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And on the Seventh Day, God Codified the Religious Tax-Exemption: Reshaping the Modern Code Framework to Achieve Statutory Harmony with Other Charitable Organizations and Prevent Abuse

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EXEMPTION: RESHAPING THE MODERN CODE FRAMEWORK TO ACHIEVE
STATUTORY HARMONY WITH OTHER CHARITABLE ORGANIZATIONS AND
PREVENT ABUSE

*Dominic Rota**

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INTRODUCTION

*[N]o church property is taxed and so the infidel and the atheist and the man without religion are taxed to make up the deficit in the public income thus caused.*¹

Over a century has passed since tax exemption for religious organizations was officially codified in the United States.² These organizations have enjoyed the benefits of such exemptions, having grown, flourished, and garnered wealth and favor in society.³ In effect, the privilege of tax exemption has enabled religious organizations to become a form of “big business” in the American marketplace.⁴

Most recently, religious organizations’ 26 U.S.C. § 501(c)(3) tax-exempt status has come under heightened political scrutiny with President Donald J. Trump’s promise to repeal the “Johnson Amendment.”⁵ Enacted in 1954, the “Johnson Amendment” is a piece of legislation that bars religious organizations from receiving tax-exempt status (or altogether revokes their existing tax-exempt status), if the religious organization attempts to “influence legislation” or “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”⁶ In his address to the National Prayer Breakfast on February 2, 2017, the President declared that the Johnson Amendment does not “allow our representatives of faith to speak freely and without fear of retribution.”⁷ A few months later, the President issued an executive order “Promoting Free Speech and Religious Liberty,” which effectively mandated the relaxation of enforcement of the Johnson Amendment with respect to those religious organizations that “speak[] or ha[ve] spoken about moral or political issues from a religious perspective.”⁸

¹ ALBERT BIGELOW PAINE, MARK TWAIN’S NOTEBOOK 223 (1935).

² See Ch. 16, § II(G), 38 Stat. 114 (1913).

³ See Christine Roemhildt Moore, *Religious Tax Exemption and the “Charitable Scrutiny” Test*, 15 REGENT U. L. REV. 295 (2003).

⁴ *Id.*

⁵ President Donald J. Trump, *Remarks at the National Prayer Breakfast*, THE WHITE HOUSE (Feb. 2, 2017, 9:11 AM), <https://www.whitehouse.gov/the-press-office/2017/02/02/remarks-president-trump-national-prayer-breakfast> [hereinafter President Trump].

⁶ 26 U.S.C.A. § 501(c)(3) (West, Westlaw current through P.L. 115-231).

⁷ President Trump, *supra* note 5.

⁸ President Donald J. Trump, *Presidential Directive Executive Order Promoting Free Speech and Religious Liberty*, THE WHITE HOUSE (May 4, 2017), <https://www.whitehouse.gov/>

The President made it clear that he issued the executive order for the purpose of “direct[ing] the [Internal Revenue Service] not to unfairly target churches and religious organizations for political speech.”⁹

With the President having taken executive action to ease taxable consequences on religious organizations (and their ministers), at least with respect to religious liberty and freedom of speech, such action seemed to indicate that the President would only authorize those laws and taxes not unduly burdening the finances of religious organizations. Yet, in almost a complete about-face from the executive order, President Trump signed into law the Tax Cuts and Jobs Act (“TCJA”),¹⁰ which quietly imposed a new tax on churches, as well as other nonprofits.¹¹ This new tax required tax-exempt organizations to begin paying a twenty-one percent tax on the fringe benefits provided to their employees, such as parking and transportation benefits.¹² Not surprisingly, the discovery of such a taxation requirement outraged churches and nonprofits, largely a product of a Republican-led Congress, finding it “oxymoron[ic]” and “horrendously unfair,”¹³ particularly in light of the Republican-backed administration’s apparent allegiance to alleviating the tax burden on religious organizations.

With much confusion surrounding the current administration’s actions—and whether these actions, in totality, were promulgated to ease the overall taxable burden on religious organizations—foundational questions as to the constitutional legitimacy of the statutory scheme on religious tax-exemption persist. Muddying the waters even further are not only the policy constraints of First Amendment jurisprudence, but also the Internal Revenue Service (“IRS”) and the courts, both of which have become reluctant to engage in any inquiry as to the validity of a religious organization’s tax-

presidential-actions/presidential-executive-order-promoting-free-speech-religious-liberty/
[hereinafter *Presidential Directive*].

⁹ President Donald J. Trump, *Remarks by President Trump at the Faith and Freedom Coalition’s Road to Majority Conference*, THE WHITE HOUSE (June 8, 2017, 12:30 PM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-faith-freedom-coalitions-road-majority-conference/>.

¹⁰ Budget Fiscal Year, 2018, Pub. L. No. 115-97, § 13304, 131 Stat 2054 (2017).

¹¹ Brian Faler, *Republican Tax Law Hits Churches*, POLITICO (June 26, 2018, 5:05 AM), <https://www.politico.com/story/2018/06/26/republican-tax-law-churches-employees-670362>.

¹² Budget Fiscal Year, 2018, Pub. L. No. 115-97, § 13304, 131 Stat 2054 (2017).

¹³ Julian Gregorio, *The Unintended Target of Tax Reform: Churches Now Face 21% Penalty*, WASH. TIMES (Aug. 7, 2018), <https://www.washingtontimes.com/news/2018/aug/7/tax-reform-hits-churches-penalty-employee-benefits/>.

exempt status. Of course, there is merit in the maxim that “both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.”¹⁴ Nevertheless, some of the Internal Revenue Code (“Code”) provisions applicable to tax-exempt religious organizations are constitutionally suspect, given their plausible, potential violation of the Establishment Clause.¹⁵

Because special tax rules apply exclusively to churches, it is important to distinguish churches, a subset of religious organizations, from the major umbrella category of religious organizations.¹⁶ The term “church” is not limited strictly to those houses of worship with Christian affiliations.¹⁷ Rather, the Code utilizes the term “church” to represent Christian-based churches, temples, synagogues, mosques, or other houses of worship. Although the Code uses the term “church,” the IRS has failed to statutorily define the term.¹⁸ Nevertheless, the IRS generated 14 criteria that it relies upon in determining whether an entity qualifies as a “church.”¹⁹ The 14 criteria are: (1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregations; (12) regular religious services; (13) Sunday schools for religious instruction of the young; and (14) schools for preparing of its ministers.²⁰

Apprehension over the constitutionality of the pertinent tax provisions is especially evident where religious organizations, whose purposes are often premised on philanthropy and provide moral guidance, are able to profit in substantial sums, or realize incredible gains, by capitalizing

¹⁴ *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

¹⁵ As will be seen in later sections of this Article, we utilize the three-pronged *Lemon* test to determine whether a statute has a secular legislative purpose, by exploring the statute’s legislative history and Congressional intent.

¹⁶ INTERNAL REVENUE SERV., REV. 8-2015, 501(C)(3): TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS, (Aug. 2015), <https://www.irs.gov/pub/irs-pdf/p1828.pdf>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Found. of Human Understanding v. Comm’r of Internal Revenue*, 88 T.C. 1341, 1358 (1987).

on preferential tax treatment. According to a 2010 estimate generated by the National Council of the Churches of Christ in the United States, contributions to around 330,000 churches totaled more than \$34 billion.²¹ Moreover, studies estimate that U.S. churches own approximately \$300 to \$500 billion in property, some of which is exempt from state property taxation.²² On a local scale, New York's nonpartisan Independent Budget Office calculated that New York City alone lost approximately \$627 million in property tax revenue due to the property tax exemption for churches.²³

Perhaps what most seriously raises the brow of the taxpayer, however, is the inordinate gain some religious entities receive by manipulating the statutory scheme in their favor.²⁴ For example, in the fiscal year from 2016 to 2017, Lakewood Church, a "megachurch" in Houston, Texas, received an annual amount of \$79 million in charitable contributions, which directly fueled its operating budget of approximately \$90 million; \$25 million of that budget was utilized for television ministry.²⁵ In addition, the Church of Scientology has collected annual receipts of approximately \$200 million (\$125 million of which is derived from spiritual counseling, known as "auditing") in addition to enjoying property values totaling \$1.5 billion.²⁶

²¹ John Montague, *The Law and Financial Transparency in Churches: Reconsidering the Form 990 Exemption*, 35 CARDOZO L. REV. 203, 206 (2013) (citing Nat'l Council of the Churches of Christ in the U.S.A., Yearbook of American & Canadian Churches 386 (2012)).

²² Please note that the fifty (50) states and the District of Columbia afford churches, as well as other nonprofit organizations, exemption from state property taxation. See Jeff Schweitzer, *The Church of America*, HUFFINGTON POST (Oct. 11, 2011, 3:49 PM), https://www.huffingtonpost.com/jeff-schweitzer/robert-jeffress-romney_b_1002753.html.

²³ David Seifman, *New York City's Losing \$13.5 in Property-Tax Breaks*, N.Y. POST (July 16, 2011, 4:00 AM), <https://nypost.com/2011/07/16/new-york-citys-losing-13-5b-in-property-tax-breaks/>.

²⁴ The Code maintains a prohibition against "inure[ment] to the benefit of any private shareholder or individual" connected to a tax-exempt organization. 26 U.S.C.A. § 501(c)(3) (West, Westlaw current through P.L. 115-231). Charities, including religious organizations, may be penalized for transacting or excess benefits in which an economic benefit conferred upon an insider exceeds the value of consideration. 26 U.S.C.A. § 4958(c)(1)(A)-(B) (West, Westlaw current through P.L. 115-231). Excessive economic benefit is determined by an evaluation of "reasonable compensation," which is defined as the "amount that would ordinarily be paid for like services by like enterprises... under like circumstances." 26 C.F.R. § 53.4958-4(b)(ii) (West, Westlaw current through Nov. 2, 2018).

²⁵ See Katherine Blunt, *How Does Lakewood Church Spend Its Millions? Here's A Look at the Budget*, HOUSTON CHRONICLE (May 31, 2018, 9:30 AM), <https://www.chron.com/news/investigations/article/How-does-Lakewood-Church-spend-its-millions-We-12955372.php>.

²⁶ Christopher Matthews, *How Much Does Scientology Pocket from Its Tax Exempt Status?*, FORTUNE (Apr. 8, 2015, 8:35 AM), <http://fortune.com/2015/04/08/scientology-tax-exempt/>.

Even more alarming is the luxury some ministers of the gospel realize through exploitation of the tax-exempt statutory scheme. In 2007, U.S. Senator Chuck Grassley (R-IA) launched an investigation²⁷ into the financial status of several leaders of six large churches, requesting each leader to voluntarily disclose information.²⁸ Reports from local news articles and tips from charity-watchdog groups drove the investigation, claiming that these targeted ministers were participating in lavish expenditures, including the purchase and enjoyment of private jets, Rolls Royce cars, vacations in Hawaii and Fiji, multi-million dollar homes, and in one case, \$23,000 marble-topped commodes.²⁹ To the Iowa Senator's dismay, these investigations yielded minimal responses, if any at all, from the targeted ministries.³⁰ Meanwhile, other pastors such as Kenneth Copeland, a pastor of a megachurch in Texas, have continued to exploit the favorable taxation scheme, enjoying a \$6.3 million estate, complete with tennis courts, a large boathouse, and garages on either side of the 18,000-square-foot mansion.³¹

Recognizing the advantageous taxation benefits religious organizations enjoy, coupled with the potential for abuse and exploitation of the tax-exempt statutory scheme at the hands of religious organizations and their leaders, this Article proposes a three-fold solution: (1) the harmonization of the statutory framework, in connection with other non-religious tax-exempt organizations; (2) the requirement of application for tax-exempt recognition and annual tax filings, supplemented with an empowered

²⁷ Senator Grassley elaborated upon the purpose of the investigation, stating the following: "Historically, Americans have given generously to religious organizations, and those who do so should be assured that their donations are being used for the tax-exempt purposes of the organizations. Recent articles and news reports regarding the possible misuse of donations made to religious organizations have caused some concern for the Finance Committee." See *Letter to Pastor Benedictus Hinn, World Healing Center Church, Inc.*, CHUCK GRASSLEY, U.S. SENATOR FOR IOWA (Nov. 5, 2007), available at <https://www.grassley.senate.gov/sites/default/files/about/upload/prg110607b.pdf>.

