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COMMENTS

THE PULPIT INITIATIVE: FIGHTING TO RETURN AMERICA'S FIRST FREEDOM TO HER CHURCHES

*David Abbondanza**

I. INTRODUCTION

Since 1954, American churches have faced a difficult decision: either say nothing about the moral issues that drive their religion or face losing their tax-exempt status. This fundamentally unsound choice falls down upon them due to an Internal Revenue Service (“IRS”) regulation that prohibits religious organizations from commenting on the moral attributes of a candidate for political office.¹ Setting out to ensure a future of religious freedom, in the fall of 2008 churches around the country began a movement aimed at ending this overbearing restriction on their activities.²

In Indiana, Pastor Ron Johnson Jr. stood in front of his congregation and told them the views of John McCain and Barack Obama, candidates for President of the United States, on the subjects of same-sex marriage and abortion.³ The reverend of a church in Pennsylvania, Frank Pultro, gave a sermon in favor of one presidential candidate, stating that only a vote for John McCain would ensure the conservative social principles of their faith.⁴

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1. I.R.C. § 501(c)(3) (2006).

2. See ALLIANCE DEFENSE FUND, THE PULPIT INITIATIVE FREQUENTLY ASKED QUESTIONS 1 (2008), http://www.alliancedefensefund.org/userdocs/Pulpit_Initiative_FAQ.pdf [hereinafter ALLIANCE DEFENSE FUND, FAQ].

3. Dale Buss, *Provoking the IRS, Preachers Address The Bully Pulpit*, WALL ST. J., Oct. 3, 2008, at W11.

4. Suzanne Sataline et al., *Partisan Sunday Sermons Test Federal Tax Laws—Some Pastors Push the IRS to Allow Politics on Pulpit*, WALL ST. J., Sept. 29, 2008, at A12.

The planning for these sermons began months in advance, and on September 28, 2008, thirty-one other pastors around the nation, un-phased by the threat of an imposed excise tax or loss of tax exempt status,⁵ joined these two in condemning or endorsing candidates for public office.⁶

The issue for these pastors and their churches centers not on gaining political power, but on teaching their congregations the basic foundations of the religion that they profess every week.⁷ One candidate for the Republican presidential nomination, Mike Huckabee, himself a former pastor in Arkansas, stressed the importance of a private citizen to be able to express his beliefs without the interference of government authorities.⁸ This rationale, built on fifty-four years of frustration, gained the support of not only churches, but legal counsel as well and culminated in the overarching project referred to as the “Pulpit Initiative” and eventually “Pulpit Freedom Sunday” on September 28, 2008.⁹

Led by the Alliance Defense Fund (“ADF”), a Christian-based legal alliance organized to “aggressively defend religious liberty,”¹⁰ the Pulpit Initiative sets out to return a pastor’s right “to speak freely from the pulpit” on social issues facing his congregation from “a biblical perspective” without the fear of government intrusion.¹¹ Likened to the Boston Tea Party,¹² Pulpit Freedom Sunday was not about gaining political power for churches or providing candidates with another avenue of funding.¹³ Instead, it was part of a “bold defense of the First Amendment’s Establishment, Free Exercise, and Free Speech clauses”¹⁴—a defense

5. See ALLIANCE DEFENSE FUND, FAQ, *supra* note 2, at 1–2.

6. See Sataline et al., *supra* note 4; see also ALLIANCE DEFENSE FUND, PASTORS PARTICIPATING IN ADF PULPIT FREEDOM SUNDAY, <http://www.telladf.org/UserDocs/PFSparticipants.pdf> (listing the pastors participating in the discussion of political candidates).

7. Ron Johnson, Jr., *Who Is in Charge of Our Pulpits?*, CHRISTIANITY TODAY, Oct. 16, 2008, <http://www.christianitytoday.com/ct/2008/octoberweb-only/142-43.0.html> [hereinafter Johnson, Jr., *Charge*]; Erik Stanley, *IRS Rules Don't Trump the Constitution*, TOWN HALL, Sept. 8, 2008, http://townhall.com/columnists/ErikStanley/2008/09/08/irs_rules_dont_trump_the_constitution.

8. Suzanne Sataline, *Pastors May Defy IRS Gag Rule—Legal Group Urges Ministers to Preach About Candidates*, WALL ST. J., May 9, 2008, at A5.

9. See ALLIANCE DEFENSE FUND, FAQ, *supra* note 2, at 1.

10. Alliance Defense Fund, Purpose, <http://www.alliancedefensefund.org/about/purpose/Default.aspx> (last visited Feb. 12, 2008).

11. ALLIANCE DEFENSE FUND, THE ALLIANCE DEFENSE FUND PULPIT INITIATIVE WHAT IT IS—WHAT IT’S NOT, <http://www.telladf.org/UserDocs/WhatIsPI.pdf> [hereinafter ALLIANCE DEFENSE FUND, WHAT IT IS].

