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Political Silence at Church: The Empty Threat of Removing Tax-Exempt Status for Insubstantial Attempts To Influence Legislation

“Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them.”¹

I. INTRODUCTION

Espionage, political threats, and infiltration of private societies are activities more seemingly identified as plot elements in the latest Tom Clancy thriller or *The Da Vinci Code*² than as unfortunate byproducts of an ambiguous tax code. Churches struggling to find a voice in modern public policy debates, however, claim that these are real tactics utilized by groups seeking to enforce extreme interpretations of the Internal Revenue Code’s political speech restrictions against tax-exempt organizations.³ Some of these groups have gone to the extreme of planting spies within churches to immediately report to the IRS whenever clergymen address policy issues and admonish churchgoers to take action on those issues.⁴

1. George Washington, Farewell Address to the Nation, Philadelphia (Sept. 17, 1796), available at <http://www.yale.edu/lawweb/avalon/washing.htm>.

2. DAN BROWN, *THE DA VINCI CODE* (2003).

3. The tax code outlines two basic political speech restrictions against certain tax-exempt organizations: (1) limitations on attempts to “influence legislation” and (2) an outright ban on political campaigning for or against candidates. I.R.C. § 501(c)(3) (2000).

4. See, e.g., Tresa Baldas, *A Bully Pulpit, or Bullying the Pulpit*, NAT’L L.J., Oct. 18, 2004, at 22 (“[R]eligious watchdogs are monitoring churches closely, in some cases hiding out in pews and spying on pastors”); Hank Merges, *Pastors Bound to Rules if Backing Candidates*, YORK DISPATCH, July 29, 2004 (explaining that “left-wing groups are suddenly springing into action . . . sending ‘spies’ into churches on Sunday mornings”); Mathew D. Staver, *Pastors, Churches and Politics: What May Pastors and Churches Do?*, LIBERTY COUNSEL, http://www.lc.org/Resources/pastors_churches_politics.htm (last visited Feb. 1, 2006) (reporting the story of Kansas pastors who received threats that a group known as MAINstream Coalition would send spies into churches on a particular day).

Those opposed to tax-exempt churches having a role in the political realm view such actions by religious leaders as clear violations of a church's tax-exempt status.⁵ At the opposite end of the spectrum are those who support the right of churches to speak out on political issues unfettered by intervention from the IRS or any other organization.⁶ Thus, in the modern development of fair and just tax policy, two competing visions have emerged as polar extremes⁷ in the debate over the relationship between the tax-exempt status of churches and their political advocacy efforts.

Couched somewhere between these two extremes is § 501(c)(3) of the Internal Revenue Code, which places two restrictions on the political speech and activities of tax-exempt organizations.⁸ The first

A possibility even more troublesome than private groups observing religious meetings to prevent political speech would be government officers infiltrating churches for the same purpose: "Policing would require monitoring sermons, a proposition that conjures images of government moles serving as church spies and state officials with notepads scribbling down Sunday quotes from the front pews, effectively creating the most extreme form of day-to-day evaluation of religion . . ." Randy Lee, *When a King Speaks of God; When God Speaks to a King: Faith, Politics, Tax Exempt Status, and the Constitution in the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 391, 404 (2000).

5. In 1998, for example, Americans United for the Separation of Church and State mailed 80,000 letters to pastors across the nation warning them that churches risked losing tax-exempt status if they distributed voter guides prepared by the Christian Coalition. See Laurie Goodstein, *The 1998 Campaign: Religion*, N.Y. TIMES, Oct. 29, 1998, at A27.

6. See, e.g., James Bopp, Jr., *Guidelines for Political Activities by Pastors and Churches*, Sept. 2004, <http://www.alliancedefensefund.org/userdocs/GuidelinesforChurchesandPastors.pdf> (explaining that "for people of faith, it is theologically incoherent to require them to disconnect their faith from their political lives").

7. This analysis labels these positions as "extremes" for purposes of drawing policy comparisons only. This label does not suggest that these positions are *radical* or that they are the *most extreme* interpretations of issues regarding the tax-exempt status of churches. For example, some would argue that any taxation of churches is unconstitutional. See, e.g., Glenn Goodwin, *Would Caesar Tax God? The Constitutionality of the Governmental Taxation of Churches*, 35 DRAKE L. REV. 383, 403-04 (1986). See generally DEAN M. KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES (1977) (providing an in-depth argument for the unconstitutionality of church taxation). At the opposite extreme are those who claim the tax-exempt status of churches is an unconstitutional establishment of religion. The ACLU, for example, has opposed tax exemptions for churches altogether. See WILLIAM A. DONAHUE, TWILIGHT OF LIBERTY: THE LEGACY OF THE ACLU 98-99 (1994). This analysis focuses on two *different* extremes—those who believe tax-exempt churches should not be able to engage in political activity and those who argue that tax-exempt churches should be able to engage in any type of political speech.

8. I.R.C. § 501(c)(3) (2000) (outlining the requirements that "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious [or other charitable] purposes" must fulfill to retain tax-exempt status). While these requirements

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is a more limited restriction mandating that “no substantial part of [a 501(c)(3) organization’s] activities” may consist of “carrying on propaganda, or otherwise attempting, to influence legislation.”⁹ The second restriction mandates that 501(c)(3) organizations may “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.”¹⁰ These two restrictions have caused great concern to parties on both sides of the issue—some arguing that the restrictions do not go far enough to separate churches from the political arena and others arguing that these restrictions are an unconstitutional burden on religion.

The bulk of modern attention in this area has centered on the political campaign ban while giving only lip service to the restriction against “substantial” attempts to influence legislation. This one-sided focus of commentators¹¹ and legislators¹² likely stems from not only the increased political activity of churches during recent presidential elections¹³ but also the relative harshness of the political campaign

apply to all 501(c)(3) organizations whether religious or nonreligious, this analysis examines the specific effects that these restrictions have on churches.

9. *Id.* Although the restriction against substantial attempts to influence legislation commonly has been referred to as the “lobbying restriction,” this analysis refers to the restriction in the plural as “lobbying restrictions” because of the various limitations this language in the Code might impose. These possible limitations are discussed *infra* Part II.B.

10. *Id.* This restriction will be referred to herein as the “political campaign ban.”

11. The vast majority of scholars have focused more on the political campaign ban than the restriction on attempts to influence legislation. See, e.g., Erik J. Ablin, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 541 (1999); Douglas H. Cook, *The Politically Active Church*, 35 LOY. U. CHI. L.J. 457 (2004); 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 (2001); Ann M. Murphy, *Campaign Signs and the Collection Plate—Never the Twain Shall Meet?*, 1 PITT. TAX. REV. 35 (2003); 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).

12. Recently proposed legislation would have repealed the political campaign ban on churches but not the restrictions against attempts to influence legislation. The Houses of Worship Free Speech Restoration Act sought to remove sermons or other religious speech during religious services or gatherings from the scope of the political campaign ban, but the Act would not have modified the lobbying restriction. See H.R. 235, 108th Cong. (2003). In 1996, however, the Crane-Rangel Amendment would have amended both restrictions by imposing an expenditure-to-revenue ratio limit of five percent on political campaign spending and twenty percent on lobbying spending for all 501(c)(3) organizations. See H.R. 2910, 104th Cong. (1996).

13. Recently, the IRS began an investigation of sixty tax-exempt organizations (including twenty churches) for alleged violations of the campaign prohibition during the

ban versus the lobbying restrictions.¹⁴ Further, many view the constitutionality of the lobbying restrictions against 501(c)(3) organizations as settled law after the Supreme Court's decision in *Regan v. Taxation with Representation of Washington*.¹⁵ However, to this day, the IRS has never revoked the tax-exempt status of a church *solely* for having a substantial amount of its activities dedicated to influencing legislation.¹⁶ Nonetheless, groups opposed to the political activity by churches continue to threaten religious entities with revocation of tax-exempt status for speaking out on social policy issues and urging members to take action in support of church positions.¹⁷

The lack of aggressive enforcement by the IRS and continued threats against churches demonstrate that a number of lingering questions still cloud the definition of permissible church conduct in attempting to shape public policy: (1) How much of a church's activities, labor, and funds can it devote to influencing legislation and still retain its tax-exempt status? (2) Do the lobbying restrictions have any influence on the relationship and communication between a church and its members? (3) To what extent may churches engage in—or encourage their members to engage in—the direct lobbying of policy makers? and (4) What are the legal implications of a church

2004 election cycle. See Guy Taylor, *Probe Continues of 60 Tax-exempt Groups, IRS Says*, WASH. TIMES, Nov. 10, 2005, at A6, available at <http://washingtontimes.com/national/20051109-115328-3741r.htm>.

14. Churches may lose their tax-exempt status for any single instance of political campaigning, including endorsement of or opposition to candidates. See, e.g., *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000) (affirming the IRS's revocation of Branch Ministries's tax-exempt status for advertising against Bill Clinton during his presidential campaign). However, churches will retain tax-exempt status for having only an "insubstantial" portion of their activities consist of attempts to influence legislation.

15. 461 U.S. 540 (1983) (upholding the revocation of a nonreligious 501(c)(3) organization's tax-exempt status for engaging in substantial political campaigning as well as dedicating a significant amount of time and resources to influence legislation). See *infra* notes 66–73 and accompanying text for a discussion of *Regan*.

16. The IRS has revoked the tax-exempt status of religious entities violating the political speech restrictions in two circumstances: (1) churches that engage in clear political campaigning in favor of or opposition to candidates, see *Branch Ministries*, 211 F.3d at 139, and (2) religious entities that engage in both substantial lobbying *and* political campaigning, see *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 856 (10th Cir. 1972); see also Murphy, *supra* note 11, at 67 ("The revocation of Branch Ministries' tax-exempt status in 1995 was the first time in history that the IRS had revoked a bona-fide church's tax-exempt status."). However, the IRS has never revoked a bona-fide church's tax-exempt status *exclusively* for violating the lobbying restrictions.

17. See *supra* notes 4–5.

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taking a particular stance on a public policy issue or piece of legislation and urging its members to be politically supportive of that stance? These unresolved questions reinforce the continuing reality that “[t]he intersection of free political debate, tax-exempt status, and free exercise of religion is littered with legal uncertainty.”¹⁸

This analysis scrutinizes the policy behind the restriction that churches “must not devote a substantial part of their activities to attempting to influence legislation”¹⁹ and presents a practical approach to interpreting this restriction. Ultimately, this analysis concludes that the IRS does have some interest in providing oversight to secure the revenue system against those who would use the tax-exempt status of a religious entity to promote a purely nonreligious political agenda.²⁰ However, that interest should never override, infringe, or even influence the religious freedom of churches and their members to act individually or collectively in speaking out on issues of religious and moral concern. To do so would amount to using the public coffer to finance the shaping of religious beliefs, or at a bare minimum, the offering of a tax benefit to keep those beliefs from influencing public policy.

This Comment argues that a proper interpretation of the lobbying restrictions should never control or attempt to define the proper relationship between a church and its members. Specifically, Congress, the IRS, and courts should clarify or otherwise narrowly interpret the lobbying restrictions to allow churches to speak out on important issues of public policy *and* communicate freely with church members regarding those issues. As part of the right to participate in critical religious and moral debates, churches must be allowed to advance their religious mission by educating and

18. Steven B. Imhoof, *The Politics of Politicking Under IRC § 501(c)(3): A Guide for Politically Active Churches*, 5 NEXUS 97, 98 (Fall 2000).

19. IRS, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 5 (2003) [hereinafter TAX GUIDE], available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf>.

20. Note that this valid interest underlying the lobbying restrictions cannot be accomplished by mere application of the IRS’s current guidelines for whether an organization constitutes a “church.” See *id.* at 23 (listing the several factors developed by the IRS and courts to determine whether an organization is in fact a church). The central concern underlying the lobbying restrictions is not whether an organization is a church; rather, the strongest policy argument in favor of the restrictions is that churches might use their tax-exempt status to engage in politically partisan activities that have nothing to do with their religious mission, and which constitute a “substantial part” of their overall activities. While this purpose may be valid, if interpreted too broadly, the lobbying restrictions would substantially curtail the ability of churches to accomplish a mission that is entirely religious.

encouraging members to get involved politically on these issues. Such an interpretation would preserve both the sanctity of the church/member relationship and the valuable stabilizing influence that religion provides in the development of public policy.

Part II of this analysis presents a background of the lobbying restrictions and then examines the current status of the restrictions by looking to both the IRS's interpretation of the restrictions and judicial precedent. After surveying the competing policies behind the lobbying restrictions, Part III argues for a narrow interpretation of the lobbying restrictions that would protect fundamental religious freedoms—particularly, the right of churches to communicate freely with church members regarding critical moral issues in society and educate them on how to get involved in shaping public policy. Finally, in Part IV, this Comment explores a real-life application of the lobbying restrictions through the lens of the past and present experiences of The Church of Jesus Christ of Latter-day Saints in attempting to influence public policy on issues of religious and moral concern. Part V offers a brief conclusion.

II. THE TAX-EXEMPT STATUS OF CHURCHES AND THE PROBLEMS OF THE RESTRICTIONS AGAINST INFLUENCING LEGISLATION

Although many churches are not politically active and remain neutral as to political candidates and parties, these churches often fulfill their religious mission by adopting strong positions on public policy issues and employing a range of direct and indirect lobbying efforts to promote these positions. To these religious entities, the tax code's restrictions on attempts to influence legislation are potentially much more harmful than even a complete ban on political campaigning. This potential for greater harm exists because the lobbying restrictions directly control the central means by which many churches and their members act on religious convictions to influence public policy.²¹ Further, the lobbying restrictions more directly involve a government determination of when religious beliefs stray from legally permissible religious actions and therefore raise

21. Generally, churches seek to influence legislation as a part of their religious mission to promote moral and religious values in society. In doing so, churches see themselves more as religious advocates than as political players. Still, the lobbying restrictions inhibit one of the most effective methods of fulfilling a church's religious mission: lobbying to change, abolish, or preserve the law.

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greater questions of government infringement upon religious freedom than does the political campaign ban.²² With this understanding in mind, this Part explores the origins, development, and current interpretations of the lobbying restrictions as applied to the tax-exempt status of churches.

A. The Tax-Exempt Status of Churches and the Origins of the Political Speech Restrictions

1. Tax-exempt status of a 501(c)(3) organization

A 501(c)(3) organization is a nonprofit entity that is exempt from paying taxes under § 501(c)(3) of the Internal Revenue Code. Tax-exempt status essentially refers to two concurrent conditions that exist as long as these organizations do not violate the tax code's restrictions: (1) these organizations are generally exempt from paying taxes²³ and (2) those who donate to these organizations may receive a deduction for their contribution.²⁴ Distinguishing these two conditions is critical because each raises different policy concerns when evaluating the relationship between tax-exempt status and the current political speech restrictions.²⁵ Much of the case law in this

22. This argument assumes, of course, that churches may more easily attach their religious beliefs to answer questions related to modern public policy debates than they can to specific political candidates or even candidates' agendas.

23. Although the nonprofit activities of churches are generally exempt, certain profit-making activities may be subject to the Unrelated Business Income Tax ("UBIT"). See TAX GUIDE, *supra* note 19, at 12–13 (explaining the general requirements for churches subject to UBIT) ("Churches and religious organizations . . . may engage in income-producing activities unrelated to their tax-exempt purposes, as long as the unrelated activities are not a substantial part of the organization's activities. However, the net income from such activities will be subject to the UBIT if [certain] conditions are met."); see also IRS, TAX ON UNRELATED BUSINESS INCOME OF EXEMPT ORGANIZATIONS (2005), available at <http://www.irs.gov/pub/irs-pdf/p598.pdf>.

24. The tax code provides a charitable deduction of up to fifty percent of an individual's taxable income for contributions to "a church or a convention or association of churches." I.R.C. § 170(b)(1)(A) (2000). The deduction provision also includes the same political speech restrictions as section 501(c)(3). See *id.* § 170(c)(2)(D) (allowing a deduction only for contributions to an organization "which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, 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").

