



12-1-2010

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## Recommended Citation

Meghan E. Sweeney, *Defending the Other First Amendment Freedom: State Campaign Disclosure Laws and the Free Exercise of Religion*, 85 Notre Dame L. Rev. 2033 (2010).

Available at: <http://scholarship.law.nd.edu/ndlr/vol85/iss5/8>

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DEFENDING THE “OTHER” FIRST AMENDMENT  
FREEDOM: STATE CAMPAIGN DISCLOSURE  
LAWS AND THE FREE EXERCISE  
OF RELIGION

*Meghan E. Sweeney\**

[T]hose who say that religion has nothing to do with politics do not know what religion means.

Mohandas K. Gandhi<sup>1</sup>

INTRODUCTION

Five church members meet on a Saturday afternoon in their church basement to make fliers for distribution at Sunday services. These fliers speak out against a proposed state bill legalizing same-sex marriage. The group uses its own supplies, including paper, but makes copies on the church’s copy machine. Should the church members have to fill out paperwork and register with the state as a political committee for this activity? Would they even know about the state laws requiring them to register? Should the church be required to pay a fine if the group fails to do so? The debate about the proper place of religious organizations in American politics is not a new one. In past court cases, most institutional plaintiffs claim violations of their free speech *and* free exercise rights, but courts have traditionally examined campaign registration and disclosure laws based only on

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<sup>1</sup> MOHANDAS K. GANDHI, AN AUTOBIOGRAPHY 454 (Mahadev Desai trans., Dover Publ’ns, Inc. 1983) (1927).

the institution's right to free speech.<sup>2</sup> But in the recent Ninth Circuit case *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*,<sup>3</sup> Judge Noonan addressed the effect of Montana's campaign disclosure law on the free exercise rights of a Baptist church in his concurrence.<sup>4</sup> Judge Noonan questioned whether the law was actually "neutral and generally applicable" as required by *Employment Division v. Smith*<sup>5</sup> to avoid strict scrutiny review due to exemptions from the registration and disclosure laws granted to media organizations.<sup>6</sup> Judge Noonan's concurrence suggests that even in a post-*Smith* world there is room to argue that state campaign laws requiring religious institutions to register with the state before speaking out on a ballot measure or piece of legislation violate the right of free exercise guaranteed by the First Amendment to the U.S. Constitution.<sup>7</sup>

To highlight the problem, this Note begins in Part I by discussing two recent examples of conflict between religious institutions and the government specifically dealing with churches that failed to register as a political committee or lobbyist under their state campaign laws. Part II gives a brief history of the free exercise case law through the Supreme Court's decision in *Smith*. Part III considers two ways to attack campaign registration and disclosure laws on free exercise grounds even after *Smith*. This Part both considers whether religious organizations have a right to institutional free exercise protection and examines whether these laws are truly neutral and generally applicable given the exemptions they grant to media organizations. Part IV examines whether these laws serve a compelling state interest that would allow them to survive a strict scrutiny analysis even if brought outside of *Smith* protection. Finally, this Note concludes that state campaign registration and disclosure laws requiring religious institu-

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2 See, e.g., *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1028 n.9 (9th Cir. 2009) ("Our disposition of the vagueness and free speech issues makes it unnecessary for us to address the Church's additional challenges based on First Amendment rights of association and free exercise of religion."); *Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 903 (Tenn. 1987) ("[W]e think that the sole determinative issue is whether the Act violates the free speech clause of the First Amendment to the Constitution of the United States. We find it unnecessary to address the other issues to resolve this case.").

3 556 F.3d 1021.

4 See *id.* at 1035 (Noonan, J., concurring).

5 494 U.S. 872 (1990). The *Smith* case will be covered in greater detail *infra* Part II.B.

6 See *Unsworth*, 556 F.3d at 1035 (Noonan, J., concurring). For further discussion of the press exemption and its effects on the general applicability of the Montana law, see *infra* Part III.B.

7 U.S. CONST. amend. I.

tions to register as political committees or lobbyists when speaking out on a ballot initiative or piece of legislation and not directly supporting a candidate for office violate the free exercise rights guaranteed by the First Amendment.<sup>8</sup>

## I. MODERN EXAMPLES OF CHURCH/STATE CONFLICT

The failure to properly abide by state campaign disclosure laws when supporting or opposing a ballot initiative or bill can lead to costly litigation and hefty fines for churches. Even more troubling, however, is the potential for discretionary enforcement and the use of state disclosure laws to punish political adversaries. Due to religious organizations’ engagement in hot-button political issues, they are likely targets for this discretionary and politically motivated enforcement. Two recent cases illustrate the potential costs to religious organizations who fail to disclose activities that the states consider political involvement.

### A. *Catholic Diocese of Bridgeport, Connecticut*

In January 2009, the Connecticut General Assembly proposed Bill No. 1098 entitled An Act Modifying Corporate Laws Relating to Cer-

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8 Although the controversial “hybrid rights” doctrine applies strict scrutiny to cases where both free exercise and another constitutional right are implicated, this doctrine goes beyond the scope of this Note. For cases applying the hybrid rights doctrine, however, see *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating a Wisconsin mandatory education law as applied to Amish students); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (striking down a tax on solicitation as applied to the dissemination of religious ideas); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (invalidating a licensing scheme for solicitation that allowed too much individual discretion by the administrator). For judicial criticism of the “hybrid rights” doctrine, see *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 566–67 (1993) (Souter, J., concurring in part) (describing *Smith’s* “hybrid” rights distinction as “ultimately untenable”); *Smith*, 494 U.S. at 895–97 (O’Connor, J., concurring) (“The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them ‘hybrid’ decisions, but there is no denying that both cases expressly relied on the Free Exercise Clause and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence.” (citations omitted)). I will instead argue that state campaign disclosure laws should fail under a strict scrutiny analysis regardless of their implications for free speech or free association because of their flagrant violation of free exercise rights. *But see Smith*, 494 U.S. at 881 (noting that the invalidation of neutral and generally applicable laws for religious reasons only occurred when “the Free Exercise Clause [was] in conjunction with other constitutional protections, such as freedom of speech and of the press or the rights of parents to direct the education of their children” (citations omitted)).

tain Religious Corporations.<sup>9</sup> The stated purpose of the bill was to “revise the corporate governance provisions applicable to the Roman Catholic Church and provide for the investigation of the misappropriation of funds by religious corporations.”<sup>10</sup> The bill, if enacted, would have reorganized the legal, financial, and administrative structure of parishes by requiring lay boards to run parishes “effectively exclud[ing]” pastors and bishops from church governance.<sup>11</sup> According to Bishop William E. Lori of the Diocese of Bridgeport, however, the bill was a “thinly-veiled attempt to silence the Church on the important Catholic issues of the day, such as same-sex marriage.”<sup>12</sup> In a diocesan statement, Bishop Lori encouraged Catholics to call and email their state senators and to come to Hartford in March of 2009 to protest at the public hearing on the bill.<sup>13</sup> The diocese succeeded in busing over a thousand people to the state capitol for a rally against the bill, although the legislature withdrew the bill the evening before the rally.<sup>14</sup> The Office of State Ethics notified the diocese six weeks later that it was under investigation for failing to register as a lobbyist before busing Catholics to the rally<sup>15</sup> and before opposing a bill regarding same-sex marriage on the diocesan website.<sup>16</sup> According to

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9 S.B. 1098, 2009 Gen. Assemb., Jan. Sess. (Conn. 2009), available at <http://www.cga.ct.gov/2009/TOB/S/2009SB-01098-R00-SB.htm>.

10 *Id.*

11 Diocesan Statement on Proposed Legislative Bill # 1098 from Rev. William E. Lori, Diocese of Bridgeport 1 (2009), available at [http://bridgeportdiocese.com/folder\\_bridgedocs/Dioc\\_statement\\_on\\_leg\\_1098\[1\].pdf](http://bridgeportdiocese.com/folder_bridgedocs/Dioc_statement_on_leg_1098[1].pdf).

12 *Id.*

13 *Id.*

14 Memorandum of Law in Support of Plaintiff’s Motion for Preliminary Injunction at 4, *Bridgeport Roman Catholic Diocesan Corp. v. Jones*, No. 2009-cv-00851 (D. Conn. 2009) [hereinafter Memorandum of Law].

15 See Daniel Tepfer, *Diocese Files Suit over Right to Protest*, CONN. POST, May 30, 2009, at A1 (quoting a letter from the state ethics enforcement officer to the diocese stating “[t]his evaluation is being conducted to ascertain whether the Catholic Diocese of Bridgeport violated [state law] by failing to register as a lobbyist in Connecticut, by failing to submit all other appropriate lobbyist filings and by failing to follow all applicable registration procedures”); Christine Stuart, *Catholic Church Sues State over Lobbying Provision*, CT NEWS JUNKIE, May 29, 2009, [http://www.ctnewsjunkie.com/courts/catholic\\_church\\_sues\\_state\\_ove.php](http://www.ctnewsjunkie.com/courts/catholic_church_sues_state_ove.php) (explaining the background of the suit).

