

ARTICLE

RFRA, CHURCHES AND THE IRS: RECONSIDERING THE LEGAL BOUNDARIES OF CHURCH ACTIVITY IN THE POLITICAL SPHERE

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The author argues that the Internal Revenue Code section governing the tax-exempt status of religious organizations infringes upon the free exercise rights guaranteed by the Religious Freedom Restoration Act. By threatening to revoke the tax-exempt status of any religious group that engages in partisan political activity, the government has effectively penalized churches for their expression of religiously held beliefs. In an attempt to overcome this problem, the author proposes a new, bright-line standard for the regulation of political activity by religious groups. Under the new standard, groups would be permitted to engage in partisan behavior but forbidden from using tax-exempt funds to support such activities. Adopting the new standard, the author concludes, would have the dual effect of facilitating IRS enforcement of the provision and avoiding the infringement of churches' free exercise rights.

Churches, along with other charitable organizations, have long been exempt from federal taxes.¹ However, this exemption is not automatic, and is predicated upon churches' abstention from certain activities within the political sphere.² Most notably, the Internal Revenue Code ("I.R.C.") prohibits churches from involvement in any activity that could be construed as supporting a political candidate's campaign.³ Churches that violate this provision are subject to the revocation of their tax-exempt status: church income is no longer exempt from taxation and individuals may no longer deduct their charitable contributions to those churches.⁴

Despite the harsh potential penalties, allegations of improper political actions by churches abounded during the 2004 presidential campaign.⁵ Numerous churches were accused of providing assistance both to Senator Kerry's and President Bush's campaigns, and both campaigns actively

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¹ 26 U.S.C. § 501(c)(3) (2000).

² See *infra* note 54 and accompanying text.

³ See *infra* note 54 and accompanying text.

⁴ See *infra* notes 49–52 and accompanying text.

⁵ See *infra* notes 96–115 and accompanying text.

solicited such assistance.⁶ The frequency with which the campaign activity prohibition was, at least allegedly, violated highlights the ineffectiveness of the current prohibition. As currently formulated, the Internal Revenue Code lacks a bright-line standard for determining whether or not actions taken by religious organizations are considered partisan, and hence unacceptable, or non-partisan and therefore permissible.⁷ Consequently, the Internal Revenue Service (“IRS”) is charged with enforcing a statute that requires a highly subjective interpretation of religious activity and that threatens to impinge upon fundamental First Amendment liberties. The combination of interpretive indeterminacy and potential infringement of constitutional rights has led to a regime in which statutory enforcement is sporadic at best and nonexistent at worst. Many churches still refrain from partisan activity—indeed, some are chilled from even participating in permissible political activity because of the guidelines’ ambiguity—but the actions of others remain largely unchecked.

And enforcement concerns are just the tip of the iceberg. A more serious, if much ignored, problem with the prohibition is its infringement upon the free exercise rights guaranteed by the Religious Freedom Restoration Act (“RFRA”). RFRA ensures that free exercise rights are not undermined by the government unless the government possesses a compelling interest for the infringement.⁸ With regard to the campaign activity prohibition, the government inaccurately bifurcates church practices into two separate spheres: the political and the religious. In so doing, the government ignores churches’ history of religiously compelled political involvement and inaccurately portrays partisan activity as beyond the bounds of religious endeavor. Having thus isolated certain church practices as non-religious, the government then penalizes churches for engaging in them by withholding the tax-exemption given to all charitable organizations.⁹ The burden this imposes is impermissible under RFRA, because the government lacks a compelling interest sufficient to justify such a broad-based prohibition on church activity.¹⁰

While the government does possess a compelling interest in prohibiting churches from spending tax-exempt funds on partisan activity—in fact, the Establishment Clause requires as much—the current prohibition is not narrowly tailored to advance that interest.¹¹ Instead, it bans broadly an entire class of protected activity, whether or not the activity implicates the relevant government interest. Consequently, the campaign activity prohibition should be held inapplicable to all church activity that does not involve the use of tax-exempt monies. This reformulation of the prohibition

⁶ See *infra* notes 96–115 and accompanying text.

⁷ See *infra* notes 84–85 and accompanying text.

⁸ See *infra* notes 150–152 and accompanying text.

⁹ 26 U.S.C. § 501(c)(3) (2000).

¹⁰ See *infra* Part IV.B.ii.

¹¹ See *infra* Part II.C.

would also provide the additional benefit of a bright-line standard that would help both the IRS in its enforcement of the provision and churches in their adherence to it.

I. HISTORICAL OVERVIEW

A. Tax Exemptions

1. Pre-American Experience

Churches have received preferential tax treatment since at least the time of Constantine,¹² and some scholars have argued that the privilege can be traced back as far as ancient Egypt¹³ or even Sumeria.¹⁴ Additional examples can be found in the early Muslim conquests and medieval Europe.¹⁵ But the American tradition of benevolent tax treatment for churches can be traced directly to the English experience.

In England, laws regarding tax exemptions for religious institutions were originally derived from two somewhat discordant roots: the common law and the equity law traditions.¹⁶ Under the common law tradition, churches and other charitable trusts were granted exemptions because they disposed of certain responsibilities that would otherwise fall to the government.¹⁷

Much of English common law was established during the English Reformation in the sixteenth century.¹⁸ At this time, the Tudors “consolidated their authority over religion and the church and subjected them to comprehensive ecclesiastical laws enforceable by both common law and com-

¹² Robert E. Rodes, Jr., *The Last Days of Erastianism: Forms in the American Church-State Nexus*, 62 HARV. THEOLOGICAL REV. 301, 317 (1969); see also MARTIN A. LARSON & C. STANLEY LOWELL, *THE CHURCHES: THEIR RICHES, REVENUES, AND IMMUNITIES* 19 (1969). After Constantine’s conversion to Christianity, he granted a series of preferences to his newfound religion, including total exemption from all taxes. See *id.* And by the time he died in 337 A.D., the Christian Church had been the recipient of several forms of tax exemptions. While later rulers revoked some of these privileges, others remained part of Roman law. See ALFRED BALK, *THE FREE LIST: PROPERTY WITHOUT TAXES* 21 (1971).

¹³ See Vaughn E. James, *Reaping Where They Have Not Sowed: Have American Churches Failed To Satisfy the Requirements for the Religious Tax Exemption?*, 43 CATH. LAW. 29, 32–35 (2004) (arguing that several examples of tax exemption for churches and clerics can be seen in pre- and post-Exodus Hebrew history).

¹⁴ John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 524 (1992). Note that the ancient Sumerian practices are more difficult to categorize because of the overlap between religious and civil institutions.

¹⁵ See *id.* at 529–31.

¹⁶ See John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363, 368 (1991).

¹⁷ This was not a full exemption in the case of many churches. Only state-established churches qualified for the exemption, the exemption did not include all taxes, and the exemption could be lifted in times of crisis. Whitehead, *supra* note 14, at 531–32. See also Witte, *supra* note 16, at 368.

¹⁸ Witte, *supra* note 16, at 369.

missary courts.”¹⁹ The common law included a substantial body of fundamentally religious law that governed everything from orthodox doctrine and morality to parish boundaries and church locations.²⁰ The church was an agency of the state and, as such, was regulated by, and intended to serve, the state. “By devoting their properties to the religious uses prescribed by the common law, church corporations and their clergy were discharging the state’s responsibility for the established religion.”²¹ And in return for providing important governmental functions, the church was rewarded with tax support and tax exemptions like other agencies of the state.²²

The church received tax exemptions from the law of equity as well, which provided tax benefits to organizations that dispensed certain social benefits.²³ Churches were excluded from taxes not because of their religious nature, but rather because of their characterization as charitable organizations. Parliament passed the Statute of Charitable Uses in 1601, providing the first working definition of charity. While the statute’s provisions were largely ignored in practice,²⁴ its preamble has proven to be hugely influential for the Internal Revenue Code’s understanding of charitable organizations.²⁵ According to the preamble, activities worthy of state support included:

[R]elief of aged, impotent and poor people, . . . maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, . . . repair of bridges, ports, havens, causeways, churches, . . . education and preferment of orphans, . . . relief, stock or maintenance for houses of correction, . . . and . . . relief or redemption of prisoners or captives.²⁶

The statute did not list religion aside from a passing reference to the “repair of churches.” Sir Francis Moore later wrote that this omission stemmed not from a desire to exclude religious activity, but instead from the hope that such an exclusion would protect church property from government confiscation.²⁷ At this point in English history, the Chantries Act

¹⁹ *Id.*

²⁰ *Id.* at 370–71.

²¹ *Id.* at 375.

²² *See id.*

²³ *See id.* at 368.

²⁴ Whitehead, *supra* note 14, at 532. *See also* Ann M. Murphy, *Campaign Signs and the Collection Plate: Never the Twain Shall Meet?*, 1 PITT. TAX REV. 35, 42 (2003).

²⁵ Christine Roemhildt Moore, *Religious Tax Exemption and the “Charitable Scrutiny” Test*, 15 REGENT U. L. REV. 295, 298 n.19 (2003) (“Notice the correlation between the organizations listed [in the Statute of Charitable Uses] and those qualifying under 26 U.S.C. § 501 (2001): churches, charities, scientific, literary and educational organizations, . . .”).

²⁶ 2 RESTATEMENT (SECOND) OF TRUSTS § 368 cmt. a (1959) (quoting Statute of Charitable Uses, 1601, 43 Eliz., c. 4 (Eng.)).

²⁷ Whitehead, *supra* note 14, at 533.

of 1547 allowed for the confiscation of all property employed in “superstitious uses.”²⁸ Because England’s established religion periodically changed between Catholicism and Protestantism, religious property was subject to the vicissitudes of the monarch’s religious affiliation. During a period of adverse religious affiliation, property employed for religious purposes by the out-of-favor denomination could be seized by the Crown under the Chantries Act as property used for superstitious purposes. Religious uses were thus:

[O]n purpose omitted in the penning of the [Statute of Charitable Uses] . . . lest the gifts intended to be employed in purposes grounded on charity might, in change of time, contrary to the mind of the giver, be confiscated into the king’s treasury; for religion, being variable according to the pleasures of succeeding princes, that which at one time is held for orthodox may, at another, be accounted superstitious; and then such lands are forfeited as appears in [the Chantries Act].²⁹

However, despite attempts to exclude “religious uses” from the category of charitable purposes, the phrase was included no later than 1639.³⁰ It has subsequently been deemed to comprise one of the four principal divisions of charity in English law.³¹

2. *The American Experience*

The Supreme Court has recognized that “[f]ew concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least [a] kind of benevolent neutrality towards churches and religious exercise generally”³² This benevolent neutrality is visible from the earliest stages of colonial existence. At first, American practices largely mimicked the English tradition of tax exemptions, though the specifics varied from colony to colony.³³ Like the English model, tax advantages were available exclusively to members of the established church. Colonies without established churches did not provide tax exemptions for any church.

Prior to the Revolutionary War, nine of the thirteen colonies had established churches.³⁴ In these colonies, the established church received

²⁸ Witte, *supra* note 16, at 376 n.49.

²⁹ *Id.* (quoting Moore, *Readings upon the Statute of 43 Elizabeth*, in G. DUKE, *LAW OF CHARITABLE USES* 131–32 (R. W. Bridgman ed. 1805)).

³⁰ *See id.*

³¹ *Comm’rs v. Pemsel*, 1891 A.C. 531, 574 (H.L.).

