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THE POLITICS OF FAITH: RETHINKING THE PROHIBITION ON POLITICAL CAMPAIGN INTERVENTION

Mark Totten*

INTRODUCTION

Recent attention to the role of religion in electoral politics has kindled new interest in what a church can say and do during an election season. Under federal tax law, churches and other charitable organizations receiving favorable tax treatment under section 501(c)(3) cannot "participate in, or intervene in ... any political campaign." The Internal Revenue Service (IRS) and the courts have interpreted this ban as both broad and absolute. It reaches not only the use of funds—an important means of regulating campaign finance—but also what a religious leader might say from the pulpit. Interpreting the general rule, the IRS draws a distinction between acceptable issue advocacy and unacceptable campaign intervention judged by a "facts and circumstances" test that encourages silence on the most pressing issues of the day. Moreover, for the first time ever, the IRS has launched an organized effort to enforce this prohibition, especially against churches. In February 2006 the IRS issued its


1. Following IRS convention, the word "church" refers to a place of worship generally and includes mosques and synagogues, but not other religious organizations. The term "faith community" as used in this Article carries the same meaning.


4. See infra text accompanying notes 19-38.


6. INTERNAL REVENUE SERV., PROJECT 302: POLITICAL ACTIVITIES COMPLIANCE INITIATIVE, FINAL REPORT (2006), available at http://www.irs.gov/pub/irs-tege/final_paci_report.pdf. "The PACI represented a change for EO Examinations in how the issue of political intervention has been addressed. In years past IRS pursued those organizations upon the receipt of a referral but only where Examination resources were
final report\textsuperscript{7} on a pilot enforcement program, the Political Activities Compliance Initiative (PACI). Of the 110 organizations investigated, 43% were churches.\textsuperscript{8} The IRS expanded the program for the 2006 mid-term elections, toward the end of providing a rapid, targeted response to alleged violations.\textsuperscript{9} In practice, this broad and absolute prohibition, together with the government's new effort to enforce it, places an unacceptable restraint on faith.

One of the more visible fruits of this effort is the investigation of All Saints Episcopal Church, one of Southern California's largest and most liberal congregations.\textsuperscript{10} The IRS has warned the church that it risks losing its tax-exempt status on account of a sermon delivered a few weeks before the 2004 election. The sermon described an imaginary debate between Jesus on the one hand and Senator Kerry and President Bush on the other.\textsuperscript{11} While disavowing any intention to tell congregants how to vote, the rector criticized both candidates, saving his harshest words for the President. He concluded by urging the congregation to "vote your deepest values." This new willingness to enforce the prohibition against churches has forged an unusual alliance in opposition that spreads across the political and theological spectrums.\textsuperscript{12}

I argue for a limited exemption from this prohibition for religious congregations. Several scholars have criticized the prohibition in the past.\textsuperscript{13}
Building on this discourse, this Article makes two distinct contributions. First, it offers an account of the unique character of faith as both total and communal, setting faith communities apart from other charitable organizations and sometimes demanding different treatment. Second, this Article looks to Congress and not the courts for relief. Most critics search for a judicial remedy, either as a matter of constitutional law under the Free Exercise Clause or under the Religious Freedom Restoration Act. Relief from the courts, however, is unrealistic in light of controlling Supreme Court precedent. Moreover, the important policy concerns at stake and the potentially broad impact of an exemption make the legislature especially suited for this task. Toward this end I sketch a legislative proposal that seeks to balance the twin goals of removing governmental restraint on the practices whereby a religious community discerns how to live out its faith in the world, while at the same time preserving the important goal of regulating campaign finance. A critical look at the rationales supporting the prohibition opens up a space to craft a more narrow rule. Part I describes the prohibition and the rationales behind it. Turning to a critical assessment, Part II examines several problems with the prohibition, including its flawed rationales, its unacceptably vague standard, and the undue restraint it places on faith. Finally, Part III argues in support of a statutory exemption and sketches what this exemption might look like.

I. THE PROHIBITION AND ITS RATIONALES

A. SCOPe, PENALTY, AND ENFORCEMENT

Section 501(c)(3) of the Internal Revenue Code identifies one set of tax-exempt organizations, primarily those "operated exclusively for religious, charitable, scientific . . . literary, or educational purposes." By virtue of their status, these organizations are both tax-exempt and qualify to receive tax-deductible donations. Furthermore, while most organizations must file for tax-exempt status and receive IRS approval, churches are automatically exempt if they satisfy the general terms of section 501(c)(3). These terms include two restrictions placed on all 501(c)(3) organizations. In addition to barring "substantial lobbying," the statute also states that a charitable organization

17. Although not the focus of this article, the Internal Revenue Code includes a second prohibition against "substantial" lobbying. A qualifying charitable organization is one in which "no substantial part of the activities . . . is carrying on propaganda, or otherwise attempting, to influence legislation." I.R.C. § 501(c)(3). Although section 501(h) creates a bright-line "expenditure test" that organizations can elect to follow, churches are expressly excluded from this measure and must satisfy the vague "substantial part" test under section 501(c)(3).
must "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."\(^{18}\)

The prohibition on political campaign intervention is wide-ranging. As the IRS recently explained: "Political campaign intervention includes any and all activities that favor or oppose one or more candidates for public office."\(^{19}\) According to the regulations, the prohibition covers not only "direct," but also "indirect" forms of intervention\(^{20}\) in national, state, and local campaigns.\(^{21}\) Forbidden activities include, but are not limited to, "the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate."\(^{22}\) The church's teaching and moral deliberations are regulated the same as any other charitable organization. The regulations do distinguish between issue- and candidate-based advocacy,\(^{23}\) allowing for the former. As we will see, however, this distinction often proves illusory. The IRS has also made clear that the prohibition is absolute. Although the restriction on lobbying allows charitable organizations to engage in limited efforts to influence legislation, the prohibition against political campaign intervention admits no exceptions.\(^{24}\)

Judicial decisions\(^{25}\) and several IRS revenue rulings\(^{26}\) have further clarified the scope of the prohibition, but neither offers much specific guidance as to how the prohibition applies to churches. Due to the sensitive issues at stake,

\(^{18}\) I.R.C. § 501(c)(3).
\(^{19}\) I.R.S. Fact Sheet, supra note 5.
\(^{21}\) Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).
\(^{22}\) Id.
\(^{23}\) Treas. Reg. § 1.501(c)(3)-1(d)(2)

(The fact that an organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under section 501(c)(3) so long as it is not an action organization of any one of the types described in paragraph (c)(3) of this section.)

\(^{24}\) I.R.S. Gen. Couns. Mem. 39,441 (Sept. 27, 1985) ("We note that, unlike influencing legislation, interventions in political campaigns are strictly prohibited for section 501(c)(3) organizations. There is no substantial test for political intervention, rather any such activity will disqualify an organization"); INTERNAL REVENUE SERV., PUB. 1828, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS, 7 (2003) ("[A]ll IRC section 501(c)(3) organizations, including churches and religious organizations, are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign"); see also Ass'n of Bar of N.Y. v. Comm'r, 858 F.2d 876, 881 (2d Cir. 1988).