²⁸ Press Release, *Grassley Seeks Information from Six Media-based Ministries*, CHUCK GRASSLEY, U.S. SENATOR FOR IOWA (Nov. 6, 2007), http://grassley.senate.gov/news/Article.cfm?custome1_dataPageID_1502=12011.

²⁹ Kathy Lohr, *Senator Probes Megachurches' Finances*, NATIONAL PUBLIC RADIO (Dec. 4, 2007, 7:57 PM), <https://www.npr.org/templates/story/story.php?storyId=16860611> [hereinafter Lohr].

³⁰ See Neela Banerejee, *Senator Awaiting Records of Ministries' Finances*, N.Y. TIMES (Dec. 24, 2007), <https://www.nytimes.com/2007/12/24/us/24church.html>.

³¹ John Burnett, *Onscreen But Out of Sight, TV Preachers Avoid Tax Scrutiny*, NATIONAL PUBLIC RADIO (Apr. 2, 2014, 4:03 PM), <https://www.npr.org/2014/04/02/298373994/onscreen-but-out-of-sight-tv-preachers-avoid-tax-scrutiny>.

auditing power in the IRS; and (3) IRS enforcement of the Johnson Amendment's prohibition against certain forms of "political activity." Part I of this Article provides a brief history of religious tax exemption, from the biblical era to early American colonial society and subsequent development of the modern statutory scheme. Part II discusses the constitutionality of tax-exemption of religious organizations, focusing on Free Exercise Clause and Establishment Clause implications. Part III begins by exploring the favorable tax treatment religious organizations receive, and the concern for abuse of the statutory scheme due to lax enforcement protocol. Part III finishes by asserting the aforementioned three-fold proposal, and the relative ease by which this three-pronged approach could be actualized.

I. A HISTORY OF RELIGIOUS TAX EXEMPTION

To more fully comprehend the statutory framework surrounding tax exemption for churches and religious entities in the United States tax system, it is first necessary to explore the historical underpinnings of religious tax exemptions. Yet, even while the discussion of historical backdrop is typically a relatively straightforward task in a number of fields, in the context of religious tax exemptions, there is no *precise* moment in which religious organizations achieved state-authorized tax-exempt status.³² Scholar Dean M. Kelley writes:

No one can find that point in history where some great lawgiver declared, "Come now, and let us exempt the church from taxation, for behold! it is as part of the fabric of the state and a pillar of the throne." There is no time before which churches were taxed and in which we can seek the reason for exemption.³³

Although the gamut of historical evidence shows that tax exemptions for religious entities may have existed in ancient civilizations, such as the Sumerians,³⁴ this Article narrows its historical lens primarily on taxation with Judeo-Christian origins.

³² Vaughn E. James, *Reaping Where They Have Not Sowed: Have American Churches Failed to Satisfy the Requirements for the Religious Tax Exemption?*, 43 CATH. LAW. 29, 32 (2004) [hereinafter James].

³³ See Dean M. Kelley, *Why Churches Should Not Pay Taxes* 5 (New York, Harper & Row 1977).

³⁴ John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 522 (1991-1992) [hereinafter Whitehead].

A. *From the Book of Genesis to the Decree of Constantine*

In the Judeo-Christian context, scholars largely point to the story of Joseph in ancient Egypt as the first instance of religious tax exemption.³⁵ Joseph, who was the son of Jacob, a Hebrew living in Canaan, was sold by ten of his brothers into slavery in Egypt, only to eventually become the Pharaoh's trusted servant.³⁶ Given this position of stature, the Pharaoh tasked Joseph with ensuring that the people of Egypt were adequately fed during a crushing seven-year famine.³⁷ As part of this task, Joseph executed the following actions: he acquired all Egyptian land, with the exception of the land of the *priests*, and he implemented a law in which the Pharaoh had a right to claim one-fifth of all produce generated on Egyptian land, except produce grown on the land of the priests.³⁸

Many years later, and well after Moses led the Exodus of the Israelites out of Egypt on a journey to the "promised land" of Canaan, the Hebrews formed a kingdom, ruled by David and Solomon, both of whom levied *substantial* taxes on the Hebrews.³⁹ David, the predecessor to Solomon, implemented the tax to finance the Hebrew nation's war machine; in contrast, Solomon, enforced a tax to build the Temple.⁴⁰ Yet, while the Hebrews suffered a major economic burden as a direct result of this taxation, the priests remained unscathed by these excessive taxes.⁴¹ This was only further legitimized by scriptural reinforcement that religious figures were to be tax exempt, as revealed in the Book of Ezra: "[w]e [are] also [to] inform you that it is *not* permitted to impose taxes, tributes, or tolls on any priest, Levite, singer, gatekeeper, temple slave or any other servant of that house of God."⁴²

It was not until the dawn of the age of Jesus Christ that the philosophical advocacy for the separation of church and state, at least regarding taxation, became manifest.⁴³ In response to a question of whether Jews should pay taxes to the Roman dictator Caesar, Jesus stated, "[r]ender

³⁵ James, *supra* note 32, at 32-33.

³⁶ See Genesis 41:37-46.

³⁷ *Id.* at 54-56.

³⁸ See Genesis 47:22, 24, 26.

³⁹ James, *supra* note 32, at 32-33.

⁴⁰ See II Samuel 1:1; I Kings 11:43.

⁴¹ See Martin A. Larson & C. Stanley Lowell, *The Churches: Their Riches, Revenues, and Immunities*, 15 (Washington, R.B. Luce 1969) [hereinafter Larson & Lowell].

⁴² Ezra 7:24 (emphasis added).

⁴³ See Matthew 22:15-22.

therefore unto Caesar the things which are Caesar's; and unto God the things that are God's."⁴⁴ Later, following the death of Christ and subsequent acts of his apostles, the disciple Paul reinforced Christ's words when addressing the Romans: "For because of this you also pay taxes, for the authorities are ministers of God, attending to this very thing. Pay to all what is owed to them: taxes to whom taxes are owed, revenue to whom revenue is owed, respect to whom respect is owed, honor to whom honor is owed."⁴⁵

While Jesus Christ seemingly advocated the position that *everyone* was to pay imperial taxes unto Caesar, the leaders of the new age of imperial Christendom said otherwise. Under the Edict of Toleration in 313 C.E., the Roman Emperor Constantine formally deemed Christianity a religion of equal standing in the eyes of the Roman Empire.⁴⁶ Following his decree, Constantine converted to Christianity, and in an effort to establish Christianity as the new, official religion of the Roman Empire, Constantine granted several advantages to the Christian Church, such as a *total* exemption from *all* forms of taxation, among other benefits.⁴⁷ Despite the fact that subsequent emperors scaled back such advantageous tax benefits, many of the tax exemptions remained embedded within Roman society.⁴⁸

Of course, the widespread rippling effect of Christianity, born from the Roman Empire, naturally reached England, among others sovereignties,⁴⁹ influencing its taxation policy through the Middle Ages.⁵⁰ While rulers such as England's King Henry II levied taxes with exemptions for religious

⁴⁴ *Id.* at 21.

⁴⁵ See Romans 13:6-7 (ESV).

⁴⁶ James, *supra* note 32, at 35 ("[P]lacing Christianity on equal footing with cult of Isis and other pagans religions within the Roman Empire").

⁴⁷ Other benefits included the following: generous fees from the public treasury; immunity from military service; and the provision that Catholic [Christians] alone be eligible to hold political office. Moreover, the Church was empowered to receive gifts and legacies; and the wealth of all who died intestate or without direct heirs was automatically conferred upon it. See Larson & Lowell, *supra* note 41, at 19.

⁴⁸ James, *supra* note 32, at 38 (citing Alfred Balk, *The Free List: Property Without Taxes* 21 (1971)).

⁴⁹ See Whitehead, *supra* note 34, at 530 (citing W. Durant, *Our Oriental Heritage* 374, 812 (1954)).

⁵⁰ James, *supra* note 32, at 37.

figures,⁵¹ others “outright repealed the ecclesiastical preference.”⁵² King Henry VIII’s decision to siphon wealth from the Catholic Church in the sixteenth century, upon severing ties with papacy amid the Protestant Reformation,⁵³ coupled with Oliver Cromwell’s rigid levying of taxes on church property a century later,⁵⁴ visibly illustrated the deviation from state-sponsored religious tax-exemption. This was largely because the growing British Empire needed a great deal of financial support to fund its imperial expansion.⁵⁵

This trend was to change with the advent of the American colonies. Although the British throne exhibited the “very real threat to a [religious organization’s] existence whe[re] the ability to tax is wielded by a sovereign bent on destruction . . . of the institution,”⁵⁶ the post-Revolutionary-War American experiment sought to recommit the “mutual independence of religious and political sovereignties.”⁵⁷

B. From Early American Society to the Modern Statutory Scheme

Despite the fact tax exemption for religious institutions has pervaded numerous sovereignties, British common and equity law have had the most readily discernible effect on tax exemptions for churches in the United States. Under British common law, church property located within the parameters of the jurisdiction of the Crown (and its colonial annexations) was exempted from ecclesiastical laws.⁵⁸ To secure tax exemption under British common law, the church seeking exemption from the property taxation was required to fulfill three conditions.

⁵¹ In 1188, King Henry I levied a tax to support the Crusades. While such an ordinance taxed all other persons, property and sources of revenue, it entirely exempted the “books and apparatus of clergymen” from the ordinance. See Claude W. Stimson, *Exemption of Property from Taxation in the United States*, 18 MINN. L. REV. 411, 416 (1934).

⁵² Cody S. Barnett, *Bringing in the Sheaves: Combating Televangelists’ Abuse of the Internal Revenue Code*, 105 KY. L.J. 365, 371 (2017) [hereinafter Barnett].

⁵³ See J.J. SCARISBRICK, HENRY VII 241-338 (1968).

⁵⁴ See Whitehead, *supra* note 34, at 530.

⁵⁵ Barnett, *supra* note 52.

⁵⁶ Erika Lietzan, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 975 (1999).

⁵⁷ *Id.* at 975 (citing Leo Pfeffer, *Church, State & Freedom* 16-17 (1953)).

⁵⁸ J. Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. REV. 363, 368 (1991) [hereinafter Witte, Jr.].

First, the exemption was granted only to state-established church property that was used for religious purposes.⁵⁹ Dissenting churches were ineligible for the exemption.⁶⁰ Second, the exemption was only from “the ecclesiastical taxes that were levied for the church's own maintenance and use.”⁶¹ The church was required to pay other taxes, such as quit-rents and hearth and window taxes.⁶² Third, the tax exemption could be eliminated “in times of emergency or abandoned altogether if the tax liability imposed on remaining properties in the community proved too onerous.”⁶³

However, because many settlers of the pre-Revolutionary New World desired freedom from religious persecution at the hands of various European governments (principally, England), religious tax treatment varied from colony to colony, often dependent upon those religious sects occupying each colony.⁶⁴ On the lenient end of the spectrum, more tolerant colonies, such as Georgia and Maryland,⁶⁵ allowed taxpayers a choice in determining which religious organizations could receive contributions from the taxpayer-colonist.⁶⁶ On the stringent end of the spectrum, some colonies, such as Massachusetts, mandated the supply of tax assistance only to churches recognized by the particular colony.⁶⁷ In addition, Virginia instituted governmental measures, providing support for the clergy, at the expense of farmers who were required to pay tithes to the clergymen.⁶⁸

Even after the Revolutionary War and subsequent ratification of the Constitution in 1788—followed shortly thereafter by the adoption of the First Amendment in 1791—religious tax exemption did not cease.⁶⁹ In fact, the practice of religious tax exemption continued, despite the absence of the following: (1) a legal basis for granting such exemptions, such as the British

⁵⁹ *Id.* at 370.

⁶⁰ *Id.* at 371.

⁶¹ *Id.*

⁶² *Id.* at 371-72.

⁶³ *Id.* at 372.

⁶⁴ See James, *supra* note 32, at 38-39; see also Barnett, *supra* note 52.

⁶⁵ These states allowed such an election from a “general tax assessment.” See James, *supra* note 32, at 38.

