The Johnson Amendment

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Celebrating the high holidays makes us conscious of the passing of time. This is the twenty-sixth consecutive year that I have stood on the bimah on Yom Kippur as professional clergy. I do not remember what it was like to sit in the pews with my family. In the spirit of confession, I am envious of all of you who do so. And this is twentieth consecutive year that I have preached sermons. (Before that I only had to sing.) There are some sermons I have given in my career that I came to regret. I gave a sermon endorsing President Bush's decision to go to war in Iraq against Saddam Hussein. I came to regret that position, as did many others, when we learned that our intelligence reports of weapons of mass destruction were inaccurate. We were all caught up then in the raw emotions of September 11th, but I have always been more hawkish than dovish myself. I took the unpopular position in college of supporting the elder President Bush's decision of repelling Iraq's invasion of Kuwait. The sermon I regret most of all is the one I gave one high holidays calling on President Clinton to resign in the wake of the Monica Lewinsky scandal. I was inspired at the time by the Chancellor of the Jewish Theological Seminary's public position calling for the President's resignation. I took that as a green light from the leader of our denomination to get "political" on this issue. I was angry at the time that my president, whom I looked up to, whom I had voted for, had behaved in a way that was inappropriate for his office. My sermon was about the robes of office. Just as the high priest wore a special white tunic for Yom Kippur, so the president must wear the robes of responsibility that come with the

presidency. But I came to regret that sermon. As the impeachment process played out we all saw how the driving motivations were more partisan than ethical. Even Kenneth Starr, the independent prosecutor at the time, suggested regret in a speech last year about the entire unhappy incident in American history. He said last year that President Clinton's "genuine empathy for human beings is absolutely clear. It is powerful, it is palpable, and the folks in Arkansas really understood that about him, that he genuinely cared." I should have been more open at the time the goodness that President Clinton brought to the presidency. I should have been more forgiving of the weaknesses. I should not have expected my political heroes to be superheroes. Had I thought of our leaders as people like us, I might have been less disappointed. Yom Kippur is supposed to teach us to see each other as fellow human beings, to learn patience, to give up our hurts and angers, and to accept each other with love.

What I most regret about that high holiday sermon was that I violated a sacred space and time of sanctuary by taking a stand on a divisive political issue from the pulpit, alienating those in the congregation who opposed the process that was going on in Washington, a group with whom I eventually came to agree.

There are actually laws about that. I don't think I broke the law back then, and I will explain why towards the end of my remarks, but I was still wrong. In May of 2000 a federal appeals court affirmed a district court decision from the prior year upholding a decision of the Internal Revenue Service to revoke the tax-exempt status of a church that had published in the Washington Times and the USA Today in the midst of the 1992 presidential election campaign a full-page ad urging Christians not to vote for Bill Clinton. The ad claimed that Governor Clinton supported abortion on demand, homosexuality, and the distribution of condoms to teenagers in

public schools. After citing a series of biblical verses, the ad concluded: "Bill Clinton is promoting policies that are in rebellion to God's laws. How then can we vote for Bill Clinton?" And then in small print: "This advertisement was co-sponsored by the Church at Pierce Creek and by churches and concerned Christians nationwide. Tax-deductible donations for this advertisement gladly accepted." It's an important case, *Branch Ministries v. Rossotti, Commissioner of the IRS.* At stake were two laws in tension with each other. The one is the fee exercise clause of the First Amendment to the United States Constitution, providing that Congress shall make no law prohibiting the free exercise of religion. The other is a law of Congress, namely, the tax code, section 501(c)(3), and specifically, the amendment to that code dating from 1954 that has come to be called the Johnson Amendment.

The Johnson amendment, while associated with President Johnson, was signed into law by President Eisenhower. Lyndon Johnson was the senator who introduced the amendment into the tax code, that a religious or other charitable organization may not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." The tax code already prohibited charitable organizations from directing "a substantial part of the activities of which" to "influence legislation."

Let's unpack that a bit. There are two provisions in the code that regulate what charitable organizations may and may not do vis-à-vis political engagement. The older provision is a limitation on the extent to which the organization can lobby to influence legislation. All charitable organizations, but especially religious institutions, are essentially committed to issues of social justice, or what we call *tikkun olam*¸ the repair of the world. We have beliefs and values that are reflected in social policies and legislation, and we need to be true to our essence to cry out our

message, to “speak truth to power.” One of the purposes of the free exercise clause in the First Amendment is to ensure that all religious institutions have the freedom to preach their messages without the interference of government censorship or control. The tax code does not prohibit charitable organizations from lobbying for or against legislation, it just requires that that lobbying not constitute a substantial part of its activities. There has been much debate and there is a broad intentional ambiguity in the case law as to what “substantial” means. One court argued that substantial meant 16 to 20 percent of the organization’s budget. Another court understood substantial as more than 5 percent of time and effort. The IRS itself has never endorsed a specific percentage definition, preferring intentional ambiguity to be adjudicated on a case-by-case basis. But the point of the law is that a church cannot be a lobbying political action committee. A few positions taken on specific pieces of legislation will not violate the code, but more than a few forays into politics would.

