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### FIXING THE JOHNSON AMENDMENT WITHOUT TOTALLY DESTROYING IT

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*The so-called Johnson Amendment is that portion of Section 501(c)(3) of the Internal Revenue Code that prohibits charities from "intervening" in electoral campaigns. Intervention has long been understood to include both contributing charitable funds to campaign coffers and communicating the charity's views about candidates' qualifications for office. The breadth of the Johnson Amendment potentially brings two important values into conflict: the government's interest in preventing tax-deductible contributions to be used for electoral purposes (called "nonsubvention") and the speech rights or interests of charities.*

*For many years, the IRS has taken the position that the Johnson Amendment's prohibition on electoral communications includes the content of a religious leader's speech in an official religious service -- a minister may not express support or opposition to a candidate from the pulpit. For at least as many years, some commentators and legislators have found this application of the Johnson Amendment especially problematic, since it implicates directly the freedom of houses of worship speech and religious exercise. These Johnson Amendment critics sought to provide some carve-out from the Johnson Amendment's general application to permit speech that includes ministers' pulpit speech without creating a massive loophole for the Johnson Amendment's general prohibition on campaign intervention. Other commentators have long argued that a limited carve-out for certain types of*

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speech is not possible—that permitting any communication of the organization's views, even in pulpit speech, would provide too large a loophole in the overall treatment of campaign contributions and expenditures.

This Article reviews the leading proposals to fix the Johnson Amendment, and finds them all lacking. It then proposes four types of modifications that could be used to properly balance the speech interests of charities (including churches) with the government's interest in a level playing field for campaign expenditures (nonsubvention). These proposed modifications include: (i) a non-incremental expenditure tax, (ii) a reporting regime, (iii) a disclosure regime, and (iv) a governance regime. The Article concludes that in order to properly balance nonsubvention with speech interests of charities, a modification of the Johnson Amendment should include some version of all four types of interventions.

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## INTRODUCTION

There has been a lot of attention to the so-called Johnson Amendment lately, and, actually, for a long time. The Johnson Amendment is the portion of Section 501(c)(3) of the Internal Revenue Code that conditions qualification for tax-exempt status on an organization refraining from participating or intervening in any campaign for public office.<sup>1</sup> It is what I have previously called the “Campaign Intervention Ban.”<sup>2</sup> The Johnson Amendment has two very different kinds of effects. First, it levels the campaign finance playing field by preventing donors from receiving a tax deduction by passing their campaign finance contribution through a 501(c)(3) organization when they could not get a tax deduction for a campaign contribution in any other context. But, second, it impacts the speech engaged in by charities and their leaders, sometimes in ways that arguably have little to do with tax-deductible contributions or tax exemption. For example, according to guidance from the Internal Revenue Service (IRS), it prevents leaders of 501(c)(3) organizations, including ministers, from indicating a view about

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<sup>1</sup> See I.R.C. § 501(c)(3) (defining an eligible entity as one “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”); see also I.R.C. § 170(c)(2)(D) (noting that a “charitable contribution” is one for use of a corporation “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”).

<sup>2</sup> 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, 675 (2009). In the present Article, I use the terms “Johnson Amendment” or “prohibition” to mean the same thing as “Campaign Intervention Ban.”

which candidate is preferable in any campaign for public office at any official function or publication of the organization, including from the pulpit.<sup>3</sup>

For a long time, the very specific application of the Johnson Amendment to religious leaders' speech during a worship service has been the source of a great deal of the attention, generating strong political opposition to the Johnson Amendment's application in this context. Donald Trump repeatedly vowed to "totally destroy" the Johnson Amendment early in his presidency<sup>4</sup> and appeared to believe he was doing so by issuing an executive order on May 4, 2017.<sup>5</sup> Legislation to change it has been proposed for decades, often targeting violations like the one that would be implicated if a minister sought to influence voters from their pulpit.<sup>6</sup> Most recently, in the 116th Congress, Representative Steve Scalise and Senator James Langford introduced The Free Speech Fairness Act of 2019 (FSFA), which would cut a narrow(ish) exception to the Johnson Amendment for any statement "made in the ordinary course of the organization's regular and customary activities" for which the organization does not incur "more than de minimis incremental expenses."<sup>7</sup> The FSFA has never been enacted, but on November 16th, 2017, the House passed tax reform legislation (The Tax Cuts and Jobs Act), which contained a modification of the Johnson

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<sup>3</sup> See Rev. Rul. 2007-41, 2007-1 C.B. 1421 (stating that leaders of 501(c)(3) organizations, such as ministers, "cannot make partisan comments . . . at official functions of the organizations.").

<sup>4</sup> E.g., Remarks at the National Prayer Breakfast, 2017 DAILY COMP. PRES. DOC. 1, at 3 (Feb. 2, 2017).

<sup>5</sup> Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017); see Salvador Rizzo, *President Trump's Shifting Claim that 'We Got Rid' of the Johnson Amendment*, WASH. POST (May 9, 2019), <https://www.washingtonpost.com/politics/2019/05/09/president-trumps-shifting-claim-that-we-got-rid-johnson-amendment/> [<https://perma.cc/38T7-3RTY>] (asserting that Trump claimed to dispose of the Johnson Amendment after signing an Executive Order in May 2017 "with the stated purpose of giving more leeway to religious groups in the realm of political speech"); see also Ellen P. Aprill, *Amending the Johnson Amendment in the Age of Cheap Speech*, 2018 U. ILL. L. REV. ONLINE 1, 4–5 (2018) (describing the dissonance between the text of the Executive Order and the statements made by President Trump when he signed it); Benjamin Leff, *Trump's Johnson Amendment Executive Order Does Not Say What He Said It Said*, SURLY SUBGROUP BLOG (May 4, 2017), <https://surlysubgroup.com/2017/05/04/trumps-johnson-amendment-executive-order-does-not-say-what-he-said-it-said/> [<https://perma.cc/5Q2K-693U>] (detailing the contrast between Trump's remarks on multiple occasions and the potential impacts of the Executive Order).

<sup>6</sup> For a list of bills introduced between 2001 and 2007, see Leff, *supra* note 2, at 679 n.11. Of the nine bills listed there, all but one provides special carveouts for religious organizations or houses of worship. See also Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1141 n.16 (2009) (relaying the rejection of the Houses of Worship Political Speech Act and like proposals).

<sup>7</sup> H.R. 949, 116th Cong. § 2 (2019). The Bill was introduced by Rep. Steve Scalise (R-LA) and has 39 co-sponsors. An identical bill was introduced in the Senate by Sen. James Lankford (R-OK). See S. 330, 116th Cong. § 2 (2019) (containing identical provisions).

Amendment that is very similar to the FSFA,<sup>8</sup> but in the final version of the law the provision was removed.<sup>9</sup> In addition to reform legislation meant to modify but not eradicate the Johnson Amendment, as recently as 2017 legislation was proposed to repeal the Johnson Amendment entirely.<sup>10</sup>

Some citizen activists have sought to effectively repeal the prohibition without Congressional action, including a group of ministers who have been publicly violating the Johnson Amendment by endorsing candidates from their pulpits on what they have been calling “Pulpit Freedom Sunday.”<sup>11</sup> Many of them then send transcripts or videotapes of their violations to the IRS, presumably seeking IRS enforcement that would enable them to test the constitutionality of the Johnson Amendment in court, but the IRS has to date not made public any enforcement against these groups.<sup>12</sup>

Supporters of the Johnson Amendment also have been active and are at least as certain of the provision’s importance as its detractors are of its venality.<sup>13</sup> For example, Professor Roger Colinvaux, one of the leading experts on the provision, has stated that if Congress passed a bill like the FSFA, relaxing but not repealing the Johnson Amendment, “partisan politics would overtake the nonprofit world, casting institutions designed to promote the

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<sup>8</sup> See H.R. 1, 115th Cong. § 5201 (as passed by the House in amended form, Nov. 16, 2017) (proposing to permit a tax-exempt organization to make certain statements related to a political campaign without losing its tax-exempt status).

<sup>9</sup> Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended in scattered sections of 26 U.S.C.). See Aprill, *supra* note 5, at 2 n.4 (“The final legislation did not include any amendment to the Johnson Amendment. 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 . . . known as the Byrd Rule.”) (citation omitted).

<sup>10</sup> H.R. 172, 115th Cong. § 1 (2017).

<sup>11</sup> See *Pulpit Initiative | Pulpit Freedom Sunday*, ALLIANCE DEFENDING FREEDOM (Feb. 5, 2019), <http://www.adfmedia.org/news/prdetail/4360> [perma.cc/GSU3-3Y97] (“Pulpit Freedom Sunday is an event associated with the Pulpit Initiative, a legal effort designed to secure the free speech rights of pastors in the pulpit.”). For a discussion of Pulpit Freedom Sunday, see Samuel D. Brunson, *Dear IRS, It Is Time to Enforce the Campaigning Prohibition. Even Against Churches*, 87 U. COLO. L. REV. 143, 145 (2016).

<sup>12</sup> Between 2004 and 2008 the IRS ran the Political Activity Compliance Initiative (PACI), which sought to investigate violations of the Johnson Amendment and to use the investigations to educate the public about its limits. But, since then, the IRS has been silent about such violations. See, e.g., Memorandum from Michael R. Phillips, Deputy Inspector General for Audit, to Commissioner, Tax Exempt and Government Entities Division, *Improvements Have Been Made to Educate Tax-Exempt Organizations and Enforce the Prohibition Against Political Activities, but Further Improvements Are Possible* (June 18, 2008), (available at <https://www.treasury.gov/Tigta/auditreports/2008reports/200810117fr.html> [https://perma.cc/Y22P-JYHF]) (providing no mention of Johnson Amendment violations).

<sup>13</sup> See, e.g., Brendan Fischer, *Destroying the Johnson Amendment: How Allowing Charities to Spend on Politics Would Flood the Swamp That President Trump Promised to Drain*, CAMPAIGN LEGAL CTR. (May 3, 2017), [https://campaignlegal.org/sites/default/files/Johnson%20Amendment%20White%20Paper\\_0.pdf](https://campaignlegal.org/sites/default/files/Johnson%20Amendment%20White%20Paper_0.pdf) [https://perma.cc/Q23Y-VKW3] (highlighting the arguments against letting 501(c)(3) non-profits participate in political campaign activities).

public good into the depraved den of identity politics and selfish motives.”<sup>14</sup> He predicts “devastating results for charities and democracy” and calls this “a seismic moment.”<sup>15</sup>

The remarkable thing about the partisan divide over the Johnson Amendment is that while the rhetoric is extreme, it is not clear that the distance between the camps is very far apart. As mentioned above, the Johnson Amendment arguably does two distinct things: (i) first, it prevents political contributors from using charities to obtain a tax deduction for their political campaign contributions, a deduction that is not available under (almost) any other circumstance. Almost everyone (even Senator Charles Grassley, a voluble Johnson Amendment critic) agrees that it would be a bad idea to permit political campaign contributions to flow through charities, permitting donors a tax deduction that they would not be able to get if they supported candidates in any other way.<sup>16</sup> This goal of the Johnson Amendment is sometimes called the “nonsubvention principle”<sup>17</sup> because it prevents 501(c)(3) organizations from using the government subsidy implicit in tax exemption and tax-deductible charitable contributions for electoral purposes. There is widespread consensus that this aspect of the Johnson

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<sup>14</sup> Roger Colinvaux, Opinion, *The House Tax Bill Could Be the End of Charities as We Know Them*, CHRON. OF PHILANTHROPY (Nov. 16, 2017), <https://www.philanthropy.com/article/the-house-tax-bill-could-be-the-end-of-charities-as-we-know-them/> [<https://perma.cc/9SSD-KRMR>]; see also E-mail from Milton Cerny, Esq., to Paul Streckfus, Editor, EO Tax Journal (Jul. 25, 2016), in Paul Streckfus, *The EOTJ Mailbag*, EO TAX J. 2016-142 (“[O]nce you allow charities to engage in political campaigns you create a cancer on the sector.”).

<sup>15</sup> Colinvaux, *supra* note 14. See also Ellen P. Aprill, *Why the IRS Should Want to Develop Rules Regarding Charities and Politics*, 62 CASE W. RES. L. REV. 643, 652 (2012) (noting that, without the additional threat of revocation of 501(c)(3) status, an excise tax would not effectively deter an organization from engaging in political campaign intervention if this intervention required little out-of-pocket expense); Roger Colinvaux, *The Political Speech of Charities in the Face of Citizens United: A Defense of Prohibition*, 62 CASE W. RES. L. REV. 685, 756 (2012) (stressing that the benefits of loosening the prohibition on political intervention are not obvious, while the benefits of retaining the prohibition—specifically, “a charitable sector that is noble in purpose and free of partisan rancor”—are evident).

<sup>16</sup> Senator Grassley reportedly said, “There was some indication in the press, I don’t know whether it’s the way the Johnson Amendment actually works so give me this leeway, but if it allows the use of church contributions to promote candidates, I think that goes too far.” Senator Charles Grassley, Remarks at the Floyd County Courthouse (Feb. 23, 2017), in Paul Streckfus, *FFRF Argues for Retention of Johnson Amendment*, EO TAX J. 2017-97 (May 17, 2017).

<sup>17</sup> This principle is explained (without using the term “subvention”) in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549 (1983) (“We have held in several contexts that a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right . . .”). See, e.g., Aprill, *supra* note 5, at 10 (“[T]he ‘no duty to pay’ rationale [is] often dubbed the nonsubvention principle . . .”).

Amendment should be preserved.<sup>18</sup> But, (ii) second, the Johnson Amendment also prevents charities from expressing their own views on the qualifications of candidates for office, and leaders of charities from expressing their personal views under circumstances in which these views could be attributed to the organization. Both spending or donating money and expressing the organization's view are considered "political campaign activity" by the IRS.<sup>19</sup> It is this second effect of the Johnson Amendment that is causing the partisan divide, since some commentators (mainly on the political right) believe that this component of the Johnson Amendment infringes on the speech rights of charitable actors, especially religious leaders speaking to their own congregations.<sup>20</sup>

A few quick examples might be helpful to understand the difference between the nonsubvention principle, which almost everyone wants to maintain, and the free speech and exercise values that Johnson Amendment critics want to foster. If Ben Leff, who is so rich that he is in the top federal income tax bracket of 37% in 2020, wants to support a candidate for president, he can contribute to the candidate's campaign, which under current law has no effect on his taxable income. Or, if there was no Johnson Amendment, he could contribute \$1,000 to the charity of his choice (for example, the Benjamin Leff Donor-Advised Fund at Vanguard Charitable, a 501(c)(3) charity), and then the charity could contribute the funds to the candidate. Leff would take a deduction of the \$1,000 charitable contribution

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<sup>18</sup> See, e.g., COMM'N ON ACCOUNTABILITY & POL'Y FOR RELIGIOUS ORG., GOVERNMENT REGULATION OF POLITICAL SPEECH BY RELIGIOUS AND OTHER 501(C)(3) ORGANIZATIONS: WHY THE STATUS QUO IS UNTENABLE AND PROPOSED SOLUTIONS 5 (2013) [hereinafter CAPRO REPORT] ("[T]here is a high level of agreement among Commission and Panel members that permitting the disbursement of funds by tax-exempt religious and other 501(c)(3) organizations for political campaign activities could have a deleterious impact on the effectiveness of the nonprofit sector.").

<sup>19</sup> See INTERNAL REVENUE SERV., CAT. NO. 11283J, INSTRUCTIONS FOR FORM 990 RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX 69 (2019) ("All activities that support or oppose candidates for elective federal, state, or local public office. It doesn't matter whether the candidate is elected. A candidate is one who offers himself or is proposed by others for public office. Political campaign activity doesn't include any activity to encourage participation in the electoral process, such as voter registration or voter education, provided that the activity doesn't directly or indirectly support or oppose any candidate.").

<sup>20</sup> See, e.g., CAPRO REPORT, *supra* note 18, at 4 ("[A] member of the clergy should be permitted to say whatever he or she believes is appropriate in the context of a religious worship service without fear of government reprisal, even when such communications include content related to political candidates."); see also E-mail from Mike Batts, Managing Partner, Batts Morrison Wales & Lee, to Paul Streckfus, Editor, EO Tax Journal (Jul. 27, 2016), in Paul Streckfus, *The EOTJ Mailbag*, EO TAX J. 2016-144 ("The content of a sermon or religious worship service embodies these [core First Amendment] rights like virtually nothing else . . . . A law that permits US government officials to monitor and evaluate the content of a minister's sermons to determine whether such content is permissible is inherently problematic. It is hard to imagine any law that is more of an affront to the First Amendment.").

(reducing his taxes by \$370), and his out-of-pocket cost for his \$1,000 contribution would be only \$630; the candidate would get the full \$1,000. The \$370 savings is “subvention,” because the US government effectively subsidizes Leff’s political contribution by permitting Leff to reduce his taxes by making a charitable contribution that is then used to support his candidate. A million-dollar contribution gives him \$370,000 worth of “subvention.” Even without subvention, our campaign finance laws permit billionaires to exert an impressive amount of influence over our elections. Permitting subvention—a subsidy from the federal government supplementing their donations—would distort the campaign finance playing field even more.

If, rather than pass the \$1,000 contribution on to a candidate, the charity uses the money to buy its own advertisement in a newspaper that says “vote for candidate X” (the candidate Leff supports), it is clear that there is still “subvention” because the cost of campaign-related speech is subsidized by the charitable deduction. But what if we imagine a charitable leader speaking at a regular meeting of their organization, like a minister preaching at a church worship service? Here, no “incremental funds” are spent on the speech because the leader would be speaking to the community at that time even if they weren’t speaking about a candidate. In that case, it might appear that there is no subvention, or at least that subvention is not a serious concern in light of the value of the speech of charities, especially churches. Under current law, charities are prohibited from engaging in a wide range of activities that might communicate their or their donors’ views with respect to a candidate regardless of whether they incur incremental costs.<sup>21</sup> In effect, the law holds that a charity cannot support or oppose a candidate, even if no incremental funds are used to communicate their support or opposition. It is this interpretation of the Johnson Amendment that some scholars, activists,<sup>22</sup> and lawmakers<sup>23</sup> oppose. They would like to relax the Johnson Amendment so charities could have views about the qualifications of candidates and could communicate those views under certain limited circumstances. Almost all critics still support the nonsubvention principle; they just want the Johnson Amendment to permit a charity to have and communicate a view about the qualifications of candidates for office. Some scholars have made compromise

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<sup>21</sup> See *infra* notes 40–43 and accompanying text.

<sup>22</sup> For example, Erik Stanley, the architect of the Pulpit Freedom Sunday protest movement, proclaimed support for the FSFA. See Erik Stanley, Opinion, *How to Fix the Johnson Amendment*, WALL ST. J. (Feb. 9, 2017, 7:26 PM), <https://www.wsj.com/articles/how-to-fix-the-johnson-amendment-1486686394> [<https://perma.cc/D22S-FZNF>] (arguing that the FSFA fixes the Johnson Amendment’s constitutional problems).

