The Fairness Doctrine as an Alternative to Enforcing the Ban on Political Intervention by Churches

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I. INTRODUCTION

The Internal Revenue Code (hereinafter the "Code") provides tax-exempt status[1] to, inter alia, religious and charitable organizations.[2] Code Section 501(c)(3) specifically proscribes a tax-exempt organization from "participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[3] As a corollary to this rule, the Code allows contributions to Section 501(c)(3) organizations to be tax deductible.[4] The tax deductibility of contributions is said to be the impetus behind the roughly $188 million contributed to tax-exempt organizations by individuals in 2004 alone.[5]

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[1] I.R.C. § 501(a) (2000). ("[A]n organization described in subsection (c) . . . shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.")

[2] I.R.C. § 501(c)(3) (2000) which reads in its entirety:

> 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.

[3] *Id.*

[4] I.R.C. § 170(a)(1) (2000). "There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary."

[5] *See* Jeffrey Thomas, *Americans Gave More To Charities in 2004 than in 2003*, WASH. FILE, Oct. 25, 2005, http://usinfo.state.gov/xarchives/display.html?p=washfile-

The Internal Revenue Service (hereinafter the "Service") has questioned the appropriateness of the Section 501(c)(3) status of several churches which have been accused of intervening in political campaigns.[6] The Service has attributed its increased monitoring of tax-exempt organizations to the relationship between the vast sums of money spent during election cycles and a spike "in the number and variety of allegations" of such organizations intervening in political campaigns.[7] For example, in June 2005 the Service sent All Saints Church in Pasadena, California a letter[8] in which it expressed concerns about the church's tax-exempt status,[9] based on an article published in the Los Angeles Times that reported that a sermon delivered on a Sunday before the 2004 Presidential election had criticized the Bush administration's policies. In this sermon, All Saints Church apparently opined that Jesus would tell both presidential candidates that "war . . . is the most extreme form of terrorism."[10] The Service's letter suggests that such commentary[11] by a church would be a contravention of Section 501(c)(3) requirements.

This raises several questions. Does an anti-war sermon constitute intervention in a political campaign? Does an anti-war sermon in a church violate Section 501(c)(3) and its prohibition against intervention in a political campaign? Does the First Amendment protect anti-war speech during wartime? Does the Service have the power to revoke the tax-exempt status of an organization whose sermon runs contrary to the federal administration's beliefs? Indeed, revenue rulings allow the Service to revoke the tax-exempt status of organizations whose activities are contrary to "established public policy," but this raises further questions about what exactly is "public policy" and who and what defines it.

Part I of this Note explores the nature of the preferential treatment that churches enjoy within the Code, the problems associated with defining what a church is, the policy reasons that justify bestowing a tax-exempt

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english&y=2005&m=October&x=200510241614581CJsamohT0.7909662&t=xarchives/xarchitem.html.

[6] The IRS is investigating 20 churches for engaging in activities that are prohibited by Section 501(c)(3). *See* Editorial, *Taxing an Unfriendly Church*, N.Y. TIMES, Nov. 11, 2005, at A22. *See also 2004 Political Activity Compliance Initiative (PACI) Summary of Results* (reporting a finding of political intervention in 37 out of the 63 churches examined.) 2006 TAX NOTES 38-111 (2006)

[7] The Federal Election Commission reported that spending during the election cycle of 2003-2004 ($10 billion) was 2.5 times that of the 1999-2000 election cycle ($4 billion). *See Political Activities Compliance Initiative, Executive Summary,* 2006 TAX NOTES 38-9 (2006).

[8] *See* Press Release, All Saints Church, (Nov. 4, 2005) (on file with author).

[9] *Id.*

[10] Rev. Dr. George Regas, If Jeasus Debated Senator Kerry and President Bush (Oct. 31, 2004), (transcript available at http://www.allsaints-pas.org/archives/sermons/(10-31-04) If Jesus Debated.pdf).

[11] The sermon delivered on October 31, 2004 was entitled "If Jesus Debated Senator Kerry and President Bush." Id.

status on religious organizations and tax deductibility for contributions to religious organizations, and the parameters within which churches must operate in order to maintain their tax-exempt status. Part II discusses the regulatory measures that are available to the Service to permit it to police tax-exempt organizations and the penalties that the Service may levy upon those tax-exempt organizations that violate the prohibitions of Section 501(c)(3). Part III discusses protections afforded to and limitation on free speech during times of war, and suggests that the public policy doctrine is inadequate in protecting churches from attempts by the government to question their activities. Finally, Part IV proposes an approach that would enable the Service to police churches and their compliance with Section 501(c)(3) requirements, without requiring the Service to consider whether public policy militates against a church's activities. This note offers the Fairness Doctrine as the tool to achieve the underlying purpose of granting churches tax-exempt status in the first place.[12]

II. STATUS OF A CHURCH WITHIN THE CONTEXT OF THE CODE.

Although the Code grants tax-exempt status to various religious and charitable organizations,[13] an organization that has been deemed to be a "church" maintains a unique place in the regulatory scheme of the Code. Unlike other organizations, which must request recognition of tax-exempt status from the Service,[14] churches are presumptively tax-exempt,[15] presumably because churches perform many functions in the public interest.[16] This, of course, raises an obvious question: what is a church? To answer this question, one must turn to the Code itself.

A. What Is a Church?

The sole guidance in the Code for defining a "church" is found in the text of Section 7611, which defines a church as "any organization claiming

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[12] While there may be numerous methods of implementing the proposal, the procedures for its implementation are beyond the scope of this paper.

[13] I.R.C. §§ 501(a) and 501(c)(3) (2000).

[14] I.R.C. § 508(a) (2000) :

> Except as provided in subsection (c), an organization organized after October 9, 1969, shall not be treated as an organization described in section 501(c)(3) – (1) unless it has given notice to the Secretary, in such manner as the Secretary may by regulations prescribe, that it is applying for recognition of such status, or (2) for any period before the giving of such notice, if such notice is given after the time prescribed by the Secretary by regulations for giving notice under this subsection.

[15] I.R.C. § 508(c)(1) (2000). ("Mandatory exceptions – Subsections (a) and (b) shall not apply to . . . churches, their integrated auxiliaries, and conventions or associations of churches.")

[16] *See infra* Part IIB.

to be a church."[17] Thus, the Code presumes that a church is what it claims to be.[18] A more precise definition may be constitutionally unattainable. Because a narrow definition of "church" necessarily requires defining "religion," any further statutory or judicial refinement of the definition of "church" will surely raise First Amendment concerns.[19] In *Thomas v. Review Bd. of Indiana Employment Sec. Division*,[20] the United States Supreme Court admitted its difficulty in defining "religious belief or practice" and conceded that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others" to be constitutionally protected.[21] Thus, the scope of the term "church" is broadly construed for First Amendment purposes.

Further complicating this definitional problem is that many churches conduct activities that would entitle it to tax-exempt status even if it were a religious organization, such as promoting education and helping the poor and sick. Accordingly, tax-exempt status has been conferred upon "a hospital, a seminary, a Catholic university and a liberal arts college"[22] and even two HMOs.[23]

Thus the definition of a church is important, not because designation as a church allows contributions to it to be tax deductible under Code Section 170(b), but rather because churches are specifically exempted from having to apply for special recognition to enjoy tax-exempt privilege.[24] Contributions to a 501(c)(3) organization are tax-deductible even if the organization is not a church, so long as the organization has applied for

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[17] "I.R.C. § 7611(h)(1)(A) (2000). "[T]he tax code lacks a precise definition of "church" for general purposes." Christine Roemhildt Moore, *Religious Tax Exemption and the "Charitable Scrutiny" Test,* 15 REGENT U. L. REV. 295, 307 (2003). Additionally, neither Code Section 501 not 170 define a "church." *See* I.R.C. §§170, 501.

[18] *See* I.R.C. § 7611(h)(1)(A) (2002).

[19] *See* Internal Revenue Manual 7.26.2.2 (Mar. 30 1999).

[20] 450 U.S. 707 (1981).

[21] Struggling with the concept of religion the Court explains that:

> Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion. The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests. However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

Id. at 713 –14. (footnote omitted, citations omitted).