16 See Pulpit Announcement from the Diocese of Bridgeport (April 19, 2009), available at [http://www.bridgeportdiocese.com/folder\\_bridgedocs/Pulpit\\_Announcements\[1\].pdf](http://www.bridgeportdiocese.com/folder_bridgedocs/Pulpit_Announcements[1].pdf) (urging Catholics to contact their state legislators and ask them to vote “no” on Senate Bill 899 legalizing same-sex marriage); *Diocese Responds to “Civil Union” Legislation*, DIOCESE OF BRIDGEPORT (April 14, 2005), [http://www.bridgeportdiocese.com/story\\_civil3.shtml](http://www.bridgeportdiocese.com/story_civil3.shtml) (urging Catholics to contact legislators voicing opposition to civil union legislation). See generally *Your Help Is Needed Now to Defeat Senate Bill 899*, DIOCESE OF BRIDGEPORT, <http://www.bridgeportdiocese.com/>

the ethics office, the diocese was required to register as a lobbyist if its expenditures "in connection with the Rally and/or the website statements were \$2000 or more."<sup>17</sup> The diocese filed suit against Thomas Jones and Carol Carson, ethics enforcement officers for the state of Connecticut, claiming that the registration requirements were "chilling [the Diocese's] constitutional rights" because the Catholic faith "compels [Catholics] to take stands on the moral issues of the day, which, from time to time, are embedded in legislation."<sup>18</sup>

Although the state Ethics Office eventually dropped the case after the Attorney General resolved not to defend Connecticut in the case due to "serious and significant potential chilling effects on protected First Amendment, free expression rights,"<sup>19</sup> the Attorney General failed to discuss the potential free exercise implications of the suit as raised by the diocese in its briefs.

### B. Canyon Ferry Road Baptist Church: East Helena, Montana

In the spring of 2004, the pastor of a small Montana Baptist church decided to involve his congregation in supporting Constitutional Initiative No. 96 (CI-96) in an attempt to place it on the ballot the following November.<sup>20</sup> CI-96 proposed to amend the Montana Constitution to define marriage "as a union between one man and one woman."<sup>21</sup> Terri Paske, a church member at Canyon Ferry Road Baptist Church, printed out a template petition supporting CI-96 from a website and made less than fifty copies on the Church's copy machine using her own paper.<sup>22</sup> With the pastor's approval, she placed about twenty copies of the petition in the church's foyer.<sup>23</sup> Around the same time, Pastor Stumberg made plans for a simulcast

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Fight\_899.shtml (last visited Apr. 4, 2010) (including documents explaining the position of the Catholic church on same-sex marriage and phone numbers of legislators to call in order to oppose the bill).

17 See Memorandum of Law, *supra* note 14, at 7. Two thousand dollars is the statutory threshold for lobbying registration in Connecticut. CONN. GEN. STAT. § 1-94 (2009).

18 Complaint at 6, *Bridgeport Roman Catholic Diocesan Corp. v. Jones*, No. 2009-cv-00851 (D. Conn. 2009).

19 Christine Stuart, *Blumenthal Sides with Catholic Church*, CT NEWS JUNKIE (June 30, 2009), [http://www.ctnewsjunkie.com/legal/blumenthal\\_sides\\_with\\_catholic.php](http://www.ctnewsjunkie.com/legal/blumenthal_sides_with_catholic.php).

20 See *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1024 (9th Cir. 2009). For the text of CI-96 and arguments for and against enactment, see BOB BROWN, 2004 VOTER INFORMATION PAMPHLET 22-25 (2004), available at <http://sos.mt.gov/Elections/archives/2000s/2004/2004-VIP.pdf>.

21 See *Unsworth*, 556 F.3d at 1024.

22 *Id.*

23 *Id.*

entitled *Battle for Marriage* to air at a regularly scheduled church service on May 23, 2004.<sup>24</sup> This presentation featured various religious leaders speaking out on the topic of marriage and discussed a possible amendment to the U.S. Constitution defining marriage as between one man and one woman; however, the program did not mention any issue or candidate specific to Montana.<sup>25</sup> The church advertised the screening through unpaid public service announcements on the radio and by passing out flyers that did not specifically mention CI-96.<sup>26</sup> Ninety-three people attended the service on May 23 and after the broadcast, Pastor Stumberg spoke briefly to the congregation about CI-96 and told everyone that they “need[ed] to sign” the petition.<sup>27</sup> A week later, the petitions circulated during Sunday services and they remained in the church foyer until June 13.<sup>28</sup> By June 13, there were ninety-eight signatures on the petitions, and Paske had them notarized and sent to the appropriate county officials.<sup>29</sup>

On May 26, 2004, an activist group called Montanans for Families and Fairness filed a campaign finance and practices complaint against the church alleging that they had created an “incidental political committee” in connection with the May 23 service and had failed to file disclosure forms for expenditures.<sup>30</sup> Incidental committees are required to follow Montana campaign finance and disclosure laws and rules.<sup>31</sup> According to the complaint, because the simulcast, words

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24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.* at 1025. Pastor Stumberg also told his congregation that “[t]his is one of the ways that we take a stand for righteousness.” *Id.*

28 *Id.*

29 *Id.* Ninety-two of the signatures on the petitions were from church members. CI-96 gained enough support to be placed on the ballot in November and it passed by a margin of 66.5% to 33.5%. *Id.*

30 *Id.*; see also Summary of Facts and Statement of Findings at 6, In the Matter of the Complaint Against the Canyon Ferry Rd. Baptist Church (Comm’r of Political Practices Mar. 2006) [hereinafter Summary of Facts], available at <http://politicalpractices.mt.gov/content/pdf/2recentdecisions1-ethics/canyonferrycfp1.pdf> (alleging that the church became an incidental political committee based on its activity). According to the Administrative Rules of Montana, an “incidental political committee” is “a political committee that is not specifically organized or maintained for the primary purpose of influencing elections but that may incidentally become a political committee by making a contribution or expenditure to support or oppose a candidate and/or issue.” MONT. ADMIN. R. 44.10.327(2)(c) (2009).

31 See Summary of Facts, *supra* note 30, at 10. Under the Montana Administrative Rules, incidental political committees must file a statement of organization, including the name and address of its treasurer and any other officers within five days of making or authorizing an expenditure on the committee’s behalf. See MONT. CODE ANN. § 13-

from Pastor Stumberg, and petition signings occurred in church facilities during regularly scheduled Church services, and because there were costs involved in running the church service, the church violated the campaign finance laws for failure to disclose these expenses.<sup>32</sup> Failing to abide by Montana disclosure laws may result in the initiation of civil or criminal actions.<sup>33</sup>

The church and Pastor Stumberg filed suit against the Montana Commissioner of Political Practices under 42 U.S.C. § 1983 stating that their rights to free speech, free association, and free exercise were compromised by the state of Montana.<sup>34</sup> The District Court ruled in favor of the State and granted summary judgment, and the plaintiffs appealed.<sup>35</sup> In their appeal, the plaintiffs claimed that the reporting requirements violated their rights to free speech, free association, and free exercise.<sup>36</sup> They also claimed that the campaign statutes are unconstitutionally vague because they have "no clear [monetary] trigger" to warn Montana citizens about when registration is necessary.<sup>37</sup> Although the appellants briefed free exercise challenges to the laws,<sup>38</sup> the Court ruled in their favor based on free speech issues and declined to address the free exercise issues in the

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37-201 (2009); MONT. ADMIN. R. 44.10.411. They must also file periodic reports set forth in a schedule in the Montana Administrative Rules including quarterly reports, year-end reports, and other periodic reports near election time. See MONT. CODE ANN. § 13-37-226; MONT. ADMIN. R. 44.10.411. Finally, they must disclose every contribution that is "earmarked" for a specific ballot issue. See MONT. ADMIN. R. 44.10.411(5); *id.* R. 44.10.519 ("For the purposes of [§] 13-37-217, MCA, and these rules, an 'earmarked contribution' is a contribution made with the direction, express or implied, that all or part of it be transferred to or expended on behalf of a specified candidate, ballot issue, or petition for nomination."); see also *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Higgins*, CV 04-24-H-DWM, 2006 WL 6196415, at \*3-4 (D. Mont. Sept. 26, 2006) (explaining the regulations for incidental political committees under Montana law), *rev'd*, 556 F.3d 1021 (9th Cir. 2009).

32 Some of the expenses involved included: the salary of Pastor Stumberg, building payments, utility costs, and cleaning charges. See Plaintiff's Summary of Facts, *supra* note 30, at 1.

33 MONT. CODE ANN. § 13-37-121(3)(4).

34 *Higgins*, 2006 WL 6196415, at \*2.

35 See *id.* at \*17.

36 Appellants' Opening Brief at 3-5, *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009) (No. 06-35883).

37 *Id.* at 17-18.

38 See *id.* at 52-55; Appellants' Reply Brief at 29-32, *Unsworth*, 556 F.3d 1021 (No. 06-35883); Brief for Nat'l Legal Found. as Amicus Curiae Supporting Plaintiffs-Appellants at 1-19, *Unsworth*, 556 F.3d 1021 (No. 06-35883) [hereinafter Nat'l Legal Found. Brief].

majority opinion.<sup>39</sup> Judge Noonan, however, stated that the campaign regulations were also unconstitutional in light of the Free Exercise Clause of the U.S. Constitution.<sup>40</sup>

These two examples show the potential problems arising from state campaign laws that unnecessarily burden religious institutions attempting to adhere to the tenets of their religions. In order to understand how to circumvent these burdensome laws, however, it is necessary to have a basic understanding of free exercise jurisprudence. Part II gives a brief history of this case law.

