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Let Charities Speak: 501(c)(3) Charitable Organizations After Citizens United

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After Citizens United

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This paper argues that tax deductible charities have a constitutional right to speak about politics. 501(c)(3) organizations include all tax deductible charities, including religious groups. Citizens United v. Federal Election Commission abrogated the ban on political speech by 501(c)(3) organizations by rejecting the reasoning in Regan v. Taxation with Representation of Washington. Regan found that 501(c)(3) organizations could be prohibited from speaking because they would still be able to speak through affiliate organizations. Citizens United rejected this argument when applied to for-profit corporations, and that reasoning applies equally to non-profit organizations. Citizens United also rejected the distinction between subsidies and punishments, which Regan relied on in its holding.

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INTRODUCTION

This paper will argue that *Citizens United v. Federal Election Commission*\(^2\) prohibits restricting political speech of 501(c)(3) organizations, in effect abrogating *Regan v. Taxation with Representation of Washington*.\(^3\)

“The First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.”\(^4\) The First Amendment grants individuals the right to endorse or denounce a candidate for office. When individuals organize together as a corporation for profit, they retain this right. But when individuals organize for a cause that is heartfelt, rather than economic, this right is eliminated. Ironically, this gag only restricts political speech, “speech that is central to the meaning and purpose of the First Amendment.”\(^5\)

In *Citizens United* the United States Supreme Court recognized corporate speech rights. Its plain language and reasoning also prohibit taxing charitable organizations from engaging in political speech. The traditional argument—that these groups can speak by reorganizing as a different type of organization—was rejected by *Citizens United*. Likewise, the argument that these groups have sold their speech for subsidies is misplaced after *Citizens United*—corporations are subsidized by limited liability, as are 501(c)(4) organizations, which are also tax exempt, but neither is barred from political participation.

This paper will argue that *Citizens United* recognized the right to endorse political candidates to 501(c)(3) organizations. Part I will introduce 501(c)(3) organizations, and the two major cases on point: *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), which held that limits to political speech applied to 501(c)(3) organizations were constitutional, and *Citizens United v. Federal Elections Commission*, which held that some limits to political speech applied to corporations were unconstitutional. Part II will apply the Court’s holding in *Citizens United* to 501(c)(3) organizations. Part III will discuss how best to remove the restriction.

I. INTRODUCTION TO 501(c)(3) ORGANIZATIONS AND PRIOR CHALLENGES

A. Introduction to 501(c)(3) Organizations

A 501(c)(3) organization is a nonprofit, tax exempt and tax deductible organization.\(^6\) Not all nonprofit\(^7\) organizations are tax exempt, and not all tax exempt organizations are eligible to receive tax deductible donations.\(^8\) Tax exemption means the organization is not required to pay

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\(^2\) 130 S. Ct. 876 (2010).
\(^3\) 461 U.S. 540 (1983).
\(^4\) *Citizens United*, 130 S. Ct. at 898.
\(^5\) Id. at 892 (citing *Morse v. Frederick*, 551 U.S. 393, 403 (2007)).
\(^8\) See generally HOPKINS, supra note 6.
federal income taxes. Tax deductibility allows those who contribute to the organization to deduct those contributions from their income tax. 501(c)(3) organizations are both tax exempt and tax deductible and are prohibited from engaging in certain political speech.

A 501(c)(3) organization is a creation of the federal tax code. It encompasses nonprofit groups “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes,” as well as certain amateur sports organizations, and societies working to reduce child and animal abuse.

The tax code imposes two broad speech restrictions on 501(c)(3) organizations. First, they may not have a “substantial part” of their activities dedicated to influencing legislation. Second, they may not participate or intervene in political campaigns for or against a candidate for public office. Along with these restrictions, 501(c)(3) organizations have the benefit of tax exemption and contributions to these organizations are tax deductible.

