ARTICLES

WHEN STATUTORY REGIMES COLLIDE:
WILL CITIZENS UNITED AND WISCONSIN RIGHT TO LIFE MAKE
FEDERAL TAX REGULATION OF CAMPAIGN ACTIVITY
UNCONSTITUTIONAL?

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ABSTRACT

In Citizens United v. Federal Elections Commission (2010) and Federal Election Commission v. Wisconsin Right to Life (2007), the Supreme Court dramatically reduced the ability of Congress to regulate campaign finance activities of corporations and others active in elections. Many of the same activities are still subject to restrictions imposed by the Internal Revenue Code, and the tax code’s restrictions are considerably more intrusive than what is permitted under campaign finance law. For example, section 501(c)(3) charitable organizations are not permitted to engage in any campaign activity, and the definition of campaign activity for tax code purposes is much broader than it is for campaign finance law purposes. Many nonprofit organizations involved in election-related activities are thus subject to two different and sometimes conflicting legal standards regulating their election-related activities.

This Article analyzes recent campaign finance decisions that have enlarged the area of protected political speech to determine how, if at all, the Roberts Court’s campaign finance jurisprudence is likely to alter existing tax law jurisprudence in the area of election activity. For the most part, tax law jurisprudence has developed independently of other areas of First Amendment law. Based upon an analysis of the distinctive tax law constitutional doctrines, the Article concludes that the tax law prohibition against section 501(c)(3) charities engaging in campaigns is likely to withstand constitutional challenges seeking to import the campaign finance First Amendment standard to invalidate the tax law restrictions. The Article also concludes that an overbreadth challenge is likely to fail. There is some possibility that the tax law prohibition is vulnerable to constitutional attack under traditional doctrines of vagueness because the terms of the tax law provisions, as these have been elaborated to date, are not sufficiently precise. However, what will transpire in the coming years is more likely to be a function of the degree of activism of the Roberts Court than an application of existing constitutional jurisprudence.

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INTRODUCTION

Since John G. Roberts became Chief Justice, the Supreme Court has repeatedly been accused of judicial activism. Among other rea-

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1 See Press Release, U.S. Senator Sheldon Whitehouse, Senate Judiciary Meeting on the Nomination of Solicitor General Elena Kagan to Be an Associate Justice of the Supreme Court (Jul. 20, 2010), available at http://whitehouse.senate.gov/newsroom/press/release/?id=20C66640-20C3-4B3E-8959-AA302211486F (arguing that the Roberts Court’s numerous 5-4 decisions are evidence of judicial activism because they reflect the Court’s unwillingness to narrow its holdings to achieve broader consensus); see also Erwin Chemerinsky, Conservatives Embrace Judicial Activism in Campaign Finance Ruling, L.A. TIMES, Jan. 22, 2010, at A29 (arguing that conservative justices on the Roberts Court “are happy to be activists when it serves their ideological agenda”); Simon Lazarus, The Most Activist Court: How progressives should think about and respond to the assaults of the Roberts Court, AMER. PROSPECT (June 29, 2007), http://www.prospect.org/cs/articles/article=the_most_activist_court (characterizing the Roberts Court as an “activist enterprise”); Dan Rad-
sons, the Roberts Court has expressly overturned earlier decisions in numerous areas of the law, and it has arguably overturned earlier decisions in numerous other cases.

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Whether the Roberts Court’s decisions are actually more activist than those of earlier Supreme Courts is a topic that warrants serious debate. In the area of political speech, however, the record is clear that the Court does not feel bound to defer to Congressional judgments and judicial precedents. Citizens United v. Federal Election Com-

\[\text{\footnotesize\textsuperscript{1}}\text{\footnotesize\textsuperscript{4}}\]

citizenship challenges involving exclusive as against inclusive race-conscious policies); FEC v. Wis. Right to Life, Inc. (WRTL), 551 U.S. 449, 483–84, 504 (2007) (overruling, according to seven of the Justices, one of the core holdings of McConnell v. FEC, 540 U.S. 93 (2003)); see also infra note 135 and accompanying text. Several commentators have also argued that the Roberts Court has tacitly or stealthily overruled precedents. See, e.g., Civil Rights Under Fire: Recent Supreme Court Decisions: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. 83 (2009) (testimony of Dahlia Lithwick, Senior Editor, Slate Magazine) (“I think it is no longer a matter of any real scholarly dispute that the current U.S. Supreme Court has worked hard in some ways to roll back what some conservatives have seen as the worst excesses of the Warren court era . . . . But I want to point out that more frequently it happens very un-dramatically in a series of feints and legal pirouettes . . . .”); Barry Friedman, The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona), 99 GEO. L.J. 1, 4 (2010) (discussing why the Court “would choose to overrule by stealth, rather than overtly, [and] the effects of [it] choosing to do so”); Richard L. Hasen, Beyond Incoherence: The Roberts Court’s Deregulatory Turn in FEC v. Wisconsin Right to Life, 92 MINN. L. REV. 1064, 1065 (2008) (arguing that “Chief Justice Roberts and Justice Alito have made . . . deregulatory moves without expressly overturning existing precedent”); ALLIANCE FOR JUSTICE, THE ROBERTS COURT’S RECORD OF OVERREACHING, 2–3 (2010), http://www.afj.org/connect-with-the-issues/the-corporate-court/roberts-court-overreach-memo.pdf (last visited Mar. 27, 2011) (arguing that the Roberts Court has overstepped its boundaries by “answering questions not presented to the Court,” and “deciding factual issues more properly reviewed and decided by lower courts”); see also Laura Krugman Ray, The Style of a Skeptic: The Opinions of Chief Justice Roberts, 85 IND. L.J. 997, 1033 (2008) (noting U.S. Supreme Court decisions that “tend[] to undermine, though not expressly overrule, Court precedents”); Nina Totenberg, The Roberts Court and the Role of Precedent, NATION (July 3, 2007), http://www.npr.org/templates/story/story.php?storyId=1168820 (“Although [Justices] Roberts and Alito both promised at their confirmation hearings to honor precedent whenever possible, in their first full term together, they effectively reversed a number of key precedents.”).

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It is possible, however, that the Court has acquired this reputation because of the contrast between the Chief Justice’s claim, during his nomination hearings, that he would judge as an umpire calling balls and strikes, not as a legislator, and the perception of some that he has been especially aggressive in his rulings. See Editorial, The Court’s Aggressive Term, N.Y. TIMES, Jul. 5, 2010, at A16 (“In the most recent term, even more than in earlier years, the Roberts court [sic] demonstrated its determination to act aggressively to undo aspects of law it found wanting, no matter the cost.”); Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States: Hearing Before the Senate Comm. on the Judiciary, 109th Cong. 56 (Sept. 13, 2005) (statement of John G. Roberts, nominee for Chief Justice of the United States Supreme Court), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:25539.pdf (last visited Mar. 27, 2011). But see Erwin Chemerinsky, An Overview of the October 2006 Supreme Court Term, 25 Touro L. REV. 751, 734–738 (2008) (arguing that the Court was conservative in the 2006–07 term).
mission is Exhibit A for this proposition, although the Roberts Court’s non-deferential approach can be seen in earlier political speech cases such as Federal Election Commission v. Wisconsin Right to Life, Inc. and Davis v. Federal Election Commission. Certainly Citizens United is the most dramatic instance of judicial activism by the Roberts Court involving political speech because the majority overruled two earlier Supreme Court decisions, invalidated a federal law of long-standing, and, by implication, invalidated parallel state campaign finance provisions in at least 24 states.

In addition to their immediate and direct effect on the content of federal campaign finance regulation, these decisions strengthening First Amendment protection for political speech have called into question the validity of the Internal Revenue Code’s regulation of political campaign activity. In particular, the campaign activities of nonprofit organizations are subject to federal tax law (the “Code”) as well as federal campaign finance regulation (the Federal Election Campaign Act or “FECA”). The provisions of these two statutory

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5 See supra note 2. This theme is the focus of Justice Stevens’ dissent in Citizens United. 130 S. Ct. at 929 et seq.


10 In the Internal Revenue Code, nonprofits are referred to as “exempt organizations.” See I.R.C. § 501(c) (2006). The two terms are not interchangeable, however. Nonprofit status is conferred under state law, and not all state law nonprofits qualify as exempt organizations under federal tax law. Nonetheless, for the sake of brevity, this Article sometimes uses the term “nonprofit” to mean “exempt organization.”

11 All references to the Code are to the Internal Revenue Code of 1954, as amended (the “Code”). Throughout this article, references to “tax law” refer to the federal income tax provisions in the Code and the associated regulations and administrative authorities, unless otherwise noted.

regimes are very different, so that a specific campaign-related activity engaged in by a nonprofit may be subject to campaign finance restrictions under FECA, but not subject to tax law restrictions under the Code, or the reverse. Alternatively, both statutes may regulate the scope or manner of a specific kind of campaign related activity, but to different degrees or in different ways. Ultimately these differences can be traced to the fact that the two statutory regimes have been enacted to further different public purposes. That the two regimes are administered and enforced by different agencies, with differing missions, powers, and histories, creates additional layers of complexity.

The Code’s restrictions on campaign activity, which apply primarily to exempt organizations, extend to a wider range of election related activities than is considered constitutional under federal election law. As a result, these restrictions are usually regarded by the regulated organizations as more intrusive than FECA restrictions. It is not surprising, then, that in 2009, lawsuits were filed challenging, inter alia, the constitutionality of the tax law restrictions as they apply to a 501(c)(3) organization and a 501(c)(4) group. The plaintiffs in

13 In this Article, the phrase “statutory regime” includes the rules created by the statute combined with the implementing regulations and administrative decisions and pronouncements, as these have been interpreted by the relevant agencies and the courts.

14 See Lloyd H. Mayer, The Much Maligned 527 and Institutional Choice, 87 B.U. L. Rev. 625, 627 (2007) (arguing that “Congress’ current approach to regulating 527s will almost certainly result in a confusing and ineffective legal regime,” discussing a “framework for evaluating which of two bodies of law is best suited to regulate a particular set of activities,” and proposing “specific changes to how Congress has and continues to approach the regulation of political activity and 527s”); see also Elizabeth Kingsley & John Pomeranz, A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations, 31 WM. MITCHELL L. REV. 55, 58–59 (2004) (responding to efforts by campaign finance reformers to import tax law standards into campaign finance law by arguing that the different purposes of the two regimes would make such endeavors unwise).

15 See infra Part I.A. The definition of campaign activity is also important for sections 162(e), 271, 276, and 527 of the Code.

16 See infra Part I.

17 See Complaint, Christian Coal. of Fla., Inc. v. United States, No. 5:09-cv-144-Oc-10GRJ, 2010 WL 3061800 (M.D. Fla. Aug. 3, 2010) [hereinafter Complaint, Christian Coal] (dismissing the challenge to restrictions as applied to a 501(c)(4) group); Complaint, Catholic Answers, Inc. v. United States, No. 09-cv-670-EG (AJB), 2009 U.S. Dist. LEXIS 96070 (S.D. Cal. Oct. 14, 2009) (dismissing the challenge to restrictions as applied to a 501(c)(3) group) [hereinafter Complaint, Catholic Answers]. Both complaints assert that the tax provisions are unconstitutionally vague and overbroad. Both also rely upon Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1039 (D.C. Cir. 1980), which holds that the definition of “educational” in an IRS regulation lacked sufficient specificity to be constitutional. For the trial court decisions, see Christian Coal., 2010 WL 3061800; Catholic Answers, 2009 WL 3320498.
these cases relied, in part, on the First Amendment standard announced in the campaign finance context in Wisconsin Right to Life.\(^\text{18}\)

To date, the constitutionality of the tax restrictions on political activity has been adjudicated only once. In *Branch Ministries v. Rossotti*, a decision involving a church that placed political ads in two national newspapers on the eve of the 1992 presidential election, the United States Court of Appeals for the District of Columbia Circuit upheld the tax law political prohibition for 501(c)(3) organizations in the face of both free speech and free exercise challenges.\(^\text{19}\)

It is thus likely that in the next few years, the Supreme Court will be asked to address the constitutionality of the tax law restrictions on campaign activity. This Article examines whether the constitutional law doctrine developed in response to campaign finance restrictions on political speech should be applied to the parallel restrictions on the same type of speech imposed by tax law. The Article focuses on the prohibition preventing section 501(c)(3) organizations from undertaking political campaign activity, although much of the analysis would also apply to the less restrictive limitations on the campaign activities of other groups described in section 501(c).

Parts I–III discuss three critical areas in which the campaign finance regime and the federal tax regime can produce inconsistent results for nonprofits active during political campaigns: (1) the categories of election related activity that may be restricted, (2) the proper method for agencies to use to determine if a group’s activities have violated their restrictions, and (3) the level of scrutiny a court will employ to determine if a restriction violates constitutional norms.

These three areas were central to the reasoning in *Wisconsin Right to Life and Citizens United*, and they will undoubtedly provide the framework for determining the constitutionality of the restrictions on political campaign activity contained in tax law.

Part IV.A analyzes how the traditional tax constitutional doctrines discussed in Parts I–III are likely to be applied to the political prohibition preventing 501(c)(3) organizations from participating in political campaigns. I conclude that it would be inappropriate to import

\(^{18}\) See *Complaint, ChristianCoal*, supra note 17, at ¶ 64; *Complaint, Catholic Answers*, supra note 17, at ¶ 31.

\(^{19}\) *Branch Ministries v. Rossotti*, 211 F.3d 137, 139 (D.C. Cir. 2000) (affirming the district court’s grant of summary judgment to the IRS). *See infra* notes 154 and 168 and accompanying text. For the free exercise claim, see *Branch Ministries*, 211 F.3d at 142–43; for the free speech claim, see *id.* at 143–44. *See also* *Branch Ministries, Inc. v. Rossotti*, 40 F. Supp. 2d 15, 26–27 (D.D.C. 1999) (the trial court decision). The Supreme Court upheld tax law restrictions on lobbying by charities in *Regan v. Taxation with Representation of Washington (TWR)*, 461 U.S. 540, 550–51 (1983).
the campaign finance First Amendment standards developed by Citizens United and Wisconsin Right to Life into tax law First Amendment jurisprudence because the constitutional principles underlying the two spheres of constitutional law are fundamentally different, permitting more intrusive regulation by the tax code than by FECA.

Part IV.B then analyzes the political prohibition in light of the “rational relation” test endorsed by tax law jurisprudence in comparable situations and concludes that the prohibition’s purpose and the means chosen to achieve that purpose are likely to pass constitutional muster. The rational relation test is appropriate because existing tax law precedents make clear that the impact of the political prohibition on exempt organizations will not be deemed a burden as a matter of constitutional law. This is the case even if the organizations in question will suffer economically from a loss of revenues if they forgo tax exemption in order to be involved in political campaigns. Thus, the political prohibition should survive challenge unless the Supreme Court uses the occasion to consider overruling the established tax law precedents. Such a possibility is real because of the Roberts Court’s “deregulatory” turn in the area of campaign finance.\footnote{See Hasen, supra note 8, at 585 (“[T]he Court’s jurisprudence, while certainly shifting toward a deregulatory direction, may not move to complete deregulation unless the Court is willing to endure continued public backlash.”).}

Part IV.C examines the possibility that the political prohibition may be deemed unconstitutional because of overbreadth or vagueness. I conclude that the overbreadth claim will not succeed because it presupposes the very doctrine that it seeks to prove. The vagueness claim is stronger because of the relative lack of precision in the terms of the prohibition and the authorities elaborating its meaning. This Part concludes that the Supreme Court might examine this question using a form of heightened scrutiny and that, in such an event, the outcome is less certain than the outcome of the previous inquiries. Thus, although it seems that the balance of authorities favors upholding the political prohibition in the tax code despite the dramatic changes made by the recent campaign finance cases, some ambiguity remains as to its constitutionality using existing tax doctrines. In the event that the prohibition is invalidated on vagueness grounds, the Internal Revenue Service will have to elaborate the terms of the prohibition in greater detail in precedential guidance before the existing regulatory regime could be reinstated.
I. THE COMPETING REGIMES: CATEGORIES OR ELECTION RELATED ACTIVITY SUBJECT TO GOVERNMENT REGULATION

A. The Expansive Tax Law Approach

Since 1954, the Internal Revenue Code has prohibited charities from participating or intervening in political campaigns. According to the statute, publishing and distributing statements count as intervention, and activity taken in opposition to a candidate counts to the same degree as activity in support of a candidate. The implementing Treasury regulations add that the prohibition applies to indirect as well as direct political participation. The political prohibition was added to the description of charitable entities in 1954 as a result of a floor amendment proposed by then Senator Lyndon Johnson. Although the legislative history of the 1954 enactment is silent as to the immediate reason for enacting the provision, political activities of

21 “Charities” is shorthand for organizations described in section 501(c)(3) of the Code and exempt from federal income tax because of their educational, religious, scientific, and other activities specified in the Code.


23 Id. Until 1987, the statute did not contain the phrase “or in opposition to.” See Omnibus Budget Reconciliation Act of 1987, Pub. L. 100–203, 101 Stat. 1330–464, § 10711 (1987). However, campaign activity was always understood to include both support and opposition to a candidate for public office.


