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# Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise

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# ARTICLES

## POLITICS AT THE PULPIT: TAX BENEFITS, SUBSTANTIAL BURDENS, AND INSTITUTIONAL FREE EXERCISE

LLOYD HITOSHI MAYER*

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* Associate Professor, Notre Dame Law School; Of Counsel, Caplin & Drysdale, Chartered. I am very grateful for the comments from Deidre Dessingue, Richard Garnett, Benjamin Leff, Michelle Mayer, Allan J. Samansky, Nelson Tebbe, Donald Tobin, Robert Tuttle, the participants in the American Association of Law Schools panel on the topic of this paper, and the participants in the Notre Dame Faculty Colloquium, and for the research assistance of Benjamin Beiter and Elizabeth Zwickert-Timmermans. I am also grateful to the Boston College Law School Law & Religion Program, which hosted a symposium where I presented my initial thoughts on some of the issues addressed in this article. In the interests of full disclosure, it should be noted that the firm with which I am Of Counsel has represented houses of worship and other charities that have been investigated by the IRS for alleged political campaign intervention, and I have been personally involved in some of those representations. All views expressed in this article are mine alone.

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*More than fifty years ago, Congress enacted a prohibition against political campaign intervention for all charities, including churches and other houses of worship, as a condition for receiving tax-deductible contributions. Yet the Internal Revenue Service has never taken a house of worship to court for alleged violation of the prohibition through political comments from the pulpit, presumably at least in part because of concerns about the constitutionality of doing so. This decision is surprising, because a careful review of Free Exercise Clause case law – both before and after the landmark* Employment Division v. Smith *decision – reveals that the prohibition almost certainly would have survived a constitutional challenge.*

*Now, however, two changes to the relevant legal landscape may shift the balance toward houses of worship seeking to challenge the prohibition in the sermon context and generate new concerns for the federal government, even as the IRS begins more aggressively to investigate alleged violations. The first change is Congress's enactment of the Religious Freedom Restoration Act of 1993 ("RFRA"), which codified the rarely followed substantial burden/strict scrutiny analysis articulated by the Supreme Court in pre-*Smith *Free Exercise Clause cases. While no longer applicable to state and local laws, RFRA still applies to federal laws, including the prohibition. The second change is the growing support among both courts and scholars for an institutional approach to protecting constitutional rights, particularly in the context of religious organizations. This approach suggests that houses of worship challenging the prohibition may be able to argue successfully that the ability to speak to their members about matters of religious conviction is a necessary aspect of free exercise and so the government cannot, either constitutionally or under RFRA, discourage such speech by placing a condition on the receipt of a long-standing tax benefit.*

## INTRODUCTION

Over fifty years ago, Congress prohibited charities from intervening in political campaigns.[1] The federal government's long-standing interpretation of

[1] *See infra* Part I and note 24. For the limited information that is known about then-Senator Lyndon Johnson's reasons for seeking the prohibition's enactment, see *infra* notes 29-31 and accompanying text.

this prohibition is that it bars charities from supporting or opposing candidates for elected public office, and that the charities reached by the prohibition include churches, mosques, synagogues, temples, and other houses of worship.[2] Yet since its enactment, there has not been a single court case addressing the significant constitutional and statutory issues raised by the application of the prohibition to religious leaders speaking to their congregations. Instead, the only court decisions concerning the prohibition's application to churches or religious ministries involve communications with the public about candidates.[3] The courts will almost certainly have to break their silence on this issue in the near future, because substantially increased enforcement of the prohibition has resulted in increasingly defiant houses of worship and offers from legal groups to defend them.

For example, on October 31, 2004 the Rector Emeritus of All Saints Church in Pasadena, California delivered a sermon titled "If Jesus Debated Senator Kerry and President Bush"[4] that spurred an Internal Revenue Service investigation.[5] The church waged a highly public battle with the IRS that resulted in the IRS concluding that the sermon violated the prohibition but imposing no penalty, leading the church to demand an explanation and an apology.[6] On January 16, 2008, Pastor Kenneth D. Taylor of the Calvary Assembly of God in Algoma, Wisconsin advertised an open letter to the IRS in the *Wall Street Journal* referencing a sermon he delivered in 2006, stating "[i]f you didn't like the All Saints sermon, you would have hated mine!," and challenging the IRS to investigate his church.[7] Another example of the

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[2] For more details regarding how the Treasury Department and the Internal Revenue Service have interpreted the prohibition, see *infra* notes 32-35 and accompanying text.

[3] *See* Branch Ministries v. Rossotti, 211 F.3d 137, 139 (D.C. Cir. 2000) (applying the prohibition to a church's purchase of full-page newspaper ads critical of then-candidate Bill Clinton); Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 851-53 (10th Cir. 1972) (upholding tax-exempt revocation where religious ministry's radio broadcasts and other public communications discussed candidates).

[4] George F. Regas, Rector Emeritus, All Saints Church, If Jesus Debated Senator Kerry and President Bush (Oct. 31, 2004), http://aschu.convio.net/archives/sermons/(10-31-04)%20If%20Jesus%20Debated.pdf.

[5] Press Release, All Saints Church, All Saints Church, Pasadena Demands Correction and Apology from the IRS (Sept. 23, 2007), http://www.allsaints-pas.org/site/DocServer/IRS_Press_Release_Sept_23__2007.pdf?docID=2521; Letter from Marsha A. Ramirez, Dir., EO Examinations, Dep't of the Treasury, to All Saints Church (Sept. 10, 2007), http://www.allsaints-pas.org/site/DocServer/Letter_from_IRS_to_All_Saints_Church.pdf?docID=2541 [hereinafter Letter from Ramirez to All Saints Church].

[6] *See* Press Release, All Saints Church, *supra* note 5; Letter from Ramirez to All Saints Church, *supra* note 5.

[7] Kenneth D. Taylor, Calvary Assembly of God, *An Open Letter to the IRS About Preaching from the Pulpit*, WALL ST. J., Jan. 16, 2008, at B18, *available at* http://www.becketfund.org/files/Open_Letter_to_IRS_from_Calvary_and_Becket_Fund.pdf. The Becket Fund for Religious Liberty paid for the publication of the letter. *Id.*

growing attention to the prohibition is one of the first mainstream media articles on Reverend Jeremiah Wright that focused on whether his support of then-Senator Barack Obama violated the tax law prohibition on electioneering.[8] Finally, a conservative religious freedom group, the Alliance Defense Fund, recruited over thirty pastors to preach on Sunday, September 28, 2008 about the moral qualifications of candidates seeking public office, declared the day "Pulpit Freedom Sunday," and then made a list of the participating pastors and churches public, in effect daring the IRS to investigate them.[9]

Prior to this century, there was only a remote possibility that the courts would have to address the extent to which the government can regulate the content of sermons because the IRS appeared to stop its investigations at the church door. In the few known instances where the IRS challenged a religious charity for alleged political campaign intervention, the questioned activity involved religious ministries communicating with the public through mass media, not pastors speaking to their congregations during regular services.[10] The only known case involving a church did not occur until the 1990s, and it focused on the publication of full-page ads in major newspapers, not comments from the pulpit.[11] The IRS's timidity in this area, while understandable, has meant that most commentators have devoted only limited attention to the First Amendment[12] and Religious Freedom Restoration Act ("RFRA")[13] issues raised by the prohibition's application to sermons, instead choosing to focus primarily on the merits of proposals that Congress create a statutory exception to the prohibition for statements made during regular worship services.[14]

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[8] Suzanne Sataline, *Obama Pastors' Sermons May Violate Tax Laws*, WALL ST. J., Mar. 10, 2008, at A1.

[9] Suzanne Sataline et al., *Partisan Sunday Sermons Test Federal Tax Laws*, WALL ST. J., Sept. 29, 2008, at A12; Press Release, Alliance Defense Fund, ADF Prepared to Defend Churches Against Possible IRS Free Speech Investigations (Sept. 29, 2008), http://www.alliancedefensefund.org/news/story.aspx?cid=4692.

[10] *See* cases cited *supra* note 3 and accompanying text; sources cited *infra* note 50 and accompanying text.

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

[12] U.S. CONST. amend. I.

[13] 42 U.S.C. §§ 2000bb to 2000bb-4 (2006).

[14] *See, e.g.*, Johnny Rex Buckles, *Is the Ban on Participation in Political Campaigns by Charities Essential to Their Vitality and Democracy?*, 42 U. RICH. L. REV. 1057, 1086 n.130 (2008); Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217, 254-59 (1992); Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; to What End?*, 42 B.C. L. REV. 903, 919-23 (2001); Edward McGlynn Gaffney, Jr., *On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics*, 40 DEPAUL L. REV. 1, 3 (1990) (concluding that the prohibition is unconstitutional, but ultimately stating that "[w]hether or not the Supreme Court . . . would adopt this position, I urge the Congress to reconsider the wisdom

Furthermore, none of these commentators have explored whether and how the growing body of court decisions and scholarly articles on church autonomy apply to the prohibition.[15]

In recent years, the political and enforcement landscapes have changed significantly. Nevertheless, Congress has repeatedly failed to advance proposals to create a statutory exception, with supporters unable to garner a majority even when the Republicans, who might be more sympathetic to such legislation, controlled the House of Representatives.[16] At the same time, the IRS launched a new and apparently well-resourced program to enforce the

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of these restraints in light of the constitutional history set forth here"); Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 773-77 (2001) (focusing on the wisdom of having the government categorize the means by which religious communities engage the world); Vaughn E. James, *The African-American Church, Political Activity, and Tax Exemption*, 37 SETON HALL L. REV. 371, 406-12 (2007); Ann M. Murphy, *Campaign Signs and the Collection Plate – Never the Twain Shall Meet?*, 1 PITTSBURGH TAX REV. 35, 65-69 (2003); Allan J. Samansky, *Tax Consequences When Churches Participate in Political Campaigns*, 5 GEO. J.L. & PUB. POL'Y 145, 171-78 (2007); Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1342-49 (2007) (asserting that the prohibition is constitutional, but in need of structural changes); Mark Totten, *The Politics of Faith: Rethinking the Prohibition on Political Campaign Intervention*, 18 STAN. L. & POL'Y REV. 298, 316-20 (2007). *But see* Wilfred R. Caron & Deirdre Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J.L. & POL. 169, 180-98 (1985) (addressing the constitutional issues at length); Steffen N. Johnson, *Of Politics and Pulpit: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, B.C. L. REV. 875, 887-901 (2001) (analyzing the public policy and First Amendment issues); Meghan J. Ryan, *Can the IRS Silence Religious Organizations?*, 40 IND. L. REV. 73, 86-96 (2007) (addressing the application of the "hybrid claim" exception to the Free Exercise Clause rule adopted in *Employment Division v. Smith*, 494 U.S. 872 (1990)); Jennifer M. Smith, *Morse Code, Da Vinci Code, Tax Code and . . . Churches: An Historical and Constitutional Analysis of Why Section 501(c)(3) Does Not Apply to Churches*, 23 J.L. & POL. 41, 72-84 (2007) (analyzing the conflicts between the prohibition and the First Amendment).

[15] *See supra* note 14; discussion *infra* Part IV.

[16] The House rejected the Houses of Worship Political Speech Protection Act, H.R. 2357, 107th Cong. (2001), on a vote of 239 to 178. 148 CONG. REC. 18909 (2002). Since then, members of Congress have repeatedly introduced similar proposals, but none of those bills have made it out of committee. *See, e.g.*, Religious Freedom Act of 2007, S. 178, 110th Cong. (2007); Religious Freedom Act of 2006, S. 3957, 109th Cong. (2006); Houses of Worship Free Speech Restoration Act of 2005, H.R. 235, 109th Cong. (2005); Houses of Worship Free Speech Restoration Act, H.R. 235, 108th Cong. (2003); Houses of Worship Political Speech Protection Act, S. 2886, 107th Cong. (2002); Bright-Line Act of 2001, H.R. 2931, 107th Cong. (2001); *see also* H.R. 2275, 110th Cong. (2007) (attempting to repeal the prohibition entirely). *See generally* ERIKA LUNDER & L. PAIGE WHITAKER, CONG. RESEARCH SERV., CHURCHES AND CAMPAIGN ACTIVITY: ANALYSIS OF THE HOUSES OF WORSHIP FREE SPEECH RESTORATION ACT AND SIMILAR LEGISLATION 7-10 (2008).

prohibition.[17] The growing availability of information about the activities of houses of worship through CDs, DVDs, YouTube videos, and websites of houses of worship has aided the IRS in its enforcement efforts.[18] In response to this program, which has led to audits of dozens of houses of worship, two legal groups supporting religious freedom have offered to defend all houses of worship targeted by the IRS because of comments from the pulpit.[19] Unless the IRS suddenly abandons its enforcement efforts with respect to houses of worship, it is almost inevitable that free exercise of religion challenges to the prohibition as applied to sermons will have their day in court.

The resolution of such challenges will not be simple. Application of the First Amendment's Free Exercise Clause is complicated by the unsettled nature of the law prior to the Supreme Court's landmark decision in *Employment Division v. Smith*,[20] as well as the uncertain scope of exceptions to the rule announced in *Smith*. Congress's attempt to overrule *Smith* by enacting RFRA further muddies the waters – courts are still wrestling with the extent to which RFRA follows pre-*Smith* case law as opposed to imposing a different and higher standard on federal laws that substantially burden exercise of religion. Previous case law upholding tax-based restrictions on charities' speech also does not resolve these questions, as it does not address the unique context of sermons. Resolving these unsettled questions will therefore be necessary to resolve this issue and will have ramifications for free exercise claims in many other contexts.

The purpose of this Article is to anticipate and suggest answers to these questions. The answers indicate that a First Amendment free exercise challenge to the prohibition will ultimately fail under the current standards applied by federal courts, even if one of the exceptions to the *Smith* rule applies.[21] Houses of worship will, however, have a strong argument that RFRA requires an exception to the prohibition in the unique context of in-person sermons during regular worship services. The reason for this predicted

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[17] *See infra* notes 52-56 and accompanying text.

[18] *See, e.g.*, Sataline, *supra* note 8 (stating the newspaper had reviewed thirteen sermons either "seen live or through church-recorded DVDs"); Paul Vitello, *Pastors' Web Electioneering Attracts U.S. Reviews of Tax Exemptions*, N.Y. TIMES, Sept. 3, 2008, at B1 (reporting that webcasting has led to new IRS scrutiny of churches' political activity).

[19] *See* Alliance Defense Fund, The Pulpit Initiative Frequently Asked Questions (Sept. 8, 2008), http://www.alliancedefensefund.org/userdocs/Pulpit_Initiative_FAQ.pdf (stating that it will represent, at no charge, participating churches subjected to IRS investigation); Letter from Kevin J. Hasson, Chairman, The Becket Fund for Religious Liberty, to Religious Leader (Sept. 17, 2004), http://www.freepreach.org/letter.pdf (offering to defend religious groups, at no charge, against IRS investigation for any "good faith religious message . . . preached from the pulpit").

[20] 494 U.S. 872 (1990).

[21] While this Article does not directly address the question of whether a First Amendment free speech challenge would succeed in this context, there are reasons to believe that it would not. *See infra* note 185.

success is that application of the prohibition to such sermons will substantially burden the exercise of religion (as RFRA uses those terms) by some houses of worship because of the inability to separate a political sermon from a house of worship's other activities.[22] Once a house of worship demonstrates the existence of such a substantial burden, RFRA requires the government to demonstrate that the prohibition is the least restrictive means for furthering a compelling governmental interest, a high standard of scrutiny that will be very difficult for the government to meet.

Houses of worship have another argument based on a possible extension of developing case law that would support a Free Exercise Clause challenge and strengthen their RFRA claim. This extension expands the existing "church autonomy doctrine" into a full-blown institutional view of free exercise that recognizes the importance of religious institutions in ensuring individuals' free exercise of religion. This institutional view would also be an acknowledgement that under the Free Exercise Clause, there are not only areas where government interests, such as prisons, the military, use of public lands, and internal administration, should easily overcome free exercise of religion concerns, but also areas where religious institution interests, such as intra-church disputes, ministerial employment decisions, and internal religious communications, should easily overcome government concerns.

Part I of this Article begins by briefly discussing the history and current scope of the political campaign intervention prohibition, including the recent enforcement efforts and likelihood that many sermons violate the prohibition. Part II explains why a sermon-based challenge to the prohibition should ultimately fail under the First Amendment when applying existing case law. Part III explores the history and meaning of RFRA, and why a RFRA-based challenge to the prohibition has a strong chance of succeeding for some houses of worship. Part IV examines another possible claim based on the church autonomy doctrine cases that are not well known but growing in momentum, as well as scholarship generally advocating an institutional approach to constitutional rights. Combining these approaches, this Article concludes that the church autonomy doctrine's protection should logically extend to internal house of worship religious communications, particularly sermons and other forms of teaching during regular worship services. The reasoning behind this conclusion is that such communications are an essential part of institutional religious activity, and protection of such institutional activity is a necessary part of protecting individual free exercise of religion. This institutional free exercise approach also has implications for a RFRA-based challenge, as

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[22] For purposes of this Article, a "political sermon" is a sermon that discusses a candidate for public office in a manner that violates the federal government's interpretation of the political campaign intervention prohibition, as described *infra* notes 39-44 and accompanying text.

elaborated in Part IV.[23] Part V briefly addresses some of the issues raised by an exception to the prohibition, whether based on the Constitution or RFRA. Finally, this Article concludes by noting some of the broader free exercise ramifications of resolving these issues in the political sermon context.

## I. THE POLITICAL CAMPAIGN INTERVENTION PROHIBITION

The prohibition is found in the federal tax laws, which condition the receipt of certain tax benefits available to charities on, among other restrictions, "not participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[24] While initially ignored by academic commentators, for the past couple of decades the prohibition has been the subject of often-heated debate on both its desirability on policy grounds and its constitutionality.[25] Despite this debate, however, it has remained essentially unchanged for over fifty years.[26]

The lack of any significant changes may be explained in part by the limited enforcement of the prohibition, which was spotty at best until this decade.[27] In 2004, however, the IRS began a dedicated enforcement program that uncovered numerous apparent violations by houses of worship, and there is significant evidence that there are many more violations yet to be discovered.[28] It therefore seems inevitable that the courts will have to address the application of the prohibition to a pastor speaking from the pulpit.

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[23] This approach may also have significant ramifications for parallel state constitutional provisions and state versions of RFRA, but discussion of these state-level effects is beyond the scope of this Article.

[24] I.R.C. § 170(c)(2)(D) (2006) (regarding eligibility to receive tax-deductible charitable contributions); *id.* § 501(c)(3) (regarding exemption from federal income tax). For purposes of this Article, the term "charity" refers to any organization described in these sections of the Internal Revenue Code. The same prohibition applies to eligibility to receive gifts and bequests that are exempt from federal gift and estate taxes, respectively. *Id.* § 2055(a)(2) (estate tax); *id.* § 2106(a)(2)(A)(ii)-(iii) (estate tax applicable to estates of nonresident who are not citizens); *id.* § 2522(a)(2), (b)(2)-(3) (gift tax).

[25] *See* Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308, 308 (1990) (stating that until "recent years" the prohibition had "generated little discussion"); articles cited *supra* note 14.

[26] The only amendment was the addition of the parenthetical phrase "(or in opposition to)" in 1987. Revenue Act of 1987, Pub. L. No. 100-203, § 10711(a), 101 Stat. 382, 464 (codified as amended I.R.C. §§ 170(c)(2)(D), 501(c)(3), 2055(a)(2)-(3), 2106(a)(2)(A)(ii)-(iii), 2522(a)(2), 2522(b)(2)-(3)). The stated purpose of this amendment was simply to clarify, consistent with existing Treasury Department Regulations, that the prohibition extended to opposing candidates for elected public office. H.R. REP. NO. 100-391, at 1621 (1987); H.R. REP. NO. 100-495, at 1018 (1987).

[27] *See* discussion *infra* Part I.B.

[28] *See* discussion *infra* Part I.B.

A. *The History and Scope of the Prohibition*

Congress enacted the prohibition in 1954 after then-Senator Lyndon Johnson added it as an amendment to an existing tax bill on the Senate floor.[29] Johnson's motivation for introducing the amendment is unclear, as is the extent to which the prohibition reflected generally accepted views about the appropriate involvement of charities in politics and the amendment's intended scope.[30] There is also no evidence that either he or other members of Congress specifically intended to restrict the activities of houses of worship or even considered the impact of the prohibition on such entities.[31]

The uncertainty about Congress's exact intentions in enacting the prohibition and the lack of any significant legislative history left it to the Treasury Department and particularly the IRS to determine the prohibition's reach. The IRS has made it clear that the prohibition applies to all charities – organizations that are both exempt from federal income tax under Internal Revenue Code section 501(c)(3) and eligible to receive tax-deductible charitable contributions under section 170(c)(2).[32] Most organizations seeking federal tax status as a charity must apply to the IRS for recognition that they meet the qualifications for tax exemption, including complying with the

[29] *See* Internal Revenue Code of 1954, Pub. L. No. 83-591, 68A Stat. 3 (originally introduced as H.R. 8300); 100 CONG. REC. 9602, 9604 (1954) (agreeing to Senator Johnson's proposal to include the prohibition as an amendment to H.R. 8300).

[30] *See, e.g.*, Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 28-29 (2003) (attributing the prohibition to Johnson's desire to stop certain Texas foundations from opposing his re-election); Murphy, *supra* note 14, at 54-55, 62 (arguing that the prohibition arose from Congress's long standing suspicion of charities' political activities combined with McCarthy era paranoia); Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733, 768 (2001) (stating that Johnson's motivation for the amendment was not to stop tax-exempt churches from intervening in political campaigns); *see also* Judith E. Kindell & John Francis Reilly, *Election Year Issues*, *in* EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2002, 335, 448-51 (2001), *available at* http://www.irs.gov/pub/irs-utl/topici02.pdf (summarizing four theories for why Congress enacted the prohibition and ultimately concluding "[p]erhaps all four are true").

[31] *See* 100 CONG. REC. 9602, 9604 (1954) (reporting no discussion regarding the prohibition and houses of worship); Dessingue, *supra* note 14, at 917 & n.51 (concluding, based in part on the recollection of Johnson's chief aide, that Johnson did not intend or consider the effect of the prohibition on religious organizations); Murphy, *supra* note 14, at 53-54 (mentioning that before enactment of the prohibition, three members of a House of Representatives committee investigated the political activities of tax-exempt organizations and had no concerns about religious leaders engaging in political activity through churches); O'Daniel, *supra* note 30, at 768 ("There is no evidence that a religious element played a significant part in Johnson's decision to ban certain tax-exempt entities – including churches – from intervening in support of a political candidate.").

[32] Kindell & Reilly, *supra* note 30, at 339.

prohibition.[33] Even organizations that are not required to file an application to be considered a charity – including houses of worship – are subject to the prohibition.[34] As interpreted by the IRS, the prohibition applies to all communications and activities by charities, including religious leaders' statements to their congregations during regular worship services.[35]

It should be noted, however, that the prohibition does not extend to other types of organizations exempt from federal income tax but ineligible to receive tax-deductible contributions.[36] The prohibition is therefore only a condition on the ability to receive tax-deductible charitable contributions, not on being exempt from federal income tax, although this point is often overlooked. For constitutional reasons detailed later in this Article, the IRS also permits charities – whether secular or religious – to create and share resources with such tax-exempt non-charitable organizations, as long as charitable funds are not used to pay for activities that the charity itself could not engage in directly.[37] The result of permitting such close affiliations is that if the leadership of a charity wants to engage in prohibited political campaign intervention, it can generally create a closely related non-charitable affiliate to intervene, as long as it uses non-charitable (non-deductible) funds to do so. This Article discusses the legal significance of this ability to speak through an alternate channel below.[38]

With respect to the scope of activities covered by the prohibition, the Treasury Department and the IRS have clarified various aspects over time. For example, they have defined the term "candidate for public office" as meaning any individual who offers herself, or is proposed by others, for elective public office at any level of government.[39] They have also issued numerous precedential and non-precedential materials on when candidate-related activities such as voter guides and candidate forums violate the prohibition.[40]

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[33] I.R.C. § 508(a) (2006) (providing that organizations organized after October 9, 1969 must apply to the IRS for § 501(c)(3) status).

[34] *See* I.R.C. § 508(c)(1)(A) (2006) (exempting houses of worship and certain house of worship-related organizations from having to apply for § 501(c)(3) status); Branch Ministries v. Rossotti, 211 F.3d 137, 141-42 (D.C. Cir. 2000) (considering and rejecting the argument that tax-exempt churches are not subject to prohibition).

[35] *See* INTERNAL REVENUE SERV., TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 8 (2008) [hereinafter IRS, TAX GUIDE] (providing as an example of political campaign intervention by a church a situation where a minister, while preaching during a regular worship service, urges the congregation to vote for a particular candidate).

[36] *See* Kindell & Reilly, *supra* note 30, at 433-34.