B. Regan v. Taxation with Representation of Washington

In *Regan v. Taxation with Representation of Washington*, the Supreme Court held that speech restrictions on 501(c)(3) organizations were constitutional. Taxation with Representation of Washington (“TWR”) was a nonprofit corporation organized to influence tax policy. TWR was formed by a merger between a 501(c)(3) and a 501(c)(4). 501(c)(3) organizations are tax exempt and tax deductible, but cannot engage in substantial lobbying. 501(c)(4) organizations are also tax exempt, but are not tax deductible and are not prohibited from engaging in substantial lobbying. A 501(c)(4) organization is the corporate form usually used for political action committees.

Following the merger, the IRS denied 501(c)(3) status to TWR because it planned to engage in substantial lobbying. The organization sued for a declaratory judgment that it qualified for 501(c)(3) status, arguing that the restriction against substantial lobbying violated the

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9 26 U.S.C.A. § 501(a), (c) (2006). Nonprofit organizations are still subject to some form of tax. See *Hopkins*, *supra* note 6. For the scope of the tax exemption to 501(c)(3) organizations, see Parts II, III, and VI of Title 26, Subtitle A, Chapter I, Subchapter F. See also 26 U.S.C.A. § 501(b) (2006).
11 26 U.S.C.A. § 501(c). State law defines exemptions and deductibility from state taxes (e.g., income, property and sales). For a discussion of state tax exemptions and their limitations, see, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 587 (1997). This paper will focus on the federal tax code because that is the source of the federal speech restriction.
12 The organization is nonprofit if “no part of [its] net earnings ... inure[] to the benefit of any private shareholder or individual.” 26 U.S.C.A. § 501(c)(3).
14 Id. But see id. at § 501(h).
15 26 U.S.C.A. § 501(c)(3). The contours of these restrictions have filled volumes. See generally *Hopkins*, *supra* note 6.
18 § 501(c)(3).
First Amendment. TWR argued that denying deductibility to groups that engage in certain forms of speech “is in effect to penalize them for such speech.”

The unanimous Supreme Court made three key holdings. The first holding, which the concurrence referred to as the Court’s “necessary assumption,” was that TWR could reorganize into a 501(c)(4) organization, which is not tax deductible but can engage in substantial lobbying. Because TWR could reorganize as a 501(c)(4) the Court found that the organization as a whole was not entirely restricted from substantial lobbying. As a less drastic alternative to complete reorganization, “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.” In other words, a “501(c)(3) organization’s right to speak is not infringed, because it is free to make known its views on legislation through its 501(c)(4) affiliate without losing tax benefits for its nonlobbying activities.” In effect, the option of creating a 501(c)(4) entity served as a safety valve to keep the speech restriction constitutional.

The Court’s second key holding was that tax exemption and tax deductibility are both economically equivalent to cash subsidies, so the two tax benefits are distinguishable only by degree. “Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare.”

The third holding addressed whether the tax was a penalty or whether it was merely withholding a subsidy. The Court found that taxing is not a penalty; exemption from taxing is a subsidy. Because the government is not required to subsidize the exercise of a right, the government could withhold the subsidy when it was being used for political speech. Tax exemptions and deductions are “a matter of grace that Congress can, of course, disallow . . . as it chooses.”

21 Regan, 461 U.S. at 545 (quoting Speiser v. Randall, 357 U.S. 513 (1958)).
22 Id. at 552; See also id. at 544 (“It appears that TWR could still qualify for a tax exemption under 501(c)(4). 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.”)
23 Id. at 544.
24 Id. at 544. See also id. (“Congress chose not to subsidize lobbying[. which is allowed only for a 501(c)(4) organization[,] as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare [allowed for 501(c)(3) organizations].”).
25 Id. at 553 (Blackmun, J. concurring).
26 “A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual’s contributions.” Regan, 461 U.S. at 544. More precisely, tax deductibility is economically equivalent to a government matching program for donations in the amount of the marginal tax rate of the donor. However, this assumes the donor will itemize deductions. Donations by low-income individuals may not be subsidized at all, which skews the benefit of deductibility toward organizations funded by wealthier donors.
27 “The system Congress has enacted provides this kind of subsidy to nonprofit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying.” 461 U.S. at 544. See also id. (“Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system.”).
28 Id. at 544.
29 Id. at 549 (quoting Commissioner v. Sullivan, 356 U.S. 27, 28 (1958)) (internal quotations omitted).
With these three holdings, the Court held that by placing speech restrictions on 501(c)(3) organizations the government was merely declining to further subsidize charitable organizations to the extent they engaged in substantial lobbying. The necessary assumption was that lobbying activities could be channeled through a 501(c)(4) entity.