12. Alan Sears, *When Government Gets A Hold of Our Churches*, TOWN HALL, Oct. 2, 2008, http://townhall.com/columnists/AlanSears/2008/10/02/when_government_gets_a_hold_of_our_churches

13. See ALLIANCE DEFENSE FUND, WHAT IT IS, *supra* note 11.

14. *Id.*

recognizing that the surest way to destroy religion is to tax it into oblivion.¹⁵ The ADF and its pastors stand strong in the belief that a church enjoys the right of tax exemption not at the mercy of the IRS, but at the basic fact of being a church.¹⁶

However, an opposing contingent feels that the ADF is concerned only with gaining political power for churches.¹⁷ In fact, some pastors of differing opinion called for an event to precede Pulpit Freedom Sunday, stressing the importance of a separation between church and state.¹⁸ Failing to see the irony, critics stand by the claim that tax exempt status for churches is not a right guaranteed by the Constitution, while at the same time, standing strong in this belief in a required so-called wall of separation between church and state.¹⁹ Those opposing the ADF's Pulpit Freedom Sunday fear that by offering legal counsel on how to defy tax legislation, the group will ultimately hinder the entire tax system in this country.²⁰ But the opposition misunderstands the motives of ADF, who adamantly stand firm that their initiative aims solely at stopping an unconstitutional ban on a pastor's right to speak on matters from a biblical perspective.²¹

This Comment looks at the foundational principles of the Pulpit Initiative and examines first, whence the need for a change came, and second, whether it is likely to come about. Part II examines the historical developments that resulted in the 1954 amendment banning pastors from speaking on candidates from the pulpit. Part III focuses on the ADF and its rationale for bringing about change along with the constitutional reasoning behind its arguments. Part IV provides some concluding remarks surrounding this initiative's likely future and whether the ADF and its associated pastors stand a chance of succeeding against the United States government.

15. See *Follett v. Town of McCormick*, 321 U.S. 573, 579 (1944) (Murphy, J., concurring).

16. Ron Johnson, Jr., *IRS Should Not Keep Churches Out of Politics*, U.S. NEWS & WORLD REP., Nov. 10, 2008, <http://www.usnews.com/articles/opinion/2008/11/10/irs-should-not-keep-churches-out-of-politics.html> [hereinafter Johnson, Jr., *IRS*].

17. See Peter Slevin, *Ban on Political Endorsements by Pastors Targeted*, WASH. POST, Sept. 8, 2008, at A3.

18. *Id.*

19. Sears, *supra* note 12 (commenting on the lack of logic in arguing against one proposition for failing to be explicitly outlined in the Constitution, while simultaneously relying on another proposition that is likewise found nowhere in the text of the Constitution).

20. Slevin, *supra* note 17. Additionally, speculation exists that the IRS will be asked to investigate ADF attorneys for ethical violations. *Id.*

21. See Stanley, *supra* note 7. Mr. Stanley is senior legal counsel at ADF and the head of the Pulpit Initiative. Erik Stanley: Conservative Columns and News for Townhall, <http://townhall.com/columnists/ErikStanley?bio=t> (last visited Feb. 12, 2008).

II. THEN-SENATOR LYNDON B. JOHNSON GOES AGAINST TRADITION BY ENACTING LEGISLATION TO END POLITICS FROM THE PULPIT

On July 2, 1954, then Senator Lyndon B. Johnson of Texas introduced an amendment that went on to become part of the Internal Revenue Code (“IRC”) that year.²² Johnson intended for the amendment to “deny[] tax-exempt status to not only those people who influence legislation but also to those who intervene in any political campaign on behalf of any candidate for any public office.”²³ Since its enactment, the IRS has interpreted this provision of the IRC to prohibit any sermons given from the pulpit discussing a candidate for office at the risk of a loss of tax-exempt status²⁴—a direct contrast with the historical upbringings of this country.²⁵

A. Since America’s Founding, Churches Have Participated in the Political Process

The founding of America developed based on the belief in a Supreme Being who imparts certain inalienable rights on everyone.²⁶ The exact reasons may have varied among the many first settlers in the New World, but many Europeans crossing the Atlantic did so for religious purposes.²⁷ As such, leading up to the amendment in 1954, churches traditionally played an active role in setting policy by following the examples set forth by God.²⁸ Further, government traditionally supported this role of religion in setting public policy, as opposed to today’s actions of the IRS.²⁹ Even the oft-blamed scapegoat for the creation of a wall separating church and state, Thomas Jefferson,³⁰ said religion stood beyond the powers of the

22. Patrick L. O’Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733, 740 (2001); see I.R.C. § 501(c)(3) (2006).

23. *Id.* (quoting 100 CONG. REC. 9604 (1954)).

24. ALLIANCE DEFENSE FUND, THE PULPIT INITIATIVE EXECUTIVE SUMMARY 1 (2008), http://www.alliancedefensefund.org/userdocs/Pulpit_Initiative_executive_summary.pdf

25. See generally Shawn A. Voyles, Comment, *Choosing Between Tax-Exempt Status and Freedom of Religion: The Dilemma Facing Politically-Active Churches*, 9 REGENT U. L. REV. 219, 226–30 (1997) (providing background on the involvement of churches in politics since the founding of America).

26. *Id.* at 228.

27. Vaughn E. James, *The African-American Church, Political Activity, and Tax Exemption*, 37 SETON HALL L. REV. 371, 374 (2007).

