

CHARITIES AND LOBBYING:
INSTITUTIONAL RIGHTS IN THE WAKE OF *CITIZENS UNITED**

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INTRODUCTION

The Supreme Court's landmark decision in *Citizens United v. FEC*¹ provided corporations with the highest level of First Amendment speech protection, at least in the context of election-related speech.² On its face, this strong level of protection would seem to throw into doubt the speech-related restrictions federal tax law imposes on charities, including the limits on lobbying.³ There are, however, at least two reasons to believe this conclusion is incorrect.

First, the effect of the *Citizens United* holding on the lobbying limits for charities is unclear because of the Supreme Court's identification of a government subsidy – in the form of tax benefits – in the charity context.⁴ Second, the Court's related decision to conclude that a charity's First Amendment rights are sufficiently vindicated by the ability

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¹ 130 S.Ct. 876 (2010).

² *See id.* at 930 (Stevens, J., dissenting) (“The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court’s disposition of this case.”); *see, e.g.*, Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/2010/01/analysis-the-personhood-of-corporations/> (Jan. 21, 2010, 18:45 EST) (“If anything, the decision in *Citizens United v. Federal Election Commission* conferred new dignity on corporate ‘persons,’ treating them — under the First Amendment free-speech clause — as the equal of human beings.”); Posting of Doug Kendall to The Huffington Post (Jan. 21, 2010, 16:27 EST) (“the Court’s conservative majority re-wrote the Constitution to give corporations . . . the same right to influence the electoral process as ‘We the People’”); Ciara Torres-Spelliscy, *A Bad Call on Campaign Finance*, CNN, Jan. 21, 2010, <http://www.cnn.com/2010/OPINION/01/21/torres.spelliscy.supreme.court.campaign.finance/> (*Citizens United* “granted corporations the same speech rights enjoyed by living, breathing persons”).

³ *See* 26 U.S.C. § 501(c)(3) (2006) (as a condition for exemption from federal income tax, limiting entities organized and operated for charitable, educational, or other listed purposes with respect to both attempting to influence legislation and participating in political campaigns); *id.* § 170(c)(2)(D) (2006) (same limitations on the same types of entities as a condition for eligibility to receive tax deductible charitable contributions).

⁴ *See* *Taxation with Representation v. Regan*, 461 U.S. 540, 544 (1983).

to speak through the alternate channel of a non-charitable affiliate further complicates the analysis.⁵ At the same time, however, these complications provide grounds for considering whether a more nuanced, “institutional rights” approach to First Amendment speech protection is appropriate in this context of lobbying by charities and perhaps also in other “subsidy” contexts.⁶

Part I of this article briefly reviews both the federal tax law limits on lobbying by charities and the Supreme Court’s basis for concluding that the limits are constitutional. Part II then reviews the *Citizens United* decision and why that decision is unlikely to have an immediate effect on the viability of those limits. Finally, Part III considers how both the *Citizens United* decision and a broader institutional rights perspective may instead affect the ability of the federal government to restrict the relationships between charities and their non-charitable affiliates that engage in lobbying, as well as affecting other contexts where the government places speech-related conditions on the provision of government subsidies.

I. CHARITIES AND LOBBYING

There is long history of charitable organizations engaging in efforts to shape public policy, including through attempting to influencing legislation. That said there is almost as long a history of the law limiting such attempts. This part reviews both those limits and the court challenges to them.

A. *Limits on Charity Lobbying*

To understand the limits on lobbying by charities requires defining “charity” and “lobbying,” as well exploring how charities engage in advocacy even with these limits in place.

⁵ See *id.* at 544 n.6, 553-54 (Blackmun, J., concurring).

⁶ See, e.g., Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 736 (1995); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497 (2007); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998).

1. Definitions

For purposes of this discussion, a “charity” is a legal entity that both is exempt from federal income tax because it is described in Internal Revenue Code section 501(c)(3) and is eligible to receive tax deductible charitable contributions because it is described in Code section 170(c)(2).⁷ Charities are therefore a subset of the category “tax-exempt” or “exempt” organizations, which category includes all organizations that are exempt from federal income tax whether or not eligible to receive tax deductible charitable contributions.⁸ Examples of non-charity exempt organizations include unions, trade associations, and the recently created nonprofit health insurance provider option.⁹ Tax-exempt organizations are in turn a subset of the category “nonprofit” or “not-for-profit” organizations, which category includes all entities that under state law do not have owners with a right to the distribution of profits whether or not exempt from federal income tax.¹⁰

The term “lobbying” as used by the federal tax law with respect to charities is attempting “to influence legislation”¹¹ although, as detailed later in this section, federal tax law actually provides two overlapping but different definitions of attempting to influence legislation.¹² Lobbying therefore generally includes any attempt, direct or indirect, to affect a bill, resolution, decree, or other action by a legislative body, as well as any attempt to affect a ballot initiative, referendum, or constitutional amendment that is subject to public vote.¹³ These definitions therefore do not treat as lobbying any communications with executive branch officials (unless aimed at influencing legislation), litigation or other interactions with judicial branch officials, or education of the public about policy issues (unless such education is an indirect attempt to influence legislation).

⁷ See I.R.C. §§ 170(c)(2), 501(c)(3) (2006).

⁸ See I.R.C. § 501(a), (c) (West 2010).

⁹ See I.R.C. § 501(c)(5), (6), (29) (West 2010).

¹⁰ See Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980) (describing this “nondistribution constraint” as the key characteristic of nonprofits).

¹¹ See I.R.C. §§ 170(c)(2), 501(c)(3) (2006).

¹² See *infra* notes 22-23 and accompanying text.

¹³ See Treas. Reg. §§ 1.501(c)(3)-1(c)(3) (flush language), 56.4911-2(d)(1)(i).

2. Limits

As others have detailed, the limits on lobbying by charities is essentially a story of “charity good” (insert picture of charity leader with halo and wings here), “lobbying bad” (insert picture of lobbyist with horns and a pitchfork here), and therefore (too much) lobbying by charities is bad.¹⁴ After the enactment of the Internal Revenue Code, the first notable mention of such a limit was in the 1930 *Slee* decision authored by Learned Hand.¹⁵ In upholding the IRS’s decision to deny charity status to the American Birth Control League, the court characterized the organization’s attempts to seek repeal or amendment of laws that addressed the prevention of conceptions as “[p]olitical agitation.”¹⁶ It concluded that such activity “is outside the scope of the statute” that provided for federal income tax exemption for organizations “organized and operated exclusively for religious, charitable, scientific, literary or educational purposes.”¹⁷

Apparently viewing this and similar decisions as not providing a sufficient barrier to charities engaging in lobbying, Congress in 1934 amended federal law to explicitly prohibit charities from engaging in lobbying as a “substantial part” of their activities.¹⁸ While apparently motivated primarily by a concern that charities would otherwise have their lobbying co-opted by parties seeking personal benefit, the statutory language reached all lobbying activities regardless of motivation.¹⁹ Thirty-five years later, Congress further amended the laws to prohibit all lobbying by a subset of charities labeled private foundations, which generally rely on a single or small group of donors for their financial

¹⁴ See, e.g., Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code’s Treatment of Legislative Activities*, 71 TEX. L. REV. 1269, 1282-83 (1993) (noting the assumed incompatibility with seeking to influence legislation, which was “considered inherently controversial,” and charity status historically); see also Alyssa Battistoni, *Why Charities Should Be Political*, SALON, (Sept. 9, 2010, 9:01 AM), http://www.salon.com/news/politics/war_room/2010/09/09/charities_politics (questioning the “simplistic” view that political involvement by charities, including lobbying, is “bad” while apolitical charitable activity is “good”).

¹⁵ *Slee v. Commissioner*, 42 F.2d 184 (2d Cir. 1930).

¹⁶ *Id.* at 185.

¹⁷ *Id.* at 184, 185.

¹⁸ Revenue Act of 1934, Pub. L. No. 74-216, § 23(o), 48 Stat. 680, 609 (1934).

¹⁹ 78 CONG. REC. 5861, 5959 (1934) (statement of Senator David Reed).

support and do not engage in activities such as operating a church, hospital, or school that Congress viewed as making them accountable to the public.²⁰

Charities struggled against these limits, especially as government activity in areas of concern to them grew. Some organizations lost their charitable status as a result, most prominently the Sierra Club.²¹ Others sought a liberalization of the existing limits, an effort that was partially successful when Congress in 1976 enacted an elective regime under which charities would be subject to a specific dollar limit on their lobbying as opposed to the vague and uncertain substantial part standard.²² After some controversy, the Treasury Department also issued regulations that provided very specific and relatively narrow definitions of what constituted “direct” and “grassroots” lobbying for charities that made this election, further freeing them from the limits.²³

Nevertheless, many charities continue to seek a loosening of these limits. For example, the Center for Lobbying in the Public Interest has long taken the position that these rules should be liberalized to make it easier for charities to be involved politically.²⁴ The possibility that newspapers and other news outlets may seek refuge in charity status could also put new pressure on these limits.²⁵ At the same time, recent criticism of lobbyists has renewed attempts to tighten the limits on lobbying by charities, including

²⁰ See Tax Reform Act of 1969, Pub. L. No. 91-172, § 101(b), 83 Stat. 487, 512-14 (1969) (codified at I.R.C. § 4945(d)(1), (e) (2006)); THOMAS A. TROYER, THE 1969 PRIVATE FOUNDATION LAW 20 & n.55 (noting that congressional concern about several Ford Foundation grants relating to school decentralization “legislation” may have been the impetus for this prohibition).

