

# GETTING FAITH OUT OF THE GUTTERS: RESOLVING THE DEBATE OVER POLITICAL CAMPAIGN PARTICIPATION BY RELIGIOUS ORGANIZATIONS THROUGH FISCAL SUBSIDIARITY

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## ABSTRACT

*This Article proposes a unique resolution to the debate over political campaign participation by tax-exempt organizations, specifically religious organizations. By virtue of their tax-exempt status, these organizations are banned from participating in political campaign activity. Commentators have debated the merits of this ban for years and to say that commentators have been all over the map regarding their opinions over the ban is putting it charitably. The ban's advocates and opponents have staked out seemingly every position imaginable in arguing the merits of this ban. Some commentators have argued forcefully that the ban is needed to preserve constitutional separation of church and state. Other commentators have argued as passionately that the ban is unconstitutional and pulls at the fabric of American democracy by unduly limiting political participation by churches and religious organizations. The arguments of each side of the debate take a zero-sum gain approach to resolving the debate, and commentators seem to discount the concerns of the opposition as either irrelevant or insignificant.*

*This Article does not attempt to resolve the debate in the literature over the ban's legitimacy. Rather, this Article proposes a solution that the literature has apparently ignored: finding a compromise between the two extremes of the debate that addresses the primary concerns of both sides. This Article proposes that section 501(c)(3) organizations be permitted an increased amount of political campaign activity in exchange for paying a tax referred to as a "self-directed tax." What makes the self-directed tax unique is that the organizations themselves would be permitted to direct the government as to how to allocate the proceeds from the tax to a preset group of government spending choices. Similar rules would apply to the charitable deduction as well. The self-directed tax would allow section 501(c)(3) organizations to become more politically active. This Article's proposal, however, still allows section 501(c)(3) organizations to preserve their unique status as partners with govern-*

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ment in the provision of public goods—a status that justifies not requiring them to provide a portion of their profits to the government for the government to do with as it pleases.

“People talk about the middle of the road as though it were unacceptable. Actually, all human problems, excepting morals, come into the gray areas. Things are not all black and white. There have to be compromises. The middle of the road is all of the usable surface. The extremes, right and left, are in the gutters.”

—Dwight D. Eisenhower, October 1963

#### INTRODUCTION

Few provisions in the Internal Revenue Code (IRC) have caused as much angst as section 501(c)(3).<sup>1</sup> This section establishes the tax-exempt status<sup>2</sup> for many charitable organizations. To gain tax-exempt status, the IRC requires these organizations to refrain from providing any private inurement to a shareholder or individual, to engage only in insubstantial lobbying activities, and to completely refrain from being involved in political campaign activity.<sup>3</sup> This last requirement, the complete ban on political campaign activity, has generated an enormous amount of ink from commentators.<sup>4</sup>

<sup>1</sup> Section 501(c)(3) states that tax exempt status will be granted to:

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) (2006).

<sup>2</sup> In conjunction with 26 U.S.C. § 170, it also establishes the eligibility for tax-deductible donations to these organizations. *Id.*

<sup>3</sup> In pertinent part, this condition states that:

[N]o 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.*

<sup>4</sup> For those interested in the topic, the most thorough overview of the arguments surrounding the ban have been compiled and discussed in NINA J. CRIMM & LAURENCE H. WINER, *POLITICS, TAXES, AND THE PULPIT: PROVOCATIVE FIRST AMENDMENT CONFLICTS* (2011). David M. Andersen opines that:

The bulk of modern attention in this area has centered on the political campaign ban while giving only lip service to the restriction against ‘substantial’ attempts to influence legislation. This one-sided focus of commentators and legislators likely stems from not only the increased political activity of churches during recent presidential elections but also the relative harshness of the political campaign ban versus the lobbying restrictions.

David M. Andersen, Comment, *Political Silence at Church: The Empty Threat of Removing Tax-Exempt Status for Insubstantial Attempts to Influence Legislation*, 2006 BYU L. REV. 115, 117–18 (2006) (footnotes omitted).

Much of the handwringing over this ban has centered on its effect on churches and religious organizations, which are usually organized under section 501(c)(3). In a debate lasting years, the ban's proponents and opponents have staked out seemingly every position imaginable in arguing the validity and merits of the ban. Proponents have forcefully argued that the ban is valid and needed to preserve constitutional separation of church and state.<sup>5</sup> Opponents have argued just as forcefully that the ban is invalid and pulls at the fabric of American democracy by unduly limiting the political participation of churches and religious organizations.<sup>6</sup>

This Article does not attempt to resolve the debate over the ban's validity. Instead, it recognizes the incentive for both sides of the debate to seek an acceptable compromise. The ban's proponents should seek an acceptable compromise because if the ban were ever held to be invalid the ban's proponents would be largely left without a mechanism through which they could address their concerns. The ban's opponents, however, should seek an acceptable compromise because if the ban continues to be held valid<sup>7</sup> the debate over the ban's merits on policy grounds has the potential to rage on indefinitely. Unfortunately, as Benjamin Leff has observed, the compromise proposals thus far have somewhat of a "ships passing in the night" feel to them.<sup>8</sup> Each side of the debate seems to gloss over the concerns of the opposition, discounting those concerns as either irrelevant or insignificant.<sup>9</sup>

Accordingly, the purpose of this Article is to propose a compromise that realistically addresses the concerns of all sides. This Article crafts a proposal through which section 501(c)(3) organizations can become more politically

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<sup>5</sup> See *infra* Part II.

<sup>6</sup> See *infra* Part II.

<sup>7</sup> At least for the foreseeable future, the ban's survival appears to be the more likely outcome, if for no other reason than the government appears reluctant to litigate current theories regarding the ban's invalidity, which denies opponents a forum to raise new arguments challenging existing law upholding the ban's validity. See, e.g., *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000) (upholding the ban's validity); Kevin Dolak, 'Pulpit Freedom Sunday' to Defy IRS, ABC NEWS (Sept. 25, 2010), <http://abcnews.go.com/US/defiant-pastors-irs-pulpit-freedom-sunday/story?id=11726610> (observing that, despite direct and intentional violations of the ban during the Alliance Defense Fund's Pulpit Freedom Sundays, the IRS has not been aggressive about investigating many of the participating pastors, which stymies these pastors' efforts to mount their challenges to the ban's validity in court); see also Lloyd Hitoshi Mayer, *Grasping Smoke: Enforcing the Ban on Political Activity by Charities*, 6 FIRST AMENDMENT L. REV. 1, 4 (2007) [hereinafter Mayer, *Grasping Smoke*] (observing that "[b]y most accounts, IRS enforcement of the prohibition has been spotty at best"); Samuel D. Brunson, *Reigning in Charities: Using an Intermediate Penalty to Enforce the Campaigning Prohibition*, 8 PITTSBURGH TAX REV. (forthcoming 2011) (arguing that the IRS's weak enforcement track record is because the penalty is too severe).

<sup>8</sup> Benjamin M. Leff, "Sit Down and Count the Cost": A Framework for Constitutionally Enforcing the 501(c)(3) Campaign Intervention Ban, 28 VA. TAX REV. 673, 679 (2009); see also Brunson, *supra* note 7 (summarizing the arguments both for and against the prohibition and concluding that both sides in the argument are flawed and rebuttable).

<sup>9</sup> More recent commentators, however, have started to appreciate that they must account for the concerns of the opposition in crafting proposals that would be acceptable to all sides. CRIMM & WINER, *supra* note 4, at 326 ("[W]e are merely trying to be realists working within established constitutional principles to ameliorate significant and provocative First Amendment tensions while posing little actual danger to any abiding constitutional values.").

active without having such activity subsidized through a tax exemption. This Article's proposal, however, still allows section 501(c)(3) organizations to preserve their unique status as partners with the government in the provision of public goods—a status that justifies the tax exemption. Although the proposal would apply to all section 501(c)(3) organizations, the proposal's benefits will be discussed primarily in regards to churches and religious organizations, as issues surrounding these organizations have generated the bulk of the debate over the ban.

This Article will summarize the arguments of the ban's proponents in Part I and the ban's opponents in Part II. Part III will sketch the parameters of a compromise proposal—a self-directed tax—and the primary benefits from such a proposal. Part IV will discuss secondary benefits to the self-directed tax. Finally, this Article will conclude that the self-directed tax is a viable compromise in this seemingly never-ending debate.

## I. ARGUMENTS FAVORING THE BAN ON POLITICAL CAMPAIGN PARTICIPATION

The ban's proponents argue the ban is legally permissible, is good public and tax policy, and provides sufficient protection for religious organizations. Proponents argue the ban is legally permissible because it is both constitutional and is consistent with the Religious Freedom Restoration Act of 1993 (RFRA). In addition, proponents argue the ban is good public policy because it furthers separation of church and state, which benefits both society at large and the religious organizations themselves. Although the public policy arguments are likely the most compelling policy arguments favoring the ban, proponents also argue the ban is good tax policy because allowing religious organizations to engage in some political activities violates the fundamental tax principle of substantive horizontal equity. Finally, proponents argue the ban provides sufficient protections for religious organizations by allowing political speech through section 501(c)(4) organizations.

### A. *The Ban Is Legally Permissible*

Any restriction on religious organizations' speech inevitably raises constitutional concerns regarding violations of freedom of speech and free exercise of religion.<sup>10</sup> Nevertheless, proponents of the ban argue there are no such constitutional violations<sup>11</sup> because the restriction neither prevents the exercise of religion nor violates free speech—it simply prevents the government from subsidizing a religious organization's political speech.<sup>12</sup> Proponents also argue the

<sup>10</sup> See *infra* Part II.A.–B.

<sup>11</sup> The most forceful recent arguments come from Donald Tobin. See Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous For 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1317 (2007); see also, e.g., Oliver S. Thomas, *The Power to Destroy: The Eroding Constitutional Arguments for Church Tax Exemption and the Practical Effect on Churches*, 22 CUMB. L. REV. 605 (1992) (summarizing the jurisprudence that makes asserting constitutional challenges to the ban difficult).

<sup>12</sup> See Tobin, *supra* note 11, at 1346 (discussing the free speech issues and pointing out that the ban was not meant to punish or control political speech but was rather simply meant to

ban is consistent with the free exercise of religion under *Employment Division, Department of Human Resources of Oregon v. Smith*.<sup>13</sup> In *Smith*, the Court held that generally applicable and neutral laws do not violate the free exercise of religion.<sup>14</sup> Proponents argue the ban is a generally applicable and neutral law because it applies to all tax-exempt organizations and does not single out religious organizations. The ban does not inhibit religious organizations' constitutional rights to free speech,<sup>15</sup> the argument goes, because they are perfectly free to engage in political campaign activity<sup>16</sup> through the creation of an affiliate organization under IRC § 501(c)(4) (although the affiliate organization could not receive tax-exempt donations).<sup>17</sup>

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avoid giving 501(c)(3) organizations an unfair advantage); *id.* at 1346–47 (discussing the free exercise concerns and noting also that “a subsidy by the government for the purpose of encouraging the free exercise of religion would violate the Establishment Clause”).

<sup>13</sup> *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 874 (1990).