³² *Walz v. Tax Comm’n*, 397 U.S. 664, 676–77 (1970).

³³ *See James, supra* note 13, at 38.

³⁴ *Id.* at 38.

government assistance, either in the form of taxes levied to support the church and church personnel, or through exemptions granted to otherwise applicable taxes.³⁵ But around the time of the Revolution, American politico-religious policy shifted, moving away from established churches and toward the separation of church and state.³⁶ Several colonies disestablished their churches either at the inception of, or shortly following, the Revolution, and with the adoption of the First Amendment in 1791, disestablishment became constitutionally mandated, at least at the federal level.

But disestablishment did not prove fatal to churches' tax-exempt status. Though neither the federal constitution nor any of the state constitutions provided any basis for granting tax exemptions,³⁷ both the federal government and various state governments soon began to recognize such exemptions.³⁸ Pennsylvania led the way on the state level, adopting an amendment that specifically protected church property from taxation.³⁹ Other states, including Virginia (now over its anti-clerical phase), would follow Pennsylvania's lead.⁴⁰

Early federal tax statutes also included provisions granting limited exemptions to churches and other charitable organizations. The first such example occurred in 1802 when the Seventh Congress enacted a taxing statute for the County of Alexandria, which specifically exempted churches from taxation.⁴¹ Another exemption followed in 1812 when Congress refunded import duties to religious organizations involved in the importation of religious articles.⁴² And Congress in 1815 granted exemption from a tax on household furniture to charitable, religious and literary organizations.⁴³

The exemption of charitable organizations, including churches, remained a part of federal tax policy fifty years later, when the government passed the first federal income tax during the Civil War.⁴⁴ And in 1894, tax exemptions for religious organizations were formally recognized for the first time in the Wilson Tariff Act of 1894. The Tariff Act provided an exemption for "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes . . . [and] stocks, shares, funds, or securities held by any fiduciary or trustee for charitable, religious, or educational purposes."⁴⁵ Although the tariff was held unconstitutional by the Court a year later in *Pollock v. Farmer's Loan &*

³⁵ *Id.*

³⁶ *Id.* at 39–40.

³⁷ See D. B. ROBERTSON, SHOULD CHURCHES BE TAXED? 69 (1968).

³⁸ See James, *supra* note 13, at 40.

³⁹ See ROBERTSON, *supra* note 37, at 69.

⁴⁰ See *id.*

⁴¹ See *Walz v. Tax Comm'n*, 397 U.S. 664, 677 (1970).

⁴² See *id.*

⁴³ Act of Jan. 18, 1815, ch. 23, § 14, 3 Stat. 186, 190 (1815).

⁴⁴ See James, *supra* note 13, at 41.

⁴⁵ Tariff Act of 1894, ch. 349, § 32, 28 Stat. 509, 556 (1894).

Trust Co.,⁴⁶ for reasons unrelated to the tax exemption, it would serve as a precedent for federal tax legislation in the coming decades.

After the Sixteenth Amendment effectively overruled *Pollock* and ensured the constitutionality of federal income taxes, Congress passed new tax legislation that provided tax advantages to charities, including religious organizations.⁴⁷ Individuals were still not allowed to deduct their charitable contributions,⁴⁸ but this oversight was partially corrected in the Revenue Act of 1917.⁴⁹ And in the Revenue Act of 1921, Congress decreed that all contributions “to or for the use of corporations, community chests, funds, or foundations organized and operated exclusively for charitable, etc., purposes were deductible.”⁵⁰ Still revealing its English antecedents, the Revenue Act’s original list of qualified tax-exempt organizations was taken from the English common law of charitable uses,⁵¹ though the current list has been expanded to encompass organizations not originally included under the common law.⁵²

B. The Campaign Activity Prohibition

Today, I.R.C. § 501(a) provides a federal tax exemption for charitable organizations, § 170 permits individuals to deduct contributions to charitable organizations, and § 501(c)(3) enumerates the types of organizations that qualify for tax-exempt treatment under § 501(a). According to § 501(c)(3), the following organizations are exempt: “Corporations, and any community chest, fund, or foundation, organized and operated exclusively for *religious*, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals”⁵³

In its enumeration of qualified organizations, § 501(c)(3) largely tracks the text of earlier Revenue Acts, but the section ends with a more recent addition. After listing the various organizations that qualify for tax-exempt

⁴⁶ 157 U.S. 429 (1895), modified by 158 U.S. 601 (1895) (rejecting as unconstitutional “direct taxes” such as the Wilson Tariff).

⁴⁷ See Murphy, *supra* note 24, at 45.

⁴⁸ Massachusetts Congressman John Jacob Rogers (R) suggested as an amendment to the Tariff Act of 1913 that individuals should be able to deduct contributions made to charitable organizations, but his suggestion was rejected by Congress. See Carol A. Jones, *Hernandez v. Commissioner: The Supreme Court Forces a Square Peg into a Round Hole*, 25 WAKE FOREST L. REV. 917, 924 (1990).

⁴⁹ See Murphy, *supra* note 24, at 45.

⁵⁰ *Rockefeller v. Comm’r*, 76 T.C. 178, 185 (1981), *aff’d*, 676 F.2d 35 (2d Cir. 1982). The Revenue Act of 1921 largely paralleled the Act of 1917, but also allowed for the deduction of indirect contributions such as gifts in trust for the benefit of charities. See Murphy, *supra* note 24, at 46.

⁵¹ See Murphy, *supra* note 24, at 46.

⁵² See *id.*

⁵³ 26 U.S.C. § 501(c)(3) (2000) (emphasis added).

treatment, Congress limits the exemption, requiring organizations to make certain that:

[N]o substantial part of [their] activities . . . is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.⁵⁴

The prohibitions on lobbying and campaign activities both arose as Senate floor amendments, and neither was subject to congressional hearings.⁵⁵ Senator David Reed introduced the lobbying prohibition, passed by Congress in 1934, and then-Senator Lyndon Baines Johnson (D-Tex.) introduced the campaign activity prohibition passed two decades later in 1954.⁵⁶ Because the campaign prohibition was raised as a floor amendment and not subject to debate, the legislative record is essentially silent.⁵⁷

In the absence of a legislative record, scholars continue to debate the impetus behind the campaign prohibition. While there is no clear consensus regarding Johnson's motivation,⁵⁸ four theories dominate the discussion, three of which focus on the Johnson-Dougherty primary in 1954.⁵⁹ These three theories put forth different permutations of the argument that Johnson wanted to stop his opponent Dudley Dougherty from receiving either financial assistance or other, non-monetary aid from various chari-

⁵⁴ *Id.* (emphasis added).

⁵⁵ See Steffen Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875, 880 (2001).

⁵⁶ See *id.*

⁵⁷ See 100 CONG. REC. 9604 (1954) (statement of Sen. Johnson) (stating only that the amendment's aim was to deny tax-exempt status to "not only those people who influence legislation but also to those who intervene in any political campaign on behalf of any candidate for office"). It has been alleged that Johnson intended that the prohibition be accepted without legislative history in order to conceal his self-interested motives behind the legislation. See D. Benson Tesdahl, *Intervention in Political Campaigns After the Pickle Hearings—A Proposal for the 1990's*, 4 EXEMPT ORG. TAX REV. 1165, 1178 n.26, 1179 n.38 (1991). According to this account, Lawrence M. Woodworth, a Johnson staffer, stated that Johnson was upset about support that a political opponent was receiving from a charitable organization and requested that Woodworth draft the language that Johnson proposed later that day. *Id.* Woodworth also stated that Johnson did not want there to be any legislative history for the prohibition. *Id.*

⁵⁸ Compare Murphy, *supra* note 24, at 46–63 (arguing that the preponderance of the evidence suggests that Johnson proposed the amendment in an attempt to moderate a more far-reaching proposal from the previous day), with 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 (2001) (arguing that Johnson proposed the amendment to stop tax-exempt, charitable organizations from aiding his opponent in a political campaign).

⁵⁹ Judith E. Kindell & John Francis Reilly, *Election Year Issues* 114 (IRS publication), available at <http://www.irs.gov/pub/irs-tege/eotopic02.pdf> (last visited Nov. 23, 2005).

table organizations and used the prohibition as his means of doing so.⁶⁰ The fourth theory disputes the notion that Johnson acted out of political self-interest and suggests that, on the contrary, Johnson's proposal was a response to an intemperate, alternative proposal motivated by anti-Communist sentiment in Congress.⁶¹ According to this theory, Congress was moving to pass a more restrictive prohibition on the activities of charitable organizations, motivated by a fear that charitable foundations may be used as a vehicle for Communists or Communist sympathizers, who hoped to use putatively charitable foundations to poison American political discourse with leftist propaganda.⁶²

Whatever the reason for Johnson's action, it is clear that his motivation was unrelated to the activities of religious institutions.⁶³ "Indeed, Senator Johnson did not hesitate to coordinate support from churches when it was to his own political advantage,"⁶⁴ and the language of the amendment did not single out religious organizations in any way.⁶⁵ Churches were simply included under the broad rubric of charitable organizations. Moreover, George Reedy, Johnson's chief aide in 1954, later stated that to the best of his recollection, "Johnson would never have sought restrictions on religious organizations . . ."⁶⁶ The ban on political activity by churches is apparently the result of historical happenstance and was neither the result of any Congressional intent nor the reflection of any overarching political goal.⁶⁷

II. THE IRS GUIDELINES AND THEIR PROBLEMS

As currently formulated, the Internal Revenue Code lacks a bright-line standard for determining whether actions taken by religious organizations are partisan, and hence unacceptable, or non-partisan, and therefore permissible. As a result, the IRS is forced to attempt highly subjective interpretations of religious activity which threaten to impinge upon fundamental First Amendment liberties. This combination of interpretive indetermi-

⁶⁰ One theory is that Johnson was concerned that funds from a charitable organization were being funneled to Dougherty's campaign. See BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 504 (7th ed. 1998). Two other Dougherty-supporting organizations, Facts Forum, which produced both television shows and a national periodical, and the Committee for Constitutional Government, may have triggered Johnson's ire, and thus his proposal. See Kindell & Reilly, *supra* note 59, at 448-49.

⁶¹ See Murphy, *supra* note 24, at 49-55.

⁶² See *id.*

⁶³ See *id.* 46-63. See generally O'Daniel, *supra* note 58.

⁶⁴ Johnson, *supra* note 55, at 881.

⁶⁵ Nor were any of the charitable organizations that Johnson may have been targeting—namely, the groups he believed to be supporting his political opponents—affiliated with any religion.

⁶⁶ Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; To What End?*, 42 B.C. L. REV. 903, 917 n.51 (2001).

⁶⁷ Though, to be fair, Congress has never repealed the ban for religious groups despite several attempts by House members to pass such legislation.

nacy and potential infringement of a constitutional right have led to a regime in which only the most brazen of violators are punished, if anyone is punished at all.⁶⁸ For example, the frequency with which the campaign activity prohibition was, at least allegedly, violated in 2004 and the lack of attendant sanctions from the IRS highlights the untenable nature of the current prohibition. A number of churches still refrain from partisan activity, but the actions of many others remain largely unaffected.

