# Free Speech & Election Law

## Holding the Service's Feet to the Fire: Applying *Citizens United* and the First Amendment to the IRC § 501(c)(3) Political Prohibition

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The Supreme Court's recent decision in *Citizens United v. FEC*[1] will have a lasting and profound impact on the future of campaign finance regulation.[2] *Citizens United* will impact several other areas of law as well,[3] not the least of which is federal tax law.[4] This article explains how *Citizens United*—and the First Amendment—apply to the law of tax exempt organizations generally, and Internal Revenue Code Section 501(c)(3) specifically.

Currently, organizations exempt from federal income tax under IRC § 501(c)(3), often called charities,[5] may not engage in more than an insubstantial amount of lobbying or violate what is known as the political prohibition, the campaign intervention prohibition, or simply, the prohibition.[6] The prohibition requires that a charity "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[7] The Internal Revenue Service (Service) investigates all relevant facts and circumstances in determining whether a charity has engaged in impermissible lobbying or campaign activities.[8] As a result, no clear standards exist for a charity to determine whether it has run afoul of the political prohibition. Most charities therefore refrain from engaging in any speech that the Service *might* consider a violation of the political prohibition.

*Citizens United* is but one of many cases dealing with challenges to laws regulating core political speech,[9] including "issue advocacy."[10] In *Citizens United*, the Supreme Court powerfully reaffirmed that strong protection for, and necessity of, core political speech as "an essential mechanism of democracy."[11] The Court stressed the need to avoid chilling political speech by giving it "breathing space" and by not prescribing complex rules regulating it.[12] The Court further explained that government efforts to chill speech by adopting a multi-factor balancing test must be viewed with skepticism, not deference, and subjected to strict scrutiny.[13] Finally, it held that permitting a corporation to engage in campaign-related speech through its political action committee (PAC) does not allow a corporation itself to speak, concluding that the ban on corporate political speech was, in fact, a ban on corporate political speech.[14]

*Citizens United* and other cases dealing with core speech affect the tax exempt sector in at least three ways. First, IRC § 501(c)(3) and the Service's enforcement thereof must comport with the procedural due process requirement that a law provides fair notice of the conduct it prohibits.[15] Second, the political prohibition is unconstitutionally vague on its face and as applied to charities engaging in political issue education and advocacy.[16] Third, *Citizens United* casts serious doubt on the veracity of the "alternate channel doctrine" (ACD), which allows speech-related prohibitions on an entity so long as there exists an alternative route or channel by which an entity may engage in those activities.[17] This article will address each of these in turn, but greatly emphasizes the latter.

### I. Procedural Due Process Demands Fair Notice of Prohibited Conduct

The Due Process Clause of the Fifth Amendment provides that "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law." This clause[18] requires that a law provide fair notice of conduct it prohibits—that a law not be vague.[19] A law violates due process when it fails to provide fair notice[20] of prohibited conduct; when it may authorize and even encourage arbitrary, discriminatory, and selective enforcement;[21] or when the government in its enforcement makes "value laden conclusion[s]" that an organization is "too doctrinaire."[22]

There are two contexts in which vagueness claims frequently arise: criminal prohibitions and laws regulating free speech. Generally, if a claim of unconstitutionality involves free speech, the claim is made strictly on free speech grounds. And if a claim involves criminal prohibitions, the claim is brought on due process grounds. Together this explains why due process fair notice cases deal either with criminal law or free speech, but not both.

The leading opinion applying the due process requirement that laws not be vague to the tax exempt organization context, *Big Mama Rag v. United States*, serves as an example of a case that would likely have had the same result regardless of whether the claim was brought under the Due Process Clause or the First Amendment.

In *Big Mama Rag*, the United States Court of Appeals for the District of Columbia Circuit held that "regulations authorizing tax exemptions may not be so unclear as to afford latitude for subjective application by IRS officials."[23] Big Mama Rag (BMR) was an educational, feminist organization

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whose purpose was "to create a channel of communication for women that would educate and inform them on general issues of concern to them."[24] After the Service denied tax exemption under IRC § 501(c)(3), BMR challenged the definition of the word "educational" within the meaning of IRC § 501(c)(3) and as implemented by regulations and Revenue Rulings.[25] The court explained at length:

> Vague laws are not tolerated for a number of reasons, and the Supreme Court has fashioned the constitutional standards of specificity with these policies in mind. First, the vagueness doctrine incorporates the idea of notice—informing those subject to the law of its meaning. *Smith v. Goguen*, 415 U.S. [566, 572 (1974)]; *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A law must therefore be struck down if "'men of common intelligence must necessarily guess at its meaning.'" *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) (*quoting Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). *See also Baggett v. Bullitt*, 377 U.S. 360, 367 (1964).
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> Second, the doctrine is concerned with providing officials with explicit guidelines in order to avoid arbitrary and discriminatory enforcement. *Hynes*, 425 U.S. at 622; *Goguen*, 415 U.S. at 572–73; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972). To that end, laws are invalidated if they are "wholly lacking in 'terms susceptible of objective measurement.'" *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967) (*quoting Cramp v. Board of Public Instruction*, 368 U.S. 278, 286 (1961)). *See also NAACP v. Button*, 371 U.S. 415, 466 (1963) (Harlan, J., dissenting) ("Laws that have failed to meet this [. . .] standard are, almost without exception, those which turn on language calling for the exercise of subjective judgment, unaided by objective norms.").

