

12-18-2010

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### Recommended Citation

Brandon S. Boulter, *Expensive Speech: Citizens United v. FEC and the Free Speech Rights of Tax-Exempt Religious Organizations*, 2010 BYU L. Rev. 2243 (2010).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2010/iss6/8>

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## Expensive Speech: *Citizens United v. FEC* and the Free Speech Rights of Tax-Exempt Religious Organizations

### I. INTRODUCTION

The U.S. Supreme Court's decision in *Citizens United v. FEC*<sup>1</sup> entered the national consciousness amid more than its fair share of controversy. During his 2010 State of the Union Address, with many of the robe-clad justices of the Supreme Court sitting front and center in the House Chambers, President Obama castigated the Court for “revers[ing] a century of law that [he] believe[d] [would] open the floodgates for special interests—including foreign corporations—to spend without limit in our elections.”<sup>2</sup>

The President's criticism, warranted or not, prompted immediate standing applause from many members of the House and Senate and a very surprising reaction from one member of the Supreme Court. Although the Justices have historically remained silent and unresponsive during the State of the Union Address, Justice Alito could not restrain himself from reacting to what he viewed as the President's misstatement of the key holding and potential ramifications of *Citizens United*. Shaking his head and mouthing what appeared to be the words “not true,” Justice Alito made his disagreement with the President clear to a world audience. This controversial exchange, which provided enough fodder to fill several days of twenty-four hour news channel programming, demonstrated how impassioned individuals can become when money and political speech are at issue. It also made clear that even after over 200 years of constitutional interpretation, significant First Amendment questions remain in flux.

The central holding in *Citizens United* is that, under the First Amendment, “the Government cannot restrict political speech based on the speaker's corporate identity.”<sup>3</sup> With that question answered, at least for the time being, it is now left to the legal world to

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1. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

2. President Barack Obama, State of the Union Address (Jan. 27, 2010), <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

3. *Citizens United*, 130 S. Ct. at 902.

consider what the broader impact of this decision will be moving forward. Many serious questions remain as to how this holding will affect free speech rights and political campaigns. For instance, it remains unclear how this decision will affect the involvement of foreign corporations in American politics or the exact nature of Political Action Committees (“PACs”) under the new framework. Additionally, there is significant uncertainty regarding the impact *Citizens United* will have on tax-exempt religious organizations that are restricted from engaging in political activities under § 501(c)(3) of the Internal Revenue Code.<sup>4</sup> Although each of these questions is worth serious review in light of *Citizens United*, this Note will focus specifically on the last question—how the decision in *Citizens United* affects tax-exempt religious organizations under § 501(c)(3).

Under § 501(c)(3) certain organizations, including those “organized and operated exclusively for religious [or] charitable . . . purposes,” are exempt from paying federal taxes as long as they adhere to certain restrictions.<sup>5</sup> These restrictions include limits on lobbying activities and participation in political campaigns.<sup>6</sup> Over the years there have been a number of legal challenges to this political activities restriction, yet all have failed to overturn the prohibition.<sup>7</sup> It is likely, however, that in light of the holding in *Citizens United*, new challenges to this restriction will arise.<sup>8</sup> As such, it is helpful to anticipate the issues that may arise with these potential challenges, including whether or not *Citizens United* even applies to tax-exempt religious organizations and, if so, how that holding affects their rights under § 501(c)(3). With a new emphasis on First Amendment political speech rights under the *Citizens United* decision, it is likely

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4. See Eliza Newlin Carney, *Brave New World of Political Spending for Nonprofits*, NATIONALJOURNAL.COM (Mar. 15, 2010), [http://www.nationaljournal.com/njonline/no\\_20100312\\_4650.php#](http://www.nationaljournal.com/njonline/no_20100312_4650.php#).

5. I.R.C. § 501(c)(3) (2006). For an overview of the history of and policy justifications for religious tax exemptions, see Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971 (1999).

6. I.R.C. § 501(c)(3).

7. See, e.g., *Regan v. Taxation with Representation*, 461 U.S. 540 (1983); *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000); *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972).

8. See MILTON CERNY, DOUGLAS W. CHARNAS & MICHELE A. W. MCKINNON, MCGUIREWOODS LLP, *CITIZENS UNITED CHANGED LANDSCAPE: MAY PRODUCE SOME LANDMINES FOR NONPROFIT ORGANIZATIONS*, Feb. 10, 2010, <http://www.mcguirewoods.com/news-resources/news/4532.asp?SearchFor=unconstitutional>.

that any challenge to the § 501(c)(3) restrictions would be based on the doctrine of unconstitutional conditions, which limits the types of conditions government can place on the benefits it provides.<sup>9</sup> Although this doctrine has been used to make similar arguments in the past,<sup>10</sup> the new First Amendment paradigm established by the *Citizens United* holding has changed the legal landscape on this issue. This Note contends that, based on this new free speech paradigm, the doctrine of unconstitutional conditions has been given renewed strength in the argument against conditioning the benefit of tax exemption for religious organizations on the willingness of those organizations to give up their First Amendment speech rights. This Note also argues, however, that in light of other interests, including adherence to the Establishment Clause and the long-recognized tradition of separation of church and state, some limits on the political activities of tax-exempt religious organizations should remain intact, preventing such organizations from maintaining tax-exempt status if they engage in completely unfettered political speech or lobbying.

Part II of this Note reviews the background and central holding of *Citizens United* as well as the general provisions of § 501(c)(3) and the related restrictions, focusing specifically on the political activities test. Part III provides an overview of the doctrine of unconstitutional conditions, including a summary of the Supreme Court unconstitutional conditions cases most relevant to this issue. Part IV uses the doctrine of unconstitutional conditions to analyze the legality of § 501(c)(3)'s political activities restriction for religious organizations in light of the decision in *Citizens United*. Part IV also considers the arguments against allowing tax-exempt religious organizations to engage in completely unfettered political activities and discusses possible limits that should continue to govern such organizations. Part V concludes this Note.

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9. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

10. See, e.g., *Speiser v. Randall*, 357 U.S. 513 (1958).

## II. *CITIZENS UNITED V. FEC*: A NEW PIECE IN THE FIRST AMENDMENT PUZZLE

### A. *Background and History*

In 2007, Citizens United, a nonprofit corporation with the stated purpose of “restoring our government to citizens’ control,”<sup>11</sup> released a film entitled *Hillary: The Movie* in an attempt to inform and influence voters during the 2008 presidential election.<sup>12</sup> The film, a politically charged documentary that was highly critical of Hillary Clinton and her husband, was initially made available in theaters and through DVD sales.<sup>13</sup> However, in an effort to make the film accessible to an even broader audience, Citizens United also wanted to distribute the film through video-on-demand, which allows those who subscribe to digital cable systems to select the video at any time from an on-screen menu.<sup>14</sup> Accordingly, Citizens United sought an agreement with a cable company, which offered to make the film available to its subscribers.<sup>15</sup> Additionally, Citizens United filmed three television commercials promoting the film and planned to pay for the costs associated with airing those ads.<sup>16</sup>

Under federal law, corporations and unions are prohibited from “using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections.”<sup>17</sup> The Bipartisan Campaign Reform Act of 2002 extended this prohibition to “electioneering communication,”<sup>18</sup> which includes “any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office; . . . made within 60 days before a general, special, or runoff election . . . or 30 days before a primary or preference election.”<sup>19</sup> Based on this statutory language, Citizens United feared it would face civil and criminal repercussions if it

11. *About Citizens United*, CITIZENS UNITED, <http://www.citizensunited.org/about.aspx> (last visited Feb. 15, 2011).

12. *Citizens United v. FEC*, 130 S. Ct. 876, 887 (2010).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*; see also 2 U.S.C. § 441b (2006).

18. 2 U.S.C. § 441b(b)(2).

