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Matthew A. Melone

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Gift Taxes on Donations to Social Welfare Organizations: De-Politicizing Social Welfare Organizations Or Politicizing the IRS?

*Matthew A. Melone**

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I. INTRODUCTION

> "*Taxation is a most flexible and effective but also a dangerous instrument of social reform. One has to know precisely what one is doing lest the results diverge greatly from one's intentions.*"[+]

The revelation that the Internal Revenue Service (IRS) had subjected conservative groups to heightened scrutiny in its examination of such groups' applications for tax-exempt status is the latest, but not the only, political controversy spawned by IRS actions with respect to

* Professor of Law, Lehigh University, Bethlehem, Pennsylvania

+ GUNNAR MYRDAL, THE POLITICAL ELEMENT IN THE DEVELOPMENT OF ECONOMIC THEORY 188 (Paul Streeten trans., 2002).

section 501(c)(4) social welfare organizations.[1] Members of the American Bar Association revealed, at a meeting in the spring of 2011, that the IRS had sent letters to several of their clients notifying them that they would be audited for gift tax liability in connection with their contributions to section 501(c)(4) organizations.[2] The IRS later acknowledged that five donors were undergoing such audits and that the decision to audit these donors was made without any interference from anyone outside the IRS.[3] Several Republican members of the Senate Finance Committee questioned the Commissioner of the IRS about whether any political appointees had influenced the decision to undertake the aforementioned audits.[4] Despite the Commissioner's assurances that no political influence was exerted upon the IRS, Representative Dave Camp, chairman of the House Ways and Means Committee, intimated that the timing of the audits, after years of IRS somnolence, suggested that the audits amounted to an attack on constitutionally protected political speech.[5] The IRS soon terminated its efforts and indicated that no further examinations of such gift tax issues would be undertaken until further notice.[6]

The IRS has long insisted that political contributions are subject to a gift tax. However, its enforcement record in this respect has been sporadic at best. Its first official pronouncement in this regard occurred more than thirty-five years after the enactment of the gift tax, and serious enforcement efforts were made for a brief period in the aftermath of the Nixon administration's campaign finance abuses.[7] However, before those efforts could bear fruit, Congress amended the

1. *See* John D. McKinnon, Siobhan Hughes & Damian Paletta, *Higher-Ups Knew of IRS Case*, Wall St. J. (May 17, 2013, 7:14 PM). *See also infra* notes 361–63 and accompanying text. Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1986, as amended.

2. Ellen P. Aprill, *Once and Future Gift Taxation of Transfers to Section 501(c)(4) Organizations: Current Law, Constitutional Issues, and Policy Considerations*, 15 N.Y.U. J. Legis. & Pub. Pol'y 289, 291 (2012).

3. *Id.* at 291–92. *See also* Stephanie Strom, *I.R.S. Moves to Tax Gifts to Groups Active in Politics*, N.Y. Times (May 12, 2011).

4. Aprill, *supra* note 2, at 292.

5. *Id.* at 291–92. *See also* Am. Bar. Ass'n., Comments of the Individual Members of the Exempt Organizations Committee's Task Force on Section 501(c)(4) and Politics 13 (May 25, 2004), *available at* http://www.abanet.org/tax/pubpolicy/2004/040525exo.pdf (noting that there was no evidence of IRS enforcement of the gift tax on donations to section 501(c)(4) entities for at least a decade). The IRS recently admitted that it had subjected certain conservative groups to inappropriate scrutiny in its review of their applications for § 501(c)(4) status. *See infra* notes 361–63 and accompanying text.

6. Aprill, *supra* note 2, at 292–93. *See also* John D. McKinnon & Dionne Searcey, *IRS also Targeted Donors to GOP Group*, Wall St. J. (June 1, 2013).

7. *See* Kip Dellinger, *Gift Tax on Political Contributions? A Lousy Idea!*, 78 Tax Notes 621 (1998). *See also infra* notes 227–30 and accompanying text.

gift tax statutes to preclude the imposition of gift taxes on donations to political organizations.[8]

Seismic changes in the legal landscape dramatically altered campaign finance practices during the 1970s, but political organizations—be they political parties, national or state political committees, or candidate committees—remained the vessels that received political contributions.[9] As a result, the gift tax issue disappeared as an issue in campaign finance. The increasing importance of "soft money" donations in the 1990s implicated political parties and, thus, the gift tax issue remained dormant. The McCain-Feingold Act turned off the "soft money" spigot and led to greater prominence of independent political committees—the so called section 527 groups—that could avoid classification as political committees for federal election law purposes yet qualify as political organizations under the tax code.[10] Thus, the gift tax issue remained in its bottle. However, the Supreme Court's holding in *Citizens United* and a subsequent appellate court decision led to increasing participation in electoral politics by section 501(c)(4) organizations.[11] These organizations enjoy a significant advantage over section 527 organizations because they have no donor disclosure requirements.[12] However, section 501(c)(4) organizations are not political organizations for purposes of the gift tax exemption.[13] Consequently, the gift tax issue resurfaced.

Part II of this Article traces the evolution of campaign finance practices. Prior to the 1970s, reform efforts were ineffective. The emergence of television as a campaign tool accelerated the money chase and, in conjunction with the excesses of the Nixon administration, led to the passage of the first campaign finance legislation with teeth in 1974. However, the Supreme Court, in the seminal case of *Buckley v. Valeo*, loosened the legislative strictures to which campaigns were subject.[14] This decision, along with later amendments to the 1974 legislation, led to the emergence of political action committees (PACs) and "soft money" as important factors in campaigns. The McCain-Feingold Act was enacted, in part, to eliminate "soft money," reduce the advantages of a candidate's personal wealth, and rein in the independent activities that were sanctioned by *Buckley*. A decade of litigation resulted in a significant evisceration of the reforms put in place

8. *See infra* notes 227–32 and accompanying text.
9. *See infra* notes 179–80 and accompanying text.
10. *See infra* notes 77–104 and accompanying text.
11. *See infra* notes 105–54 and accompanying text.
12. *See infra* notes 162–64 and accompanying text.
13. *See infra* note 179 and accompanying text.
14. *See infra* notes 54–64 and accompanying text.

by the McCain-Feingold Act. The Court's 2010 decision in *Citizens United* provided the legal foundation for unlimited independent expenditures. Federal election and tax laws require political organizations to disclose their donors. Soon after *Citizens United*, political actors turned to the section 501(c)(4) organization as a vehicle for making independent political expenditures without the burden of donor disclosure.

Part III of this Article provides an analysis of the gift tax in general and its application to contributions to section 501(c)(4) organizations. Despite the dearth of case law on this issue, it appears that taxing contributions to these organizations has ample statutory support, and the current regulations interpreting the statute should survive the deferential standard of review to which they are subject. Moreover, enforcement of the tax against donors to section 501(c)(4) organizations does not do violence to the First Amendment. However, notwithstanding the legal justification for enforcement of the tax, Part IV argues that the enforcement of the tax is unwarranted from a policy standpoint. Enforcement of the gift tax with respect to contributions to section 501(c)(4) organizations will not reduce politically motivated giving because such giving will be diverted to vehicles to which donations are exempt from the gift tax. Moreover, large corporations, for all practical purposes, will be unaffected by the gift tax thereby raising the possibility that section 501(c)(4) organizations will remain a significant political force but one dominated by corporate donors. Perhaps the most salient objection to enforcement of the tax is the risk that the public comes to perceive enforcement of the tax as selective and politically motivated. The IRS recently has taken actions that, to its critics, were politically motivated, and, for the most part, taxpayers are powerless to challenge such actions. A tax system already suffering from a lack of public respect can do without accusations of political meddling.

II. CAMPAIGN FINANCE REFORM EFFORTS

A. *Early Reform Efforts*

Efforts to reform campaign finance have had limited efficacy since the beginning of the republic. For most of our electoral history, legislative attempts to curb the influence of money in elections were toothless and ineffective. More recently, First Amendment obstacles and the ingenuity of both candidates and donors have conspired to assure that campaign finance reform legislation delivered less than promised results.

Early nineteenth century campaign practices, although quaint by modern standards, share a disconcerting trait with modern practices: a Darwinian-like ability to evolve to meet an ever-increasing need for funds. Expansion of the electorate due to an influx of immigrants necessitated vehicles that could broadly disseminate political content. Newspapers, subsidized by political parties and wealthy individuals, that produced campaign messages masquerading as journalism were those vehicles.[15] Not coincidently, moneyed interests increased their participation in political campaigns when government's participation in economic affairs increased, beginning with President Andrew Jackson's promise to dismantle the Bank of the United States and continuing with government Civil War procurement, post-war reconstruction, and rapid industrialization.[16] The "spoils system," introduced by President Jackson, created a source of campaign funds from grateful office holders in the form of salary kickbacks to the political party that provided the patronage jobs.[17] The Pendleton Civil Service Reform Act, which eliminated such patronage, served to heighten the relative clout of big money donors.[18]

Like today, much opprobrium was directed at corporate participation in election financing. However, efforts to curb corporate political activity were motivated by political payback, were narrowly focused, and proved toothless.[19] In 1907, Congress enacted the Tillman Act, which prohibited national banks and federally chartered corporations from contributing money "in connection with any election to any political office" and prohibited any corporation from contributing money in connection with any U.S. presidential or congressional elec-

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15. *See* Melvin I. Urofsky, *Campaign Finance Reform Before 1971*, 1 ALB. GOV'T L. REV. 1, 4–5 (2008). *See also* Benjamin S. Feuer, Comment, *Between Political Speech and Cold, Hard Cash: Evaluating the FEC's New Regulations for 527 Groups*, 100 NW. U. L. REV. 925, 932 (2006) (noting that newspaper costs were the most significant campaign costs throughout the early part of the nineteenth century).

16. Urofsky, *supra* note 15, at 7–8.

17. *Id.* at 8–9.

18. *Id.*

19. For example, several states carried by William Jennings Bryan in the 1896 presidential election prohibited corporate campaign contributions in 1897 in large part as retaliation against corporate support for William McKinley. *Id.* at 13. Post-Civil War reforms included the Navy Appropriations Bill of 1867, which prohibited the solicitation of contributions from naval ship yard workers, and an Executive Order issued by President Hayes in 1877 that prohibited political assessments on federal employees. *See* Robert E. Mutch, *Three Centuries of Campaign Finance Law*, *in* A USER'S GUIDE TO CAMPAIGN FINANCE REFORM 12 (Gerald C. Lubenow ed., 2001). *See also* Jon Simon Stefanuca, *The Fall of the Federal Election Campaign Act of 1971: A Public Choice Explanation*, 19 U. FLA. J.L. & PUB. POL'Y 237, 239 (2008).

tion.[20] Corporations avoided the strictures of the Tillman Act by making donations in-kind.[21]

The Publicity of Political Contributions Act, enacted in 1910, required post-election disclosure of donations and was amended one year later to put in place spending caps for House of Representatives and Senate races.[22] However, the statute applied only to donations made in an election year and only to those donations made directly to national party committees or to the candidate and, therefore, had little effect in curbing donations to state party committees or to independent committees formed to avoid the reach of the legislation.[23] The Teapot Dome scandal contributed to the passage of the Federal Corrupt Practices Act of 1925, which closed the in-kind contribution loophole created by the Tillman Act and extended the disclosure rules of the Publicity of Political Contributions Act. However, this legislation failed to contain an enforcement mechanism and was rife with easily exploitable loopholes.[24]

Organized labor became increasingly influential during the New Deal era, and the employees of numerous public works programs, who were not subject to the Pendleton Act's restrictions, provided the Roosevelt administration with a vast pool of potential donors and campaign participants.[25] The Hatch Political Activity Act (Hatch Act), enacted in 1939 in large part out of concern that President Roosevelt was building a political base through the various public works programs, extended the ban on political contributions and participation to all federal employees, not just those employed in civil service.[26] The legislation was amended shortly thereafter to extend the contribution ban to federal contractors and employees of state agencies that were recipients of federal funding, cap contributions to

20. Tillman Act of 1907, ch. 420, 34 Stat. 864 (1907) (repealed in 1971).

21. Urofsky, *supra* note 15, at 17. The statute's failure to provide an enforcement mechanism, in addition to its narrow focus on money contributions, assured continued corporate participation in elections. *Id.*

22. Publicity of Political Contributions Act of 1910, ch. 392, 36 Stat. 822 (1910); Publicity of Political Contributions Act, ch. 33, 37 Stat. 25 (1911). *See also* Urofsky, *supra* note 15, at 18.

23. Publicity of Political Contributions Act, 36 Stat. at 822–24. The Supreme Court held that the Publicity of Political Contributions Act was unconstitutional in its application to primaries and Senate races. *See* Newberry v. United States, 256 U.S. 232 (1921). The Court later held that Congress can regulate primary elections. *See* United States v. Classic, 313 U.S. 299, 317 (1941).

24. Corrupt Practices Act of 1925, §§ 301(d), 303–08, 43 Stat. 1070, 1071–73, *repealed by* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 405, 86 Stat. 3, 20 (1972); Urofsky, *supra* note 15, at 21. *See infra* notes 41–46 and accompanying text for a discussion of the Federal Election Campaign Act of 1971.

25. *See* Urofsky, *supra* note 15, at 25.

26. Hatch Act, ch. 410, 53 Stat. 1147 (1939). Urofsky, *supra* note 15, at 25.

national committees, and place a spending limit on such committees.[27] The Hatch Act restrictions proved ineffective.[28] The War Labor Disputes Act, enacted over President Roosevelt's veto in the aftermath of the United Mine Workers strike during World War II, was narrow in scope and merely prohibited labor unions from contributing to campaigns for the duration of the war.[29] However, one method of avoiding this legislation had long-lasting implications: the use of political action committees (PACs).[30] The Taft-Hartley Act of 1946 made permanent the ban on labor union contributions and prohibited all corporate political expenditures.[31]

Television reduced the influence of political parties by placing a premium on the candidates' personal characteristics, and the new medium's power as a campaign tool was brought into stark relief by the Kennedy-Nixon debates in 1960.[32] Television also greatly increased the expense of campaigns, causing cyclical fund-raising efforts to evolve into a permanent fund-raising process.[33] Little effort at campaign reform was expended in the 1950s and 1960s, but major changes came in the 1970s, the most significant of which were in response to the Watergate scandal and other Nixon administration shenanigans.

B. *Modern Reform Efforts*

The more recent history of campaign reform efforts has shown that legislative or judicial developments lead to behavioral adjustments by political actors. Professors Issacharoff and Karlan aptly captured the futility of reform efforts over a decade before the Supreme Court's controversial decision in *Citizens United*.[34]

27. Urofsky, *supra* note 15 at 25–26. The contribution and spending limitations were repealed by the Federal Election Campaign Act of 1971. *See infra* note 44 and accompanying text.

28. Urofsky, *supra* note 15, at 25–26.

29. War Labor Disputes Act, ch. 144, § 9, 57 Stat. 163, 167–68 (1943).

30. Corporations made little use of these vehicles initially due to the lack of enforcement of existing restrictions and the uncertainty over the legality of PACs. *See* Urofsky, *supra* note 15, at 28–29.

31. Labor Management Relations (Taft-Hartley) Act, ch. 120, §§ 304, 313, 61 Stat. 136, 159–60 (1947). The Taft-Hartley Act also prohibited internal union communications with members with respect to elections. *Id.* However, the Supreme Court held that the legislation did not operate to ban internal union communication. *See* United States v. Cong. of Indus. Org., 335 U.S. 106 (1948). *See also* Urofsky, *supra* note 15, at 28.

32. Urofsky, *supra* note 15, at 31.

33. Democrats' and Republicans' combined spending on presidential elections grew to almost $37 million for the 1968 election from approximately $5 million for the 1948 election. The 1972 presidential election cost approximately $91 million. Senate and House election campaign spending also grew dramatically. *Id.* at 41–42.

34. *See infra* notes 105–54 and accompanying text.

> Electoral reform is a graveyard of well-intentioned plans gone awry. It doesn't take an Einstein to discern a First Law of Political Thermodynamics—the desire for political power cannot be destroyed, but at most, channeled into different forms—nor a Newton to identify a Third Law of Political Motion—every reform effort to constrain political actors produces a corresponding series of reactions by those with power to hold onto it.[35]

The foundational statutes, the Federal Election Campaign Act Amendments of 1974 and the McCain-Feingold Act, dramatically altered the campaign finance landscape.[36] In addition, the Supreme Court has played a significant role in the evolution of campaign finance practices. The seminal case of *Buckley v. Valeo* has loomed large over campaign finance reform efforts for more than three decades.[37] *Citizens United v. FEC*, a relative newcomer to the campaign scene, has already proven its mettle as a case with far-reaching implications.[38] Generally, the legislative and judicial developments over the past forty years have resulted in a system first dominated by hard money donations to political parties and PACs and later dominated by soft money donations to political parties. More recently, outside groups have become a major force in electoral politics. Until *Citizens United*, the regulation of campaign expenditures turned on whether or not the expenditures funded express advocacy.[39] After *Citizens United*, the regulatory linchpin was no longer whether express advocacy took place but whether the expenditures in question were coordinated with the candidate.[40] Thus, independent groups were free to openly advocate for a candidate.

1. From Hard Money to Soft Money

The Federal Election Campaign Act of 1971 was enacted with the dual purpose of reigning in the spiraling costs of presidential and congressional elections and enhancing candidates' accessibility to mass media.[41] This legislation focused on the disclosure of individual contributions and attempted to curb the advantages enjoyed by wealthy

35. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1705 (1999).

36. *See infra* notes 47–52, 77–104 and accompanying text.

37. *See infra* notes 54–64 and accompanying text.

38. *See infra* notes 105–54 and accompanying text.

39. *See infra* notes 61–64 and accompanying text.

40. *See infra* notes 146–48 and accompanying text.

41. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified at 47 U.S.C. § 315 (2006)); S. REP. NO. 92-229, at 2 (1971). The Revenue Act of 1971 put in place public funding of presidential campaigns through voluntary taxpayer contributions, although implementation was delayed until the 1976 election. *See* Urofsky, *supra* note 15, at 40, 49. In addition, The Revenue Act of 1971 provided an individual tax credit or, alternatively, a deduc-

candidates.[42] The Act defined the term "political committee" very broadly, liberalized the definition of political contributions and expenditures, and allowed bona-fide loans to political candidates.[43] The Act left undisturbed the long-standing prohibitions on corporate and union contributions, but limitations on individual contributions to national committees and the spending limits imposed on such committees, imposed by the Hatch Act, were repealed and replaced by spending limitations on the candidates directly.[44] Like the reform efforts that preceded it, the legislation failed either to create an effective enforcement mechanism or to regulate all expenditures that could assist a campaign.[45] The legislation was criticized as a pro-incumbency measure.[46]

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tion for political contributions. Both provisions were repealed in 1986. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 112(a), 100 Stat. 2085 (1986).

42. Title I of the Act limited the amount that broadcast and non-broadcast media could charge political candidates. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 103, 86 Stat. 3, 4 (1972). Moreover, a legally qualified candidate was prohibited from spending funds for the use of communication media in excess of an amount based on the voting age population of the geographic area in which the election for office was held or $50,000, whichever was greater, and spending on broadcast media was limited to sixty percent of the total media communication spending limit. *Id.* § 104, 86 Stat. at 5. Title III of the Federal Election Campaign Act imposed detailed disclosure requirements on political committees that were administered by the U.S. Comptroller General, including the disclosure of all donors who contributed $100 or more to a political committee. *Id.* § 301, 86 Stat. at 11-19.

43. The statute defined a political committee as "any individual, committee, association, or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000." *Id.* § 201, 86 Stat. at 8, *repealed by* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 93-187, § 201(a)(1), 93 Stat. 1367 (1980). A contribution was defined as:

> [A] gift, subscription, loan, advance, or deposit of money or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business), made for the purpose of influencing the nomination for election, or election, of any person to Federal office . . . .

Id. § 201, 86 Stat. at 8, *repealed by* Federal Election Campaign Act Amendments of 1979 § 201(a)(1)). Expenditures were similarly defined. *Id.* § 201, 86 Stat. at 9, *repealed by* Federal Election Campaign Act Amendments of 1979 § 201(a)(1).

44. The statute prohibited a candidate from making expenditures from his personal funds or the personal funds of his immediate family in excess of $50,000 for presidential or vice-presidential candidates, and $35,000 and $25,000 for Senate and House of Representatives candidates, respectively. Federal Election Campaign Act of 1971 § 201, 86 Stat. at 9–10, *repealed by* Federal Election Campaign Act of 1976, Pub. L. No. 95-283, § 201(a), 90 Stat. 496.

45. Stefanuca, *supra* note 19, at 266–67.

46. The spending limitations on media purchases and the permissibility of bank financing provided a pro-incumbency slant to the legislation—one commentator likened Congress' behavior to that of an "oil cartel." *Id.* at 253. Spending limitations provided an obstacle to challengers in overcoming the advantages of incumbents who, not coincidentally, were usually in a better position to secure now-permissible bank financing.

However, Watergate and other associated Nixon administration malfeasance ushered in the Federal Election Campaign Act Amendments of 1974.[47] This legislation and later amendments prohibited political committees, other than a candidate's principal campaign committee, from contributing more than $5000 to any candidate with respect to any election for federal office, imposed a $1000 limit on the amount any person could contribute to any candidate with respect to any election for federal office, and limited aggregate individual contributions during any calendar year to $25,000.[48] In addition to the contribution limits, the amendments also imposed spending caps on various parties.[49] The 1974 amendments also clarified the legal status of PACs, which had been established by labor unions as early as 1943.[50] Significantly, and in contrast to previous reforms, the 1974

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47. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

48. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112, 90 Stat. 475, 488 (1976) (codified at 2 U.S.C. § 441a (2005)); Federal Election Campaign Act Amendments of 1974, § 101, 88 Stat. at 1263 (codified at 18 U.S.C. § 608(b)(1) (2006)). The statute was amended, in the wake of Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), to modify the definition of contributions to include "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents . . . ." Federal Election Campaign Act Amendments of 1976 § 112, 90 Stat. at 488 (codified at 2 U.S.C. § 441a(a)(7)(B)(i)). Further amendments in 1976 placed a $20,000 limitation on contributions to national political party committees and a $5000 limitation on contributions to other political committees. *See id.* § 112, 90 Stat. at 487 (codified at 2 U.S.C. § 441a (2006)). The limitations on contributions to political committees that engage in independent advocacy were, as a result of the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), struck down by the Court of Appeals for the District of Columbia Circuit. *See infra* notes 147–48 and accompanying text.

