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## CHURCHES' LOBBYING AND CAMPAIGNING: A PROPOSED STATUTORY SAFE HARBOR FOR INTERNAL CHURCH COMMUNICATIONS\*

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### I. INTRODUCTION

President Trump, reiterating the position he took during his 2016 presidential campaign,<sup>1</sup> has recently reaffirmed his pledge to “get rid of and totally destroy the Johnson Amendment,” a provision of the

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\* This essay is based on Chapter 7 of the author's book, EDWARD A. ZELINSKY, *TAXING THE CHURCH: RELIGION, EXEMPTIONS, ENTANGLEMENT AND THE CONSTITUTION* 187–206 (2017).

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1. David Sherfinski, *Donald Trump's Push to Repeal Johnson Amendment Buys Religious Freedom Advocates*, WASH. TIMES (Aug. 14, 2016), [http://www.washingtontimes.com/news/2016/aug/14/donald-trumps-push-to-repeal-johnson-amendment-buo/?utm\\_campaign=shareaholic&utm\\_medium=printfriendly&utm\\_source=tool](http://www.washingtontimes.com/news/2016/aug/14/donald-trumps-push-to-repeal-johnson-amendment-buo/?utm_campaign=shareaholic&utm_medium=printfriendly&utm_source=tool).

Internal Revenue Code that prohibits tax-exempt institutions from participating in political campaigns.<sup>2</sup> The Code also bars tax-exempt institutions, including churches, from substantial lobbying activities.<sup>3</sup>

Rather than the blanket repeal of the Johnson Amendment proposed by President Trump, I argue for a statutory safe harbor for churches' internal communications. This limited safe harbor would protect in-house church discussions from both section 501(c)(3)'s ban on substantial lobbying and from its prohibition on political campaigning. Under this proposed amendment to the Internal Revenue Code, churches, along with other religious and secular tax-exempt institutions, would otherwise remain subject to the Code's bars on campaigning and lobbying. While entanglement considerations counsel greater protection than current law provides for speech within churches, these statutory bars properly deter the diversion of income tax-deductible resources to campaigning and lobbying. My more targeted reform of the Johnson Amendment would achieve a better balance by addressing the legitimate concerns of churches about their First Amendment rights while preventing the tax-exempt sector from becoming a conduit for tax-deductible campaign contributions.

## II. SECTION 501(C)(3)'S BANS ON SUBSTANTIAL LOBBYING AND POLITICAL CAMPAIGNING

The Internal Revenue Code prohibits all tax-exempt section 501(c)(3) institutions (including churches and other religious entities) from "substantial[ly] . . . carrying on propaganda, or otherwise attempting, to influence legislation . . ." <sup>4</sup> In addition, section 501(c)(3), through what is often denominated as "the Johnson Amendment," <sup>5</sup> forbids tax-exempt organizations, including churches, from "participat[ing] in, or interven[ing] in, (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." <sup>6</sup> Unlike the ban on "substantial" lobbying, section 501(c)(3)'s prohibition on campaigning

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2. Abby Phillip, *Trump Asks for Prayers for Arnold Schwarzenegger's Ratings at National Prayer Breakfast*, WASH. POST (Feb. 2, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/02/02/trump-asks-for-prayers-for-arnold-schwarzeneggers-ratings-at-national-prayer-breakfast>.

3. I.R.C. § 501(c)(3), (h)(1) (2012).

4. *Id.*

5. The Amendment was named for then-Senator Lyndon B. Johnson, who proposed the provision in 1954. See 100 CONG. REC. 9,604 (1954).

6. I.R.C. § 501(c)(3).

makes no allowance for insubstantial campaign activity by a tax-exempt entity.<sup>7</sup>

The Code's prohibitions on political lobbying and campaigning have been controversial, particularly as applied to churches.<sup>8</sup> Liberals claim that conservative churches flout the statutory bar on political activity to support Republican candidates.<sup>9</sup> Conservatives retort that liberal churches, particularly African American churches, campaign on behalf of Democrats.<sup>10</sup> Objective evidence suggests that both of these criticisms have some validity.<sup>11</sup> Moreover, some church groups openly defy section 501(c)(3)'s ban on political activity.<sup>12</sup>

Revenue Ruling 2007-41<sup>13</sup> is the Internal Revenue Service's (IRS) current interpretation of the statutory prohibition on political campaigning by section 501(c)(3) organizations. The IRS understands this prohibition on political activity as requiring the IRS to intrude deeply into churches' internal operations to monitor and evaluate the comments of church personnel.<sup>14</sup> According to that ruling, for example, a minister, while free to make statements as an individual, cannot endorse a candidate for public office at "an official church function, [or]

7. *Id.*

8. See Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1138–39 (2009).

9. See, e.g., Jasper L. Cummings, Jr., *Deducting Political Expenditures*, 153 TAX NOTES 847, 853 (2016) ("There is a fair chance that most of that political activity is in the segment of churches that entered politics in a big way in the form of the Moral Majority beginning in the late 1970s."); *The Rise of the Religious Right in the Republican Party*, THEOCRACY WATCH, <http://www.theocracywatch.org> (last updated Feb. 2011).

10. See, e.g., *Many Black Pastors 'Extensions of Democratic Party'*, ONE NEWS NOW (Mar. 9, 2015), <https://www.onenewsnow.com/church/2015/03/09/many-black-pastors-extensions-of-democratic-party>.

11. See *Many Americans Hear Politics from the Pulpit*, PEW RES. CTR. (Aug. 8, 2016), <http://www.pewforum.org/2016/08/08/many-americans-hear-politics-from-the-pulpit>.

12. See Ellen P. Aprill, *Why the IRS Should Want to Develop Rules Regarding Charities and Politics*, 62 CASE W. RES. L. REV. 643, 673–74 (2012) (discussing "Pulpit Freedom Sunday"); Samuel D. Brunson, *Dear IRS, It Is Time to Enforce the Campaigning Prohibition. Even Against Churches*, 87 U. COLO. L. REV. 143, 145 (2016) (discussing "Pulpit Freedom Sunday"); Mayer, *supra* note 8, at 1140 (discussing "Pulpit Freedom Sunday"); Nathan J. Richman, *Grassley Questions Namorato on Sermon Letter*, TAX NOTES TODAY (Aug. 24, 2015), <http://www.taxnotes.com/tax-notes-today/personnel-people-biographies/grassley-questions-namorato-sermon-letter/2015/08/25/15223691> (discussing the Alliance Defense Fund's "Pulpit Initiative"); Erik Stanley, *How to Fix the Johnson Amendment*, WALL ST. J. (Feb. 9, 2017, 7:26 PM), <https://www.wsj.com/articles/how-to-fix-the-johnson-amendment-1486686394> (discussing "Pulpit Freedom Sunday").

13. Rev. Rul. 2007-41, 2007-1 C.B. 1421.

14. See *id.* at 1422–23.

in an official church publication . . . .”<sup>15</sup> Thus, a minister’s statement supporting a candidate from the pulpit, in a church’s newsletter to its parishioners, or on a church website can potentially cost his church its tax-exempt status.<sup>16</sup>

Moreover, according to the IRS, a prohibited endorsement need not be explicit.<sup>17</sup> For example, without expressly backing a candidate, a church (or other nonprofit organization) can lose its tax-exempt status under section 501(c)(3) by making itself available as a forum to one candidate but not to another “during the . . . campaign.”<sup>18</sup> Since candidates today campaign nonstop,<sup>19</sup> this standard effectively requires the IRS to scrutinize churches’ year-round activities to ensure that churches do not implicitly endorse candidates by granting them selective access to the church as a forum.

