NOTE: SELLING OUR SOUL FOR TAX BREAKS: ELECTIONEERING, LOBBYING AND THE SUBSTANTIAL BURDEN FACTOR UNDER RFRA

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Text

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Introduction

While numerous commentators have explored the many sub-issues surrounding the tax-exempt status of churches, recent events have brought renewed importance to the question of whether churches should engage in political activity at the expense of forgoing tax-exempt status. Central to this renewed importance are the various religious liberties issues which have attracted significant attention during the past several years. For example, the recent Health and Human Services ("HHS") regulation mandating coverage for contraceptives and abortifacients in employee health plans (including religiously-affiliated organizations such as Catholic universities and hospitals) has drawn the condemnation of every American bishop who heads a diocese as well as the Assembly of Orthodox Bishops in North America which represents all 53 Orthodox bishops in the United States. [1] These current events have led even left-leaning periodicals such as the New York Times to characterize Catholic/Government relations as involving a "growing sense of siege" and the HHS mandate as the equivalent of "Pearl Harbor." [2]

[*394] In response to government actions like the HHS mandate, which they see as interfering with religious liberties, the Catholic bishops have taken unprecedented steps to influence the political process. One clear example was the benediction given by Timothy Cardinal Dolan at the closing of the 2012 Democratic National Convention,

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[1] Thomas Peters, Updated: 191 Bishops (100% of Dioceses) Have Spoken Out Against Obama/HHS Mandate, Catholic Vote, 2013, http://www.catholicvote.org/discuss/index.php?p=25591. See also Record of Protest Against the Infringement of Religious Liberty by the Department of Health and Human Services, Assembly of Bishops, Feb. 2, 2012, http://www.assemblyofbishops.org/news/2012/ protest-against-hhs.

[2] Laurie Goodstein, Bishops Were Prepared for Battle Over Birth Control Coverage, N.Y. Times, Feb. 9, 2012, http://www.nytimes.com/2012/02/10/us/bishops-planned-battle-on-birth-control-coverage-rule.html?pagewanted=all.

where Dolan made numerous references to pro-life and pro-religious liberty positions. [3] Indeed, many examples of "semi-political" activity by Catholic bishops have recently been reported in the popular press. [4] On several occasions, the actions of Catholic bishops have called into question whether or not the ban on political activity by religious organizations under *26 U.S.C. § 501(c)(3)* [5] has been violated. [6] Such arguably political activities increased greatly in the run up to the 2012 Presidential election, sparking a lawsuit against the Internal Revenue Service by the Freedom from Religion Foundation for failure to enforce the electioneering ban in *26 U.S.C. § 501(c)(3)*. [7]

[*395] While much has been written both in support and in opposition of the ban, [8] the currently available literature was written at a time when churches were less engaged in potentially political speech. Additionally, this body of scholarship appears to overlook an important Free Exercise argument that the courts have implied might be sufficient to overcome a Section 501(c)(3) challenge to church speech. In this Note, I intend to: (1) Survey the history of the electioneering and substantial lobbying ban on tax-exempt organizations found in *26 U.S.C. § 501(c)(3)*; (2) Explain the appropriate Free Exercise tests to *26 U.S.C. § 501(c)(3)* under both the First Amendment and the Religious Freedom Restoration Act (RFRA); (3) Demonstrate that Catholic doctrine morally obligates the bishops to actively oppose legislation containing, or political candidates espousing, clear moral evils - including through the use of political means which would violate the political-prohibitions in *26 U.S.C. § 501(c)(3)*; and (4) Show that alternatives to directly engaging in political activity - such as the use of derivative lobbying organizations formed under *26 U.S.C. § 501(c)(4)* - do not sufficiently alleviate the substantial burden placed on Catholics by the electioneering and substantial lobbying ban.

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[3] Kerry Picket, Dolan Brings Pro-Life Message to DNC Convention, Wash. Times Blog (Sept. 6, 2012, 11:42 PM), http://www.washingtontimes.com/blog/watercooler/2012/sep/6/pick et-video-and-transcript-dolan-brings-pro-life-/. See also Robert P. George, Cardinal Dolan Goes to Charlotte, Wall St. J., Sept. 3, 2012, at A19 ("The cardinal's presence confounds efforts by the abortion-rights and gay-marriage movements to stigmatize and marginalize those who refuse to fall into line.").

[4] See, e.g., Eric W. Dolan, Group Challenges Tax-Exempt Status of Bishop Who Compared Obama to Hitler, Stalin, The Raw Story, Apr. 22, 2012, http://www.rawstory.com/rs/2012/04/22/group-challenges-tax-exempt-status-of-bishop-who-compared-obama-to-hitler-stalin/; Nanette Byrnes, As Churches Get Political, IRS Stays Quiet, Reuters, June 21, 2012, http://www.reuters.com/article/2012 /06/21/us-usa-tax-churches-irs-idUSBRE85K1EP20120621. Recent activities such as these have even led some liberal commentators to liken the Conference of Catholic Bishops to a "super PAC." See Steve M., The Catholic Church Is A GOP Super PAC in Robes, And It Shot First, No More Mister Nice Blog (Feb. 10, 2012), http://nomoremister.blogspot.com/2012/02/catholic-church-is-gop-super-pac-in.html.

[5] *26 U.S.C. § 501(c)(3)* (2010) provides that:

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.

26 U.S.C. § 501(c)(3) (2010) (emphasis added).

[6] Nicholas P. Cafardi, Politics and the Pulpit: Are Some Bishops Putting the Church's Tax Exempt Status at Risk?, Am. Mag., July 30, 2012, available at http://www.americamagazine.org/ issue/5147/article /politics-and-pulpit.

[7] Wisconsin-Based Group of Atheists, Agnostics Sues IRS Over Political Activity by Church Groups, Fox News, Nov. 15, 2012, http://www.foxnews.com/us/2012/11/15/wisconsin-based-group-atheists-agnostics-sues-irs-over-political-activity- by/print#.

[8] See W. Edward Afield, Getting Faith Out of the Gutters: Resolving the Debate Over Political Campaign Participation by Religious Organizations Through Fiscal Subsidiary, *12 Nev. L.J. 83 (2001)*.

Taken together, these four sections will explain how a litigant could mount a colorable Free Exercise challenge to the political restrictions on Section 501(c)(3) organizations under RFRA. These claims will be constructed using theories that the Courts themselves have suggested may be sufficient to overcome the substantial burden hurdle to a successful RFRA challenge.

While the legal principles discussed in this Note are equally applicable to religious non-profits of all faiths, this Note draws primarily upon Roman Catholic teachings and organizations because of the doctrinal unity and recent political activity of that organization.

