CAN THE IRS SILENCE RELIGIOUS ORGANIZATIONS?

MEGHAN J. RYAN*

As the campaign season for the 2008 presidential election begins, politicians are already courting religious organizations, which will certainly again play a crucial role in the election's outcome.[1] During the last political campaign season, religious organizations engaged in what some would characterize as unsavory politicking.[2] For instance, a Baptist church backed a ban on gay marriage in a nationally televised Sunday service,[3] a Catholic cardinal declared that individuals wearing rainbow sashes to church to identify themselves as homosexuals would be denied communion,[4] and a bishop distributed a letter to his parishioners stating that any Catholic who votes for a political candidate supportive of abortion, same-sex marriage, or stem-cell research should be denied communion.[5] Most notably, the Archbishop of Boston threatened to deny presidential candidate John Kerry communion in the Catholic Church because of Kerry's political view on abortion.[6] Churches, however, did not act alone in exploiting issues infused with both religious and political elements. In an effort to mobilize

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* Associate, Dorsey & Whitney LLP. E-mail: mjryan@post.harvard.edu. A.B., Harvard University; J.D., University of Minnesota Law School. The author thanks Gregg Polsky, Michael Stokes Paulsen, Ryan Miske, C. Michael Geise, Ryan Stai, and Jana Bruder for their helpful comments and suggestions on an earlier draft.

1. *See, e.g.*, David Espo, *Democrats Urged to Court Churchgoers*, STAR TRIB., June 29, 2006 (noting that Senator Barack Obama stated that the Democratic party "must compete for the support of evangelicals and other churchgoing Americans"); *see also* Terry Eastland, *Houses of Worship: The Moral Majority*, WALL ST. J., Nov. 5, 2004, at W17 (stating that moral values was the determining issue in how many voters cast their ballots in the 2004 presidential election); *cf.* Laurie Goodstein, *Minister, a Bush Ally, Gives Church as Site for Alito Rally*, N.Y. TIMES, Jan. 5, 2006 (reporting that a Philadelphia minister who pledged his support for a Bush presidency in 2000 offered his church as a site for a major political rally intended to "whip up support" for Bush's Supreme Court nominee Alito).

2. The *Wall Street Journal* stated that much of this was fueled by right-wing Christians hoping to bolster presidential candidate George W. Bush, as well as other Republicans, in the 2004 election and to draw attention away from the Catholic Church's sex abuse scandals. Albert R. Hunt, *Playing Politics at the Altar*, WALL ST. J., May 27, 2004, at A21.

3. *In Brief*, WASH. POST, Sept. 25, 2004, at B09.

4. Hunt, *supra* note 2.

5. *Id.* Remarkably, this same bishop neglected to mention the death penalty or the Iraq war as worthy of excommunication. *Id.* The Catholic Church opposes both of these issues. *See* John Harwood, *Bush May Be Hurt by Handling of Death-Penalty Issue*, WALL ST. J., Mar. 21, 2000, at A28; Hunt, *supra* note 2. These issues, however, were integral to the Bush campaign. Hunt, *supra* note 2.

6. *See* Gerald F. Seib, *The Catholic Vote Becomes Metaphor for Polarized Views*, WALL ST. J., Oct. 20, 2004, at A4 (noting that Kerry supports abortion rights); Editorial, *Bishops at the Ballot Box*, BOSTON GLOBE, June 16, 2004, at A20. Some evidence suggests, however, that most Catholics strongly oppose using communion as a political weapon and that this actually helped John Kerry, the Democratic candidate, in the race. Hunt, *supra* note 2.

incumbent President George W. Bush's religious supporters, the Bush campaign requested religious volunteers nationwide to turn over church directories to the campaign, distribute campaign literature, persuade their churches to hold voter registration drives, talk to seniors in the church about President Bush, recruit more volunteers for the campaign, and host campaign-related potluck dinners with church members.[7]

After various organizations protested this intermixing of religion and politics, the Internal Revenue Service ("IRS") responded.[8] It sent a letter to both the Republican and Democratic national committees, warning that the tax-exempt status of a religious organization could be revoked if the organization engaged either directly or indirectly in political activities.[9] Indeed, the IRS has revoked the tax-exempt statuses of religious organizations in the past for impermissibly intervening in political campaigns.[10] Further, beginning around the time of the 2004 presidential election, the IRS increased its monitoring of potentially improper political activities by tax-exempt religious organizations.[11] As of December 2005, the IRS was working to clear approximately 130 cases from the 2004 presidential election involving possible violations of § 501(c)(3) by tax-exempt organizations, including approximately fifty churches.[12] It is difficult to determine exactly how many of these religious organizations will lose their tax-exempt statuses because the IRS is legally prohibited from disclosing the details and the names of the organizations it investigates.[13] However, the IRS has revealed that at least one-third of its investigations for impermissible intervention in political campaigns involve religious organizations.[14] With this increased IRS attention, religious organizations must now be mindful that their messages do not contain impermissible political content, lest they risk losing their tax-exempt

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7. *National Briefing Pulpit Politics: Bush Politicking Between the Pews Once Again*, AM. POL. NETWORK, July 1, 2004, at 20. The "instruction sheet" that the Bush campaign circulated listed twenty-two "duties" for the religious volunteers to perform by specific dates. *Id.*

8. *See id.*

9. *Id.*

10. *See, e.g.*, Branch Ministries v. Rossotti, 211 F.3d 137, 145 (D.C. Cir. 2000) (approving the IRS's revocation of a church's § 501(c)(3) tax-exempt status because the church impermissibly intervened in a political campaign). Further, three tax-exempt organizations are expected to lose their tax-exempt statuses as a result of their politicking during the 2004 campaign season. *See IRS Finds Prohibited Political Activity in Majority of Exempt Group Exams*, 74 U.S.L.W. 2524, 2524 (Mar. 7, 2006) [hereinafter *IRS Finds Prohibited Political Activity*].

11. Mike Allen, *NAACP Faces IRS Investigation*, WASH. POST, Oct. 29, 2004, at A08.

12. *IRS to Finish 2004 Election Cases on Political Intervention Amid Debate*, 74 U.S.L.W. 2335, 2335 (Dec. 6, 2005). Recently, the IRS warned a California church that it could lose its tax-exempt status because a guest preacher gave an anti-war sermon on the eve of the 2004 presidential election. *Church: Anti-war Sermon Imperils Tax Status*, CNN.COM, Nov. 7, 2005, http://www.phillyblog.com/philly/showthread.php?t=12329.

13. Genaro C. Armas, *60 Tax-Exempt Groups Under Investigation; at Issue Are IRS Regulations That Bar Political Activities*, WASH. POST, Oct. 30, 2004, at A04.

14. *See id.*

statuses.[15]

Various scholars speculate as to whether the religious organizations under investigation indeed violated the IRS limitations on politicking,[16] and if they did, whether such standards are constitutionally permissible.[17] In this debate, proponents of the IRS regulations argue that in light of the test generally applied in free exercise cases, the IRS regulations cannot be invalidated on that ground.[18] Opponents of the IRS regulations highlight religious organizations' interests in stating their religious beliefs, which may coalesce with what the IRS would consider political.[19] Scholars, however, have overlooked the possibility of attacking the IRS regulations on the ground of a *Smith* hybrid claim,[20] which ratchets up the level of scrutiny when both free exercise and free speech concerns are implicated.[21]

This Article argues that the IRS regulations applying the § 501(c)(3)

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15. *See id.*

16. *See, e.g.*, Allan Samansky & Donald Tobin, *Point-Counterpoint on Election Activities of Churches and Charities*, ELECTION LAW @ MORITZ, Aug. 24, 2004, http://moritzlaw.osu.edu/electionlaw/comments/2004/040824.php (debating whether § 501(c)(3) dictates that churches should lose their tax-exempt statuses when they deny members communion because of the way they vote or when they clearly support one political candidate over another).

17. *See, e.g.*, Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401, 493 n.343 (1991) (noting that the constitutionality of § 501(c)(3)'s limitations on political participation could be questioned); Samansky & Tobin, *supra* note 16 (debating the constitutionality of any limitation that would prevent § 501(c)(3) religious organizations from incidentally espousing political messages).