[37] *See* discussion *infra* Part III.B.2.

[38] *See infra* notes 163-186 and accompanying text.

[39] Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 2008).

[40] *See, e.g.*, Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, 1421-26 (providing twenty-one examples illustrating when a tax-exempt organization violates the prohibition); IRS, TAX GUIDE, *supra* note 35, at 7-15 (discussing examples of the prohibition's application to

Nevertheless, the prohibition's exact scope still remains uncertain because the IRS relies primarily on a "facts and circumstances" test to determine whether any given activity violates the prohibition.[41] For example, the IRS view on whether an "issue ad" mentioning a candidate violates the prohibition depends on consideration of at least seven factors to determine if the ad supports or opposes the election of the candidate.[42] The factors include the timing of the ad with respect to an upcoming election and whether it expresses approval or disapproval of one or more of a candidate's positions or actions.[43] The use of numerous factors and considerations has led critics of the government's approach to refer to it as an ambiguous "smell" test.[44] Other candidate and election-related activities such as voter guides, candidate questionnaires, candidate forums, and voter registration drives are subject to similar multi-factor analyses to determine whether they violate the prohibition.[45]

Application of the ambiguous facts and circumstances test has potentially serious ramifications. In theory, both an organization's tax-exempt status and its ability to receive tax-deductible contributions are forfeit if an organization violates the prohibition even slightly. In practice, the IRS usually opts for issuing a warning letter and requiring adoption of policies to prevent future violations.[46] Nonetheless, the IRS has extreme penalties available to it and has imposed them on occasion, especially in recent years as the IRS has stepped up its enforcement of the prohibition.[47]

### B. *The Enforcement of the Prohibition*

Information about IRS enforcement of the prohibition has been quite limited because statute prohibits the IRS from discussing specific audit results.[48] The paucity of court cases involving the prohibition indicates, however, that the

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churches); Kindell & Reilly, *supra* note 30, at 369-87 (summarizing the guidance available in 2001 on specific candidate-related activities).

[41] *See* Rev. Rul. 2007-41.

[42] *Id.*

[43] *Id.*

[44] *E.g.*, OMB WATCH, THE IRS POLITICAL ACTIVITIES ENFORCEMENT PROGRAM FOR CHARITIES AND RELIGIOUS ORGANIZATIONS: QUESTIONS AND CONCERNS 12-13 (2006), *available at* http://www.ombwatch.org/files/pdfs/paci_full.pdf; *EO Committee of ABA Tax Section Offers Commentary on Politicking*, 11 EXEMPT ORG. TAX REV. 854, 856 (1995); *see also* Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*, 31 WM. MITCHELL L. REV. 55, 64-71, 65 n.39 (2004) (summarizing the existing guidance and concluding that the exact scope of the prohibition remains frustratingly ambiguous).

[45] *See* sources cited *supra* note 40.

[46] *See* discussion *infra* Part I.B.

[47] *See* discussion *infra* Part I.B.

[48] *See* I.R.C. § 6103 (2006).

IRS has rarely imposed penalties for violations.[49] There have been only five other reported instances where a charity lost its tax-exempt status because of political activity, with some losing it just for a limited period.[50] While it is possible that other charities have lost their tax-exempt status because of political activity without contesting the revocation in court, a review of IRS rulings over the past ten or so years reveals only a handful of cases where the IRS even imposed the excise tax penalty for violating the prohibition, and most of those rulings do not even mention revocation as a possible sanction.[51]

The IRS changed its stance in the 2004 election year when it launched a dedicated enforcement effort to detect and pursue violations of the prohibition.[52] In a report on this effort, the IRS stated that it found violations by forty-two houses of worship in 2004, possible violations by a similar

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[49] *See, e.g.*, Branch Ministries v. Rossotti, 211 F.3d 137, 145 (D.C. Cir. 2000); Ass'n of the Bar of N.Y. v. Comm'r, 858 F.2d 876, 877-78 (2d Cir. 1988); United States v. Dykema, 666 F.2d 1096, 1104 (7th Cir. 1981); Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 853-56, 858 (10th Cir. 1972).

[50] *See* Branch Ministries v. Rossotti, 40 F. Supp. 2d 15, 22 (D.D.C. 1999) (discussing the revocation of The Way International's tax-exempt status), *aff'd*, 211 F.3d 137; Celia Roady, *Political Activities of Tax-Exempt Organizations: Federal Income Tax Rules and Restrictions*, 22 EXEMPT ORG. TAX REV. 401, 406 n.44 (1998) (discussing the apparent revocation of Jimmy Swaggart Ministries' tax-exempt status); Press Release, Catholics for Free Choice, Operation Rescue West Loses Tax Exempt Status (Sept. 13, 2006), *reprinted in* 2006 TAX NOTES TODAY 178-38 (reporting the revocation of the tax-exempt status of Youth Ministries, Inc., which did business as Operation Rescue West); News Release, The Christian Broadcasting Network Hour (Mar. 16, 1998), *reprinted in* 98 TAX NOTES TODAY 55-78 (announcing the two-year revocation of the tax-exempt status of Pat Robertson's Christian Broadcasting Network and the permanent revocation of the tax-exempt status of three former CBN affiliates); Public Statement, Jerry Falwell, President, Old Time Gospel Hour (Feb. 17, 1993), *reprinted in* 93 TAX NOTES TODAY 81-46 (announcing the two-year revocation of the tax-exempt status of Jerry Falwell's Old Time Gospel Hour).

[51] *See* I.R.S. Tech. Adv. Mem. 2004-46-033 (Nov. 12, 2004); I.R.S. Tech. Adv. Mem. 2004-37-040 (Sept. 10, 2004); I.R.S. Tech. Adv. Mem. 2000-44-038 (Nov. 3, 2000); I.R.S. Tech. Adv. Mem. 1999-07-021 (Feb. 19, 1999); I.R.S. Tech. Adv. Mem. 98-12-001 (Mar. 20, 1998); I.R.S. Tech. Adv. Mem. 96-35-003 (Aug. 30, 1996); I.R.S. Tech. Adv. Mem. 96-09-007 (Mar. 1, 1996); I.R.S. Tech. Adv. Mem. 91-17-001 (Apr. 26, 1991).

[52] *See* INTERNAL REVENUE SERV., FINAL REPORT: PROJECT 302: POLITICAL ACTIVITIES COMPLIANCE INITIATIVE 1 (2006) [hereinafter IRS, 2004 PACI REPORT] (reporting on the results of the Political Activities Compliance Initiative ("PACI") for 2004); INTERNAL REVENUE SERV., 2006 POLITICAL ACTIVITIES COMPLIANCE INITIATIVE 1 (2007) [hereinafter IRS, 2006 PACI REPORT] (reporting on the results of the PACI for the 2006 election year); Memorandum from Lois G. Lerner, Dir., Exempt Orgs. Division, Internal Revenue Serv., to Marsha Ramirez, Dir., Exempt Orgs. Examinations, Internal Revenue Serv., et al. (Apr. 17, 2008), http://www.irs.gov/pub/irs-tege/2008_paci_program_letter.pdf (describing goals of the PACI for the 2008 election cycle). *See generally* Lloyd Hitoshi Mayer, *Grasping Smoke: Enforcing the Ban on Political Activities by Charities*, 6 FIRST AMENDMENT L. REV. 1, 7-13 (2007) (summarizing the IRS's recent enforcement efforts).

number in 2006 (also an election year for which the IRS has yet to announce the results of most of its audits), and apparent direct contributions to candidates by another eighty-seven houses of worship during 2003, 2004, and 2005.[53] For the 2004 election year, the IRS found twelve instances where a house of worship official made a statement during normal services endorsing or opposing a candidate for elected public office,[54] and it has received a similar number of accusations for the 2006 election year.[55]

To date the IRS has resolved the vast majority of violations, whether involving houses of worship or statements from the pulpit, through written advisories instead of imposing any penalty.[56] It seems unlikely, however, that the IRS can continue to be this lenient without undermining its credibility, especially since it has worked hard to inform charities, including houses of worship, of the prohibition, thus eliminating ignorance of the law as a plausible excuse.[57] There is also reason to believe that violations of the prohibition are significantly more widespread than the IRS's efforts have thus far uncovered.

### C. *Evidence of Violations by Houses of Worship*

There are several pieces of evidence indicating a significantly higher number of violations by houses of worship than the IRS has apparently discovered. For example, a 2001 survey of clergy from a variety of denominations regarding their political activities during the 2000 election year found that six percent of evangelical Protestant clergy, two percent of mainline Protestant clergy, and one percent of Roman Catholic clergy endorsed one or more candidates from the pulpit.[58] This level of involvement does not appear to be unique to the 2000 election, as a survey conducted in 1989 found a similar response rate for the first two groups.[59] While the percentages are low, the 2001 survey included most major denominations and is thus relevant for

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[53] IRS, 2006 PACI REPORT, *supra* note 52, at 3, 5-6.

[54] IRS, 2004 PACI REPORT, *supra* note 52, at 16.

[55] *See* IRS, 2006 PACI REPORT, *supra* note 52, at 4 (reporting the types of allegations that led to examinations during both the 2004 and 2006 election years).

[56] *Id.* at 5 (reporting results of closed cases, which included for the 2004 election year only seven proposed or final revocations of tax-exempt status, none of which applied to houses of worship, and no instances of financial penalties); *id.* at 7 (reporting results of candidate contribution cases, some of which have resulted in payment of financial penalties).

[57] *See* Internal Revenue Serv., Political Campaign Intervention by 501(c)(3) Tax Exempt Organizations – Educating Exempt Organizations, http://www.irs.gov/charities/charitable/article/0,,id=179750,00.html (last visited July 26, 2009).

[58] Corwin E. Smidt, *The World Is Not My Home? Patterns of Clerical Involvement in Politics over Time*, *in* PULPIT AND POLITICS: CLERGY IN AMERICAN POLITICS AT THE ADVENT OF THE MILLENNIUM 301, 312 (Corwin E. Smidt ed., 2004) (reporting the results of surveys conducted under the auspices of the Henry Institute for the Study of Christianity and Politics at Calvin College).

[59] *See id.*

the vast majority of the over 340,000 houses of worship in the United States, a small percentage of which would represent thousands of congregations.[60] Similarly, the Pew Research Center found that after the 2006 election, seven percent of Americans who attended religious services monthly reported that "they had been urged to vote for particular candidates or parties" by clergy or other religious groups.[61]

A separate article relating to a 2001 survey relies solely on responses from clergy in African Methodist Episcopal and Church of God in Christ churches, both predominantly African American denominations which together report having almost 20,000 churches.[62] When those clergy were asked whether they had endorsed a candidate while preaching in 2000 – a slightly different question than had been asked in the surveys of other denominations – forty-six percent responded affirmatively.[63] While both the low response rate and ambiguously worded question – which may have captured preaching outside of regular services – caution against drawing too strong a conclusion, these results indicate that many clergies in these denominations are supporting (and probably opposing) candidates from the pulpit.[64] Such a finding is not surprising given the long tradition of politically active African American churches.[65]

Finally, as previously noted, when the Alliance Defense Fund recently called on pastors to "deliver Scripture-based sermons from the pulpits of their churches comparing and contrasting the differing positions of the presidential candidates in light of Scripture" on "Pulpit Freedom Sunday," over thirty pastors publicly took up the challenge.[66] Similarly, the Becket Fund for Religious Liberty found a pastor who not only violated the prohibition, but also

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[60] *See* YEARBOOK OF AMERICAN & CANADIAN CHURCHES 2008, at 381 (Eileen W. Lindner ed., 2008) (disclosing a total based on the number of churches reporting within each reported religious body for 2006 or earlier). The actual number of houses of worship may differ somewhat from this figure, as the *Yearbook* relies on voluntary reporting and data collection standards vary between religious bodies. *Id.* at 9 (discussing methodology and concluding that it is reasonably accurate).

[61] GREG SMITH, SCOTT KEETER & JOHN GREEN, PEW RESEARCH CTR., RELIGIOUS GROUPS REACT TO THE 2006 ELECTION (2006), *available at* http://pewresearch.org/pubs/99/religious-groups-react-to-the-2006-election. The significance of this study is limited by the fact that the survey did not ask respondents about the context in which they received such messages, leaving open the possibility that they received the messages outside of a house of worship. *See id.*

[62] Eric McDaniel, *Black Clergy in the 2000 Election*, 42 J. FOR SCI. STUDY RELIGION 533, 534 (2003).

[63] *Id.* at 540-41.

[64] *Id.* at 535 (recognizing that the 10.8% response rate "necessitates some caution in generalizing the results of this research as reflective of the population being examined").

[65] *See* James, *supra* note 14, at 391-96 (describing the history of African American churches' political involvement and tracing it back as far as the post-Emancipation period).

[66] *See supra* note 9 and accompanying text.

willingly signed a public letter to the IRS challenging it to investigate, published at the Becket Fund's expense as a full-page ad in the *Wall Street Journal*.[67]

This information strongly indicates that sermon-related violations of the prohibition are not in short supply, numerous pastors and houses of worship are willing to defy the prohibition knowingly, and legal resources are readily available to contest any IRS attempt to impose penalties on such houses of worship and their pastors. Therefore the courts will almost certainly have to address the Free Exercise Clause and RFRA issues implicated by such a dispute. It is to those issues that we now turn.

## II. CURRENT FREE EXERCISE CLAUSE LAW

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[68] The Supreme Court's decision in *Employment Division v. Smith*[69] dominates First Amendment case law addressing government action claimed to burden an individual's exercise of religion. This Part therefore starts with *Smith*, explores the various exceptions to the rule adopted in the decision, and then discusses the pre-*Smith* case law that applies in exception cases. The Section concludes that a Free Exercise Clause-based challenge to the prohibition, even in the context of a sermon, would almost certainly fail under both *Smith* and, if one of the exceptions to *Smith* applied, the pre-*Smith* case law.

### A. Employment Division v. Smith

In *Employment Division v. Smith*, the Employment Division of the Department of Human Resources of Oregon denied unemployment compensation to two members of the Native American Church because their employer, a private drug rehabilitation organization, discharged them for sacramental use of peyote at a church ceremony.[70] The Oregon Supreme Court decided that the denial of benefits did not survive First Amendment scrutiny because it burdened the religious practices of the claimants and was not sufficiently justified by the state's interest in maintaining the financial integrity of its unemployment compensation fund.[71] It also concluded that while Oregon's criminal law prohibited peyote use, that prohibition could not apply to sacramental use, again under the Free Exercise Clause of the First Amendment.[72]

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[67] *See supra* note 7 and accompanying text.

[68] U.S. CONST. amend. I.

[69] 494 U.S. 872 (1990).

[70] *Id.* at 874.

[71] *Id.* at 875; Smith v. Employment Div., 721 P.2d 445, 450-51 (Or. 1986); Black v. Employment Div., 721 P.2d 451, 453 (Or. 1986) (companion case to *Smith v. Employment Div.*, 721 P.2d 445).

[72] *Smith*, 494 U.S. at 876; Smith v. Employment Div., 763 P.2d 146, 148-49 (Or. 1988).

The Supreme Court of the United States reversed, concluding that the Free Exercise Clause did not create an exception to Oregon's criminal statute prohibiting the use of peyote and, since the basis of the discharge and denial of benefits was a criminal act, the Free Exercise Clause did not prohibit the denial of benefits for sacramental peyote use.[73] What made the decision so significant is that the Court reached this conclusion by reasoning that the Free Exercise Clause did not excuse religiously motivated individuals from having to comply with otherwise valid, neutral, and generally applicable laws, and so the government did not have to demonstrate that such laws served a compelling interest even if they substantially burdened religious practices.[74] This reasoning departed from at least the language of earlier free exercise decisions, which required the government to make a compelling interest demonstration (and to show the law at issue was narrowly tailored to serve that interest) if a law substantially burdened religious exercise, regardless of whether it was neutral and generally applicable.[75] While the courts, and even some of the Supreme Court justices, often did not apply this strict scrutiny before *Smith*,[76] *Smith* was the first time the Supreme Court explicitly rejected strict scrutiny with respect to valid, neutral, and generally applicable laws.

Criticism of the *Smith* decision was fast and furious, including among academics, who almost uniformly lined up against it.[77] For reasons that will become clear, however, even if the Court's reasoning in *Smith* is incorrect, elimination of the *Smith* rule would not change the result of a First Amendment challenge to the prohibition. Nevertheless, the *Smith* decision remains the prevailing interpretation of the Free Exercise Clause, and so any free exercise challenge to the political campaign intervention prohibition must address the *Smith* rule.

Before moving to the exceptions to the *Smith* rule, a few points need elucidation. First, there is no doubt that the political campaign intervention prohibition is a valid law under Congress's general Sixteenth Amendment authority to impose an income tax.[78] Second, while there is some ambiguity

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[73] *Smith*, 494 U.S. at 890 ("Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug.").

[74] *Id.* at 878-79.

[75] *See infra* Part II.C.

[76] *E.g.*, Bowen v. Roy, 476 U.S. 693, 708-12 (1986) (Burger, C.J., joined by Powell & Rehnquist, JJ., plurality opinion); United States v. Lee, 455 U.S. 252, 263 & n.3 (1982) (Stevens, J., concurring); Thomas v. Review Bd., 450 U.S. 707, 722-23 (1981) (Rehnquist, J., dissenting).

[77] *See infra* note 122.

[78] *See* U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes . . . ."); Joseph M. Dodge, Murphy *and the Sixteenth Amendment in Relation to the Taxation of Non-Excludable Personal Injury Awards*, 8 FLA. TAX REV. 369, 372-73 (2007).

regarding what is a neutral and generally applicable law, there can be no doubt that the prohibition is, on its face, neutral and generally applicable. The prohibition is neutral in that there is no evidence that Congress enacted the prohibition to discriminate against religious organizations, whether one examines the words of the prohibition itself, its (minimal) legislative history, or its actual effect.[79] The prohibition is generally applicable because it applies to all organizations qualified to receive tax-deductible contributions, regardless of whether the motivation for their activities (including violating the prohibition) is religious.[80] Finally, while the law at issue in *Smith* was a criminal law, later decisions make it clear that its reasoning is not so limited.[81] The prohibition therefore falls squarely within the *Smith* interpretation of the Free Exercise Clause. As a result, any free exercise challenge to the prohibition will fail unless one of the exceptions to the *Smith* rule applies.

### B. *Exceptions to the* Smith *Rule*

In *Smith*, the Supreme Court chose to distinguish, rather than overrule, its earlier decisions concluding that a neutral and generally applicable law violated the Free Exercise Clause. In doing so, the Court acknowledged two exceptions to the *Smith* rule: (1) "hybrid" claims that implicate one or more constitutional provisions other than the Free Exercise Clause, and (2) laws that permit individual exemption determinations.[82] *Smith*, however, clearly explained neither the contours nor the effects of these exceptions. Furthermore, besides these explicit exceptions, the reasoning of *Smith* indicates that there may be a third exception for facially neutral laws that are at significant risk of not being applied neutrally because they grant significant

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[79] *See supra* notes 24, 29-31 and accompanying text; *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533-42 (1992) (stating "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral" and describing the relevant facts for determining whether a law has such an object).

[80] *See supra* notes 32, 34 and accompanying text; *see also Lukumi Babalu Aye*, 508 U.S. at 543-45 (stating that to meet the general applicability requirement the government "cannot in a selective manner impose burdens only on conduct motivated by religious belief" and describing the relevant facts for determining if the government has been selective in this manner).

[81] *See* City of Boerne v. Flores, 521 U.S. 507, 511-14, 535 (1997) (involving a municipal ordinance); Parker v. Hurley, 514 F.3d 87, 96 n.6 (1st Cir. 2008) (listing cases from four circuits that apply *Smith* to non-criminal laws), *cert. denied*, 129 S. Ct. 56 (2008).

[82] Employment Div. v. Smith, 494 U.S. 872, 881-82, 884 (1990). The Court also recognized that the rule it announced in *Smith* would not apply to government actions involving religious beliefs (as opposed to religiously motivated conduct), government actions designed to punish or inhibit specific religious views, and requests for courts to resolve internal religious organization disputes turning on questions of religious doctrine. *Id.* at 877.

discretion to the government officials applying them (but not through individual exemption determinations).

At first glance, the hybrid claim exception would appear to fit the house of worship context perfectly, as any challenge to the prohibition in this context also implicates freedom of speech. The lower courts, however, have struggled with the hybrid claim exception because the Court did not clarify the effect of having a hybrid claim.[83] The Supreme Court's hybrid claim discussion appears to have been primarily an attempt to avoid overturning *Wisconsin v. Yoder*[84] and a line of cases involving religious expression.[85] This helps explain why Justice Souter and many commentators have found the hybrid claim exception to be untenable or fundamentally inconsistent with the First Amendment to the extent it would apply a different standard than would otherwise apply to each of the constitutional rights if asserted separately.[86] A minority position, however, is that a hybrid claim either is subject to the pre-*Smith* standard or only requires a "colorable claim" that either constitutional right at issue has been violated to invoke strict scrutiny review.[87] While the majority view seems correct for the reasons provided by its proponents, if the minority view prevails in the courts and a sermon-based challenge could take advantage of it, doing so would ultimately be to no avail for the reasons discussed below.[88]

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[83] *See Parker*, 514 F.3d at 97-99 (reviewing the various positions taken by courts and commentators).

[84] 406 U.S. 205 (1972).

[85] *See Smith*, 494 U.S. at 881; Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 187-88 (2002); Kent Greenawalt, *Religion and the Rehnquist Court*, 99 NW. U. L. REV. 145, 153-54 (2004); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990) ("One suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* in this case.").

[86] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 566-67 (1992) (Souter, J., concurring); Kissinger v. Bd. of Trs. of Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993); Brownstein, *supra* note 85, at 188-93; Greenwalt, *supra* note 85, at 153-54 (2004); Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 630-32 (2003) (summarizing the criticisms and limited use of the hybrid claim exception); McConnell, *supra* note 85, at 1122.

[87] *See Parker*, 514 F.3d at 97-98; Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573, 587-601 (2003); Meghan J. Ryan, *Can the IRS Silence Religious Organizations?*, 40 IND. L. REV. 73, 87-88 (2007); *see also* Robert M. O'Neil, *Religious Expression: Speech or Worship – or Both?*, 54 MO. L. REV. 501, 505-06 (1989) (discussing, prior to *Smith*, four theories for the level of protection that religious expression, which involves both free exercise and free speech, should have under the First Amendment).

[88] *See infra* notes 118-119 and accompanying text. Although discussion of a freedom-of-speech-based challenge is beyond the scope of this Article, there are strong reasons to

The other exception explicitly acknowledged by the Court in *Smith* – again to distinguish several of its earlier decisions – was for laws under which the government has a system of individual exemptions.[89] In that situation, the Court concluded that not permitting exemptions for "religious hardship" required a compelling reason.[90] Here, however, the political campaign intervention prohibition has no such system of individual exemptions and, according to the IRS, it applies to all charities and their activities.[91] While the IRS's limited enforcement activities in past years may have raised the question of whether such a system of individual exemptions existed in practice, the IRS's more vigorous recent efforts indicate that such a system no longer exists, if it ever did.[92]

Besides these explicit exceptions to the rule stated in *Smith*, there is arguably another exception for laws that are neutral on their face but for which there is a substantial risk of non-neutral application. Since government officials charged with enforcing these laws have broad discretion in determining whether a violation has occurred, those officials can shade their decisions in a manner that either favors some religious practices over others or favors secular entities over religious ones. Essentially, such an exception would be a more generalized version of the individual exemptions exception. Even if this last exception exists, however, it is not clear that a house of worship claimant challenging the prohibition could fall within it. The "discretion" in this context is in defining the exact parameters of what constitutes support or opposition of a candidate for elected public office.[93] Despite numerous efforts by the Treasury Department and IRS, the exact scope of the prohibition remains unclear even to some IRS employees.[94] Regardless,

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believe that it would also be unsuccessful even if the hybrid exception did apply. *See infra* note 185.

[89] *Smith*, 494 U.S. at 884; *see also* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999) (concluding this exception applied when the government granted categorical "medical exemptions while refusing religious exemptions"); Rader v. Johnston, 924 F. Supp. 1540, 1553-54 (D. Neb. 1996) (concluding this exception applied when the government granted discretionary exemptions to an otherwise generally applicable rule in broad range of circumstances, but not when sought for religious reasons); Brownstein, *supra* note 85, at 193-94; Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith, Sherbert, *Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1202-03 (2005).

[90] *Smith*, 494 U.S. at 884 (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

[91] *See supra* notes 32, 34-35 and accompanying text.

[92] *See supra* Part I.B.

[93] *See supra* notes 40-45 and accompanying text.