Importantly, the court applied the heightened standards applicable to regulations touching on speech even though it was construing the regulatory definition of "educational."[26] Why? Because BMR advocated a position on "the reaction of local feminists" to a plea bargain of a female bank robber in Philadelphia—namely "that we, as women, are inextricably bound up with each other in the struggle."[27] BMR was not discussing political issues around an election, but it was advocating for women's rights in its newsletter with a position that the district court thought improperly "doctrinaire" to be educational.[28] But speech was at issue, so First Amendment standards applied.

The regulations defined educational as requiring a "full and fair exposition" of the "pertinent facts" surrounding an issue in order for a communication to be considered educational, but only if the Service determined an organization "'advocate[d] a particular position or viewpoint.'"[29] The court explained that the test to determine whether a charity met the "position of viewpoint" test was for the agent to determine whether a position was "'controversial.'"[30] And the record showed that only rarely did the Service ever make such a determination.[31] Because the test was only applied after the Service made a standardless determination as to the controversiality of a position, the court struck the position or viewpoint test as unconstitutional.

The court then reached the "full and fair exposition" standard, which the Service attempted to apply by asking whether a communication was supported by fact or opinion.[32] In analyzing the statement by BMR that "we, as women, are inextricably bound up with each other in the struggle," the court asked "is the author's description of the terms of the guilty plea sufficient to inform readers of the basis underlying her opinion? Or is further proof of the existence of 'the struggle' necessary? If so, would the article satisfy the 'full and fair exposition' test without that final statement?"[33] Because the answers to these questions under the Service's test were unclear, the court struck down the test as unconstitutional. The court further explained that the "futility of attempting to draw lines between fact and unsupported opinion is further illustrated by the district court's application of that test."[34] BMR had, according to the district court, "'adopted a stance so doctrinaire that it cannot satisfy this standard.'"[35] This, the circuit court held, was simply too much. The definition of educational was deemed unconstitutional because it was unconstitutionally vague and required a subjective determination on the part of the government.

The concerns with vagueness apply equally to the prohibition. IRC § 501(c)(3) requires that a charity not "participate in, or intervene in" a campaign "on behalf of (or in opposition to)" a candidate. The definition of "participate" is "to take part or to share in something."[36] The definition of "intervene" is "to come in or between by way of hindrance or modification or to interfere with the outcome."[37] Thus, a reasonable person could understand the phrase "participate in" a campaign to mean to take part or share in the activities surrounding a campaign. Where, as often occurs, issues become central to campaigns, merely speaking about issues becomes potentially prohibited activity. The phrase "intervene in" a campaign likewise comes to mean affecting or interfering with the outcome of an election. Because candidates often ally themselves with positions on issues, discussion of issues then affects or interferes with the outcome of the election. Thus, a natural reading of the phrase "participate in, or intervene in" includes any discussion of issues important to Americans, simply because they might also be important to the candidates.

Similarly, the phrase "on behalf of (or in opposition to)" any candidate for public office suffers the same constitutional defect.[38] The definition of "on behalf of" is "in the interest of or as a representative of."[39] Thus, the natural reading of the phrase would lead a charity to believe that it may not discuss issues in the interest of, as an agent of, or directly representing a candidate. This would seem to be a reasonable interpretation, especially since a parenthetical modifying phrase "(or in opposition to)" strongly correlates therewith. It would seem, then, reading the phrases together, that a wide array of campaign-related activity is permissible, such as comparing the charity's position with those of candidates or praising and criticizing the merits of the positions taken by various candidates. But a charity would soon discover that the

Service thought these activities to be political intervention, for the Service understands "on behalf of" to mean showing any bias (as distinct from partisanship) in light of the statement's timing and myriad other factors.[40]

In nonprecedential guidance the Service makes it clear that "[i]n situations where there is no explicit endorsement or partisan activity, there is no bright-line test for determining if the IRC 501(c)(3) organization participated or intervened in a political campaign."[41] Further, the Service has rejected the need for clear lines and voiced its "concern . . . that an IRC 501(c)(3) organization may support or oppose a particular candidate in a political campaign without specifically naming the candidate by using code words to substitute for the candidate's name in its messages."[42] "Code words," the Service explains, "are used with the intent of conjuring favorable or unfavorable images—they have pejorative or commendatory connotations. . . . [O]rganizations would not use up air time or newspaper space with a code word if the word was not intended to communicate to the viewer, listener, or reader a specific elective choice."[43] If the Service interprets a communication differently than the speaker or other hearers, then the fears of the Supreme Court ring true. The charity becomes "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning."[44]

On one hand, the statute initially appears to proscribe all speech on all policy issues. But on the other, a later clause modifies that proscription to speech in the interest of, as an agent of, or directly representing a candidate. Which is it? If the proscription falls in-between these understandings, how is a charity to know? The lack of a clear test means a charity has not received fair notice of prohibited conduct, and it allows the government to make subjective, value-laden determinations, both in violation of due process. A clear test must be established.