These administrative rules carve out a safe harbor for incumbents.<sup>20</sup> Current officeholders can be invited to attend and speak at functions sponsored by churches and other 501(c)(3) entities as long as no explicit reference is made to the incumbent’s re-election.<sup>21</sup>

A skeptical interpretation of this safe harbor is that the IRS thereby accommodates the senators and representatives who approve its budget. A less jaundiced explanation is that this safe harbor recognizes a legitimate need to permit incumbent officeholders to make routine appearances in their respective constituencies. Either way, challengers are potentially disadvantaged by this administrative rule since there is no equivalent safe harbor protecting a church’s (or other nonprofit organization’s) tax-exempt status if it invites only a non-incumbent candidate to speak.

Moreover, according to the IRS in Revenue Ruling 2007-41, the “issue advocacy” of a tax-exempt group may “function as . . . campaign intervention”<sup>22</sup> and thus cost the group its tax-exempt status. Whether such issue advocacy is permitted is a fact-based determination with all

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15. *Id.* at 1422 (situation 5); *see also id.* at 1423 (situation 6) (providing that candidate endorsement offered at “an official organization meeting . . . constitute[s] political campaign intervention”).

16. *See id.* at 1426 (situation 21).

17. *See id.* at 1423 (situation 9).

18. *Id.*

19. *See* NORMAN J. ORNSTEIN & THOMAS E. MANN, *THE PERMANENT CAMPAIGN AND ITS FUTURE*, at vii (2000) (explaining that “[c]andidates for the presidency and Congress now are in a perpetual campaign mode”).

20. *See* Rev. Rul. 2007-41, 2007-1 C.B. 1424 (situations 10–11).

21. *Id.*

22. *Id.*

of the uncertainties that implies.<sup>23</sup> Among the relevant considerations identified by the IRS is whether the issue being addressed by the 501(c)(3) entity “is a prominent issue in a campaign that distinguishes the candidates.”<sup>24</sup> Under this fact-based standard, a minister’s sermon could jeopardize her church’s tax-exempt status if, on the Sunday before an election, the minister supports or opposes abortion rights, same-sex marriage, gun control, the death penalty, or the Confederate flag, should the IRS determine any of these subjects to be “a prominent issue” in the electoral campaign.<sup>25</sup>

Unlike the Code’s prohibition on “substantial” lobbying, the Code’s ban on political campaigning by tax-exempt entities is absolute.<sup>26</sup> On the Sunday before the 1992 presidential election, Branch Ministries placed an advertisement in *The Washington Times* and in *USA Today*, urging Christians to vote against then-governor Bill Clinton.<sup>27</sup> In *Branch Ministries v. Rossotti*,<sup>28</sup> the U.S. Court of Appeals for the D.C. Circuit held that these two ads were sufficient to trigger the ban on campaigning by tax-exempt organizations.<sup>29</sup>

Section 4955, enacted as part of the Revenue Act of 1987,<sup>30</sup> imposes an excise tax on the campaign expenditure of any section 501(c)(3) organization including any church or other religious tax-exempt entity.<sup>31</sup> This excise tax applies both to the entity<sup>32</sup> and to any manager of the entity who knowingly agrees to such campaign expenditure unless the manager did not act “willful[ly]” and had “reasonable cause.”<sup>33</sup> The excise tax established by section 4955 gives the IRS a

23. *Id.* (“All the facts and circumstances need to be considered to determine if the advocacy is political campaign intervention.”).

24. *Id.* at 1425 (situation 16).

25. *See id.*

26. *See* *Branch Ministries v. Rossotti*, 211 F.3d 137, 142 (D.C. Cir. 2000).

27. *Id.* at 140.

28. 211 F.3d 137 (D.C. Cir. 2000).

29. *Id.* at 139.

30. Revenue Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987). The Revenue Act of 1987 also added to the Code two procedural provisions addressing “flagrant” campaign participation by section 501(c)(3) organizations. *Id.* § 10713. Section 6852 authorizes an immediate assessment of the excise tax imposed by section 4955 if there is “a flagrant violation of the prohibition against making political expenditures.” I.R.C. § 6852(a)(1)(B) (2012). Section 7409 authorizes an injunction against a 501(c)(3) entity to stop it from continuing to “flagrantly” participate in a political campaign. *Id.* § 7409(a)(2)(B)(i).

31. *Id.* § 4955.

32. *Id.* §§ 4955(a)(1), 4955(b)(1).

33. *Id.* §§ 4955(a)(2), 4955(b)(2).

method to enforce the statutory ban on campaign expenditures short of formally revoking the offending group's tax-exempt status.<sup>34</sup>

While section 501(c)(3)'s prohibition on campaign expenditures is absolute, that section's ban on lobbying only bans "substantial" lobbying by a tax-exempt entity.<sup>35</sup> This statutory proscription on substantial lobbying, like the prohibition of all campaigning by tax-exempt organizations, requires fact-based enforcement determinations by the IRS and, ultimately, the courts. Under the relevant Treasury regulations, a tax-exempt organization engages in statutorily-prohibited lobbying if the organization "[c]ontacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or [a]dvocates the adoption or rejection of legislation."<sup>36</sup> Thus, a minister's comments in a sermon could jeopardize the church's tax-exempt status if those comments are construed as "[a]dvocat[ing] the adoption or rejection of legislation."<sup>37</sup> Under these rules, the U.S. Court of Appeals for the Tenth Circuit upheld the revocation of the tax-exempt status of Christian Echoes National Ministry as the church had "attempt[ed] to influence legislation through an indirect campaign to mold public opinion."<sup>38</sup>

In response to the uncertainty of determining whether lobbying is "substantial" or not, Congress, in the Tax Reform Act of 1976, added sections 501(h) and 4911 to the Internal Revenue Code.<sup>39</sup> Section 501(h)<sup>40</sup> allows most tax-exempt organizations classified as public

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34. Strictly speaking, any participation in a political campaign causes the participating organization to lose its tax-exempt status under Code section 501(c)(3). However, the language of section 4955 contrasts with the language of section 4912. Section 4912 imposes an excise tax on an organization which has lost its tax-exempt status "by reason of making lobbying expenditures." I.R.C. § 4912(a) (2012). Section 4955 contains no equivalent language. *Id.* § 4955(a). The most natural reading of the two sections side-by-side reveals that section 4912 applies when a previously tax-exempt entity has lost its tax-exemption but that section 4955 can apply without such a formal loss being declared by the IRS.

35. I.R.C. § 501(c)(3) (2012).

36. Treas. Reg. § 1.501(c)(3)(ii)(a)–(b) (as amended in 2014).

37. *Id.*

38. *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 855 (10th Cir. 1972).

39. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520.

40. I.R.C. § 501(h) (2015). For purposes of sections 501(h) and 4911, "lobbying expenditures" are an exempt entity's total outlays attempting to influence legislation including communications with government officials and efforts to influence public opinion. I.R.C. §§ 501(h)(2)(A), 4911(c)(1), 4911(d)(1). "Grass roots expenditures" are the subset of these outlays devoted to influencing public opinion. I.R.C. §§ 501(h)(2)(C), 4911(c)(3). Under section 4911, an exempt organization's "exempt purpose expenditures" are the organization's total annual outlays for the purposes for which the organization is tax-exempt exclusive of the organization's fundraising costs. I.R.C. § 4911(e)(1).

charities<sup>41</sup> to elect a safe harbor calculation to determine if the electing charity's lobbying is substantial or not.