[22] Jamie Darin Prenkert, *Liberty, Diversity, Academic Freedom, and Survival: Preferential Hiring Among Religiously-Affiliated Institutions Of Higher Education*, 22 HOFSTRA LAB. & EMP. L.J. 1, 36-37 (2004).

[23] 2005 TAX NOTES 218-7 (Nov. 14, 2005).

[24] I.R.C. § 508(c)(1) (2000).

recognition of tax-exempt status.[25] Consequently, contributions to an organization purporting to be a church may still be tax deductible even if the organization is not recognized as a church, but deemed to be an organization performing qualifying charitable or educational functions. The definitional problems will surely arise when the Service questions whether an organization is a church at all, thereby requiring the organization to obtain special recognition for contributions to it to qualify for tax deduction.

As such, the Service has promulgated administrative guidelines to help define the term "church." The administrative guidelines offer a non-exhaustive list of 14 characteristics that the Service may weigh in "consider[ing] all the facts and circumstances in determining whether an organization is a church."[26] The decisional law relating to the tax-exempt status of churches has used the administrative guidelines to uphold the Service's decision to refuse or revoke the tax-exempt status of religious organizations.[27] Broadly speaking, in trying to determine whether an organization is a church, the Courts have focused on whether the organization is subject to significant financial control by another qualified church and whether the organization serves to exercise the mission of the sponsoring church.[28] The closer the relationship between an organization and a qualified church, the more likely it is that the organization will be

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[25] *See* I.R.C. § 508(a) (2000). This section states that "[n]ew organizations must notify Secretary that they are applying for recognition of section 501(c)(3) status." *Id*.

[26] The Internal Revenue Manual offers the following guidance:

> (4) The Service considers all the facts and circumstances in determining whether an organization is a church, including whether the organization has the following characteristics:
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> (a.) a distinct legal existence
> (b.) a recognized creed and form of worship
> (c.) a definite and distinct ecclesiastical government
> (d.) a formal code of doctrine and discipline
> (e.) a distinct religious history
> (f.) a membership not associated with any other church or denomination
> (g.) a complete organization of ordained ministers ministering to their congregations
> (h.) ordained ministers selected after completing prescribed courses of study
> (i.) a literature of its own
> (j.) established places of worship
> (k.) regular congregations
> (l.) regular religious services
> (m.) Sunday schools for religious instruction of the young
> (n.) schools for the preparation of its ministers

Id.

[27] *See* Internal Revenue Manual 7.26.2.2.5 (Mar. 30, 1999).

[28] Prenkert, *supra* note 22, at 14.

granted tax-exempt status. However, some organizations that are loosely affiliated with churches are unlikely to qualify for the tax-exemption.[29]

If defining a church is fraught with so much difficulty, why grant churches automatic tax-exempt status? The answer lies in the public policy doctrine.

B. The Public Policy Doctrine: In God We Trust

The relationship between churches and American society is strikingly significant: the vast majority of Americans pray once a week and "over forty percent attend church weekly."[30] The importance of such strong ties to religion is manifested by the impact of charitable contributions on religious organizations. In 2004 contributions to U.S. charities totaled $248.5 billion,[31] an amount which exceeded the estimated 2006 Gross Domestic Product (GDP) of Venezuela ($174.6 billion), Denmark ($98.5 billion), Norway ($207.3 billion), Greece ($207.3 billion), and Malaysia ($308.8 billion).[32] Contributions from individuals accounted for over 75 percent ($188 billion) of the total,[33] an estimated half of which went to religious organizations.[34] Some argue that Americans, rather than attribute their charitable contributions to an indulgent tax code, cite faith-based reasons and general skepticism of the government's ability to provide the oft-needed services that help the poor, the sick, and the needy as the reasons for generosity.[35] As such, giving to religious organizations is sometimes thought to be quite insensitive to tax incentives.[36] If that is so, why allow tax deductions to churches in the first place? Perhaps the "public policy" reason for allowing tax deductions for contributions to churches encompasses not only the important public service functions churches serve but also, given American's relationship with churches, religion itself.

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[29] *Id*. at 16.

[30] Michele Estrin Gilman, *"Charitable Choice" and the Accountability Challenge: Reconciling The Need for Regulation with the First Amendment Religion Clauses,* 55 VAND. L. REV. 799, 812 (2002).

[31] Thomas, *supra* note 5.

[32] *See* C.I.A. World Fact Book, https://www.cia.gov/cia/publications/factbook/index.html (last visited May 8, 2007).

[33] *Id.*

[34] *Id.*

[35] A tax incentive, such as tax deductibility of charitable contributions, is thought to account for only 15% of all American charitable contributions. *Id.; See* Jeffrey Thomas, *Data Show Americans Give to Charity, Volunteer*, WASH. FILE, Feb. 18, 2005, http://usinfo.state.gov/scv/Archive/2005/May/10-36789.html.

[36] *See* Pamela Greene & Robert McClelland, *Taxes and Charitable Giving*, 54 NAT'L TAX J. 433, 444 (2001). The authors conclude that tax incentives have a minimal impact on contributions to religious organizations. *But see* Miriam Galston, *Civic Renewal and The Regulation of Nonprofits*, 13 CORNELL J.L. & PUB. POL'Y 289, 376 n.367 (2004) (citing studies that find a correlation between tax incentives and charitable contributions.)

The first application of the public policy doctrine to a tax-exempt organization was in *Green v. Connally*[37] where the district court barred the Service from granting a private school tax-exempt status because of the school's racially discriminatory policies. In *Green*, the court found a "general and well-established principle that the Congressional intent in providing tax . . . exemptions is not construed to be applicable to activities that are . . . contrary to public policy."[38] The *Green* court's opinion was couched in the common law of charity rather than on any constitutional basis.[39] After the U.S. Supreme Court summarily affirmed the *Green* decision, the Service issued a Revenue Ruling consistent with the court's reasoning in *Green*.[40]

Subsequently, the public policy doctrine's application to help determine the tax-exempt status of organization was further legitimized by the Supreme Court in *Bob Jones Univ. v. U.S.*[41] In that case, the Service successfully challenged the tax-exempt status of Bob Jones University because of the university's policy barring miscegenation. The *Bob Jones* Court construed Sections 501(c)(3) and 170 as rooted in common law charitable concepts and, because charitable trusts could not be created for illegal purposes, found that tax-exempt organizations must serve a public purpose.[42] The Court specifically found the university's anti-miscegenation policy was contrary to public policy and stressed that for an organization to be granted tax-exempt status, its policies and activities could not violate public policy.[43] However, even though the Court in its reasoning refers to "the common community conscience,"[44]

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[37] 330 F.Supp. 1150 (D.C. Cir. 1971), *aff'd sub nom*. Coit v. Green 404 U.S. 997 (1971) (summary affirmance).

[38] *Id.* at 1161.

[39] *Id.* at 1157.

[40] Rev. Rul. 71-447, 1971-2 C.B. 230 ("Both the courts and the Internal Revenue Service have long recognized that the statutory requirement of being 'organized and operated exclusively for religious, charitable, . . . or educational purposes' was intended to express the basic common law concept.").

[41] 461 U.S. 574 (1983).

[42] Chief Justice Burger said,

> [t]he form of § 170 simply makes plain what common sense and history tell us: in enacting both § 170 and § 501(c)(3), Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind.

Id. at 591-92.

[43] "History buttresses logic to make clear that, to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest." *Id.* at 92.

[44] "The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred." *Id.* at 592.

a "fundamental public policy,"[45] and a "firm national policy,"[46] it offers no guidance on what those terms embody or even what might constitute "established public policy."

Thus, despite being "ill-defined . . . and lack[ing] an adequate basis in the common law that purportedly justifies it,"[47] the public policy doctrine has become firmly entrenched in our jurisprudence. However, it appears to be an unworkable doctrine in the context of analyzing the tax-exemption of organizations based on public policy for two reasons.[48] First, the doctrine assumes that "public policy" can be recognized absent any direction from the Court or Congress.[49] It is at best unclear wherefrom the "public policy" springs. Does public policy stem from federal legislation such as the Civil Rights Act of 1964[50] or the Voting Rights Acts of 1965[51] or does it emanate from within the Constitution? It is noteworthy that in finding racial segregation contrary to public policy, the Supreme Court in *Bob Jones* relied on its opinion in *Brown v. Board of Education*.[52] In *Brown*, the Court essentially found "racial discrimination in schools unconstitutional [and] not merely void as against public policy."[53] Therefore, arguably *Bob Jones* points towards the Constitution as the source of public policy.