C. Citizens United v. Federal Election Commission

*Citizens United v. Federal Election Commission* abrogates *Regan*. The group Citizens United was a nonprofit corporation. Using donations from individuals and corporations it sought to distribute a film through cable television titled “Hillary: The Movie”, a 90-minute documentary critical of a presidential candidate during the primary elections. Concerned that the release would violate election law, Citizens United sought a declaratory judgment against the Federal Elections Commission. The district court found that the release would violate 2 U.S.C. § 441b, which prohibits corporations and labor unions from making “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office and is made within 30 days of a primary or 60 days of a general election.”

The 5-4 majority reversed the district court, holding that 441b violated the First Amendment’s guarantee to free speech. The Court found that “First Amendment protection extends to corporations,” and “political speech does not lose First Amendment protection ‘simply because its source is a corporation.’” The majority applied strict scrutiny to hold that section 441b unconstitutional.

One key argument rejected by the majority was that corporate speech was not actually limited because the corporation was still free to speak through a political action committee, or “PAC.” A PAC is a distinct organization, frequently organized under 501(c)(4) that is specifically exempted from 441b’s ban. The court held that being able to speak through a PAC does not alleviate the unconstitutionality of 441b’s speech restriction on the corporation. “PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations.” The court then described the administrative requirements of a PAC, including staffing, recordkeeping, file retention, and monthly reporting to the FEC. In addition, the court noted that a corporation may not be able to set up a PAC in time to speak. The court held that “[s]ection 441b’s prohibition on corporate independent expenditures is thus a ban on speech. . . . Were the Court to uphold these restrictions, the Government could repress speech by silencing

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30 2 U.S.C.A. §§ 441b(a) (prohibiting corporations from making contributions or expenditures), 441b(b)(2) (defining “contributions or expenditures” to include “applicable electioneering communications”), 434(f)(3)(A) (defining electioneering communications). Violating this statute was a felony with a maximum penalty of five years in prison. 2 U.S.C.A. § 437g(d)(1)(A).
31 *Citizens United*, 130 S. Ct. at 899.
33 *Citizens United*, 130 S. Ct. at 898.
34 *Id.* at 917.
35 *Id.* at 21.
36 2 U.S.C.A. § 441b(b)(2).
37 *Citizens United*, 130 S. Ct. at 897–98.
38 *Id.* at 897.
39 *Id.*
40 *Id.* at 898.
certain voices at any of the various points in the speech process." The Court struck down section 441b for impermissibly restricting speech.

II. **CITIZENS UNITED PROHIBITS THE CURRENT SPEECH RESTRICTIONS ON 501(c)(3) ORGANIZATIONS**

A. **Citizens United Applies to 501(c)(3) Organizations**

In *Citizens United* the Court dealt with corporations. Most 501(c)(3) organizations are organized as corporations, so applying *Citizens United*’s holding to nonprofit and tax deductible organizations is a natural fit. In fact, the plaintiff in *Citizens United* was a nonprofit corporation.

The opinion suggests that the Court was aware its holding would impact the non-profit sector. As an example of the perverse effects of the law, it pointed out that the Sierra Club could not run an add against a logging candidate, the NRA couldn’t publish a book advocating the defeat of a handgun opponent, and the ACLU couldn’t create a website opposing a free speech opponent. “These prohibitions are classic examples of censorship.” Each of these organizations is affiliated with a 501(c)(3) organization.