A. *The Law*

As discussed above, churches, like other charitable organizations, are exempted from taxation by the Internal Revenue Code as long as they refrain from engaging in certain activities, including “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.”⁶⁹ But churches are not treated identically to other charitable organizations by the Internal Revenue Service. Unlike other tax-exempt organizations, churches do not need to apply to the IRS to obtain an advance determination that they satisfy the requirements for tax exemption under § 501(c)(3).⁷⁰ Instead, churches may simply hold themselves out as tax-exempt to congregants, and the congregants may deduct any charitable contributions they choose to make on the assumption that their church qualifies under § 501(c)(3).⁷¹

The IRS keeps track of which organizations have received a ruling or determination letter verifying their tax-deductible status in the periodically updated “Publication No. 78.”⁷² This listing can be used by donors to determine whether or not an organization has been extended tax-exempt status and assure them that their contributions are deductible under § 170(a). Donations to a church that has not been subject to a formal ruling by the IRS are deductible; however, in the event of an audit, the taxpayers claiming the deductions will be required to prove that the church met the requirements of § 501(c)(3).⁷³

The unique tax treatment of churches is also visible in the special restrictions placed on the IRS’s ability to investigate the tax-exempt status of churches.⁷⁴ The Church Audit Procedures Act established both the circumstances under which the IRS may investigate a church and the means by which it may proceed.⁷⁵ “Upon a ‘reasonable belief’ by a high-level

⁶⁸ See *Branch Ministries v. Rossotti*, 211 F.3d 137, 139 (D.C. Cir. 2000) (describing the brazen violation of a full page anti-Clinton advertisement in the *Washington Post*).

⁶⁹ 26 U.S.C. § 501(c)(3) (2000).

⁷⁰ 26 U.S.C. §§ 508(a), (c)(1)(A).

⁷¹ *Id.*

⁷² See Rev. Proc. 82-39, 1982-2 C.B. 759, §§ 2.01, 2.03.

⁷³ See *Branch Ministries*, 211 F.3d at 139.

⁷⁴ *Id.*

⁷⁵ 26 U.S.C. § 7611 (2000).

Treasury official that a church may not be exempt from taxation under section 501, the IRS may begin a ‘church tax inquiry,’⁷⁶ which is defined as:

[A]ny inquiry to a church (other than an examination) to serve as a basis for determining whether a church—

(A) is exempt from tax under section 501(a) by reason of its status as a church, or

(B) is . . . engaged in activities which may be subject to taxation⁷⁷

If the IRS is unable to make a determination on this first pass, it may opt for a more probing inquiry, a “church tax examination,” in which the IRS may examine its records and/or activities “to determine whether [the] organization claiming to be a church is a church for any period.”⁷⁸

In making its determination, the IRS need not consider whether the activity in dispute constituted a substantial part of the church’s actions, because the campaign activity prohibition is absolute.⁷⁹ As stated by the Seventh Circuit, the exemption is lost “by participation in any political campaign on behalf of any candidate for public office. It need not form a substantial part of the organization’s activities.”⁸⁰ After determining that a charitable organization has violated the campaign activity prohibition, the IRS has two weapons at its disposal: the revocation of tax-exempt status and/or the levying of § 4955 excise taxes, which are taxes levied against the church in response to political participation.⁸¹ Although Congress primarily intended § 4955 to serve as an additional penalty to revocation,⁸² the IRS also has the option of using that section by itself as an intermediate sanction in cases where the expenditure was unintentional and involved only a small amount and where the organization subsequently adopted procedures to assure that similar expenditures would not be made in the future.⁸³

Participation or intervention in political activity is never defined by the IRS,⁸⁴ but it includes, though it is not limited to, “the publication or distribution of written or printed statements or the making of oral state-

⁷⁶ See *Branch Ministries v. Rossotti*, 211 F.3d 137, 140 (D.C. Cir. 2000).

⁷⁷ 26 U.S.C. § 7611(h)(2) (2000).

⁷⁸ *Id.* § 7611(b)(1)(A),(B).

⁷⁹ See *Kindell & Reilly*, *supra* note 59, at 352.

⁸⁰ *U.S. v. Dykema*, 666 F.2d 1096, 1101 (7th Cir. 1981). See also *Ass’n of the Bar of New York v. Comm’r*, 858 F.2d 876, 877 (2d Cir. 1988).

⁸¹ See 26 U.S.C. § 4955 (2000).

⁸² See HOUSE BUDGET COMM. REP., H.R. Rep. No. 100-391, at 1623–24 (1987).

⁸³ 59 Fed. Reg. 64,359, 64,360 (Dec. 14, 1994).

⁸⁴ See *Kindell & Reilly*, *supra* note 59, at 344.

ments on behalf of or in opposition to a candidate for public office.”⁸⁵ As such, any endorsement of a candidate is strictly prohibited and even the rating of candidates on a non-partisan basis is not allowed.⁸⁶ Distributing partisan campaign literature, providing or soliciting any form of support for a political campaign or candidate, and establishing a political action committee (PAC) are similarly disallowed.⁸⁷ Purely non-partisan activities like voter registration drives and issue ads are explicitly permitted as long as they are in keeping with the organization’s tax-exempt purpose and are not a backhanded attempt to engage in partisan activity.⁸⁸ But, “[i]n situations where there is no explicit endorsement or partisan activity, there is no bright-line test for determining if the I.R.C. § 501(c)(3) organization participated or intervened in a political campaign. Instead, all the facts and circumstances must be considered.”⁸⁹ As a result, the IRS lacks the specific statutory guidance necessary to help agents determine when, and when not, to intervene in arguably impermissible church activities.⁹⁰

B. Abuses

One frequent and arguably impermissible church activity is the endorsement of candidates in political campaigns. The campaign activity prohibition has oft been honored in the breach. Both major political parties have tested its limitations. In *Branch Ministries v. Rossotti*, the D.C. District Court cited no fewer than sixty-five examples of candidates campaigning in various churches and synagogues, including episodes involving Jesse Jackson, Al Gore, Bill Clinton, Oliver North, and Rudolph Giuliani.⁹¹ And this figure is likely dwarfed by the number of political endorsements given from the pulpit by various religious leaders.

In one particularly egregious example from Rev. Jesse Jackson’s first presidential campaign, Jackson called upon black churches to provide manpower and facilities for his campaign fundraising efforts.⁹² Leading up to Super Bowl Sunday, the Jackson campaign distributed flyers and encouraged church members to bring donations for Jackson’s campaign to church

⁸⁵ Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 1990).

⁸⁶ See *Ass’n of the Bar of New York*, 858 F.2d at 878.

⁸⁷ See *Kindell & Reilly*, *supra* note 59, at 344.

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ 40 F. Supp. 2d 15, 21–22 (D.D.C. 1999). While politicians are technically allowed to address churches and synagogues, the invitation by churches to campaigning politicians smacks of intervention in a political campaign, whether or not the church’s endorsement is explicit. This interpretation is supported by the heavy reliance made by many candidates on speeches from the pulpit during campaign season.

⁹² *The D.C. Circuit Review August 1999–July 2000: Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Constitutional Law*, 69 GEO. WASH. L. REV. 554, 567 (2001).

that Sunday.⁹³ Campaign offerings were then collected separately from regular church donations by many churches.⁹⁴ The IRS did not even investigate this potential violation of § 501.

Campaign politicking increased markedly in the 2000 election, with one observer citing at least eighteen examples of questionable behavior by churches and synagogues.⁹⁵ And in 2004, politicking by churches reached an all-time high.⁹⁶ According to Americans United for the Separation of Church and State (“Americans United”), more potential violations occurred in 2004 alone than in the preceding five years combined.⁹⁷ In the first two weeks of June, Bush staffers set out to identify 1600 friendly congregations in Pennsylvania for campaign assistance.⁹⁸ President Bush also visited the Pope and reportedly complained to Cardinal Angelo Sodano, the Vatican Secretary of State, that “not all American bishops are with me.”⁹⁹ Additionally, twenty members of the House of Representatives attempted to slip a “Safe Harbor for Churches” provision, which would have allowed churches to support candidates, into a jobs bill.¹⁰⁰ This flurry of activity caused Rev. Barry Lynn, Executive Director of Americans United, to comment that “[t]his is the most concentrated dose of religion and politics I have ever seen. And it looks like it’s full steam ahead.”¹⁰¹

The Reverend’s prediction proved accurate. Veiled or outright endorsements were made in churches from Cincinnati¹⁰² to Philadelphia¹⁰³

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See O’Daniel, *supra* note 58, at 736.

⁹⁶ Telephone Interview with Dohnya Khalili, Spokesperson, Americans United for the Separation of Church and State (Dec. 2, 2004).

⁹⁷ See *id.*

⁹⁸ See Alan Cooperman, *Churchgoers Get Direction from Bush Campaign*, WASH. POST, July 1, 2004, at A6.

⁹⁹ Don Lattin, *Politics and the Church: Bush Woos Faithful with a Religious Fervor*, S.F. CHRON., June 21, 2004, at A1.

¹⁰⁰ See American Jobs Creation Act of 2004, H.R. 4520, 108th Cong., § 692 (2004). The Safe Harbor provision would have allowed pastors to engage in political activity and endorse candidates so long as they made clear that they were acting as individuals and not as representatives of the church and did not make statements in church publications, at church functions, or using church funds. The clergy would also have been allowed three unintentional violations of the statute per year, with an increased penalty for each violation. The first violation would have entailed a corporate tax on one week’s revenues, the second, a corporate tax on half of the church’s annual revenues, and the third, a corporate tax on a year’s worth of revenue. A fourth violation would have led to the full revocation of the church’s tax-exempt status. See also Lattin, *supra* note 99; Alan Cooperman, *Speaker Pushes Jobs Bill Provision: Religious Leaders Would Be Allowed More Freedom to Participate in Partisan Politics*, WASH. POST, June 9, 2004, at A19.

¹⁰¹ Lattin, *supra* note 99.

¹⁰² See Edward E. Plowman, *Pulpit Politics*, WORLD MAG., Nov. 6, 2004. At Allen Temple AME church, the minister, Donald H. Jordan stated, “I’m not worried about the law; I’m asking you to support him,” after Senator Edwards had spoken. *Id.*

¹⁰³ *Id.* At the Mt. Airy Church, Pastor Ernest C. Morris followed Sen. Kennedy to the pulpit and declared, “I can’t tell you who to vote for, but I can tell you what my mamma told me last week: ‘Stay out of the Bushes.’” *Id.*

to Aspen.¹⁰⁴ Jerry Falwell publicly admitted to supporting President Bush from the pulpit.¹⁰⁵ And pulpit appearances by campaigning politicians on both sides of the aisle were just as numerous as clerical endorsements.¹⁰⁶ Perhaps most troubling were the attempts by the Bush-Cheney campaign to use churches as recruiting grounds for its re-election campaign. In July, the Republican National Committee asked Roman Catholics who supported Bush to provide copies of their parish directories to the campaign.¹⁰⁷ The month before, the Bush-Cheney campaign had sent a detailed list of instructions to its religious volunteers across the country.¹⁰⁸ Religious Bush supporters had a list of twenty-two objectives with deadlines ranging from July 31 to October 31.¹⁰⁹ These objectives included, for example, instructions to send church directories to the Bush-Cheney state headquarters; to talk to pastors about holding Voter Registration Drives;¹¹⁰ and, as the election neared, to host campaign-related potluck dinners, distribute voter guides, and call members of the church.¹¹¹

Last but not least on the list of questionable church behavior was the distribution of the Christian Coalition's putatively non-partisan voter guides. This past summer, the Christian Coalition estimated that by Election Day it would have given out approximately thirty million voter guides,¹¹² most of which were disseminated through churches. The pamphlets selected fifteen politically charged issues and detailed each candidate's position on each issue. "[In 2004], Bush was portrayed as opposing 'unrestricted abortion on demand,' 'federal firearm registration' and United Nations command of U.S. soldiers, while Kerry was listed as offering 'no response' on each of these concerns that aroused the passion of social conservatives."¹¹³ The Christian Coalition has distributed such voter guides through

¹⁰⁴ See Deborah Frazier, *Pulpit Politics Irk Parish; Aspen Priest Angers Flock with Voting Instructions*, ROCKY MT. NEWS, Oct. 28, 2004, at 30A.

