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**POLITICAL ACTIVITY OF TAX-EXEMPT
CHURCHES, PARTICULARLY AFTER *CITIZENS
UNITED V. FEDERAL ELECTION COMMISSION*
AND CALIFORNIA'S PROPOSITION 8 BAN ON
SAME-SEX MARRIAGE: RENDER UNTO
CAESAR WHAT IS CAESAR'S . . .**

JOHN R. DOROCAK* & LLOYD E. PEAKE**

I. INTRODUCTION

The Internal Revenue Code places restrictions on the political activity of churches. Specifically, I.R.C. § 501(c) states that in order for an organization to qualify for tax exempt status under § 501(c), the organization must be operated so that

[(1)] no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and . . . [(2)] [it] does 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.¹

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1. I.R.C. §§ 501(a), 501(c), 501(h), and 4911(d) provide in part as follows:

501(a) Exemption from taxation — An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

501(c)(3) List of Exempt Organizations — Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does 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.

501(h) Expenditures by Public Charities to Influence Legislation —

(1) General rule — In the case of an organization to which this subsection applies, exemption from taxation under subsection (a) shall be denied because a substantial part of the activities of such organization consists of carrying on propaganda, or otherwise attempting, to influence legislation, but only if such organization normally;

(A) makes lobbying expenditures in excess of the lobbying ceiling amount for such organization for each taxable year, or

(B) makes grass roots expenditures in excess of the grass roots ceiling amount for such organization for each taxable year.

(2) Definitions — for purposes of this subsection —

(A) Lobbying expenditures — The term “lobbying expenditures” means expenditures for the purpose of influencing legislation (as defined in section 4911(d)).

(B) Lobbying ceiling amount — The lobbying ceiling amount for any organization for any taxable year is 150 percent of the lobbying nontaxable amount for such organization for such taxable year, determined under section 4911.

(C) Grass Roots expenditures — The term “grass roots expenditures” means expenditures for the purpose of influencing legislation (as defined in section 4911(d) without regard to paragraph (1)(B) thereof).

(D) Grass roots ceiling amount — The grass roots ceiling amount for any organization for any taxable year is 150 percent of the grass roots nontaxable amount for such organization for such taxable year, determined under section 4911.

(3) Organizations to which this subsection applies — This subsection shall apply to any organization which has elected (in such manner and at such time as the Secretary may prescribe) to have the provisions of this subsection apply to such organization and which, for the taxable year which includes the date the election is made, is described in subsection (c)(3) and —

(A) is described in paragraph (4), and

(B) is not a disqualified organization under paragraph (5).

....

(5) Disqualified organizations — for purposes of paragraph (3) and an organization is a disqualified organization if it is —

(A) described in section 170(b)(1)(A)(i) (relating to churches),

(B) an integrated auxiliary of a church or of a convention or association of churches, or

(C) a member of an affiliated group of organizations (within the meaning of section 4911(f)(2)) if one or more members of such group is described in subparagraph (A) or (B).

4911(d) Influencing Legislation —

(1) General rule — except as otherwise provided in paragraph (2), for purposes of this section, the term “influencing legislation” means —

(A) any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof, and

(B) any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation.

(2) Exceptions — For purposes of this section, the term “influencing legislation,” with respect to an organization, does not include —

(A) making available the results of nonpartisan analysis, study, or research;

(B) providing of technical advice or assistance (where such advice would otherwise constitute the influencing of legislation) to a governmental body or to a committee or other subdivision

On the other hand, some ministers have sought to challenge such restrictions through acts of civil disobedience, in order to possibly cause the Internal Revenue Service (IRS) to revoke the tax exemption status of these organizations, thus presenting the possibility of a legal challenge to the constitutionality of restrictions that limit “intervention” in campaigns on behalf of certain candidates.² Meanwhile, another political free speech

thereof in response to a written request by such body or subdivision, as the case may be;

(C) appearances before, or communications to, any legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization;

(D) communications between the organization and its bona fide members with respect to legislation or proposed legislation of direct interest to the organization and such members, other than communications described in paragraph (3); and

(E) any communication with a government official or employee, other than —

(i) a communication with a member or employee of a legislative body (where such communication would otherwise constitute the influencing of legislation), or

(ii) a communication the principal purpose of which is to influence legislation.

(3) Communications with members —

(A) A communication between an organization and any bona fide member of such organization to directly encourage such member to communicate as provided in paragraph (1)(B) shall be treated as a communication described in paragraph (1)(B).

(B) A communication between an organization and any bona fide member of such organization to directly encourage such member to urge persons other than members to communicate as provided in either subparagraph (A) or subparagraph (B) of paragraph (1) shall be treated as a communication described in paragraph (1)(A).

I.R.C. §§501(a), 501(c), 501(h), and 4911(d) (2010).

2. The Alliance Defense Fund (ADF) sponsored a Pulpit Freedom Sunday on September 28, 2008, apparently to allow ministers to intervene on behalf of particular candidates in the ministers’ official capacity at worship services. See Fred Stokeld & Simon Brown, *Churches Prepare to Challenge Ban on Campaign Intervention*, 120 TAX NOTES 39 (2008); Simon Brown, *Almost 100 Churches Participated in Initiative, Pastor Says*, 120 TAX NOTES 1260 (2008); Simon Brown,

case, this one involving corporate expenditures under the Bipartisan Campaign Reform Act of 2002 (BCRA), has come before the U.S. Supreme Court.³ Much of the code restrictions, the potential challenges to them, and the constitutional questions of paid political free speech all coalesced on both sides of the pricey campaign in November 2008 involving California's Proposition 8 to ban gay marriage.⁴

In fact, some groups have explicitly questioned whether the Mormon church in particular conducted a substantial part of its activities in an attempt to influence legislation in the campaign against Proposition 8 in California.⁵ At post election rallies in California, protestors passed out IRS complaint forms. The paperwork for reporting a tax violation by a nonprofit was already filled out — with The Church of Jesus Christ of the Latter-Day Saint's name and address. People simply had to sign the bottom.⁶

First, this article will review the I.R.C. rules which prohibit tax-exempt churches from engaging in substantial activity to influence legislation and from intervening in political campaigns for or against particular political candidates. Second, this article will discuss whether such restrictions were violated, for example, by the involvement of some churches in the November 2008 election regarding California's Proposition 8 initiative to ban same-sex marriage. Finally, the article will review some of the constitutional rules regarding political free speech

IRS Must Act on Pulpit Freedom Sunday, Former Official Says, 121 TAX NOTES 37 (2008).

3. *Citizens United v. Fed. Election Comm'n*, 558 U.S. ___, 130 S. Ct. 876 (2010) (holding that restrictions on corporate spending in elections is an unconstitutional suppression of political free speech in violation of the First Amendment).

4. John R. Dorocak, *Recent Constitutional Questions in Taxation: Toward a Legislative Solution to Constitutional Problems of Same-Sex Couples and Ministers of the Gospel?*, 19 TEMPLE POL. & CIV. RTS. L. REV. 223, 261 n.290 (2009) (indicating that nearly \$74 million was spent on Proposition 8, \$36 million in favor and \$38 million opposed).

5. Rebecca Walsh, *LDS Elders Showed Seasoned Political Savvy on California's Prop. 8*, SALT LAKE TRIB., Mar. 26, 2009, at News, State, available at 2009 WLNR 5648918. See also *Citizens United v. Fed. Election Comm'n*, 558 U.S. ___, ___, 130 S. Ct. 876, 979-82 (2010) (Thomas, J., concurring in part & dissenting in part) (noting the disclosure requirement of donations made supporting or opposing Proposition 8 resulted in retaliation against some donors).

6. Walsh, *supra* note 5.

and spending, together with some of the challenges to the I.R.C. restrictions, in order to question whether such restrictions are constitutional.

II. I.R.C. RESTRICTIONS ON POLITICAL ACTIVITY OF TAX-EXEMPT CHURCHES: NO SUBSTANTIAL PART OF ACTIVITIES IN INFLUENCING LEGISLATION NOR ANY INTERVENTION IN CAMPAIGNS OF CANDIDATES

I.R.C. § 501(c)(3) specifically provides that an organization can be tax-exempt as long as “no substantial part of [its] activities” are aimed at attempting to influence legislation or intervening in “any political campaign.”⁷ I.R.C. § 501(h) provides that an election may be made to determine whether a substantial part of activities involves attempting to affect legislation. The election may be made to utilize a lobbying expenditure test or a grassroots expenditure test.⁸ However, I.R.C. § 501(h)(3)(B) provides that the election may not be made by disqualified organizations.⁹ I.R.C. § 501(h)(5) provides that churches described in I.R.C. § 170(b)(1)(A)(1) and certain related organizations are not permitted to make the election for the lobbying or grassroots expenditure test to determine whether the tax-exempt status should be revoked.¹⁰ Such churches are left with the sometimes vague test of whether a substantial part of their activities consists of attempting to influence legislation. Congress included the expenditures test because under the substantial part test “the standards as to the permissible level of [legislative] activities under present law are too vague and thereby tend to encourage subjective and selective enforcement.”¹¹

In *Citizens United v. Federal Election Commission*, the Supreme Court similarly criticized vague statutes in the context of a First Amendment Free Speech Clause challenge to the regulation of corporate political speech. “Prolix laws chill speech for the same reason that vague laws chill speech: People ‘of common intelligence must necessarily

7. I.R.C. § 501(c) (2010).

8. § 501(h).