⁶⁶ Barnett, *supra* note 52.

⁶⁷ Massachusetts exempted those individuals who supported the colony-sponsored Church, while enforcing a tax against those who supported the non-sponsored Congregational Church. See James, *supra* note 32, at 38-39.

⁶⁸ James, *supra* note 32, at 39 (citing D.B. ROBERTSON, SHOULD CHURCHES BE TAXED? 47 (1968)).

⁶⁹ See Whitehead, *supra* note 34, at 545.

common law's mandatory satisfaction of qualifying conditions;⁷⁰ (2) explicit language in the Federal Constitution; and (3) explicit language in the newly adopted state constitutions.⁷¹ Despite the absence of state or federal constitutional mandates, state governments began enacting statutes officially recognizing religious tax exemptions.⁷² On the federal level, some early tax statutes contained sections requiring the exemption of federal tax from charitable organizations, including churches.⁷³

After the passage of these early statutes by the federal and state governments, Congress explicitly provided for the tax exemption of charitable organizations, including religious institutions such as churches, through its enactment of the first federal income tax, imposed during the Civil War.⁷⁴ Approximately 30 years after the passage of this first federal income tax, Congress enacted a more comprehensive tax scheme, the Tariff Act of 1894, which again provided an *explicit* exemption from tax for “associations organized and conducted solely for . . . religious . . . purposes.”⁷⁵ Despite the Supreme Court's declaration that the Tariff Act of 1894 was unconstitutional because its imposition of federal income taxation did not apportion in accordance with representation (and for reasons wholly unrelated to the tax exemption on religious organizations),⁷⁶ the terms of the tax exemptions recurred in the Payne Aldrich Tariff Act of 1909,⁷⁷ and again in the Revenue Act of 1913.⁷⁸

⁷⁰ See Witte, Jr., *supra* note 58, at 372-74; see also *Walz v. Tax Comm'n*, 397 U.S. 664, 682 (1970).

⁷¹ For example, the Seventh Congress enacted a taxing statute for the “County of Alexandria,” which exempted churches from taxation. Later, the Twelfth Congress refunded “import duties,” derived from the importation of religious articles, to the churches. Lastly, among the early statutes, Congress, in 1815, levied a tax on “household furniture”, but exempted such tax for any “religious” institution. See *Walz v. Tax Comm'n*, 397 U.S. 664, 667 (1970); see also Act of Jan. 18, 1815, ch. 23, § 14, 3 Stat. 186, 190 (1815).

⁷² For example, Pennsylvania was the first state to adopt a constitutional amendment, which explicitly exempted churches from property taxation, while Virginia, despite its early period of “anticlericalism,” implemented tax exemption for church property. See James, *supra* note 32, at 40 (citing D.B. ROBERTSON, SHOULD CHURCHES BE TAXED? 47 (1968)).

⁷³ Whitehead, *supra* note 34, at 541-42.

⁷⁴ *Id.* at 541 (citing ROGOVIN, BACKGROUND OF THE PRESENT INCOME TAX EXEMPTION OF CHARITABLE ORGANIZATIONS 10).

⁷⁵ Tariff Act of 1894, ch. 349, § 32, 28 Stat. 509, 556 (1894).

⁷⁶ *Pollock v. Farmers' Loan & Tr. Co.*, 158 U.S. 601, 618 (1895).

⁷⁷ Ch. 6, § 38, 36 Stat. 11, 112 (1909).

⁷⁸ Ch. 16, § II(G)(a), 38 Stat. 114, 172 (1913).

Congress eventually made federal income taxation constitutional with the passage of the Sixteenth Amendment,⁷⁹ followed by the Revenue Act of 1913.⁸⁰ Although the Revenue Act has undergone a myriad of substantive revisions since its enactment, language surrounding the religious tax exemption has survived each iteration. In the modern statutory scheme, 26 U.S.C. § 501(c)(3) provides tax exemption for groups “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.”⁸¹ Even more fascinating is the fact that “churches, their integrated auxiliaries, and conventions or associations of churches” receive *automatic* tax-exempt status; in other words, churches⁸² do not need to file a Form 1023 to receive tax-exempt status,⁸³ nor are they required to file annual Form 990s to report on their financial conditions.⁸⁴ However, before analyzing the mechanics of the statute regarding tax exemption, and the numerous privileges that accompany the statutory provisions, the constitutionality and related jurisprudence surrounding religious tax exemption will be explored in the following Part.

II. THE CONSTITUTIONALITY OF RELIGIOUS TAX EXEMPTION

The IRS, governmental agencies, and federal and state courts have either refused to define or have been extremely cautious in attempting to define “religious” activities or the word “religion.”⁸⁵ By extension, such governmental entities have been reticent to engage in probing inquiries over tax exemption for religious entities. This is, of course, attributed to the existence of the First Amendment, which provides, in part, that “Congress

⁷⁹ 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.”).

⁸⁰ See Ch. 16, § II(G), 38 Stat. 114,(1913).

⁸¹ 26 U.S.C.A. § 501(c)(3) (West, Westlaw current through P.L. 115-231) (emphasis added).

⁸² Nevertheless, 26 U.S.C.A. § 6033(a)(3)(A)(i) indicates that the parent category of “religious organization” must file a Form 990 with the IRS.

⁸³ *Organizations Not Required to File Form 1023*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/charities-non-profits/charitable-organizations/organizations-not-required-to-file-form-1023> (last updated Apr. 2, 2018).

⁸⁴ *Annual Exempt Organization Return: Who Must File*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/charities-non-profits/annual-exempt-organization-return-who-must-file> (last updated May 11, 2018).

⁸⁵ Bruce R. Hopkins, *The Law of Tax-Exempt Organizations* § 10.1 (11th ed. 2016) [hereinafter Hopkins].

shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁸⁶ The component clauses, the “establishment of religion” and “prohibiting the free exercise” are known as the *Establishment Clause* and the *Free Exercise Clause*, respectively. According to the U.S. Supreme Court, these clauses are designed to function as a textual commitment to the notion of *separation* between church and state. In other words, these clauses “rest upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.”⁸⁷ Nevertheless, these two clauses (hereinafter the “Religion Clauses”) have caused the courts to “struggle[] to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to *clash* with the other.”⁸⁸

Part II proceeds as follows: Section A briefly discusses the applicability of the Free Exercise Clause in relation to religious tax exemption; Section B analyzes the avoidance of church-state entanglement, as tethered in the Establishment Clause; and lastly, Section C maps the constitutional jurisprudence of religious tax exemption, by tracking the evolution of judicial thought as it relates to the charitable nature and purpose of religious tax exemption.

A. *Free Exercise Clause*

The Free Exercise clause is implicated when there is a conflict between secular laws and the religious beliefs of an individual. Not surprisingly, the Supreme Court has provided a more thorough expansion on this very tension: the “government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities.”⁸⁹ To ensure that the government does no such thing, the Court requires that a state “be neutral in its relations with groups of religious believers and non-believers”⁹⁰ and “confine itself to secular objectives, and neither advance nor impede religious activity.”⁹¹

⁸⁶ U.S. CONST. amend. I.

⁸⁷ *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948).

⁸⁸ *Walz v. Tax Comm’n*, 397 U.S. 664, 668-669 (1970) (emphasis added).

⁸⁹ *Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

⁹⁰ *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

⁹¹ *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 747 (1976).

Historically, religious entities such as churches have argued that the revocation of tax exemption would violate the Free Exercise Clause.⁹² Because “an unlimited power to tax involves, necessarily, a power to destroy,”⁹³ churches worry that “a more onerous tax rate . . . might effectively choke off an adherent’s religious practices,”⁹⁴ destroying free religious exercise. The Supreme Court, however, has rejected this position, stating that “not all burdens on religion are unconstitutional.”⁹⁵ More specifically, the burden of taxation, “to the extent that imposition of a generally applicable tax merely decreases” the funds available for “religious activities, any such burden is *not* constitutionally significant.”⁹⁶ In sum, the Supreme Court held that so long as a generally applicable tax does not burden the individual’s practice of his or her religion, the government could *theoretically* levy a tax on the church, as there is no violation of the Free Exercise Clause.⁹⁷ Notwithstanding the conclusion that the Free Exercise Clause is not implicated by taxation on a religious entity, a law may still fail to pass First-Amendment muster due to a violation of the Establishment Clause.

B. Establishment Clause

The Establishment Clause is more applicable to the law of tax exemption for religious entities, given that the taxation necessarily requires an element of the “regulation of religious organizations and institutions.”⁹⁸ The Supreme Court has declared that the Establishment Clause’s purpose, by design, is to avoid “sponsorship, financial support, and active involvement of the sovereign in religious activity,”⁹⁹ to steer clear from the entanglement of church and state. In determining whether government action complies with the principle of neutrality, the Supreme Court established the tripartite *Lemon* test (aptly named after the Court decision). In this test, a statute adversely affecting religious entities is only constitutional where the following three

⁹² See e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 582 (1983); see also *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 21, 109 S. Ct. 890, 903, 103 L. Ed. 2d 1 (1989) (citing *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 305 (1985)).

⁹³ *M’Culloch v. Maryland*, 17 U.S. 316, 327 (1819).

⁹⁴ *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 392 (1990).

⁹⁵ *United States v. Lee*, 455 U.S. 252, 257 (1982).

⁹⁶ *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 392 (1990)(emphasis added).

⁹⁷ *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990).

⁹⁸ *Hopkins*, *supra* note 85.

⁹⁹ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

criteria are met: (1) it must have a “secular legislative purpose;” (2) its “principal or primary effect must be one that neither advances nor inhibits religion;” and (3) it must not foster an “extensive government entanglement with religion.”¹⁰⁰

In the context of taxation, there is special concern that governmental “inspection and evaluation” of religious organizations, such as an audit of church records, membership, and financial matters, “is fraught with the sort of entanglement that the Constitution forbids.”¹⁰¹ By enacting a wholesale tax exemption on religious entities, there is certainly some form of preferential treatment of religion. Strangely, the favorable treatment of religious entities seems, at first blush, to directly violate separation of church and state and the very dangers the Establishment Clause seeks to avoid.¹⁰² Chief Justice Rehnquist, in elaborating upon this irony, stated that “[b]oth tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system [and] [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.”¹⁰³ Nevertheless, time and time again, the Court has stated that the standard for determining the constitutionality of a benefit to a religious organization is not that of preference; but rather, that of *neutrality*.¹⁰⁴

C. Tax Exemption & Supreme Court Jurisprudence

Giving rise to question over the constitutionality of tax exemption for religious organization, within the framework of the Establishment Clause, was the landmark case of *Walz v. Tax Commission of New York*. In *Walz*, a New York property owner sued the New York Tax Commission, which formally granted tax-exempt status for the property of religious organizations.¹⁰⁵ The Court, upholding the tax, wrote that the “State has an affirmative policy that considers [religious entities] as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest.”¹⁰⁶ The Court, nevertheless, recognized

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 619-620.

¹⁰² Barnett, *supra* note 52, at 374 (citing *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1450 (2011) (Kagan, J., dissenting) (discussing Madisonian origins of the Establishment Clause)).

¹⁰³ *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 544 (1983).

¹⁰⁴ *See Zelman v. Simmons-Harris et al.*, 536 U.S. 639, 652 (2002).

¹⁰⁵ *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 666 (1970).

¹⁰⁶ *Id.* at 673.

that the granting of such tax exemptions “necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a *lesser*, involvement than taxing them.”¹⁰⁷ Because the government, in granting such a tax exemption, does not directly “transfer part of its revenues to churches but [rather] simply abstains from demanding that the church support the state,” the Court held that there “is no genuine nexus between tax exemption and establishment of religion.”¹⁰⁸ More specifically, the tax exemption “creates only a minimal and remote involvement between church and state and far less than taxation of churches.”¹⁰⁹ This tangential involvement, according to the Court, ultimately “restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.”¹¹⁰

Interestingly, however, was the Supreme Court’s rejection of the “social welfare” test regarding religious tax exemption. The Supreme Court reasoned that such a “yardstick” approach for charitable contribution “could conceivably give rise to confrontations that could escalate to constitutional dimensions.”¹¹¹ If the Court were to employ a test that would require it to engage in a searching inquiry of the religious organization’s activities to determine whether they qualify as sufficient charitable contribution, the Court could effectively “tip the balance toward governmental control of churches or governmental restraint on religious practice.”¹¹² Justice Brennan, in his concurring opinion, differed significantly from the majority, insisting on the utilization of the “social welfare” test.¹¹³ According to Justice Brennan, religious organizations “are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways,” and as such, these religious organizations “bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community.”¹¹⁴ In addition, Justice Brennan asserted that the “government grants exemptions to religious organizations because they uniquely contribute to the pluralism of

¹⁰⁷ *Id.* at 674 (emphasis added).