28. Voyles, *supra* note 25, at 226.

29. See *id.* at 229.

30. See Jennifer M. Smith, *Morse Code, Da Vinci Code, Tax Code and . . . Churches: An Historical and Constitutional Analysis of Why Section 501(c)(3) Does Not Apply to Churches*, 23 J.L. & POL. 41, 64, 64 n.125 (2007) (arguing that the true origin of a separation between church and state came from Protestant theology rather than Thomas Jefferson).

federal government.³¹ History strongly points to the proposition that from the framing of our country, the Founders overwhelmingly supported religion as a method of increasing the virtues of Americans.³²

B. The Oncoming of the Twentieth Century Brought About Changes to These Traditions

The twentieth century started off with favorable recognition toward churches. With the 1913 income tax rules came an exemption offered toward, among others, religious institutions without any conditions.³³ It did not take long, however, before a church's ability to participate fully in the political process first met restrictions with the passage of the Revenue Act of 1934.³⁴ Occurring during the depression of the 1930s, this Act passed, in part, in response to a 1930 decision by the Second Circuit on the moral issues of birth control laws.³⁵ The passage of this Act, aimed at protecting donors who did not want their money used in political matters,³⁶ brought along with it a prohibition against tax-exempt entities "attempt[ing] to influence legislation in any substantial way."³⁷ While this prohibition against lobbying may have been the first of its kind, history shows that once Congress got its initial taste of prohibiting behavior, it would find it difficult to refrain from further restrictions.³⁸

What followed, in 1954, was an amendment brought on by the then freshman Senator from Texas, Lyndon Johnson, which passed without the benefit of any debate or analysis on the floor.³⁹ The history of this amendment lacks complete clarity, and some debate exists surrounding

31. Voyles, *supra* note 25, at 229 (referring to comments made during Jefferson's second Inaugural Address).

32. John Baker, *Establishment of Religion*, in THE HERITAGE GUIDE TO THE CONSTITUTION 302, 303 (Edwin Meese III et al. eds., 2005).

33. Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; To What End?*, 42 B.C. L. REV. 903, 905 (2001).

34. Pub. L. No. 73-216, 48 Stat. 680 (1934).

35. Nina J. Crimm, *A Case Study of a Private Foundation's Governance and Self-Interested Fiduciaries Calls for Further Regulation*, 50 EMORY L.J. 1093, 1106 (2001) [hereinafter Crimm, *Case Study*] (citing the Second Circuit's decision in *Slee v. Commissioner*, 42 F.2d 184 (2d Cir. 1930)).

36. Deborah J. Zimmerman, Note, *Branch Ministries, Inc. v. Rossotti: First Amendment Considerations to Loss of Tax Exemption*, 30 N. KY. L. REV. 249, 252 (2003).

37. Ann M. Murphy, *Campaign Signs and the Collection Plate—Never the Twain Shall Meet*, 1 PITTSBURGH TAX REV. 35, 46 (2003).

38. See Nina J. Crimm, *Evolutionary Forces: Changes in For-Profit and Not-For-Profit Health Care Delivery Structures; A Regeneration of Tax Exemption Standards*, 37 B.C. L. REV. 1, 8 n.20 (1995) [hereinafter Crimm, *Evolutionary Forces*].

39. O'Daniel, *supra* note 22, at 741; ALLIANCE DEFENSE FUND, THE PULPIT INITIATIVE WHITE PAPER 1 (2008), http://www.alliancedefensefund.org/userdocs/Pulpit_initiative_white_%20Paper.pdf [hereinafter ALLIANCE DEFENSE FUND, WHITE PAPER].

Senator Johnson's motives, but evidence points to a fear of the impact on his re-election campaign as one of the driving forces behind Johnson's amendment.⁴⁰

While Johnson was not likely targeting churches in particular—in fact, he used their help during his campaigns—the evidence does point to his fear that certain non-profit organizations were acting in greater benefit toward his opponent during the 1954 primary.⁴¹ Two educational institutions, Facts Forum and the Committee for Constitutional Government (“CCG”), heralded Johnson's opponent, Dudley Dougherty, during the campaign.⁴² The primary focus of these groups' publications surrounded the anti-communist sentiments popular with McCarthyism.⁴³ The campaign actions of these conservative groups annoyed Johnson, particularly because Dougherty was having trouble gaining support from within Texas, and instead appeared to rely on outside support to further his campaign.⁴⁴

Amidst Johnson's first re-election campaign, following an exceptionally close battle in 1948 that he won by only eighty-seven votes, he presumably felt tension over the amount of attention his opponent retained, given the conservative nature of Texas voters.⁴⁵ Fearing for his ability to retain his party's nomination, Johnson inquired of a fellow Congressman to determine if measures existed under the current IRS law to prevent Facts Forum and CCG from freely speaking out about a particular political candidate.⁴⁶ Upon learning that nothing could be done in his favor, Johnson proposed the infamous amendment as a Senate floor amendment that went without any discussion of First Amendment implications.⁴⁷ To this day, the text of the Code reads:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious... purposes,... no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation... *and which*

40. See generally O'Daniel, *supra* note 22, at 741–67 (discussion Johnson's re-election campaign). But see Murphy, *supra* note 37, at 46–47 (claiming that contrary to popular claims, Senator Johnson had less than “sinister” motives in proposing the amendment).

41. Zimmerman, *supra* note 36, at 252–53. During that time, the primary election essentially served as the general election in Texas, because the Democratic Party reigned supreme, making it primarily a one party state. O'Daniel, *supra* note 22, at 742.

42. Zimmerman, *supra* note 36, at 253.

43. O'Daniel, *supra* note 22, at 743.

44. *Id.* at 744.

45. *Id.* at 741–45.