[94] *See* INSPECTOR GEN. FOR TAX ADMIN., REFERENCE NO. 2008-10-117, IMPROVEMENTS HAVE BEEN MADE TO EDUCATE TAX-EXEMPT ORGANIZATIONS AND ENFORCE THE PROHIBITION AGAINST POLITICAL ACTIVITIES, BUT FURTHER IMPROVEMENTS ARE POSSIBLE 2 (2008), *available at* http://www.treas.gov/tigta/auditreports/2008reports/200810117fr.pdf ("[E]mployees within the [Exempt Organizations] function did not always understand why

there is no recent evidence that this discretion has led to the targeting of particular faiths, religious practices, or political views. Both government agencies and courts that recently investigated charges of discriminatory enforcement of the prohibition have concluded that no such discrimination exists.[95] This exception would therefore only apply if it extended not only to situations where there was some evidence of non-neutral application, but also to situations where non-neutral application was a mere possibility – even if it had not been shown to exist. While defining the exception this broadly would not necessarily encompass normal prosecutorial discretion, it would potentially cover any law where the definition of a violation required any significant amount of interpretation by a government official. Perhaps the vagueness of the definition in this context is so extreme that, regardless of the exact parameters of the exception, the prohibition clearly falls within it. However, it is hard to know where the exception's limit would be if it did not require at least some actual evidence of non-neutral application as opposed to the mere possibility of non-neutral application. Thus, the better position is that absent such evidence, this possible exception would not apply.[96]

Therefore none of the exceptions would avail a house of worship challenging the political campaign intervention prohibition and so the *Smith* rule would control. If this is correct, such a challenge would fail under current Free Exercise Clause law. What if this prediction is incorrect, in that either the minority view of hybrid claims prevails or one of the other two exceptions is found to apply? Even if this occurred, a challenger would still only be successful if the claim would have succeeded under pre-*Smith* case law.

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certain referrals were not included . . . despite having issues similar to referrals that were included.").

[95] United States v. Judicial Watch, Inc., 371 F.3d 824, 829-31 (D.C. Cir. 2004) (finding no political motivation behind audit); Branch Ministries v. Rossotti, 211 F.3d 137, 144-45 (D.C. Cir. 2000) (finding no discrimination against a Church whose tax-exempt status was revoked); INSPECTOR GEN. FOR TAX ADMIN., REFERENCE NO. 2005-10-035, REVIEW OF THE EXEMPT ORGANIZATIONS FUNCTION PROCESS FOR REVIEWING ALLEGED POLITICAL CAMPAIGN INTERVENTION BY TAX EXEMPT ORGANIZATIONS 1-3 (2005) [hereinafter INSPECTOR, REVIEW], *available at* http://www.ustreas.gov/tigta/auditreports/2005reports/200510035fr.pdf; STAFF OF THE JOINT COMM. ON TAXATION, 106th CONG., REPORT OF INVESTIGATION OF ALLEGATIONS RELATING TO INTERNAL REVENUE SERVICE HANDLING OF TAX-EXEMPT ORGANIZATION MATTERS 6 (Comm. Print 2000) ("The Joint Committee staff found no credible evidence that the IRS delayed or accelerated issuance of determination letters to tax-exempt organizations based on the nature of the organization's perceived views.").

[96] The Supreme Court has found excessive government discretion over licensing or permitting schemes unconstitutional in the free speech context, but that line of cases involves prior restraint of speech. *See, e.g.*, Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 552-53 (1975).

C. *The Pre-*Smith *Case Law*

The simple story told about the pre-*Smith* individual free exercise case law is that it required the government to meet a strict scrutiny standard whenever a law substantially burdened the free exercise of religion. Strict scrutiny requires the government to demonstrate that a law serves a compelling interest and is narrowly tailored to serve that interest. Since this is such a high level of scrutiny, it is expected that the government could not usually meet this burden - hence the oft-quoted phrase "'strict' in theory and fatal in fact."[97]

This story is a myth in several respects. First, the Supreme Court did not apply strict scrutiny prior to the 1963 case of *Sherbert v. Verner*.[98] Instead, the Court made a sharp distinction between religious *belief* – which the government could not prohibit or punish – and religiously motivated *conduct* – which the government could prohibit or punish without restriction.[99] *Reynolds v. United States*[100] established this distinction, which the Court did not revisit for over eighty years, while upholding a criminal statute banning polygamy.[101]

Second, and more importantly, soon after declaring this new strict scrutiny standard for free exercise claims, the Court quickly began watering down the standard even while continuing to use its language. Other than *Sherbert* and cases with similar facts, the only other free exercise case that truly applies the standard is *Yoder*, where the Court found that Amish claimants had a right to be exempted from compulsory education laws for their children who had

[97] Gerald Gunther, *The Supreme Court, 1971 Term – Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). While oft-quoted (out of context) to mean that strict scrutiny is fatal for the government, this level of scrutiny is actually often not fatal, even outside of the free exercise area. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 798-809, 869-71 (2006).

[98] 374 U.S. 398, 402-03 (1963) (describing the earlier case law and recognizing that "the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles" but characterizing those cases as involving "conduct or actions [that] have invariably posed some substantial threat to public safety, peace or order"). The first significant hint by the Court of a shift to this new standard was the 1961 case of *Braunfeld v. Brown*, 366 U.S. 599 (1961), where the Court for the first time looked to see if a law burdened religious conduct as opposed to belief or expression. *Id.* at 605-09.

[99] *See, e.g.*, Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 937-39 (1989) [hereinafter Lupu, *Where Rights Begin*].

[100] 98 U.S. 145 (1878).

[101] *See id.* at 164 ("Congress was deprived [by the First Amendment's Free Exercise Clause] of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."); Brownstein, *supra* note 85, at 124-26 (pointing out that pre-*Sherbert*, the Supreme Court interpreted the Free Exercise Clause as only protecting religious beliefs and, to some extent, religious speech, but arguing that the Court's real basis for protecting the latter was the Free Speech Clause).

completed the eighth grade.[102] For a broad range of other cases, commentators generally agree that the Court either explicitly abandoned strict scrutiny or used strict scrutiny language, but did not actually apply it.[103] While some of these cases may have turned on questionable judgments that any burden on exercise of religion was not "substantial," in many of these cases, the courts either acknowledged or assumed that the burden was substantial.[104] Nevertheless, the government often defeated such challenges by articulating a general governmental concern without having to demonstrate that the law was narrowly tailored to serve that concern.[105]

The Court's three tax-related cases in this area both illustrate this pattern and are particularly relevant to the political campaign intervention prohibition.[106] In *United States v. Lee*, an Amish employer sought a free exercise exemption from social security tax, based on the Amish belief that "there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system."[107] The Court found that the social security tax laws interfered with the Amish claimants' free exercise rights, but concluded that the government's interest in maintaining a sound tax system, including mandatory and continuous participation in and contribution to the social security system, sufficiently justified this interference.[108] The Court made this finding even though there

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[102] *See* Wisconsin v. Yoder, 406 U.S. 205, 207, 234 (1972); Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 201 (2004); William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 566 (1983).

[103] *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 42-44 (2007); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 9-11 (1994); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 182-85 (1995) [hereinafter Lupu, *Of Time and the RFRA*]; McConnell, *supra* note 85, at 1110, 1127-28; Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 316-25; Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 595-97 (1990).

[104] *See* Robert D. Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 CONST. COMMENT. 147, 149 (1987) ("[I]f the Court concludes that strict review is applicable, it may too readily accept the existence of a 'compelling' governmental interest and the 'necessity' of the particular regulation as a means of advancing that interest.").

[105] *Id.*

[106] On the significance of these cases, see Frederick Mark Gedicks, *RFRA and the Possibility of Justice*, 56 MONT. L. REV. 95, 115 (1995) ("*Lee* marked the beginning of the end of the *Sherbert-Yoder* doctrine."); Lupu, *Of Time and the RFRA*, *supra* note 103, at 183-85 ("The leading cases [in which the Supreme Court weakened free exercise review] all involve taxation.").

[107] 455 U.S. 252, 257 (1982).

[108] *Id.* at 257-60.

was no indication that granting the exemption to all Amish employers would significantly impact the financial soundness of the social security system and despite a federal statute granting such an exemption to self-employed Amish.[109] The opinion also did not discuss whether the law was narrowly tailored to serve this interest.

The Court also used a similar rationale to reject a free exercise claim by sectarian educational institutions that discriminated on the basis of race because of sincerely held religious beliefs.[110] In *Bob Jones University v. United States*, the Court found that the government's general and compelling interest in eradicating discrimination in education substantially outweighed the burden imposed on religious exercise by denying tax-exempt status to schools discriminating on religious grounds.[111] While the Court did not rely on the government's interest in maintaining a sound tax system as it did in *Lee*, the Court's reliance on a general governmental interest without requiring any showing that granting the exemption at issue would significantly undermine that interest is identical to its approach in *Lee*. The Court in *Bob Jones University* also concluded without explanation that there was no "less restrictive means" by which the government could accomplish this goal.[112]

Finally, in *Hernandez v. Commissioner*, the Court applied the *Lee* rationale to defeat a challenge to the denial of a charitable contribution deduction for amounts paid to various Church of Scientology entities for "auditing" services required by that faith.[113] While expressing skepticism that the loss of the deduction for such payments constituted a substantial burden, the Court did not make a final determination on this point, but instead concluded the government's interest "in maintaining a sound tax system" justified burdening religious free exercise, regardless of whether the burden was substantial.[114] As

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[109] *See id.* at 255 n.4, 256 (noting and citing the statutory exemption then codified in I.R.C. § 1402(g)); *id.* at 262 (Stevens, J., concurring) (concluding that the majority opinion overstated the risk to the tax system that would be created by granting the claim at issue); Lupu, *Of Time and the RFRA*, *supra* note 103, at 183-84 (criticizing the Court's reasoning in *Lee* on the ground that it did not involve a "careful analysis of the marginal costs and benefits reflected in the conflict" between religious norms and government interests, but instead relied on a general concern that the government had not demonstrated was plausibly threatened by the exemption sought). *But see* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 435 (2006) (citing *Lee*, 455 U.S. 252, as an example of the proper application of the compelling governmental interest test); *infra* notes 253-254 and accompanying text.

[110] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 577-85, 604 (1983).

[111] *Id.* at 604.

[112] *Id.*

[113] 490 U.S. 680, 683-84, 699-700 (1989). For a discussion of the tax rules at issue in *Hernandez* and the IRS's decision to walk away from its victory in that case, see Allan J. Samansky, *Deductibility of Contributions to Religious Institutions*, 24 VA. TAX REV. 65, 84-97 (2004).

[114] *Hernandez*, 490 U.S. at 699-700 (citing *Lee*, 455 U.S. 252).

in *Lee*, the *Hernandez* Court did not address whether the application of the tax law at issue in this particular context was narrowly tailored to further the government's interest.

The common criticism of the rationale for each of these cases is that the Court, while theoretically applying strict scrutiny, actually deferred to the government's assertion that the laws at issue served a general, compelling interest – maintaining a sound tax system with only congressionally created exceptions would be undermined by permitting limited exemptions for those with certain religious beliefs.[115] The Court did not require the government to demonstrate that the law, as applied to the actual claimants, served this compelling interest, much less that the law was narrowly tailored to further that interest. Arguably, the Court merely applied the rule that it explicitly stated in *Smith* – if a valid, neutral, and generally applicable law is at issue, the government is not required to meet the strict scrutiny standard.[116] The Court in *Smith* appeared to acknowledge that this was the case by citing *Lee* as support for the *Smith* rule, which indicated that it had been applying the *Smith* rule all along (except for the two exceptions discussed above).[117]

For a house of worship that successfully argues that *Smith* does not apply to the prohibition, this means that the house of worship must still demonstrate that its religiously-motivated conduct is substantially burdened and that the prohibition fails not under a literal strict scrutiny standard, but under the lower standard actually applied in *Lee* and *Hernandez*. The substantial burden requirement will be discussed in Part III of this article, as it is evident that even if a house of worship claimant could meet that requirement its claim would fail under the *Lee* standard.

As already discussed, *Lee* and *Hernandez* demonstrate strong deference to the government's administration of the tax system.[118] By recognizing administration of the tax system without religious exemptions as a compelling governmental interest and essentially ignoring the narrowly tailored requirement, the Court established a standard of scrutiny that makes the success of any free exercise challenge to a tax law provision nearly impossible unless the provision discriminates against religious beliefs. For the reasons already discussed with respect to the *Smith* rule, the RFRA prohibition is not discriminatory in this fashion and thus easily falls within the scope of *Lee* and *Hernandez*.[119] While a house of worship could challenge the *Lee* standard as incorrect, the subsequent *Smith* decision, which explicitly adopted the *Lee*

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[115] *See* Lupu, *Of Time and the RFRA*, *supra* note 103, at 183-84; Pepper, *supra* note 103, at 324-25.

[116] *See* Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990). Justice Stevens argued that this rule is exactly what the Court applied in *Lee* and many previous free exercise cases. *Lee*, 455 U.S. at 263 & n.3 (Stevens, J., concurring).

[117] *See Smith*, 494 U.S. at 880.

[118] *See supra* notes 108, 114 and accompanying text.

[119] *See supra* notes 79-80 and accompanying text.

standard in almost all instances, would make such a challenge quixotic. The more fruitful ground for a free exercise claim is therefore under RFRA itself, which explicitly establishes a substantial burden/strict scrutiny standard.[120]

## III. THE RELIGIOUS FREEDOM RESTORATION ACT

Congress enacted the Religious Freedom Restoration Act of 1993 in reaction to the *Smith* decision. Although originally intended to apply to all free exercise of religion challenges to governmental action, the Supreme Court limited its application to the federal government.[121] Despite its name, both the statutory language and legislative history indicate that RFRA did not merely restore the free exercise world to its pre-*Smith* existence with respect to the federal government. RFRA instead imposed a less demanding (for claimants) and less flexible (for courts) standard for judging free exercise challenges. This Article concludes that applying this standard to the prohibition as applied in the sermon context will, for some houses of worship and their leaders, substantially burden the exercise of religion and thus trigger RFRA's version of strict scrutiny. Once triggered, the government probably will not be able to carry its burden of demonstrating that the prohibition as applied in this context is the least restrictive means for furthering a compelling governmental interest – as RFRA requires – for the reasons detailed below.

### A. *The Statute*

Scholars almost uniformly criticize the *Smith* decision.[122] Members of Congress quickly and almost uniformly adopted this position as well, calling loudly for legislation to "reverse the disastrous effects of a dastardly and

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[120] Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b) (2006).

[121] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 & n.1 (2006) (citing City of Boerne v. Flores, 521 U.S. 507 (1997)). The Supreme Court appeared to assume the constitutionality of RFRA as applied to the federal government. *Id.* Even if there is a constitutional question regarding RFRA's application to the federal government, it is unclear who would raise this issue as neither plaintiffs seeking to invoke RFRA's protection nor the federal government would be likely to do so.

[122] *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 2; McConnell, *supra* note 85. *But see, e.g.*, Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 247 (1991) (defending "*Smith*'s abandonment of *Sherbert*," but not all of the reasons provided for the decision); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916 (1992) (arguing that late eighteenth-century Americans generally did not view the Free Exercise Clause as creating religious exemptions to civil laws, thereby implicitly providing support for the result in *Smith*); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 308-09 (1991) (defending the outcome, but not the reasoning, in *Smith*). *See generally* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclast Assessment*, 78 VA. L. REV. 1407, 1409 & n. 15 (citing sixteen law review articles and notes discussing *Smith*, of which fifteen condemned the holding).

unprovoked attack on our first freedom by the Supreme Court of the United States."[123] Yet even in the midst of this firestorm of criticism, Congress did not quickly push through drafted legislation,[124] but instead held hearings and conducted debates for several years before ultimately approving the Religious Freedom Restoration Act of 1993.[125] This passage of time provided Congress with an opportunity to consider and make a number of significant changes to the Act before enacting it into law.

The heart of RFRA in its current form is the following provision:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[126]

The phrase "exercise of religion" was originally defined by reference to the First Amendment, but Congress amended that provision in 2000 to incorporate by reference the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") definition,[127] which provides in relevant part: "[t]he term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[128] The reason for this amendment was to clarify "that the burdened religious activity need not be compulsory or central to a religious belief system as a condition for the

[123] 137 CONG. REC. 17,035-36 (1991) (remarks of Rep. Stephen J. Solarz introducing the 1991 version of the Religious Freedom Restoration Act).

[124] *See* Berg, *supra* note 103, at 15-16 (describing the policy concerns and political developments that delayed the enactment of RFRA).

[125] *See, e.g.*, *Religious Freedom Restoration Act of 1992: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong. 1, 1-7 (1992); *Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 1, 7-10 (1992); *Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. 2, 7-27 (1990).

[126] Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(a)-(b) (2006).

[127] *Compare* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 5(4), 107 Stat. 1488, 1489 (1993) (original version), *with* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 7(a), 114 Stat. 803, 806 (2000) (amendment).

[128] Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-5(7)(A).

claim."[129] For reasons discussed below, many houses of worship have leaders who deliver sermons that both qualify as religious exercise under this definition and violate the political campaign intervention prohibition.[130] The next sections explore the meaning of the other key provisions in RFRA, which are based at least in part on the pre-*Smith* individual free exercise case law.

B. *Substantial Burden*

The initial RFRA bills only required that a government action "burden" the exercise of religion to trigger RFRA's protection,[131] in contrast to the "substantial" or "undue" burden language used in post-*Sherbert*/pre-*Smith* Court decisions.[132] Nevertheless, the relevant committee reports consistently used "substantial burden" and the Senate eliminated any suggestion that the lack of the word "substantial" indicated a lower threshold for free exercise claims than existed pre-*Smith* by adding "substantial" as a modifier.[133] In doing so, the supporters of this change explicitly stated their intent to invoke the same requirement that the courts had applied pre-*Smith*.[134] Courts have therefore generally and correctly agreed that they should look toward the pre-*Smith* definition of "substantial burden" when applying this RFRA requirement.[135]

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[129] H.R. REP. NO. 106-219, at 13 (1999); *see also* Henderson v. Kennedy, 265 F.3d 1072, 1074 (D.C. Cir. 2001) (stating that the 2000 amendments "extended the protections of RFRA to 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief'" (quoting 42 U.S.C. § 2000cc-5(7)(A))).

[130] *See infra* notes 160-161 and accompanying text.

[131] *See, e.g.*, Religious Freedom Restoration Act of 1993, S. 578, 103d Cong. § 3 (1993); Religious Freedom Restoration Act of 1992, S. 2969, 102d Cong. § 3 (1992); Religious Freedom Restoration Act of 1991, H.R. 2797, 102d Cong. § 3 (1991).

[132] *See, e.g.*, Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) (using the term "substantial"); Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.").

[133] *See* S. REP. NO. 103-111, at 8-9 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1898 (recognizing that pre-*Smith* case law required a substantial burden to trigger the compelling interest test); H.R. REP. NO. 103-88, at 6-7 (1993) ("It is the Committee's expectation that the courts will look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened . . . .").

[134] 139 CONG. REC. 26,178-80 (1993) (statements of Sen. Kennedy and Sen. Hatch).

[135] *E.g.*, Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 813 (8th Cir. 2008); Goodall v. Stafford County Sch. Bd., 60 F.3d 168, 171 (4th Cir. 1995); *see also* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1069-70, 1074 n.16 (9th Cir. 2008) (en banc) (limiting the definition of "substantial burden" under RFRA to the burdens imposed in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)), *cert. denied*, 129 S. Ct. 2763 (2009); Henderson v. Kennedy, 253 F.3d 12, 17 (D.C. Cir. 2001); Goehring v. Brophy, 94 F.3d 1294, 1299 (9th Cir. 1996); Jolly v. Coughlin, 76 F.3d 468, 477 (2d Cir. 1996).

1. Defining "Substantial Burden"

The Supreme Court first discussed the burden requirement in the free exercise context when it decided a case involving Orthodox Jewish business owners forced by Pennsylvania law to close their stores on Sunday. Although the Court did not find the burden to violate the Constitution, it stated that "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[136] Relying on this definition, the Court concluded in *Sherbert* that the denial of unemployment benefits based on the claimant's refusal to work on her Sabbath violated the Constitution because it

> forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[137]

The Court later clarified that the burden had to be substantial, first by suggesting that the "pressure on an adherent to modify his behavior"[138] had to be "substantial"[139] and then by explicitly stating that "[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice."[140] The Court has also determined "that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions" may create a substantial burden.[141] This standard has not been without its critics, particularly with respect to the centrality requirement.[142] These concerns may explain why Congress revised the RFRA definition of "exercise of religion" in 2000 to provide explicitly that such exercise need not be "central to . . . a system of religious belief."[143] Other than this change, however, Congress intended that RFRA's substantial burden

[136] Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

[137] *Sherbert*, 374 U.S. at 404.

[138] Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981).

[139] *Id.*

[140] Hernandez v. Comm'r, 490 U.S. 680, 699 (1989); *see also* Employment Div. v. Smith, 494 U.S. 872, 883 (1990) ("[U]nder the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest.").

[141] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988).

[142] *See, e.g.*, Lupu, *Where Rights Begin*, *supra* note 99, at 959 (arguing that centrality carries a "grave risk of bias toward Western, monotheistic religions").

[143] Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-5(7)(A) (2006); *see also id.* § 2000bb-2(4) (incorporating this definition into RFRA by reference).

requirement be the same as the requirement that existed in the pre-*Smith* case law.

It is therefore clear that denying a person or institution the ability to follow his, her, or its religious beliefs without exception is a substantial burden.[144] What is less clear is whether causing an individual or organization to bear a significant additional economic burden as a cost of observing a religious belief or practice is sufficient to create a substantial burden. For example, in the *Sherbert* line of cases, the Supreme Court concluded that denying a worker unemployment compensation for refusing to work on his Sabbath constitutes a substantial burden on the free exercise of religion.[145] Nevertheless, the Supreme Court and various federal appellate courts have concluded that other types of financial burdens imposed by law upon the free exercise of religious beliefs do not reach the level of a substantial burden. For example, as discussed above, the Supreme Court concluded that the financial burden a Sunday closing law placed on Orthodox Jewish business owners who were religiously compelled to be closed on Saturday was not sufficient to violate the First Amendment's Free Exercise Clause even pre-*Smith*.[146] Similarly, the Fourth Circuit concluded under RFRA that no substantial burden exists when a local government refuses to pay for speech services for a child attending a private sectarian school even though the government would have provided those services for free if the child had attended public school.[147]

The distinction between these various cases appears to be how closely an indirect financial burden is tied to the exercise of religious belief. In the unemployment benefits cases, such as *Sherbert*, the state imposed the financial penalty specifically because of the unemployed individual's religiously compelled practice – not working on the Sabbath. In contrast, in *Braunfeld*, the state did not penalize Orthodox Jewish business owners specifically for closing their businesses on Saturday. Those owners lost the income they

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[144] *See, e.g.*, Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1069-70 (9th Cir. 2008) (en banc) ("Under RFRA, 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)."), *cert. denied*, 129 S. Ct. 2763 (2009); United States v. Friday, 525 F.3d 938, 947-48 (10th Cir. 2008) (concluding that limiting a Native American's access to eagle feathers required for a religious ceremony would substantially burden his exercise of religion under RFRA, but not deciding whether requiring a permit to obtain eagle feathers constituted a substantial burden), *cert. denied*, 129 S. Ct. 1312 (2009).

[145] *See* Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 832 (1989).

[146] Braunfeld v. Brown, 366 U.S. 599, 605-06 (1961).

[147] Goodall v. Stafford County Sch. Bd., 60 F.3d 168, 172-73 (4th Cir. 1995) (finding that the plaintiffs had "neither been compelled to engage in conduct proscribed by their religious beliefs, nor have they been forced to abstain from any action which their religion mandates that they take" by the denial of the government benefit). The Fourth Circuit issued this decision before the Supreme Court limited the application of RFRA to the federal government. *See id.* at 168; *supra* note 121 and accompanying text.

would have earned from being open on Sunday, but being open on Sunday was not religiously compelled (although as a practical matter, income from Sunday would offset income lost from being closed on Saturday). Regardless of whether one agrees with this distinction, it does provide a way of reconciling the most directly applicable Supreme Court and appellate precedents.

The distinction of how closely tied an indirect financial burden is to religious exercise does not, however, explain all of those precedents. As recognized by Congress when it enacted RFRA, the Court arguably found a substantial burden to be lacking in two cases where it appeared that the religiously-motivated conduct was substantially limited or even barred.[148] In *Bowen v. Roy*, the Court found no substantial burden on the free exercise of religion from the government's use of a child's social security number even though the Court accepted the parents' assertion that such use would impair the child's spiritual development.[149] Similarly, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, the Court found that the government's decision to complete road construction and permit timber harvesting on national forest land would impose no substantial burden, yet accepted the claimants' assertion that doing so would destroy their ability to engage in religious ceremonies on sacred land.[150]

Despite the Supreme Court's subsequent assertions that *Roy* and *Lyng* rested on substantial burden grounds,[151] a close reading of the cases strongly suggests that in both instances the Court relied primarily on an alternate ground, albeit one that did not fit the substantial burden/strict scrutiny form of analysis. In both cases, the Court's statements indicate that it believed neither claim presented a Free Exercise Clause violation because the government was operating in an area of particular federal concern and control – administration of the social security system and use of public lands, respectively – and its actions did not force or even pressure the religiously observant plaintiffs to act in violation of their beliefs. In *Roy*, the Court stated:

> The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens .... The Free Exercise Clause affords an individual protection from certain forms of governmental

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[148] *See* 139 CONG. REC. 26,415-16 (1993) (colloquy between Sen. Charles Grassley and Sen. Orrin Hatch) (addressing whether RFRA would affect the holdings in *Bowen v. Roy*, 476 U.S. 693 (1986), and *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), and Senator Hatch's statement that RFRA would not affect either case because the Supreme Court found, in both cases, that the impact on exercise of religion was incidental and not a burden).