25 See H.R. 7835, 73d Cong. §§ 101(6), 406 (1934). Only the lobbying limitation was enacted into law in 1934. ROBERT B. BURDETTE, MARIE B. MORRIS & THOMAS B. RIPY, CONG. RESEARCH SERV., 87–298 A, TAX-EXEMPT ORGANIZATIONS: LOBBYING AND POLITICAL ACTIVITY 3 (1987). A provision limiting charities’ participation in “partisan politics” was approved by the Senate in 1934 at the same time as the provision limiting the lobbying permissible for charities was enacted, but the political participation provision was not enacted into law, and it is unclear why it was dropped. Both provisions may have been inspired by an earlier court decision stating that “political agitation” should not be paid for by “public subvention.” See v. Comm’r, 42 F.2d 184, 185 (2d Cir. 1930). For theories regarding the origin of Johnson’s amendment, see generally Deirdre D. Hallo-ran & Kevin M. Kearney, Federal Tax Code Restrictions on Church Political Activity, 38 CATH. LAW. 105, 106–08 (1998); Oliver A. Houck, On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations under the Internal Revenue Code and Related Laws, 69 BROOK. L. REV. 1, 23–29 (2003); Chris Kemmitt, RFR, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere, 43 HARV. J. ON LEGIS. 145, 152–53 (2006); Patrick L. O’Daniel, More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches, 42 B.C.L. Rev. 733, 746–67 (2001); infra note 26.
charities had been the subject of Congressional hearings and proposals several times in the previous decades.\textsuperscript{26}

In contrast to charities, organizations described in other subsections of section 501(c) are permitted to participate or intervene in political campaigns. These include social welfare and civic organizations described in section 501(c)(4), labor organizations described in section 501(c)(5), and trade associations and chambers of commerce described in section 501(c)(6).\textsuperscript{27} Such organizations, however, must be primarily engaged in promoting the mission that is the basis of their respective exemptions. Campaign activities are not considered to promote an exempt purpose for any subsection of section 501(c).\textsuperscript{28} Thus, 501(c) organizations other than charities are permitted to engage in campaign activities, but if these become extensive enough, they can undermine an organization’s claim to be devoted primarily to its exempt purpose. Moreover, private benefit and certain commercial transactions, if any exist, must be aggregated with the group’s campaign intervention to determine if the group is organized and operating primarily for its exempt purpose.\textsuperscript{29} In addition to these li-

\textsuperscript{26} See Ann M. Murphy, Campaign Signs and the Collection Plate—Never the Twain Shall Meet?, 1 PIT. TAX REV. 35, 45–53 (2003) (discussing the impetus behind the enactment of the provision prohibiting tax-exempt organizations from engaging in political activities and the enactment of the House Select Committee which was meant to ascertain whether these organizations were influenced by Communists and were not engaged in politics); Roger C. Colinvaux, Citizens United and the Political Speech of Charities 5–10 (Dec. 17, 2010) (unpublished draft), available at http://ssrn.com/abstract=1726407.


\textsuperscript{28} See Treas. Reg. § 1.501(c)(4)–1(a)(2)(ii) (“The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.”); I.R.S. Gen. Couns. Mem. 36,286, 1975 GCM Lexis 391 (May 22, 1975) (“[T]he exemption of a labor organization . . . will not be affected by its participation in political activities of the nature described in its submission provided that its primary purposes and activities still entitle it to such exemption.”); IRS, Fact Sheet 97–8, supra note 27 (“Charities exempt from tax . . . and eligible to receive tax deductible charitable contributions may devote no more than an insubstantial amount of their overall activities attempting to influence legislation . . . .”). In contrast, campaign activities are the core of the exempt purpose of section 527 groups. See I.R.C. § 527(e) (2006) (defining a political organization that is “operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.”).

\textsuperscript{29} The “primarily” standard is undefined and controversial. When litigating against social welfare organizations, the IRS has repeatedly argued that the “primarily” standard means that a group’s non-social welfare activities cannot be “substantial.” See Vision Servs. Plan v. United States, 2006–1 T.C. ¶ 50,173, aff’d 2008–1 T.C. ¶ 50,160, cert. denied 129 S. Ct. 898 (2009); Brief for the United States in Opposition to the Petition for a Writ of Certiorari at 8, Vision Serv. Plan, Inc. v. United States, 2008–1 T.C. ¶ 50,160 (2008) (No. 08–164) (arguing that “a single nonexempt purpose, if substantial in nature, renders an organization ineligible for tax-exempt status”). At least one official of the IRS has stated
mitations, such organizations may also be subject to a tax calculated using the dollar amount of their campaign expenditures as a base. 30

Thus, all 501(c) exempt organizations are subject to restrictions on their campaign activity. Because the Code and the implementing Treasury regulations do not elaborate which election-related activities qualify as participating or intervening in political campaigns, the meaning of these terms must be derived from various Revenue Rulings, numerous other administrative pronouncements, and a few court cases. 31 These authorities elaborate an expansive view of the types of election related activities that are subject to the tax law restrictions. In addition to the obvious culprits, such as communicating or funding a message that expressly endorses a specific candidate or

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30 See I.R.C. § 527(f)(1) (2006). Section 527(f)(1) provides that the tax will be assessed on the lesser of the amount of a group’s campaign expenditures or its net investment income. Groups with little net investment income will thus have relatively little tax exposure no matter how much they spend on campaign activities.

contributing money to a candidate’s campaign, the Service also classifies as campaign intervention all activities that support or oppose a candidate for office or otherwise intervene in an election, indirectly as well as directly. For example, for IRS purposes, running a pre-election television ad that disparages a candidate’s character and denies her fitness for elected public office will be considered campaign intervention. Less obviously, the New York City Bar Association’s nonpartisan rating of candidates running for election as judge disqualifed it from receiving exempt status as a 501(c)(3) organization. Despite the fact that it often gave multiple competing candidates the same highest rating and political party played no role in its evaluations, the Service determined that the Bar Association’s act of rating candidates for elective office constituted intervention in a political campaign.

The IRS may find a candidate debate that includes all the candidates for a particular office nonpartisan and thus not subject to these restrictions. The debate may, however, be classified as campaign activity if the content of the questions, the format of the debate, or anything else appears to favor or disfavor one candidate in comparison to the others. Similarly, a 501(c)(3) organization may invite candidates to speak at group functions, but only if it invites competing candidates to functions of comparable importance to the host group. This limitation does not apply, however, if a candidate

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32 See Ass’n of the Bar of the City of New York v. Comm’r, 858 F.2d 876, 881 (2d Cir. 1988), cert. denied, 490 U.S. 1030 (1989) (“In pursuing this activity, the Association falls clearly within the definition of an ‘action’ organization, i.e., one that ‘participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.’” (internal citation omitted) (emphases in original)).

33 See id. at 880–82.

34 It is unnecessary to include all candidates in all instances, however. See Judith E. Kindell & John F. Reilly, Election Year Issues, in IRS, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FY 2002, at 335, 374 (2001) [hereinafter 2002 CPE], available at http://moritz.law.osu.edu/electionlaw/ebook/part3/documents/electionyearissues.pdf (“Many times, the number of legally qualified candidates for a particular office is so large that an IRC 501(c)(3) organization may determine that holding a debate to which all legally qualified candidates were invited would be impractical and would not further the educational purposes of the organization.”).


36 See 2002 CPE, supra note 34, at 381 (“An IRC 501(c)(3) organization that invites one candidate to speak at its main banquet of the year and invites an opposing candidate to speak at a sparsely attended general meeting will likely be found to have violated the political
is invited to a group’s function in a capacity other than as a candidate, e.g., as a spokesperson for a particular issue of interest to the group’s members. For example, an environmental group could have invited Al Gore to speak to its members in the weeks before the 2000 presidential election, even though he was a candidate for President, as long as no mention was made of the election, no money was raised for Gore’s campaign, and there were no endorsements of his candidacy. Questionnaires sent to candidates and disseminated to voters or the publication of voting records may be nonpartisan or they may evidence bias and constitute prohibited campaign activity. Bias, according to the Service, can be inferred by the narrowness of the subjects covered, the timing of the distribution, or the extent of the distribution as well as by editorial content.

In short, under the tax law, diverse activities and communications—none of which is an express endorsement of one or more candidates for public office—may constitute political intervention of the kind prohibited to 501(c)(3) organizations and subject to restrictions in the case of groups exempt under other subsections of 501(c).

B. The Minimalist Campaign Finance Law Approach

Traditionally, the three main types of federal campaign finance regulation were disclosure rules (primarily registration and reporting rules); limitations on the amount that individuals and entities can contribute in a year or election cycle to candidates and parties or to their committees (the “amount” rules); and prohibitions on corporations and unions spending money from their general funds for certain types of election related speech (the “source” rules). In 2010, in Citizens United, the Supreme Court invalidated the source rules for expenditures made by corporations (and, by implication, for unions)
as long as they act independently of candidates, parties, and their committees. However, the Court upheld the disclosure rules applicable to independent corporate expenditures, and it did not address the validity of the rules preventing corporations and unions from making political contributions.

The categories of campaign activity subject to regulation by FECA are for the most part precisely and narrowly defined, a fact usually explained in terms of First Amendment considerations. Specifically, the Supreme Court takes the view that campaign-related speech is core political speech that is protected by the First Amendment of the Constitution and essential to the successful working of democratic processes. When such speech is burdened by regulation, the government must justify its action by demonstrating a sufficiently strong state interest and persuading the Court that the restrictions imposed are designed to accomplish that interest in a fashion no broader than the applicable constitutional standard permits.

As elaborated by the courts, the First Amendment protection of political speech permits campaign finance regulations designed to prevent corruption or the appearance of corruption in elections, but not to equalize the resources available to different participants in the political process. Although burdensome to some degree, campaign contributions may be regulated by FECA because they involve transfers made directly to candidates or parties. Thus, they are most likely to leave the recipients feeling indebted to donors and to create occa-

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39 See Citizens United v. FEC, 130 S. Ct. 876, 913 (2010). However, if corporations or unions coordinate their actions with candidates or campaigns, the expenditures will be treated as campaign contributions and subject to the rules for contributions.

40 The Court applied two distinct levels of heightened scrutiny, depending upon the type of campaign activity involved and the degree to which the speaker’s speech is burdened. See Citizens United, 130 S. Ct. at 915–17. These are discussed infra Part III.

41 See Davis v. FEC, 128 S. Ct. at 2773–74 (endorsing this view and citing earlier decisions and dissents to the same effect).

42 See Buckley v. Valeo, 424 U.S. 1, 25–28 (1976) (per curiam) (requiring that the state “employ[] means closely drawn to avoid unnecessary abridgement of associational freedoms”); United States v. Auto. Workers, 352 U.S. 567, 577–78 (1957) (quoting a Senator stating that large contributions make political parties feel obligated to the donors). In this section of the article, I associate gratitude, influence, and access with corruption. This is the approach taken by the Supreme Court until recently. In Citizens United, however, the majority claimed that only quid pro quo corruption constitutes corruption for campaign finance law purposes. The Court’s claim, however, does not comport with the precedents. See the discussion infra notes 127–138 and accompanying text.

43 Buckley, 424 U.S. at 48 (stating that “[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy . . . .”).
sions for corruption. In contrast, funds spent by people or organizations independent of a campaign are subject to the least amount of regulation. According to the Supreme Court in *Buckley*, the reason is that, if the individual or group paying for a political communication during a campaign acts independently of a candidate or political party, the risk of corruption is less likely than the risk is with campaign contributions; in the former case, the candidate and party will not control the timing or content of the communication and might even find it unhelpful. The assumption seems to be that a candidate’s lack of control of the activity reduces the likelihood of the candidate feeling gratitude toward the one who makes the expenditure, even if the result is helpful to the campaign.

The threat of corruption is nonetheless seen as real when independent expenditures are made to endorse a specific candidate, de-

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44 See *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208 (1982) (discussing how “large financial contributions” create “political debts” and pose the risk of corruption). Regulation of campaign contributions is also permitted, according to the Supreme Court, because such regulation is only minimally burdensome. *See Buckley*, 424 U.S. at 20–21. In 2006, however, the Court found certain contribution limits so low that they constituted a violation of the First Amendment. *See Randall v. Sorrell*, 548 U.S. 230, 248–59 (2006).

45 *Buckley*, 424 U.S. at 47 (explaining that “independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive.”).

spite their independence from candidates and parties, presumably because express endorsements are likely, or would appear likely, to be made in exchange for favors or to make the candidate feel beholden to the source of funds spent so visibly on his or her behalf. As a consequence, although it struck down dollar limits on independent expenditures, the Buckley Court upheld FECA’s independent expenditure disclosure rules “to achieve through publicity the maximum deterrence to corruption and undue influence possible” in addition to disclosure’s role in providing voters with information about sources of candidates’ funding.

If individuals or groups coordinate their activities with candidates, political parties, or their committees, the possibility of corruption or the appearance of corruption is treated by campaign finance law the same as if the funds were actually contributed to those who benefit because coordinated actions are likely to create, or appear to create, political debt to the same degree as direct

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47 See Buckley, 424 U.S. at 27–28, 45 (indicating that government concerns about “preventing corruption and the appearance of corruption” are insufficient to justify limitations on independent expenditures). The Court does not categorically declare this to be the case, and its holding only assumes the proposition’s validity arguendo. But this is the clear implication of the Court's comment that expenditure caps limited to express advocacy would leave a “loophole” for those seeking to exert “improper influence” on a candidate through large expenditures of money. Id. at 45. The Buckley Court’s prediction, of course, has proved correct. Further, it is common for those who make contributions or expenditures classified as “independent” under FECA to have significant ties to the candidates or parties they are supporting. See, e.g., McConnell v. FEC, 540 U.S. 152, 153–54 (2003) (noting, as a matter of law, Congress’s concern that access to a candidate can be “sold” even by a group independent of the candidate and his or her campaign); id., at 156 n.51 (stating that the close relationship between “federal officeholders and the state and local committees of their parties . . . makes state and local parties effective conduits for donors desiring to corrupt federal candidates and officeholders”); SpeechNow.org v. FEC, 567 F. Supp. 2d 70, 75 (D.D.C. 2008) (noting the “close relationships between party operatives and the persons running prominent 527 organizations (who were in some instances one and the same),” although they did not “violate the letter of the law on independence and non-coordination”). On appeal, this decision was reversed in part and affirmed in part. See SpeechNow.org v. FEC, 599 F.3d 686, 689 (D.C. Cir. 2010); cert. denied, 79 U.S.L.W. 3268.

48 Buckley, 424 U.S. at 76; see also FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 458–65 (2001) (arguing that party expenditures coordinated with candidates or their committees can be used to circumvent contribution limits and can thus be constitutionally regulated to prevent corruption). At the time these cases were decided, only individuals could make unlimited independent expenditures for communications expressly advocating the election or defeat of a candidate. Corporations were prohibited from making such expenditures. See 2 U.S.C. § 441b(b) (2006) (prohibiting contributions by corporations and labor organizations). Citizens United overturned that prohibition. 130 S. Ct. 876, 913 (2010).
contributions. Implicit in these rulings is the view that feelings of being beholden to a contributor, or political debt, are the petri dish in which corruption, or the appearance of corruption, can flourish. In contrast to the Buckley decision, Kennedy’s opinion in Citizens United made a point of emphasizing the informational value of disclosure to the exclusion of its role in deterring corruption. This may be due to the Citizens United majority’s desire, described below, to place new limits on the meaning of corruption for campaign finance purposes, which is discussed in Part III.

Until the Citizens United decision was handed down, FECA’s “source” rules prohibited corporations and labor organizations from spending money from their corporate or union general treasuries on express advocacy or electioneering communications. The provision reflected the view that potentially unlimited revenues from commercial enterprises and unions should not be permitted to fund partisan campaigns. Such entities were, however, free to spend unlimited amounts of money from their general treasuries for all election-related communications and activities other than express advocacy or electioneering communications.