## II. The First Amendment Proscribes Vague Laws that Chill Speech

Government cannot regulate speech and speech-related activities with laws that chill permissible speech. Congress has limited what has been called the "subsidy" of tax exemption under IRC § 501(c)(3), and the related ability to receive tax-deductible donations under IRC § 170,[45] to organizations that do not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[46] However, Congress and the Service have avoided delineating the bounds of what is permissible. Certainly, "[t]he First Amendment is often inconvenient. But that is beside the point. Inconvenience does not absolve the government from its obligation to tolerate speech."[47]

In *Citizens United*, the Supreme Court unequivocally stated that "First Amendment standards must eschew the open-ended rough-and-tumble of factors, which invites complex argument in a trial court and a virtually inevitable appeal."[48] The First Amendment is "[p]remised on mistrust of government power," especially where government's "business is to censor."[49] Thus, government efforts to chill speech—e.g., by fashioning "a two-part, 11-factor balancing test,"[50] or by steadfastly refusing to craft clear speech-protective tests and looking, as the Service does, for "code words"[51] in speech—must be viewed with skepticism, not deference, and subjected to strict scrutiny.[52]

Complex laws regulating speech are in effect prior restraints.[53] The *Citizens United* Court recognized regulation of speech and behavior—even speech and behavior that may not be protected by the First Amendment—with complex laws will result in situations where "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."[54] The "First Amendment does not permit laws that force speakers to retain a [specialist] attorney . . . or seek declaratory rulings before discussing . . . issues."[55] The Court continued, "[p]rolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'"[56] And few laws are as complex as federal tax-exempt law.

The Service's reticence to provide precedential guidance and its policy to avoid litigation on these matters makes this First Amendment infringement grave indeed. The Service has made it its business to seek out "code words" and to fashion complex and unknowable "facts and circumstances" tests of the sort rejected in *Citizens United*. The unfortunate reality is that many charities "will choose simply to abstain from protected speech."[57] That is, charities are chilled from engaging in otherwise protected core political speech.

With respect to the prohibition on political intervention in IRC § 501(c)(3), there is the added constraint that organizations are unable to vindicate their rights through case-by-case litigation because the Service rarely enforces its "I-know-it-when-I-see-it" standards,[58] and even then, only selectively.[59] Enforcement poses grave administrative costs, including significant time and expense for discovery, as well as practical concerns regarding the comparative cost of litigation against the cost of paying excise taxes. Accordingly, organizations avoid any speech the Service *might* consider problematic. This is the very evil the First Amendment sought to avoid. The only solution to the vagueness problem is a clear, bright-line, speech-protective test such as the express advocacy test.[60]

## III. *Citizens United* Effectively Invalidates the Alternate Channel Doctrine vis-à-vis Tax Exempt Organizations

*Citizens United* significantly undercuts the single most important rationale the Supreme Court has used in upholding restrictions on charities' speech—what has become known as the alternate channel doctrine (ACD).[61] "Scholars have argued that the [political prohibition] is unconstitutional, or at least 'constitutionally suspect,' for decades."[62] Perhaps the strongest of these arguments is that to the degree the political prohibition "imposes more than a restriction on using tax-deductible funds for campaign intervention . . . it violates the Constitution."[63] The ACD is one method to prevent charities

from spending tax deductible monies for political campaign activity.

The ACD holds that the government need not subsidize constitutionally protected speech, but that an entity receiving government funds (whether in the form of tax exemption, or the ability to utilize tax deductible donations, which the Court views as subsidies, or in the form of a direct grant) must have an alternative channel through which it may engage in core political speech. The doctrine began with *Regan v. Taxation with Representation of Wash.*[64] Taxation with Representation challenged the clause of IRC § 501(c)(3) that prohibits a charity from engaging in more than an insubstantial amount of lobbying as unconstitutionally conditioning its tax exemption on surrendering its ability to engage in core political speech.[65] The Court noted that the tax benefits a charity receives—being exempt from paying federal income tax and the ability to receive tax deductible donations—are akin to subsidies.[66] Critical to its decision was the Court's differentiation between a statutory scheme prohibiting subsidization of certain *activities*, on the one hand, and a scheme preventing subsidization of an *organization* that engages in certain activities on the other.[67] That is, government need not subsidize constitutionally protected activity but neither may it ban that activity, either directly or indirectly.[68] Finally, the Court explained how TWR could establish a related organization under IRC § 501(c)(4), as an alternate channel, to engage in an unlimited amount of lobbying activity.[69]

Though *TWR* was a unanimous opinion, Justice Blackmun wrote a concurring opinion, joined by two other Justices, underscoring the importance of having an alternate channel through which the organization could speak. Justice Blackmun made clear that TWR had a right to lobby under the First Amendment, but that channeling this speech through a 501(c)(4) affiliate was permissible so long as TWR could *control* the 501(c)(4) organization, and the 501(c)(4) organization could *speak for* the 501(c)(3).[70]

While Justice Blackmun's position does not seem controlling, subsequent decisions have made clear this was the proper rationale. In *FCC v. League of Women Voters* (*LOWV*),[71] the majority opinion explicitly relied upon Blackmun's reasoning in striking down the federal prohibition on "editorializing" for public broadcasting stations that received federal funding.[72] Importantly, the ban applied to all station "editorializing" speech, not just speech paid for by the federal funds.[73] Because no alternate channels of speaking existed, the law was unconstitutional.[74]