¹⁰⁵ See David Kirkpatrick, *Citing Falwell's Endorsement of Bush, Group Challenges His Tax-Exempt Status*, N.Y. TIMES, July 16, 2004, at A16.

¹⁰⁶ See, e.g., David Karp, *IRS Tells Churches: No Politics*, ST. PETERSBURG TIMES, Sept. 15, 2004, at 1B (discussing campaign stops by John Kerry and Terry McAuliffe in Orlando and Miami).

¹⁰⁷ See Frances Grandy Taylor, *Politics Pushes at the Door of Religion; Campaign Tactics Blur Church-State Line*, HARTFORD COURANT, July 24, 2004, at A1.

¹⁰⁸ See Cooperman, *supra* note 98; see also David Kirkpatrick, *Bush Appeal to Churches Seeking Help Raises Doubts*, N.Y. TIMES, July 2, 2004, at A15. Technically, individuals may support candidates, even occasionally using the church as a medium (as long as they are not the minister or rabbi), but this extensive commingling of churches and partisan activity appears to violate at least the spirit of the prohibition, if not the letter of it. See Kindell & Reilly, *supra* note 59, at 366. Perhaps more importantly, it reveals the substantial ambiguity and enforcement difficulties caused by the current terms of the prohibition.

¹⁰⁹ Cooperman, *supra* note 98.

¹¹⁰ *Id.* (internal quotations omitted).

¹¹¹ *Id.* (internal quotations omitted).

¹¹² See David Lightman, *GOP Hopes Religion Sways Midwest*, HARTFORD COURANT, Oct. 29, 2004, at A1.

¹¹³ Walter Shapiro, *Vigorous Efforts Attempt To Turn Up Voter Turnout*, USA TODAY,

churches since the 1992 elections.¹¹⁴ Moreover, no church has ever lost its tax-exempt status for assisting the Christian Coalition—despite the Internal Revenue Code’s prohibition on distributing partisan campaign literature and the fact that former Coalition executive director Ralph Reed has boasted of the political advantage that the guides provide for Republican candidates.¹¹⁵ This non-enforcement should not be surprising. In fact, no church has ever lost its tax-exempt status for distribution of any of the aforementioned literature.

C. Explanations

Despite the number of alleged violations over the years, IRS auditing activity has been extremely limited and tax reprisals by the IRS have been essentially nonexistent.¹¹⁶ In the fifty-four years following the passage of the prohibition, only two churches have ever lost their tax-exempt status and only two others have been required to pay excise taxes.¹¹⁷ The most recent church to lose its tax-exempt status demonstrates just how entangled with politics a church must become before losing its tax-exempt status.¹¹⁸

Four days before the presidential election of 1992, the Church at Pierce Creek, a Christian Church in Binghamton, New York, placed full-page advertisements in both the *Washington Post* and *USA Today*. The advertisements proclaimed, “Christians Beware. Do not put the economy ahead of the Ten Commandments.”¹¹⁹ The ads then proceeded to detail the ways in which then-governor Clinton’s positions on various issues ran afoul of Biblical precepts¹²⁰ and concluded with the question, “How then can we vote for Bill Clinton?”¹²¹ Small print at the bottom of the ad explained that, “This advertisement was co-sponsored by The Church at

Oct. 25, 2004, at 10A.

¹¹⁴ See Peter Brien, *Voter Pamphlets: The Next Best Step in Election Reform*, 28 J. LEGIS. 87, 89 (2002).

¹¹⁵ See, e.g., Steven B. Imhoof, *The Politics of Politicking Under I.R.C. § 501(c)(3): A Guide for Politically Active Churches*, 5 NEXUS 102 n.48 (2000); Shannon L. Race, *The Christian Coalition As a Tax-Exempt Organization: Federal Income Tax Recommendations for the Politically Active TEO*, 43 WAYNE L. REV. 1931, 1957 n.113 (1997).

¹¹⁶ See Murphy, *supra* note 24, at 68; Randy Lee, *When a King Speaks of God; When God Speaks to a King: Faith, Politics, Tax-Exempt Status, and the Constitution in the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 391, 424 (2001).

¹¹⁷ *Review of Internal Revenue Code Section 501(c)(3) Requirements for Religious Organizations: Hearing on H.R. 2357 Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 107th Cong. 80 (2002) (statement of Rep. Karen L. Thurman, Member, Subcomm. on Oversight). Two religious organizations that were not churches also lost their tax-exempt status during this time period. See *Branch Ministries v. Rossotti*, 40 F. Supp. 2d 18, 19 (D.D.C. 1999).

¹¹⁸ See *Branch Ministries*, 40 F. Supp. 2d at 17–19.

¹¹⁹ *Id.* at 17.

¹²⁰ *Id.*

¹²¹ *Id.*

Pierce Creek, Daniel J. Little, Senior Pastor, and by churches and concerned Christians nationwide. *Tax-deductible donations for this advertisement gladly accepted.* Make donations to: The Church at Pierce Creek,¹²² presumably to ensure that the IRS was compelled to take action.

Naturally, most churches that choose to engage in political activity employ more subtle means of communicating their messages. And the IRS's actions regarding the Church at Pierce Creek have not stopped churches from signaling support for candidates in numerous other ways.¹²³ Nor has the Church at Pierce Creek incident spurred the IRS to punish similarly clear, if more minor, violations of the statute, such as political endorsements made by ministers. There are several reasons for the continued abuses and the IRS's reluctance. First, the IRS is unwilling to punish churches severely for behavior that has historically been considered acceptable, and lacking a feasible alternative to complete revocation, the most acceptable option is complete—or near complete—abeyance from regulation. The IRS appears loath to punish churches for minor infractions. For example, no church has ever lost its tax-exempt status for endorsing a candidate or allowing a candidate to speak from the church's pulpit.¹²⁴

Second, because the IRS does not have a bright line test,¹²⁵ punishment of infractions is necessarily fact-intensive and highly subjective. Most cases of church intervention are not as obvious as that of the Church at Pierce Creek and do not involve any of the handful of acts that are deemed unacceptable.¹²⁶ Given the importance of the First Amendment freedoms at stake, the IRS appears hesitant to revoke the tax-exempt status of a church in any situation which could conceivably be construed as non-partisan. One need only consider the following ambiguities with which the IRS must contend to understand the breadth of the problem. First, the IRS must determine the difference between issue and candidate advocacy. This is significant because the issue/candidate advocacy distinction determines whether the IRS has the authority to revoke tax-exempt status: while the IRS permits charitable organizations to engage in issue advocacy, candidate advocacy is cause for revocation. IRS enforcement is difficult because there is no clear line between advocacy in support of an issue and that in support of a candidate. Consequently, churches may advocate their positions on an issue—even during a campaign period—but the IRS may theoretically revoke their tax-exempt status if it feels that the church is using a “code word” such as “pro-life”

¹²² *Id.* (emphasis added).

¹²³ Alan L. Feld, *Rendering unto Caesar or Electioneering for Caesar? Loss of Church Tax Exemption for Participation in Electoral Politics*, 42 B.C. L. REV. 931, 939 (2001).

¹²⁴ See *Branch Ministries v. Rossotti*, 40 F. Supp. 2d 18, 21–22 (D.D.C. 1999).

¹²⁵ See Kindell & Reilly, *supra* note 59, at 344.

¹²⁶ See *id.*

or “pro-choice” to stand in for a candidate.¹²⁷ Thus, the IRS is left with the unenviable task of determining when a church is speaking out on a particular issue and when its speech is really a proxy for impermissible candidate advocacy.¹²⁸ The IRS has had an understandably difficult time making that distinction.

Third, the IRS must consider the individual/organization distinction. While charitable organizations are barred from engaging in partisan political activities, the individual members of such organizations, even the heads of such organizations, are not so barred. In some circumstances, however, the acts of an individual may be imputed to his organization.¹²⁹ As a result, if the IRS wants to enforce the statute, it must differentiate between actions by individuals and actions by an organization. It must also determine in which circumstances to impute individuals’ actions to their organizations. Such judgments can be nearly impossible to make, involving fact-intensive and subjective analyses that the IRS is hesitant to undertake.

Fourth, the IRS must confront the ability of churches to circumvent the prohibition on 501(c)(3) political activity by creating 501(c)(4) organizations which establish political action committees (PACs).¹³⁰ Charitable organizations are expressly forbidden from establishing PACs.¹³¹ However, a charitable organization may establish a related, but independent § 501(c)(4) organization.¹³² Section 501(c)(4) organizations are still exempt from taxes but are not tax-deductible to donors.¹³³ Such organizations cannot conduct partisan political activity either, but they may establish their own PACs.¹³⁴ Therefore, a § 501(c)(3) organization cannot establish a PAC, but it can establish a § 501(c)(4) arm that can establish a PAC. In so doing, the § 501(c)(3) organization will still maintain its tax-exempt status, as long as the activities of the downstream organizations cannot be attributed to the § 501(c)(3).¹³⁵ While this could, in theory, appear to impose a substantial burden on churches, the IRS’s requirements are more bark than bite. Generally, as long as the organizations are separately incorporated and keep records sufficient to prove that tax-deductible contributions to the § 501(c)(3) organization are not being used to pay for the activities of the other organizations, the IRS will not attribute the acts of one organization to the other.¹³⁶

¹²⁷ See *id.* at 345.

¹²⁸ See *id.* at 346.

¹²⁹ *Id.* at 363–64.

¹³⁰ See Kindell & Reilly, *supra* note 59, and accompanying text.

¹³¹ See *id.*

¹³² *Id.* at 367.

¹³³ See 26 U.S.C. § 170(c) (2000).

¹³⁴ Kindell & Reilly, *supra* note 59, at 367.

¹³⁵ *Id.*

¹³⁶ *Id.* at 367.

Fifth, the IRS must discern between non-partisan, and partisan, and thereby impermissible, voter guides published by churches and religious organizations. Charitable organizations are prohibited from distributing voter education material produced by a candidate or PAC.¹³⁷ However, they are not prohibited from distributing voter guides, as long as those guides are non-partisan.¹³⁸ To determine whether or not the guides have a partisan agenda, the IRS must inquire whether a “wide variety of issues” are covered in the guide and whether the questions “indicate a bias toward the organization’s preferred answer.”¹³⁹ Because these hazy standards are so subjective, the IRS is rarely presented with a case in which the offending party has committed an act that is dispositively, inarguably partisan.¹⁴⁰ As a result, the IRS almost never finds churches guilty of infractions.¹⁴¹

III. THE FREE EXERCISE CLAUSE

The discernment and enforcement difficulties that the IRS confronts in its efforts to implement the guidelines as they exist currently create a regime where the power of the IRS is undermined. But practical enforcement and policy concerns are just a fraction of the problem: a more serious concern stems from the prohibition’s infringement of the free exercise rights guaranteed by the Religious Freedom Reformation Act (“RFRA”). RFRA ensures that free exercise rights may not be limited by the government unless the government possesses a compelling interest for the limitation. The campaign activity prohibition fails RFRA’s test, as the government inaccurately bifurcates church practices into two separate spheres: the political and the religious. In so doing, the government ignores churches’ history of religiously compelled political involvement and inaccurately portrays partisan activity as beyond the bounds of religious endeavor. Having thus defined certain church practices as non-religious, the government then penalizes churches for engaging in them by withholding the

¹³⁷ *Id.* at 370.