9. § 501(h)(3)(B).

10 § 501(h)(5)(A)-(C).

11. S. REP. NO. 94-938, at 80 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4081, 4104.

guess at [the law's] meaning and differ as to its application.”¹² On the other hand, I.R.C. § 501(h)(5)(A)-(C) may well deny the use of the rather bright-line mechanical expenditures tests to churches and their related entities for calculating whether a substantial part of the activities are influencing legislation because of the traditional concern for burdening religious organizations with governmental intrusions.¹³

However, the § 501(c)(3) substantial part test has apparently not been vague in all situations. In *Christian Echoes National Ministry, Inc. v. United States*, the Tenth Circuit held that a church had engaged in substantial activity to influence legislation (besides intervening in campaigns for and against candidates) and revoked the organization's tax-exempt status.¹⁴ In *Christian Echoes*, the court found that the church's publications “contained numerous articles attempting to influence legislation by appeals to the public to react to certain issues.”¹⁵ The Tenth Circuit listed twenty-two examples in which *Christian Echoes* “appealed to its readers” to influence legislation and then added more examples of *Christian Echoes*' political activity.¹⁶ The court also wrote that “hundreds of exhibits” support a finding that “[t]he activities of *Christian Echoes* in influencing or attempting to influence legislation were not incidental, but were substantial and continuous.”¹⁷

12. *Citizens United v. Fed. Election Comm'n*, 558 U.S. ___, ___, 130 S. Ct. 876, 889 (2010) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

13. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (noting the Establishment Clause in the First Amendment guards against excessive governmental interference with religion), cited in *Texas Monthly v. Bullock*, 489 U.S. 1, 34 (1989) (Scalia, J., dissenting). See also John R. Dorocak, *The Income Tax Exclusion of the Housing Allowance for Ministers of the Gospel Per IRC 107: First Amendment Establishment of Religion of Free Exercise Thereof— Where Should the Warren Court Have Gone?*, 54 S.D. L. REV. 233, 250 (2009).

14. *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972).

15. *Id.* at 855.

16. *Id.* at 855-56 (noting that *Christian Echoes* used its media resources to “attack candidates and incumbents who were considered too liberal”).

17. *Id.* at 856. See also S. REP. NO. 94-938, *supra* note 11, at 84 (acknowledging the *Christian Echoes* case but stating, “[t]he committee has proceeded on this provision without evaluating that litigation” and “its actions are not to be regarded in any way as approval or disapproval of the decision of the Court of Appeals”).

**III. POLITICAL ACTIVITY OF TAX-EXEMPT CHURCHES IN
INFLUENCING LEGISLATION REGARDING CALIFORNIA'S
PROPOSITION 8 BAN ON SAME-SEX MARRIAGE (NOVEMBER 2008)**

Spending during the campaign concerning California's Proposition 8 ban on same-sex marriages, which was voted on in November of 2008, was extensive. The spending was variously estimated to be from \$73 million to \$80 million.¹⁸ Additionally, a disclosure statement by the Church of Jesus Christ of Latter-day Saints, commonly referred to as the Mormon or LDS church, reported a total of at least \$134,774 "previously unreported nonmonetary expenditures" in support of Prop 8.¹⁹ Prior to this report, only \$55,000 in donations from LDS were reported.²⁰ In *Christian Echoes*, the court indicated that, "a percentage test to determine whether the activities were substantial obscures the complexity of balancing the organization's activities in relation to its objectives and circumstances."²¹

Opponents of those churches donating to the "Yes on Proposition 8" campaign clearly understood that a church could forfeit its tax-exempt status for substantial activities seeking to influence legislation, such as Proposition 8.²² Despite attacks on the Mormon church and others, the Mormons have tried to emphasize that, although they are opposed to gay marriage, they do "not oppose certain legal protections for same-sex couples."²³ Although it is clear that the Mormon church spent over \$200,000 in support of Proposition 8,²⁴ the question

18. Dorocak, *supra* note 4.

19. Tony Semerad, *Leaked Memos: Gay Rights Group Makes New Charges Over LDS Prop 8 Role*, SALT LAKE TRIB., Mar. 19, 2009, available at 2009 WLNR 5604048.

20. Tony Semerad, *Utahns, LDS Church Spent More on Prop. 8 than Previously Known*, SALT LAKE TRIB., Feb. 9, 2009, available at 2009 WLNR 2596010.

21. *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 855 (10th Cir. 1972) (citing *Seasongood v. Comm'r of Internal Revenue*, 227 F.2d 907 (6th Cir. 1955)).

22. Walsh, *supra* note 5.

23. Rosemary Winters, *Utahns Cheer, Jeer California Gay-Marriage Ruling*, SALT LAKE TRIB., May 27, 2009, available at 2009 WLNR 10225379.

24. See Semerad, *supra* note 20.

under the I.R.C. and *Christian Echoes* would be whether such spending was a substantial part of the church's activities.

There has been some conjecture about how much the Mormon church may have supported California's Proposition 8 and encouraged contributions and support thereof,²⁵ but there does not seem to be any clear evidence as to the actual extent of the church's participation. In fact, one newspaper account seems to suggest that even the members of the Mormon congregation may not have been fully aware of the church elders' participation in the Proposition 8 campaign and similar campaigns.²⁶

In *Christian Echoes*, the Tenth Circuit rejected a percentage test to determine whether a substantial part of the church's activities was to influence or attempt to influence legislation: "A percentage test to determine whether the activities were substantial obscures the complexity of balancing the organization's activities in relation to its objectives and circumstances."²⁷ Rather, the court in *Christian Echoes* looked to the fact that the activities "were not incidental, but were substantial and continuous" as evidenced by "hundreds of exhibits."²⁸ The fact that the Mormon church itself only spent apparently \$200,000 in support of Proposition 8, an amount which is presumably a small percentage of the church's annual income or assets, would not in itself be determinative under *Christian Echoes*. In order for critics to support a challenge to the church's tax-exempt status based on the fact that a substantial part of its activities were to influence or attempt to influence legislation, more evidence of substantial and continuous activity by the church would be needed. Given the structure of the Mormon church, it is not clear whether such evidence will be forthcoming. One attempt to develop such evidence included leaked memos concerning the church's activity in Hawaii in support of an anti-same-sex marriage campaign

25. See, e.g., Semerad, *supra* note 20 (describing how much money was spent by the church in support of Proposition 8); Walsh, *supra* note 5 (describing spending by the church in the Proposition 8 ballot).

26. Walsh, *supra* note 5.

27. *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 855 (10th Cir. 1972).

28. *Id.* at 856.

there.²⁹ However, that particular effort cited eleven memos.³⁰ *Christian Echoes* cites hundreds of documents.³¹

In addition, members of various denominations have raised the question of whether the limitations in §501 on attempts to influence legislation or intervention in campaigns on behalf of political candidates violate the First Amendment guarantee of either free speech or freedom of religion. The next section of this article will discuss some of those First Amendment claims.

IV. CONSTITUTIONAL QUESTIONS REGARDING THE POLITICAL ACTIVITY OF TAX-EXEMPT CHURCHES

In the *Christian Echoes* case, the involved church argued that its First Amendment free speech and religious freedom rights were violated by the § 501 restrictions on attempting to influence legislation and intervening in political campaigns of candidates. In fact, the district court held in favor of the church that its constitutional rights had been violated.³² Clergy, and some congregations, have made a direct assault on § 501's restriction on intervention in political campaigns on behalf of candidates by preaching in favor of, and in opposition to, certain candidates, directly from the pulpit, in an apparent attempt to test the constitutionality of I.R.C. § 501.³³ The next section of this article will discuss the recent attempts by some ministers to test the constitutionality of § 501.

V. I.R.C. §501(c): INTERVENTION IN A CAMPAIGN OF CANDIDATES FOR PUBLIC OFFICE — ALLIANCE DEFENSE FUND'S PULPIT FREEDOM SUNDAY.

In *Christian Echoes*, the Tenth Circuit Court of Appeals rejected the district court's holding that § 501(c)(3) was unconstitutional because it put any restraint on the First Amendment right of free exercise of

29. Semerad, *supra* note 20.

30. *Id.*

31. *Christian Echoes*, 470 F.2d at 856.

32. *Id.* at 853.

