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The Politically Active Church

Douglas H. Cook*

I. INTRODUCTION

The title of this Article appears to be an oxymoron. Conventional wisdom holds that under current law, a church cannot be politically active. For example, one commentator recently referred to “the ban on churches’ partisan political activity.” Yet, the notion that churches may not be involved actively in politics is at the same time inaccurate, misleading, and incomplete.

Churches, as religious entities, enjoy a special status under U.S. law. The First Amendment to the United States Constitution provides, “Congress shall make no law . . . prohibiting the free exercise [of religion].” Churches, as exercisers of religion, thus have a constitutional right to pursue their religious activities, even if that pursuit takes them into the political arena. Likewise, churches enjoy a First Amendment free speech right to engage in political speech. Courts have never interpreted the Establishment Clause of the

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2. This Article will refer throughout to “churches” but is equally applicable to all religious congregations, including mosques and synagogues. This interpretation is consistent with the use of the term in the law relating to tax-exempt organizations. See IRS, U.S. DEP’T OF TREASURY, PUBLICATION 1828, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 1 (2002) (“The term church is . . . [used] in its generic sense as a place of worship including, for example, mosques and synagogues.”).
4. See Branch Ministries v. Comm’r, 211 F.3d 137, 142-44 (D.C. Cir. 2000) (recognizing that a church’s pursuit of political activities enjoys protection under the Free Exercise Clause, while holding that revocation of tax exemption did not infringe those free exercise rights).
5. See Christian Echoes Nat’l Ministry, Inc. v. United States, 470 F.2d 849, 857 (10th Cir. 1972) (recognizing that a religious organization that has engaged in political activity has a “constitutionally guaranteed right of free speech,” but holding that the revocation of tax exemption did not violate that right).
Constitution to mean that churches or religious organizations are prohibited from being active in political matters. A politically active church is thus engaging in constitutionally protected activity.

Nonetheless, many churches have elected to organize and operate under section 501(c)(3) of the Internal Revenue Code (the “Code”). As a condition of enjoying exemption from federal entity income taxation, such churches and many other exempt organizations must refrain from substantial attempts to influence legislation and from any participation in political candidate campaigns. Courts have held that conditioning tax exemption on these political activity limitations does not violate the First Amendment.

In the face of these clear limitations on 501(c)(3) churches, this Article proposes that churches might elect instead to organize and operate as tax-exempt “social welfare” organizations under section 501(c)(4) of the Code. These organizations are permitted a much wider range of political activities than 501(c)(3) entities. Part II of this Article will summarize existing tax law pertaining to the political activities of 501(c)(3) and 501(c)(4) organizations. Part III will

6. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . . “).

Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several brief amici, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right. No perfect or absolute separation [of church and state] is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.

9. See infra text accompanying notes 21-36 (discussing the lobbying limitations of section 501(c)(3)).
10. See infra text accompanying notes 37-47 (discussing the Treasury regulations and the Second Circuit’s interpretation of section 501(c)(3)’s prohibition on political campaigns).
11. E.g., Regan v. Taxation with Representation, 461 U.S. 540, 546 (1983); Branch Ministries v. Comm’r, 211 F.3d 137, 144 (D.C. Cir. 2000); see also infra text accompanying notes 33-36, 82-85 (discussing the holdings in Regan and Branch Ministries).
12. I.R.C. § 501(c)(4). The author does not mean to suggest that churches should want to engage in political activity. However, many churches do, and more perhaps would if freed from 501(c)(3)’s constraints. This Article merely proposes a vehicle for doing so for churches that might be interested.
13. See, e.g., Rev. Rul. 81-95, 1981-1 C.B. 332 (“[L]awful participation or intervention in political campaigns on behalf of or in opposition to candidates for public office will not adversely affect its exempt status under section 501(c)(4) . . . “); see also infra text accompanying notes 54-65 (noting the ability of a 501(c)(4) organization to engage in political candidate campaign activities).
examine how the 501(c)(3) limitations have been applied to churches. Finally, Part IV will present a proposal for organizing churches as 501(c)(4) exempt organizations, allowing them to conduct virtually unlimited lobbying and substantial political candidate activity.

II. PoliticA l Activities of Tax-exempt Organizations

Section 501(a) of the Code exempts from federal income tax a variety of organizations, most of which are listed in section 501(c). A common entity listed in 501(c) is the 501(c)(3) organization. These must be organized and operated for an exempt purpose, which may be "religious, charitable, scientific... literary, or educational." As discussed below, section 501(c)(3) also contains express limitations on political activities.

Section 170 of the Code is an important corollary to section 501(c)(3). Section 170 provides that individuals may be entitled to income tax deductions for charitable contributions made to 501(c)(3)-type organizations. This Article discusses the significance of this deduction's availability to church donors in Part IV.

14. I.R.C. § 501(a) ("An organization described in subsection (c) ... shall be exempt from taxation under this subtitle ... ").
15. In 1998, there were more than 700,000 501(c)(3) organizations in the United States. INDEPENDENT SECTOR, THE NEW NON-PROFIT ALMANAC IN BRIEF: FACTS AND FIGURES ON THE INDEPENDENT SECTOR 2001, at 7 (2001), available at http://www.independentsector.org/PDFs/inbrief.pdf (last visited Jan. 24, 2004). In addition to 501(c)(3) charitable organizations, the tax code lists dozens of other types of exempt entities, including business leagues (501(c)(6)), fraternal beneficiary societies (501(c)(8)), and cemetery companies (501(c)(13)). I.R.C. § 501(c).
16. I.R.C. § 501(c). Section 501(c)(3) provides exemptions for:
Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Id.
17. Id.
18. See infra text accompanying notes 21-47 (discussing the express limitations on political activities by 501(c)(3) organizations).
20. See infra notes 113-20 and accompanying and subsequent text (discussing the availability of income tax deductions for contributions to 501(c)(3) organizations and the significance of non-deductibility for donations to 501(c)(4) organizations).
A. Limitations on Lobbying by 501(c)(3) Organizations

Section 501(c)(3) provides that the following must be true of an organization qualifying for its exemption: "[N]o substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)) . . . ." Treasury regulations provide that "legislation" includes "action by the Congress, by any State legislature, by any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure." The regulations further provide that an organization is "attempting to influence legislation" if it "[c]ontacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or . . . [a]dvocates the adoption or rejection of legislation."