¹³⁸ *Id.*

¹³⁹ *Id.* at 371–72. One example that illustrates both a question indicating a bias toward the organization’s preferred answer and the difficulties facing IRS enforcement is this year’s Christian Coalition Voter Guide, which refers to “unrestricted abortion on demand” instead of simply asking whether a candidate supports abortion. *See* Shapiro, *supra* note 113. The wording shows a clear bias toward the pro-life view associated with the Republican Party, but could still be described as an issue in the election. The Christian Coalition guide also demonstrates the difficulty of enforcing the tax laws in another way. In order to satisfy IRS requirements, candidate questionnaires such as the Christian Coalition Voter’s Guide must send a questionnaire to all candidates and publish the unedited responses of all candidates. *See* Kindell & Reilly, *supra* note 59, at 371–72. Because Kerry did not respond to the Christian Coalition, he is listed as having “no response” to a variety of issues to which Kerry did, in fact, have a position. This discrepancy seems to serve as thinly veiled candidate endorsement.

¹⁴⁰ *Cf.* Branch Ministries v. Rossotti, 40 F. Supp. 2d 18, 21 (D.D.C. 1999).

¹⁴¹ *See id.*

tax-exemption given to all charitable organizations. This burden is impermissible under RFRA, because the government lacks a compelling interest sufficient to justify such a broad-based prohibition on church activity.

The government does possess a compelling interest in prohibiting churches from spending tax-exempt funds on partisan activities; in fact, the Establishment Clause demands such a ban.¹⁴² However, the current prohibition is not tailored to address that concern. Instead, it bans broadly an entire class of protected activity, whether or not the activity implicates the relevant government interest. Consequently, the campaign activity prohibition should be held inapplicable to all church activity that does not involve the use of tax-exempt monies. This reformulation of the prohibition would also provide a bright-line standard that would help both the IRS in its enforcement of the provision and churches in their adherence to it.

A. Applicable Law

1. RFRA

RFRA emerged from a battle between Congress and the Supreme Court over the meaning of the Free Exercise Clause of the First Amendment.¹⁴³ Prior to 1990, individuals whose free exercise rights had been burdened by the government were constitutionally entitled to relief so long as the government lacked a compelling state interest for burdening the right.¹⁴⁴ Then came *Employment Division v. Smith*,¹⁴⁵ which marked a significant turning point in the Supreme Court's Free Exercise Clause jurisprudence. *Smith* established the rule that individuals whose religious freedoms were abridged by the government were left without constitutional remedy so long as the offending law was deemed "generally applicable" and otherwise "valid and neutral."¹⁴⁶ In the wake of *Smith*, the government could more easily burden free exercise rights, a possibility which angered many members of Congress. In 1993, Congress responded by enacting the Religious Freedom Restoration Act (RFRA), which re-established the Court's pre-*Smith* compelling interest test.¹⁴⁷ A scant four years later, the Supreme Court offered its retort, ruling RFRA unconstitutional as applied to the states because of the limitations of sections of the Fourteenth Amendment.¹⁴⁸ Today RFRA remains inapplicable to the states, but it does apply to the federal government.¹⁴⁹

¹⁴² See *infra* notes 207–217 and accompanying text.

¹⁴³ See U.S. CONST. amend. I.

¹⁴⁴ See *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹⁴⁵ 494 U.S. 872 (1990).

¹⁴⁶ *Id.* at 878.

¹⁴⁷ See 42 U.S.C. §§ 2000bb to 2000bb-1 (2000).

¹⁴⁸ See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁴⁹ *Boerne* merely overruled RFRA's application to the states under section 5 of the

According to its text, the purposes of RFRA are:

- (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
- (2) to provide a claim of relief or defense to persons whose religious exercise is substantially burdened by government.¹⁵⁰

RFRA continues to state that:

- (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).
- (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.¹⁵¹

Finally, RFRA applies to “all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.”¹⁵²

14th Amendment. *Id.* at 527–29. But RFRA's applicability to the federal government is derived from Congress's Article I powers, specifically the Necessary and Proper Clause embodied in Article I, Section 8 of the Constitution. *See O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003). Every federal Court of Appeals that has squarely addressed this issue has decided that RFRA applies to the federal government. *See id.* at 400–01; *Guam v. Guerrero*, 290 F.3d 1210, 1221 (9th Cir. 2002); *Henderson v. Kennedy*, 265 F.3d 1072, 1073 (D.C. Cir. 2001); *Kilkumura v. Hurley*, 242 F.3d 950, 958 (10th Cir. 2001); *Christians v. Crystal Evangelical Free Church*, 141 F.3d 854, 856 (8th Cir. 1998). Moreover, RFRA raises the interesting question of whether one Congress can bind a later Congress in matters of statutory interpretation. *See, e.g., Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978) (Congress is “generally free to change its mind; in amending legislation Congress is not bound by the intent of an earlier body.”) However, since RFRA was passed long after the pertinent IRC provisions, that issue does not arise here.

¹⁵⁰ 42 U.S.C. § 2000bb(b) (2000).

¹⁵¹ *Id.* at §§ 2000bb(a)–(b).

¹⁵² *Id.* at §§ 2000bb-3(a). Note that the question of binding future Congresses does not exist here. *See supra* note 149.

2. Reading RFRA

RFRA's commands are quite direct. The statute requires that courts apply the compelling interest test as set forth in both *Sherbert* and *Yoder*.¹⁵³ Despite this, courts have rarely applied the *Sherbert* test in its substance to the tax law.¹⁵⁴ Still, since RFRA was enacted in 1993, five federal Courts of Appeals have reviewed RFRA challenges to tax laws.¹⁵⁵ In each case, the court applied a watered-down version of the compelling interest test, drawn from *Lee v. United States*¹⁵⁶ or *Hernandez v. Commissioner*.¹⁵⁷ The courts then held that the government was not required to accommodate the free exercise right in question.¹⁵⁸

On the surface, the compelling interest tests detailed in *Lee* and *Hernandez* are quite similar to those in *Sherbert* and *Yoder*.¹⁵⁹ But a closer examination reveals an important point of difference. Neither *Lee* nor *Hernandez* requires the government to make an affirmative showing that the disputed free exercise burden is in furtherance of a compelling government interest.¹⁶⁰ And the progeny of *Lee* have gone a step further, relying upon dicta from *Lee* to establish an unequivocal rule that the government interest in collecting taxes trumps all conflicting free exercise rights.¹⁶¹ By subtly reducing the government's burden in this way, the tests in *Lee* and *Hernandez* are unfaithful to RFRA.

When applying RFRA, this marked divergence from the *Sherbert/Yoder* compelling interest test is unacceptable for two reasons. First, this interpretation directly conflicts with RFRA's statutory language.¹⁶² The statutory text specifically names the *Sherbert* test and requires the government to "demonstrate" that it possesses a compelling interest and that the law in question is the least restrictive means of furthering that interest. Neither *Lee* nor *Hernandez* is consistent with that test. Second, the *Lee/Hernandez*

¹⁵³ See *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The compelling interest test in *Sherbert* and *Yoder* is the test discussed immediately above in the RFRA excerpt.

¹⁵⁴ See Michelle O'Connor, *The Religious Freedom Restoration Act: Exactly What Rights Does It "Restore" in the Federal Tax Context?*, 36 ARIZ. ST. L.J. 321, 329 (2004).

¹⁵⁵ *Id.* at 363. See *United States v. Indianapolis Baptist Temple*, 224 F.3d 627 (7th Cir. 2000); *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000); *Browne v. United States*, 176 F.3d 25 (2d Cir. 1999); *Adams v. Comm'r*, 170 F.3d 173 (3d Cir. 1999); *Droz v. Comm'r*, 48 F.3d 1120 (9th Cir. 1995).

¹⁵⁶ 455 U.S. 252 (1982).

¹⁵⁷ 490 U.S. 680 (1989).

¹⁵⁸ See O'Connor, *supra* note 154, at 362.

¹⁵⁹ Compare *Sherbert*, 374 U.S. at 403 (requiring an affirmative showing of a "compelling state interest" in order for the state to infringe upon free exercise rights) and *Yoder*, 406 U.S. at 221–22 (same) with *Hernandez*, 490 U.S. at 699–700 (requiring that a "substantial government interest" justify any burden placed on free exercise) and *Lee*, 455 U.S. at 258 (holding that "the state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest").

¹⁶⁰ See *Lee*, 455 U.S. at 258; *Hernandez*, 490 U.S. at 700.

¹⁶¹ See O'Connor, *supra* note 154, at 362.

¹⁶² See *id.* at 377.

approach “thwarts the purpose for which RFRA was enacted—namely, to afford additional protection to free-exercise rights.”¹⁶³ By allowing the government’s interest in collecting taxes to serve as an unassailable trump card, the courts reduce the protections afforded by RFRA to something more akin to *Smith*, the decision that prompted Congress to pass RFRA in the first place. Consequently, any analysis of the tax laws’ congruence with RFRA should utilize the test espoused in *Sherbert* and *Yoder*, as Congress has mandated.¹⁶⁴

B. Applying RFRA to the Campaign Prohibition

In order to apply the compelling interest test to the political campaign prohibition we must make three inquiries: first, whether the statute in question substantially burdens the free exercise of religion; second, if so, whether the government has a compelling interest that is furthered by the statute; and third, if so, whether the statute is the least restrictive means by which the government could accomplish its stated compelling interest.

1. Substantial Burden Inquiry

As the Supreme Court noted many years ago, “the power to tax the exercise of a privilege is the power to control or suppress its enjoyment.”¹⁶⁵ Moreover, the government may not “deny a benefit to a person because

¹⁶³ *Id.*

¹⁶⁴ Even if courts were not required to apply the *Sherbert* test in this context, the application of the *Lee* or *Hernandez* standards to the campaign activity prohibition might still sound the prohibition’s death knell. In *Hernandez*, the Court explained that it need not examine the substantiality of the burden at issue because “our decision in *Lee* establishes that even a substantial burden would be justified by the ‘broad public interest in maintaining a sound tax system,’ free of ‘myriad exceptions flowing from a wide variety of religious beliefs.’” *Hernandez v. Comm’r*, 490 U.S. 680, 699–700 (1989). Essentially, the Court adopted a position that would end most challenges to the tax laws before they even began. By asserting that the government’s interest in preserving a sound tax system outweighed the substantial burdens imposed on individuals’ free exercise rights, the Court obviated the need to further consider the infringed free exercise rights. But the present case can be easily distinguished from more paradigmatic *Lee* or *Hernandez* case. In most cases, the free exercise complaint seeks remediation in the form of an exemption from a pre-existing tax obligation. Allowing such exceptions for every burdened religion might, as *Lee* suggests, lead to an inefficient system plagued with myriad exceptions that could greatly hinder administration. But challenges to the political campaign prohibition raise an entirely different sort of free exercise claim. Instead of seeking a tax exemption, this challenge seeks an exemption from a law prohibiting certain behaviors. Thus, unlike *Hernandez* or *Lee*, the accommodation of the free exercise rights in question would not require the sort of exceptions to the tax code that the Court feared. The administration of the tax system would remain exactly as is and no new duties would be imposed on the government. As a result, any such challenge to the campaign activity prohibitions would require a Court to engage with the claim’s merits instead of summarily rejecting it for fear of complicating the administration of the tax code.

