

CITIZENS UNITED AND SOCIAL WELFARE ORGANIZATIONS: THE TANGLED RELATIONSHIPS AMONG GUIDANCE, COMPLIANCE, AND ENFORCEMENT

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I. INTRODUCTION

The Supreme Court issued its opinion in *Citizens United* on January 21, 2010.¹ On May 10, 2013, the Exempt Organization Division of the Internal Revenue Service (IRS) imploded when its then-Director offered lawyers assembled for the annual spring meeting of the Exempt Organizations Committee of the Tax Section of the American Bar Association her interpretations of her self-described efforts to correct problems in the administration of the tax law applicable to § 501(c)(4) organizations.² Remarks at meetings of the Exempt Organizations Committee are interesting to those who attend, but, it is safe to say, to few others. These remarks were the exception. These remarks, and a contentious press conference following them, received immediate and extensive press coverage.³ It was clear that the leadership of

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1. *Citizens United v. FEC*, 558 U.S. 310 (2010).

2. The Author was in the room for these remarks.

3. Aaron Blake, *'I'm Not Good At Math': The IRS's Public Relations Disaster*, <http://www.washingtonpost.com/blogs/the-fix/wp/2013/05/10/im-not-good-at-math-the-irss-public-relations-disaster/> (May 10, 2013, 2:18 p.m.); Lauren French, *IRS Officials Knew of Tea Party Targeting*, <http://www.politico.com/story/2013/05/irs-knew-tea-party-targeted-in-2011-91214.html> (May 11, 2013, 3:09 p.m. EDT); Lauren French & Kelsey Snell, *IRS under Siege with No Friends*, <http://www.politico.com/story/2013/05/irs-under-siege-91206.html> (May 10, 2013, 7:18 p.m. EDT); Zachary A. Goldfarb & Karen Tumulty, *IRS Admits Targeting Conservatives for Tax Scrutiny in 2012 Election*, http://www.washingtonpost.com/business/economy/irs-admits-targeting-conservatives-for-tax-scrutiny-in-2012-election/2013/05/10/3b6a0ada-b987-11e2-92f3-f291801936b8_story.html (May 10, 2013).

the Exempt Organizations Division had put the IRS in the eye of a storm.⁴

Four days after the then-Director of the Exempt Organizations Division ignited the firestorm over targeting particular organizations seeking exemption as organizations described in § 501(c)(4), the Treasury Inspector General for Tax Administration (TIGTA) issued a report critical of the IRS' handling of these applications for tax exemption submitted by various entities during the 2012 election cycle.⁵ The TIGTA Report found that "[t]he IRS used inappropriate criteria that identified for review Tea Party and other organizations applying for tax-exempt status based upon their names or policy positions instead of indications of potential political campaign intervention."⁶ Attributing the cause of this situation to "ineffective management," the TIGTA Report found that "[i]neffective management: (1) allowed inappropriate criteria to be developed and stay in place for more than 18 months, (2) resulted in substantial delays in processing certain applications, and (3) allowed unnecessary information requests to be issued."⁷ The TIGTA Report cited a failure to provide guidance to those charged with implementing the law as a factor contributing to the use of inappropriate criteria for selecting particular organizations for scrutiny. The TIGTA Report also cited the failure to provide guidance and the reliance on training instead of guidance as significant factors in the delays in processing cases.⁸ The TIGTA Report found this approach insufficient, stating:

We believe that specific guidance should be developed and made available to specialists processing potential political cases. Making this guidance available on the Internet for organizations could also address a concern raised in the IRS's

4. For a survey of reactions from members of Congress published on the Monday after the remarks on Friday, May 10, 2013, see Fred Stokeld, *IRS Sparks Outrage With Admission It Mistreated Tea Party Groups* (May 13, 2013) (2013 TNT 92-3). For an assessment of the situation almost ten months later, see Thomas B. Edsall, *Why the I.R.S. Scandal Won't Go Away*, http://www.nytimes.com/2014/02/26/opinion/edsall-why-the-irs-scandal-wont-go-away.html?_r=0 (Feb. 25, 2014).

5. *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*, Ref. No. 2013-10-053 (U.S. Dep't of the Treasury May 14, 2013) (available at <http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>) [hereinafter TIGTA Report].

6. *Id.* at "Highlights."

7. *Id.*

8. *Id.* at 14.

response that many applications appear to contain incomplete and inconsistent information.⁹

In other words, the TIGTA Report found a relationship between guidance for both officials and the public and compliance by organizations seeking exempt status. This finding became the basis for Recommendation 5 in the TIGTA Report, calling on the IRS to “[d]evelop guidance for specialists on how to process requests for tax-exempt status involving potentially significant political campaign intervention. This guidance should also be posted to the Internet to provide transparency to organizations on the application process.”¹⁰ The IRS rejected this recommendation and proposed instead to offer training to its officials.¹¹ The TIGTA Report rejected this alternative approach, stating:

We do not believe that this alternate corrective action fully addresses our recommendation. We believe that specific guidance should be developed and made available to specialists processing potential political cases. Making this guidance available on the Internet for organizations could also address a concern raised in the IRS’s response that many applications appear to contain incomplete and inconsistent information.¹²

The TIGTA Report and the continuing controversy over it have raised questions about the proper role of the IRS when tax exempt entities become involved in election campaigns. The IRS does not exist to implement campaign finance law or to ameliorate the dysfunction of the Federal Election Commission (FEC).¹³ It does exist to administer tax law in a manner that ensures that organizations exempt from taxation use their resources for their exempt purpose.¹⁴ This task posed a significant

9. *Id.* at 17.

10. *Id.* at 16.

11. *Id.*; see also *id.* at 47 (containing IRS Management’s response to the draft report). The IRS did agree with Recommendation 8 that required only that the IRS recommend to the IRS Chief Counsel and the Department of the Treasury that they develop guidance on how to measure the “primary activity” of a § 501(c)(4) organization. *Id.* at 17.

12. *Id.*

13. For an incisive critique of FEC dysfunction, see Trevor Potter, *How the FEC Can Stop the Tidal Wave of Secret Political Cash*, http://www.washingtonpost.com/opinions/how-the-fec-can-stop-the-tidal-wave-of-secret-political-cash/2012/11/16/966c48cc-2dae-11e2-89d4-040c9330702a_story.html (Nov. 16, 2012).

14. The exempt purpose of a § 501(c)(4) organization is “the promotion of social welfare.” 26 U.S.C. § 501(c)(4)(A) (2012).

challenge to the IRS long before the Supreme Court issued its opinion in *Citizens United*. That opinion posed new challenges to the IRS in reconciling its tax mission with the expanded rights of entities to engage in political speech. The IRS' failure to address these challenges for at least fifty years played a significant role in the crisis that became public in 2013.

This Article explores the roles of the IRS and the Supreme Court in creating the conditions for the redesign of § 501(c)(4) organizations as campaign finance vehicles, which resulted in the current crisis. Part II discusses the long-term failure of the IRS to issue guidance relating to § 501(c)(4), including its failure to issue any guidance in response to *Citizens United*. Part III discusses the impact of *Citizens United* on the structure and operation of § 501(c)(4) organizations. Part IV examines the impact of the Court's insistence in *Citizens United* that regulatory agencies play a limited role in campaign finance regulation and that tests based on facts and circumstances are themselves constitutionally impermissible burdens on political speech. Part V discusses the response of the reconstituted but not yet reformed IRS. Part VI offers a brief conclusion focused on the challenges going forward.

