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Citizens United and the Political Speech of Charities: A Conservative Approach*

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Citizens United and the Political Speech of Charities

Roger Colinvaux¹

Introduction

The rule that charitable organizations may not “participate in, or intervene in . . . any political campaign”² is hardly a secret. Since its introduction as part of the Internal Revenue Code in 1954, the “political activities prohibition,” as it is often called, has been the subject of considerable scholarly debate, practical concern, and occasional political wrangling. Although the contours of the rule may be imprecise, and enforcement by the IRS uneven, resulting in frustration for some, arguably the rule has stood the test of time. Like it or not, understand it or not, it is an embedded characteristic of the charitable sector that charity and political activity by law are incompatible.

As a practical matter, the political activities prohibition (or “Rule”) means that charities may not become partisan, or agents of propaganda. Charities are allowed a voice on issues, but may not themselves become political actors or unbalanced opinionators. The line can be a difficult one to draw. As Aristotle said long ago: man is by nature a political animal.³ Thus, a rule that keeps associations of persons from speaking politically is bound to bump up against primal forces from time to time. But the Rule is a well-intentioned, if paternalistic, effort to keep charitable institutions outside of the political sphere. And notwithstanding occasional pressure on the Rule, there has been during its history little realistic chance of reversal, by Congress or the courts, of this defining characteristic of the charitable “independent” sector.

One reason the Rule has lasted is because by and large it has been uncontroversial. There have been some loud voices raised in resistance to the Rule, but little concrete

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² I.R.C. § 501(c)(3).

³ Aristotle, *The Politics*, Book 1, Chapter 2 (Benjamin Jowett & Thomas Twining ed.).

action. Another reason the Rule has survived may also be because to a certain extent, it was redundant. Absent the Rule, charities would still have faced a prohibition on some of their political activities because of the campaign finance laws. Until recently, it was an established rule that corporations, including charitable corporations, could not spend money expressly advocating for or against a candidate for public office.⁴ Accordingly, for the most political of speech, charities faced a tax law restriction and a campaign finance law restriction.

The Supreme Court's decision in *Citizens United v. Federal Election Commission*⁵ changes the legal landscape. *Citizens United* held that the campaign finance rule prohibiting corporate expenditures for express advocacy⁶ (or its functional equivalent) is an unconstitutional burden on free speech under the First Amendment. Accordingly, the tax rule now stands alone, prohibiting not only express advocacy by charitable corporations but also other forms of political speech as defined by the Internal Revenue Service ("IRS").⁷

A challenge to the constitutionality of the political activities prohibition thus seems inevitable.⁸ Can the prohibition survive *Citizens United*? Should it? These are the questions addressed in this Article.⁹ Part I of the Article surveys the history of the political activities prohibition in order to emphasize that it was not a reactionary policy but quite considered, and that there are strong State interests supporting it. Part II of the Article analyzes *Citizens United* in detail and argues that if the Supreme Court considers a

⁴ § 304 of Labor Management Relations Act of 1947, 61 Stat. 159, 2 U.S.C. § 251 (1946 ed., Supp I).

⁵ 558 U.S. 50 (2010).

⁶ Express advocacy means to use "express terms [that] advocate the election or defeat of a clearly identified candidate for federal office," such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," or "reject." *Buckley v. Valeo*, 424 U.S. 1, 44, n. 52 (1976).

⁷ For a description of the type of activity generally covered by the Rule, see *infra* note __.

⁸ See *Catholic Answers Inc. and Karl Keating v. United States*, U.S. District Court for the Southern District of California, Civil Action No. 3:09-cv-00670-IEG-AJB; *Catholic Answers v. U.S.*, 2009-2 U.S. Tax Case. (CCH) P.50,697, 104 A.F.T.R.2d (RIA) 6894 (S.D. Cal. 2009), *appeal docketed*, No. 09-56926 (9th Cir. Dec. 4, 2009).

⁹ See also Miriam Galston, *When Statutory Regimes Collide: Will Wisconsin Right to Life and Citizens United Invalidate Federal Tax Regulation of Campaign Activity?*, on SSRN (arguing that the political activities prohibition is not likely to be held to be an unconstitutional burden). This Article generally agrees with Professor Galston's conclusion, and takes a different and supplementary approach.

challenge to the political activities prohibition, *Citizens United* is readily distinguishable, and the political activities prohibition, unlike the campaign finance rule, is not a burden on speech and therefore is constitutional. Part III of the Article discusses cautionary notes to the analysis of Part II, and explains that even if there is a constitutional defect to the political activities prohibition, the more important limitation on the charitable deduction nonetheless would survive. Regardless of the constitutionality of the political activities prohibition, Part IV examines the possibilities for a charitable tax status in which political activity is allowed, and concludes that the current rule is the best option. Part V concludes.

At the outset, it should be noted that historically and today, the term “political activity” gives rise to considerable confusion. As a matter of modern charity tax law, it refers to activity covered by the political activities prohibition and is distinguished from another subset of activity related to politics, namely lobbying, which carries its own separate limitation.¹⁰ Although today we readily distinguish between the two, historically the term “political activity” did not have the same technical meaning.¹¹ As discussed in Part I, a question when charitable exemption was first granted was the extent to which political activity, broadly construed, was consistent with charitable tax status. So in part, the story of political activity and charity is a story of the development of legal categories to describe specific types of “political activity” and formulate rules with respect thereto. Accordingly, although the thrust of this Article is about the political activities prohibition of § 501(c)(3), the prohibition cannot be viewed in isolation. It is closely connected to the lobbying limitation of § 501(c)(3) and also to provisions of the Code¹² that disallow ordinary and necessary business expense deductions for lobbying and political activity,¹³

¹⁰ An organization is not recognized under § 501(c)(3) unless “no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.” I.R.C. § 501(c)(3).

¹¹ See e.g., Elias Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities*, 46 Va. L. Rev. 439 (1960) (writing about “political activity” to mean what today we refer to as lobbying activity, and distinguishing it from campaign activity). Also, as discussed *infra*, early references to “political activity” in legislative history were broad and included lobbying.

¹² Unless otherwise indicated, all references to the “Code” are to the Internal Revenue Code of 1986, as amended.

¹³ I.R.C. § 162(e).

that disallow charitable contribution deductions for contributions to an organization that engages in political activity or substantial lobbying,¹⁴ and to the section of the Code that provides for the tax treatment of political organizations.¹⁵

I. Historical Background of a Noble Rule

A. *A Brief History of the Prohibition: A Noncontroversial Rule*

Senator Lyndon Johnson famously inserted the political activities prohibition as a Senate floor amendment to legislation that became the Internal Revenue Code of 1954.¹⁶ There is no direct legislative history to the provision explaining Congress's reasoning.¹⁷ The Rule's abrupt passage leads many to conclude that its rationale was mostly political: i.e., Senator Johnson was attacked by a charity during his reelection campaign and used the power of his office to change the law to prohibit such attacks.¹⁸ Indeed, there is little doubt that Johnson pushed through the Rule in the heat of a political battle. Thus, after a thorough review of the legislative record, one commentator concludes that "Johnson saw a cabal of national conservative forces, led by tax-exempt educational entities fueled by

¹⁴ I.R.C. § 170.

¹⁵ I.R.C. § 527.

¹⁶ 100 Cong. Rec. 9128 (1954).

¹⁷ The direct legislative history is succinct. Senator Johnson explained to the Senate:

Mr. President, this amendment seeks to extend the provisions of section 501 of the House bill, denying tax-exempt status to not only those people who influence legislation but also to those who intervene in any political campaign on behalf of any candidate for any public office. I have discussed the matter with the chairman of the committee, the minority ranking member of the committee, and several other members of the committee, and I understand that the amendment is acceptable to them. I hope the chairman will take it to conference, and that it will be included in the final bill which Congress passes.

Id.

¹⁸ See e.g., Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 16-23 (2003); Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B. C. L. REV. 733, 768 (2001); James J. Fishman & Stephen Schwarz, *Taxation of Nonprofit Organizations: Cases and Materials* (2d ed. 2006) ("The conventional wisdom is that Senator Johnson was out to curb the activities of a Texas foundation which had provided indirect support to his opponent in a senatorial primary election campaign."); Bruce R. Hopkins, *The Law of Tax-Exempt Organizations* § 23.1 (9th ed. 2007).

corporate donations, arrayed against him and wanted to put a stop to the meddling of these foreign interlopers.”¹⁹ Enactment of the Rule was the weapon of choice.

Notwithstanding the circumstances of the Rule’s enactment, however, the broader historical record offers a more compelling version of the origin of the Rule than as just the reaction of a single skillful Senator to a political problem. Although the absence of direct legislative history is accurate, the implication sometimes mooted in discussions of it are that we have to guess as to what Congress was thinking, or that the Amendment was ill-considered, and something we have just been coping with, for better or worse, ever since.²⁰ In light of the forthcoming challenge to the political activities prohibition, it is important therefore to put the Johnson Amendment in the wider political, legislative, and historical context.

The question of charity and politics did not arise suddenly in the summer of 1954, but was a problem that had dogged charitable tax status for decades if not centuries. Uncertainty about the role of charity in the political process was reflected in the common

¹⁹ O’Daniel, *supra* note __ at 768.

²⁰ A view that is implicit in some discussions of the Rule is that, in part because of the abrupt fashion in which the Rule was enacted, the rationale is uncertain, and we are, for the most part, supplying reasons for Congress’ actions after the fact. Importantly, here, the implication may be that the Rule was adopted ad hoc, *and therefore* should be changed, or if not changed, perhaps treated with less reverence than a more fully deliberated rule. See e.g., Houck, *supra* note __ at 81 (“The Internal Revenue Code restraints on the political activities of charities have been in evolution, and in dispute, for nearly a century. They represent no grand plan, but rather a design arrived at in pieces by the impulses of the moment. They have been looking for a reason since the time they first appeared, and it was half a century before the Congress even attempted one. Reading their histories, one is struck by the fact that each of the limitations, in a different climate, could have come out quite differently.”); John Simon, Harvey Dale, Laura Chisolm, *The Federal Tax Treatment of Charitable Organizations, in* The Nonprofit Sector 267, 285-86 (Walter W. Powell and Richard Steinberg eds., 2006) (“It is generally agreed that no cogent, consistent rationale for the various restrictions on political activity found in § 501(c)(3) and related provisions can be unearthed in the legislative record of their enactment. Rather, the constraints were adopted piecemeal, often with little discussion, and, in the case of the campaigning ban, as an apparently ad hoc response to a perceived affront to the lawmakers who sponsored the bill.”); Keith S. Blair, *Praying for a Tax Break: Churches, Political Speech, and the Loss of Section 501(c)(3) Tax Exempt Status*, 86 DENV. U. L. REV. 405, 413 (2009) (citing briefly the “little legislative history” and the “generally accepted facts” that led LBJ to introduce the amendment, then moving on to discuss how the present ban affects churches); Siri Mielke Buller, *Lobbying and Political Restrictions on § 501(c)(3) Organizations: A Guide for Compliance in the Wake of Increased IRS Examination*, 52 S.D. L. REV. 136, 143 (2007) (discussing briefly that the 1954 amendment restricting political activity was Johnson’s doing and that it remains in the current code).

law of trusts,²¹ and in the early American experience with the income tax. In 1919, for example, the Treasury adopted a regulation for purposes of the new charitable contribution deduction of 1917 stating that “associations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute.”²² Although the basis for the regulation is not clear,²³ it evidences distrust at the beginning with partisan propaganda as a charitable activity. The distrust was taken up by the courts, most notably in *Slee v. Commissioner*,²⁴ when Judge Learned Hand ruled that an organization formed to provide information about birth control acted contrary to its charitable tax exemption when it lobbied to change the birth control laws. Judge Hand famously held that “[p]olitical agitation as such is outside the statute, however innocent the aim.”²⁵

Inevitably, Congress was drawn into the debate, and in 1934 drew a line in the Code by requiring as a condition of charitable tax status that “no substantial part” of an organization’s activities could be “carrying on propaganda, or otherwise attempting, to influence legislation.” The immediate problem at the time was a charity that was engaged in a high profile attempt to rein in government at the outset of the New Deal by opposing

²¹See Houck, *supra* note __ at 4-8 (noting that “[b]y the early twentieth century . . . the English rule and its applications had evolved to the point where political activity-legislative or electoral, exclusive or ancillary - was fatal” but that the American majority rule diverged to embrace use of political means to secure charitable ends); Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 Geo. Wash. L. Rev. 308, 346 (1990) (“what can be derived from the cases is the principle that at common law, political purposes are not charitable purposes; what the cases do not necessarily establish is that the use of political means (even arguably partisan political means) to achieve a charitable end nullifies the charitable character of that end at common law.”); Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217, 252-3 (1992) (arguing that campaign intervention that furthers the organization’s mission is consistent with the common law on charitable trusts).

²² T.D. 2137, 21 Treas. Dec. Int. Rev. 285 (1919).

²³ Houck, *supra* note __ at 9. Houck describes the early interpretive rulings of the Treasury as initially recognizing political ends as charitable before changing course and deciding that “Propaganda is that which propagates the tenets or principles of a particular doctrine by zealous dissemination” and so is not for the public benefit. Subsequent decisions struggled to maintain the propaganda/educational distinction. *Id.* at 10-12 (quoting S. 1362, II-2 C.B. 152 (1920)).

²⁴ 42 F.2d 184 (2d Cir. 1930).

²⁵ *Id.* at 185. Professor Houck describes the court cases that followed *Slee* as limiting its reach. Houck *supra* note __ at 14-15.

legislation.²⁶ Accordingly, the response ultimately enacted was directed to legislative and not campaign activity. But Congress was aware of the distinction between the two subsets of “political” activity. When the 1934 rule passed the Senate, it included language similar to the later Johnson Amendment: to wit, that “no substantial part” of a charity’s activities may be “participation in partisan politics.”²⁷ However, the Congress at the time considered this language too broad and struck it in conference.²⁸ Thus, the 1934 legislation severely limited one type of political activity – lobbying – but left open for another day the issue of campaign intervention.

By enacting the Johnson amendment 20 years later, Congress in effect returned to the original 1934 Senate bill (except without an allowance for insubstantial political activity).²⁹ Accordingly, not only had Congress been considering the “political activities” of charities for some time prior to enactment of the Johnson amendment, but the Johnson amendment was but a return to language that, though not identical, had in substance passed the Senate before.

In addition, as chronicled by Professor Ann Murphy, enactment of the Johnson Amendment is best understood in the context of wider events,³⁰ including the historical tension that had been ongoing in the Treasury, the courts, and the legislature since early in the century. The time was the spring and summer of 1954.³¹ The issue was whether charities should intervene in political campaigns. Although Johnson and his aides asked this question and answered in the negative, Johnson’s actions did not occur in a vacuum.

²⁶ See Houck, *supra* note __ at 16-23.

²⁷ S. Rep. No. 73-558, 73d Cong. 2d Sess. 26 (1934).

²⁸ H.R. Conf. Rep. No. 73-1385, 73d Cong., 2d Sess. 3-4 (1934). Representative Samuel B. Hill explained in the Congressional Record that “We were afraid this provision was too broad.” 78 Cong. Rec. 7,831 (1934). See also Judith E. Kindell & John Francis Reilly, *Election Year Issues*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2002, 335 (2001).

²⁹ There is evidence that Johnson’s staff was aware of the history of the 1934 amendment. The history was described in the statement by the IRS before the Reece Committee, which appeared in Johnson’s files with handwritten transcriptions, “presumably made by a Johnson staffer.” See O’Daniel at 764-65.

³⁰ Ann M. Murphy, *Campaign Signs and the Collection Plate – Never the Twain Shall Meet?*, 1 Pittsburgh Tax Rev. 35 (2003).

³¹ Johnson first became involved in the issue because of a letter he received on May 27, 1954. He proposed his Amendment on the Senate floor on July 2, 1954. See O’Daniel, *supra* note __ at 765.

Congress had *for months* been holding public hearings that investigated the *political activities* of charitable organizations. In 1952, the House of Representatives formed a special committee to investigate tax-exempt foundations and other charities, known as the “Cox Committee.” Specifically, the committee was charged with investigating “whether foundations have been infiltrated by communists” and whether “tax-exempt groups are using their money for stated purposes and are not ‘endangering our existing capitalistic structure.’”³² The Committee concluded that although no direct evidence of subversion existed, foundations were susceptible.

Upon the death of Chairman Cox a new committee was created (the “Reece committee”) to continue the work of the Cox Committee. The Reece Committee was to:

conduct a full and complete investigation and study of educational and philanthropic foundations and other comparable organizations which are exempt from Federal income taxation to determine if any foundations and organizations are using their resources for purposes other than the purposes for which they were established, and especially to determine which such foundations and organizations are using their resources for un-American and subversive activities; *for political purposes; propaganda, or attempts to influence legislation.*³³

The Reece committee held 16 *hearings*, the last of which occurred the day Senator Johnson first proposed his political activities amendment.³⁴ In its final written report, the Committee concluded that:

It is the opinion of this Committee that the wording of *the tax law regarding the prohibition of political activity* should be carefully re-examined. We recognize that it is extremely difficult to draw the line between what should be permissible and what should not. Nevertheless, the present rule, as interpreted by the courts, permits far too much license. While further study may be indicated, we are inclined to support the suggestion that the limiting conditions of the present statute be dropped—*those which restrict to the prohibition of political activity “to influence legislation”* and those which condemn only if a “substantial” part of the foundation’s funds are so used. These restrictions make the entire prohibition meaningless. *We advocate the complete exclusion of political activity*, leaving it to the courts to apply the maxim of *de minimis no curat lex*. Carefully devised

³² See Murphy, *supra* note __ at 49.

³³ Tax Exempt Foundation, H.R. Rep. No. 83-2681, at 1 (1954) (emphasis added).