18. *See, e.g.*, John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 567, 586 (1992). Similarly, IRS Commissioner Mark Everson has stated that "[f]reedom of speech and religious liberty are essential elements of our democracy, . . . But the [U.S.] Supreme Court has in essence held that tax exemption is a privilege, not a right, stating that 'Congress has not violated [an organization's] First Amendment rights by declining to subsidize its First Amendment Activities.'" *IRS Finds Prohibited Political Activity*, *supra* note 10 (quoting Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983)) (alterations in original).

19. *See, e.g.*, Samansky & Tobin, *supra* note 16 (arguing that leaders of religious organizations should be free to point out the moral components of public issues without risking their § 501(c)(3) tax-exempt statuses); Deborah Zimmerman, Note, Branch Ministries, Inc. v. Rossotti: *First Amendment Considerations to Loss of Tax Exemption*, 30 N. KY. L. REV. 249, 265 (2003) (outlining church's free speech and free exercise interests).

20. A *Smith* hybrid claim involves both a free exercise claim and a free speech claim. *See generally* Employment Div. v. Smith, 494 U.S. 872 (1990) (outlining the *Smith* hybrid claim), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 109-280, 107 Stat. 1488, *as recognized in* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 126 S. Ct. 1211 (2006) .

21. *See generally id.* (explaining that a heightened level of scrutiny applies when both free exercise and free speech claims are involved); *infra* Part III.B.

limitation on intervening in political campaigns must be more deferential when applied to religious organizations so as not to be vulnerable to invalidation under a *Smith* hybrid claim. Part I outlines the § 501(c)(3) limitation on intervention in a political campaign, as well as the IRS regulations used to determine whether organizations are engaged in prohibited intervention in political campaigns. It notes that religious organizations are treated no differently than other organizations under these regulations. Part II explains that, in some circumstances, withholding a tax benefit from an organization simply because the organization exercises its constitutional rights may be an unconstitutional burden on that organization. Part III summarizes the constitutional test applied to free exercise claims and explains how a stricter level of scrutiny applies when free speech claims are also at issue. It argues that due to the unclear line between religious and political issues, the IRS regulation compels religious organizations to remain silent on issues that are both religious and political. This chills religious organizations' freedom of political and religious speech and burdens their free exercise of religion. The combination of these burdens makes the IRS's application of § 501(c)(3) unconstitutional under a *Smith* hybrid claim. Part IV suggests that to avoid this constitutional difficulty, the IRS should defer to religious organizations' bona fide claims that messages are religious when the messages play such dual roles. Additionally, the IRS should clarify how it will apply § 501(c)(3) so religious organizations' actions are not chilled by uncertain fears of losing their tax-exempt statuses.[22]

I. SECTION 501(C)(3) AND THE IRS'S CORRESPONDING REGULATIONS LIMIT POLITICAL ACTIVITY BY § 501(C)(3) ORGANIZATIONS

Internal Revenue Code § 501(c)(3) and corresponding IRS regulations prevent tax-exempt organizations from engaging in political activities.[23] The tax-exempt status of § 501(c)(3) is reserved for organizations "which do[] 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."[24] This prohibition against political campaign intervention is absolute; there are no *de minimus* exceptions to the rule.[25]

Organizations that do not adhere to the limitations on engaging in political

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22. Although this Article focuses on the vulnerability of the IRS's application of § 501(c)(3) under the constitutional framework set forth in *Smith*, perhaps an even stronger argument for deference can be made under the Religious Freedom Restoration Act of 1993. *See supra* note 20.

23. *See* I.R.C. § 501(c)(3) (2000).

24. *Id*. The statute also provides that § 501(c)(3) organizations may not have any part of their net earnings "inure[] to the benefit of any private shareholder or individual," or devote a substantial part of their resources to attempting to influence legislation. *Id.*

25. United States v. Dykema, 666 F.2d 1096, 1101 (7th Cir. 1989). *But see* BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 584 (8th ed. 2003) (comparing § 501(c)(3) to § 610 of the Federal Corrupt Practices Act, which is absolute on its face but has been found to allow *de minimus* exceptions).

activity are referred to as "action" organizations and are not entitled to the tax exemption conferred by § 501(c)(3).[26] If found in violation of the § 501(c)(3) limitation on intervening in a political campaign, the IRS will revoke the organization's § 501(c)(3) status indefinitely.[27] The action organization will lose its tax-exempt status for that year and will have to re-apply for its tax-exempt status if it hopes to have it reinstated the following year.[28] Additionally, in instances where action organizations egregiously violate the rules applying to tax-exempt organizations, the IRS may revoke their tax-exempt statuses retroactively.[29] This means that the organizations may be taxed for the year in which their tax-exempt statuses are revoked, as well as for previous years.[30] Further, the IRS may also apply penalty taxes to the organizations, requiring them to pay sums of up to $15,000, depending on the nature of the violation.[31]

The lack of meaningful legislative history as to what constitutes impermissible intervention in a political campaign makes the § 501(c)(3) limitation difficult to apply.[32] This limitation, which was added to § 501(c)(3) without the benefit of congressional hearings,[33] was introduced as a floor

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26. *See* I.R.C. § 501 (2000); Treas. Reg. § 1.501(c)(3)-1(c)(3) (2000). Although "action" organizations are not entitled to § 501(c)(3) statuses, they may still be entitled to § 501(c)(4) statuses. *See generally* I.R.C. § 501(c)(4) (2000) (providing that organizations not organized for profit but operated exclusively for the promotion of social welfare and devoting their earnings exclusively to charitable, educational, or recreational purposes, are entitled to tax-exempt statuses). Unlike § 501(c)(3) organizations, § 501(c)(4) organizations may attempt to influence political campaigns or engage in more targeted issue advocacy without risking their tax-exempt statuses. *See* JAMES J. FISHMAN & STEPHEN SCHWARZ, TAXATION OF NONPROFIT ORGANIZATIONS 335-38 (2003). While taxpayers who contribute to a § 501(c)(3) organization may deduct the amount of their contributions on their federal income tax returns, contributions to § 501(c)(4) organizations may not be deducted. *See* I.R.C. § 170(c)(2) (2000).

27. *See generally* HOPKINS, *supra* note 25, at 654-63, 684-99 (explaining the consequences of engaging in behavior prohibited by the guidelines for tax-exempt statuses).

28. *See id.*

29. *See generally id.* at 659-63 (explaining the consequences of retroactive revocation of an organization's tax-exempt status).

30. *See id.*

31. *See id.* at 600-02.

32. *See* Joseph S. Klapach, Note, *Thou Shalt Not Politic: A Principled Approach to Section 501(c)(3)'s Prohibition of Political Campaign Activity*, 84 CORNELL L. REV. 504, 516 (1999) ("The absence of any meaningful legislative history for the political activities provisions of § 501(c)(3) further complicates matters."); *see also* ROBERT L. HOLBERT, TAX LAW AND POLITICAL ACCESS 27 (1975) (noting that the legislative history pertaining to the enactment of § 501(c)(3) is "skimpy"). While there is no clear legislative history regarding the enactment of this limitation on political activity, it may be linked to the fundamental principle of the separation of church and state. *See* Benjamin S. De Leon, Note, *Rendering a Taxing New Tide on I.R.C. § 501(c)(3): The Constitutional Implications of H.R. 2357 and Alternatives for Increased Political Freedom in Houses of Worship*, 23 REV. LITIG. 691, 695 (2004).

33. *See* Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code*

amendment and adopted in the Senate.[34] Senator Lyndon B. Johnson of Texas offered the amendment out of concern that funds provided by a certain charitable foundation had been used to help finance the campaign of his opponent in a senatorial primary election.[35] Perhaps the only useful legislative history lending insight into the purpose of the provision is a House Report that expresses a congressional policy that the U.S. treasury should be neutral in political affairs and thus should not subsidize political activity.[36] While the original form of the bill prohibited only "partisan politics," this phrase was deleted prior to the law's enactment.[37] Still, this notion of partisanship is reflected in the courts' and IRS's interpretations of the limitation.[38]

In the context of religious organizations, courts have readily approved the IRS's revocation of tax exempt statuses when flagrant political activity has been at issue.[39] Courts have not, however, had the opportunity to rule in situations involving less egregious activity by religious organizations.[40] Therefore, courts have not had to delineate the scope of the § 501(c)(3) limitation as applied to religious organizations. The primary case in which a court confronted the question of whether a religious organization impermissibly intervened in a political campaign is *Branch Ministries, Inc. v. Rossotti*.[41] There, the D.C. Circuit approved the IRS's revocation of a church's § 501(c)(3) tax-exempt status because the organization placed full-page advertisements in two newspapers that urged Christians not to vote for presidential candidate Bill Clinton because of his positions on certain moral issues.[42] The court did not expound on whether less egregious activities by religious organizations would contravene the limitations set forth in § 501(c)(3).[43] Similarly, in *Christian Echoes National Ministry, Inc.*

Prohibits; Why; To What End?, 42 B.C. L. REV. 903, 905 (2001).

