

Government

The Johnson Amendment: Fact-checking the Narrative

There is more to the story of the Johnson Amendment than is generally being presented to the nonprofit community.

By **Robert M. Penna** | Aug. 24, 2018

Of all the issues currently facing the American nonprofit community, few **seem to evoke** (<https://independentsector.org/wp-content/uploads/2017/08/johnson-amendment-fact-sheet.pdf>) the emotional response engendered by any potential effort to alter or repeal the famous **Johnson Amendment** (<https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501c3-tax-exempt-organizations>), introduced to the US tax code in 1954.

Proponents of changing the current Johnson Amendment guidelines argue that it violates the free speech rights of nonprofit leaders—specifically, church and religious leaders—by limiting the degree to which they may, in their official capacities, become involved in the political process. Opponents of change meanwhile see removing this limitation as an existential danger to the entire sector; they describe proposed alterations to the amendment as **attacks** (<https://www.councilofnonprofits.org/take-action-johnson-amendment>) and **threats** (<https://nonprofitquarterly.org/2018/03/09/new-threat-in-congress-to-politicize-nonprofits-foundations-interview-tim-delaney/>).¹

Several accounts have held that the amendment **protects charitable nonprofits** (<https://www.givevoice.org/>) from politics and that its repeal **would destroy the sector's role** (<https://nonprofitquarterly.org/2017/02/06/losing-johnson-amendment-destroy-unique-political-role-nonprofits/>) in American society. The interpretation underlying these arguments is that the amendment was intentionally designed as a protection of the sector's sanctity when then-Senator Lyndon B. Johnson, in his wisdom and foresight, proposed it in the first place.

Unfortunately, little about these arguments squares with the actual record regarding the amendment's intended purpose, its initial adoption, or, for that matter, the sector's historical engagement in politics. Whether the best policy is to keep, alter, or repeal the amendment, the debate, at minimum, ought to be taking place in light of the facts.

To begin with, it is important to recognize that, historically speaking, the arena we today call "nonprofit" has been anything but apolitical. In the first decades of the 19th century, the forerunners of today's nonprofits were advocating for legal reforms in areas as diverse as the penal system and animal cruelty. They were pushing measures aimed at addressing the abandonment and mistreatment of children. They organized for election reform and to end political corruption. And, of course, many worked tirelessly to end slavery.

Later in the century, voluntary groups worked in support of laws calling for compulsory childhood education, temperance, and women's and workers' rights. In the early 20th century, the National Child Labor Committee, organized in 1904, led to the creation of numerous state labor committees and new state laws restricting child labor. As the voluntary sector saw its membership rise in the mid-1920s, several of these groups famously advocated for women's suffrage and against American participation in World War I. Some worked to protect the rights of minorities, others to restrict immigration.²

Far from wanting to keep politics out of the charitable realm, government's primary concern in the era before our present federal tax code was keeping these voluntary associations out of politics.³ Both Presidents George Washington and James Madison saw private associations as posing an actual danger to popular government and to the country itself—special interests whose views, desires, and aims did not necessarily reflect the common good. The existence of these associations also seemed somehow incompatible with democratic institutions; many feared that as these groups grew in size and stature, they would attract both political power and financial resources, which could tip the balance of power in their favor to the detriment of individual citizens.⁴

Later, as these private efforts became more organized and turned their attention increasingly to issues of legal and social change, states were the primary battlegrounds in this struggle, as probate courts were called on to decide whether bequests intended for use toward such reforms were themselves lawful. "It is hardly conceivable," one court wrote in 1893, "that a trust [established in a will] could be valid which has as its object to overthrow a decision of the Supreme Court."⁵

Indeed, the political involvement of a nonprofit group, the National Economy League, probably triggered the first wording in federal statute to restrict the activities of these organizations. In 1934, as part of that year's Revenue Act, Congress abolished the tax deduction for certain previously allowed philanthropic contributions, specifically those going to organizations where "a substantial part" of their activities consisted of "carrying on propaganda or otherwise attempting to influence legislation."⁶ This effectively prevented any organization that wanted to maintain the deductibility of the contributions it received from engaging in direct political action. And things stood there for 20 years, until then-Senate Majority Leader Lyndon B. Johnson offered his famous 31 words further limiting the activity of charitable organizations: "... 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."

In decided contrast to the account suggested by those holding up the amendment as a far-sighted example of noble legislation, the history behind Johnson's wording is itself steeped in politics. In 1954, two wealthy Texans had used tax-exempt organizations they headed, the Facts Forum and the Committee for Constitutional Government, to support a young state senator who opposed Johnson in that year's primary election. Johnson won handily but was reportedly incensed that two tax-exempt entities had opposed him.⁷

It's also worth noting that, as a floor amendment, the wording bypassed the usual legislative process that traditionally would include an explanatory bill memo and might even have gone through the committee process. For his part, Johnson offered no explanation, no rationale. There was no debate, no discussion; the whole thing was over in a matter of minutes, and the amendment passed on a voice vote, so there is no record of who voted how.⁸

If the intent of Congress was to prevent donor-supported, tax-exempt entities from engaging in politics, the creation of the 501(c)(4) category becomes even more of a mystery, as it has become a tax-exempt vehicle for virtually unbridled political activity.⁹ Additionally, even as government placed the earliest restrictions on political activity by some tax-exempt entities, it made exceptions for certain veterans, fraternal, and labor organizations.¹⁰ Given this, the idea that 501(c)(3) organizations are somehow too fragile to handle political activity requires greater explanation than opponents of changes to the amendment are currently offering—especially when we recognize that a number of 501(c)(3)s **maintain their own 501(c)(4)s** (<https://www.plannedparenthoodaction.org/>) that undertake the very actions prohibited to the parent group.

