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LBJ, THE IRS, AND CHURCHES: THE UNCONSTITUTIONALITY OF THE JOHNSON AMENDMENT IN LIGHT OF RECENT SUPREME COURT PRECEDENT

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INTRODUCTION

On September 28, 2008, more than thirty pastors from across the country stood in their pulpits and preached sermons that evaluated candidates running for political office in light of Scripture.¹ They made specific recommendations to their congregations, based on that scriptural evaluation, as to how the congregation ought to vote—either supporting or opposing candidates from their pulpits. The pastors were part of “Pulpit Freedom Sunday,” a project of the Alliance Defense Fund (“ADF”) intended to present a direct constitutional challenge to the 1954 “Johnson Amendment” to Section 501(c)(3) of the Internal Revenue Code.² The pastors who participated in Pulpit Freedom Sunday sent recordings of their sermons to the Internal Revenue Service (“IRS”) and awaited enforcement action that might spark a constitutional challenge to the law.³

Only one pastor who participated in Pulpit Freedom Sunday that year was investigated; however, the IRS dropped the investigation shortly after it was initiated, and there was no punishment or

¹ Press Release, Alliance Def. Fund, ADF Prepared to Defend Churches Against Possible IRS Free Speech Investigations (Sept. 29, 2008) [hereinafter ADF Prepared to Defend Churches], <http://www.alliancedefensefund.org/News/PRDetail/1978>; see also Steve Karnowski, *IRS Drops Inquiry into Minnesota Church*, STARTRIB. (July 29, 2009), http://www.startribune.com/templates/Print_This_Story?sid=51992367.

² See ALLIANCE DEF. FUND, THE PULPIT FREEDOM INITIATIVE EXECUTIVE SUMMARY (2011), available at http://adfwebadmin.com/userfiles/file/Pulpit_Initiative_executive_summary_candidates20110930.pdf (“ADF believes that the Johnson amendment is unconstitutional in restricting the expression of sermons delivered from the pulpits of churches. This initiative is designed to return freedom to the pulpit by allowing pastors to speak out on the profound and important issues of the day.”). The Johnson Amendment is contained in Section 501(c)(3) of the Internal Revenue Code, named after Lyndon B. Johnson, the sponsor of the Amendment, when it was inserted into the tax code in 1954. See *infra* Part I.B.

³ *History of Pulpit Freedom Sunday*, ALLIANCE DEF. FUND, <http://speakupmovement.org/church/LearnMore/details/5253> (last visited Apr. 6, 2012); see also ADF Prepared to Defend Churches, *supra* note 1.

enforcement action taken against the church for the pastor's sermon.⁴ None of the other participants were investigated or in any way punished by the IRS, despite the fact that Americans United for Separation of Church and State sent letters to the IRS asking it to audit the participating churches.⁵ The IRS itself was well aware of the actions of the thirty-three pastors. Their sermons received widespread media coverage, and "[a] spokesman for the I.R.S. said that the agency was aware of Pulpit Freedom Sunday and '[would] monitor the situation and take action as appropriate.'"⁶ Yet, no action was taken.

In 2009, the number of Pulpit Freedom Sunday churches grew to eighty-three.⁷ In 2010, the number grew again, this time to one hundred.⁸ Finally, the number of participating churches in Pulpit Freedom Sunday exploded in 2011 to 539 churches.⁹ None of the churches that have participated in Pulpit Freedom Sunday, save the one in 2008, have been investigated, censored, or punished for their sermons, even though they explicitly crossed the line into what the IRS deems prohibited by the Johnson Amendment.

ADF has announced that it will continue to host Pulpit Freedom Sunday in the years to come.¹⁰ The sole goal of the program is to have the Johnson Amendment declared unconstitutional as it applies to pastors' sermons from the pulpit. This might seem like an ambitious goal and one that has been unattainable for churches for over fifty years since the adoption of the Johnson Amendment in 1954. But recent developments—when viewed in light of the history of the Johnson

⁴ See Press Release, Alliance Def. Fund, IRS Withdraws Audit on Minn. Pastor's Sermons (July 28, 2009), <http://www.alliancedefensefund.org/News/PRDetail/2759>.

⁵ See, e.g., Press Release, Ams. United for Separation of Church & State, AU Asks IRS To Investigate Oklahoma Church That Endorsed McCain (Oct. 3, 2008), <http://www.au.org/media/press-releases/au-asks-irs-to-investigate-oklahoma-church-that-endorsed-mccain>.

⁶ Laurie Goodstein, *Ministers to Defy I.R.S. by Endorsing Candidates*, N.Y. TIMES, Sept. 26, 2008, at A20.

⁷ Press Release, Alliance Def. Fund, Participation in Second Annual Pulpit Freedom Sunday More Than Doubles From Last Year (Oct. 5, 2009), <http://www.alliancedefensefund.org/News/PRDetail/3180>.

⁸ Press Release, Alliance Def. Fund, Participants in Annual Pulpit Freedom Sunday Increase for Third Year (Sept. 27, 2010), <http://www.adfmedia.org/News/PRDetail/4361>.

⁹ Press Release, Alliance Def. Fund, Participation in ADF Pulpit Freedom Sunday More Than Quadruples over Last Year (Sept. 30, 2011), <http://www.adfmedia.org/News/PRDetail/4360#CurrentNewsRelease>.

¹⁰ ALLIANCE DEF. FUND, PULPIT FREEDOM SUNDAY: FREQUENTLY ASKED QUESTIONS 4 (2011), available at http://www.speakupmovement.org/Church/Content/PDF/PFS_FAQ.pdf ("ADF remains committed to achieving the goals of Pulpit Freedom Sunday, no matter how long it takes.").

Amendment's adoption and enforcement—signal that the Pulpit Freedom Sunday churches are likely on the winning side.

Part I of this Article examines the history of church tax exemption and demonstrates that exemption for churches is an unbroken practice with an extremely long historical pedigree. Thus it should not be lightly cast aside, and any threat to its existence should be taken seriously. Part I also traces the history of the restrictions on church tax exemption added by Congress in 1934 and 1954, including the history of the Johnson Amendment and the suspect circumstances surrounding its passage.

Part II analyzes the history of IRS enforcement of the Johnson Amendment, discussing the uneven and sporadic nature of that enforcement. The IRS's vague and uneven enforcement scheme has resulted in a pervasive and palpable chill on the speech of pastors and churches as they have self-censored in order to avoid potential Johnson Amendment violations and the extreme consequences associated with such violations.

Part III builds on the prior two points and analyzes the Johnson Amendment in light of the recent Supreme Court cases of *Citizens United v. FEC*,¹¹ *Arizona Christian School Tuition Organization v. Winn*,¹² and *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.¹³ The Article concludes that these cases provide important indications that the Johnson Amendment is an unconstitutional violation of the Free Speech and Free Exercise Clauses of the First Amendment, and that it cannot be justified by reliance on tax subsidy theories of regulation.

It is not the goal of this Article to repeat the work of legal scholars who have analyzed the Johnson Amendment from various angles. The great weight of that legal scholarship leans decidedly in favor of the conclusion that the Johnson Amendment is unconstitutional as a violation of the First, Fifth, and Fourteenth Amendments of the United States Constitution as well as the Federal Religious Freedom Restoration Act.¹⁴ Rather, this Article offers a fresh look at the Johnson Amendment in light of recent Supreme Court precedent that has direct bearing on its constitutionality. This precedent—when viewed in light of the history of church tax exemptions, Congress's adoption of the Johnson Amendment, and the IRS's enforcement of the Johnson Amendment—demonstrates that the pastors who participated in Pulpit Freedom

¹¹ 130 S. Ct. 876 (2010).

¹² 131 S. Ct. 1436 (2011).

¹³ 132 S. Ct. 694 (2012).

¹⁴ See *infra* notes 142–47 for a sample of the legal scholarship arguing that the Johnson Amendment is unconstitutional or violates federal law.

Sunday were justified in challenging the Johnson Amendment and should not have long to wait before it is declared unconstitutional or repealed.

I. CHURCH TAX EXEMPTION IN HISTORY

The starting point for analyzing any issue related to taxation of churches is to understand the history regarding tax exemption of churches. This is especially true in a day and age where society seems to have forgotten or conveniently ignored the fact that church tax exemption has an exceedingly long historical pedigree and that the restrictions contained in the Johnson Amendment are an aberration in the otherwise unbroken history of church tax exemption.

A. A Brief History of Church Tax Exemption Generally

Although a complete history of the tax exemption of churches is beyond the scope of this Article, it is enough to note generally that church tax exemption dates back to ancient times. Legal scholars have traced tax exemption for churches at least as far back as ancient Sumeria,¹⁵ while some have even noted that there is no precise starting point for the exemption. As Dean Kelley once remarked, “There is no time before which churches were taxed and in which we can seek the reason for exemption. It has always been the case, clear back to the priests of Egypt and beyond them into the coulisses of prehistory.”¹⁶

Tracing the roots of tax exemption may be difficult, if not impossible, and the precise origin of church tax exemption may be lost in the mists of time. But the unassailable fact remains that, for as long as anyone can remember, churches have always been tax-exempt or enjoyed favorable tax treatment.

This is not to say that the practice of tax exemption has been universally applied to all churches everywhere. Rather, exemption for churches has been applied unequally at times to favor certain churches.¹⁷

¹⁵ See, e.g., John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 524 (1992) (“One of the earliest examples of tax exemption may be found in Sumerian history, 2800 B.C.”). Whitehead provides a comprehensive review of the history of church tax exemption in ancient times through American history to the present day. *See id.* at 524–45.

¹⁶ DEAN M. KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES 5 (1977).

¹⁷ NINA J. CRIMM & LAURENCE H. WINER, POLITICS, TAXES, AND THE PULPIT 71 n.1 (2011) (tracing the historical roots of church tax exemption and noting that rulers throughout history have at times taxed some churches while granting exemptions to other favored churches); *see also* KELLEY, *supra* note 16, at 5–6 (“There were, of course, times and places where churches have been laid under levy to the state, usually in sweeping expropriations designed to counteract the churches’ increasing hold on property But this kind of action was apparently viewed as a drastic corrective to an excess, and the basic condition of exemption has prevailed before and after.”).

But, the uneven application of church tax exemption at certain points in the historical record does not negate the fact that church tax exemption has an exceedingly long history.

Even the Supreme Court has acknowledged that church tax exemption is part of an “unbroken” history in the United States that “covers our entire national existence and indeed predates it.”¹⁸ The Court has also recognized that church non-taxation is undergirded by “more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present.”¹⁹ Churches were considered exempt from taxation during the colonial period.²⁰ The very first federal level income taxes also contained an exemption for churches.²¹ After the adoption of the Sixteenth Amendment in 1913, which allowed Congress to levy income taxes,²² the Revenue Act of that same year contained an exemption for churches.²³ And every iteration of the federal income tax code from that time has contained an exemption for churches.²⁴ As Justice Brennan declared in *Walz*, “Rarely if ever has this Court considered the constitutionality of a practice for which the historical support is so overwhelming.”²⁵

B. Restrictions on the Exemption

It was not until 1934 that the first restriction was placed on church tax exemption²⁶ beyond the normal eligibility requirements to be recognized as tax-exempt. That year, Congress amended the tax code, inserting a provision stipulating that a church will lose its tax exemption if a “substantial part of . . . [its] activities . . . is carrying on propaganda,

¹⁸ *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970).

¹⁹ *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971).

²⁰ John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363, 368–80 (1991) (tracing the history of tax exemption for churches during the colonial period and noting that tax exemption derived both from common law and equity traditions).

²¹ Whitehead, *supra* note 15, at 541–42.

²² U.S. CONST. amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”).

²³ Revenue Act of 1913, Pub. L. No. 63-16, ch. 16, 38 Stat. 114, 172; *see also* Whitehead, *supra* note 15, at 542. The exemption, of course, was broader than for just churches, and encompassed all charitable, nonprofit organizations. This Article, however, focuses on church tax exemption and so will consider that specific historical aspect.

²⁴ Whitehead, *supra* note 15, at 542.

²⁵ *Walz v. Tax Comm'n*, 397 U.S. 664, 681 (1970) (Brennan, J., concurring).