19. 2 U.S.C. § 434(f)(3)(A)(i).

offered the film, as planned, through video-on-demand within thirty days of the primary election.<sup>20</sup> As such, before moving forward with the plan, Citizens United sought a declaratory judgment on the matter, as well as an injunction against any potential FEC action.<sup>21</sup> The district court denied this motion and granted the FEC's motion for summary judgment.<sup>22</sup> The Supreme Court docketed the case in August 2008<sup>23</sup> and finally heard oral arguments in March 2009.<sup>24</sup> Despite the fact that the 2008 presidential election had long since passed by the time oral arguments were heard, the Court took up the case because, in its view, there were much broader issues at hand than simply whether or not Citizens United would be in violation of § 441b.<sup>25</sup> The more pressing issues, as the Court viewed them—and certainly those with the most potential for a lasting impact on First Amendment jurisprudence—are those dealing with whether or not § 441b and other restrictions of the free speech of corporations are even constitutional.<sup>26</sup>

### *B. The Court's Reasoning*

#### *1. The applicability of 2 U.S.C. § 441b*

The Court in *Citizens United*, in an opinion written by Justice Kennedy, began its analysis of the key issues by looking at whether or not § 441b was applicable to the activities of Citizens United.<sup>27</sup> Citizens United had argued that the film did not fit within the definition of “electioneering communication” because it “was not ‘publicly distributed.’”<sup>28</sup> This argument was based on the fact that the video-on-demand nature of distribution limited the viewership to only those who requested the film, meaning, at least under Citizens United's interpretation, that the transmission would be seen by one person or one household—not the 50,000 or more viewers required

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20. *Citizens United*, 130 S. Ct. at 888.

21. *Id.*

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

23. *Id.*, *appeal docketed*, No. 08-205 (U.S. Aug. 18, 2008).

24. Robert Barnes, ‘Hillary: The Movie’ to Get Supreme Court Screening, WASH. POST, Mar. 15, 2009, at A4, *available at* [http://www.washingtonpost.com/wp-dyn/content/article/2009/03/14/AR2009031401603\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/03/14/AR2009031401603_pf.html).

25. *Citizens United*, 130 S. Ct. at 888.

26. *Id.*

27. *Id.*

28. *Id.* at 888–89.

under the statute.<sup>29</sup> Citizens United also argued that because *Hillary* is simply a “documentary film that examines certain historical events”—not express advocacy or its “functional equivalent”—it did not fall under the provisions of § 441b.<sup>30</sup> The Court rejected both arguments.<sup>31</sup>

First, the Court determined that the video-on-demand feature did not limit the “public” nature of the film’s distribution as Citizens United had argued.<sup>32</sup> Although it is true that under the video-on-demand format the film is requested on an individual basis and is not broadcast automatically to a large number of people, the Court found that the determination of whether or not a cable transmission is “publicly distributed” is whether or not it “*can* be received by 50,000 or more persons.”<sup>33</sup> In this case, the Court found that the distribution of *Hillary* clearly met that criterion.<sup>34</sup> On the question of whether or not *Hillary* constituted express advocacy, another requirement under the statute, the Court determined that “there is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton.”<sup>35</sup> Under this conclusion, the Court held that the film qualified as the functional equivalent of express advocacy, making § 441b applicable to Citizens United’s actions.<sup>36</sup> Having made this determination, the Court turned to the more difficult and certainly more controversial analysis of the constitutionality of § 441b and the claim that the statute violates the free speech rights of Citizens United.<sup>37</sup>

## 2. First Amendment concerns of § 441b

The Court could not resolve the question regarding the constitutionality of § 441b with the same ease with which it disposed of the question of § 441b’s applicability. In deciding this issue, the majority’s analysis included a rather lengthy and detailed review of First Amendment history and jurisprudence.<sup>38</sup> Appropriately,

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29. *Id.* at 889.

30. *Id.* at 889–90.

31. *Id.*

32. *Id.* at 889.

33. *Id.* at 887 (emphasis added).

34. *Id.* at 889.

35. *Id.* at 890.

36. *Id.*

37. *Id.* at 892.

38. *Id.* at 896–99.

however, this analysis began with the simplicity of the constitutional language itself: “Congress shall make no law . . . abridging the freedom of speech.”<sup>39</sup> This language, with its outright proscription on the abridgment of free speech, provides the framework with which to view the entirety of the majority’s reasoning. “Speech,” argued Justice Kennedy, “is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.”<sup>40</sup> Because such speech is so critical to the proper functioning of our democracy, reasoned the majority, the government is restricted from “allowing speech by some but not others.”<sup>41</sup> This means, at least according to Justice Kennedy and the majority, that “political speech does not lose First Amendment protection ‘simply because its source is a corporation.’”<sup>42</sup> Therefore, the restrictions placed on such speech by § 441b are unconstitutional. As simple as this reasoning may sound, in order to reach this controversial decision, the majority had to address, and ultimately overturn, years of Supreme Court jurisprudence.

Over the last fifty years, several major cases have addressed the issue of corporate First Amendment rights, and some of them have reached conclusions in direct opposition to the majority’s holding in *Citizens United*. Chief among these cases is *Austin v. Michigan State Chamber of Commerce*, which held that political speech can, in fact, be banned based on the speaker’s corporate identity.<sup>43</sup> As Kennedy noted, quoting directly from his own dissent in *Austin*, the *Austin* Court “‘upheld a direct restriction on the independent expenditure of funds for political speech for the first time in [this Court’s] history.’”<sup>44</sup> To justify this precedent, the *Austin* Court had to create or “identify” a new government interest—the antidistortion interest.<sup>45</sup>

According to the *Austin* majority, the antidistortion interest consists of preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help

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39. *Id.* at 896; U.S. CONST. amend. I.

40. *Citizens United*, 130 S. Ct. at 898.

41. *Id.*

42. *Id.* at 900 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)).

43. 494 U.S. 652 (1990), *overruled by Citizens United*, 130 S. Ct. 876.

44. *Citizens United*, 130 S. Ct. at 903 (quoting *Austin*, 494 U.S. at 695 (Kennedy, J., dissenting)).

45. *Id.*; *see also Austin*, 494 U.S. at 660.

of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."<sup>46</sup> In other words, the *Austin* Court was concerned about the "unfair advantage" that corporations would have "in the political marketplace" due to their corporate wealth, and the *Austin* Court believed this concern justified an attempt to "equalize" the relative influence of competing voices in American politics.<sup>47</sup> The *Citizens United* majority did not buy this argument. Citing a number of significant pre-*Austin* Court decisions for support, the *Citizens United* Court reasoned: "The First Amendment's protections do not depend on the speaker's 'financial ability to engage in public discussion.'"<sup>48</sup> Rather, "political speech" is "political speech" and is "indispensable . . . [whether it] comes from a corporation [or] an individual."<sup>49</sup> According to Kennedy, rather than "interfere[] with the 'open marketplace' of ideas"<sup>50</sup> by controlling who can and cannot speak, the Court and Congress should let the First Amendment govern and "[f]actions should be checked by permitting them all to speak and by entrusting the people to judge what is true and what is false."<sup>51</sup> Under this reasoning, *Citizens United* overruled *Austin*, "effectively invalidat[ing] not only BCRA Section 203, but also 2 U.S.C. 441b's prohibition . . . for express advocacy."<sup>52</sup> This decision, according to the majority, simply restored the pre-*Austin* line of precedent from *First National Bank of Boston v. Bellotti* and *Buckley v. Valeo*, returning to an interpretation of the First Amendment that does not allow the government to "suppress political speech on the basis of the speaker's corporate identity."<sup>53</sup> It is this holding that drew the ire of President Obama and raises the potential for a number of new questions and legal challenges, including those related to the First Amendment rights of religious organizations exempt from taxes under § 501(c)(3).

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46. *Austin*, 494 U.S. at 660.

47. *Id.* at 659–60 (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)).

48. *Citizens United*, 130 S. Ct. at 904 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976)).

49. *Id.* (quoting *First Nat'l. Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)).

50. *Id.* at 906 (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)).

51. *Id.* at 907 (citation omitted).

52. *Id.* at 913.