The Tenth Circuit construed this lobbying limitation broadly in Christian Echoes National Ministry, Inc. v. United States. There, a religious organization had engaged in a variety of political activities, some involving pending legislation, others merely seeking to affect public opinion on issues of current interest. The court held that there need not be specific legislation pending before a legislature to trigger 501(c)(3)’s lobbying limitation. Rather, in upholding the revocation of Christian Echoes’ exemption, the court suggested that an organization disqualifies itself from 501(c)(3) status by substantially engaging in "an indirect campaign to mold public opinion." The court also discussed what would constitute "substantial" lobbying for purposes of 501(c)(3) and, by way of rejecting any bright-line approach, held that "[a] percentage test to determine whether the activities were substantial obscures the complexity of balancing the organization’s activities in relation to its objectives and circumstances."

23. Id.
25. Id. at 851–52. For example, a Christian Echoes publication urged readers to "support the Becker Amendment by writing their Congressmen" but also to "purge the American press of its responsibility for grossly misleading its readers on vital issues." Id. at 855.
26. Id.
27. Id.
28. Id. The Tenth Circuit thus expressly put itself at odds with the Sixth Circuit, which had previously suggested five percent as a level below which an organization’s lobbying activities would not be “substantial.” See Seasongood v. Comm’r, 227 F.2d 907, 912 (6th Cir. 1955) (adopter a five percent test for “substantial”). The IRS disclaims any percentage test for “substantial,” asserting instead that the appropriate level of lobbying must be determined “on the basis of all the pertinent facts and circumstances in each case.” IRS, supra note 2, at 5.
In response to concerns about the vagueness of the "substantial part" test, Congress in 1976 added section 501(h) to the Code. Dubbed the "expenditure test," section 501(h) allows electing organizations to spend up to twenty percent of their budgets on certain kinds of lobbying. Churches, however, are not permitted to elect the 501(h) expenditure test, and thus they remain governed by the ill-defined "substantial part" test.

The Supreme Court upheld the constitutionality of section 501(c)(3)'s lobbying limitations in *Regan v. Taxation with Representation*. After denial of its exemption application, Taxation with Representation of Washington ("TWR") challenged the lobbying provision on First Amendment speech and equal protection grounds. On behalf of a unanimous Court, Chief Justice Rehnquist observed that TWR could still qualify for exemption under section 501(c)(4). Moreover, he noted that TWR could also collect tax deductible contributions for non-lobbying activity by returning to a strictly divided structure in which a section 501(c)(3) organization conducts only non-lobbying activities and a section 501(c)(4) organization conducts all lobbying activities.

**B. The Candidate Campaign Prohibition**

Section 501(c)(3) organizations may 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." Treasury regulations define a "candidate for public office" as "an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, national, 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The regulations provide that prohibited activities include "the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to" a candidate. The IRS has identified a few narrowly defined electoral activities, characterized as "voter education," which will not be viewed as prohibited candidate participation or intervention.

In *Association of the Bar v. Commissioner*, the IRS had denied the bar association exemption under section 501(c)(3) because the bar association published nonpartisan ratings of candidates for elective judgeships. The bar association rated the candidates as either "approved," "not approved," or "approved as highly qualified." A "not approved" rating, when the bar association communicated it to the public, was sometimes accompanied by a short statement of the reasons for the negative conclusion. The court held that this level of candidate activity was inconsistent with the section 501(c)(3) prohibition. The bar association argued that only "substantial" amounts of candidate intervention should be prohibited, applying the same test used for legislative involvement. The court rebuffed the bar association:

The short answer [to this argument] is that Congress did not write the statute that way. . . . As above noted, the exception from section 501(c)(3) exemption of an organization that participates in political campaigns was added to the section some twenty years after the exception based on the influencing of legislation. Had Congress intended the added exception to apply only to those organizations that devote a substantial part of their activity to participation in political campaigns, it easily could have said so. It did not.

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39. *Id.*
42. *Id.* at 878.
43. *Id.* at 877.
44. *Id.*
45. *Id.* at 881.
46. *Id.*; see also *supra* text accompanying notes 21–32 (stating that only "substantial" lobbying is prohibited for 501(c)(3) organizations and exploring interpretations of the term "substantial").
47. *Id.* (quoting United States v. Naftalin, 441 U.S. 768, 773 (1979)). The IRS has consistently maintained that the candidate campaign prohibition is absolute, not subject to any de minimis or substantiality test. E.g., IRS, *supra* note 2, at 6 (calling candidate campaign involvement "absolutely prohibited").
C. Section 501(c)(4) Organizations

Another type of exempt organization faces a much different set of possibilities when it comes to political activities. Section 501(c)(4) of the Code provides that "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare" are also exempt from federal income tax under section 501(a). Treasury regulations explain:

An organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community. An organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements.

The concept of what constitutes the "promotion of social welfare" is quite broad. Organizations that have qualified include a consumer-credit counseling service, an organization that conducted an art show to promote the arts in a community, and a roller-skating rink.