II. SECTION 501(C)(4): THE IRS' HISTORIC FAILURE TO PROVIDE GUIDANCE AND WHY IT STILL MATTERS

Guidance matters because those subject to a law have a right to know what that law requires and how the law is being interpreted and administered. Guidance enables compliance but does not ensure it. Those subject to a law also have a right to reliable information about the consequences of noncompliance. In this sense, guidance makes enforcement legitimate by defining the terms and the limits of enforcement actions. Guidance, then, is essential for both the effectiveness and the legitimacy of enforcement actions by administrative agencies. Assuming that Congress intends that the statutes it enacts will be implemented and enforced, guidance by administrative agencies is essential.¹⁵

15. The Internal Revenue Code contains a broad delegation of authority to the Department of the Treasury to "prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue." 26 U.S.C. § 7805(a). For purposes of this Article, the relationships among officials of the Treasury Department, the IRS, and Chief Counsel are not addressed separately. For an insightful analysis of the multiple

None of these considerations seem to have resulted in the issuance of fundamental guidance with respect to § 501(c)(4), either before or after *Citizens United* was decided.¹⁶

The IRS has been responsible for a dual failure to issue needed guidance—a failure to issue guidance with respect to what constitutes social welfare, the sole exempt purpose of a § 501(c)(4) organization, and a failure to issue guidance with respect to the permissible election campaign activities of § 501(c)(4) organizations, either before or after the Court decided *Citizens United*. The result of this dual failure was to create an exempt entity that could be adapted to the desire of some for a campaign finance vehicle that was not required to disclose its contributors and that could collect and deploy previously unimaginable amounts of campaign cash. As a result, the IRS failed to protect the integrity of § 501(c)(4), and it failed to distinguish between a right to engage in political speech and the abuse of tax-exempt status.

Section 501(c)(4) is the shortest provision in the enumeration of types of exempt entities in § 501. It consists solely of a reference to “[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare.”¹⁷ This provision has been in the tax law since the Revenue Act of 1913, the beginning of the modern income tax.¹⁸ The applicable regulations have done little to clarify and amplify this cryptic statutory language. The applicable regulations simply state that “[a]n 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”¹⁹ and describe qualifying organizations as “operat-

forms of tax guidance, see Kristin E. Hickman, *IRB Guidance: The No Man’s Land of Tax Code Interpretation*, 2009 Mich. St. L. Rev. 239 (2009).

16. See Lawrence Zelenak, *Custom and the Rule of Law in the Administration of the Income Tax*, 62 Duke L.J. 829, 854 (2012) (analyzing how the failure to issue meaningful guidance and the issuance of guidance that is inconsistent with the statute are akin to “customary deviations” causing diminishing respect for the Code among officials responsible for interpreting and administering it).

17. 26 U.S.C. § 501(c)(4)(A).

18. Pub. L. No. 63-16, § II(G)(a), 38 Stat. 172 (1913).

19. 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i) (2012). The shift in language from “exclusively” in the Code to “primarily” in the regulations denotes a second-order controversy that cannot be addressed without proper guidance on what activities constitute “social welfare.” The Campaign Legal Center and Democracy 21, two campaign finance reform organizations, provided a comprehensive statement of their joint position in a letter to the IRS on

[ing] primarily for the purpose of bringing about civic betterments and social improvements.”²⁰

The failure to issue meaningful guidance for the entire century that § 501(c)(4) has been in the Code has been foundational, pervasive, and intentional.²¹ The IRS has long found it convenient to use § 501(c)(4) as a “catchall” or even a “dumping ground” to avoid making hard choices about difficult issues.²² While the convenience of this approach may have paid dividends to the IRS and its officials at particular points in the history of the IRS, the cumulative failure has had substantial negative consequences for the IRS as an institution in the current controversy.²³ The negative consequences of the actions of the leadership of the exempt organization function are not limited to the IRS. These negative consequences extend to exempt entities by leaving them even more vulnerable to the self-serving interests of those who see no problem in financing their personal interests through exempt entities.

The fundamental failure was the failure and, indeed, the refusal to provide meaningful guidance with respect to the concept of “social welfare,” which is the sole exempt purpose articulated for purposes of § 501(c)(4). For a century, this term has remained without conceptual or operational explanation. What is social welfare? No meaningful guidance has ever been developed. An effort made during the 1960s to provide greater guidance on what constitutes social welfare for purposes of § 501(c)(4) concluded with claims that the task of providing guidance on the meaning of social welfare for purposes of § 501(c)(4) was too difficult and that any attempt to address this question raised even more difficult questions on how an organization would be treated if it were denied exemption as an organiza-

September 28, 2011. Ltr. from the Campaign Legal Center and Democracy 21 to Commissioner Shulman (Sept. 29, 2011) (2011 TNT 189-16).

20. 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i).

21. For a detailed development of this analysis, see Frances R. Hill & Douglas M. Mancino, *Taxation of Exempt Organizations* ch. 13 (Warren, Gorham & Lamont, 2002 with biannual cumulative supplements) (current Chapter 13 was added to the main volume as a replacement chapter in 2012).

22. *Id.* at ¶ 13.01.

23. See TIGTA Report, *supra* n. 5, at 5-6 (discussing how a number of political organizations were classified as § 501(c)(4) organizations, prompting a search for organizations with “political-sounding” names). While these consequences are most apparent and acute in the Exempt Organizations Division, they are not limited to this component of the IRS, and other components of the IRS have also been affected.

tion described in § 501(c)(4).²⁴ The Chief Counsel summed up the situation in the following terms, stating:

There is general agreement that social welfare signifies benefit to the community but beyond that knowledgeable technical people are unable to agree on the meaning of the term. The practical result is that almost any group activity not classifiable under any other provision [of § 501(c)], not patently illegal or detrimental to the community and not involving private gain is accorded “social welfare classification.”²⁵

General Counsel Memorandum 33495 also addressed what it called the “dilemma of denial of exemption,” which addressed the issue of how organizations that failed to qualify for exemption as organizations described in § 501(c)(4) should be treated for tax purposes, reasoning that:

Difficult as the interpretative issues are, resolution adverse to an organization simply shifts the problem to an even more troublesome area—that is, the tax treatment of the organization as a nonexempt entity . . . entities within the ambit of 501(c)(4) are one of the most difficult classes of organizations to which to apply conventional tax concepts.²⁶

General Counsel Memorandum 33495 then addressed what it described as the “historical function of § 501(c)(4) and its continuing significance,” stating:

More significant than any recital of the ambiguities involved in interpretation of section 501(c)(4) is what its actual functioning denotes in terms of the inadequacy of the fundamental concepts of Subchapter F exemption. Stripped of nonessentials, the predominate function of the section has been to provide a basis for nontaxable treatment of income of organizations which lack the traditionally essential characteristics of taxable entities or whose receipts do not constitute economic gain. In other words, the section has in a very large part operated as a catch-all classification for organizations with

24. General Counsel Memorandum 33495 (Apr. 27, 1967) (available at <http://www.intelliconnect.cch.com> (subscription required)) (analyzing the difficulties of developing the concept of social welfare).

25. *Id.* (quoting a 1966 study by the Chief Counsel's Office entitled Preliminary Analysis of Unadministrability of Exempt Organizations Area (May 3, 1966)).

26. *Id.*

respect to which assertion of tax liability is offensive to commonly accepted concepts of taxability.²⁷

The IRS has never seen fit to explain why developing guidance on the topic of social welfare presents insurmountable difficulties even though it has issued guidance on concepts as complex as education or charity.