## II. A BRIEF HISTORY OF THE FREE EXERCISE CLAUSE

The religion clauses in the First Amendment of the Constitution state, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." <sup>41</sup> These clauses—referred to as the Establishment Clause and the Free Exercise Clause—work in tension to both protect religious belief and prevent the government from establishing a national religion. Scholars and jurists have attempted to walk a line between the clauses that becomes harder to navigate as time passes.<sup>42</sup> Justice Rehnquist cites three reasons for the growth of this "tension" between the clauses in his dissent in *Thomas v. Review Board of Indiana*<sup>43</sup>: first, the growth of social welfare legislation, second, the incorporation of the First Amendment, and third, the overly expansive interpretation of both clauses by the Court that has "constantly narrowed the channel . . . through which any state or federal action must pass in order to survive constitutional scrutiny."<sup>44</sup> This Part gives a brief history of free exercise jurisprudence illustrating the inherent tension between the religion clauses.

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39 *Unsworth*, 556 F.3d at 1028 n.9 (Noonan, J., concurring) ("Our disposition of the vagueness and free speech issues makes it unnecessary for us to address the Church's additional challenges based on First Amendment rights of association and free exercise of religion.").

40 *Id.* at 1035 ("I gladly join the opinion of the court and write here to address the issue briefed by both parties and not of inconsequential importance: the constitutionality of [MONT. CODE ANN.] § 13-1-101 et seq. and the regulations thereunder in the light of the Free Exercise Clause of the First Amendment.").

41 U.S. CONST. amend. I.

42 *See Thomas v. Review Bd.*, 450 U.S. 707, 720–21 (1981) (Rehnquist, J., dissenting).

43 *Id.*

44 *Id.* at 721.

### A. *The Sherbert Balancing Test*

From 1963 until the *Smith* decision in 1990, the Supreme Court used a balancing test established in *Sherbert v. Verner*<sup>45</sup> to determine whether individuals were entitled to exemptions from laws that burdened their religious conduct. In *Sherbert*, an employer dismissed a member of the Seventh Day Adventist Church because she refused to work on Saturday, her Sabbath. The woman was subsequently unable to find other employment because of her refusal to work on Saturday.<sup>46</sup> South Carolina denied her unemployment benefits because her religious restriction caused her to "fail[ ] . . . to accept available suitable work when offered."<sup>47</sup> The Court established a balancing test between the burden on the plaintiff's religious liberty and any compelling interests the state had for infringing on that interest,<sup>48</sup> and determined that the plaintiff's free exercise rights were unduly burdened by the state law.<sup>49</sup> In 1972, the Supreme Court applied this balancing test in *Wisconsin v. Yoder*,<sup>50</sup> balancing the right of Amish parents to direct the education of their children against the state's interest in supporting universal compulsory education.<sup>51</sup> The Court determined that the exemption the Amish sought was not outweighed by the state's interest in promoting mandatory education to the age of sixteen, and granted the exemption.<sup>52</sup> Under *Sherbert*, therefore, states had to create exemptions from neutral, generally applicable laws that had an incidental effect of substantially burdening religion if the state interest was not compelling enough to tip the balance in the law's favor. *Sherbert* and *Yoder* marked "high points" for free exercise exemptions, however, most religious claimants during this period still failed to obtain exemptions from burdensome laws when courts applied the balancing test.<sup>53</sup>

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45 374 U.S. 398 (1963).

46 *Id.* at 399–402.

47 *Id.* at 401.

48 *Id.* at 403–09.

49 *Id.* at 409–10.

50 406 U.S. 205 (1972).

51 *Id.* at 215.

52 *Id.* at 236 ("[W]eighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.").

53 *See, e.g.,* *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (denying a challenge to the construction of a road through a sacred Indian burial ground); *United States v. Lee*, 455 U.S. 252 (1982) (denying challenge to Social Security tax by an Amish farmer who claimed that it violated his free exercise rights).

### B. *Employment Division v. Smith: Restrictions on Free Exercise*

In *Employment Division v. Smith*,<sup>54</sup> the Court retreated from the balancing test applied in *Sherbert*. In *Smith*, the state of Oregon denied two members of the Native American Church unemployment benefits because their dismissal resulted from their use of an illegal controlled substance, albeit for sacramental purposes.<sup>55</sup> The issue in the case was the criminalization of peyote without a sacramental exemption. The Court determined that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”<sup>56</sup> In the decision upholding the denial of benefits, the Court held that exemptions should be left to state political processes, and should not be carved out by the courts.<sup>57</sup> *Smith*, however, did more than outline a new test for infringements on free exercise. It also implicitly distinguished religious belief from religious action. The Court stated that the government does not have the power to control a person’s religious beliefs, but the government does have the authority to regulate religious action.<sup>58</sup> The Court expressed fear that a failure to regulate action would allow every person to “become a law unto himself,” thus creating anarchy.<sup>59</sup>

*Smith* remains the test for neutral and generally applicable laws that have an incidental burden on religion. What if a law is not neutral or generally applicable, however? In *Church of the Lukumi Babalu Aye v. City of Hialeah*,<sup>60</sup> the Court struck down a city ordinance prohibiting the slaughter of animals because the city made exceptions for many secular killings but not for religious sacrificial killings.<sup>61</sup> The Court stated:

[B]ecause [the ordinance] requires an evaluation of the particular justification for the killing, this ordinance represents a system of individualized governmental assessment of the reasons for the rele-

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54 494 U.S. 872 (1990).

55 *Id.* at 874.

56 *Id.* at 879 (quoting *Lee*, 455 U.S. at 263 n.3).

57 *Id.* at 890.

58 *Id.* at 879 (“Laws . . . are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.” (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879))). This distinction between belief and action was actually a return to the pre-*Sherbert* standard.

59 *Id.* at 885 (quoting *Reynolds*, 98 U.S. at 167).

60 508 U.S. 520 (1993).

61 *Id.* at 521–22 (discussing secular exemptions allowed by the ordinance for hunting, pest and insect control, and animal population control).

vant conduct. As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason. Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus religious practice is being singled out for discriminatory treatment.<sup>62</sup>

In cases where laws target and burden religious conduct, strict scrutiny applies.<sup>63</sup> Here, as in most cases where strict scrutiny is applied, the ordinance failed the test and was struck down.<sup>64</sup> Similarly, in *Fraternal Order of Police v. City of Newark*,<sup>65</sup> the Court struck down a police policy forbidding beards on the police force because it allowed exceptions for medical reasons but not for religious reasons.<sup>66</sup> The Court reasoned that the categorical exemption created by allowing those with skin disorders to keep their beards while prohibiting a similar exemption for those whose faiths required facial hair was problematic and "sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny."<sup>67</sup>

Is it plausible, however, to bring state campaign disclosure laws outside of *Smith* and protect politically active religious organizations? How can laws that appear neutral and generally applicable on their face be subjected to strict scrutiny when they incidentally infringe on the rights of religious institutions? Part III will outline two possible ways that state campaign disclosure laws requiring a religious institution to register as a political committee or lobbyist before speaking out about a ballot initiative or piece of legislation can be attacked purely on free exercise grounds and taken outside of the protective realm of *Smith*.

### III. CAN STATE CAMPAIGN DISCLOSURE LAWS BE SUBJECTED TO STRICT SCRUTINY?

After *Smith*, neutral and generally applicable laws will be upheld by the courts even if they have an incidental burden on religion. How, then, can a church successfully attack state campaign disclosure

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62 *Id.* at 537–38 (internal quotations marks and citations omitted).

63 *Id.* at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.")

64 *Id.* (stating that laws will survive strict scrutiny "only in rare cases").

65 170 F.3d 359 (3d Cir. 1999).

66 *Id.* at 366–67 (explaining that exemptions were allowed for officers who could not shave daily due to painful skin disorders).

67 *Id.* at 365.

laws on free exercise grounds if they apply to all groups and not only religious organizations? This Part will explore two possible ways to mount this attack. First, religious organizations may enjoy a right to institutional free exercise, protecting them from government interference and taking them outside the realm of *Smith*. This special right for religious organizations recognizes the unique role that they play in forming individual religious beliefs and in promoting social change throughout history. Although some scholars argue that this special right would violate the Establishment Clause by placing religion over irreligion, the nature of the First Amendment itself, which gives a special protection to religion, refutes this idea. Second, state campaign disclosure laws are not neutral and generally applicable because they allow exceptions for secular organizations, most notably the press. If the laws are not neutral and generally applicable, they should be subjected to strict scrutiny. This Part explores these two ideas and explains how state campaign disclosure laws should fall outside of the protection of *Smith* when applied to religious organizations.

#### A. *Institutional Free Exercise*

Some scholars believe that religious organizations should be granted a special right to institutional free exercise protecting them from government interference. This right would allow laws burdening religious organizations to circumvent *Smith* and automatically subject them to a strict scrutiny analysis. This right would be based on the unique role of religious organizations in forming individual religious beliefs and in promoting social change throughout American history. Scholars who promote institutional free exercise worry that government intrusion into the workings of religious organizations will interfere with the belief-formation of individuals and cause society to stagnate due to the diminished role of religious organizations in politics. This section discusses this right in greater depth and concludes that the right to institutional free exercise should protect religious organizations from certain state campaign disclosure laws.