Second, the doctrine assumes it is possible to identify which specific public policy interest is "established" and so ought to be pursued.[54] A public policy's status as "established" seems to be a function of its temporal endurance and the degree to which such policy is applied consistently by the judicial, legislative and executive branches.[55] But surely there has been a shift from a policy of racial discrimination[56] to one outlawing segregation in schools.[57] If public policy can switch to one in

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[45] *Id. (*". . . [A] declaration that a given institution is not "charitable" should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy.")

[46] *Id.* at 593. ("Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.")

[47] Johnny Rex Buckles, *Reforming the Public Policy Doctrine*, 53 U. KAN. L. REV. 397, 399 (2005).

[48] *Id.* at 408.

[49] *Id.*.

[50] 42 U.S.C. §§ 2000c, 2000c-6, 2000d. (2000).

[51] 42 U.S.C. § 1973 (2000).

[52] 347 U.S. 483 (1954).

[53] Buckles, *supra* note 47, at 419.

[54] *Id.*.

[55] *Id*. at 408.

[56] *See, e.g.,* The Civil Rights Cases, 109 US 24 (1883) (finding that Jim Crow laws were constitutional and that the government could not outlaw private discrimination under the Fourteenth Amendment). *See also* Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (finding that that Jim Crow laws were constitutional as long as they allowed for "separate but equal" facilities).

[57] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

diametric opposition over time, can the Service independently identify, at any given moment in time, the public policy that has been most consistently applied for the longest period of time? Even if the Service is capable of making such determinations, the taxpayer or the tax-exempt organization nevertheless bears the burden of accurately guessing which public policy the Service wishes to adopt, because "established" public policy is susceptible to being changed.

Perhaps most important is the issue whether the Service and the courts should look to the Executive branch for guidance. The question then is: does the President, as Chief Executive, have the power to "establish" public policy by decree, or does that responsibility lie with the citizens of the country by strength of majority vote through the legislative branch of government? Both options subject public policy to the vagaries of political climes and the vicissitudes of people's fortunes such that public policy could then hardly be called established. Without a workable model for advancing "public policy," application of the nebulous term may be arbitrary and capricious.

In an attempt at guidance, IRS Publication 1828, "Tax Guide For Churches And Religious Organizations, Benefits And Responsibilities Under The Federal Tax Law" ("Tax Guide") advises that churches may engage in "issues of public policy"[58] without violating the prohibitions of section 501(c)(3). Publication 1828 offers examples of permissible activities that would not be deemed as political activity: all relate to the church's *educational* activities.[59] These "educational" activities however, must be a "full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion."[60] The Service calls the Tax Guide a "living document"[61] and actually solicits comments to "further develop[ ]"[62] the guide. Presumably, the Service is willing to field questions asking it to elaborate on its definition of "fundamental public policy."[63] Thus, the question of what constitutes the "fundamental public policy" issues that churches may speak on and

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[58] I.R.S. PUB. 1828, (Rev. 09-2006).

[59] *Id.* The publication states:

> Churches and religious organizations may, however, involve themselves in issues of public policy without the activity being considered as lobbying. For example, churches may conduct educational meetings, prepare and distribute educational materials, or otherwise consider public policy issues in an educational manner without jeopardizing their tax-exempt status.

[60] Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)(b) (2002). *See* Big Mama Rag Inc., v. United States, 494 F. Supp. 473, 479 (D.C. 1979). (The regulation was cited by the D.C. Circuit in finding that a feminist newspaper did not qualify for tax-exempt status.).

[61] Brown v. Board of Educ., 347 U.S. 483 (1954).

[62] *Id.*

[63] *Id.*

whether such "fundamental public policy" should be set by Congress or the Executive branch remains unresolved.

C. *Restrictions on Churches: The Taxman Giveth and the Taxman Taketh Away.*[64]

A church's acceptance of preferential tax treatment[65] is not without consequence. The Code expressly prohibits a church from "participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[66] This prohibition is "absolute . . . with no requirement that the activity be substantial."[67] The prohibited activities "include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to a candidate."[68] Thus, by accepting preferential tax status, churches forfeit their right to engage in political activities.

The prohibitions of section 501(c)(3) have withstood constitutional challenges. The Supreme Court, in *Regan v. Taxation With Representation of Washington*[69] found that "[s]ection 501(c)(3) does not violate the First Amendment . . . [but merely reflects Congress' choice] not to subsidize [political intervention with] public funds."[70] The Code's prohibition of intervention in political campaigns does not preclude a church from addressing controversial issues.[71] Churches "have always been free to speak out on moral and ethical issues . . . . [Churches may also] take stands on political issues such as abortion, gay rights gun control, and

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[64] "Naked came I out of my mother's womb, and naked shall I return thither: the Lord gave, and the Lord hath taken away; blessed be the name of the Lord." *Job* 1:21 (King James).

[65] *Supra* Part 1A.

[66] I.R.C. § 501(c)(3) (2002).

[67] Internal Revenue Manual 7.25.3.18 (Feb. 23, 1999).

[68] Internal Revenue Manual 7.25.3.18.1 (Feb. 23, 1999); Treas. Reg. § 1.501(c)(3)–1(3)(iii) (2002).

[69] 461 U.S. 540 (1983). *See* I.R.C. § 508(a) (2002) (stating that "[n]ew organizations must notify Secretary that they are applying for recognition of section 501(c)(3) status.").

[70] 461 U.S. at 541. *See also* Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR), 126 S. Ct. 1297 (2006). (holding that Congress may condition federal financial assistance on whether law schools grant military recruiters the same access to campuses and students that the laws schools grant to non-military recruiters.

[71] *See* I.R.C. § 1.501(c)(3)-2 (2002), which explains:

> [T]he fact that [a charitable] organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under section 501(c)(3) so long as it is not an action organization of any one of the types described in paragraph (c)(3) of this section.

health care."[72] Of course, none of a church's activities may violate public policy.[73]

Section 501(c)(3) proscribes participation or intervention in "any political campaign."[74] But section 501(c)(3) and the regulations thereunder do not define "campaign." Legal scholars have offered[75] two possible definitions of "campaign"—one temporal and other functional. Under the temporal construction, "a campaign is a period defined in relation to the date of an election."[76] A church's conduct on behalf of or against a political candidate would not be construed as participation or intervention in a campaign if the conduct was too far removed from the date of an election in which the candidate participates. Alternately, conduct of churches within the defined campaign period would merit higher scrutiny. In one instance, the Service concluded that the conduct of a church within eighteen months of an election did not violate the sanctity of 501(c)(3).[77] However, the Service found that the same church violated the prohibition against political intervention when the church referred to a presidential candidate within five months of a presidential primary.[78]

On the other hand, the Service "reluctantly"[79] concluded that a charity which ran "ads [that] could be viewed as focusing attention on issues of war and peace during the 1984 election campaign"[80] did not intervene in the presidential election, despite the proximity of the ads to the October 1984 debates between Ronald Reagan and Walter Mondale and despite the Service's stated concern that "individuals listening to the ads would generally understand them to support or oppose a candidate in an election campaign,"[81] primarily because the "ads could be viewed as nonpartisan."[82]

The other, functional interpretation focuses on the activity of the

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[72] 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, 703 (2004).

[73] *See* Church of Scientology of California v. Commissioner, 83 T.C. 381 (1984); Rev. Rul. 75-231, 1975-1 C.B. 158 (Situation 3).

[74] I.R.C. § 501(c)(3) (2002).

[75] *See* FRANCES R. HILL & DOUGLAS M. MANCINO, TAX'N OF EXEMPTS (RIA), TEO WGL § 6.04(4) (2007).

[76] *Id.*

[77] *See* I.R.S. Tech. Adv. Mem. 1999-07-021 (May 20, 1998); TEO WGL § 6.04(4) n.273.

[78] *See* I.R.S. Tech. Adv. Mem. 89–36-002 (May 24, 1989); *See also* Wendell R. Bird, *The RS Offers Guidance On 'Election Year Issues' For Exempt Organizations*, 15 TAX'N EXEMPTS 269, 279 (2004).

