PROPHETIC SPEECH AND THE INTERNAL REVENUE CODE: ANALYZING I.R.C. § 501(C)(3) IN LIGHT OF THE RELIGIOUS FREEDOM RESTORATION ACT

> *And [the Pharisees] sent their disciples to [Jesus] . . . saying, "Teacher, we know that You are truthful . . . . Is it lawful to give a poll-tax to Caesar, or not?" But Jesus perceived their malice, and said, "Why are you testing Me, you hypocrites? Show Me the coin used for the poll-tax." And they brought Him a denarius. And He said to them, "Whose likeness and inscription is this?" They said to Him, "Caesar's." Then [Jesus] said to them, "Then render to Caesar the things that are Caesar's; and to God the things that are God's."*[1]

I. INTRODUCTION

A. All Saints Episcopal Church

> Jesus continues: "Mr. President [Bush], your doctrine of preemptive war is a failed doctrine. Forcibly changing the regime of an enemy that posed no imminent threat has led to disaster."
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> . . . .
>
> Jesus turns to President Bush again with deep sadness. "Is what I hear really true? Do you really mean that you want to end a decade-old ban on developing nuclear battlefield weapons, as well as endorsing the creation of a nuclear 'bunker-blaster' bomb? Are you really going to resume nuclear testing? That is sheer insanity."
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> . . . .
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> Everything I know about Jesus would have him uttering those words.
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> . . . .
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> When you go to the polls on November 2nd—vote all your values. Jesus places on your heart this question: Who is to be trusted as the world's chief peacemaker?[2]

On October 31, 2004, the very eve of the 2004 national elections, the Rev. Dr. George F. Regas, a Rector Emeritus of the Episcopal Church, delivered a guest sermon, containing the four paragraphs quoted above, before All Saints Episcopal Church, a liberal Episcopalian church in Pasadena, California.[3] Regas went on to hold President Bush and his tax cuts responsible for enlarging the gap between the rich and the poor in the United States.[4] "All of that would break Jesus' heart," he stated.[5]

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1 *Matthew* 22:16–21 (NASB).

2 Rev. Dr. George F. Regas, If Jesus Debated Senator Kerry and President Bush, at 2–3 (Oct. 31, 2004), http://www.allsaints-pas.org/sermons/(10-31-04)%20If%20Jesus%20Debated.pdf.

3 *Id.* at 1.

4 *Id.* at 3.

Regas also bemoaned the quiescence of Christian churches in regard to current social and political issues, stating that "[p]rophetic Christianity has lost its voice."[6] In response to Regas's sermon, the Internal Revenue Service ("IRS") began an investigation of the eighty-year-old parish and delivered a summons demanding the surrender of all materials containing political references, including newsletters and sermons, produced during the 2004 election year.[7] The rector of the parish, Rev. J. Edwin Bacon, Jr., was also informed that he must testify in person before IRS investigators to answer for All Saints Church's activities during the 2004 election year.[8] The IRS acted pursuant to I.R.C. § 501(c)(3), a provision of the Internal Revenue Code, which forbids all tax-exempt religious institutions, like All Saints Church, from engaging in any partisan campaign activity.[9] During an interview conducted in the midst of the controversy, Rev. Bacon justified the events at All Saints Episcopal Church by stating that the Episcopal faith "calls [the Church] to speak to the issues of war and poverty, bigotry, torture, and all forms of terrorism . . . ."[10] After the news of the IRS investigation went public, Dr. Regas sent a letter to the editor of the Los Angeles Times, stating that "[a]n IRS audit [would] not diminish the prophetic ministry of All Saints Church."[11]

B. The Church at Pierce Creek

The IRS investigated All Saints Episcopal Church in light of the seminal ruling of the Court of Appeals for the District of Columbia Circuit in *Branch Ministries v. Rossotti*.[12] The ruling directly addressed the validity and scope of Section 501(c)(3)'s prohibition against partisan campaign activity by tax-exempt religious institutions.[13] According to the facts in *Branch Ministries*, the IRS revoked the tax-exempt status of the Church at Pierce Creek, a conservative non-denominational Christian church, for that church's alleged partisan political intervention in the 1992 Presidential election.[14] The Church at Pierce Creek had published

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5 *Id.*

6 *Id.*

7 *See* Louis Sahagun, *Church Votes to Fight Federal Probe; Pasadena's All Saints Episcopal Parish Board Challenges a Request to Turn Over Documents in a Case Over a 2004 Antiwar Sermon*, L.A. TIMES, Sept. 22, 2006, at B1.

8 *See id.*

9 I.R.C. § 501(c)(3) (2000).

10 Sahagun, *supra* note 7.

11 George Regas, *The Won't-Be-Bullied Pulpit; A Pasadena Cleric Cited by the IRS Refuses to Surrender 'The Very Soul of our Ministry,'* L.A. TIMES, Nov. 9, 2005, at B13.

12 211 F.3d 137 (D.C. Cir. 2000).

13 *Id.* at 141–44.

14 *Id.* at 140.

several open letters in newspapers asserting that various policy positions taken by then-presidential candidate William Clinton violated biblical precepts.[15] On October 30, 1992, four days before the presidential election, the Church at Pierce Creek printed full-page letters in *USA Today* and the *Washington Times*.[16] The letters bore the headline "Christians Beware" and pointed out that then-Governor Clinton had "extreme views regarding abortion and homosexuality."[17] The Church cited many biblical passages to support its positions on these issues.[18] Each of the letters stated that it was sponsored by the Church and its pastor, and each letter requested "tax deductible donations."[19] Allegedly as a result of the open letters, the Church at Pierce Creek "received hundreds of contributions."[20] In response to the letters, the IRS revoked the Church's tax-exempt status in 1995.[21] The Court of Appeals for the District of Columbia Circuit upheld the revocation of the Church's tax-exempt status, holding that the Church at Pierce Creek violated the prohibition in Section 501(c)(3) against electioneering and intervention in a partisan political campaign.[22] This case represented the first time that the campaign activity prohibition in Section 501(c)(3) was used by the IRS and a federal court to revoke the tax-exempt status of a church.[23] Barry Lynn, Executive Director of Americans United for Separation of Church and State, was prompted by the ruling to declare that the decision of the District of Columbia Circuit was a "staggering defeat for

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[15] *Id.*

[16] *Id.*

[17] Mathew D. Staver, *Church's Loss of Tax Exempt Status Letter Turns Out to Be a Victory for Churches*, LIBERTY COUNSEL (2000), http://www.lc.org/Resources/ChurchLossOfTaxExempt.html. The relevant text of the letters reads as follows:

> "Christians Beware: Do not put the economy ahead of the Ten Commandments. Did you know that Gov. Bill Clinton—supports abortion on demand—supports the homosexual lifestyle and wants homosexuals to have special rights—promotes giving condoms to teenagers in public schools? Bill Clinton is promoting policies that are in rebellion to God's laws . . . . HOW, THEN, CAN WE VOTE FOR BILL CLINTON?"