²⁶ Although this restriction applies to all charitable organizations under Section 501(c)(3), this Article focuses solely on church tax exemption and so will address the law from that perspective.

or otherwise attempting, to influence legislation.”²⁷ Interestingly, the original version of the proposed 1934 bill included a ban on tax-exempt organizations’ “participation in partisan politics,” but that provision was removed in conference out of fears that it was too broad.²⁸

The 1934 lobbying provision was evidently passed in response to a threat posed by a nonprofit organization toward a sitting officeholder.²⁹ The lobbying restriction was sponsored by Senator David Reed, a Republican Senator from Pennsylvania, in an attempt to silence a nonprofit organization, the National Economy League, that had come into direct conflict with Senator Reed over the issue of benefits to veterans.³⁰ The National Economy League was lobbying against a bill introduced by Senator Reed who had made the issue, and his bill, the centerpiece of his reelection campaign to the U.S. Senate.³¹

The history behind the enactment of the lobbying restriction parallels that of the Johnson Amendment in that both were adopted in the midst of campaigns by powerful senators in an effort to silence their opposition.³² This history once led authors writing for an IRS instructional program to conclude that the passage of the Johnson Amendment was not the first time “the impetus for a Code provision [was] an exempt organization’s opposition to a legislator.”³³

Twenty years later, in 1954, Congress again amended Section 501(c)(3) of the tax code to add an additional restriction. Popularly known as the “Johnson Amendment,” after the bill’s lead proponent, Lyndon B. Johnson, while he was a Senator from Texas,³⁴ the Amendment states that a tax-exempt organization is one that “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

²⁷ Revenue Act of 1934, Pub. L. No. 73-216, § 101(6), 48 Stat. 680, 700 (codified as amended at I.R.C. § 501(c)(3) (2006)).

²⁸ See 78 CONG. REC. 7,831 (1934) (statement of Rep. Samuel B. Hill); H.R. REP. NO. 73-1385, at 3–4 (1934) (Conf. Rep.).

²⁹ See Judith E. Kindell & John Francis Reilly, *Lobbying Issues, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FY 1997*, at 261, 265 & n.9 (1996), available at <http://www.irs.gov/pub/irs-tege/eotopicp97.pdf>.

³⁰ *Id.* at 264–65.

³¹ *Id.* at 265 n.9.

³² See *infra* Part I.B.2 (recounting the dubious history of the adoption of the Johnson Amendment).

³³ Judith E. Kindell & John Francis Reilly, *Election Year Issues, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FY 2002*, at 335, 451 n.46 (2001), available at <http://www.irs.gov/pub/irs-tege/eotopici02.pdf>; see also CRIMM & WINER, *supra* note 17, at 110 (“[O]rigin of the lobbying restriction also were attributable to political partisanship and politicians’ self-interest.”).

³⁴ See 100 CONG. REC. 9,604 (1954); CRIMM & WINER, *supra* note 17, at 72.

candidate for public office.”³⁵ The history of this Amendment starkly shows its invalidity.

1. The 1954 U.S. Senate Race in Texas

In 1954, Lyndon B. Johnson was running for reelection to the U.S. Senate seat from Texas that he occupied as a first-term senator. Johnson had won his first election to the Senate “after a very close—and questionable—contest in 1948 which earned him the unflattering sobriquet of ‘Landslide Lyndon.’”³⁶ Johnson won the election by a grand total of eighty-seven votes, which was less than one-hundredth of one percent of the total votes cast.³⁷ There has been even further speculation surrounding this narrow margin of victory after the contents of the notorious “Ballot Box 13” that supplied Johnson with the necessary number of votes to win the election were destroyed by fire.³⁸

Johnson’s reelection opponent in 1954 was Dudley Dougherty, a thirty-year-old, first-term state senator from Beeville, Texas, whom Johnson dismissively referred to in communications as the “young man from Beeville.”³⁹ Dougherty adopted an aggressive, anti-communist stance in his campaign for Senate, which was very popular among the “McCarthyites”⁴⁰ who were seeking to expose and eradicate communism in the United States.⁴¹

Johnson was expected to handily defeat Dougherty and gain reelection.⁴² That is, until the entrance into the campaign of two very powerful, secular, nonprofit organizations, that were outspokenly opposed to the perceived rise of communism. One group was called the Facts Forum, created in 1951 by Texas oilman H.L. Hunt.⁴³ The other

³⁵ Internal Revenue Code of 1954, Pub. L. No. 591, § 501(c)(3), 83 Stat. 68A, 163 (codified as amended at I.R.C. § 501(c)(3) (2006)). The words “or in opposition to” were added by Congress in 1987. See *infra* Part I.B.2. For a history of the 1987 amendment to the tax code demonstrating that it too was motivated by politicians’ self-interest and was aimed at silencing nonprofit organizations, see CRIMM & WINER, *supra* note 17, at 116.

³⁶ 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 (2001).

³⁷ *Id.*

³⁸ *See id.*

³⁹ *Id.* at 742.

⁴⁰ *Id.* at 743. “McCarthyism” is named after Senator Joseph R. McCarthy, a Republican from Wisconsin. See James D. Davidson, *Why Churches Cannot Endorse or Oppose Political Candidates*, 40 REV. RELIGIOUS RES. 16, 18 (1998).

⁴¹ Davidson, *supra* note 40, at 18. McCarthy “led an effort to identify communists in government and other spheres of American life.” *Id.*

⁴² *Id.* at 24. In fact, it was reported Dougherty “knew he could not beat Johnson and told people he was only in the race for the publicity.” *Id.*

⁴³ *Id.* at 19. Through Facts Forum, Hunt hosted “large dinner parties featuring speakers warning of the evils of communism, both at home and abroad.” O’Daniel, *supra* note 36, at 753. Facts Forum also had a radio and television broadcasting presence with a

was the Committee for Constitutional Government (“CCG”)—“one of the nation’s leading anti-communist organizations”—started in 1937 by newspaper publisher Frank Gannett in response to President Roosevelt’s effort to pack the Supreme Court.⁴⁴

According to one researcher, “[Johnson] did not like the rising tide of national conservatism, especially McCarthyism . . . [and] was concerned about the compatibility between Dougherty’s anti-communist views and the widespread conservatism in the Texas electorate.”⁴⁵ Thus, it was with some dismay that Johnson discovered Facts Forum and CCG were not only helping to advance the movement of McCarthyism nationwide but were also actively supporting his campaign’s opponents in Texas.⁴⁶

Johnson took steps to investigate CCG and Facts Forum to determine whether they were violating any law by supporting Dougherty. On June 15, 1954, Gerald Siegel who was counsel to the Senate Democratic Policy Committee responded to a question from Johnson whether CCG had violated Texas election laws.⁴⁷ Siegel advised Johnson that CCG had not violated the federal income tax code because the code at the time only contained a restriction on lobbying; however, Siegel was of the opinion that CCG had violated Texas election law.⁴⁸ Johnson also asked the Democratic Whip in the House, Representative John W. McCormack, to write the IRS Commissioner to determine if CCG had violated its federal tax-exempt status.⁴⁹ In response to McCormack, the Commissioner agreed to investigate “to see just what is the effect of these activities under the internal revenue laws and what, if anything, can be done about their present status in relation to exemption privileges.”⁵⁰ Johnson also reportedly investigated certain members of Facts Forum and CCG and had his staff prepare internal memoranda on the groups’ activities.⁵¹ From this history, it is evident that Johnson was concerned about Facts Forum and CCG and was actively looking for a means of silencing these powerful opposition voices.

following of five million listeners and viewers per week; the programs featured Senator McCarthy and similar anti-Communist speakers. *Id.*

⁴⁴ Davidson, *supra* note 40, at 20–21.

⁴⁵ *Id.* at 24; see also O’Daniel, *supra* note 36, at 745.

⁴⁶ Davidson, *supra* note 40, at 24; see also O’Daniel, *supra* note 36, at 743 (“CCG was adamantly opposed to Johnson’s election and vociferously supported Dougherty—and Johnson suspected that Facts Forum, in spite of its pledge not to involve itself in political campaigns, was clandestinely in support of Dougherty, as well.”).

⁴⁷ Deirdre Dessingue Halloran & Kevin M. Kearney, *Federal Tax Code Restrictions on Church Political Activity*, 38 CATH. LAW. 105, 107 (1998).

⁴⁸ *Id.*

⁴⁹ *Id.* at 107–08.

⁵⁰ *Id.* at 108.

⁵¹ O’Daniel, *supra* note 36, at 754–59.

2. The Johnson Amendment

Johnson devised a plan to amend the federal tax code in a way that would silence Facts Forum and CCG. On July 2, 1954, in the midst of his campaign against Dougherty, Johnson appeared on the floor of the U.S. Senate to offer an Amendment to a pending tax overhaul bill.⁵² The Congressional Record for that day spells out the details of the Amendment as follows:

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 to conference, and that it will be included in the final bill which Congress passes.⁵³

The legislative history shows that the chairman did indeed take Johnson's Amendment to conference with the House, and the Amendment was agreed upon.⁵⁴

While the Conference Report reveals that the original House version of the tax bill only continued the 1934 lobbying restriction, it also notes that "[t]he Senate amendment provides that such organizations will lose their tax-exempt status if they participate or intervene (including the publishing or distributing of statements) in a political campaign on behalf of any candidate for public office."⁵⁵ In response to the differences between the two bills, the Conference Report simply states, "The House

⁵² 100 CONG. REC. 9,604 (1954); *see also* O'Daniel, *supra* note 36, at 741 ("For tax practitioners, 1954 marks the seminal year of the creation of the modern Internal Revenue Code.").

⁵³ 100 CONG. REC. 9,604 (1954).

⁵⁴ *Id.*

⁵⁵ H.R. REP. NO. 83-2543, at 46 (1954) (Conf. Rep.).

recedes.”⁵⁶ President Eisenhower signed the tax bill into law on August 16, 1954.⁵⁷

George Reedy, Johnson’s chief aide in 1954, was once interviewed about the events surrounding the passage of the Johnson Amendment. Reedy admitted that Johnson was “very thin-skinned” and that it was quite plausible Johnson moved for the Amendment to the tax code in response to his political adversaries.⁵⁸ Reedy added, however, his personal opinion that “Johnson would never have sought restrictions on religious organizations.”⁵⁹ After reviewing the history of the Johnson Amendment in the context of the “highly-charged political environment” of Johnson’s reelection campaign of 1954, one scholar observed,

The ban on electioneering is not rooted in constitutional provisions for separation of church and state. It actually goes back to 1954 when Congress was revising the tax code, anti-communism was in full bloom, and elections were taking place in Texas. . . . Johnson was not trying to address any constitutional issue related to separation of church and state; and he did not offer the amendment because of anything that churches had done. Churches were not banned from endorsing candidates because they are religious organizations; they were banned because they have the same tax-exempt status as Facts Forum and the Committee for Constitutional Government, the right-wing organizations that Johnson was really after.⁶⁰

The same scholar then bluntly concluded, “The ban on electioneering has nothing to do with the First Amendment or Jeffersonian principles of separation of church and state.”⁶¹

The only other change that Congress made to Section 501(c)(3) was in 1987 when it added the words “in opposition to” in order to clarify that the Johnson Amendment not only applied to prohibit *support for* a candidate, but also prohibited *opposition to* a candidate.⁶² The only reason given for this change in the congressional report was that “[t]his clarification reflects the present-law interpretation of the statute.”⁶³

⁵⁶ *Id.*

⁵⁷ Statement by the President Upon Signing Bill Revising the Internal Revenue Code, 199 PUB. PAPERS 715–17 (Aug. 16, 1954).

⁵⁸ Halloran & Kearney, *supra* note 47, at 107.

⁵⁹ *Id.* (internal quotation marks omitted).

⁶⁰ Davidson, *supra* note 40, at 28–29; see also O’Daniel, *supra* note 36, at 739–40 (“An examination of the history of the prohibition indicates that it was passed in 1954 with little thought by Congress, or even by its sponsor, the Democratic Minority Leader (soon to be Majority Leader), Senator Lyndon Baines Johnson, concerning its effect on churches. In any event, the prohibition was not the product of a change in public opinion, but instead appears to have been proposed by Johnson as a way to squelch certain unsavory campaign tactics targeted at him by a few tax-exempt entities.”).

⁶¹ Davidson, *supra* note 40, at 16.

⁶² See H.R. REP. NO. 100-391, pt. 2, at 1621 (1987).

⁶³ *Id.*

Apparently, the IRS had interpreted the Johnson Amendment to mean that opposition to a particular candidate was equivalent to support for another candidate and had been enforcing the Johnson Amendment accordingly.⁶⁴ But there is also evidence that this expansion of the Johnson Amendment was directed once again at silencing nonprofit organizations.⁶⁵

What is clear from this brief history of Section 501(c)(3) is that there is no principled justification for the Johnson Amendment other than political maneuvering. The Amendment appears to be nothing more than an attempt by a powerful senator to silence political opponents that he feared were hurting his chances for reelection. Johnson knew how to work the system and inserted his Amendment into a large tax overhaul bill. There was no referral to a committee for further study and hearings. There was no legislative analysis of the effect of the Amendment on tax-exempt organizations. And there was certainly no attempt to understand the effect that the Amendment might have on constitutional rights, especially those of churches and other religious organizations.⁶⁶ The Johnson Amendment plainly targets speech because it prohibits statements that are published or distributed,⁶⁷ yet Congress made no attempt to reconcile the Johnson Amendment with the First Amendment. There was absolutely no discussion at all of the First Amendment, and Johnson's Amendment simply sailed through Congress as a small addition to a popular tax overhaul bill.⁶⁸

II. IRS ENFORCEMENT OF THE JOHNSON AMENDMENT

Since 1954, the IRS has been tasked with enforcing and applying the Johnson Amendment. As described below, the IRS's enforcement of the law has been vague, arbitrary, sporadic, and even unequal at times.