[79] *See* I.R.S. Tech. Adv. Mem. 89-36-002 (May 24, 1989).

[80] *Id.*; *see also* Shawn A. Voyles, *Choosing Between Tax-Exempt Status And Freedom Of Religion: The Dilemma Facing Politically-Active Churches*, 9 REGENT U. L. REV. 219, 248-49 (1997).

[81] I.R.S. Tech. Adv. Mem. 89-36-002 (May 24, 1989).

[82] *Id.*

person seeking elective office rather than on the proximity of the activity to an election period.[83] Under this interpretation, the duration of a campaign is proportionally related to the activities of the candidate running for office.[84] As such, the candidate's activities well in advance of an election cycle may be reviewed to determine if 501(c)(3) violations have occurred. Thus, the functional interpretation of campaign is broader than the temporal interpretation because conduct not deemed intervention under the temporal interpretation could actually be a prohibited under the functional interpretation.

III. ENFORCING THE BAN ON POLITICAL INTERVENTION.

A. The Church Audit Procedure Act.[85]

While organizations seeking tax-exempt status must request such recognition from the Service,[86] churches are presumptively tax-exempt.[87] IRS Publication No. 78 periodically lists the organizations that have sought and obtained tax-exempt status under Section 501(c)(3),[88] and states that "[c]hurches . . . may be treated as tax-exempt without filing an application"[89] for tax-exemption. Another indicator that the Code treats churches differently from all other 501(c)(3) organizations is the Code's special provisions setting forth "[r]estrictions on church tax inquiries and examinations"[90] under the Church Audit Procedure Act ("CAPA").[91]

CAPA also confers a unique favored status to churches. CAPA provides that the Service may initiate an inquiry into a church's status only if "an appropriate high-level Treasury official reasonably believes"[92] that a church has violated section 501. The requirement that a senior Treasury official review allegations of a church's violation of section 501(c)(3) acts as a procedural safeguard against meritless and harassing inquiries and provides a greater measure of accountability for church tax inquires. CAPA defines a "church tax inquiry" rather self-referentially as "any inquiry to a church (other than an examination) to serve as a basis for determining whether a church (A) is exempt from tax under section 501(a) by reason of its status as a church, or (B) is carrying on an unrelated trade

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[83] HILL & MANCINO, *supra* note 75.
[84] *Id.*
[85] I.R.C. § 7611 (2000).
[86] I.R.C. §508(a) (2000).
[87] I.R.C. §508(c)(1) (2000).
[88] *See* I.R.S. PUB. 78, http://www.irs.gov/pub/irs-utl/eopub78.zip.
[89] The Service's explanation of Pub. 78 is available at http://www.irs.gov/charities/charitable/article/0,,id=150282,00.html.
[90] I.R.C. § 7611 (2000).
[91] Codified at I.R.C. § 7611 (2000).
[92] I.R.C. § 7611(a) (2000).

or business (within the meaning of section 513) or otherwise engaged in activities which may be subject to taxation."[93]

The church tax inquiry is initiated by a letter from the Service that advises the church of the Service's concerns about the church's tax-exempt status and is accompanied by a questionnaire asking the church to certify its compliance with section 501.[94] In the event that the Service is dissatisfied with the church's response, or lack thereof, the Service may examine the records of the church.[95] However, this examination may not commence until the Service has performed a tax inquiry and attempted to "determine whether [the] organization claiming to be a church is a church for any period."[96]

Thus, it is only after allowing a church to explain its conduct and after finding indicia of prohibited conduct during the examination of the church's books and records that the Service can revoke a church's tax-exempt status. No other 501(c)(3) organization receives such benevolent treatment.

B. Revocation of Tax-exempt Status.

On occasion the Service has revoked the tax-exempt status of churches, and such revocation has, without exception, withstood judicial scrutiny.[97] In *Branch Ministries v. Rossotti*,[98] the Service revoked the tax-exempt status of a church, after it found that that the church had placed two full-page ads in two national newspapers—USA Today and the Washington Times—just four days prior to a presidential election. The ads, exhorting Christians to vote against then Governor Clinton because of his positions on abortion, homosexuality, and birth-control, violated the restrictions against political intervention in political campaigns.[99] The Circuit Court for the District of Columbia upheld the Service's revocation based on the church's political intervention.[100]

But a church's violation of the proscription against political intervention may not always be as obvious as in *Branch Ministries*.

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[93] I.R.C. § 7611(h)(2) (2000).

[94] The Code requires that notice of "church tax inquiry" be served upon the church if there is "reasonable belief" that the church has violated the Code and prescribes the "contents of the inquiry notice." *See* Code § 7611(a) (2000).

[95] I.R.C. §§ 7611(b)(2), (3) (2000).

[96] I.R.C. § 7611(b)(1)(B) (2000).

[97] "Unfortunately, the Supreme Court has repeatedly rejected this argument." Christine Roemhildt Moore, *Religious Tax Exemption and the "Charitable Scrutiny" Test*, 15 REGENT U. L. REV. 295, 309 (2003).

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

[99] *Id.* at 140.

[100] *Id.* at 139.

The church in *Christian Echoes National Ministry, Inc. v. U.S.*[101] had published[102] several articles that criticized political candidates that it deemed to be too liberal, and favored the election of conservative candidates. The circuit court found that articles were published as an "attempt to influence legislation by appeals to the public to react to certain issues"[103] even though no specific legislation was referenced in the articles. This rationale was bolstered by the U.S. Supreme Court's observation in *Buckley v. Valeo*[104] that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application."[105]

Challenges to the Service's power to revoke a church's tax-exempt status have been brought on First Amendment[106] grounds[107] and Chief Justice Marshall's reminder that "[a]n unlimited power to tax involves, necessarily, a power to destroy"[108] has been the oft-cited proposition in that regard.[109] The U.S. Supreme Court has consistently upheld the Service's statutory power to revoke the status that the Service originally bestowed upon an organization and has rejected those First Amendment challenges.[110] The Supreme Court specifically found that the Code "create[s] no denominational preference,"[111] and has accordingly rejected arguments that the grant of tax-exempt status violates the Establishment Clause of the First Amendment. Given the Court's firm belief in the constitutionality of the Service's statutory authority, it is extremely unlikely that First Amendment challenges brought by All Saint's Church,

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[101] Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972).

[102] The church organization published "a monthly anti-Communist magazine, Christian Crusade, a weekly 'intelligence report', Weekly Crusader, and a newspaper column, 'For and Against.' [or] . . . It also distribute[d] pamphlets, leaflets and broadcast reprints on aspects of anti-Communist activity." *Id.* at 852.

[103] *Id.* at 855.

[104] Buckley v. Valeo, 424 U.S. 1 (1976).

[105] In *Buckley*, the Court considered the constitutionality of a statute limiting spending on campaigns for federal office. The Court found that even though "candidates campaign on the basis of their positions on various public issues, [and] campaigns themselves generate issues of public interest" the relevant provision that restricted "any expenditure . . . relative to a clearly identified candidate" must be construed as "apply[ing] only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 42-43.

[106] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

[107] Moore, s*upra* note 17, at 308-09.

[108] McCulloch v. Maryland, 17 U.S. 316, 327 (1819).

[109] Moore, s*upra* note 17, at 309.

[110] *Id.*

[111] In Hernandez v. Commissioner, 490 U.S. 680, 688 (1989) *reh'g denied* 492 U.S. 933 (1989), the court found that Section 170 did not create a preference for one religion over another and therefore did not violate the Establishment Clause.

and churches in similar situations, will fare any better.[112] This is particularly true now that the nation is fighting a war on two fronts overseas, given the nation's spotty[113] record with the First Amendment during times of war.

IV. THE FIRST AMENDMENT DURING TIMES OF WAR —*INTER ARMA SILENT LEGES*[114]

Chief Justice William Rehnquist's admonishment that "in time of war the balance between freedom and order must shift in the favor of order"[115] is not without precedent. America has had a long history of restricting constitutional protection under certain circumstances. The Alien and Sedition Acts,[116] President Lincoln's suspension of the writ of habeas corpus,[117] the Espionage Act,[118] and the Smith Act[119] are the most

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[112] *Supra* Part IIC.