I. History of the Ban

In discussing challenges to the electioneering and substantial lobbying ban on non-profit organizations, it is first prudent to discuss the origins of tax-exempt status itself. The first principle in such a study is the recognition that there "is no constitutional law principle mandating tax- **[*396]** exemption." [9] Rather, "there is no entitlement in a nonprofit organization to tax-exemption; there is no entity that has some inherent right to exempt status. The existence of tax-exemption and the determination of entities that have it are essentially the whim of the legislature involved." [10]

Despite the seeming lack of constitutional protections on tax-exempt status, constitutional issues are implicated when the conditional privilege of tax-exempt status is revoked upon engaging in Free Exercise behavior that would normally be protected under the Constitution. [11] In the context of Free Exercise challenges to the loss of a federal conditional privilege, RFRA provides even more stringent safeguards than the Free Exercise Clause itself. [12] Accordingly, religious challenges to Section 501(c)(3) should incorporate RFRA claims.

The earliest exception to a federal income tax for charitable organizations appears to have been included in the Wilson Tariff Act of 1894, [13] which was later found unconstitutional by the Supreme Court in Pollock. [14] After passage of the Sixteenth Amendment, [15] Congress enacted the Tariff Act of 1913, which once again included tax-

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[9] Bruce R. Hopkins, The Law of Tax-Exempt Organizations 7 (8th ed. 2003); accord *Christian Echoes Nat'l Ministry v. United States, 470 F.2d 849, 857 (10th Cir. 1972)* ("Tax exemption is a privilege, a matter of grace rather than right … .").

[10] Hopkins, supra note 9.

[11] *Branch Ministries v. Rossotti, 211 F.3d 137, 142 (D.C. Cir. 2000)*.

[12] *Ford v. McGinnis, 352 F.3d 582, 592 (2d Cir. 2003)* ("In a now familiar saga … Congress responded to Smith by statutorily mandating application of the Sherbert test to all free exercise claims across the board, only to have the Supreme Court invalidate the statute as an attempt by Congress to legislate in excess of its constitutional powers."). See infra Part II for a detailed explanation of the RFRA's history as well as the differences between Free Exercise challenges and RFRA challenges.

[13] Wilson Tariff Act of 1894, ch. 349, *28 Stat. 509*, 556 (1894). This act provided that "nothing herein contained shall apply to … corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes." Surprisingly, the earlier Revenue Act of 1861, ch. 45, *12 Stat. 292* (1861), and the Revenue Act of 1862, ch. 119, ***12 Stat. 432*** (1862), did not directly provide for exemptions from charitable organizations, but did provide that "all property, of whatever kind, coming within any of the foregoing descriptions … permanently or specially exempted from taxation by the laws of the State wherein the same may be situated at the time of the passage of this act … shall be exempted from the aforesaid enumeration and valuation, and from the direct tax aforesaid." Act of Aug. 5, 1861, ch. 45, *12 Stat. 292*, 297 (1861).

[14] *Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 690, 700 (1895)*, aff'd on reh'g, *158 U.S. 601 (1895)*.

[15] *U.S. Const. amend. XVI*.

exemption for religious organizations. [16] Regrettably, the congressional record does not appear to provide illumination for the Congress' reasoning for exempting charitable organizations from taxation in this act. [17]

[*397] The lobbying restrictions as they exist in their current form may be traced back to the Revenue Act of 1934, [18] which provided tax-exemption for certain organizations, including those "organized and operated exclusively for religious … purposes." [19] While there were no specific statutory restrictions on lobbying activities prior to the 1934 amendments, early treasury regulations provided that organizations "formed to disseminate controversial or partisan propaganda" were not "educational" within the meaning of the 1913 Act. [20] This restriction was the result of considerable early litigation, most notably Slee v. Commissioner. [21]

In Slee, Judge Learned Hand, writing for a unanimous court, held that organizations could engage in some lobbying where "the agitation is ancillary to the [charitable] end in chief, which remains the exclusive purpose of the association." [22] It is generally believed that the 1934 substantial lobbying restriction was a codification of the Slee decision and a rejection of the strict position taken in the 1919 treasury regulations. [23] However, the 1934 amendments adopted a different test than the court in Slee, deciding on an activities-based "no substantial part" test rather than an intent-driven "destination of lobbying" approach. [24]

While the legislative history behind the 1934 act is sparse, [25] it does provide some insight into the intent of the legislature in crafting the first political restrictions on federally tax-exempt organizations. The lobbying restriction was added as a floor amendment to the Revenue Act of 1934 and sent to the Senate Finance Committee. [26] This floor amendment also included an early version of the electioneering ban that restricted "participation in partisan politics." [27] Perhaps instructively, this provision was deleted in conference because, as one Congressman stated, "we were afraid this provision was too broad." [28]

The vague congressional record also includes rather sharp criticism from Senator David Reed, the ranking minority member of the Senate Finance **[*398]** Committee and apparent sponsor of the amendment, who wrote: "We found

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[16] Tariff Act of 1913, ch. 16, *38 Stat. 114*, 172 (1913). This act provided that "nothing in this section shall apply to … any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes."

[17] Hopkins, supra note 9, at 13 ("At the time a constitutional income tax was coming into existence (the first enacted in 1913), Congress legislated in sparse language and rarely embellished on its statutory handiwork with legislative histories." (citation omitted)).

[18] Revenue Act of 1934, ch. 277, *48 Stat. 680* (1934).

[19] Id. § 101(6).

[20] Judith E. Kindell & John Francis Reilly, P. Lobbying Issues, IRS Exempt Orgs. Continuing Prof'l Educ., 1997, at 261, 262, *http://www.irs.gov/pub/irs-tege/eotopicp97.pdf* (citing Treas. Reg. 45, art. 517 (1919 ed.); T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919)).

[21] *42 F.2d 184 (2d Cir. 1930)*.

[22] *Id. at 185*.

[23] Kindell & Reilly, supra note 20, at 266.

[24] Id.

[25] *Id. at 264*.

[26] Id.

[27] Id. at n.6 (citing H.R. Conf. Rep. No. 73-1385, 73 Cong., 2d Sess. 3-4 (1934)).

[28] Id. (citing Rep. Samuel B. Hill, 73 Cong. Rec. 7,831 (1934)).

great difficulty in phrasing the [substantial lobbying] amendment. I do not reproach the draftsmen. I think we gave them an impossible task; but this amendment goes much further than the committee intended to go." [29] Whether Senator Reed was speaking for the entire Committee or merely himself remains unclear. [30]

After the proposed and rejected "participation in partisan politics" amendments in 1934, the next time electioneering restrictions seem to have been considered was the ban's current incarnation - proposed in 1954 by then-Senate Minority Leader Lyndon Johnson. [31] Once again, this provision came without committee notes or other indications of congressional intent. [32] In fact, this amendment was "added without the benefit of hearings, testimony, or comment" by Johnson during Senate floor debate. [33] Within a few minutes, Johnson's amendment passed on voice vote without debate. [34]

It does not appear that Johnson targeted or even considered the implications for churches while proposing this amendment. [35] Indeed, George Reedy - Johnson's chief aide in 1954 - once wrote that he was "confident that Johnson would never have sought restrictions on religious organizations." [36] Rather, it appears that Johnson's intent was to "insure that the tax-exempt organizations that had supported Dudley Dougherty, his challenger in the 1954 primary election, would not do so again." [37] The final relevant changes to the IRS code took place in the Revenue Act of 1987 when the words "on behalf of (or in opposition to) any candidate" were **[*399]** substituted for "on behalf of any candidate" in an apparent attempt to clarify that mere opposition to a candidate could qualify as political activity. [38]

Despite the sparse legislative history of these provisions, and the arguable political motivation behind the 1954 amendments, courts have subsequently interpreted Section 501(c)(3) as embodying the constitutional principles of "separation and neutrality" and "the principle that government shall not subsidize, directly or indirectly, those organizations whose substantial activities are directed toward the accomplishment of legislative goals or the election or defeat of particular candidates." [39] Any organization challenging Section 501(c)(3) on RFRA grounds

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[29] *Id. at 264* (citing 78 Cong. Rec. 5,861 (1934)). See also Chase Manderino, Understanding the Lobbying Efforts of a Church: How Far Is Too Far?, *2009 B.Y.U. L. Rev. 1049, 1054-56*.