34. *See* Colleen T. Sealander, *Standing Behind Government-Subsidized Bipartisanship*, 60 GEO. WASH. L. REV. 1580, 1635 (1992).

35. *See id.* at 1635-36.

36. H.R. REP. NO. 100-391, pt. 2, at 1624-25 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 2313-1205 (noting that the IRS should strengthen its enforcement efforts in policing the § 501(c)(3) limitations).

37. *See* H.R. REP. NO. 73-1385, 3-4, 17, 19 (1934); S. REP. NO. 73-558, 26 (1934); 78 CONG. REC. 7831 (1934); 78 CONG. REC. 5959 (1934).

38. *See infra* notes 53-56.

39. *See, e.g.*, Branch Ministries v. Rossotti, 211 F.3d 137, 145 (D.C. Cir. 2000) (ruling on whether a church impermissibly intervened in a political campaign).

40. Given that most appeals regarding the revocation of an organization's tax-exempt status result in settlements, courts rarely rule on whether an organization has engaged in proscribed political campaigning. For a discussion of IRS settlements and the settlement process, see Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315, 341 (1999) (explaining that "many tax cases never make it to court because they are resolved by the IRS Appeals Office before they are ever docketed").

41. *See Branch Ministries*, 211 F.3d at 139-42.

42. *Id.* at 140-42.

43. *See id.* (analyzing whether the IRS has the authority to revoke the tax-exempt status of

v. United States, the Tenth Circuit approved the IRS's revocation of a church's § 501(c)(3) tax-exempt status, but did not clarify the scope of the prohibition on intervening in a political campaign.[44] In that case, a religious organization attacked President Kennedy for being too liberal and urged its members to elect conservatives such as Senator Strom Thurmond.[45] As in *Branch Ministries*, the court did not explore the limits of § 501(c)(3)'s prohibition on intervening in a campaign outside of the egregious activities at issue.[46] Therefore, these cases give little guidance to religious organizations as to whether § 501(c)(3) permits them to convey messages to their members that have both religious and political components.

The IRS has attempted to clarify the prohibition on intervening in a political campaign by issuing regulations and technical advice memoranda on the issue.[47] In Treasury Regulation 1.501(c)(3)-1(c)(3)(iii), the IRS states that prohibited activities "include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to . . . a candidate."[48] However, the IRS has not limited violations of § 501(c)(3) to instances in which organizations explicitly advocate the election or defeat of a clearly-identified candidate.[49] The IRS fears that this would allow an organization to surreptitiously intervene in a political campaign by using "code" language to support a candidate,[50] thus allowing too much election-influencing activity among § 501(c)(3) organizations.[51] Instead, the IRS has determined that even issue advocacy may rise to the level of prohibited intervention if it is employed in the midst of a hotly contested political campaign so as to impliedly endorse or oppose a candidate.[52]

In determining whether an activity is prohibited under § 501(c)(3), the IRS generally draws a line between activities that are conducted in a nonpartisan manner and those that are not.[53] Prohibited activities under § 501(c)(3) include

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a bona fide church, whether the revocation violated the First Amendment, and whether selective prosecution on the part of the IRS violated the Equal Protection Clause).

44. *See* Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 855-56 (10th Cir. 1972).

45. *Id.* at 856.

46. *See id.*

47. *See, e.g.*, I.R.S. Tech. Adv. Mem. 96-09-007 (Dec. 6, 1995) (determining that an organization's fundraising letters constituted prohibited intervention in a political campaign).

48. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 1990).

49. *See* FISHMAN & SCHWARZ, *supra* note 26, at 333; Judith E. Kindell & John F. Reilly, *Election Year Issues*, FY 1993 IRS EXEMPT ORG. CONTINUING PROF'L EDUC. TECHNICAL INSTRUCTION PROGRAM 400, 410-11 (1992), *available at* http://www.irs.gov/pub/irs-tege/eotopicn93.pdf.

50. Kindell & Reilly, *supra* note 49, at 411.

51. *See* Editorial, *Free Speech vs. Tax Code*, WALL ST. J., Dec. 14, 2004, at A14.

52. *See* FISHMAN & SCHWARZ, *supra* note 26, at 333.

53. *See, e.g.*, HOPKINS, *supra* note 25, at 591 ("A traditional distinction between political campaign activity and voter education activity has been that the latter is nonpartisan.").

political action committees and financial support of a candidate.[54] Activities that may be permissible if conducted in a nonpartisan manner include educational activities, voter guides, candidate questionnaires, public forums, voter drives, and inviting candidates to speak at an organization's event.[55] If conducted in a partisan manner, however, engaging in any of these activities is grounds for revoking an organization's tax-exempt status.[56] In Technical Advice Memorandum 91-17-001, for example, the IRS determined that an educational organization impermissibly intervened in a political campaign when it urged its members to vote for "the progress of the last 3-1/2 years."[57] The IRS concluded that the organization's audience would have known that the organization supported President Ronald Reagan's reelection, making the phrase tantamount to specifically urging the audience to vote for President Reagan.[58] Similarly, the IRS's application of § 501(c)(3) indicates that if a religious organization argues that abortion is immoral, this may constitute untoward politicking if a particular candidate in a controversial election has identified this issue as central to his campaign platform.[59] In such a case, preaching on the issue may be considered tantamount to supporting a particular candidate in the race.[60]

Despite the IRS's attempt to clarify the scope of the § 501(c)(3) limitation on intervening in a political campaign, organizations remain unclear as to which activities may constitute impermissible intervention in a political campaign.[61] This is especially true with respect to religious organizations.[62] This may be due, in part, to differing messages from Congress and the IRS as to the scope of the § 501(c)(3) limitation as applied to religious organizations. In the hearings on the Omnibus Budget Reconciliation Act, Congress expressed uncertainty as to whether a single standard to measure the political activities of all § 501(c)(3) organizations was appropriate.[63]

The notion that § 501(c)(3) religious organizations should be treated uniquely can be found throughout the Tax Code. For example, unlike other organizations, religious organizations are presumed to be exempt and need not

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54. *See generally* Steven B. Imhoof, Note, *The Politics of Politicking Under IRC § 501(c)(3): A Guide for Politically Active Churches*, NEXUS 97, 100-01 (Fall 2000) (articulating guidelines for religious organizations to follow in avoiding revocation of their tax-exempt statuses).

55. *See id.* at 101-05.

56. *Id.*

57. I.R.S. Tech. Adv. Mem. 91-17-001 (Apr. 26, 1991).

58. *See id.*

59. *See* Kindell & Reilly, *supra* note 49, at 410-11.

60. *See generally id.* (outlining the parameters of permissible issue advocacy).

61. *See* Brian Faler, *Falwell on 'Thugs' and Taxes*, WASH. POST, Aug. 6, 2004, at A06.

62. *See id.* (reporting that Jerry Falwell was to hold a conference to educate church leaders as to what they may say during religious services without losing their tax-exempt statuses).

