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Talk is Not Cheap: A Perspective on the Johnson Amendment

Chase B. Jones

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I. Introduction

The intersection of politics and religion is a serious point of contention for many millions of Americans. As such, these topics are often "off limits" at the dinner table. Political groups have become more and more polarizing and once neutral institutions have taken up positions firmly in one camp or another. In May 2017, President Donald J. Trump signed an executive order with the stated purpose of giving churches and religious groups more latitude in terms of political speech.[1] This Order was in direct response to Trump's campaign promise to Evangelicals and right leaning religious organizations to repeal the Johnson Amendment. Then-Senator Johnson's amendment to the Tax Code prohibits religious organizations, and other non-profits, from supporting or opposing political candidates and from using a substantial part of their resources for lobbying.[2] While the Johnson Amendment's utility has been debated since its inception, its controversy peaked during the Trump Administration.[3]

Despite criticism from different religious groups, the Internal Revenue Service ("IRS" or "Service") has continued to selectively enforce the political restrictions imposed on non-profit organizations, including churches and religious groups.[4] However, enforcement stunts the aims, goals, and objectives of many religious groups by stifling their ability to freely lobby and to publicly support candidates who share their ideologies. The Johnson Amendment puts many organizations in a precarious position by giving them a choice between tax exemption and

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[1] Exec. Order No. 12798, 82 Fed. Reg. 21675 (2017).

[2] I.R.C. § 501(c)(3).

[3] *See, e.g.,* Salvador Rizzo, *President Trump's shifting claim that 'we got rid' of the Johnson Amendment*, WASH. POST (May 9, 2019), https://www.washingtonpost.com/politics/2019/05/09/president-trumps-shifting-claim-that-we-got-rid-johnson-amendment/; Kate Shellnutt, *Johnson Amendment Repeal Removed from Final GOP Tax Bill,* CHRISTIANITY TODAY (Dec. 15, 2017), https://www.christianitytoday.com/news/2017/december/johnson-amendment-repeal-blocked-final-gop-tax-bill-byrd.html; Tom Gjelten, *Another Effort to Get Rid of the 'Johnson Amendment' Fails*, NPR (March 22, 2018), https://www.npr.org/2018/03/22/596158332/another-effort-to-get-rid-of-the-johnson-amendment-fails.

[4] *See* Mike McIntire, *Hidden under tax-exempt cloak, political dollars flow*, N.Y. TIMES (September 23, 2010), http://www.nytimes.com/2010/09/24/us/politics/24donate.html.

unbridled free speech. Part II explains the history of tax exemption and its application, highlighting the IRS' enforcement capabilities, and the ultimate restrictions placed upon religious organizations and churches. Part III explores the supposed alternative to an outright prohibition of political activity and church options regarding organizational structure. Finally, Part IV discusses concerns arising under the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act of 1993.[5]

II. The Internal Revenue Code, Churches, and Restrictions on Political Speech

Since the Founding, taxes have been inextricably linked to every aspect American society. Many scholars acknowledge that the Stamp Act of 1765 exacerbated tensions eventually leading to the Declaration of Independence.[6] The Founders believed that the power to tax was "quintessential for the proper governance of our country."[7] Despite this, exemptions are available to a variety of organizations for a variety of purposes.[8] One of the earliest references to a tax exemption for religious organizations came with the Wilson-Gorman Tariff Act of 1894.[9] The act provided a flat two percent tax on corporate income, but expressly exempted "corporations, companies, or associations organized and conducted *solely for* charitable, religious, or educations purposes . . ."[10] Despite the act being declared unconstitutional in 1895,[11] the "solely for"

[5] U.S. Const. amend. I.; 42 U.S.C. § 2000bb.
[6] Justin DuRivage, Claire Priest, *The Stamp Act and the Political Origins of American Legal and Economic Institutions*, 88 S. CAL. L. REV. 875 (2015).
[7] David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 19 (1995).
[8] *See, e.g.,* Walz v. Tax Commission, 397 U.S. 664 (1970) (holding that Federal and/or State tax exemptions for religious entities does not violate the Establishment Clause of the First Amendment); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (Scalia, J. dissenting) (stating that the plurality's holding was inconsistent with past precedent, including *Walz*). In *Texas Monthly*, the Court's controlling opinion held that a tax exemption to religious entities equates a subsidy by forcing taxpayers to become "indirect and vicarious donors" to religious entities. *Id*. at 14. Justice Scalia's dissent called the controlling opinion a "judicial demolition project," and stated that the "government may (and sometimes must) accommodate religious practices [by conferring a tax exemption upon such entities, according to a long line of precedent]." *Id*. at 38.
[9] Wilson-Gorman Tariff Act, ch. 349, 28 Stat. 509, 556 (1894). *See Walz*, 397 U.S. at 677 (finding that Congress has viewed the Religion Clauses of the Constitution authorize statutory real estate tax exemptions for religious bodies).
[10] *Id.* (emphasis added).
[11] Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895).

language has remained a key issue for many religious entities.[12] In 1913, the Sixteenth Amendment paved the way for modern taxation by granting Congress the power to tax income.[13] Subsequently, Congress passed the Revenue Act of 1913 which established the Federal income tax system. The Revenue Act allowed Congress to assess income taxes upon the "entire net income . . . [of] every corporation, joint-stock company or association," but not including "any corporation or association organized and operated *exclusively* for religious, charitable, . . . or educational purposes[.]"[14] This provision permitted religious organizations to earn tax free income from all activities, so long as the income was used for "exclusively" religious, charitable, or educational purposes until the 1950s.[15] However, in 1934 an amendment to the Revenue Act imposed a restriction on substantial activities that influence legislation.[16] In 1954, Congress passed the modern tax code, which included a section for tax exempt organizations.[17] The new "§ 501(c)(3)" maintained the same tax exemption as the original Act, included the "lobbying" restriction, but added a new restriction which became known as the Johnson Amendment. When discussed together in this paper, these restrictions will be referred to as the "political restrictions." This new provision ensured a tax exemption so long as, "no substantial part of the activities of [a religious organization] is carrying on propaganda, or otherwise attempting, to influence legislation, and *which does not participate in, or intervene in, any political campaign on behalf of any candidate* for public office."[18] This latter portion is the subject of significant

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[12] See Paul Arnsberger, Melissa Ludlum, Margaret Riley and Mark Stanton, *A History of the Tax-Exempt Sector: An SOI Perspective*, IRS STAT. OF INCOME BULL. (Winter 2008), http://www.irs.gov/pub/irs-soi/tehistory.pdf.
[13] U.S. Const. amend. XVI.
[14] Revenue Act of 1913, ch. 16, 38 Stat. 114, 172 (1913) (emphasis added).
[15] Arnsberger, *supra* note 12, at 107.
[16] 78 Cong. Rec. 5959 (1934).
[17] Internal Revenue Code of 1954, ch. 736, 68A Stat. 3, 168 (1954).
[18] I.R.C. § 501(c)(3) (emphasis added).

discussion.[19] The Johnson Amendment to § 501(c)(3) is a rigid provision with limited workability that stifles free speech and frustrates the purpose of RFRA. As such, the Amendment is unconstitutional.