³⁴ See O’Daniel, *supra* note __ at 765.

exceptions to this general prohibition against political activity might be made in the case of certain special types of organizations, such as bar associations.³⁵

The excerpt is revealing. It is a critique of the then present law “prohibition on political activity,” which at the time³⁶ included only the lobbying limit. In effect, the Committee is saying that the then present law rule did not go nearly far enough and urged changes to eliminate two loopholes. The first loophole was that the restriction covered only lobbying. Therefore, the Committee said the provision should be broadened in scope to cover all political activity, i.e., the language restricting the “prohibition” to activities “to influence legislation” should be “dropped.” The second loophole was that insubstantial lobbying was allowed. This too the Committee said should be changed, by eliminating the “substantial part” language. These two loopholes, the Committee said, “make the entire prohibition meaningless.” And so after of months of hearings and agitation, the Reece Committee expressed the exact verdict reached by Johnson, and, in turn, the Congress – that politics and charity are incompatible.

In short, although the direct legislative record of the political activities prohibition itself is sparse, the political and historical context that gave rise to enactment of the rule largely supports it.³⁷ The two years prior to enactment of the rule were notable for distrust of foundations and other charitable organizations and concern over their “political” involvement, broadly construed. Looking back to earlier in the century, the historical experience of charity and politics was characterized by suspicion and gradual retrenchment. Rather than being an ad hoc, overreaction to one man’s political problem,

³⁵ Tax Exempt Foundations, *supra* note __ at 219 (emphasis added).

³⁶ The Committee’s final report was released in December 1954, after passage of the Johnson Amendment, though apparently without taking it into account. This could be ignorance of the new rule; it could be implicit support for it. It could be that the report was drafted mostly before enactment of the Rule but published afterward. In any case, there is little question but that the climate of the time was in favor of restrictions on the “political activity” of charitable organizations.

³⁷ As Professor Murphy concludes: “Against this backdrop, when Senator Johnson proposed his amendment . . . it is not surprising that it was adopted verbatim without hearings or testimony. Both sides of the political fence were disturbed by the potential of non-profit groups to wield political power.” Murphy, *supra* note __ at 53.

the Rule is more fairly characterized as an expression of an evolved consensus.³⁸ Indeed, the ease of passage and subsequent lack of controversy regarding the Rule support the idea that by the time of its enactment it was a relatively uncontroversial proposition that charities should not be allowed to engage in political activity, broadly defined.

B. Legislative Developments After Enactment

The Rule has been strengthened and reaffirmed by Congress over time. Congress revisited the subject of political activity and charity in 1969 and 1987, each time reaffirming the thrust of the Rule. In the landmark Tax Reform Act of 1969, Congress codified the distinction between public charity and private foundation, and subjected private foundations to a distinct anti-abuse regime.³⁹ Included in the new rules was an excise tax on the political (and lobbying) activities of private foundations, which applied in addition to the loss of tax-exempt status.⁴⁰ Also in 1969, Congress completed the work of the Johnson Amendment by codifying a 1958 Treasury regulation, which had provided that no charitable deduction is allowed for contributions to organizations that violate the political activities prohibition of § 501(c)(3).⁴¹ It is significant both that Treasury on its own authority adopted this gap-filling rule in 1958, and that Congress reaffirmed it in the statute with little-to-no fanfare over a decade later.⁴²

In 1987 Congress tightened the Rule in several ways. First, Congress clarified that the Rule applied to actions “in opposition to” a candidate as well as “in support of” a candidate.⁴³ Second, Congress said that an organization losing its status as a charitable

³⁸ Of course, there were and are questions about precisely what conduct was covered or intended to be covered by the legislative language (of 1934 and 1954). But this does not obscure the central point that it is best to view the Johnson Amendment as a culmination of much that had preceded it.

³⁹ STAFF OF THE JOINT COMM. ON INT. REVENUE TAXATION, 106th Cong., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1969, 29-61 (Comm. Print 1969).

⁴⁰ I.R.C. § 4945(d)(1) & (2).

⁴¹ Pub. L. No. 91-172. Treas. Reg. _.

⁴² There does not appear to be any explanatory legislative history of the change.

⁴³ Pub. Law 100-203, § 10711(a)(2).

organization could not subsequently seek tax exemption under § 501(c)(4) of the Code.⁴⁴ Third, Congress imposed a new excise tax on expenditures in violation of the Rule.⁴⁵ Finally, Congress enhanced the audit and enforcement procedures available to the IRS.⁴⁶ This legislation was the outcome of oversight hearings chaired by Congressman J.J. Pickle, Chairman of the House Ways and Means Subcommittee on Oversight. During the hearings, the Rule was strongly supported by the Treasury, the current and a former IRS Commissioner, the ABA and various other external stakeholders.⁴⁷ The Rule was criticized by a number of organizations,⁴⁸ but notwithstanding the criticism, Congress through the legislation sought to strengthen the Rule by giving the IRS additional enforcement tools.⁴⁹ Congress was clear, however, that the present law Rule was not to be weakened.⁵⁰

⁴⁴ I.R.C. § 504(a)(2). *Id.* at § 10711(b)(1). Section 501(c)(4) provides for federal income tax exemption for “social welfare” organizations, but contributions to such organizations are not deductible as charitable contributions.

⁴⁵ I.R.C. § 4955. Pub. L. No. 100-203, §10712(a).

⁴⁶ I.R.C. §§ 6852 & 7409. Pub. L. No. 100-203, §§ 10713(b)(1), 10713(a)(1).

⁴⁷ See *Lobbying and Political Activities of Tax-Exempt Organizations: Before the Subcomm. on Oversight, House Comm. Ways and Means*, 100th Cong. 148 n.1 (1987) (statement of the Honorable J. Roger Mentz, Assistant Secretary for Tax Policy for the U.S. Department of the Treasury, that the prohibition was “sound tax policy” and the Treasury “supports continuation of this prohibition,” at 88) (statement of the Honorable Lawrence B. Gibbs, Jr., then-Commissioner of the IRS, indicating that the IRS supported continuation of the restrictions, at 71-116) (statement of former Commissioner Sheldon S. Cohen, at 222-36) (statement of ABA witness John B. Jones, Jr., the Chairman of the Section of Taxation, indicating that political activities are easier to determine than lobbying activities and that “as the committee deals with political actions, one can be more Draconian and take stronger positions,” at 130).

⁴⁸ See *Lobbying and Political Activities of Tax-Exempt Organizations: Before the Subcomm. on Oversight, House Comm. Ways and Means*, 100th Cong. 148 n.1 (1987) (letter of Edwin J. Feulner, Jr., President of the Heritage Foundation, writing that “repeal of the lobbying rules . . . would signal a new openness-a welcomeness if you will-to charities, to schools, to educational institutions, and to churches, to assume a rightful role in the legislative arena.” at 247) (written statement of United States Catholic Conference arguing that “[t]he current broad IRS interpretation of the restriction has a substantial chilling effect on the role of churches and religious organizations in discussing not only particular candidates’ views on issues of importance to members of the faith, but also in discussing the issues themselves.” *id.* at 426.)

⁴⁹ The 1987 legislation acknowledged that revocation of charitable status alone might not deter many organizations, “particularly if the organization ceases operations after it has diverted all its assets to improper purposes” and therefore an additional excise tax and audit procedures were warranted. H.R. Rep. No. 100-391, 100th Cong., 1st Sess. [1623-24] (1987).

⁵⁰ “The adoption of an excise tax sanction does not modify the present-law rule that an organization does not qualify for tax-exempt status as a charitable organization, and is not eligible to receive tax-deductible contributions unless the organization does not participate in, or intervene in, any political campaign on behalf of or in opposition to any candidate for public office.” H.R. Rep. No. 100-391, 100th Cong., 1st Sess. 1623-24 (1987).

In short, since 1954, apart from some modest legislative enhancements, Congress has, with full knowledge of a fundamental principle of charitable tax law, left the Rule alone.

C. Criticisms of and Reasons For The Rule

Nevertheless, in recent years, there has been a steady stream of attack on the Rule. Criticism comes essentially in three forms, relating either to mission, guidance, or enforcement.

Regarding mission, some charitable organizations, especially some churches, may include within their mission speech about issues of the day. Although the Rule allows charities to speak on issues,⁵¹ such organizations believe that the Rule compromises the organization's mission by denying it the ability to connect passion on the issues to the voting booth.⁵² Accordingly, there has been considerable scholarship addressing whether the Rule should be relaxed for such organizations, and whether the Rule could withstand a constitutional challenge under the First Amendment's Free Exercise Clause.⁵³ To the

⁵¹See INTERNAL REVENUE SERV., TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS (2008).

⁵²Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1168-9 (2009) (noting that “[m]any religious faiths, perhaps all, view the transmission of a holistic worldview that impacts all aspects of their adherents' lives as an integral part of their mission. Therefore it would not be surprising to find that some houses of worship believe instructing their congregations with respect to political involvement to be as important to their religious teaching as instructing them on personal relationships or finances.”); *Review of Internal Revenue Code Section 501(c)(3) Requirements for Religious Organizations: Hearing on H.R. 2357 Before the H.R. Ways and Means Subcomm. on Oversight*, 107th Cong. (2002) (statement of D. James Kennedy, President of Coral Ridge Ministries: “Even addressing moral concerns, such as abortion, from the pulpit during an election campaign may violate the IRS rule if abortion, for example, is under debate in the campaign. . . . With so much uncertainty and so much at risk, silence is, regrettably, the only option for the minister who wants to ensure that the IRS does not open a file on his church.”).

⁵³ See Mayer, *Politics at the Pulpit*, *supra* note __, at note 14 (collecting articles), 1215 (arguing that as currently applied to “sermon[s] delivered during a house of worship’s regular service,” the prohibition would survive a free exercise challenge but that such a challenge would be successful under the higher standard imposed by the Religious Freedom Restoration Act).

extent there have been serious recent legislative challenges to the Rule, they have occurred due to mission concerns.⁵⁴

Concerns based on mission go straight to the heart of the Rule. Other concerns are less direct. One of most common complaints is the imprecision of the Rule. For charities that want to engage in activity that may be close to the political activity line, the absence of a bright line, and what is asserted to be insufficient guidance, provokes dissent.⁵⁵ Notwithstanding such complaints, there is a canon of published guidance by the IRS explaining the parameters of the Rule.⁵⁶ Criticisms about lack of guidance are to a certain extent criticism of the lack of a bright line, or way of knowing in advance whether a contemplated activity is prohibited – thus the objection is partly directed to the overall facts and circumstances approach to the prohibition and the resulting lack of “yes or no” answers to questions about political activity.⁵⁷ Accordingly, some have suggested that the IRS adopt a series of safe harbors,⁵⁸ or undertake a regulation project similar to that

⁵⁴ Since 1987, a number of bills have been introduced in the Congress to relax the Rule, but none has made it out of Committee. See Lloyd Hitoshi Mayer, *Grasping Smoke: Enforcing the Ban on Political Activity by Charities*, 6 FIRST AMDT. L. REV. 1 at 4, n.8 (2007) (listing bills from the 107th through the 110th Congresses). The House Committee on Ways and Means took up legislation on the subject in 2004, but it proved controversial and was eventually dropped. The provision, inserted as part of a much larger tax bill, American Jobs Creation Act, H.R. 4520, 108th Cong. § 692 (as introduced in the House, June 4, 2004), would have allowed churches to keep charitable tax status for up to three violations of the prohibition, but the church would be subjected to tax based on its gross income, with the rate of tax increasing for each violation. In the interest of disclosure, the author, at the time Counsel to the Congressional Joint Committee on Taxation for tax-exempt organization matters, helped to draft the legislation.

⁵⁵ See e.g., Kay Guinane, *Wanted: A Bright-Line Test Defining Prohibited Intervention in Elections by 501(c)(3) Organizations*, 6 FIRST AMDT. L. REV. 142 (2007) (arguing that the current standard is too vague).

⁵⁶ Rev. Rul. 2007-41 (providing 21 examples of permitted and prohibited voter education activities, voter registration, candidate appearances, issue advocacy, rental of facilities, provision of mailing lists, use of websites and other activities); Rev. Rul. 86-95 (allowing a series of forums if the form and content are neutral); Rev. Rul. 80-282 (addressing factors that show bias in the timing and distribution of voter guides); Rev. Rul. 78-248 (providing guidance on the permitted content and structure of candidate questionnaires); Rev. Rul. 74-574 (allowing sponsoring of candidate debates and forums that are educational and impartial); Rev. Rul. 66-256 (same); Rev. Rul. 67-71, 1967 C.B. 125 (providing that the evaluation of the qualifications of candidates or support for a slate of candidates violates the prohibition); *Ass’n of the Bar of the City of NY v. Commissioner*, 858 F.2d 876 (2d Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989) (rating of judicial candidates on a nonpartisan basis).

⁵⁷ See Donald B. Tobin, *The Law of Politics: The Role of Law in Advancing Democracy*, 95 GEO. L. J. 1313, 1350 (“The facts and circumstances approach has been widely criticized and poses significant problems for 501(c)(3) organizations.”).

⁵⁸ See Ellen Aprill; Greg Colvin; ABA project; Mayer, *Grasping Smoke*, *supra* note __ at 25 (“create bright lines and safe harbors wherever possible”)

conducted in the lobbying area to give organizations greater security. Relatedly, IRS enforcement of the Rule generates controversy through allegations of uneven enforcement⁵⁹ or political bias.⁶⁰

In general, although such criticisms of the Rule are important, they also should be put into the context of the charitable sector as a whole by considering *which* types of § 501(c)(3) organizations are most directly affected, and so compromised, by the Rule. In general, these are the organizations that either are compelled by their mission (or believe they are so compelled) to participate in politics, or advocacy-oriented organizations. The first type is somewhat exceptional, legally and practically.⁶¹ The second type, however, is in an important sense the precise target of the Rule. Advocacy organizations, by their very nature, live on the line between campaign intervention and advocacy, between lobbying and education in support of their mission. It harkens back to the Reece Committee's acknowledgement "that it is extremely difficult to draw the line between what should be permissible and what should not,"⁶² and so it has proved. But that there is activity around the line should come as no surprise. More important is that the frustration of one segment of the charitable sector, is just that, a segment. Notable is the relative quiescence with which most of rest of the charitable sector, and the public, has accepted the Rule.⁶³

⁵⁹ See Mayer, *Grasping Smoke*, *supra* note __, 7-13 (summarizing the IRS's recent enforcement efforts); Tobin, *supra* note __ at 1354 ("The current enforcement regime creates uncertainty and has the potential for political manipulation.").

⁶⁰ STAFF OF THE JOINT COMM. ON TAX'N, REPORT OF INVESTIGATION OF ALLEGATIONS RELATING TO INTERNAL REVENUE SERVICE HANDLING OF TAX-EXEMPT ORGANIZATION MATTERS (Comm. Print 2000); Mayer, *Grasping Smoke*, *supra* note __ at notes 9-12.

⁶¹ It is beyond the scope of the Article to examine the claims of religious organizations, but as noted *supra*, there is considerable scholarship on the issue.

⁶² See *supra* note __.

⁶³ Broadly speaking, the Rule is largely accepted by charitable organizations and the public. There is no sense that charities writ large find the Rule to be especially constraining: hospitals are more concerned with other aspects of charity law to be worrying about engaging in partisan activity. Colleges and universities have not argued that they should be allowed to engage in politics. Nor have social service organizations, cultural organizations, or even private foundations thought to place modifying or repealing the Rule on the agenda. (Lobbying of course is a different matter.) Support for change to the Rule also does not appear forthcoming from the public at large. In a recent study by the Independent Sector, the public was asked their view of charitable organizations, and respondents consistently provided that their otherwise positive impression of charities would be tainted if charities took on a partisan flavor.

This is because there are good reasons for the Rule, which explain not only its enactment but its staying power.⁶⁴ As part of the definition of a charity, Congress through the Rule expresses a number of important and related policies, all of which serve the fundamental judgment that a political purpose is not a charitable purpose, and that political activity may not serve a charitable purpose. Because of the Rule, a § 501(c)(3) organization must focus on charitable purposes and must be free of partisanship. If education is the purpose of an activity, the activity must be educational, and not veer into propaganda. The Rule also is a defense mechanism. It protects charities from political capture, and notwithstanding the difficulties of enforcement, provides an outer boundary to the scope of the charitable sector.⁶⁵ Fundamentally, the decision as to what is and is not charitable, given a baseline of taxable status and nondeductibility of contributions to organizations, is a revenue decision by Congress. It is not a metaphysical question as to the true meaning of Charity, apart from what Congress (or the courts) thinks it means. It

⁶⁴ The political activities prohibition was no accident. Although there is without question no unequivocal statement as to what Congress intended in 1913, 1917, 1934, or 1954 on the reasons for exempt status, deductibility of charitable contributions, the lobbying rule, or the political activities prohibition, the prevailing concern driving both the political and lobbying restrictions was that the activity in question was inconsistent with charity, as defined by Congress. Consider the following statements by Congress, the Treasury Department, and the courts. “[A]ssociations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute.” T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919). “It is a matter of common knowledge that propaganda in the popular sense is disseminated not primarily to benefit the individual at whom it is directed, but to accomplish the purpose or purposes of the person instigating it.” S. 1362, II-2 C.B. 152 (1920). “Political agitation as such is outside the statute, however innocent the aim.” *Slee v. Commissioner*, 42 F.2d 184, 185 (2d Cir. 1930). Authorization of the Reece Committee: “to determine if any foundations and organizations are using their resources for purposes other than the purposes for which they were established, and especially . . . for political purposes; propaganda, or attempts to influence legislation.” Tax Exempt Foundation, H.R. Rep. No. 83-2681, at 1 (1954). Report of the Reece Committee: “The foundations are free to do as they please with the public funds at their command, so long as they do not transgress certain rules of law Political propaganda, for example is proscribed.” *Id.* Report of the Reece Committee: “when a proposed activity may have political implications, we cannot see any reason why public funds should be used when any political impact may result.” Tax Exempt Foundations, H.R. Rep. No. 83-2681, at 219 (emphasis added). The report reiterated this rationale for a political activities prohibition later stating that political activity by charitable organizations amounted to a “mis-use of public trust funds.” *Id.* at 18.