The holding in *Citizens United* makes no distinction between tax deductible organizations or other entities using the corporate form. “The people determine through their votes the destiny of the nation. It is therefore important—vitaly important—that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community.” The Court made no exceptions—no group was to be restrained.

Speaking even more directly, the Court held, “In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.” The ban on speech by 501(c)(3) organizations is Congress’s attempt to dictate who may address a public issue. In light of *Citizens United*, that restriction is unconstitutional.

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41 Id.
42 Id. at 913.
43 Id. at 897.
44 Id. at 897.
47 *Citizens United*, 130 S. Ct. at 902.
B. Citizens United Rejected the Reasoning in Regan

Citizens United abrogates Regan by rejecting its reasoning in two ways. First, Citizens United rejects Regan’s safety valve assumption—that an entity’s right to speech can be exercised by speaking through an affiliate. Second, Citizens United rejects the idea that a person could be forced to choose between some special advantages and the exercise of its fundamental rights, which weakens Regan’s distinction between a penalty and a withdrawn subsidy.

In addition, the reasoning of Citizens United also requires that Regan’s reasoning be rejected if the First Amendment is to have any effect. If Regan survives Citizens United, its reasoning could be used along with the reasoning in Citizens United to eliminate nearly any type of speech.

1. Citizens United Rejected Regan’s Necessary Assumption as Unconstitutional

Citizens United abrogates Regan, the case that upheld the speech ban on 501(c)(3) organizations. In Regan the Court relied on the “necessary assumption” that a 501(c)(3) could still speak by creating a 501(c)(4) affiliate. As long as the organization was still able to speak through an affiliate, the Court reasoned, the ban was not actually a restriction on speech, but a permissible way to segregate funds. This safety valve argument was rejected in Citizens United.

Perhaps thinking of Regan, the Court in Citizens United addressed the argument that corporations could still speak by creating an affiliated PAC, so the restriction on speech was not a ban because the corporation could still speak through an affiliate. The restriction merely prevented the corporation from comingling its political speech, which was funded by donations expressly for that purpose, with its general treasury.

The Court rejected this reasoning:

A PAC is a separate association from the corporation. So the PAC exemption from § 441b’s expenditure ban, § 441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with § 441b [the speech restriction on corporations].

The Court rejected the same safety valve approach it had relied upon in Regan. A 501(c)(4) organization is a separate association from the 501(c)(3). Its existence does not allow the 501(c)(3) to speak and does not alleviate the First Amendment problems with the ban. The necessary assumption in Regan—that speech through a reorganized affiliate is sufficient—was struck down. Regan’s reasoning was abrogated.

48 Regan, 461 U.S. at 544; see also id. at 552; Part I.C. supra.
49 Citizens United, 130 S. Ct. at 897.
50 Id. at 897. See also id. at 898–99 (“Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others . . . . Speech restrictions based on the identity of the speaker are all too often simply a means to control content.”); Part III.A infra.
2. Persons Cannot Be Forced to Choose Between a Special Advantage and a Fundamental Right

Regan’s necessary assumption is not the only part of Regan’s reasoning stricken by Citizens United. Regan held that the ban on speech was acceptable because the funds in the 501(c)(3) organization were subsidized by tax deductibility. In Regan the court distinguished penalties from subsidies. Congress was allowed to condition subsidies, but not penalties, on the organization waiving fundamental rights.

Citizens United rejected this holding. The Court dropped the strained distinction between subsidy and penalty and found plainly that a corporation cannot be forced to choose between a subsidy and a fundamental right.

‘State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.’ This does not suffice however, to allow laws prohibiting speech. ‘It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.’

That is exactly what is being required of 501(c)(3) organizations. They have been granted a special advantage, tax deductibility, for which the state seeks to exact a “forfeiture of its First Amendment rights.” A clearer holding couldn’t be asked for.