A. Certain entities are granted the tax exemption, others are not…

The Internal Revenue Code ("Code") exempts certain organizations from taxation. Exempted organizations include those "operated exclusively for religious, charitable, . . . or educational purposes . . ."[20] These entities are given the Congressional gift of non-taxation, assuming they follow a set of rules outlined by the IRS. A religious organization must take one of various corporate forms under state law to qualify for § 501(c)(3) tax exemption.[21] The primary benefit is an exemption from federal income tax, but there are additional benefits including the ability to receive tax deductible charitable contributions,[22] reduced postal rates,[23] exemption from the Federal Unemployment Tax Act,[24] and the possibility of exemption from certain state-level taxes.[25] To be granted tax exempt status, a religious organization must be organized and "operated exclusively for religious, charitable, . . . or educational purposes," and the organization's efforts must be for the benefit of the public, not for private interests.[26] The IRS and courts continue to determine which entities qualify.

There have been numerous determinations on whether entities qualify as tax exempt. In one case, the tax court determined that an organization originally incorporated as a for-profit entity, which wound up business and reorganized as a non-profit to operate a retreat facility, was

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[19] *See supra* note 3.
[20] *Id.*
[21] *Id.*
[22] I.R.C. § 170(c)(2) (defining charitable contributions as gifts made to tax exempt organizations).
[23] David A. Wimmer, Curtailing the Political Influence of Section 501(c)(3) Tax-Exempt Machines, 11 VA. TAX REV. 605, 609 (1992).
[24] I.R.C. § 3306(c)(8).
[25] Wimmer, *supra* note 23, at 609.
[26] I.R.C. § 501(c)(3).

worthy of tax exempt status.[27] In another, a court determined that an organization advocating for and practicing certain "religious" activities, no matter how profitable or competitive, is entitled to an exemption.[28] Another court found that an organization issuing honorary divinity degrees by mail order was a tax exempt entity because its issuance of such degrees was not a violation of public policy.[29] Finally, the IRS determined that an organization formed to compile genealogical data for religious activities was worthy of the exemption.[30] Seemingly, the IRS and the courts have been willing to grant the tax exemption where activities are only proximately religious. Despite this, other organizations have been denied status or have had to forfeit their tax exemption.[31]

In one case, the IRS denied tax exempt status to a school, owned and operated by a church, that excluded students from certain racial and ethnic groups.[32] In an earlier case, the IRS concluded that an organization cannot be operated for exclusively charitable purposes if its activities are carried out in a manner that is contrary to public policy.[33] These principles were discussed at length in *Bob Jones University v. U.S.*, in which a university had racially discriminatory policies that it claimed were based on sincerely held religious beliefs.[34] The IRS revoked the university's tax exemption on the basis of these discriminatory policies, a determination affirmed by the Supreme Court.[35] Needless to say, the Service and the courts have

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[27] Alive Fellowship of Harmonious Living v. Comm'r, T.C. Memo 1984-87 (1984).
[28] A. A. Allen Revivals, Inc. v. Comm'r, T.C. Memo 1963-281 (1963).
[29] Universal Life Church, Inc. v. U.S., 372 F. Supp. 770 (E.D. Cal. 1974).
[30] Rev. Rul. 71-580, 1971-2 C.B. 235.
[31] However, the IRS has provided guidance on how § 501(c)(3) organizations can regain their tax exempt status following a revocation. *See* Rev. Proc. 2014-11, 2014-3 I.R.B. 411.
[32] Rev. Rul. 75-231, 1975-1 C.B. 158; *see also* Bob Jones Univ. v. U.S., 461 U.S. 574 (1983) (holding that integration of private schools to aid in the elimination of race discrimination was a compelling government public policy).
[33] Rev. Rul. 71-447, 1971-2 C.B. 230.
[34] *Bob Jones*, 461 U.S. at 574.
[35] *Id*.

made clear that where public policy concerns exist, tax exempt status ought to be denied. Congress has delegated enforcement of these cases to the IRS.

B. Enforcement by IRS

The IRS has statutory authority under the Code to revoke tax exempt status of religious organizations.[36] The Church Audit Procedures Act ("CAPA") expressly authorizes the IRS to conduct inquiries on tax exempt status if it is found that an organization is not a church that (1) is exempt under § 501(a) or (2) is described in § 170(c).[37] The IRS may only commence a tax inquiry if (1) a "high-level Treasury official" has a reasonable belief that a church may not be exempt under § 501(a) or may be carrying on an unrelated trade or business or otherwise engaged in activities subject to taxation and (2) the Secretary provides written notice to the church about such an inquiry.[38] If an inquiry does not resolve any concerns, the IRS may proceed to a "church tax examination." In a church tax examination, the IRS may obtain and review church records or examine its activities to determine whether an organization is actually a church for tax purposes.[39]

There is just one looming question: what is a church? The Code mentions but fails to define "church," so we must look elsewhere to define it. The IRS and courts in the Seventh and Eighth Circuits analyze fourteen factors to determine whether an organization is a church.[40] These factors are:

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[36] I.R.C. § 7611.
[37] *Id.* For context, § 501(a) states that if an organization is described in subsection (c) or (d), as discussed throughout, then that organization shall be exempt from taxation, unless some exception applies.
[38] *Id*. *See* Branch Ministries v. Rossotti, 211 F.3d 137, 140 (D.C. Cir. 2000) (recognizing that a reasonable belief made by the Regional Commissioner of the IRS was sufficient to satisfy prong (1) of the CAPA tax inquiry, meaning that a Regional Commissioner is a "high-level Treasury official").
[39] I.R.C. § 7611(b)(1).
[40] *See, e.g.,* IRS Publication 1828 (Rev. 8-2015), *Tax Guide for Churches and Religious Organizations* 33 (2015) https://www.irs.gov/pub/irs-pdf/p1828.pdf; Spiritual Outreach Soc. v. Comm'r, 927 F.2d 335 (8th Cir. 1991); U.S. v. Jeffries, 854 F.2d 254 (7th Cir. 1988).

> "(1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregation; (12) regular religious services; (13) Sunday schools for religious instruction of the young; and (14) schools for preparation of its ministers."[41]

In *Spiritual Outreach Society. v. Commissioner*, the court found that all these factors "need not be met" to be considered a church, but certain factors carry more weight.[42] This test stands to be useful, but perhaps it gives too much discretion to the government. But some courts have applied different approaches.

Some jurisdictions use a "common meaning" approach.[43] How do you determine the common meaning of a word? We look to the dictionary, but which one? Hopefully, courts would apply the broadest definition of "church," to be inclusive of all faiths and denominations, but results may vary. Typically, "church" is defined as a group congregated for some sort of religious worship.[44] Although, "church" can be defined by looking to the dictionary, the term "religious organization" is not so easy to define. However, the IRS tends to reason that a religious organization includes churches but may also include nondenominational ministries,

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[41] *Spiritual Outreach*, 927 F.2d at 338.

