2007

Campaign Speech and Contextual Analysis

Miriam Galston
George Washington University Law School, mgalston@law.gwu.edu

Recommended Citation
Miriam Galston, Campaign Speech and Contextual Analysis, 6 First Amend. L. Rev. 100 (2007).

CAMPAIGN SPEECH AND CONTEXTUAL ANALYSIS

MIRIAM GALSTON*

INTRODUCTION

Within days of the 2006 mid-term elections, political commentators began discussing the vast sums of money that candidates in 2008 will have to raise in order to have a viable candidacy in the primaries or general election. Analysts noted that aggregate spending on behalf of candidates for federal office in 2006 would likely be roughly $2.6 billion, an eighteen-percent increase over the comparable spending in the 2002 mid-term election.[1] The amounts raised in the first two

* Associate Professor, George Washington University Law School. B.A., Cornell University, Ph.D., University of Chicago, J.D., Yale Law School. The author is grateful for the financial assistance provided by the George Washington Law School. The author is also indebted to Bill Galston, Michael Malbin, and Steve Weissman for their comments on an earlier draft of this article and to Matthew Mantel, Jennifer McClure, Kaitlin Dunne, Virginia Wolk, and Mary Wrightson for their outstanding research assistance.

1. Barbara Borst, *Campaign Spending Up in U.S. Congressional Races*, USA TODAY, Oct. 29, 2006 (reporting a prediction made by the Center for Responsive Politics), *available at* http://www.usatoday.com/news/washington/2006-10-29-campaign-spending_x.htm. According to the Federal Election Commission, congressional candidates alone raised 30 percent more and spent 36 percent more in 2006 than congressional candidates in 2004. *See* Press Release, Federal Election Commission, *Congressional Campaigns Spend $966 Million through Mid October* (Nov. 2, 2006) *available at* http://www.fec.gov/press/press2006/20061102can/20061102can.html. The larger figure predicted by the Center for Responsive Politics includes funds raised by parties and interest groups for congressional races in those years in addition to the sums raised by the candidates.

quarters of 2007 by candidates for President were similarly unprecedented.[2]

Concurrent with these developments, campaign finance reform initiatives have continued to surface. Recent ethics reform legislation, for example, includes a provision to increase campaign finance transparency by requiring lobbyists who bundle small individual contributions for the benefit of candidates to disclose the candidates, political parties, or other recipients for whom they raise money and the aggregate amounts raised in this way.[3] At the same time, lawmakers have renewed their efforts to restrain certain types of soft money fundraising by introducing the 527 Reform Act of 2007.[4] In the courts,[5] the sponsors of the McCain-Feingold 2002 campaign finance law (Bipartisan Campaign Reform Act of 2002 or BCRA)[6] have persisted in their attempts to compel the Federal Election Commission (FEC) to adopt regulations specifying which organizations must register as political committees under the federal campaign finance law (FECA)[7] and be subject to its fundraising[8] and disclosure rules.[9] In part prodded

2. The Campaign Finance Institute, *The Presidential Campaigns Are Setting Records*, http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=155 (stating that the presidential candidates raised a total of $277 million in the first six months of 2007).

3. *See* Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 (2007), § 204.

4. *See* 527 Reform Act of 2007, S. 463, 110th Cong. (2007), H.R. 420, 110th Cong. (2007).

5. *See* Shays v. Fed. Election Comm'n, 424 F. Supp. 2d 100 (D.D.C. 2006), (involving a suit filed in 2004 by sponsors of the McCain-Feingold legislation in the House of Representatives). The plaintiffs alleged that the FEC had failed in its duty to enforce the Bipartisan Campaign Reform Act because it never promulgated a rule outlining what actions or characteristics make an organization a political committee subject to the Federal Election Campaign Act. The court ordered the FEC to promulgate such a rule or else offer an explanation why it believed case-by-case enforcement was the proper method for enforcement.

6. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as part of FECA, *infra* note 7).

7. *See* Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et. seq.* (2000).

8. *See* 2 U.S.C. § 441a(a)(1)(C) (2000) (limiting contributions made by individuals to political committees to $5,000 per election cycle), 2 U.S.C. § 441b(a) (2000) (prohibiting corporations and unions from contributing money from their general treasuries to political committees).

by these proceedings, the FEC recently announced a series of enforcement actions against groups that had failed to register as political committees,[10] and it published an explanation and defense of its decision to enforce certain campaign finance violations on a case-by-case basis rather than by promulgating a regulation of the sort reformers insist is necessary.[11] Clearly campaign finance law and regulation is still in flux. This provides an opportunity to assess the effectiveness of reforms instituted to date as well as current efforts of reformers to revise and improve perceived deficiencies in the existing statutory and regulatory framework. An assessment of this kind requires, however, that we step back and revisit the objectives of campaign finance legislation. At least three primary purposes suggest themselves.

First and foremost, campaign fundraising should not provide an occasion for buying or selling a legislative agenda or specific legislative proposals, influencing other legislative action or inaction (e.g., in connection with nominations, appointments, or government contracts), or even granting special access to lawmakers and their staffs.