[113] Congressman Abraham Lincoln made disparaging remarks about President Polk and criticized the War against Mexico "characteriz[ing] [then President Polk's] justification for military action as dishonest" in a series of questions known as spot resolutions. (Lincoln demanded Polk identify the exact "spot" blood was spilt, because there was some concern that war was not on American soil). The press all but labeled Lincoln a traitor and referred to him as "spotty Lincoln." GEOFFREY R. STONE, PERILOUS TIMES, FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERROR 81-82 (2004).

[114] "Amid the arms of war the laws are silent." BLACK'S LAW DICTIONARY 1725 (8th ed. 2004).

[115] WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 222 (Alfred A. Knopf, ed., 1998).

[116] The "Alien and Sedition Acts" as they are collectively known comprised of four acts:

1. The Alien Enemies Act of 1798 authorized the president to imprison or deport aliens from countries at war with the United States. 1 Stat. 577-78, 5th Cong., 2d Sess. This act expired in 2 years.
2. The Alien Friends Act of 1798 authorized the president to deport any alien considered dangerous, in both war and peacetime. 1 Stat. 570-71 , 5th Cong., 2d Sess.
3. The Naturalization Act of 1795 increased the durational requirement for aliens to become citizens. 1 Stat. 414-15, 3rd Cong., 2d Sess.
4. The Sedition Act of 1798 criminalized among other things, anti-government speech during time of war. "An Act in addition to the Act, entitled 'An act for the punishment of certain crimes against the United States'", 1 Stat. 596-97, 5th Cong., 2d Sess.

[117] STONE, *supra* note 113, at 91-92. (Even though the writ of habeas corpus does not constitute "speech," President Lincoln's motivation for the suspension of the writ was to stifle dissent because he suspended the writ of habeas corpus for "all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice affording aid and comfort to the Rebels.")

[118] The Espionage Act of 1917 criminalized undermining the government during wartime. A 1918 amendment of the Act outlawed anti-war dissent. In 1919 a unanimous Supreme Court upheld the laws used to convict a socialist who distributed a flyer opposing the draft and exhorting people to assert their rights against conscription. Schenck v. United States, 249 U.S. 47 (1919).

[119] The Smith Act of 1940 remains on the books at 18 U.S.C. § 2385 and prohibits "Advocating Overthrow of Government." It provides criminal penalties to anyone who "knowingly or willfully advocates, abets, advises, or teaches the duty, necessity,

conspicuous examples. A poignant example of our abandonment of First Amendment liberty in its absolute sense is the convocation of the House Un-American Activities Committee[120] and the subsequent hunt within the government for communists who sought to "destroy the American way of life"[121] which culminated in President Truman's endorsement of the Employees Loyalty Program.[122] The Employees Loyalty Program which labeled "disloyal" any "[m]embership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination or persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive,"[123] served to underscore America's history of abandoning its First Amendment principles during times of war.[124]

But curtailment of speech for public safety reasons has long been recognized as necessary. Even before Justice Holmes noted, in *Schenck v. U.S.*,[125] the seminal case on free speech, that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic,"[126] Herbert Spencer[127] observed that "[w]ere it put to the vote, probably not a few would say ay to the proposition, that the public safety requires some restriction to be placed on the freedom of speech."[128] In fact, Spencer recognized that "[m]any would like to make it a penal offence to preach discontent to the people; and there are not wanting others who would hang up a few demagogues by way of scarecrows."[129] By defining treason as including a citizen's "adher[ing] to [the United States'] enemies, giving them aid and comfort,"

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desirability, or propriety of overthrowing or destroying the government." 18 U.S.C. § 2385 (2000).

[120] STONE, *supra* note 113, at 325.

[121] *Id.*

[122] The Employees Loyalty Program was promulgated by an executive order titled "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government." Exec. Order No. 9835, 12 Fed. Reg. 1935 (Mar. 25, 1947).

[123] *Id.* at 1938.

[124] The period in America after the Second World War and the mid-1950s gave rise to widespread fear of communism particularly after upon Soviet Union's acquisition of the atomic bomb and after the transformation of China, a former American ally, into a communist nation is commonly and pejoratively known as the Red Scare. This period gave rise to the Cold War with Soviet Bloc countries.

[125] Schenck v. United States, 249 U.S. 47 (1919).

[126] *Id.* at 52.

[127] English philosopher and political theorist Herbert Spencer (1820-1903).

[128] HERBERT SPENCER, SOCIAL STATICS: OR, THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED, Chapter XIV. The Right of Property In Ideas., § 2. New York, 1851 (1872), http://galenet.galegroup.com/servlet/MOML?af=RN&ae=F101130514&srchtp=a&ste=14 (last visited Feb. 13, 2006).

[129] *Id.*

18 U.S.C.A. § 2381[130] does precisely what Spencer envisioned in 1851.[131] In *Kawakita v. United States*,[132] the U.S. Supreme Court found that "adhering" under the treason statute simply requires intent to help the enemy.[133] Consequently, it reasoned that an "intent to interfere with" military objectives or an intent to "cause[ ] or attempt[ ] to cause . . . disloyalty, mutiny or refusal of duty . . . or [an intent to] obstruct the recruit[ment] or enlistment service" during this time of war is prohibited.[134]

Speech that helps an antiwar candidate win an election "may violate treason law—which prohibits intentionally aiding the enemy in time of war—if the speaker thinks the enemy deserves to win the war."[135] Thus, the sermon at All Saints Church, its stance admittedly anti-war, could well then be treason and the Service would be justified in revoking the church's tax-exempt status for the "fundamental public policy" reason of ensuring national security. Indeed, had the Service chosen to do so, it would have been in keeping with nation's tradition of using national security concerns to abnegate otherwise sacrosanct First Amendment rights.[136] Even Chief Justice Rehnquist advocated curbing First Amendment rights when national security is at issue when he wrote, "It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime."[137] Years after World War II and after

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[130] "Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason." 18 U.S.C. § 2381 (2000).

[131] SPENCER, *supra* note 128.

[132] Kawakita v. United States, 343 U.S. 717 (1952).

[133] *Id.* at 742-44.

[134] 18 U.S.C.A. § 2388(a) (2000) reads:

> Activities affecting armed forces during war
>
> (a) Whoever, when the United States is at war, willfully makes or conveys false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies; or
>
> Whoever, when the United States is at war, willfully causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or willfully obstructs the recruiting or enlistment service of the United States, to the injury of the service or the United States, or attempts to do so--
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.

[135] Eugene Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1280 (2005).

[136] John W. Whitehead & Steven H. Aden, *Forfeiting 'Enduring Freedom' for 'Homeland Security': A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1085 (2002).

[137] REHNQUIST, *supra* note 115, at 224-225.

Korematsu v. U.S.,[138] then Attorney General Francis Biddle[139] declared that "the Constitution has never greatly bothered any wartime President."[140] In this context, the undeclared "War on Terror" represents a new paradigm for the United States, primarily because the war has no foreseeable end. It is quite possible that First Amendment freedoms circumscribed in furtherance of nebulous "public policy," may never be regained. Freedom, then would be "just another word for nothing left to lose"[141] but then again, "if you ain't got nothing, you've got nothing to lose."[142]

V. RECOMMENDATIONS

But why should the Service depend on the whimsy of "public policy" to further the mandate of Section 501(c)(3)? A better solution would be to allow churches that wish to fulminate against an issue in public debate to do so, but require them to grant equal time to organizations espousing an opposing viewpoint. Such a policy is not unprecedented and would in fact pass constitutional muster.[143] In *Red Lion Broadcasting v. F.C.C.*,[144] the U.S. Supreme Court upheld an order by the Federal Communications Commission's (hereinafter "F.C.C."), which the F.C.C. issued pursuant to its policy, requiring that the radio station provide the person attacked in a broadcast with air time without a right to compensation. The F.C.C. policy requiring broadcasters present a fair discussion of public issues was known as the Fairness Doctrine.[145]

Although the Fairness Doctrine has been out of favor for some time,[146] the Doctrine could be adopted by the Service in enforcing the restrictions of Section 501(c)(3). The administrative procedures by which the Service may incorporate the Fairness Doctrine into the Code are beyond the scope of this article and are not discussed here, but there is a compelling policy

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[138] 323 U.S. 214 (1944). *Korematsu* upheld Congress' power to exclude persons of Japanese ancestry from the West Coast war area. *Id.* at 223.