46. Zimmerman, *supra* note 36, at 253.

47. *Id.*

*does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.*⁴⁸

As a result, the amendment has produced significant influence over the behaviors of countless churches and other tax-exempt organizations when pondering the thought of entering the political arena.⁴⁹

It provides little comfort to those who value free speech and the free exercise of religion that neither Johnson nor Congress intended in 1954 to restrict the ability of a church specifically.⁵⁰ Although Johnson ultimately prevailed in the election by an easy margin, he still proposed the amendment, which led to unintended consequences, including the ADF's attempts to right a standing wrong.⁵¹ Prior to this amendment, churches relied on an established principle grounded in centuries of history that allowed them to participate in the political process to further the moral grounds of their beliefs, so long as it remained something less than a "substantial" portion of their actions.⁵² Because of this unquestioned amendment, however, the current IRS lacks a historical rationale for applying a tax against the speech of a church; rather, it relies entirely on how it interprets its own tax code.⁵³ Churches must now decide whether speaking out on moral issues reaches a level of importance high enough to risk a possible revocation of their tax exempt status.⁵⁴ But if the events of Pulpit Freedom Sunday achieve their ultimate goals and reach the courts, the historically accurate role of the church in politics might return.

III. FIFTY-FOUR YEARS LATER, THE ADF STEPS IN TO DEFEND RELIGIOUS LIBERTY

The ADF intends, through the Pulpit Initiative, "to return freedom to the pulpit by allowing pastors to speak from Scripture about the qualifications of America's potential political leaders."⁵⁵ Despite lacking a threat of punishment from the IRS, the ADF nonetheless wishes to bring about an end to the Johnson Amendment in order to right an unconstitutional

48. I.R.C. § 501(c)(3) (2006) (emphasis added).

49. O'Daniel, *supra* note 22, at 740–41.

50. See Voyles, *supra* note 25, at 233.

51. See O'Daniel, *supra* note 22, at 752–53.

52. James, *supra* note 27, at 397.

53. Voyles, *supra* note 25, at 233–34.

54. See James, *supra* note 27, at 397–98.

55. ALLIANCE DEFENSE FUND, WHITE PAPER, *supra* note 39, at 2.

wrong.⁵⁶ Viewing free speech and religious liberty as two of the most appreciated freedoms granted to Americans, ADF wants to ensure that any debate over these freedoms takes place not only around the church, but also within its walls.⁵⁷

A. Prohibiting Speech From the Pulpit Violates the First Amendment

1. Free Establishment Clause

The ADF first looks to the Establishment Clause—“Congress shall make no law respecting an establishment of religion...”⁵⁸—in contending that the Johnson Amendment violates the Constitution of the United States.⁵⁹ By enforcing the provisions of the amendment, the government becomes “excessive[ly] entangle[d] with the church.”⁶⁰ This entanglement exceeds what the government is capable of doing by “draw[ing] fine distinctions between degrees of religious speech” and requiring the IRS to engage in excessive monitoring for enforcement measures.⁶¹

The Founders set forth the Establishment Clause to protect a person’s right to exercise freely the religion of their choice.⁶² Not believing that a connection between government and religion alone was wrong, early acts of Congress in fact recognized the importance of religion and morality in government.⁶³ One scholar, Laurence Tribe, noted that the Founders agreed to the Establishment Clause for two reasons: first, to protect state churches from being removed by a national government and second, to stop the federal government from deciding to act to the benefit of some churches, but not all.⁶⁴ By preventing a pastor from speaking on pertinent moral issues and enmeshing itself in the church’s business, the federal government, acting through the IRS, is going against the Founders’s visions.

56. *Id.* at 1–2, 2 n.2.

57. Stanley, *supra* note 7.

58. U.S. CONST. amend. I.

59. ALLIANCE DEFENSE FUND, WHITE PAPER, *supra* note 39, at 2.

60. *Id.*

61. *Id.* at 2–3 (quoting *Rigdon v. Perry*, 962 F. Supp. 150, 164 (D.D.C. 1997)).

62. Baker, *supra* note 32, at 302.

63. *Id.* (referring to the Northwest Ordinance of 1787, reenacted by Congress and stating: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged”).

64. *Id.* at 303.

The Johnson Amendment further violates the Establishment Clause because it forces the government to scrutinize not only religious speech concerning the qualifications of a candidate, but also religious speech on moral issues.⁶⁵ In outlining this issue, the ADF points to the Supreme Court decision in *Buckley v. Valeo*.⁶⁶ The ADF quotes the Court, stating that “[d]iscussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.”⁶⁷ By placing itself in such a position, the government unconstitutionally enmeshes itself too far into the church and its religion.⁶⁸

Despite the historical support for the simultaneous existence of religion and government, the Supreme Court has focused on a letter from Thomas Jefferson to the Danbury Baptist Association of Connecticut for creating a “wall of separation” between church and state.⁶⁹ The Court took this view, even though Jefferson was not involved in the First Amendment’s drafting, requiring separation between church and state in the 1947 case of *Everson v. Board of Education*.⁷⁰ Since taking this view, the Court has developed a system for testing such a violation.⁷¹ The test articulated in *Lemon v. Kurtzman* calls for courts to look at: (1) whether the statute has a secular purpose, (2) whether its main purpose advances or impedes religion, and (3) whether the statute leads to “an excessive government entanglement with religion.”⁷² The second and third parts of this test give the ADF its strongest argument against the IRS Code section in question. It will be a difficult task for the IRS to argue that the tax rule fails to either impede religion or over-entangle the government in the church’s business.