63. H.R. REP. NO. 100-391, pt. 2, at 1624-25 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 2313-1205 (questioning whether it is appropriate or feasible for the IRS to utilize a single standard in determining § 501(c)(3) violations).

file applications for determination of this status.[64] Additionally, religious organizations need not file annual financial information returns,[65] and they have various immunities and protections from IRS audits.[66] Yet, the IRS appears to treat religious and nonreligious organizations alike when interpreting and applying the § 501(c)(3) limitation on intervention in political campaigns.[67] It makes no distinction between organizations accorded an additional layer of protection under the Free Exercise Clause and those accorded no additional protection.[68]

II. WITHHOLDING A TAX BENEFIT CAN BE A BURDEN ON CONSTITUTIONAL RIGHTS

In some circumstances, denying a tax exemption to a claimant for exercising its constitutional rights—for example speech or religious rights—is unconstitutional.[69] This withholding of a tax benefit from an organization is known as an unconstitutional condition.[70] In *Speiser v. Randall*, for example, the Supreme Court held that "[t]o deny [a tax] exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech."[71] The Court thus invalidated a California requirement that property tax exemptions for veterans would be available only to those who would declare that they did not advocate the forcible overthrow of the government.[72]

In other circumstances, however, the Court has held that denying an organization a tax benefit is a mere nonsubsidy and thus does not violate the Constitution.[73] For example, in *Regan v. Taxation With Representation*, the Court upheld § 501(c)(3) limitations as applied to a nonreligious organization

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64. I.R.C. § 508(c) (2002) (amended Aug. 17, 2006).

65. *Id.* § 6033(a)(2)(A)&(C); IRS, *Tax-Exempt Status for Your Organizations*, Publication 557, 8 (Mar. 2005).

66. *See generally* I.R.C. § 7611 (2002) (listing restrictions on the IRS in initiating tax inquiries of churches).

67. *See generally* Treas. Reg. § 1.501(c)(3)-1(c)(3) (as amended in 1990) (declining to distinguish between religious organizations and other § 501(c)(3) organizations).

68. *Cf. id.*

69. *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 518, 528-29 (1958) (holding that a law conditioning veterans' tax benefits on veterans swearing not to advocate the forcible overthrow of the government is unconstitutional).

70. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 333-34 (2d ed. 2003).

71. *Speiser*, 357 U.S. at 518.

72. *Id.* at 528-29.

73. *See, e.g.*, Regan v. Taxation With Representation, 461 U.S. 540, 541-51 (1983) (holding that the limitations of § 501(c)(3) as applied to an educational organization do not unconstitutionally infringe on that organization's free speech rights).

engaged in lobbying for tax reform.[74] The Court held that Congress is not required to provide tax-exempt organizations public money with which to lobby.[75] It reasoned that Congress's "decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."[76] The Court noted that the organization in question had the option of segregating its tax-exempt activities from its political activities by creating a separate § 501(c)(4) organization to engage in its political activities.[77] The organization was not penalized for engaging in political speech because it could still do so under its sister § 501(c)(4) entity; the government just refused to subsidize that speech.[78] In *Federal Communications Commission v. League of Women Voters of California*, however, the Court held that a noncommercial educational broadcasting station could not pragmatically segregate its political and tax-exempt activities into distinct § 501(c)(3) and § 501(c)(4) organizations; therefore, a law conditioning federal funding on the station's forbearance of its right to editorialize was determined to be an unconstitutional penalty.[79]

While the Court's jurisprudence in this complex area of unconstitutional conditions remains murky, it is clear that withholding a tax benefit from an organization can be an unconstitutional penalty in some cases.[80] While scholars continue to debate which factors cause a condition to be a penalty instead of a nonsubsidy,[81] it seems that a law is considerably more likely to be labeled as an unconstitutional penalty when it is difficult for an organization to segregate its tax-exempt actions from its political actions under the law.[82]

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74. *Id.* at 545-46 (holding that § 501(c)(3) limits do not impose an "unconstitutional condition" on free speech).

75. *Id.*

76. *Id.* at 549 (citing Buckley v. Valeo, 424 U.S. 1 (1976)).

77. *Id.* at 544.

78. *Id.* at 546. The distinction between the government penalizing speech and not subsidizing speech is vital in free speech challenges. The former almost certainly renders a statute unconstitutional, whereas the latter almost always ensures that the statute will be upheld. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 202-03 (1991) (upholding speech-restrictive, abortion-related conditions on family planning subsidies); Speiser v. Randall, 357 U.S. 513, 528-29 (1958) (finding unconstitutional a California statute that provided for property tax exemptions only for veterans who would declare they did not advocate the forcible overthrow of the government).

79. FCC v. League of Woman Voters, 468 U.S. 364, 399-400 (1984).

80. *See, e.g.*, *id. But see IRS Finds Prohibited Political Activity*, *supra* note 10 (noting the IRS Commissioner's reference to the Supreme Court's holding that a tax exemption is a privilege and that Congress does not violate an organization's First Amendment rights by refusing to subsidize its First Amendment activities).

81. *See, e.g.*, Lisa Babish Forbes, Note, *Federal Election Regulation and the States: An Analysis of the Minnesota and New Hampshire Attempts to Regulate Congressional Elections*, 42 CASE W. RES. L. REV. 509, 543 n.185 (1992) (explaining that "commentators are by no means of one mind as to the essential characteristics of such [an] analysis").

82. *See League of Women Voters*, 468 U.S. at 400; *Speiser*, 357 U.S. at 518; *see also* Rumsfeld v. Forum for Academic and Inst. Rights, Inc., 126 S. Ct. 1297, 1307 (2006) (suggesting

III. THE IRS'S APPLICATION OF § 501(C)(3) TO RELIGIOUS ORGANIZATIONS PRESENTS UNIQUE CONSTITUTIONAL CONCERNS

Limiting an organization's political activities presents distinct First Amendment concerns when applied to religious organizations because the Free Exercise Clause imposes additional constitutional protections when religious organizations are involved.[83] Religious and political issues are so intertwined in some instances that it is difficult to separate religious messages from political ones.[84] This blending of political and religious speech and actions exacerbates the free speech and free exercise concerns implicated when applying § 501(c)(3) and the IRS's corresponding regulations to religious organizations.[85] Even if each of these burdens, alone, is not enough to rise to a constitutional level, the compounding of free speech and free exercise concerns makes the IRS regulation applying § 501(c)(3) ripe for challenge under a *Smith* hybrid claim.[86]

A. The Line Between Religious and Political Issues Is Difficult to Draw

Application of § 501(c)(3) requires the IRS to distinguish between political and other activities.[87] This distinction must be made even when the two activities are closely intertwined.[88] In the educational context, for example, the IRS must determine whether the slogan "vote for the progress of the last 3-1/2 years" is an educational or a political message.[89] While the distinction may be relatively clear in this example, categorization can be exceedingly difficult in the context of messages that are arguably both religious and political.

The blending of religion and politics makes distinguishing political activity from religious activity extremely difficult. "Religion and politics have been intertwined since the birth of our nation."[90] The motto "In God We Trust" on our

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that the distinction between an unconstitutional condition and a constitutional nonsubsidy is whether the condition could have been constitutionally imposed directly).

83. The Free Exercise Clause states that "Congress shall make no law respecting . . . the free exercise [of religion]." U.S. CONST. amend. I.

84. *See infra* Part III.A.

85. *See infra* Part III.B. *But see* Regan v. Taxation With Representation, 461 U.S. 540, 550 (1983) (holding that § 501(c)(3) as applied to a tax-exempt organization is not an unconstitutional condition on free speech). The freedom of speech difficulties that § 501(c)(3) poses apply to all § 501(c)(3) organizations. *See infra* Part III.B.1. These concerns are heightened in the context of religious organizations because freedom of religion issues are also present. *See infra* Part II.B.2.

86. *See generally* Employment Div. v. Smith, 494 U.S. 872 (1990) (outlining the hybrid claim); *infra* Part III.B.

87. *See, e.g.*, I.R.S. Tech. Adv. Mem. 96-09-007 (Dec. 6, 1995) (determining that an organization's fundraising letters constituted prohibited intervention in a political campaign).

88. *See id.*

89. I.R.S. Tech. Adv. Mem. 91-17-001 (Apr. 26, 1991); *see supra* text accompanying notes 57-58.

90. Judy Ann Rosenblum, Note, *Religion and Political Campaigns: A Proposal to Revise*

currency and the phrase "Under God" in the Pledge of Allegiance evidence this presence of religious elements in political life.[91] During 2004, this political intertwinement took center stage with, for example, churches denying communion to members for voting for a particular political candidate or announcing that they would do so.[92] The denial of communion to church members is an exclusively religious act.[93] Urging members to vote for a particular candidate, however, may constitute intervention in a political campaign.[94] When these political and religious acts are intertwined it is arguable whether they can be separated into distinct religious and political components.