²¹ See IRS Fact Sheet, December 19, 1966, in 7 CCH 1967 STAND. FED. TAX. REP. ¶ 6376; *IRS Proposes to Revoke Sierra Club’s Eligibility to Receive Deductible Contributions Because of the Club’s Political Activities*, 80 HARV. L. REV. 1793 (1967).

²² See Tax Reform Act of 1976, Pub. L. No. 94-455, § 1307(a)(1), (b), 90 Stat. 1520, 172021, 1722-26 (1976) (codified as amended at I.R.C. §§ 501(h), 4911 (2006)); Lauren Brown Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 INDIANA L. REV. 201, 221-26 (1987).

²³ See T.D. 8308, 55 FED. REG. 35579-01 (1990) (codified as amended primarily at Treas. Reg. §§ 1.501(h)-1 to -3, 56.5911-0 to -10 (2010)).

²⁴ See CENTER FOR LOBBYING IN THE PUBLIC INTEREST, WHAT WE DO, CLPI PROTECTS: PROTECTING AND EXPANDING NONPROFIT LOBBYING RIGHTS, <http://www.clpi.org/about-us/what-we-do> (last visited Oct. 11, 2010).

²⁵ See Marion R. Fremont-Smith, *Can Nonprofits Save Journalism? Legal Constraints and Opportunities*, 65 EXEMPT ORG. TAX REV. 463, 475 (2010).

charities that receive certain government funds.²⁶ So while many charities choose not to lobby at all, enough charities do lobby – including such prominent and varied organizations as the American Cancer Society, Focus on the Family, and the NAACP – that pressures on these limits continue.²⁷

Current law does, however, offer a way for charities to lobby without limit. That way is to create an affiliated, non-charity that while not eligible to receive tax deductible contributions also is not subject to the lobbying limits imposed on charities. The next section addresses the rules and burdens associated with having such an affiliate.

3. Non-Charitable Affiliates

The IRS has historically permitted charities to create closely affiliated non-charitable but still tax-exempt entities to engage in substantial lobbying and other activities prohibited to charities. At first glance, the requirements for such a separate affiliate are relatively light: separate legal status, most commonly separate incorporation; a separate governing body but the members of which may overlap, even entirely, with the charity's governing body; and separate finances.²⁸ At the same time, the charity and its non-charitable affiliate may share staff, office space, computer servers, and other resources as long as each pays its fair share.²⁹ They may have similar websites, those websites may link

²⁶ See, e.g., GIVE Act, H.R. 1388, § 1304 (2009) (as passed by the House, Mar. 18, 2009) (would have prohibited organizations engaged in “legislative advocacy” from receiving certain national service funding).

²⁷ American Cancer Society, 2008 I.R.S. Form 990, Sch. A, at 6 (reporting over \$11 million in lobbying expenditures in a single year); Focus on the Family, 2008 I.R.S. Form 990, Sch. C, at 2 (reporting \$1.65 million in lobbying expenditures over four years); 2008 I.R.S. Form 990, National Ass’n for the Advancement of Colored People, Sch. C, at 2 (reporting almost \$2 million in lobbying expenditures over four years). These IRS filings are available at www.guidestar.org.

²⁸ See *Taxation with Representation*, 461 U.S. 540, 544 n.6 (1983) (“[t]he IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax deductible contributions are not used to pay for lobbying”); see generally Ward L. Thomas & Judith E. Kindell, *Affiliations Among Political, Lobbying and Educational Organizations*, EXEMPT ORGANIZATIONS-TECHNICAL INSTRUCTION PROGRAM FOR FY 2000, at 255 (2000), available at <http://www.irs.gov/pub/irs-tege/eotopics00.pdf>.

²⁹ See Judith E. Kindell & John Francis Reilly, *Election Year Issues*, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FY2002, at 335, 367-69 (2001) (describing the close relationship a charity may have with its non-charitable affiliate that engages in lobbying or political campaign related activity).

to the website of the other organization, and the affiliate may use the charity's often valuable and well-known name as part of the affiliate's name at no charge.³⁰

In reality, however, the administrative burdens can be more significant. While judges and lawyers more generally may view creating and maintaining a separate legal entity as a relatively easy task, for non-lawyers consistently satisfying the legal requirements that accompany a separate legal existence may be difficult. Similarly, having staff carefully allocate both expenses and time between two entities may be easier said than done, while splitting staff between the two entities may raise a host of employment law issues and splitting resources such as office space and rented office equipment may create lease and other contracting concerns. Even keeping websites sufficiently separate may prove difficult.³¹

Legal burdens may also arise for non-charitable affiliates that are not relevant for charities. For example, gifts to charities are exempt from federal gift tax while gifts to most such affiliates may be subject to that tax, although there are a number of arguments for why that may not be the case.³² The IRS requires significant disclosure of information about such affiliates on the charity's annual information return, and on the affiliate's return about the charity.³³ Affiliates that engage in lobbying and receive payments that the payors may deduct, such as dues paid by trade association members, have to comply with a notice requirement or pay a tax.³⁴

³⁰ See, e.g., Memorandum from Marsha Ramirez, Director, Examinations, Tax Exempt and Government Entities Division, Internal Revenue Service et al. to Lois G. Lerner, Director, Exempt Organizations, Internal Revenue Service et al. 3 (Apr. 17, 2008) (discussing hyperlinks between a charity's website and that of its non-charitable affiliate).

³¹ See, e.g., I.R.S. Tech. Adv. Mem. 2009-08-050 (Feb. 20, 2009) (finding prohibited political campaign intervention by a charity when it failed to sufficiently distinguish webpages containing candidate-related material from its other webpages even though its non-charitable affiliate was responsible for those candidate-related webpages).

³² See Barbara Rhomberg, *Constitutional Issues Cloud the Gift Taxation of Section 501(c)(4) Contributions*, 15 TAXATION OF EXEMPTS 176 (Jan./Feb. 2004); Barbara Rhomberg, *The Law Remains Unsettled on Gift Taxation of Section 501(c)(4) Contributions*, 15 TAXATION OF EXEMPTS 62 (Sept./Oct. 2003)

³³ See 2009 I.R.S. Form 990, Sch. R.

³⁴ See I.R.C. §§ 162(e), 6033 (2006); John Francis Reilly & Barbara A. Braig Allen, *Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations*, EXEMPT ORGANIZATIONS-

The actual burden imposed on a charity by having to create a non-charitable affiliate to engage in substantial lobbying is important because of the constitutional issues raised by the limits on charity lobbying. Those issues arise because the federal government is conditioning receipt of a benefit – the ability to receive tax deductible charitable contributions – on surrendering the constitutionally protected right to speak with respect to certain subjects, as detailed in the next section.

B. *Constitutionality of Those Limits*

To understand both why the limits on lobbying by charities raises a constitutional issue, and why – at least before *Citizens United* – the limits ultimately survive constitutional scrutiny, requires consideration of the “unconstitutional conditions” doctrine and its specific application to these limits.

1. The Unconstitutional Conditions Doctrine

The doctrine of unconstitutional conditions is deceptively simple. It provides that the government cannot do indirectly what it could not do directly.³⁵ One of the clearest examples of such a situation involved the denial of exemption from tax, although not from federal income tax but from state property tax. In *Speiser v. Randall*, California assessors denied a property-tax exemption to two veterans based solely on the fact that the veterans refused to execute a loyalty oath contained in the exemption application.³⁶ While the assessors argued that the exemption was a “privilege” or “bounty” and so its denial could not infringe speech, presumably since the veterans only had to reject the benefit to be free of the oath, the Court felt otherwise.³⁷ It characterized the denial of exemption as a penalty on speech instead, and compared it to Congress withdrawing mailing privileges as

TECHNICAL INSTRUCTION PROGRAM FOR FY 2003, at L-1, L-19 to L-20 (2002), available at <http://www.irs.gov/pub/irs-tege/eotopicl03.pdf>.

³⁵ Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

³⁶ 357 U.S. 513, 514-15 (1958).

³⁷ *Id.* at 518-19.

a penalty for engaging in speech that Congress could not directly limit consistent with the Constitution.³⁸

Even this example highlights some of the problems with this doctrine, however. First, where is the line between a “privilege” and a “penalty”? Why, for example, is an exemption from an otherwise generally applicable tax not best characterized as the former instead of the denial of such an exemption being characterized as the latter? And should it matter? Second, what if, unlike the situation in *Speiser*, there is a relatively close relationship between the benefit at issue and the challenged condition? For example, if the government provides funds for a public education program is not the government able to control what is said as part of that program?³⁹ More controversially, what if the government determines that legalizing prostitution will harm efforts to combat AIDS and so bars groups that receive federal funding for AIDS-related work from advocating such legalization, even with private funds from other sources?⁴⁰

These and similar problems have created a cottage industry of trying to develop a coherent unconditional conditions doctrine.⁴¹ Such efforts have been less than satisfactory, however, leading some scholars to essentially throw up their hands and conclude that such coherence is unattainable.⁴² The Supreme Court in recent years also

³⁸ *Id.* at 518.