¹⁰⁸ *Id.* at 675.

¹⁰⁹ *Id.* at 676.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 674.

¹¹² *Id.* at 675.

¹¹³ *See Id.* at 687 (Brennan, J., concurring).

¹¹⁴ *Id.* (Brennan, J., concurring).

American society by their religious activities.”¹¹⁵ Despite such a deviation from conventional jurisprudence on the prevention of church-state entanglement, Justice Brennan’s “social welfare” theory foreshadowed the change in paradigm with how the Supreme Court would view religious tax exemption.¹¹⁶

In *Bob Jones University v. United States*, thirteen years after the decision in *Walz*, the Court borrowed from Justice Brennan’s concurrence in *Walz* when the Court upheld the IRS’s revocation of a Christian-based university’s tax-exempt status due to its acts of discrimination on the basis of race.¹¹⁷ Chief Justice Burger, writing for the majority, declared that “entitlement to tax exemption depends on meeting certain common law standards of charity . . . that an institution seeking tax-exempt status must serve a *public* purpose”¹¹⁸ In other words, the Supreme Court based its revocation of the religious organization’s tax-exempt status based on a public policy rationale, as opposed to First Amendment constitutionality.¹¹⁹ Indeed, this new rationale indicated that it was plausible for a religiously tax-exempt organization to lose its status as tax-exempt if the organization effectively failed to provide a charitable purpose in line with 26 U.S.C. § 501(c)(3).¹²⁰ Taking it a step further, the Court commented, in footnote 20 of the decision, that “contemporary standards must be considered in determining whether given activities provide a public benefit and are entitled to charitable tax exemption.”¹²¹ In essence, the Court opened the door to permissible legal inquiry as to whether the IRS could pursue religious organizations on the basis of “charitable purpose” or “public policy” under 26 U.S.C. § 501(c)(3).¹²²

After entertaining a discussion on the public-policy rationale of the tax-exemption, the Supreme Court returned to form, wrestling again with the constitutionality of the benefits that religious entities receive as a result of tax exemption.¹²³ In *Hernandez v. Commissioner of Internal Revenue*, the

¹¹⁵ *Id.* at 689 (Brennan, J., concurring).

¹¹⁶ Christine Roemhildt Moore, *Religious Tax Exemption and the "Charitable Scrutiny" Test*, 15 REGENT U. L. REV. 295, 314 (2003) [hereinafter Moore].

¹¹⁷ See generally *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

¹¹⁸ *Id.* at 586 (1983) (emphasis added).

¹¹⁹ *Id.* at 591.

¹²⁰ *Id.* at 588.

¹²¹ *Id.* at 593 n.20.

¹²² See Moore, *supra* note 116, at 323-324.

¹²³ See *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680 (1989).

Supreme Court, having employed the tripartite *Lemon* test,¹²⁴ concluded that a “statute primarily having a secular effect does not violate the Establishment Clause merely because it ‘happens to coincide or harmonize with the tenets of some or all religions.’”¹²⁵ Rather, tax exemptions do not advocate for, endorse, or support religion in general or “[any] particular religious practice.”¹²⁶ Being of neutral design and purpose, the Supreme Court made fairly clear that regulations which do “not facially differentiate among religious sects, but appl[y] to all religious entities,” as well as secular organizations, pass “constitutional muster.”¹²⁷

In summary, the holdings of *Walz*, *Bob Jones University*, and *Hernandez* provided a jurisprudential guide for how courts will analyze future challenges to the constitutional legitimacy of tax-exemption for religious organizations, especially in juxtaposition with its secular counterparts in 26 U.S.C. § 501(c)(3).

D. *The Internal Revenue Code & Religious Tax Exemption*

The Code contains numerous provisions addressing the special tax treatment religious organizations receive by the mere fact that they have a self-declared religious purpose. Groups “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 . . .” are exempted under 26 U.S.C. § 501(c)(3).¹²⁸

Section D proceeds in two parts: Subsection *i* identifies and analyzes the constitutionality of the tax provisions which provide preferential tax treatment for religious organizations over other charitable organizations; and Subsection *ii* outlines the potential for abuse of the tax-exemption scheme and how a religious organization may have its tax-exempt status revoked or invalidated.

¹²⁴ *Id.* at 695-697.

¹²⁵ *Id.* at 696 (citing *McGown v. Maryland*, 366 U.S. 420, 442 (1961)).

¹²⁶ *Id.* at 696.

¹²⁷ *Id.* at 681.

¹²⁸ 26 U.S.C.A. § 501 (West, Westlaw current through P.L. 115-231) (emphasis added).

1. *The Perks of Being Religious, and Its (Sometimes) Questionable Nature*

There are 14 provisions of the Code granting preferential tax treatment that benefit churches and other religious organizations or practices, some of which are constitutionally suspect.¹²⁹ To begin, the IRS requires almost all other charitable organizations to file a Form 1023 Application for Recognition of Exemption, under 26 U.S.C. 501(c)(3) of the Code.¹³⁰ Churches, as well as their associations, integrated auxiliaries, and conventions, however, are statutorily excused from such a filing requirement.¹³¹ Legislative history regarding such an exemption is silent as to the reason for this filing exception.¹³² Generally, a fairly thorough and complex application for recognition of tax exemption must be submitted to the IRS, usually leading to further requests for additional documentation from IRS agents, and often lasting over a series of months.¹³³ It is clear, however, that the purpose of this statutory carve-out is to draw a “line of separation” between government and religion¹³⁴ in a way that “minimize[s] entanglement in the exemption process.”¹³⁵ Moreover, the IRS requires most tax-exempt organizations to file Form 990 forms, which are annual information returns or notices.¹³⁶ Churches, their integrated auxiliaries, and conventions or associations, are exempted from the filing of a Form 990.¹³⁷ Similar to the background on the lack of an initial filing requirement, there is no legislative history that justifies this exemption either.¹³⁸ Furthermore, the Code requires tax-exempt entities to report to the IRS when undergoing dissolution, liquidation, termination, or substantial contraction.¹³⁹ But, again, exempt

¹²⁹ Bruce R. Hopkins, *Religious Organizations—Constitutionality of Code Provision*, 30 TAX’N EXEMPTS 17, 20, 2018 WL 3993520 [hereinafter *Religious Organizations*].

¹³⁰ 26 U.S.C.A. § 508(a) (West, Westlaw current through P.L. 115-231); 26 U.S.C.A. § 6033(i) (West, Westlaw current through P.L. 115-231).

¹³¹ 26 U.S.C.A. § 508(c)(1)(A) (West, Westlaw current through P.L. 115-231).

¹³² *Religious Organizations*, *supra* note 129 (Hopkins is referencing H. Rep’t No. 91-413, 91st Cong., 1st Sess. (1969); S. Rep’t No. 91-552, 91st Cong., 1st Sess. (1969)).

¹³³ *Religious Organizations*, *supra* note 129.

¹³⁴ *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

¹³⁵ *Religious Organizations*, *supra* note 129.

¹³⁶ 26 U.S.C.A. § 6033(a)(1) (West, Westlaw current through P.L. 115-231).

¹³⁷ 26 U.S.C.A. § 6033(a)(3)(A)(i) (West, Westlaw current through P.L. 115-231).

¹³⁸ *Religious Organizations*, *supra* note 129.

¹³⁹ 26 U.S.C.A. § 6043(b) (West, Westlaw current through P.L. 115-231).

from this requirement are churches, their integrated auxiliaries, conventions and associations (and other small public charities).¹⁴⁰

In the statutory realm of charitable organizations, the Code distinguishes those organizations classified as a “public charity” from those classified as a “private foundation.” Possessing status as a “public charity” is more advantageous from a tax perspective; churches, their conventions, and associations, receive automatic designation as a “public charity.”¹⁴¹ Once again, the legislative history accompanying the enactment of “public charity” is *silent*, other than Congress noting “that [it] believed that certain types of ‘institutional’ charitable entities should be regarded as public charities because of their nature and activities.”¹⁴² It is important to note, however, that other types of organizations including schools, hospitals, medical research organizations, and government bodies receive similar treatment under “public charity” status.¹⁴³

Although the Code provisions favoring religious tax-exemption appear to be arbitrary, they are *plausibly* rooted in anti-church-state entanglement grounds, at least on the basis that there is no intermeddling by the federal government with the fiscal nature of the religious organization, to keep both spheres “insulat[ed] [] from the other.”¹⁴⁴ Nevertheless, not all Code exemptions for religious organizations are rooted in the principle of the Establishment Clause. Of the 14 Code provisions related to religious tax exemption, the provision that raises arguably the most serious questions of constitutional validity is the “parsonage rental allowance” accorded to ministers of the gospel.¹⁴⁵ This rental allowance effectively permits a minister of the gospel to exclude from gross income the rental value of a home furnished as part of compensation¹⁴⁶ and rental allowances.¹⁴⁷ The

¹⁴⁰ 26 U.S.C.A. § 6043(b)(1) (West, Westlaw current through P.L. 115-231).

¹⁴¹ See 26 U.S.C.A. § 170(b)(1)(A)(i) (West, Westlaw current through P.L. 115-231).

¹⁴² *Religious Organizations*, *supra* note 129, at 21; See H. Rep't No. 91-413, 91st Cong., 1st Cong. (1969); S. Rep't No. 91-552, 91st Cong., 1st Sess. (1969).

¹⁴³ See 26 U.S.C.A. § 170(b)(1)(A)(ii)-(v) (West, Westlaw current through P.L. 115-231).

¹⁴⁴ *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 676 (1970).

¹⁴⁵ See 26 U.S.C.A. § 107(2) (West, Westlaw current through P.L. 115-231).

¹⁴⁶ The rental value exclusion from income can be evaluated in a much larger context, given that it does bear a secular relationship to that of the convenience-of-the-employer doctrine in 26 U.S.C.A. § 119. This doctrine is not simply restricted to religious leaders; rather, it is available for all employees, profit and non-profit alike, who satisfy the necessary elements of the doctrine. 26 U.S.C.A. § 107(1) (West, Westlaw current through P.L. 115-231).

¹⁴⁷ 26 U.S.C.A. § 107(2) (West, Westlaw current through P.L. 115-231).

constitutionality of the parsonage rental allowance was first considered in 2002 by the Ninth Circuit Court of Appeals in *Warren v. Commissioner*,¹⁴⁸ in light of Pastor Rick Warren’s housing allowances of \$76,000 to \$80,000 each year, an amount equal to or just shy of his church salary.¹⁴⁹ But before the Ninth Circuit had the opportunity to rule on its constitutionality, Congress intervened by enacting legislation, titled the Clergy Housing Allowance Clarification Act of 2002,¹⁵⁰ which provided a statutory rule on the “fair rental value” of the rental allowance paid to the ministers of the gospel as part of their compensation.¹⁵¹

Despite Congress’s intervention, the parsonage rental allowance was again challenged in *Freedom From Religion Foundation, Inc. v. Lew*, where a Wisconsin federal district court held that the “parsonage rental allowance” was unconstitutional because it results in the preferential treatment for religious messages, a blatant violation of the Establishment Clause.¹⁵² The court added that the government failed to “identify any reason why a requirement on ministers to pay taxes on a housing allowance is more burdensome for them than for the many millions of others who must pay taxes on income used for housing expenses,”¹⁵³ and additionally found that such a law “discriminates against those religions that do *not have* ministers.”¹⁵⁴ Despite the court finding that all three prongs of the *Lemon* test were violated, the decision was ultimately vacated on appeal when the Court of Appeals for the Seventh Circuit stated that the plaintiffs lacked a “constitutionally cognizable injury.”¹⁵⁵ Years later, in a new case, the same federal district court ruled that the “parsonage rental allowance” violates the Establishment Clause, primarily because it has no secular purpose or effect, as required by the first prong in *Lemon*.¹⁵⁶ This time, however, the Court of Appeals for the Seventh Circuit issued a substantive decision.