[30] Kindell & Reilly, supra note 20, at 264.

[31] Staff of J. Comm. on Taxation, 109th Cong., Historical Development and Present Law of the Federal Tax Exemption for Charities and Other Tax-Exempt Organizations 57 (Comm. Print 2005).

[32] Deirdre Dessingue, Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; To What End?, *42 B.C. L. Rev. 903, 905 (2001)*. It is worth noting that at the time of writing her article, Ms. Dessingue served as Associate General Counsel of the United States Conference of Catholic Bishops.

[33] Id.

[34] Judith E. Kindell & John F. Reilly, N. Election Year Issues, IRS Exempt Org. Continuing Prof'l Educ., 1993, at 401 (citing 100 Cong. Rec. 9,604 (1954)); accord James D. Davidson, Why Churches Cannot Endorse or Oppose Political Candidates, 40 Rev. of Religious Res. 1, 18 (Sept. 1998).

[35] Davidson, supra note 34.

[36] Id. at 18.

[37] Dessingue, supra note 32, at 905-06. As one scholar observed, "[Johnson's] amendment was directed at anti-communist groups such as Facts Forum and the Committee for Constitutional Government which stood between him and his goals of crippling McCarthyism, thwarting Allan Shivers' efforts to control the Democratic Party in Texas, and defeating Dudley Dougherty." Davidson, supra note 34, at 29.

[38] Omnibus Budget Reconciliation Act of 1987, ***Pub. L. No. 100-203***, § 10711(a)(2), *101 Stat. 1330* (1987).

[39] *Christian Echoes Nat'l Ministry v. United States, 470 F.2d 849, 857 (10th Cir. 1972)*; cf. Regan v. Taxation with *Representation, 461 U.S. 540, 544 (1983)* ("Both tax exemptions and tax deductibility are a form of subsidy that is administered

which overcomes the substantial burden threshold will likely need to challenge these and similar judicially-adopted justifications during an analysis of whether the law serves a "compelling governmental interest."

The restrictions in Section 501(c)(3) do not require that churches refrain from all political involvement. [40] During election campaigns, for example, churches are permitted to:

Educate candidates about the issues and attempt to change their positions on those issues, and may educate voters about the issues and candidates' positions on the issues. This may be accomplished through a variety of means, including sponsorship of candidate forums and distribution of voter education materials on incumbents' voting records and the results of candidate polls or questionnaires. These voter education activities, if unbiased in content, structure, format, and context, do not violate the political activity prohibition. [41]

[*400] While some limited political activity is allowed under Section 501(c)(3), the prohibitions on electioneering and substantial lobbying have had a "significant impact on the role of tax-exempt organizations in the political sphere," [42] and a chilling effect on a church's willingness to engage in political discourse. [43] This effect is discussed in greater detail in Parts III and IV of this note.

II. Free Exercise and RFRA

Prior to the Supreme Court's landmark ruling in Employment Division v. Smith, [44] courts followed a three-prong analysis elucidated in Sherbert v. Verner [45] for evaluating Free Exercise challenges to federal law. [46] Under the Sherbert test, these three prongs included determining: (1) Whether the government's action imposed a substantial burden; (2) whether a compelling government interest justified the burden; and (3) whether the burden was the least restrictive means of accomplishing the governmental purpose. [47]

In Smith, however, the Court explained that the Sherbert test did not apply to neutral laws of general applicability not "aimed at the promotion or restriction of religious beliefs." [48] As one Circuit Court explained in rather colorful language:

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through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions… . Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare."); but see Nina J. Crimm & Laurence H. Winer, Politics, Taxes and the Pulpit: Provocative First Amendment Conflicts 299 (2011) (arguing that a proper balancing approach is one which takes into account "the extent to which the subsidy actually financially supports the political campaign speech that the § 501(c)(3) gag rule currently prohibits," rather than an inquiry into the "general use of the permissible subsidy"). This view that refraining from taxing charitable organizations is the equivalent to a direct subsidy appears to be a new, and perhaps unfortunate, innovation in the Supreme Court's jurisprudence. See, e.g., *Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674-75 (1970)* (holding that a "grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state"); accord Dessingue, supra note 32, at 918.

[40] Dessingue, supra note 32, at 910.

[41] Id. (footnote omitted).

[42] *Id. at 905*.

[43] See generally Afield, supra note 8, at 96.

[44] *494 U.S. 872 (1990)*.

[45] *374 U.S. 398 (1963)*.

[46] Kristine Pham, The Substantial Burden Mountain: Implications of the United States Supreme Court's Denial of Certiorari in Navajo Nation v. United States Forest Service, SSRN, Feb. 25, 2010, at 1, available at *http://ssrn.com/abstract=1559148*.

[47] *Sherbert, 374 U.S. at 403-04*.

In a now familiar saga … Congress responded to Smith by statutorily mandating application of the Sherbert test to all free exercise claims across the board, only to have the Supreme Court invalidate the statute as an attempt by Congress to legislate in excess of its constitutional powers [in City of Boerne v. Flores [49]]. [50]

The intent of the legislature in passing RFRA was to combat the fear that many had of governmental interference in religious exercise even through so called "neutral" laws. [51] As then-President Clinton remarked at the law's signing ceremony:

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It is interesting to note … what a broad coalition of Americans came together to make this bill a reality. It's interesting to note that that coalition produced a 97-to-3 vote in the United States Senate, and a bill that had such broad support it was adopted on a voice vote in the House.

…

This act reverses the Supreme Court's decision, Employment Division against Smith, and reestablishes a standards [sic] that better protects all Americans of all faiths in the exercise of their religion in a way that I am convinced is far more consistent with the intent of the founders of this nation than the Supreme Court decision. [52]

Yet Flores merely held RFRA unconstitutional as applied to state and local governments, [53] leaving the law intact as applied to the federal government itself - something subsequently confirmed by the Supreme Court itself in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal. [54] In 2000, Congress responded to these decisions by amending RFRA to clarify that it only applied to the federal government. [55]

Through these developments, the prudent attorney challenging a law on Free Exercise principles would be wise to include a RFRA claim in order to take advantage of RFRA's easier-to-satisfy Sherbert test rather than the more stringent Smith test. Under the RFRA's resurrected Sherbert test, plaintiffs must make a threshold showing that the legislation at issue substantially burdens that party's religious beliefs. [56] Regrettably, neither RFRA nor subsequent legislation intended to clarify "substantial burden" as defined by RFRA, [57] despite the centrality of this concept to

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[48] *Smith, 494 U.S. at 879*.