³⁹ See *South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987) (concluding that conditioning states’ receipt of certain federal highway funds on adoption of certain laws is constitutional in certain circumstances, even though Congress could not constitutionally adopt such laws itself).

⁴⁰ See *Alliance for Open Soc’y Int’l v. U.S. Agency for Int’l Dev.*, 570 F. Supp.2d 533 (S.D.N.Y. 2008) (involving such restrictions)

⁴¹ See, e.g., Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001); Richard A. Epstein, *Forward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. ST. U. L. REV. 913 (2006); Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371 (1995); Sullivan, *supra* note 35.

⁴² See, e.g., Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989 (1995); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B. U. L. REV. 593 (1990).

appears to have not been very receptive to unconstitutional conditions arguments,⁴³ although it has indicated that the doctrine still has merit.⁴⁴ Courts therefore continue to have to struggle with the application of this doctrine in situations ranging from the legalizing prostitution example provided above to the provision of legal services to the poor.⁴⁵ One area where the courts have provided relatively clarity, however, is with respect to the limits on lobbying by charities.

2. Are the Limits on Charity Lobbying an Unconstitutional Condition?

The lobbying limits on charities, as well the prohibition on charities intervening in political campaigns, would seem to be ripe for an unconstitutional condition challenge. Here we have Congress doing indirectly something it clearly could not do directly – forbid a particular type of organization from engaging in a specific type of speech – absent a sufficiently strong interest for doing so (although how strong would depend on the level of protection provided to this type of speaker engaging in this type of speech, an issue that will be considered later). At the very least it therefore seems that Congress should have to provide a sufficiently strong justification for this condition on the ability to receive tax deductible charitable contributions to overcome the free speech concerns it raises.

When presented with this issue, however, the Supreme Court found it relatively easy to uphold the lobbying limits. To understand why, we have to start with a decision

⁴³ See *Rumsfeld v. Forum for Academic and Institutional Right*, 547 U.S. 47, 59-60 (2006); *United States v. American Library Ass’n*, 539 U.S. 194, 211-13 (2003); see also *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971 (2010) (rejecting what could be characterized as an unconstitutional conditions argument, although the Court found the most relevant precedents to be those involving limited public fora). The case of *Legal Services Corp. v. Velazquez* arguably involved an unconstitutional condition in the form of a limitation on Legal Services Corporation-funded attorneys with respect to raising constitutional or statutory challenges to welfare laws in otherwise permitted cases involving individual welfare recipients, but in striking down that limitation as unconstitutional the Supreme Court relied primarily on the fact that the limitation distorted the legal system and not on the unconstitutional conditions doctrine more generally. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544-48 (2001).

⁴⁴ See *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 547-48 (2005) (carefully distinguishing, as opposed to overruling or modifying, two cases that involved a “special application” of the unconstitutional conditions doctrine).

⁴⁵ See *supra* note 40 and accompanying text; *Brooklyn Legal Serv. Corp. v. Legal Serv. Corp.*, 462 F.3d 219 (2d Cir. 2006).

that did not involve a charity. In *Cammarano v. United States*, decided a little over a year after *Speiser*, the Court faced the question of whether the Treasury Department could deny taxpayers the ability to deduct lobbying expenses – in this case relating to a ballot initiative – even if those expenses otherwise qualified as ordinary and necessary business expenses.⁴⁶ After considering at length various arguments relating to whether the Treasury Department’s regulations reached the expenses at issue (and concluding they did), the Court briefly addressed a constitutional argument based on *Speiser*. In a single paragraph, it concluded that the denial of a deduction did not represent a penalty on constitutionally protected activities but only established that taxpayers be “required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code.”⁴⁷ The Court distinguished *Speiser* by noting that there California was trying to suppress certain ideas it deemed dangerous, while in this instance the denial reached attempts to influence the fate of legislation of all kinds.⁴⁸ Writing at greater length, Justice Douglas in concurrence analogized the situation in *Speiser* to denying *all* ordinary and necessary business deductions to taxpayers who engage in lobbying, which he found would clearly be a penalty on the exercise of First Amendment rights (and apparently an unconstitutional one at that), while the rules at issue in *Cammarano* only denied a subsidy for lobbying expenses by prohibiting the deduction of such expenses.⁴⁹ While not developed by Justice Douglas, his language suggests an analogy to government placing speech-related conditions on the use of the funds it itself provides, as opposed to conditions on the use of funds from other, private sources.

This precedent planted the seeds for the failed challenge by Taxation with Representation of Washington (“TWR”) to the substantial part limit on lobbying by charities.⁵⁰ In that case, the Supreme Court found that both tax exemption and deductible

⁴⁶ 358 U.S. 498, 499 (1959).

⁴⁷ *Id.* at 513.

⁴⁸ *Ibid.*

⁴⁹ *Id.* at 515.

⁵⁰ *Taxation with Representation v. Regan*, 461 U.S. 540 (1983).

of contributions were a form of subsidy, a subsidy which TWR could have foregone if it had wanted to engage in unlimited lobbying (indeed, TWR only had to surrender the deductibility of contributions since non-charity, tax-exempt organizations could and still can engage in unlimited lobbying).⁵¹ Then, relying on *Cammarano*, the Court concluded that the substantial part limit only had the effect of denying such subsidy for lobbying activities and did not impose a penalty on the exercise of constitutional rights, as was the case in *Speiser*, stating flatly that “Congress has simply chosen not to pay for TWR’s lobbying.”⁵² Following this reasoning, lower federal courts have also upheld the prohibition on charities engaging in political campaign intervention.⁵³

An important aspect of this decision, however, was the ability of a charity to create a non-charitable affiliate to engage in lobbying that exceeded the level permitted for the charity.⁵⁴ In his concurrence, joined by Justices Brennan and Marshall, Justice Blackmun emphasized that he agreed with the Court’s conclusion only because of the ease with which a charity could create and effectively speak through (and with the non-deductible funds of) such an affiliate.⁵⁵ He concluded that restrictions on the ability of charities to create and control such affiliates “would render the statutory scheme unconstitutional.”⁵⁶ While normally the view in a concurrence would be owed little if any deference, later decisions by the Court explicitly adopted Justice Blackmun’s reasoning.⁵⁷ Likely for this reason, the IRS appears to have done so as well.⁵⁸

So whatever the incoherence of the unconstitutional conditions doctrine generally, in this context existing precedent was clear that Congress may deny the “subsidy” of a tax

⁵¹ *Id.* at 544.

⁵² *Id.* at 545-46.

⁵³ *See, e.g.,* Branch Ministries v. Rossotti, 211 F.3d. 137 (D.C. Cir. 2000).

⁵⁴ *Taxation with Representation*, 461 U.S. at 544 n.6.

⁵⁵ *Id.* at 553-54.

⁵⁶ *Id.* at 554.

⁵⁷ *Rust v. Sullivan*, 500 U.S. 173, 197-98 (1991); *FCC v. League of Women Voters*, 468 U.S. 364, 399-400 (1984); *see also* Miriam Galston, *Campaign Speech and Contextual Analysis*, 6 FIRST AMEND. L. REV. 100, 116-17 (2007).

⁵⁸ *See, e.g.,* Memorandum from Marsha Ramirez, *supra* note 30, at 3 (citing Justice Blackmun’s concurring opinion in *Taxation with Representation* as authoritative on this issue).

deduction for certain types of speech – including lobbying – without running afoul of the Constitution as long as the entities at issue, whether businesses or charities, have a relatively easy means of engaging in that speech using non-deductible funds. For businesses that means is simply engaging in the lobbying without deducting the associated expenses. For charities, that means is creating a closely affiliated non-charity. And so the law stood until the Supreme Court’s recent decision in *Citizens United*.

II. *CITIZENS UNITED V. FEC*

Citizens United involved a non-charity, tax-exempt organization challenging not the federal tax law limits but instead federal election law limits on speech.⁵⁹ The specific limits at issue prohibited any corporation, including nonprofit corporations such as Citizens United, from funding certain election-related communications.⁶⁰ While the Supreme Court in *FEC v. Massachusetts Citizens for Life* (“MCFL”) had previously concluded that the First Amendment required an exception to these limits for certain types of nonprofit corporations,⁶¹ Citizens United did not fall within that exception because it accepted contributions not only from individuals but also from for-profit corporations.⁶²

In one of the most significant campaign finance decisions in decades, the closely divided Court in *Citizens United* overturned two earlier decisions and struck down those limits as unconstitutional under the First Amendment.⁶³ The reasoning and breadth of the Court’s decision at first glance suggest that the speech-related limits on charities, including the lobbying limits, are now newly vulnerable to constitutional attack. A closer examination reveals, however, that the precedents upholding those limits are probably still

⁵⁹ *Citizens United v. FEC*, 130 S.Ct. 876, 888 (2010).