[149] *Roy*, 476 U.S. at 700-01.

[150] *Lyng*, 485 U.S. at 451.

[151] *E.g.*, Employment Div. v. Smith, 494 U.S. 872, 885 & n.2 (1990).

compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.[152]

Similarly, in *Lyng*, the Court cited this passage from *Roy* and then went on to state: "[i]n neither case, however, would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[153] The Court also may have been motivated in part by the fact that the government had already gone to significant lengths to try to accommodate the beliefs at issue in this case.[154]

Thus, while the Court seemed compelled to follow the substantial burden/strict scrutiny analysis, the underlying rationale appears to have been based on a different set of concerns: specifically, the government's ability to control its own internal activities – particularly with respect to land it unquestionably owned – when those activities did not pressure the plaintiffs to violate their beliefs (even though the government's actions may have been an affront to those beliefs). The RFRA committee reports appear to acknowledge this point. The House Judiciary Committee report provides that RFRA's requirements apply to "[a]ll governmental actions which have a substantial *external* impact on the practice of religion."[155] Similarly, the Senate Judiciary Committee cites *Roy* and *Lyng* for the proposition that "strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources."[156] A correct reading of these cases therefore indicates that even if they are relevant to the application of RFRA's substantial burden requirement, they are not applicable in the political campaign intervention prohibition context because the government's action clearly goes beyond management of its own internal affairs and in fact reaches into the internal activities of houses of worship.[157]

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[152] *Roy*, 476 U.S. at 699-700.

[153] *Lyng*, 485 U.S. at 448-49.

[154] *See id.* at 443, 454 (recognizing government efforts to protect both archeological and religious sites).

[155] H.R. REP. NO. 103-88, at 6 (1993) (emphasis added).

[156] S. REP. NO. 103-111, at 9 & n.19 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1898. *But see* Lupu, *Of Time and the RFRA*, *supra* note 103, at 189-90 (arguing that the apparent congressional support for *Roy* and *Lyng* can only be explained by a combination of congressional confusion and an "insensitivity to Native American faiths").

[157] The Ninth Circuit, sitting en banc, has rejected this interpretation of *Roy* and *Lyng*, but it acknowledged that a substantial burden would exist if individuals are "forced to choose between following the tenets of their religion and receiving a government benefit . . . ." Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1069-70 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2763 (2009).

It should be noted that the Court's resolution of these cases was not necessarily improper, even if somewhat disingenuous, because the entire substantial burden/strict scrutiny structure is nothing more than a court-developed analytical tool to implement the language of the Free Exercise Clause. That tool may be modified or even abandoned if the Supreme Court concludes, as it did both pre-*Smith* and in *Smith*, that applying it in a particular context does not ultimately match the requirements of the Free Exercise Clause.

In the context of RFRA, however, the courts lack the flexibility to manipulate the substantial burden requirement to foreclose a free exercise claim on grounds that do not follow the RFRA-required substantial burden/compelling governmental interest/least restrictive means structure.[158] Moreover, even if they had that flexibility, the courts generally have not used a strained definition of substantial burden to reject free exercise claims to federal tax law.[159] Therefore, a house of worship challenging the prohibition on RFRA grounds can meet this requirement simply by demonstrating that a burden exists and is substantial under the standard of *Sherbert* and later pre-*Smith* decisions.

2. The Burden on Houses of Worship

For at least some houses of worship, it is relatively easy to demonstrate that the prohibition will burden the "exercise of religion," as defined under RFRA. Many religious faiths, perhaps all, view the transmission of a holistic worldview that impacts all aspects of their adherents' lives as an integral part of their mission.[160] Therefore it would not be surprising to find that some houses of worship believe instructing their congregations with respect to

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[158] Judges may also feel less pressure to engage in such manipulation. Under RFRA, Congress can correct any incorrect or undesirable consequences of a court's interpretation of the statute. *See generally* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999) (discussing how both RFRA and state law versions of RFRA implement a "common-law exemption model" by permitting courts to develop exemptions, while leaving legislatures with the final authority over the scope of such exemptions).

[159] *See supra* notes 107-114 and accompanying text.

[160] *See, e.g.*, U.S. CATHOLIC CHURCH, CATECHISM OF THE CATHOLIC CHURCH (2d ed. 2000) para. 2032 ("To the Church belongs the right always and everywhere to announce moral principles, including those pertaining to the social order, and to make judgments on any human affairs to the extent that they are required by the fundamental rights of the human person or the salvation of souls" (citation omitted)); THE BOOK OF COMMON PRAYER AND ADMINISTRATION OF THE SACRAMENTS AND OTHER RITES AND CEREMONIES OF THE CHURCH 855 (U.S. version 1979) (stating that lay members of the U.S. Episcopal Church are "to represent Christ and his Church; to bear witness to him wherever they may be; and, according to the gifts given them, to carry on Christ's work of reconciliation in the world"); *id.* at 856 (one of the roles an Episcopal priest is "to represent Christ and his Church, particularly as pastor to the people").

political involvement to be as important to their religious teaching as instructing them on personal relationships or finances.[161] Thus, the prohibition undoubtedly burdens the exercise of religion by some individual religious leaders and their houses of worship.

The more difficult question is whether that burden is substantial. The most commonly cited reason for why the prohibition is not a substantial burden is that houses of worship have another way of engaging in the prohibited speech – creating a non-charitable, but closely related affiliate – albeit without the use of tax-deductible funds.[162] To understand this alternate channel reasoning requires consideration of a Supreme Court case relating to the constitutionality of another restriction on charities – the limitation on their lobbying activities also found in Internal Revenue Code section 501(c)(3). That limitation requires that "no substantial part of the activities" of a charity be "carrying on propaganda, or otherwise attempting, to influence legislation."[163] In *Regan v. Taxation with Representation of Washington*, a charity challenged this lobbying limitation as an unconstitutional condition on the receipt of tax-deductible contributions under the free speech clause of the First Amendment.[164] While the Supreme Court agreed that "the government may

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[161] *See, e.g.*, Letter from Most Reverend Michael J. Sheridan, Bishop of Colorado Springs, A Pastoral Letter to the Catholic Faithful of the Diocese of Colorado Springs on the Duties of Catholic Politicians and Voters (May 1, 2004), *available at* http://moritzlaw.osu.edu/electionlaw/docs/pastoral-letter--may2004.pdf (stating "[w]e cannot allow the progress that has been made to be reversed by a pro-abortion President, Senate or House of Representatives" and "[a]ny Catholics who vote for candidates who stand for abortion, illicit stem cell research or euthanasia" will "place themselves outside full communion with the Church and so jeopardize their salvation."); Regas, *supra* note 4 (encouraging parishioners making voting decisions to consider the horrors of the Iraq war and conservatives' dismantling of social programs); *supra* notes 61-63 and accompanying text (discussing evidence from surveys that a significant number of clergy in major U.S. denominations feel it is part of their religious role to endorse candidates from the pulpit).

[162] *See* Ward L. Thomas & Judith E. Kindell, *Affiliations Among Political, Lobbying and Educational Organizations*, *in* EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2000 255, 259 (1999), *available at* http://www.irs.gov/pub/irs-tege/eotopics00.pdf (listing the requirements for charities creating non-charitable affiliates: separate legal organization; separate financial records and bank accounts; and allocation of time between the organizations for any shared officers, directors, employees, goods, services, and facilities); Miriam Galston, *Campaign Speech and Contextual Analysis*, 6 FIRST AMENDMENT L. REV. 100, 113-17 (2007) (discussing the non-charitable affiliate option); Tobin, *supra* note 14, at 1325-26; *see also* Benjamin M. Leff, *"Sit Down and Count the Cost": A Framework for Constitutionally Enforcing the 501(c)(3) Campaign Intervention Ban*, 28 VA. TAX REV. 673, 687-95 15-23 (2009) (discussing how the political intervention ban may violate the Constitution).

[163] I.R.C. § 501(c)(3) (2006); *see also id.* §§ 170(c)(2)(D), 2055(a)(2), 2106(a)(2)(A)(ii)-(iii), 2522(a)(2), 2522(b)(2)-(3) (all incorporating the same limitation by reference to I.R.C. § 501(c)(3)).

[164] Regan v. Taxation with Representation of Wash., 461 U.S. 540, 545 (1983).

not deny a benefit to a person because he exercises a constitutional right,"[165] it concluded that all Congress had done was prohibit the charity from using a government "subsidy" in the form of tax-deductible contributions for lobbying use.[166] It also noted that the charity still had the ability to engage in an unlimited amount of lobbying with non-deductible funds by creating an affiliated tax-exempt entity under Internal Revenue Code section 501(c)(4), as it had apparently done previously, and that being required to create and operate such an affiliate was not "unduly burdensome."[167]

In his concurring opinion, Justice Blackmun, joined by Justices Brennan and Marshall, viewed the ability to engage in unlimited lobbying through a tax-exempt affiliate as critical for sustaining the constitutionality of the lobbying limitation.[168] He emphasized that "any significant restriction on this channel of communication [the non-charitable affiliate], however, would negate the saving effect of § 501(c)(4)."[169] He therefore stated that the ability to create such an affiliate resolved the constitutional problem only because the IRS imposed minimal requirements, specifically that such an affiliate be separately incorporated and maintain sufficient financial records to demonstrate that tax-deductible funds were not used to pay for lobbying.[170] In Justice Blackmun's view, any attempt by the IRS to limit the control that a charity could exercise over the lobbying of its section 501(c)(4) affiliate would render the First Amendment concerns "insurmountable."[171]

Normally the views expressed in a concurring opinion are of limited to no weight. However, in later decisions the Court adopted Justice Blackmun's reasoning as that of the full Court. As documented in greater detail by Professor Miriam Galston, in both *FCC v. League of Women Voters*[172] and

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[165] *Id.*

[166] *Id.* at 544 (identifying both tax exemption and the tax deductibility of contributions as subsidies); *id.* at 546 (concluding, in reliance on an earlier case in which the Court upheld the denial of a business expense deduction for lobbying expenditures against constitutional challenge, that the First Amendment does not require Congress to subsidize lobbying).

[167] *Id.* at 544 n.6. The Court used this point to distinguish an earlier case, *Speiser v. Randall*, 357 U.S. 513 (1958), where it had applied the doctrine of unconstitutional conditions to a state law that required an organization to sign a loyalty declaration as a condition for receiving property tax exemption. *Id.* at 545 (citing *Speiser*). *Taxation with Representation* therefore represents a specific application of the much broader unconstitutional conditions doctrine, a discussion of which is beyond the scope of this article. *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (explaining that under the unconstitutional conditions doctrine, the government may not give a benefit on the condition that a recipient surrender a constitutional right).

[168] *Taxation with Representation*, 461 U.S. at 552 (Blackmun, J., concurring).

[169] *Id.* at 553.

[170] *Id.*

[171] *Id.*

[172] 468 U.S. 364 (1984).

*Rust v. Sullivan*,[173] the Court cited the ability of charities to easily create lobbying affiliates as key to the Court's conclusion in *Taxation with Representation* that the lobbying limitation survives scrutiny under the First Amendment.[174] This line of cases set the stage for the *Branch Ministries* decision.[175]

Branch Ministries, a church, purchased full-page advertisements in two newspapers shortly before the 1992 presidential election.[176] The ads urged Christians not to vote for candidate Bill Clinton on various moral grounds.[177] The IRS revoked the tax-exempt status of the church in 1995 based solely on these advertisements.[178] Branch Ministries then filed suit challenging the IRS's action under the free exercise of religion provisions of both the First Amendment and RFRA.[179] Addressing these claims together, the D.C. Circuit found that for Branch Ministries to sustain its claim under either the constitutional or the statutory provision, it had to establish that the political campaign prohibition intervention substantially burdened its free exercise right.[180] The court found that Branch Ministries had failed to make this demonstration for three reasons. First, it found that Branch Ministries did not assert that its withdrawal from electoral politics would violate its beliefs and so the only harm it might suffer would be a decrease in funds, which the court found to be constitutionally insignificant.[181] Second, it found that revocation was "more symbolic than substantial" because Branch Ministries could easily reclaim its tax-exempt and deductible contribution status simply by renouncing future involvement in political campaigns.[182] Third and finally, it found that as in *Taxation with Representation*, Branch Ministries could easily create a section 501(c)(4) affiliate to engage in political campaign intervention using non-deductible funds.[183] The court concluded that since Branch Ministries had not demonstrated that the prohibition imposed a substantial burden on its free exercise rights, the court did not have to reach the issue of whether the

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[173] 500 U.S. 173 (1991).

[174] *See Rust*, 500 U.S. at 197-98; *League of Women Voters*, 468 U.S. at 399-400; Galston, *supra* note 162, at 116-17 (noting that several district and appellate courts have also reached this conclusion).

[175] Branch Ministries v. Rossotti, 211 F.3d 137, 139 (D.C. Cir. 2000) (holding that revocation of church's tax-exempt status was constitutional).

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.* at 140-41.

[180] *Id.* at 142.

[181] *Id.* The opinion does not clearly state the basis for its determination that requiring Branch Ministries to withdraw from electoral politics would not violate the organization's religious beliefs. *Id.*

[182] *Id.* at 142-43.

[183] *Id.* at 143.

prohibition met the standards for burdening those rights under either the First Amendment or RFRA.[184] The appellate court's conclusion as to the third point is not surprising given the *Taxation with Representation* line of cases. On its face, it would appear that this analysis should foreclose any challenge to the prohibition as applied to a sermon, but there is a strong argument that in-service sermons are distinguishable from the newspaper ads in *Branch Ministries*.[185]

Assume there is a pastor who believes that certain candidates in an upcoming election are supporting policies that are fundamentally at odds with her faith's religious beliefs. Further, assume that she believes that if members of her faith vote for such candidates, those members are placing themselves at risk of eternal damnation. She therefore believes that as their pastor, she has a religious duty to warn those members in her congregation about this risk, and the other leaders of her house of worship agree. This is not just a hypothetical situation; it is almost certain that there are many religious leaders and houses of worship with these views.[186]

If these are the only facts of this hypothetical, there is a strong argument that the availability of the non-charitable affiliate will render any burden the prohibition might place on the pastor as less than substantial. For example, if she chooses to communicate this message via a pastoral letter to her congregation, the only related costs would be the cost for the time she spends composing the letter, the cost of mailing it, and a fair rental cost for access to

[184] *Id.* at 144.

[185] It may, however, foreclose a free speech challenge in this context because the unique nature of sermons arises from their religious significance, not their particular mode of speech, and it is certainly possible for a non-charitable affiliate to stage an event where a religious leader gives an in-person speech even if that speech is separate from the house of worship's regular worship service. *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 652-53 (1981) (concluding in the context of a time, place, and manner restriction that religious organizations do not enjoy any greater First Amendment rights than other organizations, even though the particular restriction at issue impeded a specific religious ritual); *id.* at 659 n.3 (Brennan, J., concurring in part and dissenting in part) (noting that the plaintiffs appeared to rest their claims solely on the Free Speech Clause, but that the majority chose to discuss the religious ritual involved without giving it any greater protection than that provided to speech generally). Partly for this reason, consideration of a free speech challenge to the prohibition is beyond the scope of this article.

[186] *See supra* notes 160-161 and accompanying text. An ABC News story described a situation almost exactly matching these facts. Russell Goldman, *Pastors Challenge Law, Endorse Candidates from Pulpit*, ABC NEWS, June 20, 2008, http://abcnews.go.com/Politics/Vote2008/story?id=5198068&page=1 (reporting that Pastor Gus Booth of the Warroad Community Church in Minnesota told his congregation in May 2008 that God wanted them to vote Republican in a sermon approved by his church's leadership and with full knowledge that the sermon violated the federal tax laws). Pastor Booth also wrote the IRS describing his sermon and challenging them to respond. *Id.*

the house of worship's mailing list.[187] As the appellate court held in *Branch Ministries*, the mere fact that these costs, all directly associated with political campaign intervention, would have to be paid for by a non-charitable affiliate with non-deductible funds does not impose a substantial burden on the free exercise rights of the pastor or her house of worship.[188]

What if, however, under the tenets of the pastor's faith, the best and perhaps only way to communicate such an important message is through her sermons during the regular, in-person gatherings of the congregation? This is not a purely hypothetical situation. In most, if not all, major faith traditions there is a high and possibly unique importance given to the in-person gathering of believers.[189] Furthermore, many faith traditions view teaching or preaching

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[187] *See* Thomas & Kindell, *supra* note 162, at 259 (recognizing that affiliated § 501(c)(3) and § 501(c)(4) organizations must reasonably allocate staff time and other shared resources); *id.* at 265 (reasoning that use of a § 501(c)(3) organization's mailing list may not be on a preferential or a non-arm's length basis).

[188] Branch Ministries v. Rossotti, 211 F.3d 137, 143 (D.C. Cir. 2000).

[189] For discussion of in-person gatherings in Christian traditions, see, for example, *Acts* 2:46, 4:31 (describing meetings of members of the early Christian church); 2 WILLIAM BARCLAY, THE GOSPEL OF MATTHEW, 190 (rev. ed. 1975) (explaining that one interpretation of *Matthew* 18:20 is as the in-person gathering of the Church); THE BOOK OF COMMON PRAYER AND ADMINISTRATION OF THE SACRAMENTS AND OTHER RITES AND CEREMONIES OF THE CHURCH 856 (U.S. version 1979) (stating as part of the Church's Catechism that "[t]he duty of all Christians is . . . to come together week by week for corporate worship"); THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH ¶ 62 (1996) (stating that under Article XIII of the Articles of Religion of the Methodist Church "[t]he visible church of Christ is a congregation of faithful men in which the pure Word of God is preached, and the Sacraments duly administered"); *Matthew* 18:20 (Jesus's statement that "[f]or where two or three come together in my name, there am I with them"); U.S. CATHOLIC CHURCH, *supra* note 160, para. 2177 ("The Sunday celebration of the Lord's Day and his Eucharist is at the heart of the Church's life."); *id.* para. 2178 ("The *Letter to the Hebrews* reminds the faithful 'not to neglect to meet together, as is the habit of some, but to encourage one another.'" (quoting *Hebrews* 10:25)); JOHN WESLEY, WESLEY'S NOTES ON THE BIBLE 418 (Zondervan Corp. 1987), *available at* http://wesley.nnu.edu/john_wesley/notes/matthew.htm (interpreting *Matthew* 18:20 to mean gathered together to worship Jesus Christ). For discussion of the Islamic significance of in-person gatherings, see, for example, C.H. Becker, *On the History of Muslim Worship*, *in* THE DEVELOPMENT OF ISLAMIC RITUAL 49, 49-74 (Gerald Hawting, ed. 2006) (describing the development and variations among the Friday service observed by Muslims). For discussion of in-person gatherings and Judaism, see, for example, A.Z. IDELSOHN, JEWISH LITURGY AND ITS DEVELOPMENT xv-xix (1960) (describing the structure and history of Jewish services). *See also* Charter of Fundamental Rights of the European Union, Dec. 2000, art. 10 (using almost identical language to the Universal Declaration of Human Rights, art. 18, quoted *infra*); Concluding Document from the Vienna Conference, Jan. 19, 1989, art. 16(d) (stating that the participating states will "respect the right of religious communities to establish and maintain freely accessible places of worship or assembly"); Universal Declaration of Human Rights, G.A. Res. 217A, at 74, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to

about moral truths during in-person gatherings of believers to be one of the most important functions of houses of worship and religious leaders.[190] Sermons are therefore, at least for some faith traditions and houses of worship, a distinct, religiously significant means of communication.[191] Thus, the religious belief that teaching during such gatherings is at the heart of a house of worship's religious mission strongly supports the view that forcing a message to be communicated by a house of worship through other means constitutes a substantial burden on free exercise of religion.

The effect of the prohibition, at least for some houses of worship, is therefore not only to prevent the communication of a candidate-related message, but to prevent that communication through the religiously motivated method of a sermon or other teaching during an in-person gathering of believers. This effect is legally significant for two reasons. First, the IRS has stated that any communication that is made through an "official" channel of a charity violates the prohibition, regardless of the source of funds that pay for that communication.[192] Second, even if this were not the case, commentators on all sides of this issue have generally agreed that it is virtually impossible to distinguish the cost of a political sermon from other costs associated with a

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change his religion or belief, and freedom, either alone *or in community with others* and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." (emphasis added)).

[190] *See, e.g.*, MARK DEVER & PAUL ALEXANDER, THE DELIBERATE CHURCH 98 (2005) (stating that biblical exposition for the mutual edification of believers is primary for the regular Sunday morning worship service, and indeed that such exposition is "the centerpiece not only of this service, but of the entire public ministry of the Word"); *The Second Helvetic Confession*, *in* THE BOOK OF CONFESSIONS 51, 94-95 (Presbyterian Church (U.S.A.) 2002) (dating from 1561 and still adhered to by the Presbyterian Church (USA), it provides that one of the two duties of a minister is "to gather together an assembly for worship in which to expound God's Word"); U.S. CATHOLIC CHURCH, *supra* note 160, paras. 81, 84-87, 132, 1100, 1349 (noting the critical role of the homily as "an exhortation to accept this Word as what it truly is, the Word of God, and to put it into practice" (citation omitted)); Becker, *supra* note 189, at 50 (explaining that in Islam the sermon (*khutba* in Arabic) is now an integral part of the regular Friday celebration); Most Reverend Donald W. Wuerl, *The Role of Priests in Catechesis in the New Millennium*, *in* PRIESTS FOR A NEW MILLENNIUM (U.S. Catholic Conference Inc. 2000) 113, 123 ("[T]he preaching of the priest is his first and principal means of exercising his prophetic office in the Church. . . . The pulpit will retain its privileged position for the priest. It is from here that Sunday after Sunday we have an opportunity to directly touch our people in a way that nothing else we do can.").

[191] In contrast to, for example, selling t-shirts with a religious message. *See* Henderson v. Kennedy, 265 F.3d 1072, 1074 (D.C. Cir. 2001) (rejecting a RFRA challenge to regulations barring the sale of t-shirts on the National Mall in part because the claimants had a multitude of other means of communicating their religious methods, including selling t-shirts at a different location); Henderson v. Kennedy, 253 F.3d 12, 16 (D.C. Cir. 2001) (observing that the plaintiffs' "declarations do not suggest that their religious beliefs demand that they sell t-shirts in every place human beings occupy or congregate").

[192] *See infra* notes 194-196 and accompanying text.

worship service.[193] Reliance on the alternate channel argument to support a conclusion that the prohibition's burden in this context is not substantial is therefore misplaced.

On the first point, the IRS has stated in precedential literature that if a university president writes a column in the monthly alumni newsletter endorsing a candidate, the university violates the prohibition.[194] This is because of the official nature of the newsletter; even if the president both identifies the endorsement as his personal views and personally pays for the column's costs, there is still a violation.[195] The IRS has also provided a parallel example in a publication for churches, by substituting a minister for the president, the minister's church for the university, and a member newsletter for the alumni newsletter.[196] The IRS's discussion of this example strongly indicates that the IRS would view a political sermon by a religious leader to be an official communication of her house of worship and a violation of the prohibition, regardless of whether the leader identified the views expressed as those of a non-charitable affiliate and the affiliate paid for any costs associated with delivering the message.[197] This interpretation of the prohibition is certainly reasonable, as it is difficult to see how a statement in the middle of the service – "and now for a message from the House of Worship Action Fund" – could be effectively disassociated from the house of worship regardless of what entity paid the associated costs.[198] The burden placed on a house of worship that sincerely believes its leaders must deliver a political sermon is therefore not only the burden of having to pay for the sermon with

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[193] *See* Caron & Dessingue, *supra* note 14, at 193 (concluding that "[t]here is no practical means by which [certain church activities] can be delegated to a section 501(c)(4) affiliate" and giving "teaching and preaching functions that normally take place during worship services" as an example); Gaffney, *supra* note 14, at 35 (concluding that "section 501(c)(4) is of no practical use to a preacher who cannot be required to announce at the beginning of a sermon whether he is speaking for a 501(c)(3) church or a 501(c)(4) clone, let alone to switch birettas or yarmulkes in the midst of such a sermon"); Leff, *supra* note 162, at 680 (citing the congressional testimony of an IRS official who asked, rhetorically, "[f]or example, what is the expenditure related to an endorsement of a candidate during a sermon from the pulpit" (footnote omitted)); Tobin, *supra* note 14, at 1325 (concluding that the non-charitable affiliate of a house of worship simply "cannot preach during services, and it cannot use the power of the pulpit to tell people how to vote"). *But see* Leff, *supra* note 162, at 717-21 (proposing a solution for this allocation problem).