\(^{25}\) See, e.g., Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000); Ass'n of Bar, 858 F.2d 876; Christian Echoes v. United States, 470 F.2d 849 (10th Cir. 1972); Haswell v. United States, 500 F.2d 1133 (Ct. Cl. 1974).

only once in its history has the IRS revoked a church’s 501(c)(3) status.27 Through various publications, however, the IRS has made clear that the prohibition applies equally to religious congregations.28 The underlying principle is that faith communities cannot say or do anything that suggests bias among the candidates. In addition to barring the transfer or use of funds on a candidate’s behalf, the prohibition affects religious congregations in three main areas.

First, the prohibition regulates candidate appearances. A congregation may invite a political candidate to speak at its events, but it must follow several guidelines. These include ensuring that no fundraising occurs and expressly stating that the event does not indicate support for or opposition to the candidate.29 The church must provide an equal opportunity to other political candidates seeking the same office.30 Second, the prohibition governs the issuance of voter guides and other printed materials related to a candidate.31 The guides must have as their purpose to educate voters and cannot directly or indirectly favor or oppose candidates.32 Scorecards that compare the candidates’ positions to the congregation’s own shared values or offer an evaluation of any kind may violate the rule.33 Furthermore, the guide cannot focus on issues of special concern to the community, absent inclusion of a broad range of issues that the candidates would address if elected to office.34 Whether that list of special concerns is abortion, marriage laws, and school vouchers, or the environment, minimum wage laws, and foreign aid, a church violates the law if it gives special attention to the candidates’ positions on issues about which the community cares the most.

Lastly, the prohibition restricts speech within the faith community, especially statements by religious leaders during a sermon or other teaching that might favor or oppose a particular candidate.35 The limits described in the

27. Branch Ministries, 211 F.3d 137.
28. I.R.S. Fact Sheet, supra note 5.
29. Id. at 8. For application of this rule to a public forum where the organization invites several candidates to a single event, see Rev. Rul. 86-95, 1986-2 C.B. 73.
32. I.R.S. Fact Sheet, supra note 5, at 9.
33. Id.
34. Id. Revenue Rule 78-248, 1978-1 C.B. 154 finds that a land conservation organization that publishes a voting guide for its members explaining where candidates stand on this issue violates the prohibition, even if the guide “contains no express statements in support of or in opposition to any candidate. While the guide may provide the voting public with useful information, its emphasis on one area of concern indicates that its purpose is not non-partisan voter education.” Presumably, if the land conversation organization would also include several other issues, the guide would not violate the prohibition.
35. The prohibition does not apply to religious leaders in their individual capacities, as any restriction of this kind would violate the First Amendment.

The political campaign prohibition is not intended to restrict free expression on political matters by leaders of organizations . . . speaking for themselves, as
context of voter guides and other printed material apply in this context, as well. The statute prohibits not only endorsements, but any speech that might favor or oppose a particular candidate.\textsuperscript{36} Furthermore, the prohibition extends not only to efforts by the congregation to influence the public, but also reaches discourse within the community, where members together discern how they might live out their faith in the world.\textsuperscript{37} Again, the IRS has made clear that the statute does not prohibit the community from speaking to important issues of public interest,\textsuperscript{38} even taking strong and controversial stands. Addressing these issues in a manner that conveys either direct or indirect support of or opposition to a candidate, however, violates the law.

Churches and other faith communities that violate this prohibition risk losing both their tax-exempt status and their ability to receive tax-deductible contributions.\textsuperscript{39} Furthermore, the IRS may choose to place an excise tax on the

\textit{individuals}... However, for their organizations to remain tax exempt under section 501(c)(3), leaders cannot make partisan comments in official organization publications or at official functions of the organization. I.R.S. Fact Sheet, \textit{supra} note 5, at 3 (emphasis added). When speaking outside this context and in their personal capacity, religious leaders should indicate that their comments are personal and not intended to represent the organization, so as to avoid potential attribution. \textit{I.d.}

\textsuperscript{36} \textit{INTERNAL REVENUE SERV., PROJECT 302, \textit{supra} note 6, at 16} (Reporting the results of the enforcement pilot project, the IRS concludes:

There were 19 instances in which a church official allegedly made a statement during a service endorsing or opposing a candidate... Project results indicated that organization officials clearly understood that express endorsements are prohibited; however, some apparently did not realize that political intervention is much broader than just express endorsements.).

\textsuperscript{37} In at least two places the IRS has indicated that one factor in deciding whether activity falls under the prohibition is the reach of the speech. Revenue Rul. 80-282, 1980-2 C.B. 178 upheld the publication of a newsletter by a 501(c)(3) organization where the newsletter contained the voting records of congressional incumbents on selected issues, in part because the organization distributed the publication only to its members, who were dispersed nationally, and included only a few thousand persons. The ruling suggested that the newsletter would likely not have an effect on the election. In IRS General Counsel Memorandum 39,441 (Sept. 27, 1985), however, the IRS found that a voter guide violated the statute where its distribution was accompanied by a press release “with the obvious intent of creating widespread publicity in the news media.” In its \textit{TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS, \textit{supra} note 24}, the IRS makes no distinctions between speech deemed “political campaign activity” that is directed at the members of the community and the same directed at the public.

\textsuperscript{38} \textit{See Treas. Reg. § 1.501(c)(3)-1(d)(2)} (as amended in 1990).

\textsuperscript{39} Section 501(c)(3) organizations are only one of at least twenty-eight types of organizations recognized under section 501(c) and eligible for tax-exempt status but the only type of tax-exempt organization under the prohibition on political campaign activity. Except for a few very limited exceptions, 501(c)(3) organizations are also the only type of organization able to receive contributions that are tax-deductible to the donor under I.R.C. § 170(a)(1). Even though other tax-exempt organizations are not under the prohibition, a charitable organization that violates it can lose both its capacity to receive tax-deductible donations and its tax-exempt status.
church and on the leaders responsible for any political expenditures.\textsuperscript{40} Minimally, IRS action will involve an audit that may prove both lengthy and intrusive. The only instance where the government has revoked a church's 501(c)(3) status was the Church at Pierce Creek, which purchased full-page advertisements in \textit{USA Today} and the \textit{Washington Times} four days before the 1992 presidential election. In opposition to then-Governor Clinton, the ads warned: "Christians Beware."\textsuperscript{41} The growing role of religious congregations in electoral politics, however, coupled with efforts by organizations such as Americans United for the Separation of Church and State to bring attention to alleged violations of the prohibition,\textsuperscript{42} has led the IRS to begin enforcing the prohibition against churches.\textsuperscript{43}

\textbf{B. REASONS FOR RESTRAINT}

The legislative history behind the prohibition is sparse.\textsuperscript{44} Then-Senator Lyndon B. Johnson inserted the provision as a floor amendment in 1954, without the benefit of congressional hearings.\textsuperscript{45} Most commentators have deemed Johnson's concerns parochial: a charitable organization was helping to fund one of his opponents in a primary election. Absent a clear policy rationale from the rule's inception,\textsuperscript{46} scholars and policymakers have filled the gap with various explanations. The four most common are the \textit{charity integrity rationale}, the \textit{exempt purposes rationale}, the \textit{subsidy rationale}, and the \textit{campaign finance rationale}.

The charity integrity rationale worries that lifting the prohibition will harm these organizations' charitable function. The IRS has offered this rationale in recent defense of the prohibition as it applies to churches. Commissioner Mark

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\textsuperscript{40} I.R.C. § 4955 (2006); I.R.C. § 4962 (2006); Treas. Reg. § 53.4955-1 (1995). The IRS has statutory authority to impose an initial tax on the organization and personally on the leaders responsible for the expenditure at the rate of 10\% and 2.5\%, respectively, of the expenditure. The statute allows an additional excise tax where the initial assessment does not equal or exceed the amount of the expenditure. Note that this sanction applies to violations in the form of monetary expenditures and would not apply to many of the violations described earlier.

