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## A MORE CAPACIOUS CONCEPTION OF CHURCH

*Samuel D. Brunson\* & Philip T. Hackney\*\**

### INTRODUCTION

United States tax law provides churches with extra benefits and robust protection from IRS enforcement actions. Churches and religious organizations are automatically exempt from the income tax<sup>1</sup> without needing to apply for recognition and without needing to file a tax return.<sup>2</sup> Beyond that, churches are protected from audit by stringent procedures.<sup>3</sup> There are good reasons to consider providing a distance between church and state, including the state tax authority. At least in part, Congress granted churches preferential tax treatment to try to avoid excess entanglement between church and state,<sup>4</sup> though that preferential treatment often just shifts the locus of entanglement. But those benefits and protections come with cost both to individual churches (by making these organizations susceptible to tax shelters and political activity shelters) and to our democratic order (by granting to churches a higher status than other organizations). Does Congress get the balance right? We think the balance struck is problematic but justifiable. In this Essay we only note the problems and suggest actions churches and religious organizations might take to protect against some of the dangers.

This Essay and co-authorship is inspired by the tremendous contributions Prof. Ellen Aprill has made in her storied career to, among other things, the nonprofit, tax, and religious sphere of the law, with a

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1. I.R.C. § 501(a), (c)(3).

2. I.R.C. §§ 508 (c)(1)(A), 6033(a)(3)(A)(i).

3. I.R.C. § 7611.

4. *See, e.g.,* *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 675–76 (1970).

particular care for the place of religion within that order.<sup>5</sup> Professor Aprill has been an important mentor to both of us and we are grateful to have the opportunity to render scholarly tribute in her honor. She consistently demonstrates a care for understanding detailed rules and developing legal theory that impacts how we consider those rules, and she brings a moral compass to the table within that precision.

In this Essay we focus primarily on churches.<sup>6</sup> That status within tax exemption comes with significant extra benefits and protections that courts have recognized.<sup>7</sup> In addressing questions of the tax status of churches, courts do not ask whether a church is a religion holding sincere religious beliefs, but focus instead on the question of whether the organization is a church.<sup>8</sup> In other words, *religious organization* is not synonymous with *church*, and the latter category is much narrower.<sup>9</sup> The Supreme Court has said a church “must be construed . . .

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5. A few examples: Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 856 (2001) (encouraging policymakers to consider larger policy issues as they decide whether to extend charitable contribution deduction to non-itemizers); Ellen P. Aprill, *Reform Judaism, B'tzelem Ehlohim, and Gay Rights*, in FAITH AND LAW: HOW RELIGIOUS TRADITIONS FROM CALVINISM TO ISLAM VIEW AMERICAN LAW 223, 235 (Robert Cochran ed., 2007) (discussing how Reform Judaism works through core values of social justice and inclusiveness); Ellen P. Aprill & Lloyd Hitoshi Mayer, *21st Century Churches and Federal Tax Law*, U. ILL. L. REV. (forthcoming) (manuscript at 4), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4346286](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4346286) (reviewing the concept of a church within tax law, encouraging a change in the test from a fourteen-factor test to an associational test and that the U.S. Government Accountability Office review the political activities of churches).

6. We recognize that “church” is too narrow a term to describe the range of religious organizations that qualify for the preferential treatment we discuss in this Essay. The term “church” has distinctly Christian connotations. See generally Dale A. Johnson, *Church and Society in Modern History: Beyond Church and State*, 19 J. CHURCH & ST. 497 (1977). We nonetheless chose to use “church” to describe the religious organizations we discuss, precisely because the Internal Revenue Code uses that term. See, e.g., I.R.C. § 170(b)(1)(A)(i) (permitting higher limit on deductible contributions to “a church or a convention or association of churches”); *id.* § 508(c)(1)(A) (providing exception to application requirement for “churches, their integrated auxiliaries, and conventions or associations of churches”); *id.* § 6033(a)(3)(A)(i) (providing exception to information return filing requirement for “churches, their integrated auxiliaries, and conventions or associations of churches”). Even focusing on Christianity alone, the structure and organization of churches is diverse and inconsistent. Charles M. Whelan, “Church” in the Internal Revenue Code: The Definitional Problems, 45 FORDHAM L. REV. 885, 903 (1977). It cannot be, though, that the special benefits received by churches are available only to Christian denominations. As noted, the government does not define the concept. But we write this footnote to acknowledge the implications of using the term with all its Christian connotations and intend to give it a more capacious meaning.

7. *Spiritual Outreach Soc’y v. Comm’r*, 927 F.2d 335, 337 n.2 (8th Cir. 1991) (“[T]here are additional tax benefits which inure to an organization if it is determined to be a church.”); *Church of Spiritual Tech. v. United States*, 26 Cl. Ct. 713, 731 n.37 (1992), *aff’d*, 991 F.2d 812 (Fed. Cir.1993) (“[C]hurches may be investigated by the IRS only in accordance with strict and specific procedures . . .”).

8. *Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 215 (2009).

9. *Am. Guidance Found., Inc. v. United States*, 490 F. Supp. 304, 306 (D.D.C. 1980).

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to refer to the congregation or the hierarchy itself, that is, the church authorities,” but refused to provide a definition.<sup>10</sup> Congress and the IRS, through Treasury Regulations, have followed suit, refusing to provide a definition for the IRS to apply.<sup>11</sup> That said, the IRS uses a fourteen-factor test to determine if an organization qualifies as a church. Some of the factors include: (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; and (6) a membership not associated with any other church or denomination.<sup>12</sup>

In this Essay, rather than focusing upon typical tax matters such as efficiency or equity, we look primarily at political justice. In evaluating whether the tax treatment of churches increases political justice, we consider a democratic order most likely to generate political justice. We thus examine the basic requirements of a democratic order including the liberal rights such as freedom of speech, association, and religion. Churches cannot be excluded from this democratic order: much of democracy is associational in nature, and churches are an important location for individuals to associate and interact.<sup>13</sup> Moreover, as we discuss later, we do not believe that the government should force churches to implement democratic internal governance.

Such government interest in the internal governance of tax-exempt organizations is not unheard-of. One of us has argued that the role of education in democracy is critical enough that charter schools should necessarily involve democratic governance that reflects the community.<sup>14</sup> And Congress requires that to qualify as tax-exempt, the boards of consumer credit counseling services should be representative of the community, providing some degree of internal democratic governance.<sup>15</sup>

We first ask whether we can find within such democratic order the need to protect churches from a tax authority in the way it is so provided. We unsurprisingly find there is no such requirement, but

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10. *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 784 (1981).

11. *Church of Visible Intel. That Governs the Universe v. United States*, 4 Cl. Ct. 55, 64 (1983).

12. *Id.*

13. See PAUL A. DJUPE & CHRISTOPHER P. GILBERT, *THE POLITICAL INFLUENCE OF CHURCHES* 4 (2009).

14. Philip Hackney, *Public Good Through Charter Schools?*, 39 GA. ST. U. L. REV. (forthcoming 2023) (manuscript at 3), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4220187](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4220187).

15. I.R.S. Priv. Ltr. Rul. 2004-50-037 (Dec. 10, 2004).

providing such protection seems a legitimate choice that a democratic order might make. However, these protections come with some harm to the greater society. A democratic order ought to publicly recognize each citizen as equal to another. But providing those who are associated with a church more protections elevates the status of such citizens and their related associations. We think the concept of church likely serves as a proxy for belief systems certain citizens hold particularly dear and should be protected from government interruption. Obviously, there are other belief systems that are similarly dear to citizens that are not similarly treated. Whether they should receive similar preferential treatment is beyond the scope of the Essay.

We note, as we present this account of the church and the state, that just like church and state intertwine in many ways, we are each intertwined with both. Both authors live in the United States and enjoy and participate in its democratic ideals as voters, as taxpayers, and as citizens. Similarly, we both have religious lives. One of us is a practicing member of the Church of Jesus Christ of Latter-day Saints (the “LDS Church”). The other was raised in the Catholic tradition and currently practices Buddhism. If anything, our associational participation with both church and state underscores to us the importance of working through the question of ensuring that the church supports the country’s democratic ideals.

#### I. TAX CODE TREATMENT OF CHURCHES AND RELIGIOUS ORGANIZATIONS

The United States has long exempted religious organizations (primarily as nonprofit corporations) from taxes. Religious organizations were implicitly exempt from the income tax enacted in 1862,<sup>16</sup> and Congress explicitly exempted such organizations from the income tax enacted 1897, in the corporate excise tax enacted in 1909,<sup>17</sup> and then in the modern income tax enacted in 1913.<sup>18</sup> Generally, since 1913, as

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16. See Samuel D. Brunson, *Mormon Profit: Brigham Young, Tithing, and the Bureau of Internal Revenue*, 2019 BYU L. REV. 41, 72 (2019).

17. Tariff Act of 1909, ch. 6, § 38, 36 Stat. 11, 113. There, Congress exempted from the Corporate Excise Tax, the precursor to the modern income tax, corporations or associations “organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.”