[49] *521 U.S. 507 (1997)*.

[50] *Ford v. McGinnis, 352 F.3d 582, 592 (2d Cir. 2003)*.

[51] *42 U.S.C.A. § 2000bb(2)* (1993) ("Laws "neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.").

[52] Press Release, William J. Clinton, Remarks by the President at Signing Ceremony for the Religious Freedom Restoration Act (Nov. 16, 1993) (White House), available at 1993 WL 479632.

[53] *City of Boerne, 521 U.S. at 511*.

[54] *546 U.S. 418, 424 (2006)*.

[55] Act to Protect Religious Liberty, and for Other Purposes, ***Pub. L. No. 106-274***, §§2(a)(2)(A), 3(b)(1), 4(c), and 5(h) (2000) (Congress included amendments to RFRA to bring it into alignment with Supreme Court jurisprudence).

[56] *42 U.S.C. § 2000bb-1(a)*; accord Pham, supra note 46, at 2.

[57] Pham, supra note 46, at 2 (citing S. Rep. No. 103-111 (1993); H. R. Rep. No. 103-88 (1993)).

the statute itself. Instead, as both the Senate and House Committee Reports clarify, RFRA merely intended to return courts to a pre-Smith analysis, thereby incorporating the pre-Smith definition of "substantial burden." [58]

[*402] As a federal law, the Internal Revenue Code ("IRC") is subject to RFRA constraints, and challengers to portions of the IRC on Free Exercise grounds generally include RFRA claims in addition to constitutional Free Exercise claims. [59] Accordingly, a Free Exercise challenger to *26 U.S.C. § 501(c)* would be remiss in failing to include a RFRA claim in addition to a First Amendment claim. Indeed, since the substantial burden inquiry is also the first step of a First Amendment analysis, a church challenging Section 501(c) on both constitutional and RFRA grounds "must first establish that its free exercise right has been substantially burdened." [60]

III. Catholic Doctrine and the Ban

Based on the recent political activity discussed above, it clearly appears that the Catholic bishops - and indeed many religious leaders of other denominations - are becoming more politically active. In entering into a more vigorous and overtly political role, the bishops - and the attorneys advising them - need to formulate a morally and prudentially acceptable test to determine when circumstances dictate the intervention of the Church. [61] While not every law or public policy - even those with moral dimensions - warrants ecclesial intervention, [62] some political issues could have such significant moral implications that the Church is obligated to speak against them. [63] Indeed,

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[58] See, e.g., H. R. Rep. No. 103-88, Hon. Henry J. Hyde, Hon. F. James Sensenbrenner, Hon. Bill McCollum, Hon. Howard Coble, Hon. Charles T. Canady, Hon. Bob Inglis, and Hon. Robert W. Goodlatte released the following additional views: "The amendments to [RFRA] … make clear that the purpose of the statute is to "turn the clock back' to the day before Smith was decided. In interpreting the statute, courts are not to look exclusively to the compelling state interest test as applied in Sherbert and Yoder, but to all prior "Federal court cases.'" Id.; see also S. Rep. No. 103-111 (including the note that "this bill is not a codification of the result reached in any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions. Therefore, the compelling interest test generally should not be construed more stringently or more leniently than it was prior to Smith.").

[59] See, e.g., *Branch Ministries v. Rossotti, 211 F.3d 137, 142 (D.C. Cir. 2000)*.

[60] Id. (citing *Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 384-85 (1990)*).

[61] Patrick Fagan, Political Confusion at the Catholic Conference, Crisis Mag., June 1996, available at *http://www.ewtn.com/library/ISSUES/PCATCC.TXT*. For example, Dr. Patrick Fagan of the Family Research Council and the Heritage Foundation has argued that the United States Conference of Catholic Bishops' "statements on political responsibility are confusing at best, and a danger to the bishops' authority at worst" because of the Conference's tendency to stray beyond making moral pronouncements. Id. Fagan argues that, while the bishops have an obligation to openly oppose "specific concrete public evil" - even when such "public evil" takes the form of legislation or political policy - the bishops lack the authority to proscribe specific political means which Catholics should take to achieve political goods. Id.

[62] Accord Catechism of the Catholic Church P 2246 (2d ed. 1997) (suggesting that the Church is limited to passing moral judgments in political maters only where "the fundamental rights of man or the salvation of souls requires it.").

[63] Fr. Michael P. Orsi, The Bishops: The Election's Biggest Losers, Catholic Exchange, Nov. 14, 2012, *http://catholicexchange.com/the-bishops-the-elections-biggest-losers/*. One contemporary example of such a grave, moral evil that the American Bishops have consistently opposed is the United States' abortion policy. Two excellent, historical examples of Christian leaders who recognized the Christian imperative to speak out against political evils are Dietrich Bonhoeffer and St. Maximilian Kolbe, both of whom lost their lives in struggling against the Nazi regime. As one recent scholar noted:

As shepherds it is important that bishops and priests speak fearlessly on the moral issues of the day and call out offending politicians. Recall, how the pastors in Germany, for the most part, failed in their obligation to condemn Hitler as the Nazis rose to power. Bishops must be ready to give up the Church's tax exempt status. It is worthless if the Church is prevented from preaching the Gospel for the sake of money.

Id. Illustratively, Germany has publicly funded churches for many years - something which may have had an impact on the German Bishops' willingness to oppose the state.

in his recent address to the United States Bishops, Pope **[*403]** Benedict XVI stressed the importance of the "Church's voice in the public square" and encouraged the American clergy to "humbly yet insistently" speak "in defense of moral truth … offering a word of hope, capable of opening hearts and minds to the truth that sets us free." [64] This test must effectively draw a distinction between those circumstances when the Church is obliged to act, and those when the Church may permissibly refrain from action. [65]

Many legal and social commentators have argued that it is imprudent for the Church to engage in political activity, for doing so risks alienating congregants and tarnishing the otherwise unbiased opinion many have of the clergy. [66] Other commentators have argued that political activity, specifically electioneering, by the Church would have little impact on parishioner voting decisions. [67] Citing to a recent study from the PEW Research Institute, Reuters, reported that "most parishioners would prefer their religious leaders steer clear of electioneering, with Catholics among the most adamant." [68]

Yet such views, apart from directly conflicting with the Church's mission to be a light to the world, ignore the reality that "Churches have played a pivotal role in every important political struggle since (and including) national independence: the abolition of slavery, gambling, child labor, prostitution, temperance, the death penalty, the war in Vietnam, abortion, and civil rights." [69]

[*404] The Church herself has suggested that it may authoritatively intervene in political matters only in opposition to specific moral evils, rather than in an endorsement of a particular means or achieving a political good. As one bishop explained:

The church, through the bishops, must teach the Gospel. I have the duty to teach about human life and dignity, marriage and family, war and peace, the needs of the poor and the demands of justice. As we learned during the civil rights struggle, we have a moral responsibility to state the truth about the dignity of every human being regardless of race. It doesn't matter whether a particular politician or a candidate for office agrees with us or not. [70]

It is important to note that merely opposing a candidate or legislative matter - without directly endorsing another candidate or piece of legislation - is still political activity that falls under Section 501(c)(3)'s prohibition. [71]

IV. Alternative Organizations, Consequences, and the Substantial Burden Hurdle

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[64] Address of His Holiness Benedict XVI to the Bishops from the United States of America on their "Ad Limina" Visit (Nov. 26, 2011), available at http://www.vatican.va/holy_father/ benedict_xvi/speeches/2011/november/documents/hf_ ben-xvi_spe_20111126_bishops-usa_en.html.