Religion and politics have become increasingly intertwined.[95] Issues that originally fell solely within the realm of religion have been co-opted by the political sphere. Politicians pluck contentious moral issues from within what used to be exclusively the religious domain and use them as a foundation on which to base their platforms. The issue of abortion, for example, has long been condemned by both the Jewish and Christian faiths but has only more recently become an issue of national politics.[96] These "moral issues" are then used in an attempt to court religious constituents.[97] Indeed, exit polls from the 2004

Section 501(c)(3) of the Internal Revenue Code, 49 FORDHAM L. REV. 536, 536 (1981) (citing B. DULCE & E. RICHTER, RELIGION AND THE PRESIDENCY 1-11 (1962)).

91. *See id.*

92. *See, e.g.*, Hunt, *supra* note 2 (noting that a Catholic cardinal declared that anyone wearing a rainbow sash to church to identify himself as a homosexual would be denied communion).

93. *See* John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 572 (1992).

94. *See generally supra* Part I.

95. *See* TIMOTHY L. FORT, LAW AND RELIGION 33 (1987) (explaining that religion and law are "inseparably linked" since both are sets of ethics, attempting to govern human behavior); *see also* Andrea Pallios, Note, *Should We Have Faith in the Faith-Based Initiative?: A Constitutional Analysis of President Bush's Charitable Choice Plan*, 30 HASTINGS CONST. L.Q. 131, 131 (2002).

96. *See infra* note 97. Politicians attempt to profit from preaching on these issues themselves because issues of morality can be especially moving. *See* KENNETH D. WALD, RELIGION AND POLITICS IN THE UNITED STATES 37 (3d ed. 1997) (noting that the potent nature of moral issues has the ability to mobilize citizens more than economic issues).

97. Religious organizations have historically espoused passionate views on issues such as abortion and homosexuality. For example, the Jewish faith has emphatically condemned abortion for over 2000 years, and the Christian faith has opposed abortion for at least 1800 years. *See* MICHAEL J. GORMAN, ABORTION & THE EARLY CHURCH 33, 47-48 (Intervarsity Press 1982). In contrast, abortion has only more recently become a topic worthy of political debate. *See* Richard K. Neumann, *On Strategy*, 59 FORDHAM L. REV. 299, 305 n.18 (1990) (citing Webster v. Reprod. Health Servs., 492 U.S. 490, 531 (1989)) (suggesting that abortion has only become a political issue since the Supreme Court handed down the *Roe v. Wade* decision in 1973); *Annotated Legal Biography on Gender*, 10 CARDOZO WOMEN'S L.J. 723, 779 (2004) ("The issue of abortion concerns the needs and demands of the nineteenth and twentieth centuries." (quoting Janet L. Dolgin, *Embryonic Discourse: Abortion, Stem Cells, and Cloning*, 31 FLA. ST. U. L. REV. 101, 102 (2003))). Thus, it is only recently that religious groups and politicians have faced off on such

presidential election indicate that "moral values" was the issue most prevalent on many voters' minds when they cast their ballots.[98]

As a result of the political co-option of religious issues, the body of issues that may be considered exclusively religious is steadily decreasing.[99] Under the IRS's current interpretation of § 501(c)(3), religious organizations cannot safely speak on issues that may contain both religious and political overtones.[100] As such, the body of issues on which religious organizations may safely speak is similarly decreasing.[101] Indeed, organizations that made remarks that lie in the gray area between religious and political speech during the 2004 presidential campaign season are currently under investigation or have already received warnings from the IRS and are at serious risk of losing their § 501(c)(3) statuses.[102] Further, the IRS appears to be growing bolder in challenging religious organizations on their use of arguably political speech.[103] Even if the IRS was not actively investigating these religious organizations, the organizations' fears of losing their tax-exempt statuses is often effective in deterring many of them from promulgating messages that may have both political and religious components.[104] Research demonstrates that many § 501(c)(3) organizations cower in fear of the IRS and avoid any kind of advocacy, even that which might be permitted.[105]

The uncertain line between permitted religious and proscribed political activities is exacerbated by the ever-growing campaign season. Section 501(c)(3) prohibits tax-exempt organizations from engaging in activities that could be interpreted as supporting or opposing a candidate for public office during the campaign season.[106] But in modern times the campaign season is an ongoing

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contentious issues.

98. Eastland, *supra* note 1.

99. *Cf.* Pallios, *supra* note 95, at 131 (noting that religion and politics are becoming increasingly more intertwined).

100. *See, e.g.*, I.R.S. Tech. Adv. Mem. 96-09-007 (Dec. 6, 1995) (determining that an organization's fundraising letters constituted prohibited intervention in a political campaign).

101. Even if religious organizations are at fault for the declining body of issues that are exclusively religious, the fact remains that the number of exclusively religious issues on which religious organizations may safely speak is decreasing.

102. *See Taxation-Exempt Organizations: IRS to Finish 2004 Election Cases on Political Intervention Amid Debate*, 74 U.S.L.W. 2335 (Dec. 6, 2005) [hereinafter *IRS to Finish 2004 Election Cases*]; *Taxation-Exempt Organizations: IRS Memo Sets Procedures to Examine Possible Political Activity by Charities*, 74 U.S.L.W. 2336 (Dec. 6, 2005).

103. *See* Allen, *supra* note 11; *see also IRS to Finish 2004 Election Cases*, *supra* note 102 (noting that "[i]n 2004, the IRS created a political intervention project designed to look at all Section 501(c)(3) groups and their involvement in political campaigns").

104. *See* Armas, *supra* note 13.

105. *See* Jeffrey M. Berry, *Who Will Get Caught in the IRS's Sights?*, WASH. POST, Nov. 21, 2004, at B03.

106. I.R.C. § 501(c)(3) (2000).

phenomenon.[107] "Candidates for the presidency and Congress now are in a perpetual campaign mode."[108] When presidents are not overtly campaigning for reelection, they consider the electoral impact of nearly every policy decision.[109] Because § 501(c)(3) organizations are prohibited from even insinuating that one candidate is preferred over another—for instance, based on a candidate's stance on a specific issue—the expanding campaign season further circumscribes a religious organization's ability to speak within the confines of the IRS regulations applying the § 501(c)(3) limitation on intervening in a political campaign.[110]

B. The Smith *Hybrid Claim Triggers Strict Scrutiny When Both Free Exercise and Free Speech Claims Are Involved*

The intertwinement of religion and politics makes for a unique challenge to the IRS's regulations implementing § 501(c)(3) under the Free Exercise Clause. Generally, claiming that a law is unconstitutional on the ground of the Free Exercise Clause has become difficult since the Supreme Court's decision in *Employment Division v. Smith*.[111] There, the Court held that most free exercise challenges are subject only to a deferential rational basis standard of review.[112] The Court carved out an exception, however, when the case involves a colorable free exercise claim in addition to the claim of another fundamental right, such as a free speech claim.[113] Although the *Smith* Court upheld the statute in question as constitutional under the First Amendment, it distinguished cases such as *Cantwell v. Connecticut*[114] and *Murdock v. Pennsylvania*[115] by noting that the facts at issue in *Smith* only involved a free exercise claim.[116] The Court stated that:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated

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107. *See generally* THE PERMANENT CAMPAIGN AND ITS FUTURE (Norman J. Ornstein & Thomas E. Mann eds., 2000) (explaining the causes and consequences of what has become the "permanent campaign").

108. *Id.* at vii.

109. Kathryn Dunn Tenpas, *The American Presidency: Surviving and Thriving Amidst the Permanent Campaign*, *in* THE PERMANENT CAMPAIGN AND ITS FUTURE 108, 115 (Norman J. Ornstein & Thomas E. Mann eds., 2000).

110. *See* Kindell & Reilly, *supra* note 49, at 446-49; *supra* notes 50-59.

111. 494 U.S. 872, 881-82 (1990) (holding that neutral, generally applicable laws are usually scrutinized under the Free Exercise Clause with a mere rational basis standard).

112. *See id.*

113. *See id.* at 881.

114. 310 U.S. 296, 308 (1940) (holding unconstitutional the conviction of Jehovah's Witnesses who were arrested for violating a law that prohibited solicitation).

