

Political Tax Law After Citizens United: A Time For Reform

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When the U.S. Supreme Court announced its decision in *Citizens United v. Federal Election Commission*¹ on January 21, 2010, the immediate and still resonant reaction from many quarters has been: "this will open the floodgates" for corporate spending to influence the democratic election process in America. We hear outrage at the concept that "corporations are persons" entitled to First Amendment speech rights. We hear shock at the conservative turn of a Court that, in a 5-4 decision, upended a hundred years of progressive campaign finance reforms and overruled its own precedents prohibiting corporate political expenditures--precedents set as recently as 1990 and 2003.

My reaction to *Citizens United* is quite different. True, it will no longer be a felony for a business corporation to make independent expenditures to support or oppose a candidate for public office, and we may therefore see more corporate spending on explicit political advertising. What I find more provocative, however, is that the Court's decision lifts the lid on a steaming cauldron of legal issues that involve *how political speech is defined in America*. Those business corporations and economic interests desiring political power had already figured out how to influence who gets elected in this country, mainly by operating in realms of speech, spending, and conduct that fell outside of the Federal Election Commission (FEC) prohibitions. Therefore, the most fascinating questions are, and will continue to be, not about who may speak to influence elections or what burdens and inhibitions may be placed on their speech, but about what I've heard Professor John Simon describe as "border patrol," the exercise of critical judgment as to what constitutes political campaign speech and what does not. Where is that line? How do we know the line has been crossed? Can we know where the line is before crossing it?

Major decisions affecting who can speak and what vehicles are available to them tend to be made by Congress and the Supreme Court, and they tend to happen once in a decade, or in a generation, or in a lifetime. Examples are the prohibition on charitable electioneering of 1954, the Federal Election Campaign Act in 1971², *Buckley*

¹ (No. 08-205), 558 U.S. ____, 130 S. Ct. 876 (2010).

² 2 U.S.C. sections 431-457.

v. *Valeo*³ in 1976, the rise of the "527" entities in the 1990s, the McCain-Feingold legislation of 2002,⁴ and now *Citizens United* in 2010. By contrast, decisions about the interpretation, use, and manipulation of regulated speech definitions are being made every day, in small shops of election and tax-exempt lawyers pursuing their craft in public agencies, such as the FEC, the Internal Revenue Service (IRS), and the state election commissions; in private nonprofits such as the Alliance for Justice, OMB Watch, and the Campaign Finance Institute; and in private law firms in Washington, Indiana, and San Francisco. Indeed, these judgment calls have been part of my daily law practice for over twenty years.

You see, even if the floodgates are now open for corporate business spending on election speech, and no new reforms are enacted to curtail or discourage that spending, there are still legal compliance measures for politically active corporations, both for-profit and nonprofit, to observe. The Court in *Citizens United* left intact the federal election regulations that require corporations to make prompt financial disclosures of their political spending and put prominent disclaimers in their paid political ads. In addition -- and this is really the thrust of my remarks today -- corporate political spending will have inescapable *tax* consequences.

The Tax Treatment of Political Spending by Businesses and Charities

Leaving aside the world of tax-exempt organizations for the moment, what is the federal income tax treatment of political spending by business corporations? If Wal-Mart -- newly liberated by *Citizens United* -- wants to spend money on negative campaign ads against every elected official that has made its life difficult, can Wal-Mart deduct those amounts from its taxable income as ordinary and necessary business expenditures under section 162 of the Internal Revenue Code?⁵ The answer would seem to be "no," because section 162(e)(1)(B) allows no deduction for any amount paid or incurred for "participation in, or intervention in, any political campaign on behalf of (or in opposition to) any candidate for public office."⁶

What does that mean? You will look in vain for much in the way of Treasury regulations, rulings, or decided cases interpreting "political intervention" under section 162(e).⁷

³ 424 U.S. 1 (1976) (*per curiam*).

⁴ Bipartisan Campaign Reform Act of 2002 (BCRA 2002) (P.L. 107-155, 116 Stat 81).

⁵ All section references are to the Internal Revenue Code of 1986, as amended.

⁶ A few tax experts have begun to comment on the business expense deduction post-*Citizens United*, e.g. Ellen Aprill at <http://electionlawblog.org/archives/015571.html> and Andrew Oh-Willeke at <http://washparkprophet.blogspot.com/2010/01/what-are-tax-implications-of-citizens.html>.

⁷ Reg. section 1.162-20(c)(1) does no more than repeat the statutory phrasing and make cross references to regulations issued under other, rather isolated, code sections 271 and 276, which address debts owed by and indirect contributions to

But wait, doesn't that phrasing sound familiar? Right. Those are almost precisely the words that were inserted in code section 501(c)(3) in 1954, the essential definition of what a tax-exempt charitable organization under the Internal Revenue Code absolutely must *not* do if is to keep its tax exemption: "participate in, or intervene in, (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."

So now, after *Citizens United*, our friends in the corporate tax bar can join us in the exempt organizations bar and ask the same question: What exactly is political campaign intervention? They will want to know because speech that constitutes political intervention will need to be paid for with after-tax dollars, but spending for speech that does not cross that line will be tax-deductible, and much less expensive.