[139] Francis Biddle, the fifty-eighth Attorney General, served between 1941-1945. Biographies of the Attorneys General, http://www.usdoj.gov/jmd/ls/agbiographies.htm#biddle (last visited at Feb. 20, 2007).

[140] STONE, *supra* note 113, at 296.

[141] JANIS JOPLIN, *Me and Bobby McGee, on* PEARL (Columbia Records 1971).

[142] BOB DYLAN, *Like a Rolling Stone, on* HIGHWAY 61 REVISITED (Columbia Records 1965).

[143] In *Red Lion Broadcasting v. FCC*, the Supreme Court found the FCC's policy (the fairness doctrine) constitutional. 395 U.S. 367, 375 (1969). *See also FCC v. League of Women Voters of California,* 468 U.S. 364, 378 (1984) (restating the Court's prior upholding of the fairness doctrine in *Red Lion* "because the doctrine advanced the substantial governmental interest in ensuring balanced presentations of views in this limited medium.").

[144] 395 U.S. 367 (1969).

[145] *Id.* at 369.

[146] The Federal Communications Commission (FCC) revoked the Fairness Doctrine in 1987. *See* 2 F.C.C.R. 5043, 5052 (1987).

reason for the Service to implement the Fairness Doctrine model to handle allegations of political intervention by churches. Under the Fairness Doctrine model the Service would merely require that objections to a church's intervention in a political campaign be given equal "airtime" by the church in question. All the Service then need do is ensure that objections to a church's stance on a matter in public dispute be afforded equal time and the Service would not be required to make subjective inquiries, such as those into content of the church's speech, to determine if the church has violated Section 501(c)(3). Therefore, such a policy would require less entanglement between the Service and the church than the current process by which the Service reviews speech and mulls the constitutional ramifications of a church's speech to evaluate whether the church has violated Section 501(c)(3) prohibitions.[147]

The Fairness Doctrine model, by applying free market principles to determine the level of political intervention in which a church may engage, may offer some efficiency gains as well. For example, opposition to political intervention by a church would be voiced by those who feel strongly about such intervention and who would have the opportunity to sway the church's constituents to a point where the church itself decides to curb its questionable activities. Furthermore, the Fairness Doctrine model presents a disincentive for churches which wish to intervene in a matter in political debate because a church faced with having to grant access to its pulpit to persons who object to its view on such an issue will likely self-censor rather than allow a forum for views antithetical to its own. The model then, encourages churches to predict which of its activities is likely to cause a demand for equal time opposing its views. As such, the Service will no longer need to decide which public policy was established because that decision would be rendered moot when people choose to not demand equal time to rebut a church's views on an issue in public debate.

A. The Fairness Doctrine

In 1949, the FCC, taking the position that its licensees were "public trustees" by virtue of broadcasting over limited and therefore, scarce, public air waves, attempted to articulate a policy that would ensure that controversial issues aired by broadcasters were balanced and fair.[148] To that end, the FCC set forth a two-pronged approach to mandate "fairness" in public broadcasts. Under the "Fairness Doctrine," as this policy came to be called, the FCC required broadcasters (1) "to provide a reasonable amount of time for the presentation . . . of programs devoted to the

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[147] *Supra* Part II A.
[148] *See* Editorializing by Broadcasting Licensees, 13 F.C.C. 1246 (1949).

discussion and consideration of public issues"[149] and (2) "to encourage and implement the broadcast of all sides of controversial public issues."[150]

The Supreme Court has "repeatedly explained" that "restrict[ions] of the expression of editorial opinion on matters of public importance . . . is entitled to the most exacting degree of First Amendment protection."[151] In *F.C.C. v. League of Women Voters of California*,[152] the Court, citing *Red Lion Broadcasting v. F.C.C.*,[153] recognized the special status of broadcasters and acknowledged that "given spectrum scarcity . . . broadcast[ers] must serve in a sense as fiduciaries for the public by presenting "those views and voices which are representative of [their] community and which would otherwise, by necessity, be barred from the airwaves."[154] However, the Court in *FCC v. League of Women Voters* suggested in a footnote that a review of the "spectrum scarcity" rationale for broadcast regulation was warranted because technological advances of cable and satellite television no longer made wavelengths scarce.[155] Casting further doubt on whether the Fairness Doctrine remained apposite to the FCC's regulatory rationale,[156] the Court pointed to the FCC's observation that the Fairness Doctrine may in fact have a chilling effect on speech and had recommended repealing the doctrine.[157] Later, in

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[149] *Id.* at 1249.

[150] *Id.* at 1251.

[151] FCC v. League of Women Voters of California, 468 U.S. 364, 375-76 (1984). Justice Brennan cites four cases from 1940 to 1983 wherein the Court stressed the importance of safeguarding the First Amendment. *Id.* at 376.

[152] 468 U.S. 364 (1984).

[153] 395 U.S. 367 (1969).

[154] *Id.* at 389.

[155] The scarcity doctrine was conceived in *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190 (1943). There, the Supreme Court rejected a challenge to the FCC's regulations pointing to Congress' finding that public interest reasons called for the regulation of the "limited number of wave lengths." *See id.* at 212-13 (quoting H.R. DOC. NO. 483, at 10 (1926)). It is important to note that the Supreme Court did not address the propriety of applying the scarcity rationale to broadcast regulation until *Red Lion*, 395 U.S. 367 (1967). *See also* Telecomm. Research and Action Center v. FCC 801 F.2d 501, 507 n.2 (D.C. Cir. 1986) (noting that "[u]ntil *Red Lion,* however, the Court had never addressed the question whether the scarcity doctrine could justify regulation of the content of broadcasts.").

[156] *Id.* at 380. (The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete . . . We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.)

[157] *Id.* at 381, n.12. (We note that the FCC, observing that "[i]f any substantial possibility exists that the [fairness doctrine] rules have impeded, rather than furthered, First Amendment objectives, repeal may be warranted on that ground alone," has tentatively concluded that the rules, by effectively chilling speech, do not serve the public interest, and has therefore proposed to repeal them.); *See also* 102 F.C.C.2d 143 (1985).

Telecommunication and Research Action Center v. F.C.C.,[158] Judge Robert Bork found that although the FCC was given responsibility for administrating the Doctrine, the Doctrine had not been codified and consequently, the FCC was free to repeal it. In 1987, the FCC issued an opinion formally abolishing the Fairness Doctrine.[159] However, the FCC's action does nothing to affect the Constitutional acceptance of such a policy by the U.S. Supreme Court.[160]

B. Broadcast Editorials Post Fairness Doctrine

In 1997, Thomas W. Hazlett and David W. Sosa published findings from their study[161] that "rigorously test[ed]"[162] the ability of the Fairness Doctrine to chill speech.[163] The study focused on the radio market and used an economic model[164] to analyze the degree to which the Fairness Doctrine induced programming content.[165] Hazlett and Sosa found that the radio market reacted differently to the specter of the two prongs[166] of the Fairness Doctrine.

The study found the first prong, under which the broadcaster was required to provide programming that was "vitally . . . of interest in the community,"[167] acted effectively to penalize broadcasters who did not

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[158] 801 F.2d 501, 517 (D.C. Cir. 1986) (finding "that language adopted in 1959 [amendment of the Communications Act did not make] the fairness doctrine a binding statutory obligation; rather, it ratified the Commission's longstanding position that the public interest standard authorizes the fairness doctrine.").

[159] In its opinion, the FCC concluded: "Under *Red Lion,* however, the constitutionality of the fairness doctrine becomes questionable if the chilling effect resulting from the doctrine thwarts its intended purpose. Applying this precedent, we conclude that the doctrine can no longer be sustained." 2 F.C.C.R. 5043, 5052 (1987). *See also* Mark Conrad, *The Demise of the Fairness Doctrine: A Blow For Citizen Access*, 41 FED. COMM. L.J. 161, 176 (April 1989).