25. For example, a 501(c)(4) organization, also known as "a social welfare organization" is also tax-exempt, but contributions to a 501(c)(4) entity are not tax deductible. *Id.* § 501(c)(4). However, "a section 501(c)(4) organization may engage in

area arises under the deduction category because individual taxpayers have the burden of proving that tax-exempt entities qualify as such.²⁶

Congress has afforded churches significant tax benefits that are not available to other traditional nonprofit organizations. Foremost among these benefits is the fact that churches automatically qualify for tax-exempt status under § 501(c)(3).²⁷ As a result, the tax code does not require them to apply for and obtain formal recognition of their tax-exempt status.²⁸ Thus, by traditional default, churches are generally not part of the federal tax base.²⁹ In addition to automatic tax-exempt status, churches enjoy other tax privileges. For example, churches are subject to less stringent annual reporting and filing

virtually unlimited lobbying activities, so long as those activities promote social welfare.” Cook, *supra* note 11, at 464–65. Because “social welfare” is broadly defined, Professor Cook suggests that a church may still engage in substantial political lobbying by forming a separate 501(c)(4) organization in addition to its 501(c)(3) organization, thus allowing the church to separate its religious and its political activities and still retain tax-exempt status. *Id.* at 473–78. The problem with this suggestion, however, is that although the IRS might classify particular activities as “political lobbying,” churches instead see their efforts as an advancement of their religious mission. Creating two separate entities, one for “religious” and one for “political” activities in essence would require the church to admit that the issues with which it is concerned are for the most part political rather than religious. Thus, the struggle continues as to whether Congress, the IRS, or churches are the proper party to make such a distinction. *See infra* notes 46–48 and accompanying text.

26. For an overview of the charitable contribution deduction as it relates to churches and the political speech restrictions, see Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843 (2001).

27. *Id.*; see also I.R.C. § 508(c)(1)(a); TAX GUIDE, *supra* note 19, at 3. Despite the automatic tax-exempt qualification of churches, the IRS suggests that churches seek formal recognition of their status as 501(c)(3) organizations for the purpose of “assur[ing] church leaders, members, and contributors that the church is recognized as exempt and qualifies for related tax benefits.” *Id.* The automatic qualification does not apply to “religious organizations,” as distinguished from “churches.” Religious organizations that do not meet the IRS criteria of a church must apply for and obtain recognition of their 501(c)(3) status to be exempt from taxation. *Id.*

28. TAX GUIDE, *supra* note 19, at 3.

29. All other organizations seeking tax-exempt status as 501(c)(3) organizations, however, must apply for formal recognition under normal IRS procedures. *See generally* IRS, TAX-EXEMPT STATUS FOR YOUR ORGANIZATION (2005) [hereinafter TAX-EXEMPT STATUS], available at <http://www.irs.gov/pub/irs-pdf/p557.pdf> (explaining the new procedures for filing a Form 1023 to obtain formal recognition as a tax-exempt 501(c)(3) organization).

Despite this traditional rule, courts have asserted that the tax-exempt status of churches is not a constitutional right but rather a matter of legislative grace. *See, e.g.*, *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.”).

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requirements,³⁰ churches benefit from specific rules limiting the IRS's authority and opportunity to audit churches,³¹ and churches are exempt from certain unemployment taxes.³² The unique tax treatment of churches³³ as compared to other nonprofits is an acknowledgement by Congress of the special role of religion in the United States. As the IRS has observed,

Congress has enacted special tax laws applicable to churches, religious organizations, and ministers in recognition of their unique status in American society and of their rights guaranteed by the First Amendment Churches and religious organizations are generally exempt from income tax and receive other favorable treatment under the tax law³⁴

2. History of church tax-exempt status and the political speech restrictions

The general history of churches' tax-exempt status in the United States and the subsequent restrictions placed on tax-exempt entities provide a foundation for the modern debate over church political speech. Tax exemptions for churches under the federal tax system existed as early as 1798.³⁵ In 1894, Congress passed the first income tax on corporations but exempted from the tax those "corporations, companies, or associations organized and conducted solely for charitable, religious or educational purposes."³⁶ Congress later

30. See TAX-EXEMPT STATUS, *supra* note 29, at 18 (explaining that churches are exempted from having to file a Form 990, the annual tax return for tax-exempt organizations).

31. See I.R.C. § 7611 (2000); *see also* TAX GUIDE, *supra* note 19, at 22.

32. See I.R.C. § 3309(b)(1).

33. Beyond the special tax rules for churches listed here, this Comment also identifies other differences in the tax treatment of churches, which differences provide insight into how to apply the lobbying restrictions to churches. For example, the tax code includes certain communications between a tax-exempt organization and its members in the list of restricted lobbying activities. However, this provision does not apply to churches. See *infra* Part II.B.2.c.

34. TAX GUIDE, *supra* note 19, at *Introduction*.

35. In 1798, Congress first recognized the validity of various state systems of exempting religious bodies from real estate taxes and other assessments. See *Walz v. Tax Comm'n*, 397 U.S. 664, 677-78 & n.5 (1970) (discussing history of religious tax exemptions in the U.S. and recognizing the historic view of "the Religion Clauses of the Constitution as authorizing statutory real estate tax exemption to religious bodies").

36. Wilson Tariff Act of 1894, Pub. L. No. 53-227, 28 Stat. 509, 556 (1894). The Supreme Court later declared this Act unconstitutional in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 586 (1895), *modified*, 158 U.S. 601 (1895). However, after the passage of the Sixteenth Amendment, the exemption again became valid after further legislation in 1913.

completed the second prong of tax-exempt status in 1917 by allowing a charitable tax deduction for contributions made to “corporations or associations organized and operated exclusively for religious, charitable, scientific, or educational purposes.”³⁷ At that time, the only restriction against such organizations was that “no part of the net income” of such charitable organizations could “inure[] to the benefit of any private stockholder or individual.”³⁸

However, in 1934, Congress for the first time passed legislation adding the restriction that “no substantial part of the activities” of a tax-exempt corporation or foundation (including churches) may consist of “carrying on propaganda, or otherwise attempting, to influence legislation.”³⁹ The original version of the bill banned tax-exempt organizations from any “participation in partisan politics.”⁴⁰ Later, this ambiguous phrase was removed in conference⁴¹ because, according to Representative Samuel B. Smith, “[w]e were afraid this provision was too broad.”⁴² Finally, in 1954, Senator Lyndon B. Johnson introduced the highly controversial campaigning restriction,⁴³ which Congress amended in 1986 to include a restriction against opposing political candidates to supplement the existing ban on endorsing candidates.⁴⁴

See Murphy, *supra* note 11, at 41–63 (describing in more detail the history of tax-exempt status for religious organizations).

37. War Revenue Act of 1917, § 1201(2), 40 Stat. 300, 330 (1917). For a more detailed history of the charitable contribution deduction, see Aprill, *supra* note 26, at 848–56.

38. War Revenue Act of 1917, § 1201(2). This restriction is still one of the conditions placed upon tax-exempt entities today. *See* I.R.C. § 501(c)(3) (2000).

39. Revenue Act of 1934, § 101(6), Pub. L. No. 73-216 (1934). This amendment was introduced by Senator David Reed of Pennsylvania who wanted to protect the interest of donors who did not desire their money to be used to finance lobbying activities. *See* Deborah J. Zimmerman, Branch Ministries, Inc. v. Rossotti: *First Amendment Considerations to Loss of Tax Exemption*, 30 N. KY. L. REV. 249, 252 (2003).

40. S. REP. NO. 73-558, at 26 (1934).

41. H.R. REP. NO. 73-1385, at 3–4 (1934) (Conf. Rep.).

42. 78 CONG. REC. 7,831 (1934) (statement of Representative Samuel B. Hill).

43. For a history of the amendment that added the political campaign restriction, see generally O’Daniel, *supra*, note 11 at 740–68 (describing the rationale behind the amendment and Johnson’s motivations for proposing it); *see also* Murphy, *supra* note 11, at 46–58 (same).

44. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085; *see also* H.R. REP. NO. 100-391, at 1621, 1625 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-1201, 2313-1205 (explaining that the rationale for the change was to promote neutrality and prevent public funds from subsidizing political activities).

B. The Lobbying Restrictions

Section 501(c)(3) of the Code mandates that “no substantial part of [a tax-exempt church’s] activities” may consist of “carrying on propaganda, or otherwise attempting, to influence legislation.”⁴⁵ Many of the problems created by this language stem from the difficulty of distinguishing sincere issue advocacy in areas of religious or moral concern from politically partisan and nonreligious lobbying efforts.⁴⁶ Some would question not only whether the government has the ability to make this distinction but also whether making such a distinction is appropriate at all.⁴⁷ These problems are compounded by the broad definition of “legislation” the IRS has adopted as well as by the vagueness of the terms “substantial” and “influence” in the tax code.⁴⁸ Although tax regulations, IRS commentary, and judicial interpretation have provided some insight into the scope of the lobbying restrictions, a clear explanation of the relationship between these restrictions and the tax-exempt status of churches remains elusive.⁴⁹ This Section examines and offers a clearer understanding of the meaning of 501(c)(3)’s restrictions against influencing legislation as they apply to tax-exempt churches.

45. I.R.C. § 501(c)(3) (2000).

46. As John Baker testified before Congress, “War and peace, human welfare, civil rights, abortion, and education are all public issues but they have attributes which make them also religious issues. The list of these areas of governmental involvement with society which some of the churches assert also demand religious involvement is almost infinite.” *Legislative Activity by Certain Types of Exempt Organizations: Hearings Before the H. Ways and Means Comm.*, 92d Cong. 283 (1972) (statement of John W. Baker, Acting Executive Director, Baptist Joint Committee on Public Affairs).

47. Michael J. Perry argues the following:

Because of the role that religious arguments about the morality of human conduct inevitably play in the political process, it is important that such arguments, no less than secular or moral arguments, be presented in—so that they can be tested in—public political debate. Moreover, it is impossible to construct ‘an airtight barrier’ between, on the one side, public culture generally—in which religiously based moral discourse is undeniably proper—and on the other, public debate specifically about controversial political issues.

MICHAEL J. PERRY, *RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES* 61 (1997).

48. *See infra* Part II.B.2.

49. *See* Steffen N. Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875, 895 (2001) (arguing that there is no “bright line between reasonable and unreasonable applications of the restrictions on tax-exempt organizations’ political activity”).

1. Establishing the constitutionality of the lobbying restrictions

Before the Supreme Court's allegedly conclusive decision regarding the lobbying restrictions in *Regan v. Taxation with Representation*,⁵⁰ courts had generally suggested that certain manifestations of religious belief in the political realm were entirely appropriate. For example, in *Girard Trust Co. v. Commissioner*,⁵¹ the Third Circuit Court of Appeals overturned the disallowance of a tax deduction for a bequest to the Board of Temperance, Prohibition, and Public Morals of the Methodist Episcopal Church. Arguably, the purpose of this organization was largely political as well as religious because the Board's goal was to promote private moral behavior.⁵²

The *Girard Trust* court faced the difficult task of applying the lobbying restrictions added to the tax code in 1934.⁵³ Questioning whether the lobbying restrictions required the complete separation of religious exercise and political participation, the court emphasized the strong relationship between religious belief and political activity:

A bright line between that which brings conviction to one person and its influence on the body politic cannot be drawn. . . . Religion includes a way of life as well as beliefs upon the nature of the world and the admonitions to be "Doers of the word and not hearers only" (James 1:22) and "Go ye therefore, and teach all nations, . . ." (Matthew 28:19) are as old as the Christian Church. The step from acceptance by the believer to his seeking to influence others in the same direction is a perfectly natural one, and it is found in countless religious groups. The next step, equally natural, is to secure the sanction of organized society for or against certain outward practices thought to be essential.⁵⁴

50. 461 U.S. 540 (1983) (establishing the constitutionality of the lobbying restrictions and the IRS's authority to enforce these restrictions).

51. 122 F.2d 108 (3d Cir. 1941).

52. The stated purpose of the organization was "to promote the cause of temperance by every legitimate means; to prevent the improper use of drugs and narcotics; to render aid to such causes as in the judgment of the board of trustees, tend to advance the public welfare." *Id.* at 112 (internal quotation marks omitted).

53. *Id.* at 108–09. The lobbying restriction at that time was identical to the language in the code today. *See id.*; I.R.C. § 501(c)(3) (2000).

54. *Girard Trust*, 122 F.2d at 110 (second omission in original). Previous to this decision, some courts had denied deductions for contributions to organizations that claimed to have religious or educational purposes, but which the courts found to have had legislative agendas involving "controversial" subjects or "partisan" propaganda. *See, e.g.*, *Leubuscher v. Comm'r*, 54 F.2d 998, 1000 (2d Cir. 1932) (denying deduction for bequest to an

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Applying this deferential standard allowing the church's Board to define and carry out its own religious mission, the *Girard Trust* court allowed the deduction for the bequest.⁵⁵ The court reasoned that the Methodist organization had a valid tax-exempt purpose and that the propaganda used to promote these goals constituted permissible religious activities not in violation of the lobbying restrictions.⁵⁶

Later, the Supreme Court's landmark decision in *Walz v. Tax Commission*,⁵⁷ which generally upheld the constitutionality of tax exemptions for religious organizations, recognized a principle similar to that articulated in *Girard Trust*: "Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right."⁵⁸ While neither *Girard Trust* nor *Walz* questioned the constitutionality of the lobbying restrictions, both cases raised important concerns about attempting to separate appropriate religious activity from substantial political advocacy.

The first major case directly addressing the constitutionality of the lobbying restrictions was *Christian Echoes National Ministry, Inc. v. United States*.⁵⁹ This case involved the revocation of a religious corporation's tax-exempt status for engaging in both extensive lobbying⁶⁰ and political campaigning.⁶¹ Reversing the lower court's

organization whose purposes involved "the dissemination of controversial propaganda"); *Noyes v. Comm'r*, 31 B.T.A. 121, 124 (1934) (denying deduction for contribution to an organization whose national body had "supported a particular view upon subjects extremely controversial in their nature" and whose local body "was active in supporting and opposing bills in the state legislature which were controversial in nature"); *Forstall v. Comm'r*, 29 B.T.A. 428, 436 (1933) (determining that the organization's purpose was not educational because it promoted only one side of "a highly controversial question"); *Appeal of Fales*, 9 B.T.A. 828, 832 (1927) (affirming tax commissioner's disallowance of deduction for contribution to organizations "formed to disseminate controversial or partisan propaganda"). However, these cases were decided before the addition of the lobbying restrictions in the tax code and mostly involved a traditional charitable trust analysis. *Girard Trust* is significant because it involved a direct analysis of the lobbying restrictions as they relate to deductions for donations to a religious organization.

55. *Girard Trust*, 122 F.2d at 111.

56. *Id.* at 110–11.

57. 397 U.S. 664 (1970).

58. *Id.* at 670.

59. 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

60. Although some of the lobbying efforts engaged in by the corporation involved religious issues (i.e., school prayer), *id.* at 854, the organization also actively supported and

holding that the denial of tax-exempt status violated the Free Exercise Clause,⁶² the Tenth Circuit held that the religious sincerity of the organization was irrelevant and that Congress had adopted the lobbying restrictions as a valid limitation on the organization's rights of free speech and free exercise.⁶³ Without citing any legislative history, however, the court also declared what it saw as the overriding congressional policies behind the political speech restrictions: political neutrality⁶⁴ and the separation of church and state.⁶⁵ The *Christian Echoes* decision was expansive because, for the first time, a court had upheld the revocation of a religious entity's tax-exempt status for substantially engaging in both indirect and direct lobbying, as well as political campaigning. Nonetheless, the relative importance of and policies behind the two political speech restrictions remained unknown until the Supreme Court had the opportunity to exclusively examine the lobbying restrictions.

Not until 1983 did the Supreme Court specifically address the constitutionality of the lobbying restrictions and the IRS's authority to enforce them. In *Regan v. Taxation with Representation*,⁶⁶ the Court upheld the IRS's denial of tax-exempt status to a newly organized nonprofit corporation solely because a substantial part of its intended activities would consist of attempts to influence

campaigned for legislative action on dozens of issues that in the court's view had nothing to do with religion—including the abolition of the income tax, U.S. withdrawal from the United Nations, and certain immigration laws, *id.* at 855.

61. *Id.* at 856 (discussing the corporation's support of and opposition to several candidates for political office).

62. The Tenth Circuit determined "that the trial court's findings of fact and conclusions of law in this area are clearly erroneous." *Id.* at 857. The lower court had found that only one of the activities of the church could appropriately be classified as "lobbying." *Id.* at 853.

63. *Id.* at 856–57.

64. *Id.* at 854 ("The limitations in Section 501(c)(3) stem from the Congressional policy that the United States Treasury should be neutral in political affairs and that substantial activities directed to attempts to influence legislation or affect a political campaign should not be subsidized." (emphasis omitted)). Interestingly, this was the same language that Congress would later adopt as its formally stated policy behind the political speech restrictions. See H.R. REP. NO. 100-391, at 1621, 1625 (1987), as reprinted in 1987 U.S.C.C.A.N. 2313-1, 2313-1201, 2313-1205.