Without an operationally meaningful concept of social welfare, any reasonable expectation of what organizations might qualify for exemption as organizations described in § 501(c)(4) lacks a solid conceptual foundation. The failure to develop this kind of guidance means that there is little guidance on how particular types of activities might satisfy the exempt purpose of promoting the social welfare of the people of the community.²⁸ Without meaningful guidance on this connection between the exempt purpose and particular activities, determinations of exempt status as organizations described in § 501(c)(4) are not grounded in considerations relevant to the reason that § 501(c)(4) is in the Code and why such organizations should be exempt from federal income tax. Stated in other terms, the IRS has not provided foundational guidance on what types of activities promote the social welfare of the people of the community and how this determination is to be made.

Even in the absence of guidance on the meaning of social welfare, the IRS did develop a concept of structural private benefit that became the one point of coherence in the law of § 501(c)(4).²⁹ The regulations refer to the social welfare of the people of the community.³⁰ In the absence of an operational concept of social welfare that could provide guidance for compliance and enforcement, the IRS developed an approach based on the idea that whatever activities a § 501(c)(4) organization engaged in would not support exempt status if its activities

27. *Id.*

28. 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i).

29. "Structural private benefit" is a descriptive term developed by Hill and Mancino to distinguish the kind of private benefit based on extending preferences solely or primarily to the members of the organization from the type of private benefit based on the personal greed of organization managers and other insiders. See Hill & Mancino, *supra* n. 21, at ¶ 13.03[2].

30. 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i).

impermissibly benefitted the members of the organization rather than the people of the community more generally.

Members of the organization could benefit, but only in the manner and to the extent that members of the community benefitted.³¹ The concept of structural private benefit has played an important role in defining limits to such activities as homeowners associations and tenants associations, but it does not serve as a replacement for an operational concept of social welfare more generally.

The second failure to issue guidance relates to advocacy activities. The regulations provide that “[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.”³² The regulations do not provide any insight into what activities might constitute “indirect” participation or intervention in a political campaign. The architecture of the guidance with respect to political campaign activities consists of two basic principles—social welfare organizations may engage in some political campaign activity, but because these activities do not constitute social welfare activities, political campaign activity may not constitute the primary activity of a social welfare organization.

Conceptualizing these principles in operational and administrable terms presents challenges of characterization and computation that the IRS has gone out of its way to avoid. The problems of characterization consist of identifying activities that constitute direct and indirect participation in election campaigns in ways that support or oppose one or more candidates for public office.³³ The problems of computation involve the definition of what constitutes the primary activity or activities of a § 501(c)(4) organization. The failure to provide an operational concept of social welfare makes computing the percentage of share of an organization’s activities that are devoted to social welfare impossible. Without this baseline computation, it is not possible

31. 26 U.S.C. § 501(c)(4); 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i).

32. 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii).

33. 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii) (addressing political activity). The IRS has generally taken the position that the same principles apply to the characterization of political activities for all types of § 501(c) organizations, and has focused on guidance for § 501(c)(3) organizations that are subject to a statutory prohibition on political campaign activities. Hill & Mancino, *supra* n. 21, at ¶ 13.08[2].

to determine what share of an organization's activities is devoted to political campaign activity.

Developing a methodology to determine the primary activity of an exempt entity is far from simple. Section 501(c)(4) organizations engage in multiple activities, including promotion of social welfare, related business activities, unrelated business activities, investment activities, issue advocacy, lobbying, election campaign activities, and activities that promote private benefit. These various activities are pursued using money, staff time, and even volunteer time in some cases. Questions of how these various assets should be allocated to various activities raises multiple issues. For example, how is staff time allocated to the organizations' various activities? How does an organization take account of activities resulting in private benefit? Without addressing these and many other issues, there is little reason for confidence in any computation of whether the organization devotes itself primarily to social welfare activities or of the extent of the organization's resources devoted to political campaign activities.

During the 2012 campaign cycle, none of these complexities were acknowledged by either the IRS or its critics. Instead, various interests engaged in a heated discussion around two related but distinguishable topics. One was whether the reference to "exclusively" in the Code was inconsistent with the reference to "primarily" in the regulations.³⁴ The other was whether "primarily" meant fifty-one percent or something more. These discussions are most charitably described as conceptually and methodologically premature. The result was a series of heated discussions about a fraction (or, if one prefers, a percentage) without any idea of what computing this fraction (or percentage) entails.

The IRS' refusal to issue guidance meant that the increasing interest in using § 501(c)(4) as the framework for yet another campaign finance vehicle resulted in a crisis over enforcement. The failure to have issued guidance before engaging in highly sensitive enforcement gave force to allegations that partisan interests, not principled tax administration, explained the treatment of particular cases. In the context of a national elec-

34. Some of these discussions are on display in various letters to the IRS from the Campaign Legal Center, all of which are collected at www.campaignlegalcenter.org. See also n. 19, *supra*.

tion, even allegations without any corroboration become combustible, in part because such allegations go to the heart of lawful governance and in part because the personal political prospects of powerful donors seeking influence and powerful politicians seeking reelection are directly impacted, or so they claimed. Throughout the 2012 election cycle, members of Congress from both parties complained that the IRS was administering § 501(c)(4) in ways that benefitted their political opponents and insisted that the IRS administer § 501(c)(4) in ways that benefitted them.³⁵ These self-interested demands by powerful politicians were consistent with the green light turned on by the Supreme Court in *Citizens United*. This new environment exacerbated the consequences of and the controversies over the IRS' historic failure to administer the law applicable to § 501(c)(4) organizations.

III. CITIZENS UNITED: ENABLING THE REDESIGN OF § 501(C)(4) ORGANIZATIONS AS CAMPAIGN FINANCE VEHICLES

As the lower court acknowledged, Citizens United is a § 501(c)(4) organization.³⁶ The Supreme Court never acknowledged Citizens United's tax status or considered its implications.

35. See Ltr. from Seven Democratic Senators to Commissioner Shulman (Feb. 16, 2012) (2012 TNT 34-74) (asking that IRS investigate abuses of § 501(c)(4)) (all citations are to Tax Notes Today, the online publication of Tax Notes, at www.taxanalysts.com (subscription required)). Tax Notes contains the most complete and most accessible archive of the extended correspondence between powerful national politicians and the IRS during the 2012 election cycle. See also Ltr. from Senator Carl Levin (D-Mich.) to Commissioner Shulman (Aug. 31, 2012) (2012 TNT 184-33) (criticizing IRS response to abuses of § 501(c)(4)); Ltr. from Ten Republican Senators to Commissioner Shulman (Aug. 6, 2012) (2012 TNT 152-16) (questioning IRS interpretations of § 501(c)(4)); Ltr. from Senator Carl Levin (D-Mich.) to Commissioner Shulman (July 27, 2012) (2012 TNT 184-34) (seeking specific information about the IRS' interpretation and application of § 501(c)(4)); Ltr. from Eleven Republican Senators to Commissioner Shulman (June 18, 2012) (2012 TNT 118-19) (seeking information on IRS requests for names of donors to § 501(c)(4) organizations); Ltrs. from Thirty-Two Democratic Members of the House of Representatives to Commissioner Shulman and President Obama (Mar. 28, 2012) (2012 TNT 62-37) (asking the IRS to investigate improper political activity by § 501(c)(4) organizations); Ltr. from Twelve Republican Senators to Commissioner Shulman (Mar. 14, 2012) (2012 TNT 51-24) (urging the IRS to avoid selective enforcement of law based on partisan considerations); Ltr. from Seven Democratic Senators to Commissioner Shulman (Mar. 13, 2012) (2012 TNT 49-19) (asking for immediate action by the IRS to limit political activities of § 501(c)(4) organizations).

36. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 275 (D.D.C. 2008).