<sup>23</sup> See H.R. 949, 116th Cong. § 2(a)(1) (2019) (allowing an organization to make a statement favoring or opposing a candidate for public office without losing its 501(c)(3) status if that statement is “made in the ordinary course of the organization’s regular and customary activities [and] results in the organization incurring not more than de minimis incremental expenses.”).



proposals because they think that it is wrong for the IRS to prevent church leaders from expressing views on candidates in worship services;<sup>24</sup> others have proposed compromise solutions because they think that some relaxation of the Johnson Amendment is politically likely, and they would like to minimize the damage done.<sup>25</sup>

Compromise legislation and academic proposals attempt to permit some communications about candidates without opening the floodgates on all political contributions. The problem is, it is very hard to conceive of how to permit enough speech to satisfy the critics who want more autonomy for charities and their leaders without opening the floodgates to widespread political influence, especially in an age in which so much partisan electoral speech occurs on the internet and in social media, where the incremental costs of such speech may be very low. For the Johnson Amendment's supporters therefore, these compromises threaten the charitable sector at its very core. The purpose of this paper is to explore whether there could be a compromise solution that recognizes the speech rights of charities while simultaneously going farther than incrementalist solutions, like the FSFA, to vindicate the nonsubvention principle.

This paper proceeds in four parts. First, it introduces the Johnson Amendment and the current IRS guidance that pertains to organizational leaders expressing views on the qualifications of candidates, especially ministers expressing their views on candidates from their pulpits. Second, it explores two types of existing proposed compromises—(i) *de minimis* incremental expenditure proposals, and (ii) a variety of more speech-restrictive proposals. Third, it explores the constitutional argument against the current Johnson Amendment, describes the minimum characteristics any

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<sup>24</sup> See, e.g., NINA J. CRIMM & LAURENCE H. WINER, *POLITICS, TAXES, AND THE PULPIT: PROVOCATIVE FIRST AMENDMENT CONFLICTS* 326 (2011) (advocating for an approach that seeks to “lessen federal governmental restriction of political speech and intrusion into religion by diminishing the IRS’s role as monitor and arbiter of the content of speech of houses of worship . . . .”); EDWARD A. ZELINSKY, *TAXING THE CHURCH: RELIGION, EXEMPTIONS, ENTANGLEMENT, AND THE CONSTITUTION* 194 (2017) (arguing that the IRS infringes on religious bodies’ exercise of autonomy and freedom when it monitors and assesses internal church communications).

<sup>25</sup> See Aprill, *supra* note 5, at 2 (arguing that amending the Johnson Amendment to provide a *de minimis* exception for incremental expenses—a proposal that has continued support in Congress—would eliminate the guards that prevent tax-free dollars from funding political campaigns); cf. Samuel D. Brunson, *Reigning in Charities: Using an Intermediate Penalty to Enforce the Campaigning Prohibition*, 8 *PITT. TAX REV.* 125, 159–68 (2011) (proposing that Congress implement a penalty that could be imposed on tax-exempt organization as a means of “discouraging public charities from participating in political campaigns and improving the IRS’s ability to enforce the prohibition.”); Colinvaux, *supra* note 14 (positing that enacting the proposed changes to the Johnson Amendment contained in the tax bill would “cast[] institutions designed to promote the general good into the depraved den of identity politics and selfish motives.”).

proposal must have to pass constitutional muster, and evaluates the current proposals from a constitutional lens. Fourth, it proposes a variety of types of possible legislation that I argue would do a better job of balancing the competing interests at play, including non-incremental expenditure taxes, and reporting, disclosure, and governance requirements.

### I. THE JOHNSON AMENDMENT'S APPLICATION TO MINISTERS' PULPIT SPEECH

Section 501(c)(3) of the Internal Revenue Code describes the qualifications that must be met for an organization to be tax-exempt under that subsection. Section 501(c)(3) organizations are notable not only because their income is exempt from the corporate income tax, but also donations may be made to them on a tax-deductible basis.<sup>26</sup> Other organizations, including those organizations that are expressly devoted to party politics, are exempt from income tax, but may not receive deductible contributions. The so-called Johnson Amendment is that portion of section 501(c)(3) that requires 501(c)(3) organizations to refrain from engaging in campaign-related activities. In its entirety, the Johnson Amendment states: “[an organization is exempt provided it] 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.”<sup>27</sup>

The penalty for violation of the Johnson Amendment is revocation of tax-exempt status, because an organization that engages in political campaign activity has not met the requirements set out in section 501(c)(3).<sup>28</sup> However, in addition to revocation, Congress has provided an excise tax that applies to

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<sup>26</sup> See I.R.C. § 170(c)(2)(D) (“[T]he term ‘charitable contribution’ means a contribution or gift to or for the use of . . . a corporation, trust, or community chest, fund, or foundation . . . which is not disqualified for tax exemption under section 501(c)(3) . . .”).

<sup>27</sup> I.R.C. § 501(c)(3). Identical language appears in I.R.C. § 170, related to the deductibility of charitable contributions. *Id.* § 170(c)(2)(D) (“[W]hich 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.”).

<sup>28</sup> See I.R.C. 501(c)(3) (detailing that, to qualify for exemption, an organization must not “participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office.”).

political expenditures.<sup>29</sup> These excise taxes can be applied to supplement revocation, or to replace revocation in cases in which revocation is not required.<sup>30</sup>

The Treasury Regulations that pertain to the Johnson Amendment are distressingly succinct,<sup>31</sup> but there is official guidance from the IRS that is very informative. In 2007, the IRS issued Revenue Ruling 2007-41, which describes in detail the IRS's interpretation of the meaning and scope of the Johnson Amendment.<sup>32</sup> Because there is so much confusion about the scope of the Johnson Amendment, it is important to emphasize some of the things that Rev. Rul. 2007-41 makes clear that the Johnson Amendment does not do. It does not prevent ministers (or other organizational leaders) from speaking about politically-charged issues like abortion, sexuality, public schooling, and religious freedom.<sup>33</sup> It does not prevent churches (or other organizations) from having official views about these issues (so-called "issue advocacy"). It does not prevent organizations from inviting candidates to speak at their meetings, including from their pulpits, as long as the organization does not favor one candidate over others.<sup>34</sup> It does not prevent ministers (or other organizational leaders) from communicating their personal views on the qualifications of candidates or even endorsing a candidate, as long as they don't do so in official meetings or publications of the organization.<sup>35</sup> And, if it is even necessary to say this, it does not impose criminal penalties on anyone no matter what they say or do.<sup>36</sup>

So, what then does the Johnson Amendment do? At least one important purpose of the Johnson Amendment is to prevent the use of tax-

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<sup>29</sup> See *id.* § 4955(a)(1) (imposing an initial excise tax of 10% of any "political expenditure."); *id.* § 4955(a)(2) (imposing an additional tax of 2.5% of the political expenditure on each manager who approved the expenditure); *id.* § 4955(b)(1) (providing that an organization that does not correct the expenditure must pay a tax of 100% of the expenditure); *id.* § 4955(f)(3) (explaining that an organization that corrects the political expenditure by "recovering part or all of the expenditure to the extent recovery is possible, [and] establish[ing] safeguards to prevent future expenditures . . .").

<sup>30</sup> See Treas. Reg. § 53.4955-1(a) (1995) (detailing that, "the excise taxes imposed by section 4955 do not affect the substantive standards for tax exception under section 501(c)(3), under which an organization is described in section 501(c)(3) only if it does not participate or intervene in any political campaign on behalf of any candidate for public office.").

<sup>31</sup> See *id.* § 1.501(c)(3)-1(c)(3), discussed *infra* at note 40 (describing the factors that determine that an organization is "not operated exclusively for one or more exempt purposes . . ."); see also *id.* § 53.4955-1 (discussing the excise taxes imposed on political expenditures).

<sup>32</sup> Rev. Rul. 2007-41, 2007-1 C.B. 1421.

<sup>33</sup> See *id.* (discussing permissible "issue advocacy").

<sup>34</sup> See *id.* (discussing permissible "candidate appearances").

<sup>35</sup> See *id.* (discussing permissible "individual activity by organization leaders").

<sup>36</sup> See Remarks by Sen. Charles Grassley, *supra* note 16 ("What I want to make sure is that this minister, or any other minister, can't be jailed just because she makes a political statement—within—from the pulpit. That's what I think the Johnson Amendment restricts, and it violates freedom of speech and freedom of religion . . .").

deductible money in political campaigns.<sup>37</sup> If a contribution is made on a tax-deductible basis to a 501(c)(3) organization, which is then contributed to a campaign or spent on campaign-intervention activities, the playing field is not level with respect to contributions or expenditures for campaign activities. Individuals, political organizations, and business corporations get no deduction for contributing to or spending on campaign activities, but any contribution made to a 501(c)(3) organization that is then contributed or spent for partisan electoral speech *does* effectively get a deduction. Thus, the Johnson Amendment prevents a distortion of the campaign funding system by preventing campaign spending by 501(c)(3) organizations, thereby requiring all contributions and expenditures to be made on a nondeductible basis.<sup>38</sup>

The second effect of the Johnson Amendment, at least as interpreted by the IRS, not only prevents the contribution or expenditure of funds, but also prevents exempt organizations from using their “voice” to communicate a preference for a candidate. The simplest version of this use of their voice would be an official endorsement—something like a press release from the Board of Directors of an exempt organization that the organization supports candidate X in an upcoming political campaign. According to the IRS, this communication would violate the Johnson Amendment. But it is not only express endorsements that violate the Johnson Amendment, according to the IRS. Any communication reasonably attributed to the organization that shows a preference among candidates is forbidden. Among other things, according to the IRS, a 501(c)(3) organization violates the Johnson Amendment when an organizational leader—including a minister—expresses views about a candidate during an official meeting—including a worship service—or in a publication of the organization.<sup>39</sup>

The logic behind this prohibition is sound in two ways. First, obviously, the statute itself does not say that an organization is prohibited from using its *money* to intervene in a campaign; it says that an organization is prohibited from intervening. The plain meaning of “intervene” plausibly includes telling people what you think. Furthermore, the statute expressly prohibits “the publishing or distributing of statements[.]”<sup>40</sup> While neither “publishing” nor “distributing” is the same as “speaking,” it is fair to read the statutory language as prohibiting the organization from communicating its

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<sup>37</sup> See Leff, *supra* note 2, at 676 n.4 (calling the nonsubvention principle “the only coherent justification for the ban”).

<sup>38</sup> See, e.g., Aprill, *supra* note 15, at 673 (“[A] more persuasive justification for the prohibition is that Congress did not wish to allow tax-deductible contributions to be used for political campaign intervention.”).

<sup>39</sup> See Rev. Rul. 2007-41, 2007-1 C.B. 1421 (explaining that a minister making an endorsement at an official church function would violate the political campaign intervention prohibition).

<sup>40</sup> I.R.C. § 501(c)(3).

preferences through any means.<sup>41</sup> This interpretation is strengthened by Treasury Regulations, which expand on the statutory language by defining campaign-intervention activities as including “the publication or distribution of written or printed statements *or the making of oral statements* on behalf of or in opposition to such a candidate.”<sup>42</sup>

Second, one might argue that any time an organization communicates its preference for a candidate, it *is* using its funds.<sup>43</sup> It used its funds literally to build (or pay for) the location at which it holds its official functions; it used its funds to attract its members who now are present at the official function; and it used its funds to build the credibility that gives its endorsement (or other intervention speech) its authority.<sup>44</sup> It did all those things over some period of time using funds it had collected on a tax-deductible basis. Thus, in a very real sense the organization is spending money on the communication, even if no *incremental* funds are expended in the present for the specific speech act. There is nothing irrational or even erroneous about the IRS’s interpretation. It is arguably the best plain-meaning interpretation of the words and intent of the statutory language.

The most controversial kind of implied endorsement is when an organizational leader, especially a church leader, speaks at an official function or in an official publication.<sup>45</sup> Rev. Rul. 2007-41 creates a *per se* rule that any such speech should be attributed to the organization rather than to the organizational leader as an individual, and therefore this speech violates the Johnson Amendment whenever it communicates a preference among candidates.<sup>46</sup> Opposition to the Johnson Amendment (except when merely confused about its scope) has generally focused on the following

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<sup>41</sup> It arguably would also be fair to read the statutory language in a limiting way, to argue that Congress intended only to prohibit actions that spread the organization’s opinion on candidates to the general public, as through “publishing” or “distributing” their views. *See* discussion *infra* Section III.A (describing *Branch Ministries*, which involved a 501(c)(3) church purchasing an advertisement opposing Bill Clinton in a national publication). Under this interpretation, an internal communication, like one from a pastor (or other organizational leader) speaking at a church service (or other official function) would not constitute campaign intervention.

<sup>42</sup> Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (1995) (as amended in 2017) (emphasis added).

<sup>43</sup> I have made this argument in detail previously. *See* Leff, *supra* note 2, at 707–15 (explaining how a 501(c)(3) organization can use subsidized funds to support its campaign-intervention activities without making a marginal expenditure).

<sup>44</sup> *See id.* at 711–15 (arguing that, regardless of whether campaign intervention directly utilizes subsidized funds, subsidized funds strengthen the organization and thereby enhance the impact of the organization’s statements).

<sup>45</sup> A variety of scholars, activists, and legislators believe that religious leaders should be permitted to say whatever they want at worship services. *See, e.g.,* Stanley, *supra* note 22 (endorsing the FSFA as a measure that will remove the Johnson Amendment’s unconstitutional restrictions on free speech and allow charities to participate in political speech).

<sup>46</sup> Rev. Rul. 2007-41, 2007-1 C.B. 1421–23.

scenario: a minister (organizational leader) wishes to express their views about the qualifications of a candidate from the pulpit (official function) based on the values of the organization, but has been prevented from doing so for fear that such communication would constitute an implied endorsement and therefore a violation of the Johnson Amendment.<sup>47</sup> Rev. Rul. 2007-41 supports the view that a communication like the one imagined would indeed violate the Johnson Amendment and so warrant enforcement action by the IRS.<sup>48</sup>

## II. EXISTING PROPOSED COMPROMISES

As discussed above, there is general consensus among scholars that the Johnson Amendment plays an essential role by preventing a loophole in the tax treatment of campaign finance.<sup>49</sup> Because funders of political campaigns do not generally receive a tax deduction for their campaign-related expenditures, a complete repeal of the Johnson Amendment would permit them to circumvent this rule by donating on a tax-deductible basis to 501(c)(3) organizations, which could then funnel their donations to a campaign, support independent organizations that advocate for candidates, or spend the donations to advocate for candidates themselves. There is widespread concern that a complete repeal of the Johnson Amendment would fundamentally transform the campaign finance system, permitting deductions for political contributions as long as they were funneled through charities.<sup>50</sup> However, there are numerous critics of the Johnson Amendment who argue that the provision could be modified to permit 501(c)(3) organizations (or at least churches) to vindicate their free speech interests (or those of their leaders) *without* opening the door to a massive loophole that dramatically drags 501(c)(3) organizations into the electoral process as conduits for

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<sup>47</sup> See discussion *infra* Section II.

<sup>48</sup> See INTERNAL REVENUE SERV., PUB. NO. 1828, TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS 7–9 (2009) (prohibiting 501(c)(3) organizations from political campaign activity on behalf of candidates running for elected office); see also INTERNAL REVENUE SERV., FREQUENTLY ASKED QUESTIONS ABOUT THE BAN ON POLITICAL CAMPAIGN INTERVENTION BY 501(C)(3) ORGANIZATIONS (2020), <https://www.irs.gov/charities-non-profits/charitable-organizations/frequently-asked-questions-about-the-ban-on-political-campaign-intervention-by-501c3-organizations-organization-position-on-issues> [<https://perma.cc/GVT2-KBJD>] (explaining the rule regarding 501(c)(3) organizations stating positions on public policy issues).

<sup>49</sup> See, e.g., Roger Colinvaux, *Political Activity Limits and Tax Exemption: A Gordian's Knot*, 34 VA. TAX REV. 1, 19–20 (2014) (defending the importance of the political activities prohibition); Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1339–41 (2007) (outlining the risks of 501(c)(3) organizations intervening in political campaigns).

<sup>50</sup> See, e.g., Colinvaux, *supra* note 14 (explaining the concern that repealing the Johnson Amendment might put charitable organizations and democracy at risk).

campaign finance.<sup>51</sup> Many of the proposals to modify the Johnson Amendment seek to expand the scope of permissible speech to permit discussion of candidates' qualifications by an organizational leader, although the focus is generally the speech of a religious leader from the pulpit or equivalent place of authority in their house of worship.<sup>52</sup>

For many critics, the key to striking the right balance between speech rights and disruption of the electoral process is distinguishing between what I previously have called an "expenditure paradigm" and an "attribution paradigm."<sup>53</sup> Under an expenditure paradigm, the point of regulating electoral speech by charities is to avoid the government subsidizing such speech through the deductibility of charitable contributions (or the exemption of charitable earnings).<sup>54</sup> Under an attribution paradigm, the point of regulating electoral speech by charities is pretty much anything else: any argument that electoral speech by charities is dangerous *whether or not* it misuses a governmental subsidy delivered through the tax code.<sup>55</sup> The more permissive proposals to modify the Johnson Amendment seek to permit electoral speech that could be *attributed* to the charity while simultaneously trying to eliminate or minimize abuse of the tax subsidies by widespread use of charitable *expenditures*. Other proposals seek to go further.

#### A. *De Minimis Incremental Expenditure Solutions*

*De minimis* incremental expenditure proposals focus on the expenditures associated with any partisan electoral speech and permit such speech if the incremental cost of such speech is very low or nonexistent. For example, the Commission on Accountability and Policy for Religious Organizations (CAPRO) produced a compromise policy proposal<sup>56</sup> that is an example of the attempt to permit more robust electoral speech by charities

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<sup>51</sup> See, e.g., Johnny Rex Buckles, *Not Even a Peep? The Regulation of Political Campaign Activity by Charities Through Federal Tax Law*, 75 U. CIN. L. REV. 1071, 1095–1107 (2007) (proposing a narrower set of reforms to replace the Johnson Amendment); Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308, 315 (1990) (explaining Constitutional concerns about the Johnson Amendment and proposing reforms to address those concerns); Alan J. Samansky, *Tax Consequences When Churches Participate in Political Campaigns*, 5 GEO. J.L. & PUB. POL'Y 145, 151–52 (2007) (advocating for treating churches differently than other kinds of charitable organizations with regards to political activities).

<sup>52</sup> See, e.g., ZELINSKY, *supra* note 24, at 201–06 (proposing a solution that only applies to houses of worship); CRIMM & WINER, *supra* note 24, at 336–37 (discussing a proposed solution in the context of houses of worship).

