

**The Eucharist: An Expressive Sacrament or a Political Tool – Comparing
the Effect of 26 U.S.C. 501(c)(3), *Branch Ministries v. Rosotti* and *Boy
Scouts of America v. Dale* on the Catholic Church’s Ability to Deny Pro-
Choice Politicians the Eucharist
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I. Introduction

With the 2008 presidential campaign now at its close, debate over the candidates and their vice presidential nominees has been fierce. Everyone has been taking a stance; however, as the debate heightened so did the tension between issues that are dually political and religious. In an ever growing debate on the church’s role in the political arena, uncertainty exists as to how and to what extent religious organizations, specifically churches, can openly voice their opinions on blended issues involving politics and religion without jeopardizing their tax-exempt status under § 501(c)(3) of the Tax Code.

The nomination of the pro-choice Catholic, Joseph Biden, as the Democratic Vice Presidential Candidate may have given the Catholic Church the loophole it needed to voice its opinion, openly and publicly, in support of the Republican Candidates and in opposition to the Democratic Candidates. Catholic Bishops were quoted in newspapers as saying, “I will not tolerate any politician who claims to be a faithful Catholic who is not genuinely pro-life,”² and politicians who support abortion are exhibiting “total disregard for the faith community.”³

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² Charles Schillinger, *Biden Risks Refusal of Holy Communion*, THE TIMES-TRIBUNE, Aug. 31, 2008, available at http://www.scrantontimes.com/articles/2008/08/31/news/sc_times_trib.20080831.a.pg1.tt31communion_sl.1911465_top4.txt.

³ Pete Vere, *Political State of Grace: Pro-choice Politicians Vex Church*, THE WASHINGTON TIMES, June 2, 2008, at B 06.

Under § 501(c)(3) of the Tax Code, such open and public opposition to a candidate should result in revocation of the church's tax-exempt status.⁴ However, no such revocation has been made. That is because these statements from Catholic officials are sparked by something considered more sacred and more untouchable than typical political debate. These bishops are responding to whether openly pro-choice politicians should be barred from receiving the sacrament of the Eucharist.⁵

This article will explore the relationship of the Eucharist to the present political climate through analyzing two specific cases. For a foundation of discussion, this article will first examine the unique meaning of the Eucharist in the Catholic Church and its role as a sacrament and as an individual identifier within the Catholic religion. Next, this article will address § 501(c)(3) of the Tax Code and the circumstances under which it can be revoked by examining the D.C. Circuit's decision in *Branch Ministries v. Rossotti*. Third, this article will look at the First Amendment's right of expressive association as announced in *Boy Scouts of America v. Dale*. This article will then determine whether a church's denial of the Eucharist to pro-choice politicians is a substantially political act which should result in revocation of tax-exempt status or whether such exclusion is constitutionally protected as a right of expressive association.

II. The Eucharist: Its Role as a Sacrament and Scarlet Letter

The Eucharist, known also as Holy Communion, is a key sacrament in the Catholic faith and symbolizes, among many things, a person's connection with God, presence in Christ and unity with the Church.⁶ The Catholic Church is

⁴ The Catholic Church is exempt from taxation as long as the Church "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." Internal Revenue Code, 26 U.S.C. § 501(a), (c)(3) (2007). This will be explained more in depth *infra* pp. 3-6.

⁵ Under Canon Law, Catholics are not permitted to receive the Eucharist if they "obstinately persist in manifest grave sin." Codex Iuris Canonici, 1983 CODE C.915. To Catholics, the denial of the Eucharist by a priest or bishop is the equivalent of the Church declaring that the person is living in grave sin. This will be discussed in further detail *infra* pp. 2-3.