⁶⁵ As a rule that polices the border of the charitable exemption (*see e.g.*, Simon, Dale, and Chisom, *supra* note __, explaining that the political activities prohibition serves a “border control” function, namely, keeping the public affairs and charitable spheres separate), it is one of the few rules (the others being lobbying and taxation of unrelated business income) we have that works to place a meaningful limit on the charitable purpose requirement and so constrain the scope of the charitable tax benefits. As discussed in Part IV, alternatives to the Rule are not appealing conceptually or administratively – and likely would lead to a significant loss of revenue.

may be dissented from by those who disagree with the policy, but it is considered policy nonetheless. In providing tax benefits, Congress had *some* idea as to what constituted a charitable purpose or a charitable activity – the details were left to events. And events confirmed and reaffirmed the initial instinct that charity and political activity, for purposes of the tax law, were mutually exclusive.⁶⁶

Of course, just because Congress has answered the question, it does not follow that the policy should continue in perpetuity. Debate about the proper relationship between politics and charity continues. In a recent spirited defense of the Rule, Professor Donald Tobin argues that the Rule protects the independence of § 501(c)(3) organizations, that campaign intervention generally is inconsistent with an educational or charitable mission, and that campaigning by § 501(c)(3) organizations would harm the democratic process.⁶⁷ By contrast, others believe that free speech and organizational mission would be better

⁶⁶ In recent years, consensus appears to have emerged that, in general, there are three lines of justification for the Rule of varying degrees of resonance. First, is the idea that the federal government should remain neutral in political affairs, or the “nonsubvention principle.” The principle’s pedigree is Learned Hand’s famous statement in *Slee* that “Controversies of that sort [i.e., political agitation] must be conducted without public subvention: the Treasury stands aside from them.” Second, the Rule has been justified as in effect a means of supporting the private benefit doctrine: namely, political activity is viewed as an activity for private gain and not for public benefit, and therefore should not be subsidized. Third, charity, by definition, just does not include political activity (including lobbying). See e.g., Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 Geo. Wash. L. Rev. 308, 332 (1990); Johnny Rex Buckles, *Not Even a Peep? The Regulation of Political Campaign Activity by Charities through Federal Tax Law*, 75 U. CIN. L. REV. 1071 (2007). Each of these rationales in turn has been criticized, as, in general, insufficient to support the Rule. *Id.* The neutrality rationale is perhaps the easiest to criticize. Neutrality can be maintained equally effectively with a prohibition or its opposite – unlimited political activity for all charities. In either case, government remains “neutral.” However, each of the three rationales seem to be variations on the definitional theme, with neutrality and preventing private benefit being derivative theories. As Judge Hand said, if “[p]olitical agitation as such is outside the statute,” then it follows that “the Treasury stands aside from them,” i.e., does not subsidize. In other words, the neutrality rationale is little more than another way to assert that charity is defined not to include political activity; i.e., public funds are not to be used or spent on political activity. It follows quite naturally that what is not charity will not be supported by the charitable tax benefits, the Treasury will “stand aside” from noncharitable activity and not “provide a subsidy” for it. Similarly, the no-private-benefit rationale is yet another way to say the same or a like thing. The no-private-benefit rule itself is derived from the charitable purpose requirement, to wit, an organization cannot primarily be charitable if it is operated primarily for private interests. Political activity, partisanship, bias, nonneutrality often are equated, and generally are regarded as private serving. Accordingly, to the extent that the political activity prohibition is intended to prevent private benefit, it is taking away the discretion otherwise left to the IRS to determine when private benefit exists by making it clear in the statute that political activity is not allowed. Thus, to the extent that the Rule prevents private benefit, it is a prophylactic, or one area where Congress felt comfortable enough to say flat out that certain activity is not permitted.

⁶⁷ Tobin, *supra* note __ at

served if charities could have a political voice.⁶⁸ The debate is an earnest one, and perhaps may fairly be characterized as a policy struggle between those concerned about the consequences of a partisan and so “not so independent” sector and those embracing a braver world of new political voices informing the public debate.

In theory, the idea of charitable organizations taking sides in politics is attractive. Under a free market of ideas approach to speech, the truth, or information, will be better served with more speech and not less. The public will have new perspectives to consider, perspectives that may well be more informative, educational, and detached than many of the political voices shrieking the loudest today. Further, allowing political activity by charities is not a mandate; charities may remain agnostic and apart from the political process. To the extent that the consumers of charity do not want charities to become involved in politics, many, if not most, charities will respond to this sentiment and remain aloof. It is easy to imagine a charity, dipping a toe in the political water to endorse a candidate for the first time, hearing from angry donors and others that the activity was inappropriate, that the charity endorsed the wrong candidate, or even that the charity should not risk endorsing a losing candidate, for fear of jeopardizing the charity’s standing in the community as an opponent of an elected official. Just as with for-profit corporations,⁶⁹ the risk of direct political activity by the corporation from the standpoint of maintaining good relationships with an organization’s consumers (or constituents, if you prefer), is likely to be high, and constraining.⁷⁰ Moreover, in a sector of over 1.2 million organizations,⁷¹ not including churches, the percentage of those likely to do much

⁶⁸ Johnny Rex Buckles, *Is the Ban on Participation in Political Campaigns by Charities Essential to Their Vitality and Democracy? A Reply to Professor Tobin*, 42 UNIVERSITY OF RICHMOND LAW REVIEW 1057 (2008).

⁶⁹ Jia Lynn Yang & Dan Eggen, *Exercising New Ability to Spend on Campaigns, Target Finds Itself a Bulls-Eye*, WASH. POST, Aug. 19, 2010 (A1).

⁷⁰ See, e.g., Frances R. Hill, *Corporate Philanthropy & Campaign Finance: Exempt Organizations as Corporate-Candidate Conduits*, 41 NEW YORK LAW SCHOOL LAW REVIEW 881, 941 (1997) (“To the extent that particular exempt organizations take positions on particular electoral contests, they may gain the advantage of intensifying the support of some members and even of attracting some new members, but they also risk alienating current and potential members and supporters. For exempt organizations with their own agendas of exempt activity, these risks should be taken seriously.”).

⁷¹ MOLLY F. SHERLOCK & JANE G. GRAVELLE, CONGRESSIONAL RESEARCH SERVICE, AN OVERVIEW OF THE NONPROFIT AND CHARITABLE SECTOR 3 (Nov. 17, 2009). This figure does not include organizations that do

more than endorse a candidate likely is small – politics is not really a natural fit for many charities. So, for the most part,⁷² a relaxation of the Rule should not result in a dramatic change in the makeup of the activities of existing organizations. Charities that already advocate on issues, a small percentage of the total, and are expected to do so by their supporters, will have more tools to advance their mission. More traditional charities – hospitals, colleges and universities, social service organizations, arts organizations – might well abstain from any new found freedom to engage in politics. Churches may be unique: some no doubt will endorse candidates and take more active electoral steps. Some will not. Some may regret a foray into politics. Others may relish it. But the success or failure of the project ultimately is likely to be decided by the parishioners – who can vote with their feet (or stay in their seat).

Taking the above thoughts into account, the Rule and its defenders, may come across as paternalistic and overly concerned about what might happen. The parade of horrors offered – the loss of independence, the diversion from, and perhaps compromise of, mission – in effect the corruption of the sector, would be a terrible outcome. Need it be feared? There should be little dispute that the admirable and aspirational qualities of charitable organizations are, to a certain extent noble ones; a nobility that rises above faction. The political sphere, by contrast is characterized by fighting, deceit, dirt – all perhaps in the service of a public good (the best will prevail) – but hardly noble qualities. Being in service to ideas, to helping others, advancing culture, delivering a needed good are the core expectations we have of charity. While permitting involvement in political activities may not necessarily lead to the corruption of the charitable sector, it would introduce an innoble quality to the sector from which our paternalistic Rule has heretofore provided a shield. Ultimately, whether the Rule should be changed is a question that should be decided not from fear about what might happen, but from a position of considering again the question Congress has already answered: is political activity

not file an exemption application with the IRS, which could number in the hundreds of thousands (e.g., churches, other qualifying religious organizations, and very small organizations). Approximately 116,000 of the 1.1 million organizations are private foundations. *Id.*

⁷² As argued in Part IV, however, change to the Rule likely would bring many new entrants.

charitable? It is noteworthy that we live in a time where distrust of government is very high – perhaps in part a product of the partisanship of ideas and the preeminence of selfish motives. Of course, distrust of all our institutions, public or private, for-profit or not for profit, also is high. Such distrust, many would argue, is not warranted. But to the extent that the Rule protects an important part of our society from further distrust, it is a good thing, paternalistic or not.

Part II. Does *Citizens United* Condemn the Political Activities Prohibition?

A. Introduction

The reason to question anew the political activities prohibition stems from the Supreme Court’s recent decision *Citizens United v. Federal Election Commission* (hereinafter “*Citizens United*”).⁷³ The case concerned a nonprofit corporation, Citizens United, organized under section 501(c)(4) of the Internal Revenue Code.⁷⁴ In January 2008, Citizens United released a film called “Hillary: The Movie,” which was very critical of Hillary Clinton, at the time a Senator and candidate for the Presidency. The Court concluded that “there is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton” and that “the film qualifies as the functional equivalent of express advocacy.”⁷⁵ Accordingly, the Court said, § 441b of the Federal Election Campaign Act (“FECA”), as amended, barred Citizens United from releasing the film.⁷⁶ However, the Court held that § 441b was an unconstitutional burden on Citizens United’s right to free speech under the First Amendment, and therefore Citizens United had a right to release the film. In reaching this conclusion, the Court overruled a prior decision,

⁷³ 558 U.S. 50 (2010).

⁷⁴ According to the Court, Citizens United had an annual budget of about \$12 million, and received most of its funds from individuals but also received some contributions from for-profit corporations. *Id.* at ___. Because of the corporate contributions, Citizens United could not qualify for the exception to the IE rule created in *Federal Election Commission v. Massachusetts Citizens for Life*, 479, U.S. 238 (1986).

⁷⁵ *Citizens United* at ___.

⁷⁶ Section 441b(a) provides in part that: “It is unlawful for . . . any corporation . . . to make a contribution or expenditure in connection with any election to any political office” 2 U.S.C. 441b(a). Section 441b(b)(2) provides that the term “‘contribution or expenditure’ includes a contribution or expenditure . . . for any applicable electioneering communication.”

Austin v. Michigan Chamber of Commerce⁷⁷ in its entirety, and part of McConnell v. Federal Election Comm’n.⁷⁸

Hypothesize now that after *Citizens United*, in the year 2012, a corporation called “Our Country,” recognized as a charity under § 501(c)(3) of the Code, releases a film called *Obama: The Movie*. This movie, in many respects a sequel to *Hillary* but with a different star, bears no reasonable interpretation other than as an appeal to vote against President Obama in his campaign for re-election to the Presidency. The IRS investigates the organization, concludes there has been a violation of the political activities prohibition, and revokes Our Country’s tax-exempt status. Our Country appeals, the case reaches the Supreme Court, and the Court must rule on the constitutionality of the political activities prohibition.

On its face, *Our Country v. Commissioner* bears a strong resemblance to *Citizens United*. The content of the speech is the same, a legal rule bars the speech, and the speaker is a corporation. There are, however, important differences: the legal rule is a tax rule, and the corporation is a charity. Whether these differences (along with others, discussed below) are enough to warrant a different outcome is of course the question. The Court will either distinguish or follow *Citizens United*, making careful analysis of the Court’s opinion there critical to our understanding of the continuing validity of the political activities prohibition.

The implications of *Citizens United* for the political activities prohibition lie mostly in the introductory material to Part III of the Court’s opinion,⁷⁹ in which the Court

⁷⁷ 494 U.S. 652 (1990).

⁷⁸ 540 U.S. 93 (2003).

⁷⁹ In general, it is useful to understand the structure of the Court’s (majority) opinion. The opinion is divided into five parts. Part I provides the factual and procedural background. Part II explains why the Court undertook a facial challenge to the statute (instead of an as-applied challenge), and why the Court believes it had to decide the constitutional issue directly, i.e., without resort to circumlocutions of statutory interpretation. Part III is organized into introductory material, and then three sections, A, B, and C. In Part III.A, the Court explains its conclusion that there are conflicting lines of precedent regarding the constitutionality of the IE rule, thus warranting its decision. Part III.B analyzes the three proffered government interests in the IE rule: the anti-distortion rationale, corruption and the appearance of corruption, and shareholder protection, concluding that none is a compelling state interest. Part III.C

provides the framework for decision, equally applicable to *Our Country* as to *Citizens United*. The key threshold issue for the Court is whether the legal rule in question is a burden on speech. If the answer is yes, then strict scrutiny of the rule follows and a compelling state interest must be found. If the answer is no, then the rule is subject to a lesser standard of review (and so probably survives).⁸⁰

In *Citizens United*, the Court concludes that the part of § 441b that bars corporations from making “independent expenditures” and “electioneering communications” (hereinafter the “IE rule”) is a burden on speech. Importantly, in reaching this conclusion, the Court considered four factors: the purpose of the rule, the sanction for violating the rule, the nature of the rule as a ban on speech, and the rule’s identification of certain preferred speakers. Each of these factors in turn must be assessed to determine whether the political activities prohibition, like the IE rule, is a burden on speech.

B. Purpose of the Rule.

Part III of the Court’s opinion begins by citing the First Amendment to the U.S. Constitution: “Congress shall make no law . . . abridging the freedom of speech.” Then, the Court says that “Laws enacted to control or suppress speech may operate at different points in the speech process.”⁸¹ Implicit in this sentence is the Court’s articulation of the purpose of the IE rule, as one to control or suppress speech. The Court later reiterates that the IE rule’s “purpose and effect” is “to silence entities whose voices the Government deems to be suspect.”⁸²

There is little room to doubt that § 441b, including the now unconstitutional ban on corporate independent expenditures, is a rule “to control or suppress speech.” The ban on corporate contributions to political candidates and campaigns and the ban on corporate

discusses the relevance of stare decisis to the Court’s decision. Part IV relates to the disclosure provisions. In Part V, the Court concludes. *Citizens United* at ___-___.

⁸⁰ See also Galston, *supra* note __ at 16 (describing framework).

⁸¹ *Citizens United* at ___.

⁸² *Id.* at ___.

independent expenditures are overt Congressional efforts to regulate speech in the electoral process. Indeed, the entire apparatus of campaign finance laws and regulations are intended to regulate core first amendment speech. By contrast, § 501(c)(3) of the Internal Revenue Code has an entirely different purpose. Notwithstanding that the rationale for § 501(c)(3) has been debated amid an obscure legislative history,⁸³ the section manifestly is not about the regulation of speech. It is not a law “enacted to control or suppress speech.”⁸⁴ Rather it is a law enacted to describe a type of organization that is not subject to federal income tax.⁸⁵

⁸³ See Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charitable Tax Exemption*, 23 J. CORP. L. 585, 590 (1987); Nina Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419, 429-39 (1998) (exploring several theories of charitable tax exemption).

⁸⁴ The cases the Court cites for examples of unconstitutional laws that suppress speech are all qualitatively different from § 501(c)(3). *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002) (striking down a village ordinance regulating door-to-door canvassing on first amendment grounds as applied to religious proselytizing, anonymous political speech, and the distribution of handbills); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991) (finding a state financial regulation inconsistent with the First Amendment because it placed a content-based financial burden on speech); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (reversing judgment awarded in a civil libel action as inconsistent with first amendment principles of freedom of speech and of the press because statements critical of public officials in their official conduct are protected); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (finding that the Ohio Criminal Syndicalism Act violated the First Amendment because it failed to distinguish mere advocacy and abstract teaching from incitement to imminent lawless action).

⁸⁵ Congress says that such an organization (which can take the form of a corporation, community chest, fund, or foundation) must meet four requirements: (1) it must be organized and operated for an exempt purpose, (2) no earnings of the organization may inure to the benefit of insiders, (3) there may be no substantial lobbying, and (4) no political activity is allowed. If all four requirements are met on an ongoing basis, then the organization is a “charity” for tax law purposes. I.R.C. § 501(c)(3). The structure of the statute is important because it shows that the political activities prohibition is definitional. Although in one sense this is obvious, there is an ongoing fault-line between “charity” in a meta sense, and “charity” for tax law purposes. Occasionally, commentators describe charity in a meta sense and the political activities prohibition as if it were external to charity, that is, as if the charity exists independent of the political activities rule. See e.g., Joseph S. Klapach, *Thos Shalt Not Politic: A Principled Approach to Section 501(c)(3)’s Prohibition of Political Campaign Activity*, 84 Cornell L. Rev. 504, 506 (describing a charity as having to do a “deal with the IRS” under which “the charity must sacrifice its ‘soul’”). This is in many respects one of the underlying tensions of charitable exemption: that organizations may view § 501(c)(3) status as an entitlement, and any conditions imposed for such status as anathema. See e.g., Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 Geo. Wash. L. Rev. 308, 332 (1990) (describing the political activities prohibition as a “choice: either exercise its right to free political expression and forfeit the benefit of tax exemption to which its charitable character otherwise entitles it, or claim its entitlement and forgo the right”). Note that because the political activities prohibition is definitional, an organization that engages in political activity does *not* have a “charitable character” at least not under the tax law. This goes to the meta versus the tax law definition of charity. Professor Chisolm is arguing more from the meta-side – whether charity *should* be defined as exclusive of political activity for tax law purposes. In her analysis of the rationales for the Rule, she says that it could have stemmed from “definitional

As discussed above, there are many reasons supporting a prohibition on political activities as part of the definition of a tax-exempt charity. Congress wants charities to focus on core charitable activity; Congress wants a charitable sector untainted by partisan flavor; Congress does not want to subsidize political activity through exemption; Congress wants to protect charities from political capture; Congress does not think political activity is charitable activity. In short, it comes down to a decision by Congress to define charity as exclusive of political activity (and private inurement, and substantial lobbying). In so doing, Congress is trying to promote something. The law is not primarily about suppressing speech. Similarly, § 170(c) of the Internal Revenue Code is a law enacted to describe the type of organization with respect to which charitable – and so deductible – contributions may be made.⁸⁶ It too is not a law “enacted to control or suppress speech.” Both sections of the Code directly implicate speech, to be sure, but their overriding purpose is not to regulate speech.