Nevertheless, the Court's opinion created new possibilities that enabled political entrepreneurs to redesign both the structure and the strategies of organizations claiming exemption as organizations described in § 501(c)(4). This Part examines both the Court's core holdings and the consequences of enabling the use of § 501(c)(4) organizations as large, well-funded, and aggressive campaign finance vehicles.

A. What *Citizens United* Decided

Citizens United held that the prohibition on the use of corporate general treasury funds to finance independent expenditures involving express advocacy was a constitutionally impermissible burden on the First Amendment right of corporate entities to engage in political speech.³⁷ This core holding had two foundational implications for the structures and operations of § 501(c)(4) organizations. First, it freed § 501(c)(4) organizations from the prior requirement that they speak through a political action committee (PAC).³⁸ According to the Court, requiring corporations to speak through a PAC burdens political speech due to limits on the persons that may be solicited,³⁹ the frequency of solicitations,⁴⁰ and the amounts that may be contributed.⁴¹ Whether the requirements for establishing and operating a PAC are burdensome in practice has been questioned by campaign finance lawyers, in at least one case through a memorably comedic format.⁴²

37. *Citizens United*, 558 U.S. at 365. *Citizens United* overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. FEC*, 540 U.S. 93 (2007), that had upheld *Austin* with respect to independent expenditures. *Citizens United* did not address the use of general treasury funds to make contributions to candidates, and thus that particular prohibition, upheld in *FEC v. Beaumont*, 539 U.S. 146 (2003), remains in place.

38. Separate segregated funds, commonly known as PACs, operate subject to 2 U.S.C. § 441b(b); Section 527 of the Code applies to PACs as well as to all other political organizations. 26 U.S.C. § 527.

39. 2 U.S.C. § 441b(b)(4)(A); 11 C.F.R. §§ 114.5, 114.7, 114.8.

40. 2 U.S.C. § 441b(b)(4)(B); 11 C.F.R. § 114.6.

41. 2 U.S.C. § 441a.

42. Trevor Potter, a former Chair of the FEC and the general counsel of Senator John McCain's presidential campaigns, represented Steven Colbert and appeared on The Colbert Report to explain campaign finance law to Mr. Colbert, who established and operated both a PAC and a § 501(c)(4) organization during the 2012 election cycle. NPR, *Examining the SuperPAC with Colbert's Trevor Potter*, <http://www.npr.org/2012/02/23/>

Second, *Citizens United* rendered irrelevant the limitations previously imposed on the permissible sources of general treasury funds that § 501(c)(4) organizations could solicit if the organization planned to use any of its general treasury funds for independent expenditures. *FEC v. Massachusetts Citizens for Life (MCFL)*⁴³ permitted § 501(c)(4) organizations to finance independent expenditures with their general treasury funds only if the organization accepted no contributions from corporations or labor unions and if the organization earned no unrelated business income.⁴⁴ The holding and reasoning in *MCFL* was consistent with the prohibition on the use of corporate general treasury funds for independent expenditures and the requirement that corporations establish PACs that were not funded by their general treasury funds to finance either independent expenditures or contributions to candidates or political organizations. *MCFL* set forth an anti-circumvention standard based on a recognition that § 501(c)(4) organizations could be used as alter egos of their corporate or union contributors.⁴⁵

Freeing § 501(c)(4) organizations from these limitations on sources of their financing⁴⁶ while clearly affirming their First

147294509/examining-the-superpac-with-colberts-trevor-potter (Feb. 23, 2012, 11:00 a.m.). Enlightenment and hilarity ensued.

43. 479 U.S. 238 (1986) [hereinafter *MCFL*]. The Supreme Court majority specifically rejected Citizens United's claim based on relaxing the *MCFL* requirements and its argument that its receipts from corporate contributors were quite limited. *Citizens United*, 558 U.S. at 327–328. The *Citizens United* majority rejected this claim on the grounds that granting it would constitute a constitutionally impermissible burden on protected political speech. *Id.* at 329.

44. See *MCFL*, 479 U.S. at 263–264 (holding that federal restrictions on independent spending did not apply to the organization because the organization “cannot engage in business activities,” “has no shareholders or other persons affiliated so as to have a claim on its assets or earnings,” and “was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities”). These requirements were incorporated into federal election law in the “qualified nonprofit corporation” regulations at 11 C.F.R. § 114.10(c).

45. For Chief Justice Roberts' impatience with arguments based on the threat of circumvention, see *infra* Part IV. It should also be noted that nothing in § 501(c)(4) requires that a § 501(c)(4) organization have more than one contributor. Stated differently, there is no public support requirement akin to the tests used to distinguish § 501(c)(3) public charities from § 501(c)(3) private foundations. See 26 U.S.C. 509(a) (listing criteria for distinguishing a public charity from a private foundation under § 501(c)(3)).

46. The *Citizens United* majority left two potential issues relating to the sources of general treasury funds unaddressed. The first is foreign source funds. The second is funding from government contractors. Neither source is limited under tax law for § 501(c)(4) organizations engaged in social welfare activities but both are subject to limitations on contributions to candidates under federal election law.

Amendment right to engage in independent expenditures involving express advocacy meant that § 501(c)(4) organizations could plan for much larger, more expensive operations.⁴⁷ Indeed, removing these limits meant that it became cost-effective to design large, sophisticated § 501(c)(4) organizations able to collect and deploy very large amounts of money free of the constraints of federal election law.

B. Redesigning Social Welfare Organizations as Campaign Finance Vehicles after *Citizens United*

Citizens United set in motion a period of organizational creativity in the design and operation of organizations claiming exemption as organizations described in § 501(c)(4). This creativity encompassed both structural design and claims made to reconcile the expanded campaign activities with exempt status. Any discussion of the design and operation of § 501(c)(4) organizations in the wake of *Citizens United* should begin by acknowledging how little is known about § 501(c)(4) organizations in general and how little is known about those § 501(c)(4) organizations that appear to have been designed or redesigned as campaign finance structures.⁴⁸ What one can say is that the design elements of politically engaged § 501(c)(4) organizations seem to have taken advantage not only of the opportunities created, clarified, or amplified by *Citizens United*, but also of the opportunities enabled by the historic and contemporary failure of the IRS to issue guidance, including guidance in response to *Citizens United*.

The post-*Citizens United* campaign finance structures built on a § 501(c)(4) platform incorporate at least four design elements: (1) collaboration between megadonors and high-profile political consultants; (2) treating independent expenditures

47. Richard Briffault, *Nonprofits and Disclosure in the Wake of Citizens United*, 10 Election L.J. 337, 346 (2011) (noting that the use of § 501(c)(4) organizations by corporations to engage in election spending “facilitate[s] the pooling of funds from many like-minded corporate donors and the hiring of political strategists to determine where those funds can be used to the greatest political effect”).

48. Much of the information that shaped the discussion of the role of § 501(c)(4) organizations during the 2012 election cycle is based on the research of The Center for Responsive Politics, see generally <http://www.opensecrets.org>, and the research of the Sunlight Foundation, see Jake Harper, *FCC Database Misses Huge Chunk of Ads*, <http://sunlightfoundation.com/blog/2012/10/03/fcc-database-misses-huge-chunk-ads/> (Oct. 3, 2012, 6:36 p.m.) (focusing on Federal Communication Commission disclosure of the financing of broadcast ads in selected media markets).

involving express advocacy as the core activity that defined the nature and scope of other activities; (3) engaging in other advocacy activities in ways that amplify the message conveyed through independent expenditures while allowing the organization to claim that it was not primarily engaged in election campaign activities; and (4) in the case of some megadonors, creating networks of organizations that continually move money among component organizations. Other elements may well emerge as more is learned about these entities.