⁶ Gregory C. Sisk & Charles J. Reid, Jr., *Abortion, Bishops, Eucharist and Politicians: A Question of Communion*, 43 CATH. LAW 255, 269 (Fall 2004).

bound by Canon Law which regulates many facets of the faith, including the administration and denial of the Eucharist during mass. In mass, prior to receiving Holy Communion from a priest or Eucharistic minister, every parishioner is under an obligation to personally examine their state of grace before presenting themselves at the altar. If one determines that her being is seriously burdened by grave sin, then that person must not present herself to receive the Eucharist until Penance is made.⁷

Under Canon 915 of the Catholic Church's *Code of Canon Law*, "those upon whom the penalty of excommunication or interdict has been imposed or declared, and others who obstinately persist in manifest grave sin, are not to be admitted to Holy Communion."⁸ Through this canon, bishops and priests can refuse to administer the sacrament of Holy Communion to an individual if they are aware of the individual's grave sin. The denial of the Eucharist is effectively a pronouncement by the priest that the individual is no longer in communion with the grace of God.⁹ Canon 915 has sparked much debate in the Catholic community and bishops are split over whether to deny the Eucharist to politicians who publicly endorse pro-choice legislation. The issue centers on whether supporting pro-choice legislation is "obstinately persist[ing] in manifest grave sin."¹⁰

Abortion, most certainly, is a grave sin under Canon Law and results in immediate excommunication from the Church.¹¹ Bishops, however, disagree on whether public support of abortion and pro-choice legislation is a grave sin.

⁷ Under Canon Law 916, "A person who is conscious of grave sin is not to celebrate Mass or to receive the Body of the Lord without prior sacramental confession unless a grave reason is present and there is no opportunity of confessing; in this case the person is to be mindful of the obligation to make an act of perfect contrition, including the intention of confessing as soon as possible." Codex Iuris Canonici, 1983 CODE C.916. "An act of perfect contrition" refers to the Sacrament of Reconciliation, also known as Penance, which represents the cleansing of one's soul through confession, absolution of sin and a return to God's grace. Sisk & Reid, *supra* note 6, at 268-69.

⁸ Codex Iuris Canonici, 1983 CODE C.915.

⁹ Sisk & Reid, *supra* note 6, at 268-69.

¹⁰ Codex Iuris Canonici, 1983 CODE C.915.

¹¹ "A person who procures a successful abortion incurs an automatic excommunication." Codex Iuris Canonici, 1983 CODE C.1398.

Some Bishops are adamant that pro-choice politicians who advocate for abortion rights, regardless of whether they personally believe that life begins at conception, should be refused the Eucharist.¹² Other Bishops hold the opposite view, and believe that pro-choice politicians should not be denied the Eucharist because of their public political stances and bishops should refrain from making the altar a political arena.¹³

In 2004, the United States Conference of Catholic Bishops announced that the choice to deny the Eucharist to a pro-choice politician lies with the individual bishop.¹⁴ Given that a bishop has in his power as an officer of the Church to publicly deny Communion to a Catholic pro-choice politician, like Joseph Biden, should that power be exercised in the midst of a presidential election? Such a denial to a Catholic politician would essentially brand him a mortal sinner and call into question the veracity of his faith. Indeed, to devout Catholics, a denial of the Eucharist would signify a severance from God's grace. Would such an action, if strategically timed to take place at the height of an election season, become more political than religious?

¹² Archbishop Raymond L. Burke, recently appointed by Pope Benedict XVI to Prefect of the Supreme Tribunal of the Apostolic Signatura, staunchly supports denial of the Eucharist to pro-choice politicians. Archbishop Burke argues that the sin of abortion is so grave that politicians who support such a sin publicly, if not personally, are obstinately persevering in manifest grave sin. Therefore, such politicians should be denied the Eucharist and such denial is within the right of the priest under Canon 915. See R. L. Burke, *Canon 915: The Discipline Regarding the Denial of Holy Communion to Those Obstinate Persevering in Manifest Grave Sin*, 96 *Periodica De Re Canonica* 3, (2007). For more information on Archbishop Burke, see his biography by accessing the hyperlink <http://www.mariancatechist.com/html/general/archbishopburkespage.htm>.

¹³ Some bishops are hesitant with placing the Eucharist in the center of debate over abortion and feel that this might lead to the Church crossing the line between religion and politics. See Amelia J. Uelmen, *The Spirituality of Communion: A Resource for Dialogue with Catholics in Public Life*, 43 *CATH. LAW* 289, 291 (Fall 2004).