When you pose the definitional question to IRS officials responsible for exempt organizations, within the first 60 seconds you will no doubt hear the mantra "it depends on the facts and circumstances." They are highly reluctant to say where the line is.

There is very little in Treasury regulations to elaborate on the term "political intervention" under Section 501(c)(3).⁸ Nor is there much case law.⁹ The Service has been fairly successful, so far, staying away from litigation over the political transgressions that have occurred in the charitable sector, and the reported cases tend to involve quite explicit, rather than marginal, violations. Most of the authoritative guidance we have on what is and is not political intervention by a charity is contained in a smattering of revenue rulings issued by the Service, which stopped in the 1980s and resumed in 2007 with a single ruling covering a variety of borderline activities.¹⁰ Beyond that, those of us who advise tax-exempt organizations about their political activities have had to try to read the tea leaves resulting from high-profile skirmishes that the IRS has had

political parties. One of the few reported decisions on the application of the section 162 business deduction to political expenses is *Diggs v. Commissioner of Internal Revenue*, 715 F.2d 245 (6th Cir. 1983), which disallowed Rep. Charles Diggs' costs of attending the Democratic National Convention in 1972 but allowed his costs to attend the National Black Political Conference.

⁸ We have only the so-called "action" organization regulations, reg. section 1.501(c)(3)-1(c)(3)(iii), which contain merely three sentences briefly defining "candidate" and saying that intervention can be direct or indirect and can be oral or written.

⁹ *Branch Ministries v. Rossotti* (221 F.3d 137 (D.C. Cir. 2000) is the most recent significant decision.

¹⁰ Rev. Rul. 2007-41, 2007-25 IRB 1421.

with the likes of Newt Gingrich,¹¹ the Christian Coalition,¹² the NAACP,¹³ the Heritage Foundation,¹⁴ All Saints Episcopal Church, and the Corporation for Public Broadcasting.¹⁵ Until recently, something could be learned from the Service's internal training materials on election year issues, provided to agents who audit exempt organizations, but that resource has been discontinued.¹⁶

What can be gleaned from the existing tax law authorities about the 501(c)(3) prohibition on political campaign intervention is that it covers a much broader range of activities than express advocacy of the election or defeat of candidates, but there is no general definition setting that broader standard, no word formula, no methodology test, no bright lines or safe harbors. By falling back on the vague, ambiguous "facts and circumstances" approach, the Service reserves the option to consider factors not even mentioned in its own revenue rulings. With that flexibility, the IRS can find violations even in situations in which organizations appear to have complied with past precedents, and can be lenient even in cases in which the violation seems blatant and obvious.

Hypothetical: Palin v. Obama, Oil Company v. Environmental Group

To illustrate the problem, and to set up a more analytical approach that might provide a solution, let's consider the hypothetical tax law predicaments of a business corporation and a charity in a future election.

It's 2012. Sarah Palin is the Republican challenger to Barack Obama.

Two corporations care about the power of elected officials -- federal, state, and local -- over oil and gas drilling in the United States.

¹¹ Colvin, "Looking for the Lessons of the Gingrich Affair," 11 *J Tax'n Exempt Orgs* 82 (Sept./Oct. 1999), discussing the IRS technical advice memorandum issued to the Progress and Freedom Foundation in 1999 (unnumbered but available from PFF, which may be contacted online at <http://www.pff.org>).

¹² Colvin, "IRS Gives Christian Coalition a Green Light for New Voter Guides," 50 *Exempt Org. Tax Rev.* 353 (Dec. 2005).

¹³ Both the NAACP and All Saints Episcopal Church matters were handled by Marc Owens, whose Sugarman Memorial lecture of October 30, 2006, was entitled "Touching a Live Wire: Charities and Politics." Both matters involved allegedly political speech, but neither organization was penalized, even though the IRS found (without explanation) that the sermon in the church was intervention and the NAACP speech was not.

¹⁴ LTR 200044038.

¹⁵ Almeras, "CPB Issues Report on Mailing List Swapping," 26 *Exempt Org. Tax Rev.* 9 (Oct. 1999).

¹⁶ Kindell & Reilly, "Election Year Issues," *IRS Exempt Organizations Continuing Professional Education Technical Instruction Program for FY 2002*, available at <http://www.irs.gov/pub/irs-tege/eotopici02.pdf>.

Friendly Fossil Fuel Co, Inc., (3F), a for-profit business corporation, wants to drill more.

Healthy Environment Council, Inc., (HEC) a 501(c)(3) nonprofit corporation, wants less drilling.

Citizens United allows both corporations to engage in speech to influence public elections by making expenditures independent of any candidate or political party.

But how are those expenditures treated under federal tax law?

Can 3F, the business corporation, deduct them as business expenses under section 162(e)?

Can HEC, the charity, make the expenditures at all, given the prohibition in section 501(c)(3)?

Our first example is a pair of dueling television ads about drilling in the Arctic National Wildlife Refuge, nationally broadcast in September 2012. 3F's ad features news clips of Sarah Palin, sounding intelligent and persuasive, favoring drilling. HEC's ad shows other news clips of Sarah Palin, sounding incompetent and ridiculous on the drilling issue, hunting down the wildlife.