49. Spending limits were imposed on candidates, committees authorized by the candidate to make expenditures, national and state committees of political parties, and certain persons authorized by the candidate or by an authorized committee to make expenditures. Federal Election Campaign Act Amendments of 1974, § 101, 88 Stat. at 1264–65 (codified at 18 U.S.C. § 608(c) (2006)). The limits, which were adjusted for inflation, were set at $10,000,000 and $20,000,000 for presidential primaries and the presidential election, respectively. Senate and House of Representatives elections were subject to lower limits. *Id.* § 101, 88 Stat. at 1264–65 (codified at 18 U.S.C. § 608(c)(1)(A)–(B) (2006)). The spending limits imposed on the use of a candidate's own funds and the funds of his immediate family by the 1971 legislation were left in place, although loans that were evidenced by a written instrument were permitted. *Id.* § 101, 88 Stat. at 1266 (codified at 18 U.S.C. § 608(a)(3) (2006)). The Act also placed a $1000 limit on independent political expenditures that was later struck down by the Supreme Court. *Id.* § 101, 88 Stat. at 1265 (codified at 18 U.S.C. § 608(e) (2006)); *see infra* note 59 and accompanying text. The contribution limits for donations were later increased and indexed for inflation by the McCain-Feingold Act. *See infra* note 83.

50. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 103, 88 Stat. 1263, 1272 (codified at 18 U.S.C. § 611 (2006)). This provision codified the Supreme Court's decision in *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972), which held that the 1971 legislation permitted union officials to administer PACs. A 1975 FEC advisory opinion that allowed Sun Oil, a corporation, to spend corporate funds in order to solicit contributions to

amendments did include an effective enforcement mechanism: the Federal Election Commission (FEC).[51] The FEC was provided with formidable enforcement powers, rule-making authority, and the authority to issue advisory opinions.[52]

The combination of higher contribution limits for donations to political parties and the ability of national and state parties to spend significantly more funds than other political actors resulted in a more prominent fundraising role for the political parties. Amendments enacted in 1979 allowed donors to contribute an unlimited amount of funds to political parties for certain party building activities—the "soft money" activities that would later provide the impetus for the enactment of the McCain-Feingold Act.[53]

Many of the reform provisions were undone by the landmark case of *Buckley v. Valeo*.[54] At issue in the case was the constitutionality of various contribution and expenditure limits imposed by the 1974 legislation and the disclosure rules of the 1971 and 1974 Acts.[55] The Court

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its PAC from stockholders and employees provided a significant boost to PAC funding. *See* FEC Advisory Opinion 1975-23, 40 Fed. Reg. 31,879 (July 29, 1975).

51. Federal Election Campaign Act Amendments of 1974, § 208, 88 Stat. at 1280 (codified at 2 U.S.C. § 437c). The FEC is comprised of six voting members, no more than three of which can be affiliated with the same political party, and two non-voting ex-officio members. *Id.* § 208, 88 Stat. at 1280–81 (codified at 2 U.S.C. § 437c). Legislation enacted in 1976 provided that the voting members of the FEC were to be appointed by the President. *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 95-283, § 101, 90 Stat. 475 (1976) (codified at 2 U.S.C. § 437c(a)(1)). Legislation enacted in 1997 limited commissioners to one six-year term. *See* Treasury and General Government Appropriations Act of 1998, Pub. L. No. 105-61, § 512(a), 111 Stat. 1272, 1305 (1997) (codified at 2 U.S.C. § 437c(a)(2)(A)).

52. Federal Election Campaign Act Amendments of 1974, § 208, 88 Stat. at 1282–85 (codified at 2 U.S.C. § 437d).

53. *See* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 101, 93 Stat. 1339, 1341–50 (1980) (codified at 2 U.S.C. § 431(b)(B)(v)(viii)–(xi)). *See also* Urofsky, *supra* note 15, at 61–62; *see infra* notes 77–79 and accompanying text.

54. *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

55. *Id.* at 6. The Supreme Court found that the government's interest in providing the electorate information upon which to cast their votes, deterring corruption through exposure, and providing enforcement authorities with essential information was sufficient to justify the disclosure requirements of the 1971 and 1974 Acts. However, future "as applied" challenges to the requirements were not precluded in the event that the disclosure requirements exposed members or supporters of historically suspect organizations to reprisal, the possibility of which the Court was well aware. *See, e.g.*, NAACP v. Alabama, 357 U.S. 449 (1958). Less than a decade after *Buckley*, the Court struck down an Ohio law that required every political party to report the names and addresses of campaign contributors and recipients of campaign contributions. The Court held that the exposure of corruption made possible by disclosure rules had little relevance to minor parties given their unlikelihood of success at the polls. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 95 (1982). The history of harassment against the Socialist Workers Party convinced the Court that the potential misuse of the required information outweighed the government's interest in obtaining the information. *Id.* at 100–02. However, in a recent case, the Court rejected a facial challenge to Washington's Public Records Act under which the names and addresses of individuals that signed a petition to initiate a referendum to

distinguished between contributions and expenditures for purposes of First Amendment protection.[56] Reasonable limitations could be imposed on political contributions because the avoidance of the "actuality and appearance of corruption resulting from large financial contributions" was a sufficient compelling interest to justify infringements upon First Amendment liberties.[57] To the Court, such limitations were narrowly tailored to meet the government's compelling interest of preventing actual or perceived corruption because they focused "precisely on the problem of large campaign contributions."[58]

In contrast, the Court held that the primary effect of the $1000 limitation on independent expenditures, the limitation on expenditures by candidates from personal or family resources, and the limitation on overall campaign expenditures "is to restrict the quantity of campaign speech by individuals, groups, and candidates" and, therefore, violated the First Amendment.[59] According to the Court, neither the government's anti-corruption interest in limiting expenditures nor the government's interest in equalizing both the ability of individuals to influence the outcome of elections and the financial resources of competing candidates were compelling enough to justify the limitations.[60]

The Court, in its examination of whether the independent expenditure limitation was unconstitutionally vague, left what proved to be a long-lasting legacy. The 1974 Act defined such expenditures as "any expenditure . . . relative to a clearly identified candidate . . . advocating the election or defeat of such candidate . . . ."[61] The Court found that this language was impermissibly vague and, in order to preserve the statutory provision, held that the provision must be interpreted to cover only "expenditures for communications that in express terms advocate the election or defeat" of a candidate.[62] The Court provided examples of express advocacy—the so-called magic words—which would later prove significant in the enactment of, and disputes

overturn a recently enacted domestic partner statute would be disclosed. *See* Doe v. Reed, 130 S. Ct. 2811 (2010).

56. Buckley v. Valeo, 424 U.S. 1, 19 (1974).

57. *Id.* at 26.

58. *Id.* at 30. The Court rejected the argument that the $1000 contribution limitation was unreasonably low. *Id.* The Court also rejected the assertion that contribution limitations were a form of discrimination that favored incumbents. *Id.* at 30–31.

59. *Buckley*, 424 U.S. at 39.

60. *Id.* at 17, 55.

61. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263, 1265.

62. *Buckley*, 424 U.S. at 44.

over, the McCain-Feingold Act.[63] *Buckley* ushered in the era of unregulated issue advocacy and the explosion of "soft money" to fund such advocacy.[64]

Political parties, as a result of the 1974 and 1976 amendments to the Federal Election Campaign Act, enjoyed an advantage over individuals who were limited to $1000 contributions to candidates,[65] corporations and labor unions that could not donate directly to candidates at all,[66] and PACs that could donate up to $5000 to candidates.[67] The limitations on donations to political parties were far more generous.[68] Moreover, parties had the unique ability to undertake coordinated expenditures.[69] Not surprisingly, coordinated expenditures undertaken by the parties dwarfed direct contributions to candidates by political parties.[70] In addition, certain grass roots activities by state party committees, such as voter registration and get-out-the-vote efforts, were subject to no spending limitation at all.[71]

63. The Court defined express advocacy to include words or phrases such as "vote for," "elect," "support," "defeat," and "reject." *Id.* at 44 n.52.

64. The fact that *Buckley* was interpreted to place issue advocacy beyond the reach of regulators may be criticized. The Court, by limiting the reach of the statute to the "magic words," merely prevented the statute from being unconstitutionally vague. Nothing in the Court's opinion suggested that clear, unambiguous statutory language that limited speech beyond the "magic words" would necessarily violate the First Amendment.

64. *See infra* notes 72–76 and accompanying text.

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

66. An exception was created for so-called "MCFL" corporations. *See infra* note 82.

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

68. *Id.*

69. Coordinated expenditures are deemed contributions to the candidates and, consequently, are subject to the stringent contribution limits. Therefore, individuals, corporations, labor unions, and PACs are limited from undertaking coordinating activities in any meaningful way. *Buckley* and the 1976 amendments to the Federal Election Campaign Act of 1971 made clear that coordinated expenditures could be regulated as contributions. *See supra* note 48 and accompanying text. In FEC v. Colo. Republican Fed. Campaign Comm. (*Colorado II*), 533 U.S. 431, 447, 451-53, 456 (2001), the Court upheld regulation of coordinated expenditures, noting that political parties and candidates invariably work together, and describing coordinated expenditures as the "functional equivalent" of contributions. Despite the difficulty in tying party expenditures to corruption, the Court held that such expenditures may be limited "to minimize circumvention of contribution limits" and that the necessity to prevent disguised contributions was "a valid theory of corruption." *Id.* at 465. In an earlier case, *Colorado I*, the Court struck down restrictions on independent expenditures by political parties. *See infra* note 72 and accompanying text.

70. Over the three election cycles between 1994 and 1998, direct Republican and Democratic Party donations to candidates totaled $14.7 million, while both parties' combined coordinated expenditures amounted to $129.4 million. *See* Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 626 (2000).

71. Coordination between state and national party committees allowed the state party committees to benefit from the national party committee's fund raising apparatus. *See id.*

Despite the fact that, as a result of the Court's decision in *Colorado I*, political parties could spend an unlimited amount on independent expenditures, such expenditures were not utilized to a great extent because the parties relied on a more effective tool: issue advocacy funded by "soft money."[72] Express advocacy activities had to be funded with "hard money" contributions, those raised within the confines of the statutory contribution limitations. As a result of the 1979 amendments to the Federal Election Campaign Act and favorable FEC decisions, state and national parties were able to raise funds outside the strictures of the statute to fund administrative costs allocable to non-federal activities despite the fact that such activities also tend to benefit candidates for federal office who appear on the same ballot and candidates for state or local office.[73]

Moreover, as a result of *Buckley's* holding that only express advocacy expenditures could be regulated, "soft money" could fund issue advocacy.[74] The FEC's approval of a "soft money" advertisement by the Republican National Committee that discussed issues but also criticized President Clinton by name, fueled the practice of issue advertising and caused both major parties to undertake multi-million dollar issue advertising campaigns during the 1996 election cycle.[75] A rapidly growing economy in the 1990s created an ample supply of well-heeled individuals and corporations that, unable to make hard money contributions, were eager to contribute "soft money" that the political parties accepted with alacrity.[76]

2. The Rise of Section 527 Groups and the Temporary Resurgence of Hard Money

The extensive use of "soft money" and some questionable practices during the 2000 presidential election prompted Senators John McCain of Arizona and Russell Feingold of Wisconsin to champion the Mc-

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72. The Colorado Republican Party ran radio ads in opposition to its likely opponent in an upcoming race for the U.S. Senate at a time in which the maximum amount allowed by law had already been expended by the party. The Court determined that the expenditures in question were independent and not subject to spending restrictions. *See* Colo. Republican Fed. Campaign Comm. v. FEC (*Colorado I*), 518 U.S. 604, 614–15, 618, 622–23 (1996). A later case, *Colorado II*, upheld restrictions on coordinated expenditures by political parties. *See supra* note 69; *see also* Briffault, *supra* note 70, at 627–28.

73. Briffault, *supra* note 70, at 629 (citing to FEC Advisory Opinion 1978-10 (1978) and FEC Advisory Opinion 1979-17 (1979)).

74. *See supra* notes 61–64 and accompanying text.

75. Briffault, *supra* note 70, at 632 (citing to FEC Advisory Opinion 1995-25 (1995)).

76. *Id.* at 631.

Cain-Feingold Act.[77] Title I of the legislation took direct aim at "soft money" by prohibiting national committees of political parties from soliciting, receiving, directing another to contribute funds or anything of value, or spending any funds that were not subject to the hard money statutory restrictions and reporting requirements.[78] State, district, and local party committees are similarly restricted with respect to amounts that such committees expend for federal election activities.[79]

Title II of the statute restricted coordinated expenditures by prohibiting political parties from engaging in electioneering communications, a term defined as any:

> [B]roadcast, cable, or satellite communication which[:] (I) refers to a clearly identified candidate for Federal office; (II) is made within[:] (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.[80]

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77. Bipartisan Campaign Finance Reform (McCain-Feingold Act) Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified at 2 U.S.C. § 441i (2002)). *See, e.g.*, Leslie Wayne, *Gore's Calls to Big Donors Number 86, Papers Show*, N.Y. TIMES, Aug. 27, 1997, at A26 (reporting that Vice President Gore made fundraising calls from the White House); Don Van Natta, Jr. & Jill Abramson, *In Justice Inquiry, Clinton Denies Seeking Financial Help for Friend*, N.Y. TIMES, July 25, 2000, at A1 (reporting on the allegations that a large campaign contribution was pledged to President Clinton by an Indonesian businessman).

78. McCain-Feingold Act § 101(a), 116 Stat. at 82 (codified at 2 U.S.C. § 441i). Title I of the Act also increased the limitation on contributions to state political committees to $10,000 and required enhanced disclosures from political committees. *Id.* §§ 102–103, 116 Stat. at 86–88 (codified at 2 U.S.C. §§ 441i(a)(1), 434). The Republican National Committee challenged the restrictions on soft money donations to political parties, but the district court upheld the ban in a decision that was affirmed without opinion by the Supreme Court. *See* Republican Nat'l Comm. v. FEC, 698 F. Supp. 2d 150 (D.D.C. 2010), *aff'd*, 130 S. Ct. 3543 (2010).

79. McCain-Feingold Act § 101(a), 116 Stat. at 82 (codified at 2 U.S.C. § 441i). State and local committees of a political party were permitted to receive "Levin Funds," which are donations up to $10,000 per year per donor that the committee may use for certain purposes such as voter registration drives, voter identification initiatives, and get-out-the-vote efforts. *Id.* § 101(a), 116 Stat. at 82 (codified at 2 U.S.C. § 441i(b)(2)).

80. *Id.* § 201, 116 Stat. at 89 (codified at 2 U.S.C. § 434). A communication is targeted at the relevant electorate if it can be received by 50,000 or more persons in the congressional district or state of a candidate for the House of Representatives or Senate, respectively. *Id.* § 201, 116 Stat. at 90 (codified at 2 U.S.C. § 434). If a communication is an "electioneering communications," then it subjects any person who disbursed funds in excess of $10,000 during any calendar year to detailed reporting requirements. *Id.* § 201, 116 Stat. at 88–89 (codified at 2 U.S.C. § 434). News stories, commentaries, editorials distributed through the facilities of a broadcast station not owned or controlled by a political party, candidate, or political committee, candidate debates or forums, or communication promoting such events are not considered "electioneering communications." *Id.* § 201, 116 Stat. at 89 (codified at 2 U.S.C. § 434).

Using the "magic words" is not required in order for a communication to fit within this definition, and, in the event that the statutory definition is held unconstitutional, the statute provides that the term includes only express advocacy communications that are "suggestive of no plausible meaning other than exhortation to vote for or against a specific candidate."[81] Corporations and labor unions were prohibited from making electioneering communications.[82]

Title III of the McCain-Feingold Act increased the contribution limitation for contributions to candidates from $1000 to $2000 and increased the limitation for contributions to national party committees from $20,000 to $25,000.[83] Congressional concern that the ban on soft money would accentuate the inherent advantage enjoyed by wealthy

81. McCain-Feingold Act § 201, 116 Stat. at 89.

82. *Id.* § 203, 116 Stat. at 91 (codified at 2 U.S.C. § 441b(b)(2)). Certain non-profit corporations and I.R.C. § 527 organizations are excluded from the prohibition under the so-called Snowe-Jeffords amendment, provided that the communication in question is paid for exclusively by funds provided directly by individuals who are citizens, nationals, or permanent residents of the United States. *Id.* § 203, 116 Stat. at 91 (codified at 2 U.S.C. § 441b(c)(2)). With respect to civic associations that receive corporate or union funding, the exemption only applies if the communication is paid for out of a segregated account to which only the above described individuals can contribute. *Id.* § 203, 116 Stat. at 91–92 (codified at 2 U.S.C. § 441b(c)(3)(B)). The Snowe-Jeffords amendment codified, to an extent, the extension of the "MCFL" corporation exception to "electioneering communications." In FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986), the ban on corporate political expenditures for express advocacy, as applied to a small, non-profit corporation, was challenged. Although the corporation could have established a PAC to make the expenditures in question, the Court believed that the administrative burdens of operating a PAC would be impractical for many small organizations. *Id.* at 254–55. The Court held that the prohibition on corporate expenditures, as applied to this corporation, was unconstitutional. The FEC subsequently amended its regulations to provide an exception for so-called "MCFL" corporations—corporations that were formed to promote political ideas, have no shareholders or other persons with a claim to corporate assets or earnings, and were not established by, nor accepted contributions from, labor unions or business corporations. *See* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292 (July 6, 1995) (codified at 11 C.F.R. pts. 100, 106, 109, 114). The provision in question was codified at 11 C.F.R. § 114.10(c).

83. McCain-Feingold Act, Pub. L. No. 107-155, § 307, 116 Stat. 81, 102 (codified at 2 U.S.C. § 441a(a)(1)). The Act set the aggregate contribution limitation at $37,500 for contributions to candidates and their authorized committees and at $57,500 for all other contributions, provided no more than $37,500 in contributions were made to political committees other than national party committees. *Id.* § 307, 116 Stat. at 102-03 (codified at 2 U.S.C. § 441a(a)(3)). These contribution limitations are indexed for inflation. *Id.* § 307, 116 Stat. at 103 (codified at 2 U.S.C. § 441a(c)). The individual contribution limits for 2013–14 are $2600 and $32,400 for contributions to candidates and national party committees, respectively. The aggregate limitations for the same period are $48,600 for contributions to candidates and $74,600 for contributions to political parties and PACs for an overall biennial limitation of $123,200. *See The FEC and Federal Campaign Finance Law*, FED. ELECTION COMM'N (Feb. 2004, last updated Jan. 2013), http://www.fec.gov/pages/brochures/fecfeca.shtml#Contribution_Limits. Recently, a federal district court upheld the constitutionality of the aggregate contribution limitations. *See* McCutcheon v. FEC, 893 F. Supp. 2d 133 (D.D.C. 2012). The Supreme Court has noted probable jurisdiction. *See* McCutcheon v. FEC, 133 S. Ct. 1242 (2013).

candidates led to the inclusion of a very controversial provision in Title III: the so-called millionaires' amendment. *Buckley* precluded restrictions on a candidate's use of personal or family funds in financing her campaign.[84] To mitigate the advantages provided by personal wealth, the millionaires' amendment, a complex provision supported by detailed disclosure rules, increased the contribution limits for donations to a candidate based on the level of self-funding by the candidate's opponent.[85] The Court invalidated this provision in 2008 because it imposed an "unprecedented penalty on any candidate who robustly exercises that First Amendment right."[86]

Less than two years after its passage, the McCain-Feingold Act was before the Supreme Court in *McConnell v. FEC*.[87] A bitterly divided Court upheld the Act virtually in its entirety, including the Act's restrictions on "soft money."[88] The Court upheld the corporate and union ban on electioneering communications, finding that the statutory definition of such communications was "both easily understood and objectively determinable."[89] Moreover, the Court rejected the notion that the use of *Buckley*'s "magic words" was a constitutional requirement in order for communication restrictions to pass First Amendment scrutiny and, in fact, expanded the definition of express advocacy when it concluded that "issue ads broadcast during the [thirty] and [sixty] day periods preceding federal primary and general elections are the functional equivalent of express advocacy."[90]

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84. *See supra* note 59 and accompanying text.

85. *See generally* McCain-Feingold Act, Pub. L. No. 107-155, § 304, 116 Stat. 81, 97 (codified at 2 U.S.C. § 441a(i)).

86. Davis v. FEC, 554 U.S. 724, 738–39 (2008). According to the Court, the "millionaires' amendment" ran counter to the anticorruption rationale approved in *Buckley* because its remedy for excessive campaign money was the very form of financing that has the potential for quid pro quo corruption—more direct campaign contributions to the opposing candidate. *Id.* at 743. The constitutionality of the "millionaires' amendment" was not decided in *McConnell*. *See* McConnell v. FEC, 540 U.S. 93 (2003). Senator Mitch McConnell, the lead plaintiff, did not challenge this provision. It was challenged by a group of other plaintiffs, but the Court dismissed their challenge for lack of standing. *See id.* at 94.

87. Titles IV and V of the Act provided for the direct appeal, on an expedited basis, to the Supreme Court of any district court decision concerning declarative or injunctive relief from the Act on constitutional grounds, gave standing to members of Congress, and mandated that reports be made accessible on the internet. McCain-Feingold Act §§ 403, 501–502, 116 Stat. at 113–15 (codified at 2 U.S.C. §§ 437h, 434(a)(11)(B), 438a).

88. Justices Stevens, O'Connor, Souter, Ginsberg, and Breyer formed the majority. Chief Justice Rehnquist, and Justices Scalia, Thomas, and Kennedy all dissented from significant portions of the majority opinion. *See McConnell*, 540 U.S. at 93.

89. *Id.* at 194. The Court did interpret the statute to retain the "MCFL" corporation exception despite statutory language, which on its face appeared to negate the "MCFL" corporation exception for television, radio, cable, and satellite television communications. *Id.* at 211. See *supra* note 82 for a discussion of the "MCFL" corporation exception.

90. *McConnell*, 540 U.S. at 206.

Justice Scalia issued a scathing dissent that foretold the future judicial hostility toward *McConnell*:

> This is a sad day for freedom of speech. Who could have imagined that the same Court which, within the past four years, has sternly disapproved of restrictions upon such inconsequential forms of expression as virtual child pornography, tobacco advertising, dissemination of illegally intercepted communications, and sexually explicit cable programming, would smile with favor upon a law that cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government.[91]

In *FEC v. Wisconsin Right to Life, Inc.*, the Court reexamined the ban on corporate electioneering communications and cited *New York Times v. Sullivan*'s admonition that the "debate on public issues should be uninhibited, robust, and wide open."[92] According to the Court, an ad is the functional equivalent of express advocacy only if such "ad is susceptible [to] no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[93] The Court placed significant emphasis on the fact that the ad in question did not mention an election, candidate, party, or challenger.[94]

The McCain-Feingold Act's prohibition on the use of "soft money" by political parties resulted in the increased prominence of section 527 organizations. These organizations include parties, committees, associations, funds, or other incorporated or unincorporated organizations that are organized and operated for the purpose of accepting contributions and making expenditures to influence, or attempt to influence, the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a

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91. *Id.* at 248 (Scalia, J., dissenting) (citations omitted).

92. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 467–68 (2007) (citing New York Times v. Sullivan, 376 U.S. 254, 270 (1964)). Wisconsin Right to Life, Inc., a non-profit advocacy corporation, desired to run advertisements within thirty days of the 2004 Wisconsin primary that would mention Senator Feingold by name. The ads criticized the filibusters by Senate Democrats of certain judicial nominees of President Bush. The ads would contain none of the so-called "magic words" of express advocacy. The corporation sought declarative and injunctive relief but such relief was denied because, according to the district court, *McConnell* precluded an "as applied" challenge to the statute. Wis. Right to Life, Inc. v. FEC, No. 04-1260, 2004 U.S. Dist. LEXIS 29036, at *6 (D.D.C. 2004). The Supreme Court unanimously reversed and remanded the case to the district court, which then sustained the challenge. *See* Wis. Right to Life, Inc. v. FEC, 546 U.S. 410 (2006) (per curiam); Wis. Right to Life, Inc. v. FEC, 466 F. Supp. 2d 195 (D.D.C. 2006).

93. Wis. Right to Life, Inc., 551 U.S. at 470.

94. *Id.* Regulations were issued in the aftermath of this decision that freed corporations and labor unions that make electioneering communications from reporting the identities of their donors unless such donations were made for furthering such communications. As a result, non-earmarked contributions to such organizations were not required to be disclosed. See 11 C.F.R. § 104.20(c)(9) (2011). *See also* Electioneering Communications, 72 Fed. Reg. 72911 (explaining the justification for the FEC's position).

political organization, or the election of Presidential or Vice-Presidential electors.[95]

Section 527 governs the taxation of political organizations, and, due to its expansive view of activities permissible by such organizations, not all of these organizations are subject to the campaign finance laws.[96] Many activities of these organizations do not amount to express advocacy and, accordingly, are outside the scope of the campaign finance rules.[97] After *Buckley*, only political organizations that engage in express advocacy or that coordinate their activities with a candidate, candidate's committee, or political party are subject to regulation by the FEC.[98] However, all section 527 organizations are subject to disclosure requirements similar to those required under the campaign finance rules, that are administered by the IRS.[99]

The McCain-Feingold Act's "soft money" ban increased the relative importance of unregulated issue advocacy by 527 organizations.[100] Democrats took to section 527 organizations more quickly than Republicans, but by the time of the 2004 presidential campaign season, Republicans had eagerly embraced these organizations.[101] Approximately $233 million was raised by section 527 organizations for federal election activities in 2004, most of which was related to the presidential election.[102] However, by 2008, both political parties

95. I.R.C. § 527(e)(2) (CCH 2013).

96. In general, political organizations are subject to tax on their taxable income at corporate income tax rates. I.R.C. § 527(b) (CCH 2013). However, excluded from taxable income is "exempt function income," which includes contributions, membership dues and fees, fundraising proceeds, and certain other sources of income. I.R.C. § 527(c)(3) (CCH 2013). Costs incurred to aid a person in exploring whether to run for office, costs related to issue advocacy, and costs incurred between elections and prior to the existence of a named candidate are examples of exempt function expenditures that would not be governed under the campaign finance rules. *See generally* Miriam Galston, *Emerging Constitutional Paradigms and Justifications for Campaign Finance Regulation: The Case of 527 Groups,* 95 GEO. L.J. 1181, 1190–93 (2007).

97. The tax law "encompasses activities that, directly or indirectly, relate to and support *any aspect* of the *process* of influencing or attempting to influence" the electoral process. *Id.* at 1192 (emphasis in original).

98. *See supra* notes 61–64 and accompanying text. The McCain-Feingold Act subjected political organizations that engage in "electioneering communications" to FEC regulation. *See supra* notes 80–82 and accompanying text.

99. I.R.C. § 527(j) (CCH 2013).

100. In contrast to political parties, these organizations were funded primarily by large contributions from individuals. *See* Meredith A. Johnston, Note, *Stopping "Winks and Nods": Limits on Coordination as a Means of Regulating 527 Organizations*, 81 N.Y.U. L. REV. 1166, 1180–81 (2006).

101. *Id.* at 1182–83.

102. *Id.* Two commentators estimated that spending by section 527 organizations during the 2004 presidential election was in excess of $440 million. *See* Ellen L. Weintraub & Jason K. Levine, *Campaign Finance and the 2008 Elections: How Small Change(s) Can Really Add Up*, 24 ST. JOHN'S J. LEGAL COMMENT. 461, 467 (2009) (citing to figures provided by OpenSecrets.org).

placed increased emphasis on "hard money" fundraising, in part due to the McCain-Feingold Act's increased contribution limitations that were exploited effectively through the use of bundlers and, in part, due to the FEC's aggressive use of case by case challenges to the practices of several section 527 groups.[103] Howard Dean's success in utilizing the internet as a tool for raising small donations resulted in the growth of internet-based "hard money" fundraising.[104]

Thus, for over thirty years *Buckley* defined the scope of permissible campaign finance regulation. The distinctions between contributions and expenditures, on the one hand, and express advocacy and other forms of communication, on the other hand, were critical to the government's regulatory efforts. However, campaign practices were about to undergo a sea of change as a result of the Court's landmark decision in *Citizens United*, a change that ushered in the era of Super PACs and politically active social welfare organizations.

3. *Citizens United*, Super PACs, and Section 501(c)(4) Organizations

Citizens United, a nonprofit corporation, released a documentary film that mentioned then-Senator Hillary Clinton, a candidate in the Democratic Party's presidential primary elections, by name and that was extremely critical of her.[105] The film was released in theaters, on DVD, and a cable operator offered to make the film available to its subscribers free of charge on its video on demand service.[106] Citizens United received a small portion of its funding from for-profit corporations.[107]

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103. *Id.* at 467–68 (noting that, after the 2004 elections, the FEC imposed over $3 million in fines against a number of section 527 organizations). Bundlers are individuals who are identified with the campaign that collect individual donations. During the 2008 presidential campaign, Senator Obama raised $750 million from 605 bundlers, and Senator McCain raised $375.5 million from 851 bundlers. *See* Laura MacCleery, *Goodbye Soft Money, Hello Grassroots: How Campaign Finance Reform Restructured Campaigns and the Political World,* 58 CATH. U. L. REV. 965, 1003–04 (2009) (citing to the results of an investigation by Public Citizen).

104. *See id.* at 970, 994–99. *See also* Daniel W. Butrymowicz, Note, *Loophole.com: How the FEC's Failure to Fully Regulate the Internet Undermines Campaign Finance Law,* 109 COLUM. L. REV. 1708, 1708 n.3 (2009). The Republican Party has experienced internal divisions over the revamping of its digital platforms for targeting voters and donors. *See* Neil King, Jr., *GOP Taps Tech Allies To Narrow Digital Gap*, WALL ST. J. (Mar. 18, 2013, 7:46 PM).

105. Citizens United v. FEC, 558 U.S. 310, 319–20 (2010). The film, HILLARY: THE MOVIE (Citizens United 2008), may have a second run. In anticipation of a presidential run in 2016 by Hillary Clinton, Citizens United showed the movie at the annual gathering of the Conservative Political Action Committee in March 2013. *See* Jim Rutenberg, *A Clinton in 'Transition' Keeps Opponents and Donors Frozen*, N.Y. TIMES (Mar. 30, 2013).

106. *Citizens United*, 558 U.S at 319–20. Citizens United also prepared three ads that it intended to run on broadcast and cable television to promote the film. *Id.*

107. *Id.*

Citizens United sought declaratory and injunctive relief against the FEC because it was concerned that the film's availability by video on demand within thirty days of the 2008 primary elections would cause the organization to run afoul of the McCain-Feingold Act's ban on corporate electioneering communications. It asserted that the ban on electioneering communication was unconstitutional as applied to the film and that the disclaimer and disclosure requirements of the McCain-Feingold Act were unconstitutional as applied to the film and its related advertisements.[108]

The Court, in a 5-4 decision, rejected all four "as applied" claims made by Citizens United.[109] Citizens United claimed that the ban on electioneering communication was inapplicable to the film because the film did not qualify as an electioneering communication under the statute because video-on-demand transmissions, delivered only to a requesting cable converter box, could be viewed by only one household, thereby falling far short of the statutorily required 50,000 person potential audience.[110] The Court rejected this argument, noting that FEC regulations clearly provided that the number of people who can receive a cable transmission is to be determined by the number of cable subscribers in the relevant area, in this case 34.5 million.[111]

Citizens United also asserted that the ban on electioneering communication could not be applied to the film because the film was not the functional equivalent of express advocacy.[112] In *Wisconsin Right to Life*, the Court held that the functional equivalent of express advo-

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108. *Id.* at 321. See *supra* notes 80–82 and accompanying text for a detailed discussion of the statutory provision in question. The Court upheld the disclaimer and disclosure provisions of the legislation. *Citizens United*, 558 U.S. at 366–72.

109. Justice Kennedy wrote the majority opinion. Chief Justice Roberts, joined by Justice Alito, concurred and wrote separately to discuss the issue of stare decisis. *Id.* at 372 (Roberts, C.J., concurring). Justice Scalia, joined by Justice Alito and by Justice Thomas in part, concurred and wrote separately to address corporate First Amendment rights. *See id.* at 385 (Scalia, J., concurring). Justice Thomas wrote a separate opinion concurring in all of the majority opinion except the part of the opinion that upheld the legislation's disclaimer and disclosure requirements. Justice Thomas believed that those requirements are also unconstitutional. *See id.* at 480 (Thomas, J., concurring in part, dissenting in part). Justice Stevens, joined by Justices Breyer, Ginsburg, and Sotomayor, dissented to all of the majority opinion except the portion of the opinion that upheld the statute's disclaimer and disclosure requirements. *See id.* at 393 (Stevens, J. dissenting in part, concurring in part).

110. In the alternative, the corporation argued that the 50,000-person requirement should be measured by the plausible number of registered voters likely to view the transmission. *Citizens United*, 558 U.S. at 323–24. The Court rejected this argument on the grounds that such a statutory interpretation would not cure the constitutional defect because it would subject the speaker to sanctions as a result of inaccurate estimates and also cause such speaker to incur burdensome expenses in challenging such estimates. *Id.* at 324.

111. *Id.* at 323.

112. *Id.* at 324.

cacy was a communication that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[113] The Court found that the film was susceptible to no reasonable interpretation other than as an appeal to vote against Senator Clinton.[114] Citizens United further contended that the corporate ban on electioneering communications should be held invalid as applied to films distributed by video-on-demand services because video on demand requires the viewer to take a series of affirmative steps in order to view a program. The Court, refusing to be drawn into technological or media-based line drawing, rejected this argument.[115]

Finally, Citizens United sought to have the Court create an exception to the electioneering communication ban that would be applicable to non-profit corporate political speech that is funded overwhelmingly by donations from individuals. The Court, prior to the enactment of the McCain-Feingold Act, had created an exception for corporate advocacy that applied to non-profit corporations that neither engaged in business activities nor accepted contributions from for-profit corporations or labor unions: the so-called MCFL exception.[116] In *McConnell,* the Court interpreted the McCain-Feingold Act to retain the MCFL exception for electioneering communications.[117] However, the Court held that Citizens United did not qualify for the exception because this exception prohibited any for-profit corporate funding and Citizens United did receive a modest amount of such funding.[118]

The Court then turned its attention to the facial validity of the provision.[119] The Court termed the provision an "outright ban" on corporate political speech buttressed by criminal sanctions.[120] The Court emphasized the prominence of political speech in First Amendment jurisprudence stating that "[t]he First Amendment 'has its fullest and

113. *Id.* at 324–25 (citing FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469–70 (2007)).

114. *Citizens United,* 558 U.S. at 326.

115. *Id.* at 326–27.

116. *See supra* note 82.

117. *See* McConnell v. FEC, 540 U.S. 93, 211 (2003).

118. *Citizens United,* 558 U.S. at 327. The Court refused to create a de minimis exception to the "MCFL" exception. *Id.* at 328–29.

119. Citizens United stipulated to dismissing part of its complaint that challenged the facial validity of the statute. The Court proceeded with a lengthy discussion that explained why the waiver of a facial challenge did not preclude the Court from addressing the facial validity of the statute. *See id.* at 329–36.

120. *Id.* at 337. The fact that a corporate sponsored PAC could speak to political issues did not soften the Court's position because PACs are burdened by administrative responsibilities and extensive regulatory mandates, which, according to the Court, might explain why there are fewer than 2000 corporate PACs. *Id.* at 337–38.

most urgent application to speech uttered during a campaign for political office.'"[121] Accordingly, "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires the [g]overnment to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[122] In perhaps the most controversial portion of the opinion, the Court rejected the notion that corporations could be targeted by speech restrictions. The Court opined that restrictions aimed at particular speakers are suspect because, in addition to their effects on the speaker, they also "deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration."[123]

The government asserted three compelling interests in support of the provision, all of which the Court rejected.[124] First, the government asserted the provision was necessary for the prevention of "the corrosive and distorting effects of immense aggregations of wealth that are accumulated 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."[125] The Court unambiguously rejected this interest as adequate to support corporate speech restrictions.[126] The second compelling interest the government asserted in support of the provision was the prevention of corruption or the appearance of such. The Court forcefully reaffirmed *Buckley*'s holding that this interest was limited to the prevention of quid pro quo corruption and stressed that the distinction drawn in *Buckley* between restrictions on political contributions and restrictions on political expenditures was predicated on this limited view of corruption.[127] In 2012, the Court reaffirmed this position in its short, and rather testy, opinion in *American Tradition Partnership, Inc. v. Bullock*.[128] Lastly, the Court rejected the gov-

121. *Citizens United*, 558 U.S. at 339 (quoting Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989)).

122. *Id.* at 340 (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)).

123. *Id.* at 341. Justice Stevens' lengthy dissent disputed, largely on historical grounds, that corporations are entitled to First Amendment protections similar to those enjoyed by natural persons. *Id.* at 424–32 (Stevens, J., dissenting in part, concurring in part). Justice Scalia had a much different view of the historical record. *Id.* at 385–93 (Scalia, J., concurring).

124. The government also asserted a fourth compelling interest: the prevention of foreign influence in the nation's political process. The Court did not reach this issue because, even if this interest was found to be compelling, the provision in question would be defective nonetheless due to its overbreadth in reaching U.S. corporations. *See Citizens United*, 558 U.S. at 362.

125. *Id.* at 348 (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990)).

126. *Id.* at 353–56.

127. *Id.* at 356–61.

128. *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490 (2012). In this case, the Court overturned a holding of the Montana Supreme Court, which upheld corporate expenditure restrictions, in part due to what the Court perceived as the state's unique history of corporate

ernment's third asserted compelling interest: protecting dissenting shareholders from being compelled to fund corporate political speech.[129] As a result, the Court invalidated the restrictions on corporate electioneering communication imposed by the McCain-Feingold Act and overruled that portion of *McConnell* that upheld this provision.[130]

Criticism of *Citizens United* generally has been directed at the Court's treatment of corporations for First Amendment purposes.[131] However, there are two reasons to believe that the handwringing by critics of the Court may be overdone. First, the constitutionality of restrictions on corporate electoral participation was not as clear as critics of *Citizens United* believed. Two years after *Buckley,* the Court, in *First National Bank of Boston v. Bellotti*, held that a Massachusetts prohibition on contributions and expenditures by certain corporations for the purposes of influencing or affecting the vote on questions submitted to voters was unconstitutional.[132] Despite the federal prohibition on corporate contributions dating back to the Till-

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participation in electoral corruption. *See* W. Tradition P'ship, Inc. v. Attorney Gen., 271 P.3d 1, 33 *rev'd sub nom.* Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490 (2012)

129. *Citizens United*, 558 U.S. at 361–62. The Court found the statute to be both under and over-inclusive in meeting this objective. It is under-inclusive because it only restricts certain forms of political speech and only for a very limited time prior to a primary or general election. It is over-inclusive because the restrictions apply to all corporations, including those owned by single shareholders. The Court also believed that any such abuse could be corrected through traditional corporate governance procedures. *Id.* at 362.

130. *Id.* at 365. The disclaimer and disclosure rules were upheld as applied to the film and the ads promoting the film. *Id.* at 366–72.

131. The Court's decision prompted President Obama to pointedly express his displeasure with the Court during his 2010 State of Union address. This portion of President Obama's 2010 State of the Union address can be viewed at http://www.cbsnews.com/video/watch/?id=6148956n. The President was not alone in his displeasure. *See Repealing the First Amendment*, WALL ST. J. (Feb. 24, 2010, 12:01 AM) (editorializing about a bill to be proposed by Senator Charles Schumer of New York and Representative Chris Van Hollen of Maryland that would restrict corporations with more than twenty percent foreign shareholders, recipients of TARP funds, and government contractors from engaging in campaign activity). The bill was introduced in the Senate on April 30, 2010. *See* DISCLOSE Act, S. 3295, 111th Cong. (2010). Movement on the bill stalled in the Senate where Democratic supporters of the bill failed to obtain a filibuster-proof majority for the bill. *See* Greg Hitt & Brody Mullins, *Campaign-Finance Legislation Dead for Now*, WALL ST. J. (July 28, 2010, 12:01 AM). A similar bill introduced in the Senate in 2012 by Senator Whitehouse of Rhode Island met a similar fate. *See* Disclose Act of 2012, S. 3369, 112th Cong. (2012). Proponents of greater disclosure appear undaunted. On January 3, 2013, Rep. Van Hollen introduced another bill in the House that is presently in committee. *See* Disclose Act of 2013, H.R. 148, 113th Cong. (2013). Senators Wyden and Murkowski co-sponsored a bill that was introduced in the Senate on April 23, 2013. The bill contains features similar to the Disclose Act, but it would also require real time reporting of campaign and independent group activity and increase the reporting threshold for donations from $200 to $1000. *See* Follow the Money Act of 2013, S. 791, 113th Cong. (2013).

132. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978).

man Act of 1907, the Court focused on the quid pro quo anti-corruption rationale set forth in *Buckley* and dismissed rationales based on shareholder rights and corrupting aggregations of wealth made possible by the corporate form.[133]

Several years later, however, the Court, in *FEC v. National Right to Work Committee*, noted that restrictions on corporations and labor unions might be justified to combat the large financial "war chests" that these entities may amass.[134] Less than a decade later in *Austin v. Michigan Chamber of Commerce*, the Court upheld the application of a Michigan law that prohibited the expenditure of corporate funds to support or oppose any candidate for election to state office to a non-profit corporation.[135] The Court relied on *Buckley*'s anti-corruption rationale to justify the restriction and denied that the statute was intended to equalize political voices, a rationale expressly deemed constitutionally inadequate in *Buckley* and later reaffirmed in *Davis*.[136] In *FEC v. Beaumont*,[137] the Court had occasion to visit the issue of whether the ban on direct corporate contributions was unconstitutional as applied to a non-profit advocacy corporation. Despite existing precedent—the MCFL exception—that provided special treatment for advocacy corporations with respect to expenditures, the Court upheld the restrictions pursuant to *Buckley*'s contribution-expenditure dichotomy.[138]

In 2007, by which time the composition of the Court had changed with the retirements of Chief Justice Rehnquist and Justice O'Connor and the additions of Chief Justice Roberts and Justice Alito, the Court, in *FEC v. Wisconsin Right to Life, Inc.*,[139] firmly rejected the position that corporate restrictions could be supported as a means of rooting out the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form."[140] The Court, in *Citizens United*, believed that corporations are entitled to the First Amendment protections enjoyed by other persons and that *Austin* was aberrational: "Thus the law stood until *Austin*. *Austin* 'uph[eld] a direct restriction on the independent expenditure of funds for political speech for the first time in [this

133. *Id.* at 789.

134. FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 207–08 (1982).

135. 494 U.S. 652 (1990).

136. *Id.* at 660. *See also supra* note 86 and accompanying text.

137. FEC v. Beaumont, 539 U.S. 146 (2003).

138. *Id.* at 158–63.

139. 551 U.S. 449 (2007).

140. *Id.* at 479–80 (citing Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990)).

Court's] history.'"[141] The Court expressly overruled *Austin* in *Citizens United*.[142]

Second, the belief that *Citizens United* will result in inordinate corporate electoral influence fails to consider the heterogeneity of corporate interests. Corporations do not share monolithic interests in matters of free trade, intellectual property protection, tax policy, energy policy, and the like. Arguably, corporate political speech, rather than overwhelm competing voices, will lead to more vigorous debate. Keep in mind that *Citizens United* also freed the prototypical corporate antagonist—labor unions—from political speech restrictions.[143] Moreover, the fear of corporate participation in electoral politics may be exaggerated. Corporations tend to keep a low public profile on contentious political matters. *Citizens United* may prompt additional corporate spending on issue advocacy, but it is unlikely to lead to unfettered spending in direct support or opposition of a candidate due to the risk of backing the wrong horse and the concomitant lack of access that it may cause. In addition, corporations are constrained by the potential reaction of customers, employees, shareholders, public interest groups, and non-governmental organizations to open advocacy.[144] Corporations routinely engage political actors, and, for the most part, that engagement, through lobbyists, is stealthy.[145] Perhaps more

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141. Citizens United v. FEC, 558 U.S. 310, 347 (2010) (quoting *Austin*, 494 U.S. at 695 (Kennedy, J., dissenting)).

142. *Id.* at 365.

143. Apparently, some corporations are not overly concerned about employee reactions to corporate politicking. *See* Steven Greenhouse, *Here's a Memo From the Boss: Vote This WAY*, N.Y. TIMES (Oct. 27, 2012) (reporting that several corporations have provided employees with information packets that suggest, and occasionally recommend, how employees should vote). *Citizens United* may benefit labor unions more than corporations because of the weaker internal and external restraints imposed on labor unions. *See* Steven J. Law, *Organized Labor and Citizens United*, WALL ST. J. (Mar. 10, 2010, 7:30 PM). *See also* Melanie Trottman, *Labor Widens Its Vote Push*, WALL ST. J. (Oct. 8, 2012, 7:44 PM) (reporting on organized labor efforts to target nonmembers with its political messages).

144. Public interest groups and non-governmental organizations have played an increasingly prominent role in corporate governance matters. *See, e.g.*, Amiram Gill, *Corporate Governance as Social Responsibility: A Research Agenda*, 26 BERKELEY J. INT'L L. 452 (2008). *See also* William McGurn, Op-ed, *The Chick-fil-A War is Back On*, WALL ST. J., Sept. 25, 2012, at A17 (opining on the controversy that surrounded Chick-fil-A CEO's statements against same-sex marriage); Brody Mullins & Ann Zimmerman, *Target Discovers Downside to Political Contributions*, WALL ST. J., Aug. 7, 2010, at A2 (reporting on nationwide demonstrations by gay rights activists outside Target stores prompted by Target's support for a gubernatorial candidate that opposed same-sex marriages).

145. Lobbying and the placement of persons sympathetic to corporate points of view in prominent regulatory positions allow such points of view to be made known to decision makers out of public view. Regulators may not be in a position to fully comprehend the myriad of issues attendant to complex corporate matters. Corporate input may actually mitigate the potential for policy mistakes due to informational asymmetries. Lobbying activities and lobbyists are subject

transparent corporate participation in the electoral process is not a bad thing.