<sup>53</sup> See Leff, *supra* note 2, at 696.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> CAPRO REPORT, *supra* note 18, at 28.

(especially churches) while still preventing charities from expending funds for electoral purposes, because permitting such expenditures “would amount to a subsidy of such activity by the taxpayers . . . .”<sup>57</sup> CAPRO was created by the Evangelical Council for Financial Accountability (“ECFA”) at the request of Republican Senator Charles Grassley, whose staff had produced a report that identified the Johnson Amendment as one of several federal laws that negatively impacted religious organizations.<sup>58</sup> CAPRO consisted of a broad array of “commissioners” with experience in the nonprofit (and especially religious) community, and was advised by several advisory panels with more specific expertise.<sup>59</sup> Its report acknowledged that the Johnson Amendment should not be repealed because it serves an important purpose of “prohibiting 501(c)(3) tax-exempt organizations from expending funds for political campaign-related activities.”<sup>60</sup> It reported that “[t]here is a high level of agreement among the Commission and Panel members that permitting the disbursement of funds by religious and other 501(c)(3) organizations for political campaign activities would likely have a deleterious impact on the effectiveness and credibility of the nonprofit sector.”<sup>61</sup> On the other hand, the report was also clear that “there is much accord among the members of the Commission and its Panel . . . that a member of the clergy should be permitted to say whatever he or she believes is appropriate in the context of a religious worship service without fear of government reprisal, even when such communications include content related to political candidates.”<sup>62</sup>

In order to “strike a necessary balance” between advancing the liberty interests of charities and preventing the expenditure of tax deductible funds on electoral speech, CAPRO proposed that the Johnson Amendment be interpreted to permit “a communication related to one or more political candidates or campaigns that is made in the ordinary course of a 501(c)(3) organization’s regular and customary religious, charitable, educational, scientific, or other exempt-purpose activities . . . so long as the organization does not incur more than *de minimis* incremental costs with respect to the communication (that is, the organization’s costs would not have been different

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<sup>57</sup> E-mail from Mike Batts, Managing Partner, Batts Morrison Wales & Lee, to Paul Streckfus, Editor, EO Tax Journal (Jul. 27, 2016), in Paul Streckfus, *The EOTJ Mailbag*, EO TAX J. 2016-144 (“Some argue that since contributions to (c)(3)s are tax deductible, allowing (c)(3)s to engage in political activity would amount to a subsidy of such activity by the taxpayers . . . and as a matter of tax policy, that is a no-go.”); he also described the compromise as “The Commission addressed this issue specifically by offering an elegant, if not perfect, solution of permitting ‘no cost political communications.’”).

<sup>58</sup> CAPRO REPORT, *supra* note 18, at 4.

<sup>59</sup> *See id.* at 61–88 (listing short biographies of commissioners and advisory panel members).

<sup>60</sup> *Id.* at 27.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 4, 28.



by any significant amount had the communication not occurred).”<sup>63</sup> The report calls this type of communication a “no-cost political communication.”<sup>64</sup>

For many years, congressional Republicans have proposed legislation to eliminate or curtail the Johnson Amendment. The current proposed legislation with the most support among congressional Republicans is the Free Speech Fairness Act of 2019 (FSFA),<sup>65</sup> which is explicitly modeled on the CAPRO proposal. That bill expressly amends section 501 of the Internal Revenue Code to make clear that:

[A]n organization . . . shall [not] 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 statement which—

“(A) is made 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.”<sup>66</sup>

The FSFA therefore expressly adopts a *de minimis* incremental expenditure approach to modifying the Johnson Amendment, which permits all “no-cost political communications” while still prohibiting the expenditure of greater sums by a 501(c)(3) organization to engage in partisan political speech. It is an attempt to more fully recognize the speech (or free exercise) interests of charities while at least attempting to prevent a complete transformation of the campaign finance system.

Even Erik Stanley, the architect of Pulpit Freedom Sunday, who vigorously argues that the Johnson Amendment is unconstitutional root and branch,<sup>67</sup> supports the compromise approach of the FSFA, arguing that “[t]he Free Speech Fairness Act . . . fixes the law’s constitutional problems . . . . [It] would get the IRS out of the speech-police business while prohibiting political expenditures or contributions by tax-exempt organizations.”<sup>68</sup>

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<sup>63</sup> *Id.* at 28.

<sup>64</sup> *Id.*

<sup>65</sup> H.R. 949, 116th Cong. (2019).

<sup>66</sup> *Id.* § 2(a). The Bill applies this definition to sections 501(c)(3), 170 (deduction for charitable contributions), 2055 (exemption from estate tax), 2106 (exemption from estate tax), 2522 (exemption from gift tax), and 4955 (excise taxes on political expenditures by 501(c)(3) organizations), and so there would be no excise taxes or other impediment to an organization acting in the ways sanctioned by the Bill.

<sup>67</sup> See Erik W. Stanley, *LBJ, the IRS, and Churches: The Unconstitutionality of the Johnson Amendment in Light of Recent Supreme Court Precedent*, 24 REGENT U. L. REV. 237, 240 (2012) (arguing that the Johnson Amendment violates the Free Speech and Free Exercise Clauses of the First Amendment).

<sup>68</sup> Stanley, *supra* note 22.

Thus, the leading compromise proposal coming from conservatives adopts an approach in which “no-cost political communication” is permitted for 501(c)(3) organizations, but any use of “subsidized” funds is prohibited. Indeed, this bifurcation of speech into “no-cost” and “subsidized” speech is the most obvious solution to the constitutional problem posed by the Johnson Amendment and the Supreme Court jurisprudence on tax provisions that limit speech. Under this analysis, the government is free to provide “subsidies” (including beneficial tax provisions like the charitable exemption and deductibility of charitable contributions) for activities that do not include engaging in political speech. This is the so-called “nonsubvention” principle: that the government’s choice not to subsidize political speech is not a “burden” on a person’s (or organization’s) speech rights, and so the government does not have to justify that choice under any kind of heightened constitutional scrutiny.<sup>69</sup> Under this analysis, there is no burden on speech if the government permits charitable tax status under the condition that the financial benefits of such status are not used for political speech. But scholars and courts have generally understood that the government is not permitted to provide tax subsidies on the condition that the recipient forego their right to engage in such speech using *their own* funds.<sup>70</sup> The Supreme Court has held that in order to avoid burdening the speech of the recipient of a government benefit, the government must permit some “alternate means” that the recipient may use to engage in political speech.<sup>71</sup> In the leading case on tax subsidies for 501(c)(3) organizations (which held that the limits on lobbying by 501(c)(3) organizations were constitutional) that alternate means was understood to be the use of an affiliated 501(c)(4) organization, which is permitted to engage in unlimited lobbying.<sup>72</sup> Therefore, the constitutional jurisprudence encourages a focus on expenditures in drawing the line

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<sup>69</sup> See *Regan v. Tax’n With Representation of Wash.*, 461 U.S. 540, 549 (1983) (“We have held in several contexts that a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.”).

<sup>70</sup> For a discussion of the so-called “unconstitutional conditions” doctrine’s application to speech-related conditions on government-provided benefits to nonprofit organizations, see, e.g., Lloyd Hitoshi Mayer, *Nonprofits, Speech, and Unconstitutional Conditions*, 46 CONN. L. REV. 1045, 1048 (2014) (articulating the article’s “goal of bringing clarity to . . . speech-related conditions on government-provided benefits to nonprofit organizations.”). The doctrine was reaffirmed in a recent Supreme Court opinion (albeit in dissent). See *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.* 140 S. Ct. 2082, 2092 (2020) (Breyer, J., dissenting) (“Congress may not, however, ‘leverage funding to regulate speech outside the contours’ of the program it has chosen to subsidize.”) (quoting *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214–15 (2013)).

<sup>71</sup> See *Regan*, 461 U.S. at 544 (“It also appears that TWR can obtain tax deductible contributions for its nonlobbying activity by returning to the dual structure it used in the past, with a § 501(c)(3) organization for nonlobbying activities and a § 501(c)(4) organization for lobbying.”).

<sup>72</sup> *Id.*

between nonsubvention (which is constitutionally unproblematic) and requiring the recipient to forego or limit political speech (which would presumably be a burden that would need to be justified by heightened or even strict scrutiny). It is not surprising, then, that a compromise proposal regarding the Johnson Amendment would attempt to permit “no-cost political communication,” since the absence of any cost negates the government’s purpose in restricting political speech by tax subsidy recipients. In effect, engaging in “no-cost political communication” should function as well as any other alternate means of communicating the recipient’s own political views.

Several years ago, I made my first attempt to propose a constitutionally appropriate application of the Johnson Amendment that balanced speech rights against the nonsubvention principle.<sup>73</sup> I argued that the IRS’s interpretation of the provision (as described in Revenue Ruling 2007-41) was too restrictive of the speech of 501(c)(3) organizations because it did not permit *any* alternate means for communicating the organization’s own views on candidates.<sup>74</sup> At the same time, I pointed out that nonsubvention is more complicated than it might at first seem. I argued that two types of then-current proposals, *de minimis* proposals and “marginal cost” proposals, insufficiently take into account the expenditure of subsidized funds that bolster or benefit an organization’s political speech. Firstly, that is because organizations can engage in speech that mixes its ordinary charitable speech with electoral speech without making any (or very, very little) incremental or marginal expenditure for the electoral speech. For example, an organization that sends a monthly two-page newsletter educating its members about environmental issues expends no incremental funds when it includes in the newsletter an endorsement of a candidate. But the fact that it spends no *additional* funds to communicate its views does not mean that it has not used the government benefit to do so. The existence of its charitable newsletter enables the organization to reach so many people with its message, and therefore the government has not avoided subsidizing the organization’s electoral speech since it subsidized the creation and development of the newsletter and its readership. The newsletter represents not just the cost of ink and paper and postage (I know, I know; no one sends newsletters anymore), but also the mailing list of recipients. For some organizations, the mailing list is their most valuable asset, and if it is shared between charitable uses and electoral, the

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<sup>73</sup> See Leff, *supra* note 2, at 679–80 (proposing an “expenditure paradigm” narrowly tailored to the government’s interest in regulating expenditures).

<sup>74</sup> See Leff, *supra* note 2, at 677 (“This article argues . . . that the Service’s current interpretation of the Ban likely exceeds permissible constitutional bounds.”).

electoral uses are subsidized by the charitable ones if a *de minimis* or marginal cost theory is used.<sup>75</sup>

Even more importantly, though, is the fact that when an organization communicates its support for a candidate, it leverages the value of its “credibility.” As I argued previously,

Indeed, the very concept of an ‘endorsement’ presupposes that the listener cares more about the credibility of the speaker than the content of the argument such speaker makes on behalf of the candidate . . . . An argument could be made that subsidized expenditures made by an organization over its entire history have served on some basis to enhance its credibility. Whatever it has spent its money on, that money has served to enhance the perceived legitimacy of the organization among its constituency. When it makes an endorsement, the organization draws upon this history of legitimacy.<sup>76</sup>

Again, if the organization’s electoral use (which the government intends to avoid subsidizing) leverages the value created by the organization’s charitable use, which has been subsidized, then the government has not avoided subvention.

In other words, CAPRO’s “no-cost political speech” is not “no-cost” at all. Thus, the FSFA—because it takes a “*de minimis* incremental expense” approach to measuring the cost of electoral speech—errs on the side of permitting too much electoral speech by nonprofits in its attempt to strike a balance between the goals of permitting speech and nonsubvention. Of course, given the difficulty of a true measurement of the “cost” of certain types of political speech, Congress can strike the balance in this way if it chooses, but there are critics of the FSFA who believe that such an approach would open a gigantic loophole in the campaign finance system, and they are seeking ways to limit the impact of that proposed loophole to strike a better balance between competing goals.

### *B. Proposed More Restrictive Solutions*

Professor Ellen Aprill has recently published an especially incisive critique of *de minimis incremental expense* approaches to the Johnson

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<sup>75</sup> In the political context, the value of a “mailing list” (or membership) is even more obvious. For example, Professor Brian Galle points out, “political theorists believe that a key source of lobbyist influence is the threat, often implicit, that the lobbyist can mobilize her constituency to vote against the official she is lobbying . . . . A charity offers the lobbyist a built-in grassroots constituency she can use in this way, saving her . . . the costs of building a separate organization.” Brian Galle, *Charities in Politics: A Reappraisal*, 54 WM. & MARY L. REV. 1561, 1608 (2013).

<sup>76</sup> Leff, *supra* note 2, at 713.

Amendment, like those advanced by CAPRO and Representative Scalise. In *Amending the Johnson Amendment in the Age of Cheap Speech*,<sup>77</sup> Aprill argues that “[t]he [FSFA] would have opened the floodgates to campaign intervention by charities and encourages the establishment of faux charities.”<sup>78</sup> Because the Bill permits organizations to engage in partisan electoral speech as long as such speech is “in the ordinary course of the organization’s regular and customary activities,”<sup>79</sup> Professor Aprill warns that new organizations could be created that communicate broadly with a wide constituency as part of their regular and customary activities in carrying out their exempt purpose, and the Bill would permit them to include partisan electoral speech (even official endorsements) in all those communications—newsletters, email blasts, websites, social media accounts, television advertisements, paid Facebook or Google advertisements, door-to-door advocacy, etc.<sup>80</sup> As long as these means of communication are established as a customary practice of the organization in communicating its tax-exempt purpose, then the inclusion of partisan electoral speech in the communications would presumably not add more than a *de minimis* incremental expense. More importantly, even for established charities, the Internet has provided an unprecedented audience at minimal incremental cost. Aprill worries that the availability of “cheap speech” through the internet or social media undermines *any* incremental-expense approach to limiting the partisan electoral speech of charities.<sup>81</sup> Because “[c]harities can have enormous influence on political campaigns with little expense in today’s digital world”<sup>82</sup> she cautions that “[a]s a practical matter, [an incremental-cost approach] will come close to simply eliminating the campaign intervention prohibition.”<sup>83</sup>

Nonetheless, Aprill acknowledges that we might be moving towards the adoption of some *de minimis* or incremental-cost solution like the FSFA. She argues that “[i]f we care about the influence of campaign speech by section 501(c)(3) organizations, regardless of the cost, we may . . . need to . . . take a different regulatory approach to the issue.”<sup>84</sup> Aprill’s regulatory proposal is “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

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<sup>77</sup> Aprill, *supra* note 5.

<sup>78</sup> *Id.* at 7. This refers not to FSFA but to provisions in the House version of the Tax Cuts and Jobs Act, H.R. 1, 115th Cong. § 5201 (2017), discussed in Aprill, *supra* note 5, at 1, that “mirrored” the FSFA and the CAPRO recommendations. See Aprill *supra* note 5, at 5 (“Their proposed legislation resembled the recommendation made in 2013 by the Commission on Accountability and Policy for Religious Organizations.”).

<sup>79</sup> H.R. 949, 116th Cong. § 2(a)(1)(A) (2019).

<sup>80</sup> Aprill, *supra* note 5, at 8.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 9.

<sup>83</sup> *Id.* at 8.

<sup>84</sup> *Id.* at 12.

be used for campaign intervention or for lobbying.”<sup>85</sup> If donors don’t explicitly limit the permissible use of their contributions, then the organization could file a statement that it will not engage in any campaign intervention, which would keep its donors identities private.<sup>86</sup> But if the organization did not expressly abstain from campaign-related speech, any donors who did not expressly limit the use of their donations would have their names publicly disclosed, so at least “voters understand who is funding the campaign intervention to make the informed decision that the Supreme Court prizes.”<sup>87</sup>

Aprill is not alone in recognizing the problem with “cheap speech” and hoping for, or proposing, solutions that would do as good a job as possible to balance the recognized need for at least some opportunity for electoral speech by charities while simultaneously limiting the harm done to the “basic principle” that “only dollars that have been taxed can be used for political intervention.”<sup>88</sup> Professor Roger Colinvaux believes that the current absolute prohibition on electoral speech by charities is constitutionally permissible and should stand.<sup>89</sup> But he, like Aprill, recognizes that the current absolute prohibition may not survive much longer. In a wide-ranging article exploring a host of difficulties that would be created if the status quo interpretation of the prohibition ceased being tenable, Colinvaux argues that a “taxing speech” approach might be necessary to prevent government subvention,<sup>90</sup> but that “the political activities of charities that did not have expenditures directly associated with the activity (such as endorsements, which may require little-to-no direct expenditure) generally would not be captured [by any attempt to measure the cost of political speech].”<sup>91</sup> Colinvaux argues that the “no-cost” political activity that was permitted under this approach, and for which deductible charitable contributions could still be made, “likely would be an enormous loophole. Thus, a serious risk of charity capture, and substantial revenue loss, would remain.”<sup>92</sup> But Colinvaux

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<sup>85</sup> *Id.* at 16.

<sup>86</sup> *Id.* at 17.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Colinvaux, *supra* note 15, at 709. He also argues that if it was found to be constitutionally problematic, the prohibition could be shifted from section 501 to section 170, and taxpayers could be denied deductible charitable contributions if the organization they contribute to engages in any partisan electoral speech. *Id.* at 744 (“The disallowance of the charitable deduction for contributions to organizations that engage in political activity requires a distinct constitutional challenge, which it should easily survive.”).

<sup>90</sup> *Id.* at 753 (“Notwithstanding these objections, of the alternatives to the Political Activities Prohibition, a taxing speech approach probably is the best.”).

<sup>91</sup> *Id.* at 751.

<sup>92</sup> *Id.* at 755. *See also* Colinvaux, *supra* note 14 (warning of “devastating results” that will accrue to the charitable sector if the absolute prohibition is replaced with an incremental expense approach).

laments weaknesses in any other approach that attempts to limit the potential damage that will be done if the status quo interpretation of the Johnson Amendment is changed to permit partisan electoral speech by charities.<sup>93</sup>

Professor Edward Zelinsky also recently acknowledged the problems with cheap speech in the internet age, but he has taken a different approach in his proposal to limit the impact of loosening the prohibition. He argues that the Johnson Amendment needs to be fixed to better balance the constitutional necessity of permitting ministers to speak freely from the pulpit with the legitimate government interest in “preventing the tax-exempt sector from becoming a conduit for tax-deductible campaign contributions.”<sup>94</sup> Zelinsky recognizes that “[i]n today’s world of the Internet and electronic media” internal communications by church leaders can have extremely broad reach without any substantial incremental expenditure.<sup>95</sup> “Through social media and television, a celebrity preacher like Rev. Joel Osteen is regularly heard and read by millions each week.”<sup>96</sup>

Zelinsky proposes a solution that he argues is more restrictive and therefore protects the integrity of the electoral system at least slightly more than the FSFA. First he argues that the Johnson Amendment should be enforced as currently interpreted against all 501(c)(3) organizations that are not houses of worship.<sup>97</sup> Second, he argues that houses of worship should be permitted to engage in partisan electoral speech but only in “internal” communications.<sup>98</sup> While acknowledging that the definition of “internal” will

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<sup>93</sup> Colinvaux, *supra* note 14.