115. 319 U.S. 105, 115 (1943) (holding unconstitutional, as applied, a law requiring Jehovah's Witnesses to obtain a license before soliciting).

116. *Smith*, 494 U.S. at 881.

> action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . .[117]

The Court referred to such a claim as a "hybrid."[118] In such cases, strict scrutiny is the appropriate standard to apply,[119] requiring that the statute or regulation at issue be necessary to achieve a compelling governmental interest.[120]

Although the *Smith* Court sought to hand down a bright-line rule,[121] it neglected to explain in detail exactly what constitutes a hybrid claim. Because the Court was somewhat vague in *Smith*, lower courts are divided as to how they should apply the hybrid claim analysis.[122] Since the *Smith* decision, the Supreme Court has not heard a case in which both a free exercise claim and another First Amendment claim were at issue. Thus, the Court has not had the opportunity to clarify the parameters of the hybrid claim.

The majority of circuit courts applying the hybrid claim analysis explain that each First Amendment claim need only be colorable, and not necessarily successful in its own right, to prevail under *Smith*.[123] If the free speech aspect of the claim is, itself, a sufficient reason to strike down the law in question, then

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117. *Id.*

118. *Id.* at 882.

119. *See id.* at 886 n.3 (rejecting the notion that neutral laws of general applicability, which do not also regulate speech, are subject to a compelling interest analysis); *see also* April L. Cherry, *The Free Exercise Rights of Pregnant Women Who Refuse Medical Treatment*, 69 TENN. L. REV. 563, 608-09 (2002) (noting that hybrid claims are subject to strict scrutiny analysis).

120. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 529 (Richard A. Epstein et al. eds., 2001); Adam M. Samaha, *Litigant Sensitivity in First Amendment Law*, 98 NW. U. L. REV. 1291, 1314 (2004).

121. *See* Andrew A. Beerworth, *Religion in the Marketplace: Establishments, Pluralisms, and the Doctrinal Eclipse of Free Exercise*, 26 T. JEFFERSON L. REV. 333, 380 (2004).

122. Courts have differed in how they apply *Smith*'s construct of hybrid claims. *See* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL'Y 119, 187-90 (2002). Some lower courts attempt to interpret the Court's directive in *Smith* and give meaning to the notion of a hybrid claim. *See, e.g.*, Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 700 (10th Cir. 1998) (holding that the hybrid claim analysis applies when plaintiffs have a "colorable" claim on the basis of another First Amendment right in addition to a claim under the Free Exercise Clause). Other courts, however, have rejected the notion of hybrid claims. *See, e.g.*, Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001) (explaining that the notion of a hybrid claim in *Smith* was mere dicta); Kissinger v. Bd. of Tr. of Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993) (refusing to apply strict scrutiny to a hybrid claim). Still other courts avoid the issue altogether. *See* Brownstein, *supra*, at 189. Some courts have held that the hybrid analysis only applies when plaintiffs can demonstrate that the claim accompanying the free exercise claim is independently viable. *See, e.g.*, Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, 539 (1st Cir. 1995) (holding that the hybrid analysis was not applicable since plaintiffs failed to state an independently viable substantive due process claim).

123. *See, e.g.*, *Swanson*, 135 F.3d at 699-700.

analyzing the claim under the Free Exercise Clause would be superfluous.[124] Similarly, if the free exercise claim, alone, invalidates the law, there is no need for the free speech component of the hybrid claim.[125] Therefore, the *Smith* Court contemplated a claim that is independently plausible as both a free exercise claim and a free speech claim, yet where neither the free exercise nor the free speech claim would independently give rise to a constitutional violation.[126] Certainly, neither the free exercise nor the free speech claim can be frivolous.[127] Both claims may, however, fall short of independently invalidating the law or regulation at issue.[128] As Professor Brownstein explains, this hybrid claim is best understood as ratcheting up the standard of scrutiny when each claim individually is subject to a standard less than strict scrutiny.[129]

Taking the hybrid claim into account,[130] the IRS regulation applying the § 501(c)(3) limitation on intervening in a political campaign is a prime target for invalidation. A challenge to the IRS's application of § 501(c)(3) would be similar to the free exercise challenges in *Cantwell*[131] and *Murdock*,[132] which the Court referred to in its *Smith* decision.[133] In *Cantwell*, the Court overturned the conviction of three Jehovah's Witnesses who were arrested for violating a Connecticut law that prohibited solicitation.[134] The Court found that the law deprived the defendants of their free exercise rights under the First and Fourteenth Amendments and burdened their rights to free speech as well.[135] Similarly, in *Murdock*, the Court invalidated a Pennsylvania law as applied to Jehovah's Witnesses.[136] The statute required persons canvassing and soliciting

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124. *Id.*

125. *See id.*

126. *Id.* at 699.

127. If it were possible to make a legitimate hybrid claim when either the free exercise claim or the free speech claim were frivolous, then the traditional scrutiny afforded such claims when asserted independently would be undermined.

128. *See Swanson*, 135 F.3d at 700.

129. *See* Brownstein, *supra* note 122, at 191 (arguing that the problem with the concept of hybrid rights is not incoherence).

130. *Compare* Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999) (noting that analysis under *Smith*'s hybrid claim is appropriate when there is a fair probability or likelihood that each claim would be successful on its merits), *with* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566-67 (1993) (Souter, J., concurring) (arguing that the hybrid claim of *Smith* is untenable); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1122-24 (1990) (arguing that the hybrid claim of *Smith* was not intended to be taken seriously).

131. 310 U.S. 296 (1940).

132. 319 U.S. 105 (1943).

133. Employment Div. v. Smith, 494 U.S. 872, 881 (1990); *see supra* text accompanying notes 114-15.

134. *Cantwell*, 310 U.S. at 300-02, 308.

135. *Id.* at 303-04.

136. *Murdock*, 319 U.S. at 115.

wares to obtain a license at a fee of about $1.50 per day.[137] The Court stated that "[i]t could hardly be denied that a tax laid specifically on the exercise of [First Amendment] freedoms would be unconstitutional."[138] The Court noted that dissemination of religious literature and preaching in the streets is accorded the same level of protection as worshiping in churches.[139]

C. The IRS's Regulation Implementing § 501(c)(3) Violates the First Amendment Under the Smith *Hybrid Claim*

Under the framework created by the *Cantwell-Murdock-Smith* line of cases, the IRS's application of § 501(c)(3) to religious organizations creates both a colorable free speech claim and a colorable free exercise claim under the First Amendment. This puts the IRS's regulations applying § 501(c)(3) to religious organizations squarely in the crosshairs of a hybrid claim under *Smith*, making it a prime target for ratcheting up the standard of scrutiny.

1. The IRS's Application of § 501(c)(3) Burdens Religious Organizations' Free Speech Rights.—The IRS's application of the § 501(c)(3) limitation on intervening in a political campaign chills both political and religious speech by religious organizations. Certainly, Congress may remove religious organizations from the list of § 501(c)(3) eligible organizations, but it cannot impose unconstitutional conditions on their inclusion.[140] Under the unconstitutional conditions doctrine, the threat of revoking a religious organization's tax-exempt status may be in effect penalizing the organization for its speech and thus unconstitutional.[141] This would be analogous to *Speiser*, in which the Court held unconstitutional the requirement that veterans swear they did not advocate the forcible overthrow of the government as a condition of receiving a tax benefit.[142] In both instances, the tax benefit depends on the taxpayer's forbearance of a constitutional right. While the regulation's burden on speech, alone, may not rise to a constitutional violation, it is at least a colorable claim which is all that is required under a *Smith* hybrid claim.[143]

The IRS's application of the § 501(c)(3) limitation burdens religious

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137. *Id.* at 106.

138. *Id.* at 108.

139. *Id.* at 109 ("This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion."). The Court also stated that sincerity of beliefs was not an issue in this particular case, and the fact that the ordinance was nondiscriminatory was irrelevant. *Id.* at 115.

140. *Cf.* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 510 (1996) (invalidating the *Posadas de Puerto Rico Ass'n v. Tourism Co.*, 478 U.S. 328 (1986), reasoning that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling" (quoting *Posadas de Puerto Rico Ass'n*, 478 U.S. at 345-46)).

141. Speiser v. Randall, 357 U.S. 513, 518 (1958).

142. *See id.* at 528-29.