18. Tariff Act of 1913, ch. 16, § II(G)(a), 38 Stat. 114, 172. (exempting “any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual” from income tax).

long as an organization was exclusively organized and operated for charitable purposes, which includes religious purposes, the organization qualifies as exempt from income tax. Such status also allows churches and religious organizations to accept charitable contributions that are deductible by the donors in calculating their federal income tax.<sup>19</sup> There is nothing special within the charitable world about being exempt or having access to deductible charitable contributions; any charitable organization can hold those benefits. So what is different about religious organizations?

Churches and conventions or associations of churches are automatically treated to prized public charity status under sections 170 and 509 of the Internal Revenue Code (“Code”), automatically allowing donors to deduct a larger amount of their adjusted gross income than if they were qualified as a private foundation.<sup>20</sup> Additionally, though most organizations must file an application on Form 1023 to be recognized by the IRS as exempt from tax, Congress exempted churches, integrated auxiliaries from churches, and conventions or associations of churches from that requirement.<sup>21</sup> That exemption remains.<sup>22</sup> Similarly, though most organizations exempt from tax under section 501(a) must file a Form 966 upon liquidating the organization, churches, integrated auxiliaries, and conventions or associations of churches are also exempted from this requirement.<sup>23</sup>

Beginning in 1941, much of the tax-exempt organization community has borne the obligation to file an information return on Form 990.<sup>24</sup> Early on, Congress made these information returns publicly available;<sup>25</sup> however, the initial regulatory and then legislative authority exempted religious organizations from this requirement.<sup>26</sup> When

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19. I.R.C. § 170.

20. I.R.C. §§ 170(c)(1)(A)(i), 509(a).

21. Tax Reform Act of 1969, Pub. L. No. 91-172, § 101(a) (83 Stat.) 487, 492, 494–95.

22. I.R.C. § 508(c)(1)(A).

23. I.R.C. § 6043. This was also added by the Tax Reform Act of 1969, Pub. L. No. 91-172, § 101(j)(35)(C), 83 Stat. 487, 529–30.

24. T.D. 5125, 1942-1 C.B. 101.

25. Revenue Act of 1950, Pub. L. No. 81-814, § 341, 64 Stat. 906, 960.

26. Revenue Act of 1943, Pub. L. No. 78-235, § 117, 58 Stat. 28, 36–37 (enacting I.R.C. § 54(f) (1944) (recodified at I.R.C. § 6033(a)); Treas. Reg. § 19.101-1 (1942) (“An organization claiming exemption under section 101 (5), (6), *except organizations organized and operated exclusively for religious purposes*, (7), (8), (9), or (14), shall also file with the other information specified herein a return of information on Form 990.” (emphasis added)).

Congress added the unrelated business income tax (UBIT) in 1950,<sup>27</sup> it made Form 990s available to the public but exempted religious and charitable organizations generally from that requirement.<sup>28</sup> In 1969 Congress added the modern iteration that we see today where churches, integrated auxiliaries of a church, and conventions or associations of churches are exempted from this filing and publicity requirement.<sup>29</sup>

Also in 1969, Congress added rules protecting churches from IRS examinations, but solely regarding the UBIT.<sup>30</sup> Before the 1969 Tax Act, Congress had not subjected churches to the UBIT.<sup>31</sup> As Congress included churches within the reach of the UBIT, it wanted to provide churches some audit protection. If the IRS wanted to open such an examination, a Regional Commissioner had to believe the church was engaged in taxable activity and the IRS had to believe it was necessary to open the examination and send the church a notice before opening the examination.<sup>32</sup> The Joint Committee on Taxation explained that the new requirement was “intended to protect churches from unnecessary tax audits in the interest of not interfering with the internal financial matters of churches.”<sup>33</sup>

In 1984, Congress expanded its protection of churches from audit. It removed section 7605(c), which focused on church examinations and UBIT, and replaced it with section 7611, which imposed significant restrictions on the ability of the IRS to open an inquiry into a church.<sup>34</sup> The Joint Committee explanation of the bill suggests that Congress had two interests in adopting these new rules: (1) ensuring the sanctity of the separation of church and state, and (2) recognizing that some people were using the form of a church as a tax avoidance

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27. Revenue Act of 1950, Pub. L. No. 81-814, § 301, 64 Stat. 906, 948. Congress initially exempted churches from the UBIT. H.R. REP. NO. 81-2319, at 108 (1950); S. REP. NO. 81-2375, at 105-06 (1950).

28. Revenue Act of 1950, Pub. L. No. 81-814, § 341, 64 Stat. 906, 960, (enacting I.R.C. § 153(c) (1950) (amended 2004)).

29. Tax Reform Act of 1969, Pub. L. No. 91-172, § 101(d), 83 Stat. 487, 519-23 (amending I.R.C. § 6033).

30. Tax Reform Act of 1969, Pub. L. No. 91-172, § 121(f), 83 Stat. 487, 548 (enacting I.R.C. § 7605(c)).

31. JOINT COMM. ON TAX'N, 91ST CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1969, at 66 (Joint Comm. Print 1970).

32. *Id.* at 67.

33. *Id.*

34. Tax Reform Act of 1984, Pub. L. No. 98-369, § 1033, 98 Stat. 1034, 1034 (enacting I.R.C. § 7611).

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device and the consequent usefulness of having clear procedures for the IRS to proceed against such organizations.<sup>35</sup>

One other fundamental benefit is worth noting, though this benefit comes primarily from outside the Code. Charitable organizations are absolutely prohibited from intervening in a political campaign (a prohibition often referred to as the “Johnson Amendment”) and may not engage in a substantial amount of lobbying.<sup>36</sup> Though this prohibition and limitation applies across charitable organizations, as a result of the Religious Freedom Restoration Act, and perhaps under the First Amendment, churches and religious organizations may have broader scope to engage in such activities.<sup>37</sup> Many churches appear to believe that religious groups do possess such latitude, as evidenced by the long-running and large operation called Pulpit Freedom Sunday where church leaders explicitly choose to violate the Johnson Amendment and alert the IRS to this fact.<sup>38</sup> To our knowledge, the IRS has yet to take any adverse action against any of these churches as a result of such violations.

Churches receive a number of other benefits as well, some of which are discussed in more detail in Part IV. Churches are exempted from retirement plan provisions.<sup>39</sup> The law exempts certain ministers from self-employment taxes.<sup>40</sup> Ministers of the gospel are able to receive income tax-free housing as a benefit from their religious organization employer without showing that it is for the convenience of its employer.<sup>41</sup>

## II. CHURCHES AND THE DEMOCRATIC ORDER

One of us has argued that democracy as political justice should be a significant value that shapes tax policy, particularly in the tax-

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35. JOINT COMM. ON TAX’N, 98TH CONG., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, at 1139–40 (Joint Comm. Print 1984).

36. I.R.C. § 501(c)(3).

37. The question of whether the Religious Freedom Restoration Act prohibits the government from penalizing tax-exempt churches’ endorsement of candidates is currently untested in the judiciary.

38. Benjamin M. Leff, *Fixing the Johnson Amendment Without Totally Destroying It*, 6 U. PA. J.L. & PUB. AFFS. 115, 119 (2020).

39. I.R.C. §§ 410(c)(1)(B), 411(e)(1)(B), 412(e)(2)(D), 414(e).

40. *Id.* § 1402(e).

41. *Id.* § 107; *cf. id.* § 119 (allowing employees to exclude meals and lodging from their gross income where provided for the convenience of their employer).



exempt sphere.<sup>42</sup> In that notion, we should value political voice equality (PVE). By PVE we mean a system where each citizen has an equal opportunity in any collective decision to generate and discuss relevant information, set the agenda, and vote on any final decision.<sup>43</sup> In setting tax policy, we should consider the extent to which that policy incentivizes or hinders PVE. We explore another element of PVE in this Essay, namely, the sense to which each citizen is publicly recognized as equal to any other citizen.<sup>44</sup> As Prof. Thomas Christiano states, “[d]emocratic decision-making is the unique way to publicly embody equality in collective decision-making under the circumstances of pervasive conscientious disagreement in which we find ourselves.”<sup>45</sup> Our interest in Part III is in exploring whether in some ideal democratic sense we would expect to provide, or even legitimately could provide, the protections and benefits Congress provides to churches from the IRS and the Code. We also ask whether those protections might be necessary in the challenges of operating a democratic order in a pluralistic world. We can only provide a very limited sketch of this realm in this short Essay.

Political voice equality is not necessarily the equilibrium state of a democratic order, however. While churches can embrace democratic governance and democracy at large, not all do.<sup>46</sup> And churches can be a locus for wealth. Wealth, especially accumulated by a legal entity, has the ability to undermine democracy by putting pressure on policy-makers to take action for those who control the wealthy legal entity that varies from what their constituents want.<sup>47</sup> While not all churches are wealthy, they certainly have the capability of accumulating wealth, with donors subsidized through the deduction of their donations, as well as interest and gains on the church’s portfolio going untaxed.<sup>48</sup>

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42. Philip Hackney, *Political Justice and Tax Policy: The Social Welfare Organization Case*, 8 TEX. A&M L. REV. 271 (2021).

43. Philip T. Hackney, *Prop Up the Heavenly Chorus? Labor Unions, Tax Policy, and Political Voice Equality*, 91 ST. JOHN’S L. REV. 315, 333 (2017).