<sup>14</sup> *See* Tobin, *supra* note 11, at 1347. Additionally, Nicholas A. Mirkay similarly notes that:

[B]ased on the above case law, provided a tax [(i)] does not constitute a prior restraint on religious activity, (ii) does not have as its primary purpose to impede such activity, (iii) is applied in a broad and religiously neutral manner, and (iv) does not impose too high of a rate, neither the taxation of, nor a restriction on an exemption granted to, religious organizations, should likely raise any free exercise concerns.

Nicholas A. Mirkay, *Losing Our Religion: Reevaluating the Section 501(c)(3) Exemption of Religious Organizations That Discriminate*, 17 WM. & MARY BILL RTS. J. 715, 753 (2009); *see also* Mark Totten, *The Politics of Faith: Rethinking the Prohibition on Political Campaign Intervention*, 18 STAN. L. & POL'Y REV. 298 (2007).

<sup>15</sup> *See* Tobin, *supra* note 11, at 1346.

<sup>16</sup> *See infra*, Part I.D.

<sup>17</sup> *See* Branch Ministries v. Rossotti, 211 F.3d 137, 143 (D.C. Cir. 2000). The court reasoned that:

As was the case with TWR, the Church may form a related organization under section 501(c)(4) of the Code. *See* 26 U.S.C. § 501(c)(4) (tax exemption for “[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare”). Such organizations are exempt from taxation; but unlike their section 501(c)(3) counterparts, contributions to them are not deductible. *See id.* § 170(c); *see also* *Regan*, 461 U.S. at 543, 552–53, 103 S.Ct. 1997. Although a section 501(c)(4) organization is also subject to the ban on intervening in political campaigns, *see* 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii) (1999), it may form a political action committee (“PAC”) that would be free to participate in political campaigns. *Id.* § 1.527-6(f), (g) (“[A]n organization described in section 501(c) that is exempt from taxation under section 501(a) may, [if it is not a section 501(c)(3) organization], establish and maintain such a separate segregated fund to receive contributions and make expenditures in a political campaign.”).

*Id.*; *see also* Ann M. Murphy, *Campaign Signs and the Collection Plate—Never the Twain Shall Meet?*, 1 PITTSBURGH TAX REV. 35, 82–83 (2003); Stephanie A. Bruch, Comment, *Politicking from the Pulpit: An Analysis of the IRS's Current Section 501(c)(3) Enforcement Efforts and How it is Costing America*, 53 ST. LOUIS U. L.J. 1253, 1263 (2009); Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145, 161 (2006) (note that while Kemmitt is not a staunch supporter of the ban, he acknowledges that the use of political action committees by § 501(c)(4) affiliates has provided a mechanism through which religious organizations could continue to be involved in the political process in spite of the ban); Tobin, *supra* note 11, at 1324–26. Further, *see infra* Part I.D. for a more detailed discussion of why proponents believe that these 501(c)(4) organizations justify the ban on political campaigning on policy grounds.

Note, however, that in the wake of *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), commentators disagree whether the ban remains legally permissible because of the Court's rejection of the arguments that PACs provide an acceptable alterna-

Proponents also argue that the ban is consistent with the RFRA, which Congress enacted to overrule a part of *Smith*'s holding. The RFRA requires the government to establish that any law that infringes the free exercise of religion is the least restrictive mechanism of furthering a compelling government interest.<sup>18</sup> Donald Tobin has argued, however, that the RFRA will only apply if the ban substantially burdens religion, which, he contends, the ban does not.<sup>19</sup> Specifically, Tobin argues the ban does not burden religion; the ban simply prevents religious organizations from receiving a subsidy without preventing them from accomplishing their fundamental religious missions, which they can achieve through permissible issue advocacy.<sup>20</sup> Furthermore, commentators have observed that even if a compelling interest standard were appropriate, generally applicable tax laws are justifiable under such a standard.<sup>21</sup>

Although the ban's supporters believe it is lawful, they must also establish it is good policy. Accordingly, proponents have argued that the ban is a good idea based on both general public policy and specific tax policy ground.

### B. *The Ban Is Good Public Policy*

In addition to being legally permissible, proponents of the ban argue it is good public policy because it benefits both society at large and the religious organizations themselves. The ban benefits society by preventing religious organizations from becoming too powerful.<sup>22</sup> Without the ban, religious organizations could overly influence candidates who are eager to use them as vehicles for tax-deductible campaign contributions.<sup>23</sup> Such increasing power and influence "poses serious problems for our current system of governance."<sup>24</sup>

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tive forum for speech in the corporate context. Compare Roger Colinvaux, *Citizens United and the Political Speech of Charities* (Dec. 17, 2010) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1726407](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1726407) (discussing why the ban would still not be an impermissible restriction on free speech even in the wake of *Citizens United*) with, Paul Weitzel, *Protecting Speech from the Heart: Political Speech by 501(c)(3) Charitable Organizations After Citizens United*, 16 TEX. REV. L. & POL. (forthcoming 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1848267&http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1848267](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1848267&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1848267) (arguing that the ban is no longer legally permissible after *Citizens United*).

<sup>18</sup> See Tobin, *supra* note 11, at 1347; Totten, *supra* note 4, at 318–19.

<sup>19</sup> See Tobin, *supra* note 11, at 1347–48.

<sup>20</sup> *Id.* at 1347–48, 1353–54. Tobin acknowledges "that it is possible that a religion might be able to argue that endorsement of a candidate is central to its religious beliefs. In such a case, the court would have to determine . . . whether the political campaign ban violates the statutory test in RFRA." *Id.* at 1348.

<sup>21</sup> *Id.* ("In examining tax cases pre- and post-*Smith*, tax statutes of general applicability have been upheld even under a compelling interest-type standard."); Totten, *supra* note 14, at 318–19. Totten goes on to state that "[n]onetheless, the Court's past insistence that the government has a compelling interest in the uniform application of tax laws leaves little hope that courts would grant an exemption." *Id.*

<sup>22</sup> Tobin, *supra* note 11, at 1317–18.

<sup>23</sup> See *id.* at 1318; see also, Sarah Hawkins, Note, *From Branch Ministries to Selma: Why the Internal Revenue Service Should Strictly Enforce the § 501(c)(3) Prohibition Against Church Electioneering*, 71 LAW & CONTEMP. PROBS. 185, 203 (2008).

<sup>24</sup> See Tobin, *supra* note 11, at 1326; see also Bruce Chapman, *Between Markets and Politics: A Social Choice Theoretic Appreciation of the Charitable Sector*, 6 GEO. MASON L. REV. 821, 838–39 (1998). In addition, the ban can help ameliorate some of the democratic

Furthermore, proponents argue the ban is good public policy because it benefits religious organizations by allowing them to preserve their independence from undue government influence.<sup>25</sup> Religious organizations inevitably lose some of their ability to preach their doctrine accurately if they are concerned about offending a political candidate who is channeling significant donations towards the organizations.<sup>26</sup> This concern over not wanting to disappoint political candidates could cause candidates to pressure religious organizations to participate actively in campaigns.<sup>27</sup> While some religious organizations might see their fortunes improve from gaining favor with politicians, others would suffer if they did not participate in politics at a high level because they would be relegated to a secondary status in their relationship to the government when compared to the “preferred” (participating) organizations.<sup>28</sup> The quest to become a “preferred” organization could have a corrupting and divisive effect on the organizations, as individuals within the organization find opportunities to profit from their power and as members bring their political opinions into the

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distortions inherent in the “majority voting paradox,” in which, because of inherent differences in individual preferences among multiple alternatives, “a majority of voters . . . can only choose a minority preferred alternative.” *Id.* The charitable sector solves this paradox by allowing individuals to support various public goods through a tax subsidy for their charitable contributions. If charities, however, participated in political campaign activity, the inherent conflicts among individual preferences in the “majority voting paradox” would be exacerbated, which could increase the possibility of a paradox occurring. Chapman explains the “majority voting paradox” as the following:

To see this problem at work, suppose that there is a committee of three individuals considering three alternatives for choice according to the method of majority rule. Imagine that each individual ranks the three alternatives *x*, *y*, and *z* (in order of preference) as follows:

Individual A:	<i>x</i>	<i>y</i>	<i>z</i>
Individual B:	<i>y</i>	<i>z</i>	<i>x</i>
Individual C:	<i>z</i>	<i>x</i>	<i>y</i>

It is easy to see that a majority of individuals (A and C) prefer *x* to *y*, a majority (B and C) prefers *z* to *x*, and a majority (A and B) prefers *y* to *z*. Thus, it is not possible to choose any of *x*, *y*, or *z* as the majority preferred choice without some other alternative being preferred by a majority as well. That a majority of voters in this situation can only choose a minority preferred alternative is the reason that this is sometimes referred to as the ‘majority voting paradox.’ Majority voting must continue to cycle endlessly (and wastefully) among the alternatives or, somewhat arbitrarily (it is said) stop at one alternative, recognizing that, while this is some kind of end to the matter, it is no more a majority preferred choice than any other. Such a ‘resolution’ of the issue is likely to be very unstable politically.

*Id.* (footnotes omitted).

<sup>25</sup> See Tobin, *supra* note 11, at 1322 (noting that “[c]hurches have flourished in the United States partially because religion and government have occupied independent spheres.”) (footnote omitted).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1323–24.

<sup>28</sup> *Id.*

pews.<sup>29</sup> Additionally, removing the ban potentially divides religious communities by alienating certain political persuasions from certain communities.<sup>30</sup>

### C. *The Ban Is Good Tax Policy*

Outside of these public policy arguments, proponents argue the ban is good tax policy. Richard J. Wood argues that allowing a limited exception to the ban “violates the [fundamental tax] principle of substantive horizontal equity because taxpayers of equal income consumption or wealth [would be] treated differently without principled tax policy reasons for the distinction.”<sup>31</sup>

This violation of horizontal equity would occur on two fronts: (1) political speakers funded by religious organizations would receive more funds than those funded by other organizations, even if the contributors had identical incomes and consumption;<sup>32</sup> and (2) political contributions to churches from high-income taxpayers would receive a preference over contributions from low-income taxpayers.<sup>33</sup> In addition, Wood argues that “[s]ystemic horizontal equity would be violated . . . because it would create an undefined exception to enforcement of 501(c)(3) that would diminish the ability of the Service to enforce the law.”<sup>34</sup>

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<sup>29</sup> *Id.* at 1324–25. Even opponents of the ban admit that removing the ban creates a risk of charities being used to advance private interests, an issue that must be addressed. *See, e.g.*, Johnny Rex Buckles, *Not Even a Peep? The Regulation of Political Campaign Activity by Charities through Federal Tax Law*, 75 U. CIN. L. REV. 1071 (2007) [hereinafter Buckles, *Not Even a Peep*]. This problem could be potentially exacerbated by the relative lack of regulatory oversight over religious organizations, which have very few reporting requirements connected to their tax-exempt status. Tobin, *supra* note 11, at 1341–42. Tobin argues that this lack of information reporting also makes it “almost impossible for private parties to provide any type of check on a church’s activities.” *Id.* at 1342.

<sup>30</sup> Hawkins argues that:

[Removing the ban] would foster divisiveness within the religious community by discouraging parishioners of one political persuasion from attending services at, or contributing to, churches that support only political ideas adverse to theirs . . . [and that removing the ban] would also foster divisiveness outside the religious community by polarizing different congregations based on perceived political persuasion.

Hawkins, *supra* note 23, at 203 (footnote omitted).

