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AMENDING THE JOHNSON AMENDMENT IN THE AGE OF CHEAP SPEECH

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On November 16, 2017, the United States House of Representatives passed tax reform legislation.¹ Its reform package included a provision amending the provision of the Internal Revenue Code (“IRS”), sometimes called the Johnson Amendment, that prohibits charities, including churches, from intervening in campaigns for elected office, at risk of loss of their exemption under section 501(c)(3).² Under the House proposal, organizations exempt as charities under section 501(c)(3) would have been permitted to engage in campaign intervention if “the preparation and presentation of such content . . . is in the ordinary course of the organization’s regular and customary activities in carrying out its exempt purpose and . . . results in the organization incurring not more than *de minimis* incremental expenses.”³

A *de minimis* exception for incremental expenses (“*de minimis* exception”) raises significant issues that demand attention in an era of what Professors Eugene Volokh and Richard Hasen have called “cheap speech.”

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1. See Comm. on Ways and Means, *HOUSE PASSED: Historic Legislation to Overhaul Nation’s Tax Code for 1st Time in 31 Years*, WAYSANDMEANS.HOUSE.GOV, <https://waysandmeans.house.gov/house-passed-historic-legislation-overhaul-nations-tax-code-1st-time-31-years/> (last visited Dec. 8, 2017). As originally proposed, the exception applied only to churches. See H.R. 1 § 5201, 115th Cong. (1st Sess. 2017), https://waysandmeansforms.house.gov/uploadedfiles/bill_text.pdf. The House provision was amended to apply to all section 501(c)(3) organizations but only for the period beginning after December 31, 2018 and ending on December 31, 2023. See *Amendment to the Amendment in the Nature of a Substitute to H.R. 1 Offered by Mr. Brady of Texas*, WAYSANDMEANSFORMS.HOUSE.GOV, https://waysandmeansforms.house.gov/uploadedfiles/chairman_amendment_2.pdf (last visited Dec. 8, 2017), <https://www.finance.senate.gov/imo/media/doc/12.1.17%20TAX%20SUBSTITUTE.pdf>.

2. To qualify as exempt under section 501(c)(3) of the Internal Revenue Code, an organization cannot “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.” I.R.C. § 510(c)(3) (2012).

3. H.R. 1 § 5201, 115th Cong. (1st Sess. 2017). The legislation passed by the senate on December 2 did not include any change to the campaign intervention prohibition. See S. Res. H.R. 1, 115th Cong. (1st Sess. 2017).

These are issues that require consideration even though a *de minimis* exception was not adopted in the current tax reform effort. The impact of cheap speech calls for re-examination of the most common constitutional justification for the prohibition—that the government has no duty to subsidize speech.

Although amendment of the Johnson Amendment did not find its way into the final tax legislation,⁴ supporters of it have announced they will continue to push for its adoption. Representative Jody B. His, Republican from Georgia, for example announced that “[a]lthough I am certainly disappointed that language to curb [the Johnson Amendment’s] chilling effects will not be included in the final conference report to overhaul our tax code, the fight is far from over.”⁵

After giving background on the Johnson Amendment, this essay discusses the impact of any *de minimis* exception regarding campaign intervention in the age of cheap speech. It considers whether the availability of cheap speech requires a new approach to limiting the political speech of charities.

I. BACKGROUND

A. History of the Johnson Amendment

Then-Senator Lyndon Johnson introduced the campaign intervention prohibition as an Amendment to section 501(c)(3) during a Senate floor debate on the 1954 Internal Revenue Code.⁶ Many believe he did so out of personal animus—because a section 501(c)(3) organization had attacked him during his reelection campaign.⁷ Others suggest that Senator Johnson introduced the amendment to head off an even more restrictive proposed

4. The final legislation did not include any amendment to the Johnson Amendment. See H.R. 1, 115th Cong. (1st Sess. 2017), <https://www.congress.gov/115/bills/hr1/BILLS-115hr1enr.pdf>. The Democrats persuaded the Senate parliamentarian that the amendment of the Johnson Amendment had to be removed from the legislation because it violated a provision that applies to reconciliation known as the Byrd Rule. See Heather Long, *In a Small Win for Democrats, the Final Tax Bill Will Not Include a Provision Allowing Churches to Endorse Political Candidates*, WASH. POST: WONKBLOG, (Dec. 14, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/12/14/in-small-win-for-democrats-the-final-tax-bill-wont-include-a-provision-to-allow-churches-to-endorse-political-candidates/?utm_term=.b54e890a9ed3. The parliamentarian apparently excluded the provision on the ground that it would produce “changes in outlays or revenues that are merely incidental to the non-budgetary components of the provision.” 2 U.S.C. § 644(b)(1)(D); see also Daniel Hemel & Ellen Aprill, *The House-Senate Tax Conference: A Bryd’s Eye View*, MEDIUM: FROM WHATEVER SOURCE DERIVED (Dec. 12, 2017), <https://medium.com/whatever-source-derived/the-house-senate-tax-conference-a-byrds-eye-view-with-ellen-aprill-afa6b55f4465/>.

5. See Fred Stokeld, *Efforts to Allow Church Politicking Falls Short*, 158 TAX NOTES 62 (Jan. 1, 2018).

6. 100 CONG. REC. 9,604 (1954).