A public charity that has made the section 501(h) election calculates its exempt purpose expenditures and then takes a percentage of those expenditures to determine its nontaxable lobbying amount and its lobbying ceiling amount for the year.<sup>42</sup> For example, if a school that has made the 501(h) election makes annual exempt purpose expenditures of \$400,000 on its educational activities, the school's lobbying taxable amount for the year is 20% of that figure, i.e., \$80,000.<sup>43</sup> If the school's exempt purpose expenditures are instead \$600,000, its lobbying taxable amount is 20% of the first \$500,000 plus 15% of the balance for a total of \$115,000.<sup>44</sup>

To see the operation of sections 501(h) and 4911, suppose that the school with a lobbying taxable amount of \$80,000 actually spends \$50,000 in that year on lobbying. This is a no-harm-no-foul situation: Since the school's lobbying outlays are less than its ceiling amount (\$120,000), the school's lobbying is insubstantial for purposes of section 501(c)(3) and the school's tax-exempt status. Moreover, no excise tax is due since the school's lobbying outlays are less than its lobbying nontaxable amount (\$80,000).

Assume instead that the school spends \$100,000 this year on lobbying. In that case, the school's exemption remains secure because its lobbying outlays are still less than the lobbying ceiling amount of

41. The Internal Code Revenue classifies entities tax-exempt under section 501(c)(3) as either public charities or private foundations. See Edward A. Zelinsky, *Why the Buffett-Gates Giving Pledge Requires Limitation of the Estate Tax Charitable Deduction*, 16 FLA. TAX REV. 393, 400–04 (2014) (discussing the classification of 501(c)(3) organizations as either public charities or private foundations).

42. I.R.C. §§ 501(h)(2)(B), 4911(c)(2).

43. See *id.* § 4911(c)(2).

44. See *id.* An organization's lobbying ceiling amount is 150% of its lobbying nontaxable amount. I.R.C. § 501(h)(2)(B). Its grass roots nontaxable amount and its grass roots ceiling amount are twenty-five percent of the equivalent lobbying figures. I.R.C. § 4911(c)(4). For all organizations electing under section 501(h), the lobbying nontaxable amount is capped at \$1,000,000. I.R.C. § 4911(c)(2)(A).

If a public charity makes the section 501(h) election, as long as its "lobbying expenditures" are "normally" less than its "lobbying ceiling amount" and its "grass roots expenditures" are "normally" less than its "grass roots ceiling amount," the public charity remains tax-exempt under section 501(c)(3). I.R.C. § 501(h)(1). If, however, a public charity that has made the section 501(h) election makes more lobbying expenditures than its "lobbying nontaxable amount" or makes more "grass roots expenditures" than its "grass roots nontaxable amount," section 4911 imposes an excise tax of twenty-five percent on the excess. I.R.C. §§ 4911(a)–(b).

\$120,000. However, the school now owes tax under section 4911 of \$5,000, i.e., 25% of the excess of \$100,000 over \$80,000.<sup>45</sup>

Suppose finally that this school spends \$125,000 on lobbying. In this case, the school's lobbying, since it exceeds the lobbying ceiling amount of \$120,000, can cause loss of the school's tax-exempt status if the school "normally" exceeds the lobbying ceiling amount. Even if this high level of lobbying expenditures is an isolated, rather than a normal, case, the school owes the 25% excise tax on the amount of its lobbying outlays (\$125,000) over the school's nontaxable lobbying amount (\$80,000).

Churches, their auxiliaries, and conventions of churches are not allowed to make the 501(h) safe harbor election.<sup>46</sup> At first blush, denying churches the section 501(h) safe harbor option appears hostile to their interests: Why deny churches an option available to other tax-exempt entities? However, the legislative history of the 1976 law indicates that churches asked to be denied this option. The General Explanation of the Tax Reform Act of 1976 states that, during the legislative process, churches had "indicated a concern that if a church were permitted to elect the new rules [of section 501(h)], then the Internal Revenue Service might be influenced by this legislation even though the church in fact did not elect."<sup>47</sup>

Suppose, for example, that a church routinely spends \$400,000 on its sacerdotal activities and "normally" spends \$125,000 on lobbying. If section 501(h) applied to the church, the church would lose its tax-exempt status because of its lobbying. As described by the General Explanation, some churches were concerned that the IRS and the courts, in this example, would automatically assume that the church's lobbying was "substantial" even if the church had not made the section 501(h) election.<sup>48</sup>

To accommodate this concern, churches and church auxiliaries and conventions cannot make the section 501(h) safe harbor election.<sup>49</sup> Moreover, Code section 501(h)(7) specifies that the standards established by section 501(h) to identify when lobbying is substantial have no relevance to the lobbying activities of those eleemosynary

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45. See I.R.C. § 4911(c)(4).

46. I.R.C. § 501(h)(5) (2012).

47. JOINT COMMITTEE ON TAX'N, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976 415 (1976).

48. *Id.*

49. I.R.C. § 501(h)(5).

entities which cannot or do not elect section 501(h)'s safe harbor for lobbying outlays.<sup>50</sup>

Thus, section 501(h) plays no role in determining whether or not a church's lobbying is substantial. While churches cannot elect section 501(h)'s safe harbor on lobbying expenses, a non-church religious organization with sufficient public support to qualify as a public charity can make this election.<sup>51</sup>

If a public charity (but not a church) skips the section 501(h) election and loses its tax-exempt status because of substantial lobbying, a five percent excise tax applies to the public charity's lobbying expenditures.<sup>52</sup> This excise tax applies both to the public charity<sup>53</sup> and to any manager of the public charity who knowingly agreed to such lobbying expenditures, unless such manager did not act "willful[ly]" and had "reasonable cause."<sup>54</sup>

Section 501(c)(3)'s prohibitions on campaigning and substantial lobbying engender considerable enforcement-related entanglement<sup>55</sup> between church and state. The IRS, to enforce these prohibitions, must monitor and evaluate church activities and the statements of church personnel to determine if such activities and statements constitute explicit or implicit campaigning or amount to "substantial" lobbying.

This enforcement is a deeply entangling enterprise. Insofar as the IRS is enmeshed with secular nonprofit institutions as the IRS scrutinizes their activities and communications, this enforcement-

50. I.R.C. § 501(h)(7); see also DEAN M. KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES 79–83 (1977) (discussing church opposition to section 501(h)).

51. I.R.C. § 501(h)(4)(D).

52. I.R.C. § 4912 (2015).

53. I.R.C. § 4912(a)–(b) (2012).

54. I.R.C. § 4912(b).

55. I propose to denominate as "enforcement entanglement" the enmeshment of church and state which results when churches are taxed. I propose the label "borderline entanglement" for the church-state tussles which occur when churches and other sectarian actors are tax-exempt. When churches (and other religious entities and actors) are tax-exempt, they must claim exemption while tax collectors must police the boundaries of exemption and sometimes reject those claims. The upshot is church-state entanglement over the borders of exemption.

Taxing churches and religious institutions leads to church-state enforcement entanglement while exempting churches and sectarian entities leads to borderline entanglement over the boundaries of the exemption. When the modern government confronts the contemporary church, there is no disentangling alternative.