<sup>31</sup> Richard J. Wood, *Pious Politics: Political Speech Funded Through I.R.C. § 501(c)(3) Organizations Examined Under Tax Fairness Principles*, 39 ARIZ. ST. L.J. 209, 215 (2007) (footnote omitted) (addressing an attempt to provide such an exception through the Houses of Worship Free Speech Restoration Act).

<sup>32</sup> This is because the value of the deductibility of a contribution to a religious organization engaged in political speech allows a taxpayer to contribute fewer dollars to fund the same amount of political speech as a taxpayer making a non-deductible contribution to a political organization. *Id.* at 216–17 (providing an illustration with two hypothetical taxpayers).

<sup>33</sup> Again, this disparate treatment arises out of the value of the deduction, which is more economically valuable to taxpayers who are in a higher tax bracket. *Id.* at 219–20 (providing an illustration using hypothetical taxpayers).

<sup>34</sup> *Id.* at 215.

*D. The Ban Provides Sufficient Protection for Religious Organizations By Allowing Political Speech Through the Use of Section 501(c)(4) Organizations*

Further supporting the constitutional and policy arguments favoring the ban is the fact that, even if there are legitimate constitutional or policy concerns with restricting religious organizations' political speech, the ban adequately mitigates any concerns that religious organizations might have. As the D.C. Circuit noted in *Branch Ministries v. Rossotti*,<sup>35</sup> religious organizations are currently permitted to engage in political speech—they simply must create a section 501(c)(4) organization<sup>36</sup> that is maintained separately from the section 501(c)(3) religious organization.<sup>37</sup>

Tobin argues that the availability of section 501(c)(4) organizations effectively balances the rights of religious organizations to engage in the political process with appropriate separation between church and state.<sup>38</sup> Tobin further argues that requiring religious organizations to use section 501(c)(4) organizations as the vehicle for their political involvement does not simply create a “distinction without a difference.”<sup>39</sup> Rather, this formalistic solution furthers the separation of church and state by forcing independent assets (not tax deductible to the donor) to fund political activity, which places religious organizations on the same playing field as other organizations participating in the political process.<sup>40</sup> In addition, section 501(c)(4) organizations help insulate religious organizations from political pressure because those that choose not to create section 501(c)(4) organizations would thus indicate their lack of desire to engage in political activity.<sup>41</sup> Finally, section 501(c)(4) organizations help separate “the theological and the political . . . [because t]he 501(c)(4) organization cannot preach during services, and it cannot use the power of the pulpit to tell people how to vote.”<sup>42</sup>

In short, the option of section 501(c)(4) adequately balances the interests of religious organizations with the constitutional and policy concerns. Of

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<sup>35</sup> *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000).

<sup>36</sup> Unlike a § 501(c)(3) organization, a § 501(c)(4) organization can create a political action committee. *Id.*; see also Tobin, *supra* note 11, at 1324–26; Murphy, *supra* note 17; Kemmitt, *supra* note 17; Bruch, *supra* note 17.

<sup>37</sup> See Tobin, *supra* note 11, at 1324–26. Even opponents of the ban note that maintaining the requisite separation between the entities to avoid the loss of tax-exempt status of the section 501(c)(3) organization is a relatively straightforward matter. Chris Kemmitt notes that, “[g]enerally, as long as the organizations are separately incorporated and keep records sufficient to prove that tax-deductible contributions to the § 501(c)(3) organization are not being used to pay for the activities of the other organizations, the IRS will not attribute the acts of one organization to the other.” Kemmitt, *supra* note 17, at 161. *But see* Bruch, *supra* note 17, at 1263 (“The main barrier for a church forming a § 501(c)(4) organization is the difficulty of separating political messages from religious messages and tracking the funding for each activity.”).

<sup>38</sup> Tobin, *supra* note 11, at 1324–26.

<sup>39</sup> *Id.* at 1325 (stating “although it may seem like a distinction without a difference, the fact that it is the 501(c)(4) organization and not the church itself that is engaging in this activity at least separates, to a degree, the theological and the political.”).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

course others strongly disagree that this current arrangement adequately allows religious organizations to inject their voices into the political arena.

## II. ARGUMENTS AGAINST THE BAN ON POLITICAL CAMPAIGN PARTICIPATION

The ban's opponents have tackled the constitutional issues on two fronts. First, they argue that the Constitution does not require the ban to protect fundamental constitutional rights. Second, they take their argument a step further by contending that, not only does the Constitution not require the ban, but enacting the ban would be unconstitutional.

### A. *The Ban Is Not Constitutionally Required*

Responding to the criticism that the ban is necessary to prevent the subsidization of political or religious speech, opponents rely on *Walz v. Tax Commission of the City of New York*,<sup>43</sup> in which the Supreme Court held that a tax exemption along with a tax deduction did not necessarily amount to a government subsidy.<sup>44</sup> According to Johnny Rex Buckles, those who view preferential tax treatment of religious organizations as a subsidy improperly consider religious organizations to be proper subjects of taxation.<sup>45</sup> Because religious organizations are better viewed as “limited co-sovereigns with the state,” Buckles believes that exempting religious organizations from taxation and permitting a charitable deduction is not a subsidy—it is simply the government appropriately determining the tax base by excluding “community income.”<sup>46</sup>

<sup>43</sup> *Walz v. Tax Comm'n of N.Y.C.*, 397 U.S. 664, 680 (1970).

<sup>44</sup> See, e.g., Totten, *supra* note 14, at 308; Johnny Rex Buckles, *Does the Constitutional Norm of Separation of Church and State Justify the Denial of Tax Exemption to Churches that Engage in Partisan Political Speech?*, 84 IND. L.J. 447, 455–63 (2009) [hereinafter Buckles, *Separation of Church and State*]; Jennifer M. Smith, *Morse Code, Da Vinci Code, Tax Code and . . . Churches: An Historical and Constitutional Analysis of Why Section 501(c)(3) Does Not Apply to Churches*, 23 J.L. & POL. 41, 76–77 (2007). Johnny Rex Buckles has attempted to justify the *Walz* view against equating favorable tax treatment with a government subsidy by establishing that this view is logical because it properly excludes religious organizations from the tax base. Buckles, *Separation of Church and State*, *supra* note 44, at 460–62. Buckles acknowledges that if religious organizations are properly part of the tax base, and if tax preferences for these organizations are considered to be a government subsidy, “the separation norm [would counsel] against government aid to churches, at least when they can use granted funds for whatever religious projects they may select.” *Id.* at 462. Note, however, that if one accepts the subsidy argument, the claim that the ban prevents subsidization of religious organizations’ religious practice “ignores the fact that even with the prohibition on political activity, the government is providing a ‘subsidy’ to churches to engage in the free exercise of religion, albeit absent political activity.” 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).

<sup>45</sup> Buckles, *Separation of Church and State*, *supra* note 44; see also John F. Coverdale, *The Normative Justification for Tax Exemption: Elements from Catholic Social Thought*, 40 SETON HALL L. REV. 889, 892 (2010) (putting forth a rationale for why tax exempt organizations are properly excludable from the tax base). Coverdale’s argument will be discussed in greater detail in Part IV.A.

<sup>46</sup> Buckles, *Separation of Church and State*, *supra* note 44, at 465 (expanding on Evelyn Brody’s “sovereign” theory of charities as being historically viewed as “limited co-sover-

Thus, under this view, the ban would not be constitutionally required to prevent the subsidization of religious speech because the government cannot be subsidizing something through favorable tax treatment if the object of the foregone tax was not properly subject to the tax in the first place.<sup>47</sup>

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eigns” with the state). Buckles, drawing on both the work of Professors Evelyn Brody and Edward Zelinsky, argues that this argument has particular resonance with religious organizations specifically (as opposed to charitable organizations generally) because the government has historically recognized that, for church and state to be truly separate, government must fully recognize the complete autonomy of religious organizations by leaving them out of the tax base. *Id.* at 460–61; see also Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585 (1998); Edward A. Zelinsky, *Are Tax “Benefits” for Religious Institutions Constitutionally Dependent on Benefits for Secular Entities?*, 42 B.C. L. REV. 805 (2001).

Kenneth Halcom has also argued that religious organizations cannot be subject to taxation, although he rests his argument on more traditional constitutional grounds. See generally Kenneth C. Halcom, *Taxing God*, 38 MCGEORGE L. REV. 729 (2007). Halcom believes that an income tax imposed on religious organizations would result in “excessive entanglement,” rendering such a tax unconstitutional under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Id.* at 773 (arguing that the tax exemption provided in section 501(c)(3) is superfluous because such a tax would be unconstitutional, although the statute permissibly can impose conditions under which the tax exemption for donations could be taken away); see also Buckles, *Separation of Church and State*, *supra* note 44, at 473 (“The ban requires odious entanglement between church and state. . . . Policing these messages and invitations to speak never ends, and it theoretically requires the agency to scrutinize every word of a sermon and to monitor every guest in a pulpit.”); Blair, *supra* note 44, at 427 (“The IRS must necessarily monitor church services and communications to ensure that their content does not cross the line into political advocacy. . . . This examination of churches runs dangerously close to an entanglement between the government and churches that violates the Free Exercise Clause.”) (footnotes omitted); Alan L. Feld, *Rendering unto Caesar or Electioneering for Caesar? Loss of Church Tax Exemption for Participation in Electoral Politics*, 42 B.C. L. REV. 931 (2001) (arguing that the ban’s broad scope could be restricted to avoid any constitutional entanglement issues).

<sup>47</sup> The argument that churches are exempt from the tax base is understandably controversial. See Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 870–71 (2001) (arguing that charitable donations “are discretionary and therefore properly part of an income tax base,” as evidenced by their high elasticity) (footnote omitted). Note, however, that such high elasticity might be caused by more than mere individual discretionary preferences—they could be the result of a community-oriented reciprocity among taxpayers that might lend further support to Buckles’s community income theory. See Chapman, *supra* note 24 (describing how the high negative elasticity can be explained by taxpayers following a reciprocity norm and increasing their giving when they see the cost of giving decrease, which thus makes it more likely that others will give as well).

Accounting for the fact that his argument against including religious organizations in the tax base might not be successful, Buckles bolsters his argument against subsidization fears by pointing out that, even if one accepts that the favorable tax treatment of religious organizations constitutes a subsidy, removing the ban as applied to religious organizations does not amount to the government subsidization of religions seeking to establish their particular faiths through support of sympathetic candidates. Buckles, *Separation of Church and State*, *supra* note 44. Because religious organizations would be unlikely to leverage political support to achieve a disproportionate influence on public policy, any leverage obtained by one particular religion would be offset by equivalent clout from other religious organizations as well as non-sectarian institutions. *Id.* Furthermore, religious organizations would not receive much in the way of subsidized funds in comparison with other charities because, even in the absence of the charitable tax exemption, religious organizations receive most of their operating funds in the form of tax-free gifts that are not deductible to the donors because they are less likely to itemize their deductions. *Id.* at 464.