The force of the general treasury funding restrictions was narrowed considerably in 2007 by Wisconsin Right to Life, and invalidated

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49 See Buckley, 424 U.S. at 46–47 (discussing “disguised contributions”).
50 See Citizens United, 130 S. Ct. at 914 (referring only to the first of Buckley’s three justifications for disclosure); id. at 915–16 (stating that the Court will not examine “the Government’s other asserted interests” because the informational function alone justifies the disclosure provision). There is nothing in the Buckley passage to suggest that the Buckley Court considered each of the three justifications listed to provide sufficient justification for the burden imposed by disclosure rules. See supra note 47–49 and accompanying text.
51 Infra Part III. B.
52 See 2 U.S.C. § 441b(a), (b)(2) (2006). For the original meaning of the technical term “electioneering communications,” see infra note 70. Buckley, 424 U.S. at 43–44, appeared to assume the validity of the source rules for express advocacy, as did FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 249 (1986), and FEC v. Beaumont, 539 U.S. 146, 152–56 (2003). McConnell, 540 U.S. 93, 103 (2003), which upheld the electioneering communication provision against a facial challenge, and also assumed the validity of the source prohibition relating to express advocacy, as did FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 455–58 (2007), which linked the electioneering communication provision of FECA to communications that were the functional equivalent of express advocacy. The phrases “general treasury” and “general treasury funds” refer to an entity’s funds resulting from its business operations; these terms are contrasted, inter alia, with funds it raises for an affiliated political action committee (“PAC”). Wis. Right to Life, Inc., 551 U.S. at 473–74. Corporations and unions were able to fund express advocacy and electioneering communications through their PACs.
53 Wis. Right to Life, 551 U.S. at 469–70 (narrowing the meaning of “electioneering communications” to instances in which the communication is also express advocacy or its “functional equivalent”).
completely in 2010 by Citizens United.\footnote{See Citizens United, 130 S. Ct. at 876 (overruling McConnell, 540 U.S. 93 (2003), as it applied to electioneering communications, and Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990), as it applied to independent corporate spending). Many commentators had concluded that Wisconsin Right to Life effectively overruled the electioneering communication portion of McConnell. See Christopher J. Peters, Under-the-Table Overruling, 54 W. WAYNE L. REV. 1067, 1070 (2008) (stating that Wisconsin Right to Life “gutted McConnell’s conclusion” that the electioneering communication provision was not constitutionally broad); Daniel R. Ortiz, The Difference Two Justices Make: FEC v. Wisconsin Right to Life, Inc. II and the Destabilization of Campaign Finance Regulation, 1 ABLANY Gouv'T L. REV. 141, 142 (2008) (asserting that the holding in Wisconsin Right to Life II “robs the [electioneering communication] ban of any content”); Hasen, supra note 3 at 1065 (stating that Wisconsin Right to Life “mostly eviscerated” the ban on corporate and union soft money funding for pre-election sham issue ads). Seven Justices in Wisconsin Right to Life agreed that the formula articulated by the Wisconsin Right to Life plurality opinion amounted to overruling McConnell. See Wis. Right to Life, 551 U.S. at 497–98 (Scalia, J., concurring in the result), 525–28 (Souter, J., dissenting). According to Samuel Issacharoff, the Wisconsin Right to Life decision signaled that the Court was “poised once again to make a decisive move against Buckley.” Samuel Issacharoff, The Constitutional Logic of Campaign Finance Regulation, 36 PEPP. L. REV. 373, 374 (2009). So far, however, the Court has framed its actions as strengthening Buckley by overruling precedents unfaithful to Buckley’s teachings.} As a result, corporations and unions are now permitted to use the revenue accumulated from their business operations to fund express advocacy or any other kind of campaign speech. These developments not only erased the source restrictions on federal campaign financing. According to Professor Daniel Ortiz, as a practical matter, they threatened to undermine FECA’s restrictions on soft money\footnote{“Soft money” refers to contributions that can be raised without satisfying FECA’s disclosure, amount, and source rules. See McConnell, 540 U.S. at 122–23. It is also sometimes referred to as “non-federal” or “unregulated” money. Id. at 125. “Issue ads” can be paid for by “soft,”—i.e., unregulated—money, in contrast to “express advocacy,” which had to be paid for with “hard” money—i.e., money subject to FECA disclosure, amount, and source restrictions. See id. at 122–36.} as well, by casting doubt as to their constitutionality.\footnote{See Ortiz, supra note 54, at 162–63. Ortiz’s article was published after Wisconsin Right to Life was decided, but before the decision in Catholics United. Thus, he also warned that Wisconsin Right to Life effectively enabled corporations and unions to spend unlimited amounts of business revenues on everything short of express advocacy. Id. at 163.} Others agreed, and the Republican National Committee (RNC) went to court to have the FECA soft money restrictions on political parties declared unconstitutional. In Republican National Committee v. Federal Election Commission, the District Court for the District of Columbia upheld the provisions, and the Supreme Court affirmed the judgment, without an opinion, although Justices Scalia, Kennedy, and Thomas would have granted probable jurisdiction and accepted the case for oral argument.\footnote{See 130 S. Ct. 3544 (2010) (affirming without opinion 698 F. Supp. 2d 150 (D.D.C. 2010)).}
There is, then, a stark contrast between the breadth of the conception of campaign related speech subject to regulation for purposes of the federal tax law and the counterpart concept in federal campaign finance law. For campaign finance law purposes, it is unclear whether any campaign related speech that is not a political contribution or an expenditure coordinated with a candidate or a political party can be subject to regulation other than the soft money and disclosure rules. Under federal income tax law, in contrast, not only express advocacy, but any campaign related speech or other action that supports or opposes a candidate for public office, may be subject to numerous restrictions, depending on the facts and circumstances of the case.

II. ANTITHETICAL AGENCY METHODOLOGIES

A. The Tax Law Facts and Circumstances Approach

As was noted earlier, there are few bright line rules to follow to determine whether a given election-related activity falls within the tax law’s capacious understanding of political campaign activity. From the time of its earliest rulings in this area, the Service has taken the position that it will look at all the facts and circumstances surrounding an activity to determine if it is prohibited to 501(c)(3) organizations or restricted to other groups exempt under section 501(a) of the Code. Making these determinations, of course, can involve the agency in complex and nuanced examinations.

The character of the Service’s facts and circumstances test is captured by a Revenue Ruling issued in 2004. The ruling sets out six

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58 The Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. No. 107-155, 116 Stat. 81, enacted, and the McConnell Court upheld, regulation of communications funded by state parties or committees, that “support” or “oppose” candidates for federal office. See 2 U.S.C. §§ 431(20), 441b(b); McConnell, 540 U.S. at 170–71 (declining to strike down the provision and giving deference to Congress). It is uncertain whether the Supreme Court will in the future conclude that such communications are independent. See Miriam Gals-ton, Emerging Constitutional Paradigms and Justifications for Campaign Finance Regulation: The Case of 527 Groups, 95 GEO. L.J. 1181, 1210–11 (2007) (discussing the relationship between such state funded communications and coordinated expenditures).

59 Express advocacy would necessarily be classified as campaign activity for federal tax law purposes, as would contributing money to, or coordinating with, a campaign.

60 See Rev. Rul. 2004-6, 2004-1 C.B. 328. In 2007, the Service issued another ruling that collected and, in some instances restated, its positions in previously issued rulings and other administrative materials. See Rev. Rul. 2007-41, 2007-1 C.B. 1421. Rev. Rul. 2004-6 examines the “public advocacy” activities of 501(c) groups other than charities to see if they would be “exempt function” activities were they carried out by a 527 political organization. If they are, the 501(c) group may be subject to tax. See supra note 30. Because the
situations in which an organization exempt under section 501(c)(4), 501(c)(5), or 501(c)(6) funds one or more broadcast or print advertisements in the weeks preceding an election. Several additional facts are common to all six situations. In each, the nonprofit funds a communication discussing an issue of concern to the group and urges whoever hears or reads the ad to contact a named public official to urge him or her to take some action consistent with the nonprofit’s agenda, and in each, the public official is a candidate in the coming election. Thus, all the situations have numerous facts that suggest, although they do not necessitate, that the organization sponsoring the ad is attempting to influence the outcome of the election by portraying a candidate for public office as in favor of, or in opposition to, the group’s objectives.

At the same time, each situation described in the Revenue Ruling might also be interpreted as grassroots lobbying or issue advocacy, which would not be considered campaign intervention under the Code. For example, in each situation the group urges the recipients of the communication to ask the official named to fund an endeavor the group cares about, to support or veto a legislative initiative, or to oppose capital punishment. Under the tax law rules elaborated by the Service, sponsoring lobbying messages of this kind is permitted to 501(c)(3) groups up to a certain limit and is permitted to a nonprofit described in other subsections of 501(c) without any limit as long as the subject of the lobbying is germane to the organization’s mission.

The 2004 Revenue Ruling describes the types of facts and circumstances that will determine whether, on balance, the Service considers the nonprofit in each of the six situations to be engaged in campaign intervention, on the one hand, or grass roots lobbying or issue advo-

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61 For example, a candidate for governor of a state may be asked to take a certain position regarding an imminent death penalty execution or a candidate for a legislature may be urged to vote for or against a legislative proposal. See Rev. Rul. 2004–6 2004–1 C.B. 332 (Situation 5).

62 Charities described in section 501(c) can lobby as long as the lobbying is not “substantial.” See I.R.C. § 501(c)(3) (2006); Treas. Reg. §§ 1.501(c)(3)–1(b)(3)(i), (c)(3)(ii). Nonprofits exempt under other subsections of section 501(c) can lobby without limit in furtherance of their exempt purposes. See Rev. Rul. 71-530, 1971-2 C.B. 257-38 (holding that although an “organization’s only activities may involve advocating changes in law,” that does not preclude the organization from tax exemption); Rev. Rul. 67-187, 1967-1 C.B. 185; Rev. Rul. 61-177, 1961-2 C.B. 117 (501(c)(6) groups).
cacy, on the other. For example, if the communication being questioned is part of a series of similar public messages sponsored by the organization over a period of time, including times not scheduled to coincide with an election, the pre-election message is less likely to be considered campaign activity. Similarly, if the pre-election message is linked to a specific event occurring near the time of the election, the pre-election message is more likely to be considered grassroots lobbying, especially if the non-election event is outside the organization’s control. For example, if an execution is scheduled to take place shortly before or after the election in that state and the organization’s pre-election message deplores capital punishment and urges citizens to call Governor X and tell him to place a moratorium on executions because of racial unfairness in sentencing patterns, the message might be classified as grassroots lobbying, even if capital punishment is a wedge issue in the Governor’s race in that state.

These facts would not, however, prevent the Service from finding that the organization sponsoring the message was engaged in campaign activity if the external event allegedly motivating the message was a bill in the state legislature, say, to end capital punishment and it could be shown that the sponsoring organization had influenced the date on which the vote in the legislature was scheduled so it would coincide with the election. Other facts possibly suggesting the existence of campaign activity would be a statement in the ad that the official to be contacted supports or opposes the position favored by the nonprofit, even if the ad avoids stating whether he or she is, or is not, fit to hold that office.

The balancing method utilized by the Service in Revenue Ruling 2004–6 is identical to the method it has employed in Revenue Rulings

63 See Rev. Rul. 2004-6, 2004-1 C.B. 330 (Situation 1), 332 (Situation 5) (describing circumstances in which issue advertisements create no tax exposure because they are not campaign activity).

64 Compare Rev. Rul. 2004-6, 2004-1 C.B. 332 (Situation 5) (stating that where an execution had been scheduled and the message was part of a series, the pre-election message was not campaign activity even though the candidate’s position was identified as opposed to that of the organization), with id. at 332 (Situation 6) (stating that where there was no external event scheduled and the message was not part of a series, the pre-election message was campaign activity).

65 See Rev. Rul. 2004-6, 2004-1 C.B. 330 (Situation 1), 332 (Situation 6) (stating that advertisements which do not identify the official’s position on the relevant issue may not be considered campaign activity, while advertisements which appear just before the election involving an oppositional candidate, and which target that candidate’s opinion, are likely to be classified as campaign activity). But see id. at 332 (Situation 5) and supra note 61 (stating that advertisements which appear just before an election involving an opposing candidate but which are part of an ongoing series of substantially similar advocacy communications are not necessarily campaign activity).
discussing voter education and other types of activities that can be partisan or nonpartisan—and thus campaign intervention or not for Code purposes—depending upon the manner in which they are conducted.\textsuperscript{66} At bottom, it entails the exercise of judgment to identify significant facts, interpret them in light of the context in which they occur, and determine the weight to accord to each.

\subsection*{B. The Campaign Finance Law Bright Line Approach}

Although a facts and circumstances test may seem a reasonable way to appreciate the complex character of an organization’s election-related activities, the probing and balancing method it employs contrasts sharply with the bright line rule approach favored by the Supreme Court in \textit{Buckley v. Valeo} and subsequent decisions, and reasserted by the plurality opinion in \textit{Wisconsin Right to Life}.

The \textit{Buckley} Court originally enunciated the express advocacy bright line rule in response to its concern that the vague “for the purpose of influencing a federal election” language in campaign finance law would have the effect of chilling non-campaign speech, especially the discussion of ideas and candidates.\textsuperscript{67} The \textit{Buckley} Court did not claim that all campaign-related speech other than express advocacy was discussion of ideas and candidates. Rather, it noted that it could be difficult to distinguish core campaign speech (urging the public to vote for or against a candidate) from other forms of political speech and issue discussion.\textsuperscript{68} The express advocacy rule was a response to this dilemma, since it created a bright line rule to differentiate political speech not subject to campaign finance regulation from speech that may be regulated.

The electioneering communication provisions enacted in 2002 as part of the McCain-Feingold campaign finance reform\textsuperscript{69} were designed by Congress to add an additional, and important, category of campaign speech that should be funded with hard money and subject to FECA disclosure while respecting \textit{Buckley}’s preference for bright

\begin{footnotes}
\item \textsuperscript{66} See supra notes 34–36 and accompanying text (describing circumstances in which debates hosted by a non-profit organization may be seen as non-partisan); Rev. Rul. 2007-41, 2007-1 C.B. 1421-26 (distinguishing permissible “voter education” activities from impermissible campaign interventions).
\item \textsuperscript{67} See \textit{Buckley v. Valeo}, 424 U.S. 1, 76–80 (1976) (per curiam) (construing section 434(e) to apply only to express advocacy in order to avoid invalidation on vagueness grounds).
\item \textsuperscript{68} See \textit{id.} at 78–79 (noting the line-drawing problems that arise in trying to distinguish issue advocacy from “advocacy of a political result”).
\end{footnotes}
line rules. In upholding the constitutionality of these provisions, the McConnell Court appears to have endorsed the bright line rule approach as well. In ruling that regulation of electioneering communications was constitutional, the Court noted that there was no vagueness problem because the criteria listed in the definition were both "easily understood and objectively determinable."

In Wisconsin Right to Life, however, the Supreme Court rejected the electioneering communication provision, despite the fact that it created a bright line rule, because the provision could apply to more than express advocacy or its "functional equivalent." At the same time, the Court reiterated its commitment to a bright line standard, emphasizing that campaign finance provisions should not be applicable in a way that "open[s] the door to a trial" on every communication an organization contemplates funding or necessitate elaborate discovery.

For the plurality Wisconsin Right to Life opinion, that meant rejecting the FEC’s intent-and-effect test for classifying campaign ads, because the FEC’s test would require examining the larger context within which political communications were designed and broadcast. The opinion strengthened its “four-corners-of-the-text” approach by asserting that, if evidence of the existence of campaign activity and evidence of issues advocacy are equal, “the tie goes to the

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70 As originally enacted, an electioneering communication was defined as a communication referring to a candidate for public office, distributed through broadcast media, and targeted to a certain number of persons able to vote for (or against) the candidate, if the communication occurred in the thirty days preceding a primary or the sixty days preceding a general election. See McConnell v. FEC, 540 U.S. 93, 194 (2003) (rejecting the constitutional objections to the new definition of "electioneering communication" under the Federal Election Campaign Act). The McConnell Court also upheld the constitutionality of a more indeterminate support/oppose standard, but only with regard to state and local political parties. See id. at 166–71 (determining that the provision’s restrictions are “closely drawn” to serve the Government’s objectives and rejecting arguments that they are overbroad and vague).


72 See id. at 194.

73 FEC v. Wis. Right to Life Inc., 551 U.S. 449, 466–67 (2007). The Court attributed the requirement that electioneering communications be express advocacy or its functional equivalent to the McConnell Court, id. at 465, although the four dissenting justices in Wisconsin Right to Life, who were part of the majority in McConnell, were adamant that this interpretation was not the opinion of the McConnell Court. See id. at 526–28 (J. Souter, dissenting) (arguing that the majority’s new test is “flatly contrary” to McConnell).

74 See id. at 466–69 (asserting that the standard “must entail minimal if any discovery, to allow parties to resolve dispute quickly without chilling speech through the threat of burdensome litigation.”).

75 See id. at 466–69 (declining “to adopt a test for as-applied challenges turning on the speaker’s intent to affect an election”).
speaker, not the censor.” The practical effect of the Wisconsin Right to Life analysis is thus to create a presumption that political speech that is not express advocacy must be deemed to be issue discussion or grassroots lobbying until proven otherwise, and to require the government to satisfy this burden of proof without utilizing evidence that a court could consider more than minimally contextual.

The Citizens United decision left this part of Wisconsin Right to Life’s doctrine intact. Thus, the method now employed by the IRS to determine whether a nonprofit organization has intervened in a political campaign is exactly the method the Court rejected in Wisconsin Right to Life, namely, a facts and circumstances test that entails taking into account the larger context in which a communication or other activity occurs. Additionally, in federal tax cases, the organization seeking to avoid violating the campaign prohibition has the burden of proof, whereas the effect of Wisconsin Right to Life’s tie breaking rule is to place the burden of proof on the government, even as it restricts the government’s access to arguably relevant information.

III. JUDICIAL SCRUTINY: STRICT OR LIGHT

First Amendment issues have arisen repeatedly in connection with tax law regulations. In general, judicial controversies involving a First Amendment challenge to the denial of tax exemption or tax deduction have developed a doctrine independent of First Amendment jurisprudence operating in other areas involving free speech. As is true in other areas of First Amendment law, if there is no burden on a protected right, the courts subject the government’s actions to the rational relation test, the lightest form of judicial scrutiny in the free speech area. If, on the other hand, the government’s actions are seen as burdening the speech rights of the affected party, the courts use some form of heightened scrutiny to determine whether the government has subjected the affected party to an unconstitutional condition on the receipt of a governmental benefit. What is unique in

76 Id. at 474.
77 The plurality opinion did agree that some recourse to context would be valid under its interpretation of the constitutional constraints. See id. at 473–74 (“Courts need not ignore basic background information that may be necessary to put an ad in context . . . .”).
78 See Madden v. Kentucky, 309 U.S. 83, 88 (1940) (“The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.”).
79 See Regan v. Taxation with Representation (TWR), 461 U.S. 540, 550 (1983) (judging the lobbying restrictions on 501(c)(3) organizations as “not irrational”; Madden, 309 U.S. at 88 (“[T]he presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.”).
the tax area is that, as a general matter, denying taxpayers tax benefits is not seen as burdening their speech.