143. Employment Div. v. Smith, 494 U.S. 872, 881 (1990).

organizations' free speech rights because such organizations cannot always effectively separate their religious and political speech. While jurisprudence in the area of the unconstitutional conditions doctrine remains uncertain, in *Regan* and *League of Women Voters*, the Court distinguished unconstitutional penalties from constitutional nonsubsidies on the basis of whether the organization's primary activities could be separated from its political activities and channeled into distinct § 501(c)(3) and § 501(c)(4) entities.[144] In *Regan*, where § 501(c)(3) was actually involved, the Court held that the law did not unconstitutionally violate the nonreligious organization's free speech rights because the organization could create a sister § 501(c)(4) organization to carry out its political activities.[145] In *League of Women Voters*, however, a sister § 501(c)(4) organization was not possible, thus the governmental limitation on speech was found unconstitutional.[146] Similar to the organization in *League of Women Voters*, and unlike the organization in *Regan*, religious organizations cannot always effectively segregate their religious messages from their political ones into the communications of separate § 501(c)(3) and § 501(c)(4) entities.[147] For example, if a preacher states in his sermon that members who vote for pro-choice political candidates cannot receive communion,[148] it is difficult to separate the religious from the political messages. The preacher is, in effect, serving a dual role when he makes that assertion.

Similarly, it would be difficult to separate the sources of funding for each component of the statement. While the statement itself costs little to nothing,[149] at issue would be the costs of the preacher's salary and the religious organization's facilities. It would be impractical to require that each component of the statement be stated in different facilities or to try to determine the fraction of the preacher's statement that would be attributed to his § 501(c)(4) salary instead of his § 501(c)(3) salary. This type of religious calculus may be possible when a religious organization places a newspaper advertisement urging Christians not to vote for President Clinton because the entire advertisement is political in nature and there is a separate monetary amount being spent on the speech.[150] However, it is not possible to segregate sources of funding when a

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144. FCC v. League of Women Voters, 468 U.S. 364, 399-400 (1984); Regan v. Taxation With Representation, 461 U.S. 540, 541-51 (1983).

145. *See Regan*, 461 U.S. at 542.

146. *League of Women Voters*, 468 U.S. at 399-400.

147. *Compare id.* (holding that a broadcasting station could not feasibly segregate its editorializing activities from its other activities), *with Regan*, 461 U.S. at 541-51 (holding that the limitations of § 501(c)(3) as applied to an educational organization do not unconstitutionally infringe that organization's free speech right).

148. *Cf.* Hunt, *supra* note 2 (noting that a Catholic cardinal declared that persons wearing rainbow sashes to church to identify themselves as homosexuals would be denied communion).

149. Additionally, because such statements cost little to nothing, the government is no longer really subsidizing political activity. This means that the government interest behind the § 501(c)(3) limitation is at its lowest ebb in these circumstances.

150. *See* Branch Ministries v. Rossotti, 211 F.3d 137, 139 (D.C. Cir. 2000).

religious organization adopts a position that it will not distribute communion to members who vote in a particular way. This is similar to the broadcasting station in *League of Women Voters* being unable to separate its editorializing activities from other activities.[151] In both instances, the organization cannot segregate its activities according to their sources of funding,[152] so the limitation on speech prevents the organization from espousing the political message while retaining its tax benefit. Therefore, similar to *League of Women Voters*, the IRS's application of § 501(c)(3) prevents religious organizations from espousing political messages if they hope to retain their tax-exempt statuses for their religious purposes.[153] This is particularly problematic because political speech has long held an important place in First Amendment jurisprudence. Professor Alexander Meiklejohn, for example, asserted that speech on public issues affecting self-government must be wholly immune from regulation, while private speech is entitled to less complete protection.[154]

The IRS's application of § 501(c)(3) also unintentionally chills *religious* speech by religious organizations. The IRS's application of § 501(c)(3) deters religious organizations from espousing religious messages if they have political undertones. While the IRS might be able to condition the tax-exempt status on refraining from engaging in political speech,[155] it is constitutionally suspect for the IRS to simultaneously hinder religious organizations from espousing religious messages just because they may have political undertones. This is problematic because of the extensive intertwinement of religious and political issues. Since a religious organization may not be able to separate its religious speech from its political speech, it is forced to forego speaking on religious topics that require the incidental mention of what the IRS might consider to be political speech.

Finally, the § 501(c)(3) limitation as applied to religious organizations also chills more speech than was at issue in *Regan*. The tax-exempt organization in *Regan* advocated certain views of income taxation before Congress, the Executive Branch, and the Judiciary.[156] In contrast, the IRS's application of § 501(c)(3) also includes communications between a religious organization and its own members. If a preacher urges his congregation to use its power to stop legal abortions, this involves speech that was not involved in *Regan*. Therefore, the IRS's application of § 501(c)(3) to religious organizations preaching to their own members restricts more political speech than the limitation approved in *Regan*.[157]

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151. *See League of Women Voters*, 468 U.S. at 399-400.

152. *See id.* at 400.

153. *Cf. id.* (holding that a broadcasting station could not feasibly segregate its editorializing activities from its other activities).

154. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 62-63 (1948).

155. *See, e.g.*, Regan v. Taxation with Representation, 461 U.S. 540, 541-51 (1983) (holding that the limitations of § 501(c)(3) as applied to an educational organization do not unconstitutionally infringe that organization's free speech rights).

156. *Id.* at 541-42.

157. *Cf. id.* (approving the IRS's revocation of an organization's tax-exempt status where the

More importantly, however, the IRS's application of § 501(c)(3) to religious organizations is more constitutionally suspect than in *Regan* because *Regan* involved a nonreligious organization that is not entitled to the same level of protection that is accorded to religious organizations under the First Amendment.[158]

2. The IRS's Application of § 501(c)(3) Burdens Religious Organizations' Free Exercise Rights.—The IRS's application of the § 501(c)(3) limitation to religious organizations also raises free exercise concerns. Religious organizations that fear losing their § 501(c)(3) tax statuses are forced to refrain from espousing religious messages that may have political undertones because of the increased intertwinement of religion and politics.[159] Commentators have recognized that the IRS interpretation of §501(c)(3) is highly intrusive on free exercise.[160] Churches, for example, must self-censor as they attempt to walk the obscure line between loss of exemption and fulfilling their obligation to speak out on the moral dimensions of important social issues.[161] Some religious organizations even consider their efforts at influencing public policy "an integral part of their religious enterprise[s;] [f]or some religious persons, political activity may even be a form of worship."[162] Consequently, in determining that a message, which is arguably both political and religious, is impermissibly political, the IRS's narrow construction of § 501(c)(3) chills religious organizations' free exercise of religion.

The IRS's application of § 501(c)(3) further infringes on religious organizations' free exercise rights by infringing on the organizations' autonomy. In *Serbian Eastern Orthodox Diocese v. Milivojevich*, the Supreme Court highlighted the importance of religious organizations' autonomy as part of their free exercise rights.[163] There, a bishop was defrocked by his church.[164] He then asked the Court to hold that his termination was defective under the church's internal regulations.[165] The Court refused, holding that courts cannot constitutionally determine whether church activities are in accordance with church doctrine.[166] It held that to do so would unconstitutionally burden the

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organization was lobbying Congress).

158. *See generally id.*

159. *See* Rosenblum, *supra* note 90, at 542-45.

160. Wilfred R. Coron & Deirdre Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J.L. & POL. 169, 178 (1985).

161. *Id.*

162. Ellis M. West, *The Free Exercise Clause and the Internal Revenue Code's Restrictions on the Political Activity of Tax-Exempt Organizations*, 21 WAKE FOREST L. REV. 395, 396 (1986).

163. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 698 (1976) (holding that courts would violate the First Amendment if they were to inquire whether the relevant church-governing body has power under religious law to decide disputes).

164. *Id.* at 705.

165. *Id.*

166. *See id.* at 709. The Court stated that permitting courts to determine religious doctrine or "probe deeply . . . into [church matters] would violate the First Amendment" *Id.* (quoting Md. &

organization's free exercise of religion because churches should be free to determine their own policies and doctrine.[167] In determining whether a religious organization's message is political instead of religious—when that message could arguably be categorized as either—the IRS risks infringing upon that organization's free exercise autonomy rights. It is within the religious organization's province to determine the nature of its own message when that message is not clearly political.