[42] *Id*. at 339. The court listed some of the factors that were important to the question of whether an entity is a church, "the existence of an established congregation served by an organized ministry, the provision of regular religious services and religious education for the young, and the dissemination of a doctrinal code, [were] of central importance." *Id*. These factors are listed by the IRS in their Tax Guide for Churches & Religious Organizations.

[43] The "common meaning" approach should be used to determine what the word "church" means absent a congressional definition. De La Salle Inst. V. U.S., 195 F. Supp. 891, 903 (N.D. Cal. 1961).

[44] *See, e.g.,* Webster's New Int'l Dictionary 324 (2d Ed. 1960) ("7. any group of worshipers"); Webster's New Int'l Dictionary 404 (3d Ed. 1986) ("6: a body of worshipers"); The Oxford English Dictionary 405 (1933) ("14. Applied to other (chiefly modern) religious societies and organizations; and sometimes, more vaguely, to any 'school' or party having the bone of a common 'creed', social, aesthetical, or other, or who are combined in any movement which furnishes them with principles of life or duty"); The New Shorter Oxford English Dictionary 399 (4th Ed. 1993) ("II A community or organization"); The American Heritage College Dictionary 259 (4th Ed. 2002) ("2. . . . c. A congregation").

interdenominational and ecumenical organizations, and other entities whose principal purpose is the study or advancement of religion.[45]

Alternatively, courts have used an associational test to determine what qualifies as a church. At minimum, churches typically have a groups of believers, communicants, or parishioners that assemble regularly in order to worship.[46] Unless an organization is reasonably available to the public in its conduct of worship, its educational instruction, and its promulgation of doctrine it cannot fulfill its associational role, and thus will not be considered a church.[47] In one case, the organization failed to meet this test where it had only two members join after its formation.[48] The court reasoned that newer churches may only have a few followers, but because of the natural vitality of the associational role, membership should grow well beyond initial numbers.[49] In *Church of Eternal Life v. Commissioner*, the organization pursued a policy that discouraged membership, and as such it lacked the associational role necessary to be classified as a church.[50] The Commissioner and the court both believed that the policy to discourage membership evinced the organization was serving a private purpose.[51] Understanding what constitutes a church is crucial to the ultimate determination of § 501(c)(3) qualification.

a. *Branch Ministries* as a foundation for understanding the IRS' enforcement authority

The previous section examined decisions that either revoked or refused to grant tax exempt status. In contrast, this section will focus on revocation of tax exempt status specifically

[45] IRS, Publication 1828 (Rev. 8-2015), *Tax Guide for Churches and Religious Organizations* 33 (2015) https://www.irs.gov/pub/irs-pdf/p1828.pdf.
[46] *See* Am. Guidance Found. Inc. v. U.S., 490 F. Supp. 304, 306 (D.D.C. 1980).
[47] *Id*.
[48] *See* Church of Eternal Life and Liberty, Inc. v. Comm'r, 86 T.C. 916, 924 (1986).
[49] *Id*.
[50] *Id*.
[51] *Id.*

because political restrictions have been violated. The IRS' authority to revoke tax exempt status does not necessarily constitute a violation of a church's right to freely exercise its religion. The D.C. Circuit has held that placing a full-page political advertisement in newspapers is sufficient grounds to revoke tax exempt status.[52] In *Branch Ministries*, the church placed an advertisement in two newspapers urging Christians not to vote for then-Presidential candidate Bill Clinton because of certain positions he held on "moral issues."[53] The church challenged the revocation arguing (1) that the IRS acted beyond its authority and (2) the revocation was in violation of the First Amendment and RFRA.[54] On the question of whether the IRS acted beyond its authority, the court held that both § 501(a) and § 170(c) disallow tax exempt status upon intervention in political campaigns and that CAPA authorizes revocation.[55]

For CAPA to apply under § 501(c)(3), there must be "participa[tion], or interven[tion] in, any political campaign on behalf of any candidate."[56] Under CAPA, a determination is made on whether a church is a tax exempt organization under § 501(c)(3), so it stood to reason that the IRS was authorized to revoke the church's tax exempt status.[57] Ultimately, the court found that the IRS did not create an unjustifiable burden on religion under RFRA by revoking the church's tax exempt status.[58] We will revisit *Branch Ministries* later to analyze church ability to utilize the Code's alternative means of tax exemption.

C. Restrictions on Lobbying and Electioneering

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[52] *Branch Ministries*, 211 F.3d at 137.
[53] *Id.* at 139.
[54] Point (2), relating to the constitution and RFRA, will be analyzed in Sec. IV. A third point was also challenged on Fifth Amendment grounds, but this discussion is irrelevant here.
[55] *Id.* at 141.
[56] *See* I.R.C. § 501(c)(3).
[57] *Branch Ministries*, 211 F.3d at 141.
[58] *Id.* at 145. We will revisit *Branch Ministries* to analyze the ability of church organizations to utilize the Code's alternative means of tax exemption, § 501(c)(4).

The Code sets forth certain responsibilities for churches and religious organizations to maintain their tax exempt status. Among their responsibilities, these organizations are subject to specific political restrictions. First, organizations are prohibited from lobbying to the extent it constitutes a "substantial part" of their activities.[59] Second, organizations are entirely prohibited from participating in or intervening in electioneering activities.[60] These restrictions may create roadblocks for churches attempting to deliver their message.

a. The Lobbying Restriction

Despite political speech being an integral part of the United States' landscape since the Founding, the argument for stifling charitable organizations' voices is not new. The first judicial acceptance of a limit to lobbying activity for charitable organizations came in *Slee v. Commissioner* where the Second Circuit held that the American Birth Control League failed to qualify under an existing statute because its purpose was to disseminate propaganda to both legislators and the public by openly opposing legislation against birth control.[61]

In *Slee*, the petitioner was a taxpayer who sought to deduct contributions made to a charitable organization.[62] The key issue was the organizations purpose of "[enlisting] the support . . . of . . . legislators to effect the lawful repeal of existing laws," which prevented it from being exclusively charitable.[63] The court conceded that many charitable ventures require a change of the law to effect the changes they seek, but seeking such changes corrupts the purpose of such an organization.[64] In the court's view, it could not be said that the purpose of an organization is "exclusively charitable" when it attempts to influence legislation.[65] As such, the court found the

[59] I.R.C. § 501(c)(3).
[60] *Id*.
[61] Slee v. Comm'r, 42 F.2d 184 (2d Cir. 1930).
[62] *Id*. at 185.
[63] *Id*.
[64] *Id*.
[65] *Id*.

petitioner's contributions as nondeductible because the organization was not operated "exclusively" for charitable purposes.[66]

Four years following the Second Circuit's decision in *Slee*, Congress amended the Revenue Act by adding the lobbying restriction, and it came quietly.[67] Senator Pat Harrison brought the amendment to the Senate floor, but there is no distinct legislative history to determine the cause for his amendment.[68] When Senator Harrison sponsored the amendment, the asserted intent was to exclude sham organizations that fronted as private interest groups.[69] The record also indicated that there was no desire to stifle the lobbying activities of legitimate organizations.[70] There was no mention of religious organizations being "illegitimate" or unworthy of the exemption.