Ann M. Murphy, *Campaign Signs and the Collection Plate—Never the Twain Shall Meet?*, 1 PITT. TAX REV. 35, 67 (2003) (quoting Lisa A. Runquist, *Basic Tax Aspects for Religious Organizations* (2001), http://www.runquist.com/ARTICLE_ReligTax.htm#N_29).

[18] *Federal Appeals Court Rules Against New York State Church in IRS Case—But Offers Blueprint for Churches to Engage in Political Speech*, American Center for Law & Justice, May 12, 2000, http://www.aclj.org/news/Read.aspx?ID=103.

[19] *See* Staver, *supra* note 17.

[20] *Id.*

[21] *Id.*

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

[23] *See* Staver, *supra* note 17. "The revocation of Branch Ministries' tax-exempt status in 1995 was the first time in history that the IRS has revoked a bona-fide church's tax-exempt status." Murphy, *supra* note 17, at 67.

Pat Robertson, Jerry Falwell and others who want to convert America's churches into a partisan political machine."[24]

C. Purpose

The purpose of this Note is to determine whether the prohibition against partisan campaign activity found in I.R.C. § 501(c)(3) is a valid law under the protective, free-exercise standards set by the Religious Freedom Restoration Act and to determine whether the IRS properly applies the prohibition. In evaluating the validity of the prohibition contained within Section 501(c)(3), Part II of this Note examines the text of the statute, as well as its legislative history and current interpretation by the IRS. Part III examines the concept of "prophetic speech," the underlying religious activity at issue in both *Branch Ministries* and the situation of All Saints Church. Finally, Part IV argues that Section 501(c)(3)'s prohibition of various types of prophetic speech practiced by religious institutions violates the standards established by the Religious Freedom Restoration Act and should be abandoned.

II. THE CURRENT LAW

A. The Legislative History of I.R.C. § 501(c)(3)

Before describing the actual content of Section 501(c)(3), it is important to understand the legislative history (or lack thereof) of this particular provision. Section 501(c)(3) contains prohibitions on partisan political intervention (electioneering) and lobbying by tax-exempt organizations.[25] These prohibitions arose as Senate floor amendments that bypassed congressional hearings.[26] Senator David Reed introduced the lobbying prohibition, which Congress passed in 1934, and Texas Senator Lyndon Johnson introduced the partisan campaign-intervention prohibition passed two decades later in 1954.[27] Because the electioneering prohibition was raised as a floor amendment and was not subject to debate, "the legislative record is essentially silent" as to this provision of Section 501(c)(3).[28] Some have speculated from the historical context surrounding Lyndon Johnson's political and campaign activities during this period that the bill containing the electioneering prohibition was introduced as Johnson's bid to squelch the political influence of nonprofit organizations that opposed him in his own electoral

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[24] Staver, *supra* note 17.

[25] *See* I.R.C. § 501(c)(3) (2000).

[26] Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145, 152 (2006).

[27] *Id.*

[28] *Id.*

campaign.[29] Some scholars that have examined the subject, however, have found that the ban on partisan political intervention by nonprofit organizations was a mere coincidence and not the manifestation of any political objective.[30]

B. I.R.C. § 501(c)(3) and Its Prohibitions

Moving to the actual text of and the substantive law surrounding the political campaign prohibition found in Section 501(c)(3), churches and other religious institutions are considered nonprofit organizations because they are created "exclusively for [a] religious" purpose and "no part of the[ir] net earnings . . . inure[] to the benefit of any private shareholder or individual . . . ."[31] Further, under I.R.C. § 170, contributors to churches and other religious institutions that qualify under Section 501(c)(3) are entitled to deduct their charitable contributions.[32] In order to maintain their tax-exempt status, however, churches and other religious institutions must not conduct any "substantial part of the[ir] activities . . . [in] carrying on propaganda, or otherwise attempting, to influence legislation" and must "not participate in, or intervene in . . . , any political campaign on behalf of (or in opposition to) any candidate for public office."[33]

C. I.R.C. § 508(c)(1)(A) and the Status of Churches

Despite the inclusion of churches and religious institutions among the wide range of organizations that may qualify for tax-exempt status

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[29] *See* Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733 (2001) (providing an extensive redaction of the historical and political events surrounding Lyndon Johnson's electoral campaign and his support of the 1954 amendment); *see, e.g.*, MATTHEW D. STAVER, FAITH AND FREEDOM: A COMPLETE HANDBOOK FOR DEFENDING YOUR RELIGIOUS RIGHTS 374 (2d ed. 1998).

[30] Kemmitt, *supra* note 26, at 153.

[31] I.R.C. § 501(c)(3) (2000).

[32] *Id.* § 170(a)(1), (c)(2)(D).

[33] *Id.* § 501(c)(3). The full text reads as follows:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Id.

under Section 501(c)(3), churches and religious institutions are not treated identically to other charitable organizations in the Internal Revenue Code. According to I.R.C. § 508(c)(1)(A), a church or religious organization is automatically considered to be tax exempt without having to apply in advance for the IRS to determine their exempt status, a consideration unique among the range of other nonprofit organizations.[34] Churches may merely present themselves to parishioners and contributors as tax-exempt, and these parishioners and contributors can lawfully deduct any charitable contributions under I.R.C. § 170 on the assumption that their church qualifies under Section 501(c)(3). Donations to churches that have not been subject to a formal ruling or advance determination by the IRS are deductible. If a contributor in this situation is audited, however, that contributor must prove that the church met the requirements of Section 501(c)(3).[35] Before the events of 1992, the Church at Pierce Creek, although not formally applying for tax-exempt status with the IRS, had asked for and received an IRS letter stating that it was in compliance with IRS guidelines on Section 501(c)(3).[36] The IRS revoked this letter ruling due to the Church's supposed campaign activities.[37] The Church at Pierce Creek then sued to be reinstated as tax deductible, resulting in the District of Columbia Circuit's decision in *Branch Ministries v. Rossotti*.[38]

D. The IRS's Interpretation and Application of the Current Law

The IRS has interpreted Section 501(c)(3) strictly to forbid all intervention in partisan political campaigns by churches and other

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[34] I.R.C. § 508(a)(1), (c)(1)(A) (2000). The relevant provisions read as follows:

(a) New organizations must notify Secretary that they are applying for recognition of section 501(c)(3) status

Except as provided in subsection (c), an organization organized after October 9, 1969, shall not be treated as an organization described in section 501(c)(3)—

(1) unless it has given notice to the Secretary in such manner as the Secretary may by regulations prescribe, that it is applying for recognition of such status . . . .

. . . .