In addition, in order to decide whether the political activities prohibition is a law with a purpose of suppressing speech, i.e., whether this is a First Amendment case, or is a law with a revenue purpose, i.e., whether this is a tax case that touches on speech, it is instructive to consider other sections of the Code pertaining to federal income tax exemption. Just as the purpose of § 441b is seen in light of the purpose of the FECA to regulate elections, the purpose of tax exemption and its relationship to partisan activity can be better understood by viewing the entire statutory scheme.⁸⁷

The law of tax-exempt organizations is a body of rules that describes at least 29 types of organization that may qualify for a tax treatment that is other than the default

consistency” that is, Congress decided that the tax law definition of charity should conform to its understanding of a common law definition. Although, definitional consistency may explain *why* Congress made its decision, more importantly now is that Congress did not *have* to define charity in accord with any common law or other norm. All we care about here is that Congress *did* decide to define charity in this way, and the purpose of such a definition was not to suppress speech; it was more affirmative than that. It was to define charity. The fact is that “partisan politics is not charitable” because that is what Congress decided.

⁸⁶ See *infra* note __.

⁸⁷ See *e.g.*, *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544 (1983) (noting that to understand the lobbying limitation of § 501(c)(3) “it is necessary to understand the effect of the tax exemption system enacted by Congress”).

treatment for the organization.⁸⁸ For example, if an organization incorporates, then as a general matter it is subject to tax as a corporation under subchapter C of the Code unless it can and does elect to be treated differently, or it qualifies for different treatment under one of the exempt organization provisions. Political organizations are treated separately, however. As a general proposition, Congress decided that an organization with primarily political purposes is not an exempt organization as such.⁸⁹ Rather, if an organization is organized and operated primarily for partisan activity, then the organization is considered a political organization and taxed under § 527 of the Code. Political organizations are defined based entirely on the purpose of the organization (irrespective of organizational form), and the tax treatment follows the definition.⁹⁰

Congress was aware that some exempt organizations might engage in partisan activity. Accordingly, if an exempt organization (meaning here any of the 29 organization types described in § 501(c)) spends money on partisan activity, the organization is subject to the tax rules of § 527.⁹¹ In general, non political organizations are not subject to express limitations as to political activity, but as a practical matter, may not allow political purposes to become primary because doing so would change the nature of the organization and so disqualify it from its otherwise applicable tax status. The only exempt organization type expressly prohibited from engaging in partisan activity⁹² is the charity – and this can

⁸⁸ Section 501(a) of the Code provides exemption from federal income tax to organizations described in § 501(c) or (d) and § 401. There are more than 29 types of organizations described in § 501(c) and (d), of which § 501(c)(3) organizations are but one type. Section 401 of the Code describes various types of pension plans.

⁸⁹ Although political organizations are often referred to as “exempt” organizations, this is mostly a misnomer, due in part to the location of the political organization provisions in the Code in the 500 series and to the terminology of the section – referring to “exempt function” and “exempt function income.” Section 527 organizations are best viewed as a distinct type of organization for tax purposes, with a special set of tax rules. See Streng; Roger Colinvaux, *Regulation of Political Organizations and the Red Herring of Tax Exempt Status*, 59 NATL. TAX J. 531 (2006).

⁹⁰ Mention voluntariness point.

⁹¹ I.R.C. § 527(f)(1).

⁹² In general, this means that the activities of a political organization and a charitable organization are mutually exclusive. However, at least one activity – attempting to influence the confirmation of judicial appointments – qualifies as a political activity for purposes of § 527 but not as political activity for purposes of § 501(c)(3). Gen. Couns. Mem. 39,694 (Jan. 22, 1988).

be explained not only because of special concerns about the politicization of charity, but also because of other tax benefits related to charities, e.g., the charitable deduction.

In other words, viewed as a matter of taxes, political activity generally, and expenses for partisan speech specifically (and the income related thereto) is and always has been a special subject for the tax law. As an activity, it is neither promoted nor suppressed. Some *other* activity might be promoted relative to political activity, but suppression is not the goal. Where political activity has been relevant, the concerns have been whether the activity is consistent with the tax status of the organization, the extent to which it is consistent, and the appropriate tax treatment for a completely partisan organization. In short, there are all kinds of ways to speak – as an individual, or through an entity. But not all entities are treated alike for tax purposes. To the extent the tax law has made distinctions based on political activity, it is not just limited to charitable organizations, but covers many others. Arguably, in no case has the purpose of the tax classification and political activity rules been based on a desire to suppress speech.⁹³

In addition, the respective purposes of the IE rule and the political activities prohibition play an important role as a background consideration in comparing *Citizens United* and *Our Country*. Because the purpose of the campaign finance law is to regulate speech, it is not surprising that the Supreme Court has developed a rich, detailed, complex, and varied jurisprudence in the campaign finance arena. Laws with the purpose of regulating speech can expect to be shaped by the Supreme Court. Over the 24-year period from the landmark case *Buckley v. Valeo*⁹⁴ to *Citizen's United*, there have been no fewer than 17 Supreme Court opinions on the constitutionality of the campaign finance laws.⁹⁵ Indeed, it is fair to say that the constant presence of the Supreme Court in the area

⁹³ As discussed *infra*, to the extent *Citizens United* calls into question the validity of the political activities prohibition, the impact will be much broader, really calling into question the basic decision made by Congress that a partisan activity is significant for tax purposes.

⁹⁴ 424 U.S. 1 (1976).

⁹⁵ *Wisconsin Right to Life v. Fed. Election Comm'n*, 551 U.S. 449 (2007); *Randall v. Sorrell*, 548 U.S. 230 (2006); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003); *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146 (2003); *Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000); *Colorado Rep Fed Campaign Comm v. Fed. Election Comm'n*, 518 U.S. 604 (1996); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652

of campaign finance has made it a key institutional actor with a vested interest (through its jurisprudence) in shaping these laws. Since *Buckley* was decided, the political battles and constitutional questions have been almost ceaseless. Justices have consistently voiced their (dissenting) opinion that *Buckley* was wrong;⁹⁶ and it has been a common currency to speculate whether the next case will bring a major shift in the constitutionality of prevailing campaign finance rules.⁹⁷ Notwithstanding the high controversy following *Citizens United*, including the accusation that the Court elected to decide a question not properly raised⁹⁸ and that the Court overturned decades of precedent with barely a nod to the importance of stare decisis,⁹⁹ in a general sense, *Citizens United* was not entirely a surprise. The Court has sent signals for years – either through the complexity of its own rulings, or through the voices of individual Justices, that all was not well in the Congressional (and the Federal Election Commission) approach to the regulation of campaign finance.

By contrast, because the purpose of § 501(c)(3) and of § 170 is to provide an exemption and a deduction, i.e., to describe organizations and expenses that for purposes of the tax system are treated differently than others, it should come as no surprise that the

(1990); Fed. Election Comm'n v. Massachusetts Citizens For Life, Inc., 479 U.S. 238 (1986); Fed. Election Comm'n v. NCPAC, 470 U.S. 480 (1985); Fed. Election Comm'n v. Nat'l Right To Work Comm., 459 U.S. 197 (1982); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982); Bread Political Action Comm. v. Fed. Election Comm'n, 455 U.S. 577 (1982); Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981); Fed. Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27 (1981); California Medical Ass'n v. Fed. Election Comm'n, 453 U.S. 182 (1981); First Nat'l Bank Of Boston v. Bellotti, 435 U.S. 765 (1978).

⁹⁶ McConnell v. Fed. Election Comm'n, 540 U.S. 93, 248 (2003) (Scalia, J., dissenting); Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 507 (1985) (White, J., dissenting).

⁹⁷ Richard A. Oppel Jr. & Neil A. Lewis, *Campaign Law Set for Big Test In a Courtroom*, N.Y. TIMES, Dec. 3, 2002, at A1 (discussing upcoming 2003 Supreme Court decision in McConnell v. Fed. Election Comm'n, which involved a challenge to the constitutionality of McCain-Feingold); Linda Greenhouse, *Supreme Court Set to Weigh Central Election-Law Issues*, N.Y. TIMES, Feb. 28, 2006, at A14 (speculating about the upcoming 2006 Supreme Court decision in Randall v. Sorrell, wherein a Vermont campaign finance law was challenged).

⁹⁸ Adam Liptak, *Justices Turn Minor Movie Case Into a Blockbuster*, N.Y. TIMES, January 23, 2010, at A13 (“‘Essentially,’ Justice John Paul Stevens wrote for the dissenters in the 5-to-4 decision, ‘five justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.’”).

⁹⁹ Adam Liptak, *Stevens Era, Nearing End, Takes On An Edge*, N.Y. TIMES, January 26, 2010, at A12 (“In his dissent, Justice Stevens said no principle required overruling two major campaign finance precedents. ‘The only relevant thing that has changed since’ those decisions, he wrote, ‘is the composition of this court.’”).

jurisprudence of the Supreme Court is much less varied, complex, and voluminous. We are not speaking here first and foremost of the Court’s role in exercising judicial review of the Constitution, but rather of the Congress’s role in raising revenue, and the extent to which the means chosen by the Congress may implicate constitutional concerns.¹⁰⁰ Accordingly, Supreme Court tax cases regarding challenges to deductions and exemptions generally must overcome the Court’s deferential posture: “deductions are a matter of legislative grace;” “exemptions – same.”¹⁰¹ More specifically, Supreme Court cases involving § 501(c)(3) (or its predecessors) are few and far between. The two most relevant cases, *Cammarano v. United States* (hereinafter “*Cammarano*”)¹⁰² and *Regan v. Taxation With Representation of Washington* (hereinafter *TWR*),¹⁰³ are unanimous¹⁰⁴ and largely summary affirmations of Congress’s decision to place limitations on speech in connection with a deduction or an exemption. A third case, *Speiser v. Randall* (hereinafter “*Speiser*”),¹⁰⁵ also is summary (by today’s standards) but this time in the opposite direction: striking down a State exemption because of its implications on free speech. *Speiser*, however, as discussed below,¹⁰⁶ is readily distinguishable from the *Cammarano* and *TWR* approach.

In any event, the sparsity of cases places any challenge to the political activities prohibition in a much different political and legal context. Unlike in campaign finance, in tax cases generally, and § 501(c)(3) cases in particular, the Court does not have a rich

¹⁰⁰ Referring to the lobbying limitation as a decision by Congress not to subsidize the activity, the Court concluded in *TWR*: “We have no doubt but that this statute is within Congress’ broad power in this area.” 461 U.S. 540, 550. *See also* Galston *supra* note __ at 16 (citing cases).

¹⁰¹ E.g., *Commissioner v. Sullivan*, 356 U.S. 27, __ (1958); *Interstate Transit Lines v. Commissioner*, 319 US 590, 593 (1943) (“[W]e examine the argument in the light of the now familiar rule that an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer”); *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934) (“Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed”).

¹⁰² 358 U.S. 498 (1959).

¹⁰³ 461 U.S. 540 (1983).

¹⁰⁴ There were concurrences in both cases, discussed *infra* at ____.

¹⁰⁵ 357 U.S. 513 (1958).

¹⁰⁶ *See infra* at ____.

history or institutional voice.¹⁰⁷ In short, the Court is not defending its own turf to the extent it is in the campaign finance arena. Although in *Citizens United* the Court showed a willingness to overturn settled law, they did so in an area of law – campaign finance – that undergoes constant legislative and judicial change and constitutional scrutiny, and arguably, was never all that “settled.” Further, the Court said they were in effect forced into a controversial decision in order to resolve a split in their own precedents.¹⁰⁸ Accordingly, it may be a much different matter institutionally to overturn a rule such as the political activities prohibition – the context is completely different, notwithstanding the facial similarities to the impact on speech.

C. Sanctions

In deciding whether the IE rule was a burden on speech, the Court in *Citizens United* describes certain actions, core speech, that if taken, would be subject to the IE rule: (1) the Sierra Club runs an ad within 60 days of a general election that tells the public to disapprove of a Congressman who supports logging in national forests; (2) the National Rifle Association publishes a book urging the public to vote against an incumbent Senator who supports a handgun ban; and (3) the American Civil Liberties Union creates a website endorsing a presidential candidate on free speech grounds. These examples, designed assuredly to highlight the outcome of the IE rule as censorship of the first order, are each also likely to violate the political activities prohibition if undertaken by charities. At first glance then, how can the Rule survive?

Here, the facial similarities between the IE rule and the political activities prohibition diverge not just with respect to purpose but also when the consequences of violating either rule are taken into account. Clearly important to the Court is that the IE

¹⁰⁷ The canon of Supreme Court cases concerning the charitable tax benefits of the Internal Revenue Code are fairly sparse and wide ranging. See e.g., *Trinidad v. Sagrada Orden de Predicadores de la Provincia del Santismo Rosaris do Filipinas*, 263 U.S. 578 (1924); *Better Business Bureau of Washington, D.C. v. United States*, 326 U.S. 279 (1945); *Walz v. Tax Comm’n*, 397 U.S. 664 (1970), *Bob Jones Univ. v. United States*, 461 U.S. 564 (1983); *TWR*.

¹⁰⁸ *Citizens United*, 558 U.S. at ___ (“The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker’s corporate identity and a post-*Austin* line that permits them.”). Compare *id.* at ___ (“___”) (Justice Stevens dissenting).

rule is “backed by criminal sanctions.”¹⁰⁹ The above examples, the Court says, “would all be felonies.”¹¹⁰ And although the opinion asserts the importance of protecting the speech of corporations qua corporations, the corporation qua corporation does not go to jail for corporate violations. Rather, only natural persons, i.e., those who knowingly and willfully violate FECA, can go to jail. That the criminal sanction is important to the Court is evidenced by the repeated references to felonies or crimes *throughout* the Court’s opinion – appearing in each Part except Part IV¹¹¹ (which is to be expected because Part IV upholds the constitutionality of the disclosure provisions). Indeed, the Court concludes in Part V that “it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute’s purpose and design.”¹¹² In other words, the criminalization of speech is a critical part of the campaign finance statutory and regulatory scheme and an important factor to the Court’s decision.

As such, the sanction therefore is a key basis for distinction with the political activities prohibition. The prohibition often is referred to, somewhat redundantly, as “absolute,”¹¹³ meaning that a single instance of political activity violates the Rule.

¹⁰⁹ *Citizens United*, 558 U.S. at ____.

¹¹⁰ *Id.* See FECA § 437g(d) (“Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation or expenditure” may be fined or imprisoned or both.).

¹¹¹ *Citizens United*, 558 U.S. at ___, ___, ___ (noting that *Citizens United* “feared” that *Hillary* involved independent expenditures thus “subjecting the corporation to civil and criminal penalties” Part I.C.) (dismissing the ACLU’s argument as amici regarding how to interpret the electioneering communication definition in part because an inaccurate determination under their definition would “potentially subject[] the speaker to criminal sanctions” Part II.A) (“a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak” Part II.E.) (“The law before us is an outright ban, backed by criminal sanctions.” Part III.Intro.) (it is a “felony for all corporations—including nonprofit advocacy corporations”) (“the following acts would all be felonies under sec. 441b”) (referring to *Austin* and the Michigan law at issue therein: “A violation of the law was punishable as a felony.” Part III.A.3) (“If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.” Part III.B.1.) (“When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought.” Part III.B.1.)

¹¹² *Id.* at ____.

¹¹³ See *Kindell & Reilly*, *supra* note __ at __. The reason for the redundancy is because words, especially words in statutes, often do not mean what they seem to say. For example, § 501(c)(3) organizations must be “exclusively” organized and operated for exempt purposes. But “exclusively” turns out to mean “primarily” in the regulations. Treas. Reg. § 1.501(c)(3)-1. Thus, the need for emphasis when describing the political activities *prohibition* as absolute – meaning, the statute really does mean what it says. Of course, this turns

Violation is not, however, a felony. Rather, the consequence for violation is revocation of the organization's charitable status. The organization also is barred from reorganizing as a tax-exempt social welfare organization under § 501(c)(4) of the Code.¹¹⁴ In addition to revocation, if expenditures are involved in the political activity, excise taxes may be assessed.¹¹⁵ There is an excise tax on the organization equal to 10 percent of the expenditure (100 percent if not corrected in a certain amount of time), and an excise tax on an organization manager equal to 2.5 percent of the expenditure (50 percent if the manager refused to agree to part or all of the correction) if the manager knowingly agreed to make the expenditure.¹¹⁶ Flagrant violations of the Rule may result in expedited enforcement action.¹¹⁷ In short, the difference in consequence between the IE rule and the political activities prohibition are huge. One makes speech a crime, the other makes speech a disqualification for an organization-level tax exemption and possibly exposes the organization and its managers to monetary penalty if there are expenditures involved. Measured as a form of suppression, the threat of a criminal sanction under the IE rule would suppress the speech of many, as it was designed to do; the threat of loss of tax exemption, though important, is of a different order.

D. A Ban on Speech

A third important factor to the Court in making the threshold decision as to whether speech is burdened by the IE rule is its characterization of the rule as a ban on speech. Here, the Court says that the IE rule is a ban “notwithstanding the fact that a PAC

out not to be entirely correct either, as the recent IRS reports on enforcement of the political activities prohibition demonstrate. See INTERNAL REVENUE SERVICE, POLITICAL ACTIVITIES COMPLIANCE INITIATIVE EXECUTIVE SUMMARY (2006) (reporting violations of the prohibition but no sanction).