According to some, however, Senator Harrison's amendment was simply a move to codify the Second Circuit's holding in *Slee*.[71] While there is no mention of such action by the Senator, members of Congress and their history of politicking most likely compelled the move toward placing political restrictions upon non-profit organizations.[72] Needless to say, the

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[66] *Id*.
[67] *See* Edward McGlynn Gaffney Jr., *On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics*, 40 DEPAUL L. REV. 1, 23 (1990) (discussing the floor amendment by Senator Pat Harrison). Prof. Gaffney mentions that an obvious place to turn to construe the meaning of a statute is its legislative history. *Id*. The 1934 floor amendment was not preceded by hearings by the Senate Finance Committee and Senator Harrison's asserted intent of the amendment was simply to exclude "sham organizations" from tax exemption. *Id*.
[68] Revenue Act of 1934, Pub. L. No. 216, § 517, 48 Stat. 680, 760 (1934).
[69] 78 Cong. Rec. 5959 (1934).
[70] *Id*.
[71] S*ee* Laura B. Chisholm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L. J. 201, 232 n. 141 (1987-88); Mariam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities*, 71 TEX. L. REV. 1269, 1285 (1993); Kevin M. Yamamoto, *Taxing Income From Mailing List and Affinity Card Arrangements: A Proposal*, 38 SAN DIEGO L. REV. 221, 230 n. 40 (2001).
[72] *See* Vaughn E. James, *The African-American Church, Political Activity, and Tax Exemption*, 37 SETON HALL L. REV. 371, 378 (2007). Professor James discusses the winding road leading to the ultimate prohibition of "substantial lobbying activity," in short, he stated that the amendment was most likely in response to President Franklin D. Roosevelt's use of various lobbying entities that won him the White House in March 1933. President Roosevelt received support from various tax exempt charity organizations, one being the National Economy League. The League's support of Roosevelt carried him, much to the dismay of many Republican senators. One such senator,

ultimate inclusion of the lobbying amendment set the stage for the Johnson Amendment's prohibition on political campaigning.

In general, if a substantial part of an organization's activities attempts to influence legislation, then it fails to qualify for § 501(c)(3). Under the current rules, a church or religious organization may therefore engage in some lobbying activity, but not too much. Despite this requirement, the IRS has not defined "substantial." But in an early case it was found that the use of five percent time and effort engaging in lobbying was "insubstantial."[73] In 1972 the use of percentages was rejected by the Tenth Circuit.[74] But later cases, including *Haswell v. US*, used a percentage based test to find the substantiality of lobbying activities, finding that 16.6% to 20.5% of total expenditures was substantial.[75] Despite judicial efforts to identify a workable test, the IRS has not determined at what point an organization's lobbying activities cross the threshold from insubstantial to substantial. In fact, it seems the Service has handed off the determination responsibility to the churches.

b. The Johnson Amendment's restrictions against electioneering and its impact on churches

In 1954, Congress enacted the amendment that changed the dynamics of § 501(c)(3). Then-Senator Lyndon B. Johnson brought an amendment to the Senate floor that would completely prohibit § 501(c)(3) organizations from participating in political campaign activities. The amendment came with a sparse record. There was no committee proposal or hearing on the

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David Aiken Reed, proposed an overhaul of the charitable contribution statute, like the one brought by Senator Harrison a mere month later. Despite it being passed over, it set the stage from the ultimate lobbying exemption.

[73] *See* Seasongood v. Comm'r, 227 F.2d 907, 912 (6th Cir. 1955).

[74] *See* Christian Echoes Nat'l Ministry, Inc. v. US, 470 4.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1974).

[75] Haswell v. US, 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975). The IRS provides for an alternate method for measuring lobbying activity with the expenditure test under § 501(h). This test allows organizations to lobby without jeopardizing their tax exempt status. Under § 4911, the Code provides an amount cap based upon the size of the organization and may not exceed $1,000,000. This exception, however, does not apply to churches or religious organizations. *See* I.R.C. § 501(h)(5).

subject, the Treasury received no proposal, and there was no record of any discussion of the amendment on the Senate floor. The record on July 2, 1954, shows that Senator Johnson was recognized on the floor and the following conversation took place:

> Mr. JOHNSON of Texas: Mr. President, I have an amendment at the desk, which I should like to have stated.
>
> The PRESIDING OFFICER: The Secretary will state the amendment.
>
> The CHIEF CLERK: On page 117 of the House bill, in Section 501(c)(3), it is proposed to strike out "individuals, and" and insert "individual," and strike out "influence legislation," and insert "influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."
>
> Mr. JOHNSON of Texas: Mr. President, this amendment seeks to extend the provisions of section 501 of the House bill, denying 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. I have discussed the matter with the chairman of the committee, the minority ranking member of the committee, and several other members of the committee, and I understand that the amendment is acceptable to them. I hope the chairman will take it into conference, and that it will be included in the final bill which Congress passes.[76]

The Johnson Amendment lacks any legislative history explaining the reasoning behind the amendment, but many scholars believe that then-Senator Johnson was acting on his fear that certain secular non-profits were working on behalf of his political opponents as an effort to unseat him.[77] Even though there is no evidence that religious organizations were involved in such behavior they were ultimately included in the flat electioneering ban brought on by the amendment.

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[76] 100 Cong. Rec. 9604 (1954).

[77] *See, eg.,* Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 24(2003); 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, 741-747 (2001).

Following the adoption of the Johnson Amendment, any organization participating or intervening in any political campaign for or against a candidate for public office is deemed to be an "action organization" and is not entitled to § 501(c)(3) status.[78] Unlike the lobbying restriction, the political activity restriction is absolute; no amount of political campaign activity is consistent retention of tax exempt status.[79] The Code provides definitions and regulations to determine what actually rises to the level of restricted activity.

The prohibition relates to "participat[ion], or intervent[ion]" in political campaign activities. What does this mean? Well, the Code mentions that publishing or distributing statements on behalf of, or in opposition to, candidates for public office.[80] This means that a preacher may speak about any issue, but not about the candidates who support that issue. Regulations were issued defining prohibited political activity as making oral statements on behalf of or in opposition to a candidate.[81] The prohibitions include both direct and indirect participation.[82] The IRS also takes the position that restricted activity arises when organizations engage in business transactions with candidates.[83] In the case where there is no specific endorsement, or provision of financial support, political campaign intervention may still be implicit, based on the circumstances, as determined by the IRS, but this has yet to be seen.