<sup>94</sup> Edward A. Zelinsky, *Churches’ Lobbying and Campaigning: A Proposed Statutory Safe Harbor for Internal Church Communications*, 69 RUTGERS U. L. REV. 1527, 1528 (2017). Zelinsky proceeds to comment that “[t]he revised statute should discourage the diversion of tax-exempt resources into campaigning and lobbying, while safeguarding internal church discussions from church-state entanglement.” *Id.* at 1547. *See also* ZELINSKY, *supra* note 24, at 204 (proposing a “safe harbor” to protect in-house church communications “from both the Section 501(c)(3) prohibition on campaigning and that section’s prohibition of substantial lobbying.”).

<sup>95</sup> Zelinsky, *supra* note 94, at 1548.

<sup>96</sup> *Id.* at 1549.

<sup>97</sup> *Id.* at 1547. Because Zelinsky’s major complaint is with church-state entanglement, not with general free speech concerns, this limitation to houses of worship seems to him to be appropriately narrowly tailored. Since I believe that the primary imperfections in the current interpretation of the Johnson Amendment are due to overly restricting speech rights, applying a solution only to houses of worship does not solve the problem (and potentially raises new constitutional concerns under the Establishment Clause by favoring religious organizations). Evaluating the respective positions in this discussion is well beyond the scope of the present Article.

<sup>98</sup> *Id.* at 1545–51. Creating an exception for “internal communications” only in the context of houses of worship has long been a favorite solution for those commentators who argue that religious organizations have a special role to play in electoral politics. *See, e.g.*, Samansky, *supra* note 51, at 165 (arguing that, as long as they do not include official endorsements, “churches and religious leaders should have virtually complete freedom to communicate with their congregations” in sermons and other routine communications); *see*

be strained by the ways that churches regularly project their church services to the masses, he argues that his limitation to internal communications would be “a stronger barrier against the potential use of tax-deductible donations for political campaigning”<sup>99</sup> because “[u]nder the [Senate’s version of the FSFA], a non-church religious organization could construe its [tax-]exempt purpose as including communication aimed at the general public . . . [which] could permit the diversion of tax-deductible contributions to political campaigning.”<sup>100</sup> Zelinsky thus presents his solution as less destructive to the campaign finance system than the FSFA, which would create a broader loophole.

Professor Nina Crimm and her co-author Laurence Winer propose an even more restrictive “internal speech” solution to the problem of “cheap speech,” attempting to better balance First Amendment interests of organizations with the nonsubvention principle.<sup>101</sup> They propose a minor change to the Johnson Amendment to apply to all 501(c)(3) organizations, and a more substantial opportunity for electoral speech that would only apply to houses of worship.<sup>102</sup> For all 501(c)(3) organizations, the prohibition on electoral speech would be removed from section 501(c)(3), so no organization would risk losing its tax-exempt status because of such speech.<sup>103</sup> But the restriction would be added to section 170, meaning that any contribution to a section 501(c)(3) organization that did engage in any amount of electoral speech would not be deductible for the donor.<sup>104</sup> Professor Colinvaux also argues for a shift of the location of the prohibition from section 501(c)(3) to section 170,<sup>105</sup> and both Colinvaux and Crimm & Winer argue that a restriction in section 170 would be less constitutionally problematic than the current one that resides in section 501(c)(3), even though it would prevent any

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also Lloyd Hitoshi Mayer, *When Soft Law Meets Hard Politics: Taming the Wild West of Nonprofit Political Involvement*, 45 J. LEGIS. 194, 228 (2018) (“Churches should therefore be allowed to include political messages in their in-person, internal communications with their members during worship services.”).

<sup>99</sup> Zelinsky, *supra* note 94, at 1550.

<sup>100</sup> *Id.*

<sup>101</sup> See CRIMM & WINER, *supra* note 24, at 321–52 (discussing the “thorny constitutional issues” raised by the 501(c)(3) tax exemption and proposing solutions).

<sup>102</sup> *Id.* at 322–23. As discussed, *supra* note 97, I personally believe that creating a more permissive regime for electoral speech by houses of worship than any other kind of 501(c)(3) organization creates more problems than it solves. But Crimm & Winer make a strong argument that houses of worship are unique in material respects that make their case for an opportunity to communicate electoral speech to their members stronger. *Id.* at 325. Treatment of this issue is well beyond the scope of this article, but it is sufficient here to point out that (1) a properly crafted solution that created an opportunity for all 501(c)(3) organizations to engage in limited electoral speech would also solve the problem for houses of worship, and (2) a solution that was only available to houses of worship would be controversial.

<sup>103</sup> *Id.* at 326–27.

<sup>104</sup> *Id.*

<sup>105</sup> Colinvaux, *supra* note 15, at 743–44.



organization that engages in campaign-intervention speech from receiving tax-deductible contributions for any of its activities.<sup>106</sup> This solution, in effect, turns 501(c)(3) organizations that engage in any electoral speech into section 501(c)(4) organizations, because they are free to engage in electoral speech, their income is exempt from the corporate income tax, and contributions to them are not deductible to the donor (all characteristics of 501(c)(4) organizations). But they would not be identical to section 501(c)(4) organizations, most notably because they could retain the 501(c)(3) label, and would not need to reorganize or re-apply for recognition of exemption.

Crimm & Winer then propose a new category of section 501(c) that would be available *only* to houses of worship that choose to opt into it (and out of 501(c)(3)). This new category would permit houses of worship to engage in electoral speech and still receive tax-deductible contributions, but only if the speech occurred “exclusively within the confines of a private setting” and “for which existing congregants are the intended audience.”<sup>107</sup> This proposal is a version of Zelinsky’s proposal to permit only “internal” church communications, but it is significantly more restrictive than Zelinsky’s proposal. Crimm & Winer argue that, under their proposal, “[i]ntending to engage, or actually engaging, in external political campaign speech would automatically disqualify a house of worship from the new . . . (proposed) tax classification.”<sup>108</sup> They clarify that a communication would be “internal” even if it was made electronically to a wide audience who was not present in person, but only if “through means that are not accessible to the general public, such as closed-circuit television or a Web site that locks out nonmembers.”<sup>109</sup> Similarly, a “hard-copy pastoral letter or newsletter” could contain electoral speech, but only “if confined solely to existing congregants or parishioners in a diocese.”<sup>110</sup>

Crimm & Winer recognize that in the age of cheap speech, purely internal communications can become external communications easily by being spread through social media or otherwise shared. But their proposal includes a requirement that “houses of worship must take all reasonable measures to urge their congregations to refrain from disseminating the private, internal partisan communications.”<sup>111</sup> The houses of worship even have an affirmative duty under the proposal to “make such dissemination[s] . . . difficult in order to alleviate concerns of complicity or even conspiratorial behavior.”<sup>112</sup> Crimm & Winer suggest that houses of worship include a

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<sup>106</sup> Colinvaux, *supra* note 15, at 744; CRIMM & WINER, *supra* note 24, at 328, 332.

<sup>107</sup> CRIMM & WINER, *supra* note 24, at 338.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 339

<sup>112</sup> *Id.*

legend on all such written communications that they are not to be shared; presumably, however, they would also be required to use available technology to make any videos that include partisan communications difficult or impossible to copy or share.<sup>113</sup> While they do not discuss it directly, this limitation would presumably apply to efforts by any affiliated organization to share or spread the message of the church's endorsement or other partisan electoral speech. Thus, a house of worship would not be permitted to create (or cooperate in the creation of) a 501(c)(4) or 527 organization that would use its own funds to publicize the church's partisan electoral teaching to a public audience. Similarly, if a candidate asked if they could share information about the church's support on their own website or in their campaign materials or even in public speeches, the house of worship would have to decline. Obviously, a difficult question would arise if members of the press asked a representative of a house of worship if it (or its pastoral leadership) had a view about the candidates that had been expressed to members. Again, presumably the church would have to decline to confirm or deny such reports. Because this new opportunity to engage in partisan speech is housed in a new provision of section 501(c), the penalty for a house of worship that participated in the spread of its internal partisan electoral message would presumably be loss of tax-exempt status.

Professor Samuel Brunson has acknowledged the problem with cheap speech and proposed a sort of hybrid approach, supplementing the current 501(c)(3) ban with a penalty regime that would apply to the deductibility of donations to charities that engage in partisan electoral speech.<sup>114</sup> He proposes that a tax be imposed that takes back the benefit of deductible contributions applied directly to those contributors who received the benefit.<sup>115</sup> The penalty would be a percentage of the deduction that was equal to the percentage of the charity's expenditures that went toward campaigning, if that amount was high.<sup>116</sup> But, acknowledging that "[e]mail, for example, is virtually costless . . ." he proposes that donors to charities that spent little on their partisan political speech would pay a penalty based on "a percentage calculated by the size of the audience toward which the political speech was directed."<sup>117</sup> The denominator or the fraction would be the total number of donors to the charity that year, and

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<sup>113</sup> *Id.*

<sup>114</sup> See Samuel D. Brunson, *Reigning in Charities: Using an Intermediate Penalty to Enforce the Campaigning Prohibition*, 8 PITT. TAX REV. 125, 159–68 (2011) (arguing for a tax law that disallows a portion of donors' deduction to the public charity).

<sup>115</sup> See *id.* at 159 ("Instead of penalizing the public charity, the tax law should disallow a portion of the deduction taken by donors to the public charity that campaigned on behalf of or against any individual.").

<sup>116</sup> See *id.* at 160 ("Rather than penalizing the public charity as a proportion of its expenditures, the intermediate penalty would disallow a percentage of donors' charitable deductions.").

<sup>117</sup> *Id.*

the numerator would be the intended audience. For example, “[i]f a pastor endorsed a candidate during a sermon, the people to whom the endorsement was directed would be those in the congregation. If a university bought an ad in the *New York Times*, the number of people to whom it was directed would be the circulation of the *New York Times*.”<sup>118</sup> If the number of people to whom the communication is directed is greater than the total number of donors for the year, then the penalty would be 100% of the value of the deduction (in effect disallowing the deduction of the contribution to that charity for the year),<sup>119</sup> and the charity would be required to notify donors of what portion of their donation is deductible based on their calculation of the penalty.<sup>120</sup>

Brunson argues that it is only fair to base the penalty on the acts of the charity itself, not of any other entity or person who subsequently spread the charity’s message. So, he acknowledges that “[t]hese tests can be gamed, of course. A public charity could, for example, send out an email endorsing a candidate to a single person, knowing that the recipient would forward the email to a much larger group.”<sup>121</sup> But he claims that if there was evidence that a charity showed deliberate intent to avoid or minimize the penalty, presumably for example by using a controlled affiliate entity, then the IRS could still revoke its tax-exempt status, since Brunson is not arguing that the Johnson Amendment be removed from section 501(c)(3).<sup>122</sup> Brunson argues that this proposed penalty regime is superior to a regime that applies penalties to charities themselves both because it mitigates the problem of “cost free political speech” and because it forces the charities to communicate with their donors in a way that might incentivize donors to exert control to limit the charity’s partisan political speech.<sup>123</sup>

### C. *Permissive Expenditure Solutions versus More Restrictive Solutions*

The proposed revisions of the Johnson Amendment fall into two camps. First, some critics argue that the Johnson Amendment is too restrictive of speech, especially the speech of spiritual leaders of houses of

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<sup>118</sup> *Id.* at 161.

<sup>119</sup> *See id.* at 162 (“[T]he intermediate penalty would cap the disallowance at 100%.”).

<sup>120</sup> *See id.* at 163 (“[I]t would require the public charity to send a notice to its donors from the year of the violation, informing them of the percentage of their donation that would not be deductible.”).

<sup>121</sup> *Id.* at 162.

<sup>122</sup> *See id.* (“But the intermediate penalty is not the only penalty in the IRS’s quiver: it would still be able to revoke the public charity’s tax exemption. Structuring an endorsement in a manner intended to avoid the penalty demonstrates awareness of the rule and a deliberate intent to avoid the rule.”).

<sup>123</sup> *See id.* at 159 (“[D]onors to the public charity have the incentive to make sure that the public charity does not violate the campaigning prohibition.”); *id.* at 164 (“[I]f its actions may increase its donors’ tax bills, violating the campaigning prohibition risks alienating its donors.”).

worship. They argue that the Johnson Amendment should be revised to permit speech by houses of worship or their leaders, so long as such speech does not involve more than a *de minimis* incremental expense in its promulgation.<sup>124</sup> This would permit partisan political commentary from the pulpit of churches. Second, other critics argue that an incremental expense solution, like the one proposed in the FSFA, would open up a massive loophole in the campaign finance system, encouraging far too much partisan political speech to be funneled through 501(c)(3) organizations, and therefore insufficiently valuing the integrity of the campaign finance system. They therefore propose solutions that would be less restrictive than the current status quo interpretation of the Johnson Amendment, but more restrictive than the proposed incremental expenditure solutions like the FSFA.<sup>125</sup>

The problem is that the more restrictive solutions do not solve the constitutional infirmities of the current interpretation of the Johnson Amendment. That does not mean that there is no way to open up the Johnson Amendment to more speech, including pulpit speech of ministers, to avoid Constitutional issues. It just means that other mechanisms must be used to narrow the speech permitted beyond a simple incremental expenditure analysis.

### **III. BETTER BALANCING COMPETING INTERESTS (ORGANIZATIONAL SPEECH RIGHTS VERSUS NONSUBVENTION)**

In the previous Section, I presented proposals by some Johnson Amendment critics to either change or interpret the Johnson Amendment to permit more partisan electoral speech than is currently permitted (at least theoretically) by the IRS. Other commentators fear that these *de minimis* incremental speech proposals will open to the door to too much partisan electoral speech and activity by charities and will therefore underserve the nonsubvention principle and undermine the integrity of the campaign finance system. In order to critically evaluate their proposals, however, it is necessary to draw out the implications of Constitutional arguments that underlie the critique of the current interpretation of the Johnson Amendment. In this Section, I describe the Free Speech jurisprudence that applies to all charities, and the minimal characteristics of a modification of the Johnson Amendment that would validate free speech interests and pass constitutional muster.

#### *A. Expanded Constitutional Analysis*

It makes good sense that proposed modifications of the Johnson Amendment, like the FSFA, focus on expenditures in their relaxing of

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<sup>124</sup> See discussion *supra* Section II.A.

<sup>125</sup> See discussion *supra* Section II.B.

restrictions on partisan electoral speech. The leading doctrinal argument for the constitutionality of the Johnson Amendment relies on a DC Circuit Court case that held that the Johnson Amendment (as applied by the IRS) did not violate the First Amendment of the United States Constitution or RFRA. The case is *Branch Ministries v. Rossotti*.<sup>126</sup> In that case, Branch Ministries, a 501(c)(3) church, took out a full-page advertisement in a national publication warning Christians that then-presidential-candidate Bill Clinton supported policies that were anathema to the values of the church.<sup>127</sup> The advertisement included an express plea for “tax-deductible donations” to the church to support its campaign-related activities, which resulted in “hundreds of contributions to the Church from across the country . . . .”<sup>128</sup> In its defense, the church argued (among other things) that the removal of its tax-exempt status on account of the advertisement represented a substantial burden on its free expression of religion in violation of the First Amendment.<sup>129</sup>

The court rejected Branch Ministries’ argument, stating that the church’s free exercise is not burdened because it has an “alternate means” for expressing its view on Bill Clinton’s worthiness for office.<sup>130</sup> It cited the Supreme Court’s holding in *Regan v. Taxation With Representation* that “the availability of such an alternate means of communication is essential to the constitutionality of section 501(c)(3)’s restrictions on lobbying.”<sup>131</sup> It then stated that “the Church can initiate a series of steps that will provide an alternate means of political communication that will satisfy the standards set by the concurring Justices in *Regan*.”<sup>132</sup> That series of steps, presumably, would be for the church to create some alternative organization that is not tax-exempt under section 501(c)(3), and *that* organization would have paid for the advertisement. The court then emphasized what was at stake in the case by stating, “[t]hat the Church cannot use its tax-free dollars to fund such [an alternate organization] unquestionably passes constitutional muster. The Supreme Court has consistently held that . . . ‘Congress has not violated [an organization’s] First Amendment rights by declining to subsidize its First Amendment activities.’”<sup>133</sup> Supporters of the IRS’s interpretation of the

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<sup>126</sup> 211 F.3d 137 (D.C. Cir. 2000).

<sup>127</sup> *See id.* at 140 (The advertisement “bore the headline ‘Christians Beware’ and asserted that then-Governor Clinton’s positions concerning abortion, homosexuality, and the distribution of condoms to teenagers in schools violated Biblical precepts.”).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 142.

<sup>130</sup> *See id.* at 143 (“We also reject the Church’s argument that it is substantially burdened because it has no alternate means by which to communicate its sentiments about candidates for public office . . . . The Church has such an avenue available to it.”).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 143 (quoting *Regan*, 461 U.S. at 548).

Johnson Amendment present this holding as validation of the constitutionality of the law.

But the actual operation of the “alternate means” of communicating the church’s views was purely speculative in the *Branch Ministries* case. The church had not attempted to use any alternative means, and so the impact on the IRS’s enforcement against an organization attempting to use such means was not tested in that case. Remember, the point of the alternate means is for an organization to communicate its views on candidates without using tax-deductible contributions to do so. Its views are protected speech, but communicating such views is not substantially burdened so long as it has some alternate means of communicating those views without “subsidized” dollars. This point is made particularly clear in Justice Blackmun’s concurrence in *Regan*, in which he stated:

It must be remembered that § 501(c)(3) organizations retain their constitutional right to speak and to petition the Government. Should the IRS attempt to limit the control these organizations have over [their alternate means], the First Amendment problems would be insurmountable. It hardly answers one person’s objection to a restriction on his speech that another person, outside his control, may speak for him. Similarly, an attempt to prevent § 501(c)(4) organizations from lobbying *explicitly on behalf* of their § 501(c)(3) affiliates would perpetuate § 501(c)(3) organizations’ inability to make known their views on legislation without incurring the unconstitutional penalty. Such restrictions would extend far beyond Congress’ mere refusal to subsidize lobbying. In my view, any such restriction would render the statutory scheme unconstitutional.<sup>134</sup>

While the Court in *Regan* was discussing the restrictions on lobbying, the logic applies equally to campaign-related speech, as was made clear in *Branch Ministries*.<sup>135</sup> A 501(c)(3) organization has a constitutionally protected right to communicate its views on candidates without the government imposing a substantial burden on it. On the other hand, the government is permitted to impose restrictions on how a 501(c)(3) organization uses the dollars it collects on a tax-deductible basis, as it has done in the Johnson Amendment. It just must be sure that the law permits some alternate means for the organization to communicate its views on candidates.

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<sup>134</sup> *Regan*, 461 U.S. at 553–54 (Blackmun, J., concurring) (emphasis added) (citations omitted).