33. See *supra* note 2 and accompanying text.

religion.³⁴ That court analogized to the Supreme Court's indication that "the First Amendment rights are not absolutes" in upholding provisions of the Hatch Act "restraining political activities by certain federal officers and employees."³⁵ The *Christian Echoes* court then concluded:

In light of the fact that tax exemption is a privilege, a matter of grace rather than right, we hold that the limitations contained in Section 501(c)(3) withholding exemption from nonprofit corporations do not deprive *Christian Echoes* of its constitutionally guaranteed right of free speech. The taxpayer may engage in all such activities without restraint, subject, however, to withholding of the exemption or, in the alternative, the taxpayer may refrain from such activities and obtain the privilege of exemption. The parallel to the "Hatch Act" prohibitions relating to political activities on the part of certain federal and state employees is clear: The taxpayer may opt to enter an area of federal employment subject to the restraints and limitations upon his First Amendment rights. Conversely, he may opt not to receive employment funds at the public trough in the areas covered by the restraints and thus exercise his First Amendment rights unfettered.³⁶

Thus, one of the early cases under § 501(c)(3) upholding the constitutionality of the limitations on political activities of churches — attempting to influence legislation and intervention in campaigns — expressly relied on similar restrictions on another First Amendment right: freedom of speech.

In a subsequent case concerning the constitutionality of the tax law restrictions on political activities under § 501(c), the Supreme Court used similar reasoning in *Regan v. Taxation With Representation* when upholding § 501(c)(3)'s limitations on political activity. The Court in *Regan* stated that "[w]e have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not

34. *Christian Echoes*, 470 F.2d at 856-57.

35. *Id.* at 857 (citing *United Pub. Workers (C.I.O.) v. Mitchell*, 330 U.S. 75 (1947) and *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127 (1947)).

36. *Id.*

infringe the right, and thus is not subject to strict scrutiny.”³⁷ The Court also stated that “the Constitution ‘does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.’”³⁸ A concurring opinion, written by Justice Blackmun and joined by Justices Brennan and Marshall in *Regan*, would have held that the restriction on a § 501(c)(3) organization’s ability to lobby was constitutional only because such an organization could alternatively form a § 501(c)(4) organization.³⁹ The concurrence distinguished a line of cases, including *Speiser v. Randall*,⁴⁰ only because of § 501(c)(4).

If viewed in isolation, the lobbying restriction contained in § 501(c)(3) violates the principle, reaffirmed today “that the government may not deny a benefit to a person because he exercises a constitutional right.” Section 501(c)(3) does not merely deny a subsidy for lobbying activities it deprives an otherwise eligible organization of its tax-exempt status . . . for all its activities.⁴¹

The *Regan* Court and concurring opinion both held that the decision therein was controlled by *Cammarano v. United States*⁴² in which the court upheld a Department of the Treasury regulation denying “business expense deductions for lobbying activities” on the ground that a First Amendment right was not infringed. Rather, Congress had decided not to “subsidize lobbying.”⁴³ Perhaps the *Cammarano* Court best explained its reasoning in the following:

Speiser has no relevance to the cases before us. Petitioners 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, as everyone else

37. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

38. *Id.* at 550 (citing *Harris v. McRae*, 448 U.S. 297, 318 (1980)).

39. *Id.* at 552 (Blackmun, J., concurring) (“The Constitutional defect that would inhere in § 501(c)(3) alone is avoided by § 501(c)(4).”).

40. 357 U.S. 513 (1958).

41. *Regan*, 461 U.S. at 552 (citing *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958)) (citations omitted).

42. 358 U.S. 498 (1959).

43. *Regan*, 461 U.S. at 546.

engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not “aimed at the suppression of dangerous ideas.” Rather, it appears to us to express a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned.⁴⁴

The *Regan* Court quoted *Madden v. Kentucky*⁴⁵ at length concerning the difficulty of a constitutional challenge to a tax restriction.

The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification The burden is on the one attacking the legislative arrangement to negative [sic] every conceivable basis which might support it.⁴⁶

Therefore, one might expect that a First Amendment challenge to the § 501(c) restrictions on the political activities of churches, whether on freedom of religion or freedom of speech grounds, would certainly face an uphill battle. Perhaps because of the perceived heavy burden on any constitutional challenge to the § 501(c) restrictions, one law professor commented about an orchestrated attempt to raise the constitutional questions: “I doubt this will ever go to court. And if it did, the ADF would lose — they don’t have a single decent legal argument

44. *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (citations omitted).

45. 309 U.S. 83 (1940).

46. *Regan*, 461 U.S. at 547-48 (quoting *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940)).

on their side.”⁴⁷ The Alliance Defense Fund had attempted to coordinate a Pulpit Freedom Sunday on September 28, 2008, to challenge the § 501(c)(3) campaign intervention ban in a political campaign on behalf of, or in opposition to, a political candidate.⁴⁸

On the other hand, those seeking to challenge the § 501(c) restrictions on constitutional grounds might find some support in Justice Scalia’s comments in the dissent in *Austin v. Michigan Chamber of Commerce*⁴⁹ and in the concurrence in *Federal Election Commission v. Wisconsin Right to Life, Inc.*⁵⁰ where he decries as unconstitutional some of the limits on “issue advocacy” versus “express advocacy” of candidates in the Michigan statute and in the BCRA respectively.⁵¹ There may be a parallel between issue advocacy under the BCRA and influencing legislation under § 501(c), on the one hand, and express advocacy and intervention in a campaign under § 501(c), on the other hand. If there is such a parallel, it would seem that, even apart from the attenuated deference of *Regan* to tax statutes, there might be some hope for a constitutional challenge to the § 501(c) restriction on influencing legislation.⁵² However, the § 501(c) restriction on intervention in a campaign may be less assailable given the upholding of the contribution limitations in *Buckley v. Valeo*.⁵³ Still, in light of the recent Supreme Court decision in *Citizens United*, and Justice Kennedy’s citation to Justice Scalia’s dissent in *Austin* where Scalia cites *Speiser*, it may be that even expenditures — but not contributions — on behalf of candidates and influencing legislation could no longer be constitutionally

47. Brown, *IRS Must Act on Pulpit Freedom Sunday, Former Official Says*, *supra* note 2, at 37 (quoting Robert W. Tuttle, George Washington University Law Professor and counsel to the Bishop of the Washington D.C. Synod of the Evangelical Lutheran Church in America).

48. *See supra* note 2 and accompanying text.

49. 494 U.S. 652, 680 (1990) (Scalia, J., dissenting) (rejecting the notion that preventing disproportionate speech in political debate is central to the First Amendment), *overruled by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. ___, 130 S. Ct. 876 (2010).

50. 551 U.S. 449, 483 (2007).

51. *Austin*, 494 U.S. at 679-95; *Wis. Right to Life*, 551 U.S. at 490-504 (2007).

52. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547-48 (1983) (citing *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940)).

53. 424 U.S. 1, 21, 29, 58 (1976) (upholding contribution limitations).

restricted based on status of the speaker or the conditioning of a benefit on denial of a constitutional right.⁵⁴

The Pulpit Freedom Sunday activities may have created a catalyst for IRS examinations or audits of churches under § 501(c). *Tax Notes*, perhaps the Bible of tax,⁵⁵ first reported the May 2008 announcement of the Pulpit Freedom Sunday in part as follows: “Erik Stanley, senior legal counsel for ADF, told Tax Analysts that although ADF is organizing Pulpit Freedom Sunday, it doesn’t plan to direct what pastors say that day. ‘There is no blueprint sermon, and we’re not telling churches what to say and what not to say,’ Stanley said.”⁵⁶ As the day for the Pulpit Freedom Sunday approached, a counter initiative was organized by Reverend Eric Williams, a “senior pastor at North Congregational United Church of Christ in Columbus, Ohio.”⁵⁷ *Tax Notes* reported on the Reverend Williams’ sermon as follows:

In his sermon, Williams focused on “the role of [churches] and that of [their] leaders in public life today.”

....

Ultimately, Williams said, “the church is the church when it remains separate from government — free to organize, to worship and to serve as each congregation, each synagogue, each temple, each mosque believes.”⁵⁸

Tax Notes also reported that “[o]n September 8 Marcus S. Owens, an attorney with Caplin & Drysdale and a former director of the IRS Exempt Organizations Division, along with two other former IRS officials, asked the IRS to investigate whether the ADF is ‘coordinating a mass violation’ of the Internal Revenue Code.”⁵⁹ By the time of the

54. See *infra* notes 96-98 and accompanying text. It is also worth noting that Kennedy, in his *Citizens United* opinion, omits the reference to *Speiser* that Scalia relied on in his dissents.