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[78] Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).
[79] Assoc. of the Bar of the City of NY v. Comm'r, 858 F.2d 876, 881 (2d Cir. 1988).
[80] *See* I.R.C. § 501(c)(3).
[81] Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).
[82] *Id*.
[83] In such cases, the IRS uses a case-by-case approach to determine whether the organization has a track record of making goods and services available to other candidates and noncandidates on the same terms (such as fair market rates for fees). *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421 (Situation 17) (a non-profit that owns a historic building and makes its event hall available for rent to the public, with standard fees set based on attendance, rents to a political campaign for a fundraising dinner where the campaign pays the standard fee, is not in violation of § 501(c)(3)). *But see* Rev. Rule 2007-41, 2007-1 C.B. 1421 (Situation 21) (a church website that posts ordinary church information, including activities of its members, posts a supportive message about a parishioner who is running for town council, has violated the electioneering restriction under § 501(c)(3)).

The Code provides that activity is prohibited when carried out for any "candidate for public office." Thankfully, the Regulations define a "candidate for public office" as "an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, state, or local."[84] There has been no guidance on the exact moment an individual becomes a candidate, but it stands to reason that as soon as a campaign begins, support by a § 501(c)(3) becomes violative.[85]

Despite the Johnson Amendment's restrictions, certain political campaign activities have been deemed permissible. In its guidance, the IRS has provided that certain "voter education" activities, including "preparation and distribution of certain voter guides, conducted in a non-partisan manner may not constitute political activity."[86] Thus, publication of a compilation of voting records or responses to candidate questionnaires have generally been allowed when the compilation does not suggest a bias for or against any candidate.[87]

Complicating this calculus, religious organizations often take positions on issues of public policy. As Professor Vaughn E. James discusses in his article, *The African-American Church, Political Activity, and Tax Exemption*, there are various denominations of post-Free African Society of 1787 churches, whose teachings were founded upon post-slavery liberation and social and political change for African-American communities.[88] After describing the history

[84] Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii). *See also* Gen. Couns. Mem. 39694, Feb. 3, 1988 (organizations may attempt to influence a confirmation vote by the Senate for a nominee for a Federal judicial seat, because Federal judges are not considered a holder of an elective office).
[85] *But see* Tech. Adv. Mem. 9635003, April 19, 1996 (stating that forums allowing participants to reflect the characteristics of a community, where the forum published participant ratings of candidates, were improper and an intervention in a political campaign by the organization).
[86] *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421.
[87] Rev. Rul. 78-248, 1978-1 C.B. 154. *See also* Rev. Rul. 80-282, 1980-2 C.B. 178 (determining that a published newsletter containing the voting records of incumbent candidates distributed to an organization's normal readership (not the general public), that is not timed to coincide with a particular election, and where no comment is made on the individual's qualifications, is permissible).
[88] *See* James, *supra* note 72, at 388. Professor James used the term "African-American Church" to describe seven denominations including the African Methodist Episcopal Church, the African Methodist Episcopal Zion Church, the Christian Methodist Episcopal Church, the National Baptist Convention, the National Baptist Convention of

of the African-American church, Professor James continued with a discussion on § 501(c)(3)'s "chilling effect" upon these denominations. His thesis is clear. Because these denominations were established to "be a medium for advocating the social, political, and economic improvement of this country's African-American people, [the Code's restrictions have had] their most significant negative impact on that body."[89] Despite this, Professor James argues that this issue is not one unique to the African-American church, and instead is shared by all religions, especially Judaism, Christianity, and Islam.[90]

c. Revisiting Denial and Revocation of Tax Exempt Status and *Branch Ministries*

It is not surprising that the Service has denied requests for exemption based on an organization's substantial purpose being the sponsorship of social and political events and newsletters, as opposed to religious activities.[91] In *First Libertarian Church v. Commissioner*, an organization based its doctrines on "ethical egoism," which is the idea that individuals have a right to their "own life, for [their] own sake, and in accordance with [their] own convictions, and without coercion from outside sources."[92] This church's doctrine grew out of a supper club established by university students to bring, so called, like-minded individuals together.[93] At some point, the church and club's activities overlapped and together their primary activities became

America, the Progressive National Baptist Convention, and the Church of God in Christ. *Id*. Professor James instructed readers that the term was not to be applied to predominantly white denominations with largely African-American congregations. *Id*.

[89] James, *supra* note 72, at 396. Professor James continues with a compelling discussion on the effects of the 1954 Johnson Amendment. He began with *Brown v. Board of Education*, and its impact on the African-American Church leaders by stating that the it emboldened ministers to intensify the fight for racial equality in all aspects of American life. From 1954 to 1984, he continued, the African-American Church did not engage in violative political activity, but when Jesse Jackson made a bid for president in 1984 the Church began operating in a way inconsistent with the letter of law. In 2000, Reverend Floyd Flake, pastor of the Allen African Methodist Episcopal Church of Queens, New York, began publicly endorsing Vice President Al Gore in his run for President. Reverend Flake's actions drew attention from the Service but after a series of negotiations the IRS did not revoke tax exempt status but forbade the Reverend from publicly endorsing another political candidate from the pulpit.

[90] *Id*. at 401.

[91] First Libertarian Church v. Comm'r, 74 T.C. 396, 405 (1980).

[92] *Id.* at 399.

[93] *Id*. at 399-400.

"(1) conducting church meetings just before club meetings, (2) sponsoring [suppers], (3) conducting club meetings, and (4) publishing the club-church newsletter."[94] Members of the church were given access to a variety of publications and periodicals of libertarian party content and many of the club meetings featured discussion of libertarian political topics.[95] When an application was filed with the IRS to recognize the church as a § 501(c)(3) organization, the Service denied it since "its purposes and activities [overlapped with] those of the Libertarian Party."[96] The court used an operational test to determine whether the organization qualified under the regulations.[97] To qualify, the organization had to show that it was operated exclusively for one or more religious purposes and that its nonexempt activity is no more than an insubstantial part of its activities.[98] Ultimately, the IRS' findings were confirmed, and the court found that the sponsorship of events for social and political discussion and a newsletter largely based on nonreligious thought, was a substantial nonreligious purpose, which failed the operational test.[99]

The Tax Court's findings in *First Libertarian* show that an organization failing to segregate social and political agendas from religious activities fail to meet the requirements under § 501(c)(3). A few questions loom after *First Libertarian*, chief among them is: if an organization has two purposes (1) to create a forum for religious thought and (2) to foster a distinct type of social and political thought, then should it be forced to lose its § 501(c)(3) status? Despite this looming question, the IRS and the courts have failed to answer it adequately. However, in *Branch Ministries* the D.C. Circuit proffered one solution.

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[94] *Id*. at 400.
[95] *Id*. at 401.
[96] *Id*. at 402.
[97] *Id*.
[98] *Id*. at 403.
[99] *Id*. at 405.