B. *The Ban Is Unconstitutional and Violates the RFRA*

In addition to arguing that the Constitution does not require the ban, opponents of the ban directly attack its legality on free speech and free exercise grounds, as well as under the RFRA.<sup>48</sup> The most compelling free speech argument is that campaign activity is protected speech under the First Amendment, and, accordingly, banning this activity as a condition of obtaining section 501(c)(3) status places an unconstitutional condition on the exercise of a constitutional right.<sup>49</sup> Opponents argue the availability of section 501(c)(4) organizations is an inadequate remedy for these constitutional concerns because it is not the most narrowly tailored solution to advance the government's interest<sup>50</sup> since it still prohibits political campaigning by section 501(c)(3) organizations even if the activity is not being subsidized by tax-exempt dollars.<sup>51</sup> Opponents

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At least one commentator believes that the question of whether the exemption constitutes a subsidy affects how one evaluates the arguments against the ban's constitutionality. See 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, 544 (1999).<sup>48</sup> See, e.g., Buckles, *Separation of Church and State*, *supra* note 44; Leff, *supra* note 8; Laura Brown Chisolm, *Sinking the Think Tanks Upstream: The Use and Misuse of Tax Exemption Law to Address the Use and Misuse of Tax-Exempt Organizations by Politicians*, 51 U. PITT. L. REV. 577 (1990); Mayer, *Grasping Smoke*, *supra* note 7; Meghan J. Ryan, *Can the IRS Silence Religious Organizations?*, 40 IND. L. REV. 73 (2007); Smith, *supra* note 44; Joseph S. Klapach, Note, *Thou Shalt Not Politic: A Principled Approach to Section 501(c)(3)'s Prohibition of Political Campaign Activity*, 84 CORNELL L. REV. 504 (1999). Another constitutional challenge that has been raised—although it is not that convincing—is that § 501(c)(3) is unconstitutionally vague. *Id.* at 515–18; Allan J. Samansky, *Tax Consequences When Churches Participate in Political Campaigns*, 5 GEO. J. L. & PUB. POL'Y 145, 158–59 (2007).

<sup>49</sup> Leff, *supra* note 8, at 686–96; Chisolm, *supra* note 48, at 631–40; Jeffrey Mikell Johnson, Comment, *The 501(c)(3) Campaign Prohibition as Applied to Churches: A Consideration of the Prohibition's Rationale, Constitutionality, and Possible Alternatives*, 2 LIBERTY U. L. REV. 557, 559 (2008); Klapach, *supra* note 48, at 513–15; Samansky, *supra* note 48, at 158–60.

<sup>50</sup> See Part II.A. for a discussion of the criticisms about the effectiveness of § 501(c)(4) organizations in addressing the ban's opponents' substantive constitutional and policy concerns.

<sup>51</sup> Leff, *supra* note 8; see also Buckles, *Separation of Church and State*, *supra* note 44, at 469 (arguing that the ban is potentially an over-inclusive method of separating the state from religious speech because: (1) it restricts the speech of both religious and non-sectarian entities equally; (2) it applies to religious and non-sectarian statements of political support equally; and (3) it restricts religious speech not only publicly but privately as well). While describing the ban's over-inclusive nature, Buckles also notes the paradox of the ban being under-inclusive in certain respects as well. *Id.* (arguing the ban is not effective in achieving separation between church and state because: (1) it still permits religious leaders to make political endorsements in their personal capacities; (2) other avenues of political speech, such as section 501(c)(4) organizations, are still available; and (3) the ban permits a certain degree of lobbying, while it restricts direct campaign activity completely).

Lending further support to the argument that the ban is perhaps not the most narrowly tailored solution available to further the government's interest is the legion of proposals that suggest more narrowly tailored solutions. See, e.g., CRIMM & WINER, *supra* note 4, at 322–23 (proposing (1) to permit political campaign activity but to disallow section 170 charitable deductions to organizations that engage in such activity and (2) creating a new classification for religious organizations in which they could elect to opt-in to a tax exempt status that would permit internal political campaign speech and also proposing relevant changes to other provisions of tax and election law to accommodate these proposals); Buckles, *Not Even*

argue the free exercise of religion is violated because “[t]he loss of tax-exempt status for engaging in speech or activities that churches feel are mandated by

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*a Peep*, *supra* note 29 (providing a good summary of some of the more recent proposals and suggesting that restrictions only need to be levied against charitable organizations that are not “independently controlled,” such as private foundations, and that these restrictions can be effectively implemented through an excise tax); Chisolm, *supra* note 48 (offering a variety of suggestions such as: (1) allowing section 501(c)(3) organizations to solicit contributions for their political action committees; (2) allowing federal election law to take care of any concerns regarding section 501(c)(3) organizations obtaining political favors in exchange for endorsements; (3) restricting the types of activities that should be prohibited); Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217, 219–20 (1992) (offering an approach similar to Chisolm’s); Johnny Rex Buckles, *Is the Ban on Participation in Political Campaigns by Charities Essential to Their Vitality and Democracy? A Reply to Professor Tobin*, 42 U. RICH. L. REV. 1057 (2008) [hereinafter Buckles, *Tobin Reply*] (proposing a number of alternatives, such as: (1) allowing limited political campaign activity with limitations either in the form of percentage of activity test, a dollar threshold cap, or a counteracting excise tax; and (2) disallowing a deduction for a portion of charitable deductions made to organizations that engage in political campaign activity); Vaughn E. James, *The African-American Church, Political Activity, and Tax Exemption*, 37 SETON HALL L. REV. 371, 372 (2007) (proposing a rule that would allow small religious organizations the ability to receive taxable financing that could be spent on political campaigns without having to form a separate organization); Leff, *supra* note 8 (proposing that the IRS issue guidance stating that only expenditures related to campaign intervention (as opposed to speech) are prohibited but also stating explicitly that these expenditures could be made through “non-501(c)(3) affiliates”); Kemmitt, *supra* note 17 (rejecting the concept of allowing limited political campaign activity on the grounds that such an exception would violate the Establishment Clause and proposing, similar to Leff, a bright line rule that only campaign-related expenditures, rather than speech, be prohibited); Totten, *supra* note 14, at 321 (proposing that section 501(c)(3) be amended “to exclude from the meaning of political campaign intervention the content of any sermon, homily, teaching, or other oral presentation made in the course of a regular church meeting”); Deborah J. Zimmerman, Note, *Branch Ministries, Inc. v. Rossotti: First Amendment Considerations to Loss of Tax Exemption*, 30 N. KY. L. REV. 249 (2003) (making a proposal similar to Totten’s); Bruch, *supra* note 17, at 1281 (proposing “a system where only political interventions aimed at the public would be investigated and subjected to penalties or revocation”); Blair, *supra* note 44, at 435–37 (proposing a limited exception for regularly scheduled religious services held by churches); Samansky, *supra* note 48, at 165 (proposing that church leaders should have complete freedom of speech during church services or in newsletters); Johnson, *supra* note 49 (supporting the Houses of Worship Free Speech Restoration Act, which would establish that religious speech given in the context of something like a sermon would not be considered political campaign activity). *But see, e.g.*, Benjamin S. De Leon, *Rendering a Taxing New Tide on I.R.C. § 501(c)(3): The Constitutional Implications of H.R. 2357 and Alternatives for Increased Political Freedom in Houses of Worship*, 23 REV. LITIG. 691 (2004) (illustrating an example of a critique of this Act); Benjamin Vaughn, Note, *The High Cost of Free Exercise: All Saints, the Service, and Section 501(c)(3)*, 61 TAX LAW 981 (2008) (proposing that any behavior that does not involve a “direct expenditure” of funds be permitted); Klapach, *supra* note 48, at 541–42 (proposing that some political activity could be permissible as long as it is conducted in a neutral manner, whenever possible); Ablin, *supra* note 47 (offering the alternative proposals of: (1) allowing some political discussion as long as no efforts were made to explicitly elect or defeat a particular candidate; (2) allowing political participation as long as it does not constitute a “substantial part” of a church’s activities; or (3) simply imposing a flat cap of 5% of revenue on amounts that a church can spend on campaign activity); Feld, *supra* note 46 (arguing that the ban’s broad scope could be restricted to avoid any constitutional entanglement issues); *cf.* Colinvaux, *supra* note 17 (examining a variety of possible solutions and concluding that the status quo truly is the best possible compromise).

their religious beliefs effectively forces churches to change their behavior in order to receive tax-exempt status.”<sup>52</sup>

Although a constitutional challenge based purely on a free exercise claim might be difficult to establish in light of the rational basis standard of review delineated in *Smith*,<sup>53</sup> the constitutional argument becomes much stronger if it is framed as a hybrid claim under *Smith*.<sup>54</sup> A hybrid claim is one that implicates free exercise concerns as well as another fundamental constitutional right, such as free speech. Under such a claim, the courts will apply a strict scrutiny standard of review.<sup>55</sup> Combining the free exercise concerns with the free speech concerns “creates both a colorable free speech claim and a colorable free exercise claim under the First Amendment . . . making [the ban] a prime target for ratcheting up the standard of scrutiny.”<sup>56</sup> Thus, while free exercise or free speech claims, standing by themselves, might be weak bases for constitutional challenge, they become much stronger when taken together.

Opponents also argue the ban violates the RFRA. Lloyd Hitoshi Mayer argues the RFRA prohibits the ban from applying to political endorsements made during sermons because political sermons are so interwoven with a religious organization’s other worship activities that banning them would substantially burden religious exercise.<sup>57</sup> The RFRA requires that, in light of this

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<sup>52</sup> Blair, *supra* note 44, at 426. The 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. See Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1210–11 (2009) [hereinafter Mayer, *Politics at the Pulpit*]; see also Vaughn, *supra* note 51.

<sup>53</sup> *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990); see Mayer, *Politics at the Pulpit*, *supra* note 52, at 1143. Mayer argues, however, that the free exercise challenge becomes stronger still if what he describes as the “church autonomy doctrine” is expanded into:

[A] full-blown institutional view of free exercise that . . . [acknowledges] that under the Free Exercise Clause, there are not only areas where government interests, such as prisons, the military, use of public lands, and internal administration, should easily overcome free exercise of religion concerns, but also areas where religious institution interests, such as intra-church disputes, ministerial employment decisions, and internal religious communications, should easily overcome government concerns.

*Id.* Of course, arguments that would be unsuccessful under *Smith* potentially could be successful under the RFRA.

<sup>54</sup> Ryan, *supra* note 48, at 86–95; Samansky, *supra* note 48.

<sup>55</sup> Ryan, *supra* note 48, at 86; Samansky, *supra* note 48.

<sup>56</sup> Ryan, *supra* note 48, at 89; Samansky, *supra* note 48. Note that, while believing that strict enforcement of the ban could be unconstitutional under a *Smith* hybrid theory, Ryan does not believe that the solution would be to remove the ban completely—she believes that the constitutional problem can be solved by providing more deference to religious organizations as to when their messages are purely religious rather than political, within limits. Ryan, *supra* note 48, at 94–95. Of course, such deference does not solve the constitutional problem if the political message itself is deemed to be fundamentally religious, a possibility that Ryan appears to discount. *Id.* at 95.