⁶⁰ See 2. U.S.C. §§ 431(9)(A)(i) (defining “expenditure” to include spending to influence any election for Federal office), 441b(a) (prohibiting expenditures by corporations), (b)(2) (including within expenditures any spending for “applicable electioneering communications”) (2006).

⁶¹ 479 U.S. 238, 263-64 (1986).

⁶² *Citizens United*, 130 S.Ct. at 891-92.

⁶³ *Id.* at 913.

good law. At the same time, the *Citizens United* decision places renewed emphasis on the importance of a (non-subsidized) avenue for otherwise limited speech.

A. *The Decision*

For many decades, Congress and most state legislatures have treated corporations differently than individuals with respect to election-related activity. As others have chronicled in detail, this different treatment included both prohibitions on campaign contributions by such legal entities as well as, more recently, prohibitions on such entities expending funds on certain kinds of election-related speech made independently of candidates and political parties.⁶⁴ While the stated reasons for such rules have varied, the courts have generally identified the greatest concern as having been that corporations could use the vast financial resources they had accumulated in part because of the legal benefits they enjoy to greatly distort electoral outcomes.⁶⁵

Whether such different treatment was constitutional, however, was unsettled for many years. In a case of first impression involving voting on a referendum, as opposed to on candidates, the Supreme Court in fact concluded that limits on corporate funding of speech relating to the referendum were in fact unconstitutional.⁶⁶ While there were some unusual aspects of the *First National Bank v. Bellotti* case, including the clear intent of the legislature to silence the voices of certain corporations with respect to a specific issue, the case soon came to be interpreted as providing constitutional protection to all corporate-funded speech in the lobbying context.⁶⁷ Even with this interpretation, however, the Court concluded in *Taxation with Representation* that the congressional limit on charities

⁶⁴ See, e.g., Adam Winkler, “Other People’s Money”: Corporations, Agency Costs, and Campaign Finance Law, 92 GEO. L.J. 871 (2004) (detailing the history of such prohibitions).

⁶⁵ See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659-60 (1990); *FEC. v. National Right to Work Comm.*, 459 U.S. 197, 207-08 (1982). *But see* Winkler, *supra* note 64 (arguing that the real reason behind such prohibitions was concern about the misuse of other people’s money – *i.e.*, funds belonging to shareholders).

⁶⁶ *First Nat’l Bank v. Bellotti*, 435 U.S. 765 (1978).

⁶⁷ See, e.g., *Consolidated Edison Co. v. Public Service Comm’n*, 447 U.S. 530, 533 (1980).

engaging in lobbying was permitted for the reasons already discussed, without even mentioned *Bellotti*.⁶⁸

When faced with the prohibition of corporate funding for certain speech relating to candidates, however, the Supreme Court initially concluded in *Austin v. Michigan Chamber of Commerce* that such a prohibition was constitutional for essentially the primary reason it deemed legislatures had enacted such prohibitions in the first place: the potentially distorting effects of corporation-accumulated wealth on elections.⁶⁹ It reached this conclusion despite the fact that it also noted that the only governmental interest that was sufficiently important to justify such a limit was combating corruption or the appearance of corruption.⁷⁰ The Court reconciled those two positions by interpreting that latter interest as encompassing the distortion concern, but only over the vigorous dissent of a minority of the Court on that point.⁷¹ While acknowledging the tension of this decision with *Bellotti*, the Court concluded (as the Court in *Bellotti* had noted) that candidate elections were a different context from ballot initiatives and raised different, legitimate governmental concerns.⁷² The Court subsequently carved out a limited exception in *MCFL* for tax-exempt nonprofit organizations funded solely by individual contributions, as noted above, but otherwise left *Austin* intact for almost twenty-five years.⁷³

In *Citizens United*, however, the Court revisited this issue and overruled *Austin*.⁷⁴ While *Citizens United* was a tax-exempt, although non-charitable, nonprofit organization, it could not take advantage of the *MCFL* exception because it received some (for-profit) corporate funding.⁷⁵ The Court's decisions did not, however, merely expand the *MCFL*

⁶⁸ See *supra* notes 50-53 and accompanying text; *Taxation with Representation v. Regan*, 461 U.S. 540 (1983).

⁶⁹ *Austin*, 494 U.S. at 659-60.

⁷⁰ *Id.* at 658.

⁷¹ Compare *id.* at 659-60 with *id.* at 683-84 (Scalia, J., dissenting), 703-05 (Kennedy, J., dissenting).

⁷² *Id.* at 659 (citing *Bellotti*, 435 U.S. at 788 n.26).

⁷³ See *supra* note 61 and accompanying text.

⁷⁴ *Citizens United v. FEC*, 130 S.Ct. 876, 913 (2010).

⁷⁵ *Id.* at 891.

exception to encompass a broader range of nonprofit organizations. The Court instead flatly ruled that corporate speech – regardless of the type of corporation involved – was subject to the same level of protection as individual speech even in the context of candidate-related speech because what mattered for First Amendment purposes was the speech, not the identity of the speaker.⁷⁶ The decision may not have been as flat-footed as it first appears, however, because the Court did leave open the possibility that some characteristics of the speaker – such as whether they are foreign entities – might still provide a permissible basis for differentiation.⁷⁷

As the *Bellotti* decision indicates, the Court’s focus on speech and not the speaker was not completely new, but the *Citizens United* decision appeared to take it to its logical extreme. Even the hedging with respect to certain speaker characteristics could be read as simply a concession that in those instances the government might have a stronger case for regulation of candidate-related speech because the combating corruption or appearance of corruption interest – even read narrowly – might be particularly strong in these instances. There was no suggestion in the opinion, however, that differential treatment of nonprofit organizations generally, or charities specifically, is permitted constitutionally.

B. Likely Immediate Effect on Charity Lobbying Limits

Nevertheless, it is highly unlikely that the *Citizens United* decision throws the existing federal tax law limits on lobbying by charities into immediate doubt for several reasons. First, the Supreme Court in *Citizens United* did not discuss *Taxation with Representation*, much less indicate that the latter’s holding might no longer be valid. Second, the Court has relied on the “alternate channel” reasoning of *Taxation with Representation* in other contexts and did not mention or discuss those precedents, much less suggest that they might now be in question (nor did the *Citizens United* dissent).⁷⁸ Third, the Court may have been motivated in part by an underlying concern that the

⁷⁶ See *id.* at 904-07.

⁷⁷ *Id.* at 911.

⁷⁸ See *supra* note 57.

members of Congress enacted the election law rules at issue to protect their own positions, to the detriment of our democratic political system.⁷⁹ There is no indication that the Court has a similar concern with respect to the federal tax law provisions. Fourth, while the Court has varied significantly with respect to the degree of deference it shows to Congress in the election-law area, it has consistently showed significant deference to Congress when it comes to tax law even when addressing constitutional challenges.⁸⁰ Finally, and as noted previously, the Supreme Court in *Taxation with Representation* relied on the fact that charities receive significant “subsidies” through the federal tax laws and thus it was permissible for Congress to limit the use of those subsidies, even with respect to speech.⁸¹ For these reasons, early commentators have generally concluded that the federal tax law prohibition on election-related speech by charities is still good law.⁸²

With respect to the last reason, however, at least one commentator has raised the issue of whether the Court’s dismissal of arguments that the various state-law benefits provided to corporations justified the prohibition on certain election-related speech may undermine the subsidy argument relied upon by the Court in *Taxation with Representation*.⁸³ He notes that the Court in *Citizens United* appeared to agree with the point made in *Austin* that “[s]tate law grants corporations special advantages” but then invoked the unconstitutional conditions doctrine by concluding “the State cannot exact as

⁷⁹ See *Citizens United*, 130 S.Ct. at 968-69 (Stevens, J., dissenting in part and concurring in part) (noting that the individual opinions relied upon by the majority have made this argument for not deferring to Congress in this context).

⁸⁰ Compare, e.g., Richard L. Hasen, *Beyond Incoherence: The Roberts Court’s Deregulatory Turn in FEC v. Wisconsin*, 92 MINN. L. REV. 1064, 1068-72 (2009) (discussing the oscillations in the Supreme Court’s deference to Congress with respect to the constitutionality of election laws) with, e.g., Andrew C. Weiler, Note, *Has Due Process Struck Out? The Judicial Rubberstamping of Retroactive Economic Laws*, 42 DUKE L.J. 1069, 1072-73 (1993) (noting that the Supreme Court has consistently rejected due process challenges to the retroactive application of tax laws).

⁸¹ See *supra* note 51 and accompanying text.

⁸² See, e.g., Miriam Galston, *When Statutory Regimes Collide: Will Wisconsin Right to Life and Citizens United Invalidate Federal Tax Regulation of Campaign Activity?* (GWU Legal Studies Research Paper No. 499, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1572511; Holly Schadler & Laurence E. Gold, *The Effect of Citizens United on Tax and Campaign Laws Governing Tax-Exempt Organizations*, 65 EXEMPT ORG. TAX REV. 229, 230-31 (2010).