\textsuperscript{41} Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000).


\textsuperscript{43} INTERNAL REVENUE SERV., supra note 6. Investigations into alleged violations by churches must follow the procedures outlined in the Church Audit Procedures Act, I.R.C. § 7611 (2006), which creates special protections for churches.

\textsuperscript{44} For an overview of the legislative history, see Dessingue, supra note 13, at 905-14; Johnson, supra note 13, at 878-81; 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).

\textsuperscript{45} 100 CONG. REC. 9,604 (1954) (statement of Senator Johnson).

\textsuperscript{46} See HOPKINS, supra note 15, at 584.
Everson remarked: "The worst thing that could happen here is that charities become vehicles of political campaigns; they lose the faith of Americans. Americans will stop giving if charities are abused. And then those in need will suffer." A recent report on the Political Activities Compliance Initiative—the new IRS enforcement effort—offers the same rationale: "If left unaddressed, the potential for charities, including churches, being used as arms of political campaigns and parties will erode the public’s confidence in these institutions." A second rationale looks to the purposes of the organizations Congress placed in section 501(c)(3) to receive special tax benefits. This rationale finds that political activity is not inherently charitable or religious and therefore the law should prohibit it.

Supporters of the prohibition often point to the subsidy rationale: a broad bar against intervention in political campaign activity is necessary to prevent the government from forcing taxpayers to subsidize political activity to which they object. The literature makes frequent appeal to this rationale and the courts have suggested it on several occasions, as well. The theory begins with the idea that tax-exempt status and the charitable deduction exist as an act of legislative grace; absent a decision by the legislature to provide these benefits, the income tax would apply. The theory then concludes that these benefits are the equivalent of an express "cash grant" from the government to tax-exempt organizations. Some commentators have suggested a strong version of the theory: government extends this favorable tax status because these organizations provide a service that the government would otherwise have to supply. The limits of this version are obvious and more plausible is a weaker version: charitable organizations provide an important benefit to society, even if it is one the government may not otherwise provide. Both versions, however, assume that the tax-benefit functions as a subsidy and both support a broad prohibition against these organizations intervening in electoral politics. If these


50. See infra text accompanying notes 54-57.


52. Murphy, supra note 49, at 64. This strong version has support in the legislative history of the Revenue Act of 1938. A House Report concluded: "The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds." H.R. Rep. No. 1860, at 19 (1938).
organizations could then support or oppose the political candidates of their choice, the taxpayer would in effect subsidize their political activities.

The appeal of the subsidy theory stems in part from its appearance in several Supreme Court opinions addressing First Amendment claims, even though the Court earlier rejected the theory.\textsuperscript{53} The seminal case is \textit{Regan v. Taxation with Representation}, involving a First Amendment challenge to the lobbying restrictions under section 501(c)(3). The Court made the strong claim that section 501(c)(3) tax benefits are in effect a governmental subsidy.\textsuperscript{54} Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants.\textsuperscript{55}

In a decision released the next day, \textit{Bob Jones v. United States}, the Court went even further, suggesting a "vicarious donor" theory: "When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors.'"\textsuperscript{56} The Court's invocation of the subsidy theory in the First Amendment context has hastened its acceptance elsewhere as an underlying policy rationale for the prohibition on political

\begin{itemize}
\item \textsuperscript{53} Walz v. Tax Comm'n, 397 U.S. 664 (1970) (rejecting a description of a municipal property tax exemption as a "direct money subsidy" to churches, which would clearly violate the Establishment Clause). \textit{Id.} at 690 (Brennan, J., concurring) ("Tax exemptions and general subsidies . . . are qualitatively different"). In subsequently adopting the subsidy theory, the Court did not expressly overrule \textit{Walz}. \textit{Regan v. Taxation with Representation of Wash.}, 461 U.S. 540, 544 n.5 (1983) ("In stating that exemptions and deductions, on one hand, are like cash subsidies, on the other, we of course do not mean to assert that they are in all respects identical." (citing \textit{Walz}, 397 U.S. 664.).

\item \textsuperscript{54} In \textit{Taxation with Representation}, the Court employed the subsidy theory to conclude that the prohibition against charitable organizations engaging in "substantial lobbying" under section 501(c)(3) does not infringe on an organization's First Amendment right to petition the government. To avoid the problem of an "unconstitutional condition"—the denial of a governmental benefit on a basis that infringes a person's constitutionally protected interest—the Court likened the tax benefit to a subsidy and argued that the organization did not have the right to lobby on the government's tab. \textit{Taxation with Representation}, 461 U.S. at 546. The Court did not have to rely on the subsidy theory, however, to reach this end. As the concurrence concluded, and the Court later affirmed in \textit{FCC v. League of Women Voters}, 468 U.S. 364, 400 (1984), "[t]he constitutional defect that would inhere in § 501(c)(3) alone is avoided by § 501(c)(4)." \textit{Taxation with Representation}, 461 U.S. at 552 (Blackmun, J., concurring). Under this second statutory provision, the organization had another means to retain its tax-exempt status and still lobby.

\item \textsuperscript{55} \textit{Taxation with Representation}, 461 U.S. at 544. A decade earlier in \textit{Christian Echoes Nat'l Ministry v. United States}, 470 F.2d 849, 853-54 (10th Cir. 1972), a lower court appealed to the tax subsidy theory, giving no mention of \textit{Walz}, but instead discerning a general congressional policy.

\item \textsuperscript{56} 461 U.S. 574, 591. Later cases have employed the theory, as well. \textit{See} \textit{Texas Monthly v. Bullock}, 489 U.S. 1, 15 (1989); \textit{Branch Ministries v. Rossotti}, 211 F.3d 137, 144 (D.C. Cir. 2000) (invoking the subsidy theory against a constitutional challenge by a church to the political campaign prohibition).
campaign intervention.

A final rationale supports the prohibition as a means to regulate campaign finance. Constitutional concerns and a long tradition of reticence on the part of the government to interfere in church affairs has meant the absence of almost any state or federal oversight of church financial matters. The IRS assumes that churches are tax-exempt.\(^{57}\) Furthermore, churches have no ongoing reporting requirements with the agency.\(^{58}\) Lifting the prohibition, critics fear, would open an extraordinary loophole in campaign finance regulation, allowing otherwise non-deductible political contributions to become tax-free merely by dropping them in the collection plate.

II. THE PROHIBITION AND ITS FAILURES

Applied to churches this prohibition is problematic on a number of counts: the policy rationales cannot support it, the IRS's interpretation of the prohibition is unacceptably vague, and most importantly, it places an undue restraint on faith.

A. A FLAWED RATIONALE

Although the campaign finance rationale is sound, it does not support the current broad and absolute prohibition, which covers various forms of expression within a church that bear only de minimis cost. Neither can the charity integrity rationale sustain it. The question of what hinders or advances the mission of a church, synagogue, or mosque is not a question that the government can or should answer. Nor is the concern whether the content of a pastor's sermon might weaken contributions to the church a governmental concern. These are questions solely for the church. Likewise, the exempt purposes rationale provides questionable support for the prohibition as it applies to churches. Although organizations falling under the 501(c)(3) umbrella are routinely referred to as "charitable organizations," the statute identifies several purposes, "charitable" being only one of them.\(^{59}\) Under general rules of statutory interpretation, a "religious" purpose is not identical to a "charitable" purpose. The question becomes, then, whether a religious purpose might include activities disallowed under the current rule. As I will argue in Part II.C, the nature of lived faith does not allow for an easy divide between faith and politics, especially concerning expression on certain moral

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59. I.R.C. § 501(c)(3) (2006) (covering organizations "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").
and political issues.