<sup>135</sup> In *Branch Ministries*, the D.C. Circuit stated that “[t]he Court subsequently confirmed [in *FCC v. League of Women’s Voters*, 486 U.S. 364, 400 (1984)] that [the description of the necessity of an alternate means found in the concurrence in *Regan*] was an accurate description of its holding.” 211 F.3d at 143. In other words, the Supreme Court subsequently adopted Justice Blackmun’s concurrence’s view of the law as its own.

Current IRS guidance arguably forecloses the use of such alternate means, creating a restriction that (in the words of Justice Blackmun) “render[s] the statutory scheme unconstitutional.”<sup>136</sup> That is because Rev. Rul. 2007-41 adopts what I have previously called an “attribution paradigm.”<sup>137</sup> This attribution paradigm can be illustrated by imagining that Branch Ministries had attempted to employ an alternate means of communicating its views on Bill Clinton rather than taking out the advertisement using tax-deductible contributions. This advertisement would have been paid for by an affiliated 501(c)(4) organization, for example the Branch Ministries Social Action Fund.<sup>138</sup> There is no dispute that such a Social Action Fund could take out an advertisement that warned Christians of candidate Bill Clinton’s views on matters important to the church, and it could even expressly urge readers to vote against Clinton. There are two key questions raised by Rev. Rul. 2007-41: (1) could the church directly control the Social Action Fund? and (2) could the advertisement explicitly identify the church as the source of the communication? For example, could the *church* at a meeting of its board of directors adopt a resolution stating that it is the view of the church that Christians should vote against Bill Clinton because of his positions on issues important to the church, and then direct the Social Action Fund to pay all the costs of publishing the text of this resolution in national newspapers? In short, could the church use some alternate means to communicate *its* view on candidates?

As for the first question—whether a church can control a social action fund being used as the church’s “alternate means”—Rev. Rul. 2007-41 is arguably silent. The Revenue Ruling does not directly address what the directors of a 501(c)(3) may do in their meetings. But prior IRS guidance suggests that it is the view of the IRS that such an action would constitute an impermissible act of campaign intervention. For example, a 1999 IRS educational publication states that the actions of an affiliated 501(c)(4) organization will not constitute a violation of the prohibition as long as the 501(c)(4) does not use the “resources or assets” of the 501(c)(3) affiliate.<sup>139</sup> But it then goes on to state, “[a]n important asset of an IRC 501(c)(3)

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<sup>136</sup> *Regan*, 461 U.S. at 554 (Blackman, J., concurring).

<sup>137</sup> See Leff, *supra* note 2, at 698–702 (arguing that under the IRS’s attribution paradigm, “the affiliate-organizations solution . . . is arguably incapable of providing 501(c)(3) organizations with a mechanism to engage in protected speech.”).

<sup>138</sup> This fund would have to be separately incorporated and raise all its funds on a non-tax-deductible basis. It would also have to have some purpose other than campaign intervention as its primary purpose, but could engage in campaign intervention activities, so long as such activities were small in amount.

<sup>139</sup> Ward L. Thomas & Judith E. Kindell, *Affiliations Among Political, Lobbying and Educational Organizations*, in IRS EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2000, at 170, 177 (1999).

organization is the time of its officers and directors.”<sup>140</sup> It concludes that the direction of a (c)(4) by a (c)(3) would constitute impermissible campaign intervention by the (c)(3).<sup>141</sup> An inevitable consequence of this reasoning is that discussion or the adoption of an express endorsement resolution within a board meeting would also constitute a violation of the prohibition.<sup>142</sup> Furthermore, a prohibition on campaign-intervention speech within a board meeting could be inferred from Revenue Ruling 2007-41. Because the Revenue Ruling prohibits campaign-related speech by organizational leaders at official functions of the organization, such speech may be prohibited even at board meetings. Board members are unquestionably “organizational leaders” and a board meeting is presumably an “official function” of the organization. The Revenue Ruling provides exemplary situations, and in Situation 6, it describes the chairman of the board of directors of a 501(c)(3) organization speaking at “a regular meeting” of the organization. It does not explicitly say that this “regular meeting” is a meeting of the board of directors, but such an inference is a fair reading of the text. The Revenue Ruling then concludes that such speech violates the prohibition “[b]ecause Chairman D’s remarks . . . were made during an official organizational meeting.”<sup>143</sup>

With regards to the second question—whether the text of the advertisement may contain what amounts to an endorsement by the church—the IRS is more clear. The text of the Revenue Ruling, taken as a whole, strongly implies that the material question is whether campaign-related speech may be *attributed to the organization*, not only whether it was funded by the organization.<sup>144</sup> Situations 3 and 5—each of which describes the circumstances in which the speech of an organizational leader will constitute a violation of the prohibition by the organization—lend support to the view that a violation occurs when such leaders make remarks that can be attributed to the organization. For example, Situation 5 describes a statement that the

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<sup>140</sup> *Id.* at 177.

<sup>141</sup> *See id.* (“[The same] considerations that prevent an IRC 501(c)(3) organization from establishing a IRC 527 organization also apply to the relationship between the IRC 501(c)(3) organization [and] the political campaign intervention of the IRC 501(c)(4) organization . . .”).

<sup>142</sup> The IRS has also taken the position that a 501(c)(3) organization may not constitute a separate segregated fund under section 527 without violating the prohibition, since the actions of the 527 fund will be attributed to the 501(c)(3) parent, even if all funds used for communicating the position are raised and spent by the 527 fund. *See I.R.S. Gen. Couns. Mem.* 39,694, at 11–12 (Feb. 1, 1988) (noting that section 527 “further states that the imposition of the section 527 tax and the ability to establish separate segregated funds do ‘not sanction the participation in these activities by section 501(c)(3) organizations.’ One of the ‘activities’ that is not sanctioned is the establishment and maintenance of a separate segregated fund by an organization described in section 501(c) where the separate segregated fund conducts activities that the tax-exempt organization itself is barred from conducting under the relevant subsection of section 501(c).”).

<sup>143</sup> Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1423.

<sup>144</sup> *Id.*



IRS concludes does not implicate the organization. The Revenue Ruling states that the statement does not violate the prohibition because the organizational leader, a minister, “did not state that he was speaking as a representative of [the] Church,” as well as the fact that the minister did not make the statement at an official church function, in an official church publication, or using the church’s assets.<sup>145</sup> In other words, the key determinant of whether a violation occurred is whether the views can be attributed to the organization or not.

Situation 5 is especially material to the question of whether an organization has an “alternate means” of communicating its own views on candidates. In it, the minister is speaking at “a press conference at Candidate V’s campaign headquarters.”<sup>146</sup> If the organization were to have an alternate means of communicating its own views on the candidate’s qualifications for office, this is exactly the kind of scenario in which it should be permissible to communicate such views. A press conference at the campaign headquarters of the candidate is obviously not an official function of the church, and the press that will communicate the statement will not do so in an official publication of the church. This would be an ideal situation for the IRS to explain exactly how an organization can use an alternate means of communicating its views on candidates: it may do by sending an organizational leader to speak *on behalf of the organization* at a press conference held at the candidate’s headquarters (or really anywhere other than an official function of the organization or at some event paid for by the organization). But the Revenue Ruling does not state that such a communication would be permissible *even if* it was attributable to the organization. Rather, it states that the statement is permissible, at least in part, because the minister “did *not* state that he was speaking as a representative of” the church.<sup>147</sup>

The logic behind the IRS’s position is not faulty. As discussed above, when an organization endorses a candidate, it effectively makes use of tax-

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<sup>145</sup> *Id.* at 1422, 1424. Situation 3 is very similar to Situation 5. Situation 13 is also arguably relevant. In that situation, the chairman of the board of a 501(c)(3) symphony speaks in favor of a mayor running for re-election who is present at a free concert of the symphony in one of the city’s public parks. Here, the question is whether the candidate’s appearance at the concert constitutes campaign intervention, and the Revenue Ruling concludes that it does because the chairman of the board communicated his support for the candidate at the event. If a free concert at a public park is an “official function” of a symphony that performs there, then the Revenue Ruling is consistent on that point without completely foreclosing any alternate means for the symphony to communicate its views on the candidates. If it is not, then this situation reinforces the position gleaned by the other situations—that any communication that expresses a preference among candidates is forbidden if that communication is attributable to the organization, whether such communication uses the organization’s funds or not.

<sup>146</sup> *Id.* at 1422.

<sup>147</sup> *Id.* (emphasis added).

deductible contributions, even if no *incremental* costs are incurred in communicating that message. With regard to the money spent to build the reputation of the organization, this is true even if the statement is made in a third-party location, like at the campaign headquarters of the candidate. But notwithstanding its logic, the IRS's position renders the statutory scheme unconstitutional. The Supreme Court held in *Regan* that the organization needs some alternate means to communicate *its own views* regarding the qualifications of candidates, and the D.C. Circuit affirmed the necessity of an alternate means in *Branch Ministries*.<sup>148</sup>

So, where does that leave us? The law (as described by the Supreme Court in *Regan* and reaffirmed by the D.C. Circuit Court in *Branch Ministries*) requires that 501(c)(3) organizations have some mechanism to communicate *their* views on candidates, even their express endorsements of candidates, without violating the Johnson Amendment. The leading IRS guidance on the matter seems to deny 501(c)(3) organizations any such alternate means for communicating their views.<sup>149</sup>

#### *B. What Must a Johnson Amendment Modification Include?*

*De minimis* incremental expenditure solutions, like the FSFA, obviously solve the constitutional defect by permitting so-called “no-cost” political speech, which could include an express endorsement by a church or other charity. But they go further than is required. They expressly adopt an incrementalist way of measuring expenditures, and pronounce all speech or action that does not require incremental expenditures “no-cost political speech,” and therefore permissible. Nothing in the Constitution requires that the cost of speech be defined using an incrementalist approach. All that is required is that the Johnson Amendment permit *some mechanism* for charities to engage in partisan electoral speech without an undue burden. This Section describes the narrowest possible approach to satisfy the constitutional requirements described by the Supreme Court in *Regan* and applied to campaign speech in *Branch Ministries*.

The narrowest modification sufficient to satisfy constitutional concerns would do at least three things. First, it would affirm the fact that an organization has a right to develop and state its own view about the qualifications of candidates for public office. This view could include an express endorsement of a candidate, or an express statement that a candidate does not reflect the values of the organization and therefore should be defeated. Second, the modification would clearly state that the organization

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<sup>148</sup> *Regan v. Tax'n With Representation of Wash.*, 461 U.S. 540, 552–53 (1983); *Branch Ministries v. Rossotti*, 211 F.3d 137, 143 (D.C. Cir. 2000).

<sup>149</sup> Thomas & Kindell, *supra* note 139, at 177.

may use, at a very minimum, its own meetings of its leadership, including its own board meetings, to develop its views and to take official action stating such views. Third, it would affirm that the organization is permitted some mechanism to communicate its official views to its members and to the general public, even if reasonable restrictions may be placed on the ways that it makes such communications. This Section describes these three minimal requirements of IRS guidance.

1. The Johnson Amendment does not prohibit an organizational express endorsement

The clearest violation of the Johnson Amendment under the IRS's interpretation is when an organization expressly endorses a candidate. Many proposals for reform of the Amendment have preserved this restriction, carving out space for an organization (or its leaders) to speak relatively freely about candidates, so long as they do not cross the putatively bright line of endorsement.<sup>150</sup> As discussed above, there is good reason—because of the plain language of the statutory text, the additional elaboration in the Treasury Regulations, and legitimate inferences from the plausible intent of the statute—to argue that the prohibition does and should prohibit express endorsements. Nonetheless, I cannot imagine how the *Regan* case can be squared with that circle. It states clearly that a 501(c)(3) organization has a constitutional right to engage in Constitutionally-protected political speech, and that governmental regulation of that speech only successfully avoids a substantial burden on that right if it ensures that the organization has an alternate means of communicating *its views*. It is not permissible for the government to offer organizations 501(c)(3) status conditional on them giving up their First Amendment rights. It is not sufficient to say that a 501(c)(3) organization is free to forego such status in order to engage in such speech. It must be able to retain its 501(c)(3) status for all of its proper charitable purposes, and *still* have an alternate means of communicating its views.<sup>151</sup>

There is nothing in *Regan* to suggest that an express endorsement could properly be distinguished from other speech that implied an endorsement. Furthermore, there is nothing in *Regan* to support the view that the government is free to place restrictions on an express endorsement so long as the organization is free to communicate about issues.

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<sup>150</sup> See, e.g., Samansky, *supra* note 51, at 153 (“I recommend that churches not be able to officially endorse candidates and still retain their status as section 501(c)(3) organizations . . .”).

<sup>151</sup> See discussion *supra* Section III.A.

2. The Johnson Amendment does not prohibit the adoption of a resolution about candidates at a board meeting

If *Regan* protects an organization's right to speak about a candidate's qualifications, including endorsing a candidate, then the organization needs to have some mechanism to develop and solidify those views. Of course, an organizational leader could communicate what *she* thinks the views of the organization are or should be without direct board approval. I know of no doctrine of nonprofit law that prevents organizational leaders who are broadly authorized to act on behalf of the organization from stating the organization's views. But the most authoritative way for an organization to act is through its board of directors.<sup>152</sup> They have ultimate authority for the actions of the organization, and they have ultimate authority to speak in its name. The most authoritative way for a board of directors to act in the name of an organization is through a resolution adopted at a properly constituted meeting. Therefore, it follows from pure common sense that the authority of an organization to speak and express its views *must* include the authority of the organization to debate those views in a properly constituted meeting of its directors, and to adopt a resolution at such a meeting expressing the organization's views. As Justice Blackmun stated in his concurrence in *Regan*, "It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him."<sup>153</sup> The person is the organization. The most authoritative way that a corporate person can speak is through its board of directors. Therefore, the board must be free to debate the organization's position and adopt a resolution stating its views.

An adequately revised Johnson Amendment must at a minimum state that the board of directors, acting at a properly authorized meeting, has the right to adopt a resolution stating the organization's views on the qualifications of candidates for public office, including adopting an express endorsement of one or more candidates. As discussed above, Rev. Rul. 2007-41 does not explicitly state that such actions are prohibited, but can fairly be read to imply it, since it prohibits campaign-intervention speech at "official functions" of the organization, which a board meeting presumably is.

3. The Johnson Amendment must permit some mechanism for communicating the organization's views on candidates

According to *Regan*, it is not enough for the organization to have political views and to be free to form those views, it must be permitted some

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<sup>152</sup> See, e.g., BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS § 5.6(a) (12th ed. 2019) (discussing nonprofit governance principles).

<sup>153</sup> *Regan*, 461 U.S. at 553 (Blackmun, J., concurring).

mechanism to communicate those views. This principle is the one that most clearly violates current law and interpretation of the Johnson Amendment, since the statute says explicitly that an organization cannot intervene, “including the publishing or distributing of statements,”<sup>154</sup> and the Treasury Regulations expand that concept by stating that campaign-intervention speech includes, “the publication or distribution of written or printed statements *or the making of oral statements* on behalf of or in opposition to such a candidate.”<sup>155</sup> But whatever form a modification of the Johnson Amendment takes, it will need to provide a mechanism for the organization to communicate its message if it is to conform to the requirements described by Justice Blackmun in *Regan*. As he stated, “[i]t must be remembered that § 501(c)(3) organizations retain their constitutional right to speak and to petition the Government.”<sup>156</sup> One cannot rightly be said to “speak” if all means of communication—“publishing and distributing of statements” as well as “the making of oral statements”—are prohibited. In addition to making clear that an organization is free to discuss the qualifications of candidates at its board meeting and adopt a resolution expressly endorsing one or more candidates, a revised Johnson Amendment must make clear that the organization is free to use some method to communicate its views to its members and others.

Of course, the government has a legitimate interest in nonsubvention and protecting the integrity of the campaign finance regulatory regime. That interest includes preventing 501(c)(3) organizations from using their own money—money that includes tax-deductible contributions—to communicate campaign-related speech to the world. Most (or even all) organizational speech includes the expenditure of some funds for the reasons described above.<sup>157</sup> Therefore, a modification of the Johnson Amendment can carve out a narrow exception to the general rule that organizations cannot “speak” about campaign-related matters. It can prohibit a wide range of activities that are plausibly speech in an effort to prevent institutional funds from being diverted to campaign-intervention activities. But it must provide *some* avenue for the organization to communicate its views on candidates.

The mechanism envisioned in *Regan* and *Branch Ministries*—referred to as an “alternate means”—is that the organization would cause the

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<sup>154</sup> I.R.C. § 501(c)(3)-1.

<sup>155</sup> Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (1995) (as amended in 2017) (emphasis added).

<sup>156</sup> *Regan*, 461 U.S. at 553 (Blackmun, J., concurring).

<sup>157</sup> As discussed *supra* note 29, an excise tax applies to such expenditures, but it has generally been the assumption of most commentators that the measurement of such expenditures should be calculated based on “marginal” or “incremental” cost. This assumption results in the conclusion that the excise tax is not very effective to restrict speech by organizational leaders at official functions. *See, e.g.*, Aprill, *supra* note 15, at 652 (“If the political campaign intervention involves little out of pocket expense, the excise tax has little bite.”).

creation of an affiliated 501(c)(4) organization, which would then communicate the 501(c)(3) organization's views.<sup>158</sup> This particular alternate means was forefront in the minds of the Justices in *Regan* because the plaintiff in the case had formerly been organized in precisely that way.<sup>159</sup> It was an affiliated pair of organizations—one tax-exempt under section 501(c)(3), one under 501(c)(4)—that engaged in lobbying activity through the 501(c)(4) affiliate.<sup>160</sup> The organization changed its organizational structure, shutting down the 50(c)(4) affiliate, in order to argue that the Constitution protects the right of 501(c)(3) organizations to engage in unlimited lobbying. It was obvious for the Court to suggest that the organization would not be unduly burdened by returning to the structure it once employed, since it once employed that structure with apparent ease. In *Branch Ministries*, the D.C. Circuit applied the holding of *Regan* and argued that a similar structure would permit the church to engage in campaign intervention speech without an undue burden.<sup>161</sup>

Thus, it arguably would be permissible for the IRS to authorize the use of that structure—affiliated 501(c)(3) and 501(c)(4) organizations—as the mechanism for a 501(c)(3) organization to communicate its views on candidates, including endorsements. So long as the IRS made clear that the organization's views can include an express endorsement by the 501(c)(3) organization, and that the organization is free to form those views at a meeting of the board of directors (as discussed above), the IRS arguably could mandate that any communication of those views to anyone other than those people authorized to demand access to the resolutions of the organization *must* be communicated through an affiliated 501(c)(4) organization. If the IRS took this position, it would require 501(c)(3) organizations to form and operate a 501(c)(4) organization as a prerequisite

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<sup>158</sup> This requirement that an organization have some alternate means of communicating its views, presumably through an affiliated non-501(c)(3) organization, has sometimes been called the “Alternate Channel Doctrine.” See, e.g., Miriam Galston, *Campaign Speech and Contextual Analysis*, 6 FIRST AMEND. L. REV. 100, 114 (2007) (discussing the Court's analysis of a bifurcated 501(c)(3) and 501(c)(4) organizational arrangement).