[194] Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, 1422.

[195] *Id.*

[196] IRS, TAX GUIDE, *supra* note 35, at 8.

[197] *See id.* For criticism of this attribution approach to the political campaign intervention prohibition, see Leff, *supra* note 162, at 696-704, 712-13, 728-29.

[198] *See* I.R.S. Tech. Adv. Mem. 2009-08-050 (Feb. 20, 2009) (concluding that political messages that appeared on a webpage bearing a charity's banner and logo would be attributed to the charity even though a non-charitable affiliate paid for the costs of the webpage and the affiliate's logo appeared below the charity's banner).

non-deductible funds, but also of having to surrender the house of worship's ability to receive tax-deductible charitable contributions *for any purpose*. Such a burden could be quite substantial, at least for a house of worship that is able to demonstrate that a significant amount of its contributions come from donors who would reduce the amount of their donations if the charitable contribution deduction was unavailable. There is also an additional complication that even if the IRS permitted the non-charitable affiliate to pay for the value of access to the congregation during the regular worship service, the IRS has indicated that such access cannot be provided on a preferential basis.[199] Rather, access must be made generally available to the public at the same cost – something almost all houses of worship presumably would find highly problematic.[200]

Even if the IRS were to abandon both its official communication approach *and* its no preferential access requirement, houses of worship and the IRS would still face the difficult task of determining how much an affiliate would have to pay in order to protect a house of worship from the loss of its ability to receive tax-deductible contributions. Reasonable views of the appropriate cost could range from the cost of the pastor's time spent preparing the sermon and some type of fair rental value for the use of the house of worship's service location, sound system, and so on, to all of the costs associated with that particular service since the congregation would not be there to hear the political sermon if those expenditures were not made, to all of the costs incurred by the house of worship for attracting individuals to attend its services generally.[201] Unless the IRS were to accept an allocation that only required minimal costs to be paid by a non-charitable affiliate – which would effectively eviscerate the prohibition – houses of worship would therefore likely be required to use non-deductible funds to pay for some portion of their activities that otherwise could be paid for with deductible funds.[202]

However, requiring a house of worship to use non-deductible funds to pay for any significant amount of its other religious activities would impose a substantial burden on exercise of religion under RFRA. It is true that the Supreme Court has found burdens on the exercise of religion to be unsubstantial when the individual adherents to a faith only had less money to spend on their religious activities because of a general tax rule applicable to a

[199] *See* Thomas & Kindell, *supra* note 162, at 265 (stating that a charity should not subsidize any political intervention activity of an affiliate by, inter alia, granting preferential access to the charity's mailing list).

[200] *Id.*

[201] For a thoughtful analysis of this problem and possible solutions, see Leff, *supra* note 162, at 715-28. For the reasons detailed in this Section, however, any cost allocation attempt that does not eviscerate the prohibition does not resolve the substantial burden problem.

[202] *See* Leff, *supra* note 162, at 704-08 (criticizing such "marginal cost" approaches).

specific activity, whether sales of printed material or payments for training.[203] The difference here is that the government is imposing the cost by refusing a benefit – the charitable contribution deduction – for an undoubtedly religious activity of a regular in-person gathering of believers because a portion of that gathering includes a prohibited message. The political sermon situation is therefore similar to the *Sherbert* line of unemployment benefits cases, where the religiously motivated refusal to accept certain jobs created a substantial burden when it resulted in the denial of benefits for which the individual was otherwise eligible.[204] Here the house of worship is being required to choose between religiously motivated expression through a means of communication chosen for religious reasons and an increased financial burden, not only with respect to that communication, but also to other religious activities that would otherwise not bear this burden. This renders the otherwise unsubstantial burden of creating a non-charitable affiliate to ensure the prohibited activity is

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[203] *See* Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 391 (1990) (stating that in the context of a state sales collection and withholding requirement, the imposition of a generally applicable tax is not a constitutionally significant burden simply because it reduces the amount of money to spend on religious activity); Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) (finding that the only burden of denying a deductible contribution for "auditing" payments was that the adherents had less money available to gain access to such sessions).

[204] *See* Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 833 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987); Thomas v. Review Bd., 450 U.S. 707, 718 (1981) ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."); Sherbert v. Verner, 374 U.S. 398, 404-06 (1963). Further support for this conclusion is found in cases under RLUIPA, where the Courts of Appeals have indicated that conditioning a benefit on abandonment of religiously motivated activity, including by imposing an economic burden, may result in a substantial burden. *See, e.g.*, Westchester Day Sch. v. Village of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007) (concluding that a substantial burden may exist if a conditional denial of a zoning request requires modifications that "are economically unfeasible" or if such a denial leaves open only alternatives that require "substantial delay, uncertainty, and expense"); Washington v. Klem, 497 F.3d 272, 281 (3d Cir. 2007) (stating that the conditioning of a benefit on an inmate's abandonment of religious conduct is sufficient to constitute a substantial burden). *But see, e.g.*, Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761-62 (7th Cir. 2003) (holding that requiring compliance with land use regulations, even if doing so results in significant additional expense, is not a substantial burden under RLUIPA). Most appellate courts that have considered the question have concluded that RLUIPA and RFRA generally apply the same definition of substantial burden. *See, e.g.*, Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 813 (8th Cir. 2008); Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 661 (10th Cir. 2006); DeHart v. Horn, 390 F.3d 262, 275 (3d Cir. 2004). *But see* San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004) (defining substantial burden under RLUIPA based on the plain meaning of the term, without reference to RFRA); *Civil Liberties for Urban Believers*, 342 F.3d at 761 (applying a RLUIPA-specific definition of substantial burden).

not paid for with tax-deductible funds into a substantial burden because of the additional cost imposed by requiring that affiliate to pay for all or most of the service costs with non-deductible funds. So even if the IRS were willing to abandon its official communication and non-preferential access requirements, almost any plausible cost allocation system would still impose a substantial burden.[205]

This conclusion does not rest on the assumption that the government must, as a constitutional matter, grant houses of worship the ability to receive tax-deductible charitable contributions to fund some or all of their religious activities. Nor does it rest on the assumption that the government must, as a constitutional matter, permit houses of worship to use tax-deductible charitable contributions for all of their activities if it permits such contributions to fund some of their activities. Rather, it rests on the conclusion that if government chooses to grant houses of worship this tax benefit for activities other than political campaign intervention, it places a substantial burden on the exercise of religion by houses of worship if it withdraws that benefit based on religiously motivated political campaign intervention that cannot be easily distinguished from other activities.[206]

Therefore, some houses of worship will be able to demonstrate that, at least with respect to their sermons, the prohibition places a substantial burden on their exercise of religion under RFRA's definition. This conclusion does not, however, mean that these houses of worship will be exempt from the prohibition's application to their sermons. What it means is that the government must demonstrate that the burden is justified under RFRA's standard.

### C. *Strict Scrutiny*

Under RFRA, the federal government "may substantially burden a person's free exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental

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[205] For similar reasons, application of the taxes imposed by I.R.C. §§ 527(f), 4955 (2006), on political activity expenditures by charities probably also impose a substantial burden on the exercise of religion for at least some houses of worship and their leaders.

[206] *See* Michael W. McConnell, *The Selective Funding Problem: Abortion and Religious Schools*, 104 HARV. L. REV. 989, 1015-18 (1991) (using abortion and education as examples and arguing that if government imposes an additional cost beyond refusing to pay the costs of exercising a constitutional right, then a sufficient burden is placed on the exercise of that constitutional right and the government must justify that burden). *But see* Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1325-27 (2008) (arguing that government should constitutionally be able, although not required, to exclude religious schools from school voucher programs even with respect to the "secular" portion of those schools' programs because the education at such schools is "not easily separable into secular and sacred components").

interest."[207] These two requirements necessarily relate, as the definition of the compelling governmental interest served is critical for determining whether the government action or rule at issue is in fact the least restrictive means of furthering that interest, and so they will be considered together. Before considering what compelling governmental interests may be served by the political campaign intervention prohibition and whether the prohibition is the least restrictive means for furthering one or more of those interests, it is necessary to consider whether and to what extent Congress, in enacting RFRA, departed from the pre-*Smith* case law regarding these requirements.

1. What RFRA Restored and What It Changed

The title of RFRA, the Religious Freedom Restoration Act, suggests that it merely restored the legal landscape that existed before the Supreme Court's decision in *Smith*. If that were so, reliance on it would prove no more fruitful than reliance on the Free Exercise Clause.[208] A closer look at the history of RFRA demonstrates that Congress did more than just reinstate the previous law with respect to both the compelling interest and least restrictive means requirements. This conclusion is supported by both Congress's explicit statements and by the legislative changes that eventually resulted in the draft of RFRA that became law.

a. *Compelling Interest*

The legislative history shows that Congress sought to restore the "compelling governmental interest test" that it believed *Smith* had incorrectly eliminated for laws of general application that burdened religion.[209] That history provides that Congress expected "that the courts will look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not . . . the least restrictive means have been employed in furthering a compelling governmental interest"[210] and that the compelling interest test "generally should not be construed more stringently or more leniently that it was prior to *Smith*."[211] Both the House and Senate committee reports also specifically listed a number of pre-*Smith* cases, including *Lee*, *Bob Jones University*, and *Hernandez*,[212] as examples of cases where the Supreme Court had employed this strict scrutiny standard.[213]

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[207] 42 U.S.C. § 2000bb-1(b) (2006).

[208] *See supra* Part II.C.

[209] H.R. REP. NO. 103-88, at 6 (1993); S. REP. NO. 103-111, at 8 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1898.

[210] H.R. REP. NO. 103-88, at 6-7; *see also* S. REP. NO. 103-111, at 8-9 (using almost identical language).

[211] H.R. REP. NO. 103-88, at 7; *see also* S. REP. NO. 103-111, at 9 (using identical language).

[212] *See* discussion *supra* Part II.C.

[213] H.R. REP. NO. 103-88, at 5 n.13; S. REP. NO. 103-111, at 5 n.5 (citing identical cases).

At the same time, however, Congress did in fact change the pre-*Smith* standard, although the exact extent of that change is unclear. One change is that Congress chose not to accept the lower level of scrutiny it concluded the Supreme Court had applied in claims involving prisoners and members of the military.[214] It is unclear to what extent Congress changed the application of the compelling interest test in other contexts, as both the House and Senate committee reports carefully stated that they neither approved nor disapproved of the result in any particular court decision involving the free exercise of religion,[215] and disclaimed even to dictate a result under the facts present in the *Smith* case itself.[216] Congress therefore left the door open for courts to reconsider, under the RFRA compelling governmental interest test, the results in *any* of the pre-*Smith* cases, and to reach different results if they concluded that the pre-*Smith* cases did not correctly apply that standard.

Congress was not simply ignorant of the extent to which the pre-*Smith* cases did not protect the free exercise of religion, as discussed above. For example, when Senator Orrin Hatch helped introduce the 1990 version of RFRA in the Senate, he carefully noted a number of questions that needed to be answered, including "whether the compelling interest test has been applied in all areas of American life prior to Smith"[217] including the military, prisons, and certain other government programs as areas where pre-*Smith* decisions "suggest that a different standard may be applicable."[218] He also noted, however, that "even if the compelling interest test did not apply in particular areas prior to the Smith decision, I and others in Congress may still feel it is desirable to extend it to some or all such areas."[219] That appears to have been his ultimate position. When he helped introduce both the 1992 and the 1993 versions of RFRA in the Senate, he did not raise this issue again, even though the bills did not exclude any areas from the compelling interest standard.[220] Rather, his position appears to be characterized by a statement he made as part of the 1992 bill's introduction: "A tough standard is necessary to protect religious liberty. This bill imposes a compelling interest test on State and Federal Governments when

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[214] H.R. REP. NO. 103-88, at 7-8 (criticizing the holdings of *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) and *Goldman v. Weinberger*, 475 U.S. 503 (1986)); S. REP. NO. 103-111, at 9-12; *see also* Lupu, *Of Time and the RFRA*, *supra* note 103, at 191-93 (explaining that it is certain that Congress intended to impose a stricter standard in these contexts than the Supreme Court had adopted, although how much stricter is unclear).

[215] H.R. REP. NO. 103-88, at 7; S. REP. NO. 103-111, at 9.

[216] H.R. REP. NO. 103-88, at 7.

[217] 136 CONG. REC. 35,840, 35,841 (1990) (discussing the introduction of S. 3254).

[218] *Id.*

[219] *Id.*

[220] 139 CONG. REC. 4821 (1993) (remarking on introduction of S. 578 during confirmation discussions for Attorney General Janet Reno); 138 CONG. REC. 18,018 (1992) (remarking on introduction of S. 2969).

a governmental rule or law burdens someone's free exercise of religion."[221] Not all members of Congress were so sanguine. Senator Alan Simpson voted against the 1993 version of RFRA in committee because of his reservations about applying the compelling interest standard in all contexts, although he ultimately voted for the final bill on the Senate floor.[222] He specifically recognized that the Supreme Court had effectively applied a lower standard than compelling interest when addressing free exercise claims in the prison context and was concerned that RFRA would eliminate this lower standard to the detriment of prison administration.[223] This concern was shared by many Senators, and became the focus of a vigorous debate that did not end until a proposed amendment to exempt prisons from the reach of RFRA failed by a vote of forty-one to fifty-eight.[224]

The House also recognized the possibility that Congress could be enacting a higher standard than embodied in the pre-*Smith* cases. As noted in the House Judiciary Committee report, at least some members of the House of Representatives were concerned that the legislation, as originally drafted, might impose a more stringent standard than applied in the cases prior to *Smith*, even outside of the prison and military contexts.[225] For this reason, the House Judiciary Committee made three changes to the 1993 House version of RFRA. First, it changed the "Purposes" section to refer to the "compelling interest test as set forth" not only in *Sherbert* and *Yoder*, which several committee members characterized as stating a test that "was far stronger than the court had been applying prior to *Smith*" but in all of the pre-*Smith* federal court cases.[226] It also changed the compelling interest requirement from a showing that the government action was "essential to" the interest to a showing that the action "furthers" that interest, and defined "exercise of religion" by reference to the First Amendment.[227] However, neither the Committee's changes to the "Purposes" section nor the definition of "exercise of religion" have survived to today. As noted above, in 2000, Congress amended the definition of "exercise of religion" to incorporate the broader definition found in RLUIPA.[228] As for the "Purposes" section change, the Senate Judiciary Committee's 1993 version of RFRA, which it approved after the House

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[221] 138 CONG. REC. 18,018 (remarking on introduction of S. 2969).

[222] *See* S. REP. NO. 103-111, at 24 (reporting Sen. Simpson's identification of himself as the single "nay" vote in the Judiciary Committee); 139 CONG. REC. 26,414 (1993) (identifying Senator Simpson's yea vote for the RFRA).

[223] S. REP. NO. 103-111, at 18-24.

[224] *See* 139 CONG. REC. 26,407-13 (reviewing the debate); *id.* at 26,414 (detailing the vote).

[225] H.R. REP. NO. 103-88, at 14 (1993).

[226] *Id.*

[227] *Id.*

[228] *See supra* notes 127-129 and accompanying text.

Judiciary Committee had approved its version, did not include that change.[229] While it is not clear that the Senate committee was even aware of the House committee's change, the language of the Senate committee's report indicates that it did not share the concerns expressed by some members of the House: "Congress also determines that the Supreme Court's decision in *Employment Division v. Smith* eliminated the compelling interest test for evaluating free exercise claims previously set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and that it is necessary to restore that test to preserve religious freedom."[230] The Senate eventually passed the Senate Judiciary Committee version, which the House then passed without commenting on or even acknowledging the Senate's rejection of the House's change to the "Purposes" section.[231]

This legislative history strongly indicates that even outside of the prison and military context, courts applying RFRA are not necessarily bound by earlier, pre-*Smith* First Amendment decisions but instead must review the reasoning of those decisions to see whether they actually employed the compelling governmental interest test mandated by RFRA.[232] An examination of the least restrictive means requirement that is also part of this test further supports this conclusion.

b. *Least Restrictive Means*

While the term "compelling interest" was relatively common in the pre-*Smith* free exercise cases, the term "least restrictive means" was not. As courts and commentators have noted, to the extent that the courts referred to a concept along these lines, they never described it as narrowly as "least

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[229] *See* S. 578, 103d Cong. § 2(b)(1) (1993).

[230] S. REP. NO. 103-111, at 14 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1904 (explaining the findings and purposes section of S. 578); *see also* 42 U.S.C. § 2000bb (2006); S. REP. No. 103-111, at 2-3 (detailing the congressional findings and declaration of purposes section of S. 578 as approved by the Senate Judiciary Committee).

[231] *See* 139 CONG. REC. 27,239-41 (1993) (detailing discussion of Senate amendment to House version of RFRA).

[232] *See, e.g.*, Berg, *supra* note 103, at 26-28 (arguing that both the text of RFRA and its legislative history support applying the compelling governmental interest test as stated in *Sherbert* and *Yoder* and not necessarily as implemented in later decisions); Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 224 & n.68 (1994); Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 284-90 (1995). *But see* Lupu, *Of Time and the RFRA*, *supra* note 103, at 196-98 (arguing that the use of "prior federal court rulings" in the "Findings" section of RFRA at least creates some ambiguity regarding whether Congress intended to impose the *Sherbert-Yoder* version of the compelling governmental interest test). The Supreme Court has also stated generally that RFRA "adopts a statutory rule comparable to the constitutional rule rejected in *Smith*" but it is not clear exactly what the Court meant by this statement. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006).

restrictive means."[233] It is not clear whether this change of terminology represents a different, higher standard for the government, or merely represents a rephrasing of the narrowly tailored requirement. The language itself would indicate the former, as any number of means could be "narrowly tailored," but presumably only one (or perhaps more if there is a tie) could be the "*least* restrictive means." Regardless of which reading is correct, courts addressing a RFRA challenge must squarely address this least restrictive means requirement, as well as whether the compelling governmental interest requirement has been met. Courts did not always address these issues in the pre-*Smith* cases, even in those cases purporting to apply the compelling governmental interest test. So while the parameters of RFRA's standard of scrutiny for government actions or rules that substantially burden the exercise of religion are not completely clear, courts applying this standard must carefully consider whether both parts of the standard have been met, and therefore should not rely solely on the conclusions of pre-*Smith* First Amendment decisions. With that in mind, this Article now turns to RFRA in the context of the political campaign intervention prohibition and religious leaders speaking from the pulpit.

2. Applying RFRA's Version of Strict Scrutiny

The burden the prohibition places on houses of worship may further several possible compelling governmental interests. The most obvious is cited in *Lee* and *Hernandez*: the government's interest in maintaining a sound tax system.[234] More specific tax-related interests include preventing avoidance of the otherwise generally applicable tax rule that contributions and expenditures in support of political activity are not deductible and preventing houses of worship from violating the general private benefit limitation on charities.[235] Another commonly cited interest is protecting the government, the public, and houses of worship themselves from the possible harm resulting from a house of worship's involvement in politics, including the risk of corruption and the appearance of corruption created by permitting a house of worship's resources to be used to influence who is elected.[236] Finally, there is also an interest in

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[233] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 535 (1997) (stating that the least restrictive means requirement "was not used in the pre-*Smith* jurisprudence"); Lupu, *Of Time and the RFRA*, *supra* note 103, at 194-95. *But see Gonzalez*, 546 U.S. at 424 (stating that RFRA adopted "a statutory rule comparable to the constitutional rule rejected in *Smith*").

[234] United States v. Lee, 455 U.S. 252, 260 (1982) ("Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."); *see also* Hernandez v. Comm'r, 490 U.S. 680, 699-700 (1989) (relying on *Lee*, 455 U.S. at 257).

[235] *See* Leff, *supra* note 162, at 694-95 (listing "potential governmental interests").

[236] *E.g.*, Tobin, *supra* note 14, at 1322-26 (explaining why intervention in political campaigns is not in the best interest of houses of worship).

enforcing the separation of church and state, including compliance with the Establishment Clause.[237] A close examination of each of these interests reveals, however, that the government will have a difficult time demonstrating that they are compelling and that the prohibition as applied to sermons is the least restrictive means for furthering them.

a. *Protecting the Tax System*

As previously discussed, the Supreme Court found in both *Lee* and *Hernandez* that maintaining a sound tax system by generally barring court-created, religiously based exemptions was a compelling governmental interest sufficient to justify the burden imposed on religion in each case.[238] There are, however, several reasons to believe that neither case is controlling in this context. First, the current situation is factually distinguishable from the situations in both *Lee* and *Hernandez*. Second, and more importantly, in neither case did the Supreme Court apply the compelling governmental interest test with the rigor required by RFRA's statutory language.

In both *Lee* and *Hernandez*, the Court faced a situation where an individual refused to pay taxes otherwise owed because of a claimed substantial burden on their religious beliefs.[239] In the current context, the tax exemption of houses of worship is not truly the issue. As discussed previously, a house of worship can choose to be tax-exempt under Internal Revenue Code section 501(c)(4) and still be able to engage in a limited amount of political campaign intervention.[240] The current issue is the ability of houses of worship to receive tax-deductible contributions.[241] While the ability to receive such contributions reduces the taxes otherwise owed by donors, any threat to the soundness of the tax system is significantly attenuated because most donors probably do not deduct their contributions.[242] Moreover, a limited exception to the prohibition

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[237] *See* Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 857 (10th Cir. 1972) (citing congressional interest in the separation of church and state as support for the prohibition as applied to a religious ministry); Dessingue, *supra* note 14, at 917.

[238] *See supra* notes 108, 114 and accompanying text.

[239] *See Lee*, 455 U.S. at 254-55; *Hernandez*, 490 U.S. at 686.

[240] *See supra* Part III.B.2.

[241] *See* Douglas H. Cook, *The Politically Active Church*, 35 LOY. U. CHI. L.J. 457, 458 (2004) (suggesting that churches desiring to be politically active should elect to "organize and operate as tax-exempt 'social welfare' organizations" under I.R.C. § 501(c)(4)); Michael Hatfield, *Ignore the Rumors – Campaigning from the Pulpit Is Okay*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 125, 128 (2006) (suggesting that churches desiring to be politically active could become taxable entities with only a modest tax cost); Donald B. Tobin, *Political Advocacy and Taxable Entities*, 6 FIRST AMENDMENT L. REV. 41, 42 (2007) (discussing the legal issues raised by using taxable entities to engage in election-related activity).

[242] *See* Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 845-46 (2001) (concluding that "churches often bear the burden of the electioneering prohibition without their contributors enjoying the benefit of a tax deduction"

for occasional candidate-related messages from the pulpit during regular worship services would involve only a small part of a house of worship's activity. Unless a deductible donation was earmarked for that activity, only a relatively small portion of the deduction arguably would be improper, further attenuating the potential harm to the tax system.[243]

In the context of a religious leader delivering a sermon, or even other types of internal house of worship communications, there seems little risk to the federal budget, even if a candidate-related message is funded with tax-deductible contributions. For almost fifty years, the IRS barely enforced the prohibition and never enforced it in the context of internal house of worship communications, and the tax system still survived – despite evidence of a significant number of violations.[244] The difficulty of demonstrating that a limited exception to the prohibition for political sermons is a realistic threat to the administration of the entire tax system also distinguishes the current situation from the RFRA cases that have upheld tax-related rules based on *Lee* and *Hernandez*.[245]

An argument could be made, however, that unlike the interest in *Lee* and *Hernandez*, the compelling governmental interest here is not maintaining the soundness of the entire tax system, but instead preventing donors from avoiding the long-standing rule that amounts paid for candidate-related activity are not deductible.[246] This rule is also embodied in the taxation of otherwise

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because lower-income taxpayers, who are less likely to itemize their deductions, are also the same taxpayers who favor religious organizations when it comes to giving); Sean Marcia & Justin Bryan, *Individual Income Tax Returns, 2005*, 27 SOI BULL. 5, 8 (reporting that almost two-thirds of all individual tax returns filed claimed the standard deduction instead of taking itemized deductions), *available at* http://www.irs.gov/pub/irs-soi/07fallbul.pdf. Tax payers can only deduct charitable donations when itemizing their tax returns. I.R.C. §§ 26, 170 (2006).

[243] *See* Berg, *supra* note 103, at 42.

[244] *See supra* Part I.B.