See Edward A. Zelinsky, *Do Religious Tax Exemptions Entangle in Violation of the Establishment Clause? The Constitutionality of the Parsonage Allowance Exclusion and the Religious Exemptions of the Individual Health Care Mandate and the FICA and Self-Employment Taxes*, 33 CARDOZO L. REV. 1633, 1661–65 (2012), for the distinction between enforcement entanglement and borderline entanglement, and the inevitability of either when taxing or exempting religious organizations.

related entanglement might be considered acceptable: The Free Exercise clause does not protect secular nonprofit organizations in the implementation of their respective missions.<sup>56</sup> However, the IRS's monitoring and evaluation of internal church communications intrudes deeply into "the autonomy and freedom of religious bodies" protected by the First Amendment.<sup>57</sup>

### III. THE CONTROVERSY

No commentator is completely happy with section 501(c)(3)'s prohibition on political campaigning by tax-exempt entities. Even legal scholars who are supportive of this prohibition call for technical modifications to the prohibition or for better enforcement of the prohibition.

Professor Roger Colinvaux concludes that the ban on campaigning by tax-exempt entities "serves important purposes"<sup>58</sup> with "no easy alternative."<sup>59</sup> He identifies five rationales for the prohibition of political campaigning by tax-exempt entities:

- (1) Congress wants charities to focus on core charitable activity;
- (2) Congress wants a charitable sector untainted by partisan flavor;
- (3) Congress does not want to subsidize political activity through exemption;
- (4) Congress wants to protect charities from political capture; and
- (5) Congress does not think political activity is charitable activity.<sup>60</sup>

Professor Laura Chisolm would also retain the prohibition on campaign activity by 501(c)(3) groups.<sup>61</sup> However, she would enable such groups to form and maintain political action committees (PACs) under section 527<sup>62</sup> as long as there is "formal and fiscal separation" between any tax-exempt institution and its respective PAC.<sup>63</sup>

Professor Ellen Aprill urges the IRS to develop more detailed administrative rules to implement section 501(c)(3)'s prohibition on

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56. See *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 667–71 (1970).

57. *Id.* at 672.

58. Roger Colinvaux, *The Political Speech of Charities in the Face of Citizens United: A Defense of Prohibition*, 62 CASE W. RES. L. REV. 685, 755 (2012).

59. *Id.* at 756.

60. *Id.* at 711.

61. Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308, 362 (1990).

62. See I.R.C. § 527 (2015).

63. Chisolm, *supra* note 61, at 363.

political campaigning by tax-exempt institutions.<sup>64</sup> Attorney Kelley S. Shoop argues that the Code's ban on tax-exempt entities' political campaigning "should [be] more actively enforce[d]."<sup>65</sup>

Dean Donald B. Tobin supports the ban on campaigning by tax-exempt entities, but also calls for more effective enforcement.<sup>66</sup> The ban, he argues, is good for both churches and "society as a whole."<sup>67</sup> Viewing the income tax treatment of section 501(c)(3) groups as a subsidy, Dean Tobin contends that, "[s]ubsidizing the entry of churches into politics artificially increases the power of religious institutions in society and poses serious problems for our current system of governance. This may allow churches, or their followers, to be overrepresented in political debates and political life."<sup>68</sup>

Dean Tobin also views the ban on campaign activity as good for churches.<sup>69</sup> If churches can campaign, they will be "co-opted" and "intimidate[ed] by powerful politicians or political parties."<sup>70</sup> Moreover, if churches can campaign, politicians will prefer some churches (those supporting them) over others (those opposing them), while churches themselves will become internally divided over which candidates to support.<sup>71</sup> To strengthen enforcement, Dean Tobin proposes that the 501(c)(3) prohibition on political campaigning by tax-exempt entities be administered by "an independent commission."<sup>72</sup>

Professor Samuel Brunson advances three reasons for stricter enforcement of the 501(c)(3) ban on churches' political campaigning<sup>73</sup>: "First, the IRS should enforce the law as written."<sup>74</sup> Second, enhanced enforcement of section 501(c)(3) would make Congress accountable for "the law it has written."<sup>75</sup> Finally, such enforcement would give affected

64. Aprill, *supra* note 12, at 683.

65. Kelly S. Shoop, Note, *If You Are a Good Christian You Have No Business Voting for This Candidate: Church Sponsored Political Activity in Federal Elections*, 83 WASH. U. L.Q. 1927, 1948 (2005).

66. Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1342 (2007).

67. *Id.* at 1320.

68. *Id.* at 1326.

69. *Id.* at 1322.

70. *Id.* at 1322-23.

71. *Id.* at 1323-24.

72. *Id.* at 1359-61. Some of the commissioners would be selected by the President; others would be picked by the leader of the opposition party in the Senate; yet other commissioners would be randomly chosen "IRS career employees in the Exempt Organizations Division of the IRS who had ten or more years of experience at the IRS." *Id.* at 1361.

73. Brunson, *supra* note 12, at 171.

74. *Id.*

75. *Id.*

churches standing “to place the constitutionality of the prohibition in front of the courts.”<sup>76</sup>

Many legal scholars are troubled that the Code’s bar on political campaigning intrudes on church autonomy.<sup>77</sup> As previously discussed, these scholars propose fundamental alternatives to current law to reduce that intrusion<sup>78</sup> and emphasize the rights of ministers and church members to communicate freely among themselves, without scrutiny by the tax collector.<sup>79</sup> Central to this critique of the Code’s ban on churches’ campaigning is the celebration of the historic role of churches as participants in important political movements in American life.<sup>80</sup> The alternatives to the Johnson Amendment, advanced by these scholars, touch upon a variety of important issues, including the trade-off between enforcement entanglement and borderline entanglement, and whether relief should be provided narrowly to churches, more broadly to religious organizations, or most broadly to all eleemosynary institutions.<sup>81</sup> These proposals demonstrate that in this area there are no ideal solutions, only imperfect trade-offs among competing and legitimate values.

Professor Buckles, for example, would repeal section 501(c)(3)’s blanket ban on participation in political campaigns,<sup>82</sup> and replace it with an excise tax in the Internal Revenue Code on the “political campaign expenditures” of tax-exempt organizations that are not “independently controlled.”<sup>83</sup> While his proposed definition of “political campaign expenditure” would largely track current law, Professor Buckles would provide a safe harbor for any “expenditures for any oral, in-person communication” made primarily between an exempt “charitable organization’s agents and its ‘members.’”<sup>84</sup> Thus, a minister’s, rabbi’s, or imam’s verbally-delivered sermon would be immunized from scrutiny of its content but a written statement in a church newsletter would not be protected by this safe harbor for campaign activity.<sup>85</sup> For this purpose, the determination of a 501(c)(3)

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76. *Id.*

77. *See, e.g.,* Johnny Rex Buckles, *Not Even a Peep? The Regulation of Political Campaign Activity by Charities Through Federal Tax Law*, 75 U. CIN. L. REV. 1071, 1074 (2007); discussion *infra* pp. 1541–51.

78. *See* discussion *infra* pp. 1541–51.

79. *See* discussion *infra* pp. 1541–51.

80. *See* discussion *infra* pp. 1541–51.

81. *See* discussion *infra* pp. 1541–51.

82. Buckles, *supra* note 77, at 1100.

83. *Id.* at 1101.

84. *Id.* at 1102.

85. *See id.* An interesting issue under this proposal is whether a sermon retains its status as protected “oral” communication with members, if the sermon is videotaped and

entity's independence would be based on the rules currently applicable to private foundations.<sup>86</sup>

Professor Buckles' proposal to amend the Internal Revenue Code eliminates one of the most entangling enforcement inquiries under current law: the IRS's monitoring and evaluation of pulpit communications to determine if such communications constitute political campaigning.<sup>87</sup> His proposal would also minimize borderline entanglement because his proposed safe harbor for independently-authorized campaign expenditures would apply to all independently-governed 501(c)(3) organizations.<sup>88</sup> Thus, to administer his proposal, there would, in specific cases, be no need to determine if a particular independently-governed organization is a "church," because this organization might qualify as "religious" or as charitable or educational.