Additionally, in *Rust v. Sullivan*, the Court relied upon the availability of an alternate channel in upholding conditions on Title X family planning funding that prohibited all discussions of and referrals for abortions between medical providers and their patients in programs funded by Title X monies.[75] Importantly, the Title X recipients have access to alternate methods of spreading their message and so were free to educate about, refer for, and perform abortions in any non-Title X program.[76] The *Rust* Court relied upon the part of the majority opinion in TWR that Justice Blackmun expounded in his concurrence for the alternate channel proposition, thereby showing that alternate channel availability was central to that opinion as well as Justice Blackmun's concurrence.[77,78]

One notable feature of the alternate channel cases is that *TWR* is the only case in which the acceptable alternate channel is actually a different legal person. In *LWV*, the government could not constitutionally prohibit the League's editorializing, except to the extent the speech was funded with government monies. In *Rust*, the medical providers (whether hospitals, doctors, or nurses) were permitted to educate about, advocate for, and perform abortions, just not inside the context of the Title X-funded program. TWR was actually required to create a separate legal entity through which it could speak, but only if the 501(c)(3) organization could both *control and have its message disseminated by* the 501(c)(4).

A final aspect of *TWR* worth mentioning is that the Court, and Justice Blackmun, in what has become the controlling analysis, chose to allow the alternate channel to be a different legal person notwithstanding the existence of other options available to fix its subsidization concern. Generally, the only benefit that 501(c)(3) organizations receive that 501(c)(4) and 527 organizations do not is the ability to receive tax-deductible donations.[79] None of these organizations pay federal income tax on any activities that further their respective exempt purposes.

Though not argued in the *TWR* briefing, the Court had a different option to alleviate its subsidization concern. This option would operate in a similar way to the unrelated business income taxation system. A charity could speak and yet ensure deductible donations are not used if it implemented a record-keeping and reporting system parallel to the unrelated business income taxation system. Unrelated business income (UBI) is taxable income derived from a charity's business activities that are unrelated to its charitable purpose.[80] UBI is permissible so long as the unrelated business is not the primary or more than an "insubstantial" purpose of the charity.[81] Political intervention can be tailored to further the educational, religious, or other charitable purpose of an organization and yet not detract from its charitable mission.[82] Requiring that deductible donations be kept separate effectively satisfies the only recognized governmental concern—subsidization of political speech.[83] Such a system would ensure that non-deductible monies are used for political intervention but the remaining functions are accep[tably "charitable." Such a system would only work if bright, clear, speech-protective lines exist to identify exactly what constitutes political campaign activity.[84]

*Citizens United* casts grave doubts on the viability of the ACD, and therefore the constitutionality of the political prohibition. *Citizens United* involved a challenge to the provision of the Bipartisan Campaign Reform Act (BCRA) that banned corporations from making electioneering communications.[85] The *Citizens United* Court explained at length that requiring a corporation to speak through another person, in that case through a PAC, meant the corporation was not the speaker.[86] The ban on corporate electioneering communications was a "ban on corporate speech notwithstanding the fact that a PAC created by the

corporation can still speak."[87] The PAC is a legally distinct person from the corporation.[88] So allowing a corporation to speak with its connected PAC is, in fact, not allowing the corporation to speak at all.

But "[e]ven if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems" with requiring a PAC speak for a corporation.[89] The Court then explained the burdens imposed on PACs, stating that "they are expensive to administer and subject to extensive regulations."[90] Some of the applicable regulations require that a PAC appoint a treasurer who must then be forwarded all donations, the PAC must keep detailed records regarding contributors and maintain them for numerous years, and they must file new registration statements to report any changes within ten days.[91] "And that is just the beginning, PACs must file" detailed monthly and last-minute reports of all cash on hand, itemized receipts of any type of income of any kind (including loans), aggregate and itemized expenditures, among other obligations.[92] "PACs . . . must exist before they can speak," and a "corporation may not be able to establish a PAC in time to make its views known."[93] Thus, requiring a corporation to speak through a different organization is a ban on the corporation's speech, and does not comport with the First Amendment.

It follows, then, that the rationale in *Citizens United* supports the idea that, requiring a charity to speak through not one but two different organizations is a ban on the charity's speech. Once a charity decides to intervene in a campaign, it must first organize an affiliate, such as an IRC § 501(c)(4) social welfare organization, which may only engage in an "insubstantial" amount of political campaign intervention.[94] Such an organization must run its own gauntlet of compliance. It must formally organize, a process which generally includes filing articles of incorporation or association. Then there must be specialized language in the organizational documents relating to distribution of assets and inurement that only a specialist would be familiar with, necessitating the hiring of a tax exempt attorney. Finally, the secretary of state will issue a certificate. In the meantime, the organization must: draft bylaws, which requires additional specialized language regarding conflicts of interest and board operation, among other topics; hold an organizational meeting; appoint a board; obtain a tax identification number; and open a bank account. Depending on the state in which the entity is organized, the order of the above work may be different.

This affiliate must then then file a Form 1024, Application for Recognition of Exemption with the Service. This six-page form contains an additional eleven schedules to be completed depending on the nature of its activities. Like PAC reports, the organization must include itemized detail of all finances, operations, and governance. It must also provide a detailed narrative of its past and planned activities that includes: a separate listing in the order of importance based on the relative time and other resources devoted to the activity; an explanation of how each activity furthers the organization's exempt purpose; and where and when the activity was or will be held. Of course, like any other organization exempt from federal income tax, it must file an annual return, Form 990, which is a behemoth of a return, requiring an extensive amount of information. And this is only the compliance for the first of two entities the charity must create in order to spread its message. This is exactly the type of burden held unconstitutional in *Citizens United*.