3. Regan’s Reasoning in Light of Citizens United Would Allow Congress to Prevent Any Speech

If Regan survives Citizens United, Congress could silence corporations by creating two forms of for-profit corporations—those that speak, and those that do not. Congress could raise corporate taxes to the point of shareholder protest, say 95%, but offer a subsidized rate to those that waive their First Amendment rights. Corporations would be silenced through a de facto ban on corporate speech. Congress could justify its actions by saying it simply did not want to subsidize corporate political speech, applying the penalty/subsidy argument accepted by Regan.

Adding the holding of Citizens United to this analysis is terrifying. The Court in Citizens United analyzed the constitutionality of the speech ban by considering whether the law would be constitutional if applied to individuals. “If §441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.” It continued, “[t]he Court has thus rejected the argument that political speech of corporations or other associations should be treated

51 461 U.S. at 544.
52 Id.
53 Id.
55 Citizens United, 130 S. Ct. at 898.
differently under the First Amendment simply because such associations are not ‘natural persons.’”

So if *Citizens United* did not distinguish between corporations and individuals, *Regan* would allow tax rates to vary depending on a person’s individual political activity. There could be a tax for those that speak, and a tax for those that do not speak. Congress could justify this as merely choosing not to subsidize political speech by individuals. But in effect a citizen could be required to pay additional taxes to exercise a fundamental right. This is a shadowy reincarnation of the poll taxes stricken in the 1960s.

### C. *Citizens United* Also Rejected *Regan*’s Policy Concerns

Under the policy reasons stated in *Citizens United*, it makes sense to allow 501(c)(3) organizations to speak. First, these organizations have in-the-trenches experience on many important policies. Second, they do not carry the same risks as speech by for-profit corporations. And, third, removing the speech restrictions would eliminate the additional cost and chill already put on these organizations.

#### 1. Expertise and Experience of 501(c)(3)’s

By banning speech by charities, we lose the voices of the most passionate groups in our society. We exclude from welfare debates those running the soup kitchens. We exclude from environmental debates those most dedicated to conservation. We exclude from foreign policy debates those who heal our soldiers at war and those who pray for peace. The price is too steep. “The Government has ‘muffle[d] the voices that best represent the most significant segments of the economy.’” If banning corporate speech muffles the best voices of our economy, banning charities from speaking muffles the voices coming from our hearts and our souls. “The remedy of ‘destroying the liberty’ of some factions is ‘worse than the disease.’”

#### 2. Granting Speech Rights to 501(c)(3)s Creates Less Risks Than Granting Speech Rights to Corporations

In *Citizens United* the Court confronted the risks of allowing corporations to speak. These risks are no greater with charities, and often do not exist at all. Because charities are funded by donations, there is a far lower risk of forcing unwilling shareholders to sponsor speech they disagree with; far lower risk of aggregating massive amounts of wealth that is disproportionate to the contributors’ belief in the message; far lower risk of a loss of faith in

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56 *Id.* at 900.
57 *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663, (holding poll taxes are unconstitutional, “Where fundamental rights and liberties are asserted . . . classifications which might invade or restrain them must be closely scrutinized and carefully confined.”).
58 *Citizens United*, 130 S. Ct. at 913 (“On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.”).
60 *Id.* (quoting The Federalist No. 10, p. 130 (B. Wright ed. 1961) (J. Madison)).
democracy. There is no reason to expect that funneling foreign contributions through 501(c)(3) organizations would be anymore rampant than money funneled through 501(c)(4) organizations.\textsuperscript{61} And while corporations were only banned from speaking for 60 days before an election, the ban on 501(c)(3) organizations is year-round.

3. Granting Speech Rights to 501(c)(3)s Alleviates the Current Chill

Allowing political speech by 501(c)(3) organizations would also prevent some of the circumvention and difficulties with grey areas the Court was concerned about in \textit{Citizens United}. 501(c)(3) organizations are allowed to discuss political issues, but cannot endorse any candidate. However, “[t]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.”\textsuperscript{62} Because it is so difficult to delineate between the two, 501(c)(3) organizations are chilled from discussing issues for fear they may lose their tax deductible status.