[160] Although the F.C.C.'s decision to repeal the Fairness Doctrine was challenged in *Syracuse Peace Council v. FCC*, the Court in that case declined to pass on the constitutional question: "Although the Commission somewhat entangled its public interest and constitutional findings, we find that the Commission's public interest determination was an independent basis for its decision and was supported by the record. We uphold that determination without reaching the constitutional issue." Syracuse Peace Council v. FCC, 867 F.2d 654, 656 (D.C. Cir. 1989). Though concurring, Judge Kenneth Starr, thought the court should have reached the Constitutional question. *Id.* at 673–74.

[161] Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect?" Evidence from a Postderegulation Radio Market*, 26 J. LEGAL STUD. 279 (1997).

[162] *Id.* at 281.

[163] *Id.*

[164] *Id.* at 284. The Economic Model made the usual assumptions associated with analyses: that the radio stations were rational organization seeking to maximize profit and minimize losses. *Id.* at 286-90.

[165] *Id.* at 281.

[166] *See supra* Part IV A.

[167] Hazlett & Sosa, s*upra* note 161, at 280. *See supra* at Part IV A.

increase "informational programming."[168] The second prong, which required "broadcasters to present [a] balanced perspective"[169] of "all sides of controversial public issues,"[170] was found to increase the demand for equal time to rebut "controversial issues," proportionally with the increase in air time of such controversial issues.[171] Hazlett and Sosa concluded that if the effects of the second prong outweighed the effects of the first prong, the quantity of informational, and as a corollary, the quantity of "controversial," issues, would be decreased,[172] and speech would be chilled. This finding was in accordance with anecdotal evidence[173] cited by the FCC that the broadcasters had curtailed airing controversial issues and had shied away from informational programming rather than abide by the Fairness Doctrine's requirement of granting equal time to opposing views, particularly because the Cullman Doctrine[174] required that the broadcasters grant such time without an expectation of compensation. The looming presence of the Fairness Doctrine was thus seen as deterrent to informational programming, and it is for that reason that the Fairness Doctrine will be efficacious while withstanding judicial review.[175]

C. "The life of the law has not been logic; it has been experience"[176]: The Fairness Doctrine adopted by the IRS Code.

The study by Hazlett and Sosa suggests that if the second prong of the Fairness Doctrine is adopted by the Service to regulate churches, the Doctrine would restrict the publication of controversial issues by churches. The Service could require churches that speak on controversial issues to provide equal time to opposing viewpoints because the concept of "fairness" in interpreting and applying the Code is not a novel one. In a 1946 case, the U.S. Supreme Court raised fairness concerns sua sponte[177]

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[168] *Id.* The FCC did not distinguish between news and public affairs programming. *Id.* at 282, n.14.

[169] *Id.* at 287.

[170] *See supra* Part IV A.

[171] Hazlett & Sosa, s*upra* note 161, at 287.

[172] *Id.* at 288.

[173] *Id.* at 300.

[174] The FCC's opinion in *In re Responsibility under the Fairness Doctrine,* 40 F.C.C. 576 (1963), became known as the Cullman Doctrine. Cullman Broad., 40 F.C.C. 576 (1963). There, the FCC found that because the overarching objective of the fairness doctrine was to inform the public of all sides of a controversial view, a licensee could not "reject a presentation . . . on the ground that he cannot obtain paid sponsorship for that presentation," effectively requiring a licensee to provide equal air time for free. *Id.* at 577.

[175] *See supra* Part IV D.

[176] From the first of twelve Lowell Lectures delivered by Oliver Wendell Holmes, Jr. on November 23, 1880, which were the basis for *The Common Law*. OLIVER WENDELL HOMLES. JR., THE COMMON LAW 1 (1881) *reprinted in* THE COMMON LAW & OTHER WRITINGS BY OLIVER WENDELL HOLMES, JR. (1982).

[177] Rothensies v. Elec. Storage Battery Co., 329 U.S. 296 (1946) (Rule 10.2.2).

and in a 1984 case it affirmed a lower court's fairness rationale.[178] While the issue in both cases was the applicability of the statute of limitations, the Court has generally leaned towards construing tax statutes that result in "consistency, regularity, and certainty."[179]

Furthermore, the regulations pertaining to section 501(c)(3) tax-exempt educational organizations already contain a semblance of the concept of equal time. For example, an educational organization qualifying for tax-exempt status may "advocate[ ] a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion."[180] Thus, it is reasonable to extend the "full and fair exposition" to tax-exempt charitable organizations that are permitted to speak on controversial issues, particularly because the regulations permit such organizations to speak on these types of issues as long as the speech does not impinge upon the prohibition against political intervention.[181] Under this model, Reverend Regas, before his October 31, 2004 sermon at All Saints Church, would have been required to offer an equal amount of rebuttal time to a person with an opposing viewpoint.

It is unlikely that a church that is required to allow its constituents to voice a viewpoint contrary to its own on a matter of public interest will honor that obligation. If Justice Holmes' aphorism is taken as gospel, it is more likely that churches will react in essence similarly to rational broadcasters and limit the publication of issues that raise their constituents' hackles. The very criticisms[182] that stultified the Fairness Doctrine would actually enhance the Service's ability to curb political intervention by 501(c)(3) organizations.

The Service's embrace of the Fairness Doctrine would serve another all-important purpose. Currently, the Service may begin an inquiry into the propriety of church's activities if a "high-level Treasury official" reasonably believes that the church has run afoul of prohibition of

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[178] Badaracco v. Commissioner, 464 U.S. 386 (1984) (Rule 10.2.2).

[179] Ivan Allen Co. v. United States, 422 U.S. 617, 641 (1975).

[180] 26 C.F.R. § 1.501(c)(3) (2002). (Rule 14.2) The regulations elaborate: "On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion." *Id.*

[181] 26 C.F.R. § 1.501(c)(3)-(2) explains that

> [t]he fact that an organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under section 501(c)(3) so long as it is not an action organization of any one of the types described in paragraph (c)(3) of this section.

Id.

[182] Hazlett & Sosa, s*upra* note 161, at 289.

501(c)(3).[183] Under the Fairness Doctrine model, a church's transgression of the prohibition against intervention in a political campaign would be objected to by a party that has been aggrieved by the church's "partisan" stance. This party, if not granted relief by the church, may report the church's violation of the Fairness Doctrine to the Service, and the Service would then be able to review whether the party was in fact denied equal time to air his opposing view on the controversial issue. Indeed a failure to abide by the Fairness Doctrine would still subject the violating church to an examination under CAPA.[184] But, unlike the current methodology, which requires the Service to review *content* of speech to determine whether a church has violated 501(c)(3) prohibitions, the Fairness Doctrine model would subject the *denial of equal time* to review and not require a review of *content* in order to determine if the Code has been violated. This would alleviate many potential First Amendment concerns. Also, the Service in enforcing section 501(c)(3) would not be required to interject its interpretation of what best serves the "public interest." Indeed the administrative efficiency resulting from the elimination of subjective content-rating factors can be cited in the promulgation of a rule using the Fairness Doctrine.[185]

D. Challenges to the Service's Adoption of the Fairness Doctrine.

The adoption of the Fairness Doctrine in the regulation of 501(c)(3) organizations will likely withstand constitutional challenges. It is well settled that the Service's tax-exemption scheme passes scrutiny under the Establishment Clause.[186] In *Regan v. Taxation With Representation of Washington* (TWR),[187] the Supreme Court rejected TWR's argument that its First Amendment rights had been violated when the Service refused to grant it tax-exempt status. The Court found that "tax exemptions . . . are a form of subsidy . . . [with] . . . much the same effect as a cash grant,"[188] and that Congress had chosen to subsidize "non profit organizations [that] promote the public welfare."[189] In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR),*[190] a unanimous Supreme Court found that Congress may condition federal assistance to law schools upon the school's compliance with a federal statute requiring the law schools to grant military recruiters the same access to the students and campuses that

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[183] I.R.C. § 7611 (2002).
[184] I.R.C. § 7611 (2002).
[185] The "Secretary [of the Department of the Treasury] shall prescribe all needful rules and regulations for the enforcement" of the tax laws. I.R.C. § 7805 (2002).
[186] *See supra* Part II C.
[187] 461 U.S. 540 (1983).
[188] *Id.* at 544.
[189] *Id.*
[190] 126 S. Ct. 1297 (2006).

the law schools grant to the most favored non-military recruiters.[191] Thus, Congress can choose to countermand the tax subsidy if certain conditions are not met, and the Service does just that through the prohibitions of Section 501(c)(3).