[245] *See, e.g.*, Jenkins v. Comm'r, 483 F.3d 90, 92 (2d Cir. 2007) (rejecting a RFRA-based exemption from paying federal taxes based on religious objections to military activities), *cert. denied*, 128 S. Ct. 129 (2007); United States v. Indianapolis Baptist Temple, 224 F.3d 627, 630 (7th Cir. 2000) (rejecting a RFRA-based exemption from paying federal employment taxes sought by a church); Adams v. Comm'r, 170 F.3d 173, 180 (3d Cir. 1999) (concluding that RFRA did not create an exemption for an individual who refused to pay income taxes because of her religiously motivated anti-war beliefs, but noting that RFRA might apply differently to the IRS in other factual contexts); Droz v. Comm'r, 48 F.3d 1120, 1122-23 (9th Cir. 1995) (rejecting a requested religious exemption to social security taxes, although it is unclear whether the court applied the First Amendment or RFRA); United States v. Philadelphia Yearly Meeting of the Religious Soc'y of Friends, 322 F. Supp. 2d 603, 613 (E.D. Pa. 2004) (finding that tax levy did not violate RFRA because it furthered government's compelling interest in quickly and inexpensively discharging tax deficiencies by the least restrictive means).

[246] *See* Lloyd Hitoshi Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625, 637-39 (2007) (describing "the longstanding rule that no deduction is allowed

tax-exempt income received by non-charitable, tax-exempt organizations that are permitted to intervene in political campaigns; and in the denial of a business expense deduction for political campaign expenditures made by taxable organizations and individuals.[247] This argument would more closely match the language of RFRA, which requires the government to "demonstrate[] that application of the burden *to the person*" at issue meets the compelling governmental interest text.[248] It also responds to the view expressed by several commentators that the mere invocation of a very general governmental interest is not sufficient to meet the RFRA standard.[249]

The Supreme Court has in fact stated that "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened."[250] It recognized that in both *Sherbert* and *Yoder*, "this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants."[251] The Court used this reasoning to reject an attempt by the Government to justify a blanket ban on a hallucinogen used in certain religious ceremonies based on a general assertion that granting any religious exemptions would undermine the Controlled Substances Act.[252] The Court also stated that the *Lee* and *Hernandez* cases represented situations where the government had successfully demonstrated that granting religious accommodations would seriously compromise the government's ability to administer a statutory program.[253] For the reasons already stated, however, the

for expenditures for political activity"); Gregg D. Polsky, *A Tax Lawyer's Perspective on Section 527 Organizations*, 28 CARDOZO L. REV. 1773, 1776-78 (2007) (describing the serious concerns raised if campaign contributions were "funded with pre-tax dollars"); *see also* Carroll, *supra* note 14, at 252-53 (finding the justification "that political activity is fundamentally inconsistent with 'charitable' status" unpersuasive); Leff, *supra* note 162, at 694-96.

[247] *See* I.R.C. § 162(e); *id.* § 527(f).

[248] 42 U.S.C. § 2000bb-1(b) (2006) (emphasis added).

[249] *See* Berg, *supra* note 103, at 39 ("[I]t should not be enough to make generalized assertions about effects on public safety or order."); Laycock & Thomas, *supra* note 232, at 222-28 ("If . . . [a] deferential view of compelling interest is read into RFRA, the congressional goal of protecting religious practice will be wholly defeated."); Paulsen, *supra* note 232, at 270-72.

[250] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430-31 (2006) (citation omitted).

[251] *Id.* at 431.

[252] *Id.* at 423; *see also* Richard W. Garnett & Joshua D. Dunlap, *Taking Accommodation Seriously: Religious Freedom and the O Centro Case*, 2005-2006 CATO SUP. CT. REV. 257, 271-72 (stating that *Gonzales* "indicates the justices' willingness to provide meaningful content to Congress's accommodation in the face of slippery-slope predictions").

[253] *Gonzales*, 546 U.S. at 435.

government will have great difficulty making that demonstration here given both the limited exception at issue and the minimal role of the prohibition in the overall tax system.[254]

Even assuming that preventing avoidance of this specific tax rule rises to the level of a compelling interest, it is hard to argue that the prohibition is the least restrictive means for furthering this interest. Outside of the purely speculative danger of the creation of a "Church of Obama" or "Temple of Palin," both of which would unlikely be viewed as politically wise or sincere religious exercise by the IRS or the courts, general donations to a house of worship will be used for a wide range of activities as opposed to simply funding the occasional political message from the pulpit.[255] The formation of a house of worship focusing on a single candidate or political party would also almost certainly violate the private benefit prohibition, as a court found had occurred when a number of Republicans formed an organization that, while undoubtedly educational, primarily benefitted campaign workers who went on to help Republican candidates.[256] In fact, for this reason any RFRA-based exception should be limited to situations where the political campaign intervention represents only an insubstantial amount of the house of worship's activity.[257] As for the possibility that donors might earmark their contributions specifically for political activity in an attempt to avoid the general rule prohibiting deductions of donations made for political expenditures, the Treasury Department has already developed a less restrictive means to address this concern in the context of donations made to support lobbying efforts – simply denying a deduction if the donation is so earmarked.[258]

Finally, it could be argued that political campaign intervention unavoidably serves the private interest of the candidates whom a house of worship chooses to support, in contradiction to the general tax rule that charities must further public and not private interests.[259] While it is certainly true that a house of worship's support of a candidate furthers the candidate's private interest, furthering of a private interest by a charity is permitted as long as the benefit to

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[254] *See* Paulsen, *supra* note 232, at 278-79 (making this point by examining how *Lee* would fare under RFRA).

[255] *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 715 (1981) (stating that an asserted belief might be "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause").

[256] Am. Campaign Acad. v. Comm'r, 92 T.C. 1053, 1055-62, 1079 (1989).

[257] While the term "insubstantial" is vague, it appears to be workable as houses of worship, charities, the IRS, and courts have lived with such a limitation on lobbying activity for over seventy years. *See* I.R.C. § 501(c)(3) (2006).

[258] Rev. Rul. 80-275, 1980-2 C.B. 69 ("No deduction is allowed under section 170 of the Code for contributions to X earmarked for use in, or in connection with, attempting to influence the legislation.").

[259] *See* Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (1990) (requiring organizations to serve "a public rather than a private interest" in order to qualify for exemption under I.R.C. § 501(c)(3)).

the private interest is both qualitatively and quantitatively incidental.[260] The former requirement is met if it is unavoidable in order for the charity to further its charitable (or in this context, religious) mission, such as when a charity pays its staff (clearly benefitting their private interests) to accomplish its mission.[261] Here, that requirement could be easily met if the house of worship determines that discussing the merits of the candidates or how to vote is an important part of its religious mission, as the discussion above relating to substantial burden demonstrates is not only plausible, but highly likely for many houses of worship.[262] The latter requirement is met if the amount of private benefit is no more than needed to accomplish the charitable goal.[263] That requirement is also easily met, especially if the exception is limited to communications within houses of worship where in many instances the marginal costs are minimal. Moreover, if a house of worship engaging in political campaign intervention through its sermons is not per se a prohibited private benefit, then the general prohibition on inappropriate private benefits, which would still apply to houses of worship, and not the political campaign intervention prohibition, is the least restrictive means for enforcing that rule.[264]

For all of these reasons, the government will have difficulty demonstrating that applying the political campaign intervention prohibition to sermons is the least restrictive means of furthering a compelling governmental interest. If the interest at issue is the government's general interest in a sound tax system, the threat to that system from a limited exception to the prohibition for sermons during regular worship services is highly speculative. If the interest is instead preventing avoidance of either the non-deductibility rule for political expenditures or the private benefit rule for charities, it is relatively easy to demonstrate that the blanket application of the prohibition to sermons is not the least restrictive means of furthering either of those interests, even assuming they are compelling.[265] It is therefore necessary to consider other possible compelling governmental interests.

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[260] I.R.S. Gen. Couns. Mem. 37,789 (Dec. 18, 1978) ("If [the private benefit] is qualitatively and quantitatively incidental, then it is consistent with exemption."). *See generally* John D. Colombo, *In Search of Private Benefit*, 58 FLA. L. REV. 1063 (2006) (discussing possible rationales for and applications of the private benefit doctrine); Darryll K. Jones, *Private Benefit and the Unanswered Questions from* Redlands Surgical Services, 29 EXEMPT ORG. TAX REV. 433 (2000) (addressing "the meaning and operation of the private benefit doctrine").

[261] *See, e.g.*, Rev. Rul. 70-186, 1970-1 C.B. 129 (holding that an organization formed to preserve and improve a lake qualified for exemption under I.R.C. § 501(c)(3) even though there would be private benefit to lakefront property owners.).

[262] *See supra* notes 160-161 and accompanying text.

[263] *See* Rev. Rul. 75-286, 1975-2 C.B. 210.

[264] *See supra* notes 259-261 and accompanying text.

[265] Due to the difficulty of meeting the least restrictive means requirement, this Article has intentionally avoided developing a specific definition of what constitutes a compelling governmental interest (assuming such a definition is even possible). For a summary of

b. *Protecting the Public, the Government, and the House of Worship*

In addition to governmental interests relating to the tax system, other commonly asserted interests relate to the potential harm that allowing even a limited exception to the prohibition could cause to the public, the federal government, and to the houses of worship themselves. The harm to the public is the risk that permitting houses of worship to support or oppose candidates creates a significant chance of corruption, or at least the appearance of corruption, when candidates try to convince houses of worship to support them.[266] Combating corruption and the appearance of corruption with respect to current and prospective government officials is a compelling governmental interest, as the Supreme Court has repeatedly held in the context of election law.[267] What is not clear, however, is that prohibiting internal house of worship communications regarding candidates furthers that interest or is the least restrictive means for doing so. While there is some anecdotal evidence that close (and often legal) relationships between nonprofits and politicians may reflect or create the appearance of corruption, such evidence is spotty at best.[268]

Furthermore, federal election law currently permits corporations and unions that are otherwise prohibited from making expenditures relating to the endorsement of candidates to spend funds communicating such an endorsement to their internal constituencies.[269] Congress therefore does not

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various attempts to do so, see Berg, *supra* note 103, at 35-40. It is clear, however, that the governmental interest must be particularly strong. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (characterizing the required level of governmental interests as "'interests of the highest order'" (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972))).

[266] *See, e.g.*, Tobin, *supra* note 14, at 1329-30 ("As churches become more powerful and integrated into political campaigns, churches also become more vulnerable, and the potential for corruption increases. . . . [T]he religion itself might be corrupted as politicians attempt to control the church, or as the church is forced to sacrifice its views for the benefit of the candidate that it supports.").

[267] *E.g.*, McConnell v. FEC, 540 U.S. 93, 196 (2003) (finding "deterring actual corruption and the avoiding any appearance thereof" to be an "important state interest" behind the Bipartisan Campaign Reform Act); Buckley v. Valeo, 424 U.S. 1, 26 (1976) ("[T]he [Federal Election Campaign] Act's primary purpose – to limit the actuality and appearance of corruption resulting from large individual financial contributions . . . [is] a constitutionally sufficient justification.").

[268] *See, e.g.*, Jack Siegel, *The Wild, the Innocent, and the K Street Shuffle: The Tax System's Role in Policing Interactions Between Charities and Politicians*, 54 EXEMPT ORG. TAX REV. 117, 117 (2006).

[269] 2 U.S.C. § 441b(b)(2)(A) (2006) (exempting from the spending prohibition expenditures for "communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject"); *see also* 11 C.F.R. § 114.1(j) (2008) (defining the "restricted class" of certain membership organizations as their "members and executive or

consider that such intra-organizational political support creates a significant risk of corruption or appearance of corruption. Also, under federal election law, both corporations and unions are able to engage in a broad range of activities targeted at the public because the federal government can constitutionally only bar them from paying for communications that constitute express advocacy or are functionally equivalent to express advocacy.[270] As the political campaign intervention prohibition covers a much broader range of communications, it is not the least restrictive means to serve this interest.[271]

A related issue is that by permitting even this limited exception to the prohibition, the government would be at least marginally increasing the funds available for political campaign intervention through the charitable contribution deduction. However, since such subsidy is significantly attenuated for the reasons already discussed, it is difficult to argue that this concern rises to a level sufficient to increase the chance of corruption or the appearance of corruption.[272] There also is little risk that the government could be harmed by being perceived as supporting, through the exemption, a particular set of candidates or a particular party since the exemption would not be for any particular political view but instead for a type of otherwise prohibited speech.[273] As the IRS has itself discovered, religiously motivated political activity can be found across the political spectrum and is not, as might be assumed, solely or primarily the province of either the religious right or the religious left.[274] In regards to aiding one type of speech over all others, it is hard to argue that the government has a compelling interest in preventing speech about politics and candidates generally – if anything, the government's interest should run in the opposite direction. Finally, regardless of whether the charitable contribution deduction is viewed as a government subsidy, both the intervening choice of donors regarding which organization to support and the choice of houses of worship of whether to engage in political campaign intervention eliminates any concern that the house of worship could be seen as speaking on the government's behalf.

Another commonly cited protective interest is that greater political involvement by houses of worship will undermine the distinctive role of such

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administrative personnel, and their families"); *id.* § 114.3(a)(2) (extending the § 441b(b)(2)(A) exemption to certain membership organizations with respect to communications with their restricted class).

[270] *See* FEC v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652, 2674 (2007).

[271] *See supra* notes 39-45 and accompanying text.

[272] *See supra* note 242 and accompanying text.

[273] *See* Caron & Dessingue, *supra* note 14, at 187 (discussing the view that "the political activity prohibition reflects a government interest in not subsidizing partisan political activity" but concluding that there is no such interest, "much less one that is compelling").

[274] *See* INSPECTOR, REVIEW, *supra* note 95, at 13-14 (concluding, based on a random sampling of alleged political activity identified by the IRS, that tax-exempt organizations "were supporting several political parties").

entities as outside voices of dissent and challenge.[275] Indeed, some of the strongest supporters for permitting houses of worship to be more involved politically also recommend against houses of worship actually taking advantage of such permission precisely because of this concern.[276] However, if a house of worship is religiously motivated to become so involved, it is difficult to argue that protecting it from itself is a compelling governmental interest.[277] Moreover, the significant extent of the political involvement of houses of worship historically - including highly publicized candidate endorsements before the enactment of the prohibition - undermines the assertion that the risk to houses of worship is so great that it justifies the prohibition's application in this context.[278]

To be fair to those that have raised these concerns about possible harm to the public, to the government, and to the house of worship itself, they have generally done so with respect to whether it would be wise for Congress to permit an exception to the prohibition for houses of worship. Under RFRA, these concerns either do not rise to the level of a compelling governmental interest or, if they do, the prohibition as applied in this context is not the least restrictive means for furthering that interest. These concerns therefore do not provide the government with sufficient justification under RFRA to impose the prohibition in this context.

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[275] *See, e.g.*, Tobin, *supra* note 14, at 1322-26.

[276] *See, e.g.*, STEPHEN L. CARTER, GOD'S NAME IN VAIN 41-58 (2000); Dessingue, *supra* note 14, at 925-26.

[277] *See* Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 48 (1989) (characterizing such interests as "[p]aternalism" and "the weakest government interest" that "should not be allowed to trump a free exercise claim, except possibly in the most extreme circumstances"); *see also* Buckles, *supra* note 14, at 1088-93 (arguing that on balance the prohibition is more harmful to houses of worship than the likely effects of relaxing the prohibition with respect to such institutions); Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301, 339-40 (2000) (addressing concerns about "religious character" and "government control" with respect to the effect of school-choice programs on religious schools); Eugene Volokh, *Intermediate Questions of Religious Exemptions*, 21 CARDOZO L. REV. 595, 624-30 (1999) (discussing "paternalistic" governmental interests and possible situations where they might be compelling).

[278] *See, e.g.*, Harry S. Stout, *Rhetoric and Reality in the Early Republic: The Case of the Federalist Clergy*, *in* RELIGION AND AMERICAN POLITICS 62-74 (Mark A. Noll ed., 1990) (describing the involvement of Federalist clergy in politics during the first decades of the United States, including election sermons that sought to influence how congregation members voted); Mark S. Scarberry, *John Leland and James Madison: Religious Influence on the Ratification of the Constitution and on the Proposal of the Bill of Rights*, 113 PENN ST. L. REV. 733, 778-97 (2009) (describing the importance of pastoral support for James Madison's election to the U.S. House of Representatives).

c. *Separation of Church and State*

Finally, but not least importantly, there is the concern that permitting houses of worship to be involved in supporting or opposing candidates for elected public office threatens to undermine an important element of the separation of church and state. This interest is not, however, well served by the prohibition's application in this context or generally. First, the prohibition only applies to houses of worship that claim the benefits of charitable status. A house of worship that chose to forgo those benefits would only face the much less comprehensive limitations imposed by election law. Second, the act of having the IRS enforce the prohibition with respect to sermons itself threatens to undermine the separation of church and state because it forces the IRS to review church communications. Therefore, whether the prohibition, as applied to such communications, enhances or undermines the separation of church and state is debatable.

The correctness of this conclusion is demonstrated by considering why RFRA and, more specifically, a RFRA-compelled exception to the prohibition are not inconsistent with the First Amendment's Establishment Clause. The current prevailing standard for applying the Establishment Clause remains the three-prong test stated in *Lemon v. Kurtzman*,[279] which requires that the law at issue serve a "secular legislative purpose;" have a "principal or primary effect... that neither advances nor inhibits religion[;]" and does not impermissibly entangle church and state.[280] In its more recent Establishment Clause cases, the Supreme Court has treated the non-entanglement requirement as part of the effects inquiry.[281]

[279] 403 U.S. 602 (1971).

[280] *Id.*, at 612-13. The *Lemon* test does not apply if there is a facial denominational preference, but that is not the case here. *See* Larson v. Valente, 456 U.S. 228, 252 (1982) ("[T]he *Lemon* v. *Kurtzman* 'tests' are intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions . . . that discriminate *among* religions."). Some Justices, and on occasion a majority of the Court, have also concluded that the *Lemon* test is not applicable in certain contexts, such as challenges to religious monuments on state grounds and school voucher programs. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 681, 685-86 & n.4 (2005) (Rehnquist, J.) (listing recent Establishment Clause cases that have not applied the *Lemon* test and concluding that the *Lemon* test is not useful in determining "whether the Establishment Clause . . . allows the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds"); *id.* at 699-700 (Breyer, J., concurring) (describing the *Lemon* test as a "useful guidepost[]" and concluding that no single test can resolve all Establishment Clause cases). *But see id.* at 703-04 (Breyer, J., concurring) (relying to a limited extent on the *Lemon* test in determining that the Ten Commandments display is constitutional).

[281] *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 233 (1997) ("[I]t is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect."); *see also* Mitchell v. Helms, 530 U.S. 793, 807-08 (2000) (plurality opinion) (Thomas, J.) (affirming *Agostini*).

Courts have had little difficulty concluding that RFRA does not violate the Establishment Clause under the *Lemon* test.[282] With respect to the first prong, the Supreme Court has stated that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[283] Easing governmental interference in religious activities is clearly the purpose behind RFRA.[284] With respect to the second prong, the Supreme Court has stated that in order for this element not to be satisfied, "it must be fair to say that the *government itself* has advanced religion through its own activities and influence."[285] RFRA, at most, frees religious individuals and institutions to advance religion through *their* activities and influence, not the federal government's. In regards to the third prong, by exempting the religiously motivated conduct of such individuals and organizations from valid, neutral, and otherwise generally applicable laws, the federal government will usually be less, not more, involved in their religious activities.

The fact that RFRA does not generally violate the Establishment Clause does not, however, necessarily mean that the clause is irrelevant with respect to this specific application of RFRA. Courts will need to consider the Establishment Clause issue, assuming the government raises it, because of the general doctrine that statutes should be interpreted, if possible, in a manner that renders them constitutional.[286] There are two possible Establishment Clause objections to a RFRA-required exception in this context. First, by allowing at least some amount of government "subsidy" to support candidate-related communications by houses of worship, while denying such a subsidy to secular charities, the exception requires government to support religious organizations over secular organizations. Second, by requiring the government to determine which institutions are legitimate houses of worship and what candidate-related communications are sufficiently religiously motivated to meet the substantial

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[282] *E.g.*, *In re* Young, 141 F.3d 854, 862-63 (8th Cir. 1998) (discussing how RFRA passes each prong of the *Lemon* test); Mockaitis v. Harcleroad, 104 F.3d 1522, 1530 (9th Cir. 1997); Sasnett v. Sullivan, 91 F.3d 1018, 1022 (7th Cir. 1996), *vacated on other grounds*, 521 U.S. 1114 (1997); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 470 (D.C. Cir. 1996); Flores v. City of Boerne, 73 F.3d 1352, 1364 (5th Cir. 1996), *rev'd on other grounds*, 521 U.S. 507 (1997); *In re* Hodge, 220 B.R. 386, 399-401 (D. Idaho 1998).

[283] Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987).

[284] *See* 42 U.S.C. § 2000bb(a)-(b) (2006) (congressional findings and declaration of purposes).

[285] *Amos*, 483 U.S. at 337 (emphasis in original).

[286] *E.g.*, NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 500 (1979) ("[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."); Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 749-50 (1961) ("Federal statutes are to be so construed as to avoid serious doubt of their constitutionality.").

burden requirement, the exception excessively entangles the government with houses of worship. Neither objection, however, is ultimately convincing.

With respect to the subsidy argument, the subsidy here is both indirect and attenuated and thus does not rise to a level that offends the Establishment Clause. It is indirect in that individual donors receive the immediate tax benefit, and they, not the government, choose whether to give to politically active houses of worship. The subsidy is therefore similar to more direct forms of support provided by the government, such as school vouchers, that have survived Establishment Clause scrutiny because of the existence of an intervening, private decision maker.[287] The subsidy here is also attenuated in that only a portion of the costs of the political activity, and likely a relatively small portion, will actually be subsidized both because of the limited number of donors who are able to deduct their contributions and the limited benefit those donors receive by doing so.[288] While the degree of attenuation could change in the future, its current level is another argument against this subsidy concern.

The Supreme Court's holding in *Texas Monthly, Inc. v. Bullock* that a state sales tax exemption for religious periodicals violates the Establishment Clause does not alter this conclusion, even if the Establishment Clause reasoning of the two opinions that make up the majority is accepted.[289] In *Bullock*, Justice Brennan's three-Justice lead opinion states that assuming that a tax exemption limited to religious activities or organizations is not mandated by the Free Exercise Clause, it will only survive Establishment Clause scrutiny if it does not "burden nonbeneficiaries markedly" and is seen as "removing a significant state-imposed deterrent to the free exercise of religion."[290] Justice Brennan states that the tax exemption at issue fails this standard, in part because it "burdens nonbeneficiaries by increasing their tax bills."[291] Justice Blackmun's concurrence, joined by Justice O'Connor, takes a different approach.[292] Justice Blackmun differentiates between a statutory preference for the dissemination

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[287] Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (finding that a school voucher program did not violate the Establishment Clause because the aid only reached religious schools indirectly and as the result of parents' choices).

[288] *See supra* note 242 and accompanying text (discussing how any threat posed by tax-deductable donations to the soundness of the tax system is significantly attenuated because most donors probably will not deduct their contributions).

[289] *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989) (Brennan, J., plurality opinion) (holding that "when confined exclusively to publications advancing the tenets of a religious faith, the exemption runs afoul of the Establishment Clause"); *id.* at 28 (Blackmun, J., concurring) (concluding that "a tax exemption *limited to* the sale of religious literature by religious organizations violates the Establishment Clause." (emphasis in original)).

[290] *Id.* at 15 (Brennan, J.).

[291] *Id.* at 19 n.8.

[292] *Id.* at 28-29 (Blackmun, J., concurring). The sixth vote for the Court's judgment was that of Justice White, who based his concurrence on the Press Clause of the First Amendment. *Id.* at 25-26 (White, J., concurring).

of religious ideas, which in his opinion, offends the Establishment Clause; and accommodating religion, for example, by barring the state from denying unemployment compensation to employees who refuse to work on their Sabbath.[293]

Neither Justice Brennan's reasoning, nor Justice Blackmun's is applicable to a RFRA-based exception for religiously motivated political sermons. Implicit in Justice Brennan's burden analysis is the assumption that the religious publications at issue will continue to be sold in significant amounts even without the exemption; and so a significant burden on the public fisc, and therefore on other taxpayers, is relieved by eliminating the exemption.[294] In the sermon context, it is much more plausible to assume that even among the houses of worship that may feel compelled to deliver political sermons, the vast majority will refrain from doing so if the cost is the loss of the ability to receive tax-deductible contributions for all of their activities. This fact will therefore leave the amount of tax revenues collected before and after the creation of exemption essentially unchanged. Under Justice Blackmun's preference versus accommodation distinction, a RFRA-based exception for religiously motivated political sermons is more akin to an accommodation because, like the religiously observant unemployment compensation recipient, the houses of worship at issue would qualify for a government benefit for a religiously motivated activity that is not an affront to the primary requirements for receiving the benefit.[295] The federal government could, of course, choose not to offer the benefit, but once it does and a religious individual or institution qualifies, the federal government is not violating the Establishment Clause by creating an exception to a condition on the benefit that bars religiously motivated or compelled conduct.

