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NOTE

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The Supreme Court's 2010 decision in Citizens United v. FEC *invalidated a longstanding restriction on corporate and union campaign spending in federal elections, freeing entities with diverse political goals to spend unlimited amounts supporting candidates for federal office. Houses of worship and other religious nonprofits, however, remain strictly prohibited from engaging in partisan political activity as a condition of tax-exempt status under Internal Revenue Code § 501(c)(3). Absent this "electioneering prohibition," religious nonprofits would be very attractive vehicles for political activity. These 501(c)(3) organizations can attract donors with the incentive of tax deductions for contributions. Moreover, houses of worship need not file with a government agency to begin operating and deriving tax benefits, and the IRS has shown reluctance to aggressively audit their activities. Two circuits have previously upheld the electioneering prohibition against legal challenges, but recent jurisprudential shifts expose the tax code provision to challenge under the Religious Freedom Restoration Act (RFRA), which directs courts to apply strict scrutiny to facially neutral laws that substantially burden the free exercise of religion. First*, Burwell v. Hobby Lobby Stores, Inc. *greatly reduced the barriers to successful RFRA claims. Second, by lifting restrictions on political speech for many other types of organizations,* Citizens United *magnified the burden the electioneering prohibition imposes on religious organizations. The decision also rejected compelling state interests that might have previously shielded the law from invalidation. This Note is the first analysis of the electioneering prohibition's vulnerability in this new legal climate. Despite these significant developments, this Note ultimately concludes that the electioneering prohibition can survive RFRA challenges because the prospect for widespread use of religious organizations as conduits for political activity undermines the values reflected in Establishment Clause jurisprudence.*

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Introduction

One month before the 2014 midterm elections, Dr. Jim Garlow, the pastor of Skyline Church in La Mesa, California, broke the law. At his Sunday church service, Garlow endorsed Democratic U.S. Congressman Scott Peters in California's Fifty-Second Congressional District over his openly gay Republican opponent Carl DeMaio.[1] "[Y]ou cannot have the advancing of the radical homosexual agenda and religious liberty at the same time, in the same nation," Garlow explained to his congregation.[2] While DeMaio shared many of the pastor's ideological positions, Garlow instructed his congregants to either support the Democratic incumbent or abstain from the election, warning that a DeMaio victory would mark the vanguard of a socially liberal Republican Party and the absence of a political home for Evangelical Christians.[3]

As a condition of tax-exempt status under Internal Revenue Code § 501(c)(3), houses of worship—like all charitable organizations—may not "participate in, or intervene in . . . any political campaign."[4] A spiritual leader's endorsement of a congressional candidate from the pulpit is a textbook violation of this tax code provision,[5] known as the "electioneering prohibition." As part of an initiative called Pulpit Freedom Sunday, Garlow delivered his sermon in an act of civil disobedience, joining with other faith leaders in a coordinated effort to publicly flaunt the law and protest what

1. Tamara Audi, *Preaching Politics, Pastors Defy Ban*, Wall St. J., Oct. 6, 2014, at A6.

2. SkylineChurch, *Skyline Church: October 5, 2014* at 47:43, Vimeo (Oct. 6, 2014, 9:31 PM), http://vimeo.com/108190109 [http://perma.cc/4X5V-WGFB].

3. *Id.*

4. I.R.C. § 501(c)(3) (2012).

5. *See* I.R.S. News Release FS-2006-17 (Feb. 2006), http://www.irs.gov/uac/Election-Year-Activities-and-the-Prohibition-on-Political-Campaign-Intervention-for-Section-501%28c%29%283%29-Organizations [http://perma.cc/8BUL-DXHQ].

they view as unconstitutional infringement on religious liberty and freedom of expression. Since 2008, over 3,800 pastors have participated in Pulpit Freedom Sunday.[6] Participating pastors send copies of their sermons to the IRS, hoping to challenge the law's validity in court.[7] Pulpit Freedom Sunday participants do not disguise their intentions. Garlow, for example, concluded his 2014 Pulpit Freedom Sunday sermon by saying, "[I]f, by chance, a member of the IRS gets this sermon and is listening, sue me."[8] More than ever before, Garlow and other opponents of the electioneering prohibition may stand poised to realize their goals. Recent Supreme Court decisions lifting restrictions on political speech[9] and granting religious exemptions to facially neutral laws [10] situate the electioneering prohibition at the epicenter of tectonic jurisprudential shifts.

Left-leaning religious entities also chafe under the restrictions imposed by the electioneering prohibition. In the aftermath of the 2004 presidential election, for example, the IRS launched an investigation against All Saints Episcopal Church in Pasadena, California after its rector, Reverend Ed Bacon, delivered an antiwar sermon two days before the election.[11] Bacon did not explicitly endorse a candidate, but depicted Jesus moderating a presidential debate and reprimanding President George W. Bush by saying, "Mr. President, your doctrine of preemptive war is a failed doctrine. Forcibly changing the regime of an enemy that posed no imminent threat has led to disaster."[12] Ultimately, the IRS concluded its investigation without penalizing the church but reiterated its position that the church had violated the law.[13] In opposing the investigation, Bacon warned, "If the IRS prevails, it will have a chilling effect on the practice of religion in America."[14]

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6. Press Release, Alliance Defending Freedom, Pulpit Freedom Participation Exceeds 1,800 Pastors, Continues Through Election Day (Oct. 10, 2014), http://www.adfmedia.org/News/PRDetail/?CID=81033 [http://perma.cc/JFH8-9YEZ].

7. Alliance Defending Freedom, Pulpit Freedom Sunday: Frequently Asked Questions and Common Objections 4 (Aug. 15, 2014), http://alliancedefendingfreedom.org/content/campaign/2014/Pulpit-Freedom-Sunday/Resources/PFS-Recruiting-Packet.pdf [http://perma.cc/3534-LPCX] ("[I]f a pastor is punished for something he says during a sermon, Alliance Defending Freedom will bring a lawsuit to protect the constitutional rights of the pastor and the church with the hope of having the Johnson Amendment declared unconstitutional.").

8. SkylineChurch, *supra* note 2 (quotation at 54:30).

9. McCutcheon v. FEC, 134 S. Ct. 1434 (2014); Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490 (2012) (per curiam); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011); Citizens United v. FEC, 558 U.S. 310 (2010).

10. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

11. Louis Sahagun, *Sermon Moves IRS to Act*, L.A. Times, Sept. 16, 2006, at A1.

12. Patricia Ward Biederman & Jason Felch, *Antiwar Sermon Brings IRS Warning*, L.A. Times, Nov. 7, 2005, at A1.

13. Sam Kim, *IRS Ends Two-Year Probe of California Church's Anti-War Sermon*, Ctr. for Effective Gov't (Sept. 25, 2007), http://www.foreffectivegov.org/node/3451 [http://perma.cc/6FRU-95RF].

14. Sahagun, *supra* note 11.

Despite conflict between the government and both progressive and conservative religious entities over the electioneering prohibition, the Supreme Court has never examined its legality. The Tenth Circuit upheld the provision under the Free Exercise Clause, holding that the "overwhelming and compelling Governmental interest . . . [in] guarantying that the wall separating church and state remain[s] high and firm" justifies any burden imposed by conditioning tax-exempt status on nonintervention in political campaigns.[15] More recently, the D.C. Circuit upheld the provision under the Religious Freedom Restoration Act (RFRA), a statute that requires courts to apply strict scrutiny to facially neutral federal laws that substantially burden the free exercise of religion.[16] The court held that the electioneering prohibition does not trigger RFRA scrutiny because it does not substantially burden the free exercise of religion.[17]

But since courts last examined the tax code provision, the Supreme Court has invalidated both state[18] and federal[19] laws barring corporations from intervening in electoral politics. These laws resemble the electioneering prohibition in substance, if not underlying rationale. [20] Additionally, the Supreme Court granted closely held corporations RFRA exemptions from the Patient Protection and Affordable Care Act (ACA)'s contraceptive mandate in *Burwell v. Hobby Lobby Stores, Inc.*, according substantial deference to the companies' characterization of the burden the law imposed on religious practice[21] and undercutting the reasoning used most recently to uphold the electioneering prohibition. [22]

Neither the Tenth Circuit nor the D.C. Circuit closely examined the purpose of the electioneering ban or weighed the importance of its goals against free exercise values. A more pointed exploration of the issue offers an interesting example of the delicate legal balance required when governmental interests and religious practice intersect. From the earliest days of the republic, religion has played a crucial role in American civic life. Alexis de Tocqueville

15. Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 857 (10th Cir. 1972).

16. Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb-1 (2012). For an explanation of the legal standard imposed by RFRA, see *infra* note 58 and accompanying text.

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

18. Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490 (2012) (per curiam).

19. Citizens United v. FEC, 558 U.S. 310, 365 (2010).

20. *Compare* 2 U.S.C. § 441b (2012) (recodified at 52 U.S.C. § 30118), *invalidated by Citizens United*, 558 U.S. at 310, *and* MONT. CODE ANN. § 13-35-227 (2010), *invalidated by* Am. Tradition P'ship, 132 S. Ct. at 2490, *with* I.R.C. § 501(c)(3) (2012).

21. *See* 134 S. Ct. 2751, 2775–79 (2014).