A. The Deferential Tax Law Approach

The tax law First Amendment decisions are, in general, deferential to government restrictions limiting taxpayers’ entitlement to deductions or exemptions because courts are reluctant to secondguess lawmakers’ determinations in the area of tax. Highlighting the high level of its deference, the Supreme Court in Madden v. Kentucky asserted that a legislature’s tax classifications have “a presumption of constitutionality.”80 Although this presumption exists in many areas of the law, the Madden Court noted that the government’s discretion in tax classifications is even greater than it is in other fields.81 As a corollary, the Supreme Court’s First Amendment jurisprudence in tax cases presumes that “statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose.”82 Because of this presumption, the “burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.”83 If, however, tax classifications burden “the exercise of a fundamental right, such as freedom of speech, or employ a suspect classification, such as race,” courts will employ “a higher level of scrutiny.”84 Further, courts will subject to “strict scrutiny” any affirmative burden that the government places on speech on the basis of its content.85

80 Madden, 309 U.S. at 88 (cited in TWR, 461 U.S. at 547).
81 See Madden, 309 U.S. at 87–88 (noting the broad discretion given to legislatures in the field of taxation).
82 TWR, 461 U.S. at 547. There is some ambiguity in the statement, however, since the full sentence reads, “Generally, statutory classifications are valid...[,]” id., and, as discussed below, the Court will subject statutes to a higher level of scrutiny in certain circumstances. Madden, 309 U.S. at 88.
83 TWR, 461 U.S. at 547. This might seem to imply that the lobbying restriction at issue in the case should have been reviewed with a higher level of scrutiny than the rational relation test since the restriction affects freedom of speech. However, the TWR Court does not employ heightened scrutiny. This apparent inconsistency is reconciled by the Court’s holding that a failure to subsidize does not, in and of itself, constitute a burden and does not infringe the right. See id. at 549 (“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.”).
84 See, e.g., Leathers v. Medlock, 499 U.S. 439, 447 (1991) (“[F]or reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech.”); Grosjean v. Am. Press Co., 297 U.S. 233, 244–50 (1936) (noting that the First Amendment prohibits imposing a tax on newspapers with a large circulation when the goal of the tax is to limit the spread of information). See also infra notes 102–108 and accompanying text (discussing Speiser v. Randall, 357 U.S. 513,
Judicial deference to legislative judgments in tax cases thus may be diminished in certain instances involving the First Amendment, although the level of scrutiny or deference has not always been clearly articulated.\textsuperscript{86} Importantly for the comparison between tax law and campaign finance law, tax statutes that selectively exempt, or fail to exempt, specific categories of speakers are not necessarily “constitutionally suspect.”\textsuperscript{87} They only trigger heightened scrutiny if in addition they discriminate on the basis of content, run the risk of suppressing specific ideas or points of view, target the press, or target a “small group of speakers.”\textsuperscript{88}

The seminal case in this area, \textit{Cammarano v. United States}, reveals how the Supreme Court determines whether the threshold condition for “a higher level of scrutiny” is present, i.e., whether a fundamental right has been burdened. In that decision, the Court upheld a provision of the Code that denied taxpayers an otherwise valid business expense deduction for the cost of lobbying against a ballot initiative that, if passed, would harm their business.\textsuperscript{89} The taxpayers had argued that the Code provision denied them a business expense deduction because of their involvement in constitutionally protected First Amendment speech. In rejecting their claim, the Court countered that the taxpayers’ exercise of free speech was not burdened by the denial of a deduction. Rather, according to the Court, the taxpayers were only being required to pay for their lobbying activities without a government subsidy.\textsuperscript{90} For First Amendment activities, in other words, denial of a subsidy did not infringe on the exercise of a fundamental right. As a result, the application of heightened scrutiny was not warranted.\textsuperscript{91}

\begin{itemize}
\item 529 (1958), in which the Court struck down a property tax exemption requirement that the taxpayer execute a loyalty oath).
\item \textsuperscript{86} See the discussion of levels of scrutiny in \textit{Am. Soc’y of Ass’n Executives v. United States}, 23 F. Supp. 2d 64, 68–69 (D.D.C. 1998), aff’d, 195 F.3d 47 (D.C. Cir. 1999).
\item \textsuperscript{87} \textit{Leathers}, 499 U.S. at 444. \textit{See also infra note 93} and accompanying text.
\item \textsuperscript{88} \textit{Leathers}, 499 U.S. at 447.
\item \textsuperscript{89} \textit{See Cammarano v. United States}, 358 U.S. 498, 499–500 (1959) (discussing the harmful effects of the measures).
\item \textsuperscript{90} \textit{See id.}, 358 U.S. at 512–13 (stating that denying the taxpayers a deduction deprived them not of free speech, but of free speech at the government’s expense). In his concurrence, Justice Douglas observed that the First Amendment would have been violated only if Congress had denied all deductions for ordinary and necessary expenses to a taxpayer who lobbied. \textit{Id.}, 358 U.S. at 515 (Douglas, J. concurring).
\item \textsuperscript{91} There is no discussion of the level of scrutiny in the decision. The First Amendment portion of the challenge is disposed of in a single paragraph that distinguishes the “nondiscriminatory denial of [a] deduction” from “the suppression of dangerous ideas.” \textit{See id.}, 358 U.S. at 515 (rejecting the idea that the plaintiffs were denied tax deductions because of engaging in constitutionally protected activities).
\end{itemize}
In dicta in *Cammarano*, the Supreme Court compared the policy underlying the ban on business deductions for lobbying expenses with the policy embodied in the provision of the tax law denying charitable tax exemption to otherwise qualified 501(c)(3) organizations if they engage in a substantial amount of lobbying. More than two decades later, in *Taxation with Representation*, the constitutionality of this limit on lobbying by charities was itself subject to a direct challenge. The Supreme Court reiterated the teaching of *Cammarano* that denying 501(c)(3) organizations a subsidy is not an infringement upon speech, and the Court expanded *Cammarano* by stating that strict scrutiny would not be required even if Congress chose to provide a tax subsidy selectively, e.g., to some but not all categories of exempt organizations. As a result, the Court ruled against the public interest organization in the case, which had been denied 501(c)(3) charitable exemption because it proposed to lobby in excess of the statutory lobbying limit.

The Supreme Court addressed the relationship between tax classifications and burdens on First Amendment freedoms again in 1989, in *Hernandez v. Commissioner*. At issue in that decision was the taxpayer plaintiffs’ entitlement to section 170 charitable contribution deductions for the cost of spiritual classes conducted by trainers of the Church of Scientology. The plaintiffs claimed that denying them such deductions for the classes unconstitutionally “deter[red] adherents from engaging in [religious] auditing and training sessions.” The Court, however, doubted that the “alleged burden” on the taxpayers’ free exercise of their religion was substantial because the effect of denying them the deductions was merely to increase the cost of the classes. The Court’s holding in *Hernandez* is consistent with its view, expressed in non-tax contexts, that economic hardship resulting from a denial of government benefits does not necessarily implicate

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92 See id., 358 U.S. at 512–13 (comparing the policies).
93 See Regan v. Taxation with Representation of Washington (TWR), 461 U.S. 540, 548 (1983) (declining to apply strict scrutiny to provisions of the Internal Revenue Code that discriminated between lobbying organizations); see also Rust v. Sullivan, 500 U.S. 173, 192-93 (1991) (upholding regulations which prohibited providers from discussing abortion as a lawful option because such regulations were permissible conditions for funding); *Leathers*, 499 U.S. at 450 (citing TWR and *Cammarano* with approval).
96 See id. at 699 (questioning the substantiability of the burden).
the Constitution, even when First Amendment protections are affected.  

In both Cammarano and Taxation with Representation, the Supreme Court discussed the government’s stated goal, that political “[c]ontroversies . . . must be conducted without public subvention; the Treasury stands aside from them.” In both cases, the Court emphasized that as a constitutional matter, “a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right . . . .” Thus, the government’s goal of securing its own neutrality and a level playing field for those who lobby was subjected to a minimal burden of justification. As the Cammarano Court explained, “since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned.”

A tax classification, or a failure to subsidize a fundamental right, nonetheless may violate the Constitution if a legislature’s action involves content discrimination or the intent to suppress certain ideas, as occurred in Speiser v. Randall. In that case, a provision of the California Constitution and implementing legislation denied the State’s veterans property tax exemption to any veteran who failed to sign a loyalty oath stating that the signatory did not advocate the violent overthrow of the government nor support a foreign nation at war with the United States. The exemption in question was sought by certain World War II veterans who had received honorable discharges and refused to sign the oath. The Supreme Court concluded that the constitutional provision should be interpreted to mean what the

97 See infra notes 176–86 and accompanying text.
98 Cammarano, 358 U.S. at 512 (citing Slee v. Comm’r, 42 F.2d 184, 185 (2d Cir. 1930)).
99 Regan v. Taxation with Representation of Washington (TWR), 461 U.S. 540, 549 (1983); see also Cammarano, 358 U.S. at 515 (Douglas, J., concurring) (criticizing “the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State”).
100 See discussion supra note 91 and accompanying text.
101 Cammarano, 358 U.S. at 513.
102 See TWR, 461 U.S. at 548 (citing Cammarano, 358 U.S. at 513 (quoting Speiser v. Randall, 357 U.S. 513, 519 (1958))); see also Leathers v. Medlock, 499 U.S. 439, 450 (1991) (noting that a tax scheme which discriminates on the basis of a speaker’s ideas violates the First Amendment). In Speiser, the Court struck down statutory provision, itself based upon a provision of the California constitution that denied a property tax exemption to persons who did not sign a loyalty oath. 357 U.S. at 529.
103 Speiser, 357 U.S. at 515.
104 Id. at 514–15.
California Supreme Court said it meant, i.e., that it applied only to those who actually engaged in speech that would be criminally punishable under California criminal law and not to abstract advocacy. Thus construed, the loyalty oath was unconstitutional because it imposed on individuals failing to sign the oath an unreasonable condition, namely, the burden of proving they were not in violation of criminal law. This violated the applicants' due process rights because the state's reliance on a "short-cut" procedure (the oath) to determine whether people had violated a criminal statute might well have the effect of infringing upon their free speech.

The Speiser Court said explicitly that the loyalty oath required by California was "frankly aimed at the suppression of ideas." When such factual situations arise, a heightened form of scrutiny, i.e., more than the rational relation test, is required to determine if the regulation in question is constitutional. Subsequent tax law decisions have distinguished Speiser's holding when explaining why a particular governmental action is valid. These tax cases are consistent with, and sometimes cite, First Amendment decisions in other areas of the law invalidating government discrimination based upon the content of speech or designed to suppress dangerous ideas.

Tax cases involving speech restrictions in connection with deductions or exemptions are portrayed by the Supreme Court as a subset of cases involving a government subsidy or grant. In some non-tax

105 See id. at 519–20 (construing the constitutional provision).
106 See id. at 523–24 (determining that the loyalty oath violates the fundamental principle that an individual should not be considered presumptively guilty of a crime).
107 See id. at 528–29 (holding that the provision’s enforcement procedures violate due process). However, neither signing nor failing to sign the oath was conclusive as to an applicant’s entitlement to the exemption. See id. at 521 n.6 (noting that it may be necessary for the claimant to allege and prove facts to justify the exemption).
108 Id. at 519 (quoting Am. Communications Ass’n v. Douds, 339 U.S. 382, 402 (1950)).
109 See, e.g., Cammarano v. United States, 358 U.S. 498, 513 (1959) (rejecting the plaintiffs’ analogy to Speiser on the ground that there was no suppression of ideas in the tax statute); Regan v. Taxation with Representation of Washington (TWR), 461 U.S. 540, 550 (1983) (noting the outcome would be different if the tax provision involved “the suppression of dangerous ideas . . . ").
110 See, e.g., Perry v. Sinderman, 408 U.S. 593, 598 (1972) (invalidating summary judgment for a state college that failed to renew a faculty member on the grounds that the nonrenewal may have been a result of the fact that the faculty member had criticized the school publicly, including before a legislative committee). See also FCC v. League of Women Voters, 468 U.S. 364, 383–84 (1984) (invalidating a regulation prohibiting nonprofit broadcast stations that were recipients of federal funds from editorializing, which, the Court said, was suppression of speech based upon content).
111 See, e.g., TWR, 461 U.S. at 544 (stating that “tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system.”). The equation of deductions and/or exemptions with subsidies has been challenged by numerous commentators.
subsidy cases, the Court’s analysis is framed in terms of the nature and validity of the conditions the government has placed on the recipient, or potential recipient, of government funds. In general, these cases examine the type of government benefit involved, the character of the right affected by the condition imposed, the degree of the burden imposed by the condition, the importance of the government’s reason for imposing the condition, and the relationship between the government’s purpose and the means chosen to achieve it.

Subsidy cases are not, however, necessarily analyzed within this framework. For example, in Rust v. Sullivan, the plaintiff organization challenged a speech restriction imposed upon the receipt of federal funds as an unconstitutional condition. In rejecting the claim that this was an unconstitutional condition case, the Court said...
our ‘unconstitutional conditions’ cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.\footnote{Id. at 197.}

\textit{Rust} involved Title X funding, and the speech restriction required recipients of Title X money to abstain from informing patients of abortion as a possible option for them to consider as part of family planning.\footnote{Id. at 180.} The Court concluded nonetheless that grant recipients were not prevented from counseling about abortion because they were free to engage in such counseling using premises that were physically separate from the facility receiving Title X funds.\footnote{Id. at 196.} In support of its finding, the Court cited a passage in Federal Communications Commission \textit{v. League of Women Voters}, to the effect that the speech restriction on government funding in that case would have been upheld if Congress had authorized the grant recipients to establish affiliated entities to engage in the restricted speech without federal funds.\footnote{Id. (citing FCC \textit{v. League of Women Voters}, 468 U.S. 364, 400 (1984) (citing Regan \textit{v. Taxation with Representation}, 461 U.S. 540, 544 (1983))).} Thus, \textit{League of Women Voters}, and \textit{Rust} agree that if an alternate channel\footnote{On the alternate channel doctrine, see infra pp. 154–158 and accompanying text.} exists for speakers to engage in the type of speech restricted by a federal grant or subsidy, there is no burden (as a matter of law)\footnote{Courts will concede that there is an economic burden, but an economic burden does not imply the existence of a legal burden. \textit{See supra} note 97 and infra notes 176–86.} and, \textit{a fortiori}, no unconstitutional condition.\footnote{Arguably \textit{Legal Services Corp. v. Velazquez} should be included in this list. In that case, the Court found that the absence of an alternative channel for indigent clients of federally subsidized legal services was an important factor leading it to invalidate the funding restriction imposed by Congress. \textit{See Legal Servs. Corp. v. Velazquez}, 531 U.S. 533, 546–49 (2001) (invalidating the provision). However, the Court also said that the restriction "suppressed speech inherent in the nature of the medium" (lawyering), \textit{id.} at 543, and interfered with the judicial function. \textit{Id.} at 546. Thus, it is unclear how the Court would have ruled had there been an alternate channel for the plaintiff’s clients.} Hence, the validity of the restriction can be justified employing only a rational basis test. To support their alternative channel argument, both decisions cite \textit{Taxation with Representation of Washington},\footnote{See infra notes 151–59 and accompanying text.} a tax decision discussed below.
B. The Heightened Scrutiny of Campaign Finance Law

Outside the tax area, the Supreme Court generally employs strict scrutiny or some other type of heightened scrutiny in cases involving restrictions on free speech. As formulated in *Turner Broadcasting System, Inc. v. Federal Communications Commission*, content-based restrictions are subject to strict scrutiny and content neutral restrictions are evaluated by “intermediate scrutiny.” These standards have been applied in a wide range of circumstances involving regulation of individuals, non-business associations, corporations, the press, and other types of media.

When campaign finance regulation is involved, however, the Supreme Court usually examines the regulations burdening speech using strict scrutiny. The strict scrutiny standard typically entails determining whether restrictions on speech serve a compelling state interest and whether the restrictions are narrowly tailored to further that interest. Starting with *Buckley* and continuing through *Citizens United*, the Supreme Court has maintained repeatedly and emphatically that the only compelling state interest justifying the regulation of campaign speech is the need to prevent corruption or the appearance of corruption.

On several occasions, the Court has equated preventing influence over elected officials or access to them with the compelling state interest in preventing corruption or its appearance. For example, *Buckley* portrayed “undue influence” alongside of “corruption” as the objective that campaign finance regulations could legitimately seek to deter. In *Federal Election Commission v. Colorado Republican Federal*
Campaign Committee, the Court affirmed its understanding that corruption means “not only . . . quid pro quo agreements, but also . . . undue influence on an officeholder’s judgment, and the appearance of such influence.” As recently as the McConnell v. Federal Election Commission, the Supreme Court stated that campaign finance regulation is justified to “prevent the selling of [which] gives rise to the appearance of corruption.” Relatedly, numerous Supreme Court decisions have stressed that avoiding the appearance of corruption is a compelling state interest in addition to avoiding corruption itself. In Buckley, for example, the Court said

[o]f almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence ‘is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.’