The second provision in the code is the Johnson amendment proper, the rule that the organization cannot participate or intervene in any political campaign on behalf or against a candidate for public office. Here there is no exception for non-substantial activity. It is a blanket prohibition. And this is what the IRS found that the Church at Pierce Creek had done by taking out ads against Bill Clinton during the presidential election campaign of 1992. The church’s appeal of the ruling to the courts was based on two claims, one, that the IRS was unconstitutionally motivated to prosecute the church because of its conservative political and religious beliefs, and two, that the Johnson amendment itself violated the free exercise clause of the Constitution. On the first claim, the church’s point was that the IRS very rarely prosecutes houses of worship. The laws that I am discussing here are so often breached, and the Church at

Pierce Creek complained that they were being unfairly singled out. Without going too far into the legal details of the argument, the courts upheld the IRS's decision. While it is true that there are many infractions of the code that have not been prosecuted—and by the way the IRS has more recently been compelled to commit itself to procedures that would more thoroughly investigate and prosecute violations of the tax codes by religious organizations—in this case the church's actions in taking out full page advertisements against Bill Clinton in papers with national circulations was a singular violation that was different from the more common violation of inviting politicians to speak from the pulpit, or more commonly, of rabbis and ministers saying more than they should, and that therefore the prosecution of the Church at Pierce Creek was not unfair. But more interesting for me was the court's denial of the church's appeal based on the free exercise clause. Does the tax code violate religious freedom by curtailing the rights of religious organizations to speak out on political issues, and more specifically, to influence elections?

As you know, the courts ruled that the tax code, the Johnson amendment, does not violate the Constitution. The courts recognized that the IRS decision did impose a financial burden on the church. The church was now exposed to federal income taxation. And donations would most likely have decreased as they were no longer tax deductible. But, in the words of the court decision, "the church failed to establish that the revocation [of tax exempt status] has imposed a burden on their free exercise of religion." The church had a choice, according to the court. It "could engage in partisan political activity and forfeit its section 501(c)(3) status or it could refrain from partisan political activity and retain its section 501(c)(3) status." That is the court argued that what was at stake here was tax-exempt status, not freedom of religion.

In this decision, *Branch Ministries Inc. v. Rossotti, Commissioner of the IRS,* the court referred to an earlier landmark case from 1972, *Christian Echoes National Ministry, Inc. v. United States.* In that case, a Christian organization that was founded to influence the public on a whole host of political issues through radio programming, had its tax exempt status revoked by the IRS in 1966, here because its activities were substantially devoted to influencing legislation as well as election campaigns. The federal appeals court in its decision upholding the IRS ruling (and reversing, by the way, the district court's decision), explained that "tax exemption is a privilege, a matter of grace rather than right. The limitations on political activity stem from the congressional policy that the United States Treasury should be neutral in political affairs and that substantial activities directed to attempts to influence legislation or affect a political campaign should not be subsidized." That is, the court held that there is no constitutional right to be exempt from taxes. The freedoms enshrined in the First Amendment means that the government cannot interfere with what a religious organization says. But non-interference is not the same as subsidizing it. You see, it's basically a question of perspective on whose money is it. Is a tax deduction my money that the government does not get, or is it the government's money that it decides, in its largesse, to allow me to keep under certain circumstances?

Well, we may think of all of our money as ours, but I have news for you, it's not. Uncle Sam gets to decide what Uncle Sam takes. This is the law in this country, and it is also codified in the sacred texts of the Judeo-Christian heritage. Although this is a shul and it is Yom Kippur, you will forgive me for quoting from the Gospel of Mark. It was, by the way, written by a Jew, and about a Jew. A coin is brought to Jesus and he asks his followers: "Whose portrait is on it and whose inscription?" and they reply: "Caesar's." Then Jesus says to them: "Give to Caesar what is