¹⁴ In 2004, the United States Conference of Catholic Bishops declared that the choice of whether to deny Communion to an openly pro-choice public figure rested with the individual bishop. The Conference also recognized that individual bishops can legitimately differ in their decision based on what they feel is the most prudent, pastoral action. Sisk & Reid, *supra* note 6, at 287.

III. Section 501(c)(3) of the Tax Code and the Effect of the Branch Ministries Decision

The Catholic Church is exempt from taxation under 26 U.S.C § 501(a), (c)(3) on the condition that the Church refrain from lobbying and participation or intervention in political campaigns.¹⁵ If the Church violates this restriction, then the Internal Revenue Service (IRS) may revoke the Church's tax-exempt status.¹⁶

In *Branch Ministries v. Rossotti*, the D.C. Circuit addressed for the first time whether the IRS's revocation of a church's tax-exempt status violated a church's right to free exercise of religion and freedom of speech under the First Amendment.¹⁷ The D.C. Circuit found the revocation did not violate the church's right to free exercise or free speech and held that the IRS's revocation of the church's tax-exempt status was constitutional.¹⁸

First, the court found that revocation of a church's tax exemption is not an "unconstitutional burden on its free exercise right" because the condition on

¹⁵ A religious organization is exempt from taxation as long as the organization "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" or "is carrying on propaganda, or otherwise attempting, to influence legislation." Internal Revenue Code, 26 U.S.C. § 501(a), (c)(3) (2007).

¹⁶ The Church Audit Procedure Act (CAPA) describes the procedure the IRS uses to investigate whether a church is participating in political campaigns in violation of its tax-exempt status under § 501(c)(3) and gives the IRS authority to revoke tax-exempt status from a church if a violation is found. Church Audit Procedure Act, 26 U.S.C. § 7611 (2007).

¹⁷ *Branch Ministries v. Rossotti*, 211 F.3d 137, 139, 141 (D.C. Cir. 2000). The court also addressed whether the IRS's revocation of tax-exempt status constituted selective prosecution in violation of the Equal Protection clause. The court found that "the Church has failed to establish selective prosecution because it has failed to demonstrate that it was similarly situated to any of the other churches. None of the reported activities involved the placement of advertisements in newspapers with nationwide circulations opposing a candidate and soliciting tax deductible contributions to defray that cost." *Id.* at 144. The church also claimed that its right to free speech and to freely exercise religion was violated under the Religious Freedom Reformation Act (RFRA). However, the analysis under both the First Amendment and RFRA are identical in this case. *Id.* at 142. Because the focus of this note is the scope of the Catholic Church's First Amendment right to expressive association and whether revocation of tax-exempt status would violate this right, this analysis of the *Branch Ministries* decision will focus only on the First Amendment rights at issue.

¹⁸ In this case, the church published an advertisement in USA TODAY and THE WASHINGTON TIMES entitled "Christians Beware" which advised that Bill Clinton's positions in the 1992 presidential election on abortion, homosexuality and distribution of condoms was in violation of Biblical teachings. *Id.* at 140.

which the tax exemption is given does not constitute conduct that would require the church to violate its religious beliefs.¹⁹ Eligibility for tax-exempt status does not require a church to support issues that are against its faith; rather, the tax exemption is conditioned upon the church's removal from electoral politics. The court found that such "a burden is not constitutionally significant."²⁰ The court further explained that revocation of tax-exempt status was "likely more symbolic than substantial" and that as long as the church did not intervene in political campaigns in the future, the church could reclaim its 501(c)(3) status.²¹

The church responded by arguing that it was substantially burdened because it had no alternative means with which to express its views on the presidential candidates. Invoking *Regan v. Taxation With Representation*,²² the court reaffirmed that the availability of "an alternative means of communication is essential to the constitutionality of § 501(c)(3)'s restrictions."²³ The court then explained that the church could initiate the formation of a related organization under § 26 U.S.C. § 501(c)(4) through which it could express its opinions.²⁴ However, this organization would have to be separately incorporated and could not be funded through tax deductible contributions to the church.²⁵ Because the church had an alternative means with which to express its views on political candidates through the formation of a 501(c)(4) organization, the court found that the church's free exercise rights had not been substantially burdened.²⁶

¹⁹ *Id.* at 142.