65. *Christian Echoes*, 470 F.2d at 857 ("The free exercise clause of the First Amendment is restrained only to the extent of denying tax exempt status and then only in keeping with an overwhelming and compelling Governmental interest: That of guarantying that the wall separating church and state remain high and firm.").

66. 461 U.S. 540 (1983).

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legislation.⁶⁷ Focusing on tax-exempt status as a “form of subsidy,”⁶⁸ the Court held tightly to two important principles: (1) the First Amendment does not require the government to subsidize lobbying⁶⁹ and (2) “a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.”⁷⁰ Based on this subsidy framework, the Court concluded that the lobbying restrictions neither created an unconstitutional burden of free speech rights under the First Amendment⁷¹ nor violated equal protection under the Fifth Amendment.⁷² Ultimately, the Court reasoned that “Congress chose not to subsidize lobbying *as extensively* as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare.”⁷³

Although *Regan* provides some insight into the Supreme Court’s use of the subsidy model to analyze the lobbying restrictions, the decision is not entirely conclusive as to religious entities because the nonprofit corporation in *Regan* was not a church and had no religious purpose. Therefore, the Supreme Court has yet to decide the meaning of the lobbying restriction as applied to churches and their free-exercise rights. Nonetheless, the question of when and how a church’s lobbying activities constitute substantial attempts to influence legislation has been left largely to the IRS as the regulatory body with authority to provide such answers.

67. *Id.* at 550–51. The organization’s stated position was that it would “advocate its point of view before Congress, the Executive Branch, and the Judiciary.” *Id.* at 542.

68. *Id.* at 544. The Court described the similarity between a governmental cash subsidy and the two conditions of tax-exempt status—exemption from paying taxes and deductibility of contributions: “A tax exemption 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. Deductible contributions are similar to cash grants of the amount of a portion of the individual’s contributions.” *Id.* However, the Court did note that by using this comparison, it “of course [did] not mean to assert that they are in all respects identical.” *Id.* at 544 n.5.

69. *Id.* at 546 (citing *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (holding that the denial of a business-expense deduction for lobbying is constitutional but that attempting to deny all deductions for business expenses to a taxpayer would unconstitutionally burden First Amendment rights)).

70. *Id.* at 549.

71. *Id.* at 545–46.

72. *Id.* at 546–51.

73. *Id.* at 544 (emphasis added). Interestingly, even under this subsidy model, the Court implicitly recognized the validity of *some* subsidization of lobbying activities by tax-exempt organizations.

2. Broad meaning of "influence legislation"

Under its statutory authority to "prescribe all needful rules and regulations,"⁷⁴ the IRS has attempted to promulgate regulations that adequately define the scope of the lobbying restrictions.⁷⁵ These regulations attribute the label of "action organization"⁷⁶ to any 501(c)(3) entity that fails to qualify as a tax-exempt entity because it engages in substantial attempts to influence legislation.⁷⁷ Although these regulations offer some examples of church activities that constitute attempts to "influence legislation," the regulations do not adequately define the relevant scope of church activities that are appropriate. Thus, churches are, for the most part, left in the dark as to what types of and how much direct or indirect lobbying they can engage in without risking the loss of their tax-exempt status.

a. Defining "legislation." The first problematic issue created by the regulations is the extremely broad definition of the term "legislation." The regulations state that "legislation . . . includes action by the Congress, by any State legislature, by any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure."⁷⁸ This definition encompasses any "action" of virtually every legislative body at all levels of government, effectively covering everything from congressional hearings to city council meetings. The definition's inclusion of the lawmaking capacity of the people themselves (i.e., referenda and ballot initiatives) is indicative of the potential severity of the lobbying restrictions because it possibly implicates a church's influence on not only the general populace but also individual church members and congregations. Further, the listed examples of legislation cannot be all-inclusive because the definition merely states that legislation "includes" these items while leaving open the possibility that other "similar procedure[s]" may constitute legislation. Perhaps more notable is the lack of an exception for those legislative processes that directly affect the rights of a church or

74. I.R.C. § 7805(a) (2000).

75. Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii), (iv) (as amended in 1990).

76. An "action organization" is not tax-exempt because it is "not operated exclusively for one or more exempt purposes." *Id.* § 1.501(c)(3)-1(c)(3)(i).

77. *Id.* § 1.501(c)(3)-1(c)(3)(ii).

78. *Id.*

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group of churches⁷⁹—including laws affecting the free exercise of religion, the legal recognition of religious entities, or even the taxation of churches. Under this definition, churches hesitant to test the murky waters of § 501(c)(3)'s vague standard for determining how much lobbying is too much lobbying⁸⁰ are left only with the remedies available through executive or judicial branches.⁸¹

b. The scope of “influencing legislation.” The core of the tax-exempt lobbying regulations promulgated by the IRS provides that “[a]n organization is an action organization [and therefore not tax-exempt] if a substantial part of its activities is *attempting to influence legislation* by propaganda or otherwise.”⁸² While the regulations do

79. The definition of “influencing legislation” found in § 4911 of the Internal Revenue Code does make an exception for “appearances before, or communications to, any legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization.” I.R.C. § 4911(d)(2)(C). However, this section does not apply to churches. *See* I.R.C. § 501(h)(7); *see also infra* Part II.B.2.c.

80. The IRS subjectively applies the vague statutory test of § 501(c)(3) to determine the point at which a church’s lobbying activities constitute a “substantial part” of its overall activities. I.R.C. § 501(c)(3). If the activities constitute only an insubstantial portion of the overall activities, the church is in no danger of losing its tax-exempt status. This Comment refers to this test simply as the “insubstantiality test.” *See* discussion *infra* Part II.B.3.

81. Bruce Hopkins points out that the restrictions do not prohibit 501(c)(3) organizations from lobbying the executive branch: “[T]hese rules do not apply to attempts to influence the executive branch or independent regulatory agencies of a government. Thus, this body of law is generally inapplicable to attempts to influence the development of regulations, rules, form instructions, and the like.” BRUCE R. HOPKINS, *PLANNING GUIDE FOR THE LAW OF TAX-EXEMPT ORGANIZATIONS* 108 (2004). He also points out that “the rules generally do not apply to attempts to influence the judicial branch of a government. This type of advocacy usually constitutes the preparation and filing of amicus curiae briefs or other participation in litigation.” *Id.*

82. Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (as amended in 1990) (emphasis added). Some have interpreted the scope of “influencing legislation” to include an element of both specificity and subjectivity:

If a policy-related, political communication displays both specificity and subjectivity, it will be held to be an attempt to influence legislation. Specificity refers to the relationship between the communication and a concrete policy objective. The IRS does not equate efforts to alter general societal attitudes with efforts to influence legislation. Instead, an organization violates the specificity test only if its political message encourages specific legislative action or calls for a policy change that could occur only through legislative action. . . .

In contrast, the subjectivity test focuses on the methods of persuasion rather than the message itself. The test represents an attempt to identify communications that employ argument rather than fact in advocating particular positions. It treats factual analysis and logical reasoning as less egregious methods of influencing legislation than appeals to emotion and normative judgments.

not provide the scope or limitations of what constitutes propaganda or attempts to influence legislation, they do provide two general examples of these lobbying activities. The regulations characterize a tax-exempt entity as having attempted to influence legislation if it “(a) [c]ontacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; *or* (b) [a]dvocates the adoption or rejection of legislation.”⁸³ The IRS has provided some additional guidance on the meaning of these examples. For example, the IRS does not automatically deem all church involvement in issues of public policy to be lobbying.⁸⁴ Further, the IRS takes the position that church leaders are not “prohibited from speaking about important issues of public policy,”⁸⁵ and churches may “otherwise consider public policy issues in an educational manner without jeopardizing their tax-exempt status.”⁸⁶

Despite these somewhat helpful hints, the answers to several important questions remain unclear, including (1) what church activities or statements constitute “advocacy” as opposed to “educational” communications, (2) whether church members are included as part of “the public,” and (3) where to draw the line between speaking out on important issues of public policy and advocating or opposing legislation.⁸⁷ Without clear answers to these

Developments in the Law—Political Activity of Nonprofit Corporations, 105 HARV. L. REV. 1656, 1661 (1992). While elements of specificity and subjectivity might have a role in determining whether a given activity constitutes an attempt to influence legislation, the IRS has not formally adopted such an interpretation of the lobbying restrictions.

83. Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii)(a)–(b) (emphasis added). The IRS’s *Tax Guide for Churches and Religious Organizations* also includes contacting employees of a legislative body as a restricted activity. TAX GUIDE, *supra* note 19, at 6 (“A church or religious organization will be regarded as *attempting to influence legislation* if it contacts, or urges the public to contact, members *or employees* of a legislative body for the purpose of proposing, supporting, or opposing legislation, or if the organization advocates the adoption or rejection of legislation.” (second emphasis added)). Another IRS publication similarly broadens the field to include “any member or employee of a legislative body . . . who may participate in the formulation of legislation.” TAX-EXEMPT STATUS, *supra* note 29, at 45.

84. TAX GUIDE, *supra* note 19, at 6.

85. *Id.* at 7.

86. *Id.* at 6. “For example, churches may conduct educational meetings [or] prepare and distribute educational materials.” *Id.* The IRS does not define what “educational” means in this context.

87. Courts have used conflicting language when attempting to make these distinctions. For example, the D.C. Circuit held that a § 501(c)(3) organization could retain its tax-exempt status if it “studies an issue touching on legislation, reaches a conclusion with respect to that

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questions, churches are wary of possible attempts to enforce strict interpretations of the lobbying restrictions and therefore do not engage in influencing or participating in crucial public policy debates to the extent that they would otherwise. Therefore, the ambiguity of these regulations has the effect of discouraging at least some churches from expressing opinions on modern policy issues or engaging in activities that promote their religious beliefs that the IRS may classify as lobbying.

c. Why other definitions of “influencing legislation” do not and should not apply. Other examples of attempts to influence legislation appear in the tax code, but these examples do not apply to churches. Section 501(h) of the tax code provides a lobbying expenditure test that allows certain tax-exempt organizations to definitively ascertain whether they are in compliance with the lobbying restrictions.⁸⁸ For those organizations choosing to make this expenditure test election, § 501(h) replaces the vague insubstantiality test of § 501(c)(3)⁸⁹ with the precise amount of lobbying spending in which these entities may engage without losing tax-exempt status and paying certain tax penalties.⁹⁰

Because the § 501(h) standard is much more concrete, more specific definitions of what constitute attempts to influence legislation are necessary to make the expenditure calculations. These special definitions are found in § 4911.⁹¹ In providing specific examples of activities that constitute attempts to influence legislation, § 4911 includes communications between a tax-exempt entity and its members that either encourage members to engage in their own political lobbying efforts or urge members to encourage

issue, and then argues the merits of that conclusion.” *Fund for the Study of Econ. Growth and Tax Reform v. IRS*, 161 F.3d 755, 760 n.9 (D.C. Cir. 1998). In the same breath, the court held that a § 501(c)(3) organization could not retain its tax-exempt status if it “assumes a conclusion with respect to a highly public and controversial legislative issue and then goes into the business of selling that conclusion.” *Id.* Unfortunately, the court does not explain why arguing the merits of a conclusion does not constitute advocacy while attempting to sell that conclusion does constitute advocacy. Further, it should make no difference that the issue is “highly public and controversial,” *id.*, because the tax code does not distinguish between contentious and noncontentious issues.

88. I.R.C. § 501(h) (2000).

89. For a discussion of the insubstantiality test, see *infra* Part II.B.3.

90. I.R.C. § 501(h); see also TAX-EXEMPT STATUS, *supra* note 29, at 45–46 (providing the detailed rules regarding the lobbying expenditure test).

91. I.R.C. § 4911(d).

nonmembers to do so.⁹² This restriction against grassroots lobbying,⁹³ however, does not apply to churches because the Internal Revenue Code establishes that churches cannot make the § 501(h) election⁹⁴ and the definitions and examples of §§ 501(h) and 4911 do not apply to churches or any other tax-exempt entity that does not make the expenditure test election.⁹⁵

92. *Id.* § 4911(d)(3)(A)–(B).

93. These limitations on membership communications are part of the Code’s restriction against “grass roots lobbying communication,” which includes “any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof.” Treas. Reg. § 56.4911-2(b)(2)(i) (1990). To constitute “grassroots lobbying,” a communication must (1) refer to specific legislation, (2) express a view on such legislation, and (3) encourage the recipients of the communication to take action regarding the legislation. *Id.* § 56.4911-2(b)(2)(ii). As this Section explains, however, these grassroots lobbying restrictions (with their accompanying limitations on internal membership communication) fortunately do not apply to churches. I.R.C. § 501(h)(5). The fact that Congress specifically excluded churches from the restrictions against grassroots lobbying is recognition of the role that religion itself plays in shaping the opinions of the general public. To mandate that churches not engage in attempts to influence the public would substantially impair the religious mission of several churches who wish to spread their message. Whether that religious message somehow relates to or even affects the outcome of controversial public policy debates should have no bearing on a church’s tax-exempt status. As Dean Kelley argues,

Churches are bound by their sense of mission, their consecrated obedience to God, to speak out on issues where the well-being of persons is at stake, to proclaim what they believe is the right and moral course for the whole society and what will benefit everyone, not just themselves or their members. Churches were doing this sort of thing before there were legislatures or lobbies, and they will continue to do so—despite whatever odds or obstacles—as long as there are churches.

KELLEY, *supra* note 7, at 86.

94. I.R.C. § 501(h)(5)(A) (describing churches as “disqualified organizations” and citing *id.* § 170(b)(1)(A)(i)); *id.* § 501(h)(7).

95. “[N]othing in [section 501(h)] or in section 4911 shall be construed to affect the interpretation of the phrase, ‘no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation,’ under [section 501(c)(3)].” *Id.* § 501(h)(7). Application of some of the language in § 4911 to churches could be helpful to those seeking to stay within the boundaries of the lobbying restrictions. For example, § 4911 makes an exception for appearances before or communications with legislative bodies making decisions directly affecting the rights and authorities of the organization. *See id.* § 4911(d)(2)(C); Treas. Reg. § 56.4911-2(c)(4). However, application of § 4911 to churches would have a detrimental effect on the communicative relationship between a church and its members that would far outweigh the law’s benefits. As the IRS explains, § 4911 excludes “communications between an organization and its bona fide members about legislation or proposed legislation of direct interest to the organization and the members, unless these communications directly encourage the members to attempt to influence legislation or directly encourage members to urge nonmembers to attempt to influence legislation.” TAX-EXEMPT STATUS, *supra* note 29, at 45. Although application of this exception to churches would allow them to influence legislation directly affecting their rights, the disallowance of open and free communication within an organization would be much more harmful to the religious rights of churches.

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If this restriction against internal grassroots lobbying applied to churches, it would significantly restrict the ability of churches to communicate with their members regarding important public policy issues. Not allowing churches and religious leaders to urge church members to take action on certain issues would render the ability to discuss such issues in a religious setting the equivalent of an empty right. In essence, churches could tell members that a public policy issue is important and even take a strong position on that issue, but they could not invite members to act on their religious convictions to support or oppose laws in accordance with that position.

This restriction, however, does not apply to churches. Instead, Congress made a conscious decision not only to exclude churches from being able to make the § 501(h) election but also to make § 4911's definition of "attempting to influence legislation" inapplicable to churches.⁹⁶ By so doing, Congress recognized the special relationship that churches have with their members, as well as the problem of government interference with that relationship. In enforcing the lobbying restrictions against churches, the IRS does not even have the option of applying the § 4911 restriction against internal grassroots lobbying because § 4911's definition of attempts to influence legislation does not apply to tax-exempt organizations still bound by the insubstantiality test of § 501(c)(3).⁹⁷ Therefore, internal communications between churches and their members do not and should not have any effect on whether a church is engaging in substantial lobbying activities under the tax code.

The question, however, is whether the IRS may independently deem such internal communications between churches and their members as being within the scope of the lobbying restrictions. Such a possibility is troubling and highlights the need for Congress or the IRS to voluntarily clarify any remaining uncertainty in this area. Ultimately, the definition of legislation is so broad, and the regulations regarding church lobbying activities so vague, that churches seeking to influence public policy in any respect will likely have to rely on the protections of the insubstantiality test.