(c) Exceptions

(1) Mandatory exceptions

Subsections (a) and (b) shall not apply to—

(A) churches, their integrated auxiliaries, and conventions or associations of churches . . . .

Id.

[35] Branch Ministries v. Rossotti, 211 F.3d 137, 139 (D.C. Cir. 2000).

[36] Staver, *supra* note 17.

[37] *Id*.

[38] *Branch Ministries*, 211 F.3d at 140.

religious institutions.[39] In keeping with the text of the relevant statute, the IRS warns against any overt endorsement of or opposition to political candidates and against any tacit endorsement communicated through partisan political appearances at church services or religious gatherings.[40] The IRS has recognized a difference between issue advocacy and candidate advocacy or electioneering.[41] Indeed, while churches may comment on issues, they may not comment on specific candidates.[42] A church may also attempt to influence legislation, so long as these attempts are less than a "substantial part" of the church's activities.[43] The law, therefore, allows a church to take positions on issues and engage in issue-oriented political activity. Further, according to the IRS, churches may undertake to educate voters by publishing and distributing voter guides and other political education materials.[44] These voter guides and educational materials may be distributed during an election campaign season and may provide information on how the candidates view different issues.[45] These materials, however, must be distributed with the sole purpose of educating voters and must not be used in any "attempt to *favor* or *oppose*" any candidate for publicly elected office.[46] Finally, because the distinction between issue advocacy,

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[39] IRS, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS: BENEFITS AND RESPONSIBILITIES UNDER THE FEDERAL TAX LAW 7 (IRS Publ'n 1828, Sept. 2006) [hereinafter TAX GUIDE], *available at* http://www.irs.gov/pub/irs-pdf/p1828.pdf. The TAX GUIDE specifically provides that:

> Under the Internal Revenue Code, all [S]ection 501(c)(3) organizations, including churches and religious organizations, are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office. Contributions to political campaign funds or public statements of position (verbal or written) made by or on behalf of the organization in favor of or in opposition to any candidate for public office clearly violate the prohibition against political campaign activity. Violation of this prohibition may result in denial or revocation of tax-exempt status and the imposition of certain excise tax.

Id.

[40] IRS, *Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations* (Feb. 2006), http://www.irs.gov/newsroom/article/0,,id=154712,00.html.

[41] *Id*.

[42] *Id*.

[43] TAX GUIDE, *supra* note 39, at 5; *see* IRS, *Lobbying Activity*, http://www.irs.gov/charities/article/0,,id=163392,00.html (last visited Oct. 30, 2007).

[44] TAX GUIDE, *supra* note 39, at 10.

[45] *Id*. But, "[t]he IRS . . . has been far from clear or comprehensive in its guidance on what constitutes a permissible voter guide." Erik J. Ablin, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 552 (1999).

[46] TAX GUIDE, *supra* note 39, at 10 (emphasis added).

legislative activities, and electioneering is "easily blurred," the IRS "requires that its agents make a subjective evaluation of the church's religious speech to discern issue commentary from veiled candidate commentary."[47]

The IRS reports that in the years following the 2004 elections it has "responded to increased complaints about political intervention by 501(c)(3) organizations and dramatic increases in the amount of money financing campaigns during election cycles . . . ."[48] As a result of the 2004 election cycle, the IRS undertook full examinations of forty-seven churches to evaluate their compliance with Section 501(c)(3) and was able to close its investigation on all but seven of these churches.[49] Thirty-seven churches were found to have substantially violated the campaign intervention prohibition in Section 501(c)(3), and three churches were found to have violated the statute to an extent not substantial enough to warrant sanctions.[50] The IRS promulgated new organizational guidelines, increasing the scope and efficiency of its investigations of alleged violations of Section 501(c)(3).[51] The prohibition on partisan campaign intervention remains an active part of the enforcement regime of the IRS, and in the future, enforcing the campaign intervention prohibition will become of increasing importance.

III. PROPHETIC SPEECH

Given the above explanation of the current law derived from Section 501(c)(3) and its interpretation by the IRS, it is evident that both the Church at Pierce Creek and All Saints Episcopal Church have violated Section 501(c)(3) as interpreted by the IRS. Both churches, whether overtly, as in the case of the Church at Pierce Creek, or more subtly, as in the case of All Saints Church, expressed opposition to a political candidate in the midst of a political campaign. The facts of the controversies surrounding All Saints Church and the Church at Pierce Creek and the claims of their religious leaders, however, make clear that these churches' actions involved much more than pure politics. Indeed, the Church at Pierce Creek used the authority of biblical passages as a warning to other Christians. Further, Dr. Regas claimed that the real

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47 *See* Kemmitt, *supra* note 26, at 179 (footnote omitted).

48 Letter from Lois G. Lerner, Director, Exempt Organizations Division, IRS, to Colleagues, Members of the Press and Taxpayers, at 3 (Nov. 7, 2006), http://www.irs.gov/pub/irs-tege/fy07_implementing_guidelines.pdf.

49 IRS, Final Report: Project 302: Political Activities Compliance Initiative, at 1, 9, http://www.irs.gov/pub/irs-tege/final_paci_report.pdf (last visited Oct. 13, 2007).

50 IRS, 2004 Political Activity Compliance Initiative (PACI) Summary of Results (Feb. 16, 2006), http://www.irs.gov/pub/irs-tege/one_page_statistics.pdf.

51 *See* IRS, FY 2007 Exempt Organizations (EO) Implementation Guidelines (Nov. 2006), http://www.irs.gov/pub/irs-tege/fy07_implementing_guidelines.pdf.

issue in controversy in his case was All Saints Church's exercise of its "prophetic ministry."[52] These comments highlight that the actions of All Saints Church and the Church at Pierce Creek must be evaluated within the context of a stream of Christian tradition that places significant emphasis on prophetic speech and the prophetic ministry.

A. The Theological Basis for Prophetic Speech

According to *The HarperCollins Bible Dictionary*, a "prophet" is "a person who serves as a channel of communication between the human and divine worlds."[53] In the Judeo-Christian tradition, the prophet was an individual appointed by God to deliver His word to mankind.[54] In the Protestant Christian community,[55] there have emerged two competing views on the current status of the gift of prophecy in the life of the Church: the cessationist view and the non-cessationist or charismatic view.[56] According to the cessationist view, all genuine prophetic activity ceased at the end of the Apostolic Age of the first century and, therefore, the prophetic ministry is no longer a continuing part of the religious life of the Christian church.[57] Conversely, according to the non-cessationist

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[52] Regas, *supra* note 11.

[53] THE HARPERCOLLINS BIBLE DICTIONARY 884 (Paul J. Achtemeier et al. eds., rev. ed. 1996).

[54] WAYNE A. GRUDEM, THE GIFT OF PROPHECY IN THE NEW TESTAMENT AND TODAY 17–18 (1988).