The first design element is the collaboration between political operatives, some of whom have their own high-profile national reputations, and megadonors, who contribute with the expectation that their money will be used to produce the election results that they are willing to pay for.⁴⁹ Political consultants' careers are made or broken by the consultants' ongoing ability to produce political results. They work for entities capable of raising the money that is needed to win elections. The terms of the collaboration between megadonors and campaign consultants cannot be determined by the available data. However, the post-election dynamic suggests that the megadonors are the dominant partners.⁵⁰ If the megadonors signal that they have not been well served by the campaign operatives, no matter how prominent they may be, an organization linked with that political operative may well not remain viable.⁵¹

The second operational design element of post-*Citizens United* § 501(c)(4) organizations is that hard-hitting express advocacy messaging appears to be their core activity. It is difficult

49. See Mike Allen, *Sheldon Adelson: Inside the Mind of the Mega-Donor*, <http://www.politico.com/news/stories/0912/81588.html> (posted Sept. 23, 2012, 9:12 p.m. EST) (profile of Sheldon Adelson, a casino owner and megadonor to GOP candidates).

50. See Kenneth P. Vogel, *Karl Rove under Fire*, <http://www.politico.com/news/stories/1112/83658.html> (Nov. 10, 2012, 7:13 a.m. EST) (assessment in the immediate aftermath of the 2012 election).

51. See generally *id.* (assessing impact of election losses on Rove's professional reputation); see also Nicholas Confessore & Jess Bidgood, *Little to Show for Cash Flood by Big Donors*, <http://www.nytimes.com/2012/11/08/us/politics/little-to-show-for-cash-flood-by-big-donors.html> (Nov. 7, 2012) (highlighting the response of certain megadonors to election losses); Karen Tumulty, *Karl Rove and His Super PAC Vow to Press On*, http://www.washingtonpost.com/politics/karl-rove-and-his-super-pac-vow-to-press-on/2012/11/10/19ed28ea-2a96-11e2-b4e0-346287b7e56c_story.html (Nov. 10, 2012) (calling the performance reviews of Rove's PAC "scathing"); Kenneth P. Vogel, *The Billion-Dollar Bust?* <http://www.politico.com/news/stories/1112/83534.html> (updated Nov. 10, 2012, 6:58 p.m. EST) (stating that some Republican megadonors will be "changing their ways" after the failed 2012 election campaign).

to imagine that these organizations would exist without a clearly articulated constitutional right to engage in express advocacy. This is what the Supreme Court provided in *Citizens United*.⁵² The large organizations appear to have developed a finely honed rapid response capacity to run ads responding to the latest twists and turns in a campaign.⁵³ The large post-*Citizens United* organizations with national profiles do not appear to be grassroots organizations designed to collect funds from small donors united by a shared belief in a particular cause or policy apart from the election or defeat of particular candidates for public office. Grassroots organizations are unlikely to be able to raise enough money rapidly enough to develop this kind of rapid response capacity. In addition, a § 501(c)(4) organization defined by a social welfare mission is likely to want that mission reflected in its political messaging, but advancing the mission is not always consistent with the rapid response capacity that political organizations value. A post-*Citizens United* § 501(c)(4) organization will reshape its messaging as many times as circumstances require to win the election, unencumbered by a mission that might constrain changes in the campaign-driven messaging.

The third operational design element of a post-*Citizens United* organization is that all of its activities other than independent expenditures for messages involving express advocacy will be undertaken to amplify the message of the organization's express advocacy. This is consistent with designing a campaign finance structure that claims tax-exempt status while appearing to operate primarily to promote the election or defeat of one or more clearly identified candidates for public office. Reliance on messaging with some claim (although not necessarily a legally sustainable claim) that the messaging is properly characterized as lobbying or issue advocacy allows the organization to claim that it is an organization described in § 501(c)(4). This design

52. *Citizens United*, 558 U.S. at 365 (holding that the decision to overrule *Austin* "effectively invalidate[d] not only BCRA Section 203, but also 2 U.S.C. 441b's prohibition on the use of corporate treasury funds for express advocacy") (internal quotations omitted).

53. This is the Author's perspective as a Florida voter who turned on her television during the 2012 election season. Social welfare organizations that are promoting a policy agenda of their own would be less likely to have developed this capacity and more likely to use their own funds to promote their core cause. Developing the empirical evidence to support or refute this hypothesis would be worth the effort, but it may be hampered by the low level of television ad buys by organizations that were not primarily interested in shaping election results.

element allows the organization to devote all its resources to election campaign messaging during the electoral cycle without any duty to disclose the amounts allocated to the purported lobbying or issue advocacy. Section 501(c)(4) organizations are not required to file an application for recognition of exempt status but can instead operate as “self-declared” § 501(c)(4) organizations and then file an information return. With the available extensions, such an organization can expect to operate for over two years even when its claim to § 501(c)(4) status is groundless. In practice, this means that such organizations can operate without constraints and without disclosure. To achieve this result, the organization must be able to do more than just argue that its lobbying and issue advocacy do not constitute election campaign activities; it must show that these activities, which constitute the organization’s primary purpose, promote the social welfare in compliance with § 501(c)(4).

The fourth design element is to develop a network of organizations for the purpose of moving money among the component organizations on what appears to be a continuous basis.⁵⁴ What is known about moving money within networks of nonprofit and some taxable entities is due to the work of the Center for Responsive Politics, which created a database tracing money among certain organizations. These movements of money seemed to have been quite purposeful and intentional. These patterns suggest that preventing disclosure is one purpose, but they also suggest plans related to rapid response capabilities may also be factors.

These design elements take advantage of the IRS’ failure to provide fundamental guidance⁵⁵ and the Supreme Court’s holding that the First Amendment right of political speech extends to entities, including § 501(c)(4) organizations.⁵⁶ At the same time, the designers of the post-*Citizens United* § 501(c)(4) organizations

54. See The Ctr. for Responsive Pols., *The Shadow Money Trail*, <http://www.opensecrets.org/news/reports/moneytrail.php> (containing a series of studies produced by The Center for Responsive Politics); see also Matea Gold, *Koch-Backed Political Coalition, Designed to Shield Donors, Raised \$400 Million in 2012*, http://www.washingtonpost.com/politics/koch-backed-political-network-built-to-shield-donors-raised-400-million-in-2012-elections/2014/01/05/9e7cfd9a-719b-11e3-9389-09e9944065e_story.html (Jan. 5, 2014) (illustrating the flow of campaign contributions over the course of several years) (see also the interactive database).

55. See *supra* pt. II (discussing the IRS’ historic failure to provide guidance for § 501(c)(4) organizations).

56. See *supra* pt. III(A) (outlining the impact of the *Citizens United* decision).

also had to design an interpretation of § 501(c)(4) that would reconcile the clear statutory requirement that § 501(c)(4) organizations operate to promote the social welfare of the people of the community with the expanded opportunities for election campaign activity funded by general treasury funds. In effect, the redesigned § 501(c)(4) entities require a redesigned interpretation of § 501(c)(4) that explains and protects their tax-exempt status.⁵⁷

C. Redesigning the Interpretation of § 501(c)(4)

The designers of the post-*Citizens United* framework benefitted from the historic failure of the IRS to issue guidance that would have clarified the nature of the social welfare as the exempt purpose of a § 501(c)(4) organization as well as from the failure to address the scope of permissible election campaign activity. The failure of the IRS to develop guidance addressing the opportunities created, clarified, amplified, or entrenched by *Citizens United* signals that the idea of § 501(c)(4) as a “catchall” or a “dumping ground” has not ended.