22. Other legal issues raised by the electioneering prohibition not addressed in this Note include potential free speech challenges to the provision. *E.g.*, Steffen N. 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, 887–90 (2001); Erik W. Stanley, *LBJ, the IRS, and Churches: The Unconstitutionality of the Johnson Amendment in Light of Recent Supreme Court Precedent*, 24 REGENT U. L. REV. 237, 266–67 (2012). This Note also does not examine the tax code provision's effect on secular charities.

described religion as a salve to the isolation and uncertainty inherent in individual liberty[23] and as a force capable of encouraging free people to forgo self-interest in favor of the collective good.[24] On the other hand, Thomas Jefferson and James Madison recognized the capacity of religion, especially when supported by the machinery of the state, to be a destructive source of division antithetical to democratic principles.[25]

Today, public opinion exhibits the same ambivalence. Religion plays an undeniable and important role in spurring many citizens to social consciousness and action. About two-thirds of Americans believe houses of worship contribute to solving important social problems, and more than three-quarters believe that such institutions strengthen morality in society.[26] Faith leaders have played central roles in the social movements that have reshaped American history and sociopolitical reality. But Americans also believe religion should play a limited role in political discourse, with nearly two-thirds opposing houses of worship endorsing political candidates and more than half opposing religious leaders' involvement in politics entirely.[27]

Accordingly, public law reifies the tension evident at the republic's founding and persisting in the polity today. At the constitutional level, the Free Exercise Clause[28] allows for the flourishing of religious life that Tocqueville valued, while the Establishment Clause[29] prohibits the entanglement between government and religion that Jefferson and Madison feared.[30] At

23. 2 Alexis de Tocqueville, Democracy in America 744–45 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2012) (1835) ("When authority no longer exists in religious matters, any more than in political matters, men are soon frightened by the sight of this limitless independence.").

24. *Id.* at 745–46 ("[There exists no] religion that does not impose on each man some duties toward the human species or in common with it, and that does not in this way drag him, from time to time, out of contemplation of himself.").

25. *See* Thomas Jefferson, Notes on the State of Virginia 172 (Richmond, J.W. Randolph 1853) ("Our sister States of Pennsylvania and New York, however, have long subsisted without any establishment [of religion] at all. . . . They have made the happy discovery, that the way to silence religious disputes is to take no notice of them."); The Federalist No. 10, at 46 (James Madison) ("Religion [has] divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.").

26. Pew Forum on Religion and Pub. Life, "Nones" on the Rise: One-in-Five Adults Have No Religious Affiliation 60–61 (2012), http://www.pewforum.org/files/2012/10/NonesOnTheRise-full.pdf [http://perma.cc/UA3H-7DAU].

27. *Id.* at 73.

28. U.S. Const. amend. I, cl. 2 ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

29. *Id.* cl. 1 ("Congress shall make no law respecting an establishment of religion . . . .").

30. Some scholars and jurists take the position that the Establishment Clause, as originally conceived, bars only the adoption of a national religion and interference with state establishments of religion. *E.g.*, Town of Greece v. Galloway, 134 S. Ct. 1811, 1835–36 (2014) (Thomas, J., concurring); Donald L. Drakeman, Church, State, and Original Intent 260–62 (2010); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 Notre Dame L. Rev. 311, 317 (1986). This originalist interpretation of the Constitution finds historical support in many practices

the statutory level, tax exemptions and deductions incentivize the proliferation of religious institutions, but the electioneering prohibition disables those same institutions from exerting the type of influence that other special interests wield in American politics. By striking this balance, the tax code attempts to advance the virtues of religion in civic life while limiting its vices.

This Note contends that, despite *Hobby Lobby* and *Citizens United*, the electioneering prohibition is valid under RFRA. Although it imposes a substantial burden on the free exercise of religion, the prohibition prevents entanglement between government and religion. Part I examines the origins of the electioneering prohibition and situates it within the constellation of campaign finance regulation. Part II argues that the electioneering prohibition substantially burdens the free exercise of religion by barring religious organizations from engaging in political advocacy targeted at securing policy goals rooted in religious belief. Part III argues that the electioneering prohibition cannot be justified as the least restrictive means of arresting the corrupting influence of money in politics or of preventing government subsidization of partisan political activity. The provision is, however, narrowly tailored to the compelling interest in preventing undue entanglement between government and religion. Accordingly, Part III concludes that the electioneering prohibition is valid under RFRA.

I. The Electioneering Prohibition in Context

Though different in origin and purpose, the electioneering prohibition resembles other limitations that lawmakers have imposed on politically engaged entities. Section I.A discusses the historical origins and evolution of the electioneering prohibition. Section I.B describes recent decisions overturning campaign finance laws and situates the electioneering prohibition within the wider landscape of political speech regulation. Section I.C argues that campaign finance deregulation magnifies the importance of the electioneering prohibition because it alone prevents religious organizations from exerting unlimited influence over the electoral process.

A. *Historical Origins of the Electioneering Prohibition*

Little legislative history exists to explain Congress's purpose when it adopted the electioneering prohibition as an amendment to the Internal Revenue Act of 1954. Circumstantial evidence suggests less than altruistic origins. Senator Lyndon Johnson—the sponsor of the amendment—secured

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from the early days of the republic at odds with modern Establishment Clause jurisprudence. Richard H. Jones, One Nation Under God? 13–15 (2012). This Note takes no position on the original meaning of the constitutional provision and assumes the continuing validity of the reigning framework for evaluating potential Establishment Clause violations established in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), and its progeny.

office in 1948 by the barest of margins and under dubious circumstances.[31] As his sophomore election approached, Johnson feared for his political future, and strong evidence suggests that he inserted the electioneering prohibition provision into the pending legislation due to concerns over two secular nonprofit organizations advocating for his defeat.[32] In sponsoring the amendment, Johnson apparently did not intend to restrict the political activities of houses of worship; in fact, he relied heavily on church support for his reelection against a Catholic opponent in overwhelmingly Protestant Texas. [33]

Johnson's intentions aside, the electioneering prohibition, at its inception, accorded with limitations placed on other entities formed primarily for apolitical purposes. The Taft-Hartley Act, enacted in 1947, prohibited unions and corporations (including nonprofit corporations) from spending general treasury funds in support of or in opposition to candidates for federal office.[34] Like other campaign finance infractions, violation of the corporate- and union-expenditure ban authorized civil penalties and, in instances of knowing and willful violations, criminal sanctions.[35] Despite the new restrictions, corporations and labor unions circumvented and openly violated Taft-Hartley, undermining its efficacy.[36]

The electioneering prohibition restricts a broader range of activities than Taft-Hartley did,[37] but it reflects the regulatory ethos of the era that broadly opposed partisan political activity by groups other than political committees such as candidate committees, traditional political action committees (PACs), and political parties.[38] In effect, the electioneering prohibition discouraged circumvention of campaign finance laws by providing a strong tax incentive for 501(c)(3) organizations to refrain from those activities that the Taft-Hartley Act prohibited.

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31. *See* Robert A. Caro, The Years of Lyndon Johnson: Means of Ascent 312–14 (1990) (describing a post-Election Day "discovery" of uncounted ballots in a Duval County, Texas precinct that delivered the Democratic runoff primary to Johnson).

32. 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, 753–62 (2001).

33. *Id.* at 768–69.

34. Labor-Management Relations Act, Pub. L. No. 80-101, § 304, 61 Stat. 136, 159 (1947), *invalidated by* Citizens United v. FEC, 558 U.S. 310 (2010).

35. 2 U.S.C. § 437g(a)(5)–(6), (d)(1)(A) (2012) (recodified at 52 U.S.C. § 30109).

36. Jeremiah D. Lambert, *Corporate Political Spending and Campaign Finance*, 40 N.Y.U. L. Rev. 1033, 1039–40 (1965).

37. *Compare* 2 U.S.C. § 441b(a), (b)(1) (prohibiting corporate or union expenditures in connection with federal elections or primaries), *with* I.R.C. § 501(c)(3) (2012) (prohibiting *participation* or *intervention* in *any* political campaign).

38. United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am. (UAW-CIO), 352 U.S. 567, 578 (1957) ("[J]ust as the great corporations had made huge political contributions to influence governmental action or inaction . . . the powerful unions were pursuing a similar course, and with the same untoward consequences for the democratic process."); V.O. Key, Jr., Politics, Parties & Pressure Groups 508–12 (5th ed. 1964).

B. *From Super PACs to God PACs*

Today, the electioneering prohibition appears incongruous with the restrictions on other entities engaged in partisan political activity. *Citizens United v. FEC* invalidated the modern iteration of Taft-Hartley's ban on corporate and union expenditures [39] and gave rise to new vehicles for electoral advocacy. The decision precipitated a paradigm shift in campaign finance jurisprudence in two respects. First, the Court overturned prior case law permitting restrictions on political speech based on the government's interest in reducing the distortive effects of large aggregations of money in politics.[40] Second, the decision adopted a narrowed definition of political corruption that sanctions only those regulations targeted strictly at preventing and punishing overt exchanges of money for political favors.[41] *Citizens United* led to the creation of super PACs—political committees that may solicit contributions of unrestricted size and spend unlimited amounts of money on campaign advertisements, so long as they do not directly contribute to or coordinate their efforts with candidates.[42] The decision also directly enabled politically engaged 501(c)(4) social welfare organizations—known colloquially as dark-money groups—to solicit and spend unlimited amounts while shielding donor names.[43] This lack of transparency stems from the Internal Revenue Code's comparatively weak disclosure provisions relative to the rules governing traditional political organizations.[44] Super PACs and dark-money groups have proliferated in state politics as well since the Court

39. 558 U.S. 310, 365 (2010) (invalidating 2 U.S.C. § 441b's ban on corporate- and union-funded independent expenditures).

40. *Citizens United*, 558 U.S. at 349–56, 365.

41. *Id.* at 359 (interpreting valid campaign finance restrictions as combating quid pro quo corruption); *see also* McCutcheon v. FEC, 134 S. Ct. 1434, 1441 (2014) (affirming that any restriction on political speech must combat quid pro quo corruption); Linda Greenhouse, *An Indecent Burial*, N.Y. TIMES (Apr. 16, 2014), http://www.nytimes.com/2014/04/17/opinion/an-indecent-burial.html?_r=0 [http://perma.cc/KX85-FC8B] ("It wasn't until the Roberts court's Citizens United decision in 2010 that the court shrank the definition of corruption to quid pro quo bribery. . . . [I]n his McCutcheon opinion, Chief Justice Roberts . . . extend[ed] Citizens United's narrow definition of corruption . . . .").

42. SpeechNow.org v. FEC, 599 F.3d 686, 696 (D.C. Cir. 2010) (holding that contribution limits are unconstitutional as applied to an independent expenditure-only group); Dave Levinthal, *How Super PACs Got Their Name*, POLITICO (Jan. 10, 2012, 12:57 PM), http://www.politico.com/news/stories/0112/71285.html [http://perma.cc/Q6YM-Y39V].