¹¹⁴ I.R.C. § 504. The inability to reorganize as a § 501(c)(4) organization does not apply to churches. I.R.C. § 504(c). This factor was cited by the court in *Branch Ministries* as part of its reasoning that the sanction, at least with respect to churches, was not especially [severe]. Pinpoint cite.

¹¹⁵ I.R.C. § 4955. The text to § 4955 suggests that the excise tax is not an intermediate sanction but is to be levied in addition to revocation of charitable status. The legislative history, however, sends mixed signals, stating both that the sanction is not intended to weaken the absolute character of the prohibition, but also that in certain limited cases, the IRS may have the discretion to use the excise tax in lieu of revocation. As an enforcement matter, the IRS appears to view § 4955 as more of an intermediate sanction.

¹¹⁶ I.R.C. § 4955.

¹¹⁷ I.R.C. § 6852, 7409.

created by a corporation can still speak.”¹¹⁸ The Court noted that a “PAC is a *separate association* from the corporation.”¹¹⁹ Therefore, the Court said, the availability of the option to speak through a PAC does *not* allow the *corporation* to speak.¹²⁰ Setting aside the implications of the somewhat bizarre assertion that a PAC is a “separate association”, the point the Court makes is quite clear and dovetails with its concern that corporations *as corporations* are worthy of protection. In effect, what the Court is saying is that speech of the corporation’s PAC is not the same as speech by the corporation, and therefore, the ban is a ban.

The Court’s conclusion that the IE rule is a “ban on speech,” notwithstanding the availability of a PAC-speech option, appears to have rather ominous implications for the political activities prohibition (and for other tax rules limiting the lobbying and political activity of charities and other exempt organizations). Since the Court’s 1983 decision in *TWR*, it has been fairly commonly understood that segregating speech by use of a PAC or an affiliated organization was an important means to inoculate a rule affecting speech from a constitutional challenge. Justice Rehnquist’s majority opinion in *TWR* referred to the alternate channel approvingly,¹²¹ and Justice Blackmun’s concurrence in *TWR* (joined by two other Justices) was based on the availability of the affiliate structure and the fact that the IRS did not require more than separate incorporation and the minimal recordkeeping necessary to ensure that tax-deductible contributions were not used for lobbying.¹²²

¹¹⁸ *Citizens United*, ___ U.S. at ___. “PAC” is short for political action committee.

¹¹⁹ *Id.* (emphasis added).

¹²⁰ And even if it did, the Court says that the formation of a PAC is a burdensome alternative: “they are expensive to administer and subject to extensive regulations.” *Id.* at ___. The Court cites the fact that “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” in addition to filing detailed monthly reports with the FEC. “PACs have to comply with these regulations just to speak.” *Id.* at ___. It is hard to know what to make of the Court’s burden argument in an exempt organization context. The reporting obligations of § 527 organizations that are not political committees (and so not subject to FEC rules) mirror the FEC requirements; i.e., a political organization too must comply with very similar regulations “just to speak.” *Compare* I.R.C. § 527(j) *with* ___. The implication is that record-keeping and ongoing reporting rules may be unconstitutional. But this part of the Court’s opinion appears to be dicta, as the Court merely adds the burden argument after it already has concluded that the PAC option is not a sufficient alternative.

¹²¹ 461 U.S. at 544.

¹²² *Id.* at 553

Indeed, the one court to have considered (and uphold) the constitutionality of the political activities prohibition cited *TWR* and concluded that a § 501(c)(3) organization had a suitable alternate channel for political activity because a § 501(c)(3) organization could set up an affiliated § 501(c)(4) organization, which in turn could establish a related PAC or political organization to conduct political activity.¹²³ Of course, the § 501(c)(3) organization must take steps to be sure that the political activities of the PAC are *not* attributable to the § 501(c)(3) organization.

Thus, the Court's statements in *Citizens United* that a PAC is a separate association and as such insufficient to speak for the corporation are hard to square with the Court's statements about alternate channels in the tax context. Indeed, directly applying the Court's statements to the tax context would seem to go against separate incorporation as a panacea and also require that the speech of any separate but related organization *be* attributable to the original organization.

So, one possibility is that the Court's thinking on alternate channels in the tax context has quite simply changed. If so, however, it does not necessarily follow that the political activities prohibition (and for that matter the lobbying limitation) suddenly become unconstitutional. Although the passage of time seems to show that the presence of a sufficient alternate channel is a part of the constitutional analysis,¹²⁴ it has never been clear the extent to which an alternate channel for speech was necessary given the broad power of Congress to make subsidy decisions.¹²⁵ Further, the Court's statement regarding the insufficiency of PACs is perhaps best viewed in connection with the nature of the IE rule as a ban on *corporate* speech. Under such a rule, the corporation as corporation was

¹²³ *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000).

¹²⁴ See Miriam Galston, *Campaign Speech and Contextual Analysis*, 6 First Amendment L. Rev. 100, 113-17 (2007) (noting that in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), *Rust v. Sullivan*, 500 U.S. 173 (1991), and a handful of district and appellate court cases, the existence of an alternate channel for lobbying is seen as important to the reasoning of *TWR*).

¹²⁵ Although, as Professor Galston explains, *id.*, subsequent courts have pointed to an alternate channel analysis, the presence or absence of an alternate channel seems more like a factor to be considered when analyzing whether a rule burdens speech than a rule of constitutional law. Perhaps the most important point here is that the majority opinion in *TWR* noted but did not emphasize the alternate channel. See also discussion *infra*.

simply prevented (under threat of criminal sanction) from speaking. However, it is different for § 501(c)(3) organizations. The political activities prohibition does not prevent the organization from speaking as an organization; rather it prevents the organization from speaking as a charity. Thus, the alternate channel analysis in the tax context is a bit different than in the campaign finance context. Here, the question is whether there is some way for the organization to speak, if not as a charity, then as something else (a social welfare organization, a PAC, whatever).¹²⁶ Thus, the relevance (again) of viewing § 501(c)(3) not in isolation but in connection with other tax-exemption provisions. Taken together, the exemption provisions provide a structure for *organization*-level speech.¹²⁷ Under the IE rule, there was no similar alternate structure available, because the ban was an *organization*-level ban. In other words, the Court in the past has not, and even in the future might not, view a PAC or a social welfare organization as “separate” for purposes of an alternate channel analysis in the tax-exempt organization context.

E. Identity Discrimination.

Citizens United is notable for its elevation of the corporate form as worthy of virtually the same First Amendment protection as individuals. The Court says:

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to establish worth, standing, and respect for the speaker’s voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.¹²⁸

¹²⁶ See Part III *infra* for additional discussion of the sufficiency of the alternate channel with respect to political activities.

¹²⁷ See, e.g., Galston, *Campaign Speech and Contextual Analysis*, *supra* note __ at __ (discussing a “network” approach to political activity by tax-exempt organizations).

¹²⁸ 558 U.S. at ____.

The Court concludes that corporations, as corporations, have a viewpoint and a right to speak. Thus, the IE rule wrongfully singled out the corporation for speech suppression.

Once again, on its face, the tenor of the Court's words strongly suggests that the political activities prohibition is problematic. If Congress shall make no law singling out certain groups to suppress their speech, then surely, in adding the political activities prohibition to § 501(c)(3) in 1954 the Congress targeted § 501(c)(3) organizations for speech suppression just as surely as the IE rule singled out corporations and barred their speech.

Yet it is not so straightforward. One distinction is the nature of the classification. As discussed above, the IE rule singles out the corporation. The corporate form is generic and a creature of State law. Corporations can and do have many purposes and functions. The corporate form is an archetype of essential legal forms, and is considered a "person" for many purposes.¹²⁹ In short, the corporation has become a foundational category of our legal system. Whether or not one agrees that corporations should have the same speech rights as natural persons, it seems indisputable that the corporate form is fundamental, and that a rule targeting the speech of a corporation is directed to a core identity of the legal system.

By contrast, § 501(c)(3) is a creature of federal tax law – a section of the Internal Revenue Code – and not an organizational form per se. Section 501(c)(3) is a tax classification¹³⁰ that applies to "[c]orporations, and any community chest, fund, or foundation."¹³¹ The purposes of a § 501(c)(3) organization are not generic but limited. Because so many organizations take advantage of the tax classification, there are of course

¹²⁹ Cites.

¹³⁰ As a general rule, Congress's tax classifications enjoy "a presumption of constitutionality" that "can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." *TWR* at 547, quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940).

¹³¹ I.R.C. § 501(c)(3).

many charities,¹³² and charities certainly form an important part of the economy and society. But the identity of charity as charity is a tax identity, not a corporate identity. Further, the political activities prohibition is not even a rule targeting the speech of charities as charities. It is part and parcel of the definition of a charity.¹³³ Thus, a corporation as a corporation exists whether or not it speaks politically, and the IE rule was based on corporate identity as such.¹³⁴ But a § 501(c)(3) organization formally *does not survive* political speech. It remains a corporation (assuming it was so organized), but is just no longer a § 501(c)(3) organization. In sum, the political activities prohibition is not a singling out based on the identity of speaker, at least not in the same way that the IE rule singles out the corporation. Rather, the political activities prohibition is best understood as a condition of a tax classification and not as an identity-based rule.¹³⁵

F. Existing Jurisprudence Supports the Political Activities Prohibition

On the surface there is language in *Citizens United*, quite a lot of language, that seems to suggest existential (neigh constitutional) peril for the political activities prohibition. At one point, the Court says point blank: “No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”¹³⁶ Facially, there appears to be no contest: a charity typically is a nonprofit corporation and

¹³² Today, there are more than 1.2 million charitable organizations. MOLLY F. SHERLOCK & JANE G. GRAVELLE, CONGRESSIONAL RESEARCH SERVICE, AN OVERVIEW OF THE NONPROFIT AND CHARITABLE SECTOR 3 (Nov. 17, 2009). This figure does not include organizations that do not file an exemption application with the IRS, which could number in the hundreds of thousands (e.g., churches, other qualifying religious organizations, and very small organizations).

¹³³ See *supra* note ____.

¹³⁴ It is an interesting question whether a State in response to *Citizens United* could amend its corporate code to place an independent expenditure prohibition as a condition of corporate existence (presumably on a going forward basis). Even though States would be unlikely to do this for fear of losing corporate business (it would only take one State to allow independent expenditures to lure corporations to such State), it would still seem to run afoul of *Citizens United*. Unlike a condition on a tax classification, violation of such a condition would terminate the corporate existence altogether, which given the Court’s support for the corporate legal form per se, would likely be an unconstitutional result.

¹³⁵ One additional question relating to identity-based discrimination is how far the Court is willing to go. As noted, a § 501(c)(3) organization is a tax classification. If a tax classification has the same First Amendment standing as the more generic legal concept of a corporation, where does the line stop? Does the fact of creating a tax status give the status an “identity” for purposes of the First Amendment? If so, then making speech (and perhaps other)-based distinctions because of tax status becomes problematic, limiting the power of Congress to make tax and spending decisions.

¹³⁶ 558 U.S. at ____.

the political activities prohibition is a limit on political speech; therefore, the prohibition is unconstitutional. But, as argued above, such a conclusion is too quick.

Purpose, sanction, and a ban on corporate speech: these are the factors that moved the Court in *Citizens United* to conclude that the IE rule was a burden on speech (and therefore that strict scrutiny applied). As explained above, with respect to each factor, *Our Country* and the political activities prohibition is distinguishable from *Citizens United* and the IE rule. The purpose of the political activities prohibition is not to suppress speech but to define charity; the legal setting is tax and not campaign finance; violation of the political activities prohibition is not criminal; the political activities prohibition is by nature a rule associated with a tax status (with, or without, a sufficient alternate channel) rather than a ban on corporate speech. These comparisons form the funnel through which the initial, and most important conclusion will be made: is the political activities prohibition a burden on speech? As shown above, on each factor, *Citizens United* is distinguishable from the hypothetical *Our Country*.

Furthermore, as indicated above, the Court would not decide *Our Country* in a legal vacuum. The Court previously has concluded, *twice* (in *Cammarano* and *TWR*),¹³⁷ that a restriction that affects speech in connection with a tax benefit does not burden speech. However, the Court also concluded the opposite in *Speiser*.¹³⁸ Accordingly, even though plausible arguments can be made distinguishing *Our Country* from *Citizens United*, *Our Country* must be positioned within existing Supreme Court jurisprudence of *Speiser*, *Cammarano*, and *TWR*.

1. The Rules of *Speiser*, *Cammarano*, and *TWR*.

Chronologically, *Speiser* is the first of the decisions, and the outlier. At issue was a provision of the California constitution, which provided for a property tax exemption for veterans. In order to claim the exemption, veterans were required to complete a standard application form which included the following oath: “I do not advocate the overthrow of

¹³⁷ 358 U.S. 498 (1959); 461 U.S. 540 (1983).

¹³⁸ 357 U.S. 513 (1958).

the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign Government against the United States in event of hostilities.”¹³⁹ The Court acknowledged that “[i]t is settled that speech can be effectively limited by the exercise of the taxing power” but held that “[t]o deny an exemption to claimants who engaged in certain forms of speech is in effect to penalize them for such speech.”¹⁴⁰ “[T]he denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the prescribed speech. The denial is ‘frankly aimed at the suppression of dangerous ideas.’”¹⁴¹ Accordingly, the Court held that the loyalty oath was an unconstitutional condition of a tax exemption.

By contrast, one year later, in *Cammarano*, the Court considered the validity of a Treasury regulation (now codified in I.R.C. § 162(e)) that disallowed a deduction for ordinary and necessary business expenses if the expense was for lobbying. Although like *Speiser*, a rule of tax had the effect of limiting speech, the Court unanimously concluded that “*Speiser* has no relevance.”¹⁴² The petitioners in *Cammarano*, the Court said: “are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets.”¹⁴³ Accordingly, a *Speiser/Cammarano* dichotomy emerged: is the rule “aimed at the suppression of dangerous ideas” or is it just a decision not to subsidize a protected activity? If the former, then there is a burden on speech; if the latter, no burden.

In the 1983 decision, *TWR*, the Court considered whether conditioning tax-exempt status under § 501(c)(3) of the Code on refraining from substantial lobbying activity was constitutional. The Court said that the unconstitutional condition model of *Speiser* was not the right one.

¹³⁹ 357 U.S. 513, 515.

¹⁴⁰ *Id.* at 518.

¹⁴¹ *Id.* at 519.

¹⁴² 358 U.S. 498, 513.

¹⁴³ *Id.*

The Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public monies. This Court has never held that the Court must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right.¹⁴⁴

Noting that it would be a different case if the rule was directed to “suppression of dangerous ideas,” citing *Speiser*, the Court found “no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect.”¹⁴⁵ Accordingly, the Court said the case was controlled by *Cammarano* and upheld the lobbying rule.

2. The *Speiser/Cammarano/TWR* trilogy discussed.

This trilogy of cases requires some discussion. Notably, because *Speiser* came first, the Court in *Cammarano* and *TWR* had to articulate a basis for distinction, which the Court does, but in a somewhat conclusory fashion. The key statement in *Cammarano* that petitioners “are not being denied a tax deduction because they engage in constitutionally protected activities”¹⁴⁶ seems in one sense incorrect. From the standpoint of the petitioners, it appears that they *are* being denied a tax deduction because of a special rule that targets constitutionally protected activities. Were it not for the rule, a deduction generally *would* be available. Similarly, Justice Rehnquist’s statement in *TWR* quoted above that the statute does not “deny TWR the right to receive deductible contributions to support its non-lobbying activity” or “deny TWR any independent benefit on account of its intention to lobby”¹⁴⁷ is very hard to make sense of on its terms. The Code *does* deny TWR the right to receive deductible contributions *if* TWR lobbies to a substantial extent.

¹⁴⁴ 461 U.S. 540, 545.

¹⁴⁵ *Id.* at 548. Arguably, this statement may provide a footing for an as-applied challenge to the political activities prohibition. The reference to the “effect” of the provision invites an argument that the result of the Rule has been to suppress ideas.

¹⁴⁶ 358 U.S. at 513.

¹⁴⁷ 461 U.S. at 545.

Further, the Code *does* deny TWR an independent benefit – that of tax exemption – if TWR intends to lobby.¹⁴⁸

Nevertheless, although the Court’s statements in *Cammarano* and *TWR* are not clear explanations of the Court’s reasoning, there is an important and controlling, if somewhat fuzzy, distinction being drawn with *Speiser*: the purpose the law. Really, the statements quoted in *Cammarano* and *TWR* are the Court’s effort to state that the rules of the federal tax code had a different purpose from the State rule at issue in *Speiser* and that such a purpose was constitutionally significant. Yes, speech is burdened as a practical matter in each case, but only in *Speiser* was the purpose of the rule to burden speech.

To see this, further discussion of *Speiser* is necessary. One aspect of *Speiser* that often seems to be overlooked is that the Court assumed without deciding that California *had* the power to “deny tax exemptions to persons who engage in the proscribed speech for which they might be fined or imprisoned.”¹⁴⁹ Thus, the Court did *not* address the question of the constitutionality of the loyalty oath as a condition of property tax exemption as such. Instead, the Court invalidated the oath on procedural due process grounds because the method California used to enforce the oath was not fair. Here, what moved the Court was that the California law in effect was established to force veterans to prove a substantive question: namely, their loyalty to the regime. Merely signing the oath was not enough to satisfy the burden; rather, it “is but part of the probative process by which the State seeks to determine which taxpayers fall into the proscribed category.”¹⁵⁰ The State’s process did not accept signing the oath as conclusive of loyalty, but the State could subpoena applications and investigate to see whether the veterans are “proper persons” to qualify for tax exemption.¹⁵¹ The Court likened the loyalty oath and its

¹⁴⁸ In his concurrence, Justice Blackmun specifically notes this part of Justice Rehnquist’s opinion and says in effect that they can only make sense if the alternate structure of unlimited lobbying through an affiliated organization is permitted. *Id.* at 553. In such a case, TWR can continue to be eligible to receive deductible contributions with respect to its nonlobbying activity and get the benefit of charitable exemption, notwithstanding the lobbying of a controlled affiliate.