On the other hand, Professor Buckles' proposal would leave many houses of worship subject to his recommended excise tax on political campaigning. Numerous synagogues, for example, would not satisfy Professor Buckles' criteria for independent governance, because a majority of a synagogue's board members are often officers of—and substantial contributors<sup>89</sup> to—the synagogue.<sup>90</sup> Similarly, a prototypical family-based entrepreneurial church would not qualify as independently-governed under this proposal, because the church founder, and the founder's family, often dominate the church's governing board.<sup>91</sup>

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placed on the church's website. A similarly interesting issue is whether, in the case of a megachurch with multiple locations, a sermon delivered at the main church location is still "oral" communication when it is simultaneously broadcast to the church's satellite locations.

86. *See id.* at 1101. Under Professor Buckles' proposal, to qualify as an independently-governed entity, a majority of the board overseeing the entity must not be officers, employees, "substantial contributors," or family members of such an officer, employee or contributor. *Id.* at 1100. If an entity satisfies this initial test of independent governance, campaign expenditures by the entity must, as a procedural matter, only be authorized by its independent directors, without the participation of the minority of dependent directors. *Id.* at 1102.

87. *See id.* at 1100.

88. *See id.*

89. For this purpose, Professor Buckles would incorporate the definition of a "substantial contributor" used in section 507(d)(2) in the context of private foundations. *See id.* at 1105. In particular, Internal Revenue Code section 507(d)(2) defines an individual as a "substantial contributor" if the individual and her spouse cumulatively contribute more than \$5000 in any year and if such cumulative contributions constitute more than 2% of total contributions received by the donee institution. I.R.C. § 507(d)(2)(A).

90. *See* Buckles, *supra* note 77, at 1100.

91. For example, Saddleback, a church with physical locations both nationally and internationally, and online churches, is run by husband and wife Rick and Kay Warren.

Under Professor Buckles' proposal, political campaign expenditures by these non-independently-governed entities would trigger a punitive tax, based on the highest federal income tax rate, increased by twenty percent.<sup>92</sup> Under current tax rates,<sup>93</sup> this penalty would be 57% of the political campaign expenditure of any 501(c)(3) group that is not independently-governed, or the political campaign expenditure of an independently-governed 501(c)(3) entity, if the expenditure was influenced by inside directors.<sup>94</sup>

On the other hand, there would be no adverse tax consequences if a majority of the independent directors of an independently-governed tax-exempt entity approved a political campaign expenditure, and there would be no penalty for any in-person communication among church members.<sup>95</sup>

Consider in this context an iconic moment in American history: Martin Luther King, Sr.'s switch of his support in the 1960 presidential election from Richard M. Nixon to John F. Kennedy.<sup>96</sup> Rev. King announced that he now supported Kennedy (despite Kennedy's Catholicism), because of Kennedy's telephone call to Mrs. Coretta Scott King.<sup>97</sup> In that call, Kennedy had expressed concern for the safety of Martin Luther King, Jr., who had recently been arrested by the Atlanta police and was being held in a Georgia state prison.<sup>98</sup>

Under Revenue Ruling 2007-41, this endorsement, had it been made from the pulpit, could have cost Rev. King's church its tax-exempt status under section 501(c)(3).<sup>99</sup> However, as an oral communication with the church's members, a statement from the pulpit would have been protected by the safe harbor Professor Buckles proposes for internal church communications.<sup>100</sup> On the other hand, if Rev. King, Sr. had allowed this statement to be videotaped and replayed on Atlanta's television stations, the relevant issue under the Buckles proposal would have been whether there was an "expenditure" (such as Rev. King's

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See SADDLEBACK CHURCH, <http://www.saddleback.com> (last visited Jan. 24, 2018); *Biography*, KAY WARREN, <http://kaywarren.com/biography> (last visited Jan. 24, 2018).

92. Buckles, *supra* note 77, at 1102.

93. The current highest income tax bracket for individuals is 37%. I.R.C. § 1, *amended* by Act of Dec. 22, 2017, Pub. L. No. 115-97, 131 Stat. 2054.

94. See I.R.C. § 1; Buckles, *supra* note 77, at 1102.

95. Buckles, *supra* note 77, at 1102.

96. THEODORE H. WHITE, *THE MAKING OF THE PRESIDENT 1960* 323 (1961).

97. *Id.* at 322-23.

98. *Id.* at 321-22.

99. See Rev. Rul. 2007-41, 2007-1 C.B. 1421 (noting in example situation five, that if a minister endorses a political candidate at an official church function, the endorsement would constitute prohibited campaign intervention).

100. Buckles, *supra* note 77, at 1102.

salary) which had been authorized by independent directors who compromised a majority of the church's board.<sup>101</sup>

In contrast to Professor Buckles' proposal, I would not focus on the governance of the church, but would instead emphasize the dichotomy between internal church communications and resource-diverting activity. I would also create special rules only for churches, understanding that a narrowly-drawn exemption would entail borderline entanglement in determining whether entities are or are not churches eligible for this proposed safe harbor. That is a cost I would accept, to protect the autonomy of internal church communications, while also preventing the tax-exempt sector from becoming a conduit for tax-deductible campaign contributions.

Unlike Professor Buckles, Attorney David S. Miller would retain the Code's general ban on political campaigning by all section 501(c)(3) organizations.<sup>102</sup> However, Miller would create a statutory safe harbor available to all such organizations.<sup>103</sup> Miller's proposed safe harbor would be similar to Code section 501(h)<sup>104</sup> but, unlike section 501(h), would not be elective.<sup>105</sup> Under Miller's proposal to amend the Code, campaigning by an organization with a single employee or a single independent contractor would be deemed *de minimis* if that employee or contractor spends less than fifteen percent of her time campaigning.<sup>106</sup> For a 501(c)(3) organization with two or more employees or independent contractors, the statutory safe harbor would apply, so long as less than ten percent of their collective time was devoted to political campaigning.<sup>107</sup> A second test to qualify for this safe harbor would require the tax-exempt entity to spend no more than the lesser of \$5000, or 10% of its non-salary budget on political campaigning.<sup>108</sup>

Thus, an occasional sermon addressing political campaign issues or an isolated candidate endorsement like Rev. King's would be protected by Miller's proposed safe harbor because relatively little of the minister's time would be involved in these isolated statements.<sup>109</sup> Similarly, a newspaper ad, like the pre-election advertisement paid for by Branch Ministries, would pass muster if the cost were \$5,000 or less

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101. *Id.*

102. David S. Miller, *Reforming the Taxation of Exempt Organizations and Their Patrons*, 67 TAX LAW. 451, 461–62 (2014).

103. *Id.* at 491–92.

104. I.R.C. § 501(h) (2012).

105. Miller, *supra* note 102, at 491–92.

106. *Id.* at 506.