Despite the criticism heaped upon the Court for this portion of its holding, perhaps the most far-reaching effect of *Citizens United* was its refusal to sanction statutory restrictions on independent express advocacy expenditures, corporate or otherwise.[146] Thus, the ability to regulate expenditures was no longer dependent, as it had been since *Buckley* and reinforced by *Wisconsin Right to Life*, on whether expenditures funded either express advocacy or, alternatively, were coordinated. Instead, regulatory power is now dependent upon whether or not the expenditures in question are independent.

It did not take long for the effects of this holding to alter campaign practices. On March 26, 2010, the Court of Appeals for the D.C. Circuit held that *Citizens United* compelled it to strike down the contribution limitations imposed on donors to an unincorporated section 527 organization that fell under the definition of a political committee.[147] The court reasoned that the constitutional protection afforded by *Citizens United* to independent political expenditures, including express advocacy expenditures, should naturally extend to contributions to organizations that make such expenditures. "In light of the Court's holding as a matter of law that independent expenditures do not corrupt or create the appearance of quid pro quo corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption."[148]

Citizens United gave the green light to political committees to expend unlimited amounts to expressly advocate for a candidate, and *SpeechNow* provided the means to fund such expenditures. As a result, the Super PAC entered the political lexicon. Super PAC is the colloquial term for a political committee that may receive and spend unlimited amounts for independent expenditures. [149] However, as a

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to widespread regulation. A discussion of such regulations is beyond the scope of this work. *See generally* Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J.L. & PUB. POL'Y 1 (2006).

146. Citizens United v. FEC, 558 U.S. 310, 365 n.22 (2010).

147. *See* SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010).

148. *Id.* at 694.

149. An "independent expenditure" is an:

> [E]xpenditure by a person—(A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

2 U.S.C. § 431(17) (2006). The regulations define "expressly advocating" as:

> [A]ny communication that—(a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Re-

political committee, a Super PAC is subject to the reporting, disclosure, and recordkeeping requirements of federal campaign law.[150] Moreover, although issue advocacy section 527 organizations are not considered political committees for purposes of the campaign finance law, they are subject to the tax code's reporting and disclosure requirements.[151] Enter the section 501(c)(4) organizations.[152] These organizations are a form of tax-exempt organization operated exclusively for the promotion of social welfare.[153] It is not uncommon

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> publican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in 94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22 (1995).

150. Political committees that do not operate exclusively to make independent expenditures often have established "separate segregated funds" or "independent expenditure-only committees" to make, and raise funds for, independent expenditures. These vehicles have also been utilized by section 501(c)(4) organizations. *See* Cynthia L. Bauerly & Eric C. Hallstrom, *Square Pegs: The Challenge for Existing Federal Campaign Finance Disclosure Laws in the Age of the Super PAC*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 329, 335–43 (2012). Super PACs were prominent actors during the 2012 campaign and refined their tactics to target races in which they could exercise significant influence. *See* Nicholas Confessore & Jo Craven McGinty, *New 'Super PACs' Alter Landscape for House Races*, N.Y. TIMES, Oct. 9, 2012, at A1. Although often associated with the Republican party, the use of Super PACs is a bipartisan phenomenon. *See* Nicholas Confessore, *'Super PACs' Finally a Draw for Democrats*, N.Y. TIMES, Sept. 27, 2012, at A1.

151. *See supra* note 99 and accompanying text.

152. Social welfare organizations have enjoyed a tax exemption since the passage of the Tariff Act of 1913, ch.16, § 11(G)(a), 38 Stat. 114, 172 (1913). The political activities of the non-profit sector caught the attention of the IRS as early as 1995, and the Wall Street Journal saw fit to highlight the extent of such political activities in 2007. *See* U.S. SEN. ENV'T AND PUB. WORKS COMM., POLITICAL ACTIVITY OF ENVIRONMENTAL GROUPS AND THEIR SUPPORTING FOUNDATIONS, 2 (Sept. 2008), *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=142d595f-411a-4057-b495-029a095fe25f. However, the ability to engage in express advocacy as a result of *Citizens United* and the ability to finance such express advocacy as a result of *SpeechNow* has increased the prominence of such organizations in electoral politics.

153. I.R.C. § 501(c)(4)(A) (CCH 2013). Political and lobbying activities are also undertaken by section 501(c)(5) organizations, principally labor unions, and section 501(c)(6) business leagues, chambers of commerce, and boards of trade. I.R.C. § 501(c)(5)–(6) (CCH 2013). In fact, the U.S. Chamber of Commerce was the most active lobbying organization in 2012. *See*

for section 527 Super PACs to be affiliated with section 501(c)(4) social welfare organizations. For example, President George W. Bush's former advisor, Karl Rove, was instrumental in the formation of American Crossroads, a Super PAC, and its affiliated social welfare organization, Crossroads GPS.[154]

Section 501(c)(4) organizations are, similar to section 501(c)(3) charitable organizations and section 527 political organizations, a form of tax-exempt organization.[155] There are significant differences among the organizations, however, with respect to permissible political activity and disclosure.[156] As discussed above, if a section 527 organization engages in express advocacy then it is subject to the disclosure and reporting requirements of federal campaign laws.[157] If such an organization engages in issue advocacy then it is not subject to federal campaign law requirements, but it is subject to tax law disclosure and reporting requirements.[158] Thus, donors to section 527 orga-

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Organization Profiles, OPEN SECRETS, http://www.opensecrets.org/orgs/ (last visited Dec. 16, 2013). A well-funded conservative organization with ties to the Koch brothers, Freedom Partners, is a section 501(c)(6) organization. *See* Nicholas Confessore, *Tax Filings Hint at Extent of Koch Brothers' Reach*, N.Y. TIMES, Sept. 13, 2013, at A13. The issues raised by these organizations' political activities are similar to the issues raised by section 501(c)(4) organizations' political activity, and the discussion, for the sake of simplicity, is focused on section 501(c)(4) organizations.

154. *See* Andrew C. Byrnes & Cortlin H. Lannin, *I Went Down to the Crossroads: Lifting the Blindfold About the Origin of 501(c)(4) Political Advertisements*, 46 U.S.F. L. REV. 481, 500–05 (2011).

155. *See* I.R.C. §§ 501(c), 527 (CCH 2013). Section 501(c)(3) organizations are organizations operated exclusively for religious, charitable, scientific, literary, or educational reasons or to foster certain amateur sports, prevent cruelty to children or animals, or test for public safety. I.R.C. § 501(c)(3) (CCH 2013). Other tax-exempt entities include social clubs, domestic fraternal societies, benevolent life insurance associations, certain cooperatives, and employee benefit trusts. *See generally* I.R.C. § 501(c) (CCH 2013).

156. Contributions to either section 501(c)(4) or section 527 organizations are not tax deductible. Contributions to section 501(c)(3) organizations, with the exception of those organized to test for public safety, are deductible. *See* I.R.C. § 170(c)(2) (CCH 2013). Note that dues or assessments to certain section 501(c) organizations, such as section 501(c)(4) social welfare organizations and section 501(c)(6) business leagues, may be deductible as ordinary and necessary business expenses pursuant to I.R.C. § 162. Political campaign and lobbying expenditures are not deductible. *See infra* notes 267–68 and accompanying text. A section 501(c) organization that incurs such expenditures must notify dues-paying members of the portion of dues allocable to such activities and to that extent the dues are not deductible. Failure to meet these requirements will subject the organization to a "proxy tax" imposed at the highest corporate tax rate. *See generally* I.R.C. § 6033(e) (CCH 2013).

157. *See supra* notes 150–51 and accompanying text.

158. *See* I.R.C. § 527(j) (CCH 2013). Failure to make the required disclosures subjects the political organization to a penalty. *See* I.R.C. § 527(j)(1) (CCH 2013). Political committees that are required to report under the federal campaign laws are not subject to the tax disclosure rules. *See* I.R.C. § 527(j)(5)(A) (CCH 2013).

nizations are disclosed under either campaign finance law or the tax law.[159]

Section 501(c)(3) organizations are prohibited from participating or intervening in any political campaign, but they may engage in lobbying activity if such activities are not a substantial part of the entity's activities or if such activities are conducted through affiliated section 501(c)(4) organizations.[160] Thus, these organizations are not significant actors in electoral politics—at least not directly.[161] In contrast,

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159. Section 527 requires political organizations to disclose expenditures of $500 or more and contributors of $200 or more, and the IRS must make such information publicly available. I.R.C. §§ 527(j)(3), 527(k) (CCH 2013).

160. *See generally* I.R.C. § 501(c)(3) (CCH 2013); Treas. Reg. §§ 1.501(c)(3)-1(c)(3)(i)-(iii), (c)(3)-1(e) (2008); Regan v. Taxation with Representation of Wash., 461 U.S. 540, 544 n.6 (1983). Section 501(c)(3) organizations may not, however, form affiliated section 527 political organizations. *See* S. REP. NO. 93-1357, at 30 (1974). I.R.C. § 501(h) contains an elective provision that provides safe harbors for lobbying expenditures by certain public charities that, if met, avoid the loss of tax exempt status. I.R.C. § 501(h) (CCH 2013). However, such electing institutions are subject to a twenty-five percent tax on excess lobbying expenditures. *See* I.R.C. § 4911 (CCH 2013). If a section 501(c)(3) organization has lost its tax-exempt status due to its lobbying or political activities, then it is precluded from converting to a section 501(c)(4) organization. I.R.C. § 504(a) (CCH 2013).

161. The possibility of forfeiting their tax-exempt status is a significant deterrent to such organizations although the alacrity with which the IRS enforces the prohibition of political activities by such organizations is questionable. *See* Vaughn E. James, *Reaping Where They Have Not Sowed: Have American Churches Failed to Satisfy the Requirements for the Religious Tax Exemption?*, 43 CATH. LAW 29, 47 (2004). *But see* Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000) (upholding revocation of tax-exempt status). The IRS may also seek injunctive relief against such organizations in limited circumstances. *See* I.R.C. § 7409(a)(2) (CCH 2013) (requiring a personal determination by the IRS Commissioner of flagrant abuse). Indirectly, these organizations may have significant effects on electoral outcomes. For example, religious organizations' positions on contentious matters, such as abortion or, more recently, mandatory contraception coverage under employer-provided health insurance, can and do exert influence over the votes of their constituents. One objective of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), is the provision of preventative care for women. 42 U.S.C. § 300gg-13 (a)(4) (2010). Recommended guidelines were published on August 3, 2011 that included, as part of such preventive care, contraceptive services for women, with discretionary exemptions for certain religious employers. *See generally* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011). After originally providing religious employers with an additional year to comply with the contraception coverage, the Obama administration, under pressure from various religious groups, announced a compromise whereby insurance companies would provide contraception coverage for employees of religious employers free of charge if the employers decided not to provide such coverage. *See* Press Release, Office of the Press Sec'y, The White House, Fact Sheet: Women's Preventive Services and Religious Institutions (Feb. 10, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions. This compromise did not placate the religious groups opposed to the mandate, and legal actions were brought alleging that the mandate violated the First Amendment. *See* Rebecca Hall, Comment, *The Women's Health Amendment and Religious Freedom: Finding a Sufficient Compromise*, 15 J. HEALTH CARE L. & POL'Y 401, 403–404 (2012). Final regulations recently were issued that provide rules similar to the aforementioned compromise. *See* Treas. Reg. § 54. 9815-2713A

section 501(c)(4) organizations may engage in unlimited lobbying activities that are related to their exempt purpose and may also engage in political campaigns provided that such activity does not constitute the organization's primary activity.[162] Several section 501(c)(4) orga-

(2013). The Third Circuit held that for-profit secular corporations cannot engage in religious exercise and, consequently, have neither Free Exercise rights nor rights under the Religious Freedom Restoration Act. *See* Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 381 (3d Cir. 2013). The Tenth Circuit, however, held that the Religious Freedom Restoration Act and the Free Exercise Clause do apply to corporations and that the contraception mandate likely violates the statutory and constitutional rights of the appellant. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1120 (10th Cir. 2013). The Supreme Court has granted certiorari. Sebelius v. Hobby Lobby Stores, Inc., 2013 U.S. LEXIS 8418 (Nov. 26, 2013). The political restrictions imposed on these organizations have been subject to criticism. *See, e.g.*, Roger Colinvaux, *The Political Speech of Charities in the Face of* Citizens United*: A Defense of Prohibition*, 62 CASE W. RES. L. REV. 685 (2012); Miriam Galston, *When Statutory Regimes Collide: Will* Citizens United *and* Wisconsin Right to Life *Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CONST. L. 867 (2011).

162. A section 501(c)(4) organization "is operated exclusively for the promotion of social welfare if it is *primarily* engaged in promoting in some way the common good and general welfare of the people of the community." Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (1990) (emphasis added). However, direct or indirect participation in political campaigns are not deemed activities that promote social welfare. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (1990). *See also* Rev. Rul. 81-95, 1981-1 C.B. 332. Treasury regulations do not provide similar rules with respect to section 501(c)(5) or section 501(c)(6) organizations. *See* Treas. Reg. §§ 1.501(c)(5)-1(1997), 1.501(c)(6)-1 (1958). However, the IRS has applied similar principles to these organizations. *See* IRS Gen. Counsel Memorandum 34233 (Dec. 3, 1969). *See also* Marker v. Schultz, 485 F.2d 1003 (D.C. Cir. 1973). Recently issued proposed regulations applicable to section 501(c)(4) organizations indicate that specific guidelines for these organizations, similar to those applicable to social welfare organizations, are under consideration. *See* Preamble to Proposed Treasury Regulations, 78 Fed. Reg. 71535 (Nov. 29, 2013). The regulations have been criticized, and one watchdog organization has submitted a petition for rulemaking to the IRS. *See* Citizens for Responsibility and Ethics in Wash., Petition for Rulemaking on Political Activities by Section 501(c)(4) Organizations (April 9, 2013), *available at* http://www.citizensforethics.org/page/-/PDFs/Legal/Letters/IRS/4_09_13_IRS_Rulemaking_Petition.pdf?nocdn=1. The IRS has sent questionnaires to several section 501(c)(4) organizations in an effort to determine if the extent of such groups' political activities jeopardizes their tax-exempt status. *See* Dan Froomkin, *IRS May Make Political Groups Pay Dearly for Keeping Donors Secret – And Out Them*, HUFFINGTON POST (last updated Mar. 9, 2012, 10:00 AM) http://www.huffingtonpost.com/2012/03/08/irs-political-groups-501c4-_n_1333389.html. *See also infra* notes 360–62 and accompanying text. Proposed regulations were issued on November 29, 2013 that would replace the reference to "direct and indirect participation in political campaigns" to "candidate related political activity," the effect of which would expand the types of activities that cannot be within the scope of an organization's primary activities. Prop. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii), 78 Fed. Reg. 71535 (Nov. 29, 2013). The term "candidate related political activity" encompasses several activities including certain communications that precede elections, voter registration drives, and donations to several types of organizations. *See* Prop. Treas. Reg. § 1.501(c)(4)-1(a)(2)(iii), 78 Fed. Reg. 71535 (Nov. 29, 2013). The preamble to the proposed rules indicates that the ability of these organizations to engage in political activity, provided that such activity is not their primary activity, is also under review. *See* Preamble to Proposed Treasury Regulations,78 Fed. Reg. 71535 (Nov. 29, 2013). The distinction between lobbying and election advocacy has been criticized on the grounds that the election of candidates supportive of an organization's objectives may be the most effective means of achieving such objectives. Thus, federal election laws often disfavor the most effective

nizations, such as the AARP and the National Rifle Association (NRA), are well known for their lobbying prowess and wield considerable political influence.[163] However, these organizations are not subject to expenditure and donor disclosure requirements.[164]

Unlike section 527 organizations, however, political expenditures that would be considered part of the exempt function activities of a section 527 political committee are subject to tax when made by section 501(c)(4) organizations.[165] The tax base for this tax is the lesser of the organization's net investment income for the taxable year in which the expenditures are made or the aggregate amount of expenditures for exempt function activities.[166] Thus, a section 501(c)(4) organization with little or no net investment income will not be deterred in carrying out political activities by the imposition of this tax. In addition, such organizations may carry out such activities through a separate segregated fund, which, for tax purposes, is treated as a separate section 527 organization.[167]

Many section 501(c)(4) organizations spent heavily during the 2010 mid-term election period, including $30 million expended by one organization, the American Action Network.[168] On the eve of the 2012

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form of speech. *See* David B. Rivkin, Jr. & Lee A. Casey, Op-ed, *The True Lesson of the IRS Scandal*, WALL ST. J., Aug. 23, 2013, at A13.

163. Facebook co-founder Marc Zuckerberg recently announced plans to form a social welfare organization whose objectives will include comprehensive immigration reform and education reform. *See* Evelyn M. Rusli, *Facebook's Mark Zuckerberg Starting Political Group*, WALL ST. J. (last updated Mar. 27, 2013, 5:21 PM).

164. *See* I.R.C. § 6104(d)(3) (CCH 2013) (providing that only private foundations and political organizations must disclose donor names and addresses). A section 501(c)(4) organization must file Form 990 with the IRS and Schedule B of such form requires the identification of donors who contributed $5000 or more to the organization. However, donor information is not available for public inspection. *See* IRS, Schedule B (Form 990, 990-EZ, or 990-PF) (2012) at 5, *available at* http://www.irs.gov/pub/irs-pdf/f990ezb.pdf. The FEC regulation that limited corporate and labor union disclosure of donor information to only those donors whose donations were for the specific purpose of funding certain electioneering communications also provides cover to these organizations. *See supra* note 94. Representative Christopher Van Hollen unsuccessfully challenged this regulation. *See* Ctr. for Individual Freedom v. Van Hollen, 694 F.3d 108 (D.C. Cir. 2012) *rev'd*, Van Hollen v. FEC, 851 F. Supp. 2d 69 (D.D.C. 2012).

165. I.R.C. § 527(f)(1) (CCH 2013).

166. I.R.C. § 527(f)(1)-(2) (CCH 2013).

167. I.R.C. § 527(f)(3) (CCH 2013). A separate segregated fund, for this purpose, must either meet the requirements for such funds under federal campaign finance laws or be formed under a state statute that permits the segregation of dues for exempt function activities. *Id.*

168. *See* Kim Barker, *How Nonprofits Spend Millions on Elections and Call it Public Welfare*, PROPUBLICA (Aug. 18, 2012, 11:25 AM) http://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public-welfare; Peter H. Stone, *Fine Line Between Politics and Issues Spending by Secretive 501(c)(4) Groups*, THE CTR. FOR PUB. INTEGRITY (last updated Dec. 1, 2011, 5:05 PM), http://www.publicintegrity.org/2011/10/31/7205/fine-line-between-politics-and-issues-spending-secretive-501c4-groups.

election, one organization that is active in investigating campaign finance practices estimated that section 501(c)(4) organizations had spent over $200 million on political advertisements, most of which were attack ads. Crossroads GPS, the brainchild of Karl Rove, spent more than $70 million on the 2012 election.[169] Democrats recently have formed a group to counter the activities of Republican-led groups.[170]

The increased participation of section 501(c)(4) organizations in partisan politics raises the question of whether a particular social welfare organization's level of political activity jeopardizes the organization's tax-exempt status.[171] In addition to the tax issues faced by the organizations, the IRS also began to focus on a tax issue applicable to the donors of such organizations, the gift tax. The applicability of the gift tax to political donations had been unsettled until 1975 when legislation expressly dealt with such donations.[172] However, at that time, such donations invariably were directed to political organizations and not social welfare organizations, and statutory and judicial guidance on the applicability of the tax to donations to social welfare organizations is muddled.

III. GIFT TAX

The gift tax statutes do not define the term "gift" with precision, and the case law is rather sparse and inconclusive as to whether contributions to social welfare organizations are gifts for purposes of the gift tax. The statutory language and the regulations provide ample support for the assertion that such contributions are, in fact, taxable. Although there are good arguments against reading such taxability into the statute, equally good counterarguments exist that should enable the IRS's position to withstand what likely would be a very deferential standard of review. Moreover, the imposition of the gift tax to such contributions should withstand First Amendment challenges.

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169. Robert Maguire & Viveca Novak, *Shadow Money's Top 10 Candidates*, OPEN SECRETS (Oct. 25, 2012, 5:06 PM), http://www.opensecrets.org/news/2012/10/shadow-moneys-top-10-candidates.html; Kim Barker, *Karl Rove's Dark Money Group Promised IRS it Would Spend 'Limited' Money on Elections*, PROPUBLICA (Dec. 14, 2012, 11:19 AM), http://www.propublica.org/article/what-karl-roves-dark-money-nonprofit-told-the-irs. For a detailed analysis of the activities of Crossroads GPS during the 2010 election, see Byrnes & Lannin, *supra* note 154, at 503–16.

170. Eliza Newlin Carney, *Rules of the Game: Obama's Nonprofit Carries on Dubious Tradition*, ROLL CALL (Mar. 10, 2013, 7:30 PM), http://www.rollcall.com/news/rules_of_the_game_obamas_nonprofit_carries_on_dubious_tradition-222978-1.html; Nicholas Confessore, *Obama's Backers Seek Big Donors to Press Agenda*, N.Y. TIMES, Feb. 23, 2013, at A1.

171. *See supra* notes 161–62 and accompanying text.

172. *See infra* notes 179–80 and accompanying text.

A. *In General*

A federal gift tax is imposed for each calendar year on the transfer of property by gift by any individual during such calendar year.[173] The gift tax, introduced by the Revenue Act of 1924, is designed to supplement the federal estate tax. The gift tax's existence and design prevents individuals from avoiding the imposition of a wealth transfer tax through inter vivos transfers.[174] Estate and gift taxes are imposed at progressive tax rates. In order to maintain such progressivity, the gift tax base is comprised of all lifetime gifts made through the end of the taxable year.[175] The tentative tax due is determined only on the amount of gifts made during the current year, but the tax on such gifts is determined by the application of higher marginal tax rates because the previous years' taxable gifts will have absorbed the lower tax rate brackets.[176] A unified credit against the donor's tax liability is provided. The credit is a statutory amount, adjusted annually for inflation, which is available to offset lifetime gift tax or testamentary estate tax liability.[177] Effective in 2013, the unified credit will shelter tax liability on cumulative lifetime and testamentary transfers up to

173. I.R.C. § 2501(a)(1) (CCH 2013). The gift tax is imposed on the donor. I.R.C. § 2502(c) (CCH 2013). Gifts made indirectly by individuals through entities, such as corporations, are deemed gifts by individuals. *See infra* notes 310–11 and accompanying text. For gifts that are made in property, the amount of the gift is determined by the value of the property on the date of the gift. I.R.C. § 2512(a) (CCH 2013). If property is transferred for less than adequate and full consideration, then the gift is the excess of the value of property over the amount of such consideration. I.R.C. § 2512(a)–(b) (CCH 2013). If the spouses so elect, then a gift made by one spouse is considered as made one-half by each spouse. I.R.C. § 2513(a) (CCH 2013). Gift tax returns are filed annually on Form 709. *See* I.R.C. § 6019 (CCH 2013); IRS, Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, *available at* http://www.irs.gov/uac/Form-709,-United-States-Gift-%28and-Generation-Skipping-Transfer%29-Tax-Return.