7. See Roger Colinvaux, *The Political Speech of Charities in the Face of Citizens United: A Defense of the Prohibition*, 62 CASE W. RES. L. REV. 685, 690–91 (2016) (summarizing and citing those who make this argument).

addition to the 1954 Code, one that would have revoked the exemption of organizations making donations to subversive individuals or organizations.⁸ Yet others see the amendment as a product of a long-running congressional consideration involving a number of separate hearings that had examined the political activities of charities.⁹ Professor Colinvaux concludes that “the ease of passage and subsequent lack of controversy regarding the [campaign intervention prohibition] support the idea that by the time of its enactment it was a relatively uncontroversial proposition that charities should not be allowed to engage in political activity, broadly defined.”¹⁰ A Republican-controlled Senate adopted it and a Republican president, Dwight Eisenhower, signed it.¹¹

President Trump’s name for this provision, the Johnson Amendment, obscures both the circumstances surrounding its ready adoption, described above, and subsequent support for the campaign intervention ban. (I nonetheless use the term, since it has become so widespread.) In 1969, Congress enacted an excise tax on political activities, whether lobbying or campaign intervention, of private foundations.¹² In that year it also codified a Treasury regulation that had denied a charitable contribution deduction for organizations that violate the campaign intervention prohibition of section 501(c)(3).¹³ After lengthy hearings,¹⁴ Congress amended the language of the prohibition itself in 1987 to prohibit explicitly opposition as well as support of a candidate.¹⁵ It made other changes as well, including a provision imposing an excise tax on political expenditures by section 501(c)(3) organizations.¹⁶ Such legislative enactments demonstrate Congressional support of the prohibition. In 1996 Congress made some minor amendments to the excise tax on charities,¹⁷ and in so doing, again affirmed the ban. As Colinvaux writes, the campaign intervention ban “has been strengthened and reaffirmed over time.”¹⁸

8. Judith E. Kindell & John Francis Reilly, *Election Year Issues*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR, 2002, 335, 449–51 (2002), available at <https://www.irs.gov/pub/irs-tege/eotopici02.pdf>.

9. Colinvaux, *supra* note 7, at 691–97. See generally Ann M. Murphy, *Campaign Sign and the Collection Plate—Never the Twain Shall Meet?*, 1 PITTSBURGH TAX REV. 35 (2003).

10. Colinvaux, *supra* note 7, at 696–97.

11. 100 CONG. REC. 9,128 (1954).

12. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487.

13. *Id.* at 553.

14. JOINT COMM. ON TAXATION, LOBBYING AND POLITICAL ACTIVITIES OF TAX-EXEMPT ORGANIZATIONS (1987).

15. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-023, 101 Stat. 1330.

16. *Id.* § 10712(a) (codified at I.R.C. § 4955 (2012)).

17. Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452. These amendments were needed to take account of new section 4958, which imposes an excise tax when economic benefits received by certain insiders of an organization tax-exempt under section 501(c)(3) or (c)(4) exceeds the economic benefits received by the organization in the transaction with the insider.

18. Colinvaux, *supra* note 7, at 696–97.

B. President Trump's Position on the Johnson Amendment

Throughout his campaign, then-candidate Trump attacked the campaign intervention prohibition. He is said to be responsible for adding the issue to the GOP platform.¹⁹ Upon accepting the nomination, he declared:

An amendment, pushed by Lyndon Johnson many years ago, threatens religious institutions with a loss of their tax-exempt status if they openly advocate their political views. . . . I am going to work very hard to repeal that language and protect free speech for all Americans.²⁰

President Trump reiterated this position after taking office. At the National Prayer Breakfast on Wednesday, February 2, 2017, President Trump renewed his campaign pledge to repeal the campaign intervention prohibition. He told a gathering of religious leaders, "I will get rid of and totally destroy the Johnson Amendment."²¹

According to White House officials, on May 3, 2017, the day before the release of President Trump's Executive Order "Promoting Free Speech and Religious Liberty," the executive order was going to direct the IRS to exercise maximum discretion to alleviate the burden of the Johnson Amendment.²² The actual Executive Order, released on May 4, took no such action. Instead, it directed the Secretary of Treasury not to take any "adverse action against any individual, house of worship, or other religious organization" for "speech of similar character" that, "consistent with law," the Department of the Treasury has "not ordinarily . . . treated as participation or intervention in a political campaign on behalf of (or in opposition to) any candidate for public office."²³ The Executive Order tracked the campaign intervention language applicable to tax-exempt charities under the Internal Revenue Code.²⁴

As the words of President Trump's Executive Order acknowledged, it did not change applicable law. It explicitly maintained the status quo. As far as the tax law is concerned, it was no more than a symbolic statement. Nonetheless, on July 12, President Trump told Pat Robertson of the Chris-

19. See Elizabeth Dias, *Republican Platform Calls for Repeal of Ban on Political Organizing by Churches*, TIME (July 14, 2016), <http://time.com/4406567/republican-platform-johnson-amendment-churches-political-organizing/>.

20. See Transcript: Donald Trump at the G.O.P. Convention, N.Y. TIMES (July 14, 2016), <https://www.nytimes.com/2016/07/22/us/politics/trump-transcript-rnc-address.html>.

21. Press Release, Donald Trump, Remarks by President Trump at National Prayer Breakfast (Feb. 2, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/02/remarks-president-trump-national-prayer-breakfast>.

22. See Maureen Groppe and David Jackson, *Trump to Sign Executive Order to 'Protect and Vigorously Promote Religious Liberty'*, USA TODAY (May 3, 2017), <https://www.usatoday.com/story/news/politics/2017/05/03/civil-liberties-groups-pledge-fight-expected-trump-order-religious-freedom/101258922/>.

23. Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/05/04/presidential-executive-order-promoting-free-speech-and-religious-liberty>.