My previous examination of *Branch Ministries* discussed that the IRS does have the right to enforce § 501(c)(3) requirements, but it continues with a discussion on the court's solution. Prior to the 1992 Presidential Election, the church in *Branch Ministries* was tax exempt when it placed full-page advertisements bearing the headline "Christians Beware."[100] The advertisements asserted that the candidate's positions "regarding abortion, homosexuality, and the distribution of condoms to teenagers in schools violated Biblical precepts."[101] Importantly, the advertisements featured an excerpt reading:

> This advertisement was co-sponsored by the Church at Pierce Creek, Daniel J. Little, Senior Pastor, and by churches and concerned Christians nationwide. Tax-deductible donations for this advertisement gladly accepted. Make donations to: The Church at Pierce Creek. [Mailing Address].[102]

The advertisements worked. The church received hundreds of contributions and became the subject of a *New York Times* article.[103] The article was not a positive feature; instead it centered around the idea that the church's advertisements almost certainly violated the IRC. The advertisements also caught the attention of the Regional Commissioner of the IRS.[104] Following a tax examination, the church's tax exempt status was revoked because of "prohibited intervention in a political campaign."[105]

This time, we see the IRS cracking down on intervention. At this point, it is important to return to Professor James' thesis on the "chilling effect" § 501(c)(3) has on certain churches and religious organizations. The church in *Branch Ministries* advocated for a type of social change

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[100] *Branch Ministries*, 211 F.3d at 140.
[101] *Id.*
[102] *Id.*
[103] *See* Peter Applebome, *Religious Right Intensifies Campaign for Bush*, N.Y. TIMES, Oct. 31, 1992, at A1; Anthony Lewis, *Tax Exempt Politics?*, N.Y. TIMES , Dec. 1, 1992, at A15.
[104] *Branch Ministries*, 211 F.3d at 140.
[105] *Id.*

that its religion purported to hold dear. Since its tenets disavowed the type of action supported by then-Governor Bill Clinton, how can they possibly communicate their message without jeopardizing their tax exempt status? In *Branch Ministries*, the court outlined one such alternative, § 501(c)(4).

III. The 501(c)(4) Alternative

Despite the issues surrounding § 501(c)(3), the Code provides a presumptive catchall in § 501(c)(4). The catchall provides that an organization operating for the promotion of social welfare may be tax exempt so long as it is primarily engaged in promoting the common good and general welfare of people in a community.[106] The key distinction between this provision and § 501(c)(3) is that (c)(4) organizations may be devoted to nonexempt purposes, so long as it is not their "primary" activity.[107] Even so, donations to § 501(c)(4)s are generally not tax deductible.[108] To illustrate the applicability of this option, we return to *Branch Ministries*. The court suggested that churches can carry on a political campaign without losing their tax exemption by separately incorporating a new non-profit division under § 501(c)(4).[109] The Court discussed in detail how to achieve this end by citing a seminal Supreme Court decision from 1983.

In *Regan v. Taxation With Representation*, the Court considered whether a non-profit organization ("TWR") whose purpose was to promote what it believed to be public interest in the area of federal taxation was violative of § 501(c)(3)'s prohibition against substantial lobbying activity.[110] TWR combined the operations of two non-profits, one organized to promote TWR's goals by publishing journals and engaging in litigation, and the other to promote the same goals

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[106] I.R.C. § 501(c)(4).
[107] *See* Treas. Reg. 1.501(c)(4)-1(a)(2)(i).
[108] IRS, *Donations to Section 501(c)(3) Organizations* (Nov. 28, 2022), https://www.irs.gov/charities-non-profits/other-non-profits/donations-to-section-501c4-organizations.
[109] *See Branch Ministries*, 211 F.3d at 143.
[110] 461 U.S. 540, 541-542 (1983).

by influencing legislation.[111] The Court mentions that the "publishing" organization was organized under § 501(c)(3), while the "lobbying" organization was organized under § 501(c)(4), neither of which were subject to federal income taxation.[112] Ultimately, the Court denied tax exempt status for TWR under its combined structure, but stated that TWR could qualify for the exemption if it returned to its dual structure or converted entirely to a § 501(c)(4) organization.[113]

In his concurrence, Justice Blackmun explained that any constitutional deficiencies that may arise under § 501(c)(3) in isolation, are cured by § 501(c)(4).[114] Justice Blackmun began his discussion by stating that, viewed in isolation, "the lobbying restriction contained in § 501(c)(3) violates the principle that the government may not deny a benefit to a person because he exercises a constitutional right."[115] In his view, § 501(c)(4) cures this "defect" by allowing nonlobbying activities to persist under § 501(c)(3) with the creation of a § 501(c)(4) affiliate to pursue charitable goals through lobbying.[116] He found that the Court viewed Congress' purpose as a way to "ensure that no tax deductible contributions [were] used to pay for substantial lobbying."[117] As such, the Court found that the IRS requires affiliated § 501(c)(3) and § 501(c)(4) organizations to be separately incorporated and keep records to show that tax deductible contributions are not used for lobbying.[118]

Following *Taxation With Representation*, the D.C. Circuit revisited this reasoning in *Branch Ministries*, but as applied to political campaign activity.[119] In *Branch Ministries*, the

[111] *Id*. at 543.
[112] *Id*.
[113] *Id*. at 544.
[114] *Id*. at 552 (Blackmun, J. concurring).
[115] *Id*. *See also* Perry v. Sindermann, 408 U.S. 593, 597 (1972) (holding that the government may not deny benefits to persons on the basis that it infringes his constitutionally protected rights, especially regarding free speech).
[116] *Id*.
[117] *Id*. at 554.
[118] *Id*.
[119] *Branch Ministries*, 211 F.3d at 143.

court found that a church has the same option suggested in *Taxation With Representation*, to create a separate § 501(c)(4) to carry on its political activities.[120] However, one problem persisted: § 501(c)(4) organizations are subject to the same ban on political campaign intervention.[121] Despite this, § 501(c) organizations have the option to form a political action committee ("PAC") that would be free to take over political campaign activity.[122] Under the regulations, § 501(c) organizations, excluding § 501(c)(3) organizations, may establish and maintain separate segregated funds to receive contributions and make political campaign expenditures.[123] This means that a § 501(c)(4) is permitted to organize a PAC to carry out the political aspirations of the § 501(c)(3).

The court in *Branch Ministries* discussed the steps required for the church to have a means of political communication, while satisfying the standards set forth in *Taxation With Representation*. The standards were as follows: (1) the church must establish a separate § 501(c)(4) organization and maintain separate records to show that tax deductible contributions were not used for political activities, and further (2) set up a separate segregated fund to receive and make expenditures in a political campaigns.[124] Under this framework, religious organizations must set up a separate § 501(c)(4) organization which would then itself need to set up a PAC. Why are these steps necessary? Could a § 501(c)(3) not simply set up a separate segregated account itself for political contributions, aside from its other charitable contributions? If the framework suggests that the organizations can account for such separation across two entities,

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[120] *Id*.
[121] Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii). Despite the ban on electioneering, § 501(c)(4) organizations have no limit on the amount of lobbying they engage in. The principle was set forth by the IRS when they found that groups organized under § 501(c)(6) were exempt even though its sole activity was to introduce legislation. *See* Rev. Rul. 61-177, 1961-2 C.B. 117. This principle was later extended to § 501(c)(4) organizations. *See* Rev. Rul. 67-293, 1967-2 C.B. 185.
[122] *Branch Ministries*, 211 F.3d at 143.
[123] *See* Treas. Reg. § 1.527-6(f), (g).
[124] *Branch Ministries*, 211 F.3d at 143.

then it stands to reason that the same logic can apply inside one organization. The only thing preventing this are the superfluous political restrictions. We will revisit this below.