107. *Id.*

108. *Id.*

109. *See id.*

and that advertisement represented all of the church's non-salary campaign expenditures for the year.<sup>110</sup>

If a tax-exempt organization's campaign outlays exceeded these safe harbor limits, Miller would apply an excise tax to these expenditures.<sup>111</sup> In addition, the IRS could seek the revocation of tax-exempt status for political campaigning.<sup>112</sup> However, Miller believes that, under his approach, this power of revocation "would be applied sparingly."<sup>113</sup>

In contrast to the Buckles and Miller proposals to amend the Internal Revenue Code to provide political campaign safe harbors to all section 501(c)(3) entities, Professor Lloyd Hitoshi Mayer concludes that some "[h]ouses of worship . . . have a strong argument that [the federal Religious Freedom Restoration Act (RFRA)] requires an exception to the [campaigning] prohibition in the unique context of in-person sermons during regular worship services."<sup>114</sup> Professor Mayer also suggests that RFRA and the First Amendment's Free Exercise clause might protect "the internal religious communications of houses of worship" from section 501(c)(3)'s prohibition on campaigning.<sup>115</sup>

Professor Mayer's perspective, protecting sermons and possibly other internal church communication, requires us to revisit the issue which troubled the Supreme Court plurality in *Texas Monthly, Inc. v. Bullock*,<sup>116</sup> namely, the borderline entanglement flowing from a narrowly drawn exemption for religious entities.<sup>117</sup> In this case, the exception Professor Mayer would craft is narrow since it would apply only to churches, not to non-church religious organizations or to secular entities.<sup>118</sup> My proposal is similarly narrow.

Attorney Deirdre Dessingue takes a particularly nuanced view of the relationship between religion and politics; she argues the church loses its "distinctive prophetic voice" when it intervenes in partisan politics.<sup>119</sup> On the other hand, she writes, "[c]hurches have played a pivotal role in every important political struggle since (and including) national independence: the abolition of slavery, gambling, child labor,

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110. *See id.*

111. *Id.* at 507.

112. *Id.*

113. *Id.*

114. Mayer, *supra* note 8, at 1142.

115. *Id.* at 1216.

116. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

117. Mayer, *supra* note 8, at 1194-95.

118. *See id.* at 1195-96.

119. Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; To What End?*, 42 B.C. L. REV. 903, 925 (2001).

prostitution, temperance, the death penalty, the war in Vietnam, abortion, and civil rights.”<sup>120</sup>

From this premise, she calls for a fundamental contraction of the Code’s prohibition on churches’ political campaigning: “The prohibition should be limited to explicit endorsements of or opposition to political candidates and other clear and unambiguous support, financial or otherwise. Discussion of issues should never constitute prohibited political activity.”<sup>121</sup>

Professor Allan J. Samansky’s views are similar. He calls for “a more liberal interpretation of the ban against campaigning by churches.”<sup>122</sup> “[C]hurches and religious leaders should have virtually complete freedom to communicate with their congregations.”<sup>123</sup> However, Professor Samansky would not permit “official endorsement by a church.”<sup>124</sup> He would also keep current law for other tax-exempt organizations arguing “that there are convincing arguments for treating churches differently from other section 501(c)(3) organizations when interpreting and applying the prohibition against intervening in campaigns.”<sup>125</sup>

Professors Nina J. Crimm and Laurence H. Winer urge Congress to amend section 501(c)(3) to permit all tax-exempt organizations, secular and religious, to engage in both internal and external political campaign speech.<sup>126</sup> However, donors to any organization engaging in such speech would lose the charitable deduction under Internal Revenue Code section 170 for their contributions to that organization.<sup>127</sup>

From the foregoing, it is fair to say that no commentator is satisfied with the status quo. Those favoring the current statute call for better enforcement and more objective interpretive guidelines of section 501(c)(3)’s ban on political campaigning. Critics view the Code’s current prohibitions on campaigning and substantial lobbying by tax-exempt entities as intruding unacceptably into internal church autonomy.

The proponents of section 501(c)(3) in its current form score their heaviest points when they raise the prospect of tax-deductible resource

120. *Id.* at 923.

121. *Id.* at 928.

122. Allan J. Samansky, *Tax Consequences When Churches Participate in Political Campaigns*, 5 GEO. J.L. & PUB. POL’Y 145, 151 (2007).

123. *Id.* at 165.

124. *Id.* at 178.

125. *Id.* at 152.

126. NINA J. CRIMM & LAURENCE H. WINER, *POLITICS, TAXES, AND THE PULPIT: PROVOCATIVE FIRST AMENDMENT CONFLICTS* 327 (2011).

127. *Id.*

diversion.<sup>128</sup> Without some restraints, nonprofits could easily become conduits for funneling income tax deductible resources into political campaigning and lobbying.<sup>129</sup> This is an outcome no one should favor.

As I stated in my OUP Blog on this issue:

Critics of the status quo occupy their strongest ground when they seek to protect internal discussions within congregations. . . . current law entangles church and state [insofar] as the Code now requires the IRS to monitor and evaluate discussions within congregations to ascertain if those discussions constitute as campaigning. . . . Had the [501(c)(3)] ban[s] on campaigning [and substantial lobbying] been aggressively enforced in the past, American life would have been diminished. Such causes as abolitionism and civil rights were deeply anchored in America's churches.<sup>130</sup>

Taking this debate into the 115th Congress, Representative Walter B. Jones, Jr. of North Carolina has introduced legislation to repeal the Johnson Amendment in its entirety.<sup>131</sup> Senator James Lankford of Oklahoma and Representative Steve Scalise of Louisiana have proposed to amend section 501(c)(3) to permit any tax-exempt organization to make any kind of statement "in the ordinary course of the organization's regular and customary activities in carrying out its exempt purpose" as long as such statement does not entail the organization "incurring . . . more than de minimis incremental expenses."<sup>132</sup> President Trump, reiterating the position he took during

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128. See Chisolm, *supra* note 61, at 325–27; Tobin, *supra* note 66, at 1317–18; Shoop, *supra* note 65, at 1930–31.

129. Linda Czipo, *Don't Weaken the Existing Ban on Electioneering by 501(c)(3) Organizations*, CTR. FOR NON-PROFITS (Feb. 7, 2017), <http://www.njnonprofits.org/blog/2017/02/07/dont-weaken-the-existing-ban-on-electioneering-by-501c3-organizations>.

130. Edward A. Zelinsky, *The Right Way To Amend the Johnson Amendment*, OXFORD U. PRESS: BLOG (Mar. 6, 2017), <https://blog.oup.com/2017/03/amend-johnson-amendment-churches-communication/>.

131. H.R. 172, 115th Cong. (1st Sess. 2017).

132. S. 264, 115th Cong. (1st Sess. 2017); H.R. 781, 115th Cong. (1st Sess. 2017); Erik Stanley, *How to Fix the Johnson Amendment*, WALL ST. J. (Feb. 9, 2017, 7:26 PM), <https://www.wsj.com/articles/how-to-fix-the-johnson-amendment-1486686394> (supporting the Lankford-Scalise legislation).

the presidential campaign,<sup>133</sup> has pledged to “get rid of and totally destroy the Johnson Amendment.”<sup>134</sup>

The Jones proposal would leave intact section 501(c)(3)'s prohibition on substantial lobbying activities by tax-exempt organizations.<sup>135</sup> In contrast, the safe harbor created by the Lankford-Scalise legislation would also immunize a tax-exempt organization's statements from the section 501(c)(3) ban on substantial lobbying.<sup>136</sup>

Most recently, proposed Section 5201 of House Bill 1, the Tax Cuts and Jobs Act, would have amended Section 501(c)(3) to create a safe harbor permitting political statements in “any homily, sermon, teaching, dialectic, or other presentation made during religious services or gatherings.”<sup>137</sup> To qualify for this safe harbor under the proposal, a statement would have to be made “in the ordinary course of the [church's] regular and customary activities” in furtherance of the church's religious purpose and could result in no “more than de minimis incremental expenses” by the church.<sup>138</sup> However, Section 5201 did not appear in the final version of the enacted bill.<sup>139</sup>

#### IV. A PROPOSAL TO PROTECT INTERNAL CHURCH COMMUNICATIONS

I would resolve this debate by amending the Internal Revenue Code to create a statutory safe harbor protecting internal church communications from both the ban on political campaigning and the ban on substantial lobbying. No inference or presumption should arise as to activity or expression outside the proposed statutory safe harbor. This proposal would shelter the internal expressive autonomy of churches while continuing to deter the use of churches and other tax-exempt organizations to divert tax-deductible resources into political activity. This statutory safe harbor would reduce the possibilities for church-state enforcement entanglement since the IRS would no longer be required to monitor and evaluate internal church communications for their content. This safe harbor would better balance churches'

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133. David Sherfinski, *Donald Trump's Push to Repeal Johnson Amendment Buys Religious Freedom Advocates*, WASH. TIMES (Aug. 14, 2016), <http://www.washingtontimes.com/news/2016/aug/14/donald-trumps-push-to-repeal-johnson-amendment-buo/>.