¹⁴⁸ 282 F.3d 1119 (9th Cir. 2002).

¹⁴⁹ Lorelei Laird, *Courts Are Hearing New Challenges to Tax Exemptions for Religion*, ABA JOURNAL (May 2014), http://www.abajournal.com/magazine/article/courts_are_hearing_new_challenges_to_tax_exemptions_for_religion.

¹⁵⁰ See Clergy Housing Allowance Clarification Act of 2002, PL 107–181, May 20, 2002, 116 Stat 583.

¹⁵¹ 26 U.S.C.A. § 107 (West, Westlaw current through P.L. 115-231).

¹⁵² 983 F. Supp. 2d 1051 (W.D. Wis. 2013).

¹⁵³ *Id.* at 1062.

¹⁵⁴ *Id.* at 1068 (emphasis added).

¹⁵⁵ *Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815, 823 (7th Cir. 2014).

¹⁵⁶ *Gaylor v. Mnuchin*, 278 F. Supp. 3d 1081, 1104 (W.D. Wis. 2017).

Circuit Judge Brennan, writing for the majority, ultimately found no violation of the *Lemon* test, declaring that the parsonage rental allowance “falls into the play between the joints of the Free Exercise Clause and the Establishment Clause: neither commanded by the former, nor proscribed by the latter.”¹⁵⁷ Taking it a step further, the Court employed the “historical significance test,”¹⁵⁸ and deferred to the government, intervening parties, and amici curiae’s offer of “substantial evidence of a lengthy tradition of tax exemptions for religion, particularly for church-owned properties.”¹⁵⁹ In effect, by excluding parsonages from income, and excluding cash allowances, Congress was merely continuing its “‘historical practice[.]’ of exempting certain church resources from taxation.”¹⁶⁰ Although the plaintiff of the case was “weighing whether to ask the full 7th Circuit to review the case or take it to the U.S. Supreme Court,”¹⁶¹ no petition for certiorari was filed, leaving more ambiguity whether this issue will appear before the Supreme Court again.

Other Code provisions that raise Establishment Clause issues include rules about “charitable gift substantiation” and “quid pro quo contributions.” Most intriguing about the rules surrounding charitable gift substantiations, in connection with religious organizations, is that the Supreme Court addressed its constitutional validity five years *before* the enactment of this section. The Supreme Court explored the “inherently reciprocal nature” of charitable exchanges with a religious organization.¹⁶² Evaluating the payments given to the Church of Scientology in exchange for auditing sessions (designed to augment spiritual actualization), the Court found that, in the context of a charitable contribution, only those “unrequited payments” may be deductible.¹⁶³ Here, however, the Court found that the exchange of a donative gift contribution for goods or services (i.e., the auditing sessions) was the very embodiment of a *quid pro* exchange.¹⁶⁴ Despite holding that such payments to religious organizations should not be given special preference,

¹⁵⁷ *Gaylor v. Mnuchin*, 919 F.3d 420, 436 (7th Cir. 2019).

¹⁵⁸ *See Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (quoting *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989)).

¹⁵⁹ *Gaylor*, 919 F.3d at 436.

¹⁶⁰ *Id.*

¹⁶¹ Scott Bauer, *Federal Appeals Court OKs Tax-free Housing for Clergy*, ASSOCIATED PRESS (March 15, 2019), <https://www.apnews.com/b9c61c5a1e584fefb808f3e329734f25>.

¹⁶² *See Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680 (1989).

¹⁶³ *Id.* at 690.

¹⁶⁴ *See id.* at 691.

Congress codified an exemption for compliance with gift substantiation and quid pro quo exchanges. Consequently, many “charitable exchanges” will likely fly under the statutory and constitutional radar.

Additional provisions appear to flag constitutional concern and controversy with secular purpose. Code rules, centered on commercial-type insurance, preclude tax exemption for tax-exempt charitable organizations when the organizations’ primary activity is to issue commercial-type insurance, or in the alternative, treat such insurance activity as an unrelated business.¹⁶⁵ Of the five exceptions to the definition of “commercial-type insurance,” one pertains to casualty or property insurance provided by a church, or a convention or association of churches.¹⁶⁶ The other pertains to the award of retirement and/or welfare benefits by a church, or a convention or association of churches, for the employees of the same, or for the beneficiaries of the employee.¹⁶⁷ Thus, in applying the first prong of the *Lemon* test, it is clear there is no obvious secular rationale for a carve-out for churches and associations or conventions of churches. As a result, other charitable organizations that provide the same benefits and insurance as churches and associations or conventions of churches are at risk for (1) denial or revocation of tax exemption, or (2) unrelated business income taxation.¹⁶⁸

Perhaps the most blatantly constitutionally suspect provision relates to the Code’s rules regarding neighborhood land. As a general statutory matter, a tax-exempt organization is taxed for income derived from debt-financed property, and such income recorded as unrelated business income for tax purposes.¹⁶⁹ The Code recognizes an exemption for interim income derived from debt-financed neighborhood real property and received by a tax-exempt organization.¹⁷⁰ To meet this exemption, the tax-exempt organization must devote the property to one or more exempt uses within *ten years* of acquiring the property, and have the property situated in the organization’s neighborhood.¹⁷¹ Churches, however, receive a five-year increase in the permissible time to put the property to one or more exempt uses, and are not

¹⁶⁵ 26 U.S.C.A. § 501(m)(1)-(2) (West, Westlaw current through P.L. 115-231).

¹⁶⁶ 26 U.S.C.A. § 501(m)(3)(C) (West, Westlaw current through P.L. 115-231).

¹⁶⁷ 26 U.S.C.A. § 501(m)(3)(D) (West, Westlaw current through P.L. 115-231).

¹⁶⁸ *Religious Organizations*, *supra* note 129, at 24.

¹⁶⁹ 26 U.S.C.A. § 514(a) (West, Westlaw current through P.L. 115-231).

¹⁷⁰ 26 U.S.C.A. § 514(b)(3)(A)-(C) (West, Westlaw current through P.L. 115-231).

¹⁷¹ *Id.*

obligated to have the property situated in the church's neighborhood.¹⁷² Although the legislative history is silent about this special rule,¹⁷³ the Code openly signals a violation of the second prong of *Lemon* by titling this special rule as the "Special rule for churches."¹⁷⁴ Armed with no secular rationale and facial impropriety of government advancement of religion, this carve-out for tax-exempt churches raises red flags about its constitutionality.

As discussed above, tax-exempt religious entities enjoy a wide spread of privileges that are unavailable to secular-based charitable organizations, even those which provide more tangible economic benefits to the U.S. infrastructure. How then should the constitutional legitimacy of statutes which either provide legislatively inexplicable benefits or violate the prongs of the *Lemon* test be addressed? The IRS is empowered and has authority to examine tax-exempt organizations; but as we will see, special rules impose restrictions on tax examinations concerning religious entities, such as churches.¹⁷⁵ Despite this, there are other means by which the IRS could more effectively regulate religious organizations' potential exploitations of the Code.

2. *Caution Over the Abuse of Tax Exemption*

Given the remarkable benefits and tax advantage religious organizations enjoy, even over fellow tax-exempt charitable organizations, the Code opens the possibility for religious organizations to exploit the modern taxation framework. At the very minimum, a 26 U.S.C. § 501(c)(3) group must satisfy a tax-exempt purpose and neither (1) "inure[] to the benefit of any private shareholder or individual" "[a] part of the [organization's] net earnings," nor (2) "attempt[] to influence legislation . . . or intervene in . . . any political campaign on behalf of... any candidate for public office."¹⁷⁶ Thus, the Code explicitly forbids tax-exempt religious organizations from

¹⁷² 26 U.S.C.A. § 514(b)(3)(E) (West, Westlaw current through P.L. 115-231).

¹⁷³ *Religious Organizations*, *supra* note 129, at 24, (Hopkins referencing H. Rep't No. 91-413, 91st Cong., 1st Sess. (1969), at 28; S. Rep't No. 91-552, 91st Cong., 1st Sess. (1969), at 64).

¹⁷⁴ 26 U.S.C.A. § 514(b)(3)(E) (West, Westlaw current through P.L. 115-231).

¹⁷⁵ *See* 26 U.S.C.A. § 7611(a)(1) (West, Westlaw current through P.L. 115-231).

¹⁷⁶ 26 U.S.C.A. § 501(c)(3) (West, Westlaw current through P.L. 115-231).

operating as (1) commercial enterprises for private gain,¹⁷⁷ or (2) vehicles for lobbying or political activities.¹⁷⁸

Despite these clear prohibitions, the IRS's ability to investigate is clearly hampered due to the difficulty of policing new religions (and their accompanying practices),¹⁷⁹ and restrictions on church taxation inquiries and examinations.¹⁸⁰ Novel churches, such as "electronic churches" and "mail-order ministries," frustrate the IRS because the IRS must walk a delicate balance between legally acceptable probing into potential tax fraud or sheltering and recognizing constitutional protections for nontraditional, minority, or unorthodox religious groups.¹⁸¹ Amid the "tightrope act," abuse cases remain prevalent, with "tax avoidance clearly taking precedence over religion."¹⁸² Recognizing the reality that "taxpayers who establish churches *solely* for tax avoidance purposes" was "reaching a breaking point,"¹⁸³ the Tax Court declared that "taxpayers [who] use the pretext of a church to avoid paying their share of taxes" and who "resort to the courts in a[n] [] attempt to vindicate themselves" will have sanctions imposed upon them for undue delay,¹⁸⁴ and will be penalized for evasion of taxes legally due.¹⁸⁵

Almost a year after the Tax Court's warning to potential abusers, The Deficit Reduction Act of 1984 went into effect, including special rules (known as the "Church Audit Procedures Act") that imposed restrictions on the IRS in its investigations of churches.¹⁸⁶ Not surprisingly, the legislative history of these rules is *silent* on the reason for this enactment.¹⁸⁷ On its face,

¹⁷⁷ For example, a court held that contributions to a church from a restaurant were not deductible because the restaurant's business activities, in connection with the church, were of a commercial character, rendering the status of the church taxable. *See Riker v. Comm'r*, 244 F.2d 220 (9th Cir. 1957).

¹⁷⁸ For example, a court affirmed the government's revocation of the tax-exempt status of a national ministry organization, upon a finding that a majority of its activities were designed to carry on propaganda, influence legislation, intervene in political campaigns. *See Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972).

¹⁷⁹ Hopkins, *supra* note 85, at § 10.2(c).

¹⁸⁰ *See* 26 U.S.C.A. § 7611(a)(1) (West, Westlaw current through P.L. 115-231).

¹⁸¹ Hopkins, *supra* note 85, at § 10.2(c).

¹⁸² *Id.*

¹⁸³ *See e.g.*, *Miedaner v. Comm'r*, 81 T.C. 272, 282 (1983) (emphasis added).

¹⁸⁴ *Id.*; *see also* 26 U.S.C.A. § 6673 (West, Westlaw current through P.L. 115-231).

¹⁸⁵ *Miedaner*, 81 T.C. at 282; *See also* 26 U.S.C.A. § 6663 (West, Westlaw current through P.L. 115-231).

¹⁸⁶ *See* 26 U.S.C.A. § 7611 (West, Westlaw current through P.L. 115-231).