[55] This Note will deal almost entirely with the theological and religious context of Protestant Christianity due to the fact that the Author is a Protestant and is most familiar with this religious context. This emphasis on the Protestant context seems particularly appropriate considering that the two churches discussed in this Note are Protestant as well.

[56] There is a distinction between the terms "non-cessationist" and "charismatic." This distinction is beyond the scope of this Note. These two terms, however, are placed together because both views hold that the gift of prophecy is a valid and continuing ministry in the Church. The Church at Pierce Creek would more closely resemble the charismatic view, while All Saints Episcopal Church would be more aptly placed in the non-cessationist camp. In a sermon delivered before the congregation of All Saints Church in October of 2006, Rev. J. Edwin Bacon, Jr., outlined All Saints Church's theology on prophecy and stated that all Christians have a prophetic duty to speak out against social and political injustice. Rev. J. Edwin Bacon, Jr., All God's Children Called to be Prophets, at 1 (Oct. 1, 2006), http://www.allsaints-pas.org/sermons/JEB%2010-1-06%20All%20God's%20Children%20Called%20To%20Be%20Prophets.pdf. Bacon then declared that modern prophets, such as Rev. Martin Luther King, Jr. and Archbishop Desmond Tutu, were inspired by God with the same "prophetic spirit" that inspired Jesus Christ and the Old Testament prophets. *Id.* at 2–3.

There are a large number of differences within the broader non-cessationist or charismatic view regarding the character and authority of the continuing prophetic ministry. For a discussion of the various different views concerning the nature of the continuing prophetic ministry, see ARE MIRACULOUS GIFTS FOR TODAY?: FOUR VIEWS (Wayne Grudem et al. eds., 1996).

[57] *See* GRUDEM, *supra* note 54, at 13.

or charismatic view, the prophetic ministry, a gift of God, is a continuing practice that is fundamental to the life of Christian churches and communities.[58] It is with the non-cessationist or charismatic view that this Note is chiefly concerned, and it is this view that is at the heart of the legal controversies involving both All Saints Episcopal Church and the Church at Pierce Creek.

Indeed, the Christian scriptures are replete with references to prophecy, and one of the passages of scripture that most directly speaks to the role and purpose of the ministry of prophecy in the life of the Church is the Apostle Paul's exposition on the subject in 1 *Corinthians* 14.[59] In these passages, Paul exhorts the believers at the Corinthian church to "[p]ursue love, yet desire earnestly spiritual *gifts*, but especially that you may prophesy."[60] Paul puts special emphasis on the fact that "one who prophesies speaks to men for edification and exhortation and consolation."[61] Not only does Paul contend that prophetic speech is useful for building up individuals but that "prophecy *is for a sign*, not to unbelievers, but to those who believe."[62] Paul goes on to state, "Now I wish that you all spoke in tongues, but *even* more that you would prophesy. . . ."[63] Thus, churches that hold a non-cessationist or charismatic view of prophecy interpret these Scripture passages as reflecting the Biblical verity that the ministry of prophecy is integral to the life and practice of Christian communities.

B. The Old Testament Prophets

Several biblical precedents for the prophetic ministry will serve to elucidate an important characteristic of Christian prophetic speech—that, within the Judeo-Christian tradition, prophetic speech can be thoroughly religious and still be composed, partially or entirely, of political subject matter. In the biblical narrative of the Old Testament prophets Nathan and Elijah and their respective prophetic ministries to the nation of Israel and its surrounding kingdoms, there is exemplary material of prophetic speech that was religious in character and yet had current political implications. The book of 2 *Samuel* records several incidents in which Nathan specifically endorsed the kingship of David, saying that the Lord was with David.[64] After David had murdered his ally Uriah and had committed adultery with Uriah's wife, however,

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58 *Id.*

59 *See* 1 *Corinthians* 14:1–25.

60 1 *Corinthians* 14:1 (NASB).

61 1 *Corinthians* 14:3 (NASB).

62 1 *Corinthians* 14:22 (NASB) (emphasis added).

63 1 *Corinthians* 14:5 (NASB).

64 *See, e.g.,* 2 *Samuel* 7:3.

Nathan appeared before David and rebuked him, recounting David's sins and their impact on Israel, the Davidic line, and on David himself.[65] Again, in 1 *Kings*, God appeared to the prophet Elijah and directed him to go to Damascus and anoint Hazael as king over the Arameans in Syria and Jehu as king over Israel.[66] In the stories of both of these prophets, a profound religious duty arising from a command from God led to intervention of the prophets in the political events of their respective times—intervention that took the form of either endorsement of or opposition to specific political leaders.

C. The Prophetic Ministry of Jesus

A more prominent precedent, within a Christian context, for the intersection of religion and politics in prophetic speech is the prophetic ministry of Jesus Christ, as recorded in the Christian gospels. In orthodox Christian theology, Jesus served in the role of prophet.[67] The prophetic ministry of Jesus within the context of first-century Judea was both profoundly religious and profoundly political in nature. Indeed, Jesus publicly confronted both the Sadducees, the faction that dominated Jewish religious life in first century Judea,[68] on religious issues[69] and the Pharisees, the faction that dominated Jewish political life in first century Judea,[70] on matters of politics.[71] Indeed, Jesus' prophecies were extremely political in subject matter and often made clear reference to the destruction of the current religious and political authority that was embodied by the Jewish Second Temple.[72] Thus, the

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[65] 2 *Samuel* 12:1–15.

[66] 1 *Kings* 19:15–16.

[67] *Luke* 24:19.

[68] James F. Driscoll, *Saducees*, 13 THE CATHOLIC ENCYCLOPEDIA 323a (Robert Appleton Co. 1912), *available at* http://www.newadvent.org/cathen/13323a.htm. The Saducees dominated Jewish religious life in the first century in the sense that they were "the dominant priestly party during the Greek and Roman period." *Id.* Considering their relatively strong influence with the Roman government and the politically important families in first-century Judea, the Saducees cannot be considered a purely religious group. THE HARPERCOLLINS BIBLE DICTIONARY, *supra* note 53, at 957–58.

[69] *See Matthew* 22:22–34.

[70] *See* James F. Driscoll, *Pharisees*, 11 THE CATHOLIC ENCYCLOPEDIA 789b (Robert Appleton Co. 1911), *available at* http://www.newadvent.org/cathen/11789b.htm. The Pharisees were dominant politically in the sense that they enjoyed the popular support of the Jewish people during the first century and were at the forefront of the Jewish-nationalist movement that defined the political climate of first-century Judea. THE HARPERCOLLINS BIBLE DICTIONARY, *supra* note 53, at 841–42. But, the Pharisees were also part of a reformist religious movement with its own interpretation of Jewish law. *Id.*

[71] *Matthew* 22:16–22.