<sup>57</sup> Mayer, *Politics at the Pulpit*, *supra* note 52, at 1142–43. Note, however, that not all commentators who support more political involvement of religious organizations necessarily believe that making a political endorsement in a sermon is an inherent part of the organization’s religious mission. See James, *supra* note 51, at 410 (“[T]he pulpit, the sacred desk entrusted to the preacher, should not be used for political campaigning by political candi-

substantial burden, the government must “demonstrate that the prohibition is the least restrictive means for furthering a compelling governmental interest, a high standard of scrutiny that will be very difficult for the government to meet.”<sup>58</sup>

According to Mayer, the traditional compelling interests that have been advanced for the ban do not hold up as justifications because: (1) the threat to the tax system is minimal because most donors do not deduct their contributions; (2) some private benefit is acceptable as long as it is no more than is needed to accomplish charitable goals; (3) there is little evidence supporting the risk of corruption as a serious concern; (4) religious organizations would not be seen as speaking for the government because of the intervening choices by donors and because of the diversity of religious organizations’ political views; (5) the government has no interest in protecting a religious organization from itself; and (6) the ban does not further separation of church and state because religious organizations are not subject to the ban if they choose not to be tax exempt and because the ban actually forces increased entanglement of church and state because of the IRS’s obligation to monitor religious speech.<sup>59</sup> Finally, Mayer points out that even if some of the government’s interests are legitimate, the ban is certainly not the least restrictive method of implementing those interests.<sup>60</sup>

Chris Kemmitt has taken the RFRA argument even further by arguing the ban violates the RFRA to the extent that it applies to any religious organization’s activity that is conducted without tax-exempt financing.<sup>61</sup> Kemmitt argues the ban substantially burdens religious free exercise because “it impermissibly conditions the receipt of . . . tax-exempt status . . . upon the forfeiture of free exercise of religion . . . [and because] it allows the government to remove religious leaders’ control over what activities and beliefs constitute religion.”<sup>62</sup> Kemmitt, like Mayer, rejects the primary compelling government interests that proponents advance and argues instead that the government’s only

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dates. These activities should rightly be carried out within the political for-profit entities established by the churches . . .”).

<sup>58</sup> Mayer, *Politics at the Pulpit*, *supra* note 52, at 1143 (also arguing that expanding the “church autonomy doctrine” would strengthen the RFRA claim as well as the Free Exercise Claim); *see also supra* note 51 and accompanying text. The difficulty the government will have in establishing a compelling government interest has historical roots, as Jennifer Smith has pointed out. Smith, *supra* note 44 (arguing that the legislative history behind section 501(c)(3) indicates that the statute was never intended to provide a blanket prohibition of the participation of tax exempt religious organizations in political life).

Of course, even if the ban does violate the RFRA, the RFRA’s protections would only apply to the federal ban as opposed to any bans imposed by the states. Mayer, *Politics at the Pulpit*, *supra* note 52, at 1161 n.121 (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 & n.1 (2006) and *City of Boerne v. Flores*, 521 U.S. 507 (1997)) (pointing out that, “[e]ven if there is a constitutional question regarding RFRA’s application to the federal government, it is unclear who would raise this issue as neither plaintiffs seeking to invoke RFRA’s protection nor the federal government would be likely to do so”).

<sup>59</sup> *Id.* at 1184, 1188–92.

<sup>60</sup> *Id.* at 1188, 1190–91.

<sup>61</sup> Kemmitt, *supra* note 17, at 146.

<sup>62</sup> *Id.* at 169.

compelling interest is to prevent such tax-exempt financing from subsidizing religious organizations' political speech.<sup>63</sup>

Thus, while acknowledging that the government has a compelling interest to restrict certain types of political activity from religious organizations, those who attack it on RFRA grounds believe that the government is painting with too broad of a brush in addressing this interest because the interest can be defined much more narrowly, which in turns leads to a much more narrowly tailored solution.

### C. *The Ban Is Bad Policy*

The ban's opponents also attack the ban on policy grounds. Opponents argue the ban allows the government to exert undue influence over religious organizations and that the ban "is simply the government's way of paying churches not to talk about certain things."<sup>64</sup> They argue this allows the government to exercise virtual control over religious organizations by using the tax code as a political weapon,<sup>65</sup> and to serve as the ultimate arbiter of what spheres are appropriate for religious organization participation.<sup>66</sup> Exacerbating

<sup>63</sup> *Id.* at 162–63.

<sup>64</sup> Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 779 (2001) (discussing Randy Lee, *When a King Speaks of God; When God Speaks to a King: Faith, Politics, Tax-Exempt Status, and the Constitution in the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 391, 434 (2001)); Blair, *supra* note 44, at 426 (quoting Lee, *supra*); Buckles, *Tobin Reply*, *supra* note 51, at 1093–94 ("[I]f the ban truly changes the behavior of churches, including the practice of taking political stands on candidates in accordance with church dogma, the ban itself constitutes one of the most egregious forms of governmental co-option of the religious community that one can envisage."). Note that this is the mirror image of the argument advanced by the ban's supporters, who claim that the ban is necessary to prevent religious organizations from having a disproportionate influence over the government. See *supra* note 50 and accompanying text.

<sup>65</sup> Eric R. Swibel, Comment, *Churches and Campaign Intervention: Why the Tax Man is Right and How Congress Can Improve His Reputation*, 57 EMORY L.J. 1605 (2008) (acknowledging claims of political bias that have been levied against IRS investigations into religious organizations.); Kelly S. Shoop, Note, *If You Are a Good Christian You Have No Business Voting for This Candidate: Church Sponsored Political Activity in Federal Elections*, 83 WASH. U. L.Q. 1927, 1944–45 (2005) (stating that although an audit revealed no evidence of such bias, it of course could be possible that the auditing agency itself could be biased); Klapach, *supra* note 48.

<sup>66</sup> Garnett, *supra* note 64; Totten, *supra* note 14, at 307 ("The question of what hinders or advances the mission of a church, synagogue, or mosque is not a question that the government can or should answer. . . . [This is a question] solely for the church."); see also Buckles, *Separation of Church and State*, *supra* note 44, at 472 (arguing that separation of church and state "supports the position that churches, not government, should determine the propriety of their speech."). Garnett observes that the government's ability to relegate religious organizations to the sidelines by defining the boundaries of what is appropriate political participation by such organizations is bad not only for religion, but also for society at large. Garnett, *supra* note 64, at 800 ("A free and liberal society, and the goods for which it aims, depend on a busy and crowded public square."); see also James, *supra* note 51, at 402 (noting that the ban has a disproportionate chilling effect on participation by the African-American community in political life because "more than in any other religious body, clergy of the African-American Church still see their mission as influencing society through political activity."). Note that these arguments are similar to the arguments raised to demonstrate "substantial burden" in claiming that the ban violates the RFRA. See, e.g., Kemmitt, *supra* note 17, at 174 ("The campaign-activity prohibition also substantially burdens religion and

this problem is the fact that, because of inconsistent IRS enforcement, religious organizations often err on the side of caution in determining the appropriate boundaries of their political speech.<sup>67</sup> As a result, religious organizations run the risk of losing their ability to serve as independent third-party institutions that influence the dialogue between individuals and the state in shaping societal values.<sup>68</sup>

The ban's opponents also aggressively criticize the argument that the ban is good public policy because it prevents the government from exerting undue influence over religious organizations.<sup>69</sup> These critics argue that the risk of government interference is overblown in this situation because: (1) religious organizations can still be pressured to endorse candidates through affiliates;<sup>70</sup> (2) religious organizations might actually feel more pressure to change their religious message in order to comply with the ban;<sup>71</sup> and (3) religious organizations will often not wish to engage in political campaign activity, even if they could, because they fear alienating their parishioners and donor base.<sup>72</sup> Furthermore, 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.<sup>73</sup>

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religious institutions by encroaching upon the ability of the church to define what is and what is not religious.”). These arguments lend weight to the claim that political campaign activity could fall under the “charitable” or “religious” mission of a religious organization and thus must be permitted if religious organizations are to be able to fulfill their charitable goals fully. See Carroll, *supra* note 50, at 252–53 (“Neither Congress nor the courts nor the IRS has ever explained . . . why campaign-related speech or conduct so differs from . . . other [permissible] attempts to influence the political, social, economic, or moral status quo that an organization engaging in it cannot properly be called ‘charitable.’”) (footnote omitted).

<sup>67</sup> Totten, *supra* note 14, at 309 (“Although the past lack of enforcement means that some religious leaders routinely flaunt the prohibition, in other cases the result of this uncertainty is a chilling effect on otherwise legitimate speech.”) (footnote omitted); Ryan, *supra* note 48, at 85 (“Research demonstrates that many §501(c)(3) organizations cower in fear of the IRS and avoid any kind of advocacy, even that which might be permitted.”) (footnote omitted). This uncertainty is, in part, due to the fact that it is often difficult to distinguish between permissible issue advocacy and impermissible political campaign activity. Buckles, *Not Even a Peep*, *supra* note 29. Although the IRS has attempted to provide clarity as to precisely what is prohibited, it has been unsuccessful in combating this uncertainty. Ryan, *supra* note 48.

<sup>68</sup> Garnett, *supra* note 64, at 799; Buckles, *Not Even a Peep*, *supra* note 29 (noting that the ban prevents religious organizations from being effective in cooperating with the government to meet community needs because it prevents religious organizations from having a say in choosing their “partners” in government and because it prevent religious organizations from being able to defend themselves against a hostile government); Ablin, *supra* note 47 (noting that the ban prevents critical voices from participating fully in politics).

<sup>69</sup> This policy justification for the ban is discussed in Part I.B.

<sup>70</sup> Buckles, *Tobin Reply*, *supra* note 51.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1087 (“One should resist the urge to use federal tax law to repress one form of religious expression in order to promote a vision of healthy religion.”).

*D. The Alternative Mechanism of Section 501(c)(4) Organizations Is Insufficient to Protect Religious Organizations' Speech Rights*

In addition to the legal and policy critiques, the ban's opponents also argue the ban does not already provide a sufficient mechanism for addressing their legal and policy concerns through the use of section 501(c)(4) organizations. They argue the very separation established by using section 501(c)(4) organizations prevents 501(c)(3) organizations from being involved in political campaign activity because such separation prevents these organizations from using their pulpits to make such political statements.<sup>74</sup> According to Chris Kemmitt, this forced separation prevents section 501(c)(4) organizations from serving as a suitable alternative to speech from the pulpit.<sup>75</sup> Therefore, according to Kemmitt, the use of section 501(c)(4) organizations cannot satisfy the judicial doctrine set out in *Regan v. Taxpayers with Representation*<sup>76</sup> and *Branch Ministries v. Rossotti*<sup>77</sup> that the ban does not substantially burden religion as long as there is an alternative mechanism for religious organizations to express their political views.<sup>78</sup>

III. MOVING TOWARDS COMPROMISE: A PROPOSAL FOR A SELF-DIRECTED TAX ON TAX-EXEMPT ORGANIZATIONS

While many of the proposals to resolve this debate center on carving out limited exceptions to the ban, these proposals ignore the reality that there is not the political will to allow churches to remain tax-free and engage in political endorsements.<sup>79</sup> Based on such logic, many think that the current system, a zero-sum gain between tax exemption and political participation,<sup>80</sup> is the best we can do. However, a compromise that serves the values of both sides of this debate is possible. If a tax that was required to allow increased political participation were imposed in such a way that its payment would be part of a religious

<sup>74</sup> Kemmitt, *supra* note 17, at 173; Leff, *supra* note 8, at 701–02; Mayer, *Politics at the Pulpit*, *supra* note 52, at 1173–75; Totten, *supra* note 14, at 314–16, 322; *see also* Buckles, *Tobin Reply*, *supra* note 51, at 1124 (noting that requiring the use of § 501(c)(4) organizations creates additional administrative costs in addition to preventing direct endorsements from the pulpit). Buckles acknowledges, however, that the very separation that the ban's supporters desire might be illusory because, despite the separation in form, functionally “[t]he general public is unlikely to assign enormous significance to the distinction between a pastor’s endorsement on behalf of his church and his endorsement on behalf of himself or a church affiliate.” *Id.* at 1105.