Caesar's and give to God what is God's" (Mark 12:15-17). But we have this in the Talmud as well. In tractate Gittin, tractate Nedarim, and several other places in the Babylonian Talmud the sage Samuel is cited as saying: *dina demalkhuta dina,* the law of the land is the law. The Babylonian Talmud was edited in, you guessed it, Babylonia. That was before Saddam Hussein came to power and before President Bush's armies came to remove him. The government under which the Jews lived was the Sassanian Empire and Samuel was saying that the Jews were required to obey it laws. There were limits to Samuel's famous dictum. Jewish law still governed ethical and religious conduct. The principle is generally limited to monetary matters and other areas of what we would call civil and criminal law. But it means that when Jewish law and state law are in conflict, Jewish law bows to state law by acknowledging the supremacy of its jurisdiction. *Dina demalkhut dina,* the law of the land is the law, means that Jewish law is not the "supreme law of the land." I wrote an article about this for the Rabbinical Assembly's volume, *The Observant Life: The Wisdom of Conservative Judaism for Contemporary Jews,* where I wrote that the application of the principle of *dina demalkhuta dina* to taxation is simply that Jews have to pay their taxes. Failure to do so violates not only secular law, but Jewish law as well. Evading taxation is unlawful and is considered a form of theft, as we are essentially robbing the government, and the people, by failing to pay taxes.

Nobody likes paying taxes. But if you love your country, as I do, then I would suggest looking at paying taxes as a privilege. I am a shareholder of the republic. And, to the extent that a portion of my tax dollars goes to help the government help people in need of help, and to the extent that the government can do so in ways that private charities cannot—look at the work of

FEMA in our hurricane-ravaged populations—I know that I am also fulfilling an ethical mandate *lateken olam*¸ to make the world a better place.

But while you might not agree with me in looking upon taxation as a privilege, the federal court precedents, in *Christian Echoes* and *Branch Ministries,* does see tax exemption, and deductible contributions, as privileges, not rights of freedom. While the Supreme Court did not review either of these cases, the principle was confirmed by a Supreme Court decision in 1983 on a somewhat different question, where it ruled—the case was *Regan v. Taxation with Representation*—that "Congress is not required by the First Amendment to subsidize lobbying."

What is the reason why the law, and the courts in upholding it, looks to curtail the political activities of houses of worship and other charities? There are a number of reasons that have been offered, but the most compelling in my mind is the concern to retain the sense of sanctuary that we feel and require in our sacred times and spaces. We are a diverse community made up of different people of different views. We need to preserve the safety of this space and this time so all can feel at home here. And just imagine how ugly things could become if well-meaning people could influence synagogue involvement in political matters through donations. The irony is that the tax code with the Johnson Amendment is intended to secure our freedom here at Temple Israel and Jewish Community Center. In the words of the court in *Christian Echoes v. United States:* "The free exercise clause of the First Amendment is restrained only to the extent of denying tax exempt status and then only in keeping with an overwhelming and compelling governmental interest: that of guaranteeing that the wall separating church and state remains high and firm." Yes, that is a wall worth preserving! And in the concluding words of the court in

Branch Ministries v. Rossotti: "The government has a compelling interest in maintaining the integrity of the tax system and in not subsidizing political activity."

We take seriously at Temple Israel and Jewish Community Center the letter and the spirit of the law in this matter. If we have a concern about a matter of proposed legislation, we focus our program on education rather than lobbying. We have hosted candidate fora here but never where a single candidate alone was invited for a campaign event, and we do not permit political signage on our property. I would never endorse or oppose a candidate for public office in my capacity as rabbi, and am very careful in speaking on matters of politics, especially from the pulpit or in Temple Talk. I do take greater freedoms in the op ed columns I write for the Jewish Standard, and the IRS does not consider such activity as a violation as long as I am writing as an individual and not in a synagogue publication, even though I may be identified as the rabbi of the synagogue. But even then I am always mindful of how my words reflect on my rabbinical office.

It is a difficult line to navigate at times, as there are issues that we, and I, do care about and where Judaism has, and ought to have, something to say. Indeed, how relevant can Judaism be if it cannot speak to matters of public interest? But we balance that with our respect for the law, for the need for this sanctuary to be a sanctuary, and our respect for the divergence of political views among the members of the congregation. I will share one example of a difficult decision we faced just over a year ago. Congress was deliberating its position on the Iran Deal, and we received a request from the Jewish Federation of Northern New Jersey, part of the effort that was being driven by AIPAC, the pro-Israel lobby in Washington, and ultimately by the government of Israel, to distribute a petition to our membership that urged Congress to oppose the deal as it was not in the interests of the State of Israel and posed a danger to the State of