##### 1. Belief/Action Distinction

In *Smith*, the Court distinguished between religious action and religious belief.<sup>68</sup> According to the Court, the government can never regulate religious belief; however, the government reserves the right

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68 *Employment Div. v. Smith*, 494 U.S. 872, 877–79 (1990); *see also* *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (“Government may neither compel affirmation of a repugnant belief; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities . . . .” (citations omitted));

to regulate religious action in order to prevent everyone from becoming a 'law unto himself.'<sup>69</sup> The Court has regulated religious action in many cases.<sup>70</sup> When campaign laws require religious institutions to register as a political committee or lobbyist before speaking out on moral issues involved in ballot initiatives or legislation is religious belief implicated or is this merely a regulation of religious action? Courts and scholars struggle to make this distinction.<sup>71</sup>

Bishop William Lori of the Diocese of Bridgeport weighed in on the debate during the recent controversy in his diocese.<sup>72</sup> In his affidavit discussing the suit against the Ethics Office of Connecticut, Bishop Lori said, "[F]rom time to time, the Diocese's religious mission compels me and the pastors within the Diocese to take stands, consistent with our religious beliefs, on legislation that concerns the moral issues of the day."<sup>73</sup> He continued that in recent years he "communicated with members of the Diocese about a variety of matters pending in the Connecticut General Assembly that implicate[d] the teachings of the Church, including gay marriage, the death penalty, abortion, and other topics" and that he fully expected that his position would require him to communicate with his congregation on leg-

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BETTE NOVIT EVANS, INTERPRETING THE FREE EXERCISE OF RELIGION 76–97 (1997) (illustrating two examples of difficult cases dealing with the belief/action distinction).

69 *Smith*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879)).

70 *See, e.g., id.* at 874, 890 (denying an exemption from state law for sacramental peyote use by members of the Native American Church); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 441–42 (1988) (allowing the Forest Service to construct a road through sacred Native American land); *Braunfeld v. Brown*, 366 U.S. 599, 603–05, 609 (1961) (upholding a law forbidding the sale of various retail products on Sunday against challenges by Saturday Sabbath observers).

71 *See Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972) ("[T]he unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs."); *see also* Gabriel Moens, *The Action-Belief Dichotomy and Freedom of Religion*, 12 SYDNEY L. REV. 195, 197 (1989) (arguing that the action-belief dichotomy is "conceptually unsound" as a judicial guideline); Donna J. Sullivan, *Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82 AM. J. INT'L L. 487, 500 (1988) ("Many religious doctrines or beliefs dictate standards of social conduct and responsibility, and require believers to act accordingly. For those adherents . . . the distinction between religious and political activities may be artificial.").

72 *See supra* Part I.A.

73 Affidavit of the Most Reverend William E. Lori at 2, *Bridgeport Roman Catholic Diocesan Corp. v. Jones*, No. 2009-cv-00851 (D. Conn. May 29, 2009).

islative matters in the future.<sup>74</sup> Finally, the Bishop stated that in order to carry out the Church's religious mission, he and the other leaders of the diocese "must be free to communicate in an uninhibited manner with [church] members on all matters of faith, regardless of the extent to which those matters overlap with legislation being considered by Connecticut's General Assembly" and that "the Diocese and its parishes cannot fulfill the Church's mission to their fullest extent, if we cannot use basic tools of communicating with our members."<sup>75</sup> It is noteworthy that Bishop Lori framed his duty to discuss important Catholic moral issues as a matter of fundamental "mission" and "calling," and not merely as voluntary religious action.

Bishop Lori's characterization of his "religious mission" is likely due to the special part religious institutions play in shaping the religious beliefs of individuals.<sup>76</sup> People go to church to learn about the central beliefs of their faith and how they can live out these beliefs in their daily lives. Therefore, if religious institutions are unable to teach morals and beliefs to their congregations without state interference, individual belief will be suppressed.<sup>77</sup> As Professor Lloyd Mayer states,

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74 *Id.*

75 *Id.* at 7. The Bishop further stated that he is "required to defend the Church, to teach on the moral issues of the day and to encourage the lay Catholic faithful to act on the Church's beliefs in order to form a more just and humane society." *Id.* (emphasis added). This statement suggests that communication by the Church hierarchy encouraging lay Catholics to act is more than mere religious action in itself, but a fundamental belief of the Church.

76 See DAVID NOVAK, IN DEFENSE OF RELIGIOUS LIBERTY 88 (2009) ("[R]eligious liberty is the right of a religious community to govern the morality of its members without any secular coercion."); Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633, 1675 (arguing for a broad right of church autonomy due to the unique role of religious organizations in forming individual religious belief); Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 274 (2008) (claiming that religious institutions, like individual believers, should be understood to possess free exercise rights because of their "infrastructural" role in forming religious belief). Professor Garnett states, "The freedom of religion is not only lived and experienced through institutions, it is also protected and nourished by them. Accordingly, the theories and doctrines we use to understand, apply and enforce the First Amendment's religious-freedom provisions should reflect and respect this fact." *Id.*

77 See Garnett, *supra* note 76, at 274; see also NOVAK, *supra* note 76, at 88 ("[F]reedom of religion becomes . . . an 'empty right' if the religious community I freely choose to join does not have the liberty to morally govern me and my fellow community members. Therefore, my right of religious freedom presupposes the communal right of a religious community to exercise its moral authority."); Brady, *supra* note 76, at 1677 ("If religious communities are not able to teach, develop, and live out their ideas free from state interference, individual belief will also be suppressed."); Mark Totten, *The Politics of Faith: Rethinking the Prohibition on Political Cam-*

"[T]he very survival of any particular set of religious beliefs and practices depends in large part on the ability of such institutions to communicate internally without government restriction."<sup>78</sup> Thus, it is crucial that institutions have the ability to speak out on elements that are central to their respective faiths, whether or not they overlap with a proposed piece of legislation or ballot initiative, without government interference or regulation.<sup>79</sup>

Not all scholars and judges believe that churches should enjoy broad autonomy. As Professor Kathleen Brady, an avid proponent of church autonomy, notes, "what one observes among the lower courts is limited protection for religious groups where government regulation burdens religious belief or practice."<sup>80</sup> Similarly, Professors Ira Lupu and Robert Tuttle, while supporting religious group autonomy on purely religious matters, favor a rule of neutrality that treats religious and nonreligious groups similarly when their functions are similar to other nonprofit organizations.<sup>81</sup> Therefore, when churches campaign for or against issues, Lupu and Tuttle prefer that they abide by the same campaign laws as other nonprofit organizations. Finally, some scholars deny any special rights to religious organizations. For example, Marci Hamilton argues that the *Smith* rule should apply to all religious organizations, regardless of the nature of their conduct.<sup>82</sup> As Lupu argued in his earlier works, the conduct of religious organiza-

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*paign Intervention*, 18 STAN L. & POL'Y REV. 298, 311–12 (2007) ("Believers usually do not settle on a set of favored beliefs and practices and then look for others with a similar list. Many are born into a faith community, or join one with more questions than answers. Faith takes shape within the bounds of a particular community . . .").

<sup>78</sup> Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1207 (2009).

<sup>79</sup> See *id.* at 1209 ("At a minimum . . . sermons and similar oral communications during regular worship services should be protected from the prohibition [on campaign involvement of churches by the IRS]. Other significant channels of internal religious communications, such as pastoral letters, encyclicals, or other less formal means of communication should also possibly be covered."). Although Professor Mayer writes about the application of federal tax laws to religious institutions, his arguments can be used to defend religious organizations from state campaign laws that have a chilling effect on religious belief, as well.

<sup>80</sup> Brady, *supra* note 77, at 1655.

<sup>81</sup> See Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 78–79, 92 (2002).

<sup>82</sup> See Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1101, 1176–77 ("When it comes to the public good, the rule of law needs to govern religious institutions, just as it does other private entities."). Hamilton further argues that protecting the rights of religious organizations does not necessarily promote the public good because "[t]he needs of religious entities and the public good are not necessarily equivalent." *Id.* at 1102.

tions can have an impact on society at large so exemptions from neutral laws may have a negative impact on society.<sup>83</sup> As Professor Brady states, however, “[r]estrictions on individual action outside the community may not undermine religious belief . . . but restrictions on internal group life could be devastating.”<sup>84</sup> Without freedom from regulation, religious sects cannot disseminate religious beliefs to both established congregations and potential converts to the faith in violation of *Smith*’s protection of religious belief. The *Canyon Ferry Road* case and the situation in the Diocese of Bridgeport illustrate the difficulty facing religious organizations in separating religious belief from political discussion.

## 2. Religion as a Catalyst for Social Change

The ability to influence politics and policy is, for many faiths, an essential part of religious practice.<sup>85</sup> For some religions, “political activity may even be a form of worship.”<sup>86</sup> Campaign disclosure laws attempting to separate religion into the “actually religious” and the political create a false dichotomy.<sup>87</sup> This is due to the fact that “[r]eligion is not, and has never been, a purely academic exercise, focused only on scriptural exegeses. It is, and remains, a socially oriented endeavor, which many sects believe requires certain social obligations.”<sup>88</sup> Therefore, for many religions, requiring a religious

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83 See Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 408–09 (1987) (“[T]he interests being protected and enforced in civil rights actions [against religious organizations] are not only the interests of the parties; substantial public and third-party interests are present as well.”).

84 Brady, *supra* note 76, at 1676.

85 See Totten, *supra* note 77, at 312–13 (stating that faith is “intrinsicly political” and that participation in politics can be, for many, as essential as other forms of religious worship); Ellis M. West, *The Free Exercise Clause and the Internal Revenue Code’s Restrictions on the Political Activity of Tax-Exempt Organizations*, 21 WAKE FOREST L. REV. 395, 396 (1986) (“Many, if not most, churches and religious groups reject the idea that religion is limited to the private realm of individual and family experience. Instead, they believe in the integration of the religious and secular life.”).