24. *Id.*

tian Broadcasting Network, “I’ve gotten rid of the Johnson Amendment. . . . Ministers and preachers and rabbis and whoever it may be . . . can speak. You couldn’t before; now you can.”²⁵

Trump’s own Justice Department disputed this claim. In a memo filed in support of a motion to dismiss a lawsuit by the Freedom From Religion Foundation alleging that the Executive Order impermissibly favored churches, the Justice Department wrote, “[t]he order does not exempt religious organizations from the restrictions on political campaign activity applicable to all tax-exempt organizations; rather, the Order directs the Government not to take adverse action against religious organizations that it would not take against other organizations in the enforcement of these restrictions.”²⁶

President Trump’s comments, both during the campaign and after his election, encouraged legislative action. Even prior to the President’s prayer breakfast, Representative Jones had introduced in January 2017 legislation to repeal the Johnson Amendment completely.²⁷ In February Representative Steve Scalise and Senator James Lankford introduced the Free Speech Fairness Act, H.R. 781 and S. 264, to permit a *de minimis* exception for political campaign intervention applicable to all section 501(c)(3) organizations.²⁸ Their proposed legislation resembled the recommendation made in 2013 by the Commission on Accountability and Policy for Religious Organizations, which had been established at the request of Senator Grassley by the Evangelical Counsel for Financial Accountability.²⁹ As described below, the House proposal eventually mirrored this recommendation.

C. The House Proposal

The Ways and Means Committee’s original proposal limited the *de minimis* exception to churches.³⁰ It quickly amended the proposal to apply

25. Fred Stokeld, *DOJ Memo Contradicts Trump’s Claim on Johnson Amendment Order*, TAX NOTES TODAY (Aug. 28, 2016), <https://www.taxnotes.com/tax-notes/exempt-organizations/doj-memo-contradicts-trumps-claim-johnson-amendment-order/2017/09/04/1w9rg>.

26. *DOJ Seeks Dismissal of Church Political Activity Executive Order Suit*, TAX NOTES TODAY (Aug. 28, 2017), <https://www.taxnotes.com/exempt-organization-tax-review/exempt-organizations/doj-seeks-dismissal-church-political-activity-executive-order-suit/2017/10/01/1w9pk>.

27. H.R. 172, 115th Cong. (1st Sess. 2017), <https://www.congress.gov/115/bills/hr172/BILLS-115hr172ih.pdf>.

28. See Free Speech Fairness Act, H.R. 172, 115th Cong. (1st Sess. 2017), <https://www.congress.gov/115/bills/hr172/BILLS-115hr172ih.pdf>. The provision ultimately adopted followed this legislative proposal.

29. See COMM. ON ACCOUNTABILITY & POLICY FOR RELIGIOUS ORG., GOVERNMENT REGULATION OF POLITICAL SPEECH BY RELIGIOUS AND OTHER 501(C)(3) ORGANIZATIONS 15–26 (2013).

30. See *supra* note 1. Under the original Ways and Means proposal, churches would “not fail to be treated as organized and operated exclusively for a religious purpose, nor . . . be deemed to have participated in, or intervened in any political campaign on behalf of (or in opposition to) any candidate for public office, solely because of the content of any homily, sermon, teaching, dialectic, or other

to all section 501(c)(3) organizations, as the Free Speech Fairness Act had done, perhaps in response to objections that favoring churches over other section 501(c)(3) organizations would be unconstitutional.³¹

The Joint Committee on Taxation scored the proposal limited to churches as losing \$2.1 billion in revenue from 2018-2027.³² This number assumed that the *de minimis* exception would open the door for a considerable increase in tax-deductible contributions. Contributors would choose to make deductible contributions for campaign intervention to section 501(c)(3) organizations instead of nondeductible contributions to section 501(c)(4) organizations, section 527 organization, and political action committees. That is, a *de minimis* exception would undermine the current regime regarding campaign activity, which requires that contribution for campaign activity be taxed at least once.³³ After the House broadened the provision to encompass all section 51(c)(3) organizations but shortened its duration to the five years between 2018 and 2023, the Joint Committee retained the estimates of the revenue loss for this broader but shorter legislative change at the same amount—\$2.1 billion.³⁴

This proposed legislation left many technical questions unanswered. For example, would the *de minimis* amount have been subject to the provisions of section 527(f), which subjects any 501(c) organization that expends amounts on campaign intervention to income tax on the lesser of these expenditure political expenditures or the organization's investment income? Logically, the answer would seem to be no, but the legislation did not make the changes needed to coordinate the proposed provisions. Expiration of the provision would also have posed difficulties. Once the exception had expired, would organizations have had to take steps to remove from their webpages, for example, earlier communications involving campaign intervention?

Further, if such legislation had become law, the IRS and the Department of the Treasury would have been faced with the difficult task of giving guidance as to the meaning of "regular and customary," "*de minimis*," and

presentation made during religious services or gatherings, but only if the preparation and presentation of such content: (A) is in the ordinary course of the organization's regular and customary activities in carrying out its exempt purpose; and (B) results in the organization incurring not more than de minimis incremental expenses." See JOINT COMM. ON TAXATION, DESCRIPTION OF H.R. 1, THE "TAX CUTS AND JOBS ACT," JCX-50-17, 295-97, <https://waysandmeans.house.gov/wp-content/uploads/2017/11/20171106-JCT-Description-of-H.R.-1-.pdf>.

31. See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

32. See JOINT COMM. ON TAXATION, ESTIMATED REVENUE EFFECTS OF THE CHAIRMAN'S AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 1, JCX-47-17 (2017).

33. See generally Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Organizations after Citizens United*, 10 ELECTION L.J. 363, 368 (2011). With the exception of certain veterans' organizations, section 501(c) organizations other than those exempt under section 501(c)(3) that are permitted to engage in some campaign intervention cannot receive tax-deductible contributions. They must also pay a tax under IRC 527(f) on the lesser of the amount of their investment income and the amount spent on campaign intervention.

34. See JOINT COMM. ON TAXATION, *supra* note 30, at 7.

“incidental.” It would likely have had to address whether donations could be earmarked for campaign intervention so long as they were within the organization’s *de minimis* limit and involved regular and customary activities. Whatever rules had been announced were sure to have been controversial and to complicate enforcement of campaign intervention that was more than *de minimis*. Of course, the IRS frequently faces regulatory challenges and knows well how to issue guidance with safe harbors and useful examples. Nonetheless, given the lack of IRS resources and controversy regarding its attempts to regulate political activities of exempt organizations,³⁵ the IRS might well have hesitated to act against possible violations of more the *de minimis* standard.