Finally, the subsidy theory likens the tax benefits that 501(c)(3) organizations receive to a cash grant and concludes that absent the prohibition the government would force taxpayers to subsidize objectionable political activity. This theory falters on two counts. First, it is not obvious that a tax-exemption and the ability to receive tax-deductible contributions amounts to a governmental subsidy. The Court’s reasoning in Walz, a First Amendment case prior to Taxation with Representation, is useful in this context as well. In Walz the Court distinguished tax exemption from a subsidy: “The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.” Moreover, even if these tax benefits did amount to a governmental subsidy, concluding that taxpayers are forced to subsidize political speech with which they disagree is implausible. The same reasoning the Court has offered in the constitutional context applies in the policy context, as well: the broad range of political viewpoints expressed from pulpits across the United States dilutes any claim that a taxpayer is subsidizing a particular position she finds objectionable.

B. AN UNWORKABLE STANDARD

Aside from failures of rationale, a standard that prohibits activities that “favor” or “oppose” a candidate for public office is unacceptably vague. The IRS has made clear that it must apply the standard on a case-by-case basis: “The Code contains no bright line test for evaluating political intervention; it requires careful balancing of all of the facts and circumstances.” Although the law often employs standards to capture subtleties that a bright line rule might miss, the costs here are too great. The law may silence faith communities on certain critical issues of public importance, while leaving religious leaders uncertain about where to draw the line.

These costs are perhaps most apparent where the IRS seeks to police the supposed line between legitimate issue advocacy and political campaign intervention. The All Saints investigation is illustrative. Before describing the imagined debate between Jesus and the candidates, the church’s former rector George Regas announced: “Jesus does win! And I don’t intend to tell you how to vote.” He then went on to explain what Jesus might say to the candidates on three issues of special concern to the congregation: “ending war and

62. INTERNAL REVENUE SERV., PROJECT 302, supra note 6, at 1. See also Rev. Rul. 86-95, 1986-2 C.B. 73.
63. See Biederman & Felch, supra note 10. For the text of the sermon, see Regas, supra note 11.
64. Regas, supra note 11, at 1.
violence, eliminating poverty, and holding tenaciously to hope." 65 Although he never explicitly endorsed a candidate, Regas urged members of the congregation to "vote your deepest values." 66 He offered no positive comments about Kerry, but the degree of criticism leveled at the President and his policies indirectly favored the Senator. At the same time, Regas did not criticize the President alone. At several points in the imagined debate, it was Jesus versus the candidates. On issues of peace and violence, Regas stated: "I believe Jesus would say to Bush and Kerry: 'War is itself the most extreme form of terrorism.'" 67 Of course, Kerry voted for the war in Iraq and, though at times sending mixed signals, continued to support the war throughout the campaign.

While the line between partisan intervention and issue advocacy is appealing in theory, the All Saints example shows that it is flawed in practice. The defect stems from the fact that the standard judging political campaign intervention is vague. As stated earlier, "[p]olitical campaign intervention includes any and all activities that favor or oppose one or more candidates," 68 whether that support is direct or indirect. 69 Although elections are always about more than just "the issues," they are always about the issues in some manner. The candidates, in fact, take on a symbolic significance and come to represent a medley of positions on various issues. Since the candidates are tied to certain issues, issue advocacy is bound to become prohibited political intervention under a vague standard that prohibits indirect political expression judged to favor one candidate or another. The more impassioned the speaker addressing an issue, the more likely a violation will occur. The easy distinction which the IRS trumpets, assuring church leaders they can still address the great moral challenges of the day without fear of government oversight, does not work in practice.

Even if this line does exist, religious congregations are hard-pressed to discern where the IRS will draw it on a case-by-case basis. Although the past lack of enforcement means that some religious leaders routinely flaunt the prohibition, in other cases the result of this uncertainty is a chilling effect on otherwise legitimate speech. 70 Addressing political issues, many religious leaders might conclude, is too great a risk. The vagueness of the standard, coupled with the severity of the penalty and the uncertainty of enforcement, makes a compelling case for revision.

65. Id.
66. Id. at 6.
67. Id. at 1.
68. I.R.S. Fact Sheet, supra note 5, at 2.
C. AN UNDUE RESTRAINT ON FAITH

The most weighty criticism arises out of the unique character of faith as both total and communal. These qualities set the faith community apart from every other charitable organization and render the prohibition a restraint not only on political intervention, but on faith itself. The law cannot bless everything done in the name of faith, but in this case the restraint is too great.

First, the claims of faith are total. This is not to deny that for some people the experience of faith is something both genuine and less than all-encompassing, perhaps even a series of rituals performed at a set day and time with few implications for the rest of the week. Nonetheless, the experience of faith for the vast majority of believers in the United States is an experience of something that places claims on every area of one's life. Certainly this is true for many Christians, who cover the broad swath of the American religious landscape, and also for many Jews and Muslims. That the lived experience of faith has this character should not come as a surprise, since faith concerns an understanding of the ultimate—the ultimate character of the world, the ultimate purpose for existence, and an understanding of God as the “Ultimate.”

71. For representative statements, see the following: CENT. CONFERENCE OF AM. RABBIS, A STATEMENT OF PRINCIPLES FOR REFORM JUDAISM (1999), available at http://data.ccaernet.org/platforms/principles.html; EVANGELICAL LUTHERAN CHURCH IN AM., CHURCH IN SOCIETY: A LUTHERAN PERSPECTIVE, available at http://www.elca.org/socialstatements/churchinsociety (“God's good and just demands address people in the obligations of their relationships and the challenges of the world.”); NAT’L ASS’N OF EVANGELICALS, FOR THE HEALTH OF THE NATION: AN EVANGELICAL CALL TO CIVIC RESPONSIBILITY 2 (2005), available at http://www.nae.net/images/civic_responsibility2.pdf (“We . . . engage in public life because Jesus is Lord over every area of life.”); POPE JOHN PAUL II, VERITATIS SPLENDOR pt. 4 (1993), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html (“the Popes . . . have developed and proposed a moral teaching regarding the many different spheres of human life.”); PRESBYTERIAN CHURCH (U.S.A.), WHY AND HOW THE CHURCH MAKES A SOCIAL POLICY WITNESS pt. 1 (1993), available at http://www.pcusa.org/acswp/index.htm (follow “Presbyterian Social Witness Policy Compilation” hyperlink; then follow “1993 Statement – PC(USA), pp. 780-781” hyperlink) (“In [the church], discernment of God’s will for all human life, including the public realm, takes place.”); S. BAPTIST CONVENTION, THE BAPTIST FAITH AND MESSAGE pt. XV (2000), available at http://www.sbc.net/bfm/bfm2000.asp (“All Christians are under obligation to seek to make the will of Christ supreme in our own lives and in human society. . . . Every Christian should seek to bring industry, government, and society as a whole under the sway of the principles of righteousness, truth, and brotherly love.”). The totality of the claims that Islam places upon believers appears throughout the Qur’an, especially in the concept of “submission” (the root of Islam means “submission”). See, for example, 6:162-163, where the Qur’an instructs the Prophet: “Say (O Muhammad) my prayer, my sacrifice, my life and my death belong to Allah; He has no partner and I am ordered to be among those who submit (Muslims).”