43. *Citizens United*, 558 U.S. at 319 (identifying Citizens United as a nonprofit corporation); Kim Barker, *Two Dark Money Groups Outspending All Super PACs Combined*, PROPUBLICA (Aug. 13, 2012, 12:50 PM), http://www.propublica.org/article/two-dark-money-groups-outspending-all-super-pacs-combined [http://perma.cc/3XRU-5V8Z]; *FAQs*, CITIZENS UNITED, http://www.citizensunited.org/frequently-asked-questions.aspx [http://perma.cc/ZG5K-4NN4].

44. *See Additional Discussion of H.R. 5175, the DISCLOSE Act, Democracy is Strengthened by Casting Light on Spending in Elections: Hearing on H.R. 5175 Before the H. Comm. on H. Admin.*, 111th Cong. 113–15 (2010) (statement of Brennan Center for Justice).

extended *Citizens United* to invalidate state bans on corporate independent expenditures in *American Tradition Partnership v. Bullock*.[45]

The creation of new entities operating in the post-*Citizens United* campaign finance framework continues. *McCutcheon v. FEC* invalidated the cap on the aggregate amount that individuals may donate annually to political parties, traditional PACs, and candidates during an election cycle.[46] This has encouraged the establishment of joint fundraising committees—dubbed "max PACs"—groups that collect large contributions from single donors and disperse the money among an assortment of political parties, traditional PACs, and candidates.[47] A rider in a recent $1.1 trillion appropriations bill increased the amount that individuals may contribute to national political parties annually, super charging the fundraising capacity of max PACs.[48]

Still standing amid these sweeping changes, the electioneering prohibition bars 501(c)(3) charities—including religious organizations—from participating in the bonanza of unregulated electoral activity central to the past three election cycles.[49] Political operatives would gain significant advantages from electioneering through religious nonprofits. First, while 501(c)(3)s enjoy tax-exempt status just as 501(c)(4)s and political committees do,[50] contributions to 501(c)(3)s are also tax deductible.[51] The ability to attract donors with the promise of a tax benefit would greatly aid political groups in generating revenue. Second, houses of worship, unlike other charitable organizations or political committees, need not file with government agencies before securing tax benefits.[52] A house of worship need only hold itself

45. 132 S. Ct. 2490, 2491 (2012) (per curiam). *See generally* Chisun Lee et al., Brennan Ctr. for Justice, After *Citizens United*: The Story in the States (2014), http://www.brennancenter.org/sites/default/files/publications/After%20Citizens%20United_Web_Final.pdf [http://perma.cc/T99R-CWTP].

46. 134 S. Ct. 1434, 1442 (2014).

47. *McCutcheon*, 134 S. Ct. at 1456; Eliza Newlin Carney, *'Max PACs' Poised to Exploit Supreme Court Decision on Campaign Finance*, CQ Wkly. (Apr. 29, 2014, 9:12 AM), http://public.cq.com/docs/weeklyreport/weeklyreport-000004464536.html [http://perma.cc/2VKF-3SZU].

48. 2 U.S.C. § 441a (2012) (recodified at 52 U.S.C. § 30116); Press Release, Democracy 21, Who Shot John: The Story of How $777,600 Contribution "Limits" Ended Up in the Omnibus Bill (Dec. 15, 2014), http://www.democracy21.org/legislative-action/press-releases-legislative-action/fred-wertheimer-who-shot-john-the-story-of-how-777600-contribution-limits-ended-up-in-the-omnibus-bill/ [http://perma.cc/MB2G-5YZJ].

49. *See generally* Adam Crowther, Pub. Citizen, Outside Money Takes the Inside Track (2012), http://www.citizen.org/documents/outside-spending-dominates-2012-election-report.pdf [http://perma.cc/ETS9-GFED]; Sundeep Iyer, Brennan Ctr. for Justice, Post-Election Analysis: 2012 Toss-Up House Races (2013), http://www.brennancenter.org/sites/default/files/publications/Post-Election%20Analysis%202012%20Toss-Up%20House%20Races.pdf [http://perma.cc/5LXE-7QWA]; Ian Vandewalker, Brennan Ctr. for Justice, Election Spending 2014: 9 Toss-Up Senate Races (2014), http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/Election_Spending_2014.pdf [http://perma.cc/6QKX-2BHL].

50. I.R.C. §§ 501(c)(1)(a), (c)(3), (c)(4), 527(a) (2012).

51. *Id.* § 170(a)(1), (c)(2).

52. 26 C.F.R. § 1.508-1(a)(3)(a) (2015).

out to the public as a house of worship to begin deriving advantage from tax-exempt status and soliciting tax-deductible contributions.[53]

Together, the advantages available to houses of worship under the tax code, if utilized for political purposes, could build on the deregulated foundation established by super PACs, dark-money groups, and max PACs. Without the electioneering prohibition and without additional changes to the tax code, groups claiming to be houses of worship could sprout up during election season and solicit unrestricted tax-deductible contributions from the public to spend in unlimited amounts supporting or opposing candidates for political office. These hypothetical organizations—which this Note refers to as "God PACs"—would further contribute to the trend of elections being bankrolled by secretive groups financed by a small coterie of wealthy donors seeking to reshape the landscape of American politics.[54]

C. *The Continued Importance of the Electioneering Prohibition*

Despite the seeming incongruity between the electioneering prohibition and the prevailing deregulatory climate surrounding political speech, the provision serves distinct and important purposes that necessitate its survival. In an era in which outside spending plays such an outsized role in the political process, the electioneering prohibition takes on even greater importance. God PACs could have severe consequences for American democracy. Critiquing the view that special interest groups effectively represent individuals in the political process, Professor Schattschneider observes, "The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent."[55] By this, he means that the proliferation of interest groups fails to ensure a political system responsive to the will of the people because the wealthy have the resources to ensure better representation of their views.[56] Similarly, permitting religious organizations to join super PACs, dark-money groups, and max PACs in contributing to the electoral discourse could lead to a chorus that sings from a sectarian hymnal and imprints public policy with religious values alien to many or even most citizens' beliefs.

As the outcomes of recent campaign finance decisions suggest, however, the 501(c)(3) electioneering prohibition is vulnerable to challenge on free speech grounds. For a restriction on political speech to pass constitutional

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53. IRS, Tax Guide for Churches & Religious Organizations 3 (2013), http://www.irs.gov/pub/irs-pdf/p1828.pdf [http://perma.cc/9SXZ-B3MP].

54. *See* Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 Geo. L.J. 1313, 1318 (2007) ("Because [501(c)(3)s] will be the only organizations to receive a subsidy for campaign speech, these organizations will become ideal entities for political campaign donors[ ] . . . [as] mechanisms or conduits for unlimited tax-deductible political contributions.").

55. E.E. Schattschneider, The Semisovereign People: A Realist's View of Democracy in America 34–35 (2d ed. 1975).

56. *See* Larry M. Bartels, Unequal Democracy: The Political Economy of the New Gilded Age 257–67 (2008) (providing empirical evidence of senator ideology and roll call vote responsiveness to high- and middle-income constituents' ideology and issue preferences, but not those of low-income constituents).

muster, the law must be narrowly tailored to serve a compelling state interest.[57] Because the electioneering prohibition specifically restricts religious organizations from engaging in partisan political activity, these groups may also challenge the provision under RFRA, under which laws that substantially burden the free exercise of religion must be the least restrictive means of furthering a compelling state interest.[58]

This Note assesses the validity of the electioneering prohibition under RFRA, instead of under the Free Speech Clause, for two reasons. First, the Supreme Court's recent decision in *Hobby Lobby* articulated a test for determining whether facially neutral laws substantially burden the free exercise of religion that is significantly more deferential to the party claiming the burden than prior RFRA case law.[59] The decision's rationale could prove fruitful to religious organizations eager to engage in political activities. Second, examining the validity of the law under RFRA allows for a careful examination from the vantage point of religious practice and the role of religion in American democracy. Since constitutional review under the Free Speech Clause would also subject the electioneering prohibition to strict scrutiny,[60] a narrower examination of the law's validity under RFRA may reveal arguments that would be helpful in countering a broader free speech challenge to the provision.

II. The Electioneering Prohibition Substantially Burdens Free Exercise Rights

While the electioneering prohibition has survived judicial scrutiny in the past, recent developments in free exercise and campaign finance jurisprudence unsettle the assumptions on which those prior decisions relied. Section II.A examines the rationale by which the D.C. Circuit upheld the electioneering prohibition under RFRA. Section II.B highlights a trend of increased deference to organizations claiming that facially neutral laws burden their religious practice, typified by the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.* Section II.C argues that *Citizens United v. FEC* forecloses the argument that the electioneering prohibition does not burden the free exercise of religion because other avenues exist for religious organizations to engage in political activity.

A. *Past Application of RFRA to the Electioneering Prohibition*

The sole appellate court to consider the validity of the 501(c)(3) electioneering prohibition under RFRA upheld the provision by finding that it did not substantially burden the free exercise of religion.[61] In *Branch Ministries*, the D.C. Circuit reviewed the revocation of a religious nonprofit's tax-

57. Citizens United v. FEC, 558 U.S. 310, 340 (2010).

58. 42 U.S.C. § 2000bb-1 (2012).

59. *See infra* notes 81–85 and accompanying text.