⁶⁴ As of 1986, the IRS defined an “action organization” as one that “participates or intervenes, directly or indirectly, in any political campaign *on behalf of or in opposition to* any candidate for public office.” Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (1986) (emphasis added).

⁶⁵ CRIMM & WINER, *supra* note 17, at 116 (“The 1987 statutory modification yet again was prompted by a mixture of self-serving political agendas, as well as concerns about the use of tax-preferred funds for partisan politics.”).

⁶⁶ *Id.* at 114; *see also supra* note 60 and accompanying text.

⁶⁷ I.R.C. § 501(c)(3) (2006).

⁶⁸ Indeed, the Johnson Amendment was so hastily passed that Johnson failed to synthesize it with other provisions of the tax code that it obviously affected. See CRIMM & WINER, *supra* note 17, at 114–15 (discussing various efforts after the passage of the Johnson Amendment to plug the holes in the income tax code created by this lack of forethought).

A. Vague Enforcement

The Congressional Research Service, in a 2008 report to Congress on the Johnson Amendment, stated, “The line between what is prohibited and what is permitted can be difficult to discern.”⁶⁹ It is an unassailable fact that “the IRS has never specified the precise meanings or parameters of the standards that it uses to regulate this highly sensitive area.”⁷⁰

1. “Facts and Circumstances”

One of the IRS’s first actions after the Johnson Amendment passed was to enact regulations enforcing the new provision by denying tax-exempt status to so-called “action organizations.”⁷¹ An “action organization” is now defined as one that “participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.”⁷² The regulations further provide,

Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.⁷³

The regulations specify that, in determining whether an organization is an action organization, “all the surrounding facts and circumstances, including the articles [of incorporation] and all activities of the organization, are to be considered.”⁷⁴

Instead of clarifying the reach of the Johnson Amendment, the regulations create confusion and raise additional questions. For instance, How does an organization *indirectly* participate or intervene in a campaign? Can that occur even if the organization never mentions the name of a candidate or a political party? When does a communication cross the line so that it is made “on behalf of or in opposition to” a candidate? What do the regulations mean when they say that activities that violate the Johnson Amendment “include, but are not limited to” the activities the IRS chose to list? What are the other activities that could violate the Johnson Amendment? What “surrounding facts and circumstances” are to be considered by the IRS? Where did the term

⁶⁹ ERIKA LUNDER & L. PAIGE WHITAKER, CONG. RESEARCH SERV., RL 34447, CHURCHES AND CAMPAIGN ACTIVITY: ANALYSIS UNDER TAX AND CAMPAIGN FINANCE LAWS 2 (2008).

⁷⁰ CRIMM & WINER, *supra* note 17, at 127.

⁷¹ Treas. Reg. § 1.501(c)(3)-1(a)(1), (c)(3)(i) (2009).

⁷² *Id.* § 1.501(c)(3)-1(c)(3)(iii).

⁷³ *Id.*

⁷⁴ *Id.* § 1.501(c)(3)-1(c)(3)(iv).

“action organization” come from, and why did the IRS introduce this term into the regulations when it is not found anywhere in the statutes?

The IRS’s attempts in subsequent years to clarify the regulations have only resulted in additional confusion. This is mainly because the IRS has merely repeated the same “facts and circumstances” language as it initially set forth in the regulations enforcing the Johnson Amendment. For instance, a Revenue Ruling in 1978 advises, “Whether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case.”⁷⁵ Identical language is repeated in a 2007 Revenue Ruling that purports to clarify the law.⁷⁶ The IRS’s *Tax Guide for Churches and Religious Organizations* reiterates the “facts and circumstances” test and broadly states, “Certain activities or expenditures may not be prohibited depending on the facts and circumstances.”⁷⁷

One legal scholar recently noted that the “facts and circumstances” test means that “the prohibition’s exact scope still remains uncertain.”⁷⁸ Others have similarly commented,

The [facts and circumstances] test has not been further articulated in statute or regulation, and the courts and the IRS have issued only a very few rulings, even fewer of them precedential. The rulings that have been issued do not offer clear road signs, but rather mere examples of 501(c)(3) behavior that is permissible or impermissible.⁷⁹

Even IRS training materials candidly admit the vagueness of the regulations: “In situations where there is no explicit endorsement or partisan activity, there is no bright-line test for determining if the [Internal Revenue Code] 501(c)(3) organization participated or intervened in a political campaign. Instead, all the facts and circumstances must be considered.”⁸⁰ The Congressional Research Service, in reporting to Congress on the Johnson Amendment, also described, “In many situations, the activity is permissible unless it is structured or conducted in a way that shows bias towards or against a candidate. Some biases can be subtle and whether an activity is

⁷⁵ Rev. Rul. 78-248, 1978-1 C.B. 154.

⁷⁶ Rev. Rul. 2007-41, 2007-1 C.B. 1421.

⁷⁷ INTERNAL REVENUE SERV., PUB. NO. 1828, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 7 (2009), available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf>.

⁷⁸ Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1147 (2009).

⁷⁹ Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*, 31 WM. MITCHELL L. REV. 55, 64–65 (2004).

⁸⁰ Kindell & Reilly, *supra* note 33, at 344.

campaign intervention will depend on the facts and circumstances of each case.”⁸¹

2. “Code Words”

Worse, the IRS’s precedential and non-precedential guidance has gone far beyond simply acknowledging that all the facts and circumstances should be considered in determining whether the Johnson Amendment has been violated. For example, the IRS’s training materials explain that a tax-exempt organization does not even have to mention a candidate by name to violate the Johnson Amendment. In 1993, the IRS included the following in its training materials:

[T]he Service is aware that an IRC 501(c)(3) organization may avail itself of the opportunity to intervene in a political campaign in a rather surreptitious manner. The concern is that an IRC 501(c)(3) organization may support or oppose a particular candidate in a political campaign without specifically naming the candidate by using *code words* to substitute for the candidate’s name in its messages, such as “conservative,” “liberal,” “pro-life,” “pro-choice,” “anti-choice,” “Republican,” “Democrat,” etc., coupled with a discussion of the candidacy or the election.⁸²

In explaining why “code words” can violate the Johnson Amendment, the IRS materials noted, “Code words, in this context, are used with the intent of conjuring favorable or unfavorable images—they have pejorative or commendatory connotations. When combined with discussions of elections, the code words also make specific candidates identifiable . . .”⁸³ The “code words” rationale has been used in at least one instance to find that a tax-exempt organization violated the Johnson Amendment.⁸⁴

3. “Issue Advocacy” or “Campaign Intervention”?

Another way the IRS has added to the vagueness of the regulations in this area is in attempting to define when an organization crosses the line from permissible “issue advocacy” to prohibited “campaign intervention.” In one Revenue Ruling, the IRS states, “Section 501(c)(3) organizations may take positions on public policy issues, including issues that divide candidates in an election for public office. However, Section

⁸¹ LUNDER & WHITAKER, *supra* note 69, at 3.

⁸² Judith E. Kindell & John F. Reilly, *Election Year Issues*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FY 1993, at 400, 411 (1992) (emphasis added), available at <http://www.irs.gov/pub/irs-tege/eotopicn93.pdf>.

⁸³ *Id.* at 411 n.6.

⁸⁴ I.R.S. Tech. Adv. Mem. 91-17-001 (Sept. 5, 1990) (finding that the organization’s use of the words “liberal” and “conservative” qualified as intervention in a political campaign).

501(c)(3) organizations must avoid any issue advocacy that functions as political campaign intervention.”⁸⁵ The Ruling goes on to caution, “Even if a statement does not expressly tell an audience to vote for or against a specific candidate, an organization delivering the statement is at risk of violating the political campaign intervention prohibition if there is any message favoring or opposing a candidate.”⁸⁶ At the same time, the IRS offers no determinative guidance for compliance, only a vague reiteration of the facts and circumstances test: “All the facts and circumstances need to be considered to determine if the advocacy is political campaign intervention.”⁸⁷

4. Who Is a “Candidate”?

Finally, there is also no certainty or precision as to who is considered a candidate. The IRS defines a “candidate for public office” as someone “who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local.”⁸⁸ It unhelpfully adds in its training materials: “The determination of when an individual has taken sufficient steps prior to announcing an intention to seek election, so that he or she may be considered to have offered himself or herself as a contestant for the office is based on the *facts and circumstances*.⁸⁹ And it notes further that “some action must be taken to make one a candidate, but the action need not be taken by the candidate or require his consent.”⁹⁰ So, additional confusion abounds related to when the Johnson Amendment prohibition applies since it only restricts statements made about “candidates,” that is, those who the IRS views as candidates based on the facts and circumstances.

5. Vague Enforcement Leading to Self-Censorship

The vagueness in the IRS’s regulation of speech is pervasive. The predictable outcome of this state of affairs has been massive self-censorship among churches and pastors. As the Supreme Court has noted, “Uncertain meanings inevitably lead citizens to ‘steer far wider of

⁸⁵ Rev. Rul. 2007-41, 2007-1 C.B. 1421.

⁸⁶ *Id.*

⁸⁷ *Id.* Drawing on an analogy to the 2004 electoral cycle, a legal scholar analyzing this aspect of the IRS’s guidance noted that “[p]olitical parties are usually divided in their policy positions on many public issues. . . . Therefore, presumably a church’s endorsement of issues that were aligned with the Republican campaign platform could have been construed as an indirect endorsement of President Bush, the [2004] Republican candidate.” 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, 55 (2007).

⁸⁸ Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (2009); Treas. Reg. § 53.4945-3(a)(2) (2009).

⁸⁹ Kindell & Reilly, *supra* note 33, at 342 (emphasis added).

⁹⁰ *Id.*

the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.”⁹¹ The Court has also observed that when speech restrictions are vague, “[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.”⁹²

B. Drawing the Line at Speech from the Pulpit

The closest the IRS comes to approximating crystal clarity in its regulations is its insistence that a pastor’s statements from the pulpit during a church service supporting or opposing a political candidate violate the Johnson Amendment.⁹³ The IRS says explicitly that leaders of 501(c)(3) organizations “cannot make partisan comments in official organization publications or at official functions of the organization.”⁹⁴ The IRS’s *Tax Guide for Churches and Religious Organizations* includes examples of situations that violate the Johnson Amendment.⁹⁵ One example states,

Minister D is the minister of Church M, a section 501(c)(3) organization. During regular services of Church M shortly before the election, Minister D preached on a number of issues, including the importance of voting in the upcoming election, and concluded by stating, “It is important that you all do your duty in the election and vote for Candidate W.” Because Minister D’s remarks indicating support for Candidate W were made during an official church service, they constitute political campaign intervention by Church M.⁹⁶

One notorious example of the application of the Johnson Amendment to a pastor’s sermon from the pulpit is the 2005 IRS audit of All Saints Episcopal Church in Pasadena, California.⁹⁷ On October 31, 2004, a pastor preached a sermon at All Saints entitled “If Jesus Debated Sen. Kerry and President Bush.”⁹⁸ The *Los Angeles Times* reported on the sermon, including the minister’s “searing indictment of the Bush administration’s policies in Iraq,” and his general criticism of

⁹¹ *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)) (internal quotation marks omitted).

⁹² *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citation omitted).

⁹³ Yet even here vagueness creeps in because the contours of what is prohibited under the Johnson Amendment remain unclear unless there is explicit endorsement or opposition from the pulpit of a candidate.

⁹⁴ Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1422.

⁹⁵ TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS, *supra* note 77, at 8.

⁹⁶ *Id.*

⁹⁷ LUNDER & WHITAKER, *supra* note 69, at 9–10.