⁸³ Seth Korman, *Citizens United and the Press: Two Distinct Implications*, 37 RUTGERS L. REC. 1, 9-10 (2010).

the price of those special advantages the forfeiture of First Amendment rights.”⁸⁴ The Court did not, however, identify those benefits as a “subsidy” or otherwise address the reasoning in *Taxation with Representation* that when a subsidy, as opposed to some other type of government-conferred advantage, is at issue then the government may constitutionally control what type of speech that subsidy supports. Moreover, it is not clear whether the Court in *Citizens United* even agreed with this “special advantages” point or simply took the position that even if it was true, it was insufficient to justify the prohibition. Under any conditions, both because the Court did not identify these advantages as equivalent to a subsidy and for the other reasons already listed, it appears at best premature to predict the demise of *Taxation with Representation*.

There are, however, two reasons why the *Citizens United* decision could still impact the limits on lobbying by charities. The first reason is simply that it is difficult if not impossible to predict the likely ramifications of this decision so soon after its issuance. Not only its holding but its reasoning will provide fodder for legal challenges and court decisions for many years, and it would be an impossible task to be accurate in predicting all of its possible ramifications or even all of its implications in this particular area.

The second and perhaps more troubling reason is that in *Citizens United* the Court did reject explicitly the argument that the election law limitations at issue in that case should survive constitutional scrutiny because corporations always have the alternative of engaging in election-related speech through a separately segregated fund, commonly known as a political action committee or PAC.⁸⁵ It found that “[a] PAC is a separate association from the corporation. So the PAC exemption from [the] expenditure ban . . . does not allow corporations to speak.”⁸⁶ The Court also concluded that even if PACs could be viewed as somehow allowing a corporation to speak, they were not sufficient to resolve the constitutional concern because “PACs are burdensome alternatives; they are

⁸⁴ *Ibid* (quoting *Citizens United v. FEC*, 130 S.Ct. 876, 905 (2010)).

⁸⁵ *Citizens United*, 130 S.Ct. at 887, 897-98.

⁸⁶ *Id.* at 897.

expensive to administer and subject to extensive regulations.”⁸⁷ Those “extensive regulations” include the need to appoint a treasurer, maintain certain records, make certain government filings, publicly disclose contributor and expenditure information, and accept contributions only from certain sources and then only up to certain amount per source.⁸⁸

While the Court had raised similar concerns in the *MCFL* case, in *Citizens United* it omitted two caveats to this conclusion that it had included in *MCFL*. First, in *Citizens United* the Court neglected to mention the limits on the sources and amounts of contributions to independent PACs, limits that provided the critical fifth vote in *MCFL* where the Court held the PAC alternative to be unconstitutionally burdensome.⁸⁹ This omission may have been intentional because, given the Court’s reasoning in *Citizens United*, it appears that such limits are unconstitutional with respect to contributions to PACs that operate independently of candidates.⁹⁰ Second, in finding the PAC alternative insufficient the Court did not, as it had in *MCFL*, drop a footnote explicitly distinguishing the tax subsidy situation addressed in *Taxation with Representation*.⁹¹ That omission latter

⁸⁷ *Id.* at 897.

⁸⁸ *See id.* at 897; 2 U.S.C. §§ 431(4)(B) (2006) (defining “political committee” to include a separate segregated fund established under 2 U.S.C. § 441b(b)), 432(a)-(d), (h)-(i) (detailing administrative requirements applicable to political committees); *id.* §§ 433-434 (same); *id.* § 441a(a)(1)(C) (per source limit on contributions to political committees); *id.* § 441b(a) (prohibiting national banks, corporations, and labor unions from making political contributions or expenditures); *id.* § 441b(b) (permitting such entities to maintain separate segregated funds for political purposes).

⁸⁹ *Compare* *Citizens United v. FEC*, 130 S.Ct. 876, 897-98 (2010) (not mentioning the contribution limits) *with* *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 265-66 (1986) (“*MCFL*”) (O’Connor, J., concurring in part and concurring in judgment) (concluding that the PAC alternative was unconstitutionally burdensome only because it both requires “a more formalized organizational form” and “significantly reduces or eliminates the sources of funding for groups such as *MCFL* with few or no ‘members’”).

⁹⁰ *See* *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (concluding that given the *Citizens United* decision, contribution limits on individual donations to independent political committees were unconstitutional); *EMILY’s List v. FEC*, 581 F.3d 1, 16-18 (D.C. Cir. 2009) (pre-*Citizens United*, concluding that FEC regulations that had the effect of limiting contributions by individuals to a non-profit entity for independent election-related activities were unconstitutional); *FEC Advisory Op.* 2010-11 (July 22, 2010) (concluding that given the *Citizens United* decision, a political committee that only makes independent expenditures may received unlimited contributions from individuals, other political committees, corporations, and labor organizations); *FEC Advisory Op.* 2010-09 (July 22, 2010) (concluding that given the *Citizens United* decision, a political committee that only makes independent expenditures and which is connected to and supported by a corporation may receive unlimited contributions from individuals).

⁹¹ *See MCFL*, 479 U.S. at 256 n.9.

may, however, simply reflect the fact that in *MCFL* the government explicitly relied on *TWR*.⁹² In contrast, in *Citizens United* neither the government nor *Citizens United* even cited *TWR*, nor did any of the numerous *amici*. It would therefore be unwise to read too much into these omissions. Nevertheless, they do at least suggest that administrative burdens, such as disclosure and recordkeeping requirements, placed on alternate channels for speech supported by non-subsidized funds may at some point become unconstitutionally heavy even in the absence of any actual limits on the raising or use of such funds. To determine what the ramifications of *Citizens United* in this respect are likely or, more importantly, should be, requires a more in-depth consideration of the issues raised by granting First Amendment protection to speech funded by *institutions* and not just speech funded by *individuals*.

III. INSTITUTIONAL RIGHTS

Scholars have wrestled for a number of years with the issue of whether and to what extent the First Amendment's free speech protection extends to speech by institutions as opposed to speech by individuals. Even those highly critical of such an extension have recognized that at least in some circumstances, speech directly made by institutions deserves some level of constitutional protection.⁹³ While the Court in *Citizens United* took a firm position on this issue, it is worth considering the possible different approaches to the threshold issue of whether speech by institutions is constitutionally protected at the highest level – *i.e.*, restrictions on such speech subject to strict scrutiny – and the related issue of whether spending on speech as well as speech itself is so protected. This is a worthwhile exercise because it reveals that even if one believes the Court adopted the wrong position in *Citizens United*, there are persuasive, alternate grounds for concluding that lobbying by charities should still usually receive the highest level of First Amendment protection. Similarly, consideration of whether certain uses of money should constitute

⁹² See Brief for Appellant at 26, *Massachusetts Citizens for Life v. FEC*, 479 U.S. 238 (1986) (No. 85-701).

⁹³ See, *e.g.*, *Bezanson*, *supra* note 6, at 80.

speech for First Amendment protection purposes reveals that even if one does not agree with the Supreme Court's current answer to this question, there are strong arguments for concluding that in the context of charities using non-deductible funds to support lobbying the answer to this question is yes. Only after consideration of these threshold issues can the impact of *Citizens United* on charities and lobbying be accurately evaluated.

A. *Threshold Issues*

There two threshold issues relating to *Citizens United* are the extent to which the First Amendment protects speech by institutions, as opposed to individuals, and, if such protection exists, whether it extends to the use of money to support such speech.

1. Is Speech by Institutions Protected?

The language of the Court's opinion in *Citizens United* could leave the impression that protection of institutional speech is an all-or-nothing proposition: either that speech has the full protection of the First Amendment, or it is deserving of no such protection.⁹⁴ That impression is incorrect, as the many scholars who have considered the issue of institutional rights have explored. There are number of options with respect to varying the strength of that protection. One obvious option would be provide a weaker level of protection for all institutions.⁹⁵ Another option would be to differentiate among types of institutions, perhaps finding strong, weak, or no protection depending on institutional characteristics.⁹⁶

To make such choices requires, however, a theory for why First Amendment protection extends to institutions. While there are numerous candidates, three approaches cover most of the landscape. First, the theory could be that freedom of speech is solely an individual right and so only speech by an individual is constitutionally protected. Even

⁹⁴ See *Citizens United*, 130 S.Ct. at 903 (appearing to characterize pre and post-*Austin* cases as taking these polar opposite positions).

⁹⁵ See, e.g., Bezanson, *supra* note 6.

that approach does not leave all institutional speech unprotected, however, for individuals often speak indirectly by hiring others – public relations firms, law firms, etc. – to speak on their behalf. But in all of these instances both the speech itself and the funds to pay for its development and communication come from an individual source. For this reason, the speech is *attributed* to the individual and it is because of that attribution it is protected, although the immediate source may be an institution.