60. Johnson, *supra* note 22, at 887–89.

61. Branch Ministries v. Rossotti, 211 F.3d 137, 144 (D.C. Cir. 2000).

exempt status after a church affiliated with the organization placed full-page campaign ads in the *Washington Times* and *USA Today* four days before the 1992 election.[62] The ads condemned then-Arkansas Governor Clinton's positions on social issues including abortion, homosexuality, and contraception, stating, "Bill Clinton is promoting policies that are in rebellion to God's laws," and asked readers, "How then can we vote for Bill Clinton?"[63] The advertisements also invited readers to make tax-deductible contributions to the church.[64]

The D.C. Circuit held that the electioneering prohibition did not substantially burden the church's free exercise of religion because "the Church does not maintain that a withdrawal from electoral politics would violate its beliefs."[65] Even if the church did engage in politics as a matter of religious conviction, the court stated in dicta that the church's free exercise of religion still would not be substantially burdened because it could separately incorporate as a 501(c)(4) social welfare organization, which could in turn form a PAC arm that could participate in political campaigns.[66] The court reasoned that any burden imposed on Branch Ministries' free exercise of religion could be avoided through other channels for the political speech it deemed central to its faith.[67] No burden on the free exercise of religion existed because the government imposed no restriction on the quantity or quality of the group's speech; it merely controlled the manner by which the group could speak by requiring it to funnel its advocacy through the media of a 501(c)(4) and affiliated PAC.[68]

The corporate structure the D.C. Circuit envisioned to accommodate Branch Ministries' desire to engage in political activity is quite common. Like 501(c)(3)s, 501(c)(4)s are nonprofit corporations exempted from paying federal corporate income taxes,[69] but they may engage in a greater degree of political activity.[70] Additionally, donations to 501(c)(4)s, unlike 501(c)(3)s, generally are not tax deductible as charitable contributions.[71]

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62. Branch Ministries, Inc. v. Rossotti, 40 F. Supp. 2d 15, 17–18 (D.D.C. 1999), *aff'd*, 211 F.3d 137 (D.C. Cir. 2000).

63. *Id.*

64. *Id.*

65. *Branch Ministries*, 211 F.3d at 142.

66. *Id.* at 143.

67. *Id.*

68. *Id.* at 143–44.

69. I.R.C. § 501(a), (c)(4) (2012).

70. *Compare id.* § 501(c)(3) (prohibiting propaganda and lobbying that constitutes more than a substantial part of the group's activity and categorically banning participation or intervention in political campaigns), *with id.* § 501(c)(4) (providing no limits on political activity provided that the organization exclusively promotes social welfare).

71. *See id.* § 170(a)(1), (c)(2) (exempting charitable contributions to "corporation[s], trust[s], or community chest[s], fund[s], or foundation[s] . . . organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes," but making no mention of 501(c)(4) social welfare organizations).

Examples of prominent 501(c)(4) organizations include the Sierra Club[72] and NARAL Pro-Choice America[73] on the left and the National Rifle Association[74] and the Koch brothers' Americans for Prosperity on the right.[75] And as the *Branch Ministries* court recognized, federal campaign finance law permits 501(c)(4)s to operate PAC arms that may engage directly in federal elections by making contributions to candidates and by soliciting contributions for that purpose.[76] As a result, all but one of the aforementioned organizations operates PACs.[77] By contrast, 501(c)(3)s may not operate PACs.[78] But this does not prevent 501(c)(4)s—even those connected to PACs—from affiliating with 501(c)(3)s.[79] Accordingly, each of the aforementioned groups also affiliates with 501(c)(3)s.[80]

B. Hobby Lobby's *Deferential Burden Analysis*

Recent cases examining the burdens imposed by facially neutral laws on the free exercise of religion have evaluated requests for exemptions with greater deference than the *Branch Ministries* court did. Most notably, the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.* held the contraceptive mandate of the ACA invalid under RFRA,[81] engaging in a shallow substantial burden prong inquiry.

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72. *Gift Planning: Supporting the Sierra Club Family*, Sierra Club, http://vault.sierraclub.org/giftplanning/family/default.aspx [http://perma.cc/N7RJ-RYDH] [hereinafter *Supporting the Sierra Club*].

73. *Mission Statements*, NARAL Pro-Choice Am., http://www.prochoiceamerica.org/about-us/mission-statements.html [http://perma.cc/LA98-R658].

74. *Ring of Freedom: Give Now*, Nat'l Rifle Ass'n, https://www.nra.org/rof/give.aspx [http://perma.cc/A2DW-TDCH] [hereinafter *Ring of Freedom*].

75. *Donate Today*, Ams. for Prosperity, http://americansforprosperity.org/donate_today [http://perma.cc/7Q93-N75Q]. Americans for Prosperity and its affiliates have been tied to the energy magnates David H. and Charles G. Koch. Carl Hulse & Ashley Parker, *Koch Group, Spending Freely, Hones Attack on Government*, N.Y. Times, Mar. 21, 2014, at A1.

76. 26 C.F.R. § 1.527-6(f) (2015); Holly Schadler, Alliance for Justice, The Connection: Strategies for Creating and Operating 501(c)(3)s, 501(c)(4)s, and Political Organizations 59 (3d ed. 2012), http://bolderadvocacy.org/wp-content/uploads/2012/10/The_Connection_paywall.pdf [http://perma.cc/HDH3-B3B4]; *see also* 2 U.S.C. § 432 (2012) (recodified at 52 U.S.C. § 30102) (listing requirements for establishing political committees).

77. *See About PFV*, NRA-PVF, https://www.nrapvf.org/about-pvf/ [http://perma.cc/BNC7-FV3F]; *Mission Statements*, *supra* note 73 (NARAL Pro Choice America PAC); *Sierra Club: 2016 PAC Summary Data*, OpenSecrets.org, http://www.opensecrets.org/pacs/lookup2.php?strID=C00135368 [http://perma.cc/L4ZA-NCJX].

78. 26 C.F.R. § 1.527-6(g); Schadler, *supra* note 76, at 71 n.1.

79. *See* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 544 (1983) (finding an organization may utilize a 501(c)(3) status for nonpolitical activities and its 501(c)(4) affiliate for lobbying and political expenditures).

80. *See AFPF Legal Status*, Ams. For Prosperity, http://americansforprosperity.org/legal [http://perma.cc/3NKH-K95J]; *Mission Statements*, *supra* note 73 (NARAL Pro-Choice America Foundation); *Ring of Freedom, supra* note 74 (NRA Foundation); *Supporting the Sierra Club*, *supra* note 72 (Sierra Club Foundation).

81. 134 S. Ct. 2751, 2785 (2014).

In *Hobby Lobby*, two closely held for-profit corporations that objected to abortion on religious grounds—Hobby Lobby and Conestoga Wood—sought exemptions from the ACA's contraceptive mandate and argued that providing their employees with health insurance that covered four contraceptive devices facilitated the destruction of embryos.[82] Justice Alito, writing for the majority, refused to inquire into the causal relationship between the employer subsidy of contraceptive devices and the destruction of embryos.[83] Doing so, he argued, would require courts to analyze the reasonableness of a religious belief, something "federal courts have no business addressing" and would "[a]rrogat[e] the authority to provide a binding national answer to [a] religious and philosophical question."[84] Deferring to the companies' characterization of the relationship between the law and their religious beliefs, the Court had little difficulty identifying a substantial burden, since failure to comply with the contraceptive mandate would saddle the companies with heavy tax penalties.[85]

If applied to Branch Ministries' political activity, this rationale would suggest that the electioneering prohibition imposes a substantial burden. The *Branch Ministries* court focused its inquiry on the nonprofit's political speech itself, rather than what the organization sought to accomplish with its political activity. Although the court acknowledged that the ads Branch Ministries placed "reflected its religious convictions on certain questions of morality," the court held that the electioneering prohibition did not constitute a substantial burden because engagement in electoral politics did not itself amount to a tenet of the organization's faith.[86] In essence, the *Branch Ministries* court determined the causal relationship between the advocacy in which the nonprofit engaged and the political ends the organization sought too tenuous for the electioneering prohibition to amount to a substantial burden on its free exercise of religion.

Like the owners of Hobby Lobby and Conestoga Wood, who believed that paying for ACA-compliant health insurance could make them complicit in the termination of pregnancies, Branch Ministries believed that complying with the electioneering prohibition would make the organization complicit in the election of a President who would adopt policies counter to its religious beliefs. The effect of a single religious organization's campaign advocacy on the outcome of an election—let alone the policies lawmakers adopt subsequent to the election—may be remote indeed. But, as Justice Ginsburg argued in her *Hobby Lobby* dissent, the provision of ACA-compliant health insurance also had a purely theoretical effect on the choices of the companies' employees.[87] The contraceptive mandate only required Hobby

82. *Hobby Lobby*, 134 S. Ct. at 2764–66.

83. *Id.* at 2777–79.

84. *Id.* at 2778.

85. *Id.* at 2776–77.

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

87. *See Hobby Lobby*, 134 S. Ct. at 2799 (Ginsburg, J., dissenting).

Lobby and Conestoga Wood to provide health insurance plans that an employee or dependent could independently utilize to secure free contraceptives.[88] "Any decision to use contraceptives made by a woman covered under Hobby Lobby's or Conestoga's plan," Justice Ginsburg reasoned, "will not be propelled by the Government, it will be the woman's autonomous choice, informed by the physician she consults."[89] Similarly, an officeholder's policy choices remain several steps removed from an outside spender, even if those choices embody or undermine values core to the spender's beliefs. By prohibiting inquiry into the attenuation between a government policy and religious exercise, *Hobby Lobby* explicitly rejected the type of causation inquiry that Justice Ginsburg favored.[90]

Developments since *Hobby Lobby* provide some preliminary evidence to suspect a shift in the evaluation of the substantial burden prong of RFRA claims. The day after issuing its *Hobby Lobby* decision, the Supreme Court once again displayed a high degree of deference to a religious organization in granting an injunction to the Christian liberal arts school Wheaton College, allowing it to opt out of the contraceptive mandate without filling out the form that religious nonprofits must submit to insurers to be freed from the law's requirements.[91] Ironically, in granting the injunction, the Court exempted the college from the very procedure it lauded in *Hobby Lobby* as a less restrictive alternative to obligatory compliance with the contraceptive mandate.[92] In granting the injunction, however, the Court offered no analysis at all concerning the burden on free exercise of religion imposed by the requirement that the college fill out the form.[93]

Moreover, plaintiffs making RFRA claims in the wake of *Hobby Lobby* have cited the decision for the proposition that attenuation between government policy and an entity's religious practice does not render the burden insubstantial. In *Wieland v. United States Department of Health and Human Services*, for example, a Missouri state senator and his wife argued that the contraceptive mandate forces them to pay for health insurance that will allow their dependent daughters to acquire contraceptives in violation of the couple's religious beliefs.[94] On appeal, the plaintiffs urged the Eighth Circuit to interpret *Hobby Lobby* to mean that "[c]laimants like the Wielands are

88. *Id.*

89. *Id.*

90. *Id.* at 2777–78 (majority opinion).