This signal was reinforced by the decision of the IRS to assure megadonors that the lingering issue of whether contributions to § 501(c)(4) organizations were subject to the gift tax would not prove troublesome.⁵⁸ It appears that the IRS had not enforced this provision of the gift tax even though it had issued a revenue ruling stating that contributions to § 501(c)(4) organizations, unlike contributions to § 501(c)(3) organizations, were subject to the gift tax.⁵⁹ The issue gained renewed prominence when the IRS contacted five donors to § 501(c)(4) organizations regarding payment of gift tax on the contributions. Six Republican senators, all of whom were members of the Senate Finance Committee, wrote to Commissioner Shulman seeking an

57. Protecting tax exempt status was important primarily because § 501(c)(4) organizations have more limited disclosure obligations under § 527(f) than do § 527 political organizations.

58. See John R. Luckey & Erika K. Lunder, *501(c)(4)s and the Gift Tax: Legal Analysis* 1–4 (Cong. Research Serv. Aug. 10, 2012) (providing insightful discussion of relevant issues); see also Memo. from Steven T. Miller, Dep. Comm’r for Servs. and Enforcement, U.S. Dep’t of the Treasury, to Chief Counsel, IRS, *Guidance for SB/SE Estate and Gift Tax and TE/GE Exempt Organizations* 1 (July 7, 2011) (available at http://www.irs.gov/pub/newsroom/guidance_for_irs_sbse_estate_and_gift_tax_and_tege_exempt_organizations.pdf) (stating that “all current examinations relating to the application of gift tax to contributions to I.R.C. § 501(c)(4) organizations should be closed”).

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

explanation.⁶⁰ Commissioner Shulman responded with assurances that these audits were not partisan.⁶¹ By early July 2011 the IRS closed the audits that had been initiated and suspended any further such audits.⁶² When questions arose in the 2012 election cycle, the IRS did not issue reasoned and principled guidance but simply informed members of Congress who had written to the IRS expressing concern that the law might be enforced to assure them that the IRS would not enforce its own interpretation of the gift tax. The path to a new interpretation of § 501(c)(4) articulated by the interests operating redesigned § 501(c)(4) organizations seemed to be remarkably clear.

The result was an interpretation of § 501(c)(4) by political entrepreneurs consistent with the redesign of § 501(c)(4) organizations as campaign finance vehicles. This interpretation of § 501(c)(4) is based on the following four propositions: (1) only express advocacy constitutes political activity for a § 501(c)(4) organizations; (2) lobbying and issue advocacy constitute social welfare and thus may serve as the primary purpose of a § 501(c)(4) organization; (3) characterization of activities is based on intrinsic factors, especially the literal words of a campaign communication, not on intent, consequences, or context; and (4) money that is held only for brief periods of time cannot be taken into account for determining the primary purpose of an organization.

First, even the large, well-funded, and aggressive § 501(c)(4) organizations are not claiming that they can engage solely or primarily in communications that involve express advocacy. They appear to be claiming instead that express advocacy is the only activity that constitutes political activity for purposes of

60. Ltr. from Six Republican Senators to Commissioner Shulman (May 18, 2011) (2011 TNT 97-31).

61. Ltr. from Commissioner Shulman to Senator Thune (May 31, 2011) (2011 TNT 109-36).

62. Memo. from the Deputy Commissioner for Services and Enforcement to the Commissioner, Small Business/Self-Employed Division (July 7, 2011) (2011 TNT 131-18). The IRS did not engage in efforts to develop guidance in this area. This episode is a vivid and not-reassuring example of Professor Zelenak's insights into the negative consequences of "customary deviations" in tax administration. See Zelenak, *supra* n. 16, at 833 (stating that the IRS has a long history of deviating from its own regulations). For an overview of this issue expressing ambivalence about the proper course, see 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. Policy 289 (2012).

determining whether a § 501(c)(4) organization is engaged primarily in political activity.

Second, legislative lobbying, including both grassroots lobbying and direct lobbying, constitutes social welfare for purposes of § 501(c)(4). This claim allows § 501(c)(4) organizations to treat advocacy activities that do not constitute independent expenditures to serve the operational goal of amplifying the political messaging of the independent expenditures while at the same time satisfying the tax law requirement that a § 501(c)(4) organization engage primarily in activities that promote the social welfare of the people of the community.

Third, the IRS' characterization of activities depends on intrinsic characteristics rather than on the context in which these activities occur. This claim is particularly important to § 501(c)(4) organizations that engage in substantial independent expenditures that expressly advocate the election or defeat of clearly identified candidates for public office. Whether or in what manner or to what degree this factor might shape the characterization of other forms of advocacy is one of the new and unaddressed issues in determining whether organizations qualify for exemption as organizations described in § 501(c)(4). If and to what extent this new factor matters to the characterization of activities that have been subject to IRS characterization in contexts in which the organization did not engage in independent expenditures involving express advocacy, that guidance will offer little or no support for claims to exempt status by redesigned § 501(c)(4) organizations.

Fourth, money that is held only briefly in the general treasury of an exempt entity and then distributed to another entity cannot be used for the purpose of characterizing the activities of the organization or for the purpose of determining its primary activity.

Taken together, the operational design elements and the elements of a jurisprudence of § 501(c)(4) based on the reasoning of *Citizens United* resulted in § 501(c)(4) organizations designed to put express advocacy through independent expenditures at the center of their operations without conceding that they are engaged primarily in political campaign activities within the meaning of either federal election law or tax law. Organizations that could operate in this new space freed from the limitations of

prior law could operate with previously unimaginable amounts of money.⁶³

No redesign of the interpretation of § 501(c)(4) will protect the post-*Citizens United* § 501(c)(4) organizations unless both the guidance and enforcement capacities of the IRS and the FEC are curtailed. *Citizens United* articulates a First Amendment jurisprudence designed to curtail the discretion of administrative agencies to limit the use of general treasury funds for independent expenditures involving express advocacy.

IV. THE COURT'S EFFORTS TO CIRCUMSCRIBE ADMINISTRATIVE DISCRETION

The elements of *Citizens United* that enabled the redesigned § 501(c)(4) organizations have received more attention than have the elements of the opinion dealing with the role of the FEC and the type of guidance that it can issue without imposing a constitutionally impermissible burden on corporate entities' right to use their general treasury funds to finance independent expenditures. This Part suggests that the Court's jurisprudential concerns are fundamentally important for asserting its primacy in the area of campaign finance.

Citizens United builds on the jurisprudential foundation developed in *FEC v. Wisconsin Right to Life, Inc. II (WRTL II)*,⁶⁴ which was decided only three years before *Citizens United*.⁶⁵ Both cases devote significant attention to methods of interpreting and administering federal election law. Both cases provide extended analysis of the relationship between complex legal requirements and congressional or agency discretion. Both cases incorporate a theory of balance of powers under which only the courts are suitable interpreters and protectors of political speech rights.

WRTL II dealt with the distinction between the functional equivalent of express advocacy and issue advocacy for purpose of

63. See Nicholas Confessore, The Caucus, *Total Cost of Election Could Be \$6 Billion*, <http://thecaucus.blogs.nytimes.com/2012/10/31/total-cost-of-election-could-be-6-billion/> (Oct. 31, 2012, 5:54 p.m.) (finding that increased contributions from political organizations would result in a record-setting six billion dollars in election spending in 2012).

64. 551 U.S. 449 (2007).