55. Erik M. Jensen, *Critical Theory and the Loneliness of the Tax Prof*, 76 N.C. L. REV. 1753, 1755 n.13 (1998).

56. Christopher Quay, *Former EO Director: Penalize Promoters of Church Campaign*, 119 TAX NOTES 791 (2008).

57. Brown, *Almost 100 Churches Participated in Initiative, Pastor Says*, *supra* note 2, at 1260.

58. *Id.*

59. *Id.* at 1260-61.

designated Pulpit Freedom Sunday, the ADF told *Tax Notes* that thirty-two churches participated, and Owens also wrote the Office of Professional Responsibility requesting that it investigate the attorneys working with ADF “coordinating mass violation.”⁶⁰ Even former director Owens, as well as professor and counsel Robert Tuttle, seem to agree that the churches participating in Pulpit Freedom Sunday “will likely face an audit and a letter asking them not to do it again [I]t is unlikely their tax exemption would be revoked.”⁶¹

In recent years, the IRS has stepped up its efforts to audit churches concerning prohibited political activities, although usually enforcement stops short of revocation, as suggested. In a news release concerning the 2004 electoral cycle, the IRS indicated that of the 132 cases assigned for field examination, twenty-two were closed because “they did not merit further use of IRS resources.”⁶² At the time of the report, eighty-two of the remaining 110 cases were closed.⁶³ “In fifty-five of the cases, the IRS issued written advisories indicating . . . that prohibited campaign activity had occurred, but that revocation was not recommended.”⁶⁴ In one case the IRS assessed the excise tax. In three cases the IRS did propose revocation, in five cases the IRS found violations other than political intervention — including delinquent returns — and “in eighteen cases the IRS found that the organization did not engage in prohibited political campaign activity.”⁶⁵

The IRS also reported that the Treasury Inspector General for Tax Administration (TIGTA) “concluded that there was no evidence of political bias” in the 2004 election cycle examinations and

60. Brown, *IRS Must Act on Pulpit Freedom Sunday, Former Official Says*, *supra* note 2 at 37; Stephanie Hench and Simon Brown, *Pulpit Freedom Sunday Counterinitiative Gains Support*, 120 TAX NOTES 1042 (2008).

61. Brown, *IRS Must Act on Pulpit Freedom Sunday, Former Official Says*, *supra* note 2, at 37.

62. INTERNAL REVENUE SERVICE, POLITICAL ACTIVITIES COMPLIANCE INITIATIVE EXECUTIVE SUMMARY, 3 (Feb. 22, 2006) [hereinafter POLITICAL ACTIVITIES SUMMARY], available at http://www.irs.gov/pub/irs-tege/exec_summary_paci_final_report.pdf.

63. *Id.*

64. *Id.*

65. *Id.* at 4.

recommended, among other things, educational material be distributed.⁶⁶ The IRS indicated that its fact sheet “represents the Service’s latest effort to educate organizations.”⁶⁷ IRS Publication 1828, *Tax Guide for Churches and Religious Organizations*, is a similar document.⁶⁸ The fact sheet and the publication give numerous examples about activities carried on by churches. They also describe when an activity may cross the line from being one that merely influences legislation and is not substantial to activities such as participating in a campaign involving candidates, which is prohibited. The examples appear to mirror the courts’ wrestling with the seemingly parallel issue advocacy and express advocacy regulations of statutes such as the BCRA and the constitutionality of such regulation.⁶⁹

In Examples Three and Four of Publication 1828, under the heading “Individual Activity by Religious Leaders,” the IRS suggests that a column by a minister in a monthly church newsletter stating that “[i]t is my personal opinion that Candidate U. should be reelected,” and a sermon by a minister during a regular church service in which he states, “[i]t is important that you all do your duty in the election and vote for Candidate W” both constitute intervention in a campaign.⁷⁰

A later part of Publication 1828 distinguishes between “issue advocacy” and “political campaign intervention,” adopting some of the language of the BCRA.⁷¹ Under this latter heading in Example One, which appears to be based on *Wisconsin Right to Life*,⁷² a newspaper ad,

66. *Id.* at 5. See also INTERNAL REVENUE SERVICE, ELECTION YEAR ACTIVITIES AND PROHIBITION ON POLITICAL CAMPAIGN INTERVENTION FOR SECTION 501(C)(3) ORGANIZATIONS:FS-2006-17 (February 2006), available at <http://www.irs.gov/newsroom/article/0,,id=154712,00.html>.

67. POLITICAL ACTIVITIES SUMMARY, *supra* note 62, at 5. See also INTERNAL REVENUE SERVICE, ELECTION YEAR ACTIVITIES AND PROHIBITION ON POLITICAL CAMPAIGN INTERVENTION FOR SECTION 501(C)(3) ORGANIZATIONS:FS-2006-17 (February 2006), available at <http://www.irs.gov/newsroom/article/0,,id=154712,00.html>.

68. INTERNAL REVENUE SERVICE, *Tax Guide for Churches and Religious Organizations*, I.R.S. Pub. No. 1828 (2009) [hereinafter *Tax Guide for Churches*], available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf>.

69. *Id.*

70. *Id.* at 8.

71. *Id.*

72. Fed. Election Comm’n v. Wis. Right to Life, 551 U.S. 449 (2007).

shortly before a primary election concerning a pending bill which states “call or write Senator C to tell him to vote for this bill, despite his opposition in the past,” does not constitute intervention in a campaign where the ad does not mention the election or distinguish C from an opponent.⁷³ In the next example in the publication, the IRS indicates that intervention is present where an ad “appears shortly before an election, . . . is not part of an ongoing series, . . . is not timed to coincide with a non-election event, . . . and takes a position on an issue that the opponent has used to distinguish himself from Governor E,” who is mentioned in the ad: “Tell Governor E what you think about our under-funded schools.”⁷⁴ Similarly, Example Three finds intervention, even without mention of the candidate, where a head of the board of church elders gives a long speech at an annual fundraising dinner and states as follows:

For those of you who care about quality of life in District W and the desire of our community for health care responsive to their faith, there is a very important choice coming up next month. . . . You have the power to respond to the needs of this community. Use that power when you go to the polls and cast your vote in the election for your state senator.⁷⁵

The IRS states that intervention is present in Example Three because the remarks are made at an official church function shortly before the election, and the elder referred to the election after stating a position on a prominent election issue “that distinguishes the candidates.”⁷⁶ The publication stresses, in these examples and elsewhere, that the conclusions are based on a consideration of all relevant facts and circumstances.

In addition, the publication devotes much less space to a discussion of “substantial lobbying activity.”⁷⁷ The publication states that an organization is excluded from § 501(c)(3) status “if a substantial part of its activities is “attempting to influence legislation (commonly known as lobbying).”⁷⁸ It subsequently defines legislation as “action by

73. TAX GUIDE FOR CHURCHES, *supra* note 68, at 9.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 5-6.

78. *Id.* at 5.

Congress, any state legislature, any local council, or similar governing body . . . or by the public in a referendum, ballot initiative, constitutional amendment, or similar procedure.”⁷⁹ In discussing the “substantial part test,” the publication states:

The IRS considers a variety of factors, including the time devoted (by both compensated and volunteer workers) and the expenditures devoted by the organization to the activity, when determining whether the lobbying activity is substantial. Churches must use the substantial part test since they are not eligible to use the expenditure test.⁸⁰

VI. BIPARTISAN CAMPAIGN REFORM ACT OF 2002: ELECTIONEERING COMMUNICATIONS, EXPRESS ADVOCACY, ISSUE SPEECH, AND DISCLOSURES IN *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*

The Supreme Court and other courts have dealt with constitutional challenges to other restrictions on political activities of churches, outside of those restrictions contained in I.R.C. § 501(c), particularly under the First Amendment. Those courts have typically dealt with express advocacy, as contrasted with issue advocacy. In I.R.C. § 501(c), issue advocacy, under the tax code language of restrictions on influencing legislation, is restricted only in that it may not be a substantial part of a church’s activities, and express advocacy, under the tax code language of intervention in the campaigns of candidates, is prohibited.

1. Citizens United v. Federal Election Commission

One recent treatment of the constitutionality of restrictions on political activities is *Citizens United v. Federal Election Commission*.⁸¹ In that case, a three-judge panel for the District of Columbia Circuit held

79. *Id.* at 6.

80. *Id.*

81. 530 F. Supp. 2d 274 (D.C. Cir. 2008), *aff’d in part, rev’d in part*, 558 U.S. ___, 130 S. Ct. 876 (2010).

that BCRA (Bipartisan Campaign Reform Act) requirements to disclose certain donors did not unconstitutionally burden Citizens United, the producer of both *Hillary: The Movie*⁸² and advertisements for the film.⁸³ In this case, the parties had agreed that the advertisements for the movie were not express advocacy; therefore they were not BCRA-restricted from being broadcast within a certain time period before the election.⁸⁴ The court also held that the movie itself was express advocacy, however, so the movie was banned under the BCRA during the prohibited period.⁸⁵ The court reasoned that the movie was the functional equivalent of express advocacy because it was designed to inform voters about Senator Hillary Clinton and her fitness for office, so that they could decide to vote for or against her, rather than focusing on legislative issues.⁸⁶

The district court in *Citizens United* relied heavily on the then most recent U.S. Supreme Court decision regarding whether a movie and its ads were the functional equivalent of express advocacy: *Federal Election Commission v. Wisconsin Right to Life, Inc.*⁸⁷ That case appears relatively straightforward, at least initially, and maybe deceptively so, in holding that a particular ad concerning a filibuster to block federal judicial nominees, which aired shortly before a primary election, was not the “functional equivalent of express advocacy;” such ads could not be constitutionally banned by the BCRA.⁸⁸ However, this summary of the holding in *Wisconsin Right to Life* may obscure the various strands of jurisprudence, some perhaps contradictory, concerning permissible regulation of political activities under the First Amendment. In his concurrence in *Wisconsin Right to Life*, Justice Scalia, joined by Justices Kennedy and Thomas, would have overruled the case’s predecessor,

82. HILLARY: THE MOVIE (Citizens United Prod. 2008).

83. *Citizens United*, 530 F. Supp. 2d at 281 (citing Fed. Election Comm’n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 259-62 (1986) and First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 791-92 & n.32 (1978)).