The major obstacle with the separationist view outlined in the *Lemon* test lies with the fact that it has not provided sufficient grounds for deciding Establishment Clause cases.⁷³ Because of that, the Supreme Court has also espoused two other possible interpretations of the Establishment Clause.⁷⁴

65. ALLIANCE DEFENSE FUND, WHITE PAPER, *supra* note 39, at 3.

66. 424 U.S. 1 (1976); *see* ALLIANCE DEFENSE FUND, WHITE PAPER, *supra* note 39, at 3.

67. ALLIANCE DEFENSE FUND, WHITE PAPER, *supra* note 39, at 3 (quoting *Buckley*, 424 U.S. at 42 n.50).

68. *Id.*

69. Baker, *supra* note 32, at 303–04.

70. 330 U.S. 1, 16 (1947); *see* Baker, *supra* note 32, at 304–05.

71. Baker, *supra* note 32, at 304.

72. 403 U.S. 602, 612–13 (1971) (internal citations omitted).

73. *Wallace v. Jaffree*, 472 U.S. 38, 110 (Rehnquist, J., dissenting); *see also* Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 3–4 (2005).

74. Baker, *supra* note 32, at 304.

The first of these is referred to as the “no coercion” principle,⁷⁵ as evidenced in the 1992 decision of *Lee v. Weisman*.⁷⁶ Cases such as *Lee* read the Constitution as only ensuring the government will refrain from coercing citizens to participate or believe in one particular religion.⁷⁷ Under this interpretation, no required “wall of separation” exists, and the government may even aid the religious practices of a wide range of people so long as it refrains from forcing anyone to participate.⁷⁸ A court looking at the Johnson Amendment under this approach would need to establish whether the loss of tax exempt status in fact coerces a citizen’s religious participation.⁷⁹

The final interpretation of the Establishment Clause views the banned practice as government fully endorsing a religion.⁸⁰ This methodology, developed at the hand of Justice O’Connor, works under a test to determine if the government action can be viewed by a reasonable observer “as sending ‘a message to nonadherents that they are not full members of the political community.’”⁸¹ The ultimate lesson from examining the Court’s record is that there is no clearly defined principal pointing to the Court’s potential analysis of the Pulpit Initiative, provided it reaches that level.⁸² The ADF will instead need to show that, using any of the Court’s previously established tests, the entanglement with religion in which the IRS rules place the government far exceeds any level of constitutionality.⁸³

2. Free Speech Clause

Next, the ADF contends that the Johnson Amendment violates the Free Speech Clause of the Constitution.⁸⁴ As one of its main focuses, a church influences its parishioners on moral issues, which becomes greatly impeded when lacking the benefit of free speech.⁸⁵ Churches have previously been instrumental in influencing beliefs regarding such important American political revolutions as slavery and civil rights; to impede churches now with this restriction goes against the principle that the importance of

75. *Id.* at 305.

76. 505 U.S. 577 (1992).

77. *Id.* at 587; *see Baker, supra* note 32, at 305.

78. *See Baker, supra* note 32, at 305.

79. *Cf. id.*

80. *Id.* at 304–05.

81. *Id.* at 305 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J. concurring)).

82. *Id.* at 306 (outlining the many different avenues the Court has used in recent years).

83. ALLIANCE DEFENSE FUND, WHITE PAPER, *supra* note 39, at 3.

84. *Id.*; *see* U.S. CONST. amend. I. The Free Speech Clause reads, “Congress shall make no law . . . abridging the freedom of speech . . .” U.S. CONST. amend. I.

85. Voyles, *supra* note 22, at 231.

political speech—to bring about the will of the people—is too great to restrain.⁸⁶ Certainly a pastor speaking to his congregation on the morals of a candidate falls outside of the category of providing such little social value that it does not deserve protection under the Constitution.⁸⁷

The ADF bases its Free Speech Clause violation on two grounds:⁸⁸ first, the Johnson Amendment discriminates against the speech of a pastor based entirely on the content of such speech,⁸⁹ and second, the amendment acts as an “unconstitutional condition” placed on the church’s tax exempt status.⁹⁰ The government here, acting through the IRS, has not left open any alternative avenues for the church’s message about a candidate, which is a requirement prior to making any restrictions.⁹¹ The ADF stresses that this is a violation of a church’s freedom of speech under the First Amendment on the grounds that the government lacks the required compelling interest to discriminate based on speech it finds out of favor.⁹² The Supreme Court, appearing to agree with this argument, favors the concept that the First Amendment necessarily requires the need of the speaker to determine independently “the content of his own message.”⁹³

The IRS contends that the compelling interest does exist in that “the U.S. Treasury should be neutral in political affairs.”⁹⁴ While untested, this argument towards a compelling interest in neutrality falls short of being persuasive because this type of speech has been allowed for centuries prior to 1954, thus making it unreasonable that one could find the government lacking neutrality by allowing it now.⁹⁵ Furthermore, even if a court found this reasoning compelling, the government must also only enforce the measure by implementing the least restrictive means.⁹⁶ Revoking the tax exempt status of the church likely exceeds this requirement if the ADF can show that the IRS has other less restrictive alternatives.⁹⁷

86. See Zimmerman, *supra* note 36, at 262 (referring to the rule outlined in *Roth v. United States*, 354 U.S. 476, 484 (1957)).

87. *Virginia v. Black*, 538 U.S. 343, 358–59 (2003).