[72] *Matthew* 24:1–28. Although Jesus' words in *Luke* regarding "rendering to Caesar" indicate that first-century Jews did have at least a vague concept of the difference between religion and politics, the religious and political lives of first century Jews were virtually

primary prophetic material in the New Testament defies a rigid distinction between the religious and political spheres.[73]

D. The Prophetic Writings

What is more, a common feature of the Judeo-Christian prophetic tradition is the centrality of written prophecy in the life of the religious community. Indeed, Hebrew texts, such as *Isaiah*, *Jeremiah*, and *Daniel*, and Greek texts, such as *Revelation*, are parts of the canon for all orthodox Christian believers. These books are not only central to the life of the religious community, but they are also profusely political in their character. For example, the book of *Daniel* records several prophecies that are thoroughly religious yet directly address immediate or future political events. The prophecies of the four beasts[74] and of the statue[75] found in *Daniel* deal almost exclusively with the political fortunes of the Gentile kingdoms in the Near East beginning with Daniel's immediate time period. Written prophecy is as valid and as prominent as oral prophecy in Christian tradition. Thus, while secular readers may perceive the published letters from the Church at Pierce Creek as crass political advertisements, these letters can be interpreted as a continuation of the prophetic speech tradition of charismatic Christian churches.

E. Analysis of Prophetic Speech

The above exposition of the non-cessationist or charismatic view of the Christian religious practice of prophetic speech serves to disclose several important points relevant to an analysis of the controversies surrounding All Saints Church and the Church at Pierce Creek and of the partisan campaign intervention prohibitions in Section 501(c)(3). First, prophetic speech and the exercise of the prophetic gift are a fundamental aspect of the religious life and practice of non-cessationist or charismatic churches. All Saints Episcopal Church and the Church at Pierce Creek were thus both engaging in behavior fundamental to their religious communities. Second, no real distinction necessarily exists between the oral and written forms of prophetic speech in the Christian

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indistinguishable. For example, the chief judicial and legislative body for the Jewish people in first century Judea was the Great Sanhedrin. THE HARPERCOLLINS BIBLE DICTIONARY, *supra* note 53, at 971–72. The Sanhedrin claimed authority over all aspects of Jewish life, including political and religious aspects, and convened in the Hall of Hewn Stone in the complex of the Second Temple. *Id.*

[73] It is therefore not surprising that the Christian tradition of prophetic speech, with its antecedents found within the New Testament and within the context of first-century Jewish experience, also defies distinctions between politics and religion.

[74] *See Daniel* 7.

[75] *See Daniel* 2.

tradition. Although the oral form of prophetic speech is far more commonly exercised in modern times, the various biblical examples present evidence that written words, such as those employed by the Church at Pierce Creek, can also play an important role in prophetic speech. Last, prophetic speech in Christian tradition has oftentimes been thoroughly religious while still being political in its subject matter, and no ready distinctions between the political and the religious spheres exist in this context. Hence, the political nature of the speech of the two churches at issue does not disqualify this speech from being genuinely prophetic.

IV. RELIGIOUS FREEDOM RESTORATION ACT AND ANALYSIS

A. Religious Freedom Restoration Act[76]

Having identified and defined the religious activity at issue in the cases of All Saints Episcopal Church and the Church at Pierce Creek, it is necessary to examine whether the prohibition of this activity by Section 501(c)(3) is valid under the Constitution and laws of the United States. The First Amendment to the United States Constitution begins with the admonition that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[77] This portion of the First Amendment contains the twin clauses that define the relationship between the Church and the State in the United States: the Establishment Clause and the Free Exercise Clause. In 1990, the Supreme Court introduced a new analytical method for deciding Free Exercise Clause cases in *Employment Division v. Smith*.[78] This new method "marked a significant turning point in the Supreme Court's Free Exercise Clause jurisprudence."[79] Indeed, *Smith* rejected applying strict scrutiny in Free Exercise Clause cases to laws that are "neutral" toward religion and "generally applicable" and, thereby, disallowed judicially

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[76] 42 U.S.C. § 2000bb-1 (2000).

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

Id.

[77] U.S. CONST. amend. I.

[78] 494 U.S. 872 (1990).

[79] Kemmitt, *supra* note 26, at 163.

created religious exemptions from such laws.[80] The Religious Freedom Restoration Act ("RFRA") was enacted by Congress in 1993 in order to restore the pre-*Smith* analysis of the Free Exercise Clause that was propagated by the Supreme Court,[81] first in *Sherbert v. Verner*[82] and again in *Wisconsin v. Yoder*.[83] According to RFRA and the *Sherbert* test, the government may "substantially burden" an individual's free exercise of religion only if it demonstrates that the burden on the individual's free-exercise right furthers a "compelling governmental interest" and is the "least restrictive means of furthering that compelling governmental interest."[84] Despite Congress's efforts to apply RFRA comprehensively, the Supreme Court ruled RFRA unconstitutional as applied to state governments because of the limitations of the Fourteenth Amendment.[85] Today RFRA remains inapplicable to the states, but it still applies to the federal government.[86] Thus, to determine whether Section 501(c)(3), federal legislation, is valid under RFRA, one must evaluate this provision according to RFRA's three prongs: substantial burden, compelling state interest, and least-restrictive means.[87]

B. Substantial Burden

Given the preceding analysis of the religious context of prophetic speech, one is prompted to the conclusion that Section 501(c)(3)'s blanket prohibitions on partisan campaign intervention by churches is a substantial burden on the free exercise of the religion of many of these institutions. Section 501(c)(3) violates the first prong of the RFRA analysis. Indeed, the Supreme Court has held that "'the power to tax the exercise of a privilege is the power to control or suppress its

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[80] 494 U.S. at 878–80.

[81] *See* 42 U.S.C. § 2000bb(b)(1) (2000).

[82] 374 U.S. 398, 406–09 (1963).

[83] 406 U.S. 205, 215, 220–29 (1972).

[84] 42 U.S.C. § 2000bb-1(a)–(b) (2000); *Sherbert*, 374 U.S. at 406–09.

[85] City of Boerne v. Flores, 521 U.S. 507, 536 (1997). The decision in *City of Boerne* only addressed whether RFRA was binding on states under Section 5 of the Fourteenth Amendment. *Id.*

[86] The Supreme Court has held that, "RFRA requires the [Federal] Government to demonstrate that the compelling interest test is satisfied . . . ." Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430 (2006). *Gonzales* held that the federal government did not meet the demands of strict scrutiny, created by RFRA, when it applied provisions of the Controlled Substances Act to members of a religious organization. *Id.* at 436–37, 439. Although not explicitly stated by the Court, RFRA may be applicable to the federal government based on powers granted to Congress by Article I, particularly the Necessary and Proper Clause in Section 8 of Article I, of the United States Constitution. *See* Kemmitt, *supra* note 26, at 163 n.149.