53. *Id.*

C. *IRS § 501(c)(3): Tax-Exempt Religious Organizations*

Before analyzing how the holding from *Citizens United* will affect tax-exempt religious organizations, it is first necessary to review the basic definition of a tax-exempt religious organization and the statutory restrictions to which such an organization must adhere. This definition and the associated restrictions are found in § 501(c)(3) of the Internal Revenue Code and the corresponding IRS regulations. Under § 501(c)(3), an organization is exempt from Federal income taxes if it is

organized and operated exclusively for religious, charitable, . . . or educational purposes, . . . [so long as] no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . , and which does not participate in, or intervene in . . . , any political campaign on behalf of (or in opposition to) any candidate for public office.<sup>54</sup>

In essence, an organization may receive and maintain tax-exempt status if it meets each of four tests: (1) the organizational test;<sup>55</sup> (2) the operational test;<sup>56</sup> (3) the private inurement test;<sup>57</sup> and (4) the political activities test.<sup>58</sup> Although failing any one of these tests will place an organization in jeopardy of losing its tax-exempt status, this Note will focus primarily on the political activities test because that is the test most likely to be affected by the holding in *Citizens United*. Accordingly, it is worthwhile to consider the restrictions of this test in more depth.

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54. I.R.C. § 501(c)(3) (2006).

55. *See* 26 C.F.R. § 1.501(c)(3)-1(b) (2010) (“An organization is organized exclusively for one or more exempt purposes only if its articles of organization . . . (a) Limit the purposes . . . to one or more exempt purposes; and (b) Do not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes.”).

56. *See id.* § 1.501(c)(3)-1(c) (“An organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in § 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.”).

57. *See id.* § 1.501(c)(3)-1(c)(2) (“An organization is not operated exclusively for one or more exempt purposes if its net earnings inure in whole or in part to the benefit of private shareholders or individuals.”).

58. *See id.* § 1.501(c)(3)-1(c)(3).

According to the IRS regulations governing the political activities test,

An organization is not operated exclusively for one or more exempt purposes if . . . a substantial part of its activities is attempting to influence legislation . . . [or] it participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.<sup>59</sup>

Under these regulations tax-exempt religious organizations, and any other § 501(c)(3) organization for that matter, are severely limited in the types of political activities in which they can engage.<sup>60</sup> That is not to say, however, that such organizations are banned completely from any type of political activity. Even though the statutory language requires that a tax-exempt organization be operated “exclusively” for one of the exempt purposes, this absolute language is tempered by the fact that the IRS regulations allow an organization to engage in certain non-exempt activities so long as such activities do not constitute a “primary” part of that organization’s activities.<sup>61</sup> Thus, tax-exempt religious organizations do have *some* latitude to engage in lobbying activities, but in doing so they run the risk of crossing the somewhat undefined boundary into non-exempt status.<sup>62</sup>

With such extreme limits on the ability of tax-exempt religious organizations to engage in political activities without losing their exemptions, it should come as no surprise that a number of such organizations have challenged this element of § 501(c)(3) as unconstitutionally restrictive.<sup>63</sup> One of the most famous of these challenges came in the 1972 case *Christian Echoes National Ministry, Inc. v. United States*, in which Christian Echoes National Ministry, a nonprofit religious corporation, sued the United States government for a refund of Federal Insurance Contribution Act (FICA) taxes under the claim that the organization was exempt under § 501(c)(3).<sup>64</sup>

59. *Id.* §§ 1.501(c)(3)-1(c)(3)(i) to (iii).

60. *See id.*

61. *Id.* § 1.501(c)(3)-1(e).

62. For further discussion of the restrictions on political activity of § 501(c)(3) organizations, see Meghan J. Ryan, *Can the IRS Silence Religious Organizations?*, 40 IND. L. REV. 73 (2007).

63. *See, e.g.*, *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000).

64. *Christian Echoes Nat’l Ministry, Inc. v. United States*, 470 F.2d 849, 851 (10th Cir. 1972).

Christian Echoes filed suit after the IRS revoked its tax-exempt status on the grounds that the organization “had engaged in substantial activity aimed at influencing legislation; and . . . had directly and indirectly intervened in political campaigns on behalf of candidates for public office.”<sup>65</sup> Following an examination of Christian Echoes’s activities, the IRS found that it had published a number of pamphlets and articles attempting to influence directly public opinion on specific legislation, including bills related to civil rights, Medicare, and firearms control, among many others.<sup>66</sup> Christian Echoes had also intervened in federal elections in an attempt to elect conservative politicians like Strom Thurmond and Barry Goldwater and defeat liberal politicians like Lyndon Johnson and Hubert Humphrey.<sup>67</sup> On these grounds, the IRS found that Christian Echoes had violated the political activities test of § 501(c)(3) and could no longer be considered tax-exempt under the statute.<sup>68</sup>

In its suit, Christian Echoes claimed that the political activities test violated both the free exercise and the free speech clauses of the First Amendment.<sup>69</sup> The Tenth Circuit rejected both claims, reasoning that “First Amendment rights are not absolutes and that courts must balance [these] freedoms against the congressional enactment . . . .”<sup>70</sup> The court also held that because “tax exemption is a privilege, a matter of grace rather than right, . . . the limitations contained in Section 501(c)(3) . . . do not deprive Christian Echoes of its constitutionally guaranteed right of free speech.”<sup>71</sup> Under the court’s reasoning, the limits of § 501(c)(3) do not restrain a religious organization from exercising its First Amendment rights.<sup>72</sup> An organization must simply make a choice between exercising its First Amendment free speech rights and receiving the “privilege” of tax exemption.<sup>73</sup>

This reasoning begs the question of whether or not the government may permissibly condition a privilege such as tax

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65. *Id.* at 853.

66. *Id.* at 855.

67. *Id.* at 856.

68. *Id.* at 852–53.

69. *Id.* at 856.

70. *Id.* at 857.

71. *Id.*

72. *Id.*

73. *Id.*

exemption on the willingness of an organization (or individual, for that matter) to give up its constitutional rights. The Supreme Court has dealt with this question numerous times, leading to a long-standing legal doctrine known as the doctrine of unconstitutional conditions. Because this issue is the focus of this Note, before moving forward with the analysis of *Citizens United's* impact on the rights of § 501(c)(3) religious organizations, it is necessary to review the doctrine of unconstitutional conditions and the relevant Supreme Court jurisprudence governing it.

### III. THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

At surface level, the doctrine of unconstitutional conditions seems simple and straightforward. In reality, however, decades of unconstitutional conditions jurisprudence have demonstrated that applying the doctrine is much more complicated and inconsistent than one might imagine. In short, the doctrine stands for the principle “that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”<sup>74</sup> Put differently, an unconstitutional condition may exist “when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference.”<sup>75</sup> This is not to say, of course, that the government may not attach certain restrictions or burdens to *any* benefit it provides. In fact, most benefits provided by the government have certain conditions attached. After all, one would be hard pressed to argue that something as ordinary as driving on a

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74. Sullivan, *supra* note 9, at 1415.

75. Sullivan, *supra* note 9, at 1421–22. In a few limited cases, the Supreme Court has held that no unconstitutional condition exists where there is “rough proportionality” or an “essential nexus” between the benefit conferred and the constitutional right implicated. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987). This suggests that an unconstitutional condition exists only when “the government . . . require[s] a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.” *Dolan*, 512 U.S. at 385. However, the Court has never extended this “essential nexus” requirement beyond “cases where the state requires land to be dedicated to public use in exchange for permits to develop other portions of the property.” *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 46 n.20 (5th Cir. 2002) (citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999)). Thus, because these proportionality concerns are implicated only in the realm of the Takings Clause, there is no need to discuss the “essential nexus” any further in this Note.

government owned road does not come with certain conditions such as obeying the speed limit or stopping at red lights. What distinguishes an unconstitutional condition from a permissible condition is that the unconstitutional condition implicates “those rights that depend on some sort of exercise of autonomous choice by the rightholder, such as individual rights to speech, exercise of religion or privacy.”<sup>76</sup> Thus, unconstitutional conditions problems often arise in cases involving First Amendment rights.

Several Supreme Court cases have addressed the doctrine in the context of First Amendment claims. In each case the Court emphasized that “the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech” even if he has no entitlement to that benefit.”<sup>77</sup> This raises the question that is the focus of this Note: in light of the Court’s decision in *Citizens United* reaffirming the importance of First Amendment political speech rights, is it an unconstitutional condition to require religious organizations to give up their free speech rights in order to receive a tax exemption? Although this question has been asked before (with no perfectly clear answer), the *Citizens United* decision adds a new piece to the puzzle, requiring a fresh analysis of this issue. Key to this analysis is the Supreme Court’s relevant jurisprudence related to the unconstitutional conditions doctrine, tax exemptions, and the First Amendment free speech rights of religious organizations.