86 West, *supra* note 85, at 396.

87 See Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145, 167 (2006) (arguing that federal tax laws “fundamentally misrepresent what constitutes religious activity”).

88 *Id.* Kemmitt gives many examples throughout history of religion “rais[ing] society’s consciousness” on important issues including: “slavery, taxation, women’s suffrage, prohibition, civil rights, war, weapons of mass destruction, capital punishment, and abortion.” *Id.*; see also OFFICE OF GEN. ASSEMBLY, PRESBYTERIAN CHURCH (U.S.A.), *GOD ALONE IS LORD OF THE CONSCIENCE* 46 (1988) (“[I]t is a limitation and denial of faith not to seek its expression in both a personal and a public manner, in

institution to follow difficult procedures before allowing them to speak about an issue of vital moral importance places a burden on their communication of religious belief and prohibits them from having an impact on the larger society outside of the organization.<sup>89</sup>

As Professor Brady states:

[A]ny time that government regulation addresses difficult social or moral issues that also divide church members, the imposition of the secular standard will disrupt the process by which the religious group develops its own doctrine and beliefs. Many Americans may approve of the results in cases where religious groups hold unpopular or outdated views. However, the First Amendment protects the freedom of individuals to hold these views, and religious groups are entitled to the protections that make such freedom possible.<sup>90</sup>

Many of the “hot-button” political issues today such as same-sex marriage and abortion go to the heart of religious belief. For many there is no real way to differentiate between the political nature of these issues and their deepest religious convictions about the sanctity of life or the nature of marriage.<sup>91</sup> Should pastors or other church leaders be forced to monitor the newspaper on a daily basis to see if what they are preaching about happens to coincide with a political proposal? Is it wise for society to force churches to make this distinction between faith and politics? The American tradition is fraught with examples of religious involvement in politics. Abolition, women’s suffrage, prohibition, and the civil rights movement were all

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such ways as will not only influence but transform the social order. Faith demands engagement in the secular order and involvement in the political realm.”).

89 Studies monitoring the actual burden placed on an individual or institution by disclosure laws show that the laws are difficult to follow—in many cases an attorney would be necessary to successfully navigate the language of the laws—and that the burden imposed is significant. See JEFFREY MILYO, INST. FOR JUSTICE, CAMPAIGN FINANCE RED TAPE 1–22 (2007) [hereinafter CAMPAIGN FINANCE RED TAPE], available at [http://www.campaignfreedom.org/docLib/20091007\\_Milyo2007RedTape.pdf](http://www.campaignfreedom.org/docLib/20091007_Milyo2007RedTape.pdf) (reporting that experimental subjects were rated on twenty specific disclosure tasks, and that on average, only forty-one percent were performed correctly). The study quoted one participant as saying, “A lawyer would have a hard time wading through this disclosure mess and we read legal jargon all the time.” *Id.* at 17. This confusing language would likely have a chilling effect upon the political activism of religious institutions who—relying largely on monetary donations—are not likely to have the resources to hire a lawyer each time they wish to speak out on topics of religious and political importance.

90 Brady, *supra* note 76, at 1679.

91 See discussion *supra* Part III.A.1.

fueled largely by the involvement of religious organizations.<sup>92</sup> History suggests that laws chilling religious involvement in politics would destroy an important source of ideas and change in American society.<sup>93</sup>

Many state laws chill this activity by threatening penalties for failing to abide by confusing and wordy campaign disclosure laws. Twenty-four states allow voters to make laws directly through ballot measures, and in each of those states a group of more than two citizens who act in support or opposition to a ballot initiative must register as a political committee within their state.<sup>94</sup> In eight of these states, there is no floor for the expenditure amount required to trigger the obligation to register as a political committee.<sup>95</sup> Therefore, any nominal expenditure by two or more persons in favor of or in opposition to a ballot measure—including a mere mention of a piece of moral legislation by a salaried pastor during a regularly scheduled church service or the use of ink in a church copy machine—would require them to register as a political committee or be subjected to possible civil or criminal penalties. Disclosure is very often a difficult and confusing task. In most states, committees are required to file disclosure information at various times throughout the year during nonelection years, and more frequently in the days and months leading up to an election.<sup>96</sup> Further, if a contribution meets a certain threshold amount—which differs from state to state—a political committee is usually required to submit extensive information about the donor.<sup>97</sup> This information is required for every donor who gives a

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92 Kemmitt, *supra* note 87, at 167 (noting the vital role of religion in the defining political struggles of the last two centuries, including abolition, prohibition, women's suffrage, and civil rights).

93 See JOHN T. NOONAN, JR., *THE LUSTRE OF OUR COUNTRY* 250–60 (1998) (discussing religious involvement in societal change and citing Toqueville's statement that "religion is America's foremost political institution"); see also Erik J. Ablin, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 571–73 (1999) (outlining the history of church political involvement); Brady, *supra* note 76, at 1703 (stating that without the unorthodox ideas promoted by religion and other minority groups, society will "stagnate").

94 See CAMPAIGN FINANCE RED TAPE, *supra* note 89, at 2. For general information about state disclosure laws, see *The Campaign Disclosure Project*, UCLA SCH. L., <http://disclosure.law.ucla.edu/Default.aspx> (last visited Mar. 30, 2010).

95 See CAMPAIGN FINANCE RED TAPE, *supra* note 89, at 22.

96 See, e.g., MONT. CODE ANN. § 13-37-226 (2009) (requiring different filing deadlines for committees supporting candidates for statewide office, local office, and incidental political committees).

97 For an example of burdensome and confusing disclosure requirements, see MONT. CODE ANN. § 13-37-229. This statute states:

sum of money greater than the threshold requirement for reporting contribution information. The committee must also disclose the names, addresses, and occupations of those to whom expenditures were made by the committee.<sup>98</sup> These rules vary by state, and are usually difficult to follow.<sup>99</sup> The complex nature of these laws and the threat of civil and criminal punishment for incorrectly abiding by them has a chilling effect on religious organizations that fear punishment and cannot afford hefty fines and expensive litigation.<sup>100</sup>

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Disclosure of contributions received. Each report required by this chapter shall disclose the following information:

(1) the amount of cash on hand at the beginning of the reporting period;

(2) the full name, mailing address, occupation, and employer, if any, of each person who has made aggregate contributions, other than loans, of \$35 or more to a candidate or political committee, including the purchase of tickets and other items for events, such as dinners, luncheons, rallies, and similar fundraising events;

(3) for each person identified under subsection (2), the aggregate amount of contributions made by that person within the reporting period and the total amount of contributions made by that person for all reporting periods;

(4) the total sum of individual contributions made to or for a political committee or candidate and not reported under subsections (2) and (3);

(5) the name and address of each political committee or candidate from which the reporting committee or candidate received any transfer of funds, together with the amount and dates of all transfers;

(6) each loan from any person during the reporting period, together with the full names, mailing addresses, occupations, and employers, if any, of the lender and endorsers, if any, and the date and amount of each loan;

(7) the amount and nature of debts and obligations owed to a political committee or candidate, in the form prescribed by the commissioner;

(8) an itemized account of proceeds that total less than \$35 from a person from mass collections made at fundraising events;

(9) each contribution, rebate, refund, or other receipt not otherwise listed under subsections (2) through (8) during the reporting period;

(10) the total sum of all receipts received by or for the committee or candidate during the reporting period; and

(11) other information that may be required by the commissioner to fully disclose the sources of funds used to support or oppose candidates or issues.

98 *See, e.g., id.* § 13-37-230(1)(a) (requiring committees to provide the full names, mailing addresses, occupation, and principal place of business of any person to whom an expenditure was made during a reporting period as well as the amount, date, and purpose of each expenditure).

99 *See* CAMPAIGN FINANCE RED TAPE, *supra* note 89, at 10–14 (describing the inability of regular citizens to fill out disclosure forms correctly in a recent study).

100 *See id.* at 14–16 (noting that “two-thirds of respondents agreed that the disclosure requirements would deter many people from engaging in independent political

Although documented instances of retaliation by political opponents for mistakes on disclosure forms or noncompliance are rare, the *Canyon Ferry Road* case and the Diocese of Bridgeport are prime examples of what is at stake. Due to the divisive nature of the issues and their level of influence on congregants, the threat of retaliation is increased for religious organizations. Therefore, confusing compliance laws may lock the lips of religious organizations, religious leaders, and church groups because they fear civil penalties and lack the resources to hire a lawyer every time they would like to participate in political dialogue.<sup>101</sup> This “chilling effect” is a burden on the free exercise of religion, as fundamental beliefs of religious organizations are silenced and are not passed down to congregations where individual belief is formed.<sup>102</sup> Equally troubling, however, is the potential stifling of one of America’s most consistent sources of positive social change and the implications for American democracy.<sup>103</sup>

### 3. Institutional Free Exercise and *Smith*

Due to the unique role of religious organizations in forming individual belief and promoting positive change within society throughout history, *Smith* should not serve as the guidepost for assessing the free exercise rights of religious institutions. Instead, institutional free exercise should give a right of autonomy to religious organizations and prevent laws that have the incidental effect of burdening religion from applying in the communal setting.<sup>104</sup> Although the Supreme

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activity,” and that figure increased to nearly 90% when participants were reminded of possible fines and punishment associated with noncompliance or mistakes on forms).