88. ALLIANCE DEFENSE FUND, WHITE PAPER, *supra* note 39, at 2–3.

89. *Id.* at 3.

90. *Id.* at 4.

91. See Eugene Volokh, *Freedom of Speech and of the Press*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 311, 315 (Edwin Meese III et al. eds., 2005).

92. ALLIANCE DEFENSE FUND, WHITE PAPER, *supra* note 39, at 3.

93. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* 547 U.S. 47, 63–64 (2006) (quoting *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995)).

94. Voyles, *supra* note 25, at 240 (internal quotation marks omitted).

95. See *id.* at 240–41; ALLIANCE DEFENSE FUND, WHITE PAPER, *supra* note 39, at 3.

96. See Voyles, *supra* note 25, at 242 (citing the requirement laid out in the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b) (2006)).

97. See *id.*

The ADF's opponents may have some other ground on which to stand, however, when looking at these Free Speech claims. The opposing viewpoint to the ADF's claims notes that a violation of the Free Speech Clause would, in fact, only occur if churches were allowed to partake in political speech.⁹⁸ Their argument is that such an allowance in favor of churches would be problematic because the bill would still prevent other tax-exempt entities from partaking in such speech, thus unfairly discriminating against them.⁹⁹ This viewpoint further stresses that the churches can still talk on the issues of the day; they must only refrain from specific election campaigns.¹⁰⁰ However, this argument fails to recognize the importance of relating the election candidate with the specific issues that face voters. For instance, one can imagine that a pastor speaking out on abortion in general will still fall short of his intended message when he must refrain from mentioning that only one of the candidates up for election actually stands against the act.

Beyond these arguments surrounding the specific content of the pastor's speech lies the ADF's remaining free speech argument that the amendment places an unconstitutional condition on the church's tax exempt status.¹⁰¹ While under the previous argument the case law was sparse, here the ADF has solid Supreme Court grounds upon which to stand.¹⁰² The problem for the IRS lies with the fact that the government is essentially offering a statutory privilege in tax exempt status only to those who give up the fundamental right of free speech.¹⁰³ Such a condition, the Supreme Court has said, cannot stand.¹⁰⁴ In a 1944 decision involving an ordained minister selling religious materials door to door, the Court found the imposition of a tax on the activity to be "obnoxious."¹⁰⁵ By doing such, the Johnson Amendment essentially issues a tax on churches based on the knowledge of their preachers, which is something that the *Follett* Court rightly acknowledged goes against the Founders's intent in drafting the First Amendment.¹⁰⁶

98. Murphy, *supra* note 37, at 74.

99. *Id.* at 73–74.

100. *Id.* at 74.

101. See ALLIANCE DEFENSE FUND, WHITE PAPER, *supra* note 39, at 4.

102. See *Follett v. Town of McCormick*, 321 U.S. 573, 577 (1944).

103. ALLIANCE DEFENSE FUND, WHITE PAPER, *supra* note 39, at 4.

104. *Follett*, 321 U.S. at 577.

105. *Id.* ("The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint.").

106. *Id.*

3. Free Exercise Clause

Finally, the ADF argues the Johnson Amendment violates the Free Exercise Clause of the Constitution.¹⁰⁷ Arguments exist on two levels as to how the prevention of a pastor from speaking about a political candidate from his pulpit infringes upon his freedom to exercise his religion.¹⁰⁸ First, viewing a church as a center for moral teaching and recognizing that politics as a whole impacts many levels of what is considered morally right and wrong, the church can no longer function toward the advancement of one of its primary purposes by preventing a pastor from endorsing or condemning a certain candidate.¹⁰⁹ The second argument focuses on the financial outlook of the church by arguing that to strip the church of tax-exempt status would financially ruin the church and prevent it from promoting the religion upon which it was founded.¹¹⁰

One of the biggest issues when looking at this clause of our Constitution revolves around the exact meaning of the term “exercise.”¹¹¹ How this affects the ADF and the Pulpit Initiative will center on whether the exercise protected is only that of one’s religious beliefs or if it extends to the practices that surround those beliefs.¹¹² Going all the way back to the founding of the country, controversy exists in exactly how to interpret this clause.¹¹³ Some look to the so-called wall of separation letter from Thomas Jefferson, while others may point to statements from James Madison or William Penn defending the exercise as covering not only beliefs, but also the physical observance of those beliefs.¹¹⁴

The first time the Supreme Court looked at the question in 1878, it ruled in favor of only protecting a person’s beliefs and not their actions.¹¹⁵ As the years have progressed, however, the Court has moved the standard to cover such actions pertaining to one’s beliefs as well.¹¹⁶ Unfortunately, that fails

107. ALLIANCE DEFENSE FUND, *supra* note 39, at 4; *see* U.S. CONST. amend. I. The Free Exercise Clause reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend. I.

108. *See* Voyles, *supra* note 25, at 236–39.

109. *Id.*

110. *Id.* at 239. *But see* ALLIANCE DEFENSE FUND, FAQ, *supra* note 2, at 2 (discussing the possibility that the loss of tax-exempt status would not significantly impact the church because only ordinary income is taxable, and churches generally operate on charitable donations).

111. Thomas Berg, *Free Exercise of Religion*, in THE HERITAGE GUIDE TO THE CONSTITUTION 307, 307 (Edwin Meese III et al. eds., 2005).

112. *See id.*

113. *See id.* at 307–08.