⁹⁸ *Id.*

the President's positions on other important issues like tax policy.⁹⁹ From the context of the sermon, it appears the minister's motivation for the message was his deeply-held religious conviction on the issues.¹⁰⁰ The IRS launched an investigation of the church that lasted until September 2007, when it sent a letter to All Saints stating without any explanation that "the sermon in question constituted intervention in the 2004 Presidential election."¹⁰¹

In a similar case, the IRS launched an investigation of Warroad Community Church in Minnesota after Pastor Gus Booth preached a sermon during the 2008 election that supported John McCain and opposed Barack Obama.¹⁰² Pastor Gus Booth had preached the sermon as part of the ADF Pulpit Freedom Sunday.¹⁰³ After an eleven-month audit, the IRS closed the investigation without any findings "because of a pending issue regarding the procedure used to initiate the inquiry."¹⁰⁴

The IRS has steadfastly maintained that it has the authority to apply the Johnson Amendment to what a pastor says from the pulpit during a sermon. In 2002, the House Ways and Means Committee held a hearing to review the Internal Revenue Code requirements for religious organizations.¹⁰⁵ During this hearing, Steven Miller, the IRS Director of Exempt Organizations, testified and was questioned by members of Congress.¹⁰⁶ Congressman Lewis asked Mr. Miller, "But if you have a minister speaking from the pulpit on Sunday morning, maybe a rabbi from the synagogue or the temple, saying that he had been told by God about somebody, that somebody should be elected, somebody should be

⁹⁹ Josh Getlin, *Pulpits Ring with Election Messages*, L.A. TIMES, Nov. 1, 2004, at A1. George Regas was Rector Emeritus of All Saints Episcopal and had been rector of the church for twenty-eight years before he retired in 1995. Patricia Ward Biederman, *A Long Tradition of Activism*, L.A. TIMES, Nov. 13, 2005, at B1. The *Los Angeles Times* reported that Regas "was legendary for his opposition to war, his championing of female clergy and his commitment to integrating gays and lesbians into the fabric of the church." *Id.*

¹⁰⁰ See Getlin, *supra* note 99.

¹⁰¹ Stephanie A. Bruch, Comment, *Politicking from the Pulpit: An Analysis of the IRS's Current Section 501(c)(3) Enforcement Efforts and How It Is Costing America*, 53 ST. LOUIS U. L.J. 1253, 1270 (2009) (internal quotation marks omitted).

¹⁰² Paul Walsh, *Warroad Pastor's IRS Case Closed, for Now*, STARTRIB. (July 29, 2009, 9:50 PM), <http://www.startribune.com/politics/statelocal/52000717.html?page=all&prepage=2&c=y#continue>.

¹⁰³ IRS Withdraws Audit on Minn. Pastor's Sermons, *supra* note 4.

¹⁰⁴ Letter from Sunita B. Lough, Dir., EO Examination, Internal Revenue Serv., to Warroad Community Church (July 7, 2009), available at <http://oldsite.alliancedefensefund.org/userdocs/IRSLetterClosingFile.pdf>.

¹⁰⁵ *Review of Internal Revenue Code Section 501(c)(3) Requirements for Religious Organizations: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 107th Cong. 2 (2002).

¹⁰⁶ *Id.* at 6–12, 14–23.

defeated, is that political activity?”¹⁰⁷ Mr. Miller responded, “That would constitute political activity.”¹⁰⁸

Tellingly, Mr. Miller went on to demonstrate just how quickly the waters can become murky in this area in response to a question from Congressman Weller who asked, “And can the minister say the following from the pulpit and not be in violation of the tax status, that candidate X is pro-life or candidate Y is pro-choice?”¹⁰⁹ In indicating that this situation would be more problematic, Mr. Miller responded, “The pastor, the minister, the rabbi can speak to issues of the day, but to the extent they start tying it to particular candidates and to a particular election, it begins to look more and more like either opposition to a particular candidate or favoring a particular candidate.”¹¹⁰

After a thorough review of the IRS’s enforcement of the Johnson Amendment, two prominent legal scholars concluded,

No one questions but that spiritual leaders must be able to address their congregants on matters of religious conscience as related to issues of the day. As a result, one might ask how spiritual leaders can deliver sermons, write pastoral letters, counsel congregants, and conduct Bible studies and discuss the application of scripture passages to current life choices with reasonable certainty of not violating the political campaign speech prohibition. And if there is no such certainty with respect to these matters, how can the IRS determine noncompliance with the statutory ban? Here the unsatisfactory answer seems clear: IRS decisions are based largely on vague or ambiguous criteria because its determinations are “fact and circumstance” sensitive.¹¹¹

If legal scholars, attorneys, and even the IRS itself cannot agree—and in fact argue—over where the line is drawn under the Johnson Amendment, how can the IRS realistically expect pastors to understand and apply these questionable speech restrictions?

C. Unequal Application

The IRS’s enforcement of the Johnson Amendment has also been unequal, or at least perceived to be unequal, at times. The *Branch Ministries v. Rossotti* case is the only reported opinion addressing the application of the Johnson Amendment to a church.¹¹² According to the court’s record in that case, “Four days before the 1992 presidential election, Branch Ministries, a tax-exempt church, placed full-page

¹⁰⁷ *Id.* at 17.

¹⁰⁸ *Id.* By labeling the hypothetical minister’s sermon “political activity,” Mr. Miller brought the sermon within the prohibition of the Johnson Amendment.

¹⁰⁹ *Id.* at 19.

¹¹⁰ *Id.*

¹¹¹ CRIMM & WINER, *supra* note 17, at 127.

¹¹² 211 F.3d 137 (D.C. Cir. 2000).

advertisements in two newspapers in which it urged Christians not to vote for then-presidential candidate Bill Clinton because of his position on certain moral issues.”¹¹³ For the first time ever, the IRS responded by revoking the church’s tax-exempt status for its involvement in politics.¹¹⁴

The church sued the IRS and raised several arguments that the revocation was unlawful. One of the arguments was that the IRS had engaged in selective prosecution of the church in violation of the Fifth Amendment’s Equal Protection Clause.¹¹⁵ Presumably, this argument was premised on the fact that, according to the *Branch Ministries* court (and presumably supported by evidence presented by the IRS), the IRS had never revoked any other church’s tax-exempt status due to a violation of the Johnson Amendment from 1954 to 2000, a span of 46 years.¹¹⁶

To support its claim of selective prosecution, *Branch Ministries* presented several hundred pages of newspaper reports regarding other politically-active churches that had retained their tax-exempt status over the years despite also clearly violating the Johnson Amendment.¹¹⁷ As reported in the case, the evidence presented by the church included “reports of explicit endorsements of Democratic candidates by clergymen as well as many instances in which favored candidates have been invited to address congregations from the pulpit.”¹¹⁸ The church argued that, despite this widespread pattern of violations, the fact that it was the only church to have its exempt status revoked was evidence of selective prosecution.¹¹⁹ The IRS actually agreed with *Branch Ministries* at oral argument that the other situations described by the church, if accurately reported, also constituted violations of the Johnson Amendment and “could have resulted in the revocation of those churches’ tax-exempt status.”¹²⁰

The *Branch Ministries* court ultimately side-stepped the church’s selective prosecution argument, however, because the church could not cite to a specific situation where another church had placed a full-page advertisement in a national newspaper in violation of the Johnson Amendment and retained its tax-exempt status. Based on this finding, the court reasoned that *Branch Ministries* was not similarly-situated to

¹¹³ *Id.* at 139.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 144.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

any other church that had engaged in impermissible political activity and not been prosecuted.¹²¹

Nevertheless, the evidence presented by the *Branch Ministries* case establishes a record of enforcement by the IRS that is spotty at best and selective at worst. From 1954 to 2000, the IRS had never revoked the exempt status of any church, yet conceded that readily available evidence established numerous violations of the Johnson Amendment. The fact that the church was ultimately unsuccessful on its selective prosecution claim does nothing to detract from the evidence of the IRS's enforcement problems in this area. Whether this atrocious record of enforcement of the Johnson Amendment is due to the IRS's reluctance to tread on the First Amendment rights of churches, or for some other reason entirely, matters little. The record established in *Branch Ministries* stands as a clear indictment of the IRS's inconsistent enforcement scheme.

Additional examples abound of the IRS's irregular enforcement of the Johnson Amendment, and space does not permit an in-depth analysis. But consider the following: During the 2008 presidential primaries, Barack Obama's pastor, Jeremiah Wright, preached a sermon in which he made statements that were susceptible of no other interpretation than support for Barack Obama and opposition to Hillary Clinton and Rudy Giuliani, other candidates for President.¹²² Reverend Wright stated,

It just came to me within the past few weeks, y'all, why so many folk are hatin' on Barack Obama. He doesn't fit the model. He ain't white, he ain't rich, and he ain't privileged. Hillary fits the mold. Europeans fit the mold. Giuliani fits the mold. Rich, white men fit the mold.¹²³

The IRS never investigated or punished Reverend Wright for his statements made from the pulpit, even though his statements in support of Barack Obama's presidential campaign were widely reported and posted on the Internet for public review.

Reverend Wright is not alone, however. Another example of a blatant violation of the Johnson Amendment occurred during Reverend Jesse Jackson's first presidential campaign.¹²⁴ Going beyond simply asking ministers to endorse his campaign, Reverend Jackson called upon

¹²¹ *Id.*

¹²² Jca325, *Jeremiah Wright - Hillary Clinton ain't never been called . . .*, YOUTUBE (Mar. 12, 2008), <http://www.youtube.com/watch?v=hAYe7MT5BxM>. The sermon was preached at Trinity United Church of Christ on December 25, 2007. See Suzanne Sataline, *Obama Pastors' Sermons May Violate Tax Laws*, WALL ST. J., Mar. 10, 2008, at A1.

¹²³ Jca325, *supra* note 122.

¹²⁴ See Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145, 156–57 (2006).

churches to coordinate major campaign fundraising efforts: “Leading up to Super Bowl Sunday, the Jackson campaign distributed flyers and encouraged church members to bring donations for Jackson’s campaign to church that Sunday. Campaign offerings were then collected separately from regular church donations by many churches.”¹²⁵ Again, the IRS chose not to investigate this potential violation of the Johnson Amendment.

Contrast these situations with the much-reported cases involving All Saints Episcopal Church in Pasadena, California, and Warroad Community Church in Warroad, Minnesota.¹²⁶ These churches were investigated by the IRS for statements of support or opposition from the pulpit while Jeremiah Wright and Jesse Jackson were never questioned, despite widespread reporting in the media of their statements and actions. Also contrast Jesse Jackson’s campaign with the IRS’s investigation of Jimmy Swaggart Ministries during the same election cycle.¹²⁷ While Jackson’s campaigning in churches was ongoing and widely reported in the media, the IRS took action against Jimmy Swaggart Ministries for participating in Pat Robertson’s presidential campaign.¹²⁸ The IRS even went so far as to issue a public warning to the religious community after the incident, stating that Swaggart’s endorsement of Robertson violated the Johnson Amendment.¹²⁹ Yet the IRS never took action or publicly warned any of the churches associated with Jesse Jackson’s campaign. These few examples alone illustrate that the IRS’s record of enforcing the Johnson Amendment is not uniform, precise, or even-handed.

D. Political Activities Compliance Initiative

Faced with complaints about its uneven and spotty enforcement record, the IRS launched a new program during the 2004 election cycle called the Political Activities Compliance Initiative (“PACI”).¹³⁰ The IRS’s goal for PACI was to review allegations of political intervention on an

¹²⁵ *Id.*

¹²⁶ See *supra* notes 97–104 and accompanying text.

¹²⁷ See 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, 249–50 (1997).

¹²⁸ *Id.* at 250.

¹²⁹ *Id.*

¹³⁰ INTERNAL REVENUE SERV., POLITICAL ACTIVITIES COMPLIANCE INITIATIVE EXECUTIVE SUMMARY 2 (2006), available at www.irs.gov/pub/irs-tege/exec_summary_paci_final_report.pdf.

expedited basis.¹³¹ By doing this, the IRS hoped to deter wrongdoers and establish a more active enforcement presence.¹³²

In 2004, PACI investigated 110 nonprofit organizations, including 47 churches.¹³³ Of the churches that were examined, thirty-seven were found to have violated the Johnson Amendment and were either given a written advisory opinion or assessed an excise tax; no church lost its tax-exempt status.¹³⁴ The 2004 PACI was successful in the IRS's view, and it recommended that the program be continued for the 2006 election cycle.¹³⁵

In 2006, PACI handled 237 referrals but only selected 100 for investigation, including 44 churches.¹³⁶ When the 2006 PACI report was issued in March 2007, sixty cases remained open; however, the IRS reported that four churches received written advisories and that ten churches had their files closed because political intervention was not substantiated.¹³⁷ Once again, no church had its tax-exempt status revoked.¹³⁸

After 2006, the PACI program became decidedly less energetic and seemingly wandered about in the bureaucratic maze of the IRS without any identifiable goal. The IRS continued PACI in 2008 and noted that the Tax-Exempt/Government Entities Commissioner requested a report on the 2008 program by March 31, 2009, including suggestions for the future direction of PACI.¹³⁹ But as of this Article, the PACI report for 2008 has never been released,¹⁴⁰ and no IRS explanation has ever been given for this failure. For some unknown and unstated reason, the IRS has apparently lost interest in its PACI program and no longer has the will to put substantial effort into it. There has also been no

¹³¹ *Id.*

¹³² INTERNAL REVENUE SERV., FINAL REPORT: POLITICAL ACTIVITIES COMPLIANCE INITIATIVE 1 (2006), available at http://www.irs.gov/pub/irs-tege/final_paci_report.pdf.