#### A. *Key Cases Involving the Doctrine of Unconstitutional Conditions*

Three of the key cases involving the doctrine of unconstitutional conditions are *Speiser v. Randall*, *Sherbert v. Verner*, and *Perry v. Sinderman*. These cases, respectively, are discussed in the following sections.

##### 1. *Speiser v. Randall*

Although the doctrine of unconstitutional conditions was first created during the *Lochner* era,<sup>78</sup> the doctrine really began to take

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76. Sullivan, *supra* note 9, at 1426.

77. United States v. American Library Ass’n, Inc., 539 U.S. 194, 210 (2003) (quoting Board of Comm’rs, Wabaunsee Cnty., Kan. v. Umbehr, 518 U.S. 668, 674 (1996) (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972))).

78. Sullivan, *supra* note 9, at 1416.

shape more recently in *Speiser v. Randall*,<sup>79</sup> a case decided by the Supreme Court in 1958. In *Speiser*, a taxpayer challenged a provision in the California Constitution providing that “no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence” is eligible to “[r]eceive any exemption from any tax imposed by this State.”<sup>80</sup> The taxpayer in this case, a World War II veteran, was denied a veterans’ property tax exemption on the grounds that he refused to make an oath that he would “not advocate the overthrow of the Government of the United States or the State of California,” as required by the application for tax exemption.<sup>81</sup> In his complaint, the taxpayer claimed that conditioning a tax exemption on such an oath is “forbidden by the Federal Constitution”<sup>82</sup> because it denies “freedom of speech without the procedural safeguards required by the Due Process Clause.”<sup>83</sup> In addressing this claim, the Court reasoned that “[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.”<sup>84</sup> In effect it would be “the same as if the State were to fine them for this speech.”<sup>85</sup> Most importantly, perhaps, the Court rejected the State of California’s contention that denial of a tax exemption does “not infringe speech” because this exemption “is a ‘privilege,’” not a right.<sup>86</sup> As will be demonstrated below, this “privilege” versus “right” issue continues to be a major element of unconstitutional conditions jurisprudence, which will most certainly have important implications on any future decision related to tax-exempt religious organizations.

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79. 357 U.S. 513 (1958).

80. *Id.* at 516 (quoting CAL. CONST. art. XX, § 19).

81. *Id.* at 514–15.

82. *Id.* at 515.

83. *Id.* at 517.

84. *Id.* at 518.

85. *Id.*

86. *Id.* This reasoning should be compared to the Tenth Circuit’s holding in *Christian Echoes National Ministry, Inc. v. United States*, discussed above. In that case, as noted above, the court held that because a tax exemption is a privilege, not a right, “withholding exemption from nonprofit corporations [does] not deprive [them] of [their] constitutionally guaranteed right of free speech.” 470 F.2d 849, 857 (1972).

## 2. *Sherbert v. Verner to Perry v. Sindermann*

Just five years after the *Speiser* decision, the Supreme Court once again faced an unconstitutional conditions question in *Sherbert v. Verner*.<sup>87</sup> Unlike *Speiser*, however, the dispute in *Sherbert* dealt specifically with religious issues, adding an important element to the development of the unconstitutional conditions puzzle. In *Sherbert*, the appellant, a member of the Seventh-day Adventist Church, lost her job for refusing to work on Saturday, which she considered to be the Sabbath Day.<sup>88</sup> Following her termination, appellant was unable to find another job due to the same religious restrictions.<sup>89</sup> As such, when she attempted to secure unemployment benefits she was denied by the state government.<sup>90</sup> South Carolina law provided that “to be eligible for benefits, a claimant must be ‘able to work and . . . available for work’ and that ‘if . . . [a claimant] has failed, without good cause . . . to accept available suitable work,’ she will not be eligible to receive unemployment benefits.”<sup>91</sup> Unsurprisingly, the appellant challenged this law and the government’s refusal to provide unemployment benefits as an infringement of her free exercise rights under the First Amendment.<sup>92</sup>

The Court sided with the appellant on this issue, determining that the denial of benefits in this instance did, in fact, impose an unconstitutional burden on the individual rights of the appellant.<sup>93</sup> Justice Brennan, writing for the Court, argued that “[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.”<sup>94</sup> In the Court’s mind, it made no difference whether the benefit at issue was a “right” or a privilege.<sup>95</sup> Relying heavily on *Speiser*, the *Sherbert* Court held “that conditions upon public benefits cannot be sustained if they so operate, whatever their

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87. 374 U.S. 398 (1963).

88. *Id.* at 399.

89. *Id.*

90. *Id.* at 399–401.

91. *Id.* at 400–01 (internal quotations and citation omitted).

92. *Id.* at 401.

93. *Id.* at 403.

94. *Id.* at 404.

95. *Id.*

purpose, as to inhibit or deter the exercise of First Amendment freedoms.”<sup>96</sup> This is true even when the benefit is “gratuitous.”<sup>97</sup>

This reasoning was reiterated nearly a decade later in *Perry v. Sindermann*,<sup>98</sup> in which the Court reviewed the case of a state-employed teacher whose contract was not renewed because, as he claimed, he had been critical of the Board of Regents.<sup>99</sup> The Board’s action, he alleged, infringed upon his First Amendment freedom of speech.<sup>100</sup> Although this case was ultimately decided on grounds largely unrelated to the doctrine of unconstitutional conditions, the Court reviewed the principles of the doctrine to ensure that the denied contract renewal had not been based on an unconstitutional condition.<sup>101</sup> In language reminiscent of both *Speiser* and *Sherbert*, Justice Stewart, writing for the Court, reasoned:

[E]ven though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.<sup>102</sup>

Once again, the Court emphasized the unique position of First Amendment rights, especially freedom of speech, by rejecting the notion that receipt of a governmental benefit could be based on some condition that interferes with a constitutional right. Although the *Speiser*, *Sherbert*, and *Perry* Courts emphatically argued against such conditions, the Court has, in more recent years, injected significant inconsistency into the doctrine of unconstitutional conditions, carving out a number of exceptions governing its application. This Note turns now to a review of the cases most relevant to these exceptions.

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96. *Id.* at 405 (citing *Speiser v. Randall*, 357 U.S. 513 (1958)).

97. *Id.*

98. 408 U.S. 593 (1972).

99. *Id.* at 594–95.

100. *Id.* at 595.

101. *Id.* at 596–98.

102. *Id.* at 597.

*B. Cases that Undermine the Doctrine of Unconstitutional Conditions*

*I. Regan v. Taxation with Representation*

Unlike the cases discussed above, *Regan v. Taxation with Representation*,<sup>103</sup> decided in 1983, was the first major Supreme Court case to consider the political activities restrictions of § 501(c)(3) within the framework of the unconstitutional conditions doctrine.<sup>104</sup> Undoubtedly, any future challenge to the § 501(c)(3) political activities restriction under the new *Citizens United* framework will be forced to reconcile the Court's holding in *Regan*. As such, it is important to understand the facts and reasoning of this case in order to understand the potential distinctions that may be drawn between *Regan* and future challenges to § 501(c)(3).

*a. Facts and procedural history.* In *Regan*, a nonprofit corporation, Taxation with Representation ("TWR"), filed suit after the IRS denied its application for tax exemption under § 501(c)(3) for what appeared to be substantial lobbying activities.<sup>105</sup> TWR was initially organized as a nonprofit charitable and educational organization with the goal of "represent[ing] the general public on tax issues before Congress, the courts, and the executive branch."<sup>106</sup> Not surprisingly, to accomplish this goal, TWR engaged in substantial lobbying activities, placing the organization in direct violation of the political activities test of § 501(c)(3).<sup>107</sup> As a result of these lobbying activities, TWR became ineligible for the tax exemption typically allowed for charitable and educational nonprofit corporations under § 501(c)(3).<sup>108</sup> The suit filed by TWR after the adverse determination by the IRS alleged that the § 501(c)(3) provision on which the denial of tax exemption was based was unconstitutional because it conditioned a governmental benefit on the willingness of an organization to give up its First Amendment free speech rights.<sup>109</sup> This unconstitutional conditions claim was

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103. 461 U.S. 540 (1983).