Current Federal Tax Law on Issue Advocacy

IRS Revenue Ruling 2007-41 contains a multi-factor test for the evaluation of issue advocacy conducted by 501(c)(3) organizations. It provides as follows:

Issue Advocacy vs. Political Campaign Intervention

Section 501(c)(3) organizations may take positions on public policy issues, including issues that divide candidates in an election for public office. However, section 501(c)(3) organizations must avoid any issue advocacy that functions as political campaign intervention. Even if a statement does not expressly tell an audience to vote for or against a specific candidate, an organization delivering the statement is at risk of violating the political campaign intervention prohibition if there is any message favoring or opposing a candidate. A statement can identify a candidate not only by stating the candidate's name but also by other means such as showing a picture of the candidate, referring to political party affiliations, or other distinctive features of a candidate's platform or biography. All the facts and circumstances need to be considered to determine if the advocacy is political campaign intervention.

Key factors in determining whether a communication results in political campaign intervention include the following:

- o Whether the statement identifies one or more candidates for a given public office;
- o Whether the statement expresses approval or disapproval for one or more candidates' positions and/or actions;

- o Whether the statement is delivered close in time to the election;
- o Whether the statement makes reference to voting or an election;
- o Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office;
- o Whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election; and
- o Whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office.

A communication is particularly at risk of political campaign intervention when it makes reference to candidates or voting in a specific upcoming election. Nevertheless, the communication must still be considered in context before arriving at any conclusions.

Let's apply Revenue Ruling 2007-41 to the hypothetical facts, and let's assume that the IRS would apply the 501(c)(3) test to 3F's business expense deduction under section 162. Looking at the seven "key" factors:

1. Both ads identify Sarah Palin by name, image, and voice. But neither identifies her as a candidate for president. Does that matter?
2. The 3F ad implicitly displays approval for her positions and actions; the HEC ad indicates disapproval.
3. Is September close in time to the November election? Hard to say. The IRS ruling sets no clear time period, unlike the federal election law which would capture a television ad run 60 days before the general election. Maybe the IRS considers June to be close in time to the November election. We don't know.
4. Neither ad makes reference to voting or the election.
5. Oil drilling, probably, has been raised (by whom?) as an issue distinguishing the presidential candidates. This is the so-called "wedge" issue test.
6. Let's assume that both organizations have a long history of mass media communications about drilling in the Arctic National Wildlife Refuge. This is not the first television ad on the subject sponsored by either organization. (Although they've never featured a political candidate before, and are spending vastly more money this time.)
7. The timing of the communication and identification of the candidate is not related to a non-electoral event. Sarah Palin is not governor of Alaska at this time, and has no official governmental function related to oil drilling there.

Of the seven factors, four (1, 2, 5, and 7) indicate political campaign intervention has occurred; five factors if the ad is regarded as close in time to the election. But we

don't know whether the exercise involves merely adding up and comparing the number of positive and negative factors, or whether some factors carry more weight than others. The revenue ruling says a communication is "particularly at risk" if it "makes reference to candidates or voting in a specific upcoming election," which these ads do not. "Any message favoring or opposing a candidate" creates a "risk" of violation, but where exactly is the line between permitted and prohibited speech? The IRS appears to be describing risky, or unsafe, speech and warning charitable organizations to give it a wide berth.

Furthermore, if "all the facts and circumstances need to be considered" and if "the communication must still be considered in context before arriving at any conclusions," then what weight should be given to other facts beyond the list of seven? What if Sarah Palin is chairman of the board of 3F? What if there has just been a massive oil spill on the North Slope? What if the ads run only in Alaska, which is a safe state for Palin? What if they run only in Ohio and Nevada, where the presidential contest is close?

Should the "Facts and Circumstances" Approach Continue?

Revenue Ruling 2007-41 is exactly the kind of multi-factor regulation of speech that seems to have given the majority in *Citizens United* heartburn. Repeatedly, Justice Kennedy's majority opinion decries the "nation-wide chilling effect" on First Amendment speech of the FEC's "unique and complex rules" on "71 distinct entities" that apply to "33 different types of political speech" with "568 pages of regulations" and "1771 advisory opinions." He was critical of the "11-factor balancing test" issued by the FEC to determine whether a communication was the functional equivalent of express advocacy. Seeing this ambiguous and difficult regulatory scheme of "open-ended rough-and-tumble" factors as tantamount to a prior restraint on speech, the majority opinion worried that speakers would "choose simply to abstain from protected speech" rather than "commence a protracted lawsuit."¹⁷ It appears that five justices were so unhappy with the uncertainty of the FEC regulations on "electioneering communications" that the Court departed from the approach taken in *Federal Election Commission v. Wisconsin Right to Life*¹⁸ and did not decide the case on a narrow, as-applied basis, but instead overruled the *Austin* precedent¹⁹ and invalidated the corporate ban on independent expenditures. The attitude seems to be: if a bright line cannot be drawn, forget it, allow the speech.