Once the 501(c)(4) organization is operational, it must organize some other entity exempt from income tax under IRC § 527, such as a state PAC, which reports to the state's reporting authority,[95] or a so-called "527," which reports to the Service.[96] In all relevant respects, an entity reporting to a state or to the Service experiences the same PAC burdens as itemized above and by the Supreme Court in *Citizens United*.[97] Further, the treasurer (and sometimes the custodian of records or chairman) of a PAC is personally liable for fines levied on the PAC,[98] a reality not experienced by leadership of charities or social welfare organizations. In short, in order for a charity to intervene in a campaign it must organize not one but two different legal entities *before* it can speak. And each entity comes with a mountain of additional compliance, a mountain of compliance that effectively renders the ACD unconstitutional in *Citizens United*.

Title X funding recipients may themselves speak, just not within the bounds of the Title X funded program. Public broadcasting stations may also speak, just not with federal funds. Charities, however, need only pass through the "Rube Goldberg" device of creating an affiliated 501(c)(4) organization, which must then create a PAC in order to engage in campaign-related speech.[99] Of course, each entity involved is subject to three very different aspects of tax exempt law (IRC §§ 501(c)(3), 501(c)(4) and 527) and an organization must take great pains to comply with each in order to engage in political campaign speech. And, 501(c)(3) organizations may not make any decision of the PAC,[100] even if the decision is filtered through an affiliate organization.

No longer can the alternative channel doctrine be considered viable to the extent that, as in *TWR*, it requires speech to be directed through a different legal entity. In what has become the controlling analysis, Justice Blackmun made clear that what the limitation of lobbying in TWR saved was the ability to speak through a different person that the 501(c)(3) could *control*.[101] Justice Blackmun further explained, any "attempt to prevent § 501(c)(4) organizations from lobbying *explicitly on behalf of their § 501(c)(3) affiliates would perpetuate § 501(c)(3) organizations' inability to make known their views on legislation without incurring the unconstitutional penalty*."[102] The problem is only made worse when the 501(c)(4) must serve as an intermediary between the affiliated 501(c)(3) and PAC.

A charity is unable to control a PAC—a requirement central to the ACD. If a charity were to control the message of the PAC, it would be by controlling each entity in the decision-making and governance stages. However, a charity may not set the electoral goals of a social welfare organization or a PAC because to do so would be to spend 501(c)(3) dollars on impermissible political intervention. Further, a PAC cannot spread a political message of its related charity, such as an endorsement of a candidate, because a charity is not permitted to endorse candidates. Without the ability to speak

itself, or to control the affiliated political entity or its message, a charity is unable to speak. The controlling analysis of *TWR* is thus undermined, and the ACD is no more, at least to the extent that it requires speech to occur through a different legal person.

Thus, even prior to *Citizens United*, a 501(c)(3) organization must have been able to prompt an affiliate that it controls to engage in speech on its behalf,[103] including statutorily proscribed speech, to avoid imposing an unconstitutional condition on the receipt of tax exemption.[104] *Citizens United* establishes that an entity itself must be able to speak. A charity cannot be forced to speak through an affiliate—and in the case of the political prohibition through *two* affiliates.

**Conclusion**

*Citizens United* poses grave challenges to the prohibition against a charity participating or intervening in a political campaign. The ACD prohibits a charity itself from speaking under the guise of allowing its "affiliated organizations" to speak. But this is a fallacy to the extent that the charity is unable to control the messenger and the message. The only workable solution is to allow a charity to engage in speech that would currently violate the political prohibition, but to do so with non-tax-deductible dollars. If this solution is to work, a bright, clear line must be adopted to delineate the bounds of what speech is "political" and what speech is "charitable."

**Endnotes**

1 130 S. Ct. 876 (2010).

2 *See* James Bopp, Jr. & Richard E. Coleson, Citizens United v. Federal Election Commission: *"Precisely What WRTL Sought to Avoid"*, 2009-2010 Cato Sup. Ct. Rev. 29; Lloyd H. Mayer, *Breaching a Leaking Dam?: Corporate Money and Elections*, Charleston L. Rev. (Supreme Court Preview edition), Vol. 4 (2009); Richard L. Hasen, Citizens United and the Illusion of Coherence, APSA 2010 Annual Meeting Paper (June 4, 2010); Justin Levitt, *Confronting the Impact of Citizens United*, Yale L. & Pol'y Rev., Vol. 29 (Sept. 13, 2010) (forthcoming); David Axelman, *Citizens United: How the New Campaign Finance Jurisprudence Has Been Shaped by Previous Dissents*, U. Miami L. Rev. (Feb. 8, 2010) (forthcoming).

Several cases have already extended the core holdings of *Citizens United*. *See* SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010); Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684 (9th Cir. 2010); Thalheimer v. City of San Diego, No. 09-CV-2862-IEG, 2010 WL 596397, at *6-9 (S.D. Cal. Feb. 16, 2010) (preliminary injunction opinion).