One activity that does not qualify as "promotion of social welfare" for purposes of section 501(c)(4) is participation in political candidate campaigns. Treasury regulations provide that "[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." However, this does not mean that section 501(c)(4) organizations cannot engage in these activities. Section 501(c)(4) does not include the express candidate activity prohibition contained in section 501(c)(3).

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48. IRC § 501(c)(4)(A) (2000 & West Supp. 2002). The same Code section also exempts certain kinds of employee associations. Id. For both types of (c)(4) organizations, private inurement is expressly prohibited. Id. § 501(c)(4)(B).


55. Id.

56. See generally Subcomm. on Political Lobbying Orgs. and Activities, ABA Section of Taxation, Report of Task Force on Section 501(c)(4) and Politics, 39 EXEMPT ORG. TAX REV. 432 (2003). The report concluded that current law may allow a 501(c)(4) organization to devote up to forty-nine percent of its annual expenditures to political candidate activities. Id. at 434.

57. See supra text accompanying note 37 (stating that 501(c)(3) organizations may not participate in political campaigns).
requires that qualifying organizations be “operated exclusively for the promotion of social welfare,” the IRS consistently interprets the word “exclusively” to mean “primarily.” Treasury regulations provide that “[a]n organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community.” Some commentators have opined that this may allow 501(c)(4) organizations to have as much as forty-nine percent of their activities devoted to the promotion of political candidates.

A revenue ruling has expressly recognized a section 501(c)(4) organization’s ability to engage in political candidate campaign activities. The ruling posited an organization that carried on “certain activities involving participation and intervention in political campaigns on behalf of or in opposition to candidates for nomination or election to public office,” including “both financial assistance and in-kind services.” The ruling explained:

Although the promotion of social welfare within the meaning of section 1.501(c)(4)-1 of the regulations does not include political campaign activities, the regulations do not impose a complete ban on such activities for section 501(c)(4) organizations. Thus, an organization may carry on lawful political activities and remain exempt under section 501(c)(4) as long as it is primarily engaged in activities that promote social welfare. . . .

Since the organization’s primary activities promote social welfare, its lawful participation or intervention in political campaigns on behalf of or in opposition to candidates for public office will not adversely affect its exempt status under section 501(c)(4) of the Code.

It is also clear that a section 501(c)(4) organization may engage in virtually unlimited lobbying activities, so long as those activities

60. Id. (emphasis added).
61. See supra note 56 (citing a report concluding that a section 501(c)(4) organization may maintain tax-exempt status so long as its political expenditures are less than half of its total expenditures); see also Fred Stokeld, EO, Exempt Bond Reps Find Plenty to Talk About in San Antonio, 39 EXEMPT ORG. TAX REV. 321, 323 (2003) (“Some practitioners follow a rule of thumb: For a 501(c)(4)’s political [candidate] activities to be ‘less than primary,’ partisan political [candidate] expenditures should be no more than forty-nine percent of its total expenditures.”).
63. Id.
64. Id.
65. Id. The revenue ruling does not discuss what level of activity would constitute “primary.” Id.
promote social welfare. A Treasury regulation explains that "[a] social welfare organization ... may qualify under section 501(c)(4) even though it is an 'action' organization described in § 1.501(c)(3)-1(c)(3)(ii) or (iv) ..." An "action" organization under the referenced regulations is an entity that fails to qualify under 501(c)(3) because it engages in more than insubstantial activities to influence legislation. Thus, unlike section 501(c)(3) organizations, a section 501(c)(4) entity may engage in substantial lobbying activities. The United States Supreme Court expressly recognized the ability of a section 501(c)(4) organization to do so in Regan v. Taxation with Representation.

III. CHURCHES AS TAX-EXEMPT ORGANIZATIONS

Although the Code uses the term "church" several times, it is nowhere defined in the Code or its regulations. However, the IRS has announced informally that it uses a multi-factor test to determine whether an entity is a church. An organization's potential status as a church is thus determined by scrutinizing fourteen criteria:

(1) a distinct legal existence;
(2) a recognized creed and form of worship;
(3) a definite and distinct ecclesiastical government;
(4) a formal code of doctrine and discipline;
(5) a distinct religious history;
(6) a membership not associated with any other church or denomination;
(7) an organization of ordained ministers;
(8) ordained ministers selected after completing prescribed studies;
(9) a literature of its own;
(10) established places of worship;
(11) regular congregations;

66. See generally HOPKINS, supra note 50, § 12.3, at 332–33 (discussing the array of lobbying activities in which a social welfare organization may engage).
68. Id. § 1.501(c)(3)-1(c)(3)(ii), (iv) ("An organization is an 'action' organization if a substantial part of its activities is attempting to influence legislation ..." (emphasis added)).
69. Regan v. Taxation with Representation, 461 U.S. 540, 543 (1983). The Court wrote, "Section 501(c)(4) organizations ... are permitted to engage in substantial lobbying to advance their exempt purposes." Id; see also supra text accompanying notes 33–36 (discussing Regan's holding).
70. E.g., I.R.C. § 508(c)(1)(A) (2000) (stating that "churches" are not required to file applications for recognition of exemption); id. § 6033 (describing how "churches" are not required to file annual informational returns); id. § 170(b)(1)(A)(i) (allowing a charitable contribution to a "church").
(12) regular religious services;
(13) Sunday schools for religious instruction of the young; and
(14) schools for the preparation of its ministers.\textsuperscript{72}

Courts have adopted and applied these criteria.\textsuperscript{73} Not all of the factors must be present, but courts place special emphasis on certain core criteria.\textsuperscript{74}

A church clearly qualifies for exemption from federal income tax under section 501(c)(3) as an entity "organized and operated exclusively for religious ... purposes."\textsuperscript{75} A recent IRS publication, \textit{Tax Guide for Churches and Religious Organizations},\textsuperscript{76} assumes throughout that churches are exempt as 501(c)(3) organizations.\textsuperscript{77} As demonstrated by the following cases, courts have applied the Code's political limitations and prohibitions on churches and other religious entities because of their status as 501(c)(3) organizations.