44. THOMAS CHRISTIANO, THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS 75 (2008) [hereinafter CONSTITUTION OF EQUALITY].

45. *Id.* at 75–76.

46. See *infra* notes 149–153 and accompanying text.

47. See Ingrid Robeyns, *What, if Anything, Is Wrong with Extreme Wealth?*, 20 J. HUM. DEV. & CAPABILITIES 251, 256 (2019).

48. I.R.C. §§ 170(c), 501(a), (c)(3) (2018).

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For instance, recent news indicates that the LDS Church has an endowment worth more than \$100 billion.<sup>49</sup> There is no reason to believe that the LDS Church is antidemocratic. In fact, it actively encourages its members both to vote and to participate in the political process while generally remaining politically neutral as an institution.<sup>50</sup> At the same time, though, over a twenty-two year period, the Church failed to comply with securities law–mandated disclosures in an attempt to disguise the breadth of its wealth.<sup>51</sup> Even without actively encouraging its membership to disregard democratic norms, then, the wealth of the LDS Church led it to flout democratically-enacted laws to disguise that very wealth. While not a flagrant attack on democracy, this highlights how churches can, through various means, institutionally work against democratic ideals. It also demonstrates how exempting a church from filing returns and the transparency attendant to those returns can have ill effect on our overall democratic order.

#### *A. Democracy Generally*

The history of Western democracy springs from the Greek culture. Though that Greek culture might have been religiously tolerant in part, it did not embody the religious liberty that is embodied today in the United States.<sup>52</sup> After all, “Socrates was condemned to death for religious heterodoxy.”<sup>53</sup> But today, the notion that freedom of thought and association is critical to a healthy democratic order is almost apodictic. The idea, however, did not emerge in democratic thought until the Enlightenment.

Though religious freedom might not have been a part of democracy in its origin, the idea of democracy derives in part from the notion of intrinsic equality, a notion that likely comes from or gained strength from the idea in Judaism and Christianity that we are all God’s children.<sup>54</sup> Additionally, the Protestant Reformation played a significant

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49. Ian Lovett & Rachel Levy, *The Mormon Church Amassed \$100 Billion. It Was the Best-Kept Secret in the Investment World*, WALL ST. J. (Feb. 8, 2020, 5:01 PM), <https://www.wsj.com/articles/the-mormon-church-amassed-100-billion-it-was-the-best-kept-secret-in-the-investment-world-11581138011> [<https://perma.cc/5HGU-FXXN>].

50. *Political Neutrality*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://newsroom.churchofjesuschrist.org/official-statement/political-neutrality> [<https://perma.cc/EGA3-4PMA>].

51. Ensign Peak Advisors, Exchange Act Release No. 96951, 2 (Feb. 21, 2023).

52. LEO PFEFFER, CHURCH, STATE, AND FREEDOM 8–9 (rev. ed.1967).

53. *Id.* at 9.

54. ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 85–86 (1989).

role in questioning political obligation and obedience to ancient forms of power and helped shape our modern conception of democracy by challenging the institutions of religion and state.<sup>55</sup> One other intriguing relationship regarding democracy and rights is worth noting: liberal rights such as freedom of speech, association, and religion are anchored in the idea of “public equality, or the idea that the institutions of society must be structured so that all can see that they are being treated as equals.”<sup>56</sup> Many in fact argue that democracy is the best system for realizing this public equality because these rights and freedoms are key to allowing a democratic process to exist.<sup>57</sup>

The key principle supporting democracy anchored in intrinsic equality states that there is no one better than an individual to decide how to best live that person’s life.<sup>58</sup> Additionally, each individual should be a part of determining the order under which they live. Robert Dahl calls this the presumption of personal autonomy.<sup>59</sup> This presumption likely runs counter, at least in part, to the doctrine of many religious groups. In most religions, certain truths have long been determined and some hierarchy is in control of propounding what those truths may be. But, if we accept both intrinsic equality and the presumption of personal autonomy, we also likely accept that we must make collective decisions through a democratic process. What does that process look like?

In any democratic community, all capable adults must be included in collective decision-making.<sup>60</sup> There are two primary stages of an ideal democratic process: setting the agenda and voting on final binding decisions.<sup>61</sup> During this process, the members of the polity must have the opportunity to develop an enlightened understanding—meaning an opportunity to generate and examine information critical to any final choice.<sup>62</sup> Thus, in order to make public equality of citizens real, each person who qualifies to have voting rights must have an equal opportunity to participate in both setting the agenda by generating information and asking questions and having voting equality at the decisional stage for binding laws.

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55. DAVID HELD, *MODELS OF DEMOCRACY* 57–58 (Stanford Univ. Press 3d ed. 2006) (1987).

56. *CONSTITUTION OF EQUALITY*, *supra* note 44, at 2.

57. DAHL, *supra* note 54, at 88–89.

58. *Id.* at 99.

59. *Id.* at 88.

60. *Id.* at 129.

61. *Id.* at 107.

62. *Id.* at 112.

Though there is disagreement, the decisional rule most synonymous with democracy is majority rule.<sup>63</sup> Such a decision mechanism arguably maximizes self-determination within a relevant group and is the only decision rule that manages to meet the criteria of decisiveness, anonymity, neutrality, and positive responsiveness.<sup>64</sup> Majority rule also furthers a moral autonomy by allowing individuals to shape the rules they live by which, in turn, allows them to shape their own moral lives.<sup>65</sup> Finally, majority rule is also arguably the best at allowing an individual to protect their right to do what they want and resist doing what they don't want to do.<sup>66</sup>

All of this said, realizing ideal democracy in a large state is utopian. No country will implement an ideal democracy. A large, pluralistic society will not be able to maximize self-determination for all members.<sup>67</sup> Thus, much democratic theory in a practical sense looks at the elements of a plural society that tend to make it more democratic than not. Dahl calls these governments polyarchies.<sup>68</sup> He names six primary attributes of a polyarchy: (1) “[e]lected officials;” (2) “[f]ree, fair, and frequent elections;” (3) “[f]reedom of expression;” (4) “[a]lternative sources of information;” (5) “[a]ssociational autonomy;” and; (6) “[i]nclusive citizenship.”<sup>69</sup> Elements one and two refer to the need to have a representative society that is responsive to change in citizen desire where the officials are subject to frequent elections. Of course, voting cannot be subject to a fee and must be carried out in a fair manner. Freedom of expression and the opportunity for alternative sources of information other than the state are key to allowing individuals to develop the enlightened understanding described above.<sup>70</sup> Associational rights are vital—in a large-scale democracy it is typically impossible for most individuals to be heard on their own.

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63. While some churches also function with majority rule-based governance, many operate on a more hierarchical basis, a basis at odds with democratic governance. *See infra* notes 149–153 and accompanying text. In contrast to nineteenth-century Protestants intent on protestantizing Catholicism, we do not argue that society should encourage hierarchical churches to adopt democratic governance. Instead, we argue that all churches—hierarchical or not—should both permit and encourage their members to participate in the civil democratic processes where they live.

64. DAHL, *supra* note 54, at 139–140 (discussing the argument for majority rule set forth in Kenneth May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decisions*, 20 *ECONOMETRICA* 680 (1952)).

65. *Id.* at 90–91.

66. *Id.* at 95.

67. ROBERT A. DAHL, *ON DEMOCRACY* 42 (1998).

68. *Id.* at 90.

69. *Id.* at 85.

70. *Id.* at 85–86.

Finally, it is critical that all capable individuals defined broadly have access to all of these rights. Note, importantly, that no association within this system is required itself to be democratic, though even an undemocratic association ought not to interfere with the democratic process or demand that its members not participate in that process.

However, this system of rights and democratic process does not protect people against either a minority that controls the decisions of the polity or a majority that chooses not to respect either the democratic process or the rights necessary to its working. Also, a majority might follow democratic procedures and adopt final decisions that conflict in some way with the values or interests of some group within the polity. Society is aware of these challenges to a democratic order. States adopt various mechanisms to try to protect against these tendencies of a democracy. In the United States, of course, we adopted a Bill of Rights that provides explicit protections for freedom of speech, religion, and association.<sup>71</sup> Additionally, the United States has deputized the Supreme Court to protect such interests.

In this process of conflict, particularly in those circumstances where a majority follows democratic procedures, various parties may make compromises that further another party's interest rather than their own in return for other important rights.<sup>72</sup> In other words, compromise of interest is possible. Still, as we noted, a key matter of democracy is a publicly realized notion of equality. Though compromises may be made, the individuals of that political order need to see that they are publicly and transparently equal.<sup>73</sup> As Immanuel Kant noted, it is difficult to organize "a group of rational beings who together require universal laws for their survival, but of whom each separate individual is secretly inclined to exempt himself from them."<sup>74</sup> Publicity is necessary to fair laws, but also to demonstrating our public equality.

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71. U.S. CONST. amend. I.

72. See CHRISTIANO, *supra* note 44, at 80.

73. *Id.* at 51.

74. IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, in KANT'S POLITICAL WRITINGS 93, 112–13 (Hans Reiss ed., H.B. Nisbet trans., 1970).