¹⁸⁷ Receiving bipartisan support, sponsors of the bill, Representative Mickey Edwards and Senator Charles Grassley introduced the Church Audit Procedure Acts, noting that the Act

like the other Code provisions granting advantages to religious tax exemptions, this restriction appears to violate the first two prongs of the *Lemon* test: (1) it does not have a secular legislative purpose, and (2) its primary effect is the advancement of religion.¹⁸⁸ The statute provides that a church tax inquiry can only be commenced “if an appropriate high-level Treasury official reasonably believes . . . that the church (A) may not be exempt, by reason of its status as a church . . . or (B) may be carrying on an unrelated trade or business”¹⁸⁹ The purpose of the Church Audit Procedures Act is to “assist both the church under examination and the Internal Revenue Service in a tax audit and resolve clearly defined issues quickly in consonance with [the] Constitution.”¹⁹⁰ The Act possesses additional features other than the “reasonable belief” basis: restrictions on examinations,¹⁹¹ notice requirements,¹⁹² limitations on period of inquiries and examinations,¹⁹³ and pre-examination conferences between the targeted churches and the IRS.¹⁹⁴

But just as the IRS received statutory ammunition to investigate and explore potential abusers of the modern statutory scheme, the IRS also failed to define the “high-level Treasury official,”¹⁹⁵ effectively rendering the Church Audit Procedures Act hamstrung. Even as the IRS attempted to vest auditing power in the Director of Exempt Organizations Examinations (“DEOE”),¹⁹⁶ a church successfully argued that the DEOE did not meet

would “resolve clearly defined issues quickly in consonance with [the] Constitution. *See* 130 CONG. REC. 9,152 (daily ed. Apr. 12, 1984) (statement of Sen. Grassley); *see also Religious Organizations*, *supra* note 129, at 23, (citing H. Rep’t No. 98-861, 98th Cong., 2nd Sess. (1984) (Conference Report)).

¹⁸⁸ *Religious Organizations*, *supra* note 129, at 23.

¹⁸⁹ 26 U.S.C.A. § 7611(a)(2)(A)-(B) (West, Westlaw current through P.L. 115-231).

¹⁹⁰ Barnett, *supra* note 52, at 379 (quoting 130 CONG. REC. 9,152 (daily ed. Apr. 12, 1984) (statement of Sen. Grassley)).

¹⁹¹ *See* 26 U.S.C.A. § 7611(b) (West, Westlaw current through P.L. 115-231).

¹⁹² *See* 26 U.S.C.A. § 7611(a)(3), (b)(2)-(3) (West, Westlaw current through P.L. 115-231).

¹⁹³ *See* 26 U.S.C.A. § 7611(c)(1) (West, Westlaw current through P.L. 115-231).

¹⁹⁴ *See* 26 U.S.C.A. § 7611(b)(3)(A)(iii) (West, Westlaw current through P.L. 115-231).

¹⁹⁵ *See* J. Michael Martin, *Why Congress Adopted the Church Audit Procedures Act and What Must Be Done Now to Restore the Law for Churches and the IRS*, 29 AKRON TAX J. 1, 21 n.100 [hereinafter Martin]; *see also* John Burnett, *Can A Television Network Be a Church? The IRS Says Yes*, NATIONAL PUBLIC RADIO (Apr. 1, 2014, 4:00 PM), <http://www.npr.org/2014/04/01/282496855/can-a-television-network-be-a-church-the-irs-says-yes> [hereinafter *Television*].

¹⁹⁶ *United States v. Living Word Christian Ctr.*, No. 08-mc-37 (ADM/JJK) 2008 U.S. Dist. LEXIS 106639, at *18 (D. Minn. Nov. 18, 2008).

congressional intent in naming a “high-level Treasury official.”¹⁹⁷ The court, in opining over the qualifications of the DEOE, declared that because the DEOE was an examining authority, the DEOE was “at odds with the legislative purpose of vesting the authority to halt over-zealous examination of churches in a high-level Treasury official.”¹⁹⁸ Following this decision, the IRS retreated, abstaining from defining the appropriate official to satisfy the “high-level Treasury” position,¹⁹⁹ leading to an ultimate cessation in the conducting of church audits.²⁰⁰ As a result, questions again lingered concerning how the IRS was to investigate prospective abusers of the taxation scheme.

E. The Johnson Amendment

The Johnson Amendment, as codified in 26 U.S.C.A. § 501(c)(3), provides that a tax-exempt entity must limit its charitable activities so that:

[N]o substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.²⁰¹

In other words, the Code imposes two obligations on tax-exempt religious organizations: (1) propaganda, or other undefined attempts to influence legislation, may not comprise a “substantial part” of the religious organization’s activities; and (2) churches may not participate in, or intervene in, any political campaign on behalf of (or in opposition) to any candidate who is seeking a position in the public office.

¹⁹⁷ *Id.* at *4-5.

¹⁹⁸ *Id.* at *39.

¹⁹⁹ See Kimberly Winston, *IRS Agrees to Monitor Churches for Electioneering*, WASHINGTON POST (July 21, 2014), https://www.washingtonpost.com/national/religion/irs-agrees-to-monitor-churches-for-electioneering/2014/07/21/99815d32-1118-11e4-ac56-773e54a65906_story.html.

¹⁹⁹ Barnett, *supra* note 52, at 380-381 (citing John Burnett, *Onscreen But Out of Sight, TV Preachers Avoid Tax Scrutiny*, NATIONAL PUBLIC RADIO (Apr. 2, 2014, 4:03 PM), <http://www.npr.org/2014/04/02/298373994/onscreen-but-out-of-sight-tv-preachers-avoid-tax-scrutiny>).

²⁰¹ 26 U.S.C.A. § 501(c)(3) (West, Westlaw current through P.L. 115-231).

In contravention to these impositions by the Code, the President's issuance of the executive order "Promoting Free Speech and Religious Liberty" called for the IRS to abandon enforcement of the Johnson Amendment against those religious organizations not playing within the bounds of the Code's political prohibitions.²⁰² This Article calls not only for the abandonment of the executive order, thereby permitting the IRS to resume enforcement of the Johnson Amendment, but also for the enforcement to be *stringently* advanced, so that tax-exempt religious organizations are obligated to rigidly adhere to the Code's restrictions. But before providing suggestions for how the IRS could effectively crack down on those religious organizations that are abusing technical work-arounds, it is first useful to address often-invoked challenges to, and criticisms of, the Johnson Amendment and its prohibition on certain forms of political activity.

Before drawing upon the sound, constitutional justifications as to why the Johnson Amendment passes muster, it is first necessary to clarify what exactly the Johnson Amendment outright prohibits, and what it has *always* permitted. Prior to the issuance of the executive order, the President, in his remarks at the National Prayer Breakfast, declared that the repeal of the Johnson Amendment is critical to the "freedom [of] the right to worship according to our own beliefs."²⁰³ Its removal from the Code would encourage and allow "our representatives of faith to *speak* freely and without fear of retribution."²⁰⁴ Yet, while such a declaration is certainly laudable in its promotion of First Amendment protections, the President ultimately missed the mark. The Johnson Amendment does not punish those members, or even church leaders (e.g., pastors, ministers, etc.), who speak in an individual capacity regarding political issues that are in direct conflict with, or in support of, the moral obligations of their religion. Rather, the Johnson Amendment punishes speech offered by those individuals speaking as emissaries of the religious organization. More simply, it is not speech from religiously affiliated individuals that is punished (as this speech is *highly* protected under First Amendment protections), it is speaking from the pulpit, designed and intended to promote political ideas or to support candidates for public office, on behalf of the religious organization.

²⁰² *Presidential Directive*, *supra* note 8.

²⁰³ President Trump, *supra* note 5.

²⁰⁴ President Trump, *supra* note 5 (emphasis added).

Former president John F. Kennedy articulated this fine distinction on the importance of religious liberty and freedom of speech in his historic address to the leaders of the Southern Baptist Church.²⁰⁵ In the context of anti-Catholic sentiment and fear that the presidential candidate would unquestionably follow direct orders from the Vatican, Kennedy delivered an impassioned speech before the Greater Houston Ministerial Association.²⁰⁶ In the address, John F. Kennedy envisioned a separation of church and state, and disentanglement between politicians and church leaders:

I believe in an America where the separation of church and state is absolute -- where no Catholic prelate would tell the President (should he be a Catholic) how to act and no Protestant minister would tell his parishioners for whom to vote -- where no church or church school is granted any public funds or political preference -- and where no man is denied public office merely because his religion differs from the President who might appoint him or the people who might elect him. . . . I believe in an America that is officially neither Catholic, Protestant nor Jewish -- where no public official either requests or accepts instructions on public policy from the Pope, the National Council of Churches or any other ecclesiastical source -- where no religious body seeks to impose its will directly or indirectly upon the general populace or the public acts of its officials -- and where religious liberty is so indivisible that an act against one church is treated as an act against all.²⁰⁷

Ultimately, John F. Kennedy imagined not the silence of religiously driven speech, but a necessary barrier between formal religious speech as it relates to political activity, and vice versa.

Perhaps the foremost raised contention against the constitutionality of the Johnson Amendment is that it infringes on a religious organization's (and its ministers') First Amendment right to the free exercise of its religion. While there is a restriction on religious entities and their freedom to express

²⁰⁵ *Transcript: JFK's Speech on His Religion*, NATIONAL PUBLIC RADIO (Dec. 5, 2007), <https://www.npr.org/templates/story/story.php?storyId=16920600>.

²⁰⁶ *Id.*

²⁰⁷ John F. Kennedy, *Address to Southern Baptist Leaders*, N.Y. TIMES (Sept. 13, 1960), available at <https://usa.usembassy.de/etexts/democrac/66.htm>.

overtly political views or advocate for a candidate for public office, this provision passes constitutional muster. Under *Employment Division v. Smith*, the Supreme Court held that the right of free exercise “does *not* relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”²⁰⁸ Here, the Johnson Amendment is neutral both on its face and on its application: it governs non-religious 501(c)(3) organizations that have tax-exempt status.²⁰⁹ To exclude religious organizations from this requirement would be the functional equivalent of awarding preferential treatment to religious organizations.²¹⁰ Thus, while the Johnson Amendment does not address the fact that some religious organizations and ministers may feel compelled by their religious beliefs to engage in political discussion, the Johnson Amendment is constitutional, given its application is neutral, secular, and generally applicable to all 501(c)(3) organizations.

Second to criticism under Free-Exercise principles are challenges under the First Amendment right of free speech. Time and time again, however, plaintiffs have challenged the Johnson Amendment but failed to demonstrate that the Johnson Amendment violates the First Amendment right of free speech. In *Regan v. Taxation with Representation of Washington*, the Supreme Court upheld the denial of 501(c)(3) status to a religious organization, stating that the “Congress is not required by the First Amendment to subsidize lobbying.”²¹¹ Elaborating upon the legal justification for the Code’s prohibition of certain political activity, the Tenth Circuit, in *Christian Echoes National Ministry, Inc. v. United States*, provided:

In light of the fact that tax exemption is a privilege, a matter of grace rather than right, we hold that the limitations contained in Section 501(c)(3) withholding exemption from nonprofit corporations do not deprive [the religious organization] of its constitutionally guaranteed right of free

²⁰⁸ *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (emphasis added).

²⁰⁹ Mark A. Goldfeder & Michelle K. Terry, *To Repeal or Not Repeal: The Johnson Amendment*, 48 U. Mem. L. Rev. 209, 235 (2017).

²¹⁰ *Id.*

²¹¹ *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 546 (1983).

speech. The taxpayer may engage in all such activities without restraint, subject, however, to withholding of the exemption or, in the alternative, the taxpayer may refrain from such activities and obtain the privilege of exemption.²¹²

Thus, the courts have made clear that the government has absolutely no obligation to provide tax exemptions for tax-exempt organizations that engage in forbidden political activity.²¹³ Tax-exemption is a form of congressional grace,²¹⁴ rather than a constitutional right: what Congress “giveth,” it may “taketh” away.

These challenges and criticisms of the Johnson Amendment overlook the genuine, compelling purpose of the Johnson Amendment. If Congress were to repeal the Johnson Amendment, 501(c)(3) organizations, including religious organizations, could receive tax deductions for donations to religious organizations.²¹⁵ What is the significance of this result? Donors could deduct any contributions on their federal income tax return, creating incentives for donors to donate to tax-exempt organizations, as opposed to Political Action Committees (“PACs”) or super-PACs.²¹⁶

Moreover, even when PACs and super-PACs are required to identify their donors, donors of 501(c)(3) organizations, including religious entities, are not required to disclose their donors’ identities.²¹⁷ In *Citizens United vs. Federal Election Commission*, Justice Kennedy expounded upon the dangers of donor-driven political action:

When private interests are seen to exert outsized control over officeholders solely on account of the money spent on (or withheld from) their campaigns, the result can depart so thoroughly “from what is pure or correct” ... that it amounts to a “subversion ... of the ... electoral process.”²¹⁸

²¹² 470 F.2d 849, 857 (10th Cir. 1972).