It's important that, as we continue to debate changes to the Johnson Amendment, we keep in mind its historical context. The forerunners of today's nonprofits were engaged in politics. The initial motivation of government was not to keep politics out of the voluntary or charitable realm, but to limit its influence on politics. And if Johnson himself ever viewed his contentious words as a protection of the nonprofit sector's innocence and sanctity, he gave no indication whatsoever of that thinking.

Including these considerations in the discussion will help the nonprofit community, the decision-makers in Congress, and the American public focus on the actual issue at hand in this debate. It may also serve to dampen the polemical nature of recent discussions. Partisans on both sides of this issue owe their audiences at least that much honesty.

The essential question here is not whether the Johnson Amendment is a bulwark against the politicization of the charitable realm or a violation of First Amendment freedoms. Rather, it is about the part we want the nonprofit sector to play in our nation's continued social and legal development—and what part the charitable community, in particular, is prepared to play.

Irrespective of what may eventually happen with the Johnson Amendment, we all should have learned this much by now: Retroactively applying an interpretation or purpose to a statute, provision, or regulation—effectively rewriting history—may be a useful rhetorical tool, but it rarely contributes to either good policy or civil debate.

Notes

¹ Additional coverage along the same lines may be found at the following: Ruth McCambridge, "National Council of Nonprofits Launches Coalition Campaign to Oppose Repeal of Johnson Amendment," (<https://nonprofitquarterly.org/2017/03/02/national-coalition-nonprofits-launches-campaign-oppose-repeal-johnson-amendment/>) "The Nonprofit Quarterly, Mar. 2, 2017. Michael Wyland, "NCN Presents Letter Signed by 4500 Nonprofits Opposing Johnson Amendment Repeal," (<https://nonprofitquarterly.org/2017/04/13/ncn-presents-letter-signed-4500-nonprofits-opposing-johnson-amendment-repeal/>) "The Nonprofit Quarterly, Apr. 13, 2017. Tim Delaney, "Don't Tread on Us: Keep Toxic Partisanship Away from Nonprofit Missions," (<https://nonprofitquarterly.org/2017/07/07/dont-tread-us-keep-toxic-partisanship-away-nonprofit-missions/>) "The Nonprofit Quarterly, July 7, 2017. Ruth McCambridge, "Repeal of Johnson Amendment: One Step Closer and Another Step Worse," (<https://nonprofitquarterly.org/2017/11/10/repeal-johnson-amendment-one-step-closer-another-step-worse/>) "The Nonprofit Quarterly, Nov. 10, 2017. Michael Wyland, "Tax Reform Measure Passes Senate without Repeal of Johnson Amendment Attached," (<https://nonprofitquarterly.org/2017/12/04/tax-reform-measure-passes-senate-without-repeal-johnson-amendment-attached/>) "The Nonprofit Quarterly, Dec. 4, 2017. Ruth McCambridge, "Dep't. of Small Mercies: Johnson Amendment Repeal Gone from Still-Terrible GOP Tax Bill," (<https://nonprofitquarterly.org/2017/12/15/dept-small-mercies-johnson-amendment-repeal-gone-still-terrible-gop-tax-bill/>) "The Nonprofit Quarterly, Dec. 15, 2017.

² Robert M. Penna, *Braided Threads: A Historical Overview of the American Nonprofit Sector*, Routledge: New York City, 2018, p. 129.

³ Olivier Zunz, *Philanthropy in America: A History*, Princeton University Press: Princeton, NJ, 2012, p. 5.

⁴ Conrad Edick Wright, *The Transformation of Charity in Post-Revolutionary New England*, Boston: Northeastern University Press, 1992, pp. 113-114.

⁵ Lewis's Estate, 152 PA 477, 477–80, 25 A. 878 (1893) as cited in Zunz, p. 83.

⁶ George Grason Tyler and John P. Ohl, "The Revenue Act of 1934," *University of Pennsylvania Law Review*, vol. 83, no. 5, 1935, p. 649.

⁷ Zunz, p. 102. James D. Davidson, "Why Churches Cannot Endorse or Oppose Political Candidates," *Review of Religious Research*, vol. 40, no. 1, Sept., 1998, pp. 17.

⁸ This is a point that might be offered to those who claim that Congress wants to *avoid the scrutiny* (<https://www.newsweek.com/house-republicans-johnson-amendment-630668>) that would come from an open debate on the virtues and downsides of the amendment. See Davidson, pp. 17-18; *The Congressional Record*, July 2, 1954, p. 9604; and *The New York Times*, July 3, 1954, p. 6 for verbatim accounts of the amendment's introduction.

⁹ The predecessor of Section 501(c)(4) of the tax code was enacted as part of the *Tariff Act of 1913*. But the legislative history of the act contains no reason or explanation for the tax-free status if these entities. The general belief, however, is that the US Chamber of Commerce pushed for the enactment of exemptions for both civic and commercial nonprofit organizations, intending to carve out a tax-free space for entities which could not qualify as charitable, educational, or religious, but whose activities somehow be interpreted as benefiting the general public. There was nothing in this original formulation regarding political activities; that came later. Originally, these organizations were those that were interpreted as promoting in some way the common good and general welfare of the people of the community. Penna, pp. 133-137.

¹⁰ Zunz, Op. Cit.

Subscribe Sign In



Robert M. Penna is best known as the author of the *Nonprofit Outcomes Toolbox*. His latest book, *Braided Threads: A Historical Overview of the American Nonprofit Sector*, was published by Routledge in March 2018.

If you like this article enough to print it, be sure to subscribe to SSIR!

Copyright © 2018 Stanford University.
Designed by Arsenal, developed by Hop Studios