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Indeed, Congress recognized this aspect of publicity as important in the sphere of nonprofit organizations by requiring annual public disclosure of information on their operations.<sup>75</sup> Though the Form 990 information return serves as a means for the IRS to ensure that tax-exempt organizations annually meet their requirements for exempt status, its required wide publicity also serves a democratic purpose by providing transparency as these organizations carry out collective activity on behalf of the public.<sup>76</sup> But to ensure strong protection of freedom of religion, Congress exempted churches from this system of transparency. The lack of governmental and public accountability for churches then puts them in danger of fraud within the church, tax fraud with the IRS, and fraud in the political domain. In her book on secrecy and governance, Sissela Bok notes: “Secrecy, when available, is peculiarly likely to increase the temptation not to cooperate with others to reduce shared burdens.”<sup>77</sup>

This next section considers the special challenges that religion presents in a democratic order.

### *B. Religious Freedom and Democracy*

We focus here on two key issues in the relationship between religion and democracy: first, the ability of any religious organization to shape that democratic order; and second, the ability of any religious organization to have protection of its speech, association, and conscience. One deliberative democracy approach locates these notions of religious freedom as a matter of protection from the state, but also protection for the polity from citizens using political power for missionary purposes, as well as the power of religious authorities to “compulsorily” influence “their members’ conscience.”<sup>78</sup>

Because religious ideas and values are often handed down as truths from some authority other than an individual, some democratic theorists have suggested we could prohibit the religious from using their religious ideas to shape the democratic order. For instance, Jür-

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75. See Philip Hackney, *Dark Money Darker? IRS Shuttles Collection of Donor Data*, 25 FLA. TAX REV. 140, 168–69 (2021).

76. *Id.* at 179–80.

77. SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 107 (Vintage Books 1989).

78. Jürgen Habermas, *Religious Tolerance—The Pacemaker for Cultural Rights*, in *THE DERRIDA–HABERMAS READER* 195, 196–97 (Lasse Thomassen ed., 2006).

gen Habermas started with a view of religion as problematic to a democratic order. He argued that religious ideas could not make up part of a universal agreement on governing one another.<sup>79</sup> Over time, though, he came to accept that religious ideas should be a significant part of the public conversation held to develop a universal basis of governance.<sup>80</sup> Citizens bringing religious convictions to public deliberations could refine “moral intuitions” of those deliberations.<sup>81</sup> Surely, if democracy is about finding the good of the people, religious individuals with their particular conceptions of the good should have a role in shaping a society.<sup>82</sup>

At its best, a democratic order asks citizens to seek the common good rather than their own selfish interests.<sup>83</sup> Someone from a liberal democratic tradition might question this need to seek the common good, arguing that the democratic order is made up of many individuals voting according to their selfish interests. Nevertheless, to the extent we accept that a citizen ought to be seeking the common good in their voting on final matters, it often puts the religious person in a troubling (to them) spot as the religious must share in the secularization of society.<sup>84</sup> As Habermas notes, religion “had to renounce this claim to a monopoly on interpretation and to shape life as a whole with the secularization of scientific knowledge, the neutralization of state power, and the universalization of religious freedom.”<sup>85</sup> Still, there is a concomitant obligation on other citizens to treat religious convictions as not per se irrational in a secular sense.<sup>86</sup>

What about the balancing of rights to freedom of speech, association, and religion with the right to participate as a public equal in a democratic order in all collective decisions to be made? The proper balancing of these rights is far from obvious. As John Rawls notes: “while we might want to include in our freedom of (political) speech rights to the unimpeded access to public places and to the free use of social resources to express our political views, these extensions of our

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79. Philippe Portier, *Religion and Democracy in the Thought of Jürgen Habermas*, 48 *SOC'Y* 426, 426 (2011).

80. *Id.*

81. *Id.*

82. Robert Audi, *Religion & Democracy*, *DAEDALUS*, Summer 2020, at 5, 7.

83. JÜRGEN HABERMAS, *BETWEEN NATURALISM AND RELIGION* 105 (Ciaran Cronin trans., Polity Press 2008).

84. *Id.* at 111.

85. *Id.*

86. *Id.* at 112.

liberty, when granted to all, are so unworkable and socially divisive that they would actually greatly reduce the effective scope of freedom of speech.”<sup>87</sup>

How we balance these rights with the democratic process may depend in part on how each person conceives of the relationship of these fundamental rights to a democratic order.<sup>88</sup> There are a couple primary ways to think of the derivation of rights such as that to religious freedom. In the liberal, or aggregative, conception of democracy, which likely dominates in the United States, religious liberty and liberty of conscience exist outside of a democratic order.<sup>89</sup> The rights in this liberal form of democracy do not derive from the procedural conception of democracy as one-person–one-vote; they are more of a constraint on a democratic order.<sup>90</sup> Ronald Dworkin describes these as “certain moral rights made into legal rights by the Constitution.”<sup>91</sup>

Within the deliberative tradition and some other democratic traditions, though, the protection of religious freedom is found in the democratic conception of “free public reasoning among equals.”<sup>92</sup> This view sees the right to a democratic process itself as “one of the most fundamental rights a person can possess.”<sup>93</sup> The other rights, such as freedom of speech and religion, are only rights as a result of the right to self-governance. Citizens, in other words, committed to such a democratic process would not without mistake deprive a minority or a majority of those primary rights.<sup>94</sup> This acts as a substantial limitation on majority rule.

As a practical matter, the difference between these two approaches likely results in different perspectives on how to protect the classic rights of freedom of speech, association, and religion. In the liberal approach, “we need institutional guarantees for substantive rights and results, not merely . . . formal procedures.”<sup>95</sup> While the deliberative democratic theorist does not disagree that some institutional guarantees are likely needed, they respond back that no democratic

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87. JOHN RAWLS, *POLITICAL LIBERALISM* 341 (expanded ed. 2005).

88. *See, e.g.*, OWEN M. FISS, *THE IRONY OF FREE SPEECH* 2–3 (1996).

89. DAHL, *supra* note 54, at 169.

90. Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 95, 97–98 (Seyla Benhabib ed., 1996).

91. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 190 (1978).

92. Cohen, *supra* note 90, at 99.

93. DAHL, *supra* note 54, at 169.

94. *Id.* at 171.

95. *Id.* at 172.



order is likely to last long where the people do not possess the moral values necessary to the existence of a strong, flexible, and healthy democracy capable of warding off anti-democratic impulses.<sup>96</sup> Finally, the deliberative theorist may question the turn to antidemocratic systems like a supreme court to decide matters on values the majority ought to have a say upon.<sup>97</sup> In a more minor sense, but still important, the deliberative theorist might question the political system fully exempting churches from any oversight that most other individuals and groups must undergo.

One last consideration is whether religious groups ought to be treated better in a freedom of association or speech sense than other groups, such as identity groups that other citizens might hold equally dear in the values the organization expresses. Under general democratic principles of public equality discussed above,<sup>98</sup> treating religious organizations differently would violate public equality. Ken Greenawalt suggests that, at least in the United States—where these fundamental rights are likely the most important in many citizen's lives—there may be some important reasons to treat religious organizations' rights in this space differently.<sup>99</sup> He sees religious organizations as a “crucial counterbalance to tendencies of government to abuse power.”<sup>100</sup> Furthermore, drawing lines between religious and nonreligious organizations that significantly matter to citizens is difficult, but it is at least a feasible task that can provide significant political protection.<sup>101</sup>

### III. ON THE INEVITABLE ENTANGLEMENT OF CHURCH AND STATE

Academic and popular discourse sometimes frame religion as “cosovereign” with the state.<sup>102</sup> Under this co-sovereignty conception, religion and the state occupy separate spheres and neither depends on the other for its existence.<sup>103</sup> The separate spheres theory “generates a

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96. *Id.*

97. *Id.* at 173.

98. See discussion *supra* Section II.A.

99. Kent Greenawalt, *Freedom of Association and Religious Association*, in FREEDOM OF ASSOCIATION 109, 110 (Amy Gutmann ed., 1998).

100. *Id.*

101. *Id.*

102. Gregory A. Kalscheur, S.J., *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL OF RTS. J. 43, 65 (2008).

103. *Id.*

space for churches, treats them as unique as compared to nonreligious groups, and offers an account of church-state separation that emphasizes institutional autonomy, not individual conscience.”<sup>104</sup>

While the separate spheres theory provides one potential undergirding for the constitutional privileges churches enjoy, explaining and justifying their unique treatment in U.S. constitutional jurisprudence, it elides the day-to-day functioning of churches. Whether they derive their authority from sources other than the state, and whether they could exist separate from the state,<sup>105</sup> churches are inextricably interlinked with the societies in which they find themselves.<sup>106</sup>

The complications of the interrelationship between co-sovereigns that occupy the same space is not unique to this conception of churches. In designing the United States’ system of constitutional federalism, the Founders intended to preserve “the states as separate sources of authority and organs of administration.”<sup>107</sup> But, as Professor Aprill has pointed out, this state-level autonomy and sovereignty does not mean states are somehow exempt from federal policies. For instance, the federal government must expressly decide whether to tax or exempt “states and their political subdivisions.”<sup>108</sup> As a policy matter, it has decided to exclude from the definition of gross income revenue derived by states, their political subdivisions, the District of Columbia, and the governments of U.S. possessions, at least as long as that revenue is derived from the provision of government services.<sup>109</sup> Even with this broad exemption—a recognition of states’ sovereignty—the federal government has the ultimate ability to recognize or not an entity’s status as a political subdivision of a state.<sup>110</sup>

In a similar manner, the tax law highlights the interrelationship between church and state because the tax law cannot ignore churches. Rather, society must make an active decision: do churches pay taxes,

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104. Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341, 1372 (2020).