91. Wheaton Coll. v. Burwell, 134 S. Ct. 2806, 2807 (2014).

92. *Hobby Lobby*, 134 S. Ct. at 2782 (noting the option for the Department of Health and Human Services to require insurance companies to separately cover contraceptive costs for objecting companies' employees).

93. *Wheaton Coll.*, 134 S. Ct. at 2807. The Court did caution against reading the injunction as its views on the merits, *id.*, but the Court's willingness to grant such an attenuated religious objection without further inquiry into the substantiality of the burden does suggest a shift in how the Court approaches RFRA claims.

94. 793 F.3d 949, 952 (8th Cir. 2015).

judges of whether their consciences are violated, not the Government."[95] The court of appeals did not reach the merits of the claim, but did find that the couple demonstrated a sufficient causal connection to establish standing, finding the alleged burden on free exercise of religion "fairly traceable from HHS's enforcement or threatened enforcement of the Mandate."[96]

The interpretation of *Hobby Lobby* urged by the Wielands comes close to converting RFRA's substantial burden prong into a sincerity test. Few plaintiffs would have difficulty making such a showing. For example, in *Perez v. Paragon Contractors Corp.*, a district court granted a member of the Fundamentalist Church of Jesus Christ of the Latter Day Saints (FLDS) the right to refuse to answer the Department of Labor's questions as part of an investigation into potential child labor violations based on his belief in the need for secrecy concerning church affairs.[97] Because the magistrate judge below raised no credibility findings, the trial judge found that the plaintiff demonstrated the sincerity of his belief simply by stating his position under oath.[98]

Other plaintiffs have read *Hobby Lobby* somewhat less broadly. In *University of Notre Dame v. Burwell*, the university, like Wheaton College, objected to filling out the paperwork necessary to secure an exemption from the contraceptive mandate.[99] Since the ACA requires insurance companies to directly cover the contraceptive needs of workers whose employers are exempt from the mandate, Notre Dame argued that the requirement burdens the university's free exercise of religion by forcing it to facilitate access to contraception.[100] In its petition for a writ of certiorari, Notre Dame noted that *Hobby Lobby*:

> did not consider whether complying with the regulations would be a "substantial" violation of the plaintiffs' religious beliefs, or whether it would require "substantial" physical exertion. Instead, the Court simply noted that the plaintiffs "object[ed] on religious grounds" to complying with the regulation, and proceeded to ask whether the plaintiffs would incur a substantial *penalty* if they did not comply.[101]

According to this interpretation, the intervening third parties do not sever the connection between Notre Dame's actions and providing contraception to its students and employees, and the substantial burden inquiry pertains only to the consequences of failing to comply with the government's directives on sincerely held religious grounds.

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95. Appellants' Rule 28(j) Letter at 1, Wieland v. U.S. Dep't of Health & Human Servs., 793 F.3d 949 (8th Cir. 2015) (No. 13-3528), ECF No. 50.

96. *Wieland*, 793 F.3d at 954–55.

97. No. 2:13CV00281-DS, 2014 WL 4628572, at *1, *3–4 (D. Utah Sept. 11, 2014).

98. *Perez*, 2014 WL 4628572, at *3.

99. Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 549–51 (7th Cir. 2014), *vacated sub nom.* Univ. of Notre Dame v. Burwell, 135 S. Ct. 1528 (2015) (mem.).

100. *Id.* at 553, 557.

101. Petition for Writ of Certiorari at 25–26, Univ. of Notre Dame v. Burwell, 135 S. Ct. 1528 (2015) (No. 14-392), 2014 WL 4978601, at *25–26 (alteration in original) (quoting Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775–79 (2014)).

These readings of *Hobby Lobby*, of course, do not bind the Supreme Court or lower courts in any fashion,[102] but they do demonstrate the hurdles that courts will face in trying to distinguish claims for religious exemptions from those claimed by Hobby Lobby and Conestoga Wood. By rejecting attenuation as a means to question the substantiality of the burdens imposed on religious practice by government regulation, the Court greatly expanded the potential for individuals and corporations to make successful RFRA claims. No matter how *Hobby Lobby* plays out in lower courts, the facile distinction that the *Branch Ministries* court made between the action in which the organization wished to engage (electioneering) and the ends it sought (among other things, reduced access to abortion and contraceptives) does not cohere with *Hobby Lobby*'s substantial burden inquiry.

C. *Alternative Outlets for Political Speech Do Not Lessen the Burden*

The alternative method identified by the *Branch Ministries* court for religious organizations to engage in political activity cannot save the electioneering prohibition from RFRA review. Under the electioneering prohibition, religious organizations wishing to engage in political activity find themselves similarly situated to corporations and labor unions prior to *Citizens United v. FEC*, which overturned the ban on corporate and union independent expenditures in federal elections.[103] Prior to *Citizens United*, federal law barred corporations and labor unions from spending general treasury funds in national elections.[104] But corporations and labor unions could (and still can)

102. Indeed, seven of eight circuits that have evaluated the question have held that the procedures designed to accommodate nonprofits and closely held companies that object to the contraceptive mandate do not substantially burden religious exercise, and the Supreme Court has granted certiorari to resolve the split. *Compare* Mich. Catholic Conference & Catholic Family Servs. v. Burwell, Nos. 13-2723, 13-6640, 2015 WL 4979692, at *9 (6th Cir. Aug. 21, 2015) (finding no substantial burden), Catholic Health Care Sys. v. Burwell, No. 14-427-cv, 2015 WL 4665049, at *9 (2d Cir. Aug. 7, 2015) (same), Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1187 (10th Cir.), *cert. granted*, 2015 WL 6759642 (Nov. 6, 2015) (mem.) (same), Wheaton Coll. v. Burwell, 791 F.3d 792, 797 (7th Cir. 2015) (same), E. Tex. Baptist Univ. v. Burwell, 793 F.3d 449, 459 (5th Cir.), *cert. granted*, 2015 WL 4127312 (Nov. 6, 2015) (mem.) (same), Univ. of Notre Dame v. Burwell, 786 F.3d 606, 611–12 (7th Cir. 2015) (same), Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs., 778 F.3d 422, 439–42 (3d. Cir.), *cert. granted sub nom.* Geneva Coll. v. Burwell, 2015 WL 4765464 (Nov. 6, 2015) (mem.) (same), *and* Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 237 (D.C. Cir. 2014), *cert. granted*, 2015 WL 6759640 (Nov. 6, 2015) (same), *with* Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 801 F.3d 927, 937 (8th Cir. 2015) (finding a substantial burden); *see also* Marty Lederman, *Update on the Contraception Coverage Regulations and Litigation*, BALKINIZATION, http://balkin.blogspot.com/2015/07/update-on-contraception-coverage.html [http://perma.cc/9N27-FZXS].

103. Citizens United v. FEC, 558 U.S. 310, 365 (2010).

104. 2 U.S.C. § 441b (2012) (recodified at 52 U.S.C. § 30118), *invalidated by* Citizens United v. FEC, 558 U.S. 310 (2010).

create PACs funded by voluntary contributions from employees, stockholders, or members for the purposes of making contributions and independent expenditures in national elections.[105]

In *Citizens United*, the Supreme Court held that this alternative means of engaging in the political process did not alleviate the First Amendment injury caused by the corporate-expenditure ban. First, the Court reasoned that corporations and their connected PACs are separate entities and that a PAC's speech cannot serve as a proxy for corporate speech.[106] Second, the Court stated that "PACs are burdensome alternatives . . . [that] are expensive to administer and subject to extensive regulations."[107] Among other things, the Court identified the requirements that PACs regularly disclose the donations they receive and contributions and expenditures they give as features that make the vehicle an onerous alternative to direct political activity.[108] *Citizens United* relieved corporations and labor unions of this encumbrance, freeing them to directly spend money from their general treasuries in federal elections.[109]

Like corporations prior to *Citizens United*, religious organizations cannot make independent expenditures in elections due to the electioneering prohibition. As *Branch Ministries v. Rossotti* suggests, however, such entities may form 501(c)(4)s with affiliated PACs to engage in political activity.[110] But *Citizens United*'s rejection of the idea that PACs constitute a separate avenue for corporate political speech applies with equal or greater force to the proposed vehicle for religious speech. To engage in the full panoply of political activity, a religious organization must operate not one, but two entities. If operating a PAC is a burdensome alternative to directly making independent expenditures, then operating a 501(c)(4) and PAC is even more burdensome.[111] And just as the PAC exception to the corporate-expenditure ban in *Citizens United* did not allow corporations to speak,[112] the ability for religious organizations to form 501(c)(4)s with affiliated PACs does not remove the burden on free exercise of religion imposed by the electioneering prohibition.

If the electioneering prohibition remains legal in the aftermath of *Hobby Lobby* and *Citizens United*, a claim for a RFRA exemption to the prohibition is likely to advance past the substantial burden stage of the test.

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105. *Id.* § 441b(b)(2).

106. *Citizens United*, 558 U.S. at 337.

107. *Id.*

108. *Id.* at 338–39.

109. *Id.* at 365; *see also* Am. Tradition P'ship v. Bullock, 132 S. Ct. 2490, 2491 (2012) (per curiam) (extending *Citizens United* to invalidate Montana's corporate independent expenditure ban).

110. 211 F.3d 137, 143–44 (D.C. Cir. 2000).

111. *See Branch Ministries*, 211 F.3d at 143–44.

112. *Citizens United*, 558 U.S. at 337.