<sup>159</sup> *Regan*, 461 U.S. at 544.

<sup>160</sup> *Id.*

<sup>161</sup> The court appeared to be confused about the law that applies to 501(c)(4) organizations, stating incorrectly that, “[a]lthough a section 501(c)(4) organization is also subject to the ban on intervening in political campaigns, it may form a political action committee (“PAC”) that would be free to participate in political campaigns.” *Branch Ministries v. Rossotti*, 211 F.3d 137, 143 (D.C. Cir. 2000) (citation omitted). However, this confusion is not material to its holding that the requirement that a 501(c)(3) organization form a 501(c)(4) affiliate is not unduly burdensome on its expression of its constitutionally-protected speech rights.

to communicating its views on candidates. This burden is not trivial,<sup>162</sup> but the D.C. Circuit in *Branch Ministries* presumably believed that it is not sufficiently burdensome to cause First Amendment concerns.<sup>163</sup>

But it makes much more sense for a modification of the Johnson Amendment to permit the communication of partisan electoral speech by an organizational leader in some form that balances the organization's right to and interest in political speech with the concerns of the nonsubvention principle without necessarily requiring the creation of an affiliated 501(c)(4) organization. In other words, it makes perfect sense to permit an organizational leader, like a minister, to communicate partisan views in an official organizational meeting, like a worship service. It also makes perfect sense, and is completely permissible, to limit those communications in ways that prevent too much violation of the nonsubvention doctrine and reduce the impact of such speech on the integrity of the campaign finance system. It makes sense to permit pulpit speech; but it also is permissible to limit the impact of the dissemination of such speech even if such dissemination does not involve incremental expenditures.

The primary reason for expressly permitting organizational leaders to speak on behalf of the organization at official functions is that such speech seems so central to what some organizations do. Religious and educational organizations have long viewed themselves as essential to the development of values-rich communities, and this view has been affirmed again and again over the course of American history.<sup>164</sup> Some of these organizations view

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<sup>162</sup> A 501(c)(4) organization cannot be formed primarily for the purpose of engaging in campaign intervention, but rather must be organized and operated for some purpose that advances social welfare. So, the burden is not just creating a separate organization and maintaining separate books and records but engaging in social welfare activities to a sufficient degree that the organization qualifies for tax-exempt status under 501(c)(4).

<sup>163</sup> There are scholars who argue that the Supreme Court narrowed its view of what constitutes an undue burden on speech in *Citizens United v. FEC*, 558 U.S. 310 (2010). See, e.g., 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, 899–901 (2011) (arguing that the *Citizens United* Court intended to limit its concept of corruption to quid pro quo corruption rather than access or influence); Lloyd Hitoshi Mayer, *Charities and Lobbying: Institutional Rights in the Wake of Citizens United*, 10 ELECTION L.J. 407, 423 (2011) (arguing that *Citizens United* suggests there must be a minimal burden on the ability of an organization to speak using non-subsidized funds if strict scrutiny applies). After *Citizens United*, the Supreme Court might be more sensitive to burdens placed on partisan electoral speech than it was when it decided *Regan*, but a full discussion of that issue is well beyond the scope of this Article.

<sup>164</sup> See CAPRO REPORT, *supra* note 18, at 17 (“[M]any 501(c)(3) organizations have as their core purposes making a difference in major social and moral conditions.”); see also Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 780 (2001) (“[O]ur history, traditions, and interminable public debates on the social issues are and have always been awash in religious expression, argument, and activism.”)

politics as outside their proper sphere, but others see political action as an essential component of the worldview that they teach.<sup>165</sup> Communications that take place at official organization functions may have a central role in the organization's ability to communicate their values to their members, and therefore may seem almost sacred (or even literally sacred). When a pastor or minister or priest or rabbi or imam speaks to their communities, their freedom to speak about the values of their tradition is important to them and their members. The idea of the government intervening in such communications and shaping what the religious leader says appears threatening to the core freedom of those organizations.<sup>166</sup> The fact that pulpit speech has been at the heart of resistance to the Johnson Amendment is not an accident. It reflects deeply held beliefs about the meaning of religious freedom and its association with what goes on between religious leaders and members in a house of worship.

Because of this deep association—an association fostered by our constitutional tradition—the government would do a lot to affirm the independence of 501(c)(3) organizations if it permitted such speech. The question is how could it do it without undermining the campaign finance regime that does not permit a tax-deduction for campaign-related contributions. Could a safe-harbor that is broad enough to include the speech of organizational leaders to organizational members be narrow enough to prevent the “flood gates” from being opened?

### *C. Analysis of Existing Proposals to Limit the Scope of a Johnson Amendment Modification*

Of the proposals examined in this paper, *de minimis* incremental expenditure solutions, like the FSFA, modify the Johnson Amendment to permit sufficient speech to meet Constitutional requirements. The FSFA and similar proposals do not say anything explicit about permissible activities of the board of directors, nor whether partisan electoral speech can be an “official” endorsement of the organization. But the FSFA's definition of “no-cost” political speech is broad enough to include the components identified

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<sup>165</sup> See, e.g., Vaughn E. James, *The African-American Church, Political Activity, and Tax Exemption*, 37 SETON HALL L. REV. 371, 395–96 (2007) (detailing the role of the church in African American society as an agent of social change, a force of community involvement, and a political institution).

<sup>166</sup> E-mail from Mike Batts, Managing Partner, Batts Morrison Wales & Lee, to Paul Streckfus, Editor, EO Tax Journal (Jul. 27, 2016), in Paul Streckfus, *The EOTJ Mailbag*, EO TAX J. 2016-144 (“The content of a sermon or religious worship service embodies these [core First Amendment] rights like virtually nothing else . . . . A law that permits US government officials to monitor and evaluate the content of a minister's sermons to determine whether such content is permissible is inherently problematic. It is hard to imagine any law that is more of an affront to the First Amendment.”).



as necessary: (i) that it permits an express endorsement, (ii) that it permits a governing body to deliberate and adopt a resolution at an official meeting, and (iii) that it permits a mechanism for communicating its views. Indeed, the problem with those solutions is that, in their effort to permit sufficient speech to charities, they undervalue the nonsubvention principle, and in doing so almost certainly will create a massive distortion of the campaign finance system, as academic commentators have predicted.<sup>167</sup>

So, what about the proposals by academic commentators who seek to provide alternatives that value the nonsubvention principle more fully than incremental expenditure proposals like the FSFA? These alternative proposals provide creative solutions, but in each case the proposal is too narrow to adequately value the speech interests and rights and constitutionally-protected speech rights of 501(c)(3) organizations. In some cases the proposed solutions are also simultaneously too broad to adequately vindicate the nonsubvention principle. What is needed is a solution that better balances free speech interests and rights against the legitimate interest in nonsubvention.

1. Proposals that maintain the status quo interpretation of organizational speech for non-church 501(c)(3) organizations insufficiently validate speech rights

First, any proposal that applies only to houses of worship does not solve potential constitutional problems for other charities and fails to validate the speech rights or interests of such non-church organizations. Commentators like Zelinsky and Crimm & Winer, who propose a special speech-friendly solution for houses of worship, emphasize the special role that religious leaders have in communicating about the values and teachings of their religious traditions, and how that role makes it especially necessary to avoid government interference when such religious leaders feel morally compelled to communicate partisan electoral messages to their members.<sup>168</sup> But organizations other than houses of worship also play a role in constructing and maintaining the social and moral universe in which their members live, and their leaders may feel equally compelled to communicate to their members in ways that constitute partisan electoral speech. The Constitution protects the speech rights of non-church charities as well as churches, and so a solution that applies only to houses of worship will be insufficiently protective of the speech rights and values of other charities.

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<sup>167</sup> See Colinvaux, *supra* note 14 (arguing that *de minimis* spending on campaign statements will not inhibit a proliferation of political speech by charities).

<sup>168</sup> See ZELINSKY, *supra* note 24, at 202 (arguing that church endorsements should not be treated “differently from other internal church discussions”); CRIMM & WINER, *supra* note 24, at 337 (proposing solutions that only apply to houses of worship).

There is also an argument that a solution that permits partisan electoral speech by houses of worship, but not by any other charity, might violate the Establishment Clause of the First Amendment by favoring religious institutions over all other charities.<sup>169</sup> The CAPRO proposed a neutral provision partially because of concerns about the constitutionality of a church-only one, and partially to vindicate the speech rights of non-church charities.<sup>170</sup> This argument was apparently persuasive enough to convince Congress to switch from a church-specific provision to a neutral one based on the FSFA when it included a Johnson Amendment reform provision in the Tax Cuts and Jobs Act of 2017.<sup>171</sup> It is beyond the scope of this Article to evaluate the arguments for or against an Establishment Clause challenge to a church-specific Johnson Amendment reform, but they are substantial enough at least to cause some commentators to argue that any modification of the Johnson Amendment should apply equally to all 501(c)(3) organizations.

Professor Zelinsky proposes enforcing the Johnson Amendment as currently interpreted against all secular 501(c)(3) organizations, and so his proposed method for limiting the effect of relaxing the Johnson Amendment for houses of worship fails to sufficiently protect the speech rights or values of non-church charities.<sup>172</sup> Crimm & Winer do not propose simply retaining the Johnson Amendment as currently interpreted for all non-church charities. Instead, they propose moving the prohibition on partisan electoral speech from section 501(c)(3), where the penalty for violation is loss of tax-exempt status, to section 170, where the penalty for an organization engaging in partisan electoral speech would be loss of tax deduction for any contribution to the organization in the year in which it violated the prohibition.<sup>173</sup> Professor Colinvaux also proposes moving the location of the Johnson Amendment from section 501 to section 170, and he makes a more explicit argument for why its placement in section 170 would be less likely to cause constitutional speech concerns. Colinvaux argues that “denying an individual or entity’s deduction for a contribution to an organization that engages in political or lobbying activity has only an indirect effect on the speech, at best . . . [and] merely reflects Congress’s decision not to subsidize speech.”<sup>174</sup> Colinvaux, like Crimm & Winer, proposes that a taxpayer who made a

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<sup>169</sup> For analysis of preferential treatment of religious charities over other charities in another context, see, for example, Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional*, 24 WHITTIER L. REV. 707, 726 (2003).

<sup>170</sup> See CAPRO REPORT, *supra* note 18, at 28–30 (proposing a neutral provision).

<sup>171</sup> See Aprill, *supra* note 5, at 5–6 (noting that the Ways and Means Committee switched to a neutral provision potentially in response to constitutional objections).

<sup>172</sup> See *supra* note 97.

<sup>173</sup> See *supra* note 102.

<sup>174</sup> Colinvaux, *supra* note 15, at 738.

contribution to an organization that engaged in any campaign intervention during the year at issue would be denied the tax deduction provided under section 170.<sup>175</sup> While it makes sense that moving the limitation from section 501 to section 170 “would require a distinct constitutional challenge,”<sup>176</sup> a rule that denies a deduction for a contribution *for any purpose* to an organization that engaged in *any* campaign-interventions speech would be just as constitutionally problematic as a rule that denies tax exemption to an organization that engaged in any campaign-intervention speech. Both are constitutionally problematic because the “penalty” for the organization exercising its constitutionally-protected speech rights is not proportional. Their donors lose the ability to make tax-deductible contributions for any purpose when the offending speech may be very minor. The opportunity for the organization to obtain tax-deductible contributions for its charitable or tax-exempt purposes is therefore offered only on the organization’s choice to forego a constitutionally-protected right, which is at the heart of what constitutes an unconstitutional condition, just the same as the choice of whether to forego the exemption under section 501(c)(3).

2. Limitation to “internal” communications is better than to “no-cost” communications, but will easily be abused

“Internal communications” limitations, like those proposed by Zelinsky and Crimm & Winer, do a better job of reducing subsidized speech by charities than *de minimis* solutions, but may well still permit substantial abuse. At the same time, some constitutional questions may remain. Remember, under *Regan*, the Constitution requires that a 501(c)(3) organization be permitted (i) to have a view on the qualifications of candidates, even if that view is in the form of an express endorsement, (ii) to formulate that view, at the very least for organizational leaders like the board of directors to be able to discuss the issue at an official board meeting, and (iii) to have some mechanism to communicate its views.<sup>177</sup> Internal-communications limitations appear to satisfy the first two requirements since board meetings and other deliberative gatherings would presumably constitute permissible internal communications. However, it is not clear whether they satisfy the third requirement—that the organization be permitted some mechanism to communicate its views. The right to communicate the organizational view on candidates might be satisfied by purely internal communications, but it might well be reasonable to understand that right as including at least *some* mechanism to communicate that view to

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 739.

<sup>177</sup> See discussion *supra* Section III.B.

external sources. That mechanism can be constrained to further the goals of nonsubvention, but it is possible that altogether eradicating it would be constitutionally impermissible. If some mechanism must be permitted, then some of the restrictions proposed by Crimm & Winer, like their requirement that 501(c)(3) organizations make it difficult to share a video externally of a leader making an internal communication, would probably be constitutionally permissible. On the other hand, a requirement that all members promise not to share externally the organization's internally communicated views in any way would probably violate the organization's constitutionally-protected speech rights or those of its members.

More importantly, however, is the fact that any internal-communication limitation is likely to be easily abused, and therefore is likely insufficient to nonsubvention interests. Members' ability to share any internal communication through social media and candidates' and independent political committees' ability to use unlimited advertising dollars to amplify internal communications mean that an endorsement or other internal communication of support is likely to have a wide public dissemination if it is valuable to a candidate. Remember, a 501(c)(3) organization has used tax-deductible contributions to develop its credibility over many years, and therefore its endorsement makes use of government-subsidized funds even if the endorsement is transmitted by third parties. Because of the ready availability of cheap speech, and because of the potential power of a second-hand delivery of speech that is authentically associated with the organization, an internal communications limitation advances the nonsubvention principle better than a *de minimis* incremental expenditure solution, but still undervalues nonsubvention principles.

3. Aprill's disclosure proposal is promising, but likely to have little effect

In her article on cheap political speech, Professor Aprill proposes a different sort of mechanism to prevent abuse of any future loosening of the Johnson Amendment. She proposes that charities that engage in campaign speech be required to disclose any donors who do not explicitly prohibit the organization to use their contributions for campaign speech.<sup>178</sup> This proposal is promising because it does not rely solely on attempting to segregate the cost of campaign speech. But it is plausible that its effect on campaign speech will be limited for reasons described later in this article.<sup>179</sup>

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<sup>178</sup> Aprill, *supra* note 5, at 17.

<sup>179</sup> See *infra* text accompanying notes 200–07.

#### 4. Brunson's penalty proposal is promising but too limited

Finally, Professor Sam Brunson has made perhaps the most creative proposal, but it has its limitations as well.<sup>180</sup> The most creative aspect of his proposal is that it imposes a financial cost on donors to charities that engage in campaign speech, but the cost is not based on the incremental cost of the speech itself. Rather, the cost would be a percentage of the value of the tax deduction received by each donor to the charity that year. Under Brunson's proposal, so-called low- or no-cost political speech (speech with no *incremental* or *marginal* cost), could still generate a penalty that attempts to reflect the nonsubvention principle. Here, classic no-cost political speech—like support for a candidate expressed in an in-person worship setting—would have a cost. A fraction would be calculated using the number of people in the church that day as the numerator and the number of donors to the church over the course of the year as the denominator, and that fraction would be applied to all tax-deductible donations received by the church for the year. So, as an example, if there were 100 people in the audience when the communication was made and 200 people donated to the church over the course of the year, the fraction would be 100/200 (50%). If one of those 200 donors made a donation of \$100, they would get a letter at the end of the year saying that the deduction derived from their donation would be reduced by 50%. So, for example, if they were in the 25% marginal tax bracket, their tax impact of their deduction would be reduced from \$25 to \$12.50. Every donor to the organization over the course of the year would get a similar letter informing them to file an amended return to reflect the reduced value of their deduction.

The key to the proposal is that the percentage of the deduction that is taxed is calculated based on the size of the audience toward which the speech is directed, not the cost of the communication.<sup>181</sup> If the size of the audience to which the communication is directed is larger than the total number of donors (which would result in a percentage over 100%), then the deduction for any donations during the year is entirely disallowed. This proposal does some things right because it avoids the problem of low-cost speech and properly links the cost of making campaign speech to the existence of a deduction for donations to charity, disallowing the deduction if the charity is attempting to reach an audience that is significantly larger than its total number of donors.

The problem with Brunson's solution is the same problem as with all of them: a charity can direct its message to a small number of insiders or even a single person, who then is free to amplify the message by spreading it to

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<sup>180</sup> See Brunson, *supra* note 114, at 164 (arguing for a tax law that disallows a portion of donors' deduction to the public charity).

<sup>181</sup> See *supra* discussion accompanying notes 114–23.

others. In an age of cheap speech, a charity could communicate its endorsement to one recipient, and that recipient could communicate that endorsement to millions of others for free through social media. In addition, in an age of unrestricted political spending, a recipient of the charity's endorsement could spend an unlimited amount of advertising dollars to amplify and spread the charity's message. Under Brunson's proposal, the charity would incur a cost based on only the communication to the first single recipient because it would be unfair to penalize the charity for actions outside of its control. Brunson fully acknowledges this problem but argues that it would still likely have a significant effect. Its effect would come both by providing a financial incentive for donors to attempt to prevent charities from directing their campaign speech to a significant audience and, like Aprill's proposal, it forces charities to communicate to donors their intention to engage in campaign speech.

#### **IV. SO, HOW COULD THE JOHNSON AMENDMENT BETTER BALANCE SPEECH RIGHTS WITH NONSUBVENTION?**

##### *A. Non-Incremental Expenditure Tax*

Professor Brunson's proposal for a tax based on audience-size rather than incremental expenditure is an example of a non-incremental expenditure financial penalty. It attempts to impose a financial penalty related to the value of the tax deduction taken for contributions to charities in order to better promote the nonsubvention principle in cases of so-called no-cost political speech. As discussed above, as a financial penalty, it is probably too timid a proposal to really promote nonsubvention because any recipient (including presumably the minister themselves acting as a private person) could immediately turn around and direct the speech to a much larger audience without that second communication resulting in any additional penalty.<sup>182</sup>

In 2009, I also proposed a non-incremental expenditure approach to promote the nonsubvention principle, while still permitting charities some mechanism for engaging in political campaign speech.<sup>183</sup> As I mentioned above, I argued that incremental (which I then called marginal or *de minimis*) expenditure solutions fail to fully prevent subvention because (i) organizations can engage in speech without spending any incremental funds, and (ii) an express or implied endorsement by an organization derives its value from the credibility of the organization, which the organization has spent funds for years to build up.<sup>184</sup> In order to more fully vindicate

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<sup>182</sup> See, e.g., Brunson, *supra* note 114, at 162 ("These tests can be gamed, of course.").