This passage in Buckley has been repeated numerous times in subsequent Court decisions. In Austin v. Michigan State Chamber of Commerce, the Supreme Court enlarged the notion of corruption to include certain situations in which the members or shareholders of a corporation do not necessarily approve the political choices funded by it, an idea first endorsed in dicta by the Court in Massachusetts Citizens for Life. In Citizens United, however, the Court repudiated this understanding of a com-

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129 McConnell, 540 U.S. at 154; see also FEC v. Nat’l Right to Work Comm., 459 U.S. 197, 210 (1982) (acknowledging the traditionally recognized “governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives . . . .”).


132 494 U.S. 652, 663 (1990) (noting that shareholders that disagree with the Chamber’s political activity may not withdraw their funds because they want to benefit from its non-political activities); see FEC v. Beaumont, 539 U.S. 146, 159 n.5 (2003) (discussing whether the risk of corruption is sufficient to support regulation of political contributions).

133 See FEC v. Mass. Citizens for Life, 479 U.S. 238, 258 (1986) (asserting that “the power of the corporation may be no reflection of the power of its ideas”).
pelling governmental purpose, expressly overruling Austin. In addi-
tion, the Court made clear its intention to limit the concept of cor-
ruption to quid pro quo corruption rather than access or influence,
thereby adopting a position that several justices had endorsed in dis-
sent for many years. Perhaps because of that history of dissent, the
majority in Citizens United (which included all of the dissenters wish-
ing to limit corruption in this way) failed to acknowledge the discre-
pancy between its view and the view of majorities of the Court in pre-
vious cases—another example of stealth overruling by the Roberts
Court. Unexpectedly, the Citizens United Court also noted that sev-
eral times in the past the Supreme Court had observed that campaign
finance “restrictions on direct contributions are preventative, because
few if any contributions to candidates will involve quid pro quo ar-
rangements.” Thus, despite all of its jurisprudential belt tightening,
the Citizens United Court did not strike down certain provisions pre-
vanting corruption or its appearance indirectly, i.e., provisions that
prevent circumvention of the quid pro quo prohibition.

Employing a corruption standard to limit government regulation
of political speech, the Supreme Court has struck down: 1) spending
limits for candidates for Congress and state elections; 2) limits on in-
dependent expenditures, a prohibition against corporate and union
political advertisements on the eve of elections paid for with soft
money; 3) a prohibition against certain advocacy organizations using
their general corporate funds for campaign expenditures; and 4)
special financing rules for candidates running against high wealth,

“no basis for allowing the Government to limit corporate independent expenditures,” as
it was overruled).
135 See id. at 909–10.
136 See McConnell v. FEC, 540 U.S. 93, 290–93 (2003) (Kennedy, J., with whom Justices Scalia
and Thomas joined, concurring in part and dissenting in part) (arguing that Buckley li-
mited the government’s compelling interest to quid pro quo corruption and citing Cit-
this interpretation): see also Scott M. Noveck, Campaign Finance Disclosure and the Legislative
Process, 47 HARV. J. ON LEGIS. 75, 92–95 (2010) (noting that the notion of “corruption"
adopted by the Court in McConnell was not a “narrow, motive-based concern about quid
pro quo” but was rather “a broader conception that encompasses all the ways in which
wealthy interests achieve disproportionate influence over the legislative process . . . .”).
137 See supra notes 127–33 and accompanying text.
138 See supra note 3 and accompanying text.
139 See Citizens United, 130 S. Ct. at 908. The Court indicated that preventive measures were
necessary, even though quid pro quo transactions would fall under bribery laws, because
of evidentiary problems. Id. But cf. Buckley v. Valeo, 424 U.S. 1, 27–28 (1976) (per cur-
iam) (noting that Congress was entitled to conclude “that contribution ceilings were a
necessary legislative concomitant to deal with the reality or appearance of corruption”).

self-financing opponents.140 In Citizens United, the Court added to this list by concluding that the state interest in preventing corruption or its appearance was not sufficiently strong to justify denying corporations the ability to use business revenues to pursue their electoral objectives.141

On a few occasions, the Supreme Court has employed an intermediate level of scrutiny in campaign finance cases. Intermediate scrutiny permits the government to demonstrate something less than a compelling interest to justify its imposition of restrictions on political speech, if the means chosen to further that interest are designed in a proper manner. In First Amendment cases involving restrictions on speech, the Supreme Court has often said that the intermediate scrutiny test is satisfied if a restriction on speech “furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”142 The means chosen satisfy this “essential” standard if the government’s interest “would be achieved less effectively absent the regulation.”143

In campaign finance cases, the Supreme Court appears to have used intermediate scrutiny when it evaluated the constitutionality of FECA’s limitations on the amount of political contributions that can be made to candidates and parties. For example, in Buckley, the Court applied what it referred to as the “lesser demand” of regulations being “closely drawn” to match a “sufficiently important [government] interest.”144 In connection with FECA’s restrictions relating to public financing, the Buckley Court also compared the burden caused by these restrictions with the burden resulting from state law

143 Ward, 491 U.S. at 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).
144 See Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 387–88 (2000) (discussing the standard applied in Buckley); see also FEC v. Wis. Right to Life, 551 U.S. 449, 464 (2007) (citing Buckley, 424 U.S. at 44–45, and four later cases repeating the need for strict scrutiny whenever “political speech” is burdened); Buckley, 424 U.S. at 16, 20, 25–26 (noting that expenditure limits require “exact scrutiny,” and because contribution limits involve “only a marginal restriction” on free speech, they are constitutional where they are “closely drawn” to further the weighty interests” of preventing corruption).
restrictions on ballot access. Although the latter were subject to “exact-acting scrutiny,” the Court was less rigorous with the former because public financing is “generally less restrictive of access” than ballot restrictions. The Court did not expressly label its method “intermediate scrutiny” (or anything else), but it appears that it was using intermediate scrutiny since it employed a form of heightened scrutiny that was clearly not strict scrutiny.

To summarize, tax law and campaign finance jurisprudence embody distinct and generally inconsistent principles regarding the form of judicial scrutiny required to test the constitutionality of restrictions on speech. In the First Amendment tax cases, the courts gravitate toward the rational relation test because of the presumption of constitutionality, and heightened scrutiny is the exception. In contrast, in campaign finance cases, the presumption is that strict scrutiny applies, and a lesser form of heightened scrutiny is the exception. In the tax cases, it is permissible to discriminate on the basis of the identity of the speaker, whereas in campaign finance law it is not. In tax cases, the courts place the burden of proof on the party challenging a government restriction on speech, whereas in campaign finance law it is exactly the reverse. Finally, underlying some tax restrictions is the government’s interest in equalizing access to government funding and creating a level playing field among participants in campaigns, whereas the campaign finance cases categorically reject equalizing speakers’ resources as a valid government purpose for burdening speech in any way. As a result of these differences, tax law provisions that affect speech are far more likely to be upheld than are restrictions imposed by campaign finance law.

IV. TAX LAW FIRST AMENDMENT JURISPRUDENCE APPLIED

Parts I–III gave an overview of the general principles of free speech doctrine in the areas of tax exemption and campaign finance. This Part applies the tax law principles to the restrictions prohibiting section 501(c)(3) groups from engaging in political campaign activity.

145 See Buckley, 424 U.S. at 94–96 (finding that such financing served “sufficiently important governmental interests and has not unfairly or unnecessarily burdened the political opportunity of any party or candidate”).
A. What Constitutes a Burden on Speech

Tax exempt organizations described in section 501(c)(3) of the Code must meet both affirmative and negative requirements. The affirmative requirement is that the group has as its purpose one or more public goods that the Code and regulations characterize generically as “charitable.” These include helping the poor, sick, or disadvantaged; promoting education, religion, science, literature, and public safety; lessening the burdens of government; and otherwise improving social welfare. The negative requirements prohibit 501(c)(3) groups from benefiting any insider (“private inurement”), having even one substantial non-exempt purpose, engaging in more than insubstantial lobbying, and participating or otherwise intervening in an electoral campaign for public office. In addition, an organization cannot qualify for 501(c)(3) status if it engages in illegal activity or violates public policy.

At first glance, based upon the traditional tax law constitutional jurisprudence discussed in Parts I-III, the absolute prohibition against 501(c)(3) organizations participating in electoral campaigns would seem not to violate the First Amendment. In a closely analogous situation, the Supreme Court upheld in Regan v. Taxation with Representation of Washington the requirement that 501(c)(3) groups not engage in substantial lobbying. Similarly upheld a prohibition on deducting the cost of lobbying that would otherwise have been an ordinary and necessary business expense. The foundation of both decisions was the doctrine that fundamental First Amendment rights are not burdened, as a matter of constitutional law, by being denied a tax benefit, since the First Amendment does not guarantee the right to exercise First Amendment freedoms at the government’s expense.

146 See I.R.C. § 501(c)(3) (2006); Treas. Reg. § 1.501(c)(3)–1(d)(1)(i). The regulations also mention lessening “neighborhood tensions,” prejudice, discrimination, community deterioration, and juvenile delinquency, and promoting human and civil rights. Id. at § 1.501(c)(3)–1(d)(2).
147 See I.R.C. § 501(c)(3) (2006); Treas. Reg. § 1.501(c)(3)–1(b)(1)(iii), (b)(3), (c)(1), (c)(3).
148 See Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983) (noting that a “charitable trust may not be illegal or violate established public policy”).
149 See supra notes 95–94, 99 and accompanying text.
150 See supra notes 89–91, 99 and accompanying text.
151 See Regan v. Taxation with Representation of Washington (TWR), 461 U.S. 540, 545 (1983) (noting that the Supreme Court has never held that Congress is required to provide subsidies to those who wish to exercise a constitutional right); Cammarano v. United States, 358 U.S. 498, 513 (1959) (holding that the denial of tax deductions was permissi-
lobby and the right to be involved in political campaigns are both core First Amendment values, the constitutional analysis should be the same in both areas.\footnote{See TWR, 461 U.S. at 552 (Blackmun, J., concurring) (citing E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 197–138 (1961) (stating that lobbying is protected by the First Amendment)).}

Taxation with Representation, however, is arguably inapposite because the organization in that case was permitted to establish a sister 501(c)(4) organization that could lobby without limit, assuming that none of its funds were derived from the 501(c)(3) group.\footnote{See TWR, 461 U.S. at 544 n.6 (noting that it was possible for a 501(c)(3) organization to establish a 501(c)(4). The Service also requires that the lobbying be in furtherance of the group’s exempt purpose. The 501(c)(4) group’s exemption is still a subsidy, according to the Court. See TWR, 461 U.S. at 544 (stating that the exemption is the functional equivalent of a “cash grant”). A 501(c)(4) group might be less heavily subsidized than a 501(c)(3) organization, however, because the latter can combine the benefit of exemption from income tax with that of receiving funds from donors entitled to the charitable contribution deduction.}

Employing a sister organization this way would enable a 501(c)(3) group to conduct its non-lobbying activities (and some lobbying activities as well) using money subsidized by the charitable contribution deduction available to the group’s donors, while its 501(c)(4) counterpart could lobby to an unlimited degree without funds thus favored.\footnote{See id. at 552–53 (stating that “[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”). The concurrence of Justice Blackmun was joined by Justices Brennan and Marshall.}

The 501(c)(3) group’s ability to lobby using an affiliated organization was noted by the majority opinion,\footnote{See TWR, 461 U.S. at 544–45 n.6.} and it was pivotal to the conclusion of Justice Blackmun’s concurrence that the taxpayer’s speech rights had not been infringed.\footnote{See id. at 552–53 (stating that “[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”). The concurrence of Justice Blackmun was joined by Justices Brennan and Marshall.}

This structural arrangement, which became formalized as the alternate channel doctrine, is now considered to be crucial to the outcome in TWR.\footnote{See id. at 552–53 (stating that “[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”). The concurrence of Justice Blackmun was joined by Justices Brennan and Marshall.} For the alternate channel to enable the 501(c)(3)
group to lobby meaningfully, according to the Blackmun concur-
rence, the organization needs to be able to control its affiliated
501(c)(4) group’s lobbying message.\(^{159}\)

In the area of campaign activity, the existence of an alternate
channel for the campaign activities of 501(c)(3) organizations is less
clear-cut than it is for lobbying by such organizations. Section 527 of
the Code authorizes the establishment of “political organizations,”
which are exempt entities created and operated “to influence the se-
lection, nomination, election, or appointment of one or more candid-
dates for public office.”\(^{160}\) Since a 501(c)(3) group is prohibited from
creating an affiliated section 527 political organization to engage in
campaign activities on its behalf,\(^{161}\) it seems to be denied the type of
sister organization crucial to *Taxation with Representation*’s validation
of the lobbying limitation.

Section 501(c)(3) organizations are, however, permitted to estab-
lish one or more sister 501(c)(4) groups, and the latter are permitted
to participate in campaigns as long as they remain primarily dedica-
ted to their core social welfare mission.\(^{162}\) A 501(c)(4) group can thus
provide a channel for a 501(c)(3) organization’s electoral projects.
Yet the 501(c)(4) alternative channel for campaign activity is not the
exact equivalent of the 501(c)(4) channel for lobbying activity because
501(c)(4) groups are subject to a quantitative limit on their
campaigning, in contrast to their lobbying, because campaigning is
not considered social welfare.\(^{163}\) The 501(c)(4) group may be further
limited because all of its activities not classified as social welfare, e.g.,
commercial and private activities, must be aggregated and the total
compared to the group’s social welfare activities to determine if the

\(^{159}\) See *TWR*, 461 U.S. 540, 553 (1983) (Blackmun, J., concurring) (“It hardly answers one
person’s objection to a restriction on his speech that another person, outside his control,
may speak for him.”).

\(^{160}\) I.R.C. § 527(c)(1)–(2) (2006).


\(^{162}\) See supra notes 27–30 and accompanying text.

\(^{163}\) See Treas. Reg. § 1.501(c)(4)–1 (1987) (stating that the “promotion of social welfare”
does not include the “direct or indirect participation or intervention in political cam-
paigns on behalf of or in opposition to any candidate for public office”).
group retains its primary focus on its exempt mission.\textsuperscript{164} The opportunity for a 501(c)(3) organization to participate in campaigns through a sister 501(c)(4) group is thus correspondingly circumscribed. Finally, under some circumstances, a 501(c)(4) group may be required to pay tax on the amount it spends on campaigning.\textsuperscript{165}

Thus, the 501(c)(4) alternate channel for 501(c)(3) groups that wish to influence elections may provide the 501(c)(3) groups with a less extensive alternate channel than was available to the plaintiffs in Taxation with Representation. At the same time, 501(c)(4) groups are themselves permitted to create affiliated section 527 political organizations. A 501(c)(3) group is thus permitted to have a sister 501(c)(4) organization that can engage in some campaign activity itself and can have an affiliated 527 organization devoted exclusively to participation in campaigns.\textsuperscript{166} Is this Rube Goldberg arrangement likely to satisfy the constitutional requirements of the alternate channel test? More than one commentator has argued that requiring a church to speak through layers of affiliated organizations robs the institution of the ability to express its views itself, i.e., with a religious voice.\textsuperscript{167}

No Supreme Court decision addresses this question directly.\textsuperscript{168} The closest the Cammarano decision comes is the assertion, made by Justice Douglas in his concurrence, that he would consider the denial of a business deduction for lobbying expenses to be a penalty if Con-

\textsuperscript{164} See supra note 29.

\textsuperscript{165} See I.R.C. § 527(f)(1) (2006); see also supra note 30.

\textsuperscript{166} See 2002 CPE, supra note 34, at 477–78 (providing an example of how this process would work).

\textsuperscript{167} See Nina J. Crimm & Laurence H. Winer, Politics, Taxes, and the Pulpit: Provocative First Amendment Conflicts 281 (2011) (noting that a 501(c)(4) “alternative may not be similarly availing for their religious messages”); Kemmitt, supra note 25, at 173 (arguing that requiring a church to communicate through a different entity would mean that “the church would be stripped of its religious voice”). Kemmitt mistakenly believes that only the church-related PAC, and not the church-related 501(c)(4), can engage in campaign activity. See id. at 161. Thus, the speaker is not as far removed from the church as Kemmitt believes and, under TWR, the 501(c)(3) organization must be able to control the 501(c)(4)’s speech. Nonetheless, as Kemmitt observes, clergy members cannot endorse candidates from the pulpit nor otherwise support specific candidates in their capacity as head of the church. Id. at 173. See also CRIMM & WINER, supra, at 4–8 (speaking through a 501(c)(4) organization might deprive a house of worship of its ability to convey a political message as a religious entity).