<sup>75</sup> Kemmitt, *supra* note 17, at 172.

<sup>76</sup> *Regan v. Taxation Without Representation*, 461 U.S. 540 (1983). For an explanation of the doctrine, *see* Kemmitt, *supra* note 17, at 173. *See also supra* note 17 and accompanying text.

<sup>77</sup> *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000); *see also supra* note 17 and accompanying text.

<sup>78</sup> Kemmitt, *supra* note 17, at 172.

<sup>79</sup> Michael Hatfield, *Ignore the Rumors—Campaigning From the Pulpit is Okay: Thinking Past the Symbolism of Section 501(c)(3)*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 125, 126 (2006). “In fact, leaders of a broad spectrum of American congregations have opposed efforts to relax the campaigning restriction in Section 501(c)(3).” *Id.* at 160 (footnote omitted).

<sup>80</sup> It is a zero-sum gain system because tax exempt organizations already have the choice to engage in political campaign activity as long as they do not elect tax-exempt status.

organization's religious mission and would serve as the vehicle for increased political participation, the tax would be an effective mechanism for balancing competing interests because it would allow increased and unsubsidized political participation by religious organizations while still providing these organizations tax advantages not enjoyed by for-profit entities.

This part proposes that an elective "self-directed tax" could be made available to tax-exempt organizations, and the ban on political campaign activity could be modified, or perhaps lifted completely, from those organizations that elect the tax. This proposal is a compromise; therefore, it runs the risk of satisfying no one. Nevertheless, this proposal would effectively address the fundamental concerns of both sides by providing an incentive for religious organizations to engage in traditionally tax-exempt activity<sup>81</sup> while not significantly distancing them from the political process.

#### A. *The Basics of a Self-Directed Tax*

A "self-directed tax" would be an elective tax that any organization that currently qualifies as tax-exempt could choose instead of remaining tax-exempt and complying with the current restrictions. The self-directed tax would initially be a tax like any other—an income tax levied against all of the potentially taxable income of an organization that would currently be classified as tax-exempt. What would make this tax unique is that the organizations electing the tax would designate how the government spends the tax dollars these organizations contribute. Although these organizations would not have unfettered discretion to mandate that the government spend their tax dollars, they could select which areas of existing government spending the government should support with their tax dollars.<sup>82</sup> A similar rule could be applied to those who donate to the electing organizations. Rather than allowing a tax deduction for the donation, under the self-directed tax the donor would be denied a deduction for the donation but would be permitted to allocate the tax due on the donated funds in a similar fashion.<sup>83</sup>

For organizations electing the self-directed tax, the ban on political speech and campaign activity would no longer be necessary to satisfy subsidization

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<sup>81</sup> See James, *supra* note 51, at 404 (noting that "[u]nless the government is ready to provide services to 'feed the souls' of Americans, or to provide society with the services provided by the Red Cross and other humanitarian organizations, it would be foolhardy for Congress to abolish the charitable tax exemption").

<sup>82</sup> For example, one religious organization electing the tax might prioritize aid to the poor and would direct that its tax dollars be spent for governmental programs that provide aid such as food stamps, while another religious organization electing the tax might prioritize providing adequate health care and would direct its tax dollars towards programs like Medicare and Medicaid.

An argument could certainly be made that the list of potential government spending choices for self-directed tax dollars might have to be restricted to a list of potential areas in which it is more likely that the charitable organizations would have superior knowledge to the government regarding how spending should be allocated. See Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 427–28 (1998) (noting that "there are many contexts . . . where we should not expect legislatures readily to give up their decisionmaking and patronage potential").

<sup>83</sup> This would be true regardless of whether or not the donor itemizes deductions.

concerns because the government could not be viewed as subsidizing such speech. However, a relaxed ban might still be necessary to address some of the non-subsidization policy arguments raised by the ban's supporters. Accordingly, rather than permitting overt political campaign activity, the organizations subject to the tax could be permitted to promote to the public exactly how they direct the government to spend their tax dollars.<sup>84</sup> In addition, the organizations could affirmatively identify political candidates who support similar prioritization of government spending. Such disclosure would provide a clearer connection between the organization and political candidates that the organization would support,<sup>85</sup> while falling short of permitting direct campaign activity.

This carrot of increased political involvement is why the tax would have to be elective. Simply replacing tax-exempt organizations' current tax benefits with the self-directed tax would not be viable because not all organizations have an equally strong desire to engage in political activity. Those organizations that have no political aspirations would balk at having a current benefit lessened to receive another benefit they do not value. Even religious organizations that only occasionally wish to violate the ban might find the self-directed tax unappealing because the penalties against such churches could be comparatively light.<sup>86</sup> Furthermore, for the election to provide any meaningful choice to tax-exempt organizations that desire to be heavily involved in the political process, efforts to enforce the ban against organizations that do not choose the self-directed tax, but that nonetheless attempted to increase their political involvement, would have to be increased significantly over their currently anemic levels (and potential penalties might have to be increased as well).<sup>87</sup> With-

<sup>84</sup> They would be permitted to do this directly without having to form a separate entity. Thus, for example, a religious organization promoting how it allocated its tax dollars in a sermon would be acceptable.

<sup>85</sup> This connection would be arguably clearer than the simple issue advocacy that is currently permitted because it is tied into government spending that already exists, thus making it easier for political candidates and religious organizations to align themselves closely in areas of broader consensus of the electorate without having to focus on particular issues that might be more polarizing (and therefore less likely to produce public statements from political candidates).

<sup>86</sup> Mayer, *Grasping Smoke*, *supra* note 7, at 36–38 (noting, as did the court in *Branch Ministries v. Rossotti*, 211 F.3d 137, 142–43 (D.C. Cir. 2000), that revocation of tax exempt status is potentially a minor penalty against churches because such status would be automatically restored the day after the noncompliant activity ceased, and that, because of difficulties in allocating expenditures to noncompliant activity, the other financial penalties available under section 4955 might not be that severe); *see also* Bruch, *supra* note 17, at 1275–76. One would hope, however, that religious organizations, given a choice between a regime that would allow them to engage in political activity without breaking the law, and one that would require them to break the law but pay a penalty, would welcome being able to conduct even occasional political activities without having to violate the civil law openly.

<sup>87</sup> *See* Kara Backus, Note, *All Saints Church and the Argument for a Goal-Driven Application of Internal Revenue Service Rules for Tax-Exempt Organizations*, 17 S. CAL. INTERDISC. L.J. 301, 303, 335 (2008) (making suggestions for improved IRS enforcement of the ban); Bruch, *supra* note 17, at 1273–79 (detailing recent IRS enforcement efforts and documenting some of the difficulties the IRS has had in enforcing the ban); Siri Mielke Buller, Note, *Lobbying and Political Restrictions on § 501(c)(3) Organizations: A Guide for Compliance in the Wake of Increased IRS Examination*, 52 S.D. L. REV. 136, 154–55 (2007) (summarizing the results of the IRS's Political Activities Compliance Initiative for the 2004 election season); Dolak, *supra* note 7; Mayer, *Grasping Smoke*, *supra* note 7, at 4–8, 38–39

out such an increase, there would be no incentive for any organization to elect the self-directed tax.

*B. How the Self-Directed Tax Provides an Effective Compromise to the Debate Over the Current Ban*

The self-directed tax is a superior mechanism for protecting religious organizations'<sup>88</sup> desires to participate in the political process, while safeguarding the public's desire not to subsidize religious political endorsements beyond the current mechanism under section 501(c)(4). Unlike the current system, the self-directed tax directly injects the religious organizations into the political process by permitting these organizations to lend their voice to the political debate without having to dilute their message through another entity.<sup>89</sup> The self-directed tax accomplishes this without the government losing any revenue by putting significant safeguards in place to ensure that a religious organization is not forced to fund anything inconsistent with its religious mission.<sup>90</sup>

In addition to addressing the subsidization concerns surrounding the ban, the self-directed tax adequately remedies the non-subsidization concerns as well.<sup>91</sup> The presence of a mild ban, such as the one contemplated by the self-directed tax, would help preserve the existing deterrent against religious organizations attempting to gain too much influence over government by taking advantage of political candidates' desires to use them as a source of tax-deductible political contributions.<sup>92</sup> Furthermore, such a mild ban would protect the religious organizations from possible coercive government influence because there would be less of an incentive for political candidates to promise political favoritism to those organizations that directly compromised their teachings in their public communications.<sup>93</sup> The self-directed tax would also not raise a horizontal equity problem because all direct political contributions would be taxed the same way and political candidates would not receive a tax advantage from

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(acknowledging that eventually the penalty regime might have to be altered in order to deter organizations that engage in minor, but more widespread, violations of the ban); Shoop, *supra* note 65, at 1948–49 (arguing for increased enforcement of the ban); Jason M. Sneed, Note, *Regaining Their Political Voices: The Religious Freedom Restoration Act's Promise of Delivering Churches from the Section 501(c)(3) Restrictions on Lobbying and Campaigning*, 13 J. L. & POL. 493, 508–09 (1997).

<sup>88</sup> Although such a tax would need to be applied to all tax-exempt organizations (as opposed to religious organizations) in order to avoid constitutional concerns, the remaining analysis of the benefits and problems of such a tax will focus on religious organizations because they have taken center stage in the current debate over the ban. *But see* Samansky, *supra* note 48 (observing that certain preferential treatment of religious organizations can occur without violating the Establishment Clause).

<sup>89</sup> Of course, there is still some inevitable dilution of the message if the organization is still prohibited from directly endorsing a candidate, but can only do so directly through a discussion of spending priorities.

<sup>90</sup> The possibility of completely mitigating against the risk of a religious organization potentially having to fund something it disagrees with is unlikely because, given the diversity in religious belief, it is impossible to rule out the potential of a religion rejecting all forms of government spending inconsistent with its religious mission.

<sup>91</sup> *See supra* Part I.

<sup>92</sup> *See supra* notes 22–29 and accompanying text.

<sup>93</sup> *See supra* notes 63–72 and accompanying text.

receiving one source over another.<sup>94</sup> Finally, rather than fostering anti-democratic concerns, the self-directed tax would ameliorate them<sup>95</sup> because it treats all donors equally, it does not result in any revenue loss from the government, and the relief being granted allows taxpayers to express their preferences between a range of goals that have already been subjected to the democratic process.<sup>96</sup>

The self-directed tax also addresses the concerns over the government preventing religious organizations from interacting in the political arena. Although the self-directed tax would prohibit religious organizations from engaging in direct campaign endorsements, it provides a mechanism for religious organizations to participate in the political arena by allowing them to allocate their tax dollars, to promote those allocations publicly, and to indicate which political candidates have been strong supporters of similar government spending priorities. In addition, the self-directed tax provides greater flexibility to religious organizations to determine for themselves the appropriate level of their political activity.

Some might initially be concerned about the financial damage caused by the imposition of the self-directed tax. First, the financial burden might be too much for religious organizations to bear. This concern might be overstated<sup>97</sup> because, even if religious organizations were subjected to taxation, donations to religious organizations are not taxable as tax-free gifts under section 102.<sup>98</sup> Furthermore, should section 102 fail to protect the donations from taxation,<sup>99</sup> there would be little tax owed because most churches operate near the break-even point.<sup>100</sup>

Second, the self-directed tax might lead to a drop in charitable giving because donors would no longer be permitted to deduct their donations (although donors would still receive a benefit by being able to allocate the tax dollars attributable to the donations).<sup>101</sup> Currently there is little evidence on this

<sup>94</sup> See *supra* notes 31–36 and accompanying text.