[65] See, e.g., 1971 Synod of Bishops, Justitia in Mundo [Justice in the World] P 37 (1971) ("Of itself it does not belong to the Church, insofar as she is a religious and hierarchical community, to offer concrete solutions in the social, economic and political spheres for justice in the world. Her mission involves defending and promoting the dignity and fundamental rights of the human person."), available at http://www.shc.edu/theolibrary/resources/snyodjw.htm.

[66] See generally Afield, supra note 8, at 99 ("Even if religious organizations might be negatively impacted by engaging in political campaign activity, it is not the place of government to impose its view paternalistically on religious organizations.").

[67] Cafardi, supra note 6.

[68] Byrnes, supra note 4.

[69] Dessingue, supra note 32, at 923.

[70] Bishop Robert J. Carlson, The Responsibility to Have a Well Informed Faith Life, EWTN (Aug. 2004), http://www.ewtn.com/library/bishops/informfa.htm.

[71] H. Chandler Combest, Symbolism as Savior: A Look at the Impact of the IRS Ban on Political Activity by Tax-Exempt Religious Organizations, 61 Ala. L. Rev. 1121, 1128 (2010).

In a Free Exercise context, courts have explained that a substantial burden exists where "the state puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." [72] In answering this question, courts do not evaluate the objective reasonableness of the asserted belief, for doing so would be "inconsistent with our nation's fundamental commitment to individual religious freedom." [73] Rather, courts merely determine "whether a claimant sincerely holds a particular belief and whether the belief is religious in nature." [74]

Courts have further clarified that while a belief need not be mandated by an adherent's religion to constitute a substantial burden, the fact that a belief is mandated is "surely relevant to resolving whether a particular burden is substantial." [75]

A key rationale espoused by the D.C. Circuit in the Branch Ministries case for the constitutionality of the lobbying and electioneering ban was the **[*405]** ability of religious organizations to engage, albeit indirectly, in political activity despite the provisions of Section 501(c)(3). [76] The court observed that, under the current regulatory scheme, a congregation wishing to engage in political activity could do so by first forming a related organization under Section 501(c)(4) of the tax code. [77] This 501(c)(4) organization could, in turn, form a political action committee (PAC) to engage in political activity. [78] Thus, for a church to engage - even indirectly - in political activity under the current tax code, it must form two separately incorporated organizations. [79]

This rationale appears to have been first advanced by the Supreme Court in Regan v. Taxation with Representation. [80] In Regan, a non-profit corporation organized to promote certain interests in federal taxation policy applied for tax-exempt status under *26 U.S.C. § 501(c)(3)*. The IRS denied the application because "it appeared that a substantial part of [the non-profit's] activities would consist of attempting to influence legislation" contrary to the substantial lobbying prohibition. [81] The non-profit appealed, saying that the lobbying prohibition violated the free speech protections of the First Amendment. [82] Writing for a unanimous Court, Justice Rehnquist found that the dual 501(c)(3)/501(c)(4) structure adequately protected the free speech rights of the nonprofit. In a concurring opinion joined by two other justices, Justice Blackmun wrote separately to stress that the Regan holding "depends entirely upon the Court's necessary assumption … about the manner in which the Internal Revenue Service administers § 501." [83]

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[72] *Jolly v. Coughlin, 76 F.3d 468, 477 (2d Cir. N.Y. 1996)* (quoting *Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 708, 718 (1996))* (internal quotation marks omitted).

[73] *Id. at 477*.

[74] *Ford v. McGinnis, 352 F.3d 582, 590 (2d Cir. 2003)*.

[75] *Id. at 593*.

[76] *Branch Ministries v. Rossotti, 211 F.3d 137, 143 (D.C. Cir. 2000)*.

[77] Id.

[78] Id. *26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii) (1999)* specifically excludes 501(c)(3) organizations from directly forming PACs.

[79] *Branch Ministries, 211 F.3d at 143*.

[80] *461 U.S. 540, 544 (1983)*.

[81] *Id. at 542*.

[82] Id.

[83] *Id. at 552* (Blackmun, J., concurring).

Indeed, Blackmun's concurrence acknowledged that Section 501(c)(3)'s prohibition "deprives an otherwise eligible organization of its tax-exempt status and its eligibility to receive tax-deductible contributions for all its activities, whenever one of those activities is "substantial lobbying.'" [84] In Blackmun's view, the free speech "constitutional defect" of Section 501(c)(3) was only rendered constitutional **[*406]** by the redeeming potential use of Section 501(c)(4) organizations. [85] Indeed, this belief was so strong that Blackmun wrote:

Any significant restriction on this channel of communication, however, would negate the saving effect of § 501(c)(4). It must be remembered that § 501(c)(3) organizations retain their constitutional right to speak and to petition the Government. Should the IRS attempt to limit the control these organizations exercise over the lobbying of their § 501(c)(4) affiliates, the First Amendment problems would be insurmountable. It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him. Similarly, an attempt to prevent § 501(c)(4) organizations from lobbying explicitly on behalf of their § 501(c)(3) affiliates would perpetuate § 501(c)(3) organizations' inability to make known their views on legislation without incurring the unconstitutional penalty. Such restrictions would extend far beyond Congress' mere refusal to subsidize lobbying. In my view, any such restriction would render the statutory scheme unconstitutional. [86]

In FCC v. League of Women Voters, the Supreme Court subsequently clarified that Blackmun's 501(c)(3)/501(c)(4) substitution reasoning was an accurate description of the Regan holding. [87]

In Branch Ministries, the D.C. Circuit applied what might be termed the "Regan 501(c)(4) exception" to a church challenging the electioneering ban. [88] However, the Branch Ministries court only applied the "Regan 501(c)(4) exception" to overcome a constitutional challenge on Free Speech grounds, [89] leaving unresolved the question of whether such an exception would be sufficient to overcome a Free Exercise or a hybrid [90] Free **[*407]** Speech/Free Exercise challenge, despite numerous constitutional similarities between the Free Speech concerns which motivated the Regan Court and the Free Exercise concerns raised by the church.