174. *See* Burnet v. Guggenheim, 288 U.S. 280, 282, 286 (1933). The constitutionality of wealth transfer taxes was settled long ago. *See* Scholey v. Rew, 90 U.S. 331, 348–49 (1875); Knowlton v. Moore, 178 U.S. 41, 81–82 (1900); *see* Bromley v. McCaughn, 280 U.S. 124, 137–38 (1929). The gift tax was repealed in 1926 but reenacted in 1932 with the passage of the Revenue Act of 1932, Pub. L. No. 72-154, § 501, 47 Stat. 169, 245 (1932).

175. I.R.C. § 2502(a)(1) (CCH 2013). All taxable gifts made after June 6, 1932 are included in the lifetime taxable gift amount. I.R.C. § 2502(b) (CCH 2013). The amount of taxable gifts for preceding taxable years is determined under the law applicable to the period in which such gifts were made. *See* I.R.C. § 2504(a)(1) (CCH 2013).

176. I.R.C. § 2502(a)(1)–(2) (CCH 2013).

177. I.R.C. §§ 2010, 2505 (CCH 2013). The federal estate tax is coordinated with the gift tax. A tentative estate tax is imposed on the sum of a decedent's taxable estate and adjusted taxable gifts made after 1976. The gift tax that would have been imposed on adjusted taxable gifts, had the gift tax rates and unified credit in the year of death been applicable to those gifts, is then subtracted from the tentative tax. In effect, the statutory mechanism has the effect of subjecting all post-1976 transfers, inter vivos and testamentary, to the unified graduated tax rate schedule. *See* I.R.C. § 2001 (CCH 2013). A discussion of the estate tax is beyond the scope of this work.

$5,250,000 and, in certain circumstances for a surviving spouse, a greater amount that possibly could reach $10,500,000.[178]

Various transfers are either exempt from the gift tax or are deductible in arriving at the total of taxable gifts. Transfers of money or property to section 527 political organizations are not subject to gift tax.[179] This exception was enacted in 1975 and is effective for transfers made after May 7, 1974.[180] Several other transfers are not included in the taxable gift total for the taxable year. Annual gifts of $14,000 per donee are not considered gifts made during the taxable year.[181] Other transfers not deemed gifts include payments on behalf of another individual to educational institutions or medical providers

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178. Rev. Proc. 2013-15, 2013-5 I.R.B. 444, 448 (Jan. 28, 2013). Federal wealth transfer taxes—gift, estate, and generation skipping transfer taxes—underwent a period of significant flux beginning with the passage of the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-106, 115 Stat. 38 [hereinafter EGTRRA] and ending with the enactment of American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013). The latter legislation was passed just in time to avert the so-called "fiscal cliff." EGTRRA made changes to the estate and generation skipping transfer tax that, among other changes, would lead to their repeal in 2010. These taxes faded in 2010 but were revived in 2011 and 2012 with a unified credit that sheltered $5,000,000 of taxable estates at the end of 2012. The 2013 legislation added some permanence to transfer taxes. Among the legislation's provisions was the reestablishment of a unified credit that would shelter $5,000,000 of lifetime gifts and testamentary transfers. I.R.C. § 2010(c)(3)(A) (CCH 2013). The unified credit is also adjusted annually for inflation. I.R.C. § 2010(c)(3)(B) (CCH 2013). Moreover, the unified credit has been made permanently portable among spouses. I.R.C. § 2010 (CCH 2013). A surviving spouse, absent an election to the contrary by the executor of the deceased, automatically succeeds to any unused unified credit of the deceased spouse. Therefore, an individual could conceivably shelter up to $10,500,000 of asset transfers from gift and estate tax liability. *See* I.R.C. § 2010(c)(4) (CCH 2013). For a detailed analysis of recent legislative changes to the estate tax and their effects on tax planning, see generally John A. Miller & Jeffrey A. Maine, *Wealth Transfer Planning for 2013 and Beyond* (Sept. 17, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2214422; Steve L. Dellinger & Nathan L. Wadlinger, *The Portability Pill: Examining the Trial Stages of Federal Estate and Gift Tax Spousal Portability*, 47 REAL PROP., TR. & EST. L.J. 367 (2012).

179. I.R.C. § 2501(a)(4) (CCH 2013).

180. Pub. L. No. 93-625, § 14, 88 Stat. 2108, 2121 (1975) (codified as amended at I.R.C. § 2501(a)(4)).

181. Rev. Proc. 2012-41, 2012-45 I.R.B. 539, 541 (Oct. 18, 2012). The annual exclusion is available for gifts of a present interest in property—an interest by which the donee has an unrestricted right to the immediate use, possession, or enjoyment of the property or the income therefrom. Treas. Reg, § 25.2503-3(b) (1983). The unrestricted right to withdraw amounts transferred in trust for a temporary period of time will satisfy the present interest requirement. *See* Crummey v. Comm'r, 397 F.2d 82 (9th Cir. 1968). Failure to exercise such power is deemed a gift to remainder beneficiaries unless the value of the foregone assets does not exceed the greater of $5000 or five percent of the assets subject to the power. I.R.C. § 2514(e) (CCH 2013). The annual exclusion is indexed annually for inflation. I.R.C. § 2503(b)(2) (CCH 2013). A gift made by one spouse to a party other than her spouse is considered made equally by both spouses provided the spouses consent to such treatment. I.R.C. § 2513(a) (CCH 2013). In effect, this provision allows married couples to gift $28,000 per donee without gift tax consequences in 2013. The election by spouses to split gifts requires the filing of a gift tax return if, in the absence of the election to split gifts, a return would have been necessary. *See* Treas. Reg. § 25.6019-2 (1994).

for tuition or medical care, respectively;[182] certain loans of artwork to tax-exempt organizations;[183] transfers pursuant to certain property settlements incident to divorce;[184] and qualified disclaimers of property.[185]

In addition, certain gifts are deductible in arriving at the total taxable gift figure. Gifts made to or for the use of the United States, any state or political subdivision thereof, or the District of Columbia for exclusively public purposes are deductible.[186] Likewise, gifts made to or for the use of organizations that are organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster certain amateur sports competition, encouragement of art, or prevention of cruelty to children and animals are deductible.[187] Gifts to these organizations are deductible provided that such organizations have not lost their tax-exempt status due to their attempts to influence legislation or their participation or intervention in any political campaign.[188] Gifts to spouses, other than gifts of certain terminable interests, are also deductible by the donor.[189] Neither an exemption nor a deduction is provided for gifts made to section 501(c)(4) organizations.

Although the statute fails to define the term "gifts," Treasury regulations define the term expansively. For gift tax purposes, gifts are not limited to transfers of property made with detached and disinterested generosity. In fact, donative intent on the part of the transferor is not an essential element in the application of the tax.[190] For example, the sale or exchange of property for less than the property's fair market value is deemed a gift.[191] Moreover, if the consideration received in a transaction cannot be reduced to a value in money or money's worth, such as love or affection, then such consideration is to be wholly disregarded and the transaction is considered a gift in its entirety.[192] The

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182. I.R.C. § 2503(e) (CCH 2013).

183. I.R.C. § 2503(g) (CCH 2013).

184. I.R.C. § 2516 (CCH 2013).

185. I.R.C. § 2518 (CCH 2013).

186. I.R.C. § 2522(a)(1) (CCH 2013).

187. I.R.C. § 2522(a)(2) (CCH 2013). These organizations qualify for tax exempt status under I.R.C. § 501(c)(3). Gifts to certain organizations operating under the lodge system and gifts to war veteran organizations also are deductible. *See* I.R.C. § 2522(a)(3)-(4) (CCH 2013). Special rules are provided for gifts made by nonresident aliens. *See* I.R.C. § 2522(b) (CCH 2013).

188. I.R.C. § 2522(a)(2) (CCH 2013).

189. I.R.C. § 2523(f)(1) (CCH 2013).

190. Treas. Reg. § 1.2511-1(g)(1) (1997).

191. Treas. Reg. § 1.2512-8 (1992).

192. *Id. See also* Wiedemann v. Comm'r, 26 T.C. 565 (1956) (holding that payments to support an adult child were gifts); Rev. Rul. 79-384, 1979-2 C.B. 344 (ruling that a payment in satisfaction of a promise to graduate from college was a gift).

Supreme Court has, on several occasions, acknowledged the broad scope of the statute: "[C]ongress intended to use the term 'gifts' in its broadest and most comprehensive sense. . . . [t]o hit all the protean arrangements which the wit of man can devise that are not business transactions within the meaning of ordinary speech."[193] The Court has also stated that "absent an express exclusion from its provisions, any transfer meeting the statutory requirements must be held subject to the gift tax."[194]

However, a sale or exchange, or other transfer of property made in the ordinary course of business, is deemed to have been made for adequate and full consideration in money or money's worth.[195] The regulations state, parenthetically, that the aforementioned exception applies if the transaction is bona-fide, at arm's length, and free of donative intent.[196] It is not clear whether these three parenthetical requirements are necessary to a determination that a transaction was made in the ordinary course of business or are both necessary and sufficient for such a determination. Courts have held that the ordinary course of business exception applies to transactions for which the transferor lacked donative intent despite the fact that the transaction in question was not a business transaction in any conventional sense.[197] Transactions motivated by business considerations, as opposed to family considerations, have also been held to qualify for the ordinary course of business exception.[198] Moreover, the Tax Court has, on several occasions, stated that a bona-fide transfer at arm's length and free of donative intent qualifies for the ordinary business exception regardless of whether the transaction is a business transaction.[199] The IRS, in Revenue Ruling 68-558, similarly found the ex-

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193. Comm'r v. Wemyss, 324 U.S. 303, 306 (1945). *See also* Wells Fargo Bank N.M., N.A., v. United States, 319 F.3d 1222, 1226 (10th Cir. 2003).

194. Dickman v. Comm'r, 465 U.S. 330, 334 n.4 (1984). The Court in this case held that the extension of interest-free loans constituted transfers subject to the gift tax, a result that has since been codified at I.R.C. § 7872 (CCH 2013).

195. Treas. Reg. § 1.2512-8 (1992).

196. *Id.*

197. *See* Harris v. Comm'r, 340 U.S. 106 (1950). *See also* Rev. Rul. 68-558, 1968-2 C.B. 415 (ruling that the sale of land at a below market price by a group of individuals to a corporation in order to induce the transferee to operate a manufacturing facility in the community was not a gift).

198. *See, e.g.*, Beveridge v. Comm'r, 10 T.C. 915 (1948); Estate of Anderson v. Comm'r, 8 T.C. 706 (1947); Hull v. Comm'r, 21 T.C.M. (CCH) 1076 (1962).

199. *See* Estate of Cullison v. Comm'r, 75 T.C.M. (CCH) 2490 (1998); Estate of Berkman v. Comm'r, 38 T.C.M. (CCH) 183 (1979).

ception to apply if the three parenthetical requirements set forth in the regulations are met.[200]

B. *Application of the Gift Tax to Contributions to Section 501(c)(4) Organizations*

1. The Dearth of Case Law

The application of the ordinary course of business exception to contributions to politically active section 501(c)(4) organizations is problematic, as evidenced by the inconsistency of the courts' holdings with respect to the application of the gift tax to political contributions.[201] In *Stern v. United States*, the district court held that political contributions made by the taxpayer were not gifts because they were bona-fide, at arm's length, and free from donative intent.[202] Accordingly, the political contributions were made in the ordinary course of business and for full and adequate consideration. Critical to the court's holding was its belief that the taxpayer was neither "motivated by affection, respect, admiration, charity, or like impulses" nor made such contributions from "detached and disinterested generosity."[203] Instead, in the court's opinion, the taxpayer's contributions were in return for full and adequate consideration because they were made to promote efficiency in government and to protect her property interests.[204] The Fifth Circuit, affirming the district court's holding, stated that:

> The transactions in controversy were permeated with commercial and economic factors. The contributions were motivated by appellee's desire to promote a slate of candidates that would protect and advance her personal and property interests. To assure that the funds would be spent in a manner consonant with the attainment of that goal, appellee and her group retained control over the disbursement of their contributions. In a very real sense, then, Mrs. Stern was making an economic investment that she believed would have a direct and favorable effect upon her property holdings and business interests in New Orleans and Louisiana.[205]

200. 1968-2 C.B. 415. The IRS, in *Stern v. United States*, appeared to retreat from the position it took in Rev. Rul. 68-558 and asserted that political contributions did not qualify for the ordinary course of business exception because such contributions could not be considered business transactions. *See infra* notes 202–05 and accompanying text.

201. The statutory exclusion for transfers to political organizations was enacted in 1975. *See supra* notes 179–80 and accompanying text.

202. 304 F. Supp. 376, 380 (E.D. La. 1969) *aff'd*, 436 F.2d 1327(5th Cir. 1971).

203. *Id.* at 380.

204. *Id.* at 378–380.

205. Stern v. United States, 436 F.2d 1327, 1330 (1971).

In *Carson v. Commissioner*, the Tax Court held that political contributions made by the petitioners to various candidates for state and local offices were not gifts.[206] However, the Tax Court's holding went well beyond *Stern*'s application of the three factor ordinary course of business exception. The court agreed with the petitioners' contention that, based on its purpose and history, the gift tax was never intended to encompass political contributions.[207] The court's holding was based on several factors. First, according to the court, the nature of political contributions belies their categorization as gifts. Political contributions are intended to advance a campaign, not to personally benefit a candidate.[208] Moreover, nothing in the record suggested that the candidates to whom the contributions were made were the natural objects of the donors' bounty.[209] Instead, the contributions were made to "promote the social framework . . . [and] social structure most conducive to his economic aspirations."[210] According to the court, this case presented circumstances in which a literal reading of a statute was "at war with its purpose and history."[211] In the court's opinion, the legislative history of the gift tax's reenactment in 1932 evidenced that Congress contemplated cases that, "despite the literal words of the statute and considering all the facts and circumstances, were simply transfers foreign to the purpose of the statute."[212] In a footnote, the court appeared to agree with one commentator's view that the gift tax should not apply to transactions between strangers of the donor if the donor is clearly hoping to benefit by the transfer.[213]

The court was also influenced by the fact that the IRS waited approximately thirty-five years from the enactment of the gift tax to declare, in 1959, that campaign contributions were subject to the gift tax.[214] Moreover, the lack of reported cases during this interregnum

206. *Carson v. Comm'r*, 71 T.C. 252 (1978) *aff'd*, 641 F.2d 864 (10th Cir. 1981).

207. *Id.* at 257.

208. *Id.* at 259.

209. *Id.* at 257.

210. *Id.* at 258.

211. *Carson*, 71 T.C. at 262.

212. *Id.* at 263.

213. *Id.* at 263 n.14 (citing to P. Faber, *Gift Tax Planning: The New Valuation Tables, Net Gifts, Political Gifts, and other Problems*, 31 N.Y.U. INST. ON FED. TAX'N 1217, 1249 (1973)).

214. *Id.* at 259. However, Rev. Rul. 72-355, 1972-2 C.B. 532 indicates that the IRS articulated its position, albeit informally, as early as 1956:

> In determining the total amount of gifts made during any year by the donor, section 2503 provides an annual exclusion of the first $3000 given to any donee. This means that a contribution to any person or organization, including a political organization, may be made each year in the amount of $3000 or less without any requirement that the amount be reported for gift tax purposes. In determining the amount permitted as an exclusion in the case of a contribution made to a political organization, only one

demonstrated that the IRS was not enforcing the tax against donors to political campaigns.[215] Finally, the purpose of the gift tax—as a backstop or supplement to the estate tax—is not served by taxing political contributions because such contributions typically are not made by testamentary disposition.[216] Accordingly, political contributions "are simply not 'gifts' within the meaning of the gift tax law."[217]

In contrast, the federal district court, in *Du Pont v. United States*, held that a contribution to a New York corporation formed to "preserve private enterprise, private property and private initiative and American independence" was taxable for gift tax purposes.[218] The taxpayer had included the contribution on his gift tax return but had taken a corresponding deduction for the contribution as a gift for charitable and public purposes.[219] The IRS disallowed the deduction upon audit and the taxpayer filed a claim for refund, asserting that the contribution was not a gift at all but, instead, was a payment to the corporation for services to be rendered by experts in monetary, business, and political conditions in the United States and elsewhere.[220] The court disagreed with the taxpayer's categorization of the payment and emphasized that the consideration claimed by the taxpayer in exchange for the payment was not reducible to money's worth.[221] Moreover, the taxpayer's contention was belied by the fact that any benefit derived from the payment was enjoyed not only by the taxpayer but also by every citizen in the country.[222] The court analogized the taxpayer's contribution to the transfer of funds to a political party that shared his economic views or to a journal that shaped public opinion.[223]

The Tax Court, in *Estate of Blaine v. Commissioner*, held that contributions to a social welfare organization that promoted world government were not deductible for gift tax purposes because the

> $3000 exclusion is permitted, even though the personal campaigns of several individuals may be benefited by the contribution made to such organization.

Id.

215. *Carson*, 71 T.C. at 260.

216. *Id.* at 260–62.

217. *Id.* at 264.

218. *Du Pont v. United States*, 97 F. Supp. 944, 946–47 (D. Del. 1951).

219. *Id.* at 945.

220. *Id.*

221. *Id.* at 946–47.

222. *Id.* at 947.

223. *Du Pont*, 97 F. Supp at 947. The Tax Court, in *Carson,* noted this statement but distinguished this case from *Du Pont* on the grounds that *Du Pont* did not concern the applicability of the gift tax to political contributions. *See* Carson v. Comm'r, 71 T.C. 252, 260 n.9 (1978).

organization did not qualify as an educational institution.[224] The taxpayer had included the contributions as gifts on a tax return but then deducted such contributions. The court did not discuss the issue of whether the taxpayer's contributions were gifts but instead focused solely on whether the status of the recipient organization qualified the taxpayer's contribution for the deduction.[225] Interestingly, the court made clear that the taxpayer, the sole benefactor of the organization, had more than an academic or educational interest in the institution of a world government.[226] However, the court did not reach the issue of whether such an interest called into question the nature of the contributions as gifts.

Du Pont and *Blaine,* unlike *Stern* and *Carson,* dealt directly with issue advocacy and not contributions to political parties or candidates for public office. In 1959, the IRS formally took the position that contributions to political parties or candidates in excess of the annual exclusion amount were subject to the gift tax.[227] The IRS later reiterated its position when it announced that it would follow *Stern* only in the Fifth Circuit and that contributions to political parties cannot be treated as made to various candidates for purposes of applying the gift tax annual exclusion.[228] However, in 1982, the IRS stated that it would no longer contend that contributions made to political organizations described in section 527 prior to May 8, 1974 were subject to gift tax.[229] This pronouncement represented a reversal of the IRS's position that the enactment of the gift tax exclusion for contributions to section 527 political organizations amounted to a change in the law.[230] However, the IRS made clear that it continues to maintain that gratuitous transfers to organizations not described in section 527 are subject to gift tax regardless of whether such contributions are motivated to advance the donor's social, political, or charitable objectives.[231] At least one taxpayer was concerned enough that the gift tax could apply to donations to section 501(c)(4) organizations to request a ruling from the IRS that contributions to a segregated fund of a

224. *Estate of Blaine v. Comm'r*, 22 T.C. 1195, 1212, 1214 (1954).

225. *Id.* at 1210–11.

226. *Id.* at 1212–13.

227. Rev. Rul. 59-57, 1959-1 C.B. 626.

228. Rev. Rul. 72-583, 1972-2 C.B. 534; Rev. Rul. 72-355, 1972-2 C.B. 532.

229. Rev. Rul. 82-216, 1982-2 C.B. 220.

230. This contention was rejected by the Tenth Circuit in *Carson*. According to the court, the enactment of the statutory exception could also be interpreted as Congress making explicit that which had been historically implied. Carson v. Comm'r, 641 F.2d 864, 866 (1981).

231. Rev. Rul. 82-216, 1982-2 C.B. 220.

section 501(c)(4) organization would qualify as a contribution to a section 527 organization and, thus, avoid any gift tax issues.[232]

2. Statutory Support for Taxability

Although whether contributions to section 501(c)(4) organizations are subject to gift tax is not free from doubt, statutory support exists for the position that such contributions are, in fact, taxable. Moreover, the regulatory requirement that consideration not reducible to money's worth is to be ignored in determining whether a transfer is a gift should be able to withstand *Chevron* deference.[233] Admittedly, plausible arguments exist for the proposition that such transfers are not gifts. However, each of these arguments has its weaknesses.

Section 2501(a)(1) imposes a tax on transfers of property by gift, and, absent a statutory exclusion or deduction, any transfer by gift is subject to tax. Section 2511 clarifies that the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.[234] Congress provided a specific exclusion for donations to political organizations, as defined in section 527.[235] Moreover, Congress provided a deduction for gifts to most section 501(c)(3) organizations and several other types of organizations.[236] Congress' silence with respect to donations to section 501(c)(4) organizations, in combination with its special treatment of contributions to section 527, section 501(c)(3), and certain other organizations, can be interpreted, under the principle of *expressio unius est exclusio alterius*, to subject donations to section 501(c)(4) organizations to tax.[237]

Of course, a transfer must first be a gift for the statute to apply regardless of the type of organization to which the transfer is made. The statute does not define the term "gift," but the regulations make clear that a transfer, the consideration for which is not reducible to

232. *See* I.R.S. Priv. Ltr. Rul. 96-52-026 (Oct. 1, 1996). See *supra* note 167 and accompanying text for a discussion of the statutory authority of section 501(c)(4) organizations to maintain segregated funds that are treated, for tax purposes, as section 527 organizations.

233. *See supra* note 192 and accompanying text.

234. I.R.C. § 2511(a) (CCH 2013).

235. I.R.C. § 2501(a)(4) (CCH 2013). *See also supra* notes 179–80 and accompanying text.

236. I.R.C. § 2522(a)(2)-(4) (CCH 2013).

237. *Expressio unius est exclusio alterius* is a maxim of statutory interpretation that means that the expression of one thing is the exclusion of another. BLACK'S LAW DICTIONARY 521 (5th ed. 1979). *See, e.g.*, Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 517 (1992) (supporting preemption of state law on "a variant of the familiar principle of *expressio unius est exclusio alterius:* Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.").

money or money's worth, is a gift.[238] Under *Chevron*, if a statute does not directly address the precise question at issue then a very deferential standard of review is applied to agency action that had been subject to notice and comment.[239] Under that standard, agency action will not be disturbed unless it is found to be arbitrary, capricious in substance, or manifestly contrary to the statute.[240] The rationale for judicial deference to agency action was set forth by Justice Ginsburg in a very recent case, *American Electric Power Co., Inc. v. Connecticut*.[241] "The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order."[242]

A less deferential test—the so called *National Muffler* test—was applied by the Court prior to *Chevron*. Under that test, the courts examined several factors, including whether the regulation in question was a contemporaneous construction of the statute, the length of time that the regulation was in effect, the degree of reliance placed on the regulations by affected parties, and the consistency of the agency's position.[243] The Court continued to apply the *National Muffler* test to Treasury regulations issued under the general statutory grant of authority under I.R.C. section 7805 and limited *Chevron* deference to Treasury regulations issued under a specific statutory grant of authority.[244]

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238. Treas. Reg. § 1.2512-8 (1992). *See also supra* note 192 and accompanying text.

239. Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842–43 (1984).

240. *See* United States v. Mead, 533 U.S. 218, 277 (2001).

241. Am. Elec. Power Co., Inc. v. Conn., 131 S. Ct. 2527 (2011). The issue in this case was whether several states, the City of New York, and three private parties could maintain federal common law nuisance claims against various private power companies and the Tennessee Valley Authority for carbon dioxide and other greenhouse gas emissions. The Court held that the Clean Water Act and actions by the Environmental Protection Agency preempted those claims. *Id.* at 2532.

242. *Id.* at 2539–40.

243. Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979).

244. *See, e.g.*, United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982); Rowan Cos., Inc. v. United States, 452 U.S. 247, 253 (1981). Several recent cases involving a statutory provision that provides relief to innocent spouses for deficiencies attributable to tax understatements in a joint income tax return illustrate the difficulty for taxpayers in overcoming *Chevron* deference. I.R.C. § 6015 contains three provisions that provide relief to innocent spouses with respect to income tax deficiencies, penalties, and interest arising from the filing of a joint income tax return. Two provisions require that the statutory relief be sought within two years of the institution of collection activities. I.R.C. §§ 6015(b)(1)(E), (c)(3)(B) (CCH 2013). The third provision applies if neither of the first two provisions is applicable and, under all the facts and circumstances, it would be inequitable to hold the spouse liable for all or a portion of the deficiency at issue. I.R.C. § 6015(f) (CCH 2013). Although this provision does not contain a two-year limitation period, the regulations apply a two-year period in which taxpayers must seek relief. Treas. Reg. § 1.6015-5(b)(1) (2002). This regulation has been challenged and upheld by the Third, Fourth,

It is arguable that a lesser standard of deference is justified for tax regulations due to the inherent advantages enjoyed by the IRS over taxpayers.[245] However, in *Mayo Foundation for Medical Education & Research v. United States*, the Court did away with the distinction between these two types of Treasury regulations, acknowledging that the changes in the administrative landscape over the years no longer justified special rules for tax regulations.[246] Accordingly, tax regulations, regardless of their source of authority, are entitled to *Chevron* deference.[247]

The regulations' categorical refusal to consider consideration that is not reducible to money or money's worth in determining whether a transfer is a gift appears to be a plausible method of interpreting the term "gift." After all, many, if not most, transfers to charitable and educational organizations, what many would consider as the prototypical transfers motivated by detached and disinterest generosity, return psychic benefits to their donors not unlike the benefits derived from political contributions. For example, it is difficult to discern a principled distinction between the benefits derived from a donation that may aid in advancing a political position favored by the donor and the benefit derived by a donor from a donation to an educational institution that advances the donor's strongly held views about educational policies. One could insert a charitable organization into the facts in *Carson* and reach the same conclusion as the Tax Court did in that

and Seventh Circuits. *See* Mannella v. Comm'r, 631 F.3d 115 (3d Cir. 2011); Jones v. Comm'r, 642 F.3d 459 (4th Cir. 2011); Lantz v. Comm'r, 607 F.3d 479 (7th Cir. 2010). In *Jones*, the Fourth Circuit applied *Chevron*-type deference and reasoned that it was plausible that Congress' failure to provide for a two-year limitation period evidenced an intention to leave the matter to the discretion of the IRS. Despite its victories in court, the IRS has announced that it will no longer require that relief under the third provision be sought within the two-year period specified in the regulations. *See* I.R.S. Notice 2011-70, 2011-2 C.B. 135.

245. *See* Am. Bar Ass'n, *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 THE TAX LAW. 717, 723–24 (2004).

246. Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 713–14 (2011).

247. *Id.* at 714. Informal agency guidance, however, is not entitled to *Chevron* deference. In *United States v. Mead*, the Court applied a much less deferential standard of review to a customs service ruling and stated explicitly that this standard of review—the *Skidmore* standard—survived *Chevron*. United States v. Mead, Corp., 533 U.S. 218, 225, 235 (2001). Under *Skidmore*, the weight that a court will give an agency action depends upon the thoroughness of the agency's deliberations, the validity of its reasoning, its consistency with earlier and later pronouncements, and other factors that provide the agency with the power to persuade. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). It is debatable whether *Skidmore* provides for any deference at all. *See Mead*, 533 U.S. at 259 (Scalia, J., dissenting). For a detailed analysis of deference in the tax context as it existed prior to *Mayo Foundation*, see Mark E. Berg, *Judicial Deference to Tax Regulations: A Reconsideration in Light of* National Cable, Swallows Holding, *and Other Developments*, 61 THE TAX LAW. 481 (2008); Am. Bar Ass'n, *supra* note 245.

case.[248] The fact that Congress saw the need to provide a specific deduction for contributions to certain charitable and educational institutions indicates that the receipt of psychic benefits was not adequate consideration for a transfer to avoid gift status.

This is not to suggest that the regulations' interpretation is the only plausible interpretation of the term "gift." Arguably, political contributions may be aligned more closely with the donor's business and property interests than donations to section 501(c)(3) organizations, although this distinction may not hold for donations to charities that work with subject matters related to a donor's business. The *Stern* court emphasized the connection of the donation to the donor's property interests, but the *Carson* court did not premise its holding on any business connection to the donation.[249] In any event, these two cases are old and hardly settle the matter. Moreover, there are several arguments for exempting contributions to section 501(c)(4) organizations from the gift tax. However, none of these arguments are particularly satisfying nor strong enough to overcome *Chevron* deference.

First, the codification of an exception for donations to political organizations can be interpreted as Congress making explicit what had already been implied and not as a change in the law. The limitation of the statutory exclusion to donations to political organizations, as defined in section 527, can be seen as reflective of the practices of the times. In the 1970s, section 501(c)(4) organizations were not significant players on the political scene and would not be for more than three decades.[250] The failure to provide a specific exclusion or deduction for transfers to section 501(c)(4) organizations in general may simply be attributable to the fact that donations to such organizations did not implicate gift tax issues because such donations were almost invariably below the gift tax annual exclusion amount and, thus, the issue was moot.[251] However, Congress has had plenty of notice of the IRS's position on this issue, and its failure to codify an exception for transfers to section 501(c)(4) organizations casts some doubt on this line of reasoning.

Second, it is arguable that the transfer of funds to a social welfare organization for political activity is not a gift but is, instead, a pooling of funds in which the organization is the receptacle for funds and the disbursement agent for payments that individual contributors could

248. *See supra* notes 206–13 and accompanying text.
249. *See supra* notes 202–13 and accompanying text.
250. *See supra* notes 149–54 and accompanying text.
251. *See supra* note 181 and accompanying text.

have made directly themselves without gift tax consequences. In fact, this rational underpins the income tax exemption for section 501(c)(7) social clubs.[252] The notion that the organization is merely a conduit for donor disbursements or holds property as a trustee for the donors has had some success as justification for not treating the receipt of political contributions by political organizations or candidates as income for income tax purposes.[253] There appears to be no reason why a similar argument cannot be made with respect to the gift tax. However, the notion that an organization is a conduit, alter-ego, trustee, or similar functionary for donors is belied by the fact that these organizations exercise discretion in how and when the funds are spent. In addition to the possibility that an organization's political objectives are not precisely congruent with the political objectives of its donors, section 501(c)(4) organizations, by definition, cannot engage primarily in political activity and, thus, have objectives and policy goals beyond political goals.[254] The IRS has rejected this theory in instances where the organization exercises more than ministerial power over the funds and is not clearly an agent.[255]

Third, the income tax treatment of transfers to section 501(c)(4) provides evidence that such transfers are not gifts. Intuitively, if a payment is income it is not a gift and, conversely, if a payment is a gift it is not income. Gifts are not income for tax purposes.[256] On the one hand, the fact that donations to an organization are not income implies that such contributions are indeed gifts. However, this begs the question of why a specific statutory income tax exemption is necessary for such contributions. Moreover, failure to meet the statutory condi-

252. *See* JOINT COMM. ON TAX., HISTORICAL DEVELOPMENT AND PRESENT LAW OF THE FEDERAL TAX EXEMPTION FOR CHARITIES AND OTHER TAX-EXEMPT ORGANIZATIONS 28 (April 19, 2005) (citing to S. REP. NO. 91-552, at 71 (1969)), *available at* https://www.jct.gov/publications.html?func=startdown&id=1586.

253. *See generally* Daniel L. Simmons, *An Essay on Federal Income Taxation and Campaign Finance Reform*, 54 FLA. L. REV. 1 (2002); I.R.S. Gen. Couns. Mem. 39813, n.32 (Mar. 19, 1990). The IRS had exempted political donations to candidates and political parties from the income of the recipients of such donations as early as 1939. However, questions remained as to whether unexpended funds were income and with respect to the tax status of political organizations in general. Section 527 was enacted to clarify the income tax status of political organizations. *See* Roger Colinvaux, *Regulation of Political Organizations and the Red Herring of Tax Exempt Status*, 59 NAT'L TAX J. 531, 534–35 (2006). Congress, however, appeared to enact section 527 based, in part, on its belief that the IRS did not require tax returns from political organizations, because the IRS believed virtually all of their receipts were from gifts. *See id.* at 535–36. Prior to the enactment of section 527 the income tax treatment of contributions was governed by IRS rulings. *See* Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 955 (2005) (discussing rulings prior to the enactment of § 527).

254. *See supra* note 162 and accompanying text.

255. Colinvaux, *supra* note 253, at 534–35.

256. I.R.C. § 102(a) (CCH 2013).

tions for tax-exempt status will result in the entity recognizing income from its donations. A gift to a charity is not a gift—at least for the income tax purposes of the charity—if the charity engages in political activity or if the charity's mission does not qualify the organization for tax-exempt status.[257] In addition, section 501(c)(4) organizations must either report their lobbying expenditures to their donors or pay a proxy tax.[258] These rules prevent donors from circumventing the prohibition on the deduction of lobbying expenses by routing such expenditures through a section 501(c)(4) organization.[259] However, the necessity of such rules presupposes that the payments to the section 501(c)(4) organization are otherwise deductible for income tax purposes. Deductions are, in general, limited to expenditures that are ordinary and necessary trade or business expenses or ordinary and necessary expenditures incurred for the production of income or the management, conservation, or maintenance of property held for the production of income.[260] Thus, this presupposition implies that many transfers to such organizations have some business or income connection.[261]

However, for income tax purposes, a gift is a transfer made "from a 'detached and disinterested generosity,' . . . 'out of affection, respect, admiration, charity or like impulses.' . . . 'What controls is the intention with which payment, however voluntary, has been made.'"[262]

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257. Such circumstances would cause the organization to lose its tax-exempt status. *See supra* note 160 and accompanying text.

258. I.R.C. §§ 6033(e)(1)(A)(ii), (e)(2) (CCH 2013). The proxy tax, imposed at the highest rate of corporate tax, provides a possibly less burdensome alternative to allocating membership dues among lobbying and political activities. The reporting requirement applies to all section 501 organizations, except section 501(c)(3) organizations. I.R.C. § 6033(e)(1)(B)(i) (CCH 2013). This provision was challenged and ultimately upheld by the D.C. Circuit. *See infra* note 286 and accompanying text.

259. Subject to certain narrow exceptions, lobbying and political expenditures are not deductible for income tax purposes. I.R.C. § 162(e)(1)(A), (B) (CCH 2013).

260. *See* I.R.C. §§ 162(a), 212 (CCH 2013). A number of expenditures unrelated either to a trade or business or to the production of income are allowed by legislative grace. *See, e.g.*, I.R.C. § 163(h)(2)(D) (CCH 2013) (allowing a deduction for mortgage interest); I.R.C. § 213 (CCH 2013) (allowing a deduction for medical expenses).

261. I.R.C. § 274(b) denies deductions for gifts to individuals in excess of token amounts if the recipient is entitled to exclude the gift from income pursuant to I.R.C. § 102. However, this provision should not be interpreted to imply that gifts to which this provision is inapplicable are deductible. This provision provides that no deduction under section 162 or section 212 are allowed for gifts and the provision is targeted at gifts to individuals with whom the donor has a business relationship. In essence, this provision prevents income tax deductions for gifts to individuals that may otherwise have been deductible under general tax principles. *See* I.R.C. § 274(b) (CCH 2013).

262. Comm'r v. Duberstein, 363 U.S. 278, 285–86 (1960) (quoting from Comm'r v. LoBue, 351 U.S. 243, 246 (1956), Robertson v. United States, 343 U.S. 711, 714 (1952), and Bogardus v. Comm'r, 302 U.S. 34, 45 (1937) (Brandeis, Stone, Cardozo, Black, J.J., dissenting)).

Thus, the income tax rules focus on the motive of the payment and not the consideration received in exchange. In contrast, the gift tax rules focus on the consideration received in exchange for the payment and place significantly less importance on the motive for the transfer.[263] To be sure, many transfers are gifts for both income and gift tax purposes.[264] However, the fact that the status of a transfer as a gift is in question for income tax purposes due to some element of reciprocity that is not reducible to money's worth does nothing to resolve its status as a gift for gift tax purposes.

Fourth, the legislative history of the gift tax exemption for contributions to political organizations indicates that Congress did not want the tax system to discourage political contributions and that the application of the tax to donations to section 501(c)(4) organizations is at odds with congressional intent.[265] However, in many respects, the tax law is decidedly unkind to political expenditures. It prohibits any deduction for amounts paid or incurred in influencing legislation, participating or intervening in any political campaign, attempting to influence the general public, or segments thereof, with respect to elections, legislative matters, or referendums, and communicating directly with certain executive branch officials.[266] Moreover, dues paid to certain tax-exempt organizations that are allocable to such activities are similarly non-deductible.[267] Deductions for certain indirect contributions to political parties, such as advertising in convention programs and other publications and admission costs to dinners and inaugural events are also not deductible.[268] Except for banks, taxpayers are prohibited from taking bad deductions or losses from worthlessness of debts owed by political parties.[269] Finally, transfers of appreciated property to section 527 organizations are treated as sales or exchanges of such property thereby triggering the recognition of gain by the donor.[270] The assertion that the tax law is not designed to impede political activity is based on a very selective view of the evidence.

Finally, another argument for not taxing contributions to section 501(c)(4) organizations—that the purposes of the gift tax is not served

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263. The regulations promulgated under I.R.C. § 102 do not contain any language that is similar to the language contained in Treas. Reg. § 1.2512-8 regarding the consideration received by the donor for the transfer. *See generally* Treas. Reg. § 1.102-1 (1956).

264. For example, transfers of funds or property by a parent to a child are generally gifts for both income and gift tax purposes.

265. *See* S. REP. NO. 93-1357, at 31 (1974).

266. *See* I.R.C. § 162(e)(1) (CCH 2013).

267. I.R.C. § 162(e)(3) (CCH 2013).

268. I.R.C. § 276(a) (CCH 2013).

269. I.R.C. § 271 (CCH 2013).

270. I.R.C. § 84(a) (CCH 2013).

by such taxation—is similarly inconclusive. The gift tax was enacted in 1924 "as a backstop to the estate tax" thereby preventing taxpayers from circumventing the estate tax through lifetime gifts.[271] Moreover, the gift tax serves as a deterrent to taxpayers from transferring appreciated property to family members in lower income tax brackets.[272] Transfers to such organizations actually serve the purpose of the estate tax in that they deplete the assets of the donor and ameliorate concerns about dynastic accumulations of wealth.[273] Moreover, it is not common for taxpayers to make testamentary transfers to these types of organizations and, consequently, the imposition of a tax on inter vivos transfers to such organizations serves little purpose from a policy standpoint.

However, testamentary transfers to section 501(c)(4) organizations and political organizations are subject to the estate tax.[274] It is quite possible that such organizations are not often the object of a decedent's bounty because testamentary transfers to such organizations are taxable. Moreover, many transfers that do not contribute to family wealth accumulation are taxable—gifts to non-relatives, for example. If the purpose of wealth transfer taxes was solely to prevent family accumulations of wealth then Congress could have limited their application to transfers that advanced that purpose.[275] Wealth taxes also raise revenue and that objective should not be overlooked. Perhaps, as a policy matter, such transfers should be deductible from a decedent's taxable estate. At present, however, testamentary transfers to such organizations are taxable and this fact hardly supports an exclusion from gift tax for inter vivos transfers. An exception for an inter vivos transfer that would otherwise be taxable at death hardly keeps with the spirit of the gift tax as a backstop to the estate tax.

Despite the statutory and regulatory support for taxation, the imposition of a tax on contributions to social welfare organizations to facili-

271. *See supra* note 174 and accompanying text; Aprill, *supra* note 2, at 293–94.

272. *Id.* at 293.

273. *Id.* at 323.

274. Deductions that are made from the gross estate to arrive at the taxable estate of a decedent include bequests, legacies, devises, or transfers to organizations similar to those to whom transfers will not incur gift taxes. However, for estate tax purposes, section 527 organizations are not included among the organizations eligible for deductible transfers. *See* I.R.C. § 2055 (CCH 2013). Unlike the gift tax, the estate tax is not burdened with the difficulty of determining whether a transfer, absent a statutory exception, is subject to tax. An inter vivos transfer can be many things, a gift being one of them. The estate tax, however, is imposed on the value of the gross estate of a decedent less statutorily provided deductions and exemptions.

275. Congress has shown it is perfectly capable of determining, with mind-numbing precision, which parties are related to each other for tax purposes. *See, e.g.*, I.R.C. § 267(b) (CCH 2013) (defining related parties for various income tax purposes).

tate political speech implicates First Amendment concerns. However, it is unlikely that the application of the gift tax, a broad based tax, to such contributions will run afoul of the Constitution.

3. Constitutional Support for Taxability

The Supreme Court has acknowledged that the denial of "the right to pool money through contributions" diminishes freedom of association because "funds are often essential if 'advocacy' is to be truly or optimally 'effective.'"[276] Justice Scalia, in *Citizens United*, supported corporate speech rights on textual grounds, but he also relied on freedom of association for support.[277] Responding to the dissent, Justice Scalia stated:

> The dissent says that when the Framers "constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind." That is no doubt true. All the provisions of the Bill of Rights set forth the rights of individual men and women—not, for example, of trees or polar bears. But the individual person's right to speak includes the right to speak *in association with other individual persons*.[278]

Justice Scalia analogized corporate speech to the speech of political parties and stated that institutional speech is "the speech of many individual Americans, who have associated in a common cause."[279] The Court, in *NAACP v. Alabama*, held that the right of association is not dependent upon the nature of the beliefs sought to be advanced—be they political, economic, religious, or cultural.[280] Associational rights are, moreover, protected not only against direct government restraints but also indirect restraints, the latter of which are examined to determine their likelihood of imposing a substantial restraint upon the exercise of such rights.[281] Consequently, whether government impediments significantly and meaningfully chill association rights is influenced by the nexus between the group's common cause and the speech in question.

Citizens United can, and has been, criticized, for its insistence on broad First Amendment protection for corporations in general. The common cause of shareholders in a typical for-profit corporation is

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276. Buckley v. Valeo, 424 U.S. 1, 65–66 (1976). *See also* Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 296 (1981) (stating that contribution limits to committees that supported or opposed ballot measures "is clearly a restraint on the right of association.").

277. *See* Citizens United v. FEC, 558 U.S. 310, 385–87 (2010) (Scalia, J., concurring).

278. *Id.* at 391–92 (Scalia, J., concurring) (emphasis in original) (internal citation omitted).

279. *Id.* at 392.

280. 357 U.S. 449, 460–61 (1958).

281. *Id.* at 461–62.

commercial in nature, and shareholders do not associate in corporate form to advance political beliefs. The nature of the modern corporation weakens the claim that restrictions on corporate political activity diminish individual associational rights. A persuasive case may be made that associational rights weaken considerably in a large publicly-traded corporation with hundreds of thousands or, perhaps, millions of shareholders—arguably, the very entities that Congress had in mind when it sought to limit corporate political participation. Moreover, the importance of such rights is placed in further doubt by the fact that the identity of the shareholders in a publicly traded corporation change by the minute or, in some cases, by the second. In contrast, members and donors to political and non-profit organizations have a focused common cause and, arguably, a stronger basis for objecting to indirect restraints on their freedom to associate and pool their resources.

Impediments to associational rights that implicate political speech are particularly problematic. Political speech is dearly protected under the First Amendment because its informative tendencies support vital societal objectives. "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."[282] One scholar noted the importance of political speech:

> [T]the modern state is personified rather than discovered. Because that state is merely a human creation, its legitimacy must be established and maintained. Unlike other kinds of expression and action, political speech precisely concerns this matter. This is the general reason why the Court has traditionally thought that political speech should be the most protected kind of expression, that government regulation of political speech has until recently been very limited, i.e., strictly scrutinized. Indeed, as we shall see, limited government results in citizens that are more, rather than less, politically active. Citizens in the modern world often exhibit their political nature through opposition to the state, not through submission to it.[283]

However, it is unlikely that the imposition of a gift tax on donations to section 501(c)(4) organizations constitutes an impermissible indirect restraint on donors' associational rights. Because the gift tax is a tax of general applicability, exemption for contributions to certain organizations can be viewed, justifiably, as a subsidy to those organiza-

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282. *Citizens United*, 558 U.S. at 339.

283. Scot J. Zentner, *Revisiting* McConnell: *Campaign Finance and the Problem of Democracy*, 23 J.L. & POL. 475, 496 (2007)

tions. Despite the fact that the gift tax is imposed on the donor, exemption from the tax indirectly benefits the donee because it reduces the cost of the contribution to the donor and potentially increases the amount of contributions a donor may be willing to make to such organizations.[284] The benefit of a gift tax exemption is analogous to the benefit that section 501(c)(3) organizations enjoy from the income tax deduction available for charitable contributions to these organizations—a benefit the Court has categorized as a subsidy to these organizations.[285]

The Court has held that speakers have no right to have their speech subsidized by government benefits. Thus, the Court has upheld the denial of tax deductions for lobbying expenditures in *Cammarano v. United States*,[286] the conditioning of tax-exempt status for section 501(c)(3) organizations on the refrainment of lobbying activity in *Regan v. Taxation with Representation of Washington*,[287] and the qualification for postal subsidies by publishers in exchange for their compliance with certain disclosure requirements in *Lewis Publishing Co. v. Morgan*.[288] If the trigger for the loss of subsidies is content neutral, the First Amendment is not violated by the government's failure to subsidize speech.[289]

Arguably, unlike the situations just described, the imposition of a gift tax constitutes the imposition of a penalty and is not the denial of a subsidy. However, tax statutes of general applicability, not designed to suppress particular content, have not been found constitutionally infirm despite the impact that such statutes may have on the dissemi-

284. *See* I.R.C. § 2502(c) (CCH 2013).