<sup>183</sup> See Leff, *supra* note 2, at 715–23 (proposing a model expenditure paradigm).

<sup>184</sup> See *supra* discussion accompanying notes 73–76.

nonsubvention values, I proposed two possible non-incremental methods for assessing the *cost* of an organization's campaign-related speech: (i) an allocation method under which the cost of campaign-related speech includes not only the incremental expense associated with the speech, but also some allocation of "overhead" costs based on any reasonable method,<sup>185</sup> or (ii) what I called a "Lump-Sum Safe Harbor Method" in which an organization that engages in campaign-related speech treats a somewhat arbitrary 10% of its total costs of operations in the current year as associated with that speech.<sup>186</sup> In that article, I argued that an organization should be prohibited from spending any of its own money (money donated on a tax-deductible basis) on campaign-intervention activity, requiring the organization to be reimbursed for the cost of such activity—which included both any incremental cost plus a proper allocation—by some person or organization that does not deduct the reimbursement.<sup>187</sup> In other words, even if an organization engages in so-called no-cost political speech, like when a minister voices a preference for a candidate at a worship service, for the purposes of the Johnson Amendment the "cost" of that speech would be considered to include 10% of the church's cost of operation for that year plus an allocation of the minister's salary.<sup>188</sup>

While I am still persuaded by my reasoning in 2009, I see now that the proposal I made then does not provide the basis for a workable solution to the Johnson Amendment problem. But I do think that some non-incremental expenditure penalty could be adopted that would better serve the nonsubvention principle than existing incremental expenditure proposals like the FSFA. It would just have to be simpler and more administrable than the solution I proposed in 2009, most importantly by replacing third-party reimbursements with a simplified excise tax regime.<sup>189</sup> For example, imagine

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<sup>185</sup> See Leff, *supra* note 2, at 717–21 (supporting a reasonable method to allocate costs between lobbying and nonlobbying activities).

<sup>186</sup> See *id.* at 721–23 (describing an arbitrary method to account for funds expended to build an organization's credibility).

<sup>187</sup> See *id.* at 711 (describing a simplified allocation mechanism in which 501(c)(3) organizations can account and pay for campaign related speech).

<sup>188</sup> See *id.* at 722 (outlining a basic mathematical formula that could accurately capture the cost of political speech for a 501(c)(3) organization).

<sup>189</sup> I.R.C. § 4955 already provides an excise tax regime that applies to "political expenditures" by 501(c)(3) organizations, but this existing excise tax on campaign-related speech is unable to serve our purposes for at least two reasons: (i) there is currently no guidance that applies a non-incremental expenditure approach to § 4955, and (ii) the tax under § 4955 starts as a relatively modest deterrent to campaign spending by a charity (10% of the expenditure). I.R.C. § 4955(a)(1). However, it then increases in a variety of ways that would make the application of the tax to constitutionally-protected speech problematic. For example, there is a tax on each "organization manager" who willfully permits the speech equal to 2.5% of the expenditure. *Id.* § 4955(a)(2). In addition, the tax increases to 100% of

a new tax that had the purpose of accounting for costs of campaign intervention *other than* incremental costs. This non-incremental tax could supplement a solution that prohibits any incremental expenditures by 501(c)(3) organizations, like the one proposed in the FSFA. So, Congress would adopt the FSFA, but with respect to so-called “no-cost political speech,” it would impose a new campaign-speech tax. If a 501(c)(3) organization made an incremental expenditure for campaign activities (like a donation to a campaign), it would lose its tax exemption. But, if it engaged in so-called no-cost political speech, it would merely pay a tax that is designed to vindicate nonsubvention principles, and no more. The design of the new excise tax would be important because it would have to be both simple enough for a 501(c)(3) organization to comply with the law without an undue burden, and robust enough to vindicate the nonsubvention principles without going too far.

The tax would be designed to reflect the fact that the use of tax-deductible contributions for political campaign activities creates subvention by permitting donors, in effect, to influence campaigns with before-tax dollars. Therefore, the tax *rate* should be roughly equal to the benefit received by donors who deduct their donations. The problem with creating such a rate, of course, is the wide range of tax benefits received by charitable donors. At one extreme, some donors do not deduct their donations at all, and so they do not receive any financial benefit from their donation. Taxpayers who do deduct their charitable contributions receive a benefit at their marginal income tax rate, which varies under current law from 10% to 37%.<sup>190</sup> To complicate things even more, 501(c)(3) organizations are also exempt from the corporate tax, and so any investment income that the organization earned avoids tax at the corporate rate, which was 35% until the TCJA recently

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the expenditure (and 50% on each organizational manager) if the expenditure is not “corrected” within a set period of time. *Id.* § 4955(b)(1)–(2). An organization “corrects” the expenditure by “recovering part or all of the expenditure to the extent recovery is possible, [establishing] safeguards to prevent future political expenditures, and where full recovery is not possible, [and] such additional corrective action as is prescribed by the Secretary by regulations.” *Id.* § 4955(f)(3). Obviously, this tax’s purpose is to prevent an organization from making a campaign-related expenditure, not to protect the nonsubvention principle while permitting an organization to engage in constitutionally-protected speech.

<sup>190</sup> See I.R.C. § 170. In addition to the deduction of the value of their contribution, taxpayers who donate appreciated assets get a tax deduction for the full value of the property *and* avoid the capital gains tax, which might be 0%, 15%, or 20%. When that double benefit is taken into account, a donation may save a taxpayer as much as almost 57% of their donation as compared to selling the appreciated asset. Furthermore, a taxpayer who makes a charitable contribution at death may save the estate tax, which is as high as 40%, although this tax applies to only a tiny fraction of all decedent taxpayers.



reduced it to 21%.<sup>191</sup> Given all that complication, it would be impossible to choose a rate that *actually* equalizes the benefit received by donors. Some somewhat arbitrary rate would have to be chosen for simplicity's sake and this rate would underserve the nonsubvention principle for some taxpayers and over-serve it for others. I could see proposing a tax at the corporate rate (currently 21%), although I believe a rate set at the top individual rate (currently 37%) would also be justified. Either would be simple enough to administer while also being tied strongly to the principle of nonsubvention to avoid claims that they were arbitrary in a constitutional sense.

Even more uncertain than what rate should apply would be how to identify the *base* of the tax in a simple enough way. A tax "base" is the number by which the "rate" is multiplied by to determine how much tax is owed. In 2009, I proposed a "base" that equaled 10% of the organization's "total cost of operations" for the year.<sup>192</sup> In other words, one would recognize that in some way *all* of an organization's expenditures serve to build that organization's credibility, influence, and audience. Therefore, to the degree to which all of the organization's expenditures have been subsidized with tax-deductible contributions and tax-exempt income, they are the proper base for the tax. But, of course, the expenditures are not *only* spent to build credibility, influence, and audience. They also advance the organization's tax-exempt mission. Therefore, some fraction must be chosen. In 2009, I chose 10% and I see no reason to modify that choice now.<sup>193</sup>

The point of this discussion is to argue that the fact that observers have generally used an incremental-expenditure approach to understand the cost of political campaign speech does not prevent Congress from using a more accurate *non-incremental* measurement. Because of the existence of so-called "no-cost political speech"—which has no cost *only* because of an incremental

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<sup>191</sup> In 2004, a provision was included in a version of the American Jobs Creation Act of 2004, which as far as I know is the only non-incremental expenditure tax on 501(c)(3) organizations that engage in campaign-related speech ever proposed. *See* H.R. 4520, 108th Cong. § 692 (as introduced in the House, June 4, 2004) (imposing a tax equal to the highest rate of tax specified by section 11(b) on the gross income of the organization for that calendar year). At the time of the proposal, the applicable rate was 35%, although it is now 21%. I.R.C. § 11(b). The provision was removed from the bill with no explanation by the time the bill was "reported" in the house on June 16th, less than two weeks later. As far as I know, it never subsequently made its way into any bill. [Thanks to Ripple Weistling for research assistance relating to this provision.] That provision would also be insufficient for our purposes, since it maintains a revocation of tax-exempt status if the organization engages in campaign-related speech on more than three occasions and the penalty does not apply if the speech "constitutes an intentional disregard by such organization or any of its religious leaders of the prohibition of such activity under subsection (c)(3)." H.R. 4520 § 692(a).

<sup>192</sup> *See* Leff, *supra* note 2, at 722 (noting that the concept of "total cost of operation" is derived from Treas. Reg. § 1.162-28(d)(4) (1995), which describes the "ratio method" for allocating costs to "lobbying activities" for the purposes of I.R.C. 162(e)(1)).

<sup>193</sup> *Id.*

method for measuring cost—the nonsubvention principle is underserved by any tax on political campaign speech that uses an incremental approach. A tax on political campaign speech that better serves the nonsubvention principle could be devised, and I have presented an example of one.

### *B. Non-Expenditure-Based Approaches*

Just because the current proposals to revise the Johnson Amendment are either too broad (FSFA, etc.) or fail to solve the underlying constitutional infirmity in the status quo interpretation, that does not mean that there is no constitutionally adequate solution that also protects the integrity of the campaign finance system better than the FSFA. In the prior Section, I described a possible way to provide an expenditure-based tax to better serve the goal of nonsubvention, while still fully recognizing an organization’s right to expression. In this Section, I discuss three types of mechanisms that could be added to a revised Johnson Amendment that would more strongly protect the integrity of the campaign finance system than solutions like the FSFA would. These non-expenditure-based solutions could be imposed to supplement either an incrementalist expenditure approach (like the FSFA) or a non-incrementalist expenditure approach (like the one described in the prior Section). First, there are “reporting” solutions, in which charities are required to report certain information to the IRS when they exercise their right to engage in partisan electoral speech. Second, there are “disclosure” solutions, in which the organization is required to report information to specific stakeholders, or the general public, in order to engage in partisan political speech. Finally, there are “governance” solutions, in which charities are required to observe some procedural mechanisms to ensure that the organization itself approves of it engaging in partisan electoral speech before it or its leaders are permitted to speak on behalf of the organization. I treat each type of mechanism in turn.

#### 1. Reporting solutions

Reporting solutions are rules that require an organization to report information related to partisan political speech to the IRS, or to some other governmental agency. Reporting solutions are similar to disclosure solutions (discussed in the next Section) because both require the organization to report some kind of information, but the difference is that reporting solutions only require the organization to communicate information to the government while disclosure solutions require an organization to communicate information to

someone else, either a specific stakeholder or the general public.<sup>194</sup> The difference between the two types of solutions is confused by the fact that the primary forms on which charities report information to the IRS are the one-time Form 1023 and the annual Forms 990, and both of these forms are required by law to be made public by the organization. Because of the requirement that almost all information on Forms 1023 and 990 is disclosed to the public, it is easy to confuse reporting with disclosure in the 501(c)(3) context. However, there is a conceptual distinction between reporting and disclosure, and therefore it is worth treating these types of solutions separately.

Reporting requirements for political campaign activity could include the *fact* that the organization engaged in such activity, as well as some information about the type of activity in which it engaged. The current Form 990 already contains a question that asks, “Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office?”<sup>195</sup> Under current law, a 501(c)(3) organization that answers “yes” to this question is presumably conceding that the organization has violated the law.<sup>196</sup> This question is broad enough to cover any speech attributed to the organization that expresses a preference for a candidate, including a favorable discussion of a candidate by a minister in a worship service.

If an organization answers “yes” to the question about political campaign activities, it is then required to answer a series of other questions that appear on Schedule C Part I of Form 990, which asks for details about the activity. Part 1-A has only three questions, asking for (i) a description of political campaign activities, (ii) an assessment of political campaign activity expenditures, and (iii) an assessment of volunteer hours for political campaign activity.<sup>197</sup> For 501(c)(3) organizations, since political campaign activities are expressly prohibited under current law, the answers to all of these questions presumably constitute an organization’s admission of improper activity, to be accompanied either by an attempt to “correct” their error, or an invitation to the IRS for enforcement action.<sup>198</sup>

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<sup>194</sup> Some states have sought to have the IRS report donor information to state agencies that oversee nonprofits within their jurisdiction, but such attempts have been controversial. See Mayer, *supra* note 98, at 219 (noting actions by some states to require charitable organizations “to submit their IRS-required donor lists to the state agency that oversees such organizations”).

<sup>195</sup> INTERNAL REVENUE SERV., OMB NO. 1545-0047, FORM 990 RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX 3 (2020).

<sup>196</sup> See discussion *supra* Section I.

<sup>197</sup> INTERNAL REVENUE SERV., OMB NO. 1545-0047, FORM 990 SCHEDULE C POLITICAL CAMPAIGN AND LOBBYING ACTIVITIES 1 (2019).

<sup>198</sup> For a discussion expressing surprise that the “Pulpit Freedom Sunday” protesters do not use the Form 1023 to get their claims into court against the IRS, see Benjamin Leff, *If Churches Really Want to Vindicate Their Right to Endorse a Candidate It’s Easy for Them*

However, if the law were changed to permit so-called no-cost political communications, the questions might still serve a purpose—or other questions might have a purpose. Since this Section is about “reporting” but not “disclosure,” we will imagine that the questions appear on a schedule that the organization is not required to disclose to the general public. What might be the benefits of requiring reporting of (i) the *fact* of political campaign activity, (ii) a description of the activity, (iii) an accounting of the cost of the activity, and (iv) an accounting of volunteer hours devoted to the activity? The most obvious purpose of a reporting requirement is that it enables the IRS to enforce the law. In most cases, the IRS seeks information so it can make a determination of which taxpayers to investigate further. In this case, however, the reporting requirement might be used for the opposite purpose: to provide a safe harbor *against* enforcement by the IRS, at least when the campaign activity is within permissible bounds or not far outside them. Since the definition of Johnson Amendment activities is potentially confusing and inherently ambiguous, it would serve both the IRS’s and charities’ interests to avoid enforcement except when really necessary. If Congress created a stand-alone penalty for failure to report campaign activity, and then the IRS took a hands-off approach to enforcement of relatively minor infractions so long as they were reported, then charities would be encouraged to report their electoral campaign activity without fear of adverse consequences from the IRS. Failure to report, on the other hand, would result in penalties.

If reporting was required and the IRS did not use that reporting to enforce the Johnson Amendment, then what purpose is served by a reporting regime? The most important purpose for reporting, other than IRS enforcement of the law, is that asking a question on a Form 990 triggers an internal process for the organization subject to the question. The organization must develop some internal procedure to be sure that it has the information required by whoever is filling out the form (usually a tax accountant, but not always). The Form 990 asks whether the organization has a policy that the Form 990 is shared with each member of the board of directors before it is filed, and it is considered a best practice for all board members to review it.<sup>199</sup> Therefore, asking about political campaign activity should have the effect of

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*to Get Into Court*, SURLY SUBGROUP BLOG (July 28, 2016), <https://surlysubgroup.com/2016/07/28/if-churches-really-want-to-vindicate-their-right-to-endorse-a-candidate-its-easy-for-them-to-get-into-court/> [<https://perma.cc/T33B-ZG65>] (“This is often presented as a dilemma for the churches: they *want* to get in to court, and are disappointed that the IRS won’t let them. To me, this public stance on the part of the churches and Alliance Defending Freedom seems disingenuous.”). *See also* Mayer, *supra* note 98, at 211 (“Interestingly, there also appears to be a reluctance on the part of ADF to bring this issue to the courts, as ADF could force a court resolution by causing a new church to be created and to file . . . for § 501(c)(3) tax-exempt status while revealing its plans to support or oppose candidates from the pulpit.”).

<sup>199</sup> INTERNAL REVENUE SERV., OMB NO. 1545-0047, FORM 990 RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX 6 (2020).

(1) requiring the organization to be more conscious of whether and when it is engaging in such activity, and (2) communicating at least to its board of directors whether it is engaging in such activity or not. Obviously, many organizations may still engage in such activity without that information appearing on the Form 990, but a modest penalty for unreported activity should at least encourage some due diligence in those preparing such returns.

It is probably the case that the existing questions on the current Form 990 are sufficient to serve as a catalyst for internal processes that will at least make an organization more conscious of the ways in which it engages in political campaign activities, and perhaps choose not to do so unless its stakeholders approve such action. If legislation were passed to permit some sort of so-called “no-cost” political campaign activities by 501(c)(3) organizations, the reporting provision could be used to encourage organizations to go through a deliberative internal process for political campaign activities, even if such activities were permitted because they met the definition of “no-cost” speech. It would be essential for the IRS to communicate that no-cost political campaign activity, however it is defined in the statute, is still political campaign activity for reporting purposes. So, even permitted activity must be reported. Otherwise, the reporting provisions will have little effect. It is likely that such a provision will only be effective if some penalty is imposed for unreported political campaign activity, even if that activity is permitted under the revised law.

## 2. Disclosure solutions

The second mechanism for limiting the impact of permitting organizations to engage in partisan electoral speech is to require disclosure from them. In the corporate context, scholars have called for disclosure of political spending by business corporations for many of the same reasons that disclosure might be warranted for charitable organizations.<sup>200</sup> I can think of two distinct types of disclosure that might be effective at limiting the impact of a looser Johnson Amendment. First, the IRS could require that any organization that engages in partisan electoral speech communicate that fact and certain information about the activity to its stakeholders. Second, the IRS could require that any organization that engages in partisan electoral speech disclose the names of its donors to the general public. These two types of

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<sup>200</sup> See Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 926–27 (2013) (arguing that SEC rulemaking requires public companies to disclose their political spending). See generally DISCLOSE Act, H.R. 5175, 111th Cong. (2010); S. 3628, 111th Cong. (2010) (proposing public disclosure requirements for individuals, entities, and special interest groups who make electioneering donations to specific candidates or political organizations).

disclosure requirements are quite different from each other, and may advance distinct interests in different ways.

**a. Disclosure of the fact of, and information about, political campaign activity**

First, the IRS could require that any organization that engages in partisan electoral speech be required to disclose that fact to its stakeholders. This could be accomplished simply by keeping the Form 990 questions described above in the portion of the 990 that is disclosed to the general public. But because Forms 990 often are not disclosed until months or even years after the described activity, one could imagine a more timely and robust disclosure requirement, for example requiring organizations to post information on their website (if they have one) or to send notifications to all members or other stakeholders. These more robust disclosure requirements would be more burdensome on the organization and so would need to be accompanied by a strong justification for their value.

Donors are important stakeholders for many charities. Under current law, organizations are required to provide certain information to all donors, and donors are required to obtain that information as a condition of obtaining a deduction on their Federal Income Tax.<sup>201</sup> It would be relatively easy to add a requirement to the current donor acknowledgement form that addresses political campaign speech. If that were the case, it would probably be best to keep the communication simple, something like: “This organization has engaged in political campaign activity within the past year.”