104. *Id.* at 542.

105. *Id.*

106. *Taxation with Representation v. Regan*, 676 F.2d 715, 717 (D.C. Cir. 1982).

107. *Id.* at 718.

108. *Id.*

109. *Id.* at 725. TWR also claimed that the IRS's denial of its application for tax exemption violated the Due Process Clause of the Fifth Amendment. *Regan*, 461 U.S. at 542.

rejected by both the district court and the circuit court, leading to an appeal heard by the Supreme Court.<sup>110</sup> Once again, TWR's unconstitutional conditions argument was rejected, and the political activities test of § 501(c)(3) was upheld as it relates to nonprofit organizations.<sup>111</sup>

*b. The Court's holding and analysis.* In analyzing TWR's unconstitutional conditions claim, the *Regan* Court looked first to precedents it had established in *Speiser* and its progeny.<sup>112</sup> The Court conceded that in the past it had "held that the government may not deny a benefit to a person because he exercises a constitutional right."<sup>113</sup> However, the Court refused to apply the *Speiser* model to this case.<sup>114</sup> Instead, the *Regan* Court based its analysis on the rule established in *Cammarano v. United States*,<sup>115</sup> a case decided less than one year after the *Speiser* decision.

The dispute in *Cammarano* centered on the question of whether an IRS regulation disallowing taxpayers from deducting money used to defeat legislation as a business expense was permissible under the Constitution.<sup>116</sup> The Court, in an opinion written by Justice Harlan, held that the First Amendment does not require the government to subsidize lobbying activities.<sup>117</sup> The Court based this holding on the reasoning that such a tax deduction was not denied because the taxpayers were "engag[ing] in constitutionally protected activities"; rather, the regulation simply required taxpayers "to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code."<sup>118</sup> The *Regan* Court relied heavily on this reasoning, ultimately concluding that, consistent with *Cammarano*, § 501(c)(3)'s restriction on political activities is constitutional because it does not prohibit First Amendment speech.<sup>119</sup> Instead,

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However, this claim and the Court's related reasoning will not be discussed here, as it is not critical to the focus of this Note.

110. *Regan*, 461 U.S. at 542.

111. *Id.* at 545–48.

112. *Id.* at 545.

113. *Id.* (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

114. *Id.*

115. 358 U.S. 498 (1959).

116. *Id.* at 499–500.

117. *Id.* at 513; *see also Regan*, 461 U.S. at 546.

118. *Cammarano*, 358 U.S. at 513.

119. *Regan*, 461 U.S. at 550.

§ 501(c)(3) simply upholds the principle that Congress will not subsidize political activities through tax exemptions, which, according to the Court, have “much the same effect as a cash grant to the organization.”<sup>120</sup> In other words, “although government may not place obstacles in the path of a [person’s] exercise of . . . freedom of [speech], it need not remove those not of its own creation.”<sup>121</sup>

In the case of TWR, the Court concluded that tax exemptions are “a matter of [congressional] grace”<sup>122</sup> and that even if the organization “does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution ‘does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.’”<sup>123</sup> The Court also found that TWR could continue to lobby while still maintaining tax exemption on its non-lobbying activities by creating a “dual structure” in which it maintained “a § 501(c)(3) organization for its nonlobbying activities and a § 501(c)(4) organization for lobbying.”<sup>124</sup> Although § 501(c)(4) organizations are also tax-exempt, they differ from § 501(c)(3) organizations in that contributions made to a § 501(c)(4) organization are not deductible.<sup>125</sup> Additionally, a § 501(c)(4) organization “may engage in an unlimited amount of lobbying, provided that the lobbying is related to the organization’s exempt purpose” and may also “engage in political campaigns on behalf of or in opposition to candidates for public office provided that such intervention does not constitute the organization’s primary activity.”<sup>126</sup> The availability of this option, reasoned the Court, also undermined TWR’s unconstitutional conditions claim on the grounds that a reasonable alternative to giving up First Amendment free speech rights existed.<sup>127</sup>

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120. *Id.* at 544–46.

121. *Id.* at 549–50 (quoting *Harris v. McRae*, 448 U.S. 297, 316 (1980)).

122. *Id.* at 549 (quoting *Comm’r v. Sullivan*, 356 U.S. 27, 28 (1958)).

123. *Id.* at 550 (quoting *Harris*, 448 U.S. at 318).

124. *Id.* at 544.

125. I.R.C. § 501(c)(4)(B) (2010).

126. John Francis Reilly & Barbara A. Braig Allen, *Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations*, IRS, EXEMPT ORGS.-TECHNICAL INSTRUCTION PROGRAM, FY 2003, at L-2, available at <http://www.irs.gov/pub/irs-tege/eotopicl03.pdf>.

127. *Regan*, 461 U.S. at 543–46 (1983).

In his concurring opinion, which was joined by Justices Brennan and Marshall, Justice Blackmun offered some noteworthy reasoning of his own regarding TWR's unconstitutional conditions claim. Although he agreed with the majority's final holding on the First Amendment claim, Justice Blackmun felt the need to distance himself from certain elements of the reasoning on which that holding was based. In Justice Blackmun's opinion:

If viewed in isolation, the lobbying restriction contained in § 501(c)(3) violates the principle . . . “that the government may not deny a benefit to a person because he exercises a constitutional right.” Section 501(c)(3) does not merely deny a subsidy for lobbying activities, it deprives an otherwise eligible organization of its tax-exempt status and its eligibility to receive tax-deductible contributions for all its activities, whenever one of those activities is “substantial lobbying.” Because lobbying is protected by the First Amendment . . . , § 501(c)(3) therefore denies a significant benefit to organizations choosing to exercise their constitutional rights.<sup>128</sup>

By this reasoning, the constitutionality of § 501(c)(3) is saved only by the existence of the less restrictive § 501(c)(4) option.<sup>129</sup> In fact, as Justice Blackmun argued, if that option were eliminated or subjected to further restrictions, “the First Amendment problems would be insurmountable. . . . [A]ny such restriction would render the statutory scheme unconstitutional.”<sup>130</sup>

It is the majority's opinion that is controlling, of course—not Justice Blackmun's. Thus, the rule to be taken from *Regan* is that § 501(c)(3)'s political activities restriction, as applied to a nonprofit tax-exempt organization, does not violate the First Amendment because it does not prevent an organization from engaging in political speech. The restriction simply supports the notion that government will not subsidize that speech. Although this is the majority holding, Justice Blackmun's concurrence raises a number of compelling issues that will be explored in Part IV, especially his argument regarding the scenario without the less restrictive option under § 501(c)(4).

It is important to note, however, that the *Regan* Court considered the restrictions of § 501(c)(3) only as they applied to a

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128. *Id.* at 552 (Blackmun, J., concurring).

129. *Id.*

130. *Id.* at 553–54.

non-profit corporation, not a religious organization.<sup>131</sup> As discussed below,<sup>132</sup> this is an important distinction, one that is critical to the focus of this Note. Interestingly, the Supreme Court has never specifically addressed the constitutionality of § 501(c)(3)'s political speech restrictions as applied to religious organizations. However, the D.C. Circuit Court of Appeals addressed this issue in *Branch Ministries v. Rossotti*.<sup>133</sup>

In *Branch Ministries*, a church challenged the revocation of its § 501(c)(3) tax-exempt status after it engaged in campaigning against a presidential candidate.<sup>134</sup> Just four days prior to the presidential election in 1992, Branch Ministries took out two full-page newspaper advertisements in an attempt to persuade “Christians not to vote for then-presidential candidate Bill Clinton because of his positions on certain moral issues.”<sup>135</sup> As a result of this political activity, the IRS revoked Branch Ministries’ tax-exempt status.<sup>136</sup> In its complaint, the church claimed that this revocation, and the § 501(c)(3) restrictions on which it was based, violated the First Amendment by restricting speech.<sup>137</sup> The circuit court rejected this argument, relying heavily on *Regan* in its decision. Like the reasoning of the *Regan* majority, the *Branch Ministries* court held that despite the strict limitations on political speech under § 501(c)(3), the church had less restrictive options, including the creation of a § 501(c)(4) entity, by which it could engage in political activities.<sup>138</sup> The *Branch Ministries* court went on to explain that once a § 501(c)(4) entity had been created, that entity could also create a Political Action Committee (“PAC”) “that would be free to participate in political campaigns” without limitations on the amount of funding it could provide, just as long as that funding did not come from the church’s tax-free dollars.<sup>139</sup> The availability of these options, along with the court’s conclusion that the government need not subsidize the free speech rights of a church, led the circuit court

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131. See *Regan*, 461 U.S. 540.