Supporters of an earlier version of the legislation asserted that a *de minimis* limit would ensure that “the organization’s primary functions remains charitable or religious in nature.”³⁶ As explained below, the consequences are not so benign. A *de minimis* exception would surely be gamed. Moreover, the availability of cheap speech raises significant constitutional issues.

II. IMPLICATIONS OF A DE MINIMIS EXCEPTION

A. Practical Effect

The proposed legislation would have opened the floodgates to campaign intervention by charities and encourages the establishment of faux charities. In his March testimony before Congressional subcommittees,³⁷ Rabbi David Saperstein, former director of the Reform Jewish Religious Action Center, asked about several possibilities, all with *de minimis* costs, including these two:

Suppose . . . in every scheduled sermon for the half-year running up to the election, the pastor(s) endorse various candidates and reiterates those endorsements?

35. See SENATE FIN. COMM., THE INTERNAL REVENUE SERVICE’S PROCESSING OF 501(C)(3) AND 501(C)(4) APPLICATION FOR TAX-EXEMPT STATUS SUBMITTED BY “POLITICAL ADVOCACY” ORGANIZATIONS FROM 2010-2013, S. REP. NO. 114-119 (2016), <https://www.congress.gov/congressional-report/114th-congress/senate-report/119>; See TREASURY INSPECTOR GEN. FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW (2013), <https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>.

36. James Lankford, Steve Scalise and Jody Hice, *U.S. Nonprofits, Including Churches Should Be Allowed to Take Sides in Politics*, WASH. POST: POSTEVERYTHING (Feb. 7, 2017), <https://www.washingtonpost.com/amhtml/posteverything/wp/2017/02/05/american-nonprofits-including-churches-should-be-allowed-to-take-sides-in-politics/>.

37. *Hearing on the Johnson Amendment Before the Subcomm. on Health Care, Benefits, and Admin. Rules and Subcomm. on Gov. Operations of the H. Comm. on Oversight and Gov. Reform*, 115th Cong. (2017) (testimony of Rabbi David Saperstein), available at https://oversight.house.gov/wp-content/uploads/2017/05/Saperstein_Testimony_05042017.pdf.

Suppose in every regular bulletin and regular email over those six months, the pastor or church leaders focus on endorsement of a party or a candidate?

Along these lines, Professor Colinvaux has offered the example of a health-care organization saying in its mass mailings: “[h]elp us in our fight against cancer. Vote for Bob Smith.”³⁸

Like Rabbi Saperstein and Professor Colinvaux, I find these scenarios troubling. I think these and other possibilities would loom particularly large for entities newly established to take advantage of any change in the campaign intervention prohibition. The proposed legislation applied to “customary and regular activities” that involve only “*de minimis* incidental expense.” New organizations can create their own norms as to what constitutes regular and customary activities. That is, I believe that organizations would have been formed precisely to take advantage of these new rules. The legislation, if it had been enacted, would have done far more than permit what may be the current practice of occasional and small violations of the campaign intervention prohibition by established organizations, the scenario that the original sponsors of this change to the law envisioned.

Importantly, in our internet era, the communicative impact of an exception for *de minimis* financial outlays is more than *de minimis*. As a practical matter, it will come close to simply eliminating the campaign intervention prohibition. Nothing in the proposed legislation forbids sermons or other customary activities of the charities that involve campaign intervention from being streamed, posted on webpages, or tweeted, if using such social media were customary for the charities. Widespread use of the Internet, including various social media, by charities pose not only practical questions such as these, but also more basic constitutional and policy questions regarding the campaign intervention prohibition more generally.³⁹

38. Roger Colinvaux, *The House Tax Bill Could Be the End of Charities as We Know Them*, CHRONICLE OF PHILANTHROPY (Nov. 16, 2017), https://www.philanthropy.com/article/Opinion-The-House-Tax-Bill/241794?cid=pt&utm_source=pt&utm_medium=en&el-qTrackId=c4433b0915064bc68e85425a5c16bfd4&elq=c5fbab6fefcf43f98e59d65f85b27e58&el-qaid=16757&elqat=1&elqCampaignId=7239. He also believes that “[d]onors would undoubtedly be willing to pay thousands of dollars for routine endorsements from important charities. There would be no way to know whether a donor was paying for charity or for politics, and, in truth, for many groups, there would cease to be any difference.” *Id.*

39. Professor Edward Zelinsky recently suggested a somewhat similar approach—a statutory safe harbor for the internal communications of churches. Edward Zelinsky, *Churches’ Lobbying and Campaigning: A Proposed Safe Harbor for Internal Church Communications*, RUTGERS U. L. REV. (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2923385. Professor Zelinsky acknowledges the difficulty of distinguishing internal from external communications in the world of the internet and electronic media, but does not go into detail as to how he would resolve the problem. Would he, for example, adopt a rule that sermons that included campaign intervention could not be streamed, posted on webpages, or tweeted, even if using such social media were customary for the church? His test does not seem workable to me.

Professor Richard Hasen recently wrote an article and an op-ed on the dangers cheap speech pose to American democracy.⁴⁰ He takes the term from 1995 article by Professor Eugene Volokh, who celebrated the coming era of cheap speech on the information superhighway as bringing about increased democratization and diversification.⁴¹ Hasen, instead, emphasizes how the rise of cheap speech has “fundamentally altered both how we communicate and the nature of our politics, endangering the health of our democracy.”⁴² While acknowledging that “the Internet has dramatically lowered the costs of obtaining information and spurred the creation and consumption of content from radically diverse sources,” he fears that “cheap speech has undermined mediating and stabilizing institutions of American democracy, including newspapers and political parties, with negative and political consequences.”⁴³

The ready availability of cheap speech underlies my concern regarding any *de minimis* spending exception to the section 501(c)(3) prohibition on campaign intervention. Charities can have enormous influence on political campaigns with little expense in today’s digital world.