101 See Appellants’ Reply Brief, *supra* note 38, at 29 (stating that the burden requiring churches to register with the state “is substantial . . . any time it exercises a core value of its faith by supporting or opposing a ballot issue that implicates its moral doctrines”).

102 See Kemmitt, *supra* note 87, at 169; see also Part III.A.1 (explaining the vital role that religious institutions play in forming individual religious belief).

103 See Brady, *supra* note 76, at 1700 (“Religious groups are among the ‘mediating structures’ or institutions of ‘civil society’ that stand between the individual and the state and transmit the values, skills, and attitudes necessary for self-government.” (footnote omitted)); Garnett, *supra* note 76, at 294–95 (arguing that religious institutions do not only benefit from, but also help protect religious freedom).

104 See Brady, *supra* note 76, at 1672–79; Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 347–52, 379–420 (1984) (using the Establishment Clause to justify the institutional exception); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1392 (1981) (“The free exercise clause . . . forbids government interference with church operations unless there is . . . a compelling governmental interest to justify the interference.”); Mayer, *supra* note 78, at 1197–1216 (arguing that institutional free

Court has never addressed the free exercise rights of religious institutions, it seems likely that the Court will in the future.

But would *Smith* really permit institutional free exercise? According to Professors Brady and Mayer, the answer is yes.<sup>105</sup> First, *Smith* creates a distinction between belief and action, as described above, forbidding the regulation of religious beliefs by the government.<sup>106</sup> If the religious institution is viewed as the place where individual religious beliefs are formed, then government interference with the formation of these beliefs would likely be prohibited by *Smith* as well. As Brady states, "If religious groups play an essential role in shaping individual religious belief and, indeed, in the very formulation of religious ideas, the freedom of belief that *Smith* envisions requires protections for religious organizations."<sup>107</sup> Further, the decision in *Smith* did not state that religion and irreligion must always be treated alike. Instead, the decision encouraged individual state legislatures to make exemptions protecting religion on their own. The opinion stated,

[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. . . . But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required . . . .<sup>108</sup>

Therefore, one who argues that religion should never be granted an exemption from a neutral law may be reading too far into *Smith* and distorting free exercise jurisprudence. Even after *Smith*, exemptions can still be made for religion even if they are not required, and according to the Court these exemptions may even be desirable.

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exercise should protect sermons and other internal religious communication from IRS tax laws).

105 See generally Brady, *supra* note 76 (arguing for a broad right of institutional free exercise protection); Mayer, *supra* note 78 (advocating free exercise protection for internal church communication with congregations). But cf. Hamilton, *supra* note 82, at 1110 (stating that allowing a right to church autonomy would prevent the government from protecting the common good by "permit[ting] religious entities to avoid being legally accountable for the harm they have caused"). Hamilton goes on to state that "[c]hurch autonomy' is not and should not be a doctrine recognized in the United States." *Id.* at 1112; see also Lupu, *supra* note 83, at 408–09 (explaining that it is unnecessary to give churches broad autonomy in many cases because the court can use "neutral principles of law" to resolve intrachurch disputes and that it is unconstitutional to grant churches complete autonomy because church decisions affect society outside of the church community).

106 *Employment Div. v. Smith*, 494 U.S. 872, 877–79 (1990).

107 Brady, *supra* note 76, at 1677.

108 *Smith*, 494 U.S. at 890; see also Brady, *supra* note 76, at 1674 (explaining that *Smith* allows for legislative accommodation of religion when permissible).

Next, given the positive role that churches historically played in promoting societal change,<sup>109</sup> it is necessary to protect their ability to speak out on matters of political importance. Exempted religious organizations do not threaten the anarchy discussed in *Smith* in the same way that exempted individuals do.<sup>110</sup> Although Professor Lupu may disagree, the fear that a church member would “by virtue of his beliefs . . . become a law unto himself” by speaking out on political issues is minimal.<sup>111</sup> The role of the religious institution is shaping the beliefs of its followers based on church doctrine. The individual’s ability to become politically active and impact society based on these acquired beliefs is entirely within the rights of the individual as an American citizen and is not threatening to American democracy. While some opponents may disagree, it matters little to the political process whether one forms their political beliefs at church or by watching CNN. Therefore, a citizen choosing to exercise their political rights based on a religious belief does not threaten society and its laws in the same way as granting every individual an exemption to a drug law for religious purposes.<sup>112</sup> This holds true even if the religious belief is unpopular.<sup>113</sup> As Brady states:

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109 See, e.g., *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1036 (9th Cir. 2009) (Noonan, J., concurring) (“Churches have played an important—no, an essential—part in the democratic life of the United States.”); Ablin, *supra* note 93, at 571–73 (“The practice of churches and clergy engaging in political rhetoric and activity is something that predates the Constitution.” (citations omitted)).

110 *Smith*, 494 U.S. at 888 (suggesting that allowing exemptions to individuals based on religious beliefs would be “courting anarchy”).

111 *Id.* at 885; see Brady, *supra* note 76, at 1677–78 (discussing the minimal threat to society posed by internal church decisions such as the hiring and firing of ministers). But see Lupu, *supra* note 83, at 408–09 (stating that the effects of certain civil rights violations by churches are not confined only to church communities but affect society as a whole). While it is true that the individual political involvement of church members may impact society outside of the religious organization, the actual formation of individual belief within the church community is protected under *Smith* and should not be regulated by the government. See Brady, *supra* note 77, at 1677 (“[T]he same danger [of anarchy discussed in *Smith*] does not arise when religious organizations are exempted from compliance with regulations that interfere with *internal community life*.” (emphasis added)).

112 See *Smith*, 494 U.S. at 888.

113 See Brady, *supra* note 76, at 1703 (“Where government regulation inhibits the preservation, transmission, and development of minority beliefs within religious communities and other civic groups, it deserves democracy, not serves it. Full freedom of belief, even unpopular and unorthodox belief, is essential to the health of democratic society as are the groups that make such beliefs possible.”).

Democratic government is not supported best by homogeneity of beliefs and values, even beliefs whose correctness seems unassailable and values that seem essential for democratic life. Shaping associational life so that the internal practices and values of religious groups and other mediating institutions match shared public norms stifles new ideas that could challenge prevailing perspectives in progressive directions.<sup>114</sup>

Some scholars argue that allowing for a broad right of church autonomy would violate the Establishment Clause by giving preferential treatment to religion.<sup>115</sup> As William Marshall explained, free exercise exemptions may violate the Establishment Clause because "[s]pecial treatment for religion connotes sponsorship and endorsement; providing relative benefits for religion over non-religion may have the impermissible effect of advancing religion."<sup>116</sup> Justice Brennan's majority opinion in *Texas Monthly, Inc. v. Bullock*<sup>117</sup> demonstrated this idea by striking down a Texas sales tax exemption for religious publications. The Court held that "Texas' sales tax exemption for periodicals published or distributed by a religious faith and consisting wholly of writings promulgating the teaching of the faith lacks sufficient breadth to pass scrutiny under the Establishment Clause. Every tax exemption constitutes a subsidy."<sup>118</sup> Similarly, anti-accommodation scholars argue that a right granting religious institutions exemptions from neutral laws violates the Establishment Clause because it singles out religion and confers a benefit on religious organizations.<sup>119</sup> This is not the case, however. Professor Brady argued, for example, "the very existence of constitutional provisions dedicated exclusively to religion demonstrate that religion is distinctive in our constitutional framework."<sup>120</sup> Therefore, accommodations for relig-

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114 *Id.*

115 See ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION* 15 (1996); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 452-60 (1994); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 319-23 (1991) [*hereinafter* Marshall, *In Defense of Smith*]; William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 390-92 (1989).

116 Marshall, *In Defense of Smith*, *supra* note 115, at 320 (citations omitted).

117 489 U.S. 1 (1989).

118 *Id.* at 14.

119 See *supra* note 115.

120 See Brady, *supra* note 77, at 1711; see also NOVAK, *supra* note 77, at 89 ("A democracy need only ensure that no adult citizen has his or her privacy invaded by any religion without his or her consent."); Michael W. McConnell, *Accommodation of*

ion are not unconstitutional. To the contrary, in *Smith*, the Court encouraged legislative accommodations for religion.<sup>121</sup> Further, in *Corp. of the Church of Jesus Christ of Latter-Day Saints v. Amos*,<sup>122</sup> the Court stated that “it has never indicated that statutes that give special consideration to religious groups are *per se* invalid.”<sup>123</sup> Instead, “[w]here, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.”<sup>124</sup> As Professor McConnell notes, “It is not credible to argue that accommodation of religion violates the First Amendment on the ground that it protects religion and not other institutions and systems of belief, because the same argument could be made against the First Amendment itself.”<sup>125</sup>

It follows, then, that institutional free exercise is consistent with *Smith* in preserving the freedom of individual religious belief, while protecting the order and stability of American democracy.<sup>126</sup> Therefore, the right of institutions to form religious beliefs, whether or not they coincide with political matters or agree with societal norms, should be protected from the chilling effect of state disclosure laws.

### B. *Are Campaign Disclosure Laws Generally Applicable?*

The central holding in *Smith* states that a neutral law of general applicability that incidentally burdens religion is not necessarily unconstitutional because it proscribes certain religious action.<sup>127</sup> But how does one tell whether a law is neutral or generally applicable? On the surface, it may not be readily apparent. For example, selective or discriminatory enforcement of facially neutral laws can subject them to strict scrutiny.<sup>128</sup> Further, recent case law suggests that when

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*Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 718 (1992) (“[I]f extending special constitutional protection to free exercise advances religion, then the Religion Clauses are contradictory . . .”).