²⁰ *Id.* (quoting *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391 (1990)).

²¹ *Id.*

²² 461 U.S. 540 (1983).

²³ *Branch Ministries*, 211 F.3d at 143.

²⁴ "Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes." Internal Revenue Code, 26 U.S.C. § 501(c)(4) (2007). While these organizations are exempt from taxation under 26 U.S.C. § 501(a), contributions to these organizations are not deductible. *See Regan v. Taxation With Representation*, 461 U.S. at 543 and the Internal Revenue Code, 26 U.S.C. § 170(c) (2007).

²⁵ *Branch Ministries*, 211 F.3d at 143.

²⁶ *Id.* at 144.

The court also observed that the IRS had not engaged in view point discrimination or violated the church's free speech rights. The court found "the restrictions imposed by § 501(c)(3) are viewpoint neutral; they prohibit intervention in favor of all candidates for public office by all tax-exempt organizations, regardless of candidate, party or view point."²⁷ The court concluded, "Congress has not violated [an organization's] First Amendment rights by declining to subsidize its First Amendment Activities."²⁸

It is clear from the *Branch Ministries* decision that the First Amendment rights to freedom of speech and free exercise of religion are not unconstitutionally burdened by § 501(c)(3) of the Tax Code. It is also evident that public advertisements from a church endorsing one presidential candidate over another are a violation of the church's tax-exempt status. However, what if a church gave an interview to a news reporter from the *New York Times* at the height of the presidential election season and publicly announced that a candidate, like Catholic Joseph Biden, was unfit to receive the Eucharist? Such a declaration would be the equivalent of saying that Biden is "obstinately persist[ing] in manifest grave sin" and living contrary to Biblical teachings.²⁹ Is this declaration distinguishable from *Branch Ministries*, where a church circulated an advertisement in *USA Today* and *The Washington Times* two weeks before the election advising Christians that Bill Clinton's policies were against Biblical teachings?³⁰ Before answering this question, it is necessary to explore the scope of the First Amendment's right to expressive association and the United States Supreme Court's examination of an organization's right to exclude individuals for expressive reasons.

IV. Boy Scouts of America v. Dale and the First Amendment's Right to Expressive Association

²⁷ *Id.*

²⁸ *Id.* at 143-144.

²⁹ Codex Iuris Canonici, 1983 CODE C.915.

³⁰ *Branch Ministries*, 211 F.3d at 140.

In *Boy Scouts of America v. Dale*, the United States Supreme Court held that the Boy Scouts had a right to exclude homosexuals from its organization under the First Amendment’s right of expressive association.³¹ The case involved a scout leader whose membership was revoked by the Boy Scouts when the organization learned that he was a homosexual and a gay rights activist. The Boy Scouts argued that they had a right to exclude individuals from their organization if that individual’s conduct was inconsistent with the moral values the organization seeks to represent.³²

In analyzing whether the First Amendment’s right to expressive association was violated through the enforcement of a local state’s anti-discrimination statute³³, the Court first recognized that:

“Implicit in the right to engage in activities protected by the First Amendment” is “a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular ideas.³⁴

The Court explained that the right of a group’s freedom of expressive association is infringed if an unwanted person is forcibly included into the group and the inclusion of such a person “affects in a significant way the group’s ability to

³¹ *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

³² *Id.* at 644.

³³ *Boy Scouts of America v. Dale* was originally brought in New Jersey state court under the New Jersey Law Against Discrimination (NJLAD). The NJLAD recognizes that “all persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities and privileges of any place of public accommodation . . . without discrimination because of . . . sexual orientation.” NJLAD, N.J. STAT. ANN. § 10:5-4. The New Jersey Supreme Court found that the Boy Scouts was a place of public accommodation under the statute and that they violated the NJLAD by revoking Dale’s membership solely because of his sexual orientation. The New Jersey Supreme Court then held that the Boy Scouts’ First Amendment right to expressive association was not infringed because it was not one of the Boy Scouts’ primary purposes to teach against homosexuality. The Boy Scouts appealed to the United States Supreme Court. *Dale*, 530 U.S. at 646-47.