As for the entanglement concern, it is offset by the entanglement concern raised by not creating an exception. Without an exception, the government – in the form of the IRS – is required to review sermons and evaluate them for their likely electoral impact. Such involvement in internal house of worship affairs is hardly less entangling than the inquiries that an exception would require. Furthermore, the government already has to determine what entities are legitimate houses of worship for numerous purposes, not the least of which

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[293] *Id.* at 28-29 (Blackmun, J., concurring).

[294] *See* Thomas C. Berg, *The New Attacks on Religious Freedom Legislation, and Why They Are Wrong*, 21 CARDOZO L. REV. 415, 441 (1999) (concluding that the lead opinion in *Texas Monthly* "focused on the fact that the particular legislative exemption for religion would have imposed significant costs on others – costs out of proportion to the burdens the exemption would remove from religious practice").

[295] *See* I.R.C. § 170(c)(2)(D) (2006) (listing the requirements for an organization to receive tax deductible contributions); KENT GREENAWALT, 1 RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 173 (2006) ("The conditions for [unemployment compensation] benefits remain roughly the same for those who do not object to Saturday work, whether or not the law creates a limited exception [for Sabbatarians].").

is eligibility for numerous federal tax benefits that are available to such entities, but not other, secular organizations.[296] As for inquiring into religious motivations for particular conduct, such an inquiry is a necessary and unavoidable part of applying both RFRA generally and, in many even post-*Smith* instances, the Free Exercise Clause. Thus neither one of these roles for the government represents excessive entanglement.

If anything, there is a strong argument that permitting an exception to the prohibition for sermons and possibly other internal house of worship communications avoids more entanglement concerns than it creates. Even though the internet and the widespread recording of sermons and worship services may permit the IRS to monitor internal house of worship communications without having to physically darken a house of worship's door, it does raise entanglement concerns if government employees are required to evaluate numerous religious messages in light of the prohibition. The exception relieves the IRS of this burden, at least in part, by reducing the need for this scrutiny. It also relieves the IRS of the difficult task of deciding how to enforce the prohibition with respect to these communications, including determining the appropriate sanctions to impose if it finds an apparent violation. The Establishment Clause therefore does not bar RFRA from requiring an exception to the prohibition for some or all internal house of worship communications. Thus, the separation of church and state is not a compelling government interest that is furthered by the application of the prohibition to such communications.

Ultimately, if a house of worship is able to demonstrate that the prohibition as applied to its sermons or other internal communications places a substantial burden on its exercise of religion, the government will have a difficult time demonstrating that the burden is justified under RFRA. A house of worship that can demonstrate that both its candidate-related message and the inclusion of that message in a sermon are religiously motivated, and so constitute the exercise of religion within the meaning and protection of RFRA, should be able to make this demonstration, as the current IRS interpretation of the prohibition indicates that engaging in such conduct results in the loss of the ability to receive tax-deductible charitable contributions for *any* activity. While the government will be able to cite to a plethora of possible compelling interests, the prohibition as applied to internal house of worship communications either does not significantly further those interests or is not the least restrictive means for furthering them. What the above discussion fails

[296] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 2008-30-028 (Apr. 28, 2008) (denying an organization that "conducts some 'street ministry' activities" classification as a church and tax-exempt status under I.R.C. §§ 501(c)(3) and 509(a)(1)). *See generally* Charles M. Whelan, *"Church" in the Internal Revenue Code: The Definitional Problems*, 45 FORDHAM L. REV. 885 (1977) (discussing how "church distinctions" in the Internal Revenue Code cause "considerable concern and confusion among church leaders, members of the bar, and the officials of the Treasury Department and the Internal Revenue Service who are responsible for their interpretation and enforcement").

to address completely, however, is the fact that a political sermon is not only the activity of a religious individual, but also of a religious institution. As this Part suggests, the law of religious liberty also has a, perhaps under-appreciated, institutional dimension, to which this Article now turns.

## IV. INSTITUTIONAL FREE EXERCISE

What arguably is most jarring about the application of the political campaign intervention prohibition to sermons is that it involves government regulation of not only the religiously motivated conduct of individuals, but also of communications between the leadership of a religious institution and its members. Even if the RFRA-based argument above is accepted, it only extends to the unique context of sermons, leaving many houses of worship for which a sermon or homily is not a religiously significant form of communication, unprotected. Given RFRA's lack of complete protection, the government, through application of the prohibition, is still able to interfere not only with the ability of an individual to follow his or her religious convictions – the situation the case law described above is designed to address – but also with the internal functioning of an institution that seeks to communicate and develop those convictions. The courts have previously recognized that in certain contexts this institutional aspect should be acknowledged and should influence the scope of the First Amendment's protection for the conduct at issue. What they have not conclusively addressed, however, is how broad that influence should be, including whether it would address the application of the prohibition to political campaign intervention by houses of worship.

This Part addresses that open question. The first Section examines the current state of the church autonomy doctrine and its potential ramifications for political sermons. This Section concludes both that the doctrine survived the *Smith* decision and that the logical extension of the doctrine, which this Article re-characterizes as "institutional free exercise," requires a conclusion that application of the prohibition to sermons and other internal house of worship religious communications is unconstitutional. The second Section revisits the previous RFRA analysis and considers whether this institutional free exercise approach is available under RFRA and, if so, how it would affect that analysis. The second Section concludes that this approach is available, but only with respect to the substantial burden requirement of RFRA. Applying the institutional free exercise approach to the substantial burden requirement of RFRA, this Article concludes that the statute ultimately strengthens the grounds for determining that the prohibition, as applied to internal religious communications, places a substantial burden on the exercise of religion by houses of worship and supports a broader exception to the prohibition than RFRA would otherwise require.

### A. *The First Amendment*

Pre-*Smith*, the federal courts recognized that the First Amendment's free exercise of religion clause protected religious institutions – as opposed to

individuals – from even valid, neutral, and generally applicable laws in two contexts.[297] The first is when civil courts are asked to resolve intra-church (or intra-denominational) disputes that involve significant ecclesiastical matters.[298] The second context is when such courts are asked to resolve employment disputes involving ministers and other employees who perform religious functions. In this context, most of the federal circuits have found that such decisions, often involving religiously motivated actions, cannot be subject to government regulation under the First Amendment,[299] although the Supreme Court has not directly ruled in this area.[300] The open questions are whether the church autonomy doctrine survived the *Smith* decision and, if it did, whether it applies in the context of the political campaign intervention prohibition's application to sermons and internal house of worship communications.

1. The Church Autonomy Doctrine Post-*Smith*

With respect to the survival of the church autonomy doctrine, the Court in *Smith* briefly acknowledged the unique nature of intra-church dispute cases

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[297] *See generally* Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lesson of* Smith, 2004 BYU L. REV. 1633 (surveying Supreme Court cases that support "a broad right of 'church autonomy' that prohibits government interference with internal church affairs regardless of whether the activities affected are religious in nature or more mundane administrative matters"); Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409 (1986) (discussing the contexts in which the right of church autonomy is well established).

[298] *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 447 (1969); Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190, 190-91 (1960); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 120-21 (1952); Dixon v. Edwards, 290 F.3d 699, 714 (4th Cir. 2002). *See generally* Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CAL. L. REV. 1378 (1981) (discussing the rationale behind judicial reluctance to resolve internal church disputes).

[299] Petruska v. Gannon Univ., 462 F.3d 294, 303-04 (3d Cir. 2006) ("Every one of our sister circuits to consider the issue has concluded that application of Title VII [of the Civil Rights Act of 1964] to a minister-church relationship would violate – or would risk violating – the First Amendment and, accordingly, has recognized some version of the ministerial exception.").

[300] *See* Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 628-29 (1986) (ordering the dismissal of a religious school's challenge to a state investigation into alleged sex discrimination when the school would have the opportunity to raise its constitutional claims in the state administrative proceedings or the state court review of those proceedings, without commenting on the merit of those claims); NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 507 (1979) (construing the statutory grant of jurisdiction to the NLRB so as to avoid the "significant risk" that the NLRB's jurisdiction would infringe on free exercise of religion if extended to teachers at church-operated schools); Gerard V. Bradley, *Church Autonomy in the Constitutional Order*, 49 LA. L. REV. 1057, 1066-68 (1989) (discussing the Court's avoidance of the issue in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987)).

and suggested, at least implicitly, their continued viability post-*Smith*.[301] As for the application of the doctrine in the employment context, federal courts that have addressed the issue have consistently concluded that it is still viable.[302] The U.S. Court of Appeals for the District of Columbia Circuit provided the most fulsome explanation for this conclusion:

> It does not follow, however, that Smith stands for the proposition that a church may never be relieved from [an obligation to comply with a valid and neutral law of general applicability]. We say this for two reasons. First, the burden on free exercise that is addressed by the ministerial exception [to Title VII of the Civil Rights Act of 1964] is of a fundamentally different character from that at issue in Smith and in the cases cited by the Court in support of its holding. The ministerial exception is not invoked to protect the freedom of an individual to observe a particular command or practice of his church. Rather, it is designed to protect the freedom of the church to select those who will carry out its religious mission. Moreover, the ministerial exception does not present the dangers warned of in Smith. Protecting the authority of a church to select its own ministers free of government interference does not empower a member of that church, by virtue of his beliefs, to become a law unto himself. Nor does the exception require judges to determine the centrality of religious beliefs before applying a compelling interest test in the free exercise field.
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> Second, while it is true that some of the cases that have invoked the ministerial exception have cited the compelling interest test, all of them

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[301] Employment Div. v. Smith, 494 U.S. 872, 877 (1990) ("The government may not . . . lend its power to one or the other side in controversies over religious authority or dogma."). No federal court appears to have had to address explicitly whether the doctrine survives in the intra-church dispute context post-*Smith*, although at least one federal appellate court apparently assumes that it does. *Dixon*, 290 F.3d at 714-15 ("The Court has consistently recognized that First Amendment values are jeopardized when church litigation turns on the resolution by civil courts of controversies over religious doctrine and practice.").

[302] *E.g.*, Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 656 (10th Cir. 2002); EEOC v. Roman Catholic Diocese, 213 F.3d 795, 800 n.* (4th Cir. 2000); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1302-04 (11th Cir. 2000); Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 349-50 (5th Cir. 1999); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 462-63 (D.C. Cir. 1996). *But see* Black v. Snyder, 471 N.W.2d 715, 719 (Minn. Ct. App. 1991) (holding that proceeding on claims "based on statues that are otherwise valid, generally applicable, and facially neutral . . . does not violate the church's free exercise rights" and is "[c]onsitent with *Smith*"). Given the enactment of RFRA, it is possible that courts may, in the future, base the ministerial exception on RFRA instead of on the First Amendment. *See* Hankins v. Lyght, 441 F.3d 96, 102-03 (2d Cir. 2006) (asserting that RFRA displaces the "judge-made" ministerial exception). *But see* Rweyemamu v. Cote, 520 F.3d 198, 204 (2d Cir. 2008) (distinguishing *Hankins* and concluding that the constitutionally based ministerial exception is still available when parties explicitly waive their rights under RFRA).

> rely on a long line of Supreme Court cases that affirm the fundamental right of churches to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.[303]

The brief mention of the intra-church dispute cases in *Smith*, the absence of any indication that *Smith* overruled those cases in subsequent Supreme Court decisions, and the care the Court took in *Smith* to distinguish its earlier free exercise decisions, indicate that *Smith* does not overturn the long line of Supreme Court church autonomy cases or take a position on the employment-related application of the church autonomy doctrine by the lower courts. As articulated by the D.C. Circuit, those cases address an institutional application of the Free Exercise Clause that is distinct from the individual assertion of religious freedom addressed in *Smith*.[304] Granting exemptions from valid, neutral, and generally applicable laws in the limited contexts where the autonomy of religious institutions is clearly at risk does not create the same threat to such laws as granting exemptions based on what may be a single individual's assertion of religious belief.

That said, the question still exists whether the church autonomy doctrine extends to some or all internal house of worship communications, such as sermons. There is only limited case law on this point, almost certainly because governments generally do not seek to regulate internal house of worship communications, presumably because of the significant constitutional issues raised by doing so.[305] In fact, the Internal Revenue Code may be unique in even conditioning receipt by houses of worship of a preferential status – the ability to receive tax-deductible contributions – upon their refraining from including certain content in communications. This is especially noteworthy because the Establishment Clause would, at least, normally preclude direct government funding of house of worship activities. In *Bryce v. Episcopal Church in the Diocese of Colorado*, however, the court applied the church autonomy doctrine to bar claims of sexual harassment made by a youth minister and her partner when it found that the statements at issue "clearly addressed religious topics," and were made "in the context of an internal church dialogue."[306] *Bryce* suggests that the church autonomy doctrine should

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[303] *Catholic Univ. of Am.*, 83 F.3d at 462 (citations and internal quotation marks omitted).

[304] *Id.*

[305] The fact that development of this doctrine by the courts has been sporadic and incomplete also limits the case law. *See* Bradley, *supra* note 300, at 1061 (observing that the church autonomy doctrine "is the least developed, most confused of our church-state analyses"); Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515, 526 (2007) ("[T]he 'church autonomy' doctrine is more of a grab-bag of precedents than a clear rule or prohibition.").

[306] *Bryce*, 289 F.3d at 659; *see also* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Rigbt* [sic] *to Church Autonomy*, 81 COLUM. L. REV. 1373, 1403 (1981) [hereinafter Laycock, *General Theory*]

protect sermons and other internal communications of a house of worship, at least those with religious content, but further inquiry must be made into the reasons behind the church autonomy doctrine to determine whether this suggestion is correct and applicable to political sermons.

The consistent underlying basis cited for the church autonomy doctrine as applied in the intra-church dispute context may be summarized as follows: to involve the government in resolving ecclesiastical disputes would be improper because it would require civil courts to engage questions that they have no authority to resolve, while at the same time displacing the religious bodies with just such authority.[307] The Supreme Court has, however, been vague regarding whether the constitutional basis for this position derives from the Free Exercise Clause or the Establishment Clause of the First Amendment, although its statements indicate that it relies on both clauses.[308] Regardless of the exact basis for this position, this reasoning has led the Supreme Court to limit the reach of the church autonomy doctrine to situations where the courts would have to answer ecclesiastical questions to resolve the dispute, while permitting civil courts to resolve disputes when doing so does not require answering such questions.[309] This approach therefore only requires the government to avoid second-guessing purely ecclesiastical decisions.[310]

In the employment context, however, the federal appellate courts have gone further based on both the Free Exercise and the Establishment Clauses, although they have split on the exact extent to which the church autonomy

("An organization's claim to autonomy is strongest with respect to internal affairs, including relationships between the organization and all persons who have voluntarily joined it." (footnote omitted)).

[307] *See* Serbian E. Orthodox Dioceses v. Milivojevich, 426 U.S. 696, 710-11 (1976).

[308] *See* Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 446 (1969) (recognizing as support both "the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property" and that "[t]he law knows . . . the establishment of no sect" (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 728-29 (1871))); *see also* Jones v. Wolf, 443 U.S. 595, 604 (1979) (approving one approach to such disputes because it promises both "nonentanglement and neutrality"); Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 GEO. J.L. & PUB. POL'Y 165, 168-79 (2009) (arguing that religious organization autonomy rests both on Establishment Clause and Free Exercise Clause principles, as well as on more general equality concerns).

[309] *See Wolf*, 443 U.S. at 602 (concluding that "a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters" (citing Md. & Va. Eldership of the Churches of God v. Church of God, Inc., 396 U.S. 367, 368 (1970))). *But see id.* at 616-18 (Powell, J., dissenting) (rejecting the majority's approach and arguing that civil courts should limit their role to determining and then following the intra-church resolution of the dispute).

[310] There are hints, however, of support for a broader concept of church autonomy in at least some of the Supreme Court's decisions. *See* Brady, *supra* note 297, at 1638-49.

doctrine protects such decisions.[311] Several courts have held that the church autonomy doctrine protection does not extend to situations where the basis for the decision at issue was both prohibited and secular.[312] While not stated in these cases, presumably the reasoning for this position is similar to the Supreme Court's reasoning in the intra-church dispute context: civil courts should only abstain from resolving disputes that turn on resolution of ecclesiastical questions that are not within the authority of such courts to resolve. This interpretation could be labeled a "weak" approach to the ministerial exception.[313] This interpretation of the church autonomy doctrine is, however, somewhat stronger than that taken in the intra-church dispute context, since the courts will abstain from second-guessing such religiously motivated decisions even if they violate secular law.

Other courts have concluded that the civil courts must abstain from any involvement with house of worship employment decisions, even if the basis for

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[311] *See, e.g.*, Rweyemamu v. Cote, 520 F.3d 198, 205-10 (2d Cir. 2008) (finding a "well entrenched" ministerial exception to bar a priest's race discrimination claim); Petruska v. Gannon Univ., 462 F.3d 294, 303-06 (3d Cir. 2006) (finding a "ministerial exception," arising under the Free Exercise Clause, which bars any claim whose resolution would infringe upon a religious institution's right to determine the individual responsible for performing spiritual functions); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 655-59 (10th Cir. 2002) (applying the church autonomy doctrine to bar plaintiffs' sexual harassment claims); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169-72 (4th Cir. 1985) (holding that "the Constitution requires that civil authorities decline to review either the procedures for selection or the qualifications of those chosen or rejected," when the plaintiff brought an action charging church with sexual and racial discrimination after he was denied a pastoral position). *But see, e.g.*, DeMarco v. Holy Cross High Sch., 4 F.3d 166, 171-72 (2d Cir. 1993) (discussing only the Establishment Clause in a case upholding a lay teacher's age discrimination claim against a parochial school).

[312] *See, e.g.*, *Bryce*, 289 F.3d at 657 ("The church autonomy doctrine is not without limits, however, and does not apply to purely secular decisions, even when made by churches."); Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324, 328-32 (3d Cir. 1993) (holding that application of the Age Discrimination in Employment Act to a religious schools' lay faculty did not violate First Amendment); *DeMarco*, 4 F.3d at 171-72 (holding that the Establishment clause is not violated in an age discrimination inquiry where religious issues are isolable); Minker v. Balt. Annual Conference of United Methodist Church, 894 F.2d 1354, 1360-61 (D.C. Cir. 1990) (holding that the plaintiff should be allowed to attempt to prove his case so long as pursuing the matter further would not "create an excessive entanglement with religion"). *But see Bryce*, 289 F.3d at 658 n.2 (suggesting the court was not relying on the ministerial exception, but only on the broader church autonomy doctrine); *DeMarco*, 4 F.3d at 172 (acknowledging that a different rule might apply if the relationship between employee and employer was pervasively religious).

[313] *See* Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1521 (2007) (discussing weak and strong approaches for treating universities as First Amendment institutions, analogizing the strong approach in that context to this position in the religious institutions context).

those decisions is purely secular, because otherwise "secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive" and thus unconstitutional.[314] The reasoning of these courts is that under the First Amendment, certain internal activities of religious institutions that are vitally important for establishing and communicating the religious identity of the institution must be off limits to government rules that normally would limit the permissible grounds for employment decisions.[315] This interpretation could be labeled a "strong approach" to the ministerial exception.

The breadth of the church autonomy doctrine has important ramifications for determining its application in the context of the political campaign intervention prohibition's application to sermons and other internal house of worship communications. If one accepts the intra-church dispute approach used by the Supreme Court, but not the ministerial exception created by the appellate courts, the doctrine would only be relevant if application of the prohibition required the IRS or the courts to resolve ecclesiastical questions. Determining whether communications have the effect of supporting or opposing a candidate for elected public office is, however, a purely secular issue.[316] Applying the prohibition does not, therefore, require either the IRS or the courts to resolve any ecclesiastical questions and so the doctrine provides no protection.

If one instead accepts the weaker version of the ministerial exception approach, the doctrine will only apply if a house of worship can demonstrate that the candidate-related content of its sermon is based on religious motivations, in the same way that courts accepting this approach only use the doctrine to shield employment decisions that a religious institution proves are religiously motivated. Such a burden of proof could easily lead to the IRS and houses of worship engaging in lengthy evidentiary disputes relating to the motivations of the houses of worship and their leadership. Moreover, the prohibition only applies if a house of worship accepts the tax benefit of

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[314] Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 350 (5th Cir. 1999); *see also Petruska*, 462 F.3d at 304 n.7, 307 (citing cases taking the view that civil courts must abstain from involvement with employment decisions); EEOC v. Roman Catholic Diocese, 213 F.3d 795, 801 (4th Cir. 2000) ("The [ministerial] exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision."); Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 91-92 (2002) (arguing that courts should avoid addressing religious employment disputes because "[t]hose who act as clergy, or who teach others to act as clergy," are "the lifeblood of the institution's expression – messenger and message are inseparable").

[315] *See, e.g.*, *Combs*, 173 F.3d at 350 ("The second quite independent concern is that in investigating employment discrimination claims by ministers against their church, secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely nondoctrinal.").

[316] *See supra* notes 40-45 and accompanying text.

deductible contributions. A house of worship that either surrendered that benefit or created an affiliate that did not enjoy that benefit could, at least indirectly, support or oppose candidates. As a result, the prohibition's level of interference with church autonomy is arguably much less than the interference involved in either resolving intra-church disputes based on theological questions, or overriding a house of worship's religiously motivated decisions regarding ministerial employees.

If one accepts the stronger version of the ministerial exception approach, however, then there should be certain spheres of activity that should be considered protected almost entirely from government regulation.[317] By interpreting the church autonomy doctrine in this fashion, houses of worship would be protected from government regulation with respect to the activities important to fulfilling their religious mission, subject to a few general limitations, such as whether the activity is primarily an internal or an external one, and a few specific limitations, for instance in areas of particular government concern, such as prisons, and, perhaps, criminalized behavior.[318] One such sphere of activity would naturally be internal house of worship religious communications, including sermons.

Determining whether one of the existing approaches the correct, or whether some in-between approach is a better application of the First Amendment, requires consideration of the underlying constitutional reasons for having a church autonomy doctrine in the first place.

2. Constitutional Grounds for an Institutional Approach

Various scholars have attempted to fill in the theoretical gap left by the courts applying the church autonomy doctrine. For example, Professor Carl Esbeck has developed a comprehensive Establishment Clause justification for the strongest approach.[319] In his view, the Establishment Clause "functions as

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[317] Courts have also applied the doctrine to religious institutions other than houses of worship with respect to employment decisions, but that aspect of the doctrine's breadth is beyond the scope of this article. *See* Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 309-10 (4th Cir. 2004) (listing ministerial exception cases involving religiously affiliated schools, hospitals, and other entities); *see also* NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 504-07 (1979) (concluding that application of the National Labor Relations Act to church-operated schools would raise serious First Amendment questions); Robert M. Cover, *The Supreme Court, 1982 Term – Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 63-67 (1983) (discussing and contrasting the Supreme Court's treatment of religious schools faced with government regulation in *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, and *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983)).

[318] *See* Laycock, *General Theory*, *supra* note 306, at 1403-09 (discussing the distinction between internal and external affairs).

[319] Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 347-52, 379-420 (1984) [hereinafter Esbeck, *Establishment Clause Limits*]; *see also* Carl H. Esbeck, *Toward a General Theory*

a structural provision regimenting the nature and degree of involvement between government and religious associations."[320] The need for civil courts to avoid resolving intra-church disputes, for government not to regulate employment decisions involving ministerial employees or religiously based social welfare program decisions, and for government generally to avoid excessive entanglement with religious matters, therefore flows from a proper interpretation of this regimentation function. Professor Esbeck views the function as stipulating that "government must avoid any involvement with religious societies that may touch upon the matters central to their religious identity and mission."[321] His reliance on the Establishment Clause, as opposed to the Free Exercise Clause, stems from his conclusion that the Free Exercise Clause is primarily about individuals, while the Establishment Clause is about institutions, specifically the relationship between governmental and religious institutions.[322] Given his interpretation of the Establishment Clause, he naturally supports the strongest approach to the church autonomy doctrine, although others applying a similar Establishment Clause based approach have advocated a more moderate level of protection.[323]

Professor Douglas Laycock, in contrast, has developed a theoretical basis that relies primarily on the Free Exercise Clause.[324] The foundation for his choice is the view that the Establishment Clause primarily relates to government support for religion, while the Free Exercise Clause primarily relates to government burdens or restrictions on religion.[325] Since the church autonomy doctrine, whatever its exact form, is about preventing government from restricting choices by religious institutions, it must therefore flow from

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*of Church-State Relations and the First Amendment*, 4 PUB. L. F. 325, 330-31 (1985) [hereinafter Esbeck, *Toward a General Theory*].

[320] Esbeck, *Establishment Clause Limits*, *supra* note 319, at 348.

[321] *Id.* at 381.