65. For an analysis of *WRTL II*, see Frances R. Hill, *Corporate Political Speech and the Balance of Powers: A New Framework for Campaign Finance Jurisprudence in Wisconsin Right To Life*, 27 St. Louis U. Pub. L. Rev. 267 (2008).

determining the scope of the application of the definition of an electioneering communication under the Bipartisan Campaign Reform Act (BCRA), which imposes penalties on electioneering communications during defined periods before primary and general elections.⁶⁶ In making this distinction, Chief Justice Roberts stated that “we give the benefit of the doubt to speech, not censorship.”⁶⁷

In implementing this decision principle, Chief Justice Roberts found what he called “censorship” in the use of complex, fact-intensive definitions.⁶⁸ To Chief Justice Roberts, tests requiring more facts are constitutionally suspect. This line of reasoning led him to reject any test based on either intent or effects.⁶⁹ His discussion of intent begins by eliding the concept of intent into the concept of subjective intent.⁷⁰ To Chief Justice Roberts, subjective intent is a preference that is unknowable.⁷¹ To support this conclusion, the Chief Justice cited the FEC’s brief, which stated that a “constitutional standard that turned on the subjective sincerity of a speaker’s message would likely be incapable of workable application; at a minimum, it would invite costly, fact-dependent litigation.”⁷²

Chief Justice Roberts then took the position that litigation was in itself “a severe burden on political speech,” pointing to the history of the *WRTL II* case:

Consider what happened in these cases. The District Court permitted extensive discovery on the assumption that WRTL’s intent was relevant. As a result, the defendants deposed WRTL’s executive director, its legislative director, its political action committee director, its lead communications consultant, and one of its fundraisers. WRTL also had to turn over many

66. Pub. L. No. 107-155, § 203, 116 Stat. 81, 91 (2002).

67. *WRTL II*, 551 U.S. at 482.

68. *Id.*

69. *Id.* at 468 (stating that “[a]n intent-based standard blankets with uncertainty whatever may be said, and offers no security for free discussion”) (internal quotations omitted).

70. *Id.* at 467.

71. *See id.* at 468 (noting that “an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of § 203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue”).

72. *Id.* (quoting Br. for Appellee, *Wisconsin Right to Life, Inc. v. FEC I*, 2005 WL 3499672 at *39 (No. 04-1581, 546 U.S. 410 (2006))).

documents related to its operations, plans, and finances. Such litigation constitutes a severe burden on political speech.⁷³

The opinion never considered the possibility that the facts were complex but instead treated complexity as a choice that served no purpose, or at least not a constitutionally permissible purpose.

Chief Justice Roberts then found that such fact-intensive intent tests would not produce principled results that were appropriately uniform across cases, but that “[a] test focused on the speaker’s intent could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another.”⁷⁴

Chief Justice Robert applied the same analysis to tests based on the effects of speech, which he concluded “would also typically lead to a burdensome, expert-driven inquiry, with an indeterminate result.”⁷⁵ He concluded that “[l]itigation on such a standard may or may not accurately predict electoral effects, but it will unquestionably chill a substantial amount of political speech.”⁷⁶

Based on this critique of fact-intensive multifactor tests, Chief Justice Roberts specified the parameters of the proper bases for a test for distinguishing issue advocacy from the kind of political speech that was the functional equivalent of express advocacy that could be regulated as an “electioneering communication.”⁷⁷ For this purpose, Chief Justice Roberts reasoned that

the proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect. . . . It must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation. . . . And it must eschew “the open-ended rough-and-tumble of factors,” which “invit[es] complex argument in a trial court and a virtually inevitable appeal.” . . . In short, it must give the benefit of any doubt to protecting rather than stifling speech.⁷⁸

73. *Id.* at 468 n. 5.

74. *Id.* at 468.

75. *Id.* at 469.

76. *Id.*

77. *Id.* at 476 n. 8 (holding that “purpose’ is not the appropriate test for distinguishing between genuine issue ads and the functional equivalent of express campaign advocacy”).

78. *Id.* at 469.

The Chief Justice then articulated his test, stating that “[i]n light of these considerations, a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”⁷⁹ The Chief Justice then explained why the ads at issue in the case did not constitute the functional equivalent of express advocacy, reasoning:

First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate’s character, qualifications, or fitness for office.⁸⁰

Based on this test, Chief Justice Roberts rejected the FEC’s defense of multifactor tests.⁸¹ He also rejected reliance on “contextual” factors in determining whether the ads were the equivalent of express advocacy.⁸² The contextual factors that the Chief Justice rejected were issues that had become factors in the campaign, the timing of the ads close to the election and after the Senate had adjourned,⁸³ and cross-references in the text of the ad to a web site.⁸⁴ Chief Justice Roberts concluded:

Given the standard we have adopted for determining whether an ad is the “functional equivalent” of express advocacy, contextual factors of the sort invoked by appellants should seldom play a significant role in the inquiry. Courts need not ignore basic background information that may be necessary to put an ad in context . . . but the need to consider such background should not become an excuse for discovery or a

79. *Id.* at 469–470.

80. *Id.* at 470.

81. *Id.*

82. *Id.* at 472.

83. *Id.* (calling the timing of the advertisements “irrelevant”).

84. *Id.* at 473 (concluding that “[a]ny express advocacy on the Web site, already one step removed from the text of the ads themselves, certainly does not render an interpretation of the ads as genuine issue ads unreasonable”).

broader inquiry of the sort we have just noted raises First Amendment concerns.⁸⁵

The Chief Justice provided a pointed summary of his opinion in his rejection of the position taken by Justice Scalia, joined by Justice Kennedy and Justice Thomas, in a concurring opinion asserting that Chief Justice Roberts' test was "impermissibly vague" and emphasizing the need for greater clarity to protect political speech.⁸⁶ Chief Justice Roberts responded:

As should be evident, we agree with Justice SCALIA on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate. It is why we emphasize that (1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of "contextual" factors highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech.⁸⁷

Chief Justice Roberts' summary of his approach to characterizing types of speech for purposes of determining whether each type is properly subject to limitations or conditions imposed under federal campaign finance law could well serve as a summary of the reasoning in Justice Kennedy's majority opinion in *Citizens United*.

Justice Kennedy rejected more limited approaches to resolving the claims by Citizens United and insisted that "the Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment."⁸⁸ Justice Kennedy had

85. *Id.* at 473–474. The Chief Justice offered as an example of a possibly relevant and permissible contextual inquiry "whether an ad describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future." *Id.* at 474 (internal quotations omitted).

86. *Id.* at 474 n. 7 (citing *id.* at 492–494 (Scalia, Kennedy & Thomas, JJ., concurring in part and concurring in the judgment)).

87. *Id.* (emphasis in original).

88. *Citizens United*, 558 U.S. at 329. Justice Kennedy continued this argument in the following terms: "It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications. Indeed, a court would be

rejected certain of the more limited approaches suggested by either Citizens United or by various of the *amici* on the grounds that

[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People “of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.” . . . The Government may not render a ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation.⁸⁹

Fact-finding will be curtailed based on assertions that doing so protects speech. Justice Kennedy found that regulation inevitably meant restrictions on speech, stating that “[a]s additional rules are created for regulating political speech, any speech arguably within their reach is chilled.”⁹⁰ Justice Kennedy described FEC regulations as imposing “unique and complex rules.”⁹¹ He noted that, in response to *WRTL II*, which articulated what Justice Kennedy described as an objective test for determining what constitutes the functional equivalent of express advocacy, “the FEC adopted a two-part, 11-factor balancing test to implement *WRTL*’s ruling.”⁹² Justice Kennedy concluded that the FEC’s regulations

may not be a prior restraint on speech in the strict sense of that term, for prospective speakers are not compelled by law to seek an advisory opinion from the FEC before the speech takes place. . . . As a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. . . . These onerous restrictions thus

remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling.” *Id.*

89. *Id.* at 324.

90. *Id.* at 334.