¹⁴⁹ 357 U.S. at 520.

¹⁵⁰ *Id.* at 522.

¹⁵¹ *Id.* at 521.

process of proof to a legislature declaring a person guilty of a crime, and then making them prove their innocence. Thus, the question “for decision . . . is whether this allocation of the burden of proof” meets due process demands.¹⁵² Although putting the burden on the taxpayer normally raises no concerns, it is different the Court said if “the purported tax was shown to be in reality a penalty for a crime,” and as the Court had noted earlier, the speech in question here *was* a crime. In such a case, greater procedural safeguards are required “than when only the amount of [the taxpayer’s] tax liability is in issue.”¹⁵³ In sum, what the State of California attempted by the loyalty oath was to establish through the tax exemption system a method to flush out potential criminals. The law was a direct attempt to suppress the speech of a particular class of persons. But there would be a different result, the Court said, if the “purpose was to achieve an objective other than restraint on speech.”¹⁵⁴

The contrast to the political activities prohibition and lobbying limitations of § 162(e) and § 501(c)(3) is notable. Perhaps, in the Court’s view, the self-evident nature of the contrast explains the Court’s fairly conclusory approach to distinguishing *Speiser* in both cases. As discussed above, Congress’s purpose for the tax rules is not related directly to speech. As the Court says in *Cammarano*, the nondeductibility of lobbying expenses is a “sharply defined national policy,”¹⁵⁵ a provision of general applicability, extant for “more than 40 years.”¹⁵⁶ “Nondiscriminatory denial of deduction . . . is plainly not ‘aimed at the suppression of dangerous ideas.’”¹⁵⁷ Regarding the lobbying limitation on § 501(c)(3) status, the Court says in *TWR*: “Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR’s lobbying.”¹⁵⁸ Also: “Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations

¹⁵² *Id.* at 523.

¹⁵³ *Id.* at 525.

¹⁵⁴ *Id.* at 527.

¹⁵⁵ 358 U.S. at 508, 512. The Court says this twice, once incorporating the nonsubvention/no subsidy rationale of *Slee*.

¹⁵⁶ *Id.* at 508.

¹⁵⁷ *Id.* at 513.

¹⁵⁸ 461 U.S. at 546.

undertake to promote the public welfare.”¹⁵⁹ Clearly, the key distinction driving the conclusion is purpose. In *Speiser*, the State set out to deny speech. But, the Court says, Congress had a revenue purpose in mind when enacting the lobbying limitations of § 162(e) and § 501(c)(3). Thus, the otherwise somewhat cryptic statements above about not denying benefits or rights but merely refusing to pay for lobbying, are really just affirmations of an accepted Congressional purpose.

Speiser also is distinguishable from the hypothetical *Our Country* in other important ways. Applying the constitutional conditions doctrine in *Speiser*, the Court intimates that the loyalty oath bore no relation to the benefit provided, i.e., the oath was “external” to the benefit. By contrast, the political activities prohibition (and the lobbying limitation) is a condition that is “internal” to the benefit, or rationally related to it. In other words, demanding loyalty has nothing intrinsically to do with providing a property tax exemption, whereas demanding nonpartisanship is related to determining the type of benefit to be provided. In addition, *Speiser*, like *Citizens United*, also appears to qualify as an identity-based speech restriction. The loyalty oath applied to veterans. A veteran is a veteran is a veteran – “though he be denied a tax exemption, he remains a veteran.”¹⁶⁰ Thus, the Court stresses that California had singled out veterans, and conditioned their speech. By contrast, charities are a creature of the tax code, and the condition is related to such tax status.

In sum, the *Speiser/Cammarano-TWR* dichotomy emphasizes purpose as arguably the most significant factor framing the decision as to whether a rule (be it a condition or not) burdens speech, and *Speiser*, although involving a condition to exemption, properly is distinguishable from the federal conditions relating to exemption and lobbying. The hypothetical *Our Country*, distinguishable from *Citizens United* on the key factors of purpose, sanction, and a ban on the corporate form, fits squarely in the *Cammarano-TWR* line. Under this line, the Court is likely to conclude that the political activities prohibition is not a burden on speech. A case from the campaign finance context, Federal Election

¹⁵⁹ *Id.* at ____.

¹⁶⁰ 357 U.S. at 528.

Comm’n v. Massachusetts Citizens for Life (“MCFL”),¹⁶¹ underlines this point. In *MCFL*, Justice Brennan easily concluded in discussing *TWR*, that the lobbying restriction of § 501(c)(3) “would infringe no protected activity, for there is no right to have speech subsidized by the Government.”¹⁶² Accordingly, despite facial similarities with respect to the outcome of the IE rule and the political activities prohibition, the legal conclusion is that two rules producing identical outcomes (no speech) may nonetheless fairly be characterized as involving in one case but not the other a burden of a fundamental right.¹⁶³

Part III. Cautionary Notes and the Relevance of the Charitable Deduction

The analysis in Part II of this Article is intended to show that as a matter of law the Court in deciding *Our Country* could *easily* and should distinguish *Citizens United*, follow the established *Cammarano-TWR* model, and hold that the political activities prohibition is consistent with the Constitution. That said, there are enough facial similarities between the IE rule and the political activities prohibition, and questions raised by the case law, potentially to tip the scales on the fairly nuanced inquiry into whether a rule burdens speech for First Amendment purposes. Or, in the alternative, perhaps the Court could be led to conclude that the political activities prohibition can survive a facial challenge, but not an as-applied challenge. This Part examines factors that perhaps could lead the Court to such conclusions. As argued below, however, even if the Court took either such approach, the impact would be slight. This is because a separate constitutional analysis is required for the political activities prohibition for tax exemption under § 501(c)(3) and for tax deduction under § 170, and any possible constitutional infirmities that may exist with respect to § 501(c)(3) do not exist with respect to § 170.

¹⁶¹ 479 U.S. 238 (1986).

¹⁶² *Id.* at 256, n. 9. Justice Brennan here confirms that although, as a practical matter, the political activities prohibition affects speech, it does not follow as a legal conclusion that it is a rule that “suppresses speech” as such; rather, it suppresses subsidized speech.

¹⁶³ Furthermore, even if the Court concluded that the political activities prohibition was a burden on speech, and that strict scrutiny applied, there is still a case to be made that defining charity as exclusive of political activity serves a compelling state interest. Although it is outside the scope of this article to make such a case, for all the reasons cited *supra*, plus the additional loss of revenue to the Treasury, and the difficulty administering any alternative scheme, discussed *infra*, the status quo is defensible as a compelling policy with an indirect effect on speech. *But see* Houck, *supra* note __ at 86.

A. *Purpose to Penalize Speech.*

Justice Douglas' concurrence in *Speiser* highlights one fault line. In *Speiser*, Justice Douglas emphasizes his agreement with the Court that the loyalty oath was problematic because it placed an unacceptable burden on citizens to prove their loyalty, contrary to the presumption of innocence.¹⁶⁴ However, he also expresses a concern that if the California rule was aimed “not to apprehend criminals but to penalize advocacy, it likewise must fall.”¹⁶⁵ To the extent the *Our Country* Court views the political activities prohibition not as a decision not to subsidize speech but rather as an effort to penalize advocacy, this thread of the argument could carry greater force.

The main support for taking such a view likely would be by reference to the direct legislative history of the political activities prohibition. Certainly, the circumstantial evidence of its enactment suggests that Senator Johnson shoved through the prohibition in response to an electoral attack by a putative charitable organization. But as argued in Part I of this Article,¹⁶⁶ the better view of the purpose of the prohibition is as a reflection of an emerging consensus that was decades in the making, and to a certain extent, largely confirmed the original understanding of the meaning of charity as nonpolitical and education as not propaganda. Further, and also as argued above, Congress's treatment of advocacy generally under the tax-exempt organization provisions of the Code suggests that penalizing advocacy is not a purpose of the tax treatment.

B. *The Penalty Effect and the Charitable Deduction: Significance and Sufficiency of an Alternate Channel*

Apart from a punitive purpose, another strand of concern identified by Justice Douglas, this time through his concurring opinion in *Cammarano*, is whether a rule might operate, irrespective of its purpose, to penalize speech. Recall that *Cammarano* concerned the constitutionality of denying a business expense deduction for lobbying. Justice

¹⁶⁴ 537 U.S. 513, 535 (citing Alexander Hamilton and the role loyalty oaths played in sparking Revolution).

¹⁶⁵ *Id.*

¹⁶⁶ See *supra* text accompanying notes __ to __.

Douglas said that, for him, *Cammarano* would be a different case if the result of a taxpayer's lobbying was that the taxpayer lost *all* deductions for ordinary and necessary business expenses. This would be to "plac[e] a penalty on the exercise of First Amendment rights," which he said "was in substance what [California] did in *Speiser*."¹⁶⁷ Although to a certain extent, the question of whether a rule has a punitive purpose and/or a penalty effect may overlap, a rule could be enacted with innocent intentions but punitive results and perhaps be unconstitutional on that basis alone. Accordingly, the political activities prohibition should be analyzed from the perspective of a penalty effect.

The penalty effect could be an issue for purposes of tax exemption under § 501(c)(3) because the "taxpayer," i.e., the organization, loses the *entire* benefit of exemption even for minor or insubstantial violations. This aspect of the political activity and lobbying rules¹⁶⁸ has led some commentators to conclude that, either as a matter of policy or as a matter of constitutional necessity, the lobbying and political activity rules should be changed.¹⁶⁹ As Justice Douglas argued, if the rule serves as a penalty for speech, which under this argument the political activities prohibition does, then it may fit the *Speiser* model. To put a label on the argument, the rule would be an unconstitutional condition of tax-exempt status.

One answer to this concern has been through the alternate channel analysis (mentioned *supra*),¹⁷⁰ namely that the penalty effect is avoided because of the availability of an alternate channel for speech. This was the argument made in Justice Blackmun's

¹⁶⁷ 358 U.S. 498, 515. Of course, the penalty effect (losing all business deductions) was not an issue in *Cammarano* because the disallowance rule affected only lobbying expenses and not other trade or business expenses.

¹⁶⁸ There is more flexibility in the lobbying context. Organizations (other than churches) can opt-out of the facts and circumstances "no substantial part" test and make an election under § 501(h) which offers more precision on the amount of lobbying allowed and on the sanction. As discussed *supra* the penalty for any political activity formally is loss of exemption, though the IRS exercises considerable discretion in this regard.

¹⁶⁹ See Chisom, *supra* note __; Benjamin M. Leff, "Sit Down and Count the Cost": A Framework for Constitutionally Enforcing the 501(c)(3) Campaign Intervention Ban, 28 VA. TAX REV. 673 (2009).

¹⁷⁰ Another answer to the question of the penalty effect may simply be one of judgment. The purpose of the law to define charity and the tax context for the law may alone be sufficient to conclude that alternate channel or no, there is no penalty effect involved.

concurrence and to a lesser extent the majority in *TWR*. But *TWR* concerned the lobbying limit of § 501(c)(3), and as commentators have noted, in general, the alternate channel available for lobbying is more permissive than the alternate channel available for political activity.¹⁷¹ Nevertheless, the D.C. Circuit in *Branch Ministries v. Rossotti*,¹⁷² upheld the constitutionality of the political activities prohibition by invoking affiliations of § 501(c)(3), § 501(c)(4), and § 527 organizations as a sufficient alternate channel.

Accordingly, assuming that an alternate channel is still useful for constitutional purposes,¹⁷³ a question is the sufficiency of the alternate channel upheld in *Branch Ministries*. The general criticism would be that the multi-step structure of *Branch Ministries* (three entities instead of two) is a burden and/or dilutes the speech. Arguably, because the Court has approved a separate entity alternate channel approach before and there is no contrary authority, the addition of the § 527 layer is not a constitutional impediment.¹⁷⁴ Notwithstanding the Court's dicta in *Citizens United* regarding the burden of establishing a PAC,¹⁷⁵ as argued above, the tax context here should be distinguishable.¹⁷⁶

In addition, to the extent that more or different channels are needed, consideration should be given to the option of an alternate channel through an affiliated for-profit corporation. The focus of the Court and of commentators has been on tax-exempt affiliates because this was the structure used by *TWR*, and is the one most commonly

¹⁷¹ See Chisom, *supra* note __. This is because unlimited lobbying may be conducted through an affiliated § 501(c)(4) organization, but not unlimited political activity because § 501(c)(4) organizations may not allow political activity to become a primary purpose.

¹⁷² 211 F.3d 137 (D.C. Cir. 2000).

¹⁷³ As noted in Part II, the Court disapproved of the PAC alternate channel for corporate independent expenditures in *Citizens United*. However, as discussed *supra*, the Court's derogation in *Citizens United* of the PAC alternate channel should be seen in the context of the Court's concern about the IE rule as a ban on corporate speech. The political activities prohibition is not such a ban.

¹⁷⁴ See Galston, *supra* note __ (concluding that such a structure does not impose a burden).

¹⁷⁵ 558 U.S. 50, at ____.

¹⁷⁶ Discussion about the presence or absence of alternate channels emphasizes again the usefulness of viewing the statutory scheme of the exemption provisions as a whole – as a network, *see* Galston *supra* note __, or way of accommodating *organization-level* speech among different tax categories, *see* text *supra* note __. If the default position is free speech and a taxable organization, then, when the organization utilizes the exemption system, both default positions change. The organization is tax-exempt, and the ability to speak as a for-profit entity is affected. The different exemption categories and ability to own for-profit and nonprofit affiliates are boxes for how to treat different activities of the same, albeit formally separate, organization for tax purposes.

employed for obvious reasons (tax advantages). But if speech is the concern, the for-profit alternate channel generally is available.¹⁷⁷ One objection might be that a § 501(c)(3) organization does not have the option of establishing a for profit affiliate to engage in political activity for the same reason that a § 501(c)(3) may not directly set up a § 527 organization.¹⁷⁸ The barrier here is the legislative history to the 1974 § 527 legislation, which said that a § 501(c)(3) organization may not have an affiliated political organization.¹⁷⁹ However, if the Court did decide to rest the decision on an alternate channel, one avenue might be to mandate a simplified structure, for example, free the IRS from the 1974 legislative history and specifically allow it.¹⁸⁰

Thus, up to this point, there are plausible arguments for concluding that the political activities prohibition does not have a penalty effect. However, one overlooked aspect of the alternate channel cited approvingly in *TWR* may also be relevant; namely, *it does not allow for unfettered speech*. This is because unlimited lobbying activity by a § 501(c)(4) organization is permitted, but only to the extent that the lobbying activity is *related* to the organization's social welfare purpose. But *unrelated* lobbying activity, if a substantial purpose of the organization, *does* result in loss of § 501(c)(4) status.¹⁸¹ Accordingly, the § 501(c)(3)/§ 501(c)(4) alternate channel is an unrestricted alternate only to the extent of the relatedness of the lobbying to the exempt purpose of the organization.¹⁸²

¹⁷⁷ Indeed, the Code explicitly contemplates tax-exempt organizations owning for profit organizations and provides for the appropriate tax treatment. *See* I.R.C. § 512(b)(13).

¹⁷⁸ There is an exception for activity related to affecting a judicial nomination. *See supra* note __.

¹⁷⁹ *See* S. Rep. No. 93-1357, at 30 (1974).

¹⁸⁰ As some commentators have noted, nothing statutorily appears to prevent the IRS from allowing such a structure, but nonetheless, with legislative history to the contrary, the IRS is unlikely to change current practice without clear direction from a higher authority.

¹⁸¹ Rev. Rul. 81-95, 1981-1 C.B. 332; Rev. Rule 2004-6, 2004-1 C.B. 328.

¹⁸² This presents a neat issue with respect to the lobbying limitation, which may turn out to be more restrictive from a speech perspective than the political activities prohibition. This is because there is no outlet for unlimited, unrelated lobbying activity by an exempt organization. By contrast, there potentially is such an outlet for political activity through use of a § 527 political organization. The political organization option is not available for unlimited lobbying however, because lobbying is not considered an exempt purpose under § 527.

There is no indication that this issue was directly considered by the Court in *TWR*. The question then is whether the First Amendment in the tax-exempt organization context is concerned with a related/unrelated distinction or, instead, is concerned with speech as speech, related or not. If a related/unrelated distinction has significance for the First Amendment, then consistent with the *TWR* alternate channel (which protected only *related* lobbying), a sufficient alternate channel for political activities need be only for *related* political activity.¹⁸³ If, however, the First Amendment does not take into account tax concerns, then assuming that an alternate structure is constitutionally significant, one issue relevant for *both* the lobbying limitation and the political activities prohibition, is the extent to which an unrestricted outlet for the speech – related or not – is required. Further, if the tax context is trumped, the questions do not stop there but rather impact the activities of *any* exempt organization, because the entire classification of an organization as exempt is to a certain extent based upon the power of the Congress to delineate a purpose and promote or classify it exclusive to other things. If the Congress does not have the power to limit speech in relation to a tax classification, then the constitutionality of many other tax classifications also are likely to come into question.

In any event, even if the Court decided that a sufficient alternate channel was constitutionally necessary, that the currently available channels are insufficient, and as a result, held that the political activities prohibition is unconstitutional, not much need change. Section 501(c)(3) would be rewritten to omit the prohibition, but conditioning a charitable deduction on a recipient's abstention from political activity would not necessarily be affected.¹⁸⁴ And this leads to another it seems unremarked aspect of the alternate channel analysis – it only affects exemption. It says nothing about deductions.

¹⁸³ However, as discussed in Part IV, the related/unrelated distinction itself is problematic in the political activity context.

¹⁸⁴ As currently written, a charitable contribution does not exist for contributions to an organization that is “disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or interevne in . . . any political campaign” Accordingly, if the political activities prohibition of § 501(c)(3) were held unconstitutional, § 170(c)(2)(D) on its face would be to no effect as a technical matter. But even if courts did not read into § 170 a no political activity requirement, § 170 could easily be redrafted to deny a charitable deduction for contributions to organizations that engage in political activity or substantial lobbying.

