

OPINION

■ IRS AND CLERGY ■

No muzzles on the pulpit

By Roman P. Storzer SPECIAL TO THE NATIONAL LAW JOURNAL

WITH THE ELECTION little more than a month away, the steady hum of campaigning—an inundation of CBS memos, Swift Boat veterans and windsurfing candidates—has included a growing, off-key note: the fight for legal and political control of churches. And the controversy centering on churches is not about maintaining the free flow of information, but rather its opposite: preventing our moral leaders from participating in this robust debate.

In every election season since 1992—and most recently, on June 10—the Internal Revenue Service (IRS) has written to political parties threatening to “take whatever actions are necessary” to prevent churches and religious leaders from engaging in “any...activ[ity] that may be beneficial or detrimental to any candidate.” The IRS has warned that churches making partisan comments—even from the pulpit—can result in the loss of a church’s tax-exempt 501(c)(3) status under IRS regulations. The prohibitions listed in the IRS’ Tax Guide for Churches are as sweeping as they are unconstitutional; at their extreme, they prevent ministers from speaking from the pulpit on political issues.

Much remains in doubt about the legitimacy and suitability of such rules. But three things are clear: These restrictions are not mandated by the establishment clause of the First Amendment; it is evident that—at least in certain applications—they violate the First Amendment’s free speech and exercise clauses; and finally, they have led to more, rather than less, political strife.

Many believe that it is improper—even unconstitutional—for churches to engage in political debate. Organizations such as the Americans United for Separation of Church and State go so far as to argue that allowing churches to speak on political matters may violate the First Amendment. Nothing could be

further from the truth. The Internal Revenue Code’s ban on political campaign speech by churches was not implemented by Congress in order to protect constitutional principles; it was a political ploy by then-Senator Lyndon B. Johnson to prevent certain nonprofit groups from opposing him and his party.

Courts have repeatedly held that ministers should be free to preach what their faith requires, without government supervision. In *Rigdon v. Perry* (1997), a federal court held that even a military chaplain has the right to engage in lobbying activity on the job, a right outweighing the government’s interest in a “politically disinterested military establishment.” Private churches deserve no less protection.

In certain situations, the 501(c)(3) campaign restrictions do violate the free speech and free exercise clauses of the First Amendment. The IRS defends its policies by citing only one case—*Branch Ministries v. Rossotti* (2000), an appellate case from the U.S. Circuit Court for the District of Columbia that upheld the revocation of tax-exempt status of a church that had funded full-page advertisements in the *Washington Times* and *USA Today* advocating the defeat of a presidential candidate. Despite the peculiar facts and narrow holding in that case, the IRS in its June warning still made the expansive claim that the “federal courts have upheld this prohibition on political campaign activity.”

But that claim is unwarranted. In *Branch Ministries*, the court acknowledged that its decision was based on that church’s admission that publishing its advertisement was not required by its religious beliefs. Such a holding would not obtain for, say, a pacifist minister telling his or her flock to vote against a pro-war senator or a Catholic priest urging his congregation to vote against anti-abortion candidates.

And the church in *Branch Ministries* had other, legal means of publishing the advertisement—the absence of such means may have rendered the IRS rule unconstitutional as a prior restraint on speech. Put another way, political speech from the pulpit should not forfeit tax-exempt status under the rule, when no alternative

means of such speech exists. No court has permitted the IRS to ban this speech, over First Amendment objection. At best, this ban on political debate by churches remains an open question, constitutionally.

Bad public policy

But is it a good idea to muzzle pastors on political issues? Some argue that engaging in political debate demeans religious institutions—they should be concerned with loftier ideas and not descend into a morass of political squabbling. While such a position may convey an idealistic sentiment, it still fails.

First, absent the IRS’ interpretation, there would be no requirement for churches to speak about political matters. They would be free to participate or not, depending on what their faith dictates. The First Amendment does not speak to the propriety of such debate; it merely provides the option.

Second, the regulations themselves have actually led to such bickering. Liberals and conservatives are using threats of IRS complaints against each other to pursue political ends. Groups like Americans United and the Mainstream Coalition threaten—and snitch on—churches they deem too supportive of Republican candidates. And the conservative Religious Freedom Action Coalition has launched a tongue-in-cheek effort called “Rat Out A Church” to “make some liberal pastors...start to feel the heat.” Both sides are sending undercover volunteers to monitor sermons for any hint of political activity.

It’s working. Ministers across the country are censoring themselves for fear of jeopardizing their churches’ tax-exempt status. These leaders provide guidance to millions of Americans on the most fundamental moral issues of the day. The IRS should stop censoring them. **NLM**

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