While the Supreme Court did place some limitations on a religious organization's right to speak on religio-political issues in *Bob Jones University v. United States*,[168] that case is inapposite here. There, the Court held that a religious educational organization's tax-exempt status could be revoked if it prohibited interracial dating by its students because the organization's policy contravened a compelling governmental interest.[169] The Court explained that an organization with such a policy is at odds with fundamental public policy and is thus not entitled to the tax exemption.[170] The burden on religious liberty was justified because it was "*essential* to accomplish an *overriding* governmental interest."[171] The Court limited its holding, however, by emphasizing that determinations of whether public policy trumps religious rights "should be made only where there is *no doubt* that the organization's activities violate *fundamental* public policy."[172] The Court's holding in *Bob Jones University* should be narrowly construed because of its emphasis that laws against racism are essential to accomplishing an overriding governmental interest.

Unlike the governmental interest at stake in *Bob Jones University*, the public interest in preventing preachers from espousing messages with both religious and political components is not compelling. The prohibition against governmental support of racial discrimination is absolute. In contrast, the government's interest in applying the limitation of § 501(c)(3)—avoiding governmental subsidization of political activity[173]—is not as "overriding" of an interest. In fact, the government does subsidize private political activity in some instances.[174]

Va. Churches v. Sharpsburg Church, 396 U.S. 367, 369 (1970)).

167. *Id.*

168. 461 U.S. 574 (1983).

169. *Id.* at 592-93 (holding that a policy banning interracial dating caused the organization not to be "charitable" within the meaning of the statute).

170. *Id.*

171. *Id.* at 603 (quoting United States v. Lee, 455 U.S. 252, 257-58 (1982)) (emphasis added).

172. *Id.* at 598 (emphasis added).

173. Further, the government's intent is not clear with respect to the limitations of § 501(c)(3). *See supra* note 32. Providing deference to religious organizations in determining whether their message is political would not raise additional Establishment Clause issues. As in *Locke v. Davey*, "there is room for play in the joints" between free exercise and establishment concerns. 540 U.S. 712, 718 (2004). See HOPKINS, *supra* note 25, for additional discussion on Establishment Clause concerns raised by § 501(c)(3).

174. *See, e.g.*, I.R.C. § 9034 (2000) (providing government matching funds for political candidates who abide by certain spending limitations); *see also* Richard Briffault, *The Future of*

Further, in situations where the § 501(c)(3) limitation might infringe on religious organizations' autonomy, any subsidization of political activity is often minimal because such private communications between organizations and their members are generally of little to no cost to the government.[175] They are private communications that require no additional expenditure by the organizations.[176]

IV. THE IRS SHOULD DEFER TO RELIGIOUS ORGANIZATIONS WHEN THEIR MESSAGES ARE ARGUABLY RELIGIOUS IN NATURE

Despite these unique concerns that arise when § 501(c)(3) is applied to religious organizations, the statute does not distinguish religious organizations from the other § 501(c)(3) organizations.[177] On its face, this silence regarding religious organizations may indicate congressional intent that the same treatment should be applied to all listed organizations.[178] Judicial preference for avoiding constitutional difficulties, however, favors applying § 501(c)(3) in a manner tailored to the constitutional concerns raised by the *Smith* hybrid claim.[179]

To avoid a *Smith* hybrid claim, the IRS should defer to religious organizations in determining whether their messages are religious in instances when the organizations promulgate messages that are arguably both religious and political in nature. This deference would be consistent with the Supreme Court holding in *Boy Scouts of America v. Dale*.[180] There, the Court held that a New Jersey anti-discrimination law that would require the Boy Scouts to admit a homosexual activist to be a troop leader violated the Boy Scouts's constitutional

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Reform: Campaign Finance After the Bipartisan Campaign Reform Act of 2002, 34 ARIZ. ST. L.J. 1179, 1214-16 (2002) (arguing that the government should provide each candidate with more public financing than is currently available). Although the government subsidizes candidates' efforts in running for office, and not the organizations supporting such candidates, the fact that any financial support is given to candidates indicates that a governmental purpose of not supporting private political activity is not as fundamental as the governmental purpose of not supporting racial discrimination.

175. *See supra* note 149.

176. *See supra* note 149.

177. *See generally* I.R.C. § 501(c)(3) (2000) (listing religious organizations along with organizations such as those operated for charitable, scientific, or literary purposes).

178. One could argue under the canon of construction *noscitur a sociis* ("it is known by its associates") that religious organizations should be treated in the same way as the other organizations listed in the statute. BLACK'S LAW DICTIONARY 1087 (8th ed. 2004); *see* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 254 (2000) (explaining that *noscitur a sociis* means that lists should be viewed as linking similar concepts).

179. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (suggesting that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"); ESKRIDGE, *supra* note 178, at 348-54.

180. 530 U.S. 640 (2000).

right of free association.[181] In its analysis, the Court deferred to the organization's assertion that it "teaches that homosexual conduct is not morally straight" and is thus contrary to "Scout Law."[182] The Court stated that it must "give deference to an association's assertions regarding the nature of its expression . . . [and] an association's view of what would impair its expression."[183] It was not for the courts to determine whether a message regarding homosexuality was really a message consistent with the Boy Scouts's principles and purposes.[184] As the *Milivojevich* case illustrates, there is an even stronger case for deference when dealing with religious organizations.[185] Accordingly, courts should defer to religious organizations in determining whether their messages, which may contain both religious and political undertones, are really religious. For example, when a church announces that it will withhold communion from members voting for pro-choice political candidates, courts should accord deference to the church when determining whether this is really a political act. This would allow religious organizations to continue espousing religious messages even though those messages might contain political undertones. It would also allow religious organizations to maintain a level of autonomy in determining the nature of their own messages—an important aspect of the *Milivojevich* decision.[186] Thus, by according deference to religious organizations, the IRS could avoid the invalidation of its application of § 501(c)(3) under a *Smith* hybrid claim.

Clearly, there should be limits on this doctrine of deference, as too much deference will encourage abuse. A religious organization should not be able to simply state that its message, which is clearly political, is religious and thus not a violation of § 501(c)(3). For instance, a religious organization flatly urging members to vote for President Bush should not be able to maintain its § 501(c)(3) tax-exempt status by merely stating that it was a religious message. Instead, religious organizations need only be given deference when their messages are *arguably* both political and religious. This recognizes that religious organizations receive greater constitutional protection than other § 501(c)(3) organizations because of the consideration that they are given under the Free Exercise Clause.[187]

CONCLUSION

As the IRS begins to crack down on religious organizations' possible intervention in political campaigns, religious organizations are altering the nature of the messages they preach to their congregations. Currently, the IRS treats

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181. *Id.* at 651-53.

182. *Id.* at 651.

183. *Id.* at 653.

184. *See id.*

185. *See* Serbian E. Orthodox Diocese v. Milojevich, 426 U.S. 696, 709 (1976).

186. *Id.* at 698; *see supra* note 163.

187. U.S. CONST. amend. I.

religious organizations no differently than other tax-exempt organizations.[188] This general application of § 501(c)(3) does not account for the special First Amendment concerns that arise when a religious organization's activities are at issue. It does not provide adequate protection for religious or political speech or for the free exercise of religion, making the IRS's interpretation of § 501(c)(3) vulnerable under a *Smith* hybrid claim. To avoid these constitutional difficulties, the IRS should defer to religious organizations in determining whether a message that is arguably both political and religious is a religious one. This doctrine of deference will become increasingly important for the survival of religious organizations as political campaigns grow in length and intensity and religion and politics become even more intricately intertwined.

188. *See, e.g.*, Fund for the Study of Econ. Growth & Tax Reform v. IRS, 161 F.3d 755, 760 (D.C. Cir. 1998) (applying the general interpretation of § 501(c)(3) to an organization dedicated to reforming the U.S. tax system); League of Women Voters v. United States, 180 F. Supp. 379, 383 (Ct. Cl. 1960) (stripping an organization of its 501(c)(3) tax-exempt status because it engaged in excessive lobbying); *see also supra* Part I (outlining the IRS's interpretation of § 501(c)(3) as applied to all § 501(c)(3) organizations).