Second, campaign finance rules should apply with equal force to all participants in elections who are similarly situated from a functional

---

9. *See* 2 U.S.C. § 433 (2000) (describing registration requirements), 2 U.S.C. § 434 (2000) (describing reporting requirements).

10. *See* MURs 5430 and 5466 (August 24, 2007) (fining Americans Coming Together (ACT)); MUR 5753 (December 13, 2006) (fining the League of Conservation Voters, two 527 groups, and the organization's Action Fund); MUR 5487 (February 28, 2007) (fining the Progress for America Voting Fund); MURs 5511 and 5525 (December 13, 2006) (fining Swift Boat Veterans and POWs for Truth); MUR 5754 (Dec. 13, 2006) (fining the MoveOn.org Voter Fund). All of these conciliation agreements and the associated documents are available at http://eqs.sdrdc.com/eqs/searcheqs?SUBMIT=continue. Most of the MURs cited in this note are summarized in FEC Notice 2007-3 ("Political Committee Status"), 72 Fed. Reg. 5595, 5604-5605 (Feb. 7, 2007) (to be codified at 11 C.F.R. Pt. 100). In addition to paying the fines, each organization agreed to register as a political committee under FECA if it continued to engage in the activities that were the subject of the enforcement proceedings.

11. *See* FEC Notice 2007-3, *supra* note 10, and *infra* note 125 and accompanying text. The plaintiffs in *Shays* found the Notice unacceptable and filed a motion alleging that the agency had failed to comply satisfactorily with the court's directive. The court disagreed. *See* Shays v. Fed. Election Comm'n, 2007 U.S. Dist. Lexis 63688, 2007 WL 2446159 (D.D.C. Aug. 30, 2007).

point of view. Loopholes and the unfairness surrounding them may arise when rules are interpreted so as to permit labels or technical distinctions rather than substance to determine outcomes. Fairness requires that function, not form, determine the proper application of campaign finance obligations and entitlements.

Finally, because of the protection afforded speech by the First Amendment, the articulation of rules must be clear enough and their application sufficiently certain that affected parties can understand their rights and the limits of those rights, so that they can make plans and adopt strategies in reliance on the rules. Thus, both constitutional considerations and fairness to participants in an election require that legal criteria be sufficiently fixed in their meanings and purposes that reasonable people acting in good faith can anticipate the consequences of their actions.

This Article explores certain tensions inherent in achieving these three goals simultaneously. The starting point of my analysis is a recent empirical study detailing the extent to which, and the ways in which, organizations exempt from taxation under § 527 or § 501(a) of the Internal Revenue Code (the Code)[12] engage in campaign activity by operating as part of networks of commonly managed nonprofits. Part I discusses the legal and policy concerns that have triggered campaign finance reforms in the last decade. Specifically, it examines problems raised by politically active exempt organizations that operate as part of networks of related organizations. Part II describes the results of the empirical study about the incidence and characteristics of networks of politically active exempt organizations that was issued under the auspices of the Campaign Finance Institute.[13] Based largely upon the study's findings, I develop certain recommendations for assessing the electoral mission of individual advocacy organizations operating as part of networks. I refer to my recommendations, which are designed to take into account the complex interactions between and among such

---

12. All references are to the Internal Revenue Code of 1954, as amended.

13. *See* Stephen R. Weissman and Kara D. Ryan, The Campaign Finance Institute, *Non-Profit Interest Groups' Election Activities and Federal Campaign Finance Policy: A Working Paper* (2006), http://www.cfinst.org/books_reports/pdf/NonprofitsWorkingPaper.pdf. A revised version was printed (without the appendices) in 54 EXEMPT ORG. TAX REV. 21 (2006).

politically active affiliated organizations, as a "network approach." Part III examines First Amendment difficulties raised by analyzing such organizations using a network approach. It focuses on a line of cases holding that the government cannot condition tax and other financial benefits on a potential recipient surrendering free speech rights that it otherwise would have unless there is an alternate channel available for the recipient to exercise those rights. Part IV asks whether this alternate-channel doctrine is inconsistent with using a network approach to classifying exempt organizations as political committees. It also examines whether the doctrine of respecting corporate and entity boundaries except in unusual circumstances would run counter to a network approach. In Part V, the FEC's use of contextual analysis, such as a network approach would entail, is discussed and the potential impact of the Supreme Court's decision in *FEC v. Wisconsin Right to Life* is considered.