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[84] Id. (emphasis added).

[85] Id. ("A § 501(c)(3) organization's right to speak is not infringed, because it is free to make known its views on legislation through its § 501(c)(4) affiliate without losing tax benefits for its nonlobbying activities.").

[86] *Id. at 553-54* (Blackmun, J., concurring).

[87] *468 U.S. 364, 400 (1984)*. See also *Branch Ministries v. Rossotti, 211 F.3d 137, 143 (D.C. Cir. 2000)*.

[88] *Branch Ministries, 211 F.3d at 143* ("The Church can initiate a series of steps that will provide an alternate means of political communication that will satisfy the standards set by the concurring justices in Regan.").

[89] Id.

[90] As one author noted:

Would a minister omit the references to the candidates [in a sermon] in order to avoid an investigation by the IRS? Clearly, there are some churches and pastors that do not let the threat of an IRS investigation deter them; that is why this issue is growing in visibility and significance. However, there are some churches that may be deterred from speaking out on issues because of the fear of losing tax-exempt status. This is a colorable infringement on speech that should trigger a hybrid claim under Smith.

Keith S. Blair, Praying for a Tax Break: Churches, Political Speech, and the Loss of Section 501(c)(3) Tax Exempt Status, *86 Denv. U. L. Rev. 405, 426 (2009)*. Whether so-called hybrid claims exist and, if they exist, whether they should be afforded any heightened degree of protection is an issue of some debate. See, e.g., Frederick Mark Gedicks, Three Questions About Hybrid Rights and Religious Groups, 117 Yale L.J. 192 (2008), available at *http://www.yalelawjournal.org/forum/three-questions-about-hybrid-rights-and-religious-groups*. But see Murad Hussain, Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling,*117 Yale L.J. 920, 927-28 (2008)*.

For example, some scholars argue that the electioneering and substantial lobbying "ban's ability to infringe upon an organization's religious mission is what creates unique Free Exercise problems with the ban that are not present in other conditions that must be satisfied to obtain and maintain tax-exempt status." [91] As another scholar noted:

For a church that believes that it has a social justice mission, speaking out on matters that may be deemed political in nature may be an essential part of its ministry. The moral issues that churches in particular and society in general care about cannot be spoken about solely by referencing the Bible or the Koran or any other religious book. These messages must have context, and that context is society at large. This "mixed message" is important for churches. If a church is precluded from speaking on an issue because it fears the loss of its tax-exempt status, that is an arguable infringement of the church's free exercise rights. [92]

The multi-layered "Regan 501(c)(4) exception" for engaging in political speech is inadequate for meeting the teaching obligations Catholic doctrine imposes upon the bishops, preventing the Church from speaking with Her own voice. While they generally lack the power to speak infallibly, [93] the bishops nonetheless have a recognized authority as the "visible source and foundation of unity in their own particular Churches" [94] and "have as their first task to preach the Gospel of God to all men." [95] This authority cannot be **[*408]** exercised independently of a bishop's office, [96] while attempts to speak for the Church through layered, derivative organizations lack both spiritual power as well as legitimacy in the public's eyes. [97] Moreover, the bishops have an affirmative obligation to lead their congregations through the many challenging, moral questions that politics present. [98]

Broadly understood, the mission of the Catholic Church is to "continue the works of Jesus Christ." [99] A chief aspect of the multifaceted work of Christ is serving as the "salt of the earth and light of the world." [100] In explaining the Church's role as the "light of the world," Christ told His followers that:

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[91] Afield, supra note 8, at 111. See also Blair, supra note 90.

[92] Blair, supra note 90, at 423-24.

[93] 1983 Code c.753. Under certain circumstances, however, bishops do have the ability to speak infallibly. On matters of faith and morals, the bishops have the power to speak infallibly when "gathered together in an ecumenical council [they] exercise the magisterium as teachers and judges of faith and morals who declare for the universal Church that a doctrine of faith or morals is to be held definitively." Id. at c.749, § 2. Outside of an ecumenical council, the bishops again have the power to speak infallibly when in communion with the Pope, "they agree that a particular proposition is to be held definitively." Id. Under canon law, Catholics are morally obliged to believe such infallible doctrines. Id. at c.750.

[94] Catechism of the Catholic Church P 886.

[95] *Id. P 888*.

[96] See generally Acts 1:20 (NRSVCE); accord 1983 Code c.212 ("Christian faithful are bound to follow with Christian obedience those things which the sacred pastors, inasmuch as they represent Christ, declare as teachers of the faith or establish as rulers of the Church."). This canon seems to imply that by virtue of their teaching office and sacramental ordination, the bishops are in a unique position as "teachers of the faith" and "rulers of the Church" to preach. According to c.375, the bishops have in a "divine institution" and receive through "consecration itself … the functions of teaching and governing" which can "only be exercised in hierarchical communion with the head and members of the college [of bishops]." This emphasis on episcopal ordination and hierarchical communion makes clear that the teaching obligations of a bishop cannot be divested. Rather, the bishop is "bound to propose and explain to the faithful the truths of the faith which are to believed and applied to morals." Id. at c.386.

[97] Crimm & Winer, supra note 39, at 316 ("Certainly the religious and moral authority of the spiritual leader of a house of worship generally is perceived as unmatchable by nonclergy surrogates.").

[98] See Bishop Samuel J. Aquila, 3rd Sunday of Easter, April 25, 2004 - Cathedral of St. Mary, 25 Apr. 2004, *http://www.ewtn.com/library/BISHOPS/3SUNEAST.HTM* ("I, [Bishop Aquila] as a successor of the apostles, cannot remain silent. I, as an apostle, must speak with the apostles and obey God rather than man and present to you the teaching of the Church on the proper relationship between our faith and professional life.").

No one after lighting a lamp puts it under the bushel basket, but on the lampstand, and it gives light to all in the house. In the same way, let your light shine before others, so that they may see your good works and give glory to your Father in heaven. [101]

Illustratively, Christ taught that "deeds" played an integral part of being a light to the world. Since Her founding, the Church has engaged in such "deeds" as caring for the poor and sick as a means of demonstrating this light of Christ's love. However, the Church's calling to engage in good deeds also extends to moral teachings. Just as hypocrisy in the moral deeds of the Church can have a deleterious effect on the public's confidence in the **[*409]** Church's teachings, right moral actions can bolster the public's perception of the Church's legitimacy. A further component of the Church's mission is to "pass moral judgments even in matters related to politics, whenever the fundamental rights of many or the salvation of souls requires it." [102]

The effectiveness of the Church is restrained when She is compelled to use this moral authority only as a guide against abstract ideas rather than concrete policies. The current debate over so-called homosexual "marriage" provides an excellent illustration of this principle. The Catholic Church has long taught that engaging in homosexual acts is immoral, and has taught that men and women with deep-seated homosexual tendencies are "called to chastity." [103] In Her role as the "light of the world," the Church has a moral obligation to preach these truths and to intellectually confront the modern trend that embraces homosexuality as an alternative lifestyle. From this moral principle, it is clear that the Church is within Her moral teaching authority - as well as Her free speech activities under Section 501(c)(3) of the IRS code - to condemn the ideology behind proponents of homosexual "marriage."