96. See I.R.C. § 501(h)(7).

97. See *supra* note 95.

3. The “insubstantiality” test

The greatest source of confusion in applying the lobbying restrictions to churches is the insubstantiality test of § 501(c)(3).⁹⁸ The loss or denial of a church’s tax-exempt status may occur when (1) the church’s articles of incorporation authorize the organization to have a substantial part of its activities consist of attempts to influence legislation,⁹⁹ or (2) the IRS makes an independent determination that the church has done so in the past.¹⁰⁰ As mentioned above,¹⁰¹ churches are not able to elect the lobbying expenditure test of § 501(h) and therefore must grapple with determining what constitutes a substantial part of their activities that attempt to influence legislation.¹⁰² This Section examines both IRS and court interpretations of this test.

a. The IRS’s insubstantiality test. The IRS has offered little interpretation of the insubstantiality test, stating simply that churches “may engage in some lobbying, but too much lobbying activity risks loss of tax-exempt status.”¹⁰³ Still, the IRS has revealed certain factors that it will take into account when applying this test:

Whether a church’s or religious organization’s attempts to influence legislation constitute a substantial part of its overall activities is determined on the basis of all the pertinent facts and circumstances in each case. The IRS considers a variety of factors, including the time devoted (by both compensated and volunteer workers) and the expenditures devoted by the organization to the activity, when determining whether the lobbying activity is substantial.¹⁰⁴

Despite this minimal guidance, the IRS’s standard in applying the insubstantiality test appears open to interpretation as churches struggle to determine at what point their lobbying activities endanger their tax-exempt status. In the end, the IRS has concluded

98. I.R.C. § 501(c)(3) (prohibiting churches from engaging in lobbying by demanding that such efforts constitute “no substantial part of the [church’s] activities”).

99. See Treas. Reg. § 1.501(c)(3)-1(b)(3)(i). This is known as the “organizational test.”

100. See *id.* § 1.501(c)(3)-1(c)(3)(ii). This is known as the “operational test.”

101. See *supra* note 94 and accompanying text.

102. See I.R.C. § 501(h)(5)(A).

103. TAX GUIDE, *supra* note 19, at 5.

104. *Id.* at 6.

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that “there is no simple rule as to what amount of activities is substantial.”¹⁰⁵

Several possible interpretations of the IRS standard demonstrate the problems associated with interpreting the lobbying restrictions. One explanation of the IRS’s insubstantiality test is that it is simply a quantitative calculation: adding up the amount of the church’s time and resources spent on influencing legislation and comparing that figure with the total time and resources spent on all activities of the church. Using this method, however, the IRS would still have to subjectively determine at what point this figure becomes “substantial.” Further, because neither the IRS nor the courts have determined within which organizational level or geographic area the insubstantiality test applies, the assumption is that substantiality is determined by examining the activities and spending of the entire organization in every geographic area in which it exists.

Another interpretation of the test might focus more on qualitative factors, thus overlapping the substantive test of what activities constitute attempts to influence legislation with a subjective determination of whether those activities are “substantial.” In performing such a qualitative analysis, however, the IRS likely would have to examine the actual importance, effect, or even results of the church’s lobbying activities, as well as the issues at which the efforts are directed. Such an interpretation would allow the IRS to make arbitrary—and possibly politically motivated—decisions as to which issues were important enough to merit “protection” from religion and how much of an effect churches can actually have on the legislative process. This standard could also be troublesome because it might tend to punish those churches that are more successful in advocating their position while leaving unscathed those churches that are not as effective at lobbying. Further, this interpretation of the test seems to contradict the statutory language—which questions not whether the activities themselves are *substantial* but whether the activities constitute a *substantial part* of a church’s overall activities.¹⁰⁶

One final approach the IRS might take—and likely the most difficult—is to attempt to distinguish between a church’s central religious mission and its ancillary political message by examining

105. Internal Revenue Manual, pt. 7, ch. 7.25.3.17.1.2(1) (Feb. 2, 1999).

106. See I.R.C. § 501(c)(3).

“the relative place of the organization’s lobbying activities in its larger agenda.”¹⁰⁷ However, by using a church’s own beliefs and doctrines as a benchmark for whether its attempts to influence legislation are substantial, the IRS engages in the risky business of drawing concrete lines between the religious and the political where such lines do not always exist. In any case, while it is unclear what criteria the IRS may utilize in applying “all of the pertinent facts and circumstances” outside of the qualitative measures that the IRS currently provides, the potential for arbitrary decision-making creates opportunity for abuse. Fortunately, the IRS has not substantially abused its discretion in this area.¹⁰⁸

b. Court interpretations of the insubstantiality test. Several judicial opinions have offered independent interpretations of the test, although few have done so in the context of religious organizations. Many courts have utilized the percentage test to make a quantitative determination of whether an organization’s lobbying activities are substantial. For example, the Sixth Circuit in *Seasongood v. Commissioner* established a substantiality threshold of five percent.¹⁰⁹ The court held that because less than five percent of the tax-exempt entity’s “time and effort” went to lobbying activities, the activities “were not in relation to all of its other activities substantial.”¹¹⁰ In calculating the total time and effort expended on lobbying activities, some courts have also looked to the organization’s time spent not only in conveying a political message to legislative bodies or the public but also in formulating and preparing that message.¹¹¹ Another group of opinions simply focus on total lobbying expenditures rather than time and effort. For example, the United States Tax Court in *World Family Corp. v. Commissioner* seemed to raise the five-percent standard when it reversed the IRS’s denial of

107. Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code’s Treatment of Legislative Activities*, 71 TEX. L. REV. 1269, 1280 (1993). This assumes, of course, that the church’s primary mission is not to engage in the promotion or rejection of legislation, which the IRS automatically considers not to be a tax-exempt purpose.

108. See Vaughn E. James, *Reaping Where They Have Not Sowed: Have American Churches Failed To Satisfy the Requirements for the Religious Tax Exemption?*, 43 CATH. LAW. 29, 47 (2004) (arguing that “the Service and the courts have not stringently enforced the [political speech] limitations”).

109. 227 F.2d 907, 912 (6th Cir. 1955).

110. *Id.*

111. See, e.g., *League of Women Voters v. United States*, 180 F. Supp. 379 (Ct. Cl. 1960).

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tax-exempt status to a nonprofit corporation whose primary purpose was to provide interest-free loans to the missionaries of a church.¹¹² Although other nonreligious activities of the nonprofit corporation constituted approximately ten percent of the total expenditures, the court nonetheless held that these activities were “insubstantial and as such not an obstruction to tax exempt status under section 501(c)(3).”¹¹³

Other courts have moved away from an exclusively quantitative analysis toward a more qualitative approach. The Tenth Circuit in *Christian Echoes National Ministry, Inc. v. United States* seemed to reject explicitly the percentage test in favor of a broader analysis:

The political activities of an organization must be balanced in the context of the objectives and circumstances of the organization to determine whether a *substantial* part of its activities was to influence or attempt to influence legislation. A percentage test to determine whether the activities were substantial obscures the complexity of balancing the organization’s activities in relation to its objectives and circumstances.¹¹⁴

Some courts have attempted to perform this balancing test while still utilizing the percentage test as a part of their determination of whether an entity’s lobbying activities are substantial. For example, the court in *Haswell v. United States* upheld the IRS’s denial of a deduction for a taxpayer’s donation to an association organized “to preserve, improve, and expand railroad passenger service.”¹¹⁵ Although the opinion quoted approvingly of *Christian Echoes* in declaring that “[a] percentage test to determine whether the activities are substantial is not appropriate,”¹¹⁶ the court’s analysis later shifted to actually include a percentage comparison of the charitable organization’s activities. Prefacing this adjusted reasoning, the court commented that “[a]lthough a percentage test is not determinative of substantiality,” the “allocat[ion of] expenditures among the various classes of functions is crucial to the ultimate

112. 81 T.C. 958, 959–60 (1983).

113. *Id.* at 967–68.

114. 470 F.2d 849, 855 (10th Cir. 1972) (citation omitted), *cert. denied*, 414 U.S. 864 (1973). For a discussion of the facts and reasoning behind the Tenth Circuit’s decision, see *supra* notes 59–65 and accompanying text.

115. 500 F.2d 1133, 1136 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975).

116. *Id.* at 1142.

determination.”¹¹⁷ The court then proceeded to calculate that the organization’s lobbying activities comprised between 16.6% and 20.5% of its total expenditures for the years in question.¹¹⁸

Ultimately, the *Haswell* decision upheld the disallowance of the taxpayer’s deduction by combining a percentage analysis with an assessment of whether the organization’s legislative program was a primary objective in its overall operations.¹¹⁹ The *Haswell* decision underscores the practical reality of insubstantiality test jurisprudence: although courts nominally may claim to engage in a multifaceted balancing test, the crux of the analysis boils down to the time and money spent by an organization on lobbying activities.

Thus, case law has failed to delineate any clearer standard beyond what Congress and the IRS have already provided. Nonetheless, two conclusions are apparent from the current interpretations of the lobbying restrictions. First, a church that spends only a minimal percentage of its time, funds, and activities to influence legislation is not in any real danger of losing its tax-exempt status. Second, a church’s attempts to influence legislation that are only ancillary to or a small part of the central religious mission of the church also pose no threat to the church maintaining its 501(c)(3) status.

III. FRAMING THE ISSUE: POLICIES UNDERLYING THE LOBBYING RESTRICTIONS AND THE NEED FOR A NARROW INTERPRETATION

With this legal understanding of the problems associated with interpreting the statutes, regulations, and case law that embody the lobbying restrictions, the analysis now turns to an examination of the competing policies underlying the tax-exempt status of churches in relation to these restrictions. The purpose of this Part is to identify the common threads of misunderstanding in applying the lobbying restrictions and to suggest possible clarifications that will protect the religious rights of churches to (1) freely communicate with their members about important policy issues and (2) encourage members to act on religious beliefs in shaping public policy.

117. *Id.* at 1146.

118. *Id.*

119. *Id.* at 1146–47.

A. Establishing an Analytical Framework

Although modern commentators, courts, the IRS, and even Congress have weighed in on the policies underlying the lobbying restrictions, no consensus has been reached in establishing a proper framework for applying the lobbying restrictions to churches. Groups on both sides of the debate continue to frame the issue in policy terms favorable to their interpretation.

Those who support unrestricted political speech of churches view any restriction against a church's political advocacy as diametrically opposed to both church autonomy¹²⁰ and each of the rights guaranteed by the First Amendment.¹²¹ These "religious free-speech advocates"¹²² assert that the political involvement of churches should have no bearing on tax-exempt status because the policies underlying favorable tax treatment of churches have nothing to do with whether churches engage in political speech. Specifically, by claiming that churches are not part of the tax base, this group refutes the notion that churches are simply another participant in a group of secular charitable organizations.¹²³ They maintain that establishing restrictions on the political speech of churches in exchange for tax-exempt status is the equivalent of "buying the churches' silence" on political issues.¹²⁴

At the opposite end of the spectrum are those who claim that the real threat lies in allowing tax-exempt religious organizations to engage in partisan politics on the public dole. These "separationists" endorse the automatic removal of tax-exempt status for churches

120. See *infra* Part III.A.6 (summarizing the autonomy arguments for unrestricted political speech by churches). For an overview of the numerous issues associated with the principle of church autonomy, see Brett G. Scharffs, *The Autonomy of Church and State*, 2004 BYU L. REV. 1217, 1259–86.

121. U.S. CONST. amend. I (guaranteeing that Congress will not make laws prohibiting the free exercise of religion, or abridging the freedom of speech, the right of peaceable assembly, and the right to petition the government).

122. This analysis will utilize the term "religious free-speech advocates" to generally identify the position of those that oppose political speech restrictions against churches.

123. See *infra* notes 136–140 and accompanying text.

124. Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 778 (2001); see also Lee, *supra* note 4, at 434 (arguing that the tax code "pays churches through tax-exempt status to be silent on issues deemed by the state to be political").

engaging in any type of political activity.¹²⁵ Those who defend this separationist position contend that the realm of tax-exempt religious activity and ecclesiastical speech must remain completely detached from the political realm—including not only political campaigning but also the creation and implementation of public policy. Without strict enforcement of the current restrictions against churches' political speech, separationists argue, religious entities would have an unchecked ability to promote their partisan agenda as publicly subsidized "political machines."¹²⁶

This Section examines the arguments of the separationist and religious free speech positions through the rubric of six current models for scrutinizing the lobbying restrictions as a condition of churches' tax-exempt status. These models include subsidization, tax-base definition, accommodation, entanglement, neutrality, and autonomy.¹²⁷ Although each school of thought attempts to frame the issue in terms of one model or another, this Section demonstrates that both sides in the debate can make valid arguments under each model. Ultimately, however, this Comment argues that each of these models provides further support for allowing religious entities to voice their opinions on moral issues and to encourage their members to act on their beliefs in shaping public policy.

125. Although the term "separationist" encompasses a broad variety of views regarding the separation of church and state, this term will be used throughout this analysis merely to describe the general position of those who favor restrictions against church participation in the political arena, particularly in the development of public policy.

126. *See, e.g.*, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, RELIGION, PARTISAN POLITICS AND TAX EXEMPTION: WHAT FEDERAL LAW REQUIRES—AND WHY 2 (arguing that "[m]ixing religion and partisan politics could lead to religious majoritarianism and divisiveness" and result in churches "form[ing] a political machine") available at http://www.au.org/site/DocServer/Religion_Partisan_Politics_And_Tax_Exemption.pdf (last visited Feb. 1, 2006).

127. This Comment does not suggest that these six are the only models by which to examine the lobbying restrictions, nor does it argue that any one model is exclusive as all of the models are meant to overlap, complement, and compete with each other to inform the analysis. For example, although the analysis explores entanglement theory, the other two prongs of the Supreme Court's infamous *Lemon* test are noticeably missing—namely, a secular purpose test and a primary effect analysis. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). The analysis could also be informed by Justice O'Connor's endorsement test or Justice Kennedy's coercion test. *See Agostini v. Felton*, 521 U.S. 203, 234 (1997) (outlining the endorsement test); *Lee v. Weisman*, 505 U.S. 577, 588–90 (1992) (discussing the coercion test). Nonetheless, the six models identified herein are the most common for examining issues related to tax-exempt status.

115] *Political Silence at Church and the Lobbying Restrictions*1. *The subsidization model*

This first model portrays the tax-exempt status of churches as a type of government subsidy.¹²⁸ The subsidization theory, described by some as “the most widely-accepted theory” in support of the tax-exempt status of churches,¹²⁹ at least has gained widespread recognition in the courts.¹³⁰ Under this model, tax exemption is possible because the government enters a quid-pro-quo relationship¹³¹ with tax-exempt entities by offering 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.”¹³²

Separationists argue that these “public purposes” include only charitable services that the government would need to provide if tax-exempt entities did not do so—such as care for the poor, emergency relief, or youth assistance programs.¹³³ This position contends that to subsidize church activity beyond this charitable purpose and allow tax-exempt churches the opportunity to influence legislation would be to create a publicly funded political machine controlled by religion,¹³⁴ which would constitute an unconstitutional establishment of religion.¹³⁵

128. Edward A. Zelinsky, *Are Tax “Benefits” for Religious Institutions Constitutionally Dependent on Benefits for Secular Entities?*, 42 B.C. L. REV. 805, 809 (2001) (articulating in more detail the theory behind the subsidization model).

129. Murphy, *supra* note 11, at 64. Some have criticized the subsidization model as not providing a proper framework for examining tax-exempt status: “While [the term] ‘subsidy’ is accurate terminology from the standpoint of the pure economics of the matter, it misconstrues and distorts the larger (and far more important) political philosophical rationalization for tax exemption for nonprofit organizations.” BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 20 (8th ed. 2003).

130. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983); *Regan v. Taxation with Representation*, 461 U.S. 540, 545, 546 (1983); *Christian Echoes Nat’l Ministry, Inc. v. United States*, 470 F.2d 849, 854, 857 (10th Cir. 1972).

131. *See, e.g.*, *Episcopal Camp Found., Inc. v. Hope*, 666 A.2d 108, 110 (Me. 1995) (quoting *YMCA v. City of Phila.*, 187 A. 204, 210 (Pa. 1936) (describing the relationship as “quid pro quo”)).

132. *Bob Jones Univ.*, 461 U.S. at 588 (emphasis added).

133. *See, e.g.*, Murphy, *supra* note 11, at 63 (“A tax-exempt entity is given special tax treatment because it performs services for the community that, in the absence of that entity, the government would need to provide.”).

134. *See supra* note 126.

135. Professor Zelinsky has demonstrated that the modern doctrine adopted by the Supreme Court “is that exemptions, exclusions, and deductions limited to religious actors and activities constitute unconstitutional subsidies in violation of the Establishment Clause.”