\textsuperscript{168} Precisely this issue was under review in Branch Ministries v. Rossotti, however, and the Court of Appeals for the District of Columbia Circuit held that the political prohibition was constitutional, inter alia, because the plaintiff could establish a 501(c)(4) group that could set up an affiliated PAC. 211 F.3d 137, 143–44 (D.C. Cir. 2000). The Court of Appeals reached this holding even though it assumed, wrongly, that 501(c)(4) groups were themselves barred from campaign activity. Id. at 143.
gress were to deny a taxpayer that lobbies all business deductions, and not just a deduction for lobbying expenses. For the majority in that case, the taxpayers’ speech rights were not burdened merely because they had to pay for lobbying “out of their own pockets.” The majority opinion in Taxation with Representation struck the same note as Justice Douglas, observing that TWR was not being denied a charitable contribution deduction for its non-lobbying activities. Although it noted that there was some burden involved in setting up a 501(c)(4) group, the Court concluded nonetheless that Congress had not “infringed any First Amendment rights or regulated any First Amendment activity.”

These two cases thus suggest that the Supreme Court should be quite deferential to Congress when assessing the threshold issue, i.e., whether speech has been burdened as a matter of constitutional law. They imply that an organization’s speech rights would be infringed only if it were prevented from engaging in First Amendment activity absolutely as a condition of receiving the tax exemption to which it was otherwise entitled. However, as noted above, the Taxation with Representation decision has been interpreted by later cases to say that the taxpayer’s speech rights would be infringed if there were no alternate channel for the exercise of those rights. Cammarano and Taxation with Representation (as interpreted by later cases) thus may advance different accounts of what constitutes a burden on political speech. Further, Taxation with Representation’s less deferential approach sheds little light on the type of affiliation that will satisfy the alternate channel test beyond its assertion that the exempt organization must be able to control the content of the affiliated organization’s lobbying speech.

By themselves, then, these cases do not definitively answer the “Rube Goldberg” question. A recent decision of the Roberts Court suggests—although it does not guarantee—that the Supreme Court will not find the current campaign prohibition for 501(c)(3) organizations an infringement on the organizations’ free speech. Ysursa v. Pocatello Education Association involved a challenge to an Idaho law
prohibiting any public employer (state or local) from providing a payroll deduction to facilitate their employees’ ability to make payments to their union’s PAC. 176 The District Court concluded that Idaho’s refusal to provide a payroll deduction for political contributions for state employees was not an abridgement of the unions’ speech because Idaho was under no obligation to incur the cost of such a program. 177 However, it pronounced the State’s ban on local governments providing such a payroll deduction unconstitutional because no state subsidy was involved at the local level. 178 Only the latter part of the ruling was appealed to the Court of Appeals, which upheld the decision of the lower court. 179

The Supreme Court reversed. Although the constitutionality of the prohibition as it affected the state government was no longer being challenged, the Court nonetheless reviewed the issue and repeated the lower court’s reasoning that Idaho was under no obligation to “enhance” unions’ political speech nor “aid” them “in their political activities” by means of a payroll deduction. 180 The Court supplemented the lower court’s reasoning by noting that Idaho had an “interest in avoiding the reality or appearance of government favoritism or entanglement with partisan politics.” 181 The Court then used the latter rationale to justify the State’s ban on local governments providing a payroll deduction for contributions to a union PAC, even though local government payroll deductions cost the state nothing and, according to the unions, could not be considered a “subsidy” by the State. 182

In Ysursa, the Supreme Court accepted as fact that “unions face substantial difficulties in collecting funds for political speech without using payroll deductions.” 183 Despite this finding, the Court asserted that there was no infringement on the unions’ political speech and, thus, that the Idaho law should be reviewed using the rational basis test. 184 To support its position, the Court repeatedly cited Taxation with Representation, which had also concluded that the economic burden caused by the restriction at issue was not of constitutional significance. The Court in the earlier case argued that

177 Id. at 1097.
178 Id.
179 Id.
180 Id. at 1098.
181 Id.
182 Id. at 1101.
183 Id. at 1098 (quoting Menken v. Emm, 503 F.3d 1050, 1058 (9th Cir. 2007)).
184 Id.
Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.\textsuperscript{185}

These two decisions involving free speech reach the same outcome as the Supreme Court’s rulings in connection with the free exercise prong of the First Amendment: an organization’s loss of revenue as a result of revocation of its exemption “is not constitutionally significant.”\textsuperscript{186}

The Supreme Court in \textit{Ysursa} relied exclusively on the majority opinion in \textit{Taxation with Representation}, which, as was noted earlier,\textsuperscript{187} appears more deferential to Congress than was Blackmun’s concurrence. \textit{Ysursa} thus suggests that the Roberts Court may be as willing as most previous Supreme Courts to find political speech unburdened as a constitutional matter when the effect of legislation denying an organization a tax-favored status is to place it in a more burdensome economic position.

The reasoning in \textit{Massachusetts Citizens for Life} is consistent with these precedents. The Supreme Court in that case invalidated a campaign finance law that required a corporate 501(c)(4) group to fund certain of its campaign activities by using an affiliated political action committee (PAC), largely basing its conclusion on the administrative burden and related costs that the 501(c)(4) group would thereby experience.\textsuperscript{188} Although on the surface the Court’s decision may seem inconsistent with the alternate channel reasoning in \textit{Taxation with Representation}, in point of fact the Court in \textit{Massachusetts Citizens for Life} went out of its way to distinguish \textit{Taxation with Representation} on the ground that the alternate channel procedure blessed in the earlier case “would infringe no protected activity, for there is no right to have speech subsidized by the Government.”\textsuperscript{189} \textit{Massachusetts Citizens for Life}, in contrast, involved a direct restriction on the campaign activity of a nonprofit under the campaign finance regime.


\textsuperscript{187}Supra note 158.


\textsuperscript{189}Ib. at 256 n.9.
At least two appellate courts have issued similar rulings. In *American Society for Association Executives v. United States*, the U.S. Court of Appeals for the District of Columbia said that the rational relation test should be applied to section 162(e)’s denial of business deductions for lobbying expenses, despite the provision’s potential economic impact on 501(c)(6) organizations and their members, because they were free to avoid the problems complained of by setting up two 501(c)(6) organizations, one of which would not lobby at all.\(^{190}\) Citing *Taxation with Representation*, the court continued, “If this option is available, the treatment of lobbying contested here is subject only to ‘rational basis’ scrutiny, and, as we shall see, handily survives.”\(^{191}\) Similarly, in *Mobile Republican Assembly v. United States*, the Court of Appeals for the Eleventh Circuit upheld the constitutionality of a disclosure provision for section 527 political organizations.\(^{192}\) Relying on *Taxation with Representation*, the Eleventh Circuit said that, “[t]he fact that the organization might then engage in somewhat less speech because of stricter financial constraints does not create a constitutionally-mandated right to the tax subsidy.”\(^{193}\)

Based upon the reasoning in the preceding Supreme Court and appellate court decisions, the current tax law prohibition on 501(c)(3) groups participating in political campaigns is likely to be understood as creating a potential economic burden on the groups’ election-related speech that nonetheless does not create a corresponding constitutional burden.

The prohibition against campaign activity by charities might still be unconstitutional if it were seen as involving content discrimination by virtue of targeting “political” speech. A challenge of this kind is unlikely to succeed, however. In *Cammarano*, the Supreme Court rejected the charge that the denial of a business deduction for the cost of lobbying was content based because it targeted lobbying, asserting instead that the provision in question was a “[n]ondiscriminatory denial of [a] deduction” that was clearly not part of an attempt to suppress specific ideas.\(^{194}\) The *Ysursa* Court similarly rejected the claim that the Idaho statute prohibiting payroll deductions for con-

\(^{190}\) 195 F.3d 47, 50–51 (D.C. Cir. 1999). *See infra* note 223 and accompanying text (describing the operation of section 162(e)).

\(^{191}\) *Id.* at 50.

\(^{192}\) 353 F.3d 1357, 1362 (11th Cir. 2003).

\(^{193}\) *Id.* at 1361. The court also said that it was following *TWR*, in which the Supreme Court “analyzed the [unconstitutional] condition within the context of the overall tax scheme, rather than as a separate provision or penalty” in response to TWR’s claim that the lobbying restriction was an unconstitutional condition. *Id.*

tributions to union PACs was content-based because of its impact on political speech.\footnote{195}

In sum, the threshold inquiry into the existence of a burden resulting from the tax law’s political prohibition is likely to conclude that no such burden exists because 501(c)(3) groups have a significant alternate channel for their campaign activities, economic burdens do not necessarily constitute legal burdens as a matter of constitutional law, and restrictions affecting the entire category of campaign speech are not considered content discrimination.

\textbf{B. The Political Campaign Prohibition Scrutinized}

Based upon the preceding, the tax law political campaign prohibition should be reviewed using the rational relation test. This test is satisfied if government action is directed toward a legitimate government interest and the means chosen is rationally related to that goal.\footnote{196}

The Congressional reports in 1954 are silent as to the reason the political prohibition was added to the Code. Nonetheless, the intent of Congress can be gleaned from the concerns that led Congress to hold hearings on the subject of charities’ advocacy activities in the preceding decade. A limitation on campaign activity by charities had been proposed in Congress in 1934, but not enacted. Prior to 1954, the IRS had sometimes taken the position that political activity should not be subsidized through the Code, and there were a few judicial decisions supporting that position.\footnote{197} These precedents reveal a general policy against permitting tax benefits to subsidize campaign spending indirectly as well as concern about charities funding campaign activity with deductible contributions. To the extent that avoiding political campaigns subsidized through the tax code is the goal of the political prohibition for 501(c)(3) groups, the means cho-

\footnote{195}{See Ysura v. Pocatello Educ. Ass’n, 129 S. Ct. 1093, 1099 (2009) (“Idaho does not suppress political speech but simply declines to promote it through public employer checkoffs for political activities.”); see also Rust v. Sullivan, 500 U.S. 173, 192–93 (1991) (rejecting plaintiffs’ allegation of content-based regulation of speech because of the federal government’s refusal to allow Title X funds to be used for abortion counseling or even counseling that mentioned abortion). The dissent disagreed with the majority on this point, see id. at 209 (Blackmun, J., dissenting), and it is difficult to imagine what would be content-based regulation if the regulation in Rust does not qualify.}

\footnote{196}{Regan v. Taxation with Representation of Washington (TWR), 461 U.S. 540, 547 (1983) (explaining the “rational basis” standard applied to statutory classifications).}

\footnote{197}{See the history described in Murphy, supra note 26, Colinvaux, supra note 26, and William P. Streng, The Federal Tax Treatment of Political Contributions and Political Organizations, 29 Tax Lawyer 139, 142–43 (1976).}
sen are reasonably related to the end. The prohibition may not be the least restrictive means of achieving that objective, since it does more than prevent charitable contributions from being used to support campaign activities. In particular, as some have suggested, requiring 501(c)(3) groups to set up a separate segregated account funded only with sums raised for which the contribution deduction was not claimed would enable such groups to participate in campaigns without dollars benefiting from the contribution subsidy. Because of this, Professor Benjamin Leff has recently argued that the 501(c)(3) political prohibition could be unconstitutional “to the degree it goes beyond advancing a concern with expenditure equity . . . .” However, Leff also cautions that a mechanism used to allocate the cost of campaign activity to an affiliated entity would have to take into account hidden costs, such as some portion of the expense of developing and maintaining the 501(c)(3) group’s credibility, in order to be completely accurate. This type of sophisticated analysis is not, however, necessary because the rational basis test does not require the government to employ the least restrictive means to achieve its goal.

A second possible rationale, one advanced by the Ysursa Court, is the government’s interest in not supporting or becoming entangled with partisan activities. This rationale does not seem applicable in relation to exempt organizations, however, because the Code prohibits political intervention only in connection with 501(c)(3) groups, whereas other organizations exempt under 501(a) are not included in the ban. In addition, Congress enacted section 527 to provide exempt status for the income of organizations created to influence electoral campaigns and to favor donors to such organizations by removing their gift taxation exposure for large contributions. Thus,

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198 The fact that certain veterans’ groups can engage in political campaigns, yet receive deductible contributions, does not undermine the rationality of the decision to prevent charities from intervening in campaigns. The government is free to provide tax subsidies selectively to achieve purposes it deems beneficial. See supra notes 87, 93.

199 See infra notes 200–201, 207, and accompanying text.

200 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, 686 (2009); see also Chris Kemmitt, supra note 25 (arguing that under the Religious Freedom Restoration Act (RFRA), churches should be permitted to engage in political campaign activity as long as they do not use contributions tax deductible under section 170 of the Code).

201 See Leff, supra note 200, at 708–14.

202 See supra note 181 and accompanying text.

203 See supra notes 27–30 and accompanying text.

existing tax law does not seem to reveal concern with governmental neutrality toward campaign activity.

It is possible to distinguish the cases in which Congress allows exempt status for groups engaged in campaigns on the grounds that the groups are not entitled to receive deductible contributions, as are 501(c)(3) organizations subject to the political prohibition. However, this would be a quantitative distinction at most, which fits better with a subsidy rather than an entanglement rationale for the political prohibition. An entangled argument might, however, be based upon the observation, made by Professor Johnny Rex Buckles, that because the charitable contribution deduction favors more affluent taxpayers, permitting charities to engage in campaigns would result in the tax code favoring the electoral preferences of the more affluent over those of the less affluent, as well.

The legislative history of section 527 political organizations, which specifically denies 501(c)(3) groups the ability to establish a 527 group, suggests another possible rationale underlying the prohibition. Congress could easily have authorized 501(c)(3) groups to establish affiliated 527 groups subject to restrictions precluding the former groups from funding the latter groups with funds derived from deductible contributions, but it chose not to. This suggests that preventing political activities from being funded with deductible contributions was not the exclusive rationale for preventing 501(c)(3) groups from political intervention. The twin prohibitions against campaign intervention and establishment of a 527 group may also reflect a belief that charitable exemption and partisan politics are incompatible.

This last explanation is consistent with the fact that the rationale for exempting 501(c)(3) groups from federal income tax and for allowing contributors to them a charitable contribution deduction in the first place is to encourage the existence and viability of associations dedicated to particular public purposes enumerated in the Code and elaborated in the Treasury regulations. Section 501 of

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205 See Johnny Rex Buckles, Not Even A Peep: The Regulation of Campaign Activity by Charities through Federal Tax Law, 75 U. CIN. L. REV. 1071, 1081 (2007) (noting that “the electoral politics of charities favored by the rich would likely receive a disproportionately large subsidy were the prohibition of electioneering repealed”).

206 See id. (noting that the progressive income tax rates result in a greater subsidy of high income earners than of lower income ones).

207 See supra note 161.

208 See supra notes 146–47 and the accompanying text; see also Tiffany Keb, Comment, Redefining What it Means to be Charitable: Raising the Bar with a Public Benefit Requirement, 86 OR. L.
the Code is not simply a federal version of state nonprofit laws, which permit entities to organize as nonprofit organizations as long as they are not established for a pecuniary purpose and do not distribute their revenues to private persons (other than a permitted class of beneficiaries). Rather, section 501(c) targets specific categories of public purpose that lawmakers have determined should be encouraged through a system of tax exemption and, in some instances, charitable contribution deduction. This would appear to be precisely the type of project selection that the Supreme Court has validated in the past in public funding cases.

The prohibition against political intervention also can be justified as a corollary of the meaning of public purpose, i.e., that pursuit of a public purpose is not consistent with involvement in political campaigns on a partisan basis. The Service’s interpretation of the political prohibition does not bar 501(c)(3) organizations from campaign activity absolutely; rather it permits campaign activity that is nonpartisan, such as voter mobilization not favoring a specific political party or candidate. Nor, as discussed above, does it prohibit other election

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209 It is possible to view section 501(c)(4) as describing any nonprofit organization with a public purpose that does not fit into another subsection of section 501(c). See JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 990 (3d ed. 2006) (asserting that “[a]s a practical matter . . . § 501(c)(4) has become the default choice (‘dumping ground’?) for organizations that fail to make the grade” as charities). While it is true that the meaning of “social welfare” in section 501(c)(4) is broad, not every nonprofit group that seeks 501(c)(4) status succeeds. See, e.g., Contracting Plumbers Co-op. Restoration Corp. v. United States, 488 F.2d 684, 685–87 (2d Cir. 1973) (finding that a non-profit organization is not exempt even though its activities are “commendable” because it “provides substantial and different benefits to both the public and its private members . . .”); Rev. Rul. 77–273, 1977–2 C.B. 195 (stating that nonprofit organizations that provide security services do not qualify for exemption); Rev. Rul. 61–158, 1961–2 C.B. 115–16 (holding that a charitable organization that funds its operations by holding a weekly lottery is not entitled to an exemption); see also John Francis Reilly, Carter C. Hull, & Barbara A. Braig Allen, IRC 501(c)(4) Organizations, in IRS, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FY 2003, at I–1, I–9 to I–12 (2002); Miriam Galston, Vision Service Plan v. U.S.: Implications for Campaign Activities of 501(c)(4)s, 53 EXEMPT ORG. TAX REV. 165, 166–67 (2006) (discussing prior cases finding certain 501(c) organizations non-exempt because one of their non-exempt activities were substantial in nature).