<sup>95</sup> See *supra* notes 22–30 and accompanying text.

<sup>96</sup> Ilan Benshalom, *The Dual Subsidy Theory of Charitable Deductions*, 84 IND. L.J. 1047, 1080–82 (arguing that charitable contributions can only further democratic principles if they satisfy the following three conditions: (1) charitable deductions should not be given more preferential treatment as the donor's income increases, in order to prevent certain groups from having outsized influence; (2) total revenue loss from charitable relief should be limited to preserve the government's allocation of how the burden should be distributed; and (3) charitable relief should be limited to those contributions that further broad, publicly defined goals).

<sup>97</sup> Hatfield, *supra* note 79, at 141–45; see also Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017, 2025–26 (2007); Totten, *supra* note 14, at 313–14. But see James, *supra* note 51, at 404 (arguing that the tax exempt status of religious organizations is enormously beneficial to those organizations).

<sup>98</sup> Hatfield, *supra* note 79, at 155; Totten, *supra* note 14, at 313.

<sup>99</sup> This is certainly at least a plausible concern because the tax-free gift argument assumes that such gifts would meet the necessary “detached and disinterested generosity” standard of *Commissioner v. Duberstein*, 363 U.S. 278, 285 (1960), which may not be a completely safe assumption. See, e.g., *Goodwin v. United States*, 67 F.3d 149 (8th Cir. 1995) (finding that gifts made to religious ministers were taxable because they did not satisfy this standard).

<sup>100</sup> Hatfield, *supra* note 79, at 157; see also Malani & Posner, *supra* note 97, at 2025.

<sup>101</sup> Blair, *supra* note 44, at 426–27; Totten, *supra* note 14, at 313–14; see also Hatfield, *supra* note 79, at 128, 159.

point, which has led to inconsistent conclusions. Accordingly, commentators can only speculate.<sup>102</sup> On one hand, taxpayers might respond to the loss of the economic incentive—the tax deduction—by donating less. On the other hand, donations to religious organizations are often driven by religious, and not just economic, motivations.<sup>103</sup> Whether the economic or the religious motivation predominates remains an open question.<sup>104</sup>

Removing the different tax treatment of charitable contributions for itemizers and non-itemizers in the context of the self-directed tax could ameliorate the potential decline in giving. Charitable donations are currently itemized deductions (and thus not available to all taxpayers),<sup>105</sup> and it is unclear if the primary donors to religious organizations are predominantly itemizers (only around 30 percent of taxpayers) or non-itemizers.<sup>106</sup> If current donors are primarily itemizers, removing the donors' contribution deductions to entities electing the self-directed tax, but allowing both itemizers and non-itemizers to allocate the tax dollars attributable to their donated funds, could help ameliorate any negative financial impact. Nevertheless, because donations from individuals constitute nearly all of religious organizations' revenue, the uncertain effect on donations could make religious organizations wary of embracing any proposal that would remove this deduction.<sup>107</sup>

The self-directed tax, as an extension of the religious organizations' mission, could help lessen this concern about the loss of the charitable deduction. If the potential financial impact of taxing religious organizations is not as significant as previously thought, any loss in revenue to religious organizations would be outweighed by their increased ability to send a direct message about which of the government's priorities they consider the most consistent with their charitable and religious goals. Rather than restricting the efficacy of religious organizations by limiting their resources, the ability to send this message would provide religious organizations with more ways to fulfill their mission.<sup>108</sup>

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<sup>102</sup> Blair, *supra* note 44, at 426–27; Totten, *supra* note 14, at 313–14; *see also* Aprill, *supra* note 47, at 859; Hatfield, *supra* note 79, at 128, 159.

<sup>103</sup> Blair, *supra* note 44, at 427.

<sup>104</sup> *Id.* (noting that “[c]ongregants may assert they are contributing because of their religious convictions, but until those congregants are faced with the loss of the deductibility of their donations, and potentially higher tax liabilities, there is no way to know what they will do”).

<sup>105</sup> 26 U.S.C. §§ 62(a), 63(d), 170 (2006).

<sup>106</sup> *See* Aprill, *supra* note 47; Blair, *supra* note 44; Hatfield, *supra* note 79 (citing studies that were based on admittedly limited data but tentatively indicated that the bulk of charitable donations to religious organizations came from non-itemizers).

<sup>107</sup> Blair, *supra* note 44, at 427 (arguing that religious organizations most likely fear even a small decline in individual donations because it might force them to reduce their charitable services); Aprill, *supra* note 47, at 844–45 (citing a study by Independent Sector, indicating that individual donations account for approximately 94 percent of religious organizations revenue); Totten, *supra* note 14, at 314 (“[T]he impact of losing the ability to receive tax-deductible donations is real, since more than 94% of the revenue for religious congregations comes from individuals. Absent a defensible rationale for this broad prohibition, faith communities rightly hesitate to lose the charitable deduction.”) (footnote omitted).

<sup>108</sup> Indeed, if one views the charitable tax deduction as a mechanism through which the government allows citizens to dictate federal spending allocations, the structure of the self-directed tax would be consistent with this view. *See* Levmore, *supra* note 82, at 405–06

If further research establishes that imposing a tax on religious organizations has a devastating effect on their revenue streams,<sup>109</sup> then religious organizations are unlikely to accept such a tax. If, however, the financial impact of a tax is relatively minimal, the self-directed tax would allow religious organizations to be more directly involved in political campaign activity without having to suffer a significant negative financial impact.

#### IV. BEYOND COMPROMISE: ADDITIONAL BENEFITS OF A SELF-DIRECTED TAX

The fact that the self-directed tax serves as an effective compromise between the two sides in the debate over the ban is enough to justify its implementation. Nevertheless, there are some secondary benefits that could potentially be achieved from the self-directed tax. Specifically, the self-directed tax could have the additional benefits of helping to create a norm-shift in tax compliance and of achieving efficiency benefits from allowing section 501(c)(3) organizations to generate and distribute profits.

##### A. *A Self-Directed Tax Can Help Foster a Culture of Treating Tax Compliance as a Moral Issue*

By fully involving religious organizations in the tax system and giving them a say in how their tax dollars are spent, the self-directed tax enables these organizations to examine which areas of government spending they feel are worthwhile. Such involvement could contribute to the idea that taxation is a moral issue because, at its core, it represents society's decision regarding which public values will receive the most support.<sup>110</sup> This recognition is important,

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(describing the arguments for and against viewing the charitable tax deduction "as a social choice mechanism to determine government spending").

<sup>109</sup> See Hatfield, *supra* note 79, at 159 (admitting that more empirical research needs to be done in order to know for sure whether his suspicion is correct).

<sup>110</sup> See, e.g., MARTIN T. CROWE, *THE MORAL OBLIGATION OF PAYING JUST TAXES* (1944) (arguing that there is a moral obligation to pay just taxes and analyzing the Catholic theological basis of that position); ROBERT W. MCGEE, *THE PHILOSOPHY OF TAXATION AND PUBLIC FINANCE* (2004) (summarizing the discussion of taxation in multiple religious traditions); Susan Pace Hamill, *An Evaluation of Federal Tax Policy Based on Judeo-Christian Ethics*, 25 VA. TAX REV. 671, 679 (2006) (arguing that "Judeo-Christian ethics require tax policy structures that both raise adequate revenues providing all citizens a reasonable opportunity to reach their potential, and allocate the burden for paying the taxes under a moderately progressive model") (footnote omitted); Susan Pace Hamill, *A Moral Perspective on "Big Business" Fair Share of America's Tax Burden*, 1 U. ST. THOMAS L. J. 857, 861 (2004) (arguing against traditional economic model of evaluating tax policy and expressing a preference for the more moral-based systems of evaluating tax policy); Michael A. Livingston, *The Preferential Option, Solidarity, and the Virtue of Paying Taxes: Reflections on the Catholic Vision of a Just Tax System* (Jan. 22, 2007) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=958806](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=958806) (arguing that Catholic principles of solidarity and the preferential option for the poor have laid the moral foundation for Catholic scholars to support a progressive tax system that justly allocates the tax burden while rejecting the extremes of both Marxism and capitalism); Kenneth H. Ryesky, *A Jewish Ethical Perspective to American Taxation*, 10 RUTGERS J.L. & RELIGION 1 (2009); CATECHISM OF THE CATHOLIC CHURCH ¶ 2409 (2d ed. 1997) (listing tax evasion as one of the ways an individual can violate the Seventh Commandment's prohibition on theft); see also *id.* at ¶

not merely in the abstract, because if religious organizations appreciate the moral component of taxation, they can start to discuss compliance with tax laws in a moral context. Such a discussion could result in a significant norm-shift that could increase tax compliance, and, accordingly, increase revenues.<sup>111</sup>

One of the more recent significant statements from a religious figure regarding taxation comes from Pope Benedict XVI and lends support to the theory that the self-directed tax could help further the moral dialogue regarding taxation.<sup>112</sup> In his most recent encyclical, *Caritas in Veritate*, the Pope references a tax policy idea that he describes as “fiscal subsidiarity,”<sup>113</sup> stating:

One possible approach to development aid would be to apply effectively what is known as fiscal subsidiarity, allowing citizens to decide how to allocate a portion of the taxes they pay to the State. Provided it does not degenerate into the promotion of special interests, this can help to stimulate forms of welfare solidarity from below, with obvious benefits in the area of solidarity for development as well.<sup>114</sup>

In laying out this general framework for a tax policy to assist in development aid, the Pope suggests that involving citizens more directly in tax allocation could result in a more efficient and a more moral method of development. Although the Pope restricted his discussion of this potential tax policy to its benefits for developing states, there is no reason why such a policy could not provide similar benefits for more developed societies.

The self-directed tax is a perfect example of the concept of fiscal subsidiarity. The self-directed tax allows the potential solidarity benefits to occur and provides a safeguard against potential special interest capture through the relaxed ban. Although the solidarity benefits might not all occur, it is enough to show that the Pope believes they might occur, showing an example of at least

2240 (establishing that paying taxes is morally obligatory as part of a taxpayer’s obligation to submit to lawful authority).

<sup>111</sup> See W. Edward Afield, *Dining with Tax Collectors: Reducing the Tax Gap Through Church-Government Partnerships*, 7 RUTGERS BUS. L.J. 53 (2010).

<sup>112</sup> Admittedly, the Catholic Church is not necessarily representative of all of Christianity, much less non-Christian religions. Nevertheless, because the Pope has recently written directly on this issue, the Catholic Church serves as a good potential test case regarding whether the self-directed tax could get religious organizations more invested in viewing and discussing the tax system as a moral issue.

<sup>113</sup> BENEDICT XVI, *CARITAS IN VERITATE* 125 (2009), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20090629\\_caritas-in-veritate\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html). The Catholic doctrine of subsidiarity states:

Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.

The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone.

PIUS XI, *QUADRAGESIMO ANNO* (1938), available at [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_p-xi\\_enc\\_19310515\\_quadragesimo-anno\\_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html) (quoted in Coverdale, *supra* note 45, at 902 (providing a good overview of the doctrine of subsidiarity)).