However, the Church is called to engage the whole man - not merely his intellect. Man is triune in nature, having mind, body, and spirit. [104] In embracing this truth, many within the Church have already recognized that the Church must combine moral teaching with practical, concrete action. [105] As one scholar observed, "Churches have a distinct voice, and the public square is diminished when churches avoid speaking because of the ban in Section 501(c)(3). While every person might not want to hear the voice of the church, churches still need to be heard." [106]

One recent example of this combination of truth with concrete action may be found in the November 2012 Referendum 74 ballot initiative in Washington State. This measure, which sought to redefine marriage to accommodate homosexual unions, [107] was actively opposed by Archbishop J. **[*410]** Peter Sartain and Auxiliary

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[99] Catholic Church's Mission is to Continue Work of Jesus Christ, Archbishop Niendstedt Explains, Catholic News Agency, Feb. 12, 2010, http://www.catholicnewsagency.com/news/ catholic_churchs_mission_is_to_ continue_work_of_jesus_christ_ archbishop_niendstedt_explains/, (quoting Archbishop John C. Niendstedt). Accord Catechism of the Catholic Church PP 730, 738, 782.

[100] *Id. P 782*. See generally Matthew 5 (NRSVCE).

[101] Matthew 5:15-16 (NRSVCE).

[102] Catechism of the Catholic Church P 2246.

[103] Id. P 2359. See also id. PP 2357-58.

[104] See 1 Thessalonians 5:23 (NRSVCE).

[105] Second Vatican Council, Gaudium et Spes [Pastoral Constitution on the Church in the Modern World] P 43 (1965), available at http://www.vatican.va/archive/hist_councils/ii_vatican _council/doc uments/vat-ii_const_19651207_gaudium-et- spes_en.html ("This split between the faith which many profess and their daily lives deserves to be counted among the more serious errors of our age."). Accord Aquila, supra note 98.

[106] 1.Blair, supra note 90, at 425.

[107] Thanh Tan, Same-sex Couples React to Passage of Referendum 74 in Washington, Seattle Times, Nov. 14, 2012, available at http://seattletimes.com/html/edcetera/2019678702_same-sex _couples_react_to_passage_ of_referendum_74_in_washington.html (despite the bishops' efforts, Washington's Referendum 74 passed).

Bishop Eusebio Elizondo of Seattle who wrote a pastoral letter directly opposing Referendum 74. [108] Catholic teaching shows that the bishops are morally obligated to engage in lobbying and electioneering efforts in opposition to particular legislation containing clear moral evils or candidates firmly espousing clear moral evils. [109]

While many within the Church are hesitant to engage in the type of overt tactics employed by Archbishop Sartain, such concerns are ill-founded. While the current prohibition on political activity traces its origins to the much-maligned 1954 Johnson Amendment, it was not until the year 2000 that the IRS first enforced the political activities ban by removing a church's tax-exempt status. [110] In fact, in the nearly sixty years since the ban's enactment, there appears to be only one church that has ever been penalized by losing its tax-exempt status. [111] Indeed, the IRS's lax enforcement of the political speech ban for 501(c)(3) organizations is well known amongst many Christian leaders. For example, in an effort to draw the IRS into litigation to challenge the constitutionality of the ban, the Alliance Defense Fund sponsors the "Pulpit Freedom Sunday" initiative. [112] In 2011, more than 500 pastors participated in this program, urging their congregations to vote for or against particular political candidates in direct violation of the IRS's electioneering ban, while in 2012, more than 1,500 pastors joined in the movement. [113]

Perhaps the laxity of the IRS's enforcement of the political speech ban can be explained by the limited options the government has to penalize **[*411]** offending organizations. Discussing the recent political comments of Illinois Bishop Daniel Jenky, one commentator explained that:

The I.R.S. can either use the nuclear option and revoke the archdiocese's tax exemption, which is so drastic as to be unthinkable, or it can use the fly-swatter option and fine the diocese for the amount it spent on the prohibited political activity under Section 4955 of the tax code. [114]

While the religious organization at the center of the leading Branch Ministries case raised a Free Exercise argument, the court found the church's rationale unconvincing. The church unsuccessfully argued that the loss of its tax-exempt status would result in fewer donations, which would harm the church's ability to fulfill its mission. [115] Citing Supreme Court precedent, the court found that a mere reduction in the amount of funds available for church activity was "not constitutionally significant." [116] The court did not, however, categorically rule out all Free Exercise

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[108] Pastoral Letter from J. Peter Sartain (Apr. 2012), available at http://stjames-cathedral.org/Events/2012/Bishops'%20Referendum%2074%20lett er%20April%202012.pdf.

[109] Accord Aquila, supra note 98 ("Any Catholic who stands for a law of man, most especially one which is objectively evil, before a law of God, puts his or her soul in jeopardy of salvation for they cooperate with a real evil.").

[110] Julie Foster, Church Loses Tax-Exempt Status, World Net Daily, May 13, 2000, http://www.wnd.com/2000/05/4497/print/.

[111] Branch Ministries v. Rossotti, 211 F.3d 137, 139 (D.C. Cir. 2000). It is worth noting that, in the words of the D.C. Circuit, "whereas not every religious organization is a church, every church is a religious organization." Id. at 141. While only one church appears to have ever lost its IRS tax exempt status for violating the electioneering and lobbying prohibition, at least one other religious organization has faced a similar penalty for such activity. See Christian Echoes Nat'l Ministry, Inc., v. United States, 470 F.2d 849, 852 (10th Cir. 1972) (where Christian Echoes National Ministry, Inc., maintained weekly religious radio and television broadcasts, published a religious magazine and other religious publications, and was directed by an ordained minister). Accord H. Chandler Combest, Symbolism as Savior: A Look at the Impact of the IRS Ban on Political Activity by Tax-Exempt Religious Organizations, 61 Ala. L. Rev. 1121, 1128 (2010).

[112] Byrnes, supra note 4.

[113] Wisconsin-Based Group of Atheists, Agnostics Sues IRS Over Political Activity by Church Groups, supra note 7.

[114] Cafardi, supra note 6.

[115] Branch Ministries, 211 F.3d at 142.

[116] Id. (quoting Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 391-92 (1990)).

arguments; rather, it noted a possible ground for distinguishing Branch Ministries, observing that "the Church does not maintain that a withdrawal from electoral politics would violate its beliefs." [117] The court further elaborated on what the appropriate constitutional standard would be, were such an argument raised, holding that:

Withdrawal of a conditional privilege for failure to meet the condition is in itself an unconstitutional burden on its [the church's] free exercise right … only if the receipt of the privilege (in this case tax exemption) is conditioned upon conduct proscribed by a religious faith, or denied because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs. [118]

An important weakness in the church's argument in the Branch Ministries case was the failure to raise and exploit this argument. As already demonstrated, the Catholic Church, acting through the bishops, has an affirmative, morally imposed obligation to oppose legislation or candidates espousing clear moral evils. Thus, compliance with the conditional requirement of 501(c)(3) status - namely, refraining from overtly taking action against such evil through electioneering or substantial lobbying - cannot be accomplished without compromising Church teaching.