Another option would be to view protection for institutional speech as, at least in some instances, derivative of protection for individual speech. Under this approach, the level of protection for institutional speech would depend on the strength of that speech's connection to the desires of individuals affiliated with that institution. At one extreme, the speech of a corporation owned by a single individual would be fully protected since that individual would have complete control over that speech – even though the funding for that speech may have originated in the corporation and not in that individual, and even though, in the words of now Justice Kagan, not requiring the corporation to distribute its funds to the individual owner before being used for the owner's desired speech may result in some "tax breaks."⁹⁷ Also near this end of the spectrum are *MCFL*-type nonprofit corporations that are funded only by individual members who share the corporation's ideological goals and so concur, at least in general terms, with its likely speech. At the other extreme, the speech of a large publicly traded corporation with tens of thousands of shareholders would almost certainly not be protected, or protected relatively weakly, because the corporation's speech would not reflect the desires of the corporation's owners but, as a practical matter, the desires of the corporation's senior management. Justice Stevens highlighted this example when he pointedly noted in his *Citizens United* dissent that the majority never uses a multinational business corporation in its hypotheticals.⁹⁸ There would necessarily be numerous other variations that would need to be considered and classified for protection purposes. As with the first approach, the protection for the institutional speech exists because such speech is attributed to one or

⁹⁶ See, e.g., Horwitz, *supra* note 6.

⁹⁷ Transcript of Oral Argument at 56, *Citizens United v. FEC*, 130 S.Ct. 876 (2010) (No. 08-205).

more individuals, but the link between the speech and such individual(s) is not required to be as strong as under the that approach.

Finally, there is the approach taken by the Court in *Citizens United* that would consider the protection as attaching to the speech and to the hearers of that speech, making the nature of the speech's source irrelevant. In this scenario the level of protection is unaffected by the fact it is an institution and not an individual speaking either directly or by attribution. The strength of the government's interest in limiting a particular type of institution's speech and the fit of such a limiting regulation might, however, depend on the nature of the source – for example, whether the institution is controlled by foreign individuals or entities, or whether the institution is the beneficiary of significant government contracts.⁹⁹

Why do these different approaches matter in the context of charities and lobbying? Because even if one disagrees with the Supreme Court's holding in *Citizens United* on this point, the charities most likely to be affected by the current limits on charity lobbying – and therefore most likely to need to take advantage of the alternate channel to speak provided by a non-charitable, tax-exempt organization – are those akin to the MCFLs of the world. Unless one takes the position that that only speech by institutions that is protected by the First Amendment is speech directed and funded by an identified individual in an essentially principal-agent relationship with the organization, the highest level of First Amendment protections should therefore extend to charity lobbying that exceeds the existing limits. My view is that this extreme, principal-agent position is untenable constitutionally, both because it would allow government to sharply limit the ability of individuals to gather together to engage in collectively desired speech – thereby favoring wealthy or prominent individuals who do not require such pooling of resources

⁹⁸ *Citizens United*, 130 S.Ct. at 936 n.12.

⁹⁹ See Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, H.R. 5175, 111th Cong. §§ 101-102 (2010) (separating out government contractors and foreign-controlled domestic corporations for stricter regulation with respect to spending on election-related communications); Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, S. 3295, 111th Cong. §§ 101-102 (2010) (same).

to be heard – and because it would undermine the freedom of association under the First Amendment.

It appears that the charities most likely to be affected by the current lobbying limits are those akin to the MCFLs of the world for two reasons. First, charities that are most similar to for-profit businesses in that they rely heavily on fees as opposed to contributions for their financial support are unlikely to bump up against the limits because such charities – *e.g.*, colleges, universities, and other schools; hospitals and health care entities; child care centers; retirement communities – focus the vast majority of their activities on providing the services for which they are paid. Whatever lobbying they engage in is therefore almost certainly going to be an insubstantial part of their activities or, if they have made the election to be subject to the alternate expenditure limits, comfortably below those limits since they are based on a sliding scale tied to overall exempt purpose expenditures. Second, in practice the actual charities with non-charitable, tax-exempt affiliates engaged in lobbying generally fit the MCFL model in that the individual supporters of these charities (and their affiliates) are well aware, and supportive, of these organizations’ public policy agendas. Besides Taxation with Representation, common examples are the American Civil Liberties Foundation and the ACLU, Focus on the Family and the Focus on the Family Action (recently renamed CitizenLink), and the Natural Resources Defense Council and the NRDC Action Fund.¹⁰⁰ The IRS has itself noticed this trait.¹⁰¹

Such charities are not, of course, limited to accepting contributions from individuals but may also be supported by other institutions, thereby differentiating them from the MCFLs of the world. To the extent such support leads to the charity (and its

¹⁰⁰ See ACLU, AMERICAN CIVIL LIBERTIES UNION AND THE ACLU FOUNDATION: WHAT IS THE DIFFERENCE, <http://www.aclu.org/american-civil-liberties-union-and-aclu-foundation-what-difference> (last visited Oct. 11, 2010); FOCUS ON THE FAMILY, FOCUS ON THE FAMILY ACTION CHANGES NAME TO CITIZENLINK, <http://www.focusonthefamily.com/socialissues/articles/weekly-alert/2010/20100521-focus-action-name-change.aspx> (last visited Oct. 11, 2010); NATURAL RESOURCES DEFENSE COUNCIL, ABOUT NRDC: NRDC ACTION FUND, <http://www.nrdc.org/about/actionfund.asp> (last visited Oct. 11, 2010); see also Report of Counsel for the Respondent, In the Matter of Speaker Newt Gingrich (Jan. 16, 1997), Exh. B (listing section 501(c)(3) organizations with section 501(c)(4) affiliates), *republished at* 97 TAX NOTES TODAY 16-78 (1997).

¹⁰¹ See Thomas & Kindell, *supra* note 28, at 255 (“Such an affiliated group of organizations is typically committed to a certain idea or movement, such as civil rights, family values, or environmental preservation.”).

non-charitable affiliate) speaking derivatively for such institutions as opposed to for like-minded individuals, the argument for the highest level of First Amendment protection for such charity speech becomes significantly weaker, if one disagrees with the Supreme Court's position in *Citizens United* (and in *Bellotti*). A different, lower level of First Amendment protection therefore would be justified for institutionally supported 501(c)(3)/501(c)(4) pairings under the derivative speech model. The vast majority of such pairings, however, does not appear to be vulnerable to such a differentiation. It therefore appears that the strict scrutiny level of First Amendment speech protection should generally extend to lobbying by such entities even absent the holdings in *Citizens United* and *Bellotti*.

2. Is Money Speech?

A second threshold issue is whether whatever level of protection exists constitutionally for institutional speech extends to speech-related spending by institutions. The question can be divided into two parts. First, there is spending that pays for speech, in that the speech would not occur at the same volume or effectiveness absent the spending.¹⁰² One of the simplest examples of the former role of money is buying a megaphone – the speech could still occur without the megaphone, but it will be heard by a larger audience if the speaker can spend money on amplification. As for the latter role, consider the difference between a message crafted by an individual and one crafted by an experienced public relations firm. Again, the speech occurs in either instance, but the ability to hire the firm will usually enhance the speech's effectiveness.

Second, there is the more controversial assertion that the very act of spending can itself be speech. The most significant but not universally accepted example of such speech is campaign contributions, where the very act of making a contribution to the candidate or political party of one's choice could be viewed as speech, and not merely as a means of facilitating speech by the recipient. Such spending is currently deemed by the Supreme

Court to have less protection than spending on the spender's own speech, however, if only because while the *act* of contributing is deemed to have substantial expressive value, the *amount* of a contribution is deemed to have significantly less such speech-related value (and so less protection).¹⁰³

Whatever the merit or lack thereof of the second issue, for the limitation on charities engaging in lobbying it is the first issue that is key. There is no doubt that lobbying, as well as other forms of advocacy, is facilitated by the ability to spend. Furthermore, the actual cost of lobbying will vary depending on whether pre-tax or post-tax funds must be used. The effect of the existing limits on charity lobbying, along with certain other federal tax provisions relating to lobbying, is, for the most part, to require the use of post-tax funds for such activity.¹⁰⁴

Even if spending itself is not a sufficiently expressive activity to merit the highest level of First Amendment protection, spending on speech does merit such protection. Speech is possible, and even high volume and effective speech is possible, without spending money, but it is much easier to engage in widespread and effective speech if funds can be spent on developing and promulgating that speech. Prohibiting or limiting the use of funds on speech therefore can significantly hinder the reach and effectiveness of that speech for those who lack non-monetary advantages – such as a high public profile – that can overcome such a prohibition or limit. Furthermore, coming together to speak through an organization form – *i.e.*, through an institution – and so pooling resources would appear to be the best way for like-minded individuals of limited means to enhance their speech through spending.

Moreover, those who reject the highest level of First Amendment protection even for spending on speech generally support that position by raising concerns regarding the

¹⁰² See, e.g., *McConnell v. FEC*, 540 U.S. 93, 251 (2003) (Scalia, J., concurring in part and dissenting in part) (making this point).

¹⁰³ See *Randall v. Sorrell*, 548 U.S. 230, 246-47 (2006); *Buckley v. Valeo*, 424 U.S. 1, 24-25 (1976).