*B. Constitutional Justification—The Uncertain Status of the
Nonsubvention Principle*

The availability of cheap speech not only raises practical questions regarding a *de minimis* exception but also raises questions about the constitutional justification for any ban. In the past, I, like others, have taken the position that, on analogy to the Supreme Court’s decision regarding lobbying in *Regan v. Taxation with Representation*,⁴⁴ the most persuasive justification for the prohibition is that Congress did not wish tax-deductible contributions to be used for campaign intervention activities.⁴⁵ *Regan* held that Congress neither infringed nor regulated First Amendment speech rights by refusing to pay for them. As the Court stated in the case, “Con-

40. Richard L. Hasen, *Speech in America Is Fast, Cheap, and Out of Control*, L.A. TIMES (Aug. 18, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-hasen-cheap-speech-democracy-20170818-story.html>; Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, FIRST AMENDMENT L. REV. (forthcoming 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3017598.

41. See generally Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

42. Hasen, *supra* note 40.

43. *Id.*

44. 461 U.S. 540 (1983). The Court rejected a challenge to the limits on lobbying applicable to section 501(c)(3) organizations. The Court’s opinion noted, and Justice Blackmun’s concurrence emphasized, that the section 501(c)(3) organization could form, without undue burden, a tax-exempt section 501(c)(4) organization that could lobby without limit. Both opinions ignored the fact that contributions to section 501(c)(4) organizations are not entitled to the important subsidy of tax-deductibility.

45. See Ellen P. Aprill, *Churches, Politics and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 844 (2001) (“Congress did not wish tax-deductible contribution to be used for electioneering activities.”).

gress has merely refused to pay for the [political activity] out of public monies.”⁴⁶ According to Professor Benjamin Leff in his analysis of the campaign intervention prohibition, the “no duty to pay” rationale, often dubbed the nonsubvention principle, is “the only coherent justification for the ban.”⁴⁷

To the extent that the nonsubvention principle rests on the ability of donors to charities, especially donations to churches, to deduct their contributions, the rationale was probably never true as an empirical matter. Only about one-third of taxpayers itemize and church giving comes predominantly from non-itemizers.⁴⁸ Nonetheless, this justification was plausible, at least *ex ante*, when the influence and reach of campaign speech had a relationship, probably a close one, to the dollars expended for such activity. Such, however, may no longer be the case, given the availability of cheap speech.

It remains possible that, even if the amount spent directly on campaign intervention is small, the campaign intervention prohibition can be tied to the benefits of deductibility of contributions and income tax exemption afforded to section 501(c)(3) organizations. Whatever the dollars spent directly on campaign intervention, the impact reflects the respect afforded to the entity engaging in the intervention. Any section 501(c)(3) organization can solicit and use tax-deductible contributions in establishing its reputation: what Leff calls its “credibility” or “goodwill.”⁴⁹ This credibility supports any campaign intervention by the organization. Thus, at least indirectly, even a *de minimis* exception for direct campaign intervention permits tax-deductible contributions or exempt income to be used for campaign intervention in many cases, as the impact of an online campaign advocacy inevitably trades on the goodwill built up with tax-deductible dollars. If so, the “no duty to subsidize doctrine” may live on even in the era of cheap speech.⁵⁰

46. 461 U.S. at 545.

47. Benjamin M. Leff calls the government interest in avoiding subsidizing political campaigns “expenditure equity.” Benjamin M. Leff, “*Sit Down and Count the Cost*: A Framework for Constitutionally Enforcing the 501(c)(3) Campaign Intervention Ban,” 28 VA. TAX REV. 673, 676 n.5 (2009).

48. Aprill, *supra* note 45, at 845–46. With the standard deduction now doubled, even fewer taxpayers will itemize, likely only 5%. See Roger Colinvaux, *The Importance of a Participatory Charitable Giving Incentive*, TAX NOTES (Mar. 1, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2924562.

49. Leff, *supra* note 47, at 712–15. While he opposes *de minimis* exceptions, *id.* at 705–07, he believes free speech considerations call for tax law to permit the establishment of non-501(c)(3) affiliates to fund or reimburse campaign expenditures, including a factor for reputation, in ways that ensure only non-deductible amounts are used for campaign intervention. In his view, current affiliate structures are not adequate because they do not permit the section 501(c)(3) organization to engage directly in campaign intervention. His argument to some extent anticipates the position of the Court in *Citizens United* that a corporation’s ability to establish a PAC did not satisfy First Amendment concerns because a “PAC is a separate association from the corporation.” 558 U.S. 310, 337 (2010).

50. Although not his preferred approach, Leff offers a somewhat similar possibility. Relying on Justice Rehnquist’s dissent in *FCC v. League of Women Voters*, 368 U.S. 364, 406 (1984) (Rehnquist, J., dissenting), he suggests that if there is no compelling valuation method to separate out expenses for

Further, one plausible reading of *Regan* supports continued life for the “no duty to subsidize” justification.⁵¹ *Regan* viewed both exemption and deduction as a form of subsidy: “A tax exemption has the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual’s contributions.”⁵² The opinion looked to the availability of such subsidies, not their actual benefit to the organization. It did not require a case-by-case determination of the extent of the benefit to the particular organization. The case seemed to assume that section 501(c)(3) organizations would have taxable income in the absence of the exemption and that its contributors in fact itemized deductions, assumptions that often may not hold. *Regan* can be read to stand for the proposition that the availability of subsidy under section 501(c)(3), whether there is in fact a subsidy for any particular organization, supports the campaign intervention ban.⁵³

In discussing *Regan*, Professor Lloyd Mayer has pointed out that “it is difficult, if not impossible for a charity to separate the government funding stream from private resources because of how tax deductions and tax exemptions function.”⁵⁴ A charity does not know whether or to what extent its donors take the charitable contribution deduction. As noted earlier, the Joint Committee on Taxation estimated that a five year *de minimis* exception would cost the government \$2.1 billion, even in a world where only 5% of taxpayers would itemize deductions. These numbers support the proposition that deductibility of contributions provides a federal subsidy.