105. See Kalscheur, *supra* note 102, at 65 (churches “preexisted the state . . . and would continue to exist if the state were suddenly dissolved or destroyed”).

106. See, e.g., GEORGE M. MARSDEN, *RELIGION & AMERICAN CULTURE: A BRIEF HISTORY* 267 (3d ed. 2018) (“Yet other subcommunities, especially those with a strong religious basis, have not faded away, even as their members participate as good citizens in the cultural mainstream as well.”).

107. Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954).

108. Ellen P. Aprill, *Revisiting Federal Tax Treatment of States, Political Subdivisions, and Their Affiliates*, 23 FLA. TAX REV. 73, 80 (2019).

109. I.R.C. § 115.

110. Aprill, *supra* note 108, at 84–85.

or does the tax law exempt them from its reaches?<sup>111</sup> Arguably, taxing churches could implicate an abridgement of religious liberty, while exempting them represents a subsidy to religion.<sup>112</sup> Taxable or not, though, the very existence of taxation and tax exemption interconnects church and state. If a church pays taxes, the connection between church and state is obvious: if a church contributes to the operation of the state, it clearly recognizes that it is subject to secular law. At the same time, if a church pays taxes, the state becomes at least partially dependent on the church for revenue.

But even where the law exempts churches from tax, that exemption represents a powerful connection to the society in which a church finds itself. Though churches automatically qualify as exempt, to maintain their exemption they must comply with certain requirements. Exemption from the federal income tax, for instance, requires that the church's profits not inure to the benefit of any private individual.<sup>113</sup> And, as noted in Part II, churches are subject to the UBIT. On top of the federal income tax requirements for exemption, each state has a different set of rules for church property to qualify as exempt from state and local property tax.<sup>114</sup> For instance, to qualify for an exemption from the Illinois property tax, a church must use its property "exclusively" for "religious purposes."<sup>115</sup> To the extent a church uses any of its property for non-exempt purposes, it loses its exemption for that proportion of the property.<sup>116</sup>

Similarly, the sales tax exemption enjoyed by tax-exempt organizations, including churches, has guardrails. Pennsylvania's sales tax law explicitly provides that the "exemption to which an exempt organization shall be entitled is limited and does not extend to all purchases by the exempt organization."<sup>117</sup> A church in Pennsylvania generally does not have to pay sales tax on most tangible personal property and services it purchases, unless it uses the property in an unrelated business.<sup>118</sup> It must pay sales tax on materials, supplies, and equipment

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111. SAMUEL D. BRUNSON, *GOD AND THE IRS: ACCOMMODATING RELIGIOUS PRACTICE IN UNITED STATES TAX LAW* 34 (2018).

112. PFEFFER, *supra* note 52, at 210.

113. I.R.C. § 501(c)(3); Treas. Reg. § 1.501(c)(3)-1(c)(2) (as amended in 2017).

114. See generally Samuel D. Brunson, *God Is My Roommate? Tax Exemptions for Parsonages Yesterday, Today, and (if Constitutional) Tomorrow*, 96 IND. L.J. 521, 568–70 (2021).

115. 35 ILL. COMP. STAT. 200/15-40(a)(1) (2001).

116. See *Faith Builders Church, Inc. v. Dep't of Revenue of State*, 882 N.E.2d 1256, 1264 (Ill. App. Ct. 2008).

117. 61 PA. CODE § 32.21(a).

118. *Id.* § 32.21(a)(2)(i).

used to construct, reconstruct, remodel, repair, or maintain real estate.<sup>119</sup> It does not, however, have to pay sales tax on materials used “for routine maintenance and repair of real estate.”<sup>120</sup>

Policing the lines between taxable and tax-exempt requires administrative effort by churches as well as oversight by tax enforcement agencies.<sup>121</sup> To keep its exemption, a church must both be aware of the qualification rules and follow those rules. It cannot allow insiders to share its profits, it must actively use its property for exempt purposes, and it must differentiate between routine maintenance and repair of its real estate. If a church wanted to entirely avoid entanglement with the state, it could ignore these various rules but, upon ignoring them, it would potentially owe taxes, which would entangle it in a different manner.

On top of churches’ need to police these lines, tax administrators must engage with and evaluate church behavior. For instance, in the late 1970s, the IRS began to promulgate rules governing the definition of “integrated auxiliaries,” a type of church-adjacent organization that enjoys tax benefits largely available only to churches.<sup>122</sup> Under rules proposed by the IRS in the 1970s, these integrated auxiliaries (including Sunday schools, youth groups, men’s and women’s church groups, and some theological seminaries) would have had to begin filing information returns.<sup>123</sup> Church leaders complained that these rules represented excessive government involvement in defining religion.<sup>124</sup> The IRS countered that it had no interest in defining religion or otherwise excessively interposing itself into the space.<sup>125</sup> Rather, it hoped that by policing the definition of “integrated auxiliaries” it would prevent the “proliferation of the phoney church,”<sup>126</sup> presumably reserving tax benefits for actual, deserving churches.

While the definitional question of what constitutes a church in a system that provides them special benefits is a necessary space of interaction between church and state, churches were unwilling to cede

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119. *Id.* § 32.21(a)(2)(ii).

120. *Id.* (emphasis added).

121. See BRUNSON, *supra* note 111, at 34.

122. David E. Anderson, *Comment on Church, IRS*, PROVO DAILY HERALD, Oct. 23, 1977, at 28; Aprill & Mayer, *supra* note 5, at 23 (calling for reining in the definition of an integrated auxiliary).

123. *Churches Fight IRS Plan to Require Tax Returns*, SALT LAKE TRIB., Apr. 24, 1976, at A5.

124. Anderson, *supra* note 122.

125. *Id.*

126. *Id.*

the question to the IRS. While the IRS's definition—that an integrated auxiliary had to be “exclusively religious”—made sense, churches asked what to make of religiously-affiliated colleges and hospitals.<sup>127</sup> Almost a decade after churches began to push back against the IRS's policy, the IRS changed course.<sup>128</sup> It agreed to recognize any organization a church listed as an integrated auxiliary, albeit with a handful of conditions.<sup>129</sup> Even as the IRS ceded to the demands of churches, though, it continued to highlight the inevitable interaction between church and state. While churches can essentially self-certify that they are churches for tax purposes, they ultimately must convince the IRS if they want to enjoy the tax benefits attendant to church status.

In other words, churches cannot avoid some degree of contact with government and society. Even attempting to opt out creates a catch-22, forcing some degree of interaction. That interaction is not necessarily adversarial—in most situations, it is fair to assume that churches *and* government want churches to maintain the tax exemptions the law grants them. Taxable or tax-exempt, though, churches cannot escape interaction with the government.

Moreover, this stark dichotomy between taxpayer and tax-exempt does a poor job of describing the world in which churches find themselves. Most churches are both exempt *and* taxpayers. Most notably, while religious organizations themselves may be exempt from the federal income tax, their employees are not. Church employees owe taxes on their church-paid salaries.<sup>130</sup> Ministers and other religious employees cannot “sever all ties with state and federal governments,” become “citizens of Heaven,” and escape liability for taxes.<sup>131</sup>

Having taxable employees connects a religious organization with the state in at least two ways. The first is, employers have an obligation to withhold taxes on the amounts they pay employees and deliver those withheld taxes to the IRS.<sup>132</sup> Congress initially exempted churches from these employer withholding obligations, but in 1983 Congress expanded these payroll tax obligations to churches and

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127. George W. Cornell, *Churches Win Key Round in Long Conflict with IRS*, PROVO DAILY HERALD, June 1, 1986, at 41.

128. *Id.*

129. *Id.*

130. I.R.C. § 61(a)(1).

131. *United States v. Stoll*, No. CIV. C05-0262RSM, 2005 WL 1763617, at \*3 (W.D. Wash. June 27, 2005).

132. I.R.C. §§ 3101(a), 3402(a).

church-related nonprofits.<sup>133</sup> The payroll tax has two parts. Half comes from employees' wages.<sup>134</sup> The employer itself pays the other half.<sup>135</sup> An employer bears ultimate liability for both its own and its employees' tax, though: the tax law makes employers liable for the full amount in the case of nonpayment.<sup>136</sup>

In 1984, Congress had second thoughts about its broad expansion of withholding obligations. It ultimately restored a conditional exemption for churches and church-controlled charities.<sup>137</sup> Even accessing that exception, though, underscores the connection between church and state. To qualify, a church must both have a religious objection to the payment of payroll taxes *and* file a timely election with the IRS.<sup>138</sup> After its initial election, an exempt church must continue to provide the IRS with information about employees' wages or the IRS will revoke its exemption from payroll tax liability.<sup>139</sup> Any church that does not religiously object to the payment of payroll taxes does not qualify for the exemption and must both withhold from its employees' wages and pay the employer excise tax.