On the other hand, religious free-speech advocates argue that government gives a tax benefit (subsidy) to churches not merely because of charitable services that churches offer but, more importantly, because of the critical and protected role that religion plays in society.¹³⁶ The Supreme Court in *Walz v. Tax Commission* recognized that churches, as well as other tax-exempt organizations, provide “beneficial and stabilizing influences in community life.”¹³⁷ Nonetheless, the Court distinguished churches from all other charitable organizations by recognizing that religious organizations “exist in a harmonious relationship to the community at large” and advance the “moral or mental improvement” of society.¹³⁸ Accordingly, the Court determined that it was “unnecessary to justify the tax exemption on the social welfare services or ‘good works’ that some churches perform for parishioners and others.”¹³⁹ Thus, there is at least some support for the argument that because churches have a stabilizing influence on society and provide moral

Zelinsky, *supra* note 128, at 834–35; *cf.* *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989) (“[W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, . . . it ‘provide[s] unjustifiable awards of assistance to religious organizations’ and cannot but ‘conve[y] a message of endorsement’ to slighted members of the community.” (quoting *Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O’Connor, J., concurring))).

136. Deirdre Dessingue describes the critical role that churches play in positively shaping the moral and civic behavior of the nation’s citizens:

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

Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; To What End?*, 42 B.C. L. REV. 903, 923 (2001) (quoting Joseph Cardinal Bernardin, Archbishop of Chicago, *Role of the Religious Leader in the Development of Public Policy*, Address at the ABA Annual Convention, Chi., Ill., (Aug. 4, 1984) (omission in original)); *see also* Ablin, *supra* note 11, at 573–75.

137. *Walz v. Tax Comm’n*, 397 U.S. 664, 673 (1970). Interestingly, Justice Brennan argued that “[t]ax exemptions and general subsidies . . . are qualitatively different.” *Id.* at 690 (Brennan, J., concurring).

138. *Id.* at 672 (majority opinion).

139. *Id.* at 674. In *Texas Monthly*, the Court attempted to clarify that this statement does not mean tax benefits may be given only to religious organizations to the exclusion of other tax-exempt entities. 489 U.S. at 12 n.2.

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value beyond the mere provision of charitable services, restricting their capacity to shape public policy would stifle, if not eliminate, their ability to have such a positive influence.¹⁴⁰

2. *The tax-base definition model*

Another model, which somewhat contradicts the subsidization model, is the tax-base definition model. Under this theory, churches are not “exempt” from taxation because they are simply not part of the tax base by default.¹⁴¹ This theory is founded on the principle that churches “cannot be exceptions from a rule in which they were never included.”¹⁴² According to this model, the label of “tax-exempt” status is misleading because deductions, exclusions, and exemptions for churches merely define the relevant tax base, of which churches are not a part.¹⁴³ Advocates of church political speech argue that threatening to tax churches if they engage in too many attempts to influence legislation goes against American history and tradition for two reasons: (1) historically, the government generally has never included churches in the tax base,¹⁴⁴ and (2) the most

140. Professor Galston argues that relaxing the political speech restrictions against churches would have a positive societal influence:

Permitting houses of worship to engage in greater amounts of advocacy might, then, increase the opportunities for congregations to influence legislation or campaigns, intensify pressure on officials and parties to adopt policies and enact legislation targeted to improve the conditions of marginalized or other needy populations, and expand on the types of civic skills that lead to an enhanced sense of political efficacy among congregants who currently are unable or unwilling to participate in civic life.

Miriam Galston, *Civic Renewal and the Regulation of Nonprofits*, 13 CORNELL J.L. & PUB. POL’Y 289, 398–99 (2004).

141. For a thorough articulation of this theory, see Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285, 1291 (1969).

142. Zelinsky, *supra* note 128, at 811 (quoting *Yale Univ. v. Town of New Haven*, 42 A. 87, 91 (Conn. 1899)).

143. *Id.* at 810. Deductions are not counted as a subsidy under this model because they are simply one step in the process of measuring each taxpayer’s “income” for tax purposes. *Id.* (citing William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972)).

144. See HOPKINS, *supra* note 129, at 14 (“Since the founding of the United States and beforehand in the colonial period, tax exemption—particularly with respect to religious organizations—was common. Churches were *uniformly* spared taxation.” (citations omitted) (emphasis added)).

significant social movements in our nation's history began as religious movements under the direction of religious leaders.¹⁴⁵

The separationist position also utilizes this model in arguing for the validity of the lobbying restrictions. This argument is built on the principle that churches are not part of the tax base because of the necessity of separating church and state. Separationists argue, however, that once churches violate this "wall of separation" and attempt to enter the realm of public legislation (a realm in which they do not belong and should not enter),¹⁴⁶ they become politically responsible to the public and their activities and property must therefore be subject to taxation by the government. In other words, this interpretation of the model contends that churches are not part of the tax base unless they make themselves part of the tax base. If churches want a role in shaping public policy, they must pay the price that everyone else must pay for that opportunity.¹⁴⁷

The problem with this separationist argument is that it ignores the special protections granted to churches and religious adherents by the First Amendment as recognized by the longstanding tradition of not taxing churches¹⁴⁸ and of respecting the historic role of churches in the nation's greatest social movements.¹⁴⁹ If churches already have the right to freely express religious beliefs publicly, government cannot condition tax-exempt status on any substantial

145. See Dessingue, *supra* note 136, at 923 ("Churches have played a pivotal role in every important political struggle since (and including) national independence: the abolition of slavery, gambling, child labor, prostitution, temperance, the death penalty, the war in Vietnam, abortion, and civil rights." (citations omitted)); David Saperstein, *Jewish Perspectives on the Role of Religion in the Political Process*, 1 J.L. & RELIG. 215, 220 (1983) (listing several historical movements in which church participation had a "determinative . . . impact" including "the antislavery movement, the temperance movement, the industrial reforms of the progressive era, the recognition of the labor movement . . . [and] the civil rights movement").

146. The final main heading of Professor Murphy's article is illustrative of this attitude: "Church Intervention and Participation in Political Activity Is Inadvisable and Unnecessary." Murphy, *supra* note 11, at 75. In countering this separationist position, Professor Garnett posits that this do-not-get-involved argument is the very message that the restrictions themselves send to churches. Garnett, *supra* note 124, at 798. He refers to the system of conditional tax exemptions and political-speech restrictions as "the process by which government domesticates the churches' evangelical vocation and convinces religion to see itself as a socially impotent force that does not belong in politics. The government tells faith communities that religion is a private matter, and, eventually, they come to believe it." *Id.*

147. Murphy, *supra* note 11, at 75 ("There are ways for § 501(c)(3) organizations to make their voices heard politically. They simply may not use public money to do so.")

148. See *supra* note 144.

149. See *supra* note 145.

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burden of that right—even if these expressions have the goal of shaping public policy.¹⁵⁰ Further, because “[r]eligious and political discourse is the center of the First Amendment right to free speech,”¹⁵¹ government should not be able to suddenly tax churches simply because they advocate legislation as an appropriate means of promoting religious doctrine. For these reasons, an interpretation of the lobbying restrictions adopting this model to define the tax base is likely to construe the restrictions in favor of churches. Still, neither courts nor the IRS have adopted this model as the policy defining the relationship between tax-exempt status and the restrictions.

3. *The accommodation model*

The accommodation model is another popular method of analyzing the conditions placed upon churches’ tax-exempt status.¹⁵² Religious free-speech advocates contend that the tax-exempt status of churches is simply a religious accommodation that allows churches to operate freely without having financial burdens placed on them by the government.¹⁵³ This position argues that by restricting churches’ ability to influence public policy as a condition of tax-exempt status, the government stifles rather than accommodates religious expression and exercise. An interpretation of the lobbying restrictions that respects the wide variety of religious traditions will also respect that the members of many faiths “incur an obligation to become active in the political arena.”¹⁵⁴ Such an understanding also would accommodate churches and church leaders that feel an

150. The court in *Sherbert v. Verner* articulated this same principle in discussing when conditions placed on government benefits become unconstitutional burdens on First Amendment rights:

It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. . . . [C]onditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. . . . “To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.”

374 U.S. 398, 404–06 (1963) (quoting *Speiser v. Randall*, 357 U.S. 513, 518 (1958)) (internal citations omitted).

151. Zimmerman, *supra* note 39, at 262.

152. See Zelinsky, *supra* note 128, at 811–12 (grouping the accommodation and entanglement models together).

153. See *id.* at 807 (“[T]he First Amendment is best understood as permitting governments to refrain from taxation to accommodate the autonomy of religious actors and activities.”).

154. Ablin, *supra* note 11, at 573.

obligation to assist their members in applying religious doctrines to real-world issues, thus making it necessary to address modern policy debates in a religious setting.¹⁵⁵

Separationists, however, argue that the tax-exempt status of churches serves the purpose of accommodating religion only inasmuch as churches provide secular charitable services that the government would otherwise have to provide.¹⁵⁶ Under this view of the accommodation model, removing or relaxing the lobbying restrictions for churches would extend the benefits of tax-exempt status beyond the purpose for which they were intended—to include religion in a group of charitable organizations that provide necessary charitable services. Ultimately, application of this model depends on the permissible scope of government accommodation under the Establishment Clause.

4. *The entanglement model*

Other theorists have utilized a concept of government entanglement with religion to analyze the tax-exempt status of churches and the accompanying political speech restrictions. The central premise of this model is that “involving the IRS in day-to-day religious life . . . would threaten unnecessary infringements” of constitutional rights.¹⁵⁷ Once again, both sides have used this concept to promote their views. For example, the separationists argue that removing or relaxing the political speech restrictions would “create[] a climate in which a church could encroach on politics, and politics could encroach on the activity of a church.”¹⁵⁸ Separationists support strict enforcement of the lobbying restrictions as means of removing the ability of both religion and government to trespass upon each other’s territory.

Religious free-speech advocates also use the entanglement metaphor to demonstrate that “tax exemption does not subsidize

155. *See id.* at 573–74.

156. *See, e.g.,* *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 12–13 (1989) (holding that tax exemptions must have a “secular purpose,” which may be “cultural, moral, or spiritual” but not “religious” (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 697 (1979) (Harlan, J., concurring))); *see also* Charles Capetanakis, *Abortion Rights Mobilization and Religious Tax Exemptions*, 34 CATH. LAW. 169, 186 (1991).

157. Lee, *supra* note 4, at 427.

158. Murphy, *supra* note 11, at 81.

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churches, but leaves them alone.”¹⁵⁹ Under this notion, the lobbying restrictions inappropriately entangle the IRS’s regulatory powers with the religious freedoms of churches and their members. Professor Garnett effectively argues the negative effect that such government encroachment on religion causes in the context of the political speech restrictions:

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.¹⁶⁰

According to this view, the IRS’s attempt to draw lines between what is political and what is religious constitutes an improper entanglement with religion. In the end, the entanglement test may simply require a determination of which government action causes the least entanglement. As the *Walz* Court explained, “Either course, taxation of churches or exemption, occasions some degree of involvement with religion. . . . 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.”¹⁶¹

Applying this balancing analysis to the lobbying restrictions, the result depends on which action creates the greater entanglement: a strict enforcement of the restrictions that would require increased government involvement in the affairs of churches *or* a narrow interpretation of the restrictions that would give tax-exempt churches greater sway in the policies of government. Common sense suggests that no bright-line answer to an entanglement analysis exists.¹⁶² However, a narrow interpretation of the lobbying restrictions that allows free and open communication between

159. Zelinsky, *supra* note 128, at 807.

160. Garnett, *supra* note 124, at 797–98 (quoting Gerard V. Bradley, *Dogmatomachy: A "Privatization" Theory of the Religion Clause Cases*, 30 ST. LOUIS U. L.J. 275, 277 (1986)) (alteration in original) (citation omitted).

161. *Walz v. Tax Comm’n*, 397 U.S. 664, 674–75 (1970).

162. *See, e.g.*, James M. Dunn, *The Christian as Political Activist*, LIBERTY, July–Aug. 1986, at 18 (“Where does one draw the line between mixing politics-religion and merging church-state? It is a popular question, often asked simply to shut off debate. The challenge works as a cutoff valve because there is no simple, easy, short answer.”).

churches and parishioners would result in less government entanglement with religion for two reasons: (1) the IRS would have no reason to enmesh itself in monitoring or regulating internal church communications regarding public policy issues; and (2) separationist groups would have less incentive to continually make frivolous claims to the IRS that churches that have communicated with parishioners regarding public policy issues have violated their tax-exempt status.

5. *The neutrality model*

Applying the principle of neutrality always raises questions of whether government can ever be truly neutral in dealing with religion. Nonetheless, both Congress and the courts continually return to the principle of neutrality to explain the underlying policies of law.¹⁶³ Once again, both sides of the lobbying-restrictions debate use this principle to defend their positions. Separationists argue that to maintain neutrality in political and religious affairs, the revenue system must not allow tax-exempt churches to influence public policy by advancing their own political agenda. They contend that a revenue system without the lobbying restrictions on churches would violate neutrality by giving a special tax benefit to churches that might use the extra funds available to engage in partisan politics.¹⁶⁴ This argument, however, assumes that “[t]he restrictions imposed by section 501(c)(3) are viewpoint neutral.”¹⁶⁵

163. Since the Supreme Court’s use of neutrality in *Everson v. Board of Education*, the principle has been a staple of First Amendment jurisprudence. 330 U.S. 1, 18 (1947) (“[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.”). The *Walz* Court used the term “benevolent neutrality” to describe the central underlying policy of tax exemptions for religious organizations. *Walz v. Tax Comm’n*, 397 U.S. 664, 676–77 (1970). In 1987, Congress declared the importance of neutrality as the basis of the political speech restrictions. See H.R. REP. NO. 100-391, at 1621, 1625 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-1201, 2313-1205 (stating that 501(c)(3)’s political speech restrictions “reflect Congressional policies that the U.S. Treasury should be neutral in political affairs”).

164. Marci Hamilton argues that “[w]ithout the limitations on political activity, the exemptions would induce many organizations to claim some religious affiliation to benefit from the tax-exempt privilege, and religiously related organizations would have relatively more wealth than secular organizations (other than charitable organizations) to spend on political objectives.” Marci A. Hamilton, *Free? Exercise*, 42 WM. & MARY L. REV. 823, 864–65 (2001).

165. Murphy, *supra* note 11, at 73.

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While the lobbying restrictions may be facially neutral, religious free-speech advocates argue that the restrictions have the non-neutral effect of silencing a large portion of society that would otherwise convey their religious beliefs in the political realm.¹⁶⁶ This chilling effect is particularly harmful to churches because of the ambiguous tax code and regulatory provisions that do not offer a clear standard for what churches may or may not do. Those pushing for fewer restrictions on churches' political speech posit that maintaining political and religious neutrality requires the government to allow churches and their members to freely engage in public debate and the shaping of public policy.¹⁶⁷ True neutrality requires acknowledgment that the First Amendment guarantees the right of all groups and individuals not only to exercise freely their belief systems but also to petition the government to address political issues that affect those beliefs. Nonetheless, although the principle of neutrality has informed First Amendment jurisprudence for nearly six decades, a common understanding of how best to define and implement neutrality has eluded this debate.¹⁶⁸

6. The autonomy model

Perhaps the most useful model to analyze the lobbying restrictions is the model of autonomy.¹⁶⁹ The principle of autonomy implies a sense of "self-direction, independence, and the ability to choose and implement a life plan."¹⁷⁰ Separationists focus on autonomy as a principle of independence in which church and state remain divided into separate spheres, thus establishing a system of "mutual noninterference by church and state in each other's

166. See Garnett, *supra* note 124, at 778–83.

167. See, e.g., Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 475 (2000) ("The great solution to the republican problem was to promote public virtue *indirectly*, by protecting freedom of speech, association, and religion, and leaving the nation's communities of belief free to inculcate their ideas of the good life, each in their own way.").

168. Some have gone so far as to argue that the principle of neutrality has been more harmful than helpful. See, e.g., Gabriël A. Moens, *The Menace of Neutrality in Religion*, 2004 BYU L. REV. 535, 536 ("[T]he neutrality principle ineffectively addresses the conflicts between the Establishment Clause and the Free Exercise Clause and has largely removed religion from American public life by trivializing its existence.").

169. For a thorough discussion of this model discussing the autonomy of the state, the autonomy of the church, and the autonomy of individuals, see Scharffs, *supra* note 120.