In \textit{Christian Echoes National Ministry, Inc. v. United States},\textsuperscript{78} the IRS revoked a religious organization's 501(c)(3) exempt status because of its excessive lobbying and prohibited candidate activities.\textsuperscript{79} Christian Echoes contended that the application of these political limitations violated its free exercise of religion rights under the First Amendment.\textsuperscript{80} The court disagreed:

We hold that the limitations imposed by Congress in Section 501(c)(3) are constitutionally valid. The free exercise clause of the First Amendment is restrained only to the extent of denying tax exempt status and then only in keeping with an overwhelming and compelling Governmental interest: That of [guaranteeing] that the wall separating church and state remain high and firm. . . .

In light of the fact that tax exemption is a privilege, a matter of grace rather than right, we hold that the limitations contained in

\textsuperscript{72} \textit{Id.} (relying upon the remarks of IRS Commissioner Jerome Kurtz made at the PLI Seventh Biennial Conference on Tax Planning on January 9, 1978).

\textsuperscript{73} \textit{See, e.g., id.} at 339 ("[W]e view the fourteen criteria as a guide, helpful in deciding what constitutes a church.").

\textsuperscript{74} \textit{Id.} ("[T]he existence of an established congregation served by an organized ministry, the provision of regular religious services and religious education for the young, and the dissemination of a doctrinal code, are of central importance." (quoting Lutheran Soc. Servs. v. United States, 758 F.2d 1283, 1287 (8th Cir. 1985))).

\textsuperscript{75} I.R.C. § 501(c)(3) (2000).

\textsuperscript{76} IRS, \textit{supra} note 2, at 2.

\textsuperscript{77} \textit{Id.} ("Churches and religious organizations, like many other charitable organizations, qualify for exemption from Federal income tax under IRC section 501(c)(3) . . .").

\textsuperscript{78} Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 852 (10th Cir. 1972).

\textsuperscript{79} \textit{Id.} at 853. \textit{See generally supra} text accompanying notes 24–28 (discussing the \textit{Christian Echoes} decision).

\textsuperscript{80} \textit{Christian Echoes}, 470 F.2d at 856.
Section 501(c)(3) withholding exemption from nonprofit corporations do not deprive Christian Echoes of its constitutionally guaranteed right of free speech. The taxpayer may engage in all such activities without restraint, subject, however, to withholding of the exemption or, in the alternative, the taxpayer may refrain from such activities and obtain the privilege of exemption.  

In Branch Ministries v. Commissioner, Branch Ministries, operating the Church at Pierce Creek, placed anti-Clinton ads in two newspapers four days before the 1992 presidential election. The IRS revoked the church’s tax-exempt status on the basis of the church’s violation of the 501(c)(3) ban on political candidate activity. On appeal, the United States Court of Appeals for the D.C. Circuit upheld the revocation and rejected the church’s free exercise arguments.

In a recent publication, the IRS reaffirmed and summarized a number of activities forbidden to 501(c)(3) churches, including contributing to candidate campaigns, making public statements for or against any candidate, and endorsing a candidate from the pulpit. The IRS emphasizes that “violation of this prohibition may result in denial or revocation of tax-exempt status.”

Congress recently considered attempts to free churches from 501(c)(3)’s political candidate limitations, most notably in the Houses of Worship Political Speech Protection Act. The announced intention of the Act was “[t]o amend the Internal Revenue Code of 1986 to permit churches and other houses of worship to engage in political campaigns.” To accomplish this, Congress would have amended 501(c)(3) to remove churches from the absolute ban on political candidate activity. The Act instead would apply to the candidate activity of churches a standard of “substantiality,” the standard currently

81. Id. at 856–57.
83. Id. at 139–40.
84. Id. at 140.
85. Id. at 142–45.
86. IRS, supra note 2, at 6–8.
87. Id. at 6.
89. Id.
90. Id. § 2. The proposed new version of 501(c)(3) would have read, in part: “and except in the case of an organization described in section 508(c)(1)(A) (relating to churches), 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.” See id. § 2(a)(1) (proposed new language in italics).
applied to the lobbying activities of 501(c)(3) organizations.\textsuperscript{91} The Houses of Worship Political Speech Protection Act was defeated in the House of Representatives on October 2, 2002, by a vote of 239 to 178.\textsuperscript{92}

IV. CHURCHES AS 501(c)(4) ORGANIZATIONS

Some churches apparently would like to be able to engage in political candidate activity\textsuperscript{93} and a larger amount of lobbying than is currently allowed within the constraints of section 501(c)(3).\textsuperscript{94} Some legislators (but not enough) apparently agree.\textsuperscript{95} If a church were to organize and operate as a section 501(c)(4) organization rather than as a 501(c)(3) organization, these ends could be accomplished.\textsuperscript{96}

There is nothing in section 501(c)(4) that prohibits a church from qualifying. A 501(c)(4) organization must be "operated exclusively for the promotion of social welfare."\textsuperscript{97} No one would seriously argue that a church, mosque, or synagogue does not function to promote social welfare.\textsuperscript{98} According to Treasury regulations,\textsuperscript{99} a 501(c)(4) church would have to be "primarily engaged in promoting in some way the common good and general welfare of the people of the community . . . [for the] purpose of bringing about civic betterments and social improvements."\textsuperscript{100} Included among the social welfare activities pursued by churches in this country are developing communities,

\textsuperscript{91} Id. § 2(a)(2). The amended section 501(c)(3) would have concluded with the following clause: "and, in the case of an organization described in section 508(c)(1)(A) [i.e., churches], no substantial part of the activities of which is participating in, or intervening in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." Id.