We don't know whether the Court would, in some future test case, invalidate the 1954 statutory ban on political campaign intervention by 501(c)(3) organizations, or uphold it based on the "subsidy" theory of *Regan v. Taxation With Representation*.²⁰ I

¹⁷ Slip Opinion, pages 16 through 19.

¹⁸ 551 U.S. 449, 127 S. Ct. 2652 (2007) (*WRTL*).

¹⁹ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

²⁰ 461 U.S. 540 (1983), involving the limitation on charitable lobbying. The logic of *Regan v. TWR* was applied to political intervention in *Branch Ministries*, *supra* note 9. It is curious that none of the *Citizens United* opinions mention the federal tax

have my own doubts about the subsidy theory. Many 501(c)(3) organizations receive little or no benefit from tax-deductible donations, or could construct their finances internally so as to avoid financing political intervention with the tax deduction. It may not be at all fair to say that a charity committing a political intervention is necessarily doing so with a government subsidy by virtue of the charitable tax deduction. I prefer to view the section 501(c)(3) tax exemption as a government declaration that the organization is dedicated to serving the broad interests of the public as a whole, does not serve any significant element of private interest (including the partisan interests of political parties and candidates seeking election), and therefore the badge of 501(c)(3) status may be relied upon by the donating public as a guarantee of political nonpartisanship and independent integrity. Americans can choose to donate to political candidates and parties if they wish to, but will know that a donation to a charity is not a means for the organization's leadership, or the donor himself or herself, to steer money toward the election of partisan political office-seekers.

It is possible to unify the tax policies underlying the section 501(c)(3) ban on political intervention, repeated in the section 170(c) charitable deduction provision, and the section 162(e) denial of business deduction: All taxpayers are expected to pay for political speech with money remaining *after* paying their federal income tax.

In any event, even if the subsidy theory or other public policy would support the prohibition on charitable electioneering, the complex, multi-factor, open-ended "facts and circumstances" test that the IRS uses to interpret the prohibition must now be considered highly vulnerable to any future constitutional review *after Citizens United*.

Where Bright Lines Are Needed

Therefore, if the federal tax law definition of political intervention is to have the best chance of surviving judicial scrutiny, we must move to bright lines, safe harbors, and above all, simplicity and ease of understanding. For the most part, this can and should be done through the issuance of new Treasury regulations. If the IRS were to undertake and complete a regulation project defining political intervention in the near future, there would be no need for any amendments to the Internal Revenue Code. The parallel wording of sections 162(e)(1)(B) and 501(c)(3) provides a sufficient foundation upon which good regulations can be constructed.

New regulations defining political intervention need to be applied consistently to three areas of federal tax law:

the disallowance of the business expense deduction under section 162(e);

the prohibition imposed on section 501(c)(3) charitable organizations; and

the limitation imposed on most other section 501(c) exempt categories, for which political intervention, and any other non-exempt activities, must not become the primary activities of the organization.

prohibition on charitable political speech, which applies to most of the nonprofit corporations that the decision had liberated from the election law ban.

I have not mentioned the third area of political tax regulation yet in this lecture, but it is critical. The principal categories of "other" 501(c) groups are (c)(4) social welfare organizations, (c)(5) labor organizations, and (c)(6) trade associations. Such organizations are exempt from income tax on any annual net surplus of revenue over expenditures, but are not entitled to tax-deductible charitable contributions under section 170 of the code. They are not prohibited from engaging in political intervention, but must keep such activity at a less-than-primary level, because their 501(c) tax exemption depends upon maintaining their qualifying exempt activities at a primary level.²¹

Citizens United is a section 501(c)(4) social welfare organization with an annual budget of \$12 million, according to the Supreme Court opinion. If it spent \$7 million in a year related to *Hillary: The Movie*, all of which constituted political intervention (the Court treated it as the functional equivalent of express advocacy), Citizens United would be in danger of losing its (c)(4) exemption because its political intervention had surpassed its social welfare programs.

This could become a problem for many 501(c) public interest groups, labor unions, and especially business associations that may pay out extra millions in funds from their general treasuries during an election year for independent political expenditures in the wake of *Citizens United*.

It is worth pausing to note that the IRS faced a constitutional setback before in its application of vague and uncertain rules governing the speech of section 501(c)(3) organizations, and it overcame that constitutional defect through the exercise of good rulemaking. In the *Big Mama Rag* case,²² the Service denied the exemption of a radical feminist publication for failure to qualify as "educational" under IRS standards as they existed in 1974. The federal court of appeals reversed the IRS action, saying that the IRS definition of "educational" was void for vagueness and did not give the organization sufficient notice of what speech would and would not meet the test for tax exemption. The Service subsequently issued Revenue Procedure 86-43,²³ a methodology test for determining whether material was prepared in an educational manner, without bias as to the speaker's viewpoint. The test was, and still is, a fairly simple word formula that can be understood without the benefit of expert legal counsel. After that, the IRS started to win cases in which the methodology test was challenged in court, because the standard was clear enough to pass constitutional muster.²⁴

The Reform Proposal

You've waited long enough for my reform proposal, and here it is.

²¹ Rev. Rul. 81-95, 1981-1 C.B. 332.

²² *Big Mama Rag, Inc. v. Commissioner*, 631 F.2d 1030 (D.C. Cir. 1980).