170. *Id.* at 1247.

affairs.”¹⁷¹ Under this separationist vision, not taxing churches and not allowing churches to exert influence in the legislative realm preserve the autonomy of both church and state by keeping the two separate in their appropriate spheres of influence. Encroachment by one on the other—such as occurs when tax-exempt religious groups engage in political lobbying efforts—would disrupt this delicate balance of autonomous coexistence.¹⁷² The irony of this argument, however, is that “requiring strict independence of church and state would not only permit, but also probably guarantee, tax-exempt status to churches.”¹⁷³

Others would view tax exemptions for religious organizations as “a recognition of sectarian autonomy.”¹⁷⁴ Religious free-speech advocates point to the violation of church autonomy that occurs by conditioning tax-exempt status on their political silence: “Our government exercises its power to tax precisely by conditionally exempting churches from taxation. It labels their expression and activity according to its own terms and, in so doing, ‘destroy[s]’ authentically religious consciousness and undermines the mediating structures of civil society.”¹⁷⁵ In essence, government is “legislating which religious beliefs can be expressed openly in houses of worship and which cannot.”¹⁷⁶ Thus, fundamental to preserving church autonomy is allowing churches to participate in the development of public policy, especially regarding those issues that are relevant not only to a church’s management, structure, and operation but also to its doctrine and religious practices:

In “attempting to influence legislation” churches speak to the moral aspects of political issues. Such witness flows directly from fundamental faith and is integral to its free exercise. It is essential to the church’s identity and mission, and to the moral authority of its

171. *See id.* at 1248–51 (quoting NORMAN REDLICH, JOHN ATTANASIO & JOEL K. GOLDSTEIN, UNDERSTANDING CONSTITUTIONAL LAW 505 (2d ed. 1999)).

172. *See* *Walz v. Tax Comm’n*, 397 U.S. 664, 675 (1970) (“The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches . . .”).

173. Scharffs, *supra* note 120, at 1263 (emphasis omitted).

174. Zelinsky, *supra* note 128, at 840.

175. Garnett, *supra* note 124, at 802 (alteration in original).

176. Galston, *supra* note 140, at 398 (citing STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 147 (1993)).

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pronouncements, that it speak as “church” through its religious structures and leaders.¹⁷⁷

Without this ability, the balance spoken of by the courts is displaced by the domination of the State’s standards for appropriate religious speech,¹⁷⁸ which directly violates the principle of autonomy.

7. A summary of the models

While some of these models of analysis are more useful than others, each offers a unique perspective in characterizing the relationship between churches’ tax-exempt status and the lobbying restrictions of § 501(c)(3). Whether tax-exempt status is viewed as offering a subsidy or defining the relevant tax base, those interpreting the lobbying restrictions should consider the principles of entanglement, accommodation, neutrality, and autonomy that underlie these relationships. Each of these models underscores the difficulty of separating religious values and practices from political agendas and activities.¹⁷⁹

While neither the arguments of the religious free-speech advocates nor those of the separationists are likely to succeed in producing any substantial statutory change to § 501(c)(3)’s lobbying restrictions, these arguments do point out the need for answers to two key remaining questions. First, at what point does appropriate religious issue advocacy become improper political lobbying? This question is a query of both the boundaries of the insubstantiality test and the difference between religious speech and political lobbying. Second, and probably more important, do the lobbying restrictions place any restraints on the relationship or communication between a

177. 200TH GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (USA), GOD ALONE IS LORD OF THE CONSCIENCE 36 (1988), *reprinted in* 8 J.L. & RELIG. 331, 364–65 (1990).

178. Professor Garnett opines that “[b]y determining for its own purposes the meaning of religious communities’ statements and activities, and by enforcing the distinctions it draws, government subtly reshapes religious consciousness itself.” Garnett, *supra* note 124, at 796. “In other words, by telling religion what it may say, really is saying, or will be deemed to have said, and by telling faith where it belongs, government molds religion’s own sense of what it is.” *Id.*

179. Professor Ablin argues that “[g]iven the right of religious believers to publicly present religious arguments, the contributions that religious viewpoints can make to political culture, and the centrality of religious beliefs to personality, it is unfair and often impossible to separate one’s religious perspective from one’s political viewpoint.” Ablin, *supra* note 11, at 576. Interestingly, what is deemed impossible on an individual level is precisely what the lobbying restrictions attempt to do at an organizational level with churches.

church and its members? These unanswered questions illustrate the need for guidelines that protect the religious rights of churches and their members to communicate freely regarding key moral and religious issues as well as the political processes affecting those issues.

*B. Empty Threats and the Need for Guidelines
that Narrowly Interpret the Restrictions*

Although one possible consequence of the vagueness of the lobbying restrictions might have been abuse by the IRS, this has not been the case historically. Instead, the lack of a clear standard by which to measure the extent and effects of church attempts to influence legislation has provided a pseudo-protection for churches. This is because courts and the IRS generally have construed these ambiguous regulatory requirements in favor of churches, which have been provided no clear ceiling of permissible lobbying activity. Without development of clear standards to define the limitations of churches' lobbying efforts, the statutory sword of 501(c)(3)—relied on by separationists to purge the policy-making process of any significant religious influence—has proven more analogous to a toothpick in the hands of the IRS. As a result, the IRS has shied away from enforcing a standard that neither it nor Congress is willing to define. Instead, the IRS has pursued action only when 501(c)(3) entities have clearly abused their tax-exempt status by using religion as a front to advance a purely partisan, nonreligious agenda.¹⁸⁰

Despite this lack of aggressive enforcement, separationists seeking to remove religious influences from politics continue to hurl threats at churches, warning that attempts to influence public policy risk immediate loss of tax-exempt status. As mentioned above, some groups have gone so far as to suggest sending spies to church meetings to ensure that religious discussion does not enter the political domain.¹⁸¹ It is these activities and misinformation that chill important religious speech in the policy-making process and therefore pose the greatest threat to church autonomy. Such a result necessitates action by either Congress or the IRS to stop these empty

180. *See, e.g.*, *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 855–56 (10th Cir. 1973) (revoking the tax-exempt status of a religious 501(c)(3) organization for engaging in extensive lobbying and political campaigning).

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

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threats. Even without further legislative or regulatory action, church leaders need to educate themselves about the lobbying restrictions and understand that the law, as it currently stands, protects their right to speak freely about modern political issues.

Nevertheless, while “the notion that churches may not be involved actively in politics is . . . inaccurate, misleading, and incomplete,”¹⁸² some additional guidelines are necessary. Many religious advocates might worry that pushing for a change in this area of the law would disrupt the status quo and allow for additional government regulation of religion. Because churches have maintained relatively quiet enjoyment to engage in “insubstantial” attempts to shape public policy on issues of moral concern, this Comment does not argue that the IRS or Congress should establish a percentage test for determining the point at which a church’s lobbying activities become a violation of § 501(c)(3). To do so would invite a significant number of audits of churches’ finances and activities as well as promote additional harmful regulation of religion. Even an ambiguous insubstantiality test would be better than major intrusions into the private financial affairs of religious entities.

Instead of establishing a percentage test, however, Congress or the IRS should establish guidelines¹⁸³ that narrowly interpret the lobbying restriction in favor of churches that wish to take strong stances on issues of moral and religious concern. These guidelines should at a minimum declare that the lobbying restrictions do not seek to regulate communications between church leaders and members regarding the application of religious beliefs to current political issues. Churches and church leaders should have an unrestricted ability to communicate to members on public policy issues that are of religious or moral concern. Many would argue that the current status of the lobbying restriction does nothing to affect this right. While this may be true, it has not stopped the harmful threats of separationist groups against churches—threats that have stifled religious speech to some degree. A clear recognition of these

182. Cook, *supra* note 11, at 457 (citation omitted).

183. These guidelines could come in the form of IRS regulations, revenue rulings, or even statutory amendments. The creation of such guidelines for the sole benefit of churches is nothing new to the IRS, which already offers substantial protections exclusively to churches. See *supra* notes 27–34 and accompanying text; see also Ablin, *supra* note 11, at 581 (“Because of the First Amendment’s specific affirmation of religious freedom, perhaps Congress is warranted in implementing a separate set of laws unique to religious organizations.”).

First Amendment rights in guidelines that interpret or define the political speech restrictions would vitiate most, if not all, of these threats.

In addition, the guidelines should also protect the right of churches not only to teach about moral issues but also to suggest how members might take action on these issues and to invite members to do so. Without the right to inform parishioners about the decisive moral battles that occur in the legislative process and to urge them to get involved in that process, the right to teach about these policy issues would have relatively little substance. In essence, churches would be telling their members, “Yes, we believe strongly in this important principle (e.g., abortion, marriage, pornography), but we can’t tell you that you can or should do anything about it because that would cost us dearly.” With guidelines in place that protect internal church communications, churches would be free to engage in open discussion with their members without the unsettling fear that doing so will cause them to lose their tax-exempt status.

The government as an institution would also benefit from such a position by empowering a great stabilizing force in society to participate more easily in the debates that shape public policy.¹⁸⁴ Instituting these guidelines would provide recognition that “[r]eligious communities are crucial sources for the kind of counter-speech that liberal governments should expect and free societies require.”¹⁸⁵ Thus, rather than silencing religious voices to achieve the independence of government, one of the best ways to foster political prosperity¹⁸⁶ is to remove the restraints that inhibit “the ability of some key actors in society from fully participating and contributing to the political process.”¹⁸⁷ Guidelines that protect the sanctity of the relationship between a church and its members would promote the

184. As David Saperstein has argued, “[T]he religious community can play an influential role in defining the public’s moral perception of the particular issue in keeping with our traditional values and goals.” Saperstein, *supra* note 145, at 220.

185. Garnett, *supra* note 124, at 800–01.

186. See *supra* note 1 and accompanying text.

187. Ablin, *supra* note 11, at 587; see also Dessingue, *supra* note 136, at 923–24 (“Through the religious liberty protections engraved in the First Amendment, the Founders intended a society that would honor the tensions of religious pluralism, not eliminate them. The ‘wall’ of separation between church and state is merely metaphor. ‘Religion cannot . . . be confined by legal fiction.’” (citation omitted)).

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principle of autonomy by recognizing the true “inter-independence” that defines the appropriate relationship between church and state.¹⁸⁸

IV. THE LDS EXPERIENCE

Although abstract principles and differing interpretations provide a somewhat clearer vision of the problems associated with the lobbying restrictions, a concrete example is helpful to demonstrate how churches, Congress, courts, and the IRS might apply these concepts. The recent experience of The Church of Jesus Christ of Latter-day Saints (“LDS Church” or “Church”)¹⁸⁹ provides a useful template for analyzing the lobbying restrictions for several reasons.

First, as is true with many other churches, the LDS Church is not politically active but has remained politically neutral in the sense that it does not endorse, support, or oppose any political candidates or parties.¹⁹⁰ The Church has, however, taken positions on a number of legislative issues that Church leaders deem moral and religious.¹⁹¹ These rare and somewhat ad hoc ventures into the shaping of public policy make the LDS Church a suitable example of a church that is

188. Professor Scharffs uses the term “inter-independence” to describe the concept of autonomy that includes notions of independence, inclusion, mutual respect, and empowerment. See Scharffs, *supra* note 120, at 1253–58. Each of these principles play a key role in shaping the current understanding of the lobbying restrictions under the several analytical models described in Part III.A.

189. For purposes of full disclosure, the author is a member of the LDS Church. However, any statements or opinions expressed are entirely the result of the author’s independent analysis of the issues and facts herein presented.

190. See LDS.org, *Church Remains Politically Neutral, Urges Members to Vote Wisely*, <http://www.lds.org/newsroom/showpackage/0,15367,3899-1--44-2-519,00.html> (last visited Feb. 2, 2006) [hereinafter *Church Remains Politically Neutral*].

191. In October, 1999, LDS Church President Gordon B. Hinckley offered this explanation of the Church’s involvement in legislative issues:

I have time to discuss one other question: “Why does the Church become involved in issues that come before the legislature and the electorate?”

. . . [W]e deal only with those legislative matters which are of a strictly moral nature or which directly affect the welfare of the Church. We have opposed gambling and liquor and will continue to do so. We regard it as not only our right but our duty to oppose those forces which we feel undermine the moral fiber of society. Much of our effort, a very great deal of it, is in association with others whose interests are similar. We have worked with Jewish groups, Catholics, Muslims, Protestants, and those of no particular religious affiliation, in coalitions formed to advocate positions on vital moral issues.

Gordon B. Hinckley, *Why We Do Some of the Things We Do*, ENSIGN, Nov. 1999, available at <http://lds.org/conference/talk/display/0,5232,23-1-14-21,00.html>.

not politically active but that takes strong positions when important moral and religious issues are at stake.¹⁹²

Second, the LDS Church's advocacy of these positions has included some degree of direct and indirect lobbying activities, which range from offering direct monetary support to simply issuing statements on public policy issues. Many of these efforts have resulted in pejorative and immediate calls for the revocation of the Church's tax-exempt status,¹⁹³ thus making the Church a suitable candidate for exploring the lobbying restrictions.

Third, the population of LDS Church members is substantially varied in different regions of the country such that Church members enjoy the status of a powerful majority in some communities and only a viable political minority in other areas. This factor provides an opportunity to examine the impact of lobbying restrictions on churches with varying degrees of political capability in different geographic locations.

Finally, some scholars have labeled LDS members as political "dry kindling"¹⁹⁴ because of their devotion and often quick reaction to what they see as divinely inspired counsel from modern-day prophets and apostles.¹⁹⁵ Because of their generally high level of

192. Several other churches and religious groups have engaged in lobbying activities that far exceed those of the LDS Church. *See, e.g.*, United States Conference of Catholic Bishops, <http://www.usccb.org>; Baptist Joint Committee for Religious Liberty, <http://www.bjcpa.org>; Religious Action Center of Reform Judaism, <http://rac.org>; The United Methodist General Board of Church and Society, <http://www.umc-gbcs.org>; Ethics and Religious Liberty Commission of the Southern Baptist Convention, <http://www.erc.com>. However, the purpose of this Comment is not to establish a bright-line rule for determining the point at which a church's lobbying activities violate the provisions of § 501(c)(3). Instead, this Part is directed at those churches that are not politically active to a great extent but feel they have a duty to make their voices known. The ambiguity of the lobbying restrictions as well as the empty threats of separationist groups have the greatest silencing effect on these types of churches.

193. *See, e.g.*, Edward Epstein, *Supervisor Hits Mormons for Politicking*, S.F. CHRON., July 7, 1999, at A13 (reporting San Francisco Supervisor Mark Leno's opinion that the church's activities were "a gross abuse of [its] tax-exempt status" and noting Mr. Leno's actions in calling for an IRS investigation of the Church for its activities during California's Proposition 22 campaign). *See infra* Part IV.B.2.

194. *See* David E. Campbell & J. Quin Monson, *Dry Kindling: A Political Profile of American Mormons*, in FROM PEWS TO POLLING PLACES: FAITH AND POLITICS IN THE AMERICAN RELIGIOUS MOSAIC (J. Matthew Wilson ed., forthcoming 2006) [hereinafter *Dry Kindling*], available at <http://www.nd.edu/~dcampbe4/dry%20kindling.pdf> (discussing the reasons for the political force that the LDS population represents).

195. Some exceptions to this loyalty have occurred. For example, in 1933 Utah was the thirty-sixth state to ratify the Twenty-first Amendment repealing Prohibition. Despite the strong and vocal opposition to repeal by then Prophet and President Heber J. Grant and the

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loyalty and commitment to the Church, members often take notice when Church leaders speak out on issues such as gambling, abortion, pornography, and the legal definition of marriage. Although LDS Church leaders rarely apply their stamp of approval on any political cause, small acts or statements from these leaders can have a significant effect in shaping public policy.

For these reasons, the LDS Church is an excellent case study for analyzing the application of the lobbying restrictions. This Part explores not only the modern history of LDS involvement in the legislative process but also the issues raised in applying the lobbying restrictions to a specific set of facts. This analysis suggests that churches that engage in insubstantial policy lobbying are not in any real danger of losing their tax-exempt status under the current regime and therefore should not give credence to the empty threats of separationist groups seeking to strip churches' tax-exempt status. Despite this relative safety, the ambiguity of the lobbying restrictions has had a chilling effect on religious speech because of widespread misunderstanding and misinformation regarding how churches may participate in shaping public policy. This silencing effect necessitates clarification by the IRS or Congress to protect fundamental religious freedoms, including the right of church leaders to communicate freely with church members.