72. See supra note 71.

73. For demographic information on the religious traditions in America, see the website of The Association of Religion Data Archives: http://www.thearda.com.
exists as the final source of allegiance—above family, friends, co-patriots, and the state. Faith traditions, in particular those of Christianity, Judaism, and Islam, have *cosmologies* (narratives about beginnings) and *eschatologies* (narratives about last things), which shape everything in between and together cast a theological vision for possibilities and responsibilities in this world.

Consequently, faith touches every area of life. This is not to suggest that persons within the traditions always have a shared understanding of how to live out that faith in the world. How persons of faith and the communities they form construe sacred texts, other writings and narratives in the tradition, empirical knowledge, and their own experience to arrive at a shared ethic will differ from one community to the next, and voices from within will dissent. Nonetheless, the all-encompassing character of faith remains. It reaches life and death, sexuality, marriage, vocation, suffering, war and peace, the environment, and certainly politics where members of a society seek to forge a workable compromise on these and many other issues of pressing social concern. The 1934 Barmen Declaration,\(^74\) issued by the German Evangelical Church one year after Hitler seized power, was a momentous statement of the total claim that faith places upon the believer. The Declaration voiced opposition to Nazi rule, which sought either to silence or subvert the church for its own nationalistic purposes.\(^75\) Rejecting both options, the signers declared: "We reject the false doctrine, as though there were areas of our life in which we would not belong to Jesus Christ, but to other lords . . . .\(^76\)

Second, the practice of faith is also communal.\(^77\) The faith community often plays a vital role in shaping how a person lives out her faith in the world. For most Christians, Jews, and Muslims, and for many persons of other traditions as well, faith is not a solo experience. Believers usually do not settle on a set of favored beliefs and practices and then look for others with a similar list. Many are born into a faith community, or join one with more questions than answers. Faith takes shape within the bounds of a particular community—First Baptist Church, the Congregation of Moses, or the Islamic Center of Greenwood—and within a particular denomination or sect—Catholicism,

\(^74\) Confessing Church, Theological Declaration of Barmen (1934), available at http://www.creeds.net/reformed/barmen.htm.
\(^75\) Id.
\(^76\) Id. at ¶8.15.
\(^77\) See, e.g., Evangelical Lutheran Church in Am., supra note 71 ("As a community of moral deliberation, the church seeks to 'discern what is the will of God' . . . . Christians struggle together on social questions in order to know better how to live faithfully and responsibly in their callings."); Mennonite Church U.S.A., Confession of Faith in a Mennonite Perspective Art. IX (1995), available at http://www.mcusa-archives.org/library/resolutions/1995/index.html ("The church is the assembly of those who voluntarily commit themselves to follow Christ . . . . [T]he church . . . . seeks to discern God's will."); Presbyterian Church (U.S.A.), supra note 71 (Under the heading "The Church as a Community of Discernment," the document concludes: "In this community, discernment of God's will for all human life, including the public realm, takes place.").
Reformed Judaism, or Sunni Islam.

How communities discern the implications of their faith will vary. For some traditions, guidance may come from an ordered hierarchy within the tradition. The papal encyclical *Evangelium Vitae* (1995) provides authoritative teaching for Catholics on issues of abortion and euthanasia. While individual Catholics may reject this teaching, it remains authoritative within the Church. A local faith community may gather to discern guidance on particular issues. Special services of prayer and reflection during times of war may function not only to express the commitments of the community, but also to form them. More often, the process by which the community shapes its practice of faith is less formal. Through the breaking of bread, communal prayers, reading from sacred texts, meeting in small groups, celebrating holy days, sharing in worship, participating in the liturgy, teaching and preaching, and other practices the community arrives at a shared understanding of how it might live out its faith in the world. This is not to say that the community is the only source of moral formation, or that individuals never dissent. Rather, the point is that the community plays a central role in shaping the practice of faith. Lived faith is almost always a shared experience.

These marks of faith as both total and communal set faith communities apart from other charitable organizations and explain why the broad prohibition is so injurious when applied to churches, synagogues, and mosques. The shared interest in one or more related issues that brings people together to advance the purposes of a charitable organization is unlike the total claim that faith places upon members of a religious community. Even where a person is so devoted to a particular cause that it consumes all of her time and energy, seldom does the cause present itself as an all-encompassing claim on the self, rooted in an account of the ultimate (and if it does, it is perhaps better described with religious language). The difference is that the claims of one are total, the claims of the other are not. The American Cancer Society, the Museum of Modern Art (MOMA), and The Nature Conservancy are filled with people devoted to cancer research, the arts, and land conservation, but their posture toward their cause is qualitatively different from the posture of many believers toward their religious traditions and the commitments they represent. Members of The Nature Conservancy join together out of a shared commitment “to preserve the plants, animals and natural communities that represent the diversity of life on Earth;” members of the Presbyterian Church of America join together out of a shared commitment to live “all aspects of our lives ... to the glory of God under the Lordship of Jesus Christ.”

The very fact that the claims of faith are total means that faith is intrinsically political. This does not mean (and in America rarely is the case)

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that believers aspire for theocracy, but it does mean that their participation in American political life may be as much an exercise of faith as reciting a sacred text or celebrating a holy day. Committed followers of the same faith, and even the same local faith community, may disagree on the issues and the candidates who represent them; nonetheless faith has much to say about what they do the first Tuesday of November. While cancer research, the arts, and land conservation are each important issues, perhaps even the primary issue that a person might weigh in deciding how to cast her vote, faith is a lens that shapes how a person perceives every issue. The problem with the prohibition arises because the claims of faith are not only total, but at the same time the practice of faith is also communal. If the community is the locus of moral discernment, a primary location where believers discern the total claims of faith, then a prohibition that cordons off one area of life and effectively demands collective silence is a restraint on faith itself.

III. TOWARD LEGISLATIVE REVISION

As it now stands, this broad prohibition as applied to churches fails because of its flawed rationale, its unworkable standard, and especially the undue restraint it places on faith. The burden it places on these communities promises to swell as the IRS continues to enforce the prohibition against them. These failures make a strong case for a carefully drawn, limited exemption for faith communities. While the government has reason to prohibit the use of funds for political campaign activity, it should not regulate the practices whereby a faith community discerns how it might live out its faith. This Part argues that Congress should act and sketches the outline of a legislative exemption. First, however, it is important to consider two alternatives and why they fail to remedy the problem.

A. THE ABSENCE OF ALTERNATIVES

One alternative to an exemption is that religious congregations might simply relinquish their favored tax status as the cost for political voice. Although the Court has never considered a constitutional or statutory challenge to the broad prohibition on political campaign activity as it applies to churches, it suggested this alternative in *Regan v. Taxation with Representation*.\(^{81}\) Donations do not generally count as taxable income,\(^ {82}\) so the church would not

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81. See *Regan v. Taxation with Representation*, 461 U.S. 540, 545 (1983) (addressing the prohibition in 501(c)(3) against "substantial lobbying," the Court employed the subsidy theory to conclude: "The Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity . . . . Congress has merely refused to pay for the lobbying out of public moneys.").