¹⁰⁴ See, e.g., I.R.C. § 162(e) (2006) (in general, denying an ordinary and necessary business expense deduction for lobbying expenditures).

effect of money on our political system. For example, in his much cited essay criticizing the Supreme Court's strict scrutiny protection of election-related spending in *Buckley v. Valeo*, Judge J. Skelly Wright based his objections in significant part on the problematic effect of disparities in financial resource money on political outcomes.¹⁰⁵ While his concerns were not limited to elections, such worries are not as heightened in the lobbying context where even supporters of lesser protection for election-related spending concede there is not the same risk of government official corruption or appearance of corruption.¹⁰⁶

Speech, including lobbying and therefore spending on speech by the charities most likely to run up against the lobbying limits should therefore be protected by the First Amendment at the highest level – *i.e.*, requiring strict scrutiny. At the same time, however, the previous holding by the Supreme Court that the government is permitted to distinguish between types of speech when providing even an indirect subsidy through the tax laws, is still valid even in the wake of *Citizens United* for the reasons already discussed. The remaining question is therefore what burdens may be imposed on charities to ensure they only use post-tax dollars to engage in the affected speech.

B. Alternate Channels: Charities and Lobbying and Beyond

As noted previously, the greatest constitutional issue raised by the *Citizens United* decision for the charity lobbying limits is the Court's strongly worded dismissal of the government's argument that the ability to form a political committee or PAC provided a sufficient alternate channel for Citizen United's speech. The first part of this dismissal provides:

Section 441b [of 2 U.S.C.] is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. A PAC is a separate

¹⁰⁵ J. Skelly Wright, *Politics and the Constitution: Is Money Speech*, 85 YALE L.J. 1001, 1017-19 (1976); *see also* *Citizens United v. FEC*, 130 S.Ct. 876, 961 (2010) (Stevens, J., concurring in part and dissenting in part).

¹⁰⁶ *See, e.g., Citizens United*, 130 S.Ct. at 958-59 (Stevens, J., concurring in part and dissenting in part).

association from the corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak.¹⁰⁷

On its face this language would seem to foreclose the argument that an “alternate channel” would be sufficient to overcome First Amendment concerns relating to speech regardless of the nature of the speaker or the ease of creating and administering such an alternate channel. Yet both this passage and the rest of the Court’s opinion in *Citizens United* lack a key element found not only in *Taxation with Representation*, but other cases relying on *Taxation with Representation*’s reasoning. That element is a government-provided financial “subsidy” that, absent the speech limitation at issue, would necessarily support certain speech. While it has been argued that all corporations enjoy an effective subsidy by virtue of their special legal status, the Supreme Court did not appear to accept that argument in *Citizens United*.¹⁰⁸ In *Taxation with Representation*, however, the Court found a subsidy to be clearly present through the charitable contribution deduction that, for at least purposes of determining the effect of the First Amendment, was analogous to direct government funding. For the reasons already discussed, a *sub silentio* overruling of *Taxation with Representation* and its progeny seems unlikely.¹⁰⁹

This language does, however, suggest a more rigid conceptualization of the alternate channel approach when strict scrutiny applies. As developed by the Supreme Court in *Taxation with Representation* and subsequent cases, it is not completely clear to what extent Congress may burden the ability of the subsidized entity to speak through another (non-subsidized) entity. Or to look at it from another perspective, it is not clear what type of relationship between the subsidized entity and the non-subsidized entity must be allowed to exist for the first entity’s First Amendment speech rights to be vindicated through the latter entity. While the Court held in *FCC v. League of Women Voters* that an absolute prohibition on a relationship with another, non-subsidized entity that engages in

¹⁰⁷ *Citizens United v. FEC*, 130 S.Ct. 876, 897 (2010) (citations omitted; modification added).

¹⁰⁸ See *supra* note 84 and accompanying text.

¹⁰⁹ See *supra* notes 78-84 and accompanying text.

the otherwise barred speech is not permitted, the Court's other decisions leave it unclear what level of restriction short of an absolute bar is permitted.¹¹⁰

As described previously, in *Taxation with Representation* both the majority opinion in a footnote and Justice Blackmun in his concurrence appeared to be of the view that a (subsidized) charity must be able to have a fairly close relationship with a (non-subsidized) affiliate for the charity's First Amendment rights to be vindicated.¹¹¹ Yet in *Rust v. Sullivan*, the Court found a relatively strong level of separation to be permissible, although that case also involved a government interest in the speech at issue not being attributed to the government.¹¹² The lower courts have similar wrestled with what level of separation – ultimately, what conditions – may be imposed on such relationships without crossing into unconstitutional territory.¹¹³

While not directly on point because of the lack of a subsidy, the holding in *Citizens United* strongly suggests that the burden on the ability of a charity or other group to speak using non-subsidized funds must be minimal if strict scrutiny applies. For the reasons already discussed, even if one disagrees with *Citizens United* general holding regarding the level of protection provided to institutional speech generally, there are strong arguments for concluding that the highest level of protection applies to most charities that will run up against the lobbying limits. These positions lead to the ultimate conclusion that all the government can require consistent with the First Amendment is the degree of separation between the charity and its non-charitable affiliate sufficient to ensure the subsidy will not flow to the speech at issue, but no more.

The Court's alternate argument with respect to PACs is also instructive on this point:

¹¹⁰ See *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

¹¹¹ See *supra* notes 54-56 and accompanying text.

¹¹² See *Rust v. Sullivan*, 500 U.S. 173, 197-98 (1991);

¹¹³ See, e.g., *Brooklyn Legal Services Corp. v. Legal Services Corp.*, 462 F.3d 219, 232-33 (2d Cir. 2006); *Alliance for Open Soc'y Int'l v. U.S. Agency for Int'l Dev.*, 570 F. Supp.2d 533 (S.D.N.Y. 2008).

Even if a PAC could somehow allow a corporation to speak – and it does not – the option to form PACs does not alleviate the First Amendment problems with § 441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.

And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur: These reports must contain information regarding the amount of cash on hand; the total amount of receipts, detailed by 10 different categories; the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over \$200; the total amount of all disbursements, detailed by 12 different categories; the names of all authorized or affiliated committees to whom expenditures aggregating over \$200 have been made; persons to whom loan repayments or refunds have been made; the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation.

PACs have to comply with these regulations just to speak. This might explain why fewer than 2,000 of the millions of corporations in this country have PACs. PACs, furthermore, must exist before they can speak. Given the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign.

Section 441b's prohibition on corporate independent expenditures is thus a ban on speech.¹¹⁴

This argument strengthens the position that the measures required to prevent such subsidies from funding certain speech must not substantially burden the ability of the same association of individuals to use non-subsidized funds for such speech. In this tax context it therefore supports the IRS' decision to require, in almost all instances, no more than what is minimally necessary to ensure financial separation between section 501(c)(3)

¹¹⁴ Citizens United v. FEC, 130 S.Ct. 876, 897-98 (2010) (citations omitted).

charitable organizations and their non-charitable but still tax-exempt affiliates.¹¹⁵ Until the *Citizens United* decision, however, this IRS position was arguably only a prudential measure in that more burdensome restrictions on the use by a charity of a non-charitable affiliate *might* have provided grounds for a constitutional challenge that possibly could succeed. With the *Citizens United* decision, such a challenge is not only more likely but would seem to have a higher chance of success.

This conclusion leads to two important ramifications in the federal tax context. First, it suggests that the few instances where the IRS has imposed a restriction that goes beyond what is required for financial separation purposes may have heightened constitutional vulnerability in the wake of *Citizens United*. One such context is the IRS conclusion that any communication by a charity leader in an “official” publication or forum of the charity will be attributed to the charity, regardless of the source of funding for such communication.¹¹⁶ While part of the rationale for this rule may be the difficulty of valuing the “halo effect” resulting from the charity leader speaking through an official charity outlet, the IRS appears to rely primarily on a conclusion that in this instance attribution to the charity is required regardless of the amount paid by a non-charity source.¹¹⁷ Given *Citizens United*, such an “attribution” approach – when no subsidized funds are used for the speech at issue – appears problematic.

Second, this conclusion raises questions regarding whether proposals to place significantly greater administrative burdens on non-charitable tax-exempt organizations, such as the proposed disclosure, recordkeeping, and other administrative requirements for such entities that engage in certain types of speech found in many of the post-*Citizens*

¹¹⁵ See, e.g., Memorandum from Marsha Ramirez, *supra* note 30, at 3 (stating that while the IRS would investigate whether links between the website of a section 501(c)(3) organization and an unrelated organization’s website might violate the prohibition on section 501(c)(3) organizations participating in political campaigns, the IRS would not pursue, for at least the time being, whether a link between the website of a section 501(c)(3) organization and the home page of a website operated by a related section 501(c)(4) organization violated that prohibition in light of Justice Blackmun’s concurring opinion in *Taxation with Representation*).

¹¹⁶ See Rev. Rul. 2007-41, 2007-25 I.R.B. 1421 (Situation 4).