²¹³ Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1925 (2006).

²¹⁴ James, *supra* note 32, at 74.

²¹⁵ LaShawn Y. Warren, *3 Reasons the Johnson Amendment Should Not Be Repealed*, CENTER FOR AMERICAN PROGRESS (Apr. 6, 2017, 9:00 AM), <https://www.americanprogress.org/issues/religion/news/2017/04/06/430104/3-reasons-johnson-amendment-not-repealed/>.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ 558 U.S. 310, 450 (2010) (quoting *United States v. Int'l Union United Auto., Aircraft & Agr. Implement Workers of Am.* (UAW-CIO), 352 U.S. 567, 575 (1957)).

Depriving Congress of the capacity to regulate the electioneering process yields the “cynical assumption that large donors [who] call the tune could jeopardize the willingness of voters to take part in democratic governance.”²¹⁹ While the First Amendment does indeed protect the sanctity of political speech, transparency through donor disclosure “enables the electorate to make informed decisions and give proper weight to different speakers and messages.”²²⁰ Armed with the tax deduction, the donor of the religious organization would be shielded from having to disclose its donations; consequently, the absence of donor transparency could signal the death toll for an effective democracy: “cynicism and disenchantment.”²²¹

Assuming the absence of the Johnson Amendment, religious organizations, whose tax-exempt status presupposes the offering of community philanthropy and moral guidance, could pocket sizable contributions from donors, all in the name of supporting a political cause, ideology, or candidate for office. This absence could breed grounds for generating tax shelters and donor transparency, thereby welcoming the potential for improperly arranged religious organizations. Thus, the Johnson Amendment serves a more compelling interest than merely prohibiting entanglement between religious ideology and political activity: it “ensures that citizens of all faith traditions (or no faith tradition) are not inadvertently financially supporting church-based politicking,” and further guarantees “that the government [is] not entangled in underwriting partisan political activity”²²² under the guise of religious liberty.

III. SOLUTIONS TO CONSTITUTIONAL AMBIGUITIES AND CHURCH ABUSE

Given the numerous privileges that tax-exempt religious organizations enjoy over complementary charitable organizations, it is no wonder why some founders of such religious organizations have exploited the modern statutory framework surrounding 26 U.S.C. § 501(c)(3).²²³ Eradication of such abuse, however, does *not* call for the complete revocation

²¹⁹ *Id.* at 450 (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 (2000)).

²²⁰ *Id.* at 371.

²²¹ *Id.* at 470.

²²² Tim Neville & Deb Walker, *Point/Counterpoint: Should the Johnson Amendment Be Changed to Allow Politics from the Pulpit?*, COLORADO SPRINGS GAZETTE (Feb. 18, 2017), <http://gazette.com/pointcounterpoint-should-the-johnson-amendment-be-changed-to-allow-politics-from-the-pulpit/article/1597169>.

²²³ See Lohr, *supra* note 29.

of tax exemption for religious organizations. As discussed earlier, religious organizations provide intangible benefits that “uniquely contribute” to the diverse American tapestry.²²⁴ Also, as the Supreme Court has recognized, there is at least some constitutional justification, vis-à-vis the Establishment Clause, for identifying a nexus between tax exemption and the functions of religious organizations.²²⁵ This Article argues for a middle-of-the-road position, one which respects the societal purpose of tax exemption for religious organizations, but which also brings the requirements for religious organizations more in line with the obligations of non-religious charitable organizations. The proposal is three-fold: (1) harmonize the statutory framework in conformity with other tax-exempt, charitable organizations; (2) require initial tax filings and Form 990s, supplemented with an empowered “Church Audit Procedures Act”; and (3) mandate the IRS to enforce the Johnson Amendment’s prohibition on specified political activity

A. *Harmony Among Charitable Organizations*

Religious organizations experience clearly measurable tax advantages, even over other 26 U.S.C. § 501(c)(3) organizations.²²⁶ We are left to accept these advantages as rooted in acknowledgement and respect for the tension between the Free Exercise Clause and Establishment Clause. But even where some of the statutory exemptions for religious organizations may be explained by First Amendment jurisprudence (i.e., exemption for initial filing), such a philosophy does not explain, or even rationalize, why other exemptions, such as the exemption for income derived from debt-financed neighborhood property, exist. Yet, similarly situated charitable organizations experience no such exemptions.²²⁷ As demonstrated in Section II, these tax-exemption provisions are likely unconstitutional as applied strictly with respect to religious organizations, due to the violation of the tripartite *Lemon* test.

This Article argues that statutory provisions exempting religious organizations from standard charitable obligations (or giving them more statutory grace) should be re-written to align with the exemptions available

²²⁴ Barnett, *supra* note 52, at 368 (quoting *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 689 (1970) (Brennan, J., concurring)).

²²⁵ See *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 675 (1970).

²²⁶ See *Religious Organizations*, *supra* note 129.

²²⁷ See 26 U.S.C.A. § 514(a) (West, Westlaw current through P.L. 115-231).

to all charitable organizations. To start, such a solution is *clearly* constitutional,²²⁸ because there is an obvious secular legislative purpose for requiring equal treatment between secular charitable organizations and religious organizations. Moreover, equal treatment among organizations clearly does not promote or inhibit the exercise of religion; rather, equal treatment permits the religious organizations to operate on grounds of taxation and financing, rooted in neutrality. With no special statutory treatment to religious organizations, no further inquiry is required as to whether there is a *Lemon* violation, harmonizing the taxation regime for religious organizations with the rest of the regime on charitable organizations. Second, the court system has already demonstrated that a number of these provisions, such as the parsonage rental allowance, are constitutionally or entirely suspect.²²⁹ What is to stop prospective litigants from challenging the constitutional validity of these tax advantages; consequently, what is to stop the courts from striking down the remaining provisions as unconstitutional *Lemon* violations? The answer is nothing. All that remains is proper standing to challenge these provisions.

Therefore, to remove any suspicion as to government-sponsored advancement of religion, the IRS should align the following provisions of the Code with other charitable organizations: initial tax recognition and assessment;²³⁰ annual information returns and notices;²³¹ report of dissolution, liquidation, or substantial contracting;²³² parsonage rental allowance;²³³ charitable gift substantiation rules;²³⁴ *quid pro quo* contribution requirements;²³⁵ commercial insurance exception;²³⁶ commercial insurance benefits exception;²³⁷ the debt-financed neighborhood land rule,²³⁸ and limitations to IRS on examination of religious organizations.²³⁹ Of course, this is merely the first step in the progression toward statutory harmony. The

²²⁸ See *Religious Organizations*, *supra* note 129, at 24.

²²⁹ See *Gaylor v. Mnuchin*, 278 F. Supp. 3d 1081, 1104 (W.D. Wis. 2017).

²³⁰ See 26 U.S.C.A. § 508(c)(1)(A) (West, Westlaw current through P.L. 115-231).

²³¹ See 26 U.S.C.A. § 6033(a)(2)(A)(i) (West, Westlaw current through P.L. 115-231).

²³² See 26 U.S.C.A. § 6043(b)(1) (West, Westlaw current through P.L. 115-231).

²³³ See 26 U.S.C.A. § 107(2) (West, Westlaw current through P.L. 115-231).

²³⁴ See 26 U.S.C.A. § 170(f)(8)(B) (West, Westlaw current through P.L. 115-231).

²³⁵ See 26 U.S.C.A. § 6115(b) (West, Westlaw current through P.L. 115-231).

²³⁶ See 26 U.S.C.A. § 501(m)(3)(C) (West, Westlaw current through P.L. 115-231).

²³⁷ See 26 U.S.C.A. § 501(m)(3)(D) (West, Westlaw current through P.L. 115-231).

²³⁸ See 26 U.S.C.A. § 514(b)(3)(E) (West, Westlaw current through P.L. 115-231).

²³⁹ See 26 U.S.C.A. § 7611 (West, Westlaw current through P.L. 115-231).

following subsection addresses arguably the most important component of the harmonization: the demand for initial filing for exempt status and subsequent annual filings, coupled with effective utilization of the Church Audit Procedures Act.

B. Tax-Exemption Filings & IRS Examinations

Recalling the concurring opinion of Justice Brennan in the *Walz* decision: religious organizations “are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways,” and as such, these religious organizations “bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community.”²⁴⁰ And again, in *Bob Jones University* the Court, echoing the concurrence of Brennan, declared that “entitlement to tax exemption depends on meeting certain common law standards of charity . . . that an institution seeking tax-exempt status must serve a *public* purpose”²⁴¹

To ensure that religious organizations meet these “common-law standards of charity” and avoid behavior that does not serve a public purpose, a more thorough review by the IRS is imperative. First, Congress should revise the Code to require religious organizations to file a Form 1023, which excuses churches, integrated auxiliaries of churches, and conventions and associations.²⁴² Second, Congress should additionally revise the Code to require religious organizations to file annual information returns (i.e., Form 990) or submit notices to the IRS. At first glance, it appears the imposition of filings upon religious organizations would violate Establishment Clause principles, because the IRS would necessarily intermeddle with the nature of religious organizations. While there is some validity to this claim, the purpose of the initial filing with the IRS is to “give[] notice to the Secretary” of its application for recognition as a 26 U.S.C. § 501(c)(3).²⁴³ It is *not* to review the practices and belief systems of the religious organization seeking an exemption.

The requirement for filing a Form 990 is no different in its non-invasive nature. The Form 990 sets forth the following items pertinent to the

²⁴⁰ *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 687 (1970) (Brennan, J., concurring).

²⁴¹ 461 U.S. 574, 586 (1983) (emphasis added).

²⁴² See 26 U.S.C.A. § 508(c) (West, Westlaw current through P.L. 115-231).

²⁴³ See 26 U.S.C.A. § 508(a)(1)-(2) (West, Westlaw current through P.L. 115-231).

financial actions of the organization: gross income, receipts, disbursements, gifts and contributions received from various sources, and “other information for the purpose of carrying out the internal revenue laws.”²⁴⁴ Thus, the statutory scheme surrounding the Form 990 never requires an annual review of the religious organization’s practices. Instead, it only requires a review of its financial operations. To support this position, the Supreme Court has noted that “routine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no ‘detailed monitoring and close administrative contact’ between secular and religious bodies, does not of itself violate the nonentanglement command.”²⁴⁵ In fact, some scholars argue the current exemption of the Form 990 requirement entangles the government *more* with religion.²⁴⁶ The Code excuses the Form 990 requirement for a major subset of religious organizations: churches, an interchurch organization of local units of a church, a convention or association, an integrated auxiliary of a church, and some church-affiliated organizations and mission societies.²⁴⁷ As a result, the IRS is often required to employ a fourteen-point test to determine what constitutes a church, which then demands a thorough inquiry of a church’s religious beliefs.²⁴⁸ With the employment of the fourteen-point test to determine whether the organization qualifies as a church, both courts and religious organizations have demonstrated discomfort with the likelihood that the courts will render inconsistent determination.²⁴⁹

²⁴⁴ See 26 U.S.C.A. § 6033(a)(1) (West, Westlaw current through P.L. 115-231).

²⁴⁵ Barnett, *supra* note 52, at 386 (quoting *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680, 696-697 (1989)).

²⁴⁶ Barnett, *supra* note 52, at 386.

²⁴⁷ Other organizations excluded from filing an annual Form 990: (i) a state institution meeting the necessary gross income under 26 U.S.C. § 115; (ii) a religious or apostolic organization; (iii) a governmental unit (or affiliate thereof); (iv) a private foundation; (v) a political organization; and (vi) other organizations, all of which have specific statutory criteria. See *Annual Exempt Organization Return: Who Must File*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/charities-non-profits/annual-exempt-organization-return-who-must-file> (last visited October 11, 2019).

²⁴⁸ See 26 C.F.R. § 1.511-2(a)(3)(ii) (2016); see also *Lutheran Soc. Serv. of Minn. v. United States*, 758 F.2d 1283, 1286-87 (8th Cir. 1985).

²⁴⁹ Barnett, *supra* note 52, at 386. For example, the Court of Federal Claims has expressed that the presently-constructed fourteen-point test “appears to favor some form of religious expressions over others... troubling when considered in light of the constitutional protections of the Establishment and Free Exercise Clause.” *Id.* (citing *Found. of Human Understanding v. United States*, 88 Fed. Cl. 203, 217 (2009)).