³⁴ *Id.* at 647 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

advocate public or private viewpoints.”³⁵ However, this freedom of association can be overridden by a compelling state interest which is “unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”³⁶

The Court in *Dale* engaged in a three part analysis to determine whether a group is entitled to protection under the First Amendment’s right to expressive association.³⁷ First, the group must engage in a form of public or private expression.³⁸ Second, the forced inclusion of the unwanted person must significantly impair the group’s ability to express its public or private viewpoints. This step in the analysis requires a court to give deference to the group’s opinion of what would adversely affect its expression.³⁹ The final step is to determine whether the contravening statute has been applied consistently with a compelling state interest, or if it has been applied in a way that violates the group’s right to expressive association.⁴⁰

In *Dale*, the Court found that the Boy Scouts was an organization that engaged in expressive activity because its general mission was to instill a system of values and develop high moral standards in young boys across the country.⁴¹ As per the second element of the test, the Court gave deference to the Boy Scouts assertion that the admission of a homosexual as a scout leader was inconsistent with their mission and their values and concluded that the forced admission of a homosexual scout leader would significantly impair the Boy Scouts’ expressive ability.⁴²

³⁵ *Id.* at 648.

³⁶ *Id.*

³⁷ *Id.* at 648, 650, 656.

³⁸ *Id.* at 648.

³⁹ *Id.* at 650, 653.

⁴⁰ *Id.* at 656-658.

⁴¹ *Id.* at 650.

⁴² *Id.* at 650-653. The majority gives much deference to the Boy Scouts view that homosexuality is inconsistent with the Scout Oath and value system. The Boy Scouts point to two main aspects of the Scout Oath – the requirements to be “clean” and “morally straight.” While there is no mention of homosexuality, or even sexuality, in the Scout Oath or Handbook, the Boy Scouts argued that to be “clean” and “morally straight” equated with being a heterosexual. *Id.* at 652. Justice Stevens’ dissent makes a strong argument that the Boy Scouts mission would not be

Finally, the Court found that the New Jersey Law Against Discrimination (NJLAD) contravened the Boy Scouts' right to expressive association and that New Jersey's interests did not "justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."⁴³

The Court concluded its analysis by distancing itself from the question of whether homosexuality was morally right or morally wrong. Instead, the court focused its last remarks by advising that "public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message."⁴⁴

The right of expressive association, as seen in *Dale*, has often been at odds with anti-discrimination legislation.⁴⁵ However, in analyzing whether the Catholic Church has a right to publicly exclude pro-choice politicians from receiving the Eucharist in the midst of a presidential campaign, the right of expressive association has a significant role to play. The final section of this article will examine whether § 501(c)(3) contravenes the Catholic Church's First Amendment right of expressive association if the Church chose to exclude a pro-choice political candidate from the Eucharist during an election. Since this issue has not been addressed by any court, *Branch Ministries* and *Dale* will serve as the guide posts for this examination.

V. The Eucharist: A Right of Expressive Association or a Political Tool?

affected by the inclusion of a homosexual scout leader and even argues that the Boy Scouts mission statement *encourages* the inclusion of such individuals. Justice Stevens points to the Boy Scouts federal charter and its description as an organization of "representative membership" and the organization's declaration that "neither the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy." *Id.* at 666.

⁴³ *Id.* at 659.

⁴⁴ *Id.* at 661.

⁴⁵ See *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557(1995).

Before proceeding in this analysis, it is essential to define the specific scope of the act being examined. The question presented is this: If a priest or bishop, as an officer of the Catholic Church, denies the Eucharist to a Catholic pro-choice Presidential or Vice Presidential Candidate at the height of a presidential election season, has the Catholic Church violated its tax-exempt status under § 501(c)(3), or is the Catholic Church acting within its First Amendment right of expressive association? The question must be analyzed in three parts. First, one must look at the exclusion of pro-choice politicians from the Eucharist and determine whether that exclusion is within the Church's First Amendment rights. Second, is the act of exclusion from the Eucharist during a presidential election sufficiently political to constitute intervention in a political campaign under § 501(c)(3)? Finally, if the answer to both of these questions is yes, is the government's interest compelling enough to justify an intrusion into the Church's right of expressive association?