132. See *infra* Part IV.

133. 211 F.3d 137 (D.C. Cir. 2000).

134. *Id.* at 139.

135. *Id.*

136. *Id.*

137. *Id.* at 140–41.

138. *Id.* at 143.

139. *Id.*

to uphold the constitutionality of § 501(c)(3)'s political speech restrictions, even as they apply to a religious organization.

This exact position involving religious organizations has never been adopted or even addressed by the Supreme Court. Thus, the circuit court's decision regarding the constitutionality of § 501(c)(3)'s political speech restrictions, at least as it applies to religious organizations, is not controlling outside of the D.C. Circuit. This holding may, in fact, inform the Supreme Court's decision on any future challenges to § 501(c)(3), particularly in its reliance on *Regan*. However, because there may be a slight gap in Supreme Court jurisprudence, there is potential for a successful challenge to such a restriction on political speech, particularly in light of *Citizens United*. This Note now discusses that possibility.

#### IV. ANALYSIS

Under the newly established framework of *Citizens United*, a corporation is now considered a person for the purposes of First Amendment free speech rights. Although this decision did not deal specifically with § 501(c)(3) organizations, the general First Amendment principle of the *Citizens United* holding is likely to have significant implications on the political speech rights of all tax-exempt § 501(c)(3) organizations, especially religious organizations. As it currently stands, *Citizens United* made no changes to the restrictions of the § 501(c)(3) political activities test, meaning that even though a § 501(c)(3) organization may be considered a person with respect to First Amendment rights, exercising those rights in the political context will still jeopardize the tax-exempt status of that organization. That being said, the *Citizens United* decision has opened the door for tax-exempt organizations to challenge the constitutionality of these political activity restrictions of § 501(c)(3) on the grounds that such restrictions unconstitutionally condition a benefit (i.e., a tax exemption) on an organization's willingness to give up its First Amendment free speech rights.

Given the history of § 501(c)(3) case law discussed above,<sup>140</sup> such legal challenges will face an uphill battle. However, in light of the holding and language of the *Citizens United* decision, many of the previous decisions in this area of the law can be distinguished, bringing new life to the possibility of eliminating the political

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140. See *supra* Part III.

activities restriction of § 501(c)(3). This Note turns now to a discussion of the challenges to § 501(c)(3)'s political speech restrictions that tax-exempt religious organizations may raise in light of the *Citizens United* holding. In doing so, this Note contends that, based on the general principle espoused in *Citizens United*, the doctrine of unconstitutional conditions provides a powerful argument against conditioning the benefit of tax exemptions for religious organizations on the willingness of those organizations to give up their First Amendment speech rights. This Note will also argue, however, that in light of other interests, including adherence to the Establishment Clause and the long recognized tradition of separation of church and state, some limits on the political activities of tax-exempt religious organizations should remain intact, preventing such organizations from maintaining tax-exempt status if they engage in completely unfettered political speech or lobbying.

A. *The Distinct Nature of Religious Organizations*

At the outset of this analysis it is necessary to place some limits on the scope of this discussion. While it is true that § 501(c)(3) provides a tax exemption to many types of organizations—including nonprofit educational and charitable organizations—this discussion will focus specifically on religious organizations exempted under § 501(c)(3). In doing so, this Note first argues that even though § 501(c)(3)'s requirements and restrictions, including the political activities test, apply to all § 501(c)(3) organizations, in the context of tax law there are inherent and substantial differences between religious organizations and all other tax-exempt organizations. This distinction between tax-exempt religious organizations and all other tax-exempt organizations is critical to the later analysis that distinguishes previous Court holdings from any future legal challenges in light of *Citizens*.

The Supreme Court considered the unique nature of religious organizations in the context of tax law when it decided *Walz v. Tax Commission of New York* in 1970.<sup>141</sup> *Walz* addressed the question of whether or not the government could grant a property tax exemption to religious organizations without violating the Establishment Clause of the First Amendment.<sup>142</sup> In addressing this

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141. 397 U.S. 664 (1970).

142. *Id.* at 667.

issue, the Court also considered its obligation to uphold the “other” religion clause of the First Amendment—the Free Exercise Clause. In the words of Chief Justice Burger, “The Court has struggled to find a neutral course between [these] two Religion clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.”<sup>143</sup> With this challenge in mind, the Court felt obligated to use the “play in the joints” between these two clauses to produce the most neutral result.<sup>144</sup> In the case of *Walz*, the Court found that the tax exemption for religious organizations was, in fact, the most neutral position between the two Religion Clauses and was, therefore, constitutional. “The grant of a tax exemption is not sponsorship [or a subsidy<sup>145</sup>] since the government does not transfer part of its revenue to churches . . . .”<sup>146</sup> Additionally, “[t]he exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches.”<sup>147</sup> Under this reasoning, not only is a tax exemption for religious organizations permissible, it is the most appropriate way to maintain the neutrality demanded by the Constitution in matters related to religious organizations. Thus, this type of reasoning, standing alone, supports the notion that religious organizations should be dealt with differently than organizations that do not bring the Religion Clauses of the First Amendment into play. However, the Court in subsequent years has backtracked somewhat from this stance.

In *Texas Monthly, Inc. v. Bullock*, the Court, in a decision written by Justice Brennan, held that a state law granting a sales tax exemption to religious publications violated the Establishment Clause because it promoted religion over nonsectarian interests.<sup>148</sup> In doing so, Brennan reasoned that contrary to his own concurring opinion in *Walz*, “[e]very tax exemption constitutes a subsidy.”<sup>149</sup>

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143. *Id.* at 668–69.

144. *Id.* at 669.

145. *See id.* at 690 (Brennan, J., concurring) (“Tax exemptions and general subsidies . . . are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer.” (footnotes omitted)).

146. *Id.* at 675 (majority opinion).

147. *Id.* at 676.

148. 489 U.S. 1 (1989).

149. *Id.* at 14.

Thus, if a state subsidizes a religion through a tax exemption but does not do so for secular groups, it has violated the Establishment Clause. In a scathing dissent, Justice Scalia rejected this reasoning and called upon the *Texas Monthly* majority to return to the more constitutional and historically justified neutrality position from *Walz*. “*Walz*,” argued Scalia, “is just one of a long line of cases in which [the Court has] recognized that ‘the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.’”<sup>150</sup> This position is supported by the fact that “the exemption of religion from various taxes ha[s] existed without challenge in the law of all 50 States and the National Government before, during, and after the framing of the First Amendment’s Religion Clauses, and ha[s] achieved ‘undeviating acceptance’ throughout the 200-year history of our Nation.”<sup>151</sup>

The principle of neutrality, as used in *Walz* and Scalia’s dissent in *Texas Monthly*, should govern matters of tax law related to religious organizations, not the standard adopted by the *Texas Monthly* majority. The reality is that religions and religious organizations, particularly churches,<sup>152</sup> *do* hold a unique position in this nation’s history and under the Constitution and other laws of this nation.<sup>153</sup> The very existence of “the Free Exercise Clause exemptions and the Establishment clause limits seem[s] to presuppose that religion is special and distinguishable from other forms of philosophy and speech” in American law and society.<sup>154</sup> “In fact, it [would be] virtually impossible to understand [the American] tradition of separation of church and state without recognizing that religion

150. *Id.* at 38 (Scalia, J., dissenting) (quoting *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144–45 (1987)).

151. *Id.* at 35 (quoting *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 681 (1970)).

152. See Nicholas A. Mirkay, *Losing Our Religion: Reevaluating the Section 501(c)(3) Exemption of Religious Organizations that Discriminate*, 17 WM. & MARY BILL RTS. J. 715, 728–29 (2009) (arguing that “[a]lthough nearly all religious organizations are eligible for a tax exemption under § 501(c)(3), only ‘churches . . .’ are presumed to be private foundations, and thus, excepted from the notice requirements” of the statute).