Nonetheless, many scholars, including Professor Leff, have argued that the “no duty to subsidize” justification extends only to the extent that tax-deductible dollars in fact fund campaign intervention.⁵⁵ As a result, they view the current ban, to the extent that it ignores the source of the funds for campaigning, as unconstitutional.⁵⁶ Many years ago, Professor Laura Chisolm wrote, “[t]o agree that a decision not to support election-

campaign intervention, “the government can condition the receipt of such contribution on the organization agreeing to refrain from engaging in campaign-intervention activities.” Leff, *supra* note 47, at 727.

51. This paragraph borrows from Aprill, *supra* note 32, at 368.

52. 461 U.S. at 544.

53. This position raises the specter of the unconstitutional conditions doctrine. I discuss the doctrine and cite some of the voluminous literature on it in Aprill, *supra* note 51, at 366–67. See also Colinvau, *supra* note 7, at 739–44; Lloyd Hitoshi Mayer, *Nonprofits, Speech, and Unconstitutional Conditions*, 46 CONN. L. REV. 1045 (2014).

54. Mayer, *supra* note 53, at 1071.

55. Expressions of this position generally focus on deductibility and not whether tax-exempt income funds the intervention. While scholars debate the extent to which charities would have taxable income in the absence of exemption, it seems clear that investment of income of charities, if any, benefits from exemption. See Daniel Halperin, *Is Income Tax Exemption for Charities a Subsidy?*, 64 TAX L. REV. 283 (2011); Daniel Halperin, *Tax Policy and Endowments: Is Excessive Accumulation Subsidized?*, 67 EXEMPT ORG. TAX REV. 125 (2011).

56. Leff, *supra* note 49, takes this position and reviews the literature.

related activity is justified is not to say that the decision to bar all election-related activity, even if undertaken with nonsubsidized dollars, is sound.”⁵⁷

A relatively recent Supreme Court decision demonstrates the uncertain status of the nonsubvention principle. In *Agency for International Development v. Alliance for Open Society*,⁵⁸ the Supreme Court held under the First Amendment a requirement that an organization adopt a policy explicitly opposing prostitution in order to receive funds from a federal government program to fight, among other ailments, HIV/AIDs as unconstitutional. Chief Justice Roberts wrote for the majority that the policy requirement at issue violates the First Amendment, because it “compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program.”⁵⁹ Such concern would seem to apply equally to the campaign intervention prohibition—the subsidy of exemption and tax-deductible dollars forbids campaign intervention, regardless of the source of its funding. Yet, the Court in *Agency for International Development* spoke favorably of *Regan* and distinguished it on the basis that the availability of a related section 501(c)(4) organization “did not deny the organization the government benefit” of tax-exempt lobbying.⁶⁰

Nonetheless, language in *Agency for International Development* and the availability of cheap speech can be seen as undermining reliance on the “no duty to subsidize” justification. If we care about the influence of campaign speech by section 501(c)(3) organizations, regardless of the cost, we may either need to find another compelling government interest that passes constitutional muster for prohibiting this kind of political speech by section 501(c)(3) organizations or take a different regulatory approach to the issue. Perhaps First Amendment scholars can come to my aid, but I have been unable to identify an alternative compelling government interest.⁶¹

57. Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308, 351 (1990). She accepted the nonsubvention justification for the campaign intervention prohibition, but believed that the consequences of campaign violate the unconstitutional conditions doctrine. *Id.* at 327–33.

58. 133 S. Ct. 2321 (2013).

59. *Id.* at 2332.

60. *Id.* at 2829. Professor Mayer finds this decision to have created more, rather than less, certainty regarding constitutional standards. See Mayer, *supra* note 53, at 1048.

61. Not all scholars agree that the campaign intervention ban is subject to strict scrutiny under the constitution such that a compelling government interest is required to uphold the ban. Professor Galston argues that tax law is unlike campaign finance law in that the Supreme Court generally applies only a rational relationship test to tax provisions. See Miriam Galston, *When Statutory Regimes Collide: Will Citizens United and Wisconsin Right to Life Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CONST. L. 867, 913 (2011).

C. Misplaced Reliance on Dollar Amounts

Furthermore, a measure relying on the amount of deductible or tax-exempt dollar amounts involved, directly or indirectly, *de minimis* or not, does not sufficiently capture all the values at stake in the campaign intervention prohibition. The lobbying rules applicable to section 501(c)(3) organizations help to articulate this concern. Section 501(c)(3) organizations other than churches can choose to make an election under 501(h) so that mechanical rules set dollar ceilings for permissible lobbying expenditures.⁶² Few choose to do so.⁶³

Most of these organizations rely instead on the requirement in the statute that “no substantial part” of a section 501(c)(3)’s activities can consist of lobbying.⁶⁴ It is this “no substantial part” test that I believe offers insight into the implications of a *de minimis* exception for political campaign intervention. The IRS has never defined what constitutes “no substantial part.” A General Counsel Memorandum stated that “the percentage of the budget dedicated to a given activity is only one type of evidence of substantiality.”⁶⁵

Bruce Hopkins in his reference book, *The Law of Tax-Exempt Organizations*, underscores that the no substantial part test for lobbying involves “more than simply a curb on spending or diversions of funds; it includes restrictions on levels of activity as well (expenditures of time).”⁶⁶ He raises the issue of cheap speech, although he does not use that name: “particularly with the advent of lobbying by means of the Internet,” the “subjective factor of *influence* may have to be taken into consideration.”⁶⁷