Indeed, implicit in Justice Blackmun's approval of the § 501(c)(4) alternate channel is affirmation of *Cammarano* as applied to § 170 of the Code. To see this, note that Justice Blackmun's alternate channel only preserves tax-exemption for the organization (through use of an affiliate). Lost, however, is the ability to receive tax deductible contributions, at least with respect to the organization's lobbying activity. In other words, the alternate channel results in a loss of an indirect tax benefit; yet this was not of concern to Justice Blackmun or to the Court – the challenge, and their focus, was on the exemption condition.

Shifting then to deductions and § 170 of the Code, an alternate channel for the organization's speech does not factor into whether the political activity and lobbying limitations of § 170 are constitutional. This is because the effect of denying a charitable (or business expense) deduction for a contribution to an organization that engages in political activity (or substantial lobbying) has on the speech of the individual or entity making the contribution (and so claiming the deduction) is indirect at best. Such a rule does not affect the speech of the individual or entity as such. It does not even affect the ability of individuals to associate and speak collectively (which they remain free to do). Rather, as the Court has said, such a rule merely reflects Congress's decision not to subsidize the speech.¹⁸⁵ In this regard, it is noteworthy that the expenses at issue in *Cammarano* were the most sympathetic types of lobbying expense – self-defense lobbying.¹⁸⁶ Yet the Court had no sympathy. Further, the penalty effect does not appear to be an issue for the charitable contribution deduction under § 170 because a taxpayer's ability to take a charitable contribution deduction as a general matter is not affected if a taxpayer makes a contribution to a charity that impermissibly lobbies or engages in political activity.

In short, although it may be that the § 170 limitations were enacted as a backstop to the § 501(c)(3) limits,¹⁸⁷ they nonetheless would require a distinct constitutional

¹⁸⁵ 358 U.S. 498 (1959).

¹⁸⁶ The petitioners in *Cammarano* were lobbying to defend their business from extinction by legislation.

¹⁸⁷ See *supra* note __.

challenge to invalidate. Without such a successful challenge to the § 170 limitations, removal of the § 501(c)(3) limits likely will not change much, as organizations that want to be eligible to receive tax deductible contributions will continue to abide by the rules.

C. Implications of Reliance on Constitutional Conditions Analysis.

So far, the analysis has not directly discussed the doctrine of constitutional conditions, lamented by commentators for its incoherence.¹⁸⁸ Under this doctrine, a condition made in connection with providing a government benefit may be unconstitutional even if the government is under no obligation to provide the benefit.¹⁸⁹ The central concern is that if the government is prohibited from directly limiting a person's rights, then the government should not be able to so limit a person's rights through the imposition of a condition in connection with a benefit. *Speiser*, *Cammarano*, and *TWR* are often cited as "constitutional conditions" cases.¹⁹⁰ Importantly, *TWR*, and its alternate channel analysis have been cited approvingly in other constitutional conditions cases, such as *Rust v. Sullivan*¹⁹¹ and *FCC v. League of Women Voters of California*.¹⁹² Accordingly, the Court's analysis of alternate channels in *Rust* and *League of Women*

¹⁸⁸ The confusion surrounding the constitutional conditions doctrine stems from the inscrutable framework for decision and inconsistent application by the courts. See e.g., Richard Epstein, *Forward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

¹⁸⁹ As outlined by Professor Chisolm, a government decision not to subsidize speech is, everyone agrees, fine. But if the government provides a benefit, and the grant or denial of the benefit is based on viewpoint or the content of speech or on suspect classifications, then the condition is reviewed subject to strict scrutiny and a compelling state interest is required. However, if the grant or denial of the benefit is just "a simple policy of nonsubsidy," then only rational basis review is required. Chisolm, *supra* note __ at __. *TWR* equated tax exemption with a subsidy, said that Congress had merely decided not to subsidize lobbying, and then appears to have applied a rational basis review. In the context of political activities, Professor Chisolm, writing however before the *Branch Ministries* decision, argued that the penalty effect mooted by Justice Douglas in *Cammarano*, should trigger a heightened scrutiny because of the absence of a sufficient alternate channel for political activities.

¹⁹⁰ In *Speiser*, the Court held that the loyalty oath was an unconstitutional condition for the reasons stated *supra*. In *Cammarano* and *TWR*, the Court held that the conditions were constitutional.

¹⁹¹ 500 U.S. 173 (1991).

¹⁹² 468 U.S. 364, 400 (1984). Here, the Court struck down a federal law that provided funding to noncommercial television and radio stations on the condition that such stations not engage in editorializing. Central to the Court's reasoning was that the law did not allow for the editorializing activity even through a separate affiliate. The Court cited the *TWR* alternate channel approvingly, stating that if the stations were permitted to "establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid".

*Voters*¹⁹³ is commonly cited in scholarship in connection with the political activities prohibition because of their relevance to the alternate channel analysis.¹⁹⁴

However, the cases have been grouped together by courts not only because of alternate channel but also because each case involves the provision of a government benefit.¹⁹⁵ In *Rust* and *League of Women Voters*, the benefits are direct public funding. In *TWR*, the benefits cited are the subsidy-like exemptions and deductions. Importantly, under a constitutional conditions analysis, from the provision of a “benefit” comes a facilitation of government conditions that may directly affect fundamental rights. Thus in *Rust*, the Court upheld a condition on the funding of family planning services under Title X of the Public Health Service Act, namely that no abortion counseling be provided with the federal funds. The Court noted that the funding scheme distinguished between a project “grantee” and the funded project of the grantee (a “Title X Project”), and that grantee as grantee remained free to provide such counseling, just not in connection with the separately established, federally funded project. Therefore, the abortion-related condition did not burden the grantee’s First Amendment rights to speak.

This sort of micro-managing by the government may be permissible in the context of direct public funding by the government. The question is the extent to which it is permitted in the context of government incentives to charitable organizations. Reliance on *Rust* to uphold the political activities prohibition could run the risk of turning the “independent” sector into a series of “Project Xs,” subject to explicit direction by the

¹⁹³ Both cases stand for the general proposition that an alternate channel is relevant, and so both offer some support for the political activities prohibition to the extent that its alternate channel is sufficient. On the one hand, *Rust* could be distinguished because the alternate channel in *Rust* arguably is “better” than that provided by the tax rules because in *Rust* no separate organization was required; rather, the separation could occur within the existing organization. On the other hand, *League of Women Voters* provides support for the separate affiliation option.

¹⁹⁴ Galston, *supra* note __, Leff, *supra* note __, Chisolm, *supra* note __.

¹⁹⁵ The Court says that *Rust* is “a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded.” 500 U.S. at 194-195. The *Rust* court cites *Maher v. Roe*, 432 U.S. 464 (1977), in which the Court upheld a State’s decision to subsidize childbirth services but not abortion providing that the government may “make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds.” 500 U.S. at 192-193. The Court then cites *TWR* for the proposition that the “legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.” *Id.* at 193 (quoting *TWR*).

federal government. In other words, if *Rust* applies conceptually, then the door may be open to conditioning any number of restraints on charitable organizations without constitutional impediment.

This risk is present because *TWR* characterizes tax exemption as a subsidy – thus inviting a constitutional conditions analysis. But the subsidy assertion is not necessarily accurate. Whether § 501(c)(3) provides a subsidy may depend upon the rationale for charitable tax exemption. To the extent that § 501(c)(3) is designed to provide a cash grant to the organization of the amount of income tax the organization would otherwise owe, per *TWR*, then perhaps there is a subsidy. But this question has been debated since the outset of the exemption in 1913.¹⁹⁶ If charitable exemption is recognition of a co-sovereign, then exemption makes sense but not as a “subsidy.”¹⁹⁷ If charitable exemption is to lessen the burdens of government,¹⁹⁸ then it is less of a subsidy than a division of labor. If charitable exemption reflects a normative principle that “good” organizations simply should not be taxed, perhaps exemption is not a subsidy in the traditional sense of the term – rather it is just a recognition that charitable organizations *should*, as a matter of tax policy, be taxed differently from for-profit organizations. Further, even if there is a subsidy conceptually, for many if not most charitable organizations, tax-exempt status does not provide much if any actual tax savings,¹⁹⁹ and it would therefore be ironic to base the constitutionality of onerous conditions on the provision of a subsidy that is actually of little monetary value. Here again, however, § 501(c)(3) and § 170 are distinct. It would be hard to argue that § 170 is not a subsidy; indeed unlike tax exemption, it has long been considered a “tax expenditure.”²⁰⁰

¹⁹⁶ See e.g., Fishman & Schwartz, *supra* note _ at 297-313.

¹⁹⁷ See Brody, *supra* note _ at _.

¹⁹⁸ See, e.g., “The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare.” H.R. REP. NO. 75-1860 (1938).

¹⁹⁹ Cite.

²⁰⁰ The five-year (2008-2012) tax expenditure for the charitable tax deduction is estimated to be \$264 billion. See Joint Committee on Taxation, Estimates of Federal Tax Expenditures for Fiscal Years 2008-

The implications of the above are several. Notwithstanding *TWR*, the extent of the applicability of the constitutional conditions doctrine on the basis that the charitable tax exemption is a government-provided subsidy is not self-evident. At a minimum, assuming that the government is providing a “benefit” here, it is important to maintain distinctions between the benefit of tax exemption and direct subsidies such as those provided in *Rust* and *League of Women Voters*. Although the cases commonly are grouped together, the difference with respect to the benefits provided also suggests that as a general matter a different analysis of the condition should apply. However, if the constitutional conditions doctrine applies with less force to tax-exemption, or arguably does not apply at all, what is the effect on the analysis of the constitutionality of the political activities prohibition? On the one hand, if exemption is not a benefit, this undermines the argument made *supra* that the political activities prohibition is not identity based speech because it makes § 501(c)(3) status less like a tax classification (i.e., an invention of the tax code) and more like a core entity type, akin to a corporation. Thus, following the reasoning of *Citizens United*, the political activities prohibition is more like a ban on corporate speech than was argued earlier. On the other hand, even if charitable tax exemption is not a government “benefit,” it can still be upheld for all the reasons stated previously – the purpose of the rule is not to suppress speech and Congress has a sufficient interest in having a nonpartisan charitable sector. Perhaps most importantly, however, the question of whether § 501(c)(3) provides a “benefit” highlights again the distinction between § 501(c)(3) and § 170. So even if the question casts additional doubt on the constitutionality of the political activities prohibition for exemption purposes, it says nothing about the constitutionality of the prohibition for deduction purposes. And, to a certain extent, it is really § 170 that is the more important of the two. Congress has a stronger spending purpose and the tax benefit is much more significant to the charities (even though less direct).

2012, Oct. 31, 2008 at 53, 55, 56 (combining 35.9 billion for education, 204.9 billion for social services, and 23.2 billion for health).

D. Summary

In brief, this Part has argued that even if the Court was persuaded that the purpose of the political activities prohibition was to suppress speech or that the prohibition had a penalty effect, and therefore concluded that the prohibition was unconstitutional, present law would not change significantly because the disallowance of the charitable deduction for contributions to organizations that engage in political activity requires a distinct constitutional challenge, which it should easily survive. In addition, the charitable sector should be mindful of the perils of relying on a constitutional conditions analysis in support of the political activities prohibition because such an analysis could open the door to increased government involvement in the affairs of charitable organizations.

Part IV. Alternatives to the Status Quo are Wanting

So far, the analysis has focused largely on whether the political activities prohibition is constitutional as such without much comment on alternatives. What if, notwithstanding the arguments made in Part III of this Article, the Court concluded that the prohibition was an unconstitutional burden on speech? What would this mean? Such a conclusion would raise a number of difficult questions. Must the law allow unlimited political activity by charities? Can a political purpose be a charitable purpose? Are political activities to be considered as an acceptable means to a (nonpolitical) charitable end? Are limits to the political activity of charities permissible, and if so, what kind of limits? These are key questions that should inform not only the constitutional analysis, but also, assuming the constitutionality of the political activities prohibition, whether Congress should, on its own initiative, modify it.

A. One Extreme: Congress May Not Restrict the Political Activity of Charitable Organizations

At first blush, it might be assumed that if the political activities prohibition is unconstitutional then no limit or restraint upon the political activities of charities is

allowed. Such a conclusion certainly would be the easiest to administer and enforce, as there would be nothing to administer or enforce. The line between political and nonpolitical activity, between education and propaganda, would not have to be drawn. There would be no facts and circumstances to consider. Such a conclusion also would best facilitate core First Amendment speech. Facing no restraint, charities could speak and spend on political activity as much as desired. To the extent that protecting speech is the critical concern, discarding the prohibition and replacing it with unfettered speech seems an easy and intuitively attractive solution.²⁰¹

But this overlooks a critical point, namely that unless there is *some* limit on the political activity of § 501(c)(3) organizations, the charitable purpose requirement²⁰² would lose all meaning. Currently, it is *because of* the political activities prohibition that a § 501(c)(3) organization as such stands apart, or operates distinctly, from its actual or contemplated political activity. That is, because a § 501(c)(3) organization is prohibited from participating in politics, by definition there must be a meaningful “charity” in existence apart from any political activity. It is from this vantage point that we often think of the merits of the political activities prohibition: i.e., whether a charity, viewed separately from any political activity, may or should be able to engage in politics.

But, without the political activities prohibition or any limit on political activities, this vital distinction would erode. There would be nothing to prevent an organization formed to “feed the poor” from doing nothing other than campaign intervention. Because the charitable purpose requirement has no substantive or positive content – it is after all a *purpose* requirement – an organization with the purpose of feeding the poor should qualify under the organizational and operational test even if all its activities were political. Clearly, the organizational test would be no barrier, as feeding the poor is a charitable

²⁰¹ If such an approach were adopted, it would call into question limitations on the political activities of other exempt organizations and the constitutionality of the tax under Code § 527(f)(1). *See infra* at note ___.

²⁰² Again, “charitable” here includes all the § 501(c)(3) exempt purposes – charitable, educational, religious, scientific, etc.

purpose.²⁰³ The operational test too would be satisfied. Here, the regulations say that to be operated exclusively for exempt purposes, the primary purpose of the organization must be an exempt purpose. This primary purpose test is met “if [the organization] engages primarily in activities which accomplish” the exempt purpose.²⁰⁴ Under this formulation, activities themselves are not necessarily either charitable or uncharitable, but primarily are viewed in connection with the ends served. Accordingly, an organization that favored candidates who want to help “feed the poor” would be engaged in an activity to accomplish exempt purposes. Without any restriction on political activities, nothing would prevent a purely political organization from qualifying as a § 501(c)(3) organization. The term “PAC” would have to be modified to include not only “political action committee” but also “political action charity.” In short, in addition to all the other types of present law charities (hospital, college or university, church, scientific organization, etc.) a charity could also be an action organization,²⁰⁵ or what we think of today as a political organization.

B. Assuming Change to the Prohibition, Some Limit Should Be Contemplated

If equating a political organization and a charity is unpalatable, one might want to consider various limitations. The first that might come to mind is to assert the old (and current) way of thinking about charity – namely that political activities should be permitted only of “real” charities, that is, charities that have some quantum of charitable activity that is not political activity. As a general matter, this does not work because, as noted above, our system provides exemption based on purposes not activities.²⁰⁶ If the

²⁰³ The organizational test requires that the organization be organized exclusively for exempt purposes. Typically it may be satisfied through a statement in the organizations governing instrument. In general, “feeding the poor” would qualify as a charitable purpose under the Treasury regulations. See Treas. Reg. § 1.501(c)(3)-1(d)(2) (defining charitable to include “relief of the poor and distressed or of the underprivileged”).

²⁰⁴ Treas. Reg. § 1.501(c)(3)-1(c)(1).

²⁰⁵ Note that because of the political activities prohibition, the Treasury regulations provide that a § 501(c)(3) organization may not be an action organization. Treas. Reg. § 1.501(c)(3)-1(c)(3). An action organization includes an organization that engages in political activity. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).

²⁰⁶ See also Hopkins, *supra* note __ at 80.

purpose is legitimate, and the activities plausibly are undertaken to advance the purpose, that is the end of the discussion.²⁰⁷

Nevertheless, one might require as an affirmative obligation of charitable status that an organization may not qualify under § 501(c)(3) unless it conducts some level of activity that serves an exempt purpose and that is not political activity. The obvious and difficult questions would be, however, how much such activity is required and how it would be measured. Furthermore, any such requirement, though styled as an affirmative obligation to conduct nonpolitical activity, would in effect be a limit on the amount of political activity because inevitably, the requisite amount of “good” activity would be defined in relation to the political activity.²⁰⁸

Alternatively, one could attempt to draw a different line and say that charitable exemption should be denied to organizations that are *really* political organizations in disguise. In effect, such an approach would be to assert that there is a relevant distinction between exempt purposes and political purposes, and that charitable exemption should be granted only for the former. The analysis here would not be on the political activities as such, but whether the activities “truly” further an exempt purpose, or instead a political purpose. This could be similar to the present law commerciality doctrine, which denies charitable exemption if the activities of an organization take on too much of a commercial hue, i.e., the organization seems more like a for profit business than a charity.²⁰⁹ But, as in the commerciality context, a political purpose/exempt purpose line likely would be very difficult to draw, especially in an area protected by the First Amendment. If an

²⁰⁷ As discussed *infra*, activities are of course relevant. If activities serve a noncharitable purpose, a substantial level of such activities may indicate that a primary purpose of the organization is not charitable, and therefore the organization ceases to qualify under § 501(c)(3). See e.g., *Better Business Bureau of Washington, D.C. v. United States*, 326 U.S. 279 (1945).