III. The Electioneering Prohibition Ensures Separation Between Church and State

Although the electioneering prohibition substantially burdens the free exercise of religion, RFRA permits facially neutral laws that encroach on religious practice if they are the least restrictive means of serving a compelling state interest.[113] While the electioneering prohibition may provide salutatory benefits for American democracy by limiting the corrupting influence of undisclosed spending in elections and government subsidization of partisan politics, Section III.A argues that these interests cannot insulate the law from invalidation under RFRA's strict scrutiny analysis. Section III.B, however, argues that the electioneering prohibition *can* be justified as the least restrictive means of preventing undue entanglement between government and religion. Paradoxically, greater accommodation of religious dissent necessitates a higher degree of government intrusion in religious entities' affairs. Rather than argue that the electioneering prohibition serves an important role in American democracy in spite of its impact on religious freedom, supporters should emphasize the critical way in which it promotes religious practice by keeping the spheres of government and religion separate.

A. *Unavailable Government Interests*

The electioneering prohibition is not narrowly tailored to the government's interest in combating corruption or its interest in preventing taxpayer subsidization of partisan political activity.

1. Anticorruption Rationale

Citizens United forecloses an argument that the electioneering prohibition can be justified as a prophylaxis against the corrupting influence of unlimited, undisclosed spending in elections. As discussed *supra*, religious

113. 42 U.S.C. § 2000bb-1(b) (2012). *Hobby Lobby* contains ambiguous analysis of the RFRA test, with the majority arguing that the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5, modified RFRA by requiring accommodation of religion "to the maximum extent permitted." Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761–62 (2014) (quoting 42 U.S.C. § 2000cc-3(g) (2012)). The majority made this argument, however, to rebut the principal dissent's suggestion that the Free Exercise Clause case law prior to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which RFRA restored, denied Free Exercise Clause protection to corporations. *Hobby Lobby*, 134 S. Ct. at 2772 ("It is simply not possible to read these provisions as restricting the concept of the 'exercise of religion' to those practices specifically addressed in our pre-*Smith* decisions."). This line of reasoning has potentially broad consequences if divorce of RFRA from prior First Amendment jurisprudence requires some sort of scrutiny even more robust than traditional strict scrutiny. This Note, however, assumes that RFRA demands a level of judicial review no more searching than that required in *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (requiring government action that substantially burdens religious practice to be justified by a compelling state interest).

organizations operating under the electioneering prohibition find themselves similarly situated to corporations and labor unions prior to the landmark campaign finance decision.[114] Just as *Citizens United* undercuts the argument that alternative vehicles for engaging in politics minimizes the burden that the electioneering prohibition imposes on religious practice, the decision likely precludes justification of the provision on the grounds that it combats the corrupting influence of money in politics. The *Citizens United* Court held that the ban on corporate and union independent expenditures could not be justified as furthering the government's compelling interest in preventing corruption or the appearance thereof.[115] The Court reasoned that independent political spending, in contrast to direct contributions from individuals and groups to candidates, carries less risk of corruption.[116] The Court elaborated that categorical bans on spending go "well beyond the Government's interest"[117] and constitute an "asymmetrical" remedy.[118] Instead, the Court held disclosure to be "a less restrictive alternative" to an outright ban that provides critical information to voters and promotes accountability.[119]

The 501(c)(3) electioneering prohibition, like the corporate and union independent expenditure ban, categorically bars political spending by an entity. Though RFRA protects religious practice, rather than freedom of speech, any law that substantially burdens the free exercise of religion must also be narrowly tailored to serve a compelling state interest.[120] If the anticorruption rationale could not rescue the corporate independent expenditure ban from a free speech challenge, then it likely cannot provide safe harbor for the electioneering prohibition under RFRA's strict scrutiny analysis. As with the corporate independent expenditure ban, the electioneering prohibition goes beyond restricting the direct flow of money to political candidates that the Court has deemed corruptive.[121] Any risk of corruption posed by 501(c)(3) campaign spending also appears minimal when one considers the amount of unrestricted and undisclosed spending by social welfare organizations in the wake of *Citizens United*.[122] Tax-exempt 501(c)(4)s spent over $257 million on independent expenditures in the 2012 presidential and congressional elections alone, [123] and undisclosed spending accounted for

114. *See supra* Section II.C.

115. *See Citizens United*, 558 U.S. at 357.

116. *Id.*

117. *Id.*

118. *Id.* at 361.

119. *Id.* at 369–71.

120. 42 U.S.C. § 2000bb(b)(1) (2012); *see also* Sherbert v. Verner, 374 U.S. 398, 403 (1963).

121. *See supra* note 36 and accompanying text.

122. *Cf. Citizens United*, 588 U.S. at 360 ("[I]ndependent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate.").

123. *Outside Spending*, OpenSecrets.org, https://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2012 [http://perma.cc/7NZG-9HY5].

over 30 percent of the money spent by outside groups.[124] With unregulated money already playing such a large role in elections, the electioneering prohibition surely cannot be justified by whatever additional corrupting consequences it holds at bay. Just as disclosure constituted a less restrictive alternative to the corporate independent expenditure ban, increasing reporting requirements for politically active 501(c)(3)s would infringe on the free exercise of religion to a lesser degree than an outright ban on partisan political activity by religious organizations.

One might argue that houses of worship pose a special risk as conduits of political spending because of the rules that govern their formation. For example, houses of worship, unlike other 501(c)(3) organizations, need not file with the IRS to begin receiving tax benefits.[125] Without the electioneering prohibition, individuals interested in spending and soliciting unlimited amounts of money in elections could declare themselves a house of worship without any determination by the IRS that the organization qualifies for tax-exempt status. But 501(c)(4) social welfare organizations can also self-declare their proper classification and begin receiving tax benefits without IRS scrutiny.[126] To the extent that this exemption from the notice requirements that apply to other 501(c)(3) organizations poses additional corruption risks, requiring houses of worship that wish to engage in electioneering activity to file with the IRS would constitute a less restrictive means of furthering the government's goals. The special rules governing the formation of houses of worship for taxation purposes do not justify an outright ban on electioneering activity.

2. Government Subsidization of Partisan Political Activity

While both the district and appellate courts in *Branch Ministries*, upheld the electioneering prohibition on the grounds that it did not substantially burden the free exercise of religion,[127] the lower court also stated that the provision constituted the least restrictive means of pursuing the compelling interest in preventing government subsidization of partisan political activity.[128] In an earlier case upholding the electioneering prohibition against a challenge under the Free Exercise Clause,[129] the Tenth Circuit characterized tax-exempt status as a "matter[ ] of legislative grace." [130] The conditions set forth in § 501(c)(3), the court stated, "stem from the Congressional policy

124. *Outside Spending by Disclosure, Excluding Party Committees*, OpenSecrets.org, http://www.opensecrets.org/outsidespending/disclosure.php [http://perma.cc/4KGU-EWEZ].

125. 26 C.F.R. § 1.508-1(a)(3)(a) (2015); *see also* IRS, *supra* note 53, at 3.

126. *See* IRS, IRS Pub. 557, Tax-Exempt Status for Your Organization 47–48 (2015), http://www.irs.gov/pub/irs-pdf/p557.pdf [http://perma.cc/3BP3-KY2V].

127. Branch Ministries v. Rossotti, 211 F.3d 137, 142 (D.C. Cir. 2000); Branch Ministries, Inc. v. Rossotti, 40 F. Supp. 2d 15, 17, 24–27 (D.D.C. 1999).

128. *Branch Ministries, Inc.*, 40 F. Supp. 2d at 25–26.

129. U.S. Const. amend. I, cl. 2.

130. Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 854 (10th Cir. 1972).

that the United States Treasury should be neutral in political affairs and that substantial activities directed to attempts to influence legislation or affect a political campaign should not be subsidized."[131] Whether in response to a RFRA or Free Exercise Clause challenge, both courts reasoned that the electioneering prohibition could survive strict scrutiny because of the compelling need for the federal government to remain neutral in partisan political fights.

To the extent that the electioneering prohibition could be supported by a political neutrality rationale before *Citizens United* fueled an explosion of outside spending, [132] that justification cannot save the electioneering prohibition today. One might distinguish 501(c)(3) organizations from the 501(c)(4) organizations newly involved in electoral politics because donors to the former but not the latter can receive tax deductions for contributions.[133] But the Supreme Court has treated tax-exempt status as a form of subsidy. Upholding the IRS revocation of tax-exempt status to segregated private schools,[134] the Court in *Bob Jones University v. United States* reasoned that "taxpayers can be said to be indirect and vicarious 'donors' " to tax-exempt organizations.[135] Just as taxpayers provided indirect support for the discriminatory policies of the colleges before the IRS took corrective action, the government currently subsidizes the political activity of 501(c)(4) social welfare organizations by according them tax-exempt status. Also, in *Regan v. Taxation with Representation of Washington*, which upheld § 501(c)(3)'s restriction on lobbying activity, the Court made no distinction between tax exemptions and deductions, characterizing both as forms as government subsidy.[136]

Beyond 501(c)(4) organizations, political organizations—which include political parties, candidate committees, super PACs, traditional PACs, and state issue advocacy organizations[137]—all qualify as tax-exempt organizations under § 527 of the tax code.[138] Historically, political organizations did not receive a tax exemption. Until 1975, the Code offered no formal tax benefits to groups engaged in political activity, but the IRS treated contributions to such groups as nontaxable gifts. [139] Congress enacted § 527 in response to the IRS decision in 1973 to begin taxing political groups.[140]

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131. *Id.* (emphasis omitted).

132. *See supra* notes 122–124 and accompanying text.

133. *See* I.R.C. § 170(a)(1), (c) (2012).

134. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

135. *Id.* at 591.

136. 461 U.S. 540, 544 (1983).

137. *See* I.R.C. § 527(e)(1)–(2); Richard Briffault, *Super PACs*, 96 Minn. L. Rev. 1644, 1648 (2012).

138. I.R.C. § 527(a).

139. Erika Lunder, Cong. Research Serv., RL 33377, Tax-Exempt Organizations: Political Activity Restrictions and Disclosure Requirements 17 (2007)

140. *Id.* at 17–18.