²³ 1986-2 C.B. 729.

²⁴ *Nationalist Movement v. Commissioner*, 102 T.C. 558 (1994), *aff'd on other grounds*, 37 F.3d 216 (5th Cir.)

I take it as a given, as settled law for over 50 years, that the federal tax definition of political speech, aimed at withdrawing the subsidies of tax deduction and tax exemption from political candidate-related activity, reaches beyond election law and covers all speech that supports or opposes a candidate for elective public office.

I propose that the broad test for political intervention be modeled on the test for lobbying activity that the IRS adopted in 1990 for most public charities, and for private foundations, with great success. It was in 1976 that Congress enacted code sections 501(h) and 4911 to provide precise expenditure limits for public charities (other than churches) that preferred a clear line in place of the vague "insubstantial" limitation on charitable lobbying imbedded in the statutory wording of section 501(c)(3). So, while the new code sections provided clear dollar limits on expenditures to "influence legislation," the definitions of direct and grass roots lobbying were left to Treasury regulations, which were proposed in 1986 and finalized in 1990, with the intensive participation of the charitable sector. The result was a set of simple, workable word formulas centered on a two-part definition of lobbying that covered communications by the charity to government officials (direct) or to the public (grass roots) that (1) "refer to" and (2) "reflect a view on" a specific legislative proposal.²⁵ Although the charitable lobbying regulations are lengthy, the interpretive detail and examples aid in sharply drawing the basic definitions and in sharply drawing a few safe harbor exceptions.²⁶

After 20 years, these fine regulations have generated practically zero controversy. The Alliance for Justice and others provide handbooks and seminars to teach charities what they can and can't do, with or without help from lawyers, to influence legislation. By and large, the rules seem to be followed. My experience has been that almost every term in the lobbying regs has a hard-enough edge to be applied to a vast range of fact patterns; the one exception is the relatively soft term "specific legislative proposal," which applies not only to bills that have been introduced but also, I think, to policy proposals of sufficient detail that the lawmakers being lobbied would know what the charity wants them to do. The term "reflect a view" seems well-understood: It means saying anything the slightest bit favorable or unfavorable about the legislative proposal.

Therefore, I propose that the basic tax definition of political intervention, as applied to speech, should be:

Any communication to any part of the electorate that (1) refers to a clearly identified candidate and (2) reflects a view on that candidate.

²⁵ Reg. section 56.4911-2. The grass roots lobbying definition has a third element: a clearly defined call to action.

²⁶ The two-part definition of lobbying has been applied in Treasury regulations issued in 1990 for private 501(c)(3) foundations, reg. section 53.4945-2, and in 1995 for business corporations and their associations, reg. section 1.162-29, also with little controversy and wide acceptance. It works in the election context also, where initiatives, referenda, bonds, and similar items submitted to the public for a vote are considered legislation and covered by the federal tax definition of lobbying: a communication that "refers to and reflects a view on" a ballot measure.

There should be two safe harbor exceptions:

(a) commentary upon an elected public official that aims to influence the official's performance within his or her current term of office without mention of any election or voting, or the person's candidacy or opponent; and

(b) presentation of information comparing candidates, gathered using an impartial methodology, without express advocacy of the election or defeat of any candidate.

(1) Refer to a Candidate

The first prong of the political speech test requires reference to a specifically identified candidate--by name, image, title, voice, or other unambiguous reference. This has a number of implications:

1) Speech about campaign issues without reference to any candidate would be permitted (related to the exempt organization's mission, of course). Thus it would not be political intervention for an organization to attempt to inject its concerns into a campaign; it may refer to the importance of the candidates addressing the issues, but if it makes reference to any specific candidate, it must do so without reflecting a view on that candidate. This is consistent with an IRS technical advice memo finding that a charitable organization did not violate its 501(c)(3) status when it ran TV ads criticizing the "Star Wars" missile defense program during the time of the Reagan-Mondale debates in 1984, without mentioning either candidate.²⁷

2) Note that the definition of political intervention relates only to a specifically identified candidate (the statute says "any candidate"--singular, not plural), not to an indefinite group of candidates, such as a political party. Conferring more than an incidental private benefit on a political party (or on any other private interest) violates section 501(c)(3) under the *American Campaign Academy*²⁸ decision, but speech alone that favors or disfavors a party shouldn't come within the definition. Party labels are often used in legislative, ideological, and other contexts, and should not be automatically treated as a reference to candidacy. Limiting the definition of political intervention to a specific candidate also means that it should not be intervention to favor election of generic groups of candidates, such as "more" women, Hispanics, people with disabilities, etc. Of course, in a particular race, "the Democrat" would refer to a specific candidate, as might "the woman" or "the one with dirt under his fingernails."

3) Then, there is the problem of "litmus tests." Many of us practicing in this area have been concerned about charities, including religious groups, that warn their followers not to vote for any candidate who is pro-choice, or favors gay marriage, or who might raise taxes. Yet, by the standard I propose, these statements are not political intervention

²⁷ TAM 8936002.