84. *Id.* at 280.

85. *Id.* at 279-80.

86. *Id.*

87. 551 U.S. 449 (2007).

88. *Id.* at 474-76.

McConnell v. Federal Election Commission.⁸⁹ Justice Scalia had also expressed in his dissent to *Austin v. Michigan Chamber of Commerce*⁹⁰ that he disagreed with the Court's upholding of Michigan's criminally sanctioned prohibition on spending by a nonprofit corporation in support or opposition to candidates in an election.⁹¹ Subsequently, as described below, in *Citizens United*, with Justice Kennedy writing the majority opinion, the Supreme Court overruled *Austin* and parts of *McConnell*.⁹² Other Justices had distinguished *Austin* from, or reconciled it with, *First National Bank of Boston v. Bellotti*,⁹³ reasoning that *Bellotti* involved issue advocacy, which could not be constitutionally prohibited.⁹⁴ Furthermore, in his dissent in *Wisconsin Right to Life*, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, reviewed the history of jurisprudence on permissible First Amendment regulations of political activities but reached the opposite result from the majority.⁹⁵

In *Citizens United*,⁹⁶ the Supreme Court held that the BCRA restrictions on direct advocacy expenditures by labor unions and corporations, both for profit and not for profit, were unconstitutional. The Court explicitly overruled *Austin*'s holding that the government could constitutionally restrict independent political expenditures by

89. *Id.* at 483-84, 501-03 (Scalia, J., concurring in part & concurring in the judgment) (citing *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003)).

90. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by* *Citizens United v. Fed. Election Comm'n*, 558 U.S. ___, 130 S. Ct. 876 (2010).

91. *Id.* at 680 (Scalia, J., dissenting) (“[T]he State cannot exact as the price of those special advantages the forfeiture of First Amendment Rights.”) (citing *Speiser v. Randall*, 357 U.S. 513 (1958)).

92. *Citizens United v. Fed. Election Comm'n*, 558 U.S. ___, ___, 130 S. Ct. 876, 913 (2010).

93. 435 U.S. 765 (1978).

94. *See, e.g.*, *Fed. Election Comm'n v. Wis. Right to Life*, 551 U.S. 449, 480 (2007) (“Two of the Justices who joined the 6-to-3 majority in *Austin* relied, in upholding the constitutionality of the ban on campaign speech, on the fact that corporations retained freedom to speak on issues as distinct from election campaigns.”); *Id.* at 489-90 (Scalia, J., concurring in part & concurring in the judgment) (“However, two Members of *Austin*'s 6-to-3 majority appear to have thought it significant that *Austin* involved express advocacy whereas *Bellotti* involved issue advocacy.”) (citing *Austin*, 494 U.S. at 675-76 (Brennan, J., concurring) & 678 (Stevens, J., concurring)).

95. *Id.* at 504 (Souter, J., dissenting).

96. 558 U.S. ___, 130 S. Ct. 876 (2010).

corporations, and it overruled the parts of *McConnell* that upheld similar restrictions.⁹⁷

The *Citizens United* Court rejected the reasoning behind *Austin*'s corporate independent expenditure restrictions, which relied on "concern for 'the corrosive and distorting effects of immense aggregations of [corporate] wealth' in the marketplace of ideas" to create a government interest compelling enough to justify the free speech infringement under strict scrutiny.⁹⁸ The Court stated that the First Amendment right to free speech did not depend on the identity of the speaker and that corporate speakers were afforded such constitutional protection.⁹⁹ The Court found that independent corporate political expenditures did not give rise to corruption or the appearance of corruption, so they could not be constitutionally restricted, despite the reading that some gave to a footnote in *Bellotti*.¹⁰⁰ The Court reasoned that *Austin* "contravened [the] . . . earlier precedents in *Buckley* and *Bellotti*."¹⁰¹

In his *Citizens United* majority opinion, Justice Kennedy quoted Justice Scalia's dissent in *Austin*: "It is rudimentary that the State cannot exact as the price of these special advantages [of the corporate form] the forfeiture of First Amendment rights."¹⁰² Justice Kennedy, however,

97. *Id.* at ___, 130 S. Ct. at 913.

98. *Id.* at ___, 130 S. Ct. at 921 (quoting *Austin*, 494 U.S. at 660).

99. *Id.* at ___, 130 S. Ct. at 903, 913.

100. *Id.* at ___, 130 S. Ct. at 884-85 ("While a single *Bellotti* footnote purported to leave the question open, this court now concludes that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.") (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978)).

101. *Id.* at ___, 130 S. Ct. at 912.

102. *Id.* at ___, 130 S. Ct. at 905 (quoting *Austin*, 494 U.S. at 680 (Scalia, J., dissenting)). Scalia's concurrence in *Wisconsin Right to Life* appears to be an exercise in laying the foundation for the consensus reached in *Citizens United* in the opinion written by Justice Kennedy (whom Scalia mentions as having joined the dissent in *Austin* and the 5-4 majority in *McConnell*) to overrule *Austin*.

Austin was a significant departure from ancient First Amendment principles. In my view, it was wrongly decided. The flawed rationale upon which it is based is examined at length elsewhere, including in a dissenting opinion in *Austin* that a Member of the 5-to-4 *McConnell* majority had joined But at least *Austin* was limited to express advocacy, and nonexpress advocacy was presumed to remain protected under *Buckley* and *Bellotti*, even when engaged in by corporations.

omitted the citation to *Speiser* from the quote of Justice Scalia's *Austin* dissent.¹⁰³ Still, some might argue that *Speiser* surely, and a broad reading of *Citizens United* possibly, supports the position that I.R.C. § 501(c)'s restrictions on influencing legislation and intervening in campaigns (with expenditures, if not with contributions) are unconstitutional.

The *Citizens United* Court did uphold the disclosure and disclaimer provisions of the BCRA, however.¹⁰⁴ Justice Thomas, concurring in part and dissenting in part, criticized the Court's upholding of these provisions:

The success of such intimidation tactics has apparently spawned a cottage industry that uses forcibly disclosed donor information to *pre-empt* [sic] citizens' exercise of their First Amendment rights

Disclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights.¹⁰⁵

Justice Thomas specifically cited examples in the popular press and the amici briefs, many regarding the opponents to Proposition 8 in California, where "[m]any supporters (or their customers) suffered property damage, or threats of physical violence or death."¹⁰⁶

Justice Thomas appeared to predict that the disclosure and disclaimer provisions would similarly have to be held unconstitutional as prior restraints on First Amendment free speech.¹⁰⁷ Because of his dissent, those who dissented to the other portions of the Court's opinion — Stevens, Breyer, Ginsburg, and Sotomayor — needed to concur in the portion of the opinion upholding the disclosure and disclaimer provisions. Apparently seizing on the Supreme Court's upholding of the

Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 486-87, 489, 490-91 (2007) (Scalia, J., concurring).

103. *Austin*, 494 U.S. at 680 (Scalia, J., dissenting). See *supra* note 90.

104. *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 914.

105. *Id.* at ___, 130 S. Ct. at 981-82 (Thomas, J., concurring in part & dissenting in part).

106. *Id.* at ___, 130 S. Ct. at 980-81.