[*412] In developing proactive, rather than reactive efforts, the Church should limit herself to the formation of moral, politically active laity. [119] While this moral formation of parishioners is of paramount importance, the bishops must not forget that there is a prophetic nature to their office as well. [120] In this role, the bishops have both the authority and the calling to take all actions necessary to prevent the spread of evil through the communities they serve. As Francis Cardinal George of Chicago recently stated, "American citizens don't lose their freedom of religion or their freedom of expression when they become bishops." [121] Why then, should the bishops be content to accept a limitation that says that they may fight evil, but only when that evil is non-political?

Unbeknownst to many in the clergy, a church's loss of 501(c)(3) tax-exempt status does not automatically result in that organization's becoming liable for corporate income tax. [122] Rather, assuming that donations to the organization are bona fide gifts made without any expectation of gain, they would not be accounted to the church as taxable income. [123]

The primary financial disadvantage to a church that loses 501(c)(3) tax-exempt status appears to be the anticipated reduction in both volume and amount of donations from supporters. Donors to 501(c)(3) tax-exempt organizations have the ability to deduct a portion of contributions from their personal income tax. Thus, the inability to deduct donations will tend to reduce the number of individuals willing to contribute. [124] Were a church to operate without 501(c)(3) status, donors could still obtain a tax-deduction for contributions so long as they could show that the church meets the requirements of *26 U.S.C. § 501(c)(3)*. [125] This means that donations to a church that lost its tax-

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[117] Id.

[118] Id. (internal citations and ellipses omitted).

[119] As Dr. Fagan wrote, "the bishops have a great role, possibly the greatest role, to play in the political health of the nation, but it is not in the articulation of public policy positions. Their great contribution is in forming Catholics of virtue and sound moral intellect … . They can have great political influence if they leave politics aside and pursue their vocation of teaching and sanctifying." Fagan, supra note 61.

[120] See Catechism of the Catholic Church PP 2036, 785, and 904.

[121] Byrnes, supra note 4.

[122] *Id. at 143*.

[123] *26 U.S.C. § 102*; accord *Branch Ministries, 211 F.3d at 143* ("the revocation of the [501(c)(3)] exemption does not convert bona fide donations into income taxable to the Church").

[124] However, as some scholars have observed, most donors to tax-exempt organizations do not deduct their contributions, creating some controversy over this argument. See Afield, supra note 8, at 97.

exempt status for engaging in electioneering or substantial lobbying and later ceased engaging in these activities may be tax deductible. As the Court of Appeals for the D.C. Circuit observed, "all that has been lost [in the event of an organization's loss of 501 (c)(3) tax exempt **[*413]** status] is the advance assurance of deductibility in the event a donor should be audited." [126]

Less understood is the reduction in gift amount per donor that organizations lacking 501(c)(3) tax-exempt status could expect compared to their tax-exempt counterparts. Donations to churches which do not qualify for tax-exemption under Section 501(c)(3) could be subject to the gift tax. [127] Under current IRS regulations, contributions above $ 13,000 to a church that has lost 501(c)(3) tax-exempt status could be subject to the gift tax, with donors receiving a heightened tax-bill rather than a tax-deduction. [128]

The gift tax also poses another challenging dilemma for churches. Were a church to forego 501(c)(3) tax-exempt status, gifts by the church to individuals or organizations could be subject to the gift tax. Interestingly, "only individuals are required to file gift tax returns. If a trust, estate, partnership, or corporation makes a gift, the individual beneficiaries, partners, or stockholders are considered donors and may be liable for the gift and [generation-skipping transfer] taxes." [129] While the issue does not appear to have been addressed by the courts, the tax code's current language suggests that the stockholders of a formerly tax-exempt corporation (and nearly all churches are tax-exempt corporations) may be personally liable for gift taxes on donations that the churches may make to support social efforts. [130]

Conclusion

Tocqueville once observed that morality, religion, and order are inseparable from liberty and "the equality of men before the law," noting that "the greatness and the happiness of man in this world can only result from their simultaneous union." [131] The Founders undoubtedly shared this **[*414]** appreciation, [132] placing free exercise and free speech protections together in the same constitutional amendment. As the Supreme Court has explained, "government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince." [133]

No party seriously argues that churches lack the First Amendment - or RFRA-protected - right to engage in political speech. Rather, the question this paper addresses is whether a church's tax-exemption may be conditioned on its

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[125] *Branch Ministries, 211 F.3d at 143*.

[126] *Id. at 142-43*.

[127] *26 U.S.C. § 2501* (2011).

[128] See *IRC Sec. 2502(c)*.

[129] IRS Form 709, available at *http://www.irs.gov/pub/irs-pdf/i709.pdf*.

[130] This is particularly troubling in light of the common practice of many churches to have clergy serve as corporate stockholders or members. Catholic bishops would be particularly vulnerable, as many Catholic organizations are constituted with the presiding bishop serving as a stockholder or corporate member. In fact, Catholic bishops themselves usually enter such agreements as "corporation sole."

[131] John T. Noonan, Jr., & Edward M. Gaffney, Jr., Religious Freedom: History, Cases, and Other Materials on the Interaction of Religion and Government 568 (3rd ed. 2011) (citing Alexis de Tocqueville, 1 Oeuvres et Correspondance Inedites 432 (Michel Levy Freres, 1861)).

[132] See, e.g., George Washington, Farewell Address (1796), available at http://avalon.law.yale .edu/18th_century/washing.asp ("Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports.").

[133] *Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995)* (emphasis in original).

near complete withdrawal from political life. In addressing this question through the lenses of RFRA's three-prong analysis, lower courts have evaluated various arguments; however, no court appears to have faced a direct conflict between a church's sincerely-held religious beliefs and the political restraints imposed by Section 501(c)(3). Such direct conflicts are plentiful, and the failure to bring these conflicts to the courts for redress appears to be the result of poor lawyering.

Catholic bishops increasingly face this direct conflict. Catholic doctrine places a clear obligation on the bishops to oppose moral evil, even when such evil takes on a political form. In fulfilling their pastoral and educational roles, the bishops are, at times, obligated to engage in activities which violate the electioneering and substantial lobbying ban in the current tax code. By virtue of their hierarchical office, episcopal consecration, and standing within the community, the bishops speak with a personalized moral authority that cannot be divested into another person or organization.

The choice given to the bishops under Section 501(c)(3) is clear: follow clear obligations of the Catholic faith and oppose political moral evils, or follow the regulations of the tax code and hide the light of the Church under a bushel basket. In facing this challenge, the Church must never grow complacent or become content to sell Her soul for the tax breaks She has come to expect. The first step in dismantling this unjust dilemma is to prove that Section 501(c)(3) substantially burdens the Church's religious beliefs, but after this, the real work of the Church must begin.