²⁸ 92 T.C. 1053 (1989).

so long as they are not directed to a specific candidate.²⁹ A charity should be able to advocate voting for pro-choice, green, pro-business, or anti-tax candidates generally. However, if a pro-life group reminded its members that *Roe v. Wade* could be overturned depending on the outcome of the November election, that message does refer to and reflect a view on the candidates for president.

4) In the same vein, "voter pledges," where a charity asks voters to add their names to a list of those committed not to vote for a candidate who would raise taxes, or to vote for a candidate who favors single-payer health care, would not be intervention so long as no candidates or races are mentioned.

(2) Reflect a View on the Candidate

The second prong -- reflect a view -- is a strict test. It rules out any bias, tilt, or favoritism of any kind in any form of speech (endorsements, paid ads, websites, mailings, films, sermons, speeches, journals, signs, yes -- even books). The view could be positive or negative, and it could be expressed internally to members or externally to the public. It requires that all references to candidates be neutral to avoid treatment as political intervention. "Neutral" means, as my colleague Beth Kingsley³⁰ has said, that a reasonable reader or listener or viewer could not discern the speaker's candidate preference. As Beth pointed out to me, reflecting a view on a piece of legislation is an easier test to apply than reflecting a view on a person (candidate) who may wear numerous hats. Nevertheless, any commentary about a candidate, from their military record to their fashion sense, can have an electoral impact, so any exception would require a strong justification.

Voter engagement activities such as voter registration, GOTV, and promotion of absentee ballots, because they refer to the upcoming election or voting, therefore must be entirely neutral when mentioning candidates, and cannot reflect a view on an incumbent candidate's performance.

Let's look at how the second prong of the speech test would be applied to efforts made by an organization to determine the policy positions of competing candidates and present them to the public: voter guides and candidate pledges.

1) Voter guides based on candidate questionnaires should be permitted, no matter the breadth of subject matter or number of questions asked, so long as the result presented to the voters does not tilt toward one candidate and away from another. To reflect no view, the questions must be neutral, at least two candidates must answer,

²⁹ The IRS may have actually conceded this point in recent litigation, *Catholic Answers v. U.S.*, 2009-2 U.S. Tax Cases (CCH) ¶50.697, 104 A.F.T.R.2d (RIA) 6894 (S.D. Cal 2009).

³⁰ Beth succeeded me as the "politics and lobbying" columnist in the *WG&L* journal *Taxation of Exempts*. See Kingsley, "Bright Lines? Safe Harbors?" 20 *Taxation of Exempts* 38 (Jul./Aug. 2008).

and there must be no indication that the organization prefers the candidate who gives a certain answer.³¹

2) If a voter guide is based partially or wholly on the organization's own research on the candidates' positions and qualifications, again, any approach should be allowed so long as there is no bias in the result.

3) Asking a candidate to make a pledge (no new taxes), endorse a policy (single-payer health care), or take a stand (on genocide in Darfur) is not conceptually different from a candidate questionnaire with a single question, and the test should be: is there favoritism in the result distributed to the voters? If all the candidates say "yes," there's no bias in presenting that result to the public. If no candidate says "yes," it could be presented neutrally, i.e. the organization is still pursuing a policy despite the fact no candidate yet favors it. If some say yes and others no, it would be political intervention if the organization released the result, but there's no harm in the asking, at least as a method of gaining the candidates' acceptance of the organization's position and asking them to take a public stand. Currently, an IRS revenue ruling prohibits even asking the question.³²

Returning to the hypothetical television ads on drilling in Alaska, the standard I propose would make the judgment call easy. Both advertisements refer to and reflect a view on Sarah Palin, candidate for president in 2012, and so the ads constitute political intervention. There would be no examination of multiple factors, no intricate balancing test, no need to interpret soft terms such as "close in time" to the election, "wedge" issues, or past history of communications. Likewise, the targeting of the message could be disregarded; if it meets the content and preparation tests, there should be no need to re-evaluate the message based on its target audience.

Given the sharp edge of the basic speech test, the two safe harbor exceptions I suggest need to be equally sharp-edged. First, look at the exception for commentary on incumbents without reference to the election.

Exception: Commentary on Incumbents

Considering the strong First Amendment protection of the right to "petition the Government for a redress of grievances," public officials should not be shielded from criticism by tax-exempt organizations, even if the official is running for re-election or for election to another public office. Therefore, an exception to the speech test should be constructed to permit communications that reflect a view on a public official who is also a candidate, so long as the speech comments only upon, and aims to influence the performance of, a public official within his or her current term of office without mention of any future election or voting, or the person's candidacy or opponent. Thus, it should not be political intervention under tax law to criticize or praise an incumbent, as long as no electoral reference is made. This exception is broad enough to permit:

³¹ The current IRS position on voter guides, set forth in Rev. Rul. 78-248, 1978-1 C.B. 154, is quite limited and has not been updated in more than 30 years.

³² Rev. Rul. 76-456, 1976-2 C.B. 151, (the IRS version of "don't ask, don't tell").

1) Grass roots lobbying on legislation or other official actions he or she could take,³³ even if the messaging does call attention to a candidate's good or bad, past or present, positions or performance on the issue.