121 *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (“[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required . . .”).

122 483 U.S. 327 (1987).

123 *Id.* at 338.

124 *Id.*; see also Brady, *supra* note 76, at 1712 (refuting the argument that religious accommodations are a violation of the Establishment Clause).

125 See McConnell, *supra* note 120, at 720.

126 See Brady, *supra* note 76, at 1672–79.

127 *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).

128 See *Tenafly Eruv Ass’n v. Borough of Tenafly*, 309 F.3d 144, 167–68 (3d Cir. 2002) (finding that Ordinance 691 was not generally applicable because of its “selective, discretionary application” that singled out religiously motivated conduct).

exemptions from the law are granted for secular reasons but not for religious reasons, the law may be underinclusive—and thus not generally applicable.<sup>129</sup>

State campaign disclosure laws appear neutral. Indeed, they do not impose disclosure requirements only on religious organizations, but rather require many groups advocating for or against a ballot initiative or piece of legislation to register as a political committee. Based on the Supreme Court’s reasoning in *Lukumi*, however, state campaign disclosure laws are not generally applicable because they allow exemptions for secular purposes. For example, as noted in the *Canyon Ferry Road* case, the Montana Code allows exemptions for

(i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or political committee or meals and lodging provided by individuals in their private residences for a candidate or other individual;

(ii) the cost of any bona fide news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication of general circulation;

(iii) the cost of any communication by any membership organization or corporation to its members or stockholders or employees;

or

(iv) filing fees paid by the candidate.<sup>130</sup>

Similarly, most other states allow some exemptions from their reporting requirements including an exemption for media and news organizations.<sup>131</sup>

In his concurrence in *Canyon Ferry Road*, Judge Noonan addressed these exceptions for media outlets and argued that they

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129 See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209–14 (3d Cir. 2004) (holding that a law prohibiting the ownership of wildlife without paying for a permit was not generally applicable because zoos and circuses did not have to meet this requirement while a Lakota Indian did have to pay to keep animals for religious reasons); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 363 (3d Cir. 1999) (holding that a police regulation forbidding beards was not generally applicable because it allowed an exemption for medical reasons but not religious reasons).

130 MONT. CODE ANN. § 13-1-101(7)(b)(i)–(iv) (2009).

131 See, e.g., ARIZ. REV. STAT. ANN. § 16-901(8)(a) (2006); CONN. GEN. STAT. § 9-601b(5) (2009); MICH. COMP. LAWS ANN. § 169.206(c)(2)(d) (West 2005); MINN. STAT. § 10A.01 Subds. 9(3) & 21(7) (2008); MO. REV. STAT. § 130.011(16)(e)(a) (2008); OR. REV. STAT. § 260.007(1) (2007); WASH. REV. CODE § 42.17.020(15)(b)(iv) (2008).

destroy the laws' general applicability.<sup>132</sup> He noted that the "media are free to promote political opinions without registering as independent political committees and without disclosing the identity of those owning the facilities used to promote the opinions."<sup>133</sup> Due to this exception, he stated that the most influential source of information in the political process is removed from regulation by the disclosure statute, and therefore the "generality of the statute is destroyed."<sup>134</sup> In an era when the bipartisanship and neutrality of many media organizations is challenged,<sup>135</sup> and when media outlets become more and more influential in forming the political views of Americans, allowing the press an exemption from reporting requirements threatens to undermine the stated purpose of campaign disclosure laws in preventing corruption and educating the public about the use of money on political matters.

Judge Noonan anticipates the counterargument to his opinion—that exempting the press from such disclosure requirements is necessary because its freedom is protected by the First Amendment and because "[a]n unregulated, unregistered press is important to our democracy."<sup>136</sup> In response to this argument, however, he states that both freedom of the press *and* freedom of religion are protected by the First Amendment and that they should be treated similarly.<sup>137</sup> In *Murdock v. Pennsylvania*,<sup>138</sup> the Supreme Court stated that the pulpit holds a "high estate" under the First Amendment, just like freedom of

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132 Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth, 556 F.3d 1021, 1035–37 (9th Cir. 2009) (Noonan, J., concurring).

133 *Id.* at 1035.

134 *Id.*

135 See, e.g., Howard Kurtz, *Neutralizing the Opposition*, WASH. POST, Oct. 22, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/22/AR2009102200951.html> (discussing President Obama's attack on Fox News and allegations that Fox is an "opinion outfit" and not a "news network"); Brian Stelter, *Fox's Volley with Obama Intensifying*, N.Y. TIMES, Oct. 12, 2009, at B1 (same); Press Release, Ctr. for Media and Pub. Affairs, George Mason Univ., Obama Leads the Media Race as Well (Oct. 14, 2008), available at [http://www.cmpa.com/media\\_room\\_press\\_8.htm](http://www.cmpa.com/media_room_press_8.htm) (reporting on a study showing that the media favored Barack Obama and that comments about Obama on the evening news were sixty-five percent positive compared to only thirty-six percent positive about Senator McCain).

136 *Unsworth*, 556 F.3d at 1036 (Noonan, J., concurring).

137 *Id.* at 1035 ("But if it is obvious that the freedom of the press would be infringed by the statute's requirements, is it not equally obvious that the free exercise of religion is burdened by them?"); see also Appellants' Reply Brief, *supra* note 38, at 31 ("[W]hile the state aggressively defends the freedom of the press, it aggressively prosecutes the free exercise of religion.").

138 319 U.S. 105 (1943).

the press.<sup>139</sup> As the appellants in the *Canyon Ferry Road* case stated in their reply brief, campaign disclosure laws are

truly unconscionable, given that the press and pulpit have remarkably similar characteristics: the same First Amendment protects both; their expression (editorial or evangelical) is inherently public; and both are commonly acknowledged as being a community's voice. In broad constitutional terms, the only real difference is that one speaks from a secular viewpoint, while the other offers a religious viewpoint.<sup>140</sup>

Further, like an unregulated press, unregulated and politically involved religious institutions are crucial to democracy in the United States.<sup>141</sup> As stated previously, the active involvement of churches in the political process is responsible for much positive social change in the United States throughout history.<sup>142</sup> To speak of the contributions of a free press without mentioning the contributions of politically active churches is to only tell half of the story of positive change in the United States since its founding.

Based on the Supreme Court's ruling in *Lukumi*, it is difficult to argue that state disclosure laws allowing exceptions for the press, as well as for other secular situations, are generally applicable. Surely if a pastor's salary or the cleaning costs associated with running a church are counted as a political expenditure,<sup>143</sup> then the salary of an editorial journalist or the costs of cleaning a newspaper office or news station should be included, as well. Why the variation of treatment between First Amendment freedoms? Because these laws are not generally applicable in practice, they lie outside of *Smith* and should be subjected to strict scrutiny.

#### IV. COMPELLING GOVERNMENT INTEREST?

If the previous arguments succeed and institutional free exercise or press exemptions bring state registration and disclosure laws outside of *Smith*, what happens next? States could still survive strict

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139 *Id.* at 109.

140 Appellants' Reply Brief, *supra* note 38, at 32.

141 *See supra* Part III.A.2; *see also* Garnett, *supra* note 76, at 294 ("[T]he claims developed in the context of the Free Speech Clause, with respect to the need for institution-sensitive doctrine, apply in the Religion Clauses context as well.").

142 *See Unsworth*, 556 F.3d at 1036–37 (Noonan, J., concurring) (noting that the end of slavery and the civil rights movement were both achieved largely due to the involvement of religious institutions); Kemmit, *supra* note 87, at 167 (recalling the contribution of religious organizations to the abolition of slavery, the women's suffrage movement, the Civil Rights Movement, etc.).

143 *See* Summary of Facts, *supra* note 30, at 1, 9.

scrutiny by proving that the laws are narrowly tailored to serve a compelling government interest.<sup>144</sup> However, when religious organizations speak out on ballot initiatives or pending legislation, forcing them to register as a political committee or lobbyist does not serve a compelling government interest and should fail a strict scrutiny analysis. This Part will examine states' purported interests in campaign disclosure laws and argue that these interests—especially the need to prevent corruption—are not served by forcing churches to register as a political committee when speaking out on a ballot initiative or piece of legislation.

### A. *The Purposes of Registration and Disclosure*

The central case defining the government's interests in requiring disclosure is *Buckley v. Valeo*.<sup>145</sup> In that case, the Court outlined three governmental interests vindicated by requiring disclosure: (1) providing the electorate with information as to where campaign money comes from and how it is spent by the candidate; (2) deterring corruption and avoiding the appearance of corruption; and (3) recording records for the purpose of preventing candidates from going over their contribution limits.<sup>146</sup> However, in *First National Bank of Boston v. Bellotti*,<sup>147</sup> the Court stated that these concerns were greatly diminished when dealing with a state referendum instead of a specific candidate for office. The Court explained, "the risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue."<sup>148</sup> Similarly, the other two pur-

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144 See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006) ("[I]f a law that burdens a religious practice is not neutral or generally applicable, it is subject to strict scrutiny, and the burden on religious conduct violates the Free Exercise Clause of the First Amendment unless it is narrowly tailored to advance a compelling governmental interest."). There are some cases, however, when even a compelling government interest may not allow the government to interfere with religion. For example, it is doubtful that the government could change the words to, say, the Apostle's Creed or the Lord's Prayer even if they had a compelling state interest to do so. Changing elements of religion central to religious belief would likely run afoul of the "excessive entanglement" prong of the *Lemon* test and violate the Establishment Clause. See *Lemon v. Kurtzman*, 403 U.S. 602, 607–09 (1971).