¹⁶⁵ *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990) (quoting *Murdock v. Pennsylvania*, 319 U.S. 105 (1943)) (internal quotations omitted).

he exercises a constitutional right.”¹⁶⁶ By denying tax exemptions to churches because they speak out on political matters, the campaign activity prohibition punishes them for the free exercise of religion. The prohibition is thereby the functional equivalent of fining churches for religious activity.¹⁶⁷

The question, then, is whether the campaign activity prohibition substantially concerns the free exercise of religion. It does. The campaign prohibition creates a false dichotomy, separating the words and actions of churches into two spheres: the purely political and the purely religious. In so doing, the tax laws fundamentally misrepresent what constitutes religious activity. Religion is not, and has never been, a purely academic exercise, focused only on scriptural exegeses. It is, and remains, a socially oriented endeavor, which many sects believe requires certain social obligations. German theologian Johann Baptist Metz described the social obligation that undergirds the church’s political involvement as follows: the “eschatological promises of biblical tradition—liberty, peace, justice, reconciliation—cannot be made private. They force one ever anew into social responsibility.”¹⁶⁸ This description is congruent with the historical interaction between churches and American society: “[a]s long as anyone can remember, churches have raised society’s consciousness regarding political issues. They comment on the culture, rebuke its leaders, and boldly denounce its mores, as they deem necessary.”¹⁶⁹ In the past two centuries alone, churches have played vital roles in myriad political struggles, including slavery, taxation, women’s suffrage, prohibition, civil rights, war, weapons of mass destruction, capital punishment, and abortion.¹⁷⁰

Different religious traditions interpret their social mandates in different ways. Some religious traditions shun involvement in the secular world. Some believe that they bear social and political obligations, but eschew involvement in partisan politics.¹⁷¹ Still others clearly compel their leaders and adherents to involve themselves in the political realm. Consider the examples of the Presbyterian Church (USA) and Black Churches in America.¹⁷²

¹⁶⁶ *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 545 (1983).

¹⁶⁷ *See Speiser v. Randall*, 357 U.S. 513, 518 (1958).

¹⁶⁸ Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 798 (2001) (quoting JOHANNES B. METZ, *THEOLOGY OF THE WORLD* 153 (Glen-Doepel trans., 1969)) (internal quotations omitted).

¹⁶⁹ Johnson, *supra* note 55, at 882.

¹⁷⁰ *Id.*

¹⁷¹ *See* Larry B. Stammer, *Partisanship in the Pulpit Can Be Election-Year Issue; Mingling Political and Religious Messages Can Have a Polarizing Effect. Some Members of the Clergy Find They Are Walking a Fine Line.*, L.A. TIMES, Oct. 16, 2004, at B2. The mixed feelings that churches hold about partisan activity is reflected in an August poll by the PEW Research Center and the PEW Forum on Religious and Public Life. In that poll, sixty-five percent of adults were opposed to congregations endorsing political candidates. Only twenty-five percent approved while ten percent had no opinion. *Id.*

¹⁷² Note that I have borrowed the term “African American” or “Black” Church from the

According to the policy statement of the Presbyterian Church (USA): “It is a limitation and denial of faith not to seek its expression in both a personal and public manner, in such ways as will not only influence but transform the social order. Faith demands engagement in the secular order and involvement in the political realm.”¹⁷³ As a consequence, the Presbyterian Church does not view its activity in the political realm as divorced from its religious goals. Rather, it believes such involvement to be religiously motivated and compelled.

Black churches in America have an even more well-established tradition of political action, both reformist and radical.¹⁷⁴ This tradition has shown its prominence in the churches’ role in the Underground Railroad and various abolitionist movements; by African American clergy seeking political office; by the churches’ leading and organizing the Civil Rights Movement; and in the churches’ mobilization of voters and provision of fora for political candidates to address members of the African American community.¹⁷⁵ These political activities “stemmed from the liberation tradition of the heritage of black churches,” which came into existence during the time of slavery and was fueled by the churches’ “own interpretations of Old Testament stories, prophetic pronouncements, and New Testament apocalypse.”¹⁷⁶

“[B]lack churches have a long tradition of involvement in electoral politics”¹⁷⁷ and “[i]t has been a continuous tradition for black churches to let both black and white politicians speak from the pulpit during political campaigns.”¹⁷⁸ This tradition of political involvement also emerges in the unique political obligations borne by African American clergy members. Because the clergy is financially independent and does not require financial assistance from outside the church community, there is an expectation that they will use this independence to speak out about pressing political issues, especially when others might shy away from public pronouncement.¹⁷⁹

History, tradition, and scriptural interpretation compel both the Presbyterian Church (U.S.A.) and the African American Church to in-

authors cited and intend to use it in the same sense: to refer to the seven independent, historical, totally African American-controlled denominations that were founded after the Free Africa Society of 1787. These include the African Methodist Episcopal Church; the African Methodist Episcopal Zion Church; the Christian Methodist Episcopal Church; the National Baptist Convention, U.S.A., Incorporated; The National Baptist Convention of America, Unincorporated; the Progressive National Baptist Convention; and the Church of God in Christ, along with a handful of smaller communions. *See generally* C. ERIC LINCOLN & LAWRENCE H. MAMIYA, *THE BLACK CHURCH IN THE AFRICAN-AMERICAN EXPERIENCE* 202 (1990).

¹⁷³ PRESBYTERIAN CHURCH (U.S.A.), *GOD ALONE IS LORD OF THE CONSCIENCE: A POLICY STATEMENT ADOPTED BY THE 200TH GENERAL ASSEMBLY* 48 (1998).

¹⁷⁴ *See generally* LINCOLN, *supra* note 172.

¹⁷⁵ *See* James, *supra* note 13, at 65–66.

¹⁷⁶ LINCOLN, *supra* note 172, at 202.

¹⁷⁷ *Id.* at 215.

¹⁷⁸ *Id.* at 206.

¹⁷⁹ *Id.* at 207.

volve themselves in politics in order to push for certain social goals. The scope of this obligation is a matter of religious faith and interpretation and, for obvious reasons, one best determined by religious and not secular leaders. To assert that the fulfillment of this political obligation may require issue advocacy but not candidate advocacy, or to claim that one is “religious” while the other purely political is nothing but sophistry.

The social obligations of the church compel it to advance certain social agendas. And the nature of religious leadership requires priests and ministers to discern which social goals are religiously compelled and to support those goals. For many ministers, the social values and goals that they view to be of paramount importance to be embodied by certain political parties. Churches that prioritize the preservation of human life at all stages and forms may legitimately feel that their religion requires them to support the party that opposes abortion, and churches who prioritize social equality may legitimately feel that their religion compels them to endorse the party that most nearly supports that aim. To punish churches for taking the obvious step to endorse certain candidates or parties is to limit the churches’ abilities to convey a religiously compelled message. A minister would be acting in no less of a religious capacity because he endeavors to end the oppression of racial minorities by endorsing Kennedy, a Democrat, than if he did so by supporting the Civil Rights Act. Indeed, his speech might be more effective if directed toward helping a candidate. Thus, campaign activity can be a religious exercise.

The campaign activity prohibition thus burdens the free exercise of religion in at least two ways. First, and most importantly, it impermissibly conditions the receipt of a benefit—namely tax-exempt status—upon the forfeiture of free exercise of religion. Second, it allows the government to remove religious leaders’ control over what activities and beliefs constitute religion.

This burden is magnified by the hazy standard adopted in the current statute. Because ministers are forbidden from backhandedly endorsing candidates through code words such as “pro-choice,” some ministers are likely to shy away from discussing social issues that are important to them, even though doing so is perfectly legal under current law. As one California minister explained, some clerics possess an imperfect understanding of the separation of church and state. “Unfortunately, too many preachers let that scare them from preaching about the importance of religious values, which is always a political stance,”¹⁸⁰ but not necessarily a partisan one. Consequently, these ministers limit their discussion of a large sphere of issues because they fear losing their church’s tax-exempt status. That “chilling effect” is a burden on the free exercise of religion.

While it seems clear that the prohibition burdens free exercise rights, the question remains whether the burden is substantial. After all, the gov-

¹⁸⁰ Stammer, *supra* note 171.

ernment does not forbid churches from engaging in partisan activity, which would be an obvious First Amendment violation. Rather, the government only conditions the receipt of tax-exempt status on the churches' abstention. The D.C. Circuit raised two related justifications in explaining why the campaign activity prohibition was permissible. First, the court noted that simply decreasing the amount of money available to a church for its religious practices did not rise to the level of a constitutionally cognizable burden.¹⁸¹ Second, the court explained that the federal government's decision not to subsidize an organization's First Amendment activities does not constitute a violation of the organization's First Amendment rights.¹⁸² I contend that while the D.C. Circuit cited the proper legal standard, it failed to apply it correctly to the facts at hand.

With respect to the D.C. Circuit's first argument, the court failed to grasp a fundamental distinction between the *Hernandez v. Commissioner*¹⁸³ and *Jimmy Swaggart Ministries v. Board of Equalization*¹⁸⁴ lines of cases, from which the precedent is derived, and the I.R.C.'s political prohibitions. The assertion in both *Swaggart* and *Hernandez*, that the tax burdens considered therein were not constitutionally problematic, stemmed from the fact that those burdens did nothing more than change the amount of money available for religious activity.¹⁸⁵

The campaign prohibition functions quite differently. Instead of merely causing an across-the-board decrease in available resources, the campaign-activity prohibition penalizes churches for holding, and acting upon, a specific religious belief. In *Swaggart* and *Hernandez*, the tax concerns did not affect the content of the organization's belief or practice. They affected only the quantity of the activity, not its fundamental character.

In the present case, the campaign prohibition actually warps religious practice and belief. By only withholding tax-exempt status for participating in certain activities, the government has ensured that most churches will conform their religious behavior to the government's preferences. The actual content of the religious message delivered by churches has been

¹⁸¹ *Branch Ministries v. Rossotti*, 211 F.3d 137, 142 (D.C. Cir. 2000).

¹⁸² *Id.* at 143–44.

¹⁸³ 490 U.S. 680, 699 (1989).

¹⁸⁴ 493 U.S. 378, 391 (1990).