Congress's choice to grant tax-exempt status to political organizations came with a significant price tag. For the subset of these organizations that engages in federal electoral activity, receipts totaled over $8.8 billion in 2012 alone.[141] If the federal government taxed the revenue raised by such groups through donations in the same manner that it taxes for-profit corporations (assuming no deductions, credits, or other means of reducing tax liability), the IRS would collect an additional $3 billion in revenue.[142] This figure does not even take into account the receipts of 527s engaged in state and local politics, which do not file with the Federal Election Commission.[143] In short, by extending tax-exempt status to social welfare and political organizations, the federal government forgoes a significant amount of revenue. While a less direct benefit than a tax deduction, a tax exemption certainly constitutes a form of subsidy. Given the substantial indirect government benefits that redound to other types of organizations besides 501(c)(3)s engaged in partisan political activity, the federal government cannot justify an outright ban on political speech based on a supposed preference to keep taxpayer dollars out of politics.

B. *Maintaining the Wall Between Church and State*

When the Tenth Circuit upheld the electioneering prohibition under the Free Exercise Clause,[144] it stated that the policy serves the "overwhelming and compelling Governmental interest . . . of guarantying that the wall separating church and state remain[s] high and firm."[145] The court did not explain how removing the prohibition would undermine the Establishment Clause, and its treatment of the issue seems conclusory. But a closer examination of the Tenth Circuit's rationale offers a fruitful defense of the electioneering prohibition.

By arguing that the electioneering prohibition serves the government's compelling interest in maintaining a strong separation between church and state, this Note does not make the stronger claim that the electioneering prohibition is constitutionally required. The Supreme Court's jurisprudence confirms that government accommodation of religious practice does not, by

141. FEC, 2012 Committee Summary, http://fec.gov/data/CommitteeSummary.do?format=csv&election_yr=2012 [http://perma.cc/NJ6X-5GA3] (sum of entries in column labeled "tot_rec").

142. This calculation is based on application of tax brackets described in I.R.C. § 11(b) to total receipts of each political organization that filed with the Federal Election Commission during the 2012 election cycle.

143. *See* Political Committee Status, 72 Fed. Reg. 5,595, 5,598 (Feb. 7, 2007) (to be codified at 11 C.F.R. pt. 100) ("[V]irtually all political committees are 527 organizations. It does not necessarily follow that all 527 organizations are or should be registered as political committees. . . . By definition, 527 organizations may engage in a host of State, local, and nonelectoral activity well outside the Commission's jurisdiction.").

144. U.S. Const. amend. I, cl. 2.

145. Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 857 (10th Cir. 1972).

itself, offend First Amendment principles. [146] And minimal levels of political activity by houses of worship—such as a religious leader endorsing a candidate from the pulpit—would not raise Establishment Clause concerns. But more extensive political involvement—such as funding independent expenditures—could prompt more invasive government efforts to police the activities of tax-subsidized religious groups. Conceivably, RFRA may permit the government to guard against Establishment Clause violations by drawing a bright line preventing the religious groups it subsidizes from engaging in activity likely to lead to intrusive oversight. [147] By prohibiting activities by tax-subsidized groups that carry a demonstrated risk of entangling the government in the internal affairs of religious entities, the electioneering prohibition furthers the government's compelling interest in reinforcing the wall separating church and state.

Lemon v. Kurtzman provides the reigning test for identifying an Establishment Clause violation and therefore provides a useful framework for identifying entanglement threats posed by permitting political activity by religious organizations.[148] For a statute to be valid under the Establishment Clause it (1) must have a secular legislative purpose, (2) must not have the primary effect of advancing or inhibiting religion, and (3) must not lead to excessive entanglement between government and religion.[149]

Exempting religious organizations from the electioneering prohibition would not run afoul of the secular purpose requirement. The Supreme

146. *E.g.*, Cutter v. Wilkinson, 544 U.S. 709, 719–20 (2005) (upholding RLUIPA); Corp. of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Amos, 483 U.S. 327, 338, 340 (1987) (upholding Title VII of the Civil Rights Act of 1964's religious exemption); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144–45 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.").

147. The Court has acknowledged that "[a]t some point, accommodation may devolve into an 'unlawful fostering of religion.' " *Amos*, 483 U.S. at 334–35 (quoting *Hobbie*, 480 U.S. at 145). In addition, the Court has noted that facially valid religious exemptions may be challenged under the Establishment Clause on an as-applied basis when they impose significant burdens on third parties. *Cutter*, 544 U.S. at 725–26. Without question, Congress has a compelling interest in preventing core Establishment Clause violations. I contend further that this interest extends to providing prophylactic protection by preempting as-applied challenges that would emerge when a law is deemed likely to lead to entanglement between government and religion or government endorsement of religion.

148. Some scholars and jurists believe *Lemon v. Kurtzman* and its progeny distorted the original meaning of the Establishment Clause. *See supra* note 30. Nevertheless, the *Lemon* test "remains the prevailing analytical tool for the analysis of Establishment Clause claims." Doe *ex rel.* Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 849 (7th Cir. 2012) (quoting Books v. City of Elkhart, 235 F.3d 292, 301 (7th Cir. 2000)). For recent examples of applications of the *Lemon* test by appellate courts, see, Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J., 760 F.3d 227, 237–45 (2d Cir. 2014); Liberty Univ., Inc. v. Lew, 733 F.3d 72, 101–02 (4th Cir. 2013); Barnes-Wallace v. City of San Diego, 704 F.3d 1067, 1082–84 (9th Cir. 2012); Satawa v. Macomb Cty. Rd. Comm'n, 689 F.3d 506, 526–28 (6th Cir. 2012). The analysis that follows will likely prove unpersuasive and unsatisfying for those who reject the *Lemon* test entirely, but this Note assumes the continuing viability of the *Lemon* framework.

149. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

Court has recognized the desire to "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions" as a permissible legislative purpose.[150] In this vein, an exemption from the electioneering prohibition would not have the advancement of religion as its primary effect, because it merely eliminates a government-imposed obstacle to religious groups furthering their goals through the political process.

Nor would a religious exemption from the electioneering prohibition have the primary effect of enhancing or inhibiting religion. In *Amos*, the Court clarified that a law does not fail the "primary effect" prong of the *Lemon* test "simply because it *allows* churches to advance religion, which is their very purpose."[151] Rather, for a law to have the primary effect of advancing religion, "the *government itself* [must] advance[ ] religion through its own activities and influence."[152] While permitting religious organizations to electioneer undoubtedly would enhance the ability of such entities to further their religious missions, any fruits of religious organizations' political activity would be the product of the groups' efforts, not the government's designs. The facial validity of the electioneering prohibition under the *Lemon* test's first two prongs underscores that, in many contexts, the government can and should grant religious accommodations when the accommodations create no perceivable risk of Establishment Clause violations.

Lifting the electioneering prohibition, however, *could* lead to an excessive entanglement between government and religion. While an exemption from the electioneering prohibition would not inevitably lead to such entanglement, it would create a risk sufficient to justify the prohibition as a prophylactic measure without violating RFRA. In *Lemon*, the Court held that state financial assistance of private parochial schools created an excessive entanglement between government and religion and violated the Establishment Clause.[153] Because the programs invalidated in *Lemon* as a condition for aid required subsidized teachers to refrain from teaching religious content, the Supreme Court found that the law required "comprehensive, discriminating, and continuing state surveillance" to ensure adherence to the conditions. This created an "excessive and enduring entanglement between state and church."[154]

Similarly, lifting the electioneering prohibition would likely prompt more invasive IRS involvement in the day-to-day activities of religious organizations that engage in substantial amounts of political activity. While 501(c)(3)s cannot electioneer, they can lobby elected officials and government agencies under current law, so long as the activity does not constitute a "substantial part" of their efforts.[155] To determine whether organizations

150. *Amos*, 483 U.S. at 335.

151. *Id.* at 337.

152. *Id.*

153. 403 U.S. at 613–14.

154. *Lemon*, 403 U.S. at 618–22.

155. I.R.C. § 501(c)(3) (2012).

have devoted a substantial amount of their activities to lobbying, the IRS engages in a subjective, fact-intensive, case-by-case inquiry that assesses the amount of time devoted to lobbying, the amount of money the organization spends on the activity, the importance of lobbying to the organization's purpose, and the continuity of its lobbying efforts.[156] This test ensures that 501(c)(3)s serve the purposes contemplated by the statute[157] and do not function merely as vehicles for untaxed political advocacy.

If 501(c)(3)s could electioneer, the IRS would undoubtedly monitor their activities to ensure that they do not become mere conduits for electoral political activity at the expense of their designed purposes. Under the substantial part test or something akin to it, the IRS would have to separate the activities of religious organizations into the "political" on the one hand, and the "religious" on the other. These determinations would involve invasive inquiries into religious doctrine by a government entity. Moreover, when oversight raises red flags, continued enjoyment of tax benefits would require religious organizations to deviate from the activities they deem conducive to their missions and instead conduct themselves in a fashion that the government considers consonant with its own conception of religious practice.

The controversy surrounding IRS efforts to monitor the activities of politically engaged nonprofits in the aftermath of *Citizens United* provides a clear illustration of the invasive oversight that the electioneering prohibition averts. In an effort beginning in 2010 to identify groups abusing nonprofit status by primarily engaging in partisan political activity, the IRS requested information about the activities of nearly 300 politically active groups. [158] Documents disclosed during a subsequent investigation of the IRS's conduct reveal that the agency requested detailed information about the qualifications of group leaders to educate the public about particular issues and organizational priorities.[159] The IRS also requested copies of materials disseminated to the public and used for legislative advocacy purposes.[160] While a Treasury Department investigation of IRS oversight found the effort tainted by potentially partisan criteria for selecting inquiry targets,[161] the investigation revealed the degree of intrusion that nonprofits could expect if the IRS policed their activity.

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156. Lunder, *supra* note 139, at 6–7; *Measuring Lobbying: Substantial Part Test*, IRS, http://www.irs.gov/Charities-&-Non-Profits/Measuring-Lobbying:-Substantial-Part-Test [http://perma.cc/APA8-RTKS].