210 See Rust v. Sullivan, 500 U.S. 173, 193–95 (1991) (noting that “[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities is believed to be in the public interest . . . [and it may choose] to fund on activity to the exclusion of the other.”); FCC v. League of Women Voters, 468 U.S. 399–400 (1984); see also Regan v. Taxation with Representation of Washington, 461 U.S. 540, 547–48 (1985) (rejecting the organization’s equal protection challenge, stating that the substantial lobbying provision was part of Congress’s legitimate tax classification function).
related activities that are conducted on a nonpartisan basis, such as candidate forums and voter education materials. Clearly, some exempt organizations are convinced that they can further their exempt purposes more effectively by supporting or opposing particular candidates for public office than without such actions, and they may be correct in some instances. In rejecting this approach, the Service explained that “support of a candidate for public office necessarily involves the organization in the total political attitudes and positions of the candidate,” in contrast to lobbying, which can be targeted to specific legislation of direct interest to an organization. Thus, assuming the prohibition derives from the meaning of public purpose, the means chosen by Congress is rationally related to its goals.

In short, as long as Congress’s decision not to commit public funds to partisan methods of achieving public purposes bestows or withholds exemption in a politically neutral fashion, it appears to be subject to the rational relation test, whose minimal requirements it satisfies without difficulty.

C. Overbreadth Analysis

A challenge could be made to the Code’s political campaign restrictions on the ground that, as interpreted by the Service, they are overbroad because they cover First Amendment protected activities that cannot be restricted constitutionally. Specifically, litigation currently in the lower courts asserts that the statute and regulations are overbroad because they include in prohibited campaign activity communications other than express advocacy. As was explained earlier, the Service defines the campaign prohibition broadly, to include communications and other activities that support or oppose candidates for public office, and not just those expressly advocating the election or defeat of such candidates.

The overbreadth doctrine operates primarily in situations involving First Amendment protections. One of the main purposes of the

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211 See supra notes 34–36 and accompanying text.
213 See Complaint, Christian Coal., supra note 17, at ¶¶ 72–77; Complaint, Catholic Answers, supra note 17, at ¶¶ 38–43.
214 See Complaint, Christian Coal., supra note 17, at ¶¶ 76–77; Complaint, Catholic Answers, supra note 17, at ¶¶ 42–43.
215 See Part I.A.
216 See Virginia v. Hicks, 539 U.S. 113, 118 (2003); see also Richard H. Fallon, Jr., Making Sense of Overbreadth, 100 Yale L.J. 853, 859–62 (1991) (describing the other situations in which the doctrine can be applied).
doctrine is to permit facial challenges to legislation or other government actions that may chill the proper exercise of protected rights because the government has framed what is prohibited more broadly than necessary to achieve its objectives. As formulated by the Court in *Broadrick v. Oklahoma*, which upheld a statute limiting state employees’ ability to engage in partisan campaign activity against a facial challenge, the question is whether the overbreadth is “substantial . . . judged in relation to the statute’s plainly legitimate sweep.” Thus, the Court in *Broadrick* upheld a statute with provisions prohibiting state employees from engaging in specific acts of political participation that were likely to be invalidated if challenged separately, on an as applied basis, because the vast majority of the statute’s provisions were constitutional. An overbreadth challenge can succeed, then, only if it can be shown that the Code’s prohibition against political intervention applies to a substantial amount of communications or other conduct that 501(c)(3) groups should be permitted to engage in under the First Amendment. The answer to an overbreadth challenge thus presupposes an answer to the prior, substantive question of the appropriate reach of the Code’s political restrictions.

Because most precedents in this area involve a challenge to direct regulation of protected activity, the government’s action is typically analyzed using strict scrutiny and, thus, its action must reflect a compelling state interest and be the least restrictive means of accomplishing its goal. However, as was discussed in the previous sections, if

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217 See Fallon, *supra* note 216, at 868 n. 94 (suggesting that the overbreadth doctrine is prophylactic, in that the Supreme Court has “discretion to adjust the doctrine’s contours in light of their assessment of the doctrine’s practical effects”). The chill potentially resulting from overbreadth is thus different from the potential chill resulting from vagueness, since the latter is a consequence of an actor’s uncertainty as to whether conduct is covered by the statute, whereas the former is a product of the statute’s excessive scope. But see id. at 904 (arguing that vagueness doctrine “is best conceptualized as a subpart of First Amendment overbreadth doctrine”). For the “analytical link” uniting vagueness and overbreadth analysis, see *Nationalist Movement v. Comm’n*, 102 T.C. 558, 585 (1994) (citing Kolender v. Lawson, 461 U.S. 352, 358–59 (1983); Lawrence H. Tribe, *American Constitutional Law* 1033–35 (2d ed. 1988)).

218 413 U.S. 601, 615 (1973); see also *Hicks*, 539 U.S. at 118–19 (quoting and applying this language). The Court has so far failed to explain what it means by “substantial” in the context of overbreadth. See Richard Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 MINN. L. REV. 1773, 1783 (2001). Hasen argues that the Court should ascertain overbreadth empirically, rather than through speculation. *Id.* at 1782–90.

219 See *Broadrick*, 413 U.S. at 618.

220 See *id.* at 611–12 (articulating the strict scrutiny standard applied to First Amendment cases); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 12077, 1278–79 (2007) (describing the emergence of the strict scrutiny standard in free speech cases); *id.* at 1313 (describing the uneven application of strict scrutiny in free speech cases).
it employs traditional tax law constitutional doctrines, the Court should be deferential to Congress’s judgment regarding the state interest at stake, i.e., which types of public purposes it wants to encourage through the tax code, including whether or to what extent it sees such purposes as inconsistent with partisan preoccupations. The claim that the Code’s restrictions are overbroad because they extend to more than express advocacy can thus be seen as a back door attempt to import into tax law jurisprudence campaign finance First Amendment standards for what political speech can be regulated without first demonstrating the necessity of applying those standards to Congress’s tax classifications on the merits.

The failure to demonstrate the threshold question of the legitimacy of Congress designing tax exemption categories to limit or exclude partisan activity is likely to be fatal to an overbreadth challenge to the Code’s campaign restrictions because the Supreme Court generally places the burden of demonstrating substantial overbreadth on the one who challenges a provision as overbroad. Another obstacle to limiting the tax law standard to express advocacy is that, if successful, this interpretation could require the Supreme Court to invalidate other sections of the Code of long standing. To take the most obvious example, section 162(e) prohibits a business deduction for the cost of lobbying or “participation in, or intervention in, any political campaign on behalf of (or in opposition to) any candidate for public office,” even if the cost otherwise qualifies as an ordinary and necessary business expense. The political campaign language is virtually identical to the counterpart language used in section 501(c)(3). Thus, if campaigning is limited to express advocacy in section 501(c)(3), the unintended consequence might be to force the Ser-

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221 See supra Part IV. A–B.
222 See N.Y. State Club Ass’n v. City of New York, 487 U.S. 1, 14 (1988) (citing Broadrick, 413 U.S. at 615). The sentence in Broadrick states that this is so “particularly where conduct and not merely speech is involved . . . .” Subsequent cases have repeated the need for substantial overbreadth before legislation is unconstitutionally overbroad without mentioning this qualification. See Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1190 n.6 (2008) (upholding a facial attack on a state’s election law provision as violating state political parties’ associational rights); Hicks, 539 U.S. at 118–20 (2003) (insisting that a law be considered substantially broad before invalidating it as overbroad); see also New York v. Ferber, 458 U.S. 747, 772 (1982) (advancing the view that overbreadth must be substantial in pure speech cases).
224 I.R.C. § 501(c)(3) (2006) (“[P]articipate 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.”).
vice to permit business deductions for all campaigning except express advocacy.

In sum, the burden of demonstrating that the Service’s current interpretation of campaign activity is overbroad will be on the challengers. To carry this burden, they must demonstrate, without bootstrapping from campaign finance jurisprudence, that Congress’s power to define which endeavors are charitable and entitled to the expenditure of limited public resources is constitutionally limited to the narrow definition of campaign activity they favor.

D. Vagueness Analysis

There are, then, considerable obstacles to a successful overbreadth challenge to legislation. The prohibition against political campaign activity could also be challenged as unconstitutionally vague because neither the statute nor the regulations elaborate with precision the nature of the proscribed activity. The general standard set forth in the statute and regulations is developed in a few judicial decisions, numerous Revenue Rulings, private letter rulings, and assorted other administrative pronouncements. Letter rulings and similar administrative materials are not precedential guidance, which might affect a First Amendment challenge based upon vagueness since they cannot be cited in a judicial proceeding as precedent. There is some authority that a court can consult such materials for an indication of the Service’s interpretation of a tax provision and even “accept the reasoning” as persuasive in the absence of authority to the contrary. Nonetheless, the courts are agreed that taxpayers are not entitled to have a court resolve a controversy based upon views expressed by the Service to other taxpayers or contained in internal administrative documents.

Efforts to determine whether legislation is unconstitutionally vague often begin with a general statement of the public policies served by the vagueness standard. First and foremost is the due process con-

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226 See Fla. Power & Light Co. v. United States, 56 Fed. Cl. 328, 334 (2003) (“Private letter rulings represent the IRS’s individual response to a particularized inquiry from a specific taxpayer and, as such, have no precedential value. . . . This does not mean, of course, that private letter rulings cannot be looked to as a source of guidance in understanding the IRS’s interpretation of the tax laws.”) (citing Hannover Bank v. Comm’r, 369 U.S. 672, 686 (1962)).
228 See Fla. Power & Light, 56 Fed. Cl. at 334 (“[P]laintiff cannot claim entitlement to a tax treatment on the basis of a ruling issued to another taxpayer.”)
cern that, absent sufficient specificity, government directives will fail to afford adequate notice to those affected concerning conduct required or prohibited. Frequently cited in this connection is the warning of Connally v. General Construction Co., that a criminal statute is unconstitutionally vague if “men of common intelligence must necessarily guess at its meaning and differ as to its application . . . .” 229 The opinion rested on the observation that due process presupposes that substantial fines and long terms of imprisonment may only be imposed if the nature of the proscribed conduct has been conveyed sufficiently to those potentially affected. 230 Equally important is the concern that a vague statute lends itself to arbitrary enforcement. 231

Initially, most of the cases citing Connally, involved criminal statutes and/or loyalty oaths. 232 More recently, the Connally pronouncement has been cited in the context of civil laws challenged for being unconstitutionally vague. 233 The standard is not, however, applied identically in the two situations. In the view of the Supreme Court, “where a statute imposes criminal penalties, the standard of certainty is higher” than in other cases. 234

The Supreme Court also distinguishes the standard applicable to vague economic regulations from those applicable to vagueness in restrictions limiting speech. The former can be evaluated using a “less strict vagueness test,” whereas “a more stringent vagueness test” will

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229 269 U.S. 385, 391 (1926) (citing Int’l Harvester Co. v. Kentucky, 234 U.S. 216, 221 (1914) (invalidating a criminal antitrust statute)); Collins v. Kentucky, 234 U.S. 634, 638 (1914) (invalidating a criminal statute prohibiting members of certain agricultural pools from acting independently of the pool)); see also generally Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (discussing the various values that are implicated where a statute is vague, including the lack of notice and reasonable opportunity to know what the law prohibits).

230 Connally, 269 U.S. at 391.

231 Kolender v. Lawson, 461 U.S. 352, 358 (1983) (criticizing a criminal statute for failing to provide an adequate standard for the statute’s requirements, thereby vesting almost complete discretion with the police); Cramp v. Bd. of Pub. Instruction of Orange County, 368 U.S. 278, 283–85 (1961) (invalidating a loyalty oath that was punishable by dismissal from public employment and conviction for perjury on the grounds that it was “so vague as to deprive [someone] . . . of liberty or property without due process . . . .”); Grayned, 408 U.S. at 108–09 (“[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.”).

232 See, e.g., supra note 229; Speiser v. Randall, 357 U.S. 513, 515 (1958) (involving a loyalty oath).

233 See, e.g., Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1035 (D.C. Cir. 1980) (involving Treas. Reg. § 1.1501–1(d)(3)).

be applied to the latter. Finally, as noted earlier, content-based restrictions are subject to the most rigorous scrutiny, and vagueness in content-based regulations similarly "raises special First Amendment concerns because of" the danger that it will chill the targeted speech.

It is unclear how these authorities would be applied in tax cases involving First Amendment issues and what level of scrutiny would be employed in analyzing the political campaign prohibition employing a vagueness test. *Taxation with Representation* is not useful here, since the plaintiff association did “not challenge the proscription against ‘substantial lobbying’ on grounds of vagueness . . . .” In *National Endowment for the Arts v. Finley*, a public funding case decided in 1998, the Supreme Court upheld statutory criteria that had been challenged as both discriminatory and vague. In its decision, the Court distinguished the level of scrutiny required for criminal statutes and statutes that directly regulate conduct, on the one hand, and statutes involving subsidies, on the other. It held that “when the Government is acting as a patron rather than a sovereign,” a level of imprecision is permitted that would be constitutionally unacceptable in other contexts.

The campaign prohibition in the Code is clearly not a criminal statute since the sanctions for violating it range from a warning letter or the imposition of an excise tax to revocation of tax exemption. Although tax statutes are not necessarily regulatory statutes, it would seem that the campaign prohibition could be characterized as

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236 See supra note 123.
238 See Taxation with Representation of Washington v. Regan (TWR), 676 F.2d 715, 726 n.22 (D.C. Cir. 1982).
239 See 524 U.S. at 588-89 (upholding admittedly vague and subjective standards for selecting recipients for NEA awards).
240 See id. at 588. *Big Mama Rag, Inc. v. United States* notes that the “power to tax the exercise of a privilege is the power to control or suppress its enjoyment.” 631 F.2d 1030, 1034 (D.C. Cir. 1980). That general proposition, enunciated in *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943), has since been circumscribed in its application.
241 See *Nat'l Endowment for the Arts*, 524 U.S. at 589.
242 See IRS, PROJECT 302: POLITICAL ACTIVITIES COMPLIANCE INITIATIVE (“PACT”) (2006). The Service found that, of the cases it closed, sixty-eight percent of the charities investigated had in fact violated the political prohibition. Almost all these groups were issued "written advisories." *Id.* at 18. At the time the Report was issued, twenty-four percent of the examinations were still in progress. *Id.* at 12.
244 See I.R.C. § 501(c)(3)-1(1987), Treas. Reg. § 1.501(c)(3)-1(c)(1)(f)(2)(ii) (2008). However, as noted by Greg Colvin, criminal sanctions can result from a finding of perjury resulting from an organization’s inaccurate Form 990.
regulatory since its purpose is to control conduct rather than to raise revenue. Alternatively, the prohibition can be seen as incidental to the statute’s primary purpose of defining what is “charitable” by excluding activities that are private and partisan in nature. So interpreted, the prohibition is less regulatory than classificatory, and the classification serves the government’s interest in selecting as charities those nonprofits most worthy of public encouragement with public resources. The classification of the political prohibition as regulatory or not might well determine whether the challenge to it on vagueness grounds would be tested under a deferential rational basis standard or a form of heightened scrutiny.

One of the most careful analyses of vagueness in a section 501(c)(3) context occurs in *Big Mama Rag v. United States*. The Court of Appeals for the District of Columbia Circuit characterized the standard to be applied in First Amendment cases as “strict,” and it concluded that the definition of “educational” in the Treasury regulations was unconstitutionally vague and prone to selective enforcement. The court found that the regulations’ “full and fair” standard was not only too general to be informative; it noted as well that the regulations’ reliance on the “reactions of members of the public” insured that the test would employ a “necessarily varying and unascertainable standard.” Moreover, the applicable regulations were so confusing that it was unclear to the court whether the organization in question should have been subjected to the standard in the first place. The standard thus invited “subjective definitions.” And in fact, the court observed, these ambiguities had enabled the Service to apply the “full and fair” test to “only a very few organizations, whose views are not in the mainstream of political thought.” In particular, the IRS appeared to have previously inappropriately applied the full and fair test when assessing the status of a homosexual organization, and the association involved in *Big Mama Rag* characterized itself as feminist and lesbian.

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245 See supra Part III. B.
246 631 F.2d 1030 (D.C. Cir. 1980).
247 Id. at 1035.
248 Id. at 1037.
249 Id.
250 Id. at 1036–37.
251 Id. at 1035.
252 Id. at 1036–37.
253 Id. at 1037; see also id. at 1040 (referring to the lower court’s “value laden conclusion that Big Mama Rag was too doctrinaire”).
254 Id. at 1032; *Big Mama Rag, Inc. v. United States*, 494 F. Supp. 473, 475 (1979).
It seems, then, that the sub-text of the vagueness discussion in *Big Mama Rag* was the court’s concern that the Service was using the regulations’ malleable standards to suppress certain kinds of ideas it found distasteful or contrary to prevailing public norms. This possibility is reinforced by the fact that, in developing its view of the strict standard to be applied to vagueness challenges in the First Amendment area, the *Big Mama Rag* court relied on precedents involving content discrimination and the suppression of viewpoints. That the *Big Mama Rag* outcome was driven by the court’s response to the Service’s practice of disfavoring views with which it did not agree substantively was also the interpretation of *Big Mama Rag* adopted by the Tax Court in a subsequent case, which upheld the constitutionality of *Revenue Procedure 86-43*, the ruling promulgated by the Service to supplement the definition of “education” in its regulations after they were declared unconstitutionally vague in *Big Mama Rag*.