This difficulty is compounded in the YouTube generation of politics where retaining a lawyer to prescreen an internet advocacy video beforehand could cost more than producing the video itself. As production becomes less expensive and more agile, the relative cost of compliance increases and disproportionately affects organizations subject to speech restrictions.

III. \textbf{If the Speech Restrictions Approved in \textit{Regan} Are Stricken, Tax Deductibility Should Remain}

If linking tax deductibility to limited speech is now unconstitutional, there are two ways the statute could be stricken. The Court could either strike down the speech restrictions on 501(c)(3) organizations, or the Court could strike down both the speech restrictions and the tax deductibility of 501(c)(3) organizations, making them similar to 501(c)(4) organizations. Because charities are subsidized in order to promote charitable work, rather than as hush money, the better reasoned approach is to strike down only the speech restrictions.

A. Tax Deductibility Should Remain In Place

Governments have a long tradition of using tax breaks to encourage charitable activity. Federal tax subsidies to charities predate most of the tax code.\textsuperscript{63} Tax subsidies by states began before the American Revolution.\textsuperscript{64}

In contrast, the restrictions on political speech by 501(c)(3) organizations only emerged in 1954, when Senator Lyndon Johnson pushed the legislation to limit the power of his opponent

\textsuperscript{61} There is no reason to believe that foreign contributors would have a greater incentive to donate to a 501(c)(3) than a domestic contributor would. On the contrary, a foreign contributor would likely have less need of tax deductibility in the United States.

\textsuperscript{62} \textit{Citizens United}, 130 S. Ct. at 909 (citing \textit{Buckley v. Valeo}, 424 U.S. 1, 23, 39, n.45 (1976)).

\textsuperscript{63} Tariff Act of 1894, ch. 349, § 32, 28 Stat. 556 (1894).

in the coming election who was backed by 501(c)(3) organizations.\textsuperscript{65} The ban was proposed on the floor of the senate, without the benefit of committee review.\textsuperscript{66} If the purpose of the speech restriction was to favor one candidate over the other, it shouldn’t be held so sacrosanct that the time-tested practice of tax deductibility is thrown out with it.

Tax deductibility for charities also serves several policy goals.\textsuperscript{67} Subsidizing charities encourages generosity, which helps counter the free-rider problem inherent in the public goods charities provide.\textsuperscript{68} Subsidizing charities may also change the focus of the organization in a way that increases the amount of charitable work provided. For example, Jill Horwitz found that not-for-profit hospitals were more likely to offer unprofitable services than for-profit hospitals.\textsuperscript{69} Eliminating tax breaks for charities because we are afraid of what they might say would set back all of these policies, subjecting them further to the market failures the tax breaks were designed to mitigate.

B. Flooding the 501(c)(3) Form

One concern with allowing 501(c)(3) organizations to speak while retaining their tax deductibility is that many other groups may begin to organize themselves under 501(c)(3) just for tax deductibility. This is a danger, but it will be mitigated by the other restrictions in 26 U.S.C. 501(c)(3), and can be eliminated by new legislation.

This concern is alleviated by the other restraints on 501(c)(3) organizations. They must be “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals.”\textsuperscript{70} Because this substantially limits the range of organizations that could fit within this description, the use of the 501(c)(3) form will be somewhat limited.\textsuperscript{71}

In addition, Congress could create a framework to increase tax advantages for charitable activities, rather than for charitable organizations. The law already makes analogous