145 424 U.S. 1 (1976).

146 *Id.* at 66–68.

147 435 U.S. 765 (1978).

148 *Id.* at 790 (citations omitted); see also *Let's Help Fla. v. Smathers*, 453 F. Supp. 1003, 1013 (N.D. Fla. 1978) ("[I]n the context of an issue campaign and election, if

poses outlined in *Buckley* are not severely implicated by a ballot initiative or other forms of issue advocacy.<sup>149</sup>

In *McConnell v. FEC*,<sup>150</sup> the Supreme Court considered a challenge to the Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>151</sup> In part, this Act attempted to deal with "issue ads." Corporations used these ads to speak out against policies of specific candidates without expressly telling the audience how to vote to circumvent the federal restrictions on express candidate advocacy.<sup>152</sup> The plaintiffs in this case challenged the BCRA claiming that *Buckley* drew a distinction between express candidate advocacy and issue advocacy.<sup>153</sup> The Court stated that the distinction drawn in *Buckley* was merely an attempt to "avoid constitutional infirmities"<sup>154</sup> and they disagreed that "the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy."<sup>155</sup> In his dissenting opinion, however, Chief Justice Rehnquist claimed that the BCRA was overbroad and regulated too much speech "that has no plausible connection to candidate contributions or corruption."<sup>156</sup> The Court found that this distinction failed to aid the legislative goals of preventing corruption and that the BCRA helped fill loopholes in order to do so. Finally, in 2007 the

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there is to be one, the threat of corruption is minimal at best and is not sufficiently compelling to sustain this ceiling on contributions as it applies to plaintiff."). *But see* Bemis Pentecostal Church v. State, 731 S.W.2d 897, 901-06 (Tenn. 1987) (discussing the increasing prevalence of interest groups and the need for checks on political expenditures even for referenda).

149 In issue campaigns, the interest in preventing candidates from going over campaign monetary limits is nonapplicable. Further, the interest in providing the electorate with information on who supports or opposes a ballot measure would not be severely inhibited if religious organizations were no longer made to abide by confusing disclosure laws that chill their political speech. Instead, voters would still have information about which nonreligious organizations supported or opposed a measure, and religious organizations would have more opportunities to make their views known without fearing civil or criminal punishment. Therefore, the public would still enjoy access to this information.

150 540 U.S. 93 (2003).

151 Pub. L. No. 107-155, 116 Stat. 81 (codified as amended at 2 U.S.C. §§ 431-457 (2006)).

152 *McConnell*, 540 U.S. at 126 (defining "issue ads" as advertisements containing "magic words" like "Vote Against Jane Doe" while specifically intending to influence elections).

153 *Id.* at 190; *see* *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (including examples of words suggesting express advocacy: "vote for," "elect," "support," and "defeat," which gave rise to the "magic words" requirement).

154 *McConnell*, 540 U.S. at 192.

155 *Id.* at 193 ("Buckley's magic-words requirement is functionally meaningless").

156 *Id.* at 350 (Rehnquist, C.J., dissenting).

Supreme Court revisited the BCRA in *FEC v. Wisconsin Right to Life*,<sup>157</sup> and determined that the BCRA was unconstitutional as applied to the specific facts of that case since the ads in question “may reasonably be interpreted as something other than an appeal to vote for or against a specific candidate” and therefore they were not “the functional equivalent of express advocacy.”<sup>158</sup> The Court stated that challenges to the BCRA must be objective and consider the substance of the electioneering communication, however the intent and effect of the communication should not be considered.<sup>159</sup> The test outlined by the Court states that “a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>160</sup> Since the *Wisconsin Right to Life* ads were not deemed a form of express advocacy, the Court found that the state had no compelling interest in regulating them because there was a diminished fear of corruption.<sup>161</sup> Similarly, state laws that require registration and disclosure when churches advocate for or against a ballot initiative or piece of legislation do not serve a compelling state interest. Therefore, these laws would fail a strict scrutiny analysis.

### B. *Issue v. Candidate Advocacy*

Scholars struggle to draw a distinction between issue and candidate advocacy to determine when organizations are required to register and disclose political expenditures.<sup>162</sup> It becomes increasingly difficult to draw a line between issue and candidate advocacy because issues often define candidates. For example, in the 2008 election, it was clear that Senator John McCain was against abortion while then-Senator Barack Obama was prochoice. During the election, then, if a church preached support of a prolife message, could they be said to

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157 551 U.S. 449 (2007). For a history of the jurisprudence leading up to and including *Wisconsin Right to Life*, see Robert L. Kerr, *Considering the Meaning of Wisconsin Right to Life for the Corporate Free-Speech Movement*, 14 COMM. L. & POL'Y 105, 123–29 (2009).

158 *Wis. Right to Life*, 551 U.S. at 451.

159 *Id.*

160 *Id.*

161 *Id.* at 478–79. The Court stated that the *Wisconsin Right to Life* ads were consistent with issue ads because they took a position on a legislative issue and urged the public to adopt the same position and contact their legislators. On the other hand, the Court listed indicia of express advocacy ads that “mention an election, candidacy, political party, or challenger” or take a “position on a candidate’s character, qualifications, or fitness for office.” *Id.* at 451–52.

162 See, e.g., Ablin, *supra* note 93, at 577–79 (“[T]he line between advocating issues and candidates is a rather murky one.”).

endorse John McCain? The same problems exist on the state level, as prolife and prochoice candidates, and those that are for and against legalizing same-sex marriage, often divide the electorate along religious lines. The main reason for the distinction between candidates and issues, as discussed above, is that there is an increased danger of corruption when specific candidates are involved as opposed to a mere ballot measure or piece of legislation.

But how do you make a meaningful distinction between the two? Is the answer a "magic words" test outlined in *Buckley*,<sup>163</sup> and referred to again in *Wisconsin Right to Life*?<sup>164</sup> Should the intent of the communication be considered? The most workable solution to this problem is to consider the communication on a case-by-case basis using "magic words" as a guideline, but not as a strict *per se* rule. For example, church communications urging their congregation to vote for a particular candidate would clearly be candidate-centered "express advocacy" and would require the church to register as a political committee under state election laws serving the compelling state interest of battling corruption. Issue advocacy, however, should be interpreted broadly to encompass ballot initiatives, opposition to or support of legislation, campaigns urging congregations to contact elected officials, etc. This is due to the diminished threat of corruption involved in these cases and the fact that the other concerns discussed in *Buckley* are also less applicable when a candidate is not involved. As Chief Justice Roberts outlined in *Wisconsin Right to Life*, "a court should find that an ad [or, in this case, an election communication] is the functional equivalent of express advocacy *only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.*"<sup>165</sup> This presumption for issue advocacy would give broad protection to the free exercise rights of religious institutions in speaking out on political issues that touch on core religious beliefs, while also protecting the interest of the state in preventing corruption in candidate elections.

State laws that force religious institutions to register as political committees or lobbyists when speaking out on moral issues that coincide with legislation or ballot initiatives do not serve a compelling state interest and would therefore fail a strict scrutiny analysis.

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163 *Buckley v. Valeo*, 424 U.S. 1, 43–44 (1976).

164 *Wisconsin Right to Life*, 551 U.S. at 474 n.7. For a more detailed discussion of the "magic words" requirement, see Richard E. Levy, *Defining Express Advocacy for Purposes of Campaign Finance Reporting and Disclosure Laws*, 8 KAN. J.L. & PUB. POL'Y 90, 99–104 (1999), advocating against the use of the "magic words" doctrine and suggesting that the "purpose and effect" of the ad should be considered.

165 *Wis. Right to Life*, 551 U.S. at 451 (emphasis added).

Although distinguishing between candidate-centered express advocacy and more general issue advocacy has been difficult for courts, in the wake of *Wisconsin Right to Life*, there should be a presumption against express candidate advocacy unless that purpose is readily clear to the reasonable observer from the face of the specific communication.

Due to the diminished government interest in preventing corruption in instances of issue advocacy, and the fact that donation information about nonreligious organizations and many individuals would still be readily available to voters, state campaign registration and disclosure laws that require religious organizations to register as a political committee or lobbyist before speaking about moral issues embedded in legislation should fail a strict scrutiny test.

#### CONCLUSION

Requiring churches to register as a political committee or a lobbyist when speaking out about legislation or a ballot initiative encroaches on the ability of religious organizations to freely discuss matters central to their faiths and is a violation of the Free Exercise Clause of the First Amendment. Although cases of this nature have traditionally been decided on free speech grounds, it should be remembered that religious liberty is an equally important “first freedom” that is worth protecting from intrusive government regulation. Therefore, a hybrid claim of action is not necessary to protect religious freedom in these cases. Instead, state campaign laws requiring church registration can be attacked on two grounds—as a violation of institutional free exercise and because they often allow exceptions destroying their general applicability. A statement from Bishop William E. Lori of the Diocese of Bridgeport, Connecticut about Legislative Bill No. 1098 is particularly applicable to this discussion: “It is up to us to stop this unbridled abuse of governmental power. It is time for us to defend our First Amendment rights. It is time for us to defend our Church!”<sup>166</sup>

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166 Lori, *supra* note 11, at 1.

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VOLUME 85

2009-2010

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