IV. Violations of the Free Exercise Clause and RFRA

While the IRS maintains its right to enforce § 501(c)(3), its power is fraught with deficiencies that serve to undermine it. A serious concern stems from Congress' passage RFRA.[125] RFRA guarantees that free exercise may not be limited by the government unless a compelling interest exists for the limitation. As such, the political campaign activity prohibition fails RFRA's test. First, the government disregards a long history of religiously compelled political speech by portraying partisan electioneering as a secular endeavor. Second, the government penalizes churches for engaging in activity that is sometimes within the scope of furthering their goals as a church. Despite other secular organizations having the same campaign and lobbying restrictions, the impact of such restrictions prejudices churches. Since the government lacks a compelling interest sufficient to justify this prohibition, the current system of enforcement under § 501(c)(3) violates RFRA.

A. Understanding RFRA and the Free Exercise Clause

In the seminal case *Employment Division v. Smith*, the Supreme Court established that when an individual's religious freedoms were abridged by government, they were left without recourse, so long as the law was "generally applicable" and "valid and neutral."[126] This decision stood to allow the government to burden free exercise rights, thereby opening the door for Congress to pass RFRA in 1993.[127]

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[125] 42 U.S.C. § 2000bb, *et. seq.*

[126] Emp. Div. v. Smith, 494 U.S. 872, 878 (1990).

[127] While RFRA remains good law, in 1997 the Supreme Court determined that RFRA was unconstitutional as applied to the states. *See* City of Boerne v. Flores, 521 U.S. 507, 527-529 (1997). Despite *Boerne*, the Court has held that RFRA is applicable to the federal government under Article I powers. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006). RFRA was intended to apply to "all Federal law, . . . statutory or otherwise," which makes it applicable to the Code. 42 U.S.C. § 2000bb-3(a).

B. Application of RFRA to § 501(c)(3)'s Political Restrictions

RFRA's standard expressly requires courts to apply the previous strict scrutiny test set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*.[128] Applying RFRA requires three separate inquiries: (1) has the generally applicable statute *substantially burdened* the exercise of religion; (2) if yes, does the Government have a compelling interest in furtherance of that statute; and (3) if yes, is there a less restrictive means available for the Government to achieve that interest?[129] Because of this, any divergence from this standard ought to be considered a violation of the statute, right? Well, it remains to be seen.

a. Substantial Burden

For a church to sustain a claim under RFRA, it must first establish that its free exercise right has been *substantially burdened*.[130] Consider *Branch Ministries* again. The church believed that the revocation of its tax exemption could "threaten its existence" because of a reluctance by its congregation to contribute funds.[131] The D.C. Circuit did not agree with this argument. However, the court did find that "[a condition is an unconstitutional burden when] a privilege is conditioned upon conduct proscribed by a religious faith, or . . . denie[d] . . . because of conduct mandated by a religious belief, thereby putting substantial pressure on an adherent to modify his behavior and violate his beliefs."[132] The court discussed that although the advertisements urging Christians not to vote for a candidate did reflect their religious convictions, the withdrawal would not violate its beliefs.[133] Despite this sentiment in *Branch Ministries*, many would argue

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[128] The purpose of RFRA was to "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by the government." 42 U.S.C. § 2000bb.
[129] *See* 42 U.S.C. § 2000bb.
[130] *See* Jimmy Swaggart Ministries v. Bd. Of Equalization, 493 U.S. 378, 384-385 (1990) (emphasis added).
[131] *Branch Ministries*, 211 F.3d at 142.
[132] *Id.*
[133] *Id.*

that the D.C. Circuit's contention was seriously flawed. Returning to Professor James' argument in his article on the African-American church, how can we apply the same logic when there are churches that exist for the very purpose of bringing about social and political change?[134]

Historically, churches have played a vital role in politics and society. In recent history, they have been at the forefront of many social struggles, including the abolition of slavery, women's suffrage, prohibition, war, civil rights, capital punishment, abolition of abortion, and LGBTQ rights.[135] Faith and theology compel many religious groups to make social change. To reason that clergy may only advocate for social change and not *for candidates* to effect that social change is simply nonsensical. To revoke a privilege for endorsing candidates who seek to uphold or rejuvenate a church's tenets impedes a church's ability to spread its message. Certainly, some churches have little interest in engaging in political activity, but perhaps their message is clear and reaches a big enough audience.[136] But for other churches, smaller churches, this may not be the case.

The restriction on campaign activity puts churches in a difficult position by making them determine what is, and what is not, religious.[137] The Founders believed that the First Amendment

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[134] James, *supra* note 72, at 388.

[135] *See* Steffen Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875, 882 (2001).

[136] In a 2014 study, Pew Research Center found that there were over 51 million Catholic adults living in the United States accounting for about one-fifth of the total adult population. David Masci, Gregory A. Smith, *7 facts about American Catholics*, PEW RSCH. CTR. (Oct. 10, 2018), https://www.pewresearch.org/fact-tank/2018/10/10/7-facts-about-american-catholics/. A similar study found that in 2020 there were approximately 5.8 million Jewish adults living in the United States. Becka A. Alper, Alan Cooperman, *10 key findings about Jewish Americans*, PEW RSCH. CTR. (May 11, 2021), https://www.pewresearch.org/fact-tank/2021/05/11/10-key-findings-about-jewish-americans/. Another study estimated that 3.45 million Muslims of all ages were living in the United States in 2017. Besheer Mohamed, *New estimates show U.S. Muslim population continues to grow,* PEW RSCH. CTR. (Jan. 3, 2018), https://www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow/. Finally, despite shrinking numbers of Christians in the United States, a 2018 and 2019 study found that nearly 65% of American adults identified themselves as Christian. Li Cohen, *Christianity in the U.S. is quickly shrinking and may no longer be the majority religion within just a few decades, research finds*, CBS NEWS (Sept. 14, 2022), https://www.cbsnews.com/news/christianity-us-shrinking-pew-research/. This statistic shows that although numbers are dwindling, nearly 167 million Christian adults live in the United States. *Id.*

[137] It seems impractical to require a preacher to determine whether he is speaking in his § 501(c)(3) or § 501(c)(4) capacity at the top of each one of his statements. Gaffney, *supra* note 67, at 35.

stood for the proposition that "religion is too personal, too sacred, too holy, to permit its unhallowed perversion by [the Government]."[138] As such, the IRS has perverted religion by forcing churches to choose between speech and a tax exemption. This is certainly a substantial burden.

b. Compelling Interests

The Government has argued that prohibitions are used to ensure that tax exempt money is not used for political activity. How can the Government determine that all campaign involvement requires the expenditure of money, let alone money contributed by church supporters? The IRS has noted that neutrality is a key concern when considering the effect of taxpayer money being used for partisan politics.[139] The prevailing argument is that tax exemptions are the functional equivalent of cash subsidies from the federal government to the exempt organization.[140] In *Christian Echoes National Ministry, Inc. v. United States*, the Tenth Circuit suggested that the federal government ought not to subsidize any attempt to influence legislation or to affect a political campaign.[141] But could neutrality truly be the Government's compelling interest?