An organization is exercising its right to expressive association under the First Amendment when it excludes an unwanted individual because the inclusion of the individual is inconsistent with the values the organization seeks to represent and would significantly affect the organization's expression.⁴⁶ "An association must merely engage in expressive activity that could be impaired in order to be entitled to protection."⁴⁷ Using *Dale*, the initial question is whether the Catholic Church engages in some form of expressive activity. The answer to this question is yes as the Catholic Church seeks to instill values and guide morality through faith-based organization.⁴⁸ "It is indisputable that an association that seeks to transmit such a system of values engages in expressive activity."⁴⁹

The second element of the analysis is whether the forced inclusion of the unwanted person would significantly impair the group's ability to express its

⁴⁶ *Dale*, 530 U.S. at 656.

⁴⁷ *Id.* at 655.

⁴⁸ Sisk & Reid, *supra* note 6, at 269-71.

⁴⁹ *Dale*, 530 U.S. at 650.

public or private view points. If a Catholic Church is forced to admit pro-choice politicians to the Eucharistic table or risk losing its tax-exempt status, would this forced inclusion substantially affect the Catholic Church's expressive ability?

The answer to this question is yes. The Catholic Church is emphatic that abortion is an extreme sin warranting automatic excommunication.⁵⁰ The forced inclusion of pro-choice politicians to share in Holy Communion, a most sacred sacrament of the Catholic Church, clearly undermines the Church's message that abortion is never necessary and should never be performed.⁵¹ Therefore, it is within the Catholic Church's right of expressive association to exclude pro-choice politicians from the Eucharistic table.

Next, it must be determined whether the exclusion of a pro-choice politician from the Eucharistic table at the height of a presidential election constitutes intervention in a political campaign and triggers a revocation of the Church's tax-exempt status. While receiving the Eucharist is a strictly religious practice, bishops have recognized the political impact of the denial of the sacrament.⁵² Denouncing a candidate as obstinately persisting in manifest grave sin by refusing to serve him the Eucharist is essentially the same as saying that the candidate's viewpoints are not supported by the Catholic faith. If a Catholic Church does deny a pro-choice candidate the Eucharist, the Court could sufficiently find that the Church intervened in a political campaign in opposition to a candidate for public office. Therefore, the IRS would be within its statutory authority to revoke the Church's tax-exempt status.

⁵⁰ Codex Iuris Canonici, 1983 CODE C.1398.

⁵¹ It is also important to remember when evaluating whether the inclusion of a member would impair an organization's expressive ability, the Court gives deference to the organization's view of what would adversely affect its expression. *Dale*, 530 U.S. at 653.

⁵² See Robert D. Novak, *For Pro-Choice Politicians, a Pass with the Pope*, THE WASHINGTON POST, April 28, 2008, at A15; Vere, *supra* note 3; Valerie Richardson & Julia Duin, *Archbishop Scolds Pro-Choice Biden*, THE WASHINGTON TIMES, August 26, 2008, <http://www.washingtontimes.com/news/2008/aug/26/archbishop-condemns-bidens-pro-choice-stance/>.

The final and most intricate question is whether the government's interest in imposing political restrictions on tax-exempt status of religious organizations is more compelling than the Church's interest in its right to expressive association. The Church could effectively argue that the government's interest in revoking its tax-exempt status is not compelling enough to justify the government's intrusion on its First Amendment right to expressive association. The Court has held that the freedom of expressive association can only be overridden by a compelling state interest that "cannot be achieved through means less restrictive of associational freedoms."⁵³ This strict standard would lean one towards concluding that the Church's interest would outweigh the state's interest. There is little legislative history to elucidate the government's interest in conditioning 501(c)(3) status on abstention from political campaigns.⁵⁴ The House report indicates the congressional policy behind the statute was to ensure that the "U.S. treasury should be neutral in political affairs and thus should not subsidize political activity."⁵⁵ The Church could invoke *Dale* and argue that if the NJLAD's policy to eradicate invidious discrimination was not compelling enough to warrant intrusion on the Boy Scout's right to expressive association, the neutrality of the treasury is not compelling enough to justify the forced inclusion of a pro-choice politician to the Eucharist in order for the Church to retain its tax-exempt status.