[87] *See* 42 U.S.C. § 2000bb-1(a)–(b) (2000).

enjoyment.'"[88] Again, "the power to tax involves the power to destroy . . . ."[89] Thus, "the government may not deny a benefit to a person because he exercises a constitutional right."[90] By denying tax exemptions to churches because they engage in prophetic speech, the partisan campaign-intervention prohibition in Section 501(c)(3) punishes churches adhering to the continuing validity of the prophetic ministry for the free exercise of their religion. Prophetic speech is a well-developed religious practice that is held by many Christian churches to be completely religious in character, although the prophetic subject matter may be political and may support or oppose certain political candidates.[91] To punish churches for speaking prophetically, and perhaps thereby endorsing or opposing certain candidates or parties, is to limit churches' ability to convey a religiously compelled message.

Certainly, the current law also imposes an implicit ideological dichotomy, separating the words and actions of churches into two competing spheres: the purely political and the purely religious.[92] As has been demonstrated in the foregoing analysis of Christian prophetic speech, this dichotomy is false when applied to this type of speech. What is more, the dichotomy acts as an implicit endorsement of certain types of theological presuppositions that should be left to churches. Indeed, the prohibition on campaign intervention and electioneering acts as a prohibition penalizing churches for holding, and acting upon, a specific religious belief: that of the continuing relevance of the prophetic ministry and prophetic speech to the religious life of the Christian Church. Essentially, Section 501(c)(3) forces All Saints Church, the Church at Pierce Creek, and other Christian churches to make the unenviable choice between practicing their prophetic ministry and maintaining their tax-exempt status. This is a substantial burden on a legitimate religious practice.

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[88] Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 386 (1990) (quoting Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943)).

[89] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819). The phrase reads in full:

> That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.

Id.

[90] Regan v. Taxation with Representation, 461 U.S. 540, 545 (1983).

[91] *See supra* Part III.

[92] *See* Kemmitt, *supra* note 26, at 162.

C. Compelling Governmental Interest

Considering the substantial burden that Section 501(c)(3) places on the legitimate religious practice of prophetic speech in Christian churches, it is necessary to determine if there is a compelling state interest in imposing this burden. Three popular arguments have been put forward to justify the current system based upon the prohibitions enumerated in Section 501(c)(3).

The first argument is primarily normative. According to this argument, which is often made by Christians and other people of faith, churches and other religious institutions should not be fora for political activism and political campaigning because this defiles the purpose of religious institutions. Indeed, most Christians and other people of faith believe that churches and other houses of worship should not engage in partisan political activities.[93] Some have even argued that "[i]n addressing the moral dimensions of policy issues, churches are fulfilling their unique prophetic role. In endorsing a particular candidate, party, or political platform, however, they jeopardize that distinctive prophetic voice."[94] Churches and other religious institutions could, therefore, devolve into nothing more than political machines.[95] The first normative argument, however, cannot provide a compelling governmental interest because, in the modern American system of separation of State and Church, the State has no interest in preserving the sacred character of religious institutions. What is more, even if the campaign intervention prohibition is removed, the text of Section 501(c)(3) would still demand that churches and religious institutions have an "exclusively . . .

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[93] The Interfaith Alliance Foundation, Religious Leaders Say: Oppose the Jones "Churches in Politics" Bill, H.R. 2357, http://www.interfaithalliance.org/site/pp.asp?c=8dJIIWMCE&b=397383 (last visited Oct. 29, 2007) [hereinafter Religious Leaders Say].

> In a recent Gallup/Interfaith Alliance Foundation poll, a full 77% of clergy were opposed to their fellow clergy endorsing political candidates. Another poll conducted by The Pew Research Center for the People and the Press and The Pew Forum on Religion and Public Life, found that 70% of Americans feel that houses of worship should not come out in favor of one candidate over another during political elections.

Id. *See* Murphy, *supra* note 17, at 81.

[94] 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).

[95] Religious Leaders Say, *supra* note 93.

> This . . . would open a dramatic loophole in the nation's campaign finance laws. Donations to houses of worship are tax deductible because the government assumes that their work is contributing to the common good of society, not a political party or a partisan campaign. As such, contributions to churches are tax deductible and donations to political candidates and parties are not. Therefore, these bills would create a significant new loophole in our nation's campaign finance laws with serious ethical and legal implications.

Id.

religious" purpose.[96] Churches and religious institutions would not be allowed to abandon their exclusively religious purpose when engaging in matters that could be considered political. Therefore, this argument cannot constitute a compelling state interest.

The next two arguments for the current law focus on the legal and policy ramifications of altering the current law. Indeed, when the case of *Branch Ministries, Inc. v. Rossotti* was in the District Court of the District of Columbia, the court stated that, "[t]he government has a compelling interest in maintaining the integrity of the tax system and in not subsidizing partisan political activity, and Section 501(c)(3) is the least restrictive means of accomplishing that purpose."[97] The IRS cites this passage in the district court's opinion in *Branch Ministries* as reflecting its own justification for the partisan campaign-intervention prohibition in Section 501(c)(3).[98] Thus, the second argument is that the Section 501(c)(3) prohibitions are "required . . . to maintain a tax system that can be easily administered without allowing myriad exceptions for different religious groups."[99] In accordance with the second argument, one could assert that the government has a compelling governmental interest in maintaining uniform rules for taxation. Canceling the prohibition on campaign activity in Section 501(c)(3), however, would not create any additional exceptions to the tax code. All churches and religious institutions would be allowed to engage in additional behavior, but the IRS would not accrue "[any] new administrative duties."[100] Contrary to the assertions of the proponents of this argument, removing the partisan campaign intervention prohibition as applied to churches would likely make the administration of the tax code by the IRS easier because the IRS would no longer have to undertake the complicated investigation and enforcement tasks associated with applying this prohibition to churches. Moreover, the IRS undertakes extensive education campaigns targeted toward churches during each election cycle in order to facilitate their compliance with Section 501(c)(3).[101] Removing the prohibition as applied to churches would relieve the IRS of the burden of implementing these massive educational campaigns. Thus,

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[96] I.R.C. § 501(c)(3) (2000).

[97] Branch Ministries, Inc. v. Rossotti, 40 F. Supp. 2d 15, 25–26 (D.D.C. 1999) (citation omitted).

[98] IRS, *Charities, Churches and Politics*, http://www.irs.gov/newsroom/article/0,,id=161131,00.html (last visited Nov. 3, 2007).

[99] Kemmitt, *supra* note 26, at 174 (citing Hernandez v. Comm'r, 490 U.S. 680, 699–700 (1989)).

[100] *Id.* at 175.

[101] IRS, *Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations* (Feb. 2006), http://www.irs.gov/newsroom/article/0,,id=154712,00.html.

the second argument also fails to provide a compelling governmental interest.