\textsuperscript{94} See supra text accompanying notes 21-28 (explaining the broad limitations on lobbying mandated by section 501(c)(3)).

\textsuperscript{95} See supra text accompanying notes 88-92 (noting that a law that would have allowed churches to engage in political activity without sacrificing tax-exempt status failed to pass in the House of Representatives).

\textsuperscript{96} See supra text accompanying notes 54-69 (explaining that 501(c)(4) organizations are permitted to engage in significant levels of candidate activity and virtually unlimited lobbying).


\textsuperscript{98} See Diocese of Rochester v. Planning Bd., 136 N.E.2d 827, 836-37 (N.Y. 1956) (stating that for purposes of zoning law, churches are "clearly in furtherance of the public morals and general welfare").


\textsuperscript{100} Id. (emphasis added).
preventing teen pregnancy, fighting substance abuse and crime, and providing food, clothing, and housing to the poor.\textsuperscript{101}

At least one court has recognized that a church-related organization with a religious purpose can qualify for exemption as a social welfare organization under section 501(c)(4).\textsuperscript{102} In Mutual Aid Association of the Church of the Brethren v. United States, the Church of the Brethren formed the unincorporated Mutual Aid Association ("MAA").\textsuperscript{103} MAA provided various kinds of property and casualty insurance to Brethren churches and church members.\textsuperscript{104} According to MAA, the church’s historic religious commitment to mutual aid motivated its insurance activities, along the lines of the older practice of "barn-raising."\textsuperscript{105} MAA thus argued that it was entitled to a 501(c)(4) exemption because it was advancing religious principles, which constituted the "promotion of social welfare."\textsuperscript{106} The Tenth Circuit agreed, observing that the proffered equation had "persuasive appeal."\textsuperscript{107} The court observed that "social welfare" in 501(c)(4) generally was interpreted as encompassing the "charitable, educational and religious" purposes embodied in 501(c)(3).\textsuperscript{108} The court concluded that, for purposes of entitlement to 501(c)(4) exemption, "[o]rganizations for the advancement of religion undoubtedly can work to better society."\textsuperscript{109}

The IRS apparently has granted 501(c)(4) exempt status to religious organizations.\textsuperscript{110} Congress has recognized implicitly that churches can


\textsuperscript{102} Mutual Aid Ass’n of the Church of the Brethren v. United States, 759 F.2d 792, 795 (10th Cir. 1985).

\textsuperscript{103} Id. at 793.

\textsuperscript{104} Id.

\textsuperscript{105} Id. at 794.

\textsuperscript{106} Id.

\textsuperscript{107} Id. at 795.

\textsuperscript{108} Id. (quoting People’s Educ. Camp Soc’y, Inc. v. Comm’r, 331 F.2d 923, 930 (2d Cir. 1964) (emphasis added)).

\textsuperscript{109} Id. The court continued, "We need not decide this issue, however, because regardless of whether we accept MAA’s premise that the advancement of religion promotes social welfare, we cannot characterize MAA as an organization dedicated exclusively or primarily to the advancement of religion." Id. The court held that MAA’s insurance activities were primarily commercial, not religious: "MAA does not give succor to souls: it sells insurance coverage." Id.

\textsuperscript{110} The Christian Coalition’s Articles of Incorporation state that its purpose is “to encourage active citizenship among people professing the Christian faith” and to “support and uphold values and moral principles that accord with the Holy Bible;... and to promulgate and teach... traditional family values... and faith in God.” LARRY J. SABATO & GLENN R. SIMPSON, DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS
qualify for exemption under 501(c)(4). And in the application of 501(c)(3) and 501(c)(4) to various organizations, courts have treated 501(c)(4) as the broader and more inclusive exemption while reserving 501(c)(3) for a narrower group of organizations. Churches, which traditionally qualify for exemption under 501(c)(3), should all the more easily qualify under 501(c)(4).

The most significant potential challenge to having a church operating as a 501(c)(4) organization has to do with the ability of donors to take tax deductions for contributions to the church. Charitable contributions to 501(c)(3) organizations can generate income-tax deductions for the donors. Contributions to 501(c)(4) organizations are not deductible. Thus, donors to a 501(c)(4) church would not be able to deduct their contributions on their individual tax returns. This might, in turn, deter some individuals from making donations to the church.


111. I.R.C. § 501(c)(4) (2000 & West Supp. 2002). Section 504 of the Code provides that if a 501(c)(3) organization loses its status because of political candidate activity or substantial lobbying, it cannot thereafter qualify for exemption under 501(c)(4). Id. § 504(a)(2). Section 504(c) specifies that this rule does not apply to churches. Id. § 504(c). Obviously, if a church by its nature was unable to qualify for 501(c)(4) exemption, it would be unnecessary to exclude it from the operation of section 504 because it could never become a 501(c)(4) after losing its 501(c)(3) status. Id. § 501(c)(3).

112. Compare Rev. Rul. 65-299, 1965-2 C.B. 165 (holding that a consumer credit counseling service was entitled to exemption under § 501(c)(4)), with Consumer Credit Counseling Serv. v. United States, 78-2 U.S. Tax Cas. (CCH) 85,188, 85,191 (D.D.C. 1978) (holding that a consumer credit counseling service only was entitled to 501(c)(3) exemption if it primarily engaged in charitable and educational activities).