¹⁸⁵ See *Swaggart*, 493 U.S. at 391; *Hernandez*, 490 U.S. at 699. In *Swaggart*, the court ruled on the constitutionality of a California law requiring retailers to collect a six percent sales tax for sales of certain goods. The court held that the tax was constitutional since the only burdens it placed upon Jimmy Swaggart Ministries were a reduction of income, resulting from a decrease in consumer demand for goods (which presumably would be more expensive with the tax) and administrative costs. The *Hernandez* case presented a functionally similar scenario. In *Hernandez*, the issue was whether the IRS must allow individuals who practice Scientology to deduct monies paid to the church in return for auditing services. The court ruled that the IRS was correct, and that there was no constitutionally cognizable burden because the refusal to grant a tax deduction merely decreased the amount of money available to spend on auditing. As in *Swaggart*, the tax law in question did not punish the church for certain beliefs it held. It merely reduced the amount of resources available for religious activity in general.

impacted, not just the amount that they can speak. This distinction is evident in *Swaggart*, where the court stated that “the sales and use tax is not a tax on the right to disseminate religious information, ideas, or beliefs *per se*; rather, it is a tax on the privilege of making retail sales on tangible personal property”¹⁸⁶ Neither *Swaggart* nor *Hernandez* dealt with a tax on the right to disseminate religious information, ideas, or beliefs. The tax-campaign prohibition does. Churches that convey a religious message discouraged by the state are taxed; churches who abstain are not. Consequently, the prohibition imposes a substantial burden on religious belief and cannot be cast aside as simply reducing the amount of resources available for religious activities.¹⁸⁷ For example, now liable for taxes, churches would face new administrative burdens. Some churches undeniably do have substantial income from sources other than donations, and loss of tax-exempt status would cause them significant financial injury. Moreover, there is a clear symbolic value at stake: loss of tax-exempt status suggests government disfavor and, potentially, the calling into question of the church’s religious and charitable identity. The tangible nature of these burdens, at least for some churches, probably explains why most ministers adhere to the letter of the law and show real fear of losing their tax-exempt status.

The campaign-activity prohibition can be distinguished from *Swaggart* in another way. Prior to *Swaggart*, the court had held that licensing fees that must be paid by religious organizations before they engage in religious activities were unconstitutional.¹⁸⁸ In *Swaggart*, the court limited its holding in the earlier cases to flat license taxes that served as prior restraints, noting the dissimilarity between such taxes and the taxes considered by the court in *Swaggart*.¹⁸⁹ The campaign-activity prohibition, however, bears more resemblance to the unconstitutional licensing taxes than it does to the sales tax at issue in *Swaggart*. Like the licensing taxes, the campaign prohibition acts like a prior restraint. In order to express certain beliefs, a church must surrender its tax-exempt status. The

¹⁸⁶ *Swaggart*, 493 U.S. at 389.

¹⁸⁷ One additional critique is that the burden on churches is superficial; the loss of tax-exempt status may not inflict real financial injury on churches. See Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 844–46 (2001); Feld, *supra* note 123, at 936. Church revenue is derived primarily from individual donors. In 1996, religious congregations received \$81.2 billion in total revenue. Aprill, *supra*, at 844. Of that figure, \$68 billion came from private donations, ninety-four percent of which came from individuals. *Id.* The tax code does not consider private donations to be income, and as such they are non-taxable. See 26 U.S.C. § 170 (2000). Consequently, even if a church were to lose its § 501(c)(3) status, it still would not be required to pay income taxes on donations from congregants. Feld, *supra*, at 936. And because many individuals do not take their deduction for donating to churches anyway, see Aprill, *supra*, at 845–46, they would not be impacted by the change in tax status. However, such an argument misses the point.

¹⁸⁸ *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105, 108–09 (1943).

¹⁸⁹ *Swaggart*, 493 U.S. at 386–87.

second a church engages in forbidden activity, it no longer qualifies as a tax-exempt entity under § 501(c)(3). Thus, churches are prevented—at least much of the time—from exercising their First Amendment rights by a prior restraint. Admittedly, enforcement issues may make the campaign-activity prohibition a more permeable restraint than a flat licensing tax, but the difference is not as substantial as it may appear. Much as an itinerant minister could preach without the benefit of a license until discovered by the authorities, churches today endorse political candidates and engage in political activity until discovered by the IRS. The mechanics may differ, but the principle is the same. The tax laws serve as a prior restraint on the free exercise of religion, just like the licensing taxes ruled unconstitutional by the Court in *Murdock*¹⁹⁰ and *Follett*.¹⁹¹

The D.C. Circuit's misunderstanding of the campaign-finance prohibition is also reflected in its misguided application of *Regan v. Taxation with Representation in Branch Ministries v. Rossotti*.¹⁹² In *Regan*, the court heard a challenge to the constitutionality of an I.R.C. provision banning lobbying by tax-exempt organizations. The court ruled that while the government may not deny a benefit to a person for the exercise of a constitutional right, the government is not required to subsidize First Amendment activity.¹⁹³ The court then proceeded to uphold the constitutionality of the provision. However, as three judges of the *Regan* court recognized, and the rest of the court later accepted,¹⁹⁴ the availability of alternate means of communication was essential to the constitutionality of § 501(c)(3)'s lobbying restrictions.¹⁹⁵ If no alternate means of communication existed, then "an otherwise eligible organization [would be deprived] of its tax-exempt status and its eligibility to receive tax-deductible contributions for all its activities, whenever one of those activities is 'substantial lobbying.'"¹⁹⁶ And because lobbying is protected by the First Amendment, the lack of an alternate means of communication would ensure that the I.R.C. denied "a significant benefit to organizations choosing to exercise their

¹⁹⁰ *Murdock*, 319 U.S. at 108–09.

¹⁹¹ *Follett*, 321 U.S. at 573.

¹⁹² See *Branch Ministries*, 211 F.3d 137, 143, citing *Regan v. Taxation with Representation*, 461 U.S. 540, 552–53 (1983).

¹⁹³ See *id.* at 545–46.

¹⁹⁴ See *FCC v. League of Women Voters*, 468 U.S. 364, 400–01 (1984).

¹⁹⁵ *Regan*, 461 U.S. at 552–53 (Blackmun, J., concurring). The Court subsequently confirmed that this was an accurate description of its holding. See *FCC*, 468 U.S. at 400. Also, note that neither of the seminal Supreme Court cases allowing government to impose conditions on federal funding are applicable here. *Rust v. Sullivan*, 500 U.S. 173, 197–98 (1991), endorses the *FCC* Court's analysis regarding the need for alternate avenues of communication, and *South Dakota v. Dole*, 483 U.S. 203 (1987), only addresses the federal government's ability to condition the payment of funds to states on compliance with requirements the federal government could not otherwise impose.

¹⁹⁶ *Regan*, 461 U.S. at 552 (Blackmun, J., concurring).

constitutional rights,”¹⁹⁷ a result prohibited by *Speiser v. Randall* in the absence of a compelling government interest.¹⁹⁸

The crucial distinction to be drawn between *Regan* and the situation confronted here is that the revocation of tax-exempt status is not simply a refusal by the IRS to subsidize church speech, but rather serves as a punitive measure.¹⁹⁹ In *Branch Ministries*,²⁰⁰ the Church relied on *Regan* to argue that its free exercise rights were substantially burdened because it lacked an alternate means by which to express its opinions about candidates.²⁰¹ The D.C. Circuit responded that the church retained an alternate avenue for expression, because it could set up a parallel § 501(c)(4) organization, which could then establish a PAC to communicate about candidates.²⁰² While the D.C. Circuit’s assertion may be formally correct, it misses the fundamental point of *Regan*’s “alternative means” requirement: namely, it fails to require that the institution in question retained a viable alternative to the channel of communication that had been burdened. If no viable alternative exists, then the constitutional problem cannot be remedied unless the burden is removed.

Because of the requirements imposed on the creation and maintenance of these additional organizations, communications from the PAC could not be communications from the church itself.²⁰³ While the requirements imposed on a 501(c)(3)’s ability to create downstream organizations are somewhat lax, they would still preclude the church from making related communications within the church itself and would almost certainly preclude the minister or priest from speaking on behalf of the PAC, whether within or outside the church. They would be, by legal necessity, communications from a different entity, albeit one that maintained some connection with the church. As a consequence, the church would be stripped of its religious voice, an outcome not permitted by *Regan*.²⁰⁴

Both the church’s free exercise rights and its religious/political message are bound up in the identity of the speaker to a unique degree. Unlike most organizations, churches communicate first and foremost through their ministers’ speaking to an assembled congregation. The religious character of the organization and the moral gravitas that defines it derive from this configuration. By requiring churches to communicate all religious messages with partisan connotations through a PAC that cannot even be established by the church, the connection to the church of any message issued will be attenuated; it will certainly no longer be religious. There is,

¹⁹⁷ *Id.*

¹⁹⁸ 357 U.S. 513, 528–29 (1958).

¹⁹⁹ See *Regan v. Taxation with Representation*, 461 U.S. 540, 546 (1983); *F.C.C.*, 468 U.S. at 400, for a discussion of the subsidy / penalty distinction.

²⁰⁰ *Branch Ministries v. Rossotti*, 211 F.3d 137, 143 (D.C. Cir. 2000).

²⁰¹ *Branch Ministries*, 211 F.3d at 143.

²⁰² See *supra* notes 132–136 and accompanying text.

²⁰³ See *Regan*, 461 U.S. at 552–53 (Blackmun, J., concurring).

²⁰⁴ See *id.* at 552.

quite simply, no adequate substitute available for that form of communication. Consequently, the burden placed upon churches is very substantial indeed.

The campaign-activity prohibition also substantially burdens religion and religious institutions by encroaching upon the ability of the church to define what is and what is not religious. By co-opting this authority from the church, and defining which church actions are religious and which non-religious, the government may “subtly reshape[] religious consciousness itself. In other words, by telling religion what it may say, . . . , and by telling faith where it belongs, government [may] mold[] religion’s own sense of what it is.”²⁰⁵ The First Amendment “stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.”²⁰⁶ Thus, when a civil magistrate—here the IRS—gets involved in the unhallowed business of defining and regulating religious content, the church’s free exercise rights are, almost by definition, substantially burdened.

2. *Compelling Interest Inquiry*

Because of the lack of legislative history,²⁰⁷ the compelling interest inquiry is somewhat less clear than it could be. However, while Congress has not specifically articulated what it believes the interest at stake to be, three main arguments are used to explain why the government has a compelling interest in the campaign-activity prohibition. The first argument asserts that the prohibition is required in order to maintain a tax system that can be easily administered without allowing myriad exceptions for different religious groups.²⁰⁸ The second argument is that the prohibition “reflect[s] Congressional policies that the U.S. Treasury should be neutral in political affairs.”²⁰⁹ The final argument is that the prohibition is necessary to ensure that tax-deductible money is not used for partisan activity.²¹⁰ While several of these arguments suggest that Congress may have a compelling interest in tempering churches’ *financial* involvement in electoral politics, none of them provides a compelling justification for the prohibition of activities that do not involve the expenditure of tax-exempt monies.

²⁰⁵ Garnett, *supra* note 168, at 796.

²⁰⁶ *Engel v. Vitale*, 370 U.S. 421, 431–32 (1962).

²⁰⁷ See *supra* notes 55–67 and accompanying text.

²⁰⁸ See *Hernandez v. Comm’r*, 490 U.S. 680, 699–700 (1989).

²⁰⁹ H.R. REP. NO. 100-391, pt. 2, at 1625 (1987), as reprinted in 1987 U.S.C.C.A.N. 2313-1205.

²¹⁰ See *Hernandez*, 490 U.S. at 699–700.

The first argument is the most easily dismissed.²¹¹ Simply stated, ending the campaign activity prohibition would not create any additional exceptions to the administration of the tax code. Churches would be allowed to engage in additional behavior, but the state would take on no new administrative duties, and no additional exemptions would be created.²¹² The tax system would continue to exist exactly as it does now without additional burdens on the government.²¹³

The second argument also may be untenable, as it presupposes that removing the political-activity prohibition would force the U.S. Treasury to assume some sort of non-neutral role in U.S. politics. However, this assumption is belied by the tremendous demographic differences among churches. Although it may be convenient to group churches as a block, there is no reason to think that institutions that are so diverse along such a range of dimensions (geographical location, racial demographics, etc.) would show a predictable bent toward any particular political party.²¹⁴ Even if they did, this argument would still be flawed, because it supports a prohibition on churches spending tax-exempt funds for partisan activity, not a prohibition on all forms of activity. Allowing churches to participate in putatively partisan activity would not place the Treasury at risk of non-neutrality if it forbade expenditures of tax-exempt monies for the activity.