Because the meaning of “substantial” is multi-factored and subjective, the lobbying requirement is difficult to enforce in any but extreme cases. The same would be true of a *de minimis* exception. Moreover, I submit that, especially in this era of cheap speech, we do and should care about these non-monetary considerations in connection with the campaign intervention prohibition as we do with the limitation on lobbying. In other words, important policy rationales for the campaign intervention prohibition remain. Professor Colinvaux has suggested that Congress’s reasons for enacting the campaign intervention prohibition as part of the definition of charity include not only avoiding partisanship but also allowing for chari-

62. Jill S. Manny, *Nonprofit Legislative Speech: Aligning Policy, Law, and Reality*, 62 CASE. W. RES. L. REV. 757, 759 (2012).

63. The generally accepted estimate is less than 2%. *See id.* at 780.

64. *See id.* at 760.

65. G.C.M. 36148 (Jan. 28, 1975).

66. BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 1643 (9th ed. 2007).

67. *Id.* at 642 (emphasis in original). Despite my comparison, I recognize that test for lobbying looks to the amount of activity, not the amount of expense.

ties to focus on core charitable activity and protecting charities from political capture.⁶⁸ Independent Sector, a national coalition of nonprofit organizations, foundations, and corporate giving programs, has stated, “[c]haritable organizations are among the most trusted entities in the United States. . . . That public trust demands that 501(c)(3) public charities remain above the political fray, advocating and informing policymakers but not engaging in partisan political activity.”⁶⁹ The National Association of State Charity Officials sent a letter dated August 23 to congressional leaders opposing repeal or weakening of the Johnson Amendment. The letter explained:

“For sixty-three years, the Johnson Amendment has preserved the integrity and independence of charitable organizations and foundations by creating a partisan-free public forum for people of all belief and interests to collaborate and exchange ideas on solving community problems, fostering art and culture, and promoting the public good without the distractions of party labels and political rhetoric.”⁷⁰

The letter also pointed out that permitting campaign intervention by charities would conflict with the common law of charities, which state officials must uphold.⁷¹ In a letter dated August 16, 2017, more than 4,000 faith leaders from all fifty states stated they were “strongly opposed to any effort to repeal or weaken current law that protects houses of worship from becoming centers of partisan politics.”⁷² These concerns do not depend on the amount of money spent on campaign advocacy or the extent to which Congress is subsidizing such speech.

Such policy considerations did not convince the Ways and Means Committee. Moreover, they alone will not suffice if the subsidy rationale has been weakened or eliminated in the era of cheap speech. If so, we need to consider what could be a sufficient governmental interest for constitutional law purposes to justify the Johnson Amendment’s limit on political

68. Colinvaux, *supra* note 7, at 711.

69. *National Poll Finds That Americans Support the Johnson Amendment to Protect Nonprofit Non-partisanship*, INDEP. SECTOR (Mar. 30, 2017), <https://www.independentsector.org/news-post/national-poll-johnson-amendment>. This press release was issued in connection with a poll. *See Poll: Americans Support the Johnson Amendment*, INDEP. SECTOR (Mar. 30, 2017), <https://www.independentsector.org/resource/poll-americans-support-keeping-amendment/>. The March 2017 poll by Independent Sector showed that 72% of voters wanted to keep current law, including 66% of Trump voters, 78% of Clinton voters, and 77% of independent voters. Polls by PRRI, the National Association of Evangelicals, Pew Research Center, and Lifeway Research have found similar results when asking about houses of worship and partisan politics. *See Polls*, PROJECT FAIR PLAY, <http://projectfair-play.squarespace.com/polls> (last visited Dec. 8, 2017).

70. Letter from Karen Gano, President, Nat’l Assoc. of State Charity Officials, to congressional leaders (Aug. 23, 2017), available at <http://www.nonprofitlawblog.com/assets/NASCO-Letter-to-Congressional-Leaders-re-Johnson-Amendment-8.23.2017.pdf>.

71. *Id.*

72. FAITH VOICES, <https://www.faith-voices.org> (last visited Dec. 8, 2017). The letter continues: “Changing the law would threaten the integrity and independence of houses of worship. We must not allow our sacred spaces to be transformed into spaces used to endorse or oppose political candidates.” *Id.*

speech, speech that is at the core of the First Amendment. That is, cheap speech raises serious questions about allowing any limit on political campaign intervention,

D. Possible Alternative Approaches

Although the demise of reliance on the nonsubvention principle has not yet been declared by the Supreme Court, the concerns outlined above call for us to consider other possible approaches to political campaign intervention by section 501(c)(3) organizations. Professor Colinvaux has outlined a tax-based approach to the campaign intervention prohibition. It is tied closely to the nonsubvention rationale and should survive constitutional challenge. He has entertained, albeit briefly, the possibility of removing the campaign intervention ban from section 501(c)(3) but retaining it under section 170.⁷³ Doing so would tie the ban strongly to a provision that almost all characterize as a subsidy.⁷⁴

The mechanics of such an approach would be complicated but not impossible. If any campaign intervention, no matter how small, results in denial of deduction for all contributions during that tax year, the charity would need to notify donors before their tax returns are due. Such notice could be similar to the substantiation receipts that tax law now requires for contributions of \$250 or more.⁷⁵ Under such a regime, donors who had expected to deduct gifts would be very unhappy. A better structure might be denying the charitable contribution deduction for gifts in the year following campaign intervention, along with some kind of notice to donors of that fact and the ability to rescind the gift before the end of the taxable year at issue. Enforcement would be difficult. For those organizations that have few if any donors who itemize, such as many if not most churches under current law and likely many more under the recently enacted tax legislation, this approach would have no effect. With the doubling of the standard deduction as part of tax reform such that only 5% of taxpayers are expected to itemize, denial of the charitable contribution deduction will affect very few.