114. *Id.*

115. *Id.* at 308; *see* Reynolds v. United States, 98 U.S. 145, 162–64 (1878).

116. *See* Berg, *supra* note 111, at 308 (citing various Supreme Court cases that have changed

to solve completely the issue here. Of great significance today is the decision of whether the protected right covers only those laws which specifically target a religious practice or whether a required exemption from a general law is necessary.¹¹⁷ If the clause only protects laws targeted specifically at a religious practice, then the ADF and its participating pastors have limited options if the IRS decides to pursue action, because the rule targets all non-profit organizations rather than only churches.¹¹⁸ However, if the interpretation favors a view that the rule incidentally prohibits the religious practice of the pastor and his church, then the ADF has a much stronger claim against the IRS.¹¹⁹ Historical evidence exists that indicates the broader exemption interpretation fits the original intent of the First Amendment.¹²⁰

When examining this element of the First Amendment, courts prefer to look again at the *Lemon* test in the Establishment Clause.¹²¹ The test follows the same three principles as the Establishment Clause analysis, and the IRS rule can again be found unconstitutional for its failure under both the second and third prongs.¹²² Similarly, as additional tests become popular with the Court, the ADF and its pastors may find themselves on unsure ground while making such arguments.¹²³

B. The Johnson Amendment Violates the Religious Freedom Restoration Act of 1993

During the middle of the twentieth century, the idea of constitutionally required exemptions under the Free Exercise Clause grew in favor within the Supreme Court.¹²⁴ Two principal cases shed light on the Court's attitude at the time; *Sherbert v. Verner*¹²⁵ and *Wisconsin v. Yoder*¹²⁶ set the tone by granting exemptions to employment and education laws for religious groups.¹²⁷ However, when observing the Court's attitude toward

approaches to interpret the Free Exercise Clause of the First Amendment).

117. *Id.*

118. *See id.*

119. *See id.*

120. *Id.* at 309. For example, the Quakers were allowed to testify by affirmation instead of the then required oath, and a number of colonies provided exemptions for both Quakers and Mennonites from serving in the militia, among other things. *Id.*

121. Zimmerman, *supra* note 36, at 265–66.

122. *Id.* at 266.

123. *See id.* at 267.

124. Berg, *supra* note 111, at 309.

125. 374 U.S. 398 (1963).

126. 406 U.S. 205 (1972).

127. Berg, *supra* note 111, at 309.

the free exercise clause of the First Amendment during the latter part of the twentieth century, the general consensus revolved around an idea that rejected the concept of exceptions for religious organizations.¹²⁸

Following the standards set in *Sherbert* and *Yoder*, the exemptions approach fell out of favor, and by 1990, the Court had completely reversed course when they ruled that no exemption applied to a religious group using illegal drugs during its religious activities.¹²⁹ Responding to the Court's change in attitude, Congress, in 1993, passed the Religious Freedom Restoration Act ("RFRA")¹³⁰ returning to the tests developed in *Sherbert* and *Yoder*.¹³¹ Under the RFRA, Congress required the government to provide a "compelling" reason, applied under the "least restrictive means," for any law that considerably hinders religion.¹³² Recognizing that it will be difficult to contest a claim of a substantial impact on one's faith,¹³³ the ADF must find a second avenue for attacking the Johnson Amendment in the RFRA.¹³⁴

Unfortunately, shortly after the passage of the RFRA, the Supreme Court muddied the waters and has left modern interpretation of religious exemptions a divided issue.¹³⁵ While not ruling on a federal issue such as the IRS rule questioned here, the Court did find that, pertaining to state or local laws, Congress had reached beyond its proper role.¹³⁶ Although, some states subsequently passed their own laws similar to RFRA, this area remains as questionable today as the Free Exercise Clause in general, which leaves the ADF in a difficult position in any legal attempt to overturn the IRS rule on tax exempt status.¹³⁷

C. Churches Should Not Exist at the Whim of the IRS

Failing to recognize the principle that a church exists whether or not the government sanctions it, some opponents of the ADF have relied on the

128. See generally Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (detailing the evolution of Free Exercise Clause interpretation and analysis).

129. *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990); see Berg, *supra* note 111, at 310.

130. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb (2006)).

131. See Berg, *supra* note 111, at 310.

132. *Id.*

133. *Smith*, 494 U.S. at 887 ("What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?").

134. ALLIANCE DEFENSE FUND, WHITE PAPER, *supra* note 39, at 5.

135. See Berg, *supra* note 111, at 310.

136. *Id.* (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

137. See *id.*

belief that only the grace of the IRS can provide a tax exemption for them.¹³⁸ What this view ignores is the principle that the church existed, receiving the benefits of tax exemption long before the creation of the IRS.¹³⁹ This long-recognized special status of churches exists for the benefit of society, contributing many services that the government itself is saved from providing.¹⁴⁰ If churches, at the threat of losing tax-exempt status, fall out of this arena by no longer fighting for social change in line with their beliefs, not only does the church lose its meaning, but all of society suffers.¹⁴¹ For this reason, the ADF is fighting to ensure that status is not determinate upon a government agency.¹⁴²

History shows that long before the enactment of the Sixteenth Amendment in 1913, which granted the government authority to collect income taxes and led to the subsequent development of the IRS,¹⁴³ the American governmental system recognized an exemption for churches in regards to taxation.¹⁴⁴ Two of this country's most revered founders, Thomas Jefferson and James Madison, both took part in decisions early in the development of the nation that set the standard for recognizing the church as deserving special status.¹⁴⁵ The Supreme Court even examined this idea and concluded that "[t]he adoption of the early exemptions without controversy... strongly suggests that [tax exemptions for churches] were not thought incompatible with constitutional prohibitions against involvements of church and state."¹⁴⁶