Although the first two arguments are rather easily dismissed as failing to provide a compelling state interest for Section 501(c)(3), the third argument is not so readily dismissed. According to the third argument forwarded by the IRS and the District Court for the District of Columbia in *Branch Ministries*, the compelling governmental interest invoked in Section 501(c)(3) is rooted in the Establishment Clause of the First Amendment. In *Everson v. Board of Education*, the Supreme Court determined that the Establishment Clause means that "[n]either a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."[102] The Court has never disavowed this statement. As the Court made clear in *Lemon v. Kurtzman*, any government action must have a legitimate secular purpose, must not have the primary effect of either advancing or inhibiting religion, and must not result in an "'excessive government entanglement with religion.'"[103] Thus, the third argument is that allowing churches and religious institutions the right to unfettered political activity, including unrestricted lobbying and unrestricted electioneering, would advance religion, and thereby establish religion, by affording religious institutions a financial advantage over secular organizations in the political sphere.[104]

While altering the tax code to remove the partisan campaign prohibition as applied to religious institutions may, in some sense, provide religious institutions with advantages over non-religious organizations in the political sphere, when viewed in the light of other Supreme Court precedents, however, the governmental interest in preventing this becomes far less compelling. In *Marsh v. Chambers*, the Court upheld the chaplaincy practice of the Nebraska legislature although the direct funding of legislative chaplains was a clear and unambiguous case of the State advancing religion according to the *Lemon* test.[105] In his opinion for the Court, Chief Justice Warren Burger ignored the specifics of the three-part *Lemon* test, which had been the standard for cases involving the Establishment Clause, and, in its place,

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[102] 330 U.S. 1, 15 (1947).

[103] 403 U.S. 602, 612–13 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

[104] Murphy, *supra* note 17, at 78. *See also id.* (quoting Rep. John Lewis as stating that altering the law in Section 501(c)(3) "'threatens the very integrity and independence of our churches and other[] houses of worship. Any time the wall of separation between church and State is breached, religious liberty is threatened.'" (148 CONG. REC. H6912, 6912–17 (2002) (statement of Rep. Lewis))).

[105] Marsh v. Chambers, 463 U.S. 783, 792–95 (1983).

substituted an analysis based on historical custom.[106] The Court stated that, "[t]o invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country."[107] According to Section 508(a), churches and religious institutions are automatically presumed to be tax exempt.[108] This indicates that Congress recognizes a historical precedent in the United States affirming that churches and religious institutions should be exempt from taxation by the State. Indeed, before 1954, religious institutions were free to engage in partisan political intervention without fear of losing their exemption from taxation.[109]

Moreover, the automatic exemption in the tax code echoes the historical recognition that the State should strive as much as possible to leave churches and religious institutions alone lest the free exercise of religion be violated. Indeed, the separation of Church and State is premised, first and foremost, on the notion that the State should be restrained from intervening in religious exercise by a "wall of separation."[110] Thus, there is a long-held historical custom of tax exemption for churches and religious institutions in recognition of the principle of separation of Church and State. This exemption has existed irrespective of campaign activity by churches.[111] Eliminating the campaign intervention prohibition would thus be a reinstatement of the historical status quo. Removing statutory prohibitions, which have no historical legislative justification[112] and very little cognizable legal justification, to return to the historical status quo is not an Establishment Clause violation that would constitute a compelling state interest.

Again, the above analysis, based on the decision in *Marsh v. Chambers*, is supported by the Supreme Court's opinion in *Walz v. Tax Commission*, the Court's seminal case on the issue of tax exemption for religious institutions.[113] In *Walz*, the Court addressed the

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[106] *Id.* at 786–90.

[107] *Id.* at 792.

[108] I.R.C. § 508(a) (2000).

[109] *See* Vaughn E. James, *Reaping Where They Have Not Sowed: Have American Churches Failed to Satisfy the Requirements for the Religious Tax Exemption?*, 43 CATH. LAW. 29, 44–48 (2004).

[110] Letter from Thomas Jefferson to Messrs. Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association (Jan. 1, 1802), *in* THOMAS JEFFERSON: WRITINGS 510, 510 (Merrill D. Peterson, ed., 1984).

[111] *See* James, *supra* note 109, at 48–69.

[112] *See supra* notes 25–30 and accompanying text.

[113] 397 U.S. 664 (1970).

constitutionality of New York's general provision of tax exemption for churches and religious institutions.[114] In finding tax exemption for churches and religious organizations to be constitutional, the Court found "[i]t . . . significant that Congress, from its earliest days, has viewed the Religion Clauses of the Constitution as authorizing statutory real estate tax exemption to religious bodies."[115] This statement emphasizes the historical importance of the tax exemption for religious institutions and does not make a distinction between the unconditional tax exemption, which was the norm prior to the 1954 addition, and the post-1954 conditional exemption. The unconditional tax exemptions that existed prior to 1954 have been recognized by the Supreme Court as being supported by powerful historical precedents.[116]

Further, the Court in *Walz* directly addressed the current concerns of those who argue that an unconditional tax exemption for religious organizations is equivalent to an establishment of religion.[117] The Court clearly stated that "[n]othing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief."[118] Indeed, certain early proponents of the Constitution and its separation of Church and State thought it essential that religious institutions be free from taxation by the government to maintain the efficacy of both of the Religion Clauses.[119] According to Chief Justice Burger, even unconditioned tax

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[114] *Id.* at 666–67.

[115] *Id.* at 677. "The existence from the beginning of the Nation's life of a practice, such as tax exemptions for religious organizations, is not conclusive of its constitutionality. But such practice is a fact of considerable import in the interpretation of abstract constitutional language." *Id.* at 681 (Brennan, J., concurring).

[116] *Id.* ("The more longstanding and widely accepted a practice, the greater its impact upon constitutional interpretation. History is particularly compelling in the present case because of the undeviating acceptance given religious tax exemptions from our earliest days as a Nation. Rarely if ever has this Court considered the constitutionality of a practice for which the historical support is so overwhelming.").

[117] "*Walz* unequivocally establishes the constitutionality, propriety, and desirability of exempting religious organizations from taxation." Ablin, *supra* note 45, at 564.

[118] *Walz*, 397 U.S. at 678.