A. Background on LDS Political Activity

Attempts to shape public policy through active political pursuits are not a recent development in the LDS Church. The vast majority of these efforts has consisted of internal Church communications among LDS leadership and members. For example, in 1933 Church leaders unsuccessfully urged Church members to fight the passage of the Twenty-first Amendment, the constitutional repeal of

fact that LDS membership constituted sixty-six percent of Utah's population, sixty-two percent of Utahns supported repeal, which gave the amendment the three-quarter supermajority of states needed for ratification. See David E. Campbell and J. Quin Monson, *Following the Leader? Mormon Voting on Ballot Propositions* 4–5 (Univ. of Notre Dame Program in Am. Democracy, Working Paper No. 16, 2003) [hereinafter *Following the Leader*], available at http://americandemocracy.nd.edu/working_papers/files/following_the_leader.pdf (explaining the reasons for the split among LDS voters over Prohibition); see also Gordon B. Hinckley, *Loyalty*, ENSIGN, May 2003, at 58, available at <http://lds.org/conference/talk/display/0,5232,23-1-353-21,00.html> (discussing the sadness of Church leaders over the lack of members' support for the Church's position).

Prohibition.¹⁹⁶ Later, with more success, the Church strongly admonished Church members and the general public in 1968 to oppose a referendum that sought to remove the ban on alcohol sales in Utah bars and restaurants.¹⁹⁷ Indeed, in recent decades the Church has taken stances on a broad range of issues including local moral controversies such as legalized betting on horse races¹⁹⁸ and the establishment of a state lottery in Idaho,¹⁹⁹ broader social debates such as the Equal Rights Amendment²⁰⁰ and the legal definition of marriage,²⁰¹ and public safety concerns such as the placement of MX missiles²⁰² and the storage of nuclear waste in Utah.²⁰³

The Church's involvement in the majority of these issues has merely consisted of issuing official Church statements rather than engaging in direct lobbying efforts. While a number of these statements are meant to "reflect church teachings and practices," other Church statements announcing "positions on matters of public policy do not rise to the level of doctrinal declarations."²⁰⁴ Some have argued that merely taking a position on such political issues is inappropriate, arguing that such official church stances are the equivalent of telling church members how to vote.²⁰⁵ However, Church leaders have repeatedly declared the Church's policy of not

196. See *Following the Leader*, *supra* note 195.

197. See *id.* at 5–6.

198. Dan Harrie & Peggy Fletcher Stack, *LDS Church Turns up Heat on Horse-Race Betting*, SALT LAKE TRIB., June 1, 1992, at A1.

199. See *Following the Leader*, *supra* note 195, at 20–21; see also Associated Press, *Local Anti-Lottery Campaign Defended*, DESERET NEWS, Nov. 17, 1988, at B4.

200. See O. Kendall White, Jr., *Mormonism and the Equal Rights Amendment*, 31 J. CHURCH & ST. 249 (1989) (offering an overview of the LDS Church's opposition to the ERA).

201. See *infra* Part III.B.

202. *Mormons Reject the MX Missile in Their Backyard*, N.Y. TIMES, May 10, 1981, at A4.

203. Joe Bauman, *LDS Church Opposes N-site*, DESERET NEWS, Sept. 12, 2005, at B1.

204. Bob Bernick, Jr., *2 Sides Duel over a Utah Flat Tax*, DESERET NEWS, Sept. 16, 2005 (statement of church spokesman Dale Bills).

205. See, e.g., Dan Egan, *For Some, Mormon Stance on Gay Issue Creates a Crisis of Conscience*, SALT LAKE TRIB., Mar. 5, 2000, at A1 (quoting a disillusioned church member as saying, "When my church tells me how to vote or where to spend my political dollars, it takes away from my opportunity to worship and consider God in my life."); see also D. Michael Quinn, *Prelude to the National "Defense of Marriage"*, 33 DIALOGUE: J. MORMON THOUGHT, Fall 2000, at 2, 13 (alleging that "most Mormons act like army ants whenever LDS headquarters gives instructions about political matters").

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telling its members how to vote on specific issues.²⁰⁶ Further, the Church vigorously claims the right to take strong positions on moral issues in the political realm,²⁰⁷ to educate its members on these issues,²⁰⁸ and to encourage them to be supportive of and loyal to those positions.²⁰⁹

Some might question whether these statements or other communications among church leaders and members qualify as attempts to influence legislation. However, as discussed above, such attempts by churches to speak out on important issues of public policy²¹⁰ or to teach and inform parishioners about key doctrines and their relationship to current social and moral debates²¹¹ do not and should not have any weight in establishing a church's tax-exempt status. By leaving churches outside the scope of statutory provisions

206. See *Church Remains Politically Neutral*, *supra* note 190 (reaffirming the Church's longstanding policy of "absolute freedom of the individual from the domination of ecclesiastical authority in political affairs" and reminding all that "[t]he Church does not extend reprimands or ecclesiastical punishment to persons who choose not to support its views on [political] issues").

207. *Id.* ("When fundamental moral issues are at stake or compelling issues arise that threaten the traditional family, the Church does not hesitate to take a stand.")

208. *Id.* (citing the position of Dallin H. Oaks that "if churches or church leaders choose to oppose or favor a particular piece of legislation, their opinions should be received on the same basis as the opinions offered by other knowledgeable organizations or persons").

209. Church leaders such as President Gordon B. Hinckley have often spoken of the difference between telling church members what to do and urging them to be supportive of and loyal to the Church and the doctrines it teaches:

Now may I say a word concerning loyalty to the Church. We see much indifference. There are those who say, "The Church won't dictate to me how to think about this, that, or the other, or how to live my life." No, I reply, the Church will not dictate to any man how he should think or what he should do. The Church will point out the way and invite every member to live the gospel and enjoy the blessings that come of such living. The Church will not dictate to any man, but it will counsel, it will persuade, it will urge, and it will expect loyalty from those who profess membership therein.

Hinckley, *supra* note 195, at 60.

210. See *supra* note 85 and accompanying text. Once again, the IRS does *not* take the position that church leaders are "prohibited from speaking about important issues of public policy." TAX GUIDE, *supra* note 19, at 7. Thus, the lobbying restrictions likely do not prohibit official church statements about public policy issues, especially when such statements do not mention specific legislation.

211. See *supra* text accompanying notes 183–188; see also *supra* Part II.B.2.c. This Comment does not contend that religious organizations should be able to use tax-exempt funds to engage in unlimited political lobbying. However, the law should never classify internal communications between church leaders and members as "lobbying" subject to the lobbying restrictions—even if those communications encourage members to get involved outside of the church in key policy debates or political processes.

regulating communications between tax-exempt organizations and their members,²¹² Congress made a conscious decision not to regulate internal church relationships in the tax code. Thus, churches are free to make such official statements and to discuss policy issues with parishioners without risking the loss of their tax-exempt status.

B. The LDS Church's Involvement in the Marriage Battle

In recent years, the LDS Church appears to have taken an approach to its involvement in political affairs that is both cautiously conservative and confidently resolute.²¹³ In doing so, the Church has picked its political battles carefully and, for the most part, has taken a low-key approach to its involvement.²¹⁴ Nonetheless, the Church has been unabashed in supporting its positions after it has made a decision to become involved.²¹⁵ Probably the greatest controversy has stemmed from the Church's involvement with marriage and family issues—especially its ardent support for those measures that protect the traditional definition of marriage as the union of a man

212. See *supra* Part II.B.2.c. (explaining that the tax code explicitly excludes churches from the definition of lobbying that restricts internal communications between a nonprofit organization and its members that encourage members either to engage in their own lobbying efforts or persuade nonmembers to do so).

213. Overall, the Church has shied away from entering political frays unless such action is absolutely necessary. See *Church Remains Politically Neutral*, *supra* note 190 (“But the Church rarely chooses to involve itself in politics, even though it is often implored to do so. ‘Scarcely a week passes that we are not importuned to lend our voice and strength to one cause or another of significance on a state, national or international level,’ President Hinckley said. ‘But we must restrain ourselves lest we become diverted from the great central mission of the Church given us by the Lord.’”).

214. Generally, the Church has been reticent to get involved in legislative matters. See, e.g., Lucinda Dillon & Bob Bernick, Jr., *Church Uses Its Clout Subtly—and Seldom*, DESERET NEWS, May 17, 2001, at A1 (quoting Governor Mike Leavitt's understanding that LDS Church leaders “spend a lot more time trying to keep the church out of [political affairs] than get them into things”). Professors Campbell and Monson argue that “this strategy of keeping a low profile is the *modus operandi* of LDS Church leaders on contemporary issues.” *Following the Leader*, *supra* note 195, at 23.

215. See, e.g., LDS.org, *Church Perspective on Alcohol Legislation in Utah*, Feb. 12, 2003, <http://www.lds.org/newsroom/showrelease/0,15503,4044-1-15428,00.html> (citing the statement of Church attorney Jerry D. Fenn on alcohol laws in Utah and stating that “[t]he Church makes no apology for its interest and participation in the legislative process where it comes to public policy issues involving moral issues” and that “[t]he Church will not abdicate what it views as a moral imperative to participate in sharing its concerns about alcohol policy and laws”).

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and a woman.²¹⁶ The bulk of the Church's activities in defending traditional marriage has taken place during ballot initiatives, public referenda, or other legislative processes in several Western states including Alaska, California, Hawaii, Montana, and Nevada.²¹⁷ This Section briefly examines the LDS Church's major efforts in the marriage arena in light of modern interpretations of the lobbying restrictions.²¹⁸

1. Protecting marriage in Alaska and Hawaii

The LDS Church's lobbying efforts in Alaska and Hawaii not only are rare examples of the Church offering direct monetary support to "political causes" but also provide an opportunity to apply the insubstantiality test.²¹⁹ In the fall of 1998, the Church donated \$600,000 to a political action group in Hawaii known as Save Traditional Marriage, which supported a proposed amendment to the Hawaii Constitution giving the state legislature rather than the courts the authority to legally define marriage.²²⁰ During the

216. In discussing the issue at the Church's October 1999 Conference, Gordon B. Hinckley articulated the Church's position on this issue:

God-sanctioned marriage between a man and a woman has been the basis of civilization for thousands of years. There is no justification to redefine what marriage is. Such is not our right, and those who try will find themselves answerable to God. Some portray legalization of so-called same-sex marriage as a civil right. This is not a matter of civil rights; it is a matter of morality. Others question our constitutional right as a church to raise our voice on an issue that is of critical importance to the future of the family. We believe that defending this sacred institution by working to preserve traditional marriage lies clearly within our religious and constitutional prerogatives. Indeed, we are compelled by our doctrine to speak out.

Hinckley, *supra* note 191. The Church's first official call for legislative and judicial protection of traditional marriage came in a statement from the Church's First Presidency in February, 1994, asking members to "appeal to legislators, judges and other government officials to preserve the purposes and sanctity of marriage between a man and a woman and to reject all efforts to give legal authorization or other official approval or support to marriages between persons of the same gender." See *LDS First Presidency Opposes Legalization of Gay Marriages*, DESERET NEWS, Feb. 14, 1994, at B1. For more information on the Church's official positions on marriage and family, see THE FAMILY: A PROCLAMATION TO THE WORLD, available at <http://www.lds.org/library/display/0,4945,105-1-11-1,00.html>.

217. Brooke Adams, *LDS Backs Amendment Against Gay Marriages*, SALT LAKE TRIB., July 8, 2004, at A1.

218. An examination of the issues involved in the marriage debate is beyond the scope of this analysis. This Section explores only the LDS Church's efforts to shape public policy in this area.

219. See *supra* Part II.B.3 (outlining the insubstantiality test).

220. See Patty Henetz, *LDS Cash Carries Gay-Marriage Fight*, SALT LAKE TRIB., Oct. 26, 1998, at A1.

debate over a similar 1998 amendment in Alaska that proposed allowing legal recognition of marriages only between a man and a woman, the Church donated \$500,000 to the Alaska Family Coalition.²²¹ Two years earlier, the LDS Church and the Catholic Church had backed a nondenominational coalition in Hawaii known as Future Today, which opposed the legalization of same-sex marriage, prostitution, and gambling.²²² The Church again defended its activities, arguing that “when a political issue has moral overtones, the Church has not only the right but the responsibility to speak out and become involved.”²²³

While the Church’s donations in Hawaii and Alaska arguably could fit into the regulations’ examples of lobbying contacts with the public,²²⁴ they likely do not exceed the hurdle established by the insubstantiality test. Under a pure percentage test, \$1.1 million in donations clearly would not amount to a substantial percentage of the Church’s annual expenditures—even if such a calculation was based on the Church’s activities in a specific geographic location such as Hawaii or California. A *Time* Magazine article in 1997 calculated that the Church possessed “a minimum of \$30 billion” in assets, brought in an “estimated \$5.9 billion in annual gross income,” and spent “billions to erect 350 church-size meetinghouses a year” as well as building several temples and maintaining a massive missionary program.²²⁵

An argument might be made that the donations were still substantial because of the effect they had on these referenda in successfully promoting the position for which the Church donated the funds. The difficulty with this assertion is three-fold. First, it is virtually impossible to prove the effect that the donation had on the overall campaign. Second, neither the IRS nor the courts are likely to adopt a rule that would punish only those churches that are successful in their lobbying activities. Finally, the insubstantiality test

221. Yereth Rosen, *Mormons Join Alaska Campaign To Ban Gay Marriage*, REUTERS, October 1, 1998, available at http://members.tripod.com/~no_on_2/rns1001.html.

222. See Mike Cannon, *LDS and Catholic Coalition Opposes Hawaii Legislation*, DESERET NEWS, Feb. 21, 1996, at B1.

223. Tony Semerad, *A Mormon Crusade in Hawaii: Church Aims To End Gay Union*, SALT LAKE TRIB., June 9, 1996, at B1 (quoting an LDS Church statement on its activities in Hawaii in defense of marriage).

224. See *supra* note 82–83 and accompanying text.

225. David Van Biema, *Kingdom Come*, TIME, Aug. 4, 1997. The Church did not confirm the accuracy of these figures.

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does not question whether the lobbying activities themselves are substantial, but whether they constitute a substantial part of a church's overall activities. In any case, the Church's donations in Hawaii and Alaska most likely did not approach a level that could have jeopardized the Church's tax-exempt status.

2. California and the fight over Proposition 22

One of the most notable LDS efforts in the political realm was during the debate over California's Defense of Marriage Act, or Proposition 22. Although the Church's involvement in this debate took a much more internal approach, Church activities raised far greater attention at the public level.²²⁶ Rather than donating any money to a group or organization, the Church simply sent out three letters to local Church leaders in California.²²⁷ On May 11, 1999, the presidency of the Church's North America West Area sent out the first letter, which outlined the Church's longstanding position on traditional marriage, described the basic provisions of Proposition 22, and asked Church members "to do all you can by donating your means and time to assure a successful vote."²²⁸ This letter was read aloud to adult members in California during Church services.²²⁹

A second letter dated May 20, 1999, authored by Douglas L. Callister, an attorney and regional ecclesiastical leader ("area authority seventy") of the Church, was sent out to some local leaders ("stake presidents") with specific instructions on how these leaders could act individually to raise money and otherwise elicit support for

226. The media hype caused by the LDS Church's position was enormous. *See, e.g.*, Associated Press, *Californians Vote Against Gay Marriages, 61%–39%*, DESERET NEWS, Mar. 8, 2000, at A01; Zachary Coile, *Mormons Raise Funds To Stop Gay Marriage*, S.F. EXAMINER, Aug. 8, 1999, at A1; Egan, *supra* note 205; Thomas D. Elias, *Mormon Church Backs California's Gay 'Marriage' Foes*, WASH. TIMES, July 18, 1999, at C2; Epstein, *supra* note 193, at A13; Elaine Herscher, *Mormon Church Assailed on Gay Marriage Stand*, S.F. CHRON., Sept. 24, 1999, at A1; John Krist, *Sex, Faith, and Oppression*, SCRIPPS HOWARD NEWS SERV., Feb. 24, 2000, available at www.shns.com/shns/g_index2.cfm?action=detail&pk=KRIST24-02-24-00; *LDS Urged To Back Ban on Gay Marriage*, DESERET NEWS, July 5, 1999, at A02; Carrie A. Moore, *California Polls: A Prop. 22 Win*, DESERET NEWS, Mar. 5, 2000, at A01; Robert Salladay, *Mormons Now Target California: Church Asks Members To Back State Ballot Initiative*, S.F. EXAMINER, July 4, 1999, at A1.

227. Letter from John B. Dickson, John O. Madsen, and Cecil O. Samuelson to LDS Priesthood leaders in California, May 11, 1999 (copy on file with author) [hereinafter Area Presidency letter]; *see also* Coile, *supra* note 226.