113. I.R.C. § 170 (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.” Id. § 170(a)(1). Deductions for contributions to churches (as well as most other charities) are allowed for up to fifty percent of the taxpayer’s adjusted gross income. Id. § 170(b)(1)(A); see § 170(b)(1)(F) (stating that “contribution base” as used in § 170(b)(1)(A) means “adjusted gross income”). To be eligible for a deduction, the contribution must be made to a qualifying organization, which the Code defines as, essentially, a 501(c)(3) entity. Id. § 170(c)(2) (using similar language as section 501(c)(3)).

114. See id. § 170(c)(2) (defining “charitable contribution” for purposes of deductibility as a donation to a 501(c)(3)-type entity); HOPKINS, supra note 50, § 12.4 (“[A] social welfare organization . . . cannot attract charitable contributions that are deductible . . . .”).

115. One church, at least, believed that loss of donor deductibility would significantly decrease the willingness of congregants to contribute: “The Church at Pierce Creek will have to
The significance of non-deductibility may be tempered, however, by two factors. First, religious principle probably motivates congregants to donate to churches more than economic incentive does. Both the Hebrew and the Christian scriptures commend, and even command, donations to the institutionalized religious body. It may be that people would, in significant numbers, continue to make contributions to their churches even if those donations were not deductible.

A second factor is perhaps even more significant. Charitable contribution deductions can be taken in full only by taxpayers who itemize their deductions. Taxpayers who do not itemize get little or no tax benefit from charitable contributions. As many as seventy percent of all individual taxpayers in any given year do not itemize.

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117. See, e.g., Malachi 3:7-12 (New International).


119. See IRS, 2003 FORM 1040 INSTRUCTIONS, supra note 118.

120. Warren Rojas, Finance Looks at Proposals on Charitable Giving, 32 EXEMPT ORG. TAX REV. 245, 245 (2001). "Senate Finance Committee Chair Charles E. Grassley, R-Iowa, said the Bush tax bill would encourage charitable giving by allowing the 70 percent of taxpayers who currently do not itemize their deductions to receive a tax break for charitable contributions." Id. (emphasis added).
For the majority of taxpayers, therefore, it is irrelevant whether their contributions go to a 501(c)(3) or a 501(c)(4) organization.

Nonetheless, there is probably a residual group of church donors who itemize and for whom deductibility is desirable, at least to the extent that they enjoy the economic saving that goes along with the spiritual benefit of the exercise. To accommodate this group, I propose that a 501(c)(4) church might set up a dual structure utilizing a sister 501(c)(3) organization. The use of such a dual structure has been endorsed by the federal courts in two significant cases.

In Regan v. Taxation with Representation, the Supreme Court upheld the constitutionality of the 501(c)(3) limitations on lobbying. The challenging organization, TWR, in the past had operated as two separate but related entities: one a 501(c)(3) for charitable and educational activities and the other a 501(c)(4) organization for lobbying. TWR merged both organizations into itself, desiring to engage in all the previous activities, including extensive lobbying, as a single 501(c)(3) entity. In holding that the 501(c)(3) lobbying limitations did not violate TWR’s First Amendment free speech rights, the Court relied on the continued availability of the previous dual structure:

It appears that TWR could still qualify for a tax exemption under § 501(c)(4). It also appears that TWR can obtain tax deductible contributions for its non-lobbying activity by returning to the dual structure it used in the past, with a § 501(c)(3) organization for non-lobbying activities and a § 501(c)(4) organization for lobbying. TWR would, of course, have to ensure that the § 501(c)(3) organization did not subsidize the § 501(c)(4) organization; otherwise, public funds might be spent on an activity Congress chose not to subsidize.

In Branch Ministries v. Commissioner, a church challenged an exemption revocation on the grounds that the 501(c)(3) political candidate prohibition violated its First Amendment rights to the free exercise of religion. In rejecting the challenge, the D.C. Circuit found no substantial burden on the church’s free exercise of religion, in part because the church had “alternate means” for pursuing its political

122. Regan, 461 U.S. at 546–47.
123. Id. at 543.
124. Id.
125. Id. at 544.
127. Branch Ministries, 211 F.3d at 142.
activities. Recognizing the dual structure already approved by the Supreme Court in Regan, the D.C. Circuit observed that “[a]s was the case with TWR, the church may form a related organization under section 501(c)(4) of the Code.” The court went on to outline what such a dual structure would look like:

The Church can initiate a series of steps that will provide an alternate means of political communication . . . . Should the Church proceed to do so, however, it must understand that the related 501(c)(4) organization must be separately incorporated; and it must maintain records that will demonstrate that tax-deductible contributions to the Church have not been used to support the political activities conducted by the 501(c)(4) organization’s political action arm.

The proposal, then, is this: a church that desires to engage in either substantial lobbying or political candidate activity, or both, could form itself as a 501(c)(4) social welfare organization. It would form simultaneously a sister 501(c)(3) organization. The 501(c)(4) church would operate as a bona fide church, engaging in the traditional religious activities recognized by the IRS as characterizing a “church.” As a part of its church activities, it could speak freely to current social issues and support or oppose legislation on moral or religious grounds without fearing that its activity would be deemed “substantial” and, hence, prohibited. A 501(c)(4) church could endorse political candidates from the pulpit, allow the use of church facilities and personnel to support candidate campaigns, and contribute

128. Id. at 143.

129. Id. The court incorrectly went on, “Although a section 501(c)(4) organization is also subject to the ban on intervening in political campaigns [citing Treasury Regulations], it may form a political action committee (‘PAC’) that would be free to participate in political campaigns.” Id. As discussed supra text accompanying notes 54–65, the 501(c)(4) regulations do not prohibit political candidate campaign activities. To the contrary, there has been express recognition that a 501(c)(4) organization may engage in such activities. Rev. Rul. 81-95, 1981-1 C.B. 332; see also supra text accompanying notes 62–65 (discussing Revenue Ruling 81-95). Thus, there would be no need for the formation of a PAC.