It is important to recognize that this exemption from payroll taxes has nothing to do with the constitutional separation of church and state. The government has a compelling interest in "the collection of social security taxes and the maintainence [sic] of a functioning social security tax system."<sup>140</sup> The government can, within the bounds of the Religion Clauses of the Constitution, require churches to pay taxes. The exemptions Congress has provided for certain churches represent political and practical choices by the government.

This inevitable interrelationship between church and state is not an even one, though. The First Amendment places significant limitations on the state's ability to regulate churches. This is not, to be clear, the thorny question of when to accommodate religious practice, per-

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133. *Bethel Baptist Church v. United States*, 822 F.2d 1334, 1336 (3d Cir. 1987).

134. I.R.C. § 3101(a).

135. *Id.* § 3111(a). *But see id.* § 3101(b)(2) (imposing a surtax on high earning employees).

136. *Id.* § 3403.

137. *Bethel Baptist Church*, 822 F.2d at 1336.

138. I.R.C. § 3121(w).

139. *Id.*

140. *Bethel Baptist Church*, 822 F.2d at 1340.

haps “the question that dominates the field of Law and Religion today.”<sup>141</sup> Rather, it is the fact that, under most circumstances, the government cannot interfere with the internal deliberations of churches.<sup>142</sup> Churches, scholars of law and religion argue, have a constitutionally protected degree of autonomy and independence.<sup>143</sup> As discussed above in Part II, this is entirely consistent with a democratic order. Freedom of association, conscience, speech, and religion all demand this type of autonomy.

This autonomy, however, creates the risk that churches will act in ways that undermine democracy. Churches have no constitutional limitation on their ability to influence the deliberations of government. At a basic level, this should go without saying: the Constitution functions as a limitation on government—not private—action.<sup>144</sup> While the Constitution prohibits the establishment of any state religion, it does not prevent religious individuals from voting based on their religious convictions. It does not prevent religious individuals from running for or holding office.<sup>145</sup> It does not even prevent churches from guiding their congregants’ votes. However, from an ideal democratic perspective, churches as an associational matter ought not interfere with their members’ cooperation with the general democratic order.<sup>146</sup>

Indeed, this imbalance in influence between government and churches runs up against the country’s long-standing discomfort with religious bodies gaining too much secular power. This discomfort can

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141. Hillel Y. Levin et al., *To Accommodate or Not to Accommodate: (When) Should the State Regulate Religion to Protect the Rights of Children and Third Parties*, 73 WASH. & LEE L. REV. 915, 917–18 (2016).

142. See, e.g., Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981) (arguing that churches have a constitutional right to conduct certain religious activities autonomously).

143. Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 292 (2008).

144. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 234 (1992) (“The First Amendment does not protect a person from lies or imposition by private individuals. Rather the First Amendment protects against impositions by government . . .”).

145. U.S. CONST. art. VI, cl. 3.

146. In contrast to the LDS Church, the actions of which may have undercut democracy, but which at least rhetorically and formally support democracy, see *supra* notes 50–51, some churches actively want to limit or subvert democracy. For instance, Douglas Wilson, pastor of Christ Church in Moscow, Idaho, envisions a Christian state where Catholics and liberal Protestants would feel unwelcome. Jack Jenkins, *‘Christian Patriots’ Are Flocking from Blue States to Idaho*, WASH. POST (Feb. 24, 2023, 8:00 AM), <https://www.washingtonpost.com/religion/2023/02/24/idaho-christian-nationalism-marjorie-taylor-greene/> [<https://perma.cc/5MKL-JD66>].

trace its roots to disestablishment. The early history of post-disestablishment religion was one in which many religious societies began incorporating. That incorporation allowed churches to extend their life and their wealth, but it also provided a lever with which state governments could oversee, and even regulate, churches.<sup>147</sup> But this discomfort also equally resides in a conception of ideal democratic principles in a plural world. The reality is that we exist in a “diversity of . . . comprehensive religious, philosophical, and moral doctrines,” which is “not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy.”<sup>148</sup> If we want to exist in that diverse and pluralistic world while respecting the reasonable values of others, we must strike a bargain between a willingness to respect values and an agreement to cooperate in a democratic way.

And why would the state want to regulate churches? In part, because the exemption from the federal income tax and the charitable contribution deduction provide a subsidy to charitable organizations, churches included. But also, because churches—like most tax-exempt organizations—can and at times do choose whether to pursue democratic or undemocratic governance.<sup>149</sup> Nonprofits sometimes provide collective goods and services that democracy might ideally demand be made by democratic means. For instance, one of us has argued that, because education is a collective good, Congress ought to require nonprofits that operate charter schools to be more democratic to obtain exempt status as a charitable organization.<sup>150</sup>

Not all churches are undemocratic, of course. While it would be a fool’s errand to try to generalize all religious practices, some examples will serve to illustrate. For instance, the constitutions of many Jewish synagogues provide congregants with significant power in the synagogue’s governance, including the power to elect the synagogue’s board of directors and to hire and fire the rabbi.<sup>151</sup> Similarly, in many

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147. Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307, 325–26 (2014).

148. RAWLS, *supra* note 87, at 36.

149. Dana Brakman Reiser, *Dismembering Civil Society: The Social Cost of Internally Undemocratic Nonprofits*, 82 OR. L. REV. 829, 829 (2003) (“For today’s nonprofits, internal democracy is optional.”).

150. Hackney, *supra* note 14.

151. Michael Brown, *Signs of the Times: Changing Notions of Citizenship, Governance, and Authority as Reflected in Synagogue Constitutions*, in NOT WRITTEN IN STONE: JEWS, CONSTITUTIONS, AND CONSTITUTIONALISM IN CANADA 85, 97–98 (Daniel J. Elazar et al. eds.,



Protestant churches, congregants elect (or, at least, nominate) their congregation's leaders.<sup>152</sup> In some Catholic parishes, lay members have the opportunity to receive training for leadership roles.<sup>153</sup>

Even in churches that allow some degree of lay control, however, there is tension between religion and democracy. While the congregational membership exercises some control over how the congregation functions and who leads it, most congregations are ultimately headed by a special leader. And that special leader has qualities that differentiate them from the general body of their congregation. Until relatively recently, churches, synagogues, and mosques tended to exclude women from formal leadership roles.<sup>154</sup> Moreover, even in religions that have eliminated gender-based exclusions on formal leadership, leadership is not available to all congregants. While some sense of "calling" may be the most important qualification, many congregations impose additional requirements, such as formal education, for those who would lead the congregation.<sup>155</sup>

Religious democracy, then, is different from political democracy. Congregants have a smaller range of options on which they can vote, and those options are ultimately constrained by religious doctrines and practices. Even churches that allow no level of congregational voting and control are not necessarily *antidemocratic*, but they fall outside the realm of democracy. Ultimately, we do not care about the internal governance of religious organizations. It is a hallmark of contemporary Free Exercise jurisprudence that the government cannot interfere with a church's internal governance, including its selection of

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2003); *see also* Aprill, *Reform Judaism*, *supra* note 5, at 225 (discussing Reform Judaism's commitment to the democratic values of nondiscrimination and inclusivity).

152. Earl Kent Brown, *Co-responsibility in Church Governance: Some Protestant Experiences*, 31 JURIST 187, 198 (1971).

153. James C. Cavendish, *Church-Based Community Activism: A Comparison of Black and White Catholic Congregations*, 39 J. SCI. STUD. RELIGION 371, 380 (2000).

154. *See, e.g.*, Hilary Kalmbach, *Islamic Authority and the Study of Female Religious Leaders*, in WOMEN, LEADERSHIP, AND MOSQUES: CHANGES IN CONTEMPORARY ISLAMIC AUTHORITY 1, 1 (Masooda Bano & Hilary Kalmbach eds., 2012) (pointing out that "men have held a near-monopoly over public religious leadership for much of Islamic history"); Stefanie Sinclair, *Regina Jonas: Forgetting and Remembering the First Female Rabbi*, 43 RELIGION 541, 541 (2013) (in 1935 Regina Jones was ordained as the first female rabbi); Jimi Adams, *Stained Glass Makes the Ceiling Visible: Organizational Opposition to Women in Congregational Leadership*, 21 GENDER & SOC'Y 80, 80 (2007) ("For most of Christian history, official church policies excluded women from holding clergy positions.").

155. Paul Perl & Patricia M.Y. Chang, *Credentialism Across Creeds: Clergy Education and Stratification in Protestant Denominations*, 39 J. FOR SCI. STUDY RELIGION 171, 172 (2000).

clergy.<sup>156</sup> After all, as Rawls notes, the “political is distinct from the associational, which is voluntary in ways that the political is not.”<sup>157</sup>

We agree with this jurisprudence. We do not believe that the government should *force* democratic ideals on churches. As a normative matter, though, the converse is also true: churches—whether democratic or not—should not prevent their members, who are citizens of the state, from participating in their individual capacities in the democratic process. Allowing churches unrestricted access to influence government, while largely preventing government from influencing churches, would allow churches to export their undemocratic values into government, especially since the constitutional limitation on government would prevent the government from reciprocally exporting its democratic values into churches.