[119] *See generally* ISAAC BACKUS, AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY, AGAINST THE OPPRESSIONS OF THE PRESENT DAY (Boston, John Boyle 1773). In September of 1775, Rev. Isaac Backus, a strong supporter of the separation of Church and State, delivered a sermon in which he stated:

> Yet, as we are persuaded that an entire freedom from being taxed by civil rulers to religious worship, is not a mere favor, from any man or men in the world, but a right and property granted us by God, who commands us to stand fast in it, we have not only the same reason to refuse an acknowledgment of such a taxing power here, as America has the above-said power, but also,

exemption for churches was a function of "religious tolerance" that prevents the government from engaging in excessive interference in the religious sphere and promotes religious plurality.[120] Chief Justice Burger's argument leads to the conclusion that tax exemptions for religious institutions, in fact, prevent the type of excessive entanglement that the Court found incompatible with the Establishment Clause in *Lemon v. Kurtzman*.[121]

Thus, avoiding an establishment of religion does not constitute a compelling governmental interest in favor of Section 501(c)(3) because removing the prohibition as applied to religious institutions would only restore the historical status quo regarding the tax relationship between religious institutions and the federal government. This status quo was based on a historical custom and was similar to the custom held constitutional in *Marsh v. Chambers*,[122] which the Supreme Court has stated does not violate the Establishment Clause of the First Amendment.[123] Indeed, this historical custom was meant to safeguard the separation of Church and State and to avoid the constitutional problem of excessive entanglement that the Supreme Court has concluded, in *Lemon*, threatens this separation. Therefore, with that in mind, Section 501(c)(3) violates the standards set by RFRA because it is a substantial burden on the prophetic speech of churches, such as All Saints Episcopal Church and the Church at Pierce Creek, and because the government lacks a compelling state interest that justifies this burden.

V. CONCLUSION

Currently, under Section 501(c)(3), any partisan campaign intervention undertaken by a church, such as the Church at Pierce Creek, will result in the revocation of the tax-exempt status of that

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> according to our present light, we should wrong our consciences in allowing that power to men, which we believe belongs only to God.

Isaac Backus, *A History of New England (1774–75)*, *reprinted in* 5 THE FOUNDERS' CONSTITUTION, 65, 65 (Philip B. Kurland & Ralph Lerner eds., Liberty Fund 1987).

120 *Walz*, 397 U.S. at 678.

121 Indeed, "one can argue that taxation of churches violates the Free Exercise Clause of the First Amendment because it allows the government to become excessively entangled with the financial affairs of churches, and thus burdens the practice of religion." Ablin, *supra* note 45, at 564.

122 463 U.S. 783, 792–95 (1983). Sponsoring legislative prayer, as in *Marsh v. Chambers*, is similar to exempting churches and other houses of worship from taxes in that both are customs that confer a particular benefit on religion. Both practices have long historical roots extending back to certain legislative actions by the founding generation. Further, both customs single out religion, including clergy and religious bodies, for benefits based on their religious exercise.

123 *See supra* notes 25–30 and accompanying text.

church or religious institution. The Supreme Court has yet to rule on the constitutionality of the prohibition on participation in political campaigns by churches. Thus, Section 501(c)(3) remains in question. Churches such as All Saints Episcopal Church[124] and the Church at Pierce Creek, however, are bound by religious duty and conviction to speak prophetically, even if this means that their prophetic speech resounds into the political sphere. Indeed, it is apparent that, at certain times, churches are compelled to become involved in political campaigns, in recognition of their prophetic ministry.

Thus far, attempts to reformulate the partisan campaigning prohibition to overcome the prohibition's violation of RFRA have failed to recognize that distinctions between political and religious content are not always applicable when dealing with Christian prophetic speech.[125] Recent popular proposals, such as the Crane-Rangel Amendment, have suggested that churches and religious organizations would be allowed to dedicate a certain percentage of their income to partisan political activity.[126] These proposals, however, require the government to determine which church activities are political and which are religious and how much of this partisan political activity is appropriate and should be tolerated. Plans that suggest a "substantial part" test—similar to Section 501(c)(3)'s lobbying-prohibition test—should be used to determine the extent to which churches may engage in partisan political intervention. This test would also entail a judicial or governmental determination of the character of church activities, such as Christian prophetic speech.[127] Certain scholars have even suggested that the tax code should allow churches and other religious institutions to engage in partisan political intervention, without any fear of having their tax-exempt status revoked, but any church funds expended in partisan

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[124] On September 10, 2007, the IRS sent a closing letter to All Saints Episcopal Church that "simultaneously closed the dormant examination—without challenge to the Church's tax-exempt status and without the audit ever actually taking place—and concluded without explanation that [Regas's sermon] constituted intervention in the 2004 Presidential election." Press Release, All Saints Church, All Saints Church, Pasadena Demands Correction and Apology From the IRS (Sept. 23, 2007), http://www.allsaints-pas.org/site/DocServer/IRS_Press_Release_Sept_23__2007.pdf. The investigation of All Saints Church may be concluded, but it remains a vivid example of the detrimental effects of the electioneering prohibition in Section 501(c)(3) on religious communities and on the relationship between these communities and the government. Indeed, All Saints Church was forced to undergo an intense, two-year examination by the IRS that consumed significant amounts of All Saints Church's time and resources. In the end, although it did not revoke All Saints Church's tax-exempt status, the IRS declared the legitimate, religiously motivated practice of prophetic speech by Regas and All Saints Church to be a violation of the Internal Revenue Code. *See supra* text accompanying notes 2–11.

[125] *See* Ablin, *supra* note 45, at 551–53; *see also* Kemmitt, *supra* note 26, at 153–62.

[126] *See* Ablin, *supra* note 45, at 585–86; *see also* Kemmitt, *supra* note 26, at 177–78.

[127] Ablin, *supra* note 45, at 584.

political activity would be taxed by the government.[128] This last plan would necessitate a delineation and classification of all of a church's activities as either political or religious. It is therefore likely that this plan would require even more invasive church investigations than those conducted under the present enforcement regime, as well as judicial or governmental determination of the nature of all of a church's activities. Indeed, all of the proposed changes to Section 501(c)(3) proffered recently have required either an implicit or an explicit judicial or governmental determination of what is religious and what is political. Hence, these proposed changes would also run afoul of the standards imposed by RFRA.

With the increasing prominence of so-called "faith-and-values voters," on both the left and the right,[129] the influence of churches and other religious institutions will almost certainly come under increasing scrutiny both by nongovernmental organizations and by the IRS. As the prominence of churches in politics increases, the IRS and the United States government will likely be forced to deal with the troubling consequences of the current law. The current law and the proposed changes to the current law violate the free-exercise right of churches and other religious institutions as guaranteed in RFRA and also create excessive entanglement of the State in the Church's affairs. History bears out that an unconditional tax exemption for churches and other religious institutions not only avoids the problems associated with the current law, but also promotes religious freedom and religious pluralism. Therefore, courts should abandon and Congress should appeal the current prohibition in Section 501(c)(3) against partisan political intervention by churches and other religious institutions to protect religious institutions from violations of their right to free exercise as safeguarded by Congress in the Religious Freedom Restoration Act.

Zachary S. Cummings

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[128] Kemmitt, *supra* note 26, at 176–77.

[129] Ron Chepesiuk, *Faith Based Groups Left and Right Appeal to Different 'Moral Values*,*'* THE NEW STANDARD, Dec. 7, 2004, http://newstandardnews.net/content/?action=show_item&itemid=1284.