¹³³ INTERNAL REVENUE SERV., 2004 POLITICAL ACTIVITY COMPLIANCE INITIATIVE (PACI) SUMMARY OF RESULTS 1 (2006), available at http://www.irs.gov/pub/irs-tege/one_page_statistics.pdf.

¹³⁴ *Id.*

¹³⁵ FINAL REPORT, *supra* note 132, at 25.

¹³⁶ INTERNAL REVENUE SERV., 2006 POLITICAL ACTIVITIES COMPLIANCE INITIATIVE REPORT 3 (2007), available at http://www.irs.gov/pub/irs-tege/2006paci_report_5-30-07.pdf.

¹³⁷ *Id.* at 5.

¹³⁸ *Id.*

¹³⁹ Letter from Lois G. Lerner, Dir., Exempt Orgs., to Marsha Ramirez, Dir., Examinations; Rob Choi, Dir., Rulings & Agreements; and Bobby Zarin, Dir., Customer Educ. & Outreach (Apr. 17, 2008), available at http://www.irs.gov/pub/irs-tege/2008_paci_program_letter.pdf.

¹⁴⁰ See IRS Unsure When PACI Report Will be Released, OMB WATCH, <http://www.ombwatch.org/node/9864> (last visited Apr. 6, 2012).

communication from the IRS regarding whether it will continue the PACI program for the 2012 election cycle.¹⁴¹

The PACI program's fitful "stop and start" history demonstrates a lack of commitment on the part of the IRS to engage in any sustained and measured enforcement efforts of the Johnson Amendment. Considering also the vague and far-reaching pronouncements by the IRS concerning the Johnson Amendment, it seems that the IRS is suffering from a split personality disorder—preferring to make bold, vague, and far-reaching statements regarding what conduct violates the Johnson Amendment while refusing to enforce the law with any real precision or accuracy. The IRS appears to prefer a system of enforcement that relies almost exclusively on intimidation instead of actual interpretation and enforcement in individual cases. And all this is going on while the IRS studiously avoids any court confrontation over the very serious constitutional issues involved in enforcing the Johnson Amendment. It is to those constitutional problems we now turn.

III. THE UNCONSTITUTIONALITY OF THE JOHNSON AMENDMENT IN LIGHT OF RECENT SUPREME COURT PRECEDENT

As noted earlier, a number of authors and legal scholars have concluded that the Johnson Amendment violates the Free Speech Clause,¹⁴² the Free Exercise Clause,¹⁴³ the Establishment Clause,¹⁴⁴ the Equal Protection Clause,¹⁴⁵ the Federal Religious Freedom Restoration Act,¹⁴⁶ and the unconstitutional conditions doctrine.¹⁴⁷

¹⁴¹ In their report on PACI, scholars, Nina Crimm and Laurence Winer, expressed, "Despite the IRS's efforts, spiritual leaders of houses of worship continue to voice their frustrations regarding the potential for 'selective prosecution' by the IRS and complain that the vagueness of proffered IRS interpretations leaves them in positions of unwittingly engaging in impermissible political campaign speech or over-censoring themselves." CRIMM & WINER, *supra* note 17, at 144.

¹⁴² See, e.g., Keith S. Blair, *Praying for a Tax Break: Churches, Political Speech, and the Loss of Section 501(c)(3) Tax Exempt Status*, 86 DENV. U. L. REV. 405, 423 (2009); Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217, 254 (1992); Jeffrey Mikell Johnson, *The 501(c)(3) Campaign Prohibition as Applied to Churches: A Consideration of the Prohibition's Rationale, Constitutionality, and Possible Alternatives*, 2 LIBERTY U. L. REV. 557, 574–75 (2008); Smith, *supra* note 87, at 78–81.

¹⁴³ See, e.g., Blair, *supra* note 142, at 423–24; Johnson, *supra* note 142, at 575–77; Allan J. Samansky, *Tax Consequences When Churches Participate in Political Campaigns*, 5 GEO. J.L. & PUB. POL'Y 145, 153, 180 (2007); Smith, *supra* note 87, at 81–84; Voyles, *supra* note 127, at 239.

¹⁴⁴ See, e.g., Johnny Rex Buckles, *Does the Constitutional Norm of Separation of Church and State Justify the Denial of Tax Exemption to Churches That Engage in Partisan Political Speech?*, 84 IND. L.J. 447, 479–80 (2009); Johnson, *supra* note 142, at 577–80; Samansky, *supra* note 143, at 152; Bruch, *supra* note 101, at 1278.

¹⁴⁵ See, e.g., Voyles, *supra* note 127, at 245–50.

¹⁴⁶ See, e.g., Kemmitt, *supra* note 124, at 162–63; Mayer, *supra* note 78, at 1216.

It is not the intent of this Article to repeat what those able authors have already articulated. Rather, this Article will analyze the constitutionality of the Johnson Amendment in light of recent Supreme Court decisions in *Citizens United v. FEC*, *Arizona Christian School Tuition Organization v. Winn*, and *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*. These cases provide substantial guidance and support to the argument that the Johnson Amendment is hopelessly unconstitutional.

A. *Citizens United v. FEC*

In *Citizens United v. FEC*, the Supreme Court struck down as unconstitutional a portion of the Bipartisan Campaign Reform Act (“BCRA”)¹⁴⁸ that prohibited “corporations . . . from using their general treasury funds to make independent expenditures for speech defined as an ‘electioneering communication’ or for speech expressly advocating the election or defeat of a candidate.”¹⁴⁹ Violators of the law were punished through civil and criminal penalties.¹⁵⁰

Citizens United was a nonprofit corporation that produced a film entitled *Hillary: The Movie*.¹⁵¹ It wanted to make the movie available to video-on-demand cable subscription customers within thirty days of the 2008 primary elections, but was afraid that the movie would be deemed by the Federal Elections Commission (“FEC”) to violate the law as an “electioneering communication” and thus subject it to civil and criminal penalties.¹⁵² Consequently, the corporation filed suit to have the electioneering communications prohibition struck down as unconstitutional. The Supreme Court agreed and issued an opinion striking down the law that is likely one of its strongest precedents on free speech.¹⁵³

In order to understand the application of *Citizens United* to the Johnson Amendment, it is best to address the Court’s opinion in sections of analysis, showing how each part has direct application to the unconstitutionality of the Johnson Amendment.

¹⁴⁷ See, e.g., CRIMM & WINER, *supra* note 17, at 281–82.

¹⁴⁸ Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b (2006).

¹⁴⁹ 130 S. Ct. 876, 886 (2010).

¹⁵⁰ 2 U.S.C. § 437g(d) (2006).

¹⁵¹ *Citizens United*, 130 S. Ct. at 886–87.

¹⁵² *Id.* at 888. The term “electioneering communication” was defined as “any broadcast, cable, or satellite communication” that ‘refers to a clearly identified candidate for Federal office’ and is made within 30 days of a primary or 60 days of a general election.” *Id.* at 887 (quoting 2 U.S.C. § 434(f)(3)(A) (2006)).

¹⁵³ *Id.* at 917; see also Joel M. Gora, *The First Amendment . . . United*, 27 GA. ST. U. L. REV. 935, 987 (2011) (concluding that the *Citizens United* decision is a “landmark of political freedom”).

1. Political Speech Is Essential and Should Not Be Chilled.

a. Citizens United

In *Citizens United*, the Supreme Court placed great emphasis on the importance of political speech and also condemned attempts to chill speech through vague regulations or complex regulatory schemes.¹⁵⁴

The BCRA contained a requirement that electioneering communications must be received by 50,000 or more persons to fall within the ambit of the statute.¹⁵⁵ In an attempt to preserve its constitutionality, the amici in *Citizens United* urged the Court to limit the reach of this requirement to situations where there is a plausible likelihood that the communication will be seen by 50,000 or more voters, as opposed to simply being technologically capable of being seen.¹⁵⁶ The Court rejected that argument, noting the importance of political speech and of protecting that speech from being chilled:

Prolix laws chill speech for the same reason that vague laws chill speech: People “of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.” The Government may not render a ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation.¹⁵⁷

Similarly, the Court rejected the argument that, because movies shown through video-on-demand have a lower risk of distorting the political process than do television advertisements, it could simply strike down the prohibition as applied to movies and leave it in place for television advertisements.¹⁵⁸ In rejecting this argument, the Court refused to draw lines based on the particular technology used to disseminate speech.¹⁵⁹ The Court observed that drawing such lines would require “substantial litigation over an extended time” and that “[t]he interpretive process itself would create an inevitable, pervasive, and

¹⁵⁴ *Citizens United*, 130 S. Ct. at 889, 898–99.

¹⁵⁵ 2 U.S.C. § 434(f)(3)(C) (2006).

¹⁵⁶ *Citizens United*, 130 S. Ct. at 889.

¹⁵⁷ *Id.* (alteration in original) (citation omitted) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). The Court reasoned,

In addition to the costs and burdens of litigation, this result would require a calculation as to the number of people a particular communication is likely to reach, with an inaccurate estimate potentially subjecting the speaker to criminal sanctions. The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day.

Id.

¹⁵⁸ *Id.* at 890.

¹⁵⁹ *Id.*

serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable.”¹⁶⁰

The Court also dismissed an argument that it could carve out an exception to the prohibition for corporate political speech funded overwhelmingly by individuals.¹⁶¹ The Court noted that the “series of steps suggested [to limit the reach of the law in this way] would be difficult to take in view of the language of the statute,”¹⁶² but more importantly, it stated, “Applying this standard would thus require case-by-case determinations. But archetypical political speech would be chilled in the meantime. ‘First Amendment freedoms need breathing space to survive.’ We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned”¹⁶³ In rejecting all of these arguments to limit the reach of the BCRA prohibition on electioneering communications, the Court concluded that it could not “resolve [the] case on a narrower ground without chilling political speech, *speech that is central to the meaning and purpose of the First Amendment.*”¹⁶⁴

In assessing the importance of political speech, the Court rejected deciding the case on an as-applied basis and noted the uncertainty that such an approach would allow.¹⁶⁵ It pointed to the fact that elections frequently require the ability for citizens to speak on an expedited basis.¹⁶⁶ Requiring speakers to file a lawsuit to litigate the permissibility of their speech would frustrate the contemporaneous nature of speech in the midst of heated political campaigns.¹⁶⁷

The Court also precluded this argument under the rationale that because speech itself is of primary importance to the integrity of the election process, “[a]s additional rules are created for regulating political speech, any speech arguably within their reach is chilled.”¹⁶⁸ Noting the complexity of the FEC’s regulations and the deference given by federal courts to administrative determinations, the Supreme Court labeled the restrictions as “onerous” and equated them to prior restraints on speech.¹⁶⁹ It went on to explain that “[w]hen the FEC issues advisory opinions that prohibit speech, [m]any persons, rather than undertake

¹⁶⁰ *Id.* at 891.

¹⁶¹ *Id.*

¹⁶² *Id.* at 892.

¹⁶³ *Id.* (citations omitted) (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 468–69 (2007)).

¹⁶⁴ *Id.* (emphasis added) (citing Morse v. Frederick, 551 U.S. 393, 403 (2007)).

¹⁶⁵ *Id.* at 894–95.

¹⁶⁶ *Id.* at 895.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 895–96.

the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech”¹⁷⁰ And, to the Court, the effect was that the regulations harmed “not only [the speakers] but society as a whole, which is deprived of an uninhibited marketplace of ideas.”¹⁷¹

The FEC’s regulatory scheme allowed it to select whatever speech it deemed safe for public consumption through the application of ambiguous tests.¹⁷² This scheme required FEC officials to “pore over each word of a text to see if, in their judgment, it accords with the 11-factor test they have promulgated. This is an unprecedented governmental intervention into the realm of speech.”¹⁷³

The importance of political speech was the primary rationale the *Citizens United* Court used in striking down the BCRA prohibition on electioneering communications. In praise of the freedom of political speech, the Court declared,

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment “has its fullest and most urgent application to speech uttered during a campaign for political office.”¹⁷⁴

Furthermore, the Court noted that “it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.”¹⁷⁵ Citing well-established Court precedent, it also stated that “[p]olitical speech is ‘indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.’”¹⁷⁶

The vital importance of political speech was the polestar of the *Citizens United* decision, and the Court took great pains to ensure that political speech was not chilled by overly burdensome regulations and regulatory or interpretive schemes that required case-by-case determinations without setting forth with precision what speech was prohibited. In fact, the Court even went so far as to say that complex and

¹⁷⁰ *Id.* at 896 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (alteration in original)).

¹⁷¹ *Id.* (quoting *Hicks*, 539 U.S. at 119).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 898 (citation omitted) (quoting *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)) (internal quotation marks omitted).

¹⁷⁵ *Id.* at 899.

¹⁷⁶ *Id.* at 904 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)).

vague laws that require determinations by government officials were functional prior restraints.