82. As the D.C. Circuit concluded in *Branch Ministries v. Rosotti*, which involved a
suddenly shoulder a sizable tax burden. Moreover, the loss of the charitable
deduction only affects persons who itemize their deductions. Nonetheless, the
impact of losing the ability to receive tax-deductible donations is real, since
more than 94% of the revenue for religious congregations comes from
individuals. Absent a defensible rationale for this broad prohibition, faith
communities rightly hesitate to lose the charitable deduction.

While the Court affirmed this alternative for a public interest group, it also
raises potential constitutional problems when applied to religious
congregations. As a widespread remedy this alternative would impose an
unprecedented and perhaps unconstitutional entanglement of the state with
religion. In Walz, the Court considered an Establishment Clause challenge to
New York City’s property tax exemption as it applied to religious
organizations. Turning to the question of government entanglement, the Court
observed: “Either course, taxation of churches or exemption, occasions some
degree of involvement with religion. Elimination of exemption would tend to
expand the involvement of government by giving rise to [assorted government
claims] and the direct confrontations and conflicts that follow in the train of
those legal processes.”

Under a second alternative, a church would operate two organizations: a
501(c)(3) organization for most of its activities and a separate but related
501(c)(4) organization for political activities. Again, the Court opened the
door to this possible alternative in Regan v. Taxation with Representation, and in Branch Ministries v. Rossotti the D.C. Circuit described a similar

kind of constitutional challenge that has never reached the Court, “the revocation of the exemption does not convert bona fide donations into income taxable to the Church.” Branch Ministries v. Rosotti, 211 F.3d 137, 143 (D.C. Cir. 2000). See also 26 U.S.C. § 102(a) (2006) (“Gross income does not include the value of property acquired by gift . . . .”).


85. See Walz v. Tax Comm’n of New York, 397 U.S. 664, 676 (1970) (“For so long as federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax.”); Murphy, supra note 49, at 41-46; John W. Whitehead, Tax Exemption and Churches: A Historical and Constitutional Analysis, 22 Cumb. L. Rev. 521 (1991-92).

86. Walz, 397 U.S. 664.

87. Id. at 674. See also Whitehead, supra note 85. At the same time, and without making clear whether this observation is essential for the Establishment Clause validity of the tax-exemption, Walz also notes that the property tax exemption applies to a broad class of charitable organizations. 397 U.S. at 672-73.

88. For the most developed argument in support of churches organizing as a dual structure under section 501(c)(3) and section 501(c)(4), see Douglas H. Cook, The Politically Active Church, 35 Loy. U. Chi. L.J. 457 (2004).

alternative. Section 501(c)(4) organizations are devoted to the broad purpose of promoting “social welfare.” The primary difference is that donations to tax-exempt 501(c)(4) organizations do not qualify for the charitable deduction, but the restrictions on lobbying also do not apply, and the prohibition on political campaign activity under the regulations is not absolute.

This alternative, however, fails for at least two reasons. First, the extent to which a 501(c)(4) organization can engage in political activity otherwise prohibited under section 501(c)(3) is unclear and disputed. The problem begins with how the regulations interpret the statute. A 501(c)(4) organization must be “operated exclusively for the promotion of social welfare,” but the statute contains no express prohibitions against lobbying or political campaign activity, as does section 501(c)(3). Pushing the boundaries of interpretive flexibility, the regulations define “exclusively” as “primarily.” They then invoke nearly the same language in section 501(c)(3) and state: “The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.” The implied conclusion is that a 501(c)(4) organization can engage in political campaign activity otherwise prohibited under section 501(c)(3) if the organization’s primary activity is the promotion of social welfare. The courts have not defined what measure of political campaign activity the statute allows.

90. 211 F.3d 137, 143 (D.C. Cir. 2000) (As was the case with TWR, the Church may form a related organization under section 501(c)(4) of the Code. . . . Such organizations are exempt from taxation; but unlike their section 501(c)(3) counterparts, contributions to them are not deductible. . . . Although a section 501(c)(4) organization is also subject to the ban on intervening in political campaigns, . . . it may form a political action committee (‘PAC’) that would be free to participate in political campaigns.).


95. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (as amended in 1990). See also Gregory L. Colvin & Miriam Galston, Report of Task Force on Section 501(c)(4) and Politics, 39 EXEMPT ORG. TAX REV. 432, 433 (2003) (Neither the code nor the regulations describe what activities constitute direct or indirect campaign intervention or participation for 501(c)(4)s. Rev. Rul. 81-95, 1981-1 C.B. 332, the only ‘recent’ precedential authority, implies that campaign activities for purposes of 501(c)(3) organizations will also be campaign activities for 501(c)(4)s because it cites 501(c)(3) rulings for examples of such activities.).

96. The court in Branch Ministries misses this implied conclusion, finding that the ban is complete and suggesting that a 501(c)(4) organization would need to form a separate political action committee. Branch Ministries v. Rossotti, 211 F.3d 137, 143 (D.C. Cir. 2000). See also Rev. Rul. 81-95, 1981-1 C.B. 332 (1981).
and commentators widely disagree. More important, while this alternative is available for certain types of political campaign activity involving the use of funds, it fails when applied to expression within the community. The problem is one of severability. The law requires a careful separation between the 501(c)(3) organization and the related 501(c)(4) organization. This separation is nearly impossible in the context of a sermon or other teaching within the faith community. A pastor, rabbi, or imam cannot announce that part of the message speaks for the 501(c)(4) organization. The exempt and non-exempt activities are inseparably intertwined. Although the 501(c)(4) alternative would allow a church to purchase a political advertisement in a newspaper (Branch Ministries), or other uses of funds where the activity is severable from the 501(c)(3) organization, this alternative fails where the issue is the community's own discourse.

**B. THE COURTS, CONGRESS, AND A RELIGIOUS EXEMPTION**

The inadequacy of these alternatives suggests the need for a limited exemption to the prohibition as it applies to religious congregations. When government grants a religious exemption, it carves out either a partial or complete exception to a generally applicable and otherwise valid law to protect the values of free exercise. Government might grant a religious exemption under three different models. Under the constitutional model, judges grant exemptions as a matter of constitutional law. These exemptions represent the minimum level of protection required by the Constitution as interpreted by the

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97. Comparing 501(c)(3) and 501(c)(4) organizations, Hopkins concludes: “Neither may, to any appreciable degree, participate or intervene in any political campaign on behalf of or in opposition to any candidate for public office.” HOPKINS, supra note 15, § 12.4. Cook goes so far as to suggest that a church might devote 49% of its resources to otherwise prohibited political campaign activity and still satisfy the regulations. Cook, supra note 88, at 464.

98. Branch Ministries, 211 F.3d at 143 (“[T]he related 501(c)(4) organization must be separately incorporated; and it must maintain records that will demonstrate that tax-deductible contributions to the Church have not been used to support the political activities conducted by the 501(c)(4) organization’s political action arm.”). See also Miriam Galston, Civic Renewal and the Regulation of Nonprofits, 13 CORNELL J. L. & PUB. POL’Y 289, 371-72 (2004).

99. Cook proposes that a church might organize as a 501(c)(4) organization and have a separate 501(c)(3) organization for distinct activities that do not involve prohibited political activity (such as evangelism or a Sunday School ministry). Cook, supra note 88. If Cook’s proposal satisfies the severability requirements—and it is not clear that it does—then it seems that it does so only at the cost of including much activity within the 501(c)(4) organization that might otherwise qualify under section 501(c)(3).