285. *See* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 544 (1983). The deduction for charitable contributions is limited to contributions to or for the use of certain entities, including several types of non-profit entities. Section 504(c)(4) and section 527 political organizations are not eligible donees for purposes of the charitable contribution deduction. *See* I.R.C. § 170(c) (CCH 2013).

286. 358 U.S. 498 (1959). *See also* Am. Soc'y of Ass'n Execs. v. United States, 195 F.3d 47 (D.C. Cir. 1999) (upholding the statutory requirement that certain tax exempt organizations either report the portion of dues to members that funded lobbying activities or, alternatively, pay a proxy tax of thirty-five percent).

287. 461 U.S. 540 (1983).

288. 229 U.S. 288 (1913).

289. *See* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 548 (1983) (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959)). In *Speiser v. Randall*, 357 U.S. 513 (1958), the Court held that a California law that conditioned the receipt of a property tax credit by veterans on the veterans' signing a statement that they did not advocate the overthrow of the government was unconstitutional because the law, in part, was designed to punish "dangerous ideas." *Id.* at 59.

nation of speech.[290] In *Leathers v. Medlock*, the Court upheld the imposition of a sales tax on sales by cable operators despite the existence of an exemption from the tax for several other forms of media purchases.[291] According to the Court, "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas."[292] In contrast, taxes that are imposed on a small, select group of transactions, whose subject matter is protected by the First Amendment, have been struck down.[293] The gift tax is a tax of general applicability and is not designed to suppress particular ideas or content. Moreover, imposition of the tax to all donations to section 501(c)(4) organizations, whether politically active or not, further supports the content neutrality of the tax.

In one respect, however, the imposition of the gift tax to transfers to section 501(c)(4) organizations could be problematic. In *Regan v. Taxation with Representation of Washington*, a concurring opinion indicated that the ability of an organization to use alternate means to engage in a protected activity without the government subsidy was critical to the upholding of the statute.[294] In that case, the Court upheld the statute's conditioning of a section 501(c)(3) organization's tax-exempt status on the organization's refrainment from lobbying activity.[295] According to the concurrence, the loss of the organization's tax exemption would have precluded its receipt of deductible contributions and, thus, significantly impeded its ability to raise funds for any purpose.[296] However, the ability of such organizations to establish separate section 501(c)(4) organizations that may engage in lobbying provided such organizations with an alternative means of conducting lobbying activities without the loss of their tax-exempt status.[297] Similarly, in *Rust v. Sullivan*, the Court upheld the withholding

290. The mere existence of an income tax impedes the dissemination of ideas because it reduces the disposable income with which a person could disseminate ideas or purchase ideas for consumption.

291. *Leathers v. Medlock*, 499 U.S. 439 (1991).

292. *Id.* at 453.

293. *See* Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983) (holding that a tax on paper and ink that applied to a small subset of newspaper publishers was unconstitutional); Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936) (holding that a gross receipts tax on the sale of advertisements by certain newspapers was unconstitutional because it was "a deliberate and calculated device in the guise of a tax to limit the circulation of information")

294. Regan v. Taxation with Representation of Wash., 461 U.S. 549, 551–52 (Blackmun, J., concurring).

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

296. Taxation with Representation, 461 U.S. at 552 (Blackmun, J., concurring).

297. *Id.* at 552–53.

of federal funds from family planning organizations that discussed abortion as a family planning option in large part because a family planning organization could provide such information through a separate organization that did not receive federal funds.[298]

As previously discussed, section 501(c)(4) organizations may form separate segregated funds that are deemed section 527 political organizations.[299] Consequently, political activities can be undertaken by such segregated funds without the imposition of gift tax on donors to such funds. However, section 501(c)(4) organizations that undertake lobbying activities have no alternative methods of undertaking such activities without the imposition of a gift tax on their donors.[300] It is not clear whether this fact could prove problematic because the courts have not been consistent in their insistence that an alternative channel of communication be present.[301] In any event, it is arguable that the logic of *Cammarano* should apply to this situation.[302] Because the gift tax applies to donations to any section 501(c)(4) organization, an exemption for donations that fund such organizations' lobbying activities would be a subsidy for lobbying activities.[303] *Cammarano* is clear that the government need not subsidize lobbying activities.[304]

IV. POLICY ARGUMENTS AGAINST TAXATION

The IRS's position that contributions to section 501(c)(4) organizations are subject to gift tax has support in the statutory language and the regulatory definition of a gift and may very well pass muster under the deferential standards of *Mayo* and *Chevron.* Moreover, it does not appear that enforcement of the gift tax for such donations would face constitutional impediments. However, such enforcement is not justified from a policy standpoint.

Despite the fact that the statute leaves ample room for interpretation of the term "gift," there is something to be said for a method of statutory interpretation that considers the everyday, commonsense meaning of a term with which people are generally familiar. The *Carson* court's definition of a gift is probably better aligned with people's understanding of that term than a definition that ignores any reciprocal benefit that is not reducible to money's worth. Moreover, many

298. Rust v. Sullivan, 500 U.S. 173, 196 (1991).
299. *See supra* note 167 and accompanying text.
300. Lobbying is not considered an exempt function. *See* Treas. Reg. § 1.527-2(c)(1) (1985).
301. *See* Aprill, *supra* note 2, at 319–20 n.173–74.
302. *See supra* note 286 and accompanying text.
303. See Colinvaux, *supra* note 253, at 538–39 for an excellent discussion of whether a tax exemption is, in fact, a subsidy.
304. *See supra* note 286 and accompanying text.

section 501(c)(4) organizations, such as volunteer firefighters' associations or community organizations that maintain free-parking for visitors, serve missions that unlikely would cause a donor to consider a donation to such organizations a taxable transaction.[305] In fact, many section 501(c)(4) organizations serve missions that could qualify them as section 501(c)(3) organizations, and their tax status reflects an organizational preference for operational flexibility—a flexibility that, for the most part, is sought for the ability to lobby and engage in political activity.[306] Moreover, *Carson*'s reasoning is particularly apt to the extent that donors contribute to an organization such as the AARP or the NRA to enhance the organization's ability to achieve legislative objectives with which the donor shares a particularly strong affinity.

Large donations to such organizations for political purposes are the obvious target of IRS enforcement. Let us assume, however, that the statutory cover provided for contributions to political organizations defined in section 527 is meant to be exclusive and that such exclusivity is meant to subject such contributions to the statutory disclosure requirements.[307] Assuming that this result is desirable, subjecting all transfers to section 501(c)(4) organizations to the gift tax is a poor method of achieving this result.

It is likely that the imposition of the gift tax on donations to section 501(c)(4) organizations will tend to force political donors to divert substantial contributions to section 527 organizations or force section 501(c)(4) organizations to create segregated funds that are treated as section 527 organizations to receive such contributions.[308] To that extent, the threat of the gift tax will serve to bring political donors into the open. However, gift tax enforcement will not deter mega-donors from participation in the political process. The very wealthy could either undertake their activities directly without the need for organizational intermediaries or form their own political organizations.[309]

305. *See* Rev. Rul. 87-126, 1987-2 C.B. 150; Rev. Rul. 81-116, 1981-1 C.B. 333.

306. *See supra* notes 160–62 and accompanying text. Section 501(c)(3) organizations enjoy a fund raising advantage over section 501(c)(4) organizations due to the fact that contributions to the former organizations qualify for the charitable deduction for income tax purposes, while contributions to the latter organizations do not. *See* I.R.C. § 170 (CCH 2013). The regulations provide that a charitable mission can include the promotion of social welfare. *See* Treas. Reg. § 1.501(c)(3)-1(d)(2) (1990). Oftentimes, the distinction between these two types of organizations is dependent upon the breadth of the class of beneficiaries served. *See* Aprill, *supra* note 2, at 299–300.

307. *See supra* notes 179–80 and accompanying text.

308. *See supra* note 167 and accompanying text.

309. Several wealthy donors have already formed their own Super PACs. *See* Raymond Hernandez, *Bloomberg Starts 'Super Pac,' Seeking National Influence*, N.Y. TIMES (Oct. 17, 2012) (reporting on the formation of a Super PAC by New York City mayor Michael Bloomberg); Sara

Moreover, corporations owned by a large number of shareholders would be undeterred by the threat of a gift tax. Although the gift tax is applicable only to individuals, the regulations deal with the possibility that entities such as trusts, corporations, partnerships, and the like become vehicles through which gifts are laundered.[310] The gift tax applies to gifts that are made indirectly, and gifts by a corporation are deemed to be gifts made by the shareholders.[311] This provision appears to be aimed at closely-held corporations because these entities, typically family-owned, offer the greatest possibilities of intra-family gift-giving. This provision will provide little deterrence to corporations with a large number of shareholders because it is unlikely that any individual shareholder's allocable portion of the gift will exceed the gift tax annual exclusion, which is presently set at $14,000.[312] Consequently, section 501(c)(4) organizations could very well continue their political activities with corporate funding. In light of the hand-wringing over *Citizens United*, the possibility of corporate dominance over section 501(c)(4) organizations' political activities is, most likely, not a welcome possibility.[313]

Murray & Brody Mullins, *Investor Bankrolls Big Romney Campaign*, WALL ST. J. (Sept. 17, 2012, 1:35 PM) (reporting on the formation of a Super PAC by Joe Ricketts, the billionaire founder of Ameritrade).

310. The gift tax is applicable to individual taxpayers. *See supra* note 173 and accompanying text.

311. Treas. Reg. §§ 25.2511-1(c)(1) (1997), 25.2511-1(h)(1) (1997). Although not expressly stated in the regulations, similar principles presumably would apply to treat gifts by a trust, partnership, or limited liability company as gifts by the beneficial owners, partners, and members, respectively. Single-member limited liability companies not electing to be taxed as corporations are ignored for federal income tax purposes, and any gifts by such entities would be considered a direct gift by the single member. *See* Treas. Reg. § 301.7701-3(b)(1)(ii) (2006).

312. *See supra* note 181 and accompanying text. The regulations provide no guidance in determining how gifts are to be allocated among shareholders. Presumably, gifts are allocated according to shareholdings on the date that the gifts are made. Also, if a shareholder is not an individual but an entity then a further allocation must be made until the gift is allocable to an individual. This author is unaware of the application of this provision to a publicly-traded corporation.

313. Corporations would enjoy a similar advantage with respect to the lobbying activities of section 501(c)(4) organizations. Corporations also fund lobbying activities through section 501(c)(6) organizations such as the U.S. Chamber of Commerce. The U.S. Chamber of Commerce was, based on dollars spent, the most prolific lobbying organization in 2012. *See supra* note 153. The SEC is considering requiring the disclosure of corporate political and lobbying activity. *See* Office of Info. and Regulatory Affairs, *Disclosure Regarding the Use of Corporate Resources for Political Activities*, *available at* http://www.reginfo.gov/public/do/eAgendaView Rule?pubId=201210&RIN=3235-AL36. The imposition of such a disclosure requirement has generated vigorous debate between proponents and opponents of the requirement. *See* Nicholas Confessore, *S.E.C. Is Asked to Require Disclosure of Donations*, N.Y. TIMES (April 23, 2013). Opinion on the desirability of such a disclosure requirement is decidedly mixed. *Compare* J.W. Verret, *The SEC Ponders Circumventing* Citizens United, WALL ST. J. (Jan. 8, 2013, 7:14 PM) *with* Thomas P. DiNapoli & Bill de Blasio, *Companies: Show Us the Money*, N.Y. TIMES (Mar.

Finally, the imposition of the gift tax to donations to section 501(c)(4) organizations will raise the issue of politically-motivated, selective enforcement of the tax. Moreover, to the extent the agency does, in fact, serve a political master, there are little or no judicial checks to assure that the agency enforces the tax in an evenhanded manner. The IRS has undertaken questionable actions in recent years that suggest to its critics that it has been enlisted to serve political agendas.

In the midst of the financial crisis in 2008, the Treasury and the Federal Reserve were eager to have financially sound institutions subsume their more troubled brethren.[314] Not surprisingly, many troubled institutions had significant net operating losses for federal income tax purposes that, if available to a suitor, would facilitate their

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21, 2013). Access to the ballot for shareholder proposals concerning corporate political activity may be challenged by the corporation on the grounds that such activity is exclusively a managerial prerogative. *See* 17 C.F.R. § 240.14-8(i)(7) (2008); Abbott Laboratories, SEC No-Action Letter (Feb. 11, 2009), *available at* http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2009/aflcio021109-14a8.pdf. *But see* Bank of America, SEC Response of the Office of the Chief Counsel, Div. of Corp. Fin. (Feb. 11, 2009), *available at* http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/stephenjohnson021513-14a8.pdf (concluding that a shareholder proposal could not be excluded from the ballot under 17 C.F.R. §§ 240.14-8(i)(3) or 240.14-8(i)(3) (2008)). Recently, the New York State Common Retirement Fund filed suit to compel Qualcomm, Inc. to disclose its political activity. Dan Strumpf, *Qualcomm Sued Over Political-Giving Records*, WALL ST. J. (Jan. 3, 2013, 6:24 PM). Corporate political activity may be motivated, in significant part, by the personal objectives of executives. A relatively recent study examined the relationship between political donations and firm returns. A positive relation between donations and firm returns indicates that such donations are driven by firm objectives, whereas a negative relation between donations and returns implies that donations were motivated to a great extent by management's desire to demonstrate its power and prestige or obtain high-profile cabinet or ambassadorial positions. The authors found a negative correlation between donations and firm returns. *See* Rajesh K. Aggarwal, Felix Meschke & Tracy Yue Wang, *Corporate Political Contributions: Investments or Agency?* (June 25, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=972670. The Center for Responsive Politics reported that forty major ambassadorships were granted to large donors of George Bush and the Republican Party between 2000 and 2004 and that thirty-three of such ambassadorships were given to corporate chief executive officers, presidents, founders, or their immediate family members. *Id.* at 11.

314. The economy began to weaken in 2007, and by March of 2008 the Federal Reserve Bank of New York agreed to provide approximately $29 billion as a loss guarantee to facilitate the acquisition of Bear Stearns by J.P. Morgan. J.P. Morgan bore the risk of the first $1.15 billion of losses, and the New York Federal Reserve took on the next $28.82 billion of risk. *See* FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL INQUIRY REPORT 290 (2011) [hereinafter CRISIS REPORT], *available at* http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf. The Financial Crisis Inquiry Commission, a ten-member panel appointed by Congress, was created by the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 5, 123 Stat. 1617, 1625–31, to examine the causes of the financial crisis. By October of that year, Lehman Brothers failed, the federal government became an owner of Fannie Mae and Freddie Mac, and $85 billion of loans from the government were authorized to the giant insurer, American International Group. *See* CRISIS REPORT, *supra* note 314, at 309-343. In October, the Troubled Asset Relief Program (TARP) was born as part of the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 101, 122 Stat. 3765, 3767 (2008).

acquisition. However, federal tax law severely limits the utility of acquired net operating loss carryforwards.[315] Tax accounting principles do not assure that all economic losses incurred by the acquired entity prior to acquisition are reflected in the net operating loss figure at the time of acquisition, and, consequently, the statute creates a rebuttable presumption that certain losses that are realized post-acquisition are subject to the same limitations as the net operating losses themselves.[316]

On September 30, 2008, in the midst of the financial crisis, the IRS released Notice 2008-83.[317] The notice provided acquirers of troubled banks with tax benefits that, in all likelihood, were unavailable under the statute. In effect, bad debt losses incurred post-acquisition on the acquired bank's loan portfolio would not be subject to the presumption that such losses were incurred prior to the acquisition and, thus, subject to the statute's strictures.[318] Bank acquirers were relieved of its burden of proof to show that such losses were incurred post-acquisition.[319] The notice was immediately criticized as a bailout for the

315. Once a statutory threshold change in ownership occurs, net operating losses that arose prior to the ownership change are available to offset only a limited amount of taxable income in any taxable year. That limit, the section 382 limitation, is equal to the value of the old loss corporation multiplied by the long-term tax-exempt rate. I.R.C. § 382(b)(1) (CCH 2013). Some corporations have gone to great lengths to protect themselves from the application of section 382 by using poison pills, a technique usually reserved to deter unwanted takeovers. In their basic form, poison pills allow existing shareholders to acquire additional stock at a bargain price in the event an unwanted suitor accumulates an amount of stock in the corporation exceeding a defined threshold, typically fifteen to twenty percent. To deter ownership changes under section 382, corporations have lowered the triggering threshold to just under five percent. The Delaware Supreme Court has upheld the use of poison pills. *See* Versata Enters. v. Selectica, Inc., 5 A.3d 586 (Del. 2010). *See also* Serena Ng & Randall Smith, *AIG Raises Tax Shield,* WALL ST. J. (Mar. 10, 2011, 12:01 AM) (describing the adoption of a plan by American International Group, Inc. to protect its ability to use over $32 billion in net operating losses); Dana Mattioli, *Kodak Is Exploring Sale of Patent in Apple Lawsuit,* WALL ST. J. (Aug. 2, 2011) (reporting that Kodak adopted an anti-takeover plan that is triggered if a party acquired more than 4.9 percent of Kodak stock, that is intended to insure that its net operating losses would be available to shield gains from patent sales).

316. I.R.C. § 382(h)(1)(B), (2)(B) (CCH 2013).

317. I.R.S. Notice 2008-83, 2008-2 C.B. 905.

318. Section 2 of the I.R.S. Notice, its operative provision, states:

> For purposes of section 382(h), any deduction properly allowed after an ownership change (as defined in section 382(g)) to a bank with respect to losses on loans or bad debts (including any deduction for a reasonable addition to a reserve for bad debts) shall not be treated as a built-in loss or a deduction that is attributable to periods before the change date.

Id.

319. During the financial crisis, this would have been a tall order indeed. Bank holdings were souring well before the issuance of Notice 2008-83. *See, e.g.*, Jenny Anderson, *Wall St. Banks Confront a String of Write-Downs*, N.Y. TIMES (Feb. 19, 2008); David Leonhardt, *Holding On*, N.Y. TIMES, Apr. 6, 2008, at MM10. For a fascinating look at the behind-the-scenes negotiations

banking industry.[320] Congress eventually overturned Notice 2008-83 with the passage of the American Recovery and Reinvestment Act of 2009 and made clear its displeasure with the IRS.[321] Despite the fact that Congress acted to preserve its legislative prerogatives, it did so only prospectively. The new law applied only to transactions that occurred after January 16, 2009 and the notice would remain in effect for ownership changes that occurred pursuant to contracts and certain written agreements that were entered into on or before January 16, 2009.[322]

More recently, regulations have been issued that appear to contradict the statute that provides tax credits for certain purchasers of health insurance. The Patient Protection and Affordable Care Act segments the health insurance market into four markets: the individual market; two employer provided group insurance markets, the small and large group market, based on the size of the employer; and the Exchanges.[323] By January 1, 2014, each state must create and op-

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that took place between various financial institutions and the effect that inflated loan values had on those negotiations, see ANDREW ROSS SORKIN, TOO BIG TO FAIL (2011).

320. *See, e.g.*, Jesse Drucker, *Obscure Tax Breaks Increase Cost of Financial Rescue*, Wall St. J. (Oct. 18, 2008, 12:01 AM); Amit R. Paley, *A Quiet Windfall for U.S. Banks*, WASH. POST (Nov. 10, 2008) (describing the reaction of several tax lawyers to the notice). One Wall Street tax authority observed that "[i]t couldn't be clearer if they had taken out an ad." Joe Nocera, *So When Will Banks Give Loans?*, N.Y. TIMES (Oct. 25, 2008) (quoting tax expert Robert Willens). Senators Schumer of New York and Grassley of Iowa questioned the propriety of the notice and the latter requested an internal Treasury review of the circumstances surrounding the issuance of the notice. Press Release, Senator Charles E. Schumer, Schumer Seeks Answers from IRS, Treasury on Tax Code Change that Subsidizes Bank Acquisitions (Oct. 30, 2008), *available at* http://www.schumer.senate.gov/Newsroom/record.cfm?id=304737&&year=2008&; Press Release, Senator Chuck Grassley, Grassley Seeks Inspector General Review of Treasury Bank Merger Move (Nov. 14, 2008), *available at* http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=18109. The Treasury's inspector general admitted that a legitimate argument could be made that the IRS exceeded its authority in issuing the notice. *See* CRISIS REPORT, *supra* note 314, at 371.

321. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1261, 123 Stat. 115, 342–43. Section 1261(a) of the legislation stated Congress' findings as follows:

> (1) The delegation of authority to the Secretary of the Treasury under section 382(m) of the Internal Revenue Code of 1986 does not authorize the Secretary to provide exemptions or special rules that are restricted to particular industries or classes of taxpayers.
> (2) Internal Revenue Service Notice 2008-83 is inconsistent with the congressional intent in enacting such section 382(m).
> (3) The legal authority to prescribe Internal Revenue Service Notice 2008-83 is doubtful.

Id.

322. *Id.*

323. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1304, 1312, 124 Stat. at 171, 182 (2010). On June 28, 2012, the Supreme Court upheld the constitutionality of the individual insurance mandate, perhaps the most controversial portion of this legislation. *See* Nat'l Fed'n. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012). Although the Court held that the

erate an Exchange that offers insurance for purchase by individuals and employees of small employers.[324] The Exchanges are intended to function as insurance marketplaces in which individuals have the ability to comparison shop for insurance products, and the federal government will subsidize state Exchanges until January 1, 2015.[325] However, a state may opt out of creating and operating an Exchange, in which case the Exchange will be established by the federal government.[326]

Federal tax credits are provided for individuals and families who purchase insurance through an Exchange, whose income is below a certain threshold, and who do not obtain insurance through their employer.[327] The credit appears to be limited to taxpayers who are enrolled in state Exchanges.[328] However, regulations were issued recently that would also allow participants in federally assisted Exchanges to qualify for the credit.[329] These regulations have come under attack.[330]

Both of these instances are examples of the IRS issuing taxpayer friendly guidance—unusual for this agency—that appear to contravene the statute. Typically, taxpayers are unable to challenge such actions due to lack of standing. The two examples described above are atypical in that both dealt with highly visible, politicized subject matter: the bank bailouts and ObamaCare. Notice 2008-83 was overturned, albeit prospectively, by Congress as a result of the negative publicity generated by the Notice. The health care tax credit regulations are being challenged but only because this tax credit has an unusual feature: qualification for the credit triggers a penalty that is imposed on employers of the taxpayers that qualify for the credit.[331]

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imposition of the individual mandate was impermissible under the commerce power, the Court also held that the imposition of the mandate was a proper exercise of Congress' taxing power. *Id.* at 2593, 2600. Seven Justices also struck down the statute's expansion of Medicaid as impermissibly coercive to the states and held that states could decline to expand Medicaid eligibility without the loss of federal funds provided under existing programs. *See id.* at 2606–07.