The Court has consistently, and in very strong terms, condemned prior restraint schemes: “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”¹⁷⁷ Moreover, the Court has warned, “[P]rior restraints on speech . . . are the most serious and the least tolerable infringement on First Amendment rights.”¹⁷⁸ This is because society “prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.”¹⁷⁹ Historically, the Court has also noted that “it has been generally, if not universally, considered . . . the chief purpose of the [First Amendment] to prevent previous restraints”¹⁸⁰ In *Lovell v. City of Griffin*, it reaffirmed that the prevention of prior restraints was a “leading purpose” in the adoption of the First Amendment.¹⁸¹ And in *Carroll v. President & Commissioners of Princess Anne*, the Court noted that “[p]rior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement.”¹⁸² Needless to say, this universal disapproval of prior restraints on speech is deeply entrenched in First Amendment doctrine.

b. Application to the Johnson Amendment

It is evident that the *Citizens United* opinion applies to the Johnson Amendment and raises serious questions regarding the constitutionality of that law.

First, the terms of the Johnson Amendment are as ill-defined as the term “electioneering communication” in the BCRA. Terms such as “participate in” or “intervene in” in the Johnson Amendment lack precision. Scholars have noted the vagueness of these terms in the law,¹⁸³ and the IRS has even admitted that “[t]he Code contains no bright line test for evaluating political intervention; it requires careful balancing of all of the facts and circumstances.”¹⁸⁴ The IRS’s “facts and circumstances” test exacerbates the vagueness of the Johnson

¹⁷⁷ *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980) (Burger, J., dissenting) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)) (internal quotation marks omitted).

¹⁷⁸ *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1975).

¹⁷⁹ *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

¹⁸⁰ *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

¹⁸¹ 303 U.S. 444, 451–52 (1938) (citing *Patterson v. Colorado*, 205 U.S. 454, 462 (1907); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 245–46 (1936); *Near*, 283 U.S. at 713–16).

¹⁸² 393 U.S. 175, 181 (1968).

¹⁸³ See, e.g., *Kingsley & Pomeranz*, *supra* note 79, at 64–65.

¹⁸⁴ FINAL REPORT, *supra* note 132, at 1.

Amendment and highlights the fact that there can be no precise interpretation of its terms.

Second, the IRS has a complex regulatory scheme for enforcing the Johnson Amendment. The “facts and circumstances” test mandates that governmental agents use their subjective interpretations of particular speech by a pastor or church to determine whether it violates the Johnson Amendment. Similar to the BCRA’s electioneering communication prohibition addressed in *Citizens United*, the IRS, like the FEC, applies ambiguous tests in enforcing the Johnson Amendment, and government agents are required to “pore over each word of a text to see if, in their judgment, it accords” with the agency’s test that contains numerous factors.¹⁸⁵ The IRS has created more than one multi-factor test to determine whether speech violates the Johnson Amendment. For instance, the IRS has a seven-factor test to determine whether a communication is permissible “issue advocacy” or unlawful “political campaign intervention.”¹⁸⁶ This test is just as complex and susceptible to subjective determinations as the FEC’s test for determining whether a communication is an “electioneering communication.” Thus, the same dangers exist in the IRS’s enforcement scheme of the Johnson Amendment as in the FEC’s enforcement of the BCRA: chill on speech, self-censorship, and vague and arbitrary enforcement of the law.

The IRS has also exacerbated the vagueness of the Johnson Amendment by its various interpretations, guidance, and pronouncements throughout the years. As discussed previously, the IRS states that there is such a thing as “indirect participation” in a political campaign.¹⁸⁷ Yet there is no definition of what is considered “indirect,” and the IRS has issued no guidance to cabin that phrase and prevent its abuse by government officials tasked with reviewing speech for compliance with the law. At least some IRS training materials also state that the Johnson Amendment can be violated by the use of “code words,” yet there is no attempt to define that term or in any way limit its application.¹⁸⁸ In these ways, the enforcement scheme adopted and pursued by the IRS for the Johnson Amendment is even worse than that of the FEC’s scheme under the BCRA. The definition of what speech actually violates the Johnson Amendment has become so blurred as to be indecipherable. The predictable result of this sorry state of affairs is the undeniable chill on speech and widespread self-censorship among those

¹⁸⁵ See *Citizens United v. FEC*, 130 S. Ct. 876, 896 (2010).

¹⁸⁶ Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1424.

¹⁸⁷ Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (2009).

¹⁸⁸ See Kindell & Reilly, *supra* note 82, at 411. Instead of providing clarity to define “code words,” the IRS only states that code words used in the context of political campaigns “are used with the intent of conjuring favorable or unfavorable images.” *Id.* n.6.

organizations and individuals that fall within the Johnson Amendment's tyrannical domain.

Finally, the Supreme Court in *Citizens United* placed great emphasis on the importance of political speech. To be sure, *Citizens United* was not the first time the Court had made similar statements;¹⁸⁹ however, the case stands as one of the Court's strongest declarations of the foundational importance of political speech. While speech by churches about candidates or elections might arguably be characterized as political speech, it is more properly characterized as religious speech since it is motivated and undergirded by the religious doctrine of the church. The Supreme Court has consistently held that religious speech occupies a high estate under the First Amendment: "Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."¹⁹⁰

Thus, religious speech is at least as protected, if not more protected, than political speech. Given this fact, the analysis in *Citizens United* applies with equal, if not greater, force to the Johnson Amendment. The restriction that the Johnson Amendment imposes on religious speech is just as egregious and deserving of condemnation as the unconstitutional restriction that the BCRA imposed on political speech.

2. Speaker Identity Restrictions Are Invalid Under the First Amendment.

a. *Citizens United*

Central to the Court's holding in *Citizens United* is that speaker identity restrictions on speech are invalid. In the context of *Citizens*

¹⁸⁹ See, e.g., *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."); see also *Brown v. Hartlage*, 456 U.S. 45, 53 (1982) ("The free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy—the political campaign."); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."); *Pennekamp v. Florida*, 328 U.S. 331, 346 (1946) ("Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve.").

¹⁹⁰ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (citing *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)). The Court further explained, "Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Id.*

United, this meant that the BCRA prohibition that applied to restrict the speech of corporations, but not others, was unconstitutional.

The Court reaffirmed that restrictions distinguishing among speakers are prohibited under the First Amendment.¹⁹¹ The Court noted that such speaker identity restrictions are “all too often simply a means to control content.”¹⁹² It concluded, “We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.”¹⁹³

As support for its conclusion, the Court pointed to the history of free speech and the fact that, “[a]t the founding, speech was open, comprehensive, and vital to society’s definition of itself; there were no limits on the sources of speech and knowledge.”¹⁹⁴ It recognized that the BCRA prohibition was censorship that was “vast in its reach” and that the government had “muffle[d] the voices that best represent the most significant segments of the economy.”¹⁹⁵ The Court reasoned, “By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.”¹⁹⁶ In condemning the BCRA’s electioneering communications prohibition as unconstitutional, the Court went on to state,

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses

¹⁹¹ *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (citing *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)).

¹⁹² *Id.* at 899. The Court explained,

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

Id.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 906.

¹⁹⁵ *Id.* at 907 (alteration in original) (quoting *McConnell v. FEC*, 540 U.S. 93, 257–58 (2003) (internal quotation marks omitted) (Scalia, J., concurring in part, dissenting in part, concurring in the judgment in part, and dissenting in the judgment in part)).

¹⁹⁶ *Id.*

censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.¹⁹⁷

The Court finally concluded by stating that “the Government may not suppress political speech on the basis of the speaker’s corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”¹⁹⁸

b. Application to the Johnson Amendment

The Supreme Court’s language regarding speaker identity restrictions almost seems calculated to apply directly to the Johnson Amendment. The Court specifically included nonprofit corporations in its opinion.¹⁹⁹ Thus, it is impossible to ignore the application of *Citizens United* to the Johnson Amendment. And, like the political speech doctrine relied upon by the Court in *Citizens United*, the prohibition on speaker identity restrictions applies directly to the Johnson Amendment.

Section 501(c) of the Internal Revenue Code now contains a list of at least twenty-nine categories of entities exempt from federal income taxes.²⁰⁰ Yet out of these categories, only one, that of 501(c)(3), has historically been subject to the restriction of the Johnson Amendment.²⁰¹ This may be owing to the fact that the Amendment was hastily added with no forethought for how it would integrate or synthesize with the remainder of the Code.²⁰² But, whatever the reason, it is plain that the Amendment has historically only applied to one group of entities—those exempt under Section 501(c)(3).

Some may suggest that the reason for this differential treatment is that only Section 501(c)(3) entities receive the double benefit of exemption and tax-deductible contributions.²⁰³ This is not the case, however. Veterans’ organizations are also considered exempt from

¹⁹⁷ *Id.* at 908.

¹⁹⁸ *Id.* at 913.

¹⁹⁹ *Id.* (“No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.” (emphasis added)).

²⁰⁰ I.R.C. § 501(c) (2006 & Supp. IV 2011).

²⁰¹ Section 501(c)(29), recently added to the Internal Revenue Code by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), contains a condition similar to that of the Johnson Amendment. See § 501(c)(29)(B)(iv) (Supp. IV 2011).

²⁰² For a discussion of how the Johnson Amendment was added with no attempt to synthesize its provisions with the rest of the tax code, see CRIMM & WINER, *supra* note 17, at 114–15. Repeated amendments were necessary in later years to integrate the Johnson Amendment fully into the Code. *Id.*

²⁰³ See, e.g., Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. Rev. 843, 866 (2001).

income taxes and are allowed to receive deductible contributions.²⁰⁴ These organizations are not subject to the Johnson Amendment and yet are still allowed to endorse or oppose candidates without endangering their tax-exempt status.²⁰⁵

The Johnson Amendment sets up a speaker-identity restriction where certain nonprofit corporations are prohibited from speaking in such a way as to support or oppose political candidates but others are not. Only organizations that are “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals” have historically been prohibited from supporting or opposing candidates for office.²⁰⁶ All others have been allowed to support or oppose candidates for office and remain exempt and, at least in the case of veterans’ organizations, receive deductible contributions. This is a classic speaker-identity restriction, and *Citizens United* seems to indicate that the Supreme Court will invalidate such restrictions as violative of the Free Speech Clause.

3. Corporations Cannot Have Their Speech Restricted by Requiring Them to Establish a PAC to Speak Politically.

a. Citizens United

In *Citizens United*, the Court rejected the argument that, because corporations still had the ability to speak out politically by establishing a Political Action Committee (“PAC”), the BCRA electioneering communication prohibition did not violate the First Amendment.²⁰⁷ The Court held, in no uncertain terms, that the prohibition “is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak.”²⁰⁸

After cataloging the burdensome process of setting up a PAC and of complying with PAC regulations, the Court concluded that, “[g]iven the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a

²⁰⁴ See § 501(c)(19) (providing tax exemption); I.R.C. § 170(c)(3) (2006) (providing deductibility of contributions).

²⁰⁵ There may be a small tax to be paid by the organization for monies expended in supporting or opposing candidates. See I.R.C. § 527(f) (2006). But that does not change the fact that these organizations can endorse or oppose candidates while maintaining their exemption and their ability to receive deductible contributions.

²⁰⁶ § 501(c)(3).

²⁰⁷ *Citizens United v. FEC*, 130 S. Ct. 876, 897 (2010).

²⁰⁸ *Id.* (citing *McConnell v. FEC*, 540 U.S. 93, 330–33 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in the judgment in part)).

current campaign.”²⁰⁹ Thus, the fact that a corporation has an alternative way to speak (through the establishment of a PAC) does not alleviate the unconstitutional burden on free speech associated with a ban on the corporation itself being able to speak. The burdensome regulations associated with a PAC and the fact that a PAC is not a substitute for the corporation’s ability to speak mean that any restriction on political speech by corporations cannot be justified by pointing to the fact that the corporation may speak through an alternative channel.

b. Application to the Johnson Amendment

Some scholars have attempted to justify the Johnson Amendment’s ban on speech by arguing that churches can simply create additional, separate organizations to speak for them in the political realm.²¹⁰ This idea comes from the Supreme Court’s decision in *Regan v. Taxation With Representation of Washington* where the Court upheld the lobbying restrictions in Section 501(c)(3) against a constitutional challenge.²¹¹ After upholding the restrictions, the *Regan* Court noted that a Section 501(c)(3) organization could still receive tax-deductible contributions for its lobbying activities by creating a separate Section 501(c)(4) organization.²¹²

Justice Blackmun wrote a concurring opinion in *Regan* where he made it plain that, in his view, “[t]he constitutional defect that would inhere in § 501(c)(3) alone is avoided by § 501(c)(4)” where the charitable goals of the Section 501(c)(3) organization can be pursued through lobbying by an affiliated Section 501(c)(4) organization.²¹³ Justice Blackmun reasoned, “Any significant restriction on this channel of communication, however, would negate the saving effect of § 501(c)(4). It must be remembered that § 501(c)(3) organizations retain their constitutional right to speak and to petition the Government.”²¹⁴ He issued, however, the following caveat:

Should the IRS attempt to limit the control these organizations’ exercise over the lobbying of their § 501(c)(4) affiliates, the First Amendment problems would be insurmountable. It hardly answers one person’s objection to a restriction on his speech that another

²⁰⁹ *Id.* at 897–98.