100. Although outside the scope of this Article, the occasion for granting an exemption depends on a conception of what “neutrality” toward religion requires. See generally Douglas Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DEPAUL L. REV. 993 (1990).

Supreme Court. The legislature plays no role; rather, the courts have the first and final say. The Court’s decision in Wisconsin v. Yoder that the Free Exercise Clause required an exemption for Amish parents from the state’s mandatory education law is an example of this model. While it affords the greatest protections for minorities and gives federal courts the power to review state action, it excludes the legislature from a decisionmaking process that often requires balancing important policy concerns.

The \textit{common law} model gives courts the power to decide in the first instance, under a standard and procedure pre-determined by statute, but the legislature reserves the final say for itself. This model is currently in place under the Religious Freedom Restoration Act (RFRA). The Court’s recent decision in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, allowing members of a church to receive communion by drinking a substance banned under the Controlled Substances Act, is an example of this model. If Congress objects to the Court’s decision, it retains the power of legislative override. This model draws on the unique strengths of both the judiciary and the legislature, combining the responsiveness and protections of the courts with the legislature’s ability to balance competing policy concerns. Minorities do not have the same protection, however, since Congress can choose to override a judicial decision. Moreover, the Court has ruled that the law does not reach the states.

Finally, under the \textit{statutory model} the legislature has the first and final say in granting religious exemptions. The exemption to the Controlled Substances Act for the use of peyote by the Native American Church is an example. This model gives the legislature the ability to balance competing policy concerns. Exemptions under this model, however, may be less likely on account of legislative inertia, minorities may have the least protection, and power over the states is limited.

Most scholars who are critical of the prohibition on political campaign intervention as it applies to churches have looked to the courts for an exemption, either under the constitutional or common law models. Both

105. Boerne v. Flores, 521 U.S. 507 (1997) (concluding that the statute was not a valid exercise of congressional power under Section 5 of the Fourteenth Amendment).
107. \textit{But see} Louis Fisher, \textit{Nonjudicial Safeguards for Religious Liberty}, 70 U. Cin. L. REV. 31 (2001) (arguing that the political process has done a better job at protecting politically weak minorities than have the courts).
means of redress, however, are unrealistic in light of previous Court rulings. *Employment Division v. Smith*\(^{109}\) nearly precludes an exemption under the Free Exercise Clause. In *Smith* the Court largely rejected the constitutional model for granting religious exemptions. The respondents in this case lost their jobs because they ingested peyote as part of a religious ceremony.\(^{110}\) The state subsequently denied their application for unemployment benefits on the grounds that their employer fired them for misconduct under the state’s drug laws.\(^{111}\) The Court held that the Free Exercise Clause of the Constitution does not require an exemption to a generally applicable and otherwise valid law.\(^{112}\) Allowing an exemption where the law does not target religious exercise, the Court explained, would allow a person “by virtue of his beliefs, ‘to become a law unto himself.’”\(^{113}\) Since the prohibition on political campaign activity under 501(c)(3) applies to all charitable organizations and does not target religion, *Smith* precludes an exemption under the Free Exercise Clause.\(^{114}\)

It is also unlikely that the Court would grant an exemption under the RFRA.\(^{115}\) Congress passed RFRA with the express aim of restoring the rule in *Sherbert v. Verner*,\(^{116}\) which applied strict scrutiny under the First Amendment where a generally applicable law infringed on religious practice.\(^{117}\) Formerly under *Sherbert*, and now under RFRA, the government must show that it has a compelling state interest that justifies a law or policy infringing on the free exercise of religion. Although the Court struck down RFRA against the states and refused to adopt its standard as an interpretation of what the Free Exercise Clause requires,\(^{118}\) the Court has affirmed the statute’s applicability in the federal context.\(^{119}\) Nonetheless, the Court’s past insistence that the government has a compelling interest in the uniform application of tax laws leaves little

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\(^{110}\) *id.* at 874.

\(^{111}\) *id.* at 879-80.

\(^{112}\) *id.* at 885 (citations omitted).

\(^{113}\) The Court attempted to distinguish previous cases where it had granted exemptions under generally applicable laws with the contrived claim that these cases represented a “hybrid situation,” where the free exercise claim connected to some other constitutional right. See *id.* at 881-82. Among other problems, the Court did not explain why the presence of another constitutional right, present in many cases, created the grounds for an exemption. A hybrid claim could be made in this case since political speech is also at stake. The Court, however, was less interested in opening an alternative means of relief than it was in attempting to avoid directly overruling itself.

\(^{114}\) For a detailed assessment of this question, see O'Connor, *supra* note 108.


\(^{117}\) See *City of Boerne v. Flores*, *521 U.S. 507* (1997).

hope that courts would grant an exemption. In the seminal case, United States v. Lee, the Court concluded: "Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." The only viable source for a religious exemption is Congress, under the statutory model. Wanting the finality and breadth of a constitutional decision, or perhaps unduly favoring judicial solutions, legal scholars who criticize the prohibition often lament this situation. Nonetheless, each model for granting a religious exemption has its own strengths. One particular strength of the statutory model is that it allows the legislature to balance competing policy concerns. Any decision to grant exemptions will require this balancing, but in some cases the importance of competing policy concerns and the potential reach of the exemption make a statutory model especially appropriate. In O Centro the Court granted a religious exemption for members of a Christian Spiritist sect based in Brazil, with approximately 130 members in the United States. In contrast, a partial exemption for faith communities to the section 501(c)(3) prohibition against political campaign activity would have vastly greater impact, implicating the government’s “weighty interests” in regulating the system of campaign finance. The United States has more than 353,000 religious congregations with a total annual revenue well over $80 billion. Congress is well-suited for the task of carving out an exemption, while at the same time keeping intact those aspects of the prohibition which the campaign finance rationale demands. While one might discern an eagerness on the part of the Court to close the door to religious exemptions, Employment

120. The Court would also have to find that the prohibition places a substantial burden on faith communities. Although I argue that the 501(c)(4) alternative does not alleviate the burdens on religious congregations, the Court’s opinion in Regan v. Taxation with Representation, 461 U.S. 540, 545 (1983), and the D.C. Circuit’s decision in Branch Ministries v. Rosotti, 211 F.3d 137, 143 (D.C. Cir. 2000), both suggest that the Court may be reluctant to follow this path.

121. 455 U.S. 252, 260 (1982). See also O Centro, 126 S. Ct. at 1223; Hernandez v. Comm’r, 490 U.S. 689, 699-700 (1989), criticized by Employment Div. v. Smith, 494 U.S. 872 (1990); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 19 (1989); Bob Jones Univ. v. United States, 461 U.S. 574, 603-604 (1983), criticized by Employment Div. v. Smith, 494 U.S. 872 (1990). In Lee the Court applied strict scrutiny under the Free Exercise Clause and Congress required the same standard under RFRA. Lee, 455 U.S. 252. The Court has tended to apply the test in the same way in each context. See, e.g., O Centro, 126 S. Ct. at 1220-21 (looking to previous constitutional cases for guidance in applying strict scrutiny under RFRA). The statute, in fact, encourages this approach by citing previous constitutional cases as examples of the standard it adopts. 42 U.S.C. § 2000bb(b)(1) (2006). In general, however, there is reason to think that the judiciary might be more willing to grant an exemption under the common law model than under the constitutional model, given the possibility of a legislative override.