2) Legislative scorecards that compare current officeholders, no matter how narrow the subject matter or how broad the distribution.³⁴

3) Criticism of the official's performance, including calls for censure, impeachment, resignation, or a change in direction.

4) Praise for the official's leadership, success, or advancement of policies desired by the organization, with some element aimed at influencing actions he or she could take during the current term of office.

However, this exception would not protect commentaries with phrases such as "four more years," "regime change," "hold him accountable in 2012," etc. Comments about holding officials "accountable" (to the will of their constituents, to their past promises, etc.), understood as pertaining to performance within their current term of office, would be acceptable -- but not if linked to their re-election.

Shifting the hypothetical advertisement a bit, suppose that the business corporation, 3F, runs an ad critical of Obama's stance against drilling on the Alaskan North Slope, while the environmental group, HEC, runs an ad praising Obama for the same thing. Both ads are broadcast in September 2012, and there are pending executive actions on drilling he could take, even if his term were to end in January 2013. My exception would allow the ads, regardless of how they were timed or targeted, so long as no direct or indirect reference to the November election is made.

Exception: Impartial Methodologies

Second, consider the exception I offer for presentations of information comparing the candidates, gathered using certain defined impartial methodologies. The result of a methodology may cause the candidates to appear more or less favorably, but this is usually due to choices made by the candidates with full knowledge that the information will be used to compare them. These are communications and events prepared and conducted in a thoroughly even-handed manner, where the process allows the candidates the chance to present themselves in the best light. The comparison must involve all candidates for an office or party nomination, or all candidates above a certain level of support in voter opinion polls, but at least two must participate. If the process recognized by this exception is fair, the published content of the result will not be examined for bias under the basic speech rule. The result may reflect a view on a candidate (without express advocacy) but is not political intervention, due to the exception. Examples are:

³³ See *WRTL*, *supra* note 18, and sections 501(h) and 4911.

³⁴ Contrast the limited treatment of legislative scorecards under Rev. Rul. 80-282, 1980-2 C.B. 178.

1) Candidate debates. With at least two present (or their chosen surrogates), there should be no concern about the policy bias of the sponsoring organization or in the questions asked, so long as the candidates have an equal opportunity to speak.³⁵

2) Publication of objective information that is factual only, without any element of opinion, such as data from campaign finance reports showing the sources and amounts of each candidate's contributions received, or scientific surveys of voter attitudes and preferences.

3) Candidate questionnaires, resulting in voter guides, prepared following an open, even-handed safe harbor process such as the following:³⁶

a) Any number of questions may be asked, including one.

b) Questions must be related to office sought, but the range of issues can be broad or narrow.

c) The organization's preferred position can be evident from the content of questions asked, information provided in or with the guide, or from the organization's name and reputation.

d) Questions must be delivered to candidates at least 30 days before the election, with at least 10 days to reply.

e) Questions can ask for single word (yes/no, support/oppose) answers, but must allow the candidate at least 25 words to explain the answer, and the guide must include the full explanation.

f) At least 20 days before the election, all candidates must receive the answers of all the candidates who responded, and have at least 10 days to modify their answers.

g) The organization must publish and/or distribute the guide, including copies to all candidates, at least 10 days before the election.

h) The voter guide may be published only if at least two candidates respond to at least one question.

i) The guides cannot include any other information about the candidates, e.g. background, contributions received, endorsements, and cannot attempt to describe

³⁵ Rev. Rul. 86-95, 1986-2 C.B. 73, describes one model of nonpartisan candidate debate, but many other formats should be permitted.

³⁶ Some of these elements were present in the IRS settlement after a long controversy with the Christian Coalition, which allowed the Coalition to qualify for section 501(c)(4) exemption despite predominant election-related activities that would include voter guides prepared using an acceptable methodology. See Colvin, "IRS Gives Christian Coalition a Green Light for New Voter Guides," 50 *Exempt Org. Tax Rev.* 353 (Dec. 2005).

the positions of non-responding candidates from news reports, websites, legislative votes, public statements, etc.

j) The guide must include: all questions asked and answers received, links to websites of all candidates who gave answers, and a disclaimer stating that the guide is not presented in support of or opposition to any candidate for public office.

Let's look again at our hypothetical race between Obama and Palin in 2012. HEC asks both presidential candidates to answer the question "will you renew the moratorium on off-shore drilling?" in up to 100 words. Both respond: Palin says "drill baby drill forever," Obama says he'll renew the moratorium "as soon as 50% of the nation's energy mix comes from solar, wind, geothermal, and nuclear, assuming the waste problem can be solved." HEC publishes the replies, side-by-side, in full-page newspaper ads and on its website. Assuming the impartial methodology I just described is used, the published comparison of the two candidates' answers would not be political intervention even though it might be apparent that HEC, as an environmental advocate, prefers Obama's answer. But like a live, oral, candidate debate, each side has had an equal chance to state its position, mindful of the audience and the opponent's answer.

The federal tax law two-part speech test would be a single standard that would apply to taxable and tax-exempt entities everywhere, regardless of how federal, state, local, or foreign election laws might treat the same speech.

