

A BRIEF AND SELECTIVE SURVEY OF THE CONSTITUTIONAL FRAMEWORK RELEVANT TO
RESTRICTIONS ON THE POLITICAL ACTIVITIES OF TAX EXEMPT ORGANIZATIONS

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I. First Amendment Protection of Political Speech

- Political speech is at the heart of First Amendment protection. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (“debate on the qualifications of candidates” is among “the most fundamental First Amendment activities”); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates . . .”).
- Political expression of organizations, as well as individuals, is protected. *See, e.g., First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

II. Distinction Between Direct Regulation or Prohibition of Speech and Decision Not to Subsidize Speech, Including “Subsidizing” Through Tax Exemption and Deductibility

- Direct government regulation, limitation, or prohibition of speech generally must be supported by a compelling governmental interest and narrowly tailored to serve that interest without unnecessarily constraining the protected speech, but a government decision not to subsidize speech - even political speech - does not compromise the First Amendment rights of the speaker. *Regan v. Taxation With Representation*, 461 U.S. 540, 546 (1983).

- Despite continuing debate about whether it is accurate to characterize tax exemption and deductibility of contributions as a “subsidy,” the Supreme Court appears to be convinced that it is. “[B]oth tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual’s contributions.” Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983). Therefore, Congress’s decisions about exemption and deduction rules are essentially “spending” decisions, and Congress has wide latitude in choosing how to spend public funds.

III. Limits on Government’s Freedom to Allocate Its Spending for Speech

- Nonetheless, Congress is not entirely unconstrained in conditioning receipt of government-funded benefits on forgoing constitutionally-protected speech. “[I]f the Government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to ‘produce a result which [it] could not command directly.’ Such interference with constitutional rights is impermissible.” Perry v. Sinderman, 408 U.S. 593, 597 (1972) (quoting Speiser v. Randall, 3357 U.S. 513, 526 (1958)).

A. Distinctions on the Basis of Suspect Classifications, Content, or Viewpoint

- Allocation of a subsidy on the basis of suspect classifications or on the basis of viewpoint, so as to “aim at the suppression of dangerous ideas,” would require justification by compelling governmental interest. Regan v. Taxation With Representation of Washington, 461 U.S. 540, 544 (1983).

- When government funds individuals to carry a government message, it may constitutionally place content-based restrictions on the funded expression. Rust v. Sullivan, 500 U.S. 173 (1991). “[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. . . . it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.” Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 833 (1995).
- “It does not follow, however, . . . that viewpoint-based restrictions are proper when [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.” Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 834 (1995).
- Where allocation of funds to autonomous speakers rests on a “competitive process” rather than “indiscriminate” subsidy to “encourage a diversity of views from private speakers,” content-based distinctions are constitutionally permissible, so long as the allocation decisions are not “calculated to drive ‘certain ideas or viewpoints from the marketplace’.” National Endowment for the Arts v. Finley, 118 S. Ct. 2168 (1998).

B. Unconstitutional Conditions

Distinction Between Decision Not to Subsidize and Imposition of Independent Penalty

- Policy of non-subsidy for protected expression need only stand up to rational basis justification, but a funding allocation decision that has the further effect of denying a benefit other than subsidy for the speech at issue *because* an

individual engages in protected expression may be invalid as an unconstitutional condition.

- A rule denying a business expense tax deduction for the cost of lobbying on issues of importance to the business “simply [requires taxpayers] to pay for those [constitutionally protected] activities entirely out of their own pockets.” Cammarano v. United States, 358 U.S. 498 (1959).
- However, conditioning eligibility for a veterans’ property tax exemption on signing a loyalty oath does not merely decline to help pay for particular speech, but rather extracts an independent penalty (in the form of a withheld benefit) unless the taxpayer agrees to forgo the exercise of his guaranteed right of free expression. Putting the taxpayer to the choice of waiving a constitutional right or forfeiting the independent benefit to which he is otherwise entitled is an impermissible unconstitutional condition. Speiser v. Randall, 357 U.S. 513 (1958).
- “Unconstitutional conditions cases involve situations in which the government has placed a condition on the recipient of the subsidy rather than on the particular program or service, thus, effectively prohibiting the recipient from engaging in protected conduct outside the scope of the federally funded program.” Rust v. Sullivan, 500 U.S. 173, 197 (1991).

Characterization of Section 501)(c)(3) Lobbying Restrictions

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- Section 501(c)(3)’s restriction of eligibility for charitable exemption and deductibility to charitable organizations “no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation” is like Cammarano, rather than Speiser, because “[the] Code does not deny [a charitable organization] the right to receive deductible contributions

to support its nonlobbying activity, nor does it deny [the organization] any independent benefit on account of its intention to lobby. . . . Congress has simply chosen not to pay for [the organization's] lobbying.” Regan v. Taxation With Representation of Washington, 461 U.S. 540, 545 (1983).

Significance of Ability to Segregate Subsidized Activities from Non-Subsidized Activities So As to Avoid Independent Penalty Effect

- Despite the fact that section 501(c)(3) denies eligibility to receive deductible contributions for *any* purpose if an organization engages in substantial lobbying, whether with deductible dollars or not, it does not impose an independent penalty that would be an unconstitutional condition, because the organization may segregate the non-subsidized lobbying activity fiscally and structurally by establishing and controlling a sister organization under section 501(c)(4), which imposes no restrictions on lobbying. Thus, the organization need not choose between forgoing protected expression or giving up the public subsidy of deductibility for its other activities. Regan v. Taxation With Representation of Washington, 461 U.S. 540, 545 (1983). *See also* Federal Communications Commission v. League of Women Voters, 468 U.S. 364 (1984) and Rust v. Sullivan, 500 U.S. 173 (1991), continuing to attach importance to the ability to segregate subsidized activities from non-subsidized activities in order to avoid an independent penalty effect that could lead to invalidation as an unconstitutional condition.

Unconstitutional Conditions Analysis When There Is An Independent Penalty Effect

- Even where government attempts to control the use of a subsidy by attaching conditions other than limitations on the use of the subsidy itself, such that there *is* an independent penalty imposed because of engaging in protected

speech, the condition may be constitutional nonetheless. Although case law provides no clear or consistent formula for drawing the line between permissible and unconstitutional conditions, it seems clear that there must be some relationship between the condition and the objectives the government seeks to accomplish by providing the benefit. When the distribution of a benefit turns on a condition that imposes upon freedom of expression, the connection between the condition and the government's purposes in providing the benefit must be real and substantial. When the government's important purposes could be equally well achieved through lesser intrusions on protected interests or when the intrusion serves some purpose unrelated to the legitimate goals of the benefit program, the condition is constitutionally impermissible. *See, e.g., United States Civil Service Commission v. Letter Carriers*, 413 U.S. 548 (1972); *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364 (1984); *Planned Parenthood v. Arizona*, 789 F.2d 1348, *aff'd sub nom Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986).

IV. The Religion Clauses of the First Amendment

- Religion-neutral conditions on eligibility for tax exemption do not violate the Free Exercise Clause, even where they result in denial of exempt status to an organization on account of behavior that is motivated by sincere religious belief; nor do they violate the Establishment Clause by preferring religions whose tenets do not demand the prohibited behavior over religions whose tenets do not. *Bob Jones University v. United States*, 461 U.S. 574 (1983).
- Even where political speech is motivated by sincere religious conviction, tax exemption-related limitations on political speech do not violate the Free Exercise Clause. *Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).