73. Colinvaux, *supra* note 7, at 742–44.

74. If a taxpayer who itemizes deductions makes a charitable contribution of \$100, that taxpayer's income is reduced by the \$100 deduction. If the taxpayer is paying tax at a rate of 25%, this reduction in income saves the taxpayer \$25 in taxes; the after-tax cost to the taxpayer of the \$100 deduction is only \$75. The government subsidizes the contribution by permitting the deduction and bearing the loss of revenue. The charitable contribution deduction appears on the tax expenditure budget, under which certain tax benefits are equated with direct subsidies. Income tax exemption for charities does not. The tax expenditure budget treats income tax exemption as part of the "normal" structure of the Internal Revenue Code. See generally *What is the Tax Expenditure Budget?*, TAX POL'Y CTR: BRIEFING BOOK, <http://www.taxpolicycenter.org/briefing-book/what-tax-expenditure-budget> (last visited Dec. 8, 2017). The extent to which income tax exemption in fact serves as a subsidy is a matter of some controversy and turns, at least in part, on the extent the organization has investment income. See Halperin, *supra* note 55.

75. See I.R.C. § 170(f)(8) (2012).

A variation of this proposal is also possible. We could deny the deduction only to the extent that the charity engaged in campaign intervention. Such a limitation would resemble current rules that limit the business deduction for membership dues to the extent tax-exempt organizations spend funds on lobbying.⁷⁶ Yet, the ability to engage in cheap speech would mean that this approach would produce only a small reduction in the charitable contribution deduction and would, as explained above, be likely to affect many taxpayers. Thus, other approaches seem necessary.

If, however, the “no duty to subsidize” rationale has lost traction, given the availability of cheap speech, and we are unable to identify another compelling government interest in forbidding campaign speech by section 501(c) organizations, unlimited campaign intervention as well as unlimited lobbying would need to be permitted as a matter of constitutional law. If so, we need another regulatory tool if we are concerned about charities engaging in campaign intervention. I suggest a radical approach—disclosure of donors, whether or not they itemize, to section 501(c)(3) organizations unless they specify that their donations will not be used for campaign intervention or for lobbying. We currently do require disclosure of donors to political organizations.⁷⁷

The Supreme Court endorsed disclosure in *Citizens United*. The Court rejected *Citizens United* to disclosure required under campaign finance law. It saw disclosure as a “less restrictive alternative to more comprehensive regulation of speech.”⁷⁸ Ease of disclosure in the internet age is the other side of the coin to cheap speech, as *Citizens United* recognized.⁷⁹

With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are “‘in the pocket’ of so-called moneyed interests.” The First Amendment protects political speech, and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

76. See I.R.C. § 6033 (2012). The proxy tax is imposed at the highest marginal rate of the corporate income tax on all lobbying expenses of the tax-exempt organization, as defined in section 162(e)(1). The flow-through option requires the organization to provide all donors or other contributors with a reasonable estimate of the portion of dues or other contributions that is allocable to expenditures not deductible under section 162. See Aprill, *supra* note 45, at 377–79.

77. See I.R.C. § 527(j) (2012) (reporting requirements for political organizations not reporting under federal or state disclosure law); 52 U.S.C. § 30104 (2012) (reporting requirements under campaign finance law).

78. 558 U.S. 310, 369 (2010).

79. *Id.* at 370 (citations omitted).

The Court clearly endorsed disclosure as a regulatory tool that does not violate the First Amendment.

In short, I am suggesting that provisions like those of the various DISCLOSE Acts apply to section 501(c)(3) organizations, including churches.⁸⁰ That is, unless the organization represents that it will not engage in campaign intervention, or donors specify, that their contributions could not be used for campaign intervention, the names of donors would be publicly available so that voters understand who is funding the campaign intervention to make the informed decision that the Supreme Court prizes.

I recognize that, out of respect for individual liberty and privacy, non-disclosure of contributors to exempt organizations (other than private foundations and political organizations) has long been a hallmark of our tax system.⁸¹ I readily admit that enforcement of this approach would be difficult. I also acknowledge that Congress did not pass any of several versions of the DISCLOSE Act even when it applied only to noncharitable 501(c) organizations involved in campaign intervention. Congress, thus, is unlikely to welcome my suggestion. If we are find ourselves confronting so major a change as the possible demise of the nonsubvention rationale for limiting the political speech of section 501(c)(3) organizations, however, we will need to consider major changes to the law applicable to these organizations if we accept the policy justifications for the ban. Adopting a *de minimis* exception risks forces the constitutional issue.

IV. CONCLUSION

Charities can have enormous influence on political campaigns with little expense in today's digital world. Contributions to charities are deductible; contributions to PACs and non-charitable section 501(c) organizations are not. Many who wish to intervene in political campaigns will shift their contribution from PACs and social welfare organizations to charities. I suspect that the Joint Committee of Taxation underestimates the revenue loss from even a five-year *de minimis* exception.

Under our current campaign finance regime, only dollars that have been taxed can be used for political intervention. A *de minimis* exception for campaign intervention for charities would undermine this basic principle. Moreover, over time, permitting charities to engage in partisan politics would reduce the respect long afforded to these entities and thus harm the sector. A *de minimis* exception to the campaign intervention prohibition

80. For a description of the 2014 version of the DISCLOSE Act, see David Earley, *DISCLOSE Act Crucial to Transparency of Federal Election Spending*, BRENNAN CTR. FOR JUST. (July 23, 2014), <http://www.brennancenter.org/blog/disclose-act-crucial-transparency-federal-election-spending>.

81. See I.R.C. § 6104(d) (2012).

would damage both the laws regulating charities and the laws regulating campaign finance. Our country would be far poorer for such changes.