107. *Id.* at ___, 130 S. Ct. at 981-82.

disclosure provisions in the BCRA, Senator Charles Schumer proposed legislation, along with Senators Feingold, Wyden, Bayh, and Franken, to require that CEOs of corporate donors appear in ads for candidates their corporations support and that contributions exceeding \$1,000 be disclosed to the Federal Election Commission, on the organization's website, and to shareholders in corporate filings.¹⁰⁸ Later in this article, the authors suggest, and criticize, requiring a waiver of the corporate veil of limited liability concerning political contributions.¹⁰⁹ These suggestions possibly run afoul of the First Amendment as impermissible burdens on free speech, as predicted by Justice Thomas.¹¹⁰

2. *Buckley v. Valeo*

The case that began the more modern, post-World War II jurisprudence on constitutional restrictions on political activity is *Buckley v. Valeo*.¹¹¹ That case's holding was that a restriction on express advocacy using such magic words "as 'vote for,' 'elect,'... 'vote against,' 'defeat,' 'reject'" could be constitutionally defended.¹¹² It was within this context that Justice Scalia, in his *Austin* dissent,¹¹³ and the dissenters in *Wisconsin Right to Life*,¹¹⁴ sought to frame what Chief Justice Roberts found in *Wisconsin Right to Life* — that the particular ads were not the functional equivalent of express advocacy and therefore could not be constitutionally prohibited.¹¹⁵ *Buckley* has also been read as allowing

108. Press Release, Senate Democrats Unveil Legislation to Limit Fallout from Supreme Court Ruling that Allows Unlimited Special-Interest Spending on Elections — Announce Plan for Senate Passage by July 4 (Apr. 29, 2010), available at http://schumer.senate.gov/new_website/record.cfm?id=324343.

109. See *infra* notes 156-60 and accompanying text.

110. See *supra* notes 100-02 and accompanying text.

111. 424 U.S. 1 (1976).

112. Fed. Election Comm'n v. Wis. Right To Life, Inc., 551 U.S. 449, 486-87 (2007) (Scalia, J., concurring in part & concurring in the judgment) (quoting *Buckley v. Valeo*, 424 U.S. 1, 44 & n.52 (1976)).

113. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting), overruled by *Citizens United v. Fed. Election Comm'n*, 558 U.S. ___, 130 S. Ct. 876 (2010).

114. *Wisconsin Right to Life*, 551 U.S. at 513 (Souter, J., dissenting).

115. *Id.* at 476 (majority opinion).

regulation of contributions but not expenditures.¹¹⁶ One of the authors here, from his perspective as a tax professor and past tax practitioner, had stressed in previous writings on questions of tax constitutionality that tax practitioners often focus on practical matters rather than lofty constitutional questions.¹¹⁷ Both authors here wonder whether the First Amendment jurisprudence on political activities helps eliminate the statutory and constitutional questions, if any, inherent in I.R.C. § 501(c)'s restrictions on influencing legislation and intervening in political campaigns of candidates.

VII. THE TAX CONSTITUTIONAL CASES ON FREE SPEECH IN THE BROADER CONTEXT OF POLITICAL FREE SPEECH CONSTITUTIONAL CASES

As mentioned previously, the IRS has sought to furnish guidance to exempt organizations concerning what situations might constitute intervention into a campaign.¹¹⁸ Perhaps the only solace from the constitutional jurisprudence that a challenger to I.R.C. § 501(c)'s ban on intervention in a campaign, like the Pulpit Freedom Sunday preachers,¹¹⁹ might take would come from Justice Scalia's concurring remarks in *Wisconsin Right To Life* and dissent in *Austin*, now cited approvingly by the Court in *Citizens United*.¹²⁰ On the other hand, the IRS's explanation

116. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. ___, ___, 130 S. Ct. 876, 901-02 (2010).

117. See *infra* note 152 and accompanying text.

118. See *supra* notes 67-68 and accompanying text.

119. See *supra* Part IV.

120. In *Citizens United*, Justice Kennedy likely provided support for a minister of a church who would want to challenge I.R.C. § 501(c)'s prohibition on intervention in a campaign of candidates:

Either as support for its antidistortion rationale or as a further argument, the *Austin* majority undertook to distinguish wealthy individuals from corporations on the ground that “[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.” This does not suffice, however, to allow laws prohibiting speech. “It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.”

of what constitutes influencing legislation in its Publication 1828¹²¹ may seem to be a model of clarity, compared with the Court's free speech constitutional jurisprudence. In any event, a § 501(c) organization is not restricted in influencing legislation until such influencing becomes a substantial part of its activities,¹²² albeit that substantial part test may be somewhat nebulous, as evidenced by *Christian Echoes*¹²³ and the legislative history which developed the alternative expenditures test.¹²⁴ Perhaps Justice Scalia's strongest language is in his dissent in *Austin*, where he cites *Speiser*:

Those individuals who form that type of voluntary association known as a corporation are, to be sure, given special advantages – notably, the immunization of their personal fortunes from liability for the actions of the association – that the State is under no obligation to confer. But so are other associations and private individuals given all sorts of special advantages that the State need not confer, ranging from tax breaks to contract awards to public employment to outright cash subsidies. It is rudimentary that the State cannot exact as

558 U.S. at ___, 130 S. Ct. at 905 (citation omitted) (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658-59 (1990) and quoting *Id.* at 680 (Scalia, J., dissenting)). See also *supra* notes 49-54 and accompanying text.

121. IRS Publication 1828 provides as follows:

A church or religious organization will be regarded as *attempting to influence legislation* if it contacts, or urges the public to contact, members or employees of a legislative body for the purpose of proposing, supporting, or opposing legislation, or if the organization advocates the adoption or rejection of legislation. Churches and religious organizations may, however, involve themselves in issues of public policy without the activity being considered as lobbying. For example, churches may conduct educational meetings, prepare and distribute educational materials, or otherwise consider public policy issues in an educational manner without jeopardizing their tax-exempt status.

TAX GUIDE FOR CHURCHES, *supra* note 68, at 6.

122. See I.R.C. § 501(h) (2010).

123. *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d. 849 (10th Cir. 1972). See *supra* notes 14-17 and accompanying text.

124. See *Lobbying by Public Charities; Lobbying by Private Foundations*, 55 Fed. Reg. 35,579 (Aug. 31, 1990) (codified at Treas. Reg. § 501(h)-1-3).

the price of those special advantages the forfeiture of First Amendment rights. The categorical suspension of the right of any person, or of any association of persons, to speak out on political matters must be justified by a compelling state need.¹²⁵

Speiser was discussed previously in the context of *Regan*.¹²⁶ In *Regan*, the Supreme Court held that *Cammarano*, denying lobbying expense deductions, provided better support for the constitutionality of the limitation on lobbying by a tax-exempt organization than *Speiser*, in which California's denial of a property tax exemption, on account of a taxpayer's refusal to sign a declaration that he would not advocate the violent overthrow of the government, was found to be unconstitutional.¹²⁷ Perhaps those seeking to test the I.R.C. § 501(c) restrictions of political activities of churches, be it ministers preaching on Pulpit Freedom Sunday or churches spending to influence Proposition 8, should certainly look to *Speiser* rather than *Regan*.

Justice Brennan wrote the opinion for a 7-to-1 decision in *Speiser*.¹²⁸ The Court found a violation of due process in that California's statutory procedure did not show a compelling interest in burdening speech protected by the First Amendment.¹²⁹ Justice Brennan wrote:

It is true that due process may not always compel the full formalities of a criminal prosecution before criminal advocacy can be suppressed or deterred, but it is clear that the State which attempts to do so must provide procedures amply adequate to safeguard against invasion of speech which the Constitution protects. It is, of course, familiar practice in the administration of a tax program for the taxpayer to carry the burden of introducing evidence to rebut the determination of the

125. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting) (citations omitted), *overruled by Citizens United v. Fed. Election Comm'n*, 558 U.S. ___, 130 S. Ct. 876 (2010).

126. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983). See *supra* notes 40-44 and accompanying text.

127. *Regan*, 461 U.S. at 545-46. See also *supra* notes 37-46 and accompanying text.

128. *Speiser v. Randall*, 357 U.S. 513, 514 (1958).

129. *Id.* at 528-29.

collector. But while the fairness of placing the burden of proof on the taxpayer in most circumstances is recognized, this Court has not hesitated to declare a summary tax-collection procedure a violation of due process when the purported tax was shown to be in reality a penalty for a crime. The underlying rationale of these cases is that where a person is to suffer a penalty for a crime he is entitled to greater procedural safeguards than when only the amount of his tax liability is in issue. Similarly it does not follow that because only a tax liability is here involved, the ordinary tax assessment procedures are adequate when applied to penalize speech.¹³⁰

Justice Black, with whom Justice Douglas joined, concurring, wrote perhaps more directly: "California, in effect, has imposed a tax on belief and expression I am convinced that this whole business of penalizing people because of their views and expressions concerning government is hopelessly repugnant to the principles of freedom upon which this Nation was founded."¹³¹ If those who deal specifically with constitutional questions in tax focus on the language of *Speiser*, it seems difficult to reconcile with *Regan*, particularly when Justice Brennan wrote:

[W]e hold that when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition. The State clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech.¹³²

In contrasting the case before the court in *Speiser* with cases cited by the State of California concerning loyalty oaths by public employees and officers in labor unions, Justice Brennan explained the compelling interest present in those cases:

130. *Id.* at 524-25 (citations omitted).

131. *Id.* at 529-31 (Black, J., concurring).

132. *Id.* at 528-29 (majority opinion).