²¹⁰ See, e.g., Douglas H. Cook, *The Politically Active Church*, 35 LOY. U. CHI. L.J. 457, 473–74 (2004); Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1324–26 (2007).

²¹¹ 461 U.S. 540, 545, 551 (1983).

²¹² *Id.* at 544.

²¹³ *Id.* at 552 (Blackmun, J., concurring); see also *id.* at 553 (“A § 501(c)(3) organization’s right to speak is not infringed, because it is free to make known its views on legislation through its § 501(c)(4) affiliate without losing tax benefits for its nonlobbying activities.”).

²¹⁴ *Id.*

person, outside his control, may speak for him. Similarly, an attempt to prevent § 501(c)(4) organizations from lobbying explicitly on behalf of their § 501(c)(3) affiliates would perpetuate § 501(c)(3) organizations' inability to make known their views on legislation without incurring the unconstitutional penalty. Such restrictions would extend far beyond Congress' mere refusal to subsidize lobbying. In my view, any such restriction would render the statutory scheme unconstitutional.²¹⁵

The Court has subsequently adopted Justice Blackmun's rationale as the significant holding of *Regan*.²¹⁶ The Court of Appeals for the District of Columbia, in *Branch Ministries*, also relied upon Justice Blackmun's concurrence in *Regan* to justify upholding the Johnson Amendment against a free exercise challenge.²¹⁷ As evidence that the church's free exercise rights were not substantially burdened, the D.C. Circuit specifically relied upon the fact that the church could initiate a series of steps to create a Section 501(c)(4) organization, which could in turn create a Section 527 political organization.²¹⁸

The *Citizens United* case changes this legal landscape rather dramatically. It is now clear that relying on a separate organization to speak for the Section 501(c)(3) organization is not sufficient to save a statute from unconstitutionality.²¹⁹ *Citizens United* is unequivocal in its condemnation of a scheme that does not permit a corporation to speak for itself but forces that speech into a separate organization that can only be set up after a series of burdensome and time-consuming regulations have been met.²²⁰ Instead, *Citizens United* mandates that the corporation *itself* must be permitted to speak in order for any law purporting to regulate the speech of the corporation to be considered constitutional.²²¹

Although the Court did not overrule *Regan* in *Citizens United*, it is doubtful that the *Regan* analysis would now apply with any force in a challenge to the Johnson Amendment. It is even less applicable in the case of a pastor preaching a sermon from his pulpit during a Sunday morning service. That sermon is quintessential religious speech and cannot be shifted over to a separate organization. Requiring a pastor to refrain from specifically applying Scripture or church teaching to a

²¹⁵ *Id.* at 553–54 (citation omitted).

²¹⁶ See *Rust v. Sullivan*, 500 U.S. 173, 197–98 (1991); *FCC v. League of Women Voters*, 468 U.S. 364, 399–400 (1984).

²¹⁷ *Branch Ministries v. Rossotti*, 211 F.3d 137, 143 (D.C. Cir. 2000). Notably, the church in *Branch Ministries* did not raise a free speech claim. Thus, the court had no opportunity to decide whether the Johnson Amendment violated the Free Speech Clause.

²¹⁸ *Id.* at 143.

²¹⁹ *Citizens United v. FEC*, 130 S. Ct. 876, 912–13 (2010).

²²⁰ *Id.*

²²¹ *Id.*

candidate or election and instead to wait and make that application through a separate Section 501(c)(4) organization makes no practical sense and, in fact, violates the free speech and free exercise rights of churches. There is no substitute for the spiritual guidance of a pastor speaking as the head of his church. That simply cannot be replaced by a speech that is made at a separate meeting of a different Section 501(c)(4) organization.

Also, Justice Blackmun's concurrence in *Regan* rested on the assumption that the lobbying restrictions on Section 501(c)(3) organizations were only constitutional because the Section 501(c)(3) organization could control, and make it views known through, the Section 501(c)(4) organization.²²² That may work in the lobbying context where the prohibition against lobbying is not absolute. But that is an insufficient mechanism to avoid the absolute candidate prohibition of the Johnson Amendment. In its training materials, the IRS has explicitly stated that a Section 501(c)(3) organization (or its officials) may not in any way direct, assist, or coordinate the activities of a non-Section 501(c)(3) organization for partisan political purposes.²²³ Thus, the rationale of *Regan* simply does not apply in relation to the Johnson Amendment. And *Citizens United* makes clear that the Court has stepped away from allowing speech regulations to stand under the rationale that the corporation can simply have another organization speak for it. The *Citizens United* case requires that a nonprofit or for-profit corporation be allowed to speak for itself, and any law or regulation prohibiting such speech is unconstitutional.

4. Favorable Status of Corporations Cannot Justify Restrictions on Speech.

a. *Citizens United*

Finally, the *Citizens United* opinion categorically rejects any attempt to justify speech restrictions on the ground that because corporations get favorable status under state law, they can be more heavily regulated.²²⁴

In *Austin v. Michigan Chamber of Commerce*, the Court had previously drawn somewhat of a distinction between wealthy individuals and corporations based on the fact that “[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and

²²² *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 552 (1983) (Blackmun, J., concurring).

²²³ See Ward L. Thomas & Judith E. Kindell, *Affiliations Among Political, Lobbying and Educational Organizations*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FY 2000, at 255, 265 (1999), available at <http://www.irs.gov/pub/irs-tege/eotopics00.pdf>.

²²⁴ *Citizens United*, 130 S. Ct. at 905.

favorable treatment of the accumulation and distribution of assets.”²²⁵ The *Citizens United* Court, however, rejected this distinction in the context of laws regulating free speech: “It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.”²²⁶

This issue will be addressed more fully below in discussing the *Arizona Christian School Tuition Organization v. Winn* case.²²⁷ But, it is important to note here that this part of the *Citizens United* opinion seems to indicate a philosophical assumption of a majority of the Court that simply granting favorable status to a corporation cannot justify placing restrictions on the corporation’s speech. Consequently, a corporation cannot be required to give up those favorable conditions in order to exercise its First Amendment rights.

b. Application to the Johnson Amendment

This portion of the *Citizens United* opinion lays the foundation for the Court’s retreat from the “exemption as subsidies” approach to tax exemptions. Additionally, it signals the Court’s willingness to deny as unconstitutional attempts to require an individual to surrender favorable status or benefits in order to exercise First Amendment rights.

The application of this line of reasoning to the Johnson Amendment is evident. A Section 501(c)(3) nonprofit corporation cannot be expected to give up its favorable tax treatment in order to exercise its First Amendment rights. Stated differently, Congress cannot condition the exercise of First Amendment rights on the surrender of tax-exempt status or benefits. Doing so runs afoul of *Citizens United*.

Some may argue in this context that there is a major difference between *Citizens United* and the Johnson Amendment, that the former dealt with a criminal prohibition on speech, and that the latter simply conditions receipt of tax exemption on refraining from speaking. The argument would emphasize that there is a major difference between a criminal prohibition and a condition on receipt of tax-exempt status. Proponents of this line of thinking have argued that a Section 501(c)(3) organization is not prohibited from speaking; it just cannot speak and obtain favorable tax status.²²⁸

²²⁵ 494 U.S. 652, 658–59 (1990).

²²⁶ *Citizens United*, 130 S. Ct. at 905 (quoting *Austin*, 494 U.S. at 680 (Scalia, J., dissenting)).

²²⁷ See discussion *infra* Part III.B.

²²⁸ See, e.g., Robert Maddox, *Churches & Taxes: Should We Praise the Lord for Tax Exemption?*, 22 CUMB. L. REV. 471, 474 (1992) (“Some church leaders say that they feel muzzled by this rule and argue that it restricts their right to offer prophetic witness on social and moral issues. But none to my knowledge have felt strongly enough about the issue to voluntarily forego tax exemption.”).

Yet *Citizens United* rejects this argument explicitly. Beyond the Court's statement that government cannot condition the receipt of benefits or favorable status on the surrender of First Amendment rights,²²⁹ the Court made it clear that "[l]aws enacted to control or suppress speech may operate at different points in the speech process."²³⁰ It then went on to offer several notable examples of invalid restrictions occurring throughout different stages of the speech process, including "seeking to exact a cost after the speech occurs."²³¹

Seeking to exact a cost after speech occurs is exactly the scheme propagated by the Johnson Amendment. The IRS seeks to exact a financial cost on Section 501(c)(3) organizations for speech that violates the Johnson Amendment, either through an excise tax pursuant to Section 4955,²³² or by revocation of exemption, which requires forfeiting exempt status and deductibility of contributions. And the application of the IRS's "facts and circumstance" test ensures that the financial cost for the speech occurs only *after* the speech is uttered.

The *Citizens United* Court also gave an expansive list of examples of what it would consider unconstitutional censorship of free speech, including one scenario particularly relevant to the Johnson Amendment: "[T]he American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech."²³³ If prohibiting the American Civil Liberties Union from creating a website that tells the public to vote for a political candidate is a "classic example of censorship," then so is a regulation that penalizes a pastor for a sermon that specifically applies Scripture or church teachings to a candidate or election in a way that violates the Johnson Amendment. This is as much of a "classic example of censorship" as the examples identified by the Court in *Citizens United*.

Thus, the *Citizens United* Court has signaled its unwillingness to allow restrictions on speech that are based on the receipt of a favorable government benefit or status. The Court will not countenance restrictions that condition receipt of that status or benefit on the surrender of First Amendment rights.

In all, the *Citizens United* opinion has important ramifications that apply directly to the Johnson Amendment. The rationale of *Citizens United* is unavoidable and signals serious trouble for the continued vitality of the Johnson Amendment. The Supreme Court continues to

²²⁹ *Citizens United*, 130 S. Ct. at 905.

²³⁰ *Id.* at 896.

²³¹ *Id.* (emphasis added) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 267 (1964)).

²³² I.R.C. § 4955(a)–(c) (2006).

²³³ *Citizens United*, 130 S. Ct. at 897.

march in a direction spelling doom for the Johnson Amendment as indicated by another recent precedent, *Arizona Christian School Tuition Organization v. Winn*.

B. Arizona Christian School Tuition Organization v. Winn

In *Arizona Christian School Tuition Organization v. Winn*, the Supreme Court dismissed on standing grounds a taxpayer challenge under the Establishment Clause to a tax credit given for individuals who contributed money to a student tuition organization that in turn provided scholarships for students to attend private school.²³⁴

Although this case dealt with taxpayer standing under the Establishment Clause and does not have direct application to the Johnson Amendment, it signals an important shift in the Court's theoretical understanding of the government's ability to equate tax credits and, by logical extension, tax exemptions with direct government expenditures or subsidies. This understanding has direct application in relation to the justification frequently used to argue in favor of the constitutionality of the Johnson Amendment, namely that tax exemptions are akin to subsidies. The argument here is that the Johnson Amendment does not restrict speech but rather represents a reasoned approach by Congress to decide that it will not subsidize political speech of nonprofit organizations.²³⁵

The *Winn* Court rejected the plaintiffs' argument that a tax credit was akin to a subsidy or governmental expenditure, which the taxpayers would have standing to challenge under the Establishment Clause.²³⁶ It explained that there is a difference between when the government spends money and “[w]hen the government declines to impose a tax.”²³⁷

The *Winn* Court distinguished between governmental expenditures and tax credits by noting that “[w]hen the government collects and spends taxpayer money, governmental choices are responsible for the transfer of wealth. In that case a resulting subsidy of religious activity is . . . traceable to the government's expenditures.”²³⁸ The Court then contrasted governmental expenditures with Arizona's tax-credit program at issue in *Winn*:

Here, by contrast, contributions result from the decisions of private taxpayers regarding their own funds. Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute

²³⁴ 131 S. Ct. 1436, 1449 (2011).

²³⁵ One should question, though, how reasonable or rational the Johnson Amendment is given its suspect inception. See discussion *supra* Part I.B.

²³⁶ *Winn*, 131 S. Ct. at 1447 (“In [the plaintiffs'] view, the tax credit is . . . best understood as a governmental expenditure. That is incorrect.”).