United legislative proposals, might be unconstitutional.¹¹⁸ Indeed, a challenge to these requirements is already being brought by SpeechNow.org, a non-charitable nonprofit organization that asserts it only engages in a limited amount of election-related speech regulated by federal election law but is still subject, unconstitutionally, to the full range of PAC administrative burdens.¹¹⁹ While the existing law and pending proposals primarily target candidate-related election communications, not lobbying, they could impact the use of non-charitable affiliates for lobbying if such affiliates also engage in candidate-related speech as well. *Citizens United* strongly suggests that if strict scrutiny applies to restrictions on charities engaging in lobbying through non-charitable affiliates – which I argue it does even if one disagrees with the main holding in *Citizens United* – then such administrative burdens are at a minimum constitutionally vulnerable.

One possible solution to this tension would be to adjust the existing categories of tax-exempt organizations that permit a single organization to engage in both (unlimited) lobbying and (as a secondary activity) candidate-related communications and other activities. Currently numerous tax-exempt organizations, including section 501(c)(4) advocacy groups, section 501(c)(5) labor organizations, and section 501(c)(6) trade associations operate, under this regime. Section 501(c) could be modified, however, to only permit such organizations to engage in unlimited lobbying (in furtherance of their social welfare, labor, or industry purposes) while requiring that all candidate-related activities occur in a separate entity that while also tax-exempt could be subject to more extensive disclosure and other administrative obligations, as is the case with the current section 527 organizations. This resolution still requires, however, that the burden of creating a separate, political organization be minimal, and so does not resolve the issue of

¹¹⁷ See Benjamin Leff, “*Sit Down and Count the Cost: A Framework for Constitutionally Enforcing the 501(c)(3) Campaign Intervention Ban*,” 28 VA. TAX REV. 673, 701-02 (2009) (criticizing this attribution rule on these grounds, pre-*Citizens United*).

¹¹⁸ See, e.g., Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, H.R. 5175, 111th Cong. §§ 201-214, 301 (2010); Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act, S. 3295, 111th Cong. §§ 201-214, 301 (2010).

¹¹⁹ See *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), *petition for cert. filed*, 79 U.S.LW. 3077 (U.S. Jul. 23, 2010) (No. 10-145).

whether such disclosure and administrative obligations might, at some point, become unconstitutionally burdensome.

C. *Ramifications Beyond the Federal Tax Rules*

As noted previously, the holding in *Taxation with Representation* has been relied on in cases outside of the federal tax limits on speech by charities that raise unconstitutional conditions. Besides *Rust v. Sullivan*, there is pending litigation regarding legal assistance programs that receive federal funds and the speech-related limits placed on the use of private funds by those programs,¹²⁰ as well as litigation regarding AIDS prevention programs that receive federal funds and the speech-related limits placed on the private use of funds by those programs.¹²¹

These cases have generally involved *direct* subsidies from the federal government, usually in the form of grants, as opposed to the *indirect* subsidies provided to charities through the Internal Revenue Code. This difference has at times raised the additional issue of whether the organizations receiving the subsidies – usually tax-exempt organizations, and often charities – could be perceived by the public as speaking on behalf of the government or being paid to communicate a government-favored message and so a greater level of separation between their subsidized and non-subsidized speech can be required constitutionally so as not to confuse the public regarding what the government is saying or undermine the government’s desired message.¹²² Not all direct subsidies

¹²⁰ See *Brooklyn Legal Services Corp. v. Legal Services Corp.*, 462 F.3d 219, 232-33 (2d Cir. 2006) (remanding case for consideration of whether the plaintiffs had an adequate alternative channel for engaging in speech using only private funds). This dispute is currently on hold pending possible legislation that would moot it, that litigation could re-ignite at any time. See *Dobbins/Velazquez v. Legal Services Corporation*, http://www.brennancenter.org/content/resource/dobbins_velazquez_v_legal_services_corporation/ (see second to last paragraph of case summary, which notes that “[t]he continuance may be terminated by any party and the case may be resumed in the District Court at any time”).

¹²¹ See *Alliance for Open Society Int’l v. U.S. Agency for Int’l Development*, 570 F. Supp.2d 533 (S.D.N.Y. 2008).

¹²² See, e.g., *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 833-34 (1995) (characterizing *Rust v. Sullivan*, 500 U.S. 173 (1991), as involving the government funding a program so as to use “private speakers to transmit specific information pertaining to its own program” and distinguishing that situation from one where the government “expends funds to encourage a diversity of views from private speakers”).

necessarily involve a government-favored message, however, so at least outside of that context the ramifications of *Citizens United* would appear to be similar as for charities seeking to engage in lobbying with non-subsidized funds.

More specifically, if strict scrutiny applies to government attempts to limit the use by charities of non-subsidized funds for lobbying, for the same reasons this level of scrutiny should also apply to government attempts to limit the use of non-subsidized funds by grant-receiving entities for various forms of speech. As with the charities that are most likely to run up against the lobbying limits, such entities are often (although not always) ideologically committed groups heavily supported by individuals who agree with the ideological positions taken. If this level of scrutiny applies, the consideration of PACs in *Citizens United* suggests that any burdens placed on the use of non-subsidized funds that go beyond what is absolutely necessary to ensure the proper use of the subsidized funds will be at least constitutionally suspect. Such burdens have included requiring the hiring of separate staff and the use of physically separate facilities. Absent a need for such burdens to prevent the attribution of the speech at issue to the government, which is a separate concern that may justify such burdens constitutionally, such measures appear to go beyond what is permitted under the First Amendment in the wake of *Citizens United*.

More fundamentally, *Citizens United* may provide a catalyst for renewed consideration of the unconstitutional conditions doctrine not only in the charity speech context but in the subsidy situation more broadly. Such renewed consideration is far from certain, but the continued confusion over when a condition that infringes on constitutional rights – particularly the right to free speech – is unconstitutional indicates that such consideration is still needed. One possible approach would be to consider whether the underlying purpose of the subsidy should be the controlling factor, with the constitutionality of the speech-related condition turning on whether that condition is necessary for accomplishing that purpose.

Such an approach would have potentially broad ramifications, including to the charity lobbying context. The question in that context would become whether the

purpose for the charitable contribution deduction would be frustrated by permitting charities to engage in unlimited lobbying. Indeed, there is a strong case to be made that it was exactly this concern that motivated Congress when it enacted the initial charity lobbying limit, because the legislative history indicates that Congress felt charity lobbying could be co-opted by private interests and serving private interests is fundamentally at odds with the public benefitting nature of the organizations Congress has identified as eligible for deductible charitable contributions.¹²³ The problem with the limit as enacted, however, is that it goes well beyond this private interest concern. Moreover, the subsequent development of the private benefit doctrine indicates that the blunt instrument of a general lobbying limitation is not needed to address this private interest concern.¹²⁴

Interestingly, and as others have addressed at length, the prohibition on candidate-related political activity by charities may pass muster under this refinement of the unconstitutional conditions doctrine.¹²⁵ That is because supporting or opposing candidates for election would generally appear to have a much greater private interest serving aspect – that is the interest of the candidate in obtaining the desired office – than most lobbying efforts. Whether, the vagueness of the existing definition for what is prohibited candidate-related activity would raise a separate constitutional issue is not, however, addressed by this refinement.

CONCLUSION

A careful reading of *Citizens United* strongly suggests that the existing limits on lobbying by charities continue to be valid. Those limits rest on the congressional decision not to provide a “subsidy” for such speech through the contribution deduction available to

¹²³ See *supra* note 19 and accompanying text.

¹²⁴ See generally Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (2010) (requiring charities to serve “a public rather than a private interest”); Andrew Megosh et al, *Private Benefit Under 501(c)(3)*, EXEMPT ORGANIZATIONS-TECHNICAL INSTRUCTION PROGRAM FOR FY 2001, at 135 (2000).

¹²⁵ See Gregory L. Colvin, *How Well Does the Tax Code Work in Regulating Politics?*, 12 TAX. OF EXEMPTS 66 (2000).

charities, a factor not present in *Citizens United* and previously held by the Supreme Court to provide a sufficient basis for such limits. At the same time, the constitutional requirement that charities have an alternate channel for engaging in lobbying beyond the limits remains intact.

What *Citizens United* may change is the extent to which the government may burden the ability to create that alternate channel beyond what is absolutely necessary to ensure financial separation. While the IRS has historically been careful to keep that burden light, its position has arguably been primarily a pragmatic one designed to avoid constitutional litigation that it might lose but that would certainly require significant resources it could more productively use elsewhere. Now, however, the risk of such a loss appears to be significantly increased. Moreover, both some of its current positions and congressional proposals that would impose additional burdens may also be constitutionally problematic.

Finally, this line of argument suggests that other, non-tax cases that raise similar issues also be impacted by *Citizens United*. Again, the presence of a government subsidy still appears to permit the government to dictate what speech may – and may not – be funded by that subsidy. The requirements the government may impose in the name of achieving this goal may be subject to a greater constitutional scrutiny, however. Furthermore, *Citizens United* may trigger further consideration of whether the unconstitutional conditions doctrine can be successfully refined in the subsidy context. One of the ramifications of *Citizens United* may therefore have been to bring even greater clarity to this one corner of the otherwise murky unconstitutional conditions world.