The government could argue that revoking the Church's tax-exempt status is not an intrusion at all; rather, the government is just declining to continue subsidizing the Church's activities. The Supreme Court has held that "Congress has not violated [an organization's] First Amendment rights by declining to subsidize its First Amendment activities."⁵⁶ It can easily be argued that a tax subsidy is just that – a subsidy. The Church has the choice of whether to receive the subsidy by choosing whether to intervene in a political campaign.

⁵³ *Dale*, 530 U.S. at 648.

⁵⁴ Meghan J. Ryan, *Can the IRS Silence Religious Organizations*, 40 IND. L. REV. 73, 77 (2007).

⁵⁵ *Id.*

⁵⁶ *Regan v. Taxation With Representation*, 461 U.S. at 548.

Yet, this intervention is substantially different from the intervention in *Branch Ministries* where the church published an advertisement in a newspaper with nationwide circulation. This activity centers on the administration of a holy sacrament of the Church.⁵⁷ And at the end of the day, the Court will be reluctant to revoke a tax exemption from an organization that is abiding by the rules of its religion. The involvement of the Eucharist should tip the scales in favor of the Church's interest and the Church should be able to deny the Eucharist to any individual who is, in the eyes of the Catholic faith, unworthy to receive it. Most importantly, the Church should not fear revocation of its tax-exempt status through exercising the tenets of its faith.

This balance is easily swayed in favor of the government, though, if the Church would then publicly announce the denial of the Eucharist to the press and intentionally circulate it to the nation through a public medium. While a Church has the right to expressively associate, the Court should not find it has the right to use its sacrament as a shield to announce political endorsements of one candidate over the other. The Catholic Church does have the choice of whether to deny the Eucharist to a pro-choice politician privately or to announce the denial publicly.

This is the key distinction to make when evaluating whether revocation of the Church's tax-exempt status infringes on its right of expressive association. If the Church chooses to announce its denial of the Eucharist to a pro-choice politician in a public medium, the action is then transformed from a private act of expressive association into a public act constituting intervention in a political campaign. The Court should then find the government's interest in protecting the neutrality of the U.S. treasury compelling enough to warrant revocation of the Church's tax-exempt status.

⁵⁷ Specifically, the sacrament referred to is the Eucharist which the Catholic Church must administer in accordance with canon law. See *Codex Iuris Canonici*, 1983 CODE C.915.

VI. Conclusion

The nomination of Catholic Joseph Biden as the Democratic Vice Presidential Candidate sparked debate among Catholic bishops on whether to deny him the Eucharist because of his support for pro-choice legislation. If the Catholic Church decided to deny Biden the Eucharist, it would have effectively pronounced him a mortal sinner and subsequently endorsed the Republican ticket. The ramifications of this action on the Church's tax-exempt status will depend on the manner in which the Church chooses to act, both now and in the future, when it comes to denying Catholic candidates the Eucharist.

The intersection between *Branch Ministries*, which upheld the government's authority to revoke tax-exempt status from a church despite First Amendment challenges, and *Dale*, which upheld an organization's First Amendment right to expressive association despite a state's anti-discrimination statute, can be read to distinguish between public action and private action. This is directly applicable to the issue of whether the denial of the Eucharist to a pro-choice politician during the election campaign should result in the government's revocation of the Catholic Church's tax-exempt status. This article articulates the view that if the Church chose to broadcast its exclusion of a Catholic political candidate from the sacrament through a public medium, the Church will have transformed its exclusion from a private act of expressive association into a public act of political opposition. This transformation should allow the government to effectively revoke the Church's tax-exempt status. Conversely, if the Catholic Church acted in a private manner and denied a candidate the Eucharist without publicizing it, the Church is within the protection of the First Amendment because it is engaging in an act of expressive association which outweighs the government's interest in enforcing § 501(c)(3) of the Tax Code. As a result, the government would not have the authority to revoke the Church's tax-exempt status. Therefore, the Eucharist can function either as a political tool or an expressive sacrament, and it is within the power of the Catholic Church to decide which path to take.