3 *See* Wendy Seltzer, Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment, Berkman Ctr. Research Publication No. 2010-3 (Mar. 2010); Reuven S. Avi-Yonah, To Be or Not to Be? Citizens United and the Corporate Form, Univ. of Mich. Law & Econ. Empirical Legal Studies Ctr. Paper No. 10-005 (Feb. 1, 2010); Paul M. Secunda, *Addressing Political Captive Audience Workplace Meetings in the Post-Citizens United Environment*, Yale L.J. Online, Vol. 120 (Apr. 27, 2010); Jonathan A. Marcantel, The Corporation as a 'Real' Constitutional Person (June 5, 2010); James A. Gardner, *Anti-Regulatory Absolutism in the Campaign Arena: Citizens United and the Implied Slippery Slope*, Cornell J.L. & Pub. Pol'y, Vol. 20 (Aug. 22, 2010); David Kairys, The Contradictory Messages of Speech Law: Eloquence and Annoyance (July 18, 2010); Elizabeth R. Sheyn, *The Humanization of the Corporate Entity: Changing Views of Corporate Criminal Liability in the Wake of Citizens United*, U. Miami L. Rev., Vol. 65, No. 1 (Feb. 8, 2010); Anne Tucker Nees, Politicizing Corporations: A Corporate Law Analysis of Corporate Personhood and First Amendment Rights after Citizens United; Darrell A. H. Miller, Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights (July 6, 2010).

4 *See* Miriam Galston, When Statutory Regimes Collide: Will Wisconsin Right to Life and Citizens United Invalidate Federal Tax Regulation of Campaign Activity? (March 2010) [hereinafter "Statutory Regimes"]; Jonathan A. Marcantel, The Corporation as a 'Real' Constitutional Person (June 5, 2010).

5 Not all organizations exempt under IRC § 501(c)(3) are "charities," properly understood. But for the purposes of this article "charity" is a sufficient short hand for "organization exempt from federal income taxation under IRC § 501(c)(3)."

6 26 C.F.R. (Reg.) § 1.501(c)(3)-1(c)(3)(i) & (ii); *see also* IRC § 501(c)(3).

7 IRC § 501(c)(3).

8 Reg. § 1.501(c)(3)-1(c)(3)(iv); Revenue Ruling (Rev. Rul.) 78-248.

9 A government that takes away the core of what the First Amendment protects leaves what at most is at the periphery: Wearing profane jackets, FEC v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431, 466 (2001) (Thomas, J., dissenting) (collecting authorities), burning crosses, pornography, McConnell v. FEC, 540 U.S. 93, 265 (2003) (Thomas, J., dissenting) (collecting authorities), "making false defamatory statements, filing lawsuits, dancing nude, exhibiting drive-in movies with nudity, burning flags, and wearing military uniforms[, plus] begging, shouting obscenities, erecting tables on a sidewalk, and refusing to wear a necktie." Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 412 (2000) (Thomas, J., dissenting) (collecting authorities). *See also McConnell*, 540 U.S. at 248 (Scalia, J., dissenting) (collecting authorities).

10 That is, speech other than "express advocacy" as defined in *Buckley v. Valeo*. 424 U.S. 1, 43-44 & n.52 (1976). *See* James Bopp Jr. & Richard E. Coleson, *The First Amendment Is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 UWLA L. Rev. 1, 9, 11-15 (1997) (explaining the long-standing express advocacy test).

11 130 S. Ct. at 898.

12 *Id.* at 892 (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469 (2007) (controlling opinion by Roberts, C.J., joined by Alito, J.) [hereinafter WRTL II]), 889.

13 *Id.* at 895 & 898.

14 *Id.* at 897-98. Many charities choose to incorporate as not-for-profit corporations, a decision that is permissible under IRC § 501(c)(3). Banning charities from engaging in certain types of speech is a ban on speech.

15 *See* City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

16 The Service recognizes that there is at least some core political speech that would constitute political issue education that does not violate the political prohibition. *See* Rev. Rul 2007-41; 2002 Continuing Professional Education (CPE) Text at 344-45.

17 *See* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 545 (1983) ("TWR"). The concurring opinion turned on the existence of an alternate channel. Subsequent Supreme Court decisions have adopted the view of the concurrence. *See* FCC v. League of Women Voters, 468 U.S. 364, 400 (1984); Rust v. Sullivan, 500 U.S. 173, 196 (1991).

18 The Due Process Clauses of the Fifth and Fourteenth Amendments are substantially similar and are to be interpreted as protecting the same interests: "To suppose that 'due process of law' mean[s] one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection." Eldridge v. Williams, 424 U.S. 319, 335 (1976). *See also* Hurtado v. California, 110 U.S. 516 (1884) ("[W]hen the same phrase was employed . . . it was used in the same sense with no greater extent.").

19 *See Morales*, 527 U.S. at 56; Smith v. Goguen, 415 U.S. 566, 572 (1974); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); *Buckley*, 424 U.S. at 77.

20 The term "notice" has two meanings in the due process context. The first, as mentioned above, is that a law must provide fair notice of conduct it prohibits, that a law not be vague. *See supra* note 19. The second meaning is that a person "be given notice of case against him and opportunity to meet it." Matthews v. Eldridge, 424 U.S. 319, 348 (1976) (internal citation omitted). It is the former meaning at issue here.

The Service provides much "process" when it inquires into whether a communication constitutes prohibited political intervention. This "process" often takes the form of multi-year investigations and internal appeals that are closed to the charity being investigated. This very "process" is a large part of the problem because it and the threat of it chills speech and otherwise permissible activities. Sweezy v. New Hampshire, 354 U.S. 234, 245 & 249-50 (1957) (explaining how an investigation itself, which stops far short of the overt threat of enforcement can "chill" First Amendment activities).