The *FAIR* Court found that the Solomon Amendment did not infringe upon the unconstitutional conditions doctrine, because the First Amendment did not prevent Congress from "directly imposing [the statute's] access requirement" upon the law schools.[192] But the Court has recognized that Congress's "insist[ence] that public funds be spent for the purpose for which they are authorized" does not impose an unconstitutional condition.[193] Therefore, Congress can require that churches spend the tax-exempt, tax-deductible donations that churches collect be used for charitable purposes or at the very least, not be used for political intervention.

The constitutional arguments in favor of the Service's adoption of the Fairness Doctrine should mirror the Supreme Court's reasoning for upholding the constitutionality of the Solomon Amendment. First, the *FAIR* Court found that the requirement that law schools open their doors to military recruiters did not translate into a requirement that law schools endorse the government's position on an issue.[194] Similarly, the Fairness Doctrine's application to 501(c)(3) organizations cannot be construed as requiring tax-exempt organizations to adopt the governments position on matters of public interest. Second, the *Fair* Court observed that the Solomon Amendment did not compel law schools to take a position contrary to their own because the law schools would not be engaging in speech by allowing military recruiters on their campuses and as such, it was unlikely that the views of the military recruiter would be identified with that of the law school.[195] The *FAIR* Court noted that even high schools students could tell the difference between speech sponsored by a school and "speech the school was legally required to do."[196] There is no reason then to believe that churchgoers will not be able to distinguish between a church's position on a controversial issue and the position of one who wishes to avail of the policy under Fairness Doctrine. Third, the

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[191] *Id.* at 1305.

[192] 126 S.Ct. 1297, 1307 (2006). The *FAIR* Court thought the Congress had constitutional authority, independent of the First Amendment, under the Art I, § 8, clause 1. *Id.* at 1306.

[193] United States v. Am. Library Ass'n, 539 U.S. 194, 196 (2003) (Rule 10.2.2).

[194] 126 S.Ct. at 1308 ("There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse.").

[195] *Id.* at 1310 ("Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing about the Solomon Amendment restricts what law schools may say about the military's policies.").

[196] *Id.*

Court distinguished *FAIR* from *Boy Scouts of America v. Dale*[197] and found that unlike the statute in *Dale*, the statute in *FAIR* does not affect "associational rights."[198] In *Dale*, New Jersey's statute was found to be unconstitutional because it attempted to force the Boy Scouts to include homosexuals, thereby "significantly affecting" the Boy Scouts' freedom of expressive association.[199] In *FAIR*, the Court found that because the law schools were not expected to offer military recruiters membership to the law schools' "expressive association," the law schools' freedom of expression was not affected.[200] The Fairness Doctrine, if adopted by the Service, would not require that opposing view points be aired by a member of the tax-exempt organization. As such, the Fairness Doctrine would not encroach upon a tax-exempt organization's freedom of expression. Additionally, given the existing body of law on the applicability of the public interest rationale to tax-exempt status,[201] the Service could convince a reviewing court that Congress's intent in enacting Section 501(c)(3) was to make speech by tax-exempt organizations be "fair and balanced."

Notwithstanding the narrow implications of *FAIR*,[202] the current bulwark against encroachment on First Amendment rights, despite Justice Scalia's disapproval,[203] is the *Lemon* Test. In *Lemon v. Kurtzman,*[204] the Court applied a three part test to strike down state laws that compensated non-secular schools for a portion of the costs they incurred in teaching secular students, finding that the statutes caused "excessive entanglement between government and religion."[205] Under this test, in order for a statute to avoid conflict with the First Amendment it must meet three criteria: "First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and third] the statute must not foster an excessive government entanglement with religion."[206]

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[197] 530 U.S. 640 (2000).

[198] 126 S. Ct. at 1312.

[199] *Id.* at 1312.

[200] *Id.*

[201] *Supra* Part I B.

[202] 126 S. Ct. at 1307 ("As a general matter, the Solomon Amendment regulates conduct, not speech.").

[203] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J.) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District."). Justice Scalia then lists nine cases wherein Supreme Court justices have criticized the Lemon Test. *Id.* at 398-99.

[204] 403 U.S. 602 (1971).

[205] *Id.* at 614. (Even though the three-prong test is known as the Lemon Test, it should be noted that the "excessive entanglement" concept was conceived in Walz v. Tax Commission.) In *Walz,* the Court found that a state could exempt a religious organization from property tax. *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

[206] *Id.* at 612-13. (Internal quotations and citation omitted).

A few years later, in *Agostini v. Felton*, the Court blessed the "excessive entanglement" inquiry, finding that only "excessive" entanglement would infringe upon the First Amendment.[207] The *Agostini* Court, while upholding a New York City program that allowed public school teachers to teach at religious schools, advised that, in analyzing whether there is excessive entanglement between government and religion, the factors that should be examined are "the character and purposes of the institutions that are benefited [from the relationship between government and the religious organization], the nature of the aid that the State provides, and the resulting relationship between the government and religious authority."[208]

Currently, under both the temporal and functional interpretations of "intervening in a political campaign," the Service reviews content of speech to gauge whether a church has in fact intervened in a political campaign.[209] With the adoption of the Fairness Doctrine for the enforcement of 501(c)(3), the Service would no longer have to do so. The Service would review complaints by concerned citizens who allege a denial of equal time, effectively minimizing, if not removing itself from any excessive entanglement with a church that such review may cause.

Given the public interest rationale for tax-exemption in the first place, it is not surprising that the rulings underlying section 501(c)(3) can be interpreted as evoking the concept of "fairness." As such, an amendment to 501(c)(3) incorporating language from the second prong of the Fairness Doctrine could be easily accomplished. The amendment would require that churches "broadcast . . . all sides of controversial public issues."[210] Churches would then effectively be tax-exempt as qualified education organization because "[i]t has been historically recognized that the conduct of factual inquiries on subjects of benefit to the public and the dissemination of the information so developed is educational in the charitable sense."[211] Such classification will eliminate the present controversies that underlie defining organizations as churches.

VI. CONCLUSION.

The question of a church's right to speak on issues of morality that happen to be in the center of a political debate may be purely an academic one. From a practical standpoint, it can be argued that churches have a statutory vehicle to deliver their political messages to their constituents.

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[207] 521 U.S. 203, 233 (1997).

[208] *Id.* at 206.

[209] *See supra* Part I C.

[210] Editorializing by Broadcasting Licensees, 13 F.C.C. 1246, 1251 (1949).

[211] *See* George G. Bogert, Trusts & Trustees § 375 (2d ed. 1964). *See also* Rev. Rul. 74-615, 1974-2 C.B. 165.

Indeed, the Code does not preclude churches from creating their own non-profit organizations under section 501(c)(4). Admittedly, donations to 501(c)(4) organizations are not deductible and such organizations may not engage in political campaigns,[212] but the IRS regulations do allow a 501(c)(4) organization to form a political action committee ("PAC") which could be discretely funded to carry out political lobbying and campaigning.[213]

There is little doubt that the religion practiced by candidates for political office will be a factor in American politics—perhaps even more so for candidates running for President. There is even less doubt that churches and religious organizations will continue to influence the choice of the American voters. However, while endorsement of a political candidate by a church is anathema to the Code, objections to a government's policies ought not be construed as an endorsement of an opposing government's viewpoint. Churches should be allowed to maintain the right to oppose what they perceive as morally repugnant policies and actions of the government. As Justice Hughes put it, in reversing a conviction under an Oregon statute prohibiting attendance at a meeting of the Communist Party:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.[214]

Because churches have historically been the locus of social and political discourse, it is only natural that churches serve as an appropriate forum to discuss the rightness or wrongness of a particular war. Surely, if churches cannot be entrusted to be the moral conscience of the nation how can that responsibility rest in the exclusive hands of the government? The Service's adoption of the Fairness Doctrine in policing 501(c)(3) organizations can only help foster a fair and balanced public discourse of issues of public interest.

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[212] 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii) (2002).
[213] 26 C.F.R. § 1.527-6(f) (2002).
[214] DeJonge v. Oregon, 299 U.S. 353, 365 (1937).