Consider this, the church in *Branch Ministries* attempted to thwart a Christian vote for then-Governor Clinton during his bid for President.[142] Would it stand to reason that there were churches and religious groups who supported then-Governor Clinton? Certainly. The IRS' argument of neutrality looks past a key component of American politics: differences in sentiment between organizations. In *Walz*, the Supreme Court noted that "[a]dherents of particular faiths . . . [each] take strong positions on public issues . . ."[143] Because of this, there is an unpredictable

[138] Engel v. Vitale, 370 U.S. 421, 431 (1962).
[139] H.R. Rep. No. 100-391 (1987).
[140] Gaffney, *supra* note 67, at 31.
[141] 470 F.2d 849 (10th Cir. 1972).
[142] *Branch Ministries*, 211 F.3d at 140.
[143] *Walz*, 397 U.S. at 670.

level of support for different candidates. This would balance in favor of no particular religious ideology. The IRS would not be in jeopardy of losing their purported neutrality if no particular candidates or ideologies have a distinct advantage.

It is important to note, however, that courts have been unwilling to reach the least restrictive means prong without first finding a compelling governmental interest.[144] So to determine whether there is a less restrictive means, we must assume that the IRS' neutrality would constitute a compelling interest.[145] In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court "assume[d] that [a Government] interest [was] compelling within the meaning of RFRA," to reach the less restrictive means prong.[146] We must do the same here.

c. Is the 501(c)(4) alternative a less restrictive means?

The question of whether § 501(c)(4) can stand as a less restrictive alternative is a difficult one. In *Hobby Lobby*, a federal agency imposed regulations requiring specific employer group health plans to furnish "preventive care and screenings" for women.[147] Despite the regulation, Congress did not specify the types of preventive care that would be required.[148] Religious non-profit organizations were exempt from the regulation, but for-profit enterprises did not receive the same treatment.[149] In *Hobby Lobby*, the respondents were three closely-held, for-profit corporations whose owners had a "sincerely held religious belief" that "human life begins at conception."[150] The respondents believed that the statute violated their religious freedoms by requiring them to provide access to contraceptive.[151] The Court held that under RFRA the

[144] *See O Centro*, 546 U.S. at 429.
[145] 573 U.S. 682 (2014).
[146] *Id*. at 728.
[147] *Id*. at 697.
[148] *Id*.
[149] *Id*.
[150] *Id*. at 701.
[151] *Id*. at 700-705.

Government is prohibited from substantially burdening religious freedoms "unless that action constitutes the least restrictive means of serving a compelling government interest."[152] The Court began its analysis by calling the least restrictive means standard "exceptionally demanding."[153]

The standard requires the Government to show that "it lacks other means of achieving its [compelling interest] without imposing a substantial burden on the exercise of religion."[154] The Government contended that cost-free access to contraception was of the utmost importance, but the Court ultimately found that the Government failed to satisfy that standard.[155] The Court hung its hat upon a straight forward alternative where the Government would assume the cost to provide contraceptive to women unable to obtain them under their health plan.[156] Justice Alito noted that the Government already gave an accommodation to religious nonprofits and could simply extend the accommodation to for-profit enterprises.[157]

To analogize, assuming the government has a compelling interest in enforcing the political restrictions under § 501(c)(3), the proposed "alternative" under § 501(c)(4) cannot be considered a less restrictive means. As it stands, § 501(c)(4)s are subject to the same political restrictions as § 501(c)(3)s.[158] The law does allow § 501(c)(4)s to create a PAC that may freely participate in political activity, but the steps required to create one are unneeded.[159] To satisfy *Branch Ministries* formula, churches must follow a superfluous set of steps: (1) the church must establish a separate § 501(c)(4) organization and maintain separate records to show that tax deductible contributions were not used for political activities, and further (2) set up a separate

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[152] *Id*. at 690.
[153] *Id*. at 728.
[154] *Id*.
[155] *Id*.
[156] *Id*.
[157] *Id*.
[158] Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii).
[159] *Branch Ministries*, 211 F.3d at 143.

segregated fund to receive and make political expenditures.[160] A less restrictive means would be to draw a clear line in the sand and provide rules for churches; not a risible formula to achieve the same goal. A less restrictive alternative is to simply allow the church itself to create the separate segregated fund.

C. Proposed Alternative: Drawing a line in the sand for taxpayers

First Amendment concerns require a change in the current tax law concerning the political speech prohibitions outlined in § 501(c)(3). The current law requires the IRS to determine which activity is acceptable and which is not. By easing restrictions, to stand in accordance with RFRA, the Service could allow a certain level of political activity and give churches and religious groups guidance on the permissible level of activity and what exactly constitutes a violation. One easy solution could be an allowance for candidate support from the pulpit. This allowance should not cause any concerns over tax exempt money being applied to partisan political activity. No money would change hands. If the Service drew a clear line in the sand, then churches and religious groups would be able to support their beliefs while not frustrating any concerns of the Government. As a proposal, the same "substantial part" language that is found in the lobbying amendment, can be applied to the electioneering amendment. This alternative would allow churches to exercise their religious speech freely, without the fear of financial punishment by the IRS.

Another simple change could be to eliminate the superfluous requirements proposed in *Taxation With Representation* and *Branch Ministries*. Instead of requiring § 501(c)(3)s to organize a separate entity to carry out its political ambitions, why not allow organizations to simply segregate charitable contributions in a separate account? This simple solution would

[160] *Id.*

eliminate the unnecessary step of creating separate entities to carry out the same ultimate mission. Like in *Hobby Lobby*, this proposed solution would be a less restrictive means on churches and religious organizations by allowing them to carry out their mission unencumbered by the superfluous formula required by *Branch Ministries*. These proposed alternatives would still allow the government to achieve its goal of neutrality without burdening religious free exercise.

V. Conclusion

As the law stands, churches and their leaders may comment on political issues, but not support candidates that stand for those issues. Congress enacted § 501(c)(3) to support the long-standing doctrine of tax exemption for charitable, religious, and educational ventures. Despite this, Congressional leaders have used their power to distort the meaning and the purpose of § 501(c)(3) to reach their own self-serving goals. The Johnson Amendment was passed to stifle political opponents, and as an unfortunate consequence, it has stifled the free speech rights of churches and religious groups for well over half a century. Despite concerns arising under RFRA and the Free Exercise Clause of the First Amendment, Congress and the IRS have failed to remedy the unconstitutional nature of § 501(c)(3)'s political speech prohibition. Simply amending the Code to include a clear line in the sand allowing churches and religious groups to create separate segregated funds, instead of following the superfluous formula proffered in *Branch Ministries,* would resolve a long-standing constitutional issue and ensure the safety of free exercise rights for clergy, churches, and many millions of worshippers in the United States.