21 *See Morales*, 527 U.S. at 56 (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

22 *See* Big Mama Rag v. United States, 631 F.2d 1030, 1035-37 (D.C. Cir. 1980).

23 631 F.2d at 1034.

24 *Id.* at 1032 (internal quotation omitted).

25 *Id.* at 1034 (quoting Reg. § 1.501(c)(3)-1(d)(3)(i) (1959)). That Regulation stated:

> "[E]ducational," as used in section 501(c)(3), relates to (a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or (b) The instruction of the public on subjects useful to the individual and beneficial to the community. An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.

26 631 F.3d at 1035-39.

27 631 F.3d at 1038 (internal citation omitted).

28 631 F.3d at 1038 (citing the district court opinion).

29 *Id.* at 1036-37.

30 *Id.* at 1036.

31 *Id.* at 1036-37.

32 *Id.* at 1038.

33 *Id.* (internal citation omitted).

34 *Id.* (internal citation omitted).

35 *Id.* (internal citation omitted).

36 Merriam-Webster Online Dictionary (2010).

37 *Id.*

38 "Since the phrase 'on behalf of' is left undefined by the legislature, the 'constitutional requirement of definiteness' is not met, thereby rendering the law unconstitutionally vague." *Shrink Mo. Gov't PAC*, 922 F. Supp. at 1425 (citing *Buckley*, 424 U.S. at 77).

39 Merriam-Webster Online Dictionary.

40 *See, e.g.*, Rev. Rul. 2007-41 (citing Rev. Ruls. 78-248 & 80-282) (explaining bias).

41 2002 Continuing Professional Education (CPE) Text 344, q.7.

42 *Id.* at 345.

43 *Id*. at n.10.

44 Thomas v. Collins, 323 U.S. 516, 535 (1945).

45 *See* Regan, 461 U.S. at 549.

46 IRC § 501(c)(3).

47 Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 701 (1992).

48 130 S. Ct. 876, 896 (2010) (brackets and internal quotation marks omitted) (quoting WRTL II, 551 U.S. at 469).

49 *Id.* at 896, 898.

50 *Id.* at 895.

51 *See* 2002 CPE 344-45.

52 *Citizens United*, 130 S.Ct. at 898. The FEC's *rejection* of *WRTL II*'s bright-line, speech-protective test led the Supreme Court to overturn Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990), and part of McConnell because the FEC's rule did "precisely what *WRTL* sought to avoid" by converting the Court's "objective 'appeal to vote' test . . . [into] a two-part, 11-factor balancing test." *Citizens United*, 130 S.Ct. at 895. Noting that *WRTL II* had been "a careful attempt to accept the essential elements of . . . McConnell, while vindicating the First Amendment," *id.* at 894, the Court simply removed the foundation for vague and prolix laws that chill speech. *Id.* at 913.

53 *Citizens United*, 130 S. Ct. at 895.

54 Virginia v. Hicks, 539 U.S. 113, 119 (2003) (citation omitted).

55 *Citizens United*, 130 S. Ct. at 889.

56 *Id.* (citing Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).

57 *Hicks*, 539 U.S. at 119 (citation omitted).

58 *See* Branch Ministries v. Rossotti, 211 F.3d 137, 144 (2000) (describing how the Service conceded that the various church-sponsored political activities cited by Branch Ministries were in violation of the political prohibition even though the Service chose not to enforce it in those cases). *See also* Complaints and Briefing in Christian Coalition of Florida, Inc. v. United States, Civil Action No. 5:09-cv-00144-WTH-GRJ (M.D. Fla. 2010); Complaints and Briefing in Catholic Answers, Inc. v. United States, Civil Action No. 3:09-cv-00670-IEG-AJB (S.D. Cal. 2009).

59 The Service's *modus operandi* seems to be to embark on massive multi-year investigations only to find that the speech it was concerned with was either proper or only slightly improper and then to issue a letter finding either no violation or a violation not serious enough to trigger excise taxes or revocation of tax exemption. This letter usually admonishes speakers to toe the line—that is, not to speak so loudly—anymore. Of course, when the Service finds "slightly improper" speech, a charity has no judicial recourse to the investigation and may not appeal the "adverse" determination.

It is precisely this problem—the problem of ad hoc line-drawing, complex multi-factor tests, and inability to litigate—that is to be avoided when core speech is at issue. When otherwise legitimate investigations impinge on freedom of speech, that power must be "carefully circumscribed" if it is to avoid violating First Amendment rights. *Sweezy*, 354 U.S. at 245; *see also* FEC v. Machinists Nonpartisan Political League, 655 F.2d 380, 387 (D.C. Cir. 1981) ("[E]xtra-careful scrutiny" is warranted where political activities and association are subject to investigation). An investigation itself, which stops far short of the overt threat of enforcement, can "chill" First Amendment activities. *See Sweezy*, 354 U.S. at 245, 249-50.

60 For a detailed list of the numerous tests that have been offered to distinguish genuine issue ads from sham election intervention, see James Bopp, Jr. & Richard E. Coleson, *Distinguishing "Genuine" from "Sham" In Grassroots Lobbying: Protecting the Right to Petition During Elections*, 29 Campbell L. Rev. 353, 401-12 (2007), *available at* http://law.campbell.edu/lawreview/articles/29-3-353.pdf.