91. *Id.*

92. *Id.* at 334–335.

function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit.⁹³

Justice Kennedy concluded with an analysis of the balance of powers and the role of the courts in protecting the First Amendment right of political speech:

[T]he FEC has created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests. If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question. Government officials pore over each word of a text to see if, in their judgment, it accords with the 11-factor test they have promulgated. This is an unprecedented governmental intervention into the realm of speech.⁹⁴

The majority in *Citizens United* emphasized the shortcomings of administrative agencies and suggested that questions relating to political speech could not safely or responsibly be left to their consideration and discretion.⁹⁵ Justice Kennedy concluded:

Because the FEC's "business is to censor, there inheres the danger that [it] may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression." . . . When the FEC issues advisory opinions that prohibit speech, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." . . . Consequently, "the censor's determination may in practice be final."⁹⁶

93. *Id.* at 335.

94. *Id.* at 336.

95. *See id.* at 335 (finding that the reliance on administrative agencies leads to onerous restrictions on speech).

96. *Id.* at 335–336. This facile characterization of a duly established government agency, acting pursuant to properly delegated authority to interpret and implement law,

This analysis was based on the multifactor test used by the FEC, but that does not mean that the reliance on similar facts and circumstances determinations for tax law purposes would differ in tone or substance. Whether the statute being interpreted deals directly with political speech or indirectly with political speech, the Court in *Citizens United* took the position that other governmental actors, whether Congress or an administrative agency, should not have discretion to burden the First Amendment right of political speech.

V. THE IRS' RESPONSE TO CITIZENS UNITED

The interpretation and administration of tax law turns on consideration of the facts and circumstances of particular cases in light of the statutory requirements and the available guidance. The IRS gave no indication of considering the implications of *Citizens United* in order to reconcile the expanded scope for political campaign activities with the requirement that § 501(c)(4) organizations operate primarily to promote the social welfare of the people of the community. The leadership of the exempt organization function in place during the 2012 election cycle did not simply fail to issue guidance. That leadership gave every indication that it had made a decision to not issue guidance. That decision seemed to control its actions even after it had come to understand that its strategy for dealing with the impending release of the Inspector General's report had not been well received. Indeed, the IRS agreed to implement every recommendation in the Inspector General's Report except the recommendation that the IRS issue guidance so that the public and the regulated community could more readily comply and so that the enforcement policies could be more readily understood.⁹⁷ The IRS offered to increase staff training instead.⁹⁸ None of the people responsible for this response remained employed at the IRS long enough thereafter to explain their reasoning.

as a "censor" invites specific refutation, but that enterprise is beyond the scope of the present Article.

97. See TIGTA Report, *supra* n. 5, at 16-17 (containing the IRS response to the Inspector General's recommendations).

98. *Id.*

The new leadership at the IRS immediately reversed course and pledged to issue guidance.⁹⁹ The task confronting the IRS moving forward will be challenging, to say the least. The task is not to issue guidance on a clear slate. The task is to issue guidance on a very messy slate reflecting the compound failures of the past and the resulting vested interests that have arisen in response to these administrative failures and lapses. Whether an administrative agency can do this successfully is an open question. Whether the IRS can do this in the current situation is by no means certain.

The Supreme Court's position on multifactor tests as a burden on First Amendment rights is an important complexity confronting the IRS. If consideration of multiple factors creates uncertainty for the public and for the regulated community at the same time that it is impermissibly expanding the scope of the agency's discretion, what is the alternative? The alternative is not simply an approach that will consider political speech. The regulatory task of the IRS is to preserve the integrity of tax exemption while protecting political speech. These two considerations do not necessarily point in the same direction. This is the constitutional terrain that the IRS will have to navigate in light of *Citizens United*. It will also have to navigate a terrain of vested interests created by the IRS itself through its tactical use of § 501(c)(4) as a "catchall" or a "dumping ground" for so many decades.

On November 29, 2013, the IRS and Department of the Treasury issued proposed regulations dealing with election campaign activity by § 501(c)(4) social welfare organizations.¹⁰⁰ The proposed regulation amends Treasury Regulation § 1.501(c)(4)-1(a) by replacing the concept of "political campaign intervention" with the concept of "candidate-related political activity."¹⁰¹ The proposed regulations are intended to provide greater clarity and certainty in distinguishing political activities from social welfare activities by reducing dependence on fact-intensive determinations.¹⁰² The preamble to the proposed regulations states that

99. Daniel Werfel, *Charting a Path Forward at the IRS: Initial Assessment and Plan of Action 14* (IRS 2013) (available at <http://www.irs.gov/pub/newsroom/Initial%20Assessment%20and%20Plan%20of%20Action.pdf>).

100. 78 Fed. Reg. 71535 (Nov. 29, 2013).

101. *Id.* at 71536.

102. *Id.*

[t]he Treasury Department and the IRS recognize that more definitive rules with respect to political activities related to candidates—rather than the existing, fact-intensive analysis—would be helpful in applying the rules regarding qualification for tax-exempt status under section 501(c)(4). Although more definitive rules might fail to capture (or might sweep in) activities that would (or would not) be captured under the IRS' traditional facts and circumstances approach, adopting rules with sharper distinctions in this area would provide greater certainty and reduce the need for detailed factual analysis in determining whether an organization is described in section 501(c)(4).¹⁰³

The emphasis on replacing determinations based on facts and circumstances of particular cases with distinctions that appear clearer is consistent with the Court's insistence that complex regulatory tests are constitutionally impermissible.¹⁰⁴ Questions of the appropriate nature and degree of administrative discretion are important issues that are not addressed explicitly in the regulations, but it would be difficult to understand the proposed regulations without considering this element of *Citizens United* and *WRTL II*.

Given this context, there are reasons to welcome the new regulations as an important step forward from the implosion of the Exempt Organizations Division. These regulations indicate that the new leadership of the IRS and Treasury Department understand the importance of guidance in enabling compliance by the regulated community and principled enforcement by the IRS. Although disputes over guidance may be intense, they are unlikely to produce the toxic atmosphere of accusations of mistreatment of particular organizations that have characterized the 2013 dispute over the IRS' treatment of particular organizations during the 2012 election cycle.

103. *Id.* at 71536–71537. The preamble to the proposed regulations also states:

The Treasury Department and the IRS acknowledge that the approach taken in these proposed regulations, while clearer, may be both more restrictive and more permissive than the current approach, but believe the proposed approach is justified by the need to provide greater certainty to section 501(c)(4) organizations regarding their activities and reduce the need for fact-intensive determinations.

Id. at 71538.

104. *See supra* pt. IV (examining *WRTL II*, 551 U.S. at 469).

VI. CONCLUSION

The IRS found itself in the eye of the wrong storm due to its century-long failure to issue guidance that enabled compliance and explained enforcement. Congress bears some substantial responsibility for this state of affairs. Nothing would have prevented Congress from amending § 501(c)(4) and from exercising its broad oversight authority to address the issues arising from the failure of guidance.

The more useful issue relates to how the IRS and the exempt organization community go forward. The response to date suggests that the IRS is being reconstituted, but that reform will be a long, difficult process.¹⁰⁵ The unasked question is whether there is support for reform within that larger community of exempt entities or whether the redesign of § 501(c)(4) has been quietly embraced by organizations that still have some social welfare purpose apart from shaping election outcomes. Uncertainty over the answer provides strong evidence of the importance of *Citizens United* in redesigning social welfare organizations to minimize the importance of the organizations' exempt activities and to enable their use as campaign finance vehicles.

105. See Werfel, *supra* n. 99, at 5 (admitting in response to the questions raised about IRS practices of regulating § 501(c)(4) organizations that "this Report does not purport to provide a complete and final set of answers at this time").