Ignoring this clear historical precedent, however, the IRS now determines the tax-exempt status not on whether the institution is a church, but rather on whether the institution has expressed its beliefs.¹⁴⁷ Even if one chooses to give the IRS the benefit of the doubt and conclude that tax-

138. Rob Boston, *Pulpit Plot Thickens*, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE (Nov. 2008), http://www.au.org/site/News2?abbr=cs_&page=NewsArticle&id=10115 (quoting a Catholic archbishop who follows IRS rules for the benefit of a tax exempt status).

139. See *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 711 (1970) (Douglas, J., dissenting).

140. Smith, *supra* note 30, at 45–46 (listing such services as providing emergency response, contributing to schools, and protecting groups such as immigrants and drug addicts).

141. See *id.* at 46–47.

142. ALLIANCE DEFENSE FUND, WHITE PAPER, *supra* note 39, at 5.

143. U.S. CONST. amend. XVI; see generally IRS, Brief History of the IRS, <http://www.irs.gov/irs/article/0,,id=149200,00.html> (last visited Jan. 18, 2009) (providing a brief history on the development of the IRS).

144. See Smith, *supra* note 30, at 65–66.

145. *Id.*

146. *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 711 (1970) (Douglas, J., dissenting) (stating that had there been a conflict, Jefferson and Madison would not have been silent on the issue); see Smith, *supra* note 30, at 65–67.

147. See Smith, *supra* note 30, at 66–67.

exemption comes at the will of the government, the ADF still has a claim. The Supreme Court recently recognized a principle that, if applied here, would allow churches to recognize the benefit of tax-exempt status even if not entitled to it.¹⁴⁸ The rationale behind this theory centers on the infringement of First Amendment rights by the IRS against those churches.¹⁴⁹ The Court prohibited denial of even non-entitled benefits if such denial relies solely on infringing a constitutionally protected right.¹⁵⁰ History and Supreme Court precedent seem to weigh in favor of the ADF rather than the IRS.

IV. CONCLUSION

In the end, will the ADF, Ron Johnson Jr., Frank Pultro, and the thirty-one other pastors participating in Pulpit Freedom Sunday succeed in changing the current tax legislation back to the principles upon which history tells us are correct? Only time will tell, but they stand little chance if the IRS decides to stand by, as usual, and give the pastors a pass on their apparent violation of the IRC.¹⁵¹ However, with so many participants and such a level of public attention, it may prove to have gone too far this time for the IRS to ignore.

Senator Johnson may not have been motivated by the idea of stifling a church's free speech in proposing his amendment in 1954,¹⁵² yet the unintended consequences resulting from a lack of debate on the issue has led to this exact outcome. Johnson himself was only motivated by political power, but the result of his actions has banned certain speech among the same churches that helped him during his campaign.¹⁵³ Today, the pastors participating in the Pulpit Freedom Sunday are not motivated by political power or a desire to turn their congregations into another funding source for political candidates.¹⁵⁴ Instead these pastors, reminiscent of the passion in those who first came to this country, find motivation only in the basic human belief in religious liberty.

By taking the torch for these pastors, the ADF is hoping to engage the

148. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* 547 U.S. 47, 59 (2006).

149. See *supra* notes 84–106 and accompanying text.

150. *Rumsfeld*, 547 U.S. at 59 (reaffirming the principle set forth in *Board of Commissioners v. Umbehr*, 518 U.S. 668, 674 (1996)).

151. See O'Daniel, *supra* note 22, at 736–39 (listing a set of numerous violations in which the IRS has previously let go without enforcement).

152. Murphy, *supra* note 37, at 46.

153. Zimmerman, *supra* note 36, at 252–53.

154. Johnson, Jr., *IRS*, *supra* note 16.

IRS in a legal battle that will eventually give the Supreme Court a new test case to examine.¹⁵⁵ While it seems evident throughout American history that churches are to be afforded a tax-exempt status without question from the government, a battle in the courts should prove to be an interesting constitutional debate. With history and a bevy of First Amendment arguments on its side, the early edge looks to be on the side of the ADF.

Although some carry more weight than others, under any of its First Amendment arguments—whether referencing the Establishment, Free Speech, or Free Exercise Clauses—the ADF should prevail if tested under precedent set by the Supreme Court. In arguing against the Johnson Amendment as a violation of the Establishment Clause, the ADF appears to have the winning argument under the Supreme Court’s test that prohibits an excessive entanglement between government and religion as well as government impeding religion with its legislation.¹⁵⁶ It is hard to imagine a greater level of entanglement than monitoring every word uttered out of the mouth of a pastor. And while the church is bigger than its tax-exempt status, one cannot foresee a bigger impediment to practical existence in today’s market driven economy than the stripping of that status.

With all of the attention on religion today seemingly focused on keeping it out of the public square, the ADF refuses to stand by and watch an attempt to keep religion out of churches. The pastors of Pulpit Freedom Sunday, along with their churches, took a great risk in speaking out. Their hope is undoubtedly to one day reach the Supreme Court and change the law, but for now, they must wait on the IRS.

155. Sataline, *supra* note 8.

156. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).