134. Phillip, *supra* note 2.

135. See H.R. 172, 115th Cong. (1st Sess. 2017).

136. See S. 264, 115th Cong. (1st Sess. 2017); H.R. 781, 115th Cong. (1st Sess. 2017).

137. Tax Cuts and Jobs Act, H.R. 1, 115th Cong. § 5201(a) (as introduced in House, Nov. 2, 2017).

138. *Id.*

139. See Act of Dec. 22, 2017, Pub. L. No. 115-97, 131 Stat. 2054.

legitimate First Amendment concerns about their internal communications with the need to prevent the diversion of tax-deductible resources to political campaigns.

Contrary to the recommendations of some commentators,<sup>140</sup> I would not treat "official" or "explicit" endorsements differently from other internal church discussions. A ban on express endorsements would require the IRS to continue to scrutinize in-house church communications. My proposal instead reduces the church-state enforcement entanglement that arises when the tax collector must monitor in-house church discussions. Such monitoring would continue if "official" and "explicit" endorsements remain off-limits to tax-exempt churches.

Little of substance would be gained by outlawing "official" or "explicit" endorsements since skilled speakers can make their meanings clear without using those labels. A rhetorician as adroit as Rev. King, Sr. could have effectively communicated his support for Kennedy's candidacy while eschewing terms like "official" and avoiding an express endorsement. To reduce church-state enforcement entanglement, the safe harbor protecting in-house church communication should create a true safe harbor, immunizing from IRS scrutiny all internal church discussions including any "official" or "explicit" endorsements of particular candidacies or causes.

My proposal also reflects the conclusion that, in entanglement terms, it is artificial to treat separately the section 501(c)(3) ban on campaigning and that section's ban on substantial lobbying. Both prohibitions, in their current forms, raise the same question about the autonomy of church communications: Should the IRS be obligated to police discussions within religious congregations to enforce the limitations of section 501(c)(3)? When a minister delivers a pro-life or pro-choice sermon, that sermon can, depending on the circumstances, be characterized under current law as a lobbying effort to mobilize public opinion or as political campaigning to support or oppose particular candidates. Either way, it is, in First Amendment terms, deeply entangling for the tax collector to be monitoring and evaluating this sermon.

To reduce enforcement entanglement between the IRS and churches, all pulpit communications (even "official" and "explicit" statements and endorsements) should be excluded from both the ban on political campaigning and the ban on lobbying. Commentators like Professor Colinvaux and Attorney Dessingue correctly observe that

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140. Dessingue, *supra* note 119, at 928; Samansky, *supra* note 122, at 178.

churches (including synagogues, temples, mosques and other such religious institutions) forfeit their distinctive voices when they become overtly partisan.<sup>141</sup> But these congregations, not Congress, are responsible for protecting their respective voices. The revised statute should discourage the diversion of tax-exempt resources into campaigning and lobbying, while safeguarding internal church discussions from church-state entanglement. Churches must themselves maintain their unique voices transcending partisanship.

My proposal raises an important issue at the borderline of the suggested exemption for in-house church communications: What is the pulpit in the digital age? This inquiry in turn raises two sub-questions: What is a church? What, in a world of electronic media, are internal, pulpit-like communications?

Many provisions of the Internal Revenue Code already pose the entangling borderline question whether particular institutions are churches or not. For example, the Code places churches into the public charity category rather than classifying them as private foundations.<sup>142</sup> In procedural terms, the Code excuses “churches, their integrated auxiliaries, and conventions or associations of churches” from filing annual returns<sup>143</sup> and from obtaining IRS confirmation of their tax-exempt status.<sup>144</sup> Similarly, the Code extends special audit protections to “any organization claiming to be a church”<sup>145</sup> and to “any convention or association of churches.”<sup>146</sup> Church retirement plans receive more lenient treatment under the Code than do the retirement arrangements of non-church employers.<sup>147</sup> My proposal for a safe harbor for in-house church communications would create another potentially contentious borderline between churches, entitled to the protection of such safe harbor for their in-house messaging, and non-churches, not entitled to such protection from the section 501(c)(3) bans on campaigning and substantial lobbying.

In this area, there are no ideal solutions, just imperfect trade-offs. Through a safe harbor for in-house church communications, I propose to reduce the enforcement entanglement inherent in the IRS’s policing of

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141. Colinvaux, *supra* note 58, at 723–25; Dessingue, *supra* note 119, at 922–25, 922 n.80.

142. 26 U.S.C. § 170(b)(1)(A)(i) (2012); 26 U.S.C. § 509(a)(1) (2006).

143. 26 U.S.C. § 6033(a)(3)(A)(i) (2012).

144. 26 U.S.C. § 508(c)(1) (2006).

145. 26 U.S.C. § 7611(h)(1)(A) (1994).

146. *Id.* § 7611(h)(1)(B).

147. 26 U.S.C. §§ 401(a)(9)(C)(iv), 414(e) (2012); 29 U.S.C. § 1003(b)(2) (2002); Tax Reform Act of 1976, Pub. L. No. 94-455, § 501(b)(1), 90 Stat. 1558; *see also* Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652 (2017).

internal church discussions. That safe harbor would protect churches' in-house conversations from both the section 501(c)(3) prohibition on campaigning and that section's prohibition of substantial lobbying. The resulting reduction of enforcement entanglement would come at a cost, namely, borderline entanglement as the IRS would monitor the boundaries of a safe harbor limited to internal church discussions to determine which organizations are (and are not) churches entitled to the protection of their internal messaging from IRS review.

Borderline entanglement could be mitigated by expanding the proposed safe harbor for in-house communications to cover the internal discussions of all religious organizations or, even more broadly, to cover in-house communications among all 501(c)(3) entities. However, I would not enlarge the proposed safe harbor to reach beyond internal church discussions. Supporters of current law correctly cite the danger that 501(c)(3) groups can be used to divert tax-deductible donations into campaigning and lobbying.<sup>148</sup> Responding to this concern, my proposed statutory safe harbor should be limited to the internal communications of churches. This would leave the current statutory bans intact for all 501(c)(3) groups other than churches and would continue to apply those bans to churches outside the context of churches' internal communications.

In particular cases, it would be a challenge under my proposal to separate internal church communications protected by the suggested statutory safe harbor from other church activity. In today's world of the Internet and electronic media, the church's pulpit is not as clearly demarcated as it was in an earlier age. Hence, the line between internal communications and external outreach is not as clear today as it once was.

For example, a preacher in a megachurch may simultaneously broadcast her sermon to different locations at which the church conducts services. Those broadcasts will often be available to the world at large. Similarly, a minister may place her sermon on the church's website for the benefit of congregants who did not attend the service at which the sermon was delivered. While steps can be taken to limit the access of outsiders to these electronically-transmitted communications, those limits will often be permeable.