324. Patient Protection and Affordable Care Act, § 1311(b), 124 Stat. at 173.

325. *Id.* § 1311(d)(5)(A), 124 Stat. at 178.

326. *Id.* § 1321(c), 124 Stat. at 186.

327. I.R.C. § 36B (CCH 2013).

328. *See* I.R.C. § 36B(b)(2) (CCH 2013).

329. *See* Treas. Reg. §§ 1.36B-1(k), 1.36B-2(a) (2012); 45 C.F.R. § 155.20 (2012).

330. *See* Louise Radnofsky, *Health Law Opponents Challenge Tax Credit*, WALL ST. J. (July 17, 2012, 9:42 PM).

331. *See* Oklahoma *ex rel.* Pruitt v. Sebelius, No. CIV-11-030-RAW, 2013 U.S. Dist. LEXIS 113232 (E.D. Okla., filed Jan. 21, 2011). *See also* Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 HEALTH MATRIX 119, 120 n.4 (2013). The Patient Protection and Affordable Care Act, §§ 1513, 10106(e), 124 Stat. at 253–56, 910–11, added § 4980H to the I.R.C. This provision im-

As a result, these employers have standing to challenge the regulations. Moreover, these regulations are not the only example of this phenomenon with respect to ObamaCare. The Obama administration has recently announced that enforcement of the statute's employer mandate, effective January 1, 2014, will not go into effect until 2015.[332]

Typically, tax pronouncements that favor a taxpayer or group of taxpayers cannot be challenged due to lack of standing. Therefore, if the IRS does selectively enforce the gift tax then its decisions not to enforce that tax against certain donors will be immune from legal challenge.

Frothingham v. Mellon is the foundational case for federal taxpayer standing jurisprudence.[333] In that case, a taxpayer alleged that the

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poses an exaction on certain employers if they do not offer insurance coverage to their employees or offer coverage that is deemed inadequate under the statute and at least one full-time employee is allowed a tax credit or cost-sharing reduction. *See* I.R.C. § 4980H(a) (CCH 2013). The Fourth Circuit has recently held that Liberty University had standing to challenge the employer mandate and upheld the constitutionality of the employer mandate. *See* Liberty Univ., Inc. v. Lew, 733 F.3d 72, 83 (4th Cir. 2013). The government argued that Liberty had failed to establish standing because it is speculative whether Liberty will be subject to an assessable payment due to its provision minimum essential health insurance coverage that may satisfy the statute's affordability criteria, thereby precluding the application of the penalty. *Id.* at 90. According to the court:

> Liberty need not show that it will be subject to an assessable payment to establish standing if it otherwise alleges facts that establish standing. In this case, in addition to alleging that it "could" be subject to an assessable payment, Liberty alleges that the employer mandate and its "attendant burdensome regulations will . . . increase the cost of care" and "directly and negatively affect [it] by increasing the cost of providing health insurance coverage." . . . [T]o establish standing, Liberty need not *prove* that the employer mandate will increase its costs of providing health coverage; it need only plausibly allege that it will.

Id. at 89–90 (emphasis in original).

332. *See* I.R.S. Notice 2013-45, 2013-31 I.R.B. 116 (July 9, 2013); Louise Radnofsky, *Health Law Penalties Delayed*, WALL ST. J. (July 3, 2013, 9:55 AM). The statute imposes an exaction on certain employers if they do not offer insurance coverage to their employees or if they offer coverage that is deemed inadequate under the statute. This provision is effective on January 1, 2014, and the statute contains no provision for delaying its effective date. *See generally* I.R.C. § 4980H (CCH 2013). Two attorneys that played pivotal roles in the constitutional challenge to the Affordable Care Act's individual mandate have posited that individuals may maintain standing to challenge the delay in the enforcement of the employer mandate due to its effect on individuals that purchase health insurance. They assert that, due to the comprehensive and coordinated nature of the various statutory provisions, the suspension of one provision has deleterious effects on persons subject to other provisions. In this case, the lack of an employer mandate may force an individual who otherwise may have obtained employer coverage to purchase her own insurance. *See* David B. Rivkin, Jr. & Lee A. Casey, *Why the President's ObamaCare Maneuver May Backfire*, WALL ST. J. (July 14, 2013, 5:22 PM). It appears that the logic of *Wright v. Allen* would preclude standing on such a theory. *See infra* notes 342–48 and accompanying text.

333. Frothingham v. Mellon, 262 U.S. 447 (1923). The standing requirement is rooted in Article III of the Constitution, which provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and . . . to Controversies to which the United States shall be party . . . ." U.S. CONST. art. III, § 2. A detailed

Federal Maternity Act of 1921, a statute that provided financing to states in order to reduce infant and maternal mortality, violated the Tenth Amendment and that the federal expenditures under the statute increased her tax bill in violation of due process.[334] The Court held that the taxpayer failed to present a justiciable case or controversy but, instead, raised a "matter of public and not individual concern" resolvable only through political means.[335] The Court reasoned that the effect of the expenditures on her federal tax liability was too "remote, fluctuating and uncertain" and that her "interest in the moneys of the Treasury" was "shared with millions of others."[336] The invocation of federal judicial power requires a party to show "not only that the statute is invalid but that he has sustained . . . some direct injury as the result of its enforcement, not merely that he suffers in some indefinite way in common with people generally."[337]

In *Simon v. Eastern Kentucky Welfare Rights Organization*, several organizations promoting access to health care for the poor alleged

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discussion of the constitutional and prudential underpinnings of the standing requirement and the criticism to which it has been subject is beyond the scope of this work. For a detailed analysis of standing *see* Richard A. Epstein, *Standing and Spending – The Role of Legal and Equitable Principles*, 4 CHAP. L. REV. 1, 25–27 (2001); Cass R. Sunstein, *What's Standing after* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Louis L. Jaffe, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895 (1960). The Court recently denied the petitioners standing in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), the high-profile case involving the constitutionality of Proposition 8, a California ballot measure that amended the California constitution to limit marriage to heterosexual unions. The state of California did not appeal the decision of the federal district court that held that Proposition 8 was unconstitutional. *Id.* at 12. The decision was appealed to the Ninth Circuit by the official proponents of the ballot measure, and the Ninth Circuit upheld the district court on the merits after concluding that the appellants had standing to appeal. *Id.* at 14–15. The Ninth Circuit had certified a question to the California Supreme Court that inquired whether, under California law, the official proponents of a ballot measure possessed a particularized interest in the measure's validity sufficient for them to assert the State's interest in the matter. The California Supreme Court responded affirmatively. *Id.* at 12–13. The Court, however, held that the official proponents of a ballot measure had suffered an injury that was indistinguishable from the injury suffered by the citizens of California in general. *Id.* at 20. Moreover, the petitioners were not, according to the Court, acting as agents of the state, but were instead acting as private citizens. *Id.* at 23–33.

334. Frothingham v. Mellon, 262 U.S. 447, 479, 486–88 (1923).

335. *Id.* at 487–89.

336. *Id.* at 487.

337. *Id.* at 488. The Court distinguished this case from its decision in *Crampton v. Zabriskie*, 101 U.S. 601 (1879), a decision that let a local taxpayer action stand. In the Court's opinion, local taxpayers' stake in the local treasury are direct and immediate, unlike federal taxpayers' interest in the federal treasury. *Frothingham*, 262 U.S at 486. In a relatively recent case, the Court made clear that *Frothingham* applies with equal force to taxpayer challenges to state tax and spending provisions. In that case, the plaintiffs alleged that property tax relief and a state tax credit granted to the DaimlerChrysler Corp. pursuant to a contract entered into between the corporation and the City of Toledo violated the Commerce Clause. *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006).

that the IRS violated section 501(c)(3) by granting a tax exemption to two hospitals without conditioning the tax exemption closely enough to the hospitals' charitable care for the indigent.[338] The plaintiffs asserted that the IRS's action encouraged the hospitals to deny services to the members and clients of the plaintiff organizations.[339] Despite conceding that the plaintiffs had, indeed, suffered an injury in fact, the Court denied the plaintiffs standing because Article III "still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."[340] According to the Court, whether the tax exemption encouraged the denial of medical service was purely speculative. Correspondingly, whether removal of the exemption would result in the availability of such services was equally speculative because it was plausible that the hospitals in question would forego the tax exemption and operate unfettered by the restrictions imposed by such exemption.[341]

Likewise, the Court denied standing in *Allen v. Wright*, another case challenging taxpayers' tax-exempt status.[342] An outstanding IRS ruling denied tax-exempt status to racially discriminatory private schools. A nationwide class action was brought on behalf of the plaintiffs, their children, and all parents of African-American children that attended schools in public school systems undergoing desegregation. The plaintiffs alleged that some private schools in desegregating school districts were, in fact, discriminatory and that the IRS failed to assure that its policies were implemented by the tax-exempt private schools.[343] The harms alleged were two-fold. First, the IRS's conduct amounted to tangible federal support for racially segregated institutions.[344] Second, the conduct interfered with the desegregation efforts of the school districts by encouraging the operation and expansion of segregated educational institutions.[345] The Court held that the first injury was not cognizable because, in the absence of allegations that the plaintiffs were personally affected by discriminatory conduct, their al-

338. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 30–32 (1976).

339. *Id.* at 32–33.

340. *Id.* at 40–42.

341. *Id.* at 42–44.

342. Allen v. Wright, 468 U.S. 737 (1984).

343. *Id.* at 744–45.

344. *Id.* at 745.

345. *Id.*

legations amounted to a mere assertion of a right to have the government act in accordance with the law.[346]

With respect to the second alleged injury, the Court found that the plaintiffs had asserted an injury in fact. The Court held that the second injury, the diminished opportunity for the plaintiffs' children to receive an education in a racially integrated school, was judicially cognizable and, in light of *Brown v. Board of Education*, that it was one of the most serious injuries recognized by the legal system.[347] However, citing *Simon*, the Court stated that:

> The line of causation between that conduct and desegregation of respondents' schools is attenuated at best. From the perspective of the IRS, the injury to respondents is highly indirect and "results from the independent action of some third party not before the court." . . . The diminished ability of respondents' children to receive a desegregated education would be fairly traceable to unlawful IRS grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration. . . . Moreover, it is entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies.[348]

Taxpayer standing is countenanced only with respect to Establishment Clause violations, the so-called *Flast* exception. In the seminal case of *Flast v. Cohen*, the plaintiff alleged that the allocation of funds to religious schools, pursuant to the Federal Education Act of 1965, violated the Establishment Clause.[349] The Court set forth a two prong test for standing. First, the plaintiff must "establish a logical link" between her status as a taxpayer and the legislation at issue.[350] The Court then clarified that, in order to satisfy this prong of the test, the act challenged must be an act of Congress made pursuant to its Article I, Section 8 power to tax and spend for the general welfare.[351] The plaintiff, according to the Court, suffered a direct financial injury in the form of tax money spent in violation of specific constitutional protections.[352] Second, "the taxpayer must establish a nexus" between her status as a taxpayer and the alleged constitutional violation.[353]

346. *Id.* at 753–56.
347. *Allen*, 468 U.S. at 756.
348. *Id.* at 757–58 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 42 (1976)).
349. Flast v. Cohen, 392 U.S. 83, 85 (1968).
350. *Id.* at 102.
351. *Id.* at 102–03.
352. *Id.* at 106.
353. *Id.* at 102.

This test is met if the violation alleged implicates a clear limitation on congressional power under Article I, Section 8. According to the Court, the Establishment Clause serves as a "specific constitutional limitation" on Congress' power to tax and spend under Article I, Section 8 because the framers adopted the Establishment Clause as a result of their fear that "the taxing and spending power would be used to favor one religion over another or to support religion in general."[354] The Court distinguished this case from *Frothingham* on the ground that *Frothingham* involved Fifth and Tenth Amendment claims, two provisions that do not impose clear limitations on Congress' power to tax and spend.[355]

Flast has been narrowly applied, and allegations of violations of other constitutional provisions have not fared well.[356] Moreover, the Court has refused to apply *Flast* to alleged constitutional violations by the Executive branch.[357]

Due to the standing requirement, taxpayers cannot challenge an IRS decision not to enforce the gift tax on donations to section 501(c)(4) organizations. The issuance of Revenue Ruling 2008-83 and the regulations interpreting the health insurance tax credit have been criticized as an attempt to avoid politically difficult decisions by executive fiat.[358] To be sure, these actions dealt with the government

354. *Flast*, 392 U.S. at 103–04.

355. *Id.* at 105.

356. Less than a decade after *Flast* was decided, the Court denied standing to a taxpayer who sought to enforce the "Accounts Clause" contained in Article I, § 9 by requiring Congress to publish the portion of the federal budget earmarked for the Central Intelligence Agency. United States v. Richardson, 418 U.S. 166 (1974). The Court, in the same year, also denied taxpayer standing in a case that asserted that membership in the military reserves by a member of Congress violated Article I, § 6 of the Constitution. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974). More recently, the Court refused to extend *Flast* to alleged Commerce Clause violations. *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 347 (2006) (stating that "[w]hatever rights plaintiffs have under the Commerce Clause, they are fundamentally unlike the right not to 'contribute three pence' . . . for the support of any one [religious] establishment ") (quoting 2 WRITINGS OF JAMES MADISON 186 (G. Hunt ed. 1901)).

357. Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc., 454 U.S. 464, 479–80 (1982) (holding that the taxpayer lacked standing because the challenged action was taken pursuant to Article IV, § 3 and not, as *Flast* requires, pursuant to Article I, § 8 and because the alleged violation was not committed by Congress but by an executive agency). The Court, however, found *Flast* applicable to agency action in the administration of a specific congressional mandate holding that the distinction between congressional action and agency action is not relevant when the agency's action is "at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers." Bowen v. Kendrick, 487 U.S. 589, 619–20 (1988). A very recent case indicates that *Bowen* is to be narrowly construed to apply only to situations in which expenditures are made pursuant to a statutory mandate and not to situations in which expenditures are funded by general appropriations and made at the discretion of the executive branch. *See* Hein v. Freedom from Religion Found., Inc., 551 U.S. 607 (2007).

358. *See supra* notes 317–330 and accompanying text.

bailout of financial institutions and ObamaCare, both politically sensitive issues. However, it is arguable that the one area where agency decisions are most likely to be interpreted as politics disguised as discretion is enforcement of the tax law with respect to political contributions. The express statutory prohibition on the exertion of influence by executive branch officials over the IRS is unlikely to quell public perception that political factors have influenced decisions to enforce or not enforce the gift tax.[359]

The recent disclosure that the IRS was contemplating enforcement of the gift tax against donors to section 501(c)(4) organizations was met with the expected accusations that the agency's actions were an attempt to hinder Republican fund-raising efforts, as was the attempt by New York's attorney general to obtain tax information on section 501(c)(4) organizations from the IRS.[360] More recently, the IRS issued an apology for admittedly subjecting conservative organizations to inappropriate scrutiny during the 2012 campaign season in its review of their applications for section 501(c)(4) status.[361] Despite the agency's assertion that the actions in question were undertaken by career civil servants against whom no political pressure was exerted, Republican leaders were not mollified by the apology, and evidence surfaced that the controversial actions were more widespread than initially believed.[362] It takes little imagination to envision that serious efforts by the IRS to enforce the tax against some donors but not others will be met by assertions that the IRS has been enlisted as a political weapon. Ironically, political meddling with the IRS—one of the Nixonian practices that, to a great extent, led to the passage of

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359. *See* I.R.C. § 7217 (CCH 2013). Church investigations are subject to heightened taxpayer protections. *See* I.R.C. § 7611 (CCH 2013). Despite the statutory protections, investigations are often met with accusations of political motives. *See* Leslie S. Garthwaite, Comment, *An End to Politically Motivated Audits of Churches? How Amendment to Section 7217 Can Preserve Integrity in the Tax Investigation of Churches Under Section 7611*, 60 THE TAX LAW. 503 (2007) (discussing the IRS investigation into the activities of the All Saints Episcopal Church).

360. Bernie Becker, *Tax Writers Fire Off Warning to NY AG*, THE HILL (Sept. 17, 2012, 5:21 PM) http://thehill.com/blogs/on-the-money/domestic-taxes/125612-tax-writers-fire-off-warning-to-ny-ag.

361. John D. McKinnon & Corey Boles, *IRS Apologizes for Scrutiny of Conservative Groups*, WALL ST. J. (May 10, 2013, 4:23 PM); Jonathan Weisman, *I.R.S. Apologizes to Tea Party Groups Over Audits of Applications for Tax Exemption*, N.Y. TIMES (May 10, 2013).

362. Jonathan Weisman, *Mismanagement by I.R.S. Cited in Tea Party Scrutiny*, N.Y. TIMES, May 15, 2013, at A1; John D. McKinnon & Siobhan Hughes, *FBI Launches Probe of IRS*, WALL ST. J., May 15, 2013, at A1; John D. McKinnon & Siobhan Hughes, *Wider Problems Found at IRS*, WALL ST. J., May 13, 2013, at A1. President Obama forced the resignation of acting IRS Commissioner Steven Miller as a result of the scandal. *See* John D. McKinnon, Evan Perez & Damian Paletta, *Tax Scandal Fells IRS Chief*, WALL ST. J., May 16, 2013, at A1. For a compendium of sources discussing this scandal, see http://taxprof.typepad.com/taxprof_blog/irs_news/ (last visited June 26, 2013).

campaign reform legislation—may very well become a byproduct of an effort to do justice to the spirit of the campaign finance laws.[363] Whether, in fact, the IRS is subject, and ultimately succumbs, to political pressure is beside the point if the public perceives that such pressure has been exerted and heeded.

The exposure of the funding sources behind political activities to the sunlight of disclosure is a laudable objective. Use of the gift tax to drive political activity out of section 501(c)(4) organizations, despite the constitutional and statutory support for this technique, is poor policy. A more effective approach, similar to the proxy tax scheme imposed on section 501(c)(4) organizations, is to focus on disclosure and provide such organizations with a choice.[364] Section 501(c)(4) organizations can either conduct all their political activity through a sister section 527 organization or segregated fund or, alternatively, disclose their donors. A de minimis level of direct political activity could be permitted thereby allowing organizations with insignificant amounts of political activity to avoid the administrative burdens of establishing a separate political organization or segregated fund.[365]

Subjugation of section 501(c)(4) organizations to the disclosure requirements of section 527 political organizations will likely cause section 501(c)(4) organizations to form affiliated political organizations or create segregated funds regardless of gift tax concerns. Political activity undertaken by section 501(c)(4) organizations incur transaction costs not similarly incurred by political organizations. These costs result from the managerial attention required to assure that political activity is not the primary activity of the organization lest it lose its tax-exempt status.[366]

Donors incur agency costs with respect to the funding of political activity that is not subject to "hard money" restrictions.[367] Direct con-

363. President Nixon attempted to use the IRS to harass persons on his infamous enemies list. *See* JOINT COMM. OF INTERNAL REVENUE TAX., INVESTIGATION INTO CERTAIN CHARGES OF THE USE OF THE INTERNAL REVENUE SERVICE FOR POLITICAL PURPOSES (Dec. 20, 1973) *available at*, https://www.jct.gov/publications.html?func=startdown&id=4038. President Nixon was not alone in seeking the aid of the IRS for political purposes. *See generally* JOHN A. ANDREW III, THE POWER TO DESTROY: THE POLITICAL USES OF THE IRS FROM KENNEDY TO NIXON (2002); DAVID BURNHAM, A LAW UNTO ITSELF: POWER, POLITICS, AND THE IRS (1989). *See also* James Bovard, *A Brief History of IRS Political Targeting*, WALL ST. J., May 15, 2013, at A15.

364. *See supra* note 258 and accompanying text.

365. Section 84 should be amended to provide that the donation of appreciated property to fund section 504(c)(4) organizations' political activities is subject to the same treatment as similar donations to political organizations: a deemed sale of such assets. *See supra* note 270 and accompanying text.

366. *See supra* note 162 and accompanying text.

367. Agency costs exist in all relationships in which one party acts on behalf of another. Agency relationships form among individuals because each individual's decisions affect the

tributions to a candidate's campaign committee or contributions to fund expenditures that are closely coordinated with a candidate will not incur the agency costs that result from unregulated contributions to independent organizations. Donors to independent organizations run the risk that such organizations' expenditures are not as helpful to the candidate as expected. For example, attack advertisements or excessive focus on a contentious issue may be counterproductive or at least not as beneficial to a candidate as activities that the candidate's staff would have undertaken had the expenditures been coordinated with them. The use of section 501(c)(4) organization as the vehicle through which independent expenditures are made increases the possibility of agency costs because, unlike political organizations, section 501(c)(4) organizations must, in order to maintain their tax exempt status, primarily undertake social welfare activities. Consequently, in addition to the agency costs made possible by the inability to coordinate political activity with a candidate, donors to social welfare organizations cannot be assured that their contributions will be used strictly for political purposes.

If section 501(c)(4) organizations were forced to disclose their donors then any advantage they enjoy over political organizations with respect to political activity vanishes. In that case, it is unlikely that a social welfare organization will risk its tax-exempt status by directly undertaking political activity when nothing is lost by undertaking those activities through an affiliated political organization or segregated fund.

V. CONCLUSION

Campaign finance reform efforts have either had little effect or, when effective, generated behavioral responses that largely negated their intended effect. The distinctions between contributions and expenditures, and between advocacy and non-advocacy, set forth in *Buckley* allowed money to flow to independent issue-oriented organizations and political parties. Much of what the McCain-Feingold Act intended to accomplish was undone by *Citizens United.* Independent advocacy is now outside the reach of the campaign finance laws. Whether *Citizens United* is an unmitigated disaster or, alternatively, a long overdue validation of First Amendment principles is beside the

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wealth of others, with those decisions often unobservable. The management of this agency relationship results in the incurrence of monitoring costs by the principal, bonding costs by the agent to signal fealty to the principal, or some combination of the two. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,* 3 J. FIN. ECON. 305, 309 (1976).

point. Campaign finance practices have shown a propensity to evolve regardless of the obstacles put in place to limit the political influence, real or perceived, of money.

The use of the gift tax to achieve goals unmet by campaign finance laws is unwise. Although the imposition of the tax on donors to section 501(c)(4) organizations will, in most likelihood, find statutory and constitutional support, such imposition will do little to reduce political expenditures. The impediments that the gift tax places on contributions that fund the political activities of social welfare organizations will be overcome by the diversion of donations to section 527 political organizations. Moreover, social welfare organizations may continue with their political activities with the funding of large corporations that are ambivalent toward the gift tax. Enforcement of the gift tax will also expose the IRS to accusations of political meddling or worse.

Social welfare organizations enjoy a singular advantage over political organizations: donor anonymity. The imposition of donor disclosure requirements on such organizations will, for all practical purposes, drive political activity out of social welfare organizations and into political organizations. As a result, social welfare organizations can focus exclusively on their missions, and donors can fund such missions unburdened from gift tax concerns. The effects of *Citizens United* will not be undone by brandishing about the gift tax as a weapon against donors to one type of organization.