²⁰⁸ For example, in order for such an affirmative requirement to have any substance, the nonpolitical activity must be substantial, otherwise a token amount would do. But substantiality likely would have meaning only in relation to the amount of political activity. An organization with little-to-no political activity, would not have to undertake much nonpolitical activity to qualify. However, an organization with considerable political activity would have a higher nonpolitical activity threshold. This in turn would encourage the organization to reduce the amount of political activity so as to strengthen the substantiality of the nonpolitical activity.

²⁰⁹ See generally John D. Colombo, *Commercial Activity and Charitable Tax Exemption*, 44 WM. & MARY L. REV. 487 (2002).

organization's stated purpose is to find ways to help the poor, and the organization promotes the candidates it believes (or says it believes) are committed to this goal, a principled challenge to the organization as "politically motivated" would be very hard to establish, even if it were clear what being politically motivated means.

Another limit might be to suggest that although political activity should be permitted, it should be limited in extent. If it is too difficult to question an organization's true purpose as political or not, the quantum of activities of the organization could be used as a proxy for the organization's purposes. Thus, an organization with a lot of political activity could be suspect because, one might argue, the more political activity there is, the more likely the organization is really a political organization and not a charity.²¹⁰ Even if we knew how much political activity generally should be equated with political and not exempt purposes (10 percent? 50 percent?), there appears to be no reason to assume that the amount of political activity as such would have any meaningful bearing on an organization's "true" purpose.²¹¹ And if the answer to this is that we do not care, we just need to limit the amount of political activity as a prophylactic against the political organization masquerading as charity, then we have not advanced very far from the

²¹⁰ An activity-based limit would likely take one of two forms: something similar to the current "no substantial part" rule that applies in the lobbying context, I.R.C. § 501(c)(3), or something like the rule in the § 501(c)(4) context, namely that the political activities may not become so extensive as to become a primary purpose of the organization. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii); Rev. Rul. 81-95, 1981-1 C.B. 332. A "no substantial part" rule seems especially problematic, given the context here of assuming that the political activities prohibition is unconstitutional. If it is unconstitutional to bar political activities altogether because the speech is so fundamental, it may not make much sense to say that it is constitutional so long as the organization stops speaking after the first paragraph. And irrespective of the constitutional question, a "no substantial part" approach would arguably be worse than the current rule. At least the current rule provides clarity on the permitted/not permitted question. But a no substantial part rule would introduce new uncertainty on the amount of permitted activity, new complexity if a regime similar to the I.R.C. § 501(h) were adopted, would be unlikely to satisfy organizations making mission-based arguments for allowing political activity, and all the benefits of the current rule (a nonpartisan sector) would be lost, with little apparent gain. The § 501(c)(4) approach would provide a more generous limit on political activities (capped so as to prevent a political purpose from becoming a primary purpose) but also raises similar questions. It is discussed in more detail *infra*.

²¹¹ Indeed, many organizations, especially organizations that believe political activity is required by the organization's mission, would argue that political activity that is related to mission clearly serves an exempt purpose and so should not be subject to an arbitrary limit that does not take the relatedness of the speech into account. It is a different question of course if it could be established that an organization's political activity served a private end and not a charitable one. But no special rule would be needed for such a case because the private benefit doctrine already should prohibit exemption.

political activities prohibition in the first place, which, as argued *supra*, among other things is such a prophylactic. Furthermore, if it is unconstitutional to prohibit political activities, why is it constitutional to allow such activities, but only a little bit? This too seems a difficult question to answer.

Yet another approach could be to treat political activity much like any other, and subject it to a “related/unrelated” test. As noted above, activities are neither inherently charitable nor noncharitable – their character depends upon relatedness to an exempt purpose. Assuming that a political purpose is not an exempt purpose, then, under this approach, political activity must be examined to see whether it is related to an exempt purpose. If it is so related, then the activity is unrestricted. If it is unrelated, then the activity is permitted, but may not become so substantial that the purpose served becomes a primary purpose. If this happens, then charitable exemption is lost.

The difficulties with this approach are similar to those discussed above with respect to other possible limitations. First, drawing a related/unrelated distinction would be extremely difficult in this context. Except in egregious cases, an organization, including a charity PAC, should be able to trace political activity to some exempt purpose. Second, adoption of the related/unrelated paradigm involves a limit on political activities – namely, unrelated political activity may not become substantial. To the extent the First Amendment is concerned with protecting speech as speech, it would seem not to matter much whether the speech is “related” or not. Rather the question is whether it is burdened or not. In addition, although a related/unrelated distinction may have intuitive appeal because it is familiar, in the speech context, it may make no sense. Viewed under the First Amendment, we are talking about the speech of a charity as charity (a value the Court presumably would be protecting if it struck down the political activities prohibition). To what extent does it make sense to say that a charity speaking as a charity is somehow speaking in way that is unrelated to itself? It would seem that the presumption must be that organizational speech is in the best interest of the organization, or at least is of the organization and so somehow related to its (primary) purposes. If the charity speaks as the agent for another, then there likely are private benefit problems, and

so covered by the private benefit doctrine. But a charity speaking as a “person,” expressing views on its own behalf, is not speaking in a related or unrelated fashion. Whatever the content – it is just speech, and by definition the speech of a charity, which would seem to take on an inherently “related” character. In short, a limit based on a related/unrelated distinction would likely be no limit at all.

C. Taxing Speech: The Most Plausible Limitation.

It is because of the futility of the above limitations that one might resort to regulating the political speech of charity through the Internal Revenue Code. Namely, if it is unconstitutional to prohibit charities from engaging in political activity, and no reasonable line can be drawn, then what remains is to allow political activity by charities, but tax it. Such a solution would really be a continuation of current law, but instead of revocation of § 501(c)(3) status for engaging in political activity, the sanction would be loss of exemption with respect to the political activity.

This solution ties into perhaps the most forceful objection to the political activities prohibition – namely, the nature of the penalty for violation. As noted *supra*, the argument is that revocation of § 501(c)(3) status is a penalty disproportionate to the offense. Thus, a narrower approach would be to provide for a loss of tax exemption only to the extent of political activity, and therefore allow a charity to retain § 501(c)(3) status. This approach has some appeal because it does not undermine the power of Congress to decide whether or not to subsidize speech, but merely says that the penalty of revocation of § 501(c)(3) status altogether is an overbroad remedy.

Using the existing legal regime, the result generally would be to treat expenses for political activity by § 501(c)(3) organizations just like those of other tax-exempt organizations. A charity could either make its political activity expenses²¹² from a separate

²¹² A definition of “political activity expenses” would have to be fashioned. Under present law, there are multiple terms at play. A “political expenditure” is a defined term for § 501(c)(3) organizations and generally means expenses in violation of the political activities prohibition. Such expenses are subject to an excise tax. I.R.C. § 4955. Alternatively, tax-exempt organizations that are not § 501(c)(3) organizations and so not subject to an excise tax on their “political expenditures” are subject to tax on expenses for an

segregated fund (or PAC)²¹³ or forgo the PAC option, make the expenses directly, and be subject to tax on the expenses under § 527(f)(1).²¹⁴ Under such an approach, the independent expenditures of charities, for example, generally would be subject to tax.

There are some pitfalls. Perhaps most importantly, the political activities of charities that did not have expenditures directly associated with the activity (such as endorsements, which may require little-to-no direct expenditure) generally would not be captured. This is important not only because such activities can be the most potent, but also because failure to capture such activity undermines the rationale for the partial loss of exemption approach, namely that although Congress may refuse to subsidize political activity, it just must not over-punish. Accordingly, fully capturing the subsidy associated with all political activities is critical.²¹⁵ But, even if complex special rules could be developed rationally to attribute some expenditure to each instance of political activity,²¹⁶ a missing link is that tax-exemption as such supports the entire § 501(c)(3) organization, its fabric and very identity and effectiveness. Presumably, the reason for allowing a § 501(c)(3) organization to speak politically as such an organization and not through an alternative structure is that § 501(c)(3) provides a distinct and valuable voice. But the value of that voice is to a certain extent directly supported by the blanket § 501(c)(3) exemption, i.e., it cannot realistically be allocated out. Accordingly, special rules or no, it may be impracticable to tailor a more appropriate penalty than the current one: loss of exempt status.

“exempt function” as that term is defined in § 527. Confusingly, “exempt function” expenses are generally those made for political purposes, i.e., for the exempt function of a political organization governed by § 527.

²¹³ Such a fund would be considered a political organization under § 527 and subject to the rules thereto. I.R.C. § 527(f)(3).

²¹⁴ Section 527(f)(1) provides that a tax-exempt organization (other than a § 527 political organization) is subject to tax on the amount of its political expenses or the amount of its investment income, whichever is less. Thus, tax-exempt organizations forgoing the PAC option can avoid the § 527(f)(1) tax to the extent they have no investment income.

²¹⁵ In fact, as argued *infra* text at notes __ to __, it is doubly critical.

²¹⁶ See Leff, *supra* note __ (developing a regime for, among other things, determining how to allocate expenses to non “expenditure” activities such as endorsements); *see also* American Jobs Creation Act of 2004, H.R. 4520, 108th Cong. § 692 (as introduced in the House, June 4, 2004) (treating a set percentage of income as subject to tax for violations of the political activities prohibition).

In addition, another potential pitfall with partial loss of exemption approach is whether it would raise new concerns about penalizing speech. Although more narrowly tailored than the current rule, it would create at least the appearance of a tax on speech, which could have a chilling effect. Thus, for example, although a charity might no longer face loss of § 501(c)(3) status, each independent expenditure would have tax consequences, which to an organization with a baseline of tax-exemption would still seem like a penalty.²¹⁷ The partial loss of exemption approach would also be an exception to the generally prevailing rule that charitable organizations may not engage in unlimited unrelated activity. Because the political activity was subject to tax, it would follow that it was not a “related” activity, even if such terminology were not used. Due to constitutional concerns, however, unlike other unrelated activities, the charity could engage in as much of it as desired, so long as taxes are paid.²¹⁸ This runs counter to the very idea that a charitable organization should be organized and operated exclusively for charitable purposes. Further, as a practical matter, this approach does not avoid vagueness or line-drawing problems because it would still be necessary to distinguish between taxable speech and nontaxable speech.²¹⁹

D. Much Ado About Nothing? It Depends on the Deduction.

Notwithstanding these objections, of the alternatives to the political activities prohibition, a partial loss of exemption approach probably is the best.²²⁰ It does not

²¹⁷ Because of *Citizens United*, this is now an issue for noncharitable exempt organizations such as § 501(c)(4) organizations which, after *Citizens United* are subject to the § 527(f)(1) tax for independent expenditures. Detailed discussion of this issue is, however, outside the scope of this Article. In addition, if the baseline is more appropriately that of a taxable organization, then partial taxation is not a penalty but just partial withdrawal of a benefit. Assuming that the proper baseline is that of a taxable organization, revocation of § 501(c)(3) status altogether (the current rule) is really just a difference of degree not of kind. Blanket revocation can and as argued above should be construed as total revocation of a benefit, and not as a penalty with constitutional dimensions.

²¹⁸ Political activity would thus be treated better than unrelated business activity, which also is subject to tax, but may not be unlimited. See e.g., Rev. Rul. 69-220, 1969-1 C.B. 154; Gen Couns. Mem. 39108; *People’s Educ. Camp Soc’y, Inc. v. Comm’r*, 331 F.2d 923 (2d Cir. 1964), *cert. den.*, 379 U.S. 839 (1964).

²¹⁹ Also affecting the analysis is whether the “subsidy” rationale for tax-exempt status is adopted. See *supra* text accompanying note ___. If not, then a partial loss of exemption approach should in theory be based on something other than tailoring the penalty to the activity subsidized.

²²⁰ This is not an endorsement of the approach, however.

involve arbitrary limits on the amount of political activity and does not require related/unrelated distinctions. Organizations that argue that political intervention is connected to, if not required, by the organization's mission likely would be satisfied, especially (and ironically) because it would be difficult to impose a loss of tax benefit with respect to endorsements or other types of speech where there is no obvious expenditure. Thus, the "true" charities, or those with substantial nonpolitical activities, that want to dabble in politics would be able to participate in a meaningful way in political campaigns. Further, for those concerned about charities becoming too immersed in politics, there would be real disincentives to political activity. Political activity expenses, such as independent expenditures, would have tax consequences. In addition, as discussed in Part II, although endorsements and other types of campaign intervention might not carry tax consequences, they would present their own perils: most pertinently that of alienating the organization's own constituency.

However, even if all this were an acceptable solution, there remains one critical issue: the charitable deduction. Assuming that the political activities prohibition is modified to permit some or even unlimited political activity, if the present law approach to the charitable deduction is retained,²²¹ which as argued in Part III, appears to present negligible constitutional concerns, the change to the exemption rules largely would be much ado about nothing. This is because charities that value the charitable deduction would refrain from engaging in political activity. Further, political organizations that might be tempted to become charity PACs (i.e., political organizations disguised as charities) would lose a major reason to organize as a charity.²²² Accordingly, unless the charitable deduction rules were modified to allow charitable contributions to charities that engage in political activity, changes to the exemption rules are unlikely to make much difference.

²²¹ As noted *supra*, such approach is that there is no such deduction to organizations that engage in political activity. I.R.C. § 170(c)(2)(D).

²²² There could still be other incentives, namely more favorable disclosure rules. Charities (other than private foundations) are not required to publicly disclose donors, as are political organizations. See I.R.C. § 6104(d)(3). This highlights another change that would have to be debated, whether the disclosure rules for charities should be changed if political activity is allowed. This would become part of the ongoing debate about disclosure. See Disclose Act.

One might respond then that the charitable deduction rules therefore should also be changed. And therein lies the rub. Here, there are two possible approaches. One is just to make a blanket change to the policy of the charitable deduction, and provide that a charitable deduction is available irrespective of the political activity of charities. However, although Congress has the power to take such action, it is highly doubtful that it would. The revenue consequences likely would be significant, as arguably, such a change would result in a lot of new charitable contributions, especially as the change would encourage formation of new politically-oriented § 501(c)(3) organizations. Further, apart from revenue concerns, Congress might simply not opt for a policy that would encourage political activity by charities and further dilute the meaning of a charitable purpose to include political purposes. In addition, there is a real risk of “charity capture,” namely that charities would become subject to the political preferences of major donors, who might make large charitable contributions with political intent, and so drive the political conduct of the charitable organization.

Another option would be to attempt to retain coherence between the charitable exemption and the charitable deduction, and follow through on the partial loss of exemption approach in the charitable deduction context. This would continue the policy of nonsubsidy for political activity and discourage donors from making contributions for political purposes. Under such an approach, there would be some disallowance of the charitable deduction to the extent that an organization engages in political activity. Thus, a regime could be established to deny a portion of a charitable deduction to donors with respect to contributions made to organizations that engage in political activity, in proportion to such activity.²²³ Or, in the alternative, the deduction would be allowed but the organization would pay a proxy tax on the amount of subsidy provided by the charitable deduction.²²⁴ However, the need for such a proxy tax regime further magnifies

²²³ For example, if a donor made a contribution of \$100 to a charity, 10 percent of the activities of which were political activity, the donor would be allowed a deduction of \$90 instead of the full \$100.

²²⁴ Such an approach would be similar to present-law rules that apply to ensure that otherwise deductible membership dues paid by businesses to exempt organizations such as trade associations that engage in nondeductible lobbying activity either are not deducted or, if deducted, tax is paid to the extent of the value of the deduction. *See* I.R.C. § 6033(e). It already has been proposed in Congress that the proxy tax regime

the problem, discussed above, of valuing the subsidy (here, the amount of a charitable contribution that should be disallowed) for political activities that do not have readily assignable expenses, such as endorsements. To the extent such activities cannot be readily captured, deductible political donations for such political activity likely would be an enormous loophole. Thus, a serious risk of charity capture, and substantial revenue loss, would remain.

E. Summary

In short, alternatives to the status quo, whether constitutionally mandated or not, are unappealing. The alternatives range from the extreme of unlimited political activity to drawing arbitrary lines regarding the amount of permitted political activity. The former would undermine the meaning of charity, by inviting political purposes into the fold. The latter alternatives involve difficult line-drawing exercises that offer little-to-no improvement over present law but without the benefits of the present law rule. Arguably, the best alternative, which would address the putative “penalty effect” of present law by denying exemption only to the extent of the political activity, would have little practical impact absent corresponding changes to the charitable deduction, which in turn would likely leave a gaping and undesirable loophole in the form of permitting many politically motivated contributions to be deducted and generating the risk of political capture of charities by major donors.

Part V. Conclusion

Citizens United makes a Supreme Court challenge to the political activities prohibition likely, and a reexamination of the political speech of charities necessary. This Article has argued that although the political activities prohibition has flaws, it has largely been a noncontroversial rule that serves important purposes. Most critically, the

be extended to the lobbying activities of § 501(c)(3) organizations in order to deny the charitable deduction with respect to a charity’s lobbying activity. Minority Staff Report, Investigation of Jack Abramoff’s use of Tax-Exempt Organizations, Comm. on Finance, U.S. Senate, 109th Cong. 2d Sess., S. Prt. 109-68 (Oct. 2006) at 54.

prohibition draws an important line that acts as one of the few limitations on the charitable purpose requirement. Because of the prohibition, charities are not allowed to get involved in politics, which gives the charitable purpose requirement clarity and keeps the “independent” sector independent. Although the risks of loosening the prohibition may be overstated, the gains from doing so are not apparent. There is real, if intangible, benefit to a charitable sector that is noble in purpose and free of partisan rancor. Furthermore, there is no easy alternative to the political activities prohibition. Accordingly, this Article has argued that the political activities prohibition should be retained. Of course, retention of the prohibition would not be possible if it were unconstitutional. Although *Citizens United* presents a challenge to the constitutionality of the prohibition, close analysis of the case results in several meaningful and critical distinctions that could and should lead to the conclusion that the political activities prohibition is not, for constitutional purposes, a burden on speech. This is not to say that present law is perfect – it is not. But the prohibition represents the evolution of a century of wrestling with the subject of political activity and charity, and the wisdom that the two are not compatible. Such wisdom should not be contravened.