\textsuperscript{65} See generally Hopkins, supra note 6, at 678.
\textsuperscript{66} 100 Cong. Rec. 9604 (1954).
\textsuperscript{69} Jill R. Horwitz, Why We Need the Independent Sector: The Behavior, Law, and Ethics of Not-For-Profit Hospitals, 50 UCLA L. Rev. 1345, 1367–68 (2003).
\textsuperscript{71} There is also a limitation that “no part of the net earnings” of the 501(c)(3) organization “inures to the benefit of any private shareholder or individual.” 26 U.S.C. § 501(c)(3). This will probably not pose any real barrier though, because for profit organizations can create separate 501(c)(3) entities, donate to them for tax deductions, then speak through them. It is also worth noting that the phrase “inures to the benefit of” probably cannot be construed to encompass granting a tax deduction to an individual because the structure of the statute is designed to provide this tax deductibility, so no organization could qualify.
distinctions,\textsuperscript{72} though admittedly the issue becomes more difficult when dealing with religious charities.\textsuperscript{73}

\section{501(c)(3) Organizations and Religion}

Because religious groups are often organized as 501(c)(3) organizations, a number of commentators have considered whether tax deductibility violates the Establishment Clause.\textsuperscript{74} Other commentators have asked whether these speech restrictions violate the Free Exercise Clause.\textsuperscript{75} Because so much has already been said on these topics, I will only briefly discuss the most relevant case, \textit{Walz v. Tax Commission of the City of New York}.\textsuperscript{76} For further depth, I recommend the articles cited above.

In \textit{Walz v. Tax Commission of the City of New York} the plaintiff argued that exempting religious organizations from paying property tax violated the Establishment Clause.\textsuperscript{77} The Court recognized the difficulty of reconciling the Establishment Clause with the Free Exercise Clause, “both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.”\textsuperscript{78} Because of this difficulty, the court found that the “First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State.”\textsuperscript{79} The Court then made a laundry list of subsidies that flow from the government to churches, including exemption from or reduction in federal income tax, state income tax, property tax, clergy income and housing taxes, tax deductibility, and tax credits for educational expenses at religious schools.\textsuperscript{80}

The Court held that the property tax exemptions were a “reasonable and balanced” attempt to guard against religious intolerance.\textsuperscript{81} The Court also found that the purpose of the exemption was “neither the advancement nor the inhibition of religion,” finding it relevant that the exemption did not “single[] out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of

\textsuperscript{73} See \textit{Walz v. Tax Comm'n of New York}, 397 U.S. 664, 674 (1970). (“To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize.”)
\textsuperscript{76} 397 U.S. 664 (1970).
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.} at 669.
\textsuperscript{79} \textit{Id.} at 669 (internal citations and quotations omitted).
\textsuperscript{80} \textit{Id.} at 670–72.
\textsuperscript{81} “Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms-economic, political, and sometimes harshly oppressive. Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers.” \textit{Id.} at 673.
property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.”

Walz holds that lifting the speech restriction against 501(c)(3) organizations while retaining tax deductibility would not violate the Establishment Clause. Walz explained that:

Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs amici, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right. No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.

The Court found no distinction between speech by individuals or religions before concluding that the property tax exemption was constitutional. Tax exemptions are different from tax deductibility only by degree. So lifting the speech restriction against 501(c)(3) organizations while retaining tax deductibility would only change the degree of the subsidy, which is within Congress’s power.

There is also no reason to suspect that the other concerns found in Walz, such as singling out religion from other nonprofits, would be present.

Because the change is merely a change of degree within the providence of Congress, and no additional concerns mentioned in Walz are present, lifting the speech restrictions against 501(c)(3) organizations is unlikely to violate the Establishment Clause.

CONCLUSION

“The worth of speech ‘does not depend upon the identity of its source.’” For profit corporations can already speak. Overturning Regan would merely recognize that speech from the heart is as valuable as speech from the wallet.

Because the restrictions on political speech were premised on assumptions the Court rejected in Citizens United, Regan is abrogated and 501(c)(3) organizations have the right to fully engage in political speech.

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82 Id. at 672–73.
83 Id. at 670.
84 Regan, 461 U.S. at 544.
85 Tax exemptions and deductions are “a matter of grace that Congress.” Id. at 549.