[322] Esbeck, *Toward a General Theory*, *supra* note 319, at 330-31; *see also* Berg, *supra* note 308, at 172-77 (building on Esbeck's approach to argue for an Establishment Clause-based, dual jurisdictions view of religious organization autonomy); Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 416-31 (1987) [hereinafter, Lupu, *Free Exercise Exemption*] (arguing that the Free Exercise Clause's protection is limited to individuals, and so does not support the institutional-focused church autonomy doctrine).

[323] *See* Lupu & Tuttle, *supra* note 314, at 92 (concluding, with caveats, that religious entities occupy a "distinctive place" in our "constitutional order," such that when they act in "uniquely religious ways," as opposed to in ways indistinguishable from other nonprofits, the government must avoid interfering with their internal life and self-governance).

[324] Laycock, *General Theory*, *supra* note 306; *see also* Brady, *supra* note 297, at 1672-79 (drawing support from the *Smith* decision and, through that decision, the Free Exercise Clause, for a broad right of church autonomy).

[325] Laycock, *General Theory*, *supra* note 306, at 1384.

the Free Exercise Clause.[326] Working from this basis, he generally concludes that what this Article has identified as the strongest approach is the correct one, although he recognizes that some limits are required.[327]

This Article agrees that a basis for the church autonomy doctrine can be found in the Establishment Clause, particularly when there is a risk that government interference with a particular activity could create significant entanglement concerns. There are, however, several reasons why the church autonomy doctrine should not be based primarily or exclusively on the Establishment Clause, at least in the context of the political campaign intervention prohibition. First, if the main establishment concern is one of entanglement, as the courts that have discussed this concern to any extent have generally indicated, it is unclear whether and how the doctrine should apply when there are entanglement issues raised both when applying the government regulation at issue, and when determining the scope of the doctrine's protection.[328] As previously discussed, the application of the political campaign intervention prohibition to sermons and other internal house of worship communications presents exactly this type of situation.[329]

Second, reliance primarily on the Establishment Clause in the absence of clear entanglement concerns fails to provide guidance regarding how strong the church autonomy doctrine should be. As Professors Ira Lupu and Robert Tuttle have explained, one's view of what regimentation is created by the Establishment Clause ultimately turns on one's view of whether that clause recognizes religious institutions as having a distinctive role in society.[330] Accepting that religious institutions have a distinctive role can lead to significantly different views regarding the extent to which that role is protected from government interference by the Establishment Clause.[331] The Free

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[326] In contrast to Professor Esbeck, Professor Laycock views the entanglement aspect of Establishment Clause doctrine to be incoherent and therefore unhelpful. *Compare id.* at 1392 (deeming entanglement "useless as an analytic tool"), *with* Esbeck, *Establishment Clause Limits*, *supra* note 319, at 381 (explaining entanglement in terms of the doctrine of judicial avoidance of intrafaith disputes).

[327] Laycock, *General Theory*, *supra* note 306, at 1402. *But see* Lupu, *Free Exercise Exemption*, *supra* note 322, at 431 (rejecting an institutional view of the Free Exercise Clause and instead basing a limited church autonomy doctrine on freedom of association).

[328] *See, e.g.*, Petruska v. Gannon Univ., 462 F.3d 294, 311 (3d Cir. 2006), *cert. denied*, 550 U.S. 903 (2007); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1169-70 (4th Cir. 1985).

[329] *See supra* notes 286-296 and accompanying text.

[330] Lupu & Tuttle, *supra* note 314, at 37-92.

[331] *Compare* Esbeck, *Establishment Clause Limits*, *supra* note 319, at 381 ("[G]overnment must avoid any involvement with religious societies that may touch upon the matters central to their religious identity and mission."), *with* Lupu & Tuttle, *supra* note 314, at 92 ("When [religious] institutions perform functions indistinguishable from other segments of the nonprofit world, the law should treat them as their secular counterparts are treated.").

Exercise Clause, in contrast, clearly views the exercise of religion as a liberty requiring strong, albeit limited, protection from government interference. The key questions under the latter clause is whether that protection extends to religious institutions as well as individuals and, if it does, whether such protection takes a different, stronger form than the protection provided for individuals.

Third and finally, even if one accepts the view that the Free Exercise Clause primarily protects individuals, there is a strong argument that it also protects religious institutions under what Professor Lupu has characterized as a theory of derivative rights: while it is individuals who hold religious beliefs that they then exercise, the role of religious institutions in that exercise justifies protecting those institutions as well.[332] Professor Lupu ultimately concludes that this argument is unpersuasive, because an institution cannot itself have conscience or heartfelt concerns – that is, religious institutions do not have religious beliefs on which they act, only individuals do – and granting them protection "might permit the successful assertion of bad faith exemption claims."[333] This conclusion is too cramped a view of the role of religious institutions. Such institutions are not only vehicles for the implementation of individual religious beliefs, although this is one of their important functions; they are also vehicles for the development, refinement, and communication of such beliefs, and the ramifications of those beliefs for conduct, to both current adherents and possible converts.[334] In the same way that "[t]he right to choose ministers without government restriction underlies the well-being of religious community, for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines,"[335] the very survival of any particular set of religious beliefs and practices depends in large part on the ability of such institutions to communicate internally without government restriction. The very individual right that the Free Exercise Clause clearly protects is therefore dependent on the ability of such institutions to function free from government regulation, at least with respect to those activities that are most important to perpetuating their faith. The unquestioned protection that the Free Exercise Clause provides for an individual's internal *beliefs* (as opposed to conduct) are parallel to the protection this Article argues should come from the church autonomy doctrine for an institution's communication of its beliefs to its members. For this reason, a better name for this approach in the free exercise context is "institutional free exercise," as opposed to the "church autonomy doctrine."

This institutional free exercise reasoning is also consistent with the recent recognition that certain constitutional rights may not be fully protected unless

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[332] Lupu, *Free Exercise Exemption*, *supra* note 322, at 426.

[333] *Id.* at 427.

[334] For a more in-depth development of this view, see Brady, *supra* note 297, at 1675-77.

[335] Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1167-68 (4th Cir. 1985) (citation omitted).

the special role that certain distinct types of institutions play with respect to those rights is recognized and protected. This movement began about ten years ago, when Professor Frederick Schauer raised the issue of whether, particularly in the context of government land, government funds, and government employees, some types of institutions should enjoy a certain level of autonomy with respect to their speech, even if that speech is government-funded.[336] A number of other scholars have examined the role of such institutions and the protections that they should enjoy as institutions under both the Free Speech and Free Exercise Clauses.[337] In each of these contexts, scholars have concluded that a sensitivity to the role of particular institutions in realizing the constitutionally protected liberties at issue is needed to fully protect those liberties.[338] While the exact ramifications of this sensitivity are open to debate, it necessarily leads to broader protection for those institutions from government regulation than the courts currently provide. Moreover, whatever the strength of this approach under other provisions of the First Amendment, the unique role of religious institutions may require a greater level of institutional protection than justified in other contexts as already acknowledged by the courts.[339]

Finally, this approach would also represent an acknowledgement that just as government has, as Professor Lupu calls them, certain "enclaves," such as prisons and the military, where its control should be given great deference even in the face of free exercise claims,[340] houses of worship have similar institutional spheres of authority. In these limited contexts the authority of the religious institution should generally trump, in the same way that in the government enclaves the authority of the government generally trumped even pre-*Smith*.

### 3. Applying Institutional Free Exercise

Returning to the prohibition and political sermons, under this institutional free exercise approach at least some internal house of worship communications

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[336] Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 86-87 (1998) (discussing the possible "autonomy" of journalistic and art organizations).

[337] *E.g.*, Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 273-95 (2008) (discussing an institutional approach to the Religion Clauses, and the role of churches generally); Horwitz, *supra* note 313, at 1497-1558 (discussing universities as "First Amendment institutions"); Lupu & Tuttle, *supra* note 314, at 37-92 (addressing the broader question of whether religious institutions occupy a "distinctive place" in our "constitutional order"); *see also* Horwitz, *supra* note 313, at 1503 n.26 (citing other articles addressing the issue of institutions and First Amendment rights).

[338] *E.g.*, Horwitz, *supra* note 313, at 1512; Lupu & Tuttle, *supra* note 314, at 40.

[339] *See* Horwitz, *supra* note 313, at 1522.

[340] Lupu, *Of Time and the RFRA*, *supra* note 103, at 175, 180-81 (identifying certain "enclave" exceptions from the exemption doctrine).

should be protected from civil laws, including the tax laws. As discussed above, for many faiths the most important channel for communicating religious truths to congregations is through teaching during regular worship services.[341] At a minimum, therefore, sermons and similar oral communications during regular worship services should be protected from the prohibition. Other significant channels of internal religious communications, such as pastoral letters, encyclicals, or other less formal means of communication should also possibly be covered.[342]

Even under this approach to institutional free exercise, there are at least two arguments for it not protecting a house of worship from application of the prohibition. First, the federal tax system is another form of government enclave and so, like prisons, the military, public lands, and internal administration, government action in this area deserves special deference.[343] Unlike these other areas, however, the tax system is neither limited to a subset of the population with a special relationship to the government, nor is its effect primarily internal to the government. To label anything relating to the tax system as within a government enclave would open the door to making all government regulations enclaves – for surely they are all important to the functioning of the government – and thus eviscerate the concept of institutional free exercise even in its currently accepted form (by at least federal appellate courts).

The stronger counter-argument is that the prohibition is inherently different from the employment discrimination laws that are the subject of the existing ministerial exception. Those laws are regulatory in that they apply to all houses of worship; there is no way for a house of worship to escape the reach of those laws absent the ministerial exception. The prohibition is, however, based on a subsidy because it only applies to a house of worship that receives the benefit of tax-deductible charitable contributions. A house of worship that surrenders that benefit or subsidy is no longer subject to the prohibition.[344] So why should a house of worship that accepts this benefit be able to avoid the prohibition that accompanies it?

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[341] *See supra* notes 189-190 and accompanying text.

[342] *See* Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1539 (1979) (arguing that certain activities at the "spiritual epicenter" of a church, including religious education, should be protected from government regulation absent a compelling interest); Berg, *supra* note 308, at 208 (suggesting that an institutional autonomy approach should cover "a sermon, congregational newsletter, or other communication that would have happened anyway"); Brady, *supra* note 297, at 1698 (concluding that because of the difficulties courts face when trying to determine what regulations burden religious doctrine or practice, all church affairs should be protected by the church autonomy doctrine).

[343] *See* Lupu, *Where Rights Begin*, *supra* note 99, at 934 n.6 (drawing a parallel between the prison, military, and tax settings).

[344] *See* articles cited *supra* note 241.

The compelling response to this argument recognizes that the ability to receive charitable contribution deductions, while it can and has been characterized as a subsidy, is not like a government grant or other benefit that a house of worship applies for knowing that by doing so it may be surrendering some of its autonomy from the government. All houses of worship *automatically* receive this benefit since its creation in the second decade of the twentieth century.[345] Congress only added the prohibition decades later.[346] A house of worship that is religiously compelled to violate the prohibition in its internal communications would therefore, absent a constitutional or statutory exemption, be required to give up what has not only been a long-established benefit, but one that it never affirmatively chose to claim but instead received by default. This house of worship is therefore at an automatic disadvantage with respect to every other house of worship that does not share that particular religious conviction.

In practice, this prohibition is thus more like a regulatory provision than a subsidy, but the penalty for violating the prohibition is the fine imposed by losing the ability to receive tax-deductible contributions – a penalty that other houses of worship do not face because they do not share this particular religious conviction. The appropriate baseline here is not a house of worship without the ability to receive tax-deductible charitable contributions, because *all* houses of worship automatically have this ability. Rather, the appropriate baseline is a house of worship with the ability to receive tax-deductible contributions, so the removal of this ability actually imposes a penalty on a house of worship for its religiously motivated actions.

There is a risk that this argument proves too much, in that it could lead to the conclusion that houses of worship should not be covered by any of the limitations imposed on charities – such as the prohibition on private inurement or private benefit that are violated by, for example, excessive compensation – because any of those limitations represent as strong a violation of a house of worship's institutional freedom as the political campaign intervention prohibition. There is, however, an aspect of internal religious communications that separates it from other activities, such as the setting of compensation. That aspect is that such communications are necessary to impart religious beliefs, which are the reason for the institution's existence. Without the ability to protect such communications from government interference, the very existence of those beliefs is at risk. It is therefore this combination of the fact that the prohibition is effectively regulatory and not a subsidy because it is automatically granted to houses of worship, and the fact that internal religious

[345] *See* John A. Wallace & Robert W. Fisher, *The Charitable Deduction Under Section 170 of the Internal Revenue Code*, *in* IV RESEARCH PAPERS: TAXES 2131, 2131 (Comm'n on Private Philanthropy and Pub. Needs, Dep't of Treasury 1977) (detailing the 1917 creation of the charitable contribution deduction); *supra* note 34 and accompanying text (explaining why houses of worship are not required to apply for charitable status).

[346] *See supra* note 29 and accompanying text.

communications are essential to the maintenance and transmission of religious beliefs, that brings such communications – but not necessarily other conditions imposed by the federal tax laws on the ability to receive tax-deductible contributions – within the scope of institutional free exercise.

Finally, the protection should not be absolute. Besides the government enclave exception already discussed, a sufficiently compelling governmental interest furthered in a narrowly tailored manner could possibly be sufficient to overcome the institutional free exercise protection. For the reasons already detailed, however, the prohibition's application in this context is unlikely to meet this high standard as long as the protected political messages are only a relatively small part of a house of worship's activities.[347]

### B. *RFRA Revisited*

This institutional perspective is relevant to the Religious Freedom Restoration Act as well. RFRA, on its face, does not mention the church autonomy doctrine or any other version of institutional free exercise. It is clear, however, that Congress intended that both religious institutions and individuals could invoke RFRA's protection. The earliest versions of the legislation explicitly defined "person" as including not only individuals, but also "religious organizations, associations, and corporations."[348] No explanation is provided in the legislative history for why later versions of the legislation, including the version ultimately passed by Congress, do not include a definition for person, but in the absence of a definition in the specific statute at issue, the General Provisions of the United States Code provide "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the word[] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[349] There is nothing in the context of RFRA to indicate that that definition does not apply, and in fact, there are numerous examples provided in its legislative history that indicate its drafters and supporters intended to protect institutions as well as individuals.[350] Given the differences already discussed between these religious institutions and individuals, the question therefore is whether those differences should make a difference when applying RFRA to a religious institution. The answer to this question is that such differences may, and in the political sermon context should, matter for purposes of determining whether the affected house of worship is substantially burdened in its exercise of religion. This effect on the substantial burden analysis in turn influences the scope of any RFRA-required exception.

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[347] *See supra* Part III.C.2.

[348] S. 3254, 101st Cong. § 4(4) (1990); *see also* H.R. 4040, 102d Cong. § 5(4) (1991); H.R. 5377, 101st Cong. § 4(4) (1990).

[349] 1 U.S.C. § 1 (2006).

[350] *See* Laycock & Thomas, *supra* note 232, at 234-36.

As the language of RFRA makes clear, the key issue under the substantial burden requirement is whether the person at issue – individual or institution – bears such a burden because of the government's rule or action.[351] As previously discussed, whether a burden is substantial appears to turn on the extent of the government's interference with the exercise of religion and the extent to which the government action occurs within a government enclave, such as on public land or within government agencies.[352] An institutional perspective strengthens the argument that the political campaign intervention prohibition as applied to sermons imposes a substantial burden under RFRA for several reasons.

First, the prohibition inhibits a primary and important means of communication within the institution for religious messages.[353] That alone suggests the burden on a house of worship is substantial. Furthermore, internal house of worship communications are about as far from being a government enclave as could be imagined. They are in fact within a house of worship enclave, if the reasoning of the *Roy* and *Lyng* cases is applied to houses of worship as well as to the government. Moreover, requiring a house of worship to create a separate, although related institution to pay for and communicate the prohibited message and any activities deemed related to that message is a fundamental violation of that house of worship's integrity as an institution. The decision of whether to form a separate legal entity, no matter how closely it can be related to the house of worship parent, should not be one forced on a house of worship if it wishes to engage in internal speech on religious matters with its congregants. When combined with the difficulty, if not impossibility, of applying the "alternative channel" rationale to the unique context of sermons already described, recognition of institutional free exercise provides strong, additional support for concluding that the prohibition as applied to sermons meets RFRA's substantial burden requirement.

The institutional perspective is also relevant for determining the extent of the RFRA-required exception to the prohibition. Absent that perspective, the exception should be limited to otherwise prohibited messages communicated as part of the sermon, homily, or other teaching that is part of a regular worship service and then only for those houses of worship that can demonstrate that both their political communication and the form of that communication were religiously motivated. For the reasons already discussed, it is highly likely

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[351] *See* 42 U.S.C. § 2000bb-1(a) (2006) ("Government shall not substantially burden *a person's* exercise of religion . . . ." (emphasis added)); *id.* § 2000bb-1(b) ("Government may substantially burden *a person's* exercise of religion only if it demonstrates that application of the burden to *the person* . . . ." (emphasis added)).

[352] *See supra* Part III.B.2.

[353] *See supra* note 190 and accompanying text (discussing the critical role of teaching and preaching within houses of worship).

there are numerous houses of worship that could meet these requirements.[354] The IRS and the courts would be required to make individualized (or, perhaps in some cases, denominational-wide) determinations regarding whether these requirements are met, but this is not an overwhelming burden compared with applying the prohibition generally, especially since it does not raise more significant entanglement concerns than applying the prohibition generally, as general application already requires individualized determinations.

The institutional perspective, however, would arguably justify excluding all internal house of worship communications, or at least those that are religious in nature.[355] This is because the burden would be substantial not only due to the difficulty of separating out the costs of candidate-related communication, which only applies to sermons and similar in-service messages, but also due to the interference with the transmission of religious matters within the house of worship institution. It also would not turn on the religious motivations of the house of worship at issue, effectively assuming that sufficient religious motivation supports any religious message communicated internally by a house of worship, such that tampering with the contents of that message would substantially burden the exercise of religion by the house of worship. This perspective would therefore justify a broader exception.

## V. DEFINING THE EXCEPTION

Whether based on RFRA or the Constitution, any exception to the prohibition must be defined sufficiently to permit both the IRS to administer it and houses of worship to understand it. While this Article does not intend to address all of the possible definitional and other issues raised by the creation of such an exception, it will try to explain briefly why these issues do not appear insurmountable.

Common definitional issues will include "house of worship" and "member," assuming that a "regular worship service" is defined as a regular meeting of the house of worship's members for worship, ritual, or teaching. Other definitional issues will include "regular worship service" for the narrow exception and "internal" for the broader exception. Boundary issues will include when a worship meeting is no longer "regular" because of the presence of a large number of non-members[356] and how far a house of worship can

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[354] *See supra* notes 161, 190 and accompanying text (discussing the potential religious importance of political sermons).

[355] For an argument that all internal communications, whether explicitly religious or not, should be covered, see Laycock & Thomas, *supra* note 232, at 234.

[356] For example, is a regularly scheduled Saturday night service where many non-members are expected because of the presence of a nationally known outside speaker still a "regular worship service"?

distribute a communication before it is no longer "internal."[357] Finally, the courts would need to determine the exact limits of the exception in contexts such as prisons, the military, and other areas of particularly strong government concern.

None of these definitional concerns appear insurmountable, as both the IRS and the Federal Election Commission ("FEC") have to deal with many of these issues already in similar contexts. As has already been noted, the IRS currently must apply a definition of "church" (equivalent to the term "house of worship" used in this Article) for numerous federal tax purposes.[358] Similarly, both the IRS and the FEC have to make determinations regarding who qualifies as a "member" for various purposes under the federal tax and election laws, respectively, and the FEC has to determine whether corporations and unions have limited messages about their candidate endorsements to "internal" channels.[359]

One possible objection is that unlike in these other contexts, the question of who is a "member" may have religious significance, which could lead a house of worship to assert a broader definition than either the IRS or the FEC currently uses. At the extreme, a church with an extensive broadcast ministry might claim that it believes everyone who hears the pastor's message – that is, every television viewer and radio listener – is a member and so communications with them are "internal" to the church. Assuming that such an assertion reflects a sincere religious belief does not, however, automatically mean that such communications fall within either a RFRA or institutional free exercise based exception to the prohibition. With respect to the RFRA-based exception, the religious significance of the means of communications is almost certainly lowered when the message is part of a broadcast as opposed to an in-person service and, regardless of whether it is, the burden of having the broadcast attributed to and paid for by a non-charitable affiliate almost certainly falls below the substantial threshold. With respect to a broader, institutional free exercise based exception, there are still limits to such an exception – probably at the point the government can demonstrate a compelling interest and a narrowly tailored remedy, such as the need to prevent corruption and the appearance of corruption created by church-paid, broadcast messages supporting or opposing candidates – that would prevent its expansion to this degree even in the face of an assertion that everyone within the (electronically enhanced) sound of the pastor's voice is a member.

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[357] For example, making CDs of the sermon available in the house of worship lobby for anyone who missed it, compared with broadcasting the sermon live in the local media market, or posting the sermon on the internet.

[358] *See supra* note 296 and accompanying text.

[359] *See, e.g.*, 26 C.F.R. § 56.4911-3(a)(2) (2008) (requiring the IRS to distinguish between communications to members and nonmembers for purposes of determining whether expenditures by charities are for grassroots lobbying); *supra* note 269 and accompanying text (relating to the FEC).

As for boundary issues, most of those can be easily resolved, and so the hard cases should be relatively few. For example, it generally should be easy to distinguish between worship services that occur at the same day, time, and location each week and follow essentially the same format from one-time events in larger venues (to accommodate significant numbers of non-members), at different times and days, or from special events with one-time advertising to the general community. Similarly, reproductions or broadcasts that only primarily reach members – such as CDs sold in the house of worship's lobby, webcasts available in a members-only portion of the house of worship's website, or services piped into an overflow room – are readily distinguishable from internet, cable, radio, or television broadcasts of sermons that are readily available to and primarily reach the general public. Therefore regardless of the exact scope of the exception, that exception should be manageable by both the IRS and houses of worship.

## CONCLUSION

In the course of addressing the almost inevitable challenge to the application of the political campaign intervention prohibition to a sermon delivered during a house of worship's regular service, the courts will face a number of questions that have so far been left unanswered in the post-*Smith*, RFRA world. The ramifications of these answers may extend well beyond this important but limited context. With respect to the Free Exercise Clause, the extent and effect of the various exceptions to the rule articulated in *Employment Division v. Smith* will be at issue, although this Article ultimately concludes that even if one or more of the exceptions is available, such a challenge will fail under the existing application of the Free Exercise Clause. Under the Religious Freedom Restoration Act, the degree to which it actually imposed a higher standard than existed pre-*Smith* will be tested. That higher standard alone should be enough to render such a challenge successful in the unique context of an in-person sermon for a house of worship that is religiously motivated to both communicate a candidate-related message and to include that message in a sermon. The protection by RFRA is, however, limited to this specific factual situation, and so it will not be available for all houses of worship, including ones that do not place any religious significance on the sermon or other in-person, in-service communication.

Consideration should, however, also be given to whether the institutional setting of such a sermon requires a greater level of protection under the Free Exercise Clause than would otherwise apply. This Article argues that the institutional setting should matter. There is growing recognition that constitutional rights held by individuals are not fully protected unless there is also recognition that certain institutions play an important role in facilitating the exercise of those rights. The courts have in fact already recognized this fact to some extent for religious institutions, although both the scope of that recognition and even its specific constitutional basis remains unsettled. If, however, the role of institutions is relevant to the Free Exercise Clause at all,

that provision should generally protect sermons and other internal religious communications by houses of worship from government regulation, including the prohibition, lest the very transmission of religious beliefs within a faith body be inhibited.

This institutional perspective is also relevant to the application of RFRA. In enacting RFRA, Congress explicitly recognized that institutions as well as individuals engage in the exercise of religion. Courts should therefore consider the institutional context of federal laws that burden that exercise when determining whether that burden is in fact substantial. With that perspective in mind, it is clear that prohibiting certain content for internal religious communications by houses of worship represents a substantial burden, unless a house of worship is either willing to forgo significant tax benefits that accrue to all of its activities, or is willing to subdivide its activities (including activities related to the prohibited communication but not consisting of the prohibited communication itself) between itself and another entity. Applying the compelling government interest/least restrictive means standard to such a prohibition as it applies to the house of worship at issue, as RFRA requires, places a burden on the government that it is unlikely to be able to meet. If the government fails to meet this standard, the institutional perspective strongly suggests that not only sermons but all internal, religious communications would be substantially burdened, and so would have to be exempt from the prohibition. The recognition of institutional free exercise protection in this context would also ensure greater protection under both RFRA and the First Amendment for the internal religious communications of houses of worship. Ultimately, the recognition of protection for institutional free exercise would significantly enhance the rights guaranteed by both the Free Exercise Clause and RFRA, and so ensure the continued protection of religious beliefs of all stripes.