We want to be entirely clear that, as a normative matter, we do not advocate requiring churches to adopt democratic internal governance. That would represent significant governmental overreach into private belief and conduct. Moreover, it is something that state governments have done in the past to protestantize Catholicism and other non-Protestant religions. In the nineteenth century, Americans feared that Catholicism threatened the individualistic foundations of American democracy.<sup>158</sup> To prevent the Catholic Church from undermining democracy, New York law, for instance, only allowed individual congregations, not hierarchical churches, to incorporate and required incorporated congregations to hold their property through lay trustees.<sup>159</sup> This organizational structure and focus on lay members fit the pattern of many Protestant churches, but was inimical to the organizational structure of the Catholic Church.<sup>160</sup>

Attempting to force churches to conform to a democratic (or Protestant) ideal is different, however, from trying to rein in their ability to unduly influence the body politic. And it is this second line that the rules governing tax-exempt organizations’ political activities attempt to police. Section 501(c) places two limitations on churches’

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156. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 185 (2012) (“Our decisions in that area confirm that it is impermissible for the government to contradict a church’s determination of who can act as its ministers.”).

157. RAWLS, *supra* note 87, at 137.

158. Philip Hamburger, *Illiberal Liberalism: Liberal Theology, Anti-Catholicism, & Church Property*, 12 J. CONTEMP. LEGAL ISSUES 693, 704 (2002).

159. *Id.* at 713.

160. *Id.* at 713–14.

(and other tax-exempt organizations’) political activities: no substantial part of a tax-exempt organization’s activities can involve lobbying, and tax-exempt organizations face a strict prohibition on endorsing or opposing candidates for office.<sup>161</sup> These two limitations do not single out churches, nor do they try to influence the internal governance or organization of churches. Rather, they attempt to put some space between churches and politics, a space that is not constitutionally mandated but that is consistent with the norm of church-state separation.

These limitations on church political participation are well-known. They provide some space for good-faith actors to decline to participate in politics. Even if some congregants—including, potentially, donors—want a church to endorse candidates for office, the Johnson Amendment gives them cover to decline. After all, if endorsing a candidate for office would potentially cause a church to lose its tax exemption, it is in the church’s best interest not to endorse a candidate.<sup>162</sup> Critically, the Supreme Court has held that Congress “has the authority to determine whether the advantage the public would receive from additional lobbying by charities is worth the money the public would pay to subsidize that lobbying and other disadvantages that might accompany that lobbying.”<sup>163</sup> The Court of Appeals for the D.C. Circuit has further held that the Constitution not only permits Congress to limit tax-exempt organizations’ politicking, it allows Congress to limit *churches’* politicking.<sup>164</sup>

Of course, not all churches are good-faith actors. The news frequently highlights tax-exempt churches that endorse candidates in spite of the prohibition on such behavior.<sup>165</sup> Churches that choose to violate the prohibition can do so with the knowledge that there is almost no chance they will face any repercussion. The IRS has revoked almost no church’s exemption for the endorsing of a candidate in the

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161. I.R.C. § 501(c)(3).

162. Cf. Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; to What End?*, 42 B.C. L. REV. 903, 925 (2001) (“Church political involvement comes at a considerable price in terms of integrity and independence.”).

163. *Regan v. Tax’n With Representation of Wash.*, 461 U.S. 540, 550 (1983).

164. *Branch Ministries v. Rossotti*, 211 F.3d 137, 142 (D.C. Cir. 2000) (church failed to demonstrate that its loss of tax exemption for endorsing a candidate violated the Constitution).

165. See, e.g., Jessica Priest et al., *These 20 Churches Supported Political Candidates. Experts Say They Violated Federal Law*, PROPUBLICA (Nov. 7, 2022), <https://www.propublica.org/article/johnson-amendment-violation-examples> [<https://perma.cc/HJ75-47W2>].

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seven decades since the tax law began prohibiting tax-exempt organizations from endorsing candidates.<sup>166</sup> Additionally, the availability of the charitable contribution deduction<sup>167</sup> and the lack of disclosure of church activities to the public (and even the IRS), as well as the robust protections from IRS examination, make churches attractive to those interested in engaging in political campaign activities without any government oversight.

What is the solution to churches that are bad actors? It cannot be to cut them out of secular society altogether. Even if that were legally permissible—and the Supreme Court has been very clear that government generally cannot prevent religious groups from participating in the broader society<sup>168</sup>—as a practical matter, such a separation would not work. Churches are made up of a body of individuals who have the right and ability to participate in democracy.

One option would be to eliminate the preferential treatment churches receive over other tax-exempt organizations. If churches had to apply for exemption, disclose their finances, and face audits on the same terms as other exempt organizations, they would be more publicly accountable. They would also become less attractive sources for antidemocratic political funding. However, changing those rules would require political will, and we see no evidence that Congress has the appetite to make these changes. So, while we think Congress could reconsider its relieving churches from the requirement to file an application for exemption or the Form 990, and it could choose to provide much less audit protection to churches, we focus on other solutions here.

#### IV. BALANCING DEMOCRATIC AND RELIGIOUS LIBERTY IDEALS

To ensure that churches do not subvert democracy, then, under current political constraints, we recommend persuasion. Yes, the law

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166. Samuel D. Brunson, *Dear IRS, It Is Time to Enforce the Campaigning Prohibition. Even Against Churches*, 87 U. COLO. L. REV. 143, 169 n.161 (2016) (citing Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145, 159 (2006)).

167. Congress prohibits the deduction of either political campaign spending or lobbying. I.R.C. § 162(e). If a church could engage in such political activity or it engaged in substantial lobbying activity, it would have found a way to deduct expenses that are otherwise not deductible, and it would be hard for the IRS to stop such activity.

168. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (“Trinity Lutheran is a member of the community too, and the State’s decision to exclude it for purposes of this public program must withstand the strictest scrutiny.”).

should provide guardrails that prevent churches from imposing their practices and beliefs on people who do not share those practices or beliefs. But the constitutional protection of free exercise and disestablishment means that, for the most part, those guardrails must be more persuasive than substantive. Democratic society cannot—and should not—expel religion. Rather, it must convince churches of both the importance of democratic consensus and of churches' obligation to preserve and enhance that democratic consensus.

Organized religion has proven adept at navigating the political sphere to preserve and expand its privileges. For example, two decades ago, a decision by the Ninth Circuit threatened the continuing exclusion from income of housing allowances paid to clergy, and the court appointed Professor Erwin Chemerinsky to advise it “whether the court had authority to review the constitutionality of the parsonage allowance, whether it should do so, and whether the allowance was constitutional.”<sup>169</sup> The possibility that the courts could find the parsonage allowance unconstitutional unnerved churches. In response to lobbying by various religious organizations, Congress enacted the Clergy Housing Allowance Clarification Act of 2002, which clarified and mooted the Ninth Circuit case before the court could find the parsonage allowance unconstitutional.<sup>170</sup> As he spoke in favor of the legislation, North Dakota Rep. Earl Pomeroy recounted how, the previous day, he had attended a roundtable of North Dakota clergy who were “terribly concerned about the underlying threat to the housing allowance.”<sup>171</sup> Similarly, Rep. Sam Johnson of Texas told the House that Rev. Dr. Frederick Schmidt of SMU's Perkins School of Theology wrote him that eliminating the exclusion for ministers' housing allowance would “drastically alter the financial well-being of many clergy, and present a fiscal hurdle to religious communities that are ill-prepared to address that change.”<sup>172</sup>

Religious organizations and their members obviously should not be excluded from the public square. Even if there were a desire to prohibit religious perspectives in the political sphere, “no such exclusion

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169. Brunson, *supra* note 114, at 531 (citing *Warren v. Comm'r*, 282 F.3d 1119, 1119–20 (9th Cir. 2002)).

170. *Id.*; 148 CONG. REC. 4673 (2002) (statement of Rep. Jim Ramstad).

171. 148 CONG. REC. 4671 (2002).

172. *Id.* at 4672.

is possible in a democratic society.”<sup>173</sup> A democratic society that deliberately excludes citizens’ voices is not truly a democratic society. True democratic choice requires, among other things, universal (adult, at least) suffrage.<sup>174</sup> Disenfranchising voters, either formally or informally, undercuts democratic norms.<sup>175</sup>

At the same time, though, while universal suffrage is critical to democracy, democracy must protect itself from undemocratic ideals. Otherwise, “a powerful antidemocratic faction, religious or otherwise, could emerge and threaten the very democratic institutions that enabled it to gain prominence and power.”<sup>176</sup> Overall, while churches are not necessarily antidemocratic, many implement undemocratic internal governance.<sup>177</sup> Democratic society poses risks to churches—as a non-majority stakeholder, churches risk being undercut by a hostile majority voice. Churches also pose risks to the democratic society, though. The danger to democracy would lie, however, with churches that were affirmatively antidemocratic and which actively discouraged their congregants from voting or, more dangerously, encouraged them to vote in democracy-destroying ways.