<sup>114</sup> Pope Benedict XVI, *supra* note 113, at 125.

one major religion that could be receptive to the self-directed tax and that could accordingly find itself more invested in the moral nature of the tax system.<sup>115</sup> This could help produce the norm-shift necessary to achieve greater compliance.

*B. The Self-Directed Tax Could Advance Efficiency If, As a Component of the Tax, Tax-Exempt Organizations Were Permitted to Generate and Distribute Profits*

To make the self-directed tax more palatable to both sides of the debate, one of the features that could be added, although not necessary to achieve the primary benefits, is to permit organizations subject to the tax to generate and distribute profits to shareholders.<sup>116</sup> The ban's supporters might favor such a requirement because the for-profit form could incentivize organizations to generate more profits that could accordingly be subject to the self-directed tax. If the self-directed tax imposed on entities operating in the for-profit form were appealing to enough religious organizations, then fewer such organizations would be operating without paying any income taxes. In turn, the government's financial subsidization of religious political speech would decrease because the number of religious organizations receiving a subsidy from the government would be reduced, thus lowering the risk that subsidized organizations might engage in political campaign activity.<sup>117</sup> The ban's opponents might favor such

<sup>115</sup> *But see* Coverdale, *supra* note 45, at 894 (arguing that keeping tax-exempt organizations outside the tax base is necessary in order to be consistent with Catholic social teaching). Coverdale's view suggests that applying fiscal subsidiarity to tax-exempt religious organizations would be inconsistent with Catholic social teaching because bringing these organizations into the tax base would potentially disincentivize gratuitous giving and would potentially result in further, rather than decreased, centralization. *See id.* The self-directed tax still offers considerable support for both of these foundational principles, however, which potentially justifies its use if it allows for religious organizations to be more directly involved in the political process. Although the self-directed tax removes an economic incentive for charitable giving, it still leaves an incentive in place in the form of allowing contributions to be eligible for self-allocation by the donor. Rather than decreasing truly charitable giving, the self-directed tax increases it. With the self-directed tax, the donors no longer have an economic motivation to give to charity (which by definition would decrease the gratuitousness of such a gift). They still have an incentive, but it is an incentive that allows them to become more directly involved in the political process and to more closely link their gift to the work of the charitable organization that the donor chooses to support, in that the donor can direct its tax allocation in the same manner as that which the charity feels best furthers its charitable purpose. Furthermore, while admittedly providing potentially more revenue to a centralized government, the self-directed tax increases subsidiarity because it transfers the decision-making process regarding how a portion of tax dollars are spent from the federal government to individual tax-exempt organizations and donors. In addition, by involving tax-exempt organizations more directly in the political process, the self-directed tax increases subsidiarity by preventing an abdication of influence from these organizations in the affairs of the state.

<sup>116</sup> Currently, tax-exempt organizations organized for charitable purposes are not permitted to operate as for-profit entities. 26 U.S.C. § 501(c)(3) (2006).

<sup>117</sup> Although the ban's supporters tend to be most concerned with avoiding subsidizing the involvement of religion in the political process, lessening the number of tax-exempt religious organizations generally could be an appealing goal to them because fewer tax-exempt religious organizations necessarily means that the government is providing a smaller potential subsidy towards religion generally. For those supporters of the ban more concerned with

a requirement because the for-profit model could allow them to benefit from certain efficiencies that are more prevalent in the for-profit sector.

Anup Malani and Eric Posner have recently described some of these potential efficiencies that could make the for-profit form attractive to both the organizations and to society.<sup>118</sup> They argue that limiting the tax preferences to non-profit charitable organizations forgoes efficiency that could be achieved by improved management and administrative cost-cutting techniques present in for-profit organizations' inherent desire to increase profits.<sup>119</sup> In addition, providing tax preferences to for-profit entities engaged in charitable activities might encourage firms to produce more goods and services that have a public benefit, as evidenced by the increasing growth and popularity of socially responsible investment funds.<sup>120</sup>

Malani and Posner also offer a proposal that has some similar characteristics to the self-directed tax, and they illustrate how the self-directed tax could directly increase efficiency. They state:

An objection based on the public goods theory might be that the government does not know which public goods the public values. Therefore, it must delegate expenditures to donors because donations give signals about the public's need. But the idea that donors have private information about what the public needs is in some tension with the idea that they are insensitive to administrative costs. Do donors care or do they not? Even if one were to accept this tension, there is a reform that is both better and simpler than the coupling of the nondistribution constraint with tax benefits. That reform would ask people to select, say, on their income tax form, an activ-

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avoiding entanglement between the government and religion, this benefit would not be as substantial because, under the self-directed tax, although the government may not be subsidizing religion, it is still entangled with it on account of the ability of the religious organizations to direct government spending under the self-directed tax.

<sup>118</sup> Malani & Posner, *supra* note 97; see also M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571 (2009) (presenting data demonstrating the efficiency benefits of using for-profit entities to achieve altruistic ends).

<sup>119</sup> Malani & Posner, *supra* note 97, at 2055. However, these efficiency gains could come at a price in that the very thing that motivates many people to engage in charitable work (i.e., the increases in reputation and self-esteem that come from working for a non-profit organization) could be taken away. Brian Galle, *Keeping Charity Charitable*, 88 TEX. L. REV. 1213 (2010) (positing for-profit could reduce the "warm glow" effect essential to recruiting charitable employees, because these employees would have their "glow" reduced because people might perceive them as simply working for a money-making enterprise). In addition, charities might become less entrepreneurial as they become more motivated by protecting profit bases. *Id.* at 1230. Accordingly, they might have to be subject to additional regulations similar to those imposed on the current private sector in order to protect their customers from abusive business practices. *Id.* at 1232; see also James R. Hines, Jr., et al., *The Attack on Nonprofit Status: A Charitable Assessment*, 108 MICH. L. REV. 1179 (2010) (challenging the purported efficiency benefits of for-profit charities); Rob Atkinson, *Keeping Republics Republican*, TEXAS L. REV. See Also 235 (Apr. 13, 2011), <http://www.texasrev.com/seealso/vol/88/responses/atkinson> (arguing that the government is actually superior to both for-profit and non-profit charitable organizations for securing the public good). Given the broad range of charitable organizations, however, surely that sector comprises a big enough tent to allow entrepreneurial charities to attract "warm glow" seekers, while more profit centered charities could still produce the potential efficiency advantages that could be well worth any increased regulation. Galle, *supra* note 119.

<sup>120</sup> Malani & Posner, *supra* note 97, at 2022.

ity—rather than the organization—they would like to fund and a dollar amount they would like to fund that activity. Then the government would accumulate these dollars and choose an organization to receive such dollars. (Individuals would remain free to donate directly to an organization, but they would only receive a tax deduction for donations to activities, not to organizations.) This procedure would elicit private information about values of public goods, without coupling them to ill-chosen organizations.<sup>121</sup>

Malani and Posner's proposed efficiencies from using the government as an intermediary between donors and the activities that they support are based primarily on the fact such a system would allow the government to have better knowledge regarding what the public values.

These efficiencies would be even more pronounced with the self-directed tax. With the self-directed tax, the public preferences will have already been reflected through the democratic process that produces the array of government spending possibilities. The self-directed tax simply makes up any fund misallocations in government spending by allowing society to commit funds directly to areas where they believe the government has not directed sufficient funds. Admittedly, the self-directed tax would provide less flexibility than Malani and Posner's proposal, which would allow taxpayers to select an activity regardless of whether the government is currently spending money on it. However, unlike Malani and Posner's proposal, the self-directed tax does not weaken the connection between the donor and the organization because it does not remove the incentive for the donor to contribute directly to the organization. This strengthened connection is critical if the potential norm-shifting benefits in compliance behavior are to be realized.<sup>122</sup>

The most significant disadvantage of a for-profit system is that the government would have to narrow the scope of what it considers to be charitable activities, because the broad definition under the current system would make it difficult to distinguish charitable for-profit organizations from entities that are engaged in activities solely with the purpose of increasing profits.<sup>123</sup> This restrictive definition of charitable activities would discourage experimental charities that might provide value but might necessarily fall outside of the restrictive definition.<sup>124</sup>

However, the need to impose a more restrictive definition of charity is lessened in the context of the self-directed tax. If tax preferences come in the form of tax exemptions and charitable deductions, there is certainly a need for a more restrictive definition of charitable activities to mitigate the temptations that for-profit entities not engaged in legitimate charitable activity might experience. Conversely, in the context of the self-directed tax, those concerns are

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<sup>121</sup> *Id.* at 2052.

<sup>122</sup> See *supra* notes 108–15 and accompanying text.

<sup>123</sup> David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals*, 62 TAX L. REV. 221, 254 (pointing out, as an example, that “any research and development efforts of for-profit firms might qualify as ‘scientific’”); see also Galle, *supra* note 119, at 1215 (noting for-profit charities could create problems in that they would increase the costs of monitoring charities because they would change how those costs are distributed and would require greater costs in determining whether the particular activities are charitable).

<sup>124</sup> Schizer, *supra* note 121, at 255.

not as pronounced because the tax preference does not actually increase profits. The tax, after all, is still imposed, and the preference simply takes the form of who has authority to allocate the tax dollars.

#### CONCLUSION

The amount of energy spent debating the merits of a provision that is rarely enforced, and would not significantly impact many organizations even if it were enforced, is impressive. It is tempting to chalk this debate up to an interesting discussion among academics with little real world importance. The uncertainty surrounding the ban, however, could have a significant chilling effect on speech by charitable organizations, making achieving a workable solution essential to an appropriate integration of these organizations into American society.<sup>125</sup> If religious organizations are feeling this chilling effect, there is a significant policy conflict in play between the desire to include these organizations more fully in the political process and the desire to avoid giving religious organizations a preference in the political process that could run afoul of principles of church and state separation.

Of course, one approach is to wait until one side of the debate clearly triumphs over the other, once and for all. Another approach, often overlooked, is to craft a proposal that addresses the primary concerns of both sides of the debate. Existing proposals have failed in this regard because they have focused primarily on what the contours of the ban should be from the perspective of banning as much or as little as is constitutionally permissible or required. Often the debate ends up being the constitutionality of regulating, or giving a preference to, religion.<sup>126</sup>

The self-directed tax proposed in this Article is an initial attempt to find this middle ground. Implementation of the self-directed tax allows religious organizations (indeed, all charitable organizations) to be more involved in the political process without receiving a government subsidy. At the same time, because the self-directed tax prevents the government from taking a religious organization's profits and spending them on whatever the government wishes, the proposal lessens some of the concerns that arise when one considers taxing religious organizations. In fact, the self-directed tax has the added benefit of allowing religious organizations to incorporate the tax system into their religious mission and their political advocacy. Thus, the tax has the effect of involving religious organizations more fully in the political process without any of the concerns of providing financial benefits to religious political speech. Admittedly, the self-directed tax is just one possible compromise—there are most certainly other alternatives. If academics and policymakers are willing to consider such compromise proposals, perhaps the opposing sides to this debate can begin speaking with, instead of at, each other. That alone would be a step in the right direction.

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<sup>125</sup> Totten, *supra* note 14, at 302–03.

<sup>126</sup> See, e.g., Samansky, *supra* note 48 (the proposal offered by Samansky); Tobin, *supra* note 11 (offering a corresponding critique to Samansky's proposal).