Of course, the obligation of initial filings and Form 990s amounts to nothing, *unless* the IRS is statutorily authorized to conduct an investigation under the Church Audit Procedures Act (“CAPA”). Recall that the CAPA authorizes a “high-level Treasury official” to initiate an audit or investigation against an organization classified as a church by the IRS.²⁵⁰ Before conducting such an audit, the “high-level Treasury official” must have a “reasonable belief” that the church is either (1) not actually a church as defined in the IRS regulations, or (2) engages in otherwise taxable activity.²⁵¹ But while the Act does appear to empower the IRS to conduct a more comprehensive inquiry, the “high-level Treasury official” remains undefined, with Congress and the IRS abstaining from taking actions to designate an individual or associated IRS position to fulfill the role.²⁵² The solution, though demanding considerable Congressional action, is straightforward: Congress and/or the IRS must select an appropriate “high-level Treasury official.” While the statute does contemplate the selection of a secretary of the Treasury,²⁵³ it is fair to state that audits of churches (and other church-related organizations) are a fairly low priority. Some scholars argue the Director of Exempt Organizations (“DEO”), an official merely one rank above the DEOE, should be selected. Like the DEOE, this too received disapproval.²⁵⁴ Alternatively, other scholars have taken the approach most closely resembling Occam’s razor, “[a]mend[ing] the [Act] [to] [n]ame the [IRS] Commissioner [or his designee] as a sufficient ‘High-Level Treasury Official.’”²⁵⁵ This position has been endorsed by multiple organizations, including the American Center for Law and Justice.²⁵⁶

In sum, the IRS, empowered with the capacity to demand Form 1023s and subsequent filings of Form 990s, could easily review and audit the financial workings of religious organizations—specifically churches—to ensure that they are serving a proper public purpose. Moreover, the IRS, as advocated by scholars, should name an appropriate individual to the position of “high-level Treasury official” to give teeth to the Church Audit Procedures Act. These demands, which facially appear to require more state

²⁵⁰ See 26 U.S.C.A. § 7611(a)(2) (West, Westlaw current through P.L. 115-231).

²⁵¹ See 26 U.S.C.A. § 7611(a)(2) (West, Westlaw current through P.L. 115-231).

²⁵² *Television*, *supra* note 195.

²⁵³ See 26 U.S.C. § 7611(h)(7) (West, Westlaw current through P.L. 115-231).

²⁵⁴ See Martin, *supra* note 195, at 17.

²⁵⁵ Barnett, *supra* note 52, at 381.

²⁵⁶ *Id.* at 383 (citing Martin, *supra* note 195, at 18).

involvement, would merely require the IRS and federal government to perform a review of the financial data of the organizations to ensure that no abuse or non-charitable activity is alive within the religious organization.

C. *Strict Enforcement of the Johnson Amendment*

For all the fierce opposition to the Johnson Amendment, the irony is the law has never been stringently enforced against those churches violating the prohibitions of 26 U.S.C. § 501(c)(3). In fact, there exists only one court decision in which a church lost its tax-exempt status as a result of violating the statutory ban on specified political activity.²⁵⁷ Remarkably, there is evidence suggesting that religious organizations violate these prohibitions more egregiously than the IRS's history of enforcement may suggest. In 2004, the IRS commenced a project titled the "Political Activity Compliance Initiative" (the "Initiative"), the purpose of which was to "promote compliance" with the 26 U.S.C. § 501(c)(3) prohibition "against political campaign intervention by reviewing and addressing allegation of political intervention (PI) by tax exempt organizations on an expedited basis during the 2004 election year."²⁵⁸ Of the 132 cases assigned to the IRS for further examination, 40 involved churches.²⁵⁹ Further, of the 40 churches targeted, 37 churches were found to have improperly committed acts of political convention, to which the IRS issued written advisories or assessed excise taxes.²⁶⁰ Thus, given the statistical figures of this study, and the vast number of churches in the United States, a large number of churches likely engage in some form of politics that may cross the threshold of improper politicking.²⁶¹

But the IRS is lax—at best—in its enforcement of the Johnson Amendment. Of course, there are consequences to such unpredictability and restraint. For one, lax enforcement by the IRS encourages, or even enables, churches, associations, conventions, and integrated auxiliaries of the churches to feel more empowered to violate the Johnson Amendment, due to

²⁵⁷ See *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000).

²⁵⁸ Internal Revenue Service, *Final Report, Project 302, Political Activities Compliance Initiative 1* (2004), available at http://www.irs.gov/pub/irs-tege/final_paci_report.pdf [hereinafter Internal Revenue Service].

²⁵⁹ Internal Revenue Service, *2004 Political Activity Compliance Initiative (PACI), Summary of Results* (2004), available at https://www.irs.gov/pub/irs-tege/one_page_statistics.pdf.

²⁶⁰ Internal Revenue Service, *supra* note 258.

²⁶¹ 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, 428 (2009).

the low number of IRS investigations of churches.²⁶² In addition, the IRS's minimal enforcement of the political ban provides little guidance to those religious organizations seeking to discern what compliance and non-compliance may actually amount to, through a prosecutorial lens.

Even more agonizing is the fact that the IRS has yet to issue clear guidance as to exactly what constitutes forbidden political activity. Turning directly to the statute, one can readily see that 26 U.S.C. § 501(c)(3) fails to define: (1) what amounts to a “substantial part” of a religious organization in attempting to influence legislation, and (2) what constitutes “participati[on]” or “interven[tion]” in a political campaign, on behalf of (or in opposition to) any candidate for public office.²⁶³ Not surprisingly, the companion regulations to the Code are equally worthless, stating the obvious extent of the statute: “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” are forbidden.²⁶⁴

In yet another attempt to clarify the reach of the Johnson Amendment's prohibition on specified political activity, the IRS published Revenue Ruling 2007-41, which provides 21 examples illustrating the application of the facts and circumstances to be considered to determine whether an organization exempt from income tax under section 501(c)(3) has engaged in any forbidden political activity.²⁶⁵ But just as one expects the IRS to provide clear lines of demarcation with this newly promulgated Revenue Ruling, it warns the reader that an organization's activities must be measured by “all the facts and circumstances” present in the factual situation.²⁶⁶ Equally less helpful is the fact that each of the factual situations listed “involves only one type of activity,” with further analysis needed when there is a “combin[ation] [of] one or more types of activity.”²⁶⁷ But more disheartening than the frailty of ideally constructed factual situations is that the Revenue Ruling does not teach the practitioner any more than previously known. In fact, the IRS fully acknowledged that religious organizations may engage in

²⁶² *Id.* at 429 (citing Lloyd Hitoshi Mayer, *Grasping Smoke: Enforcing the Ban on Political Activity by Charities*, 6 First Amendment L. Rev. 16, 19-20).

²⁶³ 26 U.S.C.A. § 501(c)(3) (West, Westlaw current through P.L. 115-231).

²⁶⁴ 26 C.F.R. § 1.501(c)(3)(iii) (West, Westlaw current through Jan. 10, 2019).

²⁶⁵ Rev. Rul. 2007-41, 2007-1 C.B. 1421 (2007).

²⁶⁶ *Id.*

²⁶⁷ *Id.*

political activity, so long as this activity is performed in a neutral fashion, as embodied in the following actions:

[1] Invite all candidates for political office to address their congregation, provided there is a statement that says the views expressed are those of the candidates and that the church is not endorsing any candidate. . . . [2] Distribute a list of voting records of all members of Congress on major legislative issues involving a wide range of subjects, provided the publication contains no editorial opinion and its content and structure do not imply approval or disapproval of any members or their voting records. . . . [3] Sponsor a voter registration drive, provided it is done so in a neutral manner and is non-partisan.²⁶⁸

Although intended to act as more helpful guidance to religious organizations, the Revenue Ruling ultimately falls short of its aim, teaching no more than is already known, and failing to give meaningful enforceability of the Johnson Amendment.

As such, enforceability of the political prohibitions requires more than mere advisory opinions; enforceability demands congressional resolution of ambiguity and *actual* enforcement by the IRS against those religious organizations in direct violation of the statute. Professor Vaughn E. James proposes a twofold approach to more efficient enforcement of 26 U.S.C. § 501(c)(3): (1) erasure of the ambiguity of the term “substantial part,” and (2) clearly defining what exactly constitutes participation or intervention in a political campaign.²⁶⁹ This Article both recommends and departs from Professor James’s twofold solution to ensure stringent enforcement of the Johnson Amendment.²⁷⁰

First, amending the Code to clarify the definition of what constitutes a “substantial part” would not only provide notice to religious organizations curious about the extent of their influence in legislation, but would also provide the IRS with a bright line of the activity to specifically target. Professor James writes that the language “substantial part” should be

²⁶⁸ James, *supra* note 32, at 47 (citing Rob Hall, *When Faith and Politics Clash*, COVENANT NEWS, Sept. 21, 2000, available at <http://www.covchurch.org/cov/news/item1259.html>) (emphasis omitted).

²⁶⁹ James, *supra* note 32, at 74.

²⁷⁰ *Id.*

narrowly limited to “direct or indirect contact with an elected official in attempt to influence legislation.”²⁷¹ Although the proposal invites a myriad of speculative inquiries as to what constitutes an “indirect contact” with an elected official, what is certain is that the proposal captures those situations in which *direct* contact is made by the religious organization, on behalf of the religious organization, with the elected official, to influence legislation. While the IRS has historically struggled with effectively prosecuting those religious organizations that violate the Johnson Amendment’s prohibition, this retooling of the definition would empower the IRS to more consistently and equitably proceed with enforcement. As an added plus, the proposed change provides ample notice to religious organizations about whether their activities amount to lobbying. Professor James’s proposal does not prevent members of religious organizations from contacting legislators, driven by their religious convictions; rather, it prevents the tax-exempt religious organization from doing such.

Second, Professor James calls for a clear definition as to what exactly constitutes participation or intervention in a political campaign, which is critical to the success of strict enforcement. While there is validity in this request, to provide additional guidance to the IRS (and notice to religious organizations), additional regulations and revenue rulings will not likely aid the IRS in enforcing the Johnson Amendment. Rather, the following actions must occur. First, the President’s executive order, titled “Promoting Free Speech and Religious Liberty,” must be overturned, either through revocation by the current sitting (or later-elected) President, or legislation geared to invalidate the executive order. Second, following the revocation, the IRS must begin to explore and investigate the taxation status of a church under the (hopefully) revitalized CAPA. It is through this mechanism the IRS could execute an examination of the organization’s non-religious records and activities to determine whether the organization has engaged in improper political activity.

In sum, to further prevent exploitation of the taxation scheme under 26 U.S.C. § 501(c)(3), Congress must provide a brighter line with what amounts to a “substantial part” of a tax-exempt organization’s activities in connection to lobbying. Moreover, the IRS must commence proper enforcement of the Johnson Amendment and investigate those religious

²⁷¹ *Id.* at 74-75.

organizations either in violation of the Code's prohibitions, or close to being in violation, to issue advisory warnings or punish with excise taxes.

CONCLUSION

As related in this Article, there are a number of Code provisions which demand greater scrutiny through Establishment Clause analysis. Time and time again, however, because of constraints by policy and First Amendment jurisprudence, the IRS and the courts have exercised restraint in entertaining discussion as to the constitutional validity of these provisions, and with that, the legitimacy of some religious organizations' tax-exempt status.

Further complicating the affairs of IRS policy and First Amendment jurisprudence is the interplay between the executive and legislative branches. Presently, it remains contestable whether the administration ultimately wishes the overall tax burden on religious organizations to decrease. But, with seemingly incongruent policies authorized by the Trump administration, it remains a prominent question of whether the executive orders and administration-backed legislation support, in totality, the legitimacy of the statutory scheme on religious tax-exemption.

But while the government continues to avoid these pressing issues, many religious entities and leaders are empowered to exploit the malleable statutory framework for their financial benefit. Of course, the Constitution protects churchgoers, pastors, and believers who wish to personally provide tangible and intangible benefit to the unique American fabric; but surely the Constitution and Code do not provide insulation for those institutional "wolves" who come in "sheep's clothing."