²³⁷ *Id.*

²³⁸ *Id.*

to STOs. While the State, at the outset, affords the opportunity to create and contribute to an STO, the tax credit system is implemented by private action and with no state intervention. Objecting taxpayers know that their fellow citizens, not the State, decide to contribute and in fact make the contribution.²³⁹

The Court reasoned, “Like contributions that lead to charitable tax deductions, contributions yielding STO tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations.”²⁴⁰

The Court’s rationale applies directly to the case of donations made to churches. Giving to churches is done by private choice, and everyone understands that when a person decides to give a donation to his church, it is not the government giving the money, but the private individual. The Court’s language in *Winn* is extremely close to an outright rejection of the “exemptions as subsidies” argument that is frequently advanced to justify the constitutionality of the Johnson Amendment’s restriction on speech. Scholars argue that the Johnson Amendment can be justified despite its loathsome restriction on speech because the government has simply made a decision not to subsidize political speech of nonprofit organizations.²⁴¹

This argument can be traced back to certain statements made by the Court regarding the subject of tax exemption in prior cases. In *Walz v. Tax Commission*, the Supreme Court upheld a property tax exemption granted to religious organizations.²⁴² The plaintiff in *Walz* contended that the exemption was, in effect, a forced contribution to a religious organization in violation of the Establishment Clause.²⁴³ In other words, the plaintiff argued that the exemption was the equivalent of an unconstitutional direct government subsidy to religion.

The Supreme Court rejected that argument but did acknowledge that “[g]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit . . .”²⁴⁴ The indirect economic benefit did not constitute government sponsorship, however, because “the government does not transfer part of its revenue to churches but simply

²³⁹ *Id.* at 1448.

²⁴⁰ *Id.* The Court went on to criticize the “exemptions as subsidies” argument: “[The plaintiffs’] contrary position assumes that income should be treated as if it were government property even if it has not come into the tax collector’s hands.” *Id.*

²⁴¹ See, e.g., Eric R. Swibel, Comment, *Churches and Campaign Intervention: Why the Tax Man Is Right and How Congress Can Improve His Reputation*, 57 EMORY L.J. 1605, 1609–10 (2008) (“The campaign intervention restriction ensures that government subsidization of organizations through forbearance from tax collection does not extend to certain partisan activity.”).

²⁴² 397 U.S. 664, 680 (1970).

²⁴³ *Id.* at 667.

²⁴⁴ *Id.* at 674.

abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees ‘on the public payroll.’”²⁴⁵ As the *Walz* Court decided, simply granting a tax exemption is not akin to subsidizing the activity of an exempt entity.²⁴⁶

Later, in *Regan v. Taxation With Representation of Washington*, the Court seemed to retreat from this understanding a bit.²⁴⁷ The *Regan* Court gave great weight to the theory that exemptions are like government subsidies and therefore can be more highly regulated. In upholding the lobbying restriction of Section 501(c)(3) against a constitutional challenge, the Supreme Court reasoned, “Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income.”²⁴⁸ The Court did qualify its analysis to some degree: “In stating that exemptions and deductions, on the one hand, are like cash subsidies, on the other, we of course do not mean to assert that they are in all respects identical.”²⁴⁹

The tension between *Walz* and *Regan* represents a theoretical tension inherent in the debate regarding tax exemption. Essentially, from a tax expenditure perspective, tax benefits are economically—and constitutionally—equivalent to direct expenditures of public funds.²⁵⁰ As one proponent of this view explains, “The benefits granted through the tax code have the same value to the recipients as an equal amount of direct government subsidies.”²⁵¹ The counterargument, championed by noted scholar and professor Boris Bittker, is that “[t]here is no way to tax *everything* In specifying the ambit of any tax, the legislature cannot avoid ‘exempting’ those persons, events, activities, or entities that

²⁴⁵ *Id.* at 675.

²⁴⁶ *Id.*

²⁴⁷ 461 U.S. 540, 544 (1983).

²⁴⁸ *Id.* Regarding the lobbying restriction in particular, the Court explained, The system Congress has enacted provides this kind of subsidy to nonprofit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying. In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare.

Id.

²⁴⁹ *Id.* at 544 n.5 (citing *Walz*, 397 U.S. at 674–76 (Brennan, J., concurring)).

²⁵⁰ See, e.g., Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 WAKE FOREST L. REV. 855, 856 (1993); Edward A. Zelinsky, *Are Tax “Benefits” Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379, 399 (1998).

²⁵¹ Adler, *supra* note 250, at 856.

are outside the territory of the proposed tax.”²⁵² Thus, as Bittker argues, “the assertion that an exemption is equivalent to a subsidy is untrue, meaningless, or circular, depending on context, unless we can agree on a ‘correct’ or ‘ideal’ or ‘normal’ taxing structure as a benchmark from which to measure departures.”²⁵³ Tax exemption theory comes from one of two perspectives: Either the government owns all property and “gives back” some by exemptions or tax credits, or the government does not own the property and only takes some private property in taxation to support its needs.

Professor Zelinsky has noted that, in the tax expenditure context, “[t]he Court itself has equivocated, equating tax benefits and direct spending in some constitutional cases but not in others without indicating a rationale for such a seemingly inconsistent approach.”²⁵⁴ The *Winn* case, however, represents the alignment of a majority of the Justices in opposition to tax expenditure analysis. When the Court in *Winn* concluded that “[p]rivate bank accounts cannot be equated with the Arizona State Treasury,”²⁵⁵ it placed itself more in line with *Walz* than with *Regan*, and against tax expenditure analysis for use in constitutional decision-making.

As applied to the Johnson Amendment, *Winn* signals that the Court will reject an argument that the law is constitutional on the theory that a tax exemption is equivalent to a government subsidy and therefore justifies a higher level of government regulation. After *Winn*, it is highly doubtful that the exemptions as subsidies argument can be used to justify speech restrictions. To be sure, *Winn* is a standing case and exists in an era where the current Court seems to be retreating from finding taxpayer standing under the Establishment Clause.²⁵⁶ But *Winn* and its theoretical implications for the exemptions as subsidies argument cannot be ignored.

C. Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC

On January 11, 2012, the United States Supreme Court decided the case of *Hosanna-Tabor Evangelical Lutheran Church & School v.*

²⁵² Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285, 1288 (1969).

²⁵³ *Id.* at 1304.

²⁵⁴ Zelinsky, *supra* note 250, at 380–81.

²⁵⁵ Arizona Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1448 (2011).

²⁵⁶ See, e.g., *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 610 (2007) (refusing to allow taxpayer standing to challenge executive expenditures under the Establishment Clause).

EEOC.²⁵⁷ The case was the Supreme Court's first treatment of the "ministerial exception" from employment discrimination laws.²⁵⁸

The case arose in the context of a lawsuit filed against a Christian school by a teacher who claimed that she had been fired in retaliation for threatening to file an Americans with Disabilities Act ("ADA") lawsuit against the school.²⁵⁹ The Christian school was operated by a Lutheran church that defended against the lawsuit by invoking the "ministerial exception" to employment discrimination laws, arguing that the suit was barred by the First Amendment because the claim at issue involved the employment relationship between the church and one of its ministers.²⁶⁰

The Supreme Court held that the ministerial exception indeed exists and that it is rooted in both the Free Exercise and Establishment Clauses.²⁶¹ The Court concluded that the ministerial exception barred the teacher's claim and prohibited the state from imposing an unwanted minister on a congregation through the application of employment discrimination laws.²⁶²

Of special note to the constitutionality of the Johnson Amendment was one of the EEOC's arguments in *Hosanna-Tabor*. The EEOC maintained that the Supreme Court's earlier precedent in *Employment Division v. Smith*²⁶³ precluded recognition of the ministerial exception because the employment discrimination law at issue in *Hosanna-Tabor* was a neutral law of general applicability.²⁶⁴ In *Smith*, the Court held that a neutral law of general applicability could substantially burden the free exercise of religion.²⁶⁵ *Smith* represented a shift in the Court's treatment of claims that governmental action violated the Free Exercise Clause. No longer would such claims of burden on the free exercise of religion be subjected to strict scrutiny. Instead, if a law was neutral and generally applicable, then the government would not be required to justify the burden under a strict scrutiny analysis.²⁶⁶ In reaching its conclusion in *Smith*, the Court reaffirmed its prior holdings—that the "right of free exercise does not relieve an individual of the obligation to

²⁵⁷ 132 S. Ct. 694 (2012).

²⁵⁸ Prior to the Supreme Court's decision in *Hosanna-Tabor*, every U.S. Circuit Court of Appeals to consider the issue had recognized the existence of a ministerial exception to employment discrimination laws. *See id.* at 705 & n.2.

²⁵⁹ *Id.* at 701.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 706.

²⁶² *Id.* at 709.

²⁶³ 494 U.S. 872 (1990).

²⁶⁴ *Hosanna-Tabor*, 132 S. Ct. at 706–07.

²⁶⁵ *Smith*, 494 U.S. at 879, 884–86.

²⁶⁶ For a case where the Court found that the law was not neutral as to religion, see *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993).

comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”²⁶⁷

In *Hosanna-Tabor*, the EEOC argued that the *Smith* decision precluded recognition of a ministerial exception.²⁶⁸ The Supreme Court disagreed,

It is true that the ADA’s prohibition on retaliation, like Oregon’s prohibition on peyote use [in *Smith*], is a valid and neutral law of general applicability. But a church’s selection of its ministers is unlike an individual’s ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself.²⁶⁹

The Court’s rejection of *Smith* in *Hosanna-Tabor* is important for purposes of ascertaining the constitutionality of the Johnson Amendment. Scholars have asserted that the Johnson Amendment is a neutral law of general applicability and thus is not amenable to a challenge under the Free Exercise Clause.²⁷⁰ Yet the *Hosanna-Tabor* decision carves out an exception to *Smith*’s general rule for conduct that is internal to the church and affects the faith and mission of the church itself. The strongest application of *Hosanna-Tabor* in the Johnson Amendment context would be to its regulation of a pastor’s sermon from the pulpit. A sermon from the pulpit is quintessentially conduct that is internal to the church and that “affects the faith and mission of the church itself.”²⁷¹ Indeed, it is difficult to conceive of a matter that affects the faith and mission of a church more than what its pastor says from the pulpit. Just as interfering with a church’s selection of its pastor violates the First Amendment’s Religion Clauses, so does interfering with what a church’s pastor says from the pulpit during a sermon. The Johnson Amendment does not seek to regulate outward physical acts; instead, it inserts itself into the internal workings of churches and affects the very faith and mission of those institutions. As such, it falls within the new exception to *Smith* recognized by the Supreme Court in *Hosanna-Tabor*.

This means that the Johnson Amendment must be justified by a compelling governmental interest that is advanced in the least restrictive means available. This strict scrutiny test is a rigorous standard. In describing the test, the *Smith* Court explained, “[I]f

²⁶⁷ *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

²⁶⁸ *Hosanna-Tabor*, 132 S. Ct. at 706.

²⁶⁹ *Id.* at 707.

²⁷⁰ See, e.g., Mayer, *supra* note 78, at 1152–53.

²⁷¹ *Hosanna-Tabor*, 132 S. Ct. at 707.

'compelling interest' really means what it says . . . many laws will not meet the test."²⁷² Given the history and the lack of any legitimate justification for the Johnson Amendment, it would be exceedingly difficult for the government to advance any compelling interest to justify the law. Even if the government were somehow able to produce a compelling governmental interest, the Johnson Amendment would not advance that interest (whatever it is) in the least restrictive means available. The Johnson Amendment contains no halfway measures and is an absolute prohibition. Such an absolute prohibition is not a least restrictive means of advancing the government's interest, no matter how the Court would view it.

Hosanna-Tabor is yet another recent indication that the Johnson Amendment is in serious constitutional jeopardy. With this landmark decision, the Supreme Court breathed new life into the strict scrutiny standard under the Free Exercise Clause. For the Johnson Amendment to meet that strict scrutiny standard would be next to impossible.

CONCLUSION

The Johnson Amendment to Section 501(c)(3) of the Internal Revenue Code is at odds with the history of tax exemption for churches. Its enactment was an effort to insulate politicians from scrutiny and to ensure reelection by silencing opposing voices. Thus, it is also at odds with the foundational commitment that our country has made to robust and open dialogue in the electoral context. It has been enforced in a way that fosters fear and self-censorship and has a chilling effect on speech. The vagueness of the statute has been exacerbated many times over by accompanying vague regulations, guidance, and pronouncements from the IRS.

The Supreme Court's recent decisions in *Citizens United*, *Winn*, and *Hosanna-Tabor* pave the way for a finding by the Court that the Johnson Amendment is unconstitutional. These cases demonstrate that the Johnson Amendment has no constitutional validity. Whether the challenge arises through churches participating in the Alliance Defense Fund's Pulpit Freedom Sunday or from some other front remains to be seen. But when a court soon addresses the issue, the advocates for declaring the Johnson Amendment unconstitutional now have more powerful ammunition from the Supreme Court to argue for the law's invalidation. Put bluntly, after *Citizens United*, *Winn*, and *Hosanna-Tabor*, the Johnson Amendment's days are numbered.

²⁷² *Smith*, 494 U.S. at 888.