The difficulties of distinguishing internal from external communications in the modern age will sometimes be even greater than these examples suggest. If a celebrity preacher, like Rev. Billy Graham or Rev. Rick Warren, makes a politically salient announcement from

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148. See Czipo, *supra* note 129.

the pulpit, that announcement will become known to the world at large moments later.<sup>149</sup> Through social media and television, a celebrity preacher like Rev. Joel Osteen is regularly heard and read by millions each week.<sup>150</sup>

Under my proposed safe harbor for in-house church communications, *Branch Ministries v. Rossotti*<sup>151</sup> would remain good law. Consequently, if a preacher's church paid for a newspaper advertisement or hired a public relations firm to disseminate his announcement beyond the membership of the church, that could constitute campaigning or lobbying and thus potentially trigger the prohibitions of section 501(c)(3). The facts of *Branch Ministries* would cross the line from protected internal church communications to the diversion of tax-deductible resources to lobbying and campaigning.<sup>152</sup> Hence, the safe harbor would not apply in that kind of situation since the church was reaching beyond its membership.

This approach would require difficult line-drawing problems. But what important legal principle does not, including the Johnson Amendment in its current form? On balance, the best, albeit imperfect, trade-off is to protect internal church communications while otherwise leaving in place the Internal Revenue Code's current prohibitions on tax-exempt organizations' political campaign activity and substantial lobbying.

My proposal differs from the Jones bill<sup>153</sup> in two respects. The Jones legislation would apply to all activities of all 501(c)(3) entities.<sup>154</sup> My proposal is narrower and would only immunize from scrutiny churches' internal communications.<sup>155</sup> Moreover, the Jones proposal would leave intact the ban on "substantial lobbying" for all exempt organizations, including churches.<sup>156</sup> My proposal in this respect is broader and would carve a safe harbor from section 501(c)(3)'s lobbying ban for internal church communications.

149. See, e.g., Michael W. Chapman, *Rev. Billy Graham: 'America is Just as Wicked as Sodom and Gomorrah Ever Were'*, CNS NEWS: BLOG (Oct. 16, 2014, 4:56 AM), <http://www.cnsnews.com/mrctv-blog/michael-w-chapman/rev-billy-graham-america-just-wicked-sodom-and-gomorrah-ever-were>.

150. *The Evolution of Joel Osteen, Pastor of the Biggest Church in America*, ONLINE CHRISTIAN COLLEGES (2017), <http://www.onlinechristiancolleges.com/joel-osteen/> (stating Osteen has seven million weekly viewers of his TV ministry).

151. *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000).

152. *Id.* at 140.

153. H.R. 172, 115th Cong. (1st Sess. 2017).

154. See *id.*

155. See *id.*

156. See *id.*

The Lankford-Scalise legislation<sup>157</sup> comes closer to my proposal but is still different in important respects. That legislation would protect all section 501(c)(3) organizations.<sup>158</sup> I suggest that protection just be extended to churches. Since the problem is untoward government intrusion into churches' internal communications, the solution is the protection of such church communication.

Moreover, the Lankford-Scalise bill would permit any kind of statement "in the ordinary course of the organization's regular and customary activities in carrying out its exempt purpose."<sup>159</sup> In contrast, I propose more targeted protection for churches' internal communications. Under the Lankford-Scalise bill, a non-church religious organization could construe its exempt purpose as including communication aimed at the general public.<sup>160</sup> This is too broad a standard and could permit the diversion of tax-deductible contributions to political campaigning. My proposal, in contrast, would protect church autonomy by creating a safe harbor limited to churches' internal communications. While succoring the First Amendment rights of churches (and similar congregations such as synagogues, temples and mosques), my approach would keep a stronger barrier against the potential use of tax-deductible donations for political campaigning. Since the problem is untoward government intrusion into churches' internal communications, the solution should be targeted to the protection of such church communications.

Of the recent legislative proposals, Section 5201 of House Bill 1 came closest to the position I advance. Section 5201 would have retained Section 501(c)(3)'s general ban on political campaigning by churches and other exempt institutions.<sup>161</sup> However, Section 5201, if added to Section 501(c)(3), would have immunized internal church communications from this ban.<sup>162</sup>

Section 5201 fell short in two respects. First, the safe harbor that this legislation would have created in Section 501(c)(3) would not have protected internal church communications from the Code's prohibition on lobbying.<sup>163</sup> Comments made during a "homily, sermon, teaching, dialectic or other presentation" could still be classified as lobbying.<sup>164</sup> If

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157. S. 264, 115th Cong. (1st Sess. 2017).

158. *Id.*

159. *Id.*

160. *See id.*

161. *See Tax Cuts and Jobs Act, H.R. 1, 115th Cong. § 5201(a)* (as introduced in House, Nov. 2, 2017).

162. *See id.*

163. *Compare id., with I.R.C. § 501(c)(3)* (2012).

164. H.R. 1, 115th Cong. § 5201(a).

deemed substantial, such lobbying could cause a church to lose its tax-exempt status.<sup>165</sup> Second, Section 5201, if enacted into law, would have required the IRS to determine if a particular statement was made “in the ordinary course of the [church’s] regular and customary activities” furthering the church’s religious purposes.<sup>166</sup> This statutory language would entangle church and state as it would require the IRS to monitor churches to determine their “regular and customary activities” and to assess which such activities further the churches’ religious purposes.<sup>167</sup>

Future legislation could improve upon the proposed Section 5201 by correcting these two deficiencies. Legislation should extend Section 5201’s safe harbor for internal church communications to protect such communications from Section 501(c)(3)’s prohibition on lobbying.<sup>168</sup> Legislation should also upgrade Section 5201 by deleting from it the entangling test whether particular statements are made “in the ordinary course of the [church’s] regular and customary activities” in furtherance of the church’s religious purposes.<sup>169</sup> Legislation that amends and builds from Section 5201 would require that churches not incur “more than de minimis incremental expenses” in the context of political statements.<sup>170</sup> This requirement would properly deter the use of churches as conduits for tax-deductible campaign contributions.

Even without these two changes, Section 5201 would have improved present law. Added to the Code, Section 5201 would have protected some internal church communications from characterization as political campaigning while leaving intact the prohibition against churches and other exempt institutions being used for such campaigning.<sup>171</sup> With these two changes, Section 5201 would have implemented the optimal balance, protecting internal church communications from church-state entanglement while preventing churches from funneling tax-deductible resources to political campaigns.<sup>172</sup>

## V. CONCLUSION

Rather than the blanket repeal of the Johnson Amendment proposed by President Trump, I suggest a statutory safe harbor for the internal communications of churches. This limited safe harbor would

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165. *See id.*

166. *Id.*

167. *Id.*

168. *See id.*

169. *Id.*

170. *Id.*

171. *See id.*

172. *See id.*

protect in-house church discussions from both section 501(c)(3)'s ban on substantial lobbying, and from that section's prohibition on political campaigning. Under this proposed amendment to the Internal Revenue Code, churches would, along with other religious and secular tax-exempt institutions, otherwise remain subject to the Code's bars on campaigning and lobbying. While entanglement considerations counsel greater protection than current law provides for speech within churches, these statutory bars properly deter the diversion of income tax-deductible resources to campaigning and lobbying. My more targeted reform of the Johnson Amendment, limited to churches' internal communications, is a better balance which addresses the legitimate concerns of churches about their First Amendment rights while preventing the tax-exempt sector from becoming a conduit for tax-deductible campaign contributions.