153. See *id.* at 729 (“The tax exemption of religious organizations—specifically, churches—is deep-rooted in American history.”). This fact is also supported by § 501(c)(3). Under § 501(c)(3) churches are not required to apply for tax exemption. It is an automatic benefit conferred on account of the unique position of churches in our nation’s history. Secular organizations do not receive the same treatment. Rather, under § 501(c)(3) non-churches must apply for the tax exemption before receiving that benefit. See I.R.C. § 501 (2006).

154. Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 WM. & MARY BILL RTS. J. 303, 304 (2001).

raises political and constitutional issues not raised by other institutions or ideologies.”<sup>155</sup> As the Court noted in *Walz*, “Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least [a] kind of benevolent neutrality towards churches and religious exercise generally . . . .”<sup>156</sup> Due to the obvious tension between the two First Amendment religion clauses, lawmaking bodies and the courts have an obligation to strike an appropriate balance on issues related to religious organizations. This same obligation does not exist in matters related to nonreligious organizations. As such, this distinction between tax exemptions for religious organizations and those for nonreligious organizations is critical to this discussion and should guide any analysis of tax laws related to religious organizations. This distinction also provides an important mechanism by which several of the Court’s decisions discussed above can be distinguished in light of *Citizens United*. Much of the jurisprudence governing the doctrine of unconstitutional conditions as it relates to the free speech rights of religious organizations should be reevaluated in light of the distinctions drawn in *Walz* and Justice Scalia’s dissent in *Texas Monthly*, and in light of the Court’s decision in *Citizens United*. If religious organizations do, in fact, hold a unique place in our nation’s history, as Burger and Scalia argue, the argument can be made that such organizations should be allowed to exercise First Amendment free speech rights while still qualifying for § 501(c)(3) tax exemptions. Part B, below, addresses the legal arguments in favor of this position by distinguishing previous case law, and Part C addresses a few of the legal- and policy-based arguments that weigh against completely eliminating the restrictions of § 501(c)(3).

#### *B. The Doctrine of Unconstitutional Conditions and § 501(c)(3)*

The Court’s decision in *Regan v. TWR*, along with the D.C. Circuit’s decision in *Branch Ministries v. Rossotti*, represents one of the most significant legal hurdles to any religious organization hoping to challenge the political activities test of § 501(c)(3). It

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155. Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 (2000).

156. *Walz*, 397 U.S. at 676–77, quoted in Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145, 149 (2006).

would appear that, by holding that the political speech restrictions under § 501(c)(3) do not violate the First Amendment rights of a nonprofit corporation, the Court effectively slammed the door on any future challenges to that aspect of the Code. This is not the case, however. *Regan* can be distinguished on several grounds in light of *Citizens United*, leaving open the possibility that its holding is not applicable to situations governing religious organizations. There are two major points on which *Regan* (and to a lesser degree, *Branch*) may be distinguished: 1) the distinction between religious organizations and all other tax-exempt organizations under § 501(c)(3); and 2) the availability, or lack thereof, of less restrictive alternatives to § 501(c)(3) in light of the new *Citizens United* framework. If *Regan* may, in fact, be distinguished from cases involving religious organizations, it can be argued that the *Speiser-Perry* model of unconstitutional conditions is more applicable to questions governing § 501(c)(3) restrictions for religious organizations than is the *Cammarano* framework used in *Regan*. If such is the case, this change in models could have a significant impact on any future challenges to the § 501(c)(3) political activities test.

*1. Regan does not apply with equal force to religious organizations*

The argument that the *Regan* holding does not apply with equal force to religious organizations is not novel. In fact, that is the very argument rejected by the majority in *Branch Ministries*.<sup>157</sup> Again, it is important to note that *Branch Ministries* was a circuit court decision and has not been adopted by the Supreme Court, but the decision does provide some powerful ammunition against any attempt to distinguish *Regan*.

The *Regan* holding, as noted above, did not address tax-exempt religious organizations.<sup>158</sup> Rather, it focused specifically on the rights of a secular, nonprofit corporation. Under the *Walz*-Scalia framework discussed above, this is an important distinction.<sup>159</sup> If, as *Walz* and Scalia's *Texas Monthly* dissent suggest, over 200 years of history support the unique nature of religious organizations in this nation's legal framework, then the "neutrality" approach to the

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157. See *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000).

158. See *supra* Part III.B.1.b.

159. See *supra* Part IV.A.

taxation of religious organizations should require a much different analysis than what was provided in *Regan*. Because *Regan* dealt solely with a secular organization, the Court was not forced to consider the tension between the Establishment Clause and the Free Exercise Clause. Nor was it forced to consider the neutrality between those clauses, which is provided through tax exemptions for religious organizations. Had it done so, the *Regan* Court may very well have taken a different approach in order to account for the impact that the revocation of tax exemption could have, not only on free speech rights, but also on the Establishment and Free Exercise Clauses.

It may be argued that the religious/secular distinction would have made little difference in the analysis based on the fact that the *Branch* court considered this distinction and reached largely the same conclusion as *Regan*. This argument lacks logical weight, however, because *Branch Ministries* was decided well after *Regan*, thus requiring the D.C. Circuit to account for the *Regan* holding and synthesize its own rule within that framework. Without the reasoning of *Regan*, it is possible that the *Branch Ministries* court may have reached a very different holding. Given this possibility, and the fact that the *Branch Ministries* decision is not binding on the Supreme Court, it is possible that the Supreme Court would develop a new line of reasoning on this matter, completely independent of the majority holding in *Regan*. This possibility, along with the new framework emphasizing free speech rights in *Citizens United*, leaves the door open for a potentially successful challenge to the restrictions of § 501(c)(3).

## 2. *The availability of less restrictive alternatives to § 501(c)(3)*

The constitutionality of the political activities restriction of § 501(c)(3) was largely dependent on the availability of less restrictive means by which a tax-exempt organization could exercise free speech rights.<sup>160</sup> Without any less restrictive options, “the lobbying restriction contained in § 501(c)(3) violates the principle . . . that the government may not deny a benefit to a person because he exercises a constitutional right.”<sup>161</sup> In other words, “in isolation,” the political activities restriction of § 501(c)(3) violates the doctrine of unconstitutional conditions by requiring an

160. *Regan v. Taxation with Representation*, 461 U.S. 540, 551–54 (1983) (Blackmun, J., concurring).

161. *Id.* at 552 (internal quotations omitted).

organization to give up its First Amendment free speech rights in exchange for a governmental benefit.<sup>162</sup> The constitutionality of § 501(c)(3) was saved only by the fact that § 501(c)(3) organizations can also create § 501(c)(4) entities, which can legally engage in certain forms of lobbying. The *Branch Ministries* court took this reasoning one step further by arguing that PACs created by § 501(c)(4) organizations can engage in practically unlimited political activities.<sup>163</sup> Any significant restrictions on these options would, however, in the words of Blackmun, “negate the[ir] saving effect.”<sup>164</sup> This issue, therefore, hangs on whether or not, in light of the development of Supreme Court jurisprudence (including *Citizens United*), any further restrictions have been placed on these political activities.

The short answer to this question is ‘no.’ The IRS itself has not placed any further restrictions on the free speech right of § 501(c)(3) religious organizations. However, the mere fact that the *Citizens United* holding seems to expand the general free speech rights of all organizations other than those covered by § 501(c)(3) calls into question the continuing restrictions on tax-exempt organizations. In light of the *Citizens United* decision, which allows for greater First Amendment rights of corporations and other organizations, the speech restrictions imposed under § 501(c)(3) are now effectively more restrictive simply because they have not expanded to meet the increased free speech rights under the *Citizens United* framework.

Additionally, it is important to consider the realities of the “less restrictive” alternatives to § 501(c)(3), which under both *Regan* and *Branch Ministries* save the political activities test of § 501(c)(3) from being deemed unconstitutional. These options include (1) the creation of a PAC and (2) the creation of a § 501(c)(4) organization.