Even though the two-part political intervention test reaches all forms of communication that go to voters, including sermons, articles, books, films, and Internet messages, there is still the question whether a particular speech is truly attributable to the organization. An organization may host a forum, live or using media, where various bloggers, authors, panelists, guest speakers, op-ed writers, pundits, and audience members may refer to political candidates and reflect passionate views about them. Principles of common law (agency, vicarious liability) should determine whether such a person is speaking on behalf of an organization. If the person is not an official representative or other agent of an organization, a simple disclaimer should relieve the organization of responsibility under the tax law speech test.

There may be justification for other exceptions to the proposed speech rule. For instance, certain commercial activities involve the reflection of views on candidates as a customary part of the goods or services sold to customers, such as books, newspapers and other news media, political consultancies, advertisers, even comedy clubs. An exception to the definition of political intervention would allow corporations engaged in such lines of commerce to fully deduct their ordinary and necessary costs of doing business under section 162(e), and perhaps exempt organizations could conduct such activities to generate unrelated business taxable income.

Other Political Tax Law Problems

There are other legal and conceptual problems to be solved, beyond speech, if political tax law is to be thoroughly reformed:

What if business and tax-exempt organizations are tempted to make non-speech expenditures of resources, such as contributions to candidates and political committees, in-kind donations of goods and services, renting mailing lists, lending staff time, coordinated expenditures, and voter mobilization? Rather than creating an elaborate system for classifying these transactions as political intervention or not, perhaps the tax law definition should just follow the campaign finance reporting systems in place in the federal, state, or local jurisdiction where the election is held. Unlike speech, where the tax law standard is much higher than the election standard of express advocacy, there is no reason to treat the recognition and measurement of material values used for or against a candidate any differently under tax law than under election law.

Among the various tax statutes and regulations, there is some inconsistency regarding the point at which a person is a "candidate" for public office.³⁷ Furthermore, code section 527, which defines and regulates political organizations, presents several anomalies: Appointive as well as elective offices are included, as well as all political party offices, and the scope of activity subject to the 527 tax regime is both broader and narrower than it is for other tax-exempt and for business entities. These incongruities should be corrected.

For the non-charitable 501(c)s, the (c)(4)s, (5)s, and (6)s, we need Treasury regulations to set a *bright-line limit*: if political intervention, including an allocable share of overhead, is more than 50% of (a) annual expenditures or (b) annual staff time (both employees and independent contractors), the organization would be presumed to fail the primary purpose test.³⁸

The "facts and circumstances" approach should be stricken from IRS guidance on political speech everywhere. If a violation does occur because an organization has crossed the line, the IRS can still consider mitigating circumstances in deciding whether to revoke exemption, impose excise taxes, or let the organization go with a warning. The IRS already does do so in cases of first-time violations, single occurrences, ignorance of the rules, small amounts, admitted and corrected violations, and precautions taken to prevent future abuses.

In Conclusion

I welcome your reactions to the reforms I offer here. When bright lines are drawn, some speech that might seem harmless may be captured, while other speech that might seem political to the casual observer might escape regulation. Hopefully, this new test for political speech would result in fewer instances of the former and more of the latter. But remember, these are not criminal law standards; no one goes to jail or commits a felony by crossing one of these lines. There are simply decisions to be made

³⁷ Compare reg. section 1.501(c)(3)-1(c)(3) (iii) with reg. section 1.276-1(f)(2).

³⁸ I was involved in proposing a 40 percent safe harbor, see Subcommittee on Political and Lobbying Organizations and Activities (Gregory L. Colvin and Miriam Galston, Co-chairs), *Task Force on Section 501(c)(4) and Politics -- Final Report*, American Bar Association Section of Taxation, Exempt Organizations Committee (submitted to IRS, May 7, 2004).

about tax treatment, which are unavoidable and should be applied even-handedly across a vast range of tax-paying and tax-exempt endeavors.

We cannot stand still.³⁹ Expenditures to influence elections in the political marketplace were expanding before *Citizens United* and are likely to increase at an accelerated pace as this judicial blessing of corporate political speech enters our culture, and the stigma of partisan engagement diminishes. The border patrol -- we few -- the elite of private and public counsel who have tried to divine the perimeter of the badlands of political intervention should let go of this frustrating and elusive game. Whether it is my proposal or someone else's, we should demand that Treasury and the IRS undertake the hard work to craft a complete set of bright-line regulations that all players in our democracy, with or without attorneys, can easily learn and take to heart.

³⁹ Indeed, many of us in the exempt organizations bar have been in conversation for decades on this subject, through the American Bar Association Tax Section's Exempt Organizations Committee, the Alliance for Justice, OMB Watch, the California Political Attorneys Association, and many spontaneous gatherings. I count them as friends, colleagues, shapers and re-shapers of my own thinking: Ellen Aprill, Nan Aron, Gary Bass, Eve Borenstein, Milt Cerny, Deirdre Dessingue, Terence Dougherty, Rosemary Fei, Diane Fishburn, Miriam Galston, Gail Harmon, Fran Hill, Jim Joseph, Beth Kingsley, David Levitt, Lloyd Mayer, Lance Olson, Marc Owens, John Pomeranz, Ezra Reese, Celia Roady, and Holly Schadler.