The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public. The present legislation, however, can have no such justification. It purports to deal directly with speech and the expression of political ideas.¹³³

On the other hand, in *Regan*, Justice Rehnquist, writing for a unanimous court, explained:

Congressional selection of particular entities or persons for entitlement to this sort of largesse "is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find". . . . We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny. *Buckley v. Valeo* upheld a statute that provides federal funds for candidates for public office who enter primary campaigns, but does not provide funds for candidates who do not run in party primaries. We rejected First Amendment and equal protection challenges to this provision without applying strict scrutiny.¹³⁴

Justice Rehnquist also used *Regan* to distinguish *Speiser*:

We have already explained why we conclude that Congress has not violated TWR's First Amendment rights by declining to subsidize its First Amendment activities. The case would be different if Congress were

133. *Id.* at 527. Perhaps Justice Brennan's reasoning also casts doubt on the Tenth Circuit's reliance in *Christian Echoes* on the analogy to Hatch Act prohibitions of political activities by federal and state employees. See *supra* note 36 and accompanying text.

134. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983) (citations omitted) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317 (1937)).

to discriminate invidiously in its subsidies in such a way as to “ai[m] at the suppression of dangerous ideas.”¹³⁵

Apparently the explanation to which Justice Rehnquist was referring for the holding was this: “We held that Congress is not required by the First Amendment to subsidize lobbying . . . 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.”¹³⁶

Thus, the Supreme Court attempted to reconcile *Regan* with *Speiser* by saying that the state in *Speiser* discriminated invidiously in its aim to suppress dangerous ideas.¹³⁷ Even accepting that characterization of *Speiser*, could not the ministers participating in the Pulpit Freedom Sunday intervening in campaigns of candidates, and the Mormon church participating in influencing legislation in the campaign concerning Proposition 8, argue that Congress discriminated invidiously if its subsidy in the form of tax exemption was removed? Justice Brennan, author of the *Speiser* majority opinion in 1958, was still on the court in 1983, and he joined with Justice Blackmun’s concurring opinion in *Regan*. Justice Blackmun would have held that the principle “that the government may not deny a benefit to a person because he exercises a constitutional right” is violated when the government “does not merely deny a subsidy for lobbying activities, [but] deprives an otherwise eligible organization of its tax-exempt status . . . whenever one of those activities is ‘substantial lobbying,’ [b]ecause lobbying is protected by the First Amendment.”¹³⁸ The concurrence found that the “constitutional defect that would inhere in § 501(c)(3) alone is avoided by § 501(c)(4).”¹³⁹ The concurrence explains that the § 501(c)(3) organization could set up a § 501(c)(4) organization to carry on lobbying.¹⁴⁰ The § 501(c)(4) organization cannot receive tax-deductible contributions.¹⁴¹ However, in *Citizens United*, the Court stated that the availability of a §

135. *Id.* at 548 (quoting *Cammarano v. United States*, 358 U.S. 478, 513 (1959) (internal quotation omitted)).

136. *Id.* at 546 (citing *Cammarano*, 358 U.S. at 513).

137. *Id.* at 548.

138. *Id.* at 552 (Blackmun, J., concurring) (citations omitted). See *supra* notes 40-41 and accompanying text.

139. *Id.*

140. *Id.*

141. *Id.* at 553.

501(c)(4) organization, such as a political action committee would not cure a constitutionally defective regulation of the free speech of a for-profit or a not-for-profit corporation or of a labor union, where that regulation was based on the identity of the speaker.¹⁴²

What *Regan* and *Speiser* seem to point out is that taxation on speech will not always call for strict scrutiny, although some might question that conclusion given the strength of Justice Brennan's language in the *Speiser* opinion.¹⁴³ In the cases involving limitations on political activities apart from the limitations in I.R.C. § 501(c), strict scrutiny has often been required and a compelling governmental interest has been found in at least two different ways. In *Wisconsin Right to Life*, Chief Justice Roberts explained what might constitute a compelling interest under strict scrutiny:

This Court has long recognized “the governmental interest in preventing corruption and the appearance of corruption” in election campaigns. This interest has been invoked as a reason for upholding *contribution* limits. As *Buckley* explained, “[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.” We have suggested that this interest might also justify limits on electioneering *expenditures* because it may be that, in some circumstances, “large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions.”¹⁴⁴

Chief Justice Roberts further explained another compelling interest:

A second possible compelling interest recognized by this Court lies in addressing a “different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated

142. *Citizens United v. Fed. Election Comm'n*, 558 U.S. ___, ___, 130 S. Ct. 876, 897-99 (2010).

143. *Speiser v. Randall*, 357 U.S. 513 (1958).

144. *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478 (2007) (citations omitted).

with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."¹⁴⁵

Chief Justice Roberts may have eventually become frustrated with these analyses when he wrote:

Enough is enough Appellants argue that an expansive definition of "functional equivalent" is needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions. But such a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny.¹⁴⁶

Chief Justice Roberts went on to distinguish *Austin* from *Bellotti*, as discussed previously, stating:

Austin relied, in upholding the constitutionality of the ban on campaign speech, on the fact that corporations retained freedom to speak on issues as distinct from election campaigns Accepting the notion that a ban on campaign speech could also embrace issue advocacy would call into question our holding in *Bellotti* that the corporate identity of a speaker does not strip corporations of all free speech rights.¹⁴⁷

Citizens United overruled *Austin* and rejected its "antidistortion rationale" for prohibiting speech based on the corporate identity of the speaker in a case of independent expenditures for express advocacy or, perhaps in other words, intervention in a campaign of candidates.¹⁴⁸

Now again, possibly reaching the same point of uncertainty as Chief Justice Roberts in his review of First Amendment jurisprudence, the question is: do these non-tax First Amendment free speech cases provide any guidance on the constitutional validity of the restrictions under I.R.C. § 501(c) on substantial activity influencing legislation

145. *Id.* at 479 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990) (overruled by *Citizens United*, 558 U.S. ___, 130 S. Ct. 876).

146. *Id.* at 478-79 (citation omitted).

147. *Id.* at 480 (citations omitted).

148. *Citizens United v. Fed. Election Comm'n*, 558 U.S. at ___, ___, ___, 130 S. Ct. 876, 904-08, 912-13.

and/or intervening in a campaign of candidates? Although the Internal Revenue Code prohibition on § 501(c)(3) organizations from intervening in a campaign of candidates might parallel express advocacy in these other cases on First Amendment restrictions, does the Court's failure to find constitutional restrictions on issue advocacy in cases such as *Bellotti* and *Wisconsin Right to Life* suggest that I.R.C. § 501(c)(3) restrictions on influencing legislation might not pass constitutional muster?

Presumably, intervention in campaigns in the form of express advocacy could have been restricted constitutionally under the compelling governmental interest to prevent quid pro quo type corruption, as explained by Chief Justice Roberts in *Wisconsin Right to Life*, citing *Buckley*.¹⁴⁹ However, in light of *Citizens United*, *Buckley* presumably would allow only regulation of direct contributions to candidates but not independent expenditures for candidates, even if not expressly issue advocacy.¹⁵⁰ In addition, how does the restriction of substantial activity influencing legislation withstand constitutional review in light of *Bellotti* and *Citizens United* unless recourse is had to *Regan* and its attempt to distinguish *Speiser* as involving invidious discrimination? Still, *Citizens United* seems to stand for the proposition that free speech cannot be regulated based on the identity of the speaker.¹⁵¹

As explained elsewhere by one of the authors, tax practitioners likely have paid limited attention to weighty constitutional issues.¹⁵² There may have been little occasion to compare I.R.C. § 501(c)(3)'s

149. *Wisconsin Right to Life*, 551 U.S. at 478 (citing *Buckley v. Valeo*, 424 U.S. 1, 26-27, 45 (1976)). See *supra* note 139 and accompanying text.

150. See *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 901-03.

151. *Id.* at ___, 130 S. Ct. at 905. See *infra* note 159 and accompanying text.