130. Branch Ministries, 211 F.3d at 143.

131. See supra text accompanying notes 71–74 (discussing the criteria that the IRS uses to determine if an entity is a church).

132. It could speak freely without fearing that it would be found to have engaged in a substantial “campaign to mold public opinion.” See supra text accompanying notes 26–27 (discussing the idea that an organization will be disqualified from § 501(c)(3) status by engaging in such a campaign).

133. 501(c)(4) organizations are not limited to “insubstantial” amounts of lobbying as are 501(c)(3) entities. See supra text accompanying notes 21–28 (explaining how 501(c)(3) entities are restricted in their political lobbying efforts); supra text accompanying notes 66–69 (noting that 501(c)(4) entities may engage in substantial lobbying activities).
church funds to political campaigns. The church would receive support from tithes and offerings from congregants who do not itemize their deductions, or from congregants who believe that their contributions represent a religious duty apart from considerations of tax deductibility.

The sister 501(c)(3) organization would be closely related to the church, but would be a separate, nonprofit charity. This 501(c)(3) charity would engage in a set of church activities selected as those unlikely to involve any political candidate activity. For example, the 501(c)(3) sister could support and operate domestic and foreign missions and evangelism, benevolence ministry, and the church’s Sunday school. None of these activities would involve political candidate support; in fact, they would be prohibited expressly (internally and externally) from doing so. The 501(c)(3) entity could receive contributions from church members who wished to take advantage of income tax deductibility. No funds would be permitted to flow from the 501(c)(3) organization to the sister 501(c)(4).

This dual structure is, of course, somewhat more complicated than that under which churches operate currently. For one thing, churches presently do not have to apply to the IRS for recognition of 501(c)(3) tax-exempt status. A church forming itself as a 501(c)(4) entity

134. A 501(c)(4) church may engage in political candidate activity so long as its primary activities promote social welfare. See Rev. Rul. 81-95, 1981-1 C.B. 332; supra text accompanying notes 56–65 (noting that 501(c)(4) organizations are not restricted in the same manner as 501(c)(3) organizations regarding political campaign activities). A 501(c)(4) church could devote perhaps up to forty-nine percent of its expenditures to candidate support while still “primarily” pursuing social welfare. See supra note 61 and accompanying text (noting what level of activity may constitute “primary” activity). Monetary contributions to candidate campaigns would have to comply with other applicable law. See, e.g., 2 U.S.C § 441b (2000 & West Supp. 2002) (prohibiting corporate contributions in connection with certain federal elections).

135. See supra text accompanying notes 113–20 (exploring the motivations behind donating to churches apart from tax deduction considerations).

136. See infra note 142 (discussing integrated auxiliaries of churches).

137. Nonprofit corporations, under state law, are those that do not distribute their income for profit to members, directors, or officers. MODEL NON-PROFIT CORP. ACT § 2(c) (1986).

138. Funds could not flow from the 501(c)(3) charity to the 501(c)(4) church because the church would presumably be involved in substantial political activity (including candidate support), which the 501(c)(3) is not permitted to fund. See supra text accompanying notes 33–36 (discussing Regan v. Taxation with Representation, in which the Court stated that a 501(c)(3) charity would have to keep funds separate from a 501(c)(4) organization).

139. I.R.C. § 508(a) requires most new charitable organizations seeking exempt status under § 501(c)(3) to give notice to the IRS. I.R.C. § 508(a) (2000). This notice is accomplished by means of IRS Form 1023, “Application for Recognition of Exemption,” which is available at http://www.irs.gov/pubs/irs-fill/K1023.pdf. However, “churches, their integrated auxiliaries, and conventions or associations of churches” are not required to give notice or apply. I.R.C.
would have to file IRS Form 1024, *Application for Recognition of Exemption Under Section 501(a).* The form is, if anything, less burdensome than Form 1023, which is used by organizations seeking 501(c)(3) exempt status,¹⁴⁰ and a church could complete and submit it with relatively little trouble.¹⁴¹ Interestingly enough, the sister 501(c)(3) charity normally would not have to complete and submit Form 1023—usually it would be automatically tax exempt, by virtue of its relationship with the church.¹⁴²

Under the tax code, most exempt organizations must file annual information returns.¹⁴³ Churches, however, are exempted from this requirement.¹⁴⁴ Nothing in the Code limits this exception to 501(c)(3) churches,¹⁴⁵ so a 501(c)(4) church would not have to file the annual information return. Likewise, the sister 501(c)(3) charity would not have to file the annual return because “integrated auxiliaries of churches” are exempted from the filing requirement.¹⁴⁶

§ 508(c)(1)(A). The result is that churches are “automatically” exempt under section 501(c)(3). *Id.* § 501(c)(3).

¹⁴⁰ This is the opinion of the author, who is familiar with both forms.

¹⁴¹ Again, this is in the author’s opinion.