61 *See* Miriam Galston, *No Strings Attached?: The First Amendment and Tax-Exempt Organizations*, 6 First Amendment L. Rev. 100, 115-17 (2007) [hereinafter "No Strings Attached?"].

62 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, 685, fn. 9, & fn. 30 (2009) (collecting authorities).

63 *Id.* at 686 (citing Laure Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 Geo. Wash. L. Rev. 308, 319-53 (1990)).

64 461 U.S. 540 (1983).

65 *Id.* at 542.

66 *See* TWR, 461 U.S. at 544; IRC § 170(a) (2000); *see also* Miriam Galston, *No Strings Attached?*, *supra* note 60, at 114 n.53 (citing IRC § 170(a) and explaining how the charitable contribution deduction is a subsidy to the donor who is able to reduce his or her taxable income, but that the Court views this as an indirect subsidy to recipient charities as well because of their enhanced ability to raise money).

67 461 U.S. at 545.

68 *Id.*

69 *Id.* at 543.

70 *Id.* at 551-53 (Blackmun, J., concurring). Justice Blackmun made clear, however, that the 501(c)(3) organization could not transfer its funds to the 501(c)(4), but that the 501(c)(4) organization could be controlled by the 501(c)(3). *Id.* at 553.

71 468 U.S. 364 (1984).

72 *Id.* at 399-00.

73 *Id.* at 400.

74 *Id.* at 400-01.

75 500 U.S. 173, 198-99 (1991).

76 *Id.* at 193.

77 *Id.* at 197-98.

78 In the context of tax exempt entities, the alternate channel doctrine was extended by the United States Court of Appeals for the District of Columbia Circuit. *Branch Ministries*, 211 F.3d at 143. Relying upon Blackmun's concurrence in TWR and upon LWV, the D.C. Circuit held that the plaintiff church could utilize an affiliate 501(c)(4) organization to establish a PAC, through which its campaign speech could be undertaken. *Id.* Notably, the Branch Ministries Court never addressed the free speech concerns addressed in this article; instead it addressed the free exercise of religion claims brought by Branch Ministries. *Id.*

79 *See* IRC § 170. There are some additional tax benefits charities receive, many of which are tied to specific quasi-governmental functions some perform. For an exhaustive listing, see John Simon et al., *The Federal Tax Treatment of Charitable Organizations*, *in* The Nonprofit Sector: A Research Handbook 267, 268-72 (Walter W. Powell & Richard Steinberg eds., 2006).

80 *See* IRC §§ 511-13; Reg. § 1.501(c)(3)-1(e). While the UBIT rules are complex, they are clear.

81 IRC § 513(a).

82 *See* Rev. Proc. 86-43.

83 *See supra* note 59, regarding the numerous possible bright line tests.

84 Congress has already decided to subsidize political speech in the form of tax exemption in exempting so-called 527 organizations from federal income tax. *See* IRC § 527.

85 2 U.S.C. 441b. Electioneering communications are any broadcast, cable, or satellite communication that (a) refers to a clearly identified candidate for federal office; (b) is made within (i) sixty days before a general, special, or runoff election; or (ii) thirty days before a primary election or a convention or caucus of a political party; and (c) is targeted to the relevant electorate. 2 U.S.C. § 434(f)(3)(A)(i).

86 130 S. Ct. at 897-98.

87 *Id.* at 897.

88 *Id.* A corporation that establishes a PAC may completely control that PAC, but only through appointing the officers of the PAC.

89 *Id.* at 897.

90 *Id.*

91 *Id.*

92 *Id.* (citing McConnell, 540 U.S. at 331-32).

93 *Id.* at 898.

94 *See* IRC § 501(c)(4). The metes and bounds of "substantiality" have not been identified with any clarity. On the one hand, the IRS has defined the term substantial in relation to the legislative activities of exempt organization to be five percent or greater. Reg. § 1.501(c)(3)-1(b)(3)(i). On the other hand, the IRS did not revoke an organization's tax exemption even though seventy-five percent of its income was derived from unrelated business sources. Rev. Rul. 57-313, 1957-1 C.B. 316. Further, authorities conflict on what activities to measure in determining what activities count. Do volunteer hours count? How about expenditures? What counts more, expenditures of volunteer hours? There is no clear guidance.

95 For a complete listing of where to find each state's campaign finance law, see Database of Campaign Finance Legislation, National Conference of State Legislatures, *available at* www.ncsl.org (click on "Legislatures & Elections" then "Elections & Campaigns" and then "Database Campaign Finance Legislation").

96 The Service outlines the filing requirements for organizations tax-exempt under IRC § 527 at http://www.irs.gov/charities/political/article/0,,id=96355,00.html.

97 130 S. Ct. at 897-98.

98 *See* 11 C.F.R. 104.14(d).

99 Miriam Galston, Statutory Regimes, *supra* note 4, at 27.

100 2002 CPE Text at 365-67.

101 461 U.S. 552-54.

102 *Id.* at 553 (emphasis added).

103 It may be that the charity itself is not actually controlling the affiliate, but that the people who sit on the respective boards are making the decisions. This then means that if the boards do not overlap to a significant degree at each level, an affiliated PAC may experience "mission drift" and the charity and PAC may ultimately move in different directions.

104 On this view, even before *Citizens United*, explicit endorsement of a candidate by a 501(c)(3) through its 501(c)(4) affiliate was and remains permissible.