124. INDEP. SECTOR, supra note 84, at 3.

125. Id. at 4.
C. REDRAWING THE LINES

Drawing an exemption for religious congregations requires balancing the burden that the current prohibition places on faith communities with legitimate policy concerns underlying the prohibition, particularly the government’s strong interest in regulating campaign finance. The vast number of religious congregations, the magnitude of revenue they generate, and the near absence of government oversight are strong reasons for regulating the use of tax-exempt funds in this context. This rationale, however, does not support the broad and absolute prohibition now in place. The current prohibition restricts the passage of funds, but it also interferes with the practices whereby a religious community discerns how to live out its faith in the world. This interference comes from both substantive restrictions in the law and the chilling effect this law has on account of a vague standard, a severe penalty, and uncertain enforcement.

An exemption for churches to the general prohibition on political campaign intervention should come in the form of a bright-line rule. One reason is to give government officials less room for subjective judgments that determine what a church can say and do. Consistent with a long tradition of government reticence to interfere with religion, under the Free Exercise Clause and beyond, the IRS should adopt a standard that limits the extent to which judgments are based on the “facts and circumstances” of each particular case. Adopting a bright-line rule would increase the likelihood that church leaders can discern with confidence where the IRS will draw the lines. Even if the current standard is more narrow than often perceived, the inability of church leaders to predict how the IRS will apply the standard has had a chilling effect among many congregations. Finally, a bright-line rule has the advantage of limiting the occasions of governmental intrusion that follow in the course of the IRS simply trying to determine whether or not a violation of the standard has occurred. Since the current standard is based on the “facts and circumstances” of each particular case, reaching a conclusion may often require a lengthy and intrusive investigation. Of course, the trade-off in adopting a bright-line rule is that in almost all cases—and the proposal I suggest is no exception—the rule

126. 494 U.S. 872, 890 (1990)
(Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process.... [A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.... But to say that a nondiscriminatory religious-practice exemption is... desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.).

127. I.R.S. Fact Sheet, supra note 5.
will fail to map perfectly the underlying policy rationales. The rule may sweep more broadly or narrowly than the rationales suggest, at some points even producing inconsistencies, but in this case the advantages outweigh any costs.

The exemption I have in mind attempts to remedy the primary problem with the current prohibition against political campaign intervention: the effect it has in limiting engagement, discussion, and discernment within faith communities on the great moral and political issues of the day. As discussed earlier, a standard that defines political campaign intervention as "any and all activities that favor or oppose one or more candidates for public office,"\(^{128}\) whether direct or indirect,\(^{129}\) belies any assurances by the IRS that churches are free to engage in issue advocacy. At some point, as the All Saints example shows, the IRS may decide that certain strong positions on the issues are in fact favoring a political candidate. This judgment, however, is not for the government to make.

To remedy this problem, Congress should amend section 501(c)(3) of the Internal Revenue Code to exclude from the meaning of political campaign intervention the content of any sermon, homily, teaching, or other oral presentation made in the course of a regular church meeting.\(^{130}\) This exemption would only apply to faith communities;\(^{131}\) it would not apply to other religious organizations. All Saints Episcopal and Thomas Road Baptist are included; Focus on the Family and the Interfaith Alliance are not. Although this limitation requires a distinction between a "church" and other religious organizations, the tax code already contemplates this distinction in excepting churches from the filing requirement for tax-exempt status.\(^{132}\) Furthermore, the exemption is limited to oral communications; written handouts, voter scorecards, and other forms of written communication are not covered. Finally, the exemption is limited to regular church meetings.\(^{133}\) It does not extend to

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128. Id.
133. The application of this rule to sermons originally delivered to the congregation, but also conveyed through the media, raises some challenges. Exempting sermons in this context would invite abuse. The easiest rule to apply would not extend the exemption to cover any oral communication aimed outside the community and that is otherwise prohibited under section 501(c)(3). At the same time, many people for different reasons “participate” in the life of a faith community through the media, whether by the internet, radio, or television. An alternative and less stringent rule might allow the conveyance where it is not distributed to the public for the purpose of influencing an upcoming election. Clear violations of this alternative rule would include repackaging a sermon as a paid infomercial or purchasing media time during an election cycle and outside the congregation’s regular practice. Internet streaming poses another challenge. Compared to a radio program or a commercial on TV, however, the potential influence of a sermon available over the internet is relatively small, especially since the user must make an active choice to access the material.
anything the church sponsors, nor would it cover a special political event for church members scheduled a few weeks before the election.

This proposal has many strengths. Foremost, it addresses the primary problem with the current prohibition, lifting any restraint on the issues a religious leader might address, the intensity with which an issue is discussed, and the degree to which one issue is balanced with others. The exemption is also relatively narrow. The ads purchased in *Branch Ministries*, 134 donations to political campaigns, and public campaign rallies in the church are all ruled out. The restrictions on voter scorecards and candidate appearances remain. In addition, the use of tax-exempt funds is restricted. Of course, almost any oral or written communication made by a religious leader who draws a paycheck from the congregation conceivably carries a price tag. The monetary value of the words in a sermon, however, is de minimis. If a religious congregation wants to use funds in a way not covered by this exemption, then it may have recourse to the alternative organizational structure suggested by the court in *Branch Ministries v. Rossotti*. 135 Recall that a 501(c)(4) organization is a separate entity governed by a more relaxed rule concerning political campaign activity. The activities of the 501(c)(4) must remain separate from the related 501(c)(3) organization. Some activities, however, such as sermons and other church teaching, are not amenable to this arrangement because they are not severable from the activities of the church as a 501(c)(3) organization.

At the same time—as is the case with any bright-line rule—the proposal has some limitations as well. For many supporters of the prohibition, the fact that this exemption allows for political endorsements from the pulpit will be troubling. The need for a clear rule, however, demands as much. If the exemption did not extend to political endorsements, then the IRS would be left with the same subjective task of determining when a sermon effectively amounts to an endorsement. Disallowing only “express endorsements” is less vague, but still raises problems. Would a pastor who ended his sermon by asking the congregation whether a true Christian could ever vote for a person who did not commit to overturning *Roe v. Wade* make an express endorsement? More important, whether the exemption does or does not allow for endorsements matters much less once the decision is made that a church will not violate the prohibition by addressing issues of moral/political concern. Discerning where a religious leader stands in some cases will be obvious. The decision to support a political candidate from the pulpit may be an unwise choice reflecting a failure to recognize the range of issues at stake and the threat such support might pose to the integrity of a ministry. In fact, research indicates that a solid majority of voters do not want clergy to discuss electoral politics from the pulpit. 136 Nonetheless the faith community—and not the

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135. *Id.*

government—should make this decision.

Furthermore, extending the exemption to sermons and not scorecards allows for some inconsistencies. A sermon might communicate the same material as a printed voter guide. While the exemption would cover the former, it would not cover the latter. Drawing the line here, however, is reasonable given the likelihood that voter guides will circulate outside the faith community and exert significant influence. Any exemption will have to make compromises at some point.

Admittedly, the account of faith in Part II as both total and communal might well push in favor of lifting the prohibition altogether. The Christian tradition, in particular, has an understanding of its "prophetic" role in society and questions a strong public/private distinction. The demands of faith, however, must balance with other ends such as society's need to regulate the political process. This proposal preserves this end while also lifting an undue restraint on faith.