surrounding this test and "highlight the need for lawmakers to clarify the extent to which churches may engage in lobbying efforts and what activities constitute attempts to influence legislation."[88] Those scholars cited the need to prevent a chilling effect on religious/political speech and to protect against bias in the test's application. Thus, the IRS must clear up these ambiguities by defining insubstantial lobbying activity and attempts to influence legislation vis-à-vis churches and religious non-profits, thereby creating a bright line rule.

To do so with little legally sustainable opposition in the form of constitutional challenges, the IRS merely must provide a rational basis for such rules.[89] One rationale may be the

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[84] Andersen, *supra* note 11, at 173.

[85] Andersen, *supra* note 11, at 157-172.

[86] Andersen, *supra* note 11, at 173 (quoting Erik J. Ablin, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 NOTRE DAME L.J. ETHICS & PUB. POL'Y 541, 587-88 (1999).

[87] I.R.C. § 501(c)(3) (2006).

[88] Andersen, *supra* note 11, at 172.

[89] *See supra* notes 48-49.

following: IRS Code prevents tax-deductible contributions and tax-exempt monies given to churches and religious non-profits from being spent in the political arena, unless those monies provide for educational materials distributed to church members, voters, or members of the legislative and judicial branches of government. This rationale represents a more liberal one than imagined by the Supreme Court in *Regan*.[90] Moreover, the rationale recognizes the social benefit which religious education may provide to the nation, and this benefit coincides with the historical reasons for our nation's providing tax-exemptions to churches and non-profit organizations.[91] This amenable rationale leaves only the method through which the IRS Code may accomplish its goal in question.

The IRS Code might limit permissible activities to the following: (1) submission of briefs amici to judges deciding matters which may affect religious tenants; (2) educational publications drawing connections between religious tenants and political issues which reach members of the church or of religious non-profits only and which do not expressly advocate one political position or candidate; and (3) letters written on behalf of the church or religious non-profit and sent to lawmakers in the church or religious non-profit's jurisdiction which perform a function similar to a brief amici. These categories provide for bright line rules about a church or non-profit's use of tax-exempt monies which strike a balance between the government's subsidizing partisan behavior and religion's educational purpose. Moreover, churches and religious non-profits who wish for more substantial participation in politics may create a § 501(c)(4) affiliate to fulfill that wish. Since "[e]ighty four percent of annual revenues for churches consist of donations,"[92] churches likely could direct a portion of those monies to a § 501(c)(4) affiliate. The individual donors to a § 501(c)(4) affiliate would loose the ability to write-off those donations on their individual tax forms, but one assumes that such a burden would not deter zealous political advocates.[93] This model provides for some political participation, by way of educational publications, and provides a structure less complicated than the "complex corporate"[94] triad method.[95] This model also does not present an undue burden for churches and religious non-profits with regard to bookkeeping and other assurances of the separateness of the § 501(c)(3) and the § 501(c)(4) affiliate.[96] This legal compromise provides a workable solution

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[90] Regan v. Taxation with Representation of Washington, 461 U.S. 540, 544 n.6 (1983).

[91] Discussed *infra* note 11.

[92] Hatfield, *supra* note 36, at 128.

[93] Donors might also split their donations between the § 501(c)(3) and the § 501(c)(4) organization; thus, they might retain the deductibility of monies given to the former.

[94] Hatfield, *supra* note 36, at 145.

[95] Murphy, *supra* note 24, at 82-83.

[96] Regan v. Taxation with Representation of Washington, 461 U.S. 540, 544 n.6 (1983). *See* discussion *supra* note 62.

for challengers to the current model of IRS scrutiny regarding restrictions on the political activity of § 501(c)(3) churches and religious non-profit organizations.

V. Conclusion

Under the "subsidy theory" or the "social benefit" theory adopted by the Supreme Court in *Regan*,[97] religion provides a societal good which the government would otherwise provide in its absence. One might characterize that societal good as religion's mission of educating the public about morality. When moral decisions intersect with political ones, § 501(c)(3) places some undesirable restrictions on a church or religious non-profit's political activities. If the government respects the roots of its tax-exemption for those bodies – or, in other words, honors and allows for their providing a social benefit – then the government need develop a test under § 501(c)(3) which permits religious education on moral issues. This test need not tolerate zealous advocacy for the religious right, nor should it unrealistically proscribe any connection between church and state, especially when the language of the federal constitution evidences a tenuous connection between the two. This Note proposed a model which contemplates proper deference to legislative decision-making with regard to the tax code and which coincides with jurisprudence surrounding churches, religious non-profits, and their challenges of denied or lost § 501(c)(3) tax-exempt status. Moreover, the proposed model allows churches and other non-profits to retain their tax exempt status while pursuing a non-adversarial method of resistance in politics and to lawmaking which has an ethical tinge. Should these religious bodies dislike the proposed structure, that model guarantees an outlet (i.e. these bodies may write to their representatives and explain the reasons why the system does not coincide with traditional American freedom of religion or with their religious tenants). Churches and religious non-profits have sought relief in the courts – enforcement mechanisms; whereas, the proposed model permits them to use the legislature – law making/changing bodies – a potentially more effective strategy. The potential for such action by religious bodies is negligible, in light of the more respectful and more defined restrictions on how churches and non-profits can and cannot engage in lobbying activities. This compromise promises lasting change and coincides with history, modern case law, and legal scholarship.

[97] *Regan*, 461 U.S. at 544.