Regarding the first option, the *Citizens United* decision has made significant changes to the system governing PACs. Although it is not entirely clear how exactly these changes will affect such committees, it appears that most corporations will no longer be required to create PACs in order to participate financially in political speech. Accordingly, it seems highly inequitable to require any organization, including a tax-exempt religious organization, to utilize a PAC in order to exercise its free speech rights when such

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162. *Id.*

163. *Branch Ministries v. Rossotti*, 211 F.3d 137, 143 (D.C. Cir. 2000).

164. *Regan*, 461 U.S. at 553.

committees are no longer required for corporations. With the necessity of creating a PAC effectively eliminated for most organizations, this option no longer appears to be the “less restrictive” means that it seemingly was when the *Regan* and *Branch Ministries* cases were decided. Under this new reality, creating a PAC may no longer provide a viable alternative to the political speech restrictions of § 501(c)(3). Therefore, this new change under *Citizens United* could undermine the reasoning of both *Regan* and *Branch Ministries* and call into question the constitutionality of § 501(c)(3)’s limits on political speech.

There are also valid grounds on which to challenge the determination made by both the *Regan* and *Branch Ministries* courts that the creation of § 501(c)(4) organizations provides an acceptable “less restrictive” alternative to the limits of § 501(c)(3). This is especially true in regards to a § 501(c)(3) religious organization. Although the option of creating a § 501(c)(4) organization is *technically* available to § 501(c)(3) religious organizations, in reality this option is not a practical or reasonable alternative to the limits of the political activities test of § 501(c)(3). Religious organizations are inherently different from all non-religious organizations, even those organizations that are exempt under § 501(c)(3). These inherent differences make the creation and use of a § 501(c)(4) organization highly impractical for a religious organization. As discussed above,<sup>165</sup> a § 501(c)(4) organization “may engage in an unlimited amount of lobbying, provided that the lobbying is related to the organization’s exempt purpose.”<sup>166</sup> Although § 501(c)(4) allows for unlimited lobbying, because such lobbying must be “related to the organization’s exempt purpose,” this option is largely if not entirely useless to a tax-exempt religious organization. Under § 501(c)(3), a religious organization is exempt simply because it is a religious organization. This is a broad category, with largely undefined boundaries. As such, it would be difficult to determine when lobbying relates to a religious organization’s exempt purposes and when it does not. This reality makes the use of the § 501(c)(4) structure and its benefits impractical as the less restrictive alternative the *Regan* and *Branch Ministries* courts suggest it is. Because the benefits intended by § 501(c)(4) do not apply with any practicality to tax-exempt religious organizations, the creation of a § 501(c)(4)

165. *See supra* Part III.

166. Reilly & Allen, *supra* note 126.

organization is not a less restrictive alternative to the political activities test of § 501(c)(3), despite what *Regan* and *Branch Ministries* claim. Therefore, the free speech restrictions of § 501(c)(3), at least as they apply to tax-exempt religious organizations, present an unconstitutional conditions problem in light of the *Citizens United* decision.

3. *Conclusions concerning unconstitutional conditions and § 501(c)(3) organizations*

Because the Court's decision in *Regan* can be distinguished on the issue of tax exemptions for religious organizations under § 501(c)(3), the *Speiser-Perry* model of unconstitutional conditions should govern any challenge to the free speech restrictions of § 501(c)(3), not the *Cammarano-Regan* model. This is made abundantly clear by key language adopted in the *Citizens United* decision. In addressing the concern that corporations would be able to engage in unlimited political speech while continuing to benefit financially from the special advantages of the corporate form, the *Citizens United* Court quoted Scalia's dissent from a previous case, which stated, "It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights."<sup>167</sup> In other words, simply because "[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets," does not mean the state can prohibit speech.<sup>168</sup> By comparison, the special advantages afforded by the State to religious organizations also may not be conditioned on the forfeiture of First Amendment rights. Therefore, in light of the *Citizens United* holding, and the reasoning on which it is based, the political activities test of § 501(c)(3) represents an unconstitutional conditions problem, which may require the loosening of the free speech restrictions currently placed on tax-exempt religious organizations.

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167. *Citizens United v. FEC*, 130 S. Ct. 876, 905 (2010) (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting)).

168. *Id.* (quoting *Austin*, 494 U.S. at 658–59).

C. *Arguments Against Allowing Continued Tax Exemption*

In light of the Court's decision in *Citizens United*, there may be support for legal challenges to the political activities restrictions of § 501(c)(3) as they relate to religious organizations. This possibility gives rise to the question of how far the political speech rights of tax-exempt religious organizations *should* extend if these challenges somehow succeed. Where exactly this line should be drawn may be an issue for another discussion, but it is helpful to touch briefly on a few of the key considerations that could impact that determination.

This determination will likely depend on how the Court views the justifications for tax exemptions and how it ultimately decides to deal with the Establishment Clause and the separation between church and state. Despite the fact that *Citizens United* has strengthened the free speech rights of all organizations, including tax-exempt religious organizations, concern for maintaining the separation of church and state under the Establishment Clause may ultimately prevent the courts from completely overturning the political activities restrictions of § 501(c)(3) in favor of entirely unlimited political speech.

Much of the Court's discussion in *Walz* centered on the concern for balancing the Free Exercise Clause of the First Amendment with the Establishment Clause and whether or not a tax exemption for a religious organization would upset that balance. The Court ultimately determined that tax exemptions for religious organizations are justified not simply because they tend to promote social welfare and good works performed by religious organizations, but because they are the best way of maintaining the desired separation between church and state. By the Court's reasoning, "the grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."<sup>169</sup> In other words, by allowing churches to simply keep their money, rather than forcing them to contribute to the public coffers, the government minimizes the kind of involvement that could upset the balance between church and state. The Court conceded that "a direct money subsidy would be a relationship pregnant with involvement," but it found that a tax exemption did not rise to the level of a direct subsidy.<sup>170</sup> The

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169. *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 675 (1970).

170. *Id.*

distinction between tax exemptions and direct subsidies is an important one that has been addressed in a number of post-*Walz* decisions.<sup>171</sup> This distinction, and its obvious implications on the issue of the separation of church and state, would play a significant role in any challenge to the political activities restrictions of § 501(c)(3) and any determination regarding the length to which speech rights of tax-exempt organizations should extend.

If the political activities restrictions of § 501(c)(3) were eliminated entirely, the balance between church and state upheld in *Walz* would be disturbed significantly because it would allow religious organizations to engage in political speech and lobbying while still receiving significant tax exemptions by virtue of their status as religious organizations. The exemptions of § 501(c)(3), without the accompanying political activities restrictions, would in effect force the government to pay for the political activities of religious organizations. Suddenly, such organizations would have more money in their pockets to intervene in government affairs, thereby upsetting the balance between church and state. This reality should raise serious concerns about eliminating the political activities restrictions of § 501(c)(3) completely, even in light of *Citizens United's* reaffirmation of the First Amendment speech rights of corporations and other organizations. Perhaps, in the end, the best way to balance the various interests at stake—including the interests of the State and those tax-exempt religious organizations affected—would be to simply extend the rights currently found in § 501(c)(4) more effectively to religious organizations. In other words, these competing interests might be most effectively balanced by allowing religious organizations to engage in political speech so long as it is related to their religious purpose. As noted above, this standard would be difficult to define and even more difficult to enforce, but such a system just may be the best solution to what is an obviously difficult problem.

## V. CONCLUSION

Even under the new First Amendment paradigm created by *Citizens United v. FEC*, any challenge to the political activities restrictions of § 501(c)(3) as applied to tax-exempt religious organizations will face an uphill battle. Many years of established

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171. See, e.g., *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

precedent, in addition to a long-standing adherence to the separation of church and state, will make it difficult for any such challenge to successfully eliminate the political restrictions of § 501(c)(3). Despite this apparent difficulty, the *Citizens United* decision has given the doctrine of unconstitutional conditions renewed strength in the argument against conditioning the benefit of tax exemption for religious organizations on the willingness of those organizations to give up their First Amendment speech rights. However, in light of other interests, including adherence to the Establishment Clause and the long recognized tradition of separation of church and state, some limits on the political activities of tax-exempt religious organizations should remain intact, preventing such organizations from maintaining tax-exempt status if they engage in completely unfettered political speech or lobbying.

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