157. I.R.C. § 501(c)(3) (2012) ("[501(c)(3)s are] organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . .").

158. Juliet Eilperin, *Report Details IRS Scrutiny*, Wash. Post, May 13, 2013, at A1.

159. Jonathan Weisman, *I.R.S. Scrutiny Went Beyond the Political*, N.Y. Times, July 5, 2013, at A1.

160. *Id.*

161. Treasury Inspector Gen. for Tax Admin., Ref. No. 2013-10-053, Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review 5–10 (2013), http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf [http://perma.cc/5DDC-KZBS].

If forced to distinguish organizations' religious activities from political activities, the IRS would be compelled to probe into matters of religious doctrine and make judgment calls as to whether activity reflects adherence to religious conviction or a political agenda. Consider how the IRS would evaluate the following hypothetical examples:

> Illustration A: In 2005, the Twenty-Fifth General Synod of the United Church of Christ (UCC) passed a resolution opposing cuts to social safety-net programs based on the Bible's teachings about poverty and urged opposition to such budget cuts.[162] Based on this resolution, a UCC pastor publishes an article in the church bulletin urging congregants to vote against the local congressman who supported the House leadership's 2015 budget containing deep cuts to social safety-net program funding.[163]
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> Illustration B: In 2015, the Orthodox Union (OU), the largest umbrella organization for Orthodox Jewish congregations in America,[164] adopted a resolution expressing its views on negotiations between the United States and Iran on nuclear proliferation.[165] Citing "grave[ ] conern[s]" over the threat of a nuclear Iran to Israel, the resolution emphasized its belief that "no deal is better than a bad deal" that would allow Iran to develop nuclear capability.[166] Two months before the 2016 election, the Orthodox Union publishes a voter guide rating members of Congress based on their positions on the negotiations.

Would the IRS classify the conduct in each illustration as religious or political? The UCC resolution references scripture, while the OU resolution does not. But Israel undeniably plays a central role in the Jewish faith.[167] Would the IRS promulgate a rule requiring religious textual references in organizational advocacy for the agency to deem the conduct religious rather than political? Is the OU resolution better understood as a manifestation of faith or as a political expression of Jewish nationalism?[168] Both? Each illustration involves action by religious organizations in furtherance of a resolution

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162. Twenty-Fifth General Synod of the United Church of Christ, To Advance the Cause of the Most Disadvantaged in the Budgetary and Appropriations Process (2005), http://uccfiles.com/synod/resolutions/TO-ADVANCE-THE-CAUSE-OF-THE-MOST-DISADVANTAGED-IN-THE-BUDGETARY-AND-APPROPRIATION-PROCESS.pdf [http://perma.cc/FFK6-R6SR].

163. Jonathan Weisman, *Republicans Propose Budget with Deep Cuts*, N.Y. Times, Mar. 18, 2015, at A16.

164. *About the OU Advocacy Center*, Orthodox Union Advocacy Center, http://advocacy.ou.org/about/ [http://perma.cc/DVD8-H2Q6].

165. *OU Policy Resolution: The Iranian Threat*, Orthodox Union Advocacy Center (Feb. 6, 2015, 12:19 PM), http://advocacy.ou.org/2015/ou-policy-resolution-iranian-threat/ [http://perma.cc/92RR-N83H].

166. *Id.*

167. *See, e.g.*, *Psalms* 137:5–6 ("If I forget you, O Jerusalem, let my right hand wither; let my tongue stick to my palate if I cease to think of you, If I do not keep Jerusalem in memory even at my happiest hour.").

168. *See, e.g.*, Jacob Klatzkin, *Judaism Is Nationalism*, in Arthur Hertzberg, The Zionist Idea 316–18 (Atheneum 1970) (1959).

passed by a religious movement. Would the IRS classify political activity related to such resolutions as per se religious?

Evaluation of religious groups' activities would also likely replicate prolonged efforts by the Federal Election Commission and courts to define political activity in the campaign finance context. The UCC pastor's letter contained an express appeal to vote against an incumbent, whereas the OU congregation's voter guide contained no such direct appeal. But given the OU's strong stance on the threat of Iran to Israel, congregants would likely interpret the voter guide as urging them to vote for members of Congress with high ratings. Would the IRS classify only direct appeals to vote for or against candidates as political advocacy?[169] Or adopting a more deferential position, it might classify all advocacy as religious except the kind "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[170] Either rule would constitute a government agency's judgment that certain types of communication are more political than religious in nature, even when a religious organization believes that such activity is central to its faith mission.

In other contexts, religious organizations have recognized the threat that such entanglement poses to their own goals. The Union for Reform Judaism, the largest Jewish denomination in North America [171] and a staunch proponent of separation of church and state,[172] has repeatedly opposed government sources of funding that could benefit its own congregations. [173] It has done so partially as a matter of principle, seeking to legitimize its opposition to legislation that it believes violates the Establishment Clause.[174] But it also asserts its self-interest, arguing, "if we are now to be treated the same as [secular organizations], then all the rules, regulations, audits, monitoring,

169. *Cf.* Buckley v. Valeo, 424 U.S. 1, 44 & n.52 (1976).

170. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 470 (2007).

171. *History*, Union for Reform Judaism, http://urj.org/about/union/history/ [http://perma.cc/SSX6-J6S6].

172. 48th Gen. Assembly of the Union for Am. Hebrew Congregations, *Separation of Church and State*, Union for Reform Judaism (1965), http://urj.org//about/union/governance/reso//?syspage=article&item_id=2254 [http://perma.cc/CW6N-JBGF].

173. *E.g.*, *Energy Efficiency Bills: Hearing on S. 717, S. 1084, S. 1191, S. 1199, S. 1200, S. 1205, S. 1206, S. 1209, and S. 1213 Before Subcomm. on Energy of the S. Comm. on Energy and Natural Res.*, 113th Cong. 88–89 (2013) (statement of Rabbi David Saperstein, Director and Counsel, Religious Action Center of Reform Judaism); *Constitutional Role of Faith-Based Organizations in Competitions for Federal Social Service Funds: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 107th Cong. 27–32 (2001) [hereinafter *Faith-Based Organizations*] (statement of Rabbi David N. Saperstein, Director, Religious Action Center of Reform Judaism); Letter from Robert Heller, Chair, Union for Reform Judaism Bd. of Trustees and Rabbi David Saperstein, Dir., Religious Action Ctr. of Reform Judaism to Rabbis, Presidents, and Temple Admr's (Oct. 20, 2004) [hereinafter Letter from Robert Heller], http://synagoguestrategies.com/wp-content/uploads/2015/03/URJ-2004-DHS-Funding-Security-memo-03072015.pdf [http://perma.cc/9ULY-7L5D].

174. Letter from Robert Heller, *supra* note 173, at 2 ("If we abandon that position and say that such direct support *is* Constitutional, then we are going down the road to parochiaid and government funded religions, which have been a disaster in so many nations.").

entanglement and interference that religion uniquely has been spared will now accompany government money."[175] Rabbi David Saperstein, former Director of the Religious Action Center of Reform Judaism, opposed government funding of religious social service programs, saying, "[w]ith government money comes government rules, regulation, audits, monitoring, interference and control."[176]

These observations do not necessarily demonstrate that permitting religious organizations to electioneer would invariably lead to entanglement whenever such entities decided to participate in the electoral process. Unlike the subsidies struck down in *Lemon v. Kurtzman* that conditioned aid on restrictions that required government monitoring,[177] increased government involvement in religious groups' affairs is not an indispensible feature of lifting the electioneering prohibition. When evaluating religious entities' electioneering activity, the amount of IRS scrutiny would likely depend on the amount of political work done by the organizations and the degree to which such work appears to predominate as the organization's purpose. Absent the electioneering prohibition, the government could wait for as-applied challenges to emerge to sort out when unrestricted political activity by religious groups leads to excessive entanglement. But since a clear potential for such outcomes seems likely, RFRA's compelling interest prong leaves latitude for the government to act prophylactically to prevent such situations before they arise.

The electioneering prohibition is narrowly tailored to the compelling interest in preventing entanglement between government and religion. There is simply no noninvasive means for the government to permit religious organizations to electioneer while also ensuring that political activity does not overtake the religious activity that the government wished to incentivize by granting tax-exempt status.

Conclusion

Despite prior affirmation of the legality of the 501(c)(3) electioneering prohibition by courts of appeals, recent Supreme Court decisions raise new threats to the provision. *Burwell v. Hobby Lobby Stores, Inc.* articulates a significantly more deferential interpretation of RFRA's "substantial burden" prong, prohibiting courts from inquiring into the degree of attenuation between a government policy and religious belief. This interpretation of RFRA would make it very difficult for the government to deny a religious organization's request for an exemption from the electioneering prohibition on the grounds that it does not substantially burden the free exercise of religion.

175. *Id.*

176. *Faith-Based Organizations*, *supra* note 173, at 28.

177. 403 U.S. 602, 619–21 (1971).

The rationale of *Citizens United v. FEC* prevents the government from asserting its desire to prevent political corruption or subsidization of partisan political activity as a compelling state interest justifying the electioneering prohibition. *Citizens United* rejected the anticorruption rationale as a justification for the ban on corporate or union independent expenditures, suggesting that the interest cannot preserve the similarly structured electioneering prohibition. Further, the proliferation of nonprofit political activity as a result of *Citizens United*—coupled with the tax benefits that political organizations have long enjoyed—undermines any suggestion that the electioneering prohibition has the prevention of government subsidy of partisan political activity as its chief purpose.

The electioneering prohibition can, however, survive RFRA review because of its key role in preventing entanglement between government and religion. The provision holds at bay intrusive IRS inquiry of religious organizational activity that would accompany engagement in partisan politics. Because the electioneering prohibition is narrowly tailored to the compelling state interest in ensuring separation between church and state, the tax code provision can and should survive RFRA review despite the sweeping changes ushered in by *Hobby Lobby* and *Citizens United*.