The arguments in favor of disclosure are similar to those regarding reporting, but they take into account the interests of stakeholders other than the government and those persons directly involved in preparing or approving the Form 990. In other words, disclosure requirements recognize that donors, funders, employees, contractors, beneficiaries, members, parishioners, students, faculty, and even the general public have an interest in knowing that an organization they are associated with is engaging in political campaign activity.<sup>202</sup> Based on that knowledge, they may choose to increase or affirm their connection to the organization or to decrease or sever their association. Donors may choose to donate based on the organization’s political campaign activity or choose to refrain from donating. Remember, the information that would be disclosed is presumably the organization’s understanding that it is

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<sup>201</sup> See I.R.C. § 170(f)(8) (mandating that a tax deduction over \$250 must be substantiated by a “contemporaneous written acknowledgment of the contribution by the donee organization.”).

<sup>202</sup> See, e.g., DISCLOSE Act, H.R. 5175, 111th Cong. (2010); S. 3628, 111th Cong. (2010) (proposing public disclosure requirements for individuals, entities, and special interest groups who make electioneering donations to specific candidates or political organizations).

engaging in permissible political campaign activity, abiding by whatever restrictions are included in future legislation. If they were engaged in impermissible activity and disclosed this, then the disclosure may result in enforcement by the IRS.

Finally, if an organization is required to identify and disclose such activity, even if it is permissible, the organization may be more deliberative in choosing whether to engage in such activity. Disclosure gives stakeholders an opportunity to attempt to influence the organization if they do not want it to engage in political campaign activity. How effective that influence would be would vary from organization to organization, of course.

### **b. Disclosure of donors**

A very different type of disclosure would be if Congress required that any organization that engages in political campaign activity be required to disclose to the general public the names of its donors. As discussed above, Professor Aprill has proposed a version of this requirement.<sup>203</sup> She suggests “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.”<sup>204</sup> She argues that such disclosure serves the same purposes as disclosure of political campaign contributors in other legal contexts:

[P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters . . . . The First Amendment protects political speech, and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.<sup>205</sup>

Unfortunately, a donor disclosure provision, like the one proposed by Aprill, is likely to be less effective than disclosure in the business corporation context for a variety of reasons.<sup>206</sup> Disclosure of all donors to an organization that engages in political campaign speech would advance some of the same purposes as disclosure of the fact of the corporation’s speech, but not

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<sup>203</sup> See Aprill, *supra* note 5, at 16 (proposing a rule requiring 501(c)(3) organizations disclose their donors unless said donors specified that their contributions are not to be used for campaign intervention or lobbying).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* (quoting *Citizens United v. FEC*, 558 U.S. 310, 370 (2010)).

<sup>206</sup> See, e.g., David Earley, *DISCLOSE Act Crucial to Transparency of Federal Election Spending*, BRENNAN CTR. FOR JUST. (July 23, 2014), <https://www.brennancenter.org/our-work/analysis-opinion/disclose-act-crucial-transparency-federal-election-spending> [<https://perma.cc/GX27-NM3Y>] (analyzing the effects the DISCLOSE Act would have on organizations if they were required to disclose their donors).

others.<sup>207</sup> For example, to the degree to which the goal of disclosure is to permit citizens to “see whether elected officials are ‘in the pocket’ of so-called moneyed interests,”<sup>208</sup> it is not clear how a disclosure of a long list of donors to a 501(c)(3) organization would do that effectively. The donors may have very diverse interests, and the fact that the organization endorsed or otherwise supported a candidate is probably weak evidence that the candidate is “in the pocket” of all or any of the donors. If the goal is to enable stakeholders to hold an organization accountable for its political campaign speech, then it is not entirely clear why the stakeholders need to see a list of the names of the donors. It is plausible that a list of donors that contained *amounts* of their donation would be relevant, since both stakeholders and citizens could then see if an organization is dominated by a small number of donors, and that information might be relevant to fully understand the political interests of the organization. But absent the magnitude of the donation, it is not clear what the mere list of names provides.

Most damaging to the efficacy of a donor disclosure provision like the one proposed by Aprill is the limitation that donors’ names are disclosed “*unless* they specify that their donations will not be used for campaign intervention or lobbying.”<sup>209</sup> The problem with this limitation is that it plausibly renders the whole disclosure provision ineffective. Remember, the point of non-expenditure-based regulation of political speech is that the existence of low- or no-cost political speech means that an organization can engage in quite effective campaign intervention without spending anything (at least anything incremental). So, if donors can avoid having their names disclosed simply by specifying that their donations cannot be used for campaign intervention, there is not really any impediment to them preventing their names from being disclosed. Arguably, a 501(c)(3) organization could still engage in no-cost political campaign activity, if legislation were adopted to permit such activity, even if *every single one* of its donors had specified that *their* donation should not be so used. At worst, all it would take would be one small donor willing to have their name disclosed to avoid the disclosure regime for all the other donors. If all of the big-money donors were not disclosed, and a few small dollar donors were, that would arguably provide as little or even less information about who was influencing which politician and vice versa than if there was no donor disclosure provision at

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<sup>207</sup> For a discussion of the policy objectives of corporate activity disclosure versus donor disclosure in the context of state-level regulation of non-charitable nonprofit electoral speech, see Linda Sugin, *Politics, Disclosure, and State Law Solutions for 501(c)(4) Organizations*, 91 CHI.-KENT L. REV. 895, 918–25 (2016) (arguing that disclosing organizational spending in politics can achieve the policy goals of protecting the political process, donors, and voters).

<sup>208</sup> Aprill, *supra* note 5, at 16 (quoting *Citizens United*, 558 U.S. at 370).

<sup>209</sup> *Id.* (emphasis added).



all. Presumably, Aprill included the opt-out because she recognized that “out of respect for individual liberty and privacy, nondisclosure of contributors to exempt organizations . . . has long been a hallmark of our tax system.”<sup>210</sup> Therefore, requiring disclosure, but permitting nondisclosure of any donor who specifies that their donation cannot be used for political activity, is a compromise between two competing values. Unfortunately, in this case, it renders the disclosure regime ineffectual.

One possible benefit of a donor disclosure regime is that it would force donors to communicate with the organization about political campaign activities. If the organization was required to disclose their donors’ names unless the donor asked for their donations not to be used for political campaign activities, then the organization would have to explain that requirement to the donor and the donor would have the opportunity to express their preferences to the organization. This communication might be beneficial, but could be accomplished less controversially by a disclosure regime designed to force the communication, as described above.

It is possible that the true purpose of a donor disclosure regime is to simply disincentivize political campaign speech by charities. It is possible that organizations know that their donors would prefer not to be disclosed, at least in some cases, and so a regime that threatens disclosure, even with an ability to opt out, will cause organizations to choose not to engage in political campaign speech to avoid upsetting their donors. To the degree to which a donor disclosure regime is intended to decrease such activity without being designed to advance legitimate governmental interests, it is presumably constitutionally suspect and improper.

### 3. Governance solutions

Because a charity is by definition a complex entity, what it means for it to “speak” is an inherently difficult question. This is because a charity, like any corporation (which most charities are) can only act through its agents. And no single one of its agents reliably acts on behalf of the organization all the time.<sup>211</sup> Therefore, it is not unreasonable to require that charities follow some procedures to make sure that any speech, or specifically its partisan electoral speech, is really its own. In other words, one could imagine imposing some special rules relating to the *governance* of a charity that engages in partisan electoral speech. This Section briefly addresses whether charities should be subject to rules requiring them to follow specific governance

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<sup>210</sup> *Id.* at 17.

<sup>211</sup> See Galle, *supra* note 75, at 1625–26 (warning that a charity’s goals might not perfectly align with a political candidate’s platform, thereby allowing the charity’s agents to exercise their own judgment in choosing which issues and candidates the charity should support, potentially contradicting the wishes of the charity’s contributors).

procedures before engaging in partisan electoral speech, and the penalties that could be applied for failure to follow those governance procedures.

Corporate law scholars proposed similar governance rules for business corporations following the *Citizens United* case.<sup>212</sup> Recognizing that the separation of ownership and control in a corporation causes an “agency problem,” these scholars argue that aligning the corporation’s political speech with its shareholders’ will is a compelling government interest justifying special governance rules that apply to corporations engaging in political speech. While charities and business corporations differ because charities do not have shareholders the way business corporations do, they do have stakeholders and suffer from agency problems that are at least as severe as those that infect business corporations.<sup>213</sup> Given how important electoral speech is, and how potentially closely tied it is to an organization’s core identity and mission, a rule requiring that a charity properly expresses its *own* view, and not the personal view of one or more of its agents, seems eminently justified.<sup>214</sup> A concern for the First Amendment rights of charities should not create a situation in which the government empowers the charity’s agents to speak on its behalf without the proper consent of the charity. That does not make sense.

So, what type of procedural rules would best align an organization’s speech with its intentions (and what type of penalties would be appropriate to enforce such rules)? First of all, one could imagine requiring a charity’s board of directors to approve any political speech made on behalf of the organization. That would mean that a pastor could not endorse, or express views—positive or negative—about a candidate from the pulpit unless the church’s directors (or equivalent governing body) had expressly approved such action. The organization’s board of directors could approve a leader expressing the views using her own judgment about how to apply the organization’s values to a choice among candidates *without* directing the

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<sup>212</sup> See, e.g., Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 84 (2010) (proposing a series of rules for “determining whether the corporation actually wishes to engage in political speech” and arguing that “lawmakers should develop special rules to govern who may make political speech decisions on behalf of corporations”); Jennifer S. Taub, *Money Managers in the Middle: Seeing and Sanctioning Political Spending After Citizens United*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 443, 449–50 (2012) (proposing that governance procedures should represent natural persons who constitute corporations); see also *id.* at 447 (discussing the Shareholder Protection Act); Shareholder Protection Act, H.R. 2517, 112th Cong. (2011) (requiring that corporations disclose both direct and indirect political expenditures and obtain advance consent by a majority of the outstanding shares before allocating funds to political activity).

<sup>213</sup> Galle, *supra* note 75, at 1625–26.

<sup>214</sup> See Bebchuk & Jackson, *supra* note 212, at 108 (arguing that legal rules designed to prevent the use of corporate resources for speech the corporation does not want to engage in would be constitutionally valid, as long as the rules would not steer corporate political speech toward expensive procedures deliberately designed to deter corporate speech).

leader which candidate to support. Or the board of directors could make a decision itself about which candidate best advanced the values of the organization. Or, of course, the board could expressly prohibit a leader from expressing views that could be attributed to the organization, which would presumably include expressing any views about candidates at an official meeting of the organization (such as a worship service). The choice of what the organization's position would be with respect to electoral speech would be up to the board of directors of the organization.<sup>215</sup>

While official board approval seems like an obvious first step, it might be insufficient to protect the interests of the organization. Bebchuk & Jackson argue that business corporations should be required to obtain *shareholder* approval to spend any money on political speech, not merely the approval of the directors.<sup>216</sup> They also propose that shareholders should be empowered to adopt resolutions about the manner or type of political action the corporation may take, permitting shareholders to control corporate decision-making about political spending beyond just approving the budget for such activities.<sup>217</sup> Both of these proposals seem appropriate for charities as much as or more than for business corporations, except for the fact that charities do not have shareholders. So, if there is to be a rule that some approval beyond the board of directors would be required for a charity to engage in electoral speech, then the first obvious question is: approval from whom? For some charities, an obvious candidate for this role is the “members.” In most states, nonprofit organizations are defined as either “membership” or “nonmembership” organizations.<sup>218</sup> A “member” in these states is anyone who has the authority to elect or appoint the board of directors.<sup>219</sup> These members sometimes have authority to make specific important decisions on behalf of the organization—their approval may be needed to change certain provisions of the bylaws, or to dissolve the organization.<sup>220</sup> So, for

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<sup>215</sup> See *id.* at 101 (proposing a requirement that independent directors approve political speech by the corporation or its leaders). A rule for charities could include such a requirement, but could also forego any “independence” requirement, since “independence” has a significantly different meaning in the charitable board context than the business corporation context. See Benjamin Moses Leff, *Federal Regulation of Nonprofit Board Independence: Focus on Independent Stakeholders as a Middle Way*, 99 KY. L. REV. 731, 732–35 (2010) (highlighting the legal issues inherent to the IRS requiring charitable organizations include independent board members as part of their recent corporate “governance initiative”).

<sup>216</sup> Bebchuk & Jackson, *supra* note 212, at 98 (“[L]awmakers should . . . require shareholder approval for corporate political spending.”).

<sup>217</sup> *Id.* at 99 (“[W]e also propose that shareholders be permitted to adopt binding resolutions concerning corporate political spending.”).

<sup>218</sup> W. COLE DURHAM & ROBERT SMITH, 1 RELIGIOUS ORGANIZATIONS AND THE LAW § 9:22 (2017).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

organizations that have a membership in this sense, it would be natural if one were looking for some authority beyond the board to approve political speech to vest it in the membership. But most organizations do not have members in this sense, and so a rule requiring members to approve political speech would only impact a minority of organizations.

For many organizations, a suitable proxy for shareholders might be some broader class of participants in the organization's activities. These participants might be internally considered "members" even though they do not have the authority to elect the governing body, and so are not "members" in the legal sense. For example, a church may have parishioners or other "members" who are regular attendants and supporters. In some cases, members may be required to pay dues as a prerequisite of membership, but organizations may have a very wide range of mechanisms to define their membership in this sense. One could imagine arguing that this constituency should have the power to decide whether the organization engages in electoral speech. Especially if legislation is adopted that prioritizes so-called "internal communications," one could imagine the same mechanism that defines when an organizational communication is "internal" defining the constituency that has the authority to decide if the organization will make such internal electoral communications.<sup>221</sup> One could imagine adding to legislation that permits "internal" communications simultaneously requiring the organization to define a "membership" to which the organization can make such internal communications and then requiring approval from that membership in order to engage in electoral speech.

Finally, there is a strong argument that donors to charitable organizations should be empowered to decide whether the organization engages in electoral speech or not. There is an old principle of charitable trust law that donors make donations to charitable organizations subject to the restrictions found in the organizations' organizing documents. Because 501(c)(3) organizations are prohibited from engaging in political campaign activities under current law, every charitable organization that has been recognized as exempt under 501(c)(3) has a statement in its governing documents that the organization will not engage in such activities. Some of those statements may be drafted skillfully enough that a change in law would expand their permissible activities so they can engage in any type of political speech that is permitted, but many will not be. Even if the language in an organizing document is permissive, there is a strong argument that donors have donated to organizations under an understanding that the organization cannot engage in political campaign activities. Therefore, there is a strong argument that an organization should obtain consent in some form from its donors prior to engaging in any such conduct. That argument has nothing to

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<sup>221</sup> See *supra* discussion accompanying notes 86–97.

do with subvention or fairness in campaign funding. It has to do with plain old consumer protection of donors. Donors should be able to choose what type of organization they are contributing to and organizations should not be in the business of misleading them. Of course, any donor consent provision will necessarily apply to *current* donors, and so will not correct any problem with *prior* donors. A stronger provision would demand some sort of consent from prior donors before an organization can change its position with respect to political campaign activity. However, a provision that demanded consent from prior donors would likely be too burdensome for most organizations to follow, and so would have the effect of barring existing organizations from engaging in political campaign activities, leaving the field entirely to those new organizations created specifically to influence elections that commentators like Professor Aprill are most concerned about.<sup>222</sup>

However a governance provision is crafted, it will create the necessity for an organization to make a clear decision whether to engage in political campaign activities or not, and may well reduce ad hoc or unauthorized expressions of electoral opinions. If those expressions of electoral opinions—endorsements or implicit endorsements—are attributable to an organization in any way, it is beneficial for them to actually be the opinions of the organization, not of some or other agent of the organization. Any church or other organization that values its pastor's or other leader's views about the qualifications of candidates will presumably authorize those leaders to express those views as the views of the organization. That right is arguably protected by the Constitution, but the Constitution does not protect the right of an organization's agent or agents to express their own views as the views of the organization or in a context in which the imprimatur of the organization is assumed.

## CONCLUSION

So, how do we fix the Johnson Amendment? Obviously, the Johnson Amendment only needs fixing if it is broken, and so a fix assumes that the status quo is not sustainable. I believe that the status quo is not sustainable because it unconstitutionally burdens the speech rights of charitable organizations by prohibiting them from expressing their views on the qualifications of candidates, without providing them with an adequate alternate channel for expressing such views. I also believe that the Johnson Amendment is broken because the partisan divide over the proper scope of the provision has paralyzed the IRS and prevented it from adequately enforcing the prohibition even against obviously improper activity. But I do not think one needs to be convinced that the status quo is unconstitutional or

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<sup>222</sup> See Aprill, *supra* note 5, at 7 (“[T]he proposed legislation . . . encourages the establishment of faux charities.”).

inadequately enforced to believe that the Johnson Amendment needs to be fixed. One might simply be concerned that the political forces gathering to change the Johnson Amendment are getting closer and closer to their goal, and that the fix they are proposing—a *de minimis* incremental cost approach like the FSFA—is insufficiently protective of the nonsubvention principle. Even if you believe that the status quo is sustainable as a policy matter, if you think it will fail as a *political* matter, you might be interested in a better fix than the leading proposal in Congress.

So, what are the parameters of a revised Johnson Amendment that actually adequately balances the speech interests of charities against the nonsubvention principle? First, it still prevents 501(c)(3) organizations from merely serving as a pass-through for campaign contributions. That is, the first job of the Johnson Amendment is to prevent incremental expenditures by a 501(c)(3) organization to political campaign organizations or for political campaign activities. Those incremental expenditures obviously violate the nonsubvention principle and should be prohibited. Second, it would impose a financial cost to engaging in *non*-incremental expenditures—so-called “no-cost” political speech. I’ve proposed an excise tax of 21% on a base of 10% of the organization’s total operating costs for the year. That excise tax would cover all of the no-cost political speech no matter how many times it occurred, though it would not cover incremental expenditures. Third, some sort of disclosure regime should be imposed to require 501(c)(3) organizations that want to engage in political campaign activity to report that fact and information about how they did it or plan to do it to their stakeholders and to the general public. Finally, governance requirements should be imposed to make sure that relevant stakeholders have consented to the organization’s exercise of its speech rights prior to any political campaign activity taking place. I believe that these four requirements are necessary to best balance the speech rights of charitable organizations with the nonsubvention principle, and that they do a better job of aligning policy with the interests of charities, their stakeholders, and the common good than existing proposals that limit the scope of an incremental approach by only permitting certain organizations (like houses of worship) or certain communications (like internal communications).

I am not deluded enough to think that the political climate is such that real compromise action by Congress or the IRS on this matter is possible at the present moment. But I do harbor the faint hope that someday, perhaps even in the near future, something in this Article could be useful to actors or spectators seeking to steer a middle course between two poles of political rhetoric that exaggerate the partisan divide on this issue.