¹⁴² I.R.C. § 508(c)(1) provides that “integrated auxiliaries” of churches are exempted from the application requirement. I.R.C. § 508(c)(1). The regulations indicate that the definition of “integrated auxiliary of a church” is contained in another set of regulations, Treasury Regulation § 1.6033-2(h). *See* Treas. Reg. § 1.508-1(a)(3)(a) (as amended in 1995). Those regulations, in turn, provide that an integrated auxiliary of a church is an organization that is “affiliated” with a church. Treas. Reg. § 1.6033-2(h)(2)(ii) (as amended in 1995). “Affiliated” can mean either that the organization is “operated, supervised, or controlled by or in connection with” a church, Treas. Reg. § 1.6033-2(h)(2)(ii), or that “[r]elevant facts and circumstances” show the affiliation, Treas. Reg. § 1.6033-2(h)(2)(iii). The regulations indicate that those facts and circumstances include (1) organizational documents (e.g., articles of incorporation or constitution) affirming religious doctrines and principles in common with the church; (2) appointment or removal power over at least one of the organization’s officers or directors, vested in the church; (3) the name of the organization indicating an institutional relationship with the church; and (4) annual reporting to the church. Treas. Reg. § 1.6033-2(h)(3)(i)-(iv). These would all be very typical for two sister organizations.

¹⁴³ I.R.C. § 6033(a)(1) (2000). “Except as provided in paragraph (2), every organization exempt from taxation under section 501(a) shall file an annual return . . .” *Id.*

¹⁴⁴ *Id.* § 6033(a)(2)(A)(i).

¹⁴⁵ *See,* e.g., *id.* § 6033.

¹⁴⁶ *Id.* § 6033(a)(2)(A)(i); *see also supra* note 142 (providing the definition of an integrated auxiliary of a church).
V. SUMMARY AND CONCLUSION

New churches form every day in this country. In light of the proposal above, let us follow a hypothetical church-planting team through the process. We assume, first of all, that the putative congregants believe it is appropriate and desirable for their future local church to be involved in activities influencing legislation and supporting elective candidates.

The group begins by forming two new nonprofit corporations: Acme Bible Church and Acme Bible Charities. The church’s articles of incorporation indicate that it will be organized and operated as a church and as an entity exempt from federal income taxation under section 501(c)(4) of the Code. The articles of the charity contain the language mandated by the IRS for 501(c)(3) entities, including the appropriate political activity limitations and prohibitions. The charity’s articles


148. The IRS strongly recommends that the following language appear in the articles of incorporation of a 501(c)(3) entity:

Said corporation is organized exclusively for charitable, religious, educational, and scientific purposes, including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code.

... No part of the net earnings of the corporation shall inure to the benefit of, or be distributable to its members, trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth [above]. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the corporation shall 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. Notwithstanding any other provision of these articles, the corporation shall not carry on any other activities not permitted to be carried on (a) by a corporation exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code, or (b) by a corporation, contributions to which are deductible under section 170(c)(2) of the Internal Revenue Code, or the corresponding section of any future federal tax code.

... Upon the dissolution of the corporation, assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code, or shall be distributed to the federal government, or to a state or local government, for a public purpose. Any such assets not so disposed of shall be disposed of by a Court of Competent Jurisdiction of the county in which the principal office of the corporation is then located, exclusively for such purposes or to such organization or organizations, as
(or bylaws) indicate that it will engage in religious, educational, and charitable activities in support of the church, including (perhaps) missions, benevolence, and Sunday school. The articles and bylaws of both organizations affirm their common religious identity, provide for a measure of control by the church over the charity’s board, and require annual reporting by the charity to the church. The church applies for recognition of its 501(c)(4) exempt status by filing Form 1024. The charity does not file an application with the IRS because it is automatically exempt as an “integrated auxiliary” of a church. Neither the church nor the charity are required to file annual informational returns.

In the church bulletin every Sunday the following paragraphs appear:

Acme Bible Church is a nonprofit corporation, exempt from federal income tax as a social welfare organization under section 501(c)(4) of the Internal Revenue Code. However, this church does not receive tax deductible charitable contributions. This allows the church to engage in a variety of political activities consistent (we believe) with our religious mission.

Those wishing to make tax-deductible charitable contributions should make their checks payable to Acme Bible Charity. Contributions to Acme Bible Charity will be used for missions, evangelism, benevolence, and Sunday School, and not for political activity.

Tax deductibility is determined by a number of other factors as well. The above is not to be construed as legal advice. Consult your tax professional to assess your own situation with regard to deductibility of contributions.

From time to time, the pastor reminds the congregation about these things and explains them briefly for the benefit of new members and visitors.

said Court shall determine, which are organized and operated exclusively for such purposes.


149. These are among the factors that will allow a conclusion that the two organizations are “affiliated.” See I.R.C. § 6033(a); Treas. Reg. § 1.6033-2(h) (as amended in 1995); supra note 142 (discussing the level of control a church may exercise over the charity board).

150. See supra text accompanying notes 139–40 (discussing the requirement that an entity seeking 501(c)(4) status file a Form 1024, a less burdensome form than that required by an organization seeking 501(c)(3) status).

151. See I.R.C. § 508(c)(1)(A) (2000); supra note 142 (defining an integrated auxiliary and discussing the tax implications thereof).

152. See supra text accompanying notes 143–46 (stating that current law does not require churches or integrated auxiliaries of churches to file annual information returns).
Acme Bible Charity operates alongside the church, supporting missions, evangelism, benevolence, and Sunday school with tax-deductible donations. Acme Bible Church operates the church building, puts on religious services, pays the pastor, and does virtually everything any other church does. The pastor speaks out frequently and boldly on the great moral issues of the day, even though those issues are actively debated in the legislative arena. When the church believes that a candidate for elective office is particularly committed to the religious principles for which the church stands, the church endorses and supports the candidate.

And the tax code is complied with and satisfied.