228. Coile, *supra* note 226.

229. *See* Area Presidency letter, *supra* note 227.

Proposition 22.²³⁰ The letter reminded Church leaders that “[i]n every instance the contribution of a Church member will be voluntary and in his capacity as a private citizen” and that “[n]o undue pressure of any type should be applied.”²³¹ In addition, the letter mandated that the fundraising process be completely separated from Church meetings, activities, and property.²³² Finally, in January 2000, the area presidency sent a third letter, which was similar to the first, reminding Church members about the March 7 vote and urging them to continue their support for Proposition 22.

Although the Church’s level of official activity in the Proposition 22 initiative was relatively minimal, one author has labeled this effort as “the most direct involvement ever for a large religious organization in California’s populist lawmaking process.”²³³ This activity led to immediate calls for an IRS investigation of the Church’s tax-exempt status.²³⁴ Mark Leno, the San Francisco Supervisor and homosexual-rights activist called the letter “a gross abuse of [the Church’s] tax-exempt status.”²³⁵ Leno authored a resolution passed by the San Francisco Board of Supervisors calling on the IRS “to investigate whether the Mormon Church violated its tax-exempt status by getting directly involved in raising money for the initiative campaign.”²³⁶

Despite these claims, determining whether these letters violated the lobbying restrictions requires a more detailed analysis. The first question is whether the Church’s activities constituted “attempts to influence legislation” as defined by the regulations.²³⁷ If the restriction against urging the “public”²³⁸ to engage in lobbying

230. Letter from Douglas L. Callister to LDS Stake Presidents in California (May 20, 1999) (copy on file with author) [hereinafter Callister Letter]; *see also* Coile, *supra* note 226.

231. Callister Letter, *supra* note 230.

232. *Id.* (“No fundraising may take place on Church property, through use of Church letterhead, or by virtue of general announcements in Church meetings.”).

233. Elias, *supra* note 226.

234. *See* Epstein, *supra* note 193.

235. Coile, *supra* note 226; *see also* Elias, *supra* note 226.

236. Coile, *supra* note 226.

237. No further analysis is necessary if the activity does not constitute an attempt to influence legislation. Recall that according to the regulations, an organization has attempted to influence legislation if it “(a) [c]ontacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or (b) [a]dvocates the adoption or rejection of legislation.” Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii)(a)-(b) (as amended in 1990).

238. *Id.* § 1.501(c)(3)-1(c)(3)(ii)(a).

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activities includes church members, then this question should likely be answered in the affirmative. However, as discussed above, Congress explicitly excepted churches from any code provision regulating the internal communications between a tax-exempt entity and its members.²³⁹ Nonetheless, despite the discrepancy in the IRS's position,²⁴⁰ the letters might have constituted an attempt to "[a]dvocate[] the adoption or rejection of legislation"²⁴¹ and therefore possibly fall within the purview of the lobbying restrictions.

Thus, the more important analysis again falls under the insubstantiality test.²⁴² Once again, the time and costs involved in preparing and sending these three letters were likely insufficient to rise to the level of a "substantial part" of the Church's activities.²⁴³ Therefore, under a straightforward percentage test, the letters clearly do not violate the lobbying restrictions. Even under the *Christian Echoes* balancing test,²⁴⁴ the LDS campaign in favor of traditional marriage likely did not represent a substantial part of the Church's overall activities. As Douglas Callister argued, "The church's involvement with political issues is rare and does not involve a significant fraction of its total activities and assets when one considers the substantial resources committed by the church to missionary work, temple and meeting-house construction and maintenance, family history, education and so forth."²⁴⁵ One might argue that because marriage is central to the LDS faith, any significant effort to shape public policy on such a key issue should be labeled "substantial." However, the question is not whether the issue in question is central to a church's religious tenets or even whether the

239. See *supra* Part II.B.2.c.

240. As discussed above, the IRS has never articulated the line between advocating the adoption or rejection of legislation and speaking out on important issues of public policy. See *supra* Part II.B.2.c. If the line is drawn at the mentioning of specific pieces of legislation, the Church likely attempted to influence legislation. However, such a bright-line rule would allow churches to simply avoid the harshness of the restrictions by doing anything except specifically mentioning the legislation by name.

241. Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii)(b) (as amended in 1990).

242. If the activities are properly classified as attempts to influence legislation, the question then becomes whether those activities were a substantial part of the organization's overall activities. See *supra* Part II.

243. One calculation put the cost of sending the first letter at only \$52.47. Elias, *supra* note 226; see also note 225 and accompanying text (providing 1997 estimates of the church's total assets and annual expenditures).

244. See *supra* note 114 and accompanying text.

245. Coile, *supra* note 226.

activities themselves could be labeled as “substantial.” Rather, the test is whether the lobbying activities constitute a substantial part of a church’s overall activities. In sum, “[t]here is no prohibition on a church becoming involved in an insubstantial way [o]n an issue that is central to the religion.”²⁴⁶

Still, while the Church’s tax-exempt status was not endangered in this instance, the ambiguity of the lobbying restrictions and empty threats of stripping tax-exempt status may have had a silencing effect even on the LDS Church. For example, the limited nature of the Church’s efforts in California demonstrates the chilling effect that ambiguous lobbying restrictions have on religious speech. More significantly, the LDS Church has not engaged in similar direct communications with its members regarding specific legislative proposals since the Proposition 22 debate. This lack of internal instruction on specific issues might indicate that the repeated and unsubstantiated threats of removing the Church’s tax-exempt status during the California initiative may have had at least some effect in reducing the Church’s involvement in similar, more recent initiatives.

3. Utah’s Amendment Three and the Federal Marriage Amendment

During the recent debate over Utah’s Amendment Three²⁴⁷ and the Federal Marriage Amendment, the Church returned to its model of issuing statements of principle in the form of press releases—this time articulating the Church’s position on constitutional amendments defining marriage in two statements by the Church’s First Presidency.²⁴⁸ However, in neither of these statements did the

246. Elias, *supra* note 226 (quoting Douglas Callister).

247. Amendment Three to the Utah Constitution, which became effective on January 1, 2005, reads as follows: “(1) Marriage consists only of the legal union between a man and a woman; (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.” UTAH CONST. art. I, § 29.

248. The first statement by the Church read as follows: “The Church of Jesus Christ of Latter-day Saints favors a constitutional amendment preserving marriage as the lawful union of a man and a woman.” LDS.org, *First Presidency Issues Statement on Marriage*, July 7, 2004, <http://lds.org/newsroom/showrelease/0,15503,4028-1-19733,00.html>. The statement qualified this position with the comment that it was simply “a statement of principle in anticipation of the expected debate over same-gender marriage [and] not an endorsement of any specific amendment.” *Id.* Three months later, the second statement offered doctrinal support as well as a clearer delineation of the Church’s position:

We of The Church of Jesus Christ of Latter-day Saints reach out with understanding and respect for individuals who are attracted to those of the same

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Church offer its support for a particular amendment, nor did the Church indicate whether these statements referred to either a state or federal marriage amendment. Unlike the Church's previous political battles regarding the definition of marriage, the Church did not ask anyone to raise money independently. Also, the Church itself did not offer any monetary support to the passage of Amendment Three as the Church had in Hawaii and Alaska.

Despite the relatively innocuous nature of these press releases, they again raise the question of whether official church statements to the public constitute attempts to influence legislation. While the Church was clearly taking a strong stance in the middle of a hot political debate, the statements do not refer to any specific legislation, although they do refer to a specific category of legislation—constitutional amendments. Some might question the timing of the statements because the Church issued the first just before the U.S. Senate was scheduled to vote on a federal marriage amendment²⁴⁹ and issued the second just two weeks before Utahans were to vote on Amendment Three.²⁵⁰ Once again, however, such statements do not involve any significant costs or time in preparation or delivery. They are simply declarations of the Church's doctrinal stance on an important public policy issue related to the sanctity and preservation of traditional marriage.²⁵¹ As such, these declarations of official church positions on policy issues likely do not come within the purview of the lobbying restrictions. Even if these statements did

gender. We realize there may be great loneliness in their lives but there must also be recognition of what is right before the Lord.

As a doctrinal principle, based on sacred scripture, we affirm that marriage between a man and a woman is essential to the Creator's plan for the eternal destiny of His children. The powers of procreation are to be exercised only between a man and a woman lawfully wedded as husband and wife.

Any other sexual relations, including those between persons of the same gender, undermine the divinely created institution of the family. The Church accordingly favors measures that define marriage as the union of a man and a woman and that do not confer legal status on any other sexual relationship.

LDS.org, *First Presidency Statement on Same-Gender Marriage*, Oct. 19, 2004, <http://lds.org/newsroom/showrelease/0,15503,4028-1-20336,00.html>. See also Rebecca Walsh, *LDS Church Shuns Political Fight over Utah's Marriage Amendment*, SALT LAKE TRIB., Aug. 30, 2004, at B1; Rebecca Walsh, *LDS Church Issues Edict on Marriage*, SALT LAKE TRIB., Oct. 20, 2004, at B1.

249. See Walsh, *LDS Church Shuns Political Fight over Utah's Marriage Amendment*, *supra* note 248.

250. See Walsh, *LDS Church Issues Edict on Marriage*, *supra* note 248.

251. See *supra* note 210 and accompanying text.

constitute attempts to influence legislation, they clearly would not have caused the Church to cross the substantiality threshold for its overall lobbying activities.

C. Direct Lobbying Efforts and the Flat Tax Issue

Finally, an analysis of the LDS Church's involvement in the political arena is not complete without mentioning the infrequent direct lobbying efforts in which the Church engages. Very rarely, Church attorneys, lobbyists, or other officers will communicate directly with legislators regarding specific public policy issues. The central issue is whether church contacts with legislators is for the purpose of persuading or educating—the lobbying restrictions covering the former but not the latter.²⁵²

This practice recently came under scrutiny when attorneys for the Church directly contacted Utah legislators over proposals to scrap the charitable donation deduction and implement a flat tax.²⁵³ Some have questioned the propriety of this and similar moves because a majority of the members of the Utah legislature are also members of the LDS Church.²⁵⁴ Prefacing these communications with another public statement regarding the Church's position on the matter, Church spokesman Dale Bills said that the motivation for supporting the continuation of the deduction was broader than the Church's own interest in providing an incentive for its members to pay tithing.²⁵⁵ Thus, the Church did not necessarily disagree with the adoption of a flat tax in Utah, but rather the abolition of the charitable gift deduction in conjunction with the new tax regime.²⁵⁶

252. See *supra* note 86 and accompanying text.

253. See Bob Bernick, Jr., *Flat Tax Issue Puts LDS Legislators in a Bind*, DESERET NEWS, Sept. 2, 2005, at A19. The flat tax would replace Utah's current graduated income tax.

254. See Bob Bernick, Jr., *LDS Church Lobbying on Taxes*, DESERET NEWS, Sept. 1, 2005 ("More than 80 percent of the 104 part-time legislators are members of the LDS Church."). Still, legislators have described "the limited amount of contact there is between the [C]hurch and the legislature." Dillon, *supra* note 214 (quoting Utah House Speaker Marty Stephens).

255. See Bob Bernick, Jr., *Utah Ponders Flat Tax*, DESERET NEWS, May 27, 2005, at A1 ("For the overall good of the citizenry, the state tax system should continue to provide tax deductions for charitable giving—including religious contributions. Charitable contributions help provide for society's poor and needy, education and the arts, and other important social needs."). This statement was not issued as an official declaration by the First Presidency of the Church but by Church spokesman Dale Bills. *Id.*

256. See Bernick, *supra* note 254.

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Similar to previous political activities of the Church, these official statements and even the direct lobbying of legislators did not rise to the level of a substantial portion of the Church's overall activities. Nonetheless, the Church's involvement in the flat-tax issue raises some interesting questions in relation to the lobbying restrictions. First, to what extent may churches lobby on activities that directly affect their own rights, powers, and obligations? Although the tax code offers protection for certain tax-exempt entities that lobby public officials on issues directly affecting their rights, these provisions specifically exclude churches from their coverage.²⁵⁷ Even if the IRS would not enforce strict interpretations of the lobbying restrictions against such lobbying efforts on issues directly affecting churches' rights, both Congress and the IRS should amend the law to extend these protections to churches. A second issue concerns communications by church officials with legislators who happen to be members of that church. May a church informally communicate important positions to church members who are in a position to more effectively advocate that position during a legislative process? These are just a few of the several questions that remain unanswered under the current state of the law.

In summary, the LDS Church's efforts at political advocacy provide an excellent template for analyzing the lobbying restrictions. Although this overview of the Church's political activities may give the impression that the Church is often engaged in considerable lobbying, the fact is that these instances are rare and amount to only a small fraction of the Church's overall religious mission throughout the world.²⁵⁸ Nonetheless, though minimal and infrequent, the Church's efforts are effective because of the generally loyal reaction of its members.²⁵⁹ The LDS Church's efforts to shape public policy is demonstrative of how other churches that are not otherwise politically active may make their voices heard in the political arena without endangering their tax-exempt status.

Nonetheless, because neither the IRS nor Congress has made it absolutely clear that such internal church correspondence and

257. See *supra* notes 79, 95 (explaining that because churches cannot make an election under § 501(h), the definitions offering these protections in § 4911 do not apply to churches).

258. See *supra* note 213.

259. "[I]t is the very infrequency of Mormon mobilization that accentuates its effectiveness. Because LDS Church leaders rarely speak out on explicitly political questions, when they do Mormons sit up and take notice." *Dry Kindling*, *supra* note 194, at 29.

direction from church leaders falls outside the scope of § 501(c)(3)'s lobbying restraints, churches will continue to be extremely hesitant to communicate with members about any issue that is or has been debated in the political realm. Further, groups opposed to church involvement in shaping public policy will continue to threaten churches with loss of tax-exempt status for engaging in these communicative activities. Churches must be free to engage in open and free communication with members and parishioners regarding important religious and moral issues of public policy such as the definition of marriage. Accordingly, the lobbying restrictions should be clarified to allow churches to educate members regarding such issues and encourage members to get involved in the political processes that determine the outcome of these issues.

V. CONCLUSION

This analysis has shown that the discrepancies inherent in the lobbying restrictions of § 501(c)(3) have been a great source of confusion and concern in the religious community. However, churches seeking to retain an independent voice in shaping public policy need not fear the empty threats of separationist groups because (1) the IRS has never revoked a church's tax-exempt status *solely* for violating the lobbying restrictions and (2) the lobbying restrictions likely do not regulate internal church teaching or communication regarding public policy. Nonetheless, these ambiguities have had the effect of not only removing some religious influences from government policymaking but also subtly shaping religious belief by giving the false impression that too much religious speech about political issues is somehow inappropriate or unlawful.

These problems 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. The example of the LDS Church provides at least some indication that churches can engage in advocacy efforts on moral issues without jeopardizing their tax-exempt status. Nonetheless, Congress and the IRS should act to protect internal church relationships by excluding communications between church leaders and members from the scope of the lobbying restrictions. Such guidelines would protect the right of churches to teach their members the moral and religious implications of modern public policy issues and to encourage members to get involved in the political processes affecting those issues.

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Thus, a proper interpretation of the lobbying restrictions of § 501(c)(3) can preserve the autonomy of church and state by respecting both internal church relationships and the integrity of the revenue system. However, this result is possible only if the government's interpretation of the lobbying restrictions recognizes the reality that "[c]hurches exist in part to teach morality and influence behavior."²⁶⁰ The purpose of applying the lobbying restrictions to churches has never been to prevent religious beliefs from influencing public policy, but rather to ferret out those organizations that would abuse their tax-exempt status to promote a purely nonreligious political agenda under the guise of religion. Accordingly, the law must recognize the rights of churches and church leaders to teach members about important policy issues and urge members to apply their religious beliefs by participating in the political process.

With numerous moral issues on the political horizon at both the state and federal level—ranging from attempts to change the legal definition of marriage to the widespread use of pornography—America cannot afford to reject its religious heritage in the policy-making process. As John Adams famously declared, “[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”²⁶¹ Thus, without a narrow interpretation of the lobbying restrictions that protects the relationship between a church and its members, society would lose one of its most stabilizing forces, and churches would be bereaved of their historic and fundamental role in shaping public policy to reflect the religious values of America's citizens.

260. Ablin, *supra* note 11, at 587–88. “Though it may not always be wise for a church to become politically active, at times a church will feel compelled to become involved in its pursuit of justice.” *Id.* at 588.

261. 9 JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 229 (Charles Francis Adams ed., 1854) (address to the military on Oct. 11, 1798).

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