Israel. We discussed the matter at some length at a board meeting, and we decided not to forward the Federation's request to the membership here. We found that our membership was deeply divided on the Iran Deal, as was the public both in this country and in Israel. There was a legitimate debate on which course of action was the better course for the interests of the United States, the State of Israel, and the peace of the world. In Israel especially, there was heated debate between intelligence and military experts and others as to whether the Deal was the way to go or not. We decided to leave that matter to the individual autonomy of the members of the congregation and not take a stand for or against the deal as a congregation. We decided to stay out of the politicking, although we were not averse to holding an informational forum to discuss the pros and cons of the issue. Now, please understand, I do not believe that the Federation was incorrect to suggest that congregations pursue the course of lobbying in that instance. Jewish federations across the country debated the question and ours, after significant discussion on its board, decided to endorse the petition. If a synagogue distributed and endorsed the petition it is unlikely that such would have constituted *substantive* time and effort on the part of the synagogue. We were only being asked to forward an email, which costs no time and no money and extremely minimal effort. But neither was our board incorrect in deciding not to do so. We opted to be guided by the spirit of the tax code even if the letter would have permitted use the alternative course of action. I believe our board made the correct decision. We opted to preserve the sanctity of this sanctuary, and preserve the freedom to debate and engage with matters relating to Israel.

Our decision should in no way have been interpreted as any lack of support or love for the State of Israel. Indeed, Alla and I are looking to lead another congregational tour to Israel

this July. You may have seen the banner in the lobby. We will send the information out by mail soon, and it will appear in the next issue of Temple Talk. I am committed to share my love of Israel with whomever can join us. That being said, our decision caused significant disappointment with some members of the congregation.

At that time, some criticized me for being too supportive of President Obama. Some claimed that I was too much of a liberal and too supportive of a President who was not a friend of the Jews. I strongly disagreed that President Obama was not a friend. But while I tend to be more liberal than conservative on political issues, I am not always so, and prefer to see myself as a passionate centrist. But most importantly, my own political views are immaterial to my conduct in this office. I have always been respectful of the President, no matter who fills that office. I see that as part of my duty, as a spiritual leader of a religious organization in this republic. I tried to explain to members of the congregation that my respect towards the President was of a civic, rather than a partisan, motivation. I explained that in my prior congregation when there was a Republican in the White House some were disappointed with my public respect. And now, while I would not go so far as to say that my prayers were answered, we have for the first time since my tenure began at Temple Israel a Republican in the White House. And as I expected, I have received significant criticism from some for being too respectful of President Trump. I am comfortable with that criticism. Well, congregational rabbis need to get comfortable with a lot of criticism. That's part of the job. But in this case it meant I was fulfilling what I see as my civic duty.

I have, and I do, speak to issues that are in the public domain, as issues where Judaism has something to teach. Like the mitzvah of welcoming immigrants, for we were once slaves in

Egypt. Like the mitzvah of providing health care, because God calls us to provide healing. Like the mitzvah of caring for the environment, because we are God's partners in creation. Like the mitzvah of fighting against racial and other prejudice, the dangers of which we know better than anyone. But I will not use my office to speak against the person of the president. And besides, no matter what opinions one may or may not hold regarding the President, no one who sits in that office does so without a deep and profound care and love for this country. There may and will be other motivations, but they are not mutually exclusive.

So I do regret giving that sermon years ago calling on President Clinton to resign. I do not think I broke the law. I was not seeking to influence any kind of legislation. And most importantly, President Clinton at the time was in his second term, so by definition he was not a candidate for office in the next presidential election.

But what about right now? The Republican Party platform of 201—and the Republican party is currently our governing party—urges the repeal of the Johnson amendment, and in support of the right of religious leaders to engage in the political process and elections without risking the tax-exempt status of their organizations. And on May 4, 2017, just over four months ago, the President, who had spoken often of his intention to "totally destroy" the Johnson amendment, signed an executive order instructing the Treasury Department to enforce the tax code in a way that did not unfairly prosecute houses of worship. While the executive order did not, and cannot, change the tax code, it did bring the question forward, eliciting congressional committee hearings on the value of the Johnson amendment. So the question I have been wresting with is whether a sermon in defense of the Johnson amendment would itself constitute a violation of the Johnson amendment?

While that is a delicious irony, I doubt you have heard any violation of the tax code tonight. My intent is to speak educationally about my understanding of the law, its meaning and its effect on our governing policies here at Temple Israel and Jewish Community Center. I am not speaking for or against any legislation before Congress. We have simply been studying the tax code together. And while that may have been an unusual text for a sermon, I hope I have provided some food for thought, as there is nothing else we can eat tonight. And if you heard anything else in my remarks, I hope you will be forgiving.