Clearly, on its face, the political campaign prohibition is not designed to suppress specific viewpoints, since it is not targeted to any political party or political orientation. However, it is possible that the standard is not precise enough to afford constitutionally sufficient notice to taxpayers attempting to comply with its strictures, nor to prevent arbitrary, viewpoint based enforcement. As for the latter, opinions are likely to differ as to the existence of political bias on the part of the IRS when it actually enforces the political prohibition. Complaints alleging biased enforcement have, in fact, been leveled against the agency. Responding to such complaints, the Treasury

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255 Of course, it is constitutional to deny 501(c)(3) exemption to a group that violates a strong public policy. See Bob Jones Univ. v. United States, 461 U.S. 574, 579 & 605 (1983) (upholding the Service’s denial of a charitable exemption to an institution of higher learning that discriminated in admissions on the basis of race). The IRS did not, however, assert a violation of public policy against *Big Mama Rag*.

256 See *Big Mama Rag*, 631 F.2d at 1034–35.


258 See *Nationalist Movement v. Comm’t*, 102 T.C. 558, 581–83 (1994). *Rev. Proc. 86–43* was before the District Court for the District of Columbia Circuit in *National Alliance v. United States*, 710 F.2d 868 (D.C. Cir. 1983). The court in that case declined to rule directly on the constitutionality of the Revenue Procedure, but it did note (in dictum) that the four-part test went a long way toward “reduce[ing]” the vagueness in the “full and fair” test. *Id.* at 875.

259 See, e.g., Branch Ministries, Inc. v. Rossotti, 40 F. Supp. 2d 15, 19 (D.D.C. 1999) (“Plaintiffs also contend that the IRS selectively prosecuted the Church on the basis of its political and/or religious views in violation of the Equal Protection Clause and that the revocation violated the First Amendment and the Religious Freedom Restoration Act.”); Tobin, *supra* note 153, at 1315–16 (stating that non-profits have criticized the IRS for subjective or political enforcement practices); Art Pine, *Inquiry Finds No IRS Wongdong in Audits*, *L.A. TIMES*, Mar. 16, 2000, at A16 (describing a report that showed that claims by Republicans
Inspector General of Tax Administration (TIGTA) conducted an investigation and gave the Service a clean bill of health in 2005. In addition, since 2004, the IRS has established and follows a national, standardized procedure for identifying and reviewing possible violations of the political prohibition in each election cycle. This procedure is known as the “Political Activities Compliance Initiative,” or “PACI.”

The method employed, which is published on the IRS website, involves a specially trained team of personnel that reviews all referrals alleging a violation of the political prohibition, decides which cases should be investigated, forwards them to designated agents in the field for investigation, and recommends sanctions when violations are found. Although these procedures do not guarantee lack of bias, the process should reduce the opportunity for viewpoint discrimination significantly because it is well documented and the method, results, and sanctions are described in detail on the Service’s website. Although several of the IRS’s determinations have been contested by the organizations audited, published accounts of these cases suggest that there is not a substantial risk of selective or discriminatory enforcement.

Whether the degree of notice of prohibited activities to affected parties is constitutionally sufficient is more difficult to assess. The notice provided to organizations and guidance available to enforcement

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264 The most difficult situations involve speeches, sermons, and other communications that contain multiple messages, some electoral and some not, in a single communication.
personnel in connection with the political prohibition is far greater than was provided under the full and fair standard at issue in *Big Mama Rag* in at least two respects. First, the difference between the regulations in the two situations is especially clear with respect to the *extent* of vagueness. In *Big Mama Rag*, it was not even obvious to the court which organizations were subject to the “full and fair” test to begin with, and there was no written guidance elaborating the meaning of “full and fair” once the IRS determined that the standard should be applied.\(^{265}\) In contrast, there is no ambiguity regarding the entities subject to the political prohibition. Although there are a limited number of judicial decisions applying the prohibition,\(^{266}\) there are a dozen Revenue Rulings addressing the meaning of the political prohibition, many of which describe and analyze multiple fact patterns.\(^{267}\) The information contained in these sources has been reproduced in plain language guides in a wide assortment of publications, such as pamphlets, brochures, and memoranda produced by law firms and advocacy organizations, many of which are available for free on the Internet.\(^{268}\)

That the amount of guidance explaining the political prohibition is “significant” does not mean it is optimal. Optimal would be detailed regulations, replete with illustrations, as exist to determine what constitutes lobbying when a section 501(h) election is in effect.\(^{269}\) At the same time, the fact that creative minds can devise campaign practices not addressed by existing guidance should not condemn that guidance as unconstitutionally vague.\(^{270}\) Given the

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\(^{266}\) See supra note 31.

\(^{267}\) See supra notes 31; Kindell & Reilly, supra note 34 (discussing revenue rulings).


\(^{270}\) See Grayned v. City of Rockford, 408 U.S. 104, 110 n.15 (1972) (“It will always be true that the fertile legal imagination can conjure up hypothetical cases in which the meaning of disputed terms will be in nice question.”) (citing Am. Commc’ns Ass’n v. Douds, 339 U.S. 382, 412 (1950) (internal quotations omitted)).
complexity and variety of methods of political campaigning, not to mention the rapidity with which campaigning has evolved with changes in technology, this may be a situation in which the constitutional protection afforded speech must take into account "whether it would have been practical to draft more precisely." In sum, although the prohibition is enforced through a facts and circumstances test, there is a significant amount of precedential guidance to assist both organizations that seek to stay on the right side of the line and IRS personnel seeking to enforce the standard properly.

Second, as important as the quantity of guidance for interpreting the political prohibition is the fact that the criteria contained in the guidance are largely objective. For example, the Service’s determination depends upon such things as whether voting records are distributed on an annual basis at the close of legislative sessions or their distribution is timed to an election, whether communications about legislative issues are targeted to election periods and concentrated in swing states where those issues are identified with specific candidates, whether all candidates are invited to candidate forums, whether voter guides based upon candidate surveys reproduce the candidates’ words accurately, whether partisan voter guides are distributed on the organization’s premises or on the public sidewalks outside an organization’s control, and the like. This contrasts with Big Mama Rag, where the standard in the regulations required the IRS to determine if a newsletter’s articles were “‘full and fair’” “based on an individualistic—and therefore necessarily varying and unascertainable—standard: the reactions of members of the public.”

Some of the criteria contained in the political prohibition are, however, subjective. For example, depending upon the context, the IRS will examine whether the format or questions at a candidate forum reveal bias, whether the questions asked in a candidate survey are too concentrated in a single subject area, suggesting bias, or whether a communication made on the eve of an election improperly conveys a view as to a candidate’s fitness for office. Considerations such as these inject an element of uncertainty into the analysis that may be troubling from a First Amendment perspective because, as a

272 There is also considerable non-precedential guidance in the form of private letter rulings issued to individual taxpayers, IRS Fact Sheets, Field Service advisories, PACI reports, and Exempt Organizations Continuing Professional Education (CPE) Technical Instruction Program essays used for training IRS personnel.
273 See supra notes 34–38, 60–65, and accompanying text.
274 Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1037 (1980).
practical matter, they may impose a burden of restraint on would-be actors during an election who desire to engage in political speech or other election related activities. It is unclear whether the presence of criteria requiring the exercise of judgment on the part of the organizations and the Service to this extent would trigger the application of heightened scrutiny. For the reasons that follow, it is likely that the level of indeterminacy posed by such criteria would survive heightened scrutiny.

The fact that the political prohibition does not discriminate on the basis of viewpoints and that the scope of the standard is not open-ended, as were the regulations implicated in *Big Mama Rag*, suggests that the prohibition would be subject to intermediate scrutiny, if the rational relation test is deemed too lenient for the vagueness threat to political speech posed by the Code’s restrictions on campaign activity. That intermediate scrutiny would be used, rather than strict scrutiny, if heightened scrutiny is employed, is also suggested by the circumstance that most of the campaign finance cases employing strict scrutiny involved criminal sanctions. For example, in invalidating the political expenditure cap in *Buckley*, the Supreme Court noted that “[c]lose examination of the specificity of the statutory limitation [on independent expenditures] is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests.”

The *Buckley* Court characterized vagueness in statutes with criminal sanctions as “particularly treacherous.” The *Buckley* Court characterized vagueness in statutes with criminal sanctions as “particularly treacherous.”

The Supreme Court’s opinion in *Wisconsin Right to Life* was similarly concerned that the penalty for violating the law was criminal prosecution and criminal penalties. Likewise, for the *Citizens United* majority, the “threats of criminal liability and the heavy costs of defending against FEC enforcement” facing corporations seeking to engage in political activity during elections made the source rules in FECA analogous to prior restraints on protected speech. Moreover, the campaign finance cases involved a complete ban on political speech, ac-

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275 *Buckley v. Valeo*, 424 U.S. 1, 40–41 (1976) (per curiam); *see also id.* at 40 n.47 (rejecting the suggestion that to alleviate the vagueness of § 609(e)(1), the Commission should publish advisory opinions); supra note 234.

276 *Buckley*, 424 U.S. at 76.

277 *See FEC v. Wis. Right To Life, Inc.* (“*WRTL*”), 551 U.S. 449, 493 (2007) (Scalia, J., concurring) (discussing the criminal nature of penalty); *see also McConnell v. FEC*, 540 U.S. 93, 323, 335 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part) (noting the criminal penalties imposed on unions and corporations for broadcasting messages that explicitly refer to a candidate).

according to the Court, whereas 501(c)(3) organizations are able to engage in political speech either as taxable entities or through exempt affiliates.

Violations of the political prohibition are not usually subject to criminal sanctions. In the worst case, the IRS could impose revocation of an organization’s exemption and a civil tax penalty. For a 501(c)(3) group, an excise tax of ten percent of the amount spent on communication(s) determined to be campaign intervention could be imposed on the organization, and a two and one half percent tax could be imposed on the managers who made the decision, unless their action was not willful and was due to reasonable cause. As the IRS’s recent enforcement push reveals, however, revocation is rarely proposed and it has only been imposed if violations are flagrant or repeated. As the PACI Reports also reveal, most organizations found to have engaged in prohibited campaign activity have received only written advisories, even though the violations included such clearly prohibited activities as contributing money to a candidate or posting campaign signs on the organization’s premises. Even when excise taxes have been imposed, the Service frequently refunds the tax as well as interest and penalties, if any, if the organization corrects the violation. Further, revocation relating to one or more years of

279 See WRTL, 551 U.S. at 465.
280 As Greg Colvin has noted, an exempt organization runs the risk of a criminal violation if its Form 990 is found to be fraudulent, but this would involve the intent to characterize its activities falsely rather than filing a false return by mistake. Remarks at the Meeting of the Committee on Exempt Organizations of the Section on Taxation of the American Bar Association (May 7, 2010).
281 I.R.C. § 4955(a) (2006). Under existing interpretations of willfulness and reasonable cause, it is unlikely that many decision makers would be subject to the manager’s tax. See Treas. Reg. §§ 53.4955–1(b)(4)–(7) (describing the standard for “knowing,” “willfulness,” and “reasonable cause”). For a description of the sanctions imposed on violations occurring in the last three election cycles, see the 2004 and 2006 PACI reports, supra note 261 and accompanying text. Note, however, that the amount of the excise taxes can be doubled to one-hundred percent and fifty percent, for the organization and managers respectively, if the violation is not corrected. See I.R.C. § 4955(b) (2006). Correction means “recovering part or all of the expenditure to the extent recovery is possible, establishment of safeguards to prevent future political expenditures, and where full recovery is not possible, such additional corrective action as is prescribed by the Secretary by regulations.” I.R.C. 4955(f)(3) (2006).
282 See 2004 PACI Report and 2006 PACI Report, supra note 261; Branch Ministries, Inc. v. Rossotti, 211 F.3d 137, 145 (D.C. Cir. 2000) (revoking the exemption of a church that had placed a full-page advertisement in two national newspapers urging Christians not to vote for Bill Clinton for President).
284 See Catholic Answers, Inc. v. United States, No. 09-cv-670-IEG (AJB), 2009 U.S. Dist. LEXIS 96670, at *7–8 (discussing IRS refund); Complaint, Christian Coal., supra note 17, at ¶¶ 43–44 (mentioning IRS refund). Numerous commentators have remarked on the
an organization in no way precludes it from having its exemption restored in exchange for agreeing to abstain from campaign activities. All of these considerations bear on how chilled an organization’s speech is likely to be as a result of the political prohibition. Although civil fines can impose burdens on the affected entities, the burden is qualitatively different from and usually far less extreme than what is entailed by criminal sanctions.

Under the intermediate scrutiny standard of judicial scrutiny, Congress would have to demonstrate that the purpose of the political prohibition “furthers an important or substantial” interest, is “unrelated to the suppression of free expression,” and needs the prohibition for its goal to be implemented “effectively.”285 All of the interests furthered by the political prohibition should be considered substantial: preventing deductible charitable contributions from being used to fund political activities, assuring that only organizations devoted exclusively to a charitable mission are selected to benefit from public financial support, preventing tax favored charities from dissipating their time, energy, and concentration on partisan activities, and preventing charities from engaging in activities with a high risk of furthering the private benefit of individuals and candidates for public office.

The means chosen by Congress to address these concerns may be more controversial. As was noted earlier, if preventing public funds from subsidizing campaign activity is seen as the sole government interest, it may be possible to construct a mechanism involving an affiliated entity to reduce this risk.286 Even so, it is difficult to predict whether the political prohibition would be found constitutionally infirm for this reason, given that intermediate scrutiny does not require the government to select the least restrictive means for achieving a statute’s purpose. Further, taking into account considerations such as keeping charities’ focus on their charitable mission and out of partisan activities, the ability of a 501(c)(3) organizations to partner with affiliated 501(c)(4) groups that engage in campaign activity should satisfy the standard of being narrowly drawn to achieve the entire range of statutory purposes.

285 See supra notes 142–145 and accompanying text (discussing the intermediate scrutiny standard).

286 See the suggestions made by CRIMM & WINER, supra note 167, at 326–27, 328–33; see also supra notes 199–201.
CONCLUSION

The preceding analysis is not entirely conclusive. A direct attack on the constitutionality of the tax law prohibition on 501(c)(3) groups’ political campaign activity is very unlikely to succeed, even though the tax law restriction applies to a far wider range of campaign activities than is permitted for campaign finance regulation of political speech. As discussed in this Part, the key differences in the constitutional analysis of the prohibition under tax law, as compared with the counterpart analysis of restrictions under campaign finance law, suggest that minimal judicial scrutiny will be applied to the former and that both the government’s purpose in limiting political activity for charities and the means chosen will be found reasonable. In part because of the weakness of an attack on the prohibition, an overbreadth challenge is also likely to fail.

The outcome with respect to a vagueness challenge to the terms of the prohibition, as implemented by the IRS, is more uncertain. There is the possibility that intermediate scrutiny would be employed, rather than the rational relation test, to evaluate the restriction. In that event, it is likely that some, if not all, of the government interests discussed in Part IV would be considered substantial. Some uncertainty exists as to the ability of the political prohibition to qualify as narrowly enough drawn to achieve the government’s purposes. In particular, the prohibition’s validity in this respect may turn on whether a reviewing court accepts the validity of linking the prohibition to goals in addition to preventing deductible charitable contributions from financing campaign activity. Of course, if the Court were to invalidate the political prohibition because it fails to provide sufficient notice to the entities affected by the regulation or the government officials tasked with enforcing the regulations, the IRS would be able to promulgate more detailed regulations, along the model of the lobbying regulations for 501(c)(3) organizations, to correct any deficiencies noted by the Court.

I would distinguish what I believe is a fair reading of the constitutional tax law jurisprudence from what might happen if the political campaign prohibition makes its way to the Supreme Court. Five of the current Justices have made crystal clear their aversion to anything that can be construed as interfering with the free exercise of political

287 This Article has confined itself to the constitutional dimensions of the political prohibition. For a thorough analysis of the public policy reasons for the prohibition, focusing on the dangers that would result were 501(c)(3) groups to engage in campaign activity, see Tobin, supra note 153.
speech. It is possible that they could disregard the weight of the precedents described in this paper, invoking other constitutional doctrines, for example, that the government should not be permitted to do indirectly what it cannot do directly. They might argue that Massachusetts Citizens for Life has superseded Taxation with Representation with respect to the constitutionality of requiring certain organizations to use an affiliate for campaign activities and dismiss the distinction between campaign finance and tax law expressly made by the Supreme Court in that case as mere dictum pronounced in a footnote. In that event, the alternate channel doctrine blessed in Taxation with Representation and subsequent Supreme Court cases would no longer be good law and exempt organizations, like organizations in general, could not have their political speech regulated to a greater degree than is permitted by Buckley, as interpreted by Wisconsin Right to Life and Citizens United.

The outcome, if campaign finance constitutional standards are applied to tax legislation, is beyond the scope of this article. If the political restrictions applying to charities and other exempt organizations are invalidated, it is likely that the tax code’s prohibition against business deductions for the costs of campaigning and lobbying could be found unconstitutional as well, since both the restrictions on business deductions and the limitations on lobbying by 501(c)(3) organizations were upheld using the identical rationale. As remote as these possibilities may at first seem, given that three Justices are already on record as prepared to overrule Buckley itself, it would be rash to predict what the future will bring.

289 Roger Colinvaux has recently engaged in such an analysis. He concluded that the tax law political prohibition would be upheld even if scrutinized under campaign finance constitutional standards. Colinvaux, supra note 26, at 17–32.