Using the power of government to require churches to act in prodemocratic ways strikes us as improper. Churches acting in a prodemocratic manner is certainly not a requirement in an ideal democratic order. As a practical matter, even if it were not improper, government is also unlikely to affirmatively require churches to act in prodemocratic ways. While we believe that the Constitution does not prohibit the federal government from regulating churches, we are concerned that, as a practical matter, it will not do so even to prevent antidemocratic or tax-sheltering behavior.<sup>178</sup> In part, we have this concern because, historically, the federal government has balked at regulating religious actors. Even in areas where the government could regulate

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173. Michael Walzer, *Drawing the Line: Religion and Politics*, 1999 UTAH L. REV. 619, 619.

174. Andreas Schedler, *Elections Without Democracy: The Menu of Manipulation*, J. DEMOCRACY, Apr. 2002, at 36, 40.

175. *Id.* at 44.

176. Mark Cladis, *Religion, Secularism, and Democratic Culture*, 19 GOOD SOC’Y, no. 2, 2010, at 22, 26.

177. *See supra* notes 149–153 and accompanying text.

178. In fact, we fear that without the campaigning prohibition—as underenforced as it may be—the antidemocratic problems we identify here will become supercharged. Without the prohibition, churches could become a locus for political activity. Why? Because donors can contribute to churches, taking a charitable deduction, with basically no limitation on the amount of donation. Centering political action in churches would be bad for democracy, but it would also be dangerous to churches, threatening to tear apart the community and the religious ideals it espouses.

churches, it often declines to do so.<sup>179</sup> This reticence may come from a desire to “protect First Amendment values by limiting restrictions on religious exercise and regulatory entanglement with churches,” even where such limits are unnecessary.<sup>180</sup> It may derive from the chaotic and often internally-inconsistent Religion Clause jurisprudence courts have developed through the years.<sup>181</sup> It may be that regulating the political activities of churches would be deeply unpopular with the public.<sup>182</sup>

Whatever the reason, it seems unlikely to us that the federal or any state government would enact legislation that required religious organizations to support democracy. And even if a government were to enact legislation, the nonprofit area generally—and religious organizations in particular—faces notoriously limited governmental oversight.<sup>183</sup> Even still, we believe that religious organizations should not only be permitted to engage in the democratic process but should engage—and encourage their members to engage—in affirmatively pro-democratic ways. If the government cannot require them to do so, though, how can we ensure that churches do not act in an anti-democratic manner or pressure their members to act in such a manner?

Through democracy-affirming norms. Law plays a critical role in regulating society, but, as Lawrence Lessig points out, it is only one of four behavior-regulating constraints.<sup>184</sup> Norms, markets, and the “architecture” of the world also play a role in constraining and regulating behavior.<sup>185</sup>

To some extent, the tax law’s prohibition on endorsing or opposing candidates for office functions more as a norm than as a law. The IRS virtually never enforces the Johnson Amendment against any nonprofit organization, and enforcement against churches happens even less frequently.<sup>186</sup> But the fact that the law goes unenforced does not mean that it is socially worthless. Rather, even without being enforced, it highlights the norm that tax-exempt organizations, including

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179. Aprill & Mayer, *supra* note 5, at 14.

180. *Id.*

181. BRUNSON, *supra* note 111, at 14–15.

182. Brunson, *supra* note 166, at 193–94.

183. NORMAN I. SILBER, A CORPORATE FORM OF FREEDOM: THE EMERGENCE OF THE MODERN NONPROFIT SECTOR 148–49 (2001).

184. Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662 (1998).

185. *Id.* at 662–63.

186. Brunson, *supra* note 166, at 169.

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churches, do not endorse or oppose candidates.<sup>187</sup> The existence of the law, enforced or not, may trigger compliance with the underlying norm, but at the very least it signals that norm.<sup>188</sup>

Congress or the IRS could use the norm-triggering value of law to encourage churches to support democratic ideals or, at the very least, not undermine those ideals. They would not have to promulgate statutes or regulations requiring churches to allow their members to participate in the democratic process, but they could do things to signal the importance of churches actively supporting democratic norms. For instance, Congress could fund an educational push highlighting the role churches played in encouraging and justifying the Revolutionary War.<sup>189</sup> Leading up to the Civil War, northern Protestants viewed the United States as a “true Christian democracy” and were willing to sacrifice to preserve the union.<sup>190</sup> And even outside of the United States’ borders, churches have been central to democratization. About three-fourths of the countries that democratized between 1974 and 1990 were Catholic countries, and the Church was intimately involved in their eventual shift toward democracy.<sup>191</sup> Publicizing this relationship between church and democracy would not force churches to support democracy. It would, however, remind both churches and church members of their integral part in the creation and preservation of democracy. It would represent at least one step toward making democracy salient in the minds of churches and their members.

Perhaps critical to this norm-triggering is the acknowledgement that under current law, churches can engage in political actions. While churches face a blanket prohibition on supporting or opposing candidates for office, the tax law allows churches and other tax-exempt organizations to participate in lobbying as long as their participation does not rise to the level of a “substantial part” of their activities.<sup>192</sup> There seems to be a widespread misunderstanding of this bifurcation

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187. See Michael P. Vandenberg, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENV'T L.J. 55, 74 (2003).

188. *Id.*

189. In the lead-up to the Revolution, in response to colonists’ caution, “patriotic clergymen told their congregations that failure to oppose British tyranny would be an offense in the sight of Heaven.” PATRICIA U. BONOMI, *UNDER THE COPE OF HEAVEN: RELIGION, SOCIETY, AND POLITICS IN COLONIAL AMERICA* 216 (updated ed. 2003).

190. DAVID ROLFS, *NO PEACE FOR THE WICKED: NORTHERN PROTESTANT SOLDIERS AND THE AMERICAN CIVIL WAR* 57–58 (2009).

191. Daniel Philpott, *The Catholic Wave*, J. DEMOCRACY, Apr. 2004, at 32, 32–33.

192. I.R.C. § 501(c)(3).



in what the tax law allows churches to do in the political space.<sup>193</sup> Additionally, there is no prohibition on members of a church forming social welfare organizations under section 501(c)(4) of the Code, or even a political organization under section 527 of the Code, to fully engage in the political process with their values.<sup>194</sup> To the extent churches feel excluded from the democratic process, they may be less inclined to take seriously an obligation to uphold democratic ideals. Publicly acknowledging what churches may do under the tax law could help nudge them toward a more prodemocratic position.

We believe that this approach—triggering democratic norms among churches—strikes a balance between the need to encourage churches to espouse prodemocracy ideals and the space for religious liberty that churches need to enjoy. We believe that this balance is not necessary, as the government could more fulsomely regulate churches. But we also believe it is acceptable; it balances the special treatment that our political and social system grants churches with the protection of society's democratic ideals. It would certainly be possible to advocate for a different balance, but this one would be effective.

We do think that it is in the interest of churches to observe the complicated church-tax relationship that we have discussed herein. We hope church members take note of the significant lack of governmental oversight that comes with this relationship. That lack of oversight in turn makes churches an attractive home for sheltering income and engaging in political activities in an easily covert manner. Thus, the protections from tax law and the IRS can quickly become harms. While we do not here advocate government mandates, we believe that wise churches will take note and set up controls to protect against these potential ill effects.

#### CONCLUSION

The last several years have demonstrated the tenuousness of democracy. Though tenuous and imperfect, we believe that democratic ideals are critical to creating a more just society. It is equally critical, then, that we work to preserve and encourage democracy. To preserve democracy, we need to understand how it functions. The associational

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193. The Freedom from Religion Foundation reports that it "receives numerous questions about church activities in influencing legislation, or lobbying." *State/Church FAQ: Churches and Political Lobbying Activities*, FREEDOM FROM RELIGION FOUND., <https://ffrf.org/faq/state-church/item/14005-churches-and-political-lobbying-activities> [<https://perma.cc/XQX7-RF7V>].

194. *Id.*; see I.R.C. §§ 501(e)(4), 527.

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aspects of democracy are critical to that function. And those associational aspects cannot exclude churches. Churches, after all, are an important site where people come together to discuss, to debate, and to associate.<sup>195</sup>

Still, churches play an uncomfortable role within democracy. To preserve them from majoritarian impulses, the United States has decided to grant them a significant degree of autonomy and separateness. That autonomy and separateness protect them, but also create a space in which democracy risks undermining itself. The lack of required filings with the IRS, the lack of a public disclosure of their activities and assets, and the stringent limitations on IRS examination, along with the ability to deduct contributions make churches uniquely attractive to those who might misuse church funds or the church entity status to engage in tax fraud or as a political activity disclosure shelter.

We do not believe, for practical and, perhaps, constitutional reasons, that the government can—or even should—require churches to act in democracy-affirming ways. But we do believe that the government can and should work to create norms that encourage churches to act in prodemocratic ways. Indeed, we believe abiding by such norms is in the best interest of members of churches who prefer that their church not become a tax or political activity shelter. As a critical locus of associational contact, churches are well-positioned to reinforce democratic norms in their congregants, norms which will buoy democracy even in the rough waters it will inevitably encounter.

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195. See DJUPE & GILBERT, *supra* note 13, at 6–7.

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