152. See, e.g., John R. Dorocak, *The Income Tax Exclusion of the Housing Allowance for Ministers of the Gospel per I.R.C. Section 107: First Amendment Establishment of Religion or Free Exercise Thereof – Where Should the Warren Court Have Gone?*, 54 S.D. L. REV. 233, 236 n.10 (2009) (describing the external pressure for tax scholarship to have practical implications); John R. Dorocak, *Same-Sex Couples and the Tax Law: Tax Filing Status for Lesbians and Others*, 33 OHIO N.U. L. REV. 19, 20 (2007) (noting the “relative isolation of the tax professor” from encountering issues of race, gender, and class and citing Erik M. Jensen, *Critical Theory and the Loneliness of the Tax Prof*, 76 N.C. L. REV. 1753, 1756 (1998) (explaining the tax field’s “traditional insistence on connection with the real world of practice”)).

prohibition of substantial activity influencing legislation to cases such as *Bellotti* and *Citizens United*. It may be worthwhile, then, to examine the extent of the activities in *Bellotti* and *Citizens United* to see how they would compare to the activities in *Christian Echoes* and activities by the Mormon church regarding Proposition 8. On the other hand, those ministers participating in the Pulpit Freedom Sunday now have arguments regarding their express advocacy, or intervention in a campaign of candidates, in light of the *Citizens United* prohibition on discrimination based on identity of the speaker and *Speiser*'s prohibition on conditioning a benefit on the nonexercise of a constitutional right. The ministers' argument for I.R.C. § 501(c)'s unconstitutionality is stronger, especially in light of Justice Kennedy's use of Justice Scalia's language from his *Austin* dissent wherein Scalia cited *Speiser*.¹⁵³ Both *Austin* and *Citizens United*, which overruled *Austin*, involved third-party expenditures on behalf of, or in opposition to, candidates.¹⁵⁴

However, in *Bellotti*, the appellant corporations that wanted to spend money on issue advocacy concerning the graduated income tax in the state of Massachusetts apparently did not engage in substantial activities, but rather sought to have the ban on their spending declared unconstitutional before undertaking such spending.¹⁵⁵ On the other hand, in *Wisconsin Right to Life*, the corporation was described by the Court as an "ideological advocacy corporation" organized under § 501(c)(4) of the Internal Revenue Code, and it planned to broadcast the ads in question multiple times — a clear indication that influencing legislation was a substantial goal for this entity.¹⁵⁶ Note, however, the entity was not a § 501(c)(3) corporation but rather a § 501(c)(4) corporation.¹⁵⁷ As previously discussed, the concurring opinion in *Regan* referred to the availability of a § 501(c)(4) political action committee as remedying a

153. See *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 905 ("It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.") (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting) (overruled by *Citizens United*, 558 U.S. ___, 130 S. Ct. 876)).

154. *Id.* at ___, 130 S. Ct. at 886-87, 913; *Austin*, 494 U.S. at 656.

155. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 767-69 (1978).

156. *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 458-60 (2007).

157. *Id.* at 458.

possible unconstitutional limit on § 501(c)(3)'s political speech restrictions.¹⁵⁸ However, *Citizens United* rejected the availability of I.R.C. § 501(c)(4) as a remedy to the unconstitutional prohibition on speech.¹⁵⁹ Still, cases like *Citizens United* and *Speiser* might go a long way toward assisting a potential defendant, such as the Mormon church in an action to revoke a tax exemption on the grounds of substantial activities in influencing legislation. *Buckley* and its progeny, including *Citizens United*, however, would seem to support the I.R.C. § 501(c)(3) ban on intervention in a campaign of candidates, similar to express advocacy and direct contributions to candidates, but likely not with independent expenditures.¹⁶⁰

In reaching for some political compromise on corporate spending regarding corporate free speech, one might argue that the ability to operate in a corporate form is not a *right* but rather a *privilege*, and thus can be granted, withheld, withdrawn, and otherwise regulated in compliance with applicable state law, as is typically the case with any privilege. Thus, a state could lawfully require, for example, that the corporate veil would not be available to any liability arising from a corporation's political campaign expenditures. This would not result in the forfeiture of First Amendment rights any more than exposure to potential personal liability of unincorporated organizations or individuals may affect their First Amendment rights.

This analysis appears entirely consistent with the Tenth Circuit's conclusion in *Christian Echoes*, where the court held that tax exemptions are a privilege, not a right, and thus withholding such an exemption from *Christian Echoes* did not deprive it of its First Amendment free speech right.¹⁶¹ Further, such analysis appears to be consistent with the holding in *Regan* wherein the Court cited several precedents indicating that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."¹⁶²

158. See *supra* notes 39-41 and accompanying text.

159. See *supra* note 137 and accompanying text.

160. See *supra* note 145 and accompanying text.

161. *Christian Echoes Nat'l Ministry v. United States*, 470 F.2d 849, 857 (10th Cir. 1972).

162. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983) (citing *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); *Buckley v. Valeo*, 424 U.S. 1 (1976)).

Finally, this analysis seems consistent with the idea expressed in *Cammarano* that petitioners were not denied a tax deduction because of their involvement with constitutionally protected activities, i.e., lobbying, but were “simply being required to pay for those activities entirely out of their own pockets, *as everyone else engaging in similar activities is required to do* under the provisions of the Internal Revenue Code.”¹⁶³

However, as to this point, which might reasonably be referred to as leveling the playing field, there is arguably contrary authority in *Citizens United*. The *Citizens United* Court stated that “*Buckley* rejected the premise that the Government has an interest ‘in equalizing the relative ability of individuals and groups to influence the outcome of elections’ The First Amendment’s protections do not depend on the speaker’s ‘financial ability to engage in public discussion.’”¹⁶⁴ Arguably, under the above referenced corporate veil proposal, and unlike the facts in *Buckley*, there would be no denial of any constitutional right, but simply a condition interposed for the exercise of a state-granted privilege. However, the distinction between a privilege and a right, at least in the area of First Amendment speech, does not appear to be determinative. In *Speiser*, the Court specifically held:

[T]he appellees are plainly mistaken in their argument that, because a tax exemption is a “privilege” or “bounty,” its denial may not infringe speech [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 proscribed speech.¹⁶⁵

Simply put, what cannot be lawfully done directly cannot be lawfully done indirectly. When taken together, the reasoning in *Citizens United* and *Speiser* gives rise to considerable doubt concerning the future viability of the related holdings in *Christian Echoes*, *Regan*, and *Cammarano*.

163. *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (emphasis added).

164. *Citizens United v. Fed. Election Comm’n*, 558 U.S. ___, ___, 130 S. Ct. 876, 904 (2010) (citing *Buckley*, 424 U.S. at 48-49 (1976)).

165. *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958).

VII. CONCLUSION

The focus of this article has been the political activity of tax-exempt churches under I.R.C. § 501(c). That code section prohibits such churches from intervention in political campaigns of candidates and from substantial activity in influencing legislation. Constitutional cases involving this tax provision, such as *Christian Echoes* and *Regan*, uphold its validity despite First Amendment challenges based on freedom of religion and freedom of speech, in part relying on *Cammarano*, a case holding constitutional the denial of lobbying expenses.

However, *Speiser* raised the issue that a governmental privilege cannot be conditioned on the non-exercise of a constitutional right, at least where there was invidious discrimination against a class — in that case, veterans — who had to restrict their First Amendment right to political speech by taking a loyalty oath, in order to receive an exemption from a property tax. A person could also be so discriminated against because of other status. The question is whether *Speiser* would provide any support to those challenging I.R.C. § 501(c)'s restrictions, especially now in light of *Citizens United*.

Other First Amendment cases on freedom of political speech do seem to lend some support to the § 501(c) restrictions, although the cases use language different from that in the I.R.C., and the cases concern taxpayers other than § 501(c) churches. *Buckley*, *Bellotti*, *Austin*, *Wisconsin Right to Life*, and *Citizens United* all seem to stand for at least the constitutionality of the regulation of contributions on behalf of candidates in circumstances of express advocacy. Under those cases, can I.R.C. § 501(c) prevent any expenditures on behalf of candidates or expenditures constituting a substantial activity regarding legislation? That is, do the cases permit only regulation of contributions to campaigns of candidates? Or do cases such as *Regan* and *Christian Echoes* still constitutionally permit § 501(c)'s restrictions despite *Speiser*? *Citizens United* and *Speiser* have created considerable doubt in the future viability of the related holdings in *Christian Echoes*, *Regan*, and *Cammarano*, which the courts will later have to clarify.¹⁶⁶

166. One wonders what impact *Citizens United* and *Speiser* might have on somewhat shadowy organizations such as The Family — “the obsessively secret Arlington spiritual group that organizes the National Day of Prayer breakfast” and is

also known as the Fellowship religious organization located at 133 C. St. SE in Washington, D.C. Manuel Roig-Franzia, *The Political Enclave That Dare Not Speak Its Name*, WASH. POST, June 26, 2009, at A1. Another reporter has described the organization as follows:

The home is owned by the C Street Center Inc., an affiliate of a religious group known as the Fellowship Foundation. The foundation sponsors the annual National Prayer Breakfast and international development projects, and holds Bible study and prayer meetings at the house, which is registered with the Internal Revenue Service as a church.

Steve Tetreault, *New complaint cites Ensign*, LAS VEGAS REV.-J., Apr. 2, 2010, at 1A, available at 2010 WLNR 7032787. The organization came to light when eight senators and representatives were investigated for ethics violations because of the low rent they paid to live at C Street. *Id.* A former Department of Justice attorney said “the alleged housing gift for members of Congress is an example of how the Fellowship religious organization, also referred to as the Family, seeks to act as a government power broker.” *Id.* See also *Behind the closed doors on C Street: The Family lives and prays as a fundamentalist group with power at the center of its agenda*, LAS VEGAS SUN, July 19, 2009, at 1, available at 2009 WLNR 13850104 (providing further details about the controversy in an interview with Jeff Sharlet, the author of a book about the C Street group).