Even if the above reasons were insufficient justifications for drawing the line at the expenditure of tax-exempt funds, the Establishment Clause would provide an additional reason for drawing this line. Over a half-century ago, the Supreme Court explained that the Establishment Clause means that “[n]either [a state nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another.”²¹⁵ Though time has seen the Court alter the test it uses to examine Establishment Clause claims, those words remain true today. As the Court made clear in *Lemon v. Kurtzman*,²¹⁶ and reaffirmed many times since,²¹⁷ the government cannot pass a law that has the primary effect of advanc-

²¹¹ See *supra* note 164 and accompanying text.

²¹² There is also no reason to think that allowing churches to become involved in partisan activity would involve additional enforcement needs. The IRS already avoids closely monitoring church activity, and it could continue to do so under a more lax standard. And by drawing the line at financial expenditures, IRS enforcement actually becomes a simpler, more objective process with an easily enforceable, bright-line rule.

²¹³ Nor would this create the need to make more exceptions for other religious organizations at a later date. See discussion *supra* note 164.

²¹⁴ And even if churches as a whole tended to side more with one party than another, this general bias might not be reflected in the political activity engaged in by churches as a block. For instance, even if more churchgoers were to hold Republican sympathies, it is possible that the most active group of churches would be African American churches that held Democratic sympathies.

²¹⁵ *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947).

²¹⁶ 403 U.S. 602, 612 (1971) (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

²¹⁷ See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997).

ing (or inhibiting) religion. Changing the tax laws to allow religious institutions a government-subsidized financial advantage over non-religious organizations in the political sphere would clearly advance religion and would provide religious organizations with a distinct advantage over their secular counterparts in the political sphere. Consequently, RFRA and the Establishment Clause serve to carve out statutory and constitutional parameters for the government regulation of politico-religious activity by churches. RFRA requires that churches be allowed to communicate religious messages—even those with a political position—without fear of financial penalty, while the Establishment Clause forbids the government from allowing churches to use their tax-exempt funds to engage in partisan activities.

V. PROPOSED SOLUTIONS

A. *A New Bright-Line Rule*

Carving out a clearly delineated safe harbor for politico-religious activity will alleviate pressing First Amendment concerns much more successfully than either the status quo or the leading alternatives.²¹⁸ While the status quo cripples enforcement efforts with interpretive ambiguities and the most discussed alternatives either fail to cure the statute's free exercise infirmities or raise new First Amendment concerns, the safe harbor proposal both palliates the existing free exercise problems and distills enforcement into a simple matter of whether or not money was spent on political activity.

As currently written, the campaign activity prohibition requires the IRS to undertake a highly subjective, fact-intensive inquiry in order to determine what behavior is acceptable and what behavior is not.²¹⁹ By instead defining the limit of permissible partisan activity to end at the expenditure of tax-exempt money for partisan purposes, the IRS could create a bright-line rule that would serve two purposes. First, it would provide churches with better guidance so that they may more successfully comply with the law, thus reducing both the chilling effect of the current law and the incidence of unintentional violations. Second, it would allow the IRS to determine more accurately which actions are and are not violations.²²⁰ Consider a few of today's most vexing concerns and how

²¹⁸ See *infra* Part V.B.

²¹⁹ See *supra* notes 89, 125 and accompanying text.

²²⁰ Of course, the IRS would still be required to make determinations involving which actions are partisan and which not partisan, but the IRS would have less cause to avoid enforcing clear violations of the law. Currently, the IRS ignores most violations, presumably because they seem so minor and the revocation of a church's tax-exempt status so disproportionate a punishment. Under the proposed interpretation, several of the most difficult problems would be resolved because the IRS would be addressing only the expenditure of tax-exempt funds. Moreover, many new gray area concerns could be alleviated by the addition of a *de minimis* spending exception. Under such a rule, *de minimis* expenditures such

easily they would be resolved under the new standard. Candidate endorsement from the pulpit would be clearly permissible, as would the distribution of voter guides produced by outside organizations, irrespective of their political bent. Candidate forums and visits also would be acceptable in most situations. Fundraising by churches, donations to campaigns, and partisan advertisements would all be forbidden.²²¹ And if the IRS did enforce these laws, there would almost certainly be little outcry, given the Establishment Clause concerns that support the IRS's position. In practice, the prohibition would exclude approximately the same range of activities, but churches would no longer be chilled from fully enjoying their free exercise rights, and churches would no longer be rewarded for violating the letter of the law. Enforcement would be scaled back little, if at all, and churches would be free to exercise their religion freely without the specter of financial punishment looming over them.²²²

B. Alternative Proposals

There are three other alternatives that have been discussed: the application of federal election disclosure rules, the adoption of a "substantial part" test, and the Crane-Rangel Amendment's five percent rule.²²³ None of these alternatives, however, address adequately both the constitutional and pragmatic policy concerns raised by the campaign-activity prohibition.

Federal election disclosure rules require an organization that speaks out on behalf of a "clearly identified" electoral candidate to disclose its expenditures if the speech is considered to be "express advocacy."²²⁴ A similar rule could be used in the church context, allowing the church to engage in political activities without fear of IRS reprisal as long as the activities did not amount to "express advocacy." However, this shift in standards would hardly solve the problem. "Express advocacy" is still not a bright-line test; thus, enforcement and adherence would remain problematic²²⁵ and would not be permissive enough to comply with RFRA.

as the allocation of meeting space or the waiver of small fees would not pose enforcement difficulties.

²²¹ While it may seem that churches could involve themselves in limited activities without the use of tax-exempt funds, the risk of commingling tax-exempt and non-tax-exempt funds makes a more prophylactic prohibition on churches spending money for partisan purposes a desirable addition to the law.

²²² This is also important because a church's ability to freely exercise its religion would no longer be dependent on its financial status or degree of risk aversion.

²²³ Erik J. Ablin, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 585-86 (1999) (discussing various proposals for removing the restrictions on church campaign activity).

²²⁴ *Id.* at 583.

²²⁵ For a discussion of the vagaries confronted by courts in the application of analogous tests, see Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46

Candidate endorsement by a minister, for instance, is protected by RFRA, but would still violate an express advocacy test.

Adopting the “substantial part” standard would allow for more church participation in political activity by applying the same § 501(c)(3) standard currently used for lobbying. A church would be allowed to involve itself in electoral activity as long as that activity did not constitute a “substantial part” of its activities.²²⁶ This proposal has two key flaws. First, the “substantial part” inquiry is extremely subjective and invites extensive regulatory oversight, which may be problematic from an Establishment Clause perspective.²²⁷ Second, the standard would allow churches to engage in activity, such as making donations to political campaigns, that is repugnant to the Establishment Clause so long as that activity did not constitute a substantial part of the church’s activity.

The Crane-Rangel Amendment—the brainchild of Representatives Philip Crane (R-Ill.) and Charles Rangel (D-N.Y.)—would have amended § 501(c)(3) to allow churches to spend funds on political campaigning so long as their expenditures did not exceed five percent of gross revenues.²²⁸ While the amendment would allow for the full enjoyment of free exercise rights guaranteed by RFRA, it would proceed one step further than it ought, by allowing churches to spend up to five percent of their revenues on electioneering activities. Because churches are tax-exempt organizations, their revenues are tax exempt. Therefore, the Crane-Rangel Amendment would permit churches to spend tax-exempt funds on partisan political activities. As discussed in Part IV, allowing churches, but not other charitable organizations, to make such expenditures probably would violate the Establishment Clause.²²⁹ And while allowing all charitable organizations to make such expenditures would alleviate the Establishment Clause concerns, it would create a regulatory and administrative nightmare for both the IRS and participating agencies²³⁰ and might also spawn entanglement concerns.

UCLA. L. REV. 1465, 1474 n.21 (1999).

²²⁶ Ablin, *supra* note 223, at 584.

²²⁷ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Probing regulatory oversight may constitute excessive entanglement in the religious context. *See generally* *Agostini v. Felton*, 521 U.S. 203, 233 (1997).

²²⁸ Ablin, *supra* note 223, at 585.

²²⁹ *See* *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997).

²³⁰ Churches and other charitable organizations would be forced to keep strict records of all revenues, and the IRS would be required to untangle the financial records of numerous nonprofits, taxing its limited resources.

VI. CONCLUSION

Both pragmatic policy concerns and free exercise concerns support abandoning the current formulation of the campaign activity prohibition. Consider, for instance, the candidate/issue dichotomy discussed above.²³¹ While churches may comment on issues, they may not comment on candidates. The IRS recognizes the easily blurred distinction between candidate and issue advocacy, and it requires that its agents make a subjective evaluation of the church's religious speech to discern issue commentary from veiled candidate commentary.²³² Given the difficulty of determining whether certain speech constitutes candidate, rather than issue, advocacy and of proving the veracity of the initial, subjective determination, the IRS is understandably loath to enforce the campaign-activity prohibition in borderline cases. The same pattern is repeated in a variety of contexts: candidate forums, the distribution of voter guides by the Christian Coalition, even candidate fundraising.²³³ Unless the violation is too visible to ignore and too partisan to debate,²³⁴ the IRS seems unwilling to enforce the prohibition.

This state of affairs may be inevitable given the fundamental nature of the right at stake and the lack of a bright-line IRS rule. The IRS must choose between substantially abandoning enforcement of the rule and becoming involved in a legal quagmire in which it must fight a battle (probably public) against various religious organizations, threatening the free exercise rights of various churches armed with nothing more than its subjective interpretation of the churches' actions. While the IRS may be able to keep most churches in line by using the occasional threat and prosecuting the most egregious offenders, the upward spike in partisan activity seen in the 2004 election suggests that the IRS may be fighting a losing battle.²³⁵ Unchecked by regulatory action, churches are likely to become more brazen in their violation of the campaign activity prohibition. And given that more vigorous enforcement of the current standard is fraught with unappealing concerns, the IRS is unlikely to engage in stricter enforcement of partisan activity unless armed with a bright-line rule upon which it can more fearlessly rely to regulate church activity.

Simply allowing churches to engage in political activity so long as they avoid spending tax-exempt money on those activities solves all of these problems. It ensures ministers and worshipers the free exercise rights

²³¹ See *supra* notes 127–128 and accompanying text.

²³² See *supra* notes 127–128 and accompanying text.

²³³ See *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000), *supra* notes 91–92, 112–115 and accompanying text.

²³⁴ One example of this type of violation is the actions taken by the Church at Pierce Creek. See *Branch Ministries v. Rossotti*, 40 F. Supp. 2d 15, 18 (D.D.C. 1999). See also *supra* notes 119–122 and accompanying text.

²³⁵ See *supra* notes 96–99 and accompanying text.

guaranteed them by RFRA, provides a bright-line test that allows churches to adhere to IRS guidelines and for the IRS to enforce those guidelines, and avoids Establishment Clause concerns by prohibiting the use of tax-exempt dollars. Prudence recommends such a course, and RFRA and the Establishment Clause command it.