I. THE PROBLEM OF CORRUPTION

Since 1971, when it enacted the Federal Election Campaign Act, (FECA),[14] Congress has attempted to prevent corruption or the appearance of corruption in federal elections resulting either from campaign contributions made to the candidates and political parties or from expenditures made on their behalf. In general, Congress has attempted to achieve its objective in two ways: (1) by enacting limits on the amount of contributions that individuals and entities can give to candidates or parties, by year or by election cycle (the "amount" restrictions),[15] and (2) by requiring disclosure on the part of those who receive and spend campaign funds.[16] A third strategy for preventing corruption, introduced at the beginning of the twentieth century, has been to prohibit corporations, labor unions, and national banks from spending their general treasury funds on certain kinds of campaign activity (the "source" restrictions).[17] Although these entities cannot spend funds from

---

14. *See supra* note 7.
15. 2 U.S.C. § 441a(a)(1)(C) (2000).
16. 2 U.S.C. §§ 433, 434 (2000).
17. The source restrictions are now part of FECA. *See* 2 U.S.C. § 441b(a) (2000). For the history of the rules limiting corporate funding of election activities,

their general treasuries,[18] they are free to set up political action committees, or PACs, and solicit contributions to them from related individuals.[19] The PACs are then able to make contributions to candidates and parties and to engage in all forms of campaign spending. Money raised in accordance with the preceding disclosure, amount, and source restrictions is known as "hard money." Everything else is "soft money."[20]

The Supreme Court closely polices Congress's efforts to regulate campaign financing in order to prevent Congress from violating the First Amendment by restricting political speech through regulations that are overly broad or vague or that cannot be justified by the government interest served. In 2003, the Court upheld against a First Amendment attack a provision of the McCain-Feingold reform legislation that prohibited candidates and political parties from raising and spending soft money either for themselves or for state organizations.[21] The Court also validated companion provisions prohibiting political parties (federal, state, or local) from raising soft money for § 527 organizations[22] or for § 501(c) organizations that make expenditures or disbursements on behalf of federal candidates.[23]

---

see FEC v. Beaumont, 539 U.S. 146, 152-55 (2003). For the history of restrictions on union funding of campaign activities, see McConnell v. FEC, 540 U.S. 93, 116-17 (2003).

18. *See* 2 U.S.C. § 441b(a) (2007).

19. *See* 2 U.S.C. § 441b(b)(2)(C) (2000). Corporations may solicit contributions for their PACs from shareholders and executive and administrative employees (and the families of all of these), *see* 2 U.S.C. § 441b(b)(4)(A)(i) (2000), and labor organizations may solicit contributions for their PACs from members and their families, *see* 2 U.S.C. § 441b(b)(4)(A)(ii) (2000).

20. On the meaning of the term "soft money," see *McConnell*, 540 U.S. at 122-23. The term did not appear in FECA or the implementing regulations until the enactment of BCRA in 2002. Even now, although the term appears in the title to § 441i of FECA, it is not defined in the statute.

21. *McConnell*, 540 U.S. at 142-73.

22. *See* 2 U.S.C. §§ 441i(d)(1)-(2) (2000); *McConnell*, 540 U.S. at 174-81. The prohibition does not apply in the case of a 527 organization that is registered with the FEC as a political committee or that is a nonfederal candidate or nonfederal party committee.

23. *See* 2 U.S.C. § 441i(d)(1) (2000); *McConnell v. FEC*, 540 U.S. 93, 181-83 (2003).

Since the enactment of the McCain-Feingold campaign finance legislation, reformers have become concerned that certain nonprofit organizations are becoming vehicles for evading the soft money restrictions. In particular, attention has focused on groups organized under § 527 of the Code, the provision for "political organizations." Groups that qualify under that section are exempt from income tax on contributions made to them and certain other revenues they generate to the extent that these sums are segregated for use in influencing, or attempting to influence, the nomination, appointment, or election of individuals for public office.[24] In addition, contributors to such groups are not liable for the gift tax when the amounts they contribute exceed the annual gift tax exclusion.[25]

Some groups organized under § 527 of the Internal Revenue Code are required to register as political committees with the FEC because of the type and amount of their political activity. Once registered, a group will be subject to the source, amount, and disclosure rules set forth in FECA with respect to its federal campaign activities.[26] Under FECA, registration with the FEC is required if a group raises or spends more than $1,000 "for the purpose of influencing any election for federal office."[27] In addition to this statutory requirement, the Supreme Court has suggested that before an entity can be required to register with the FEC, it must either be under the control of a candidate for federal office or have the election or defeat of a federal candidate as its major purpose.[28] Most commentators agree that the FECA registration

---

24. *See* I.R.C. §§ 527(a), (c)(1), (e)(2) (2000). The groups are, however, taxable on their net investment income and certain capital gains, and they may be taxable on other income that is not raised and spent for "exempt function" purposes or is not properly segregated for such purposes. Section 527 of the Code applies to activities designed to influence elections at the state or local as well as the federal level, and it also extends to activities related to non-elective offices. The rules set forth in FECA and its implementing regulations, in contrast, apply only to federal activities and elective offices.

25. *See* I.R.C. § 2501(a)(4) (2000).

26. A political committee is also permitted to maintain a non-federal account to fund its non-federal activities. *See* 11 CFR § 106.6 (2007).

27. *See* 2 U.S.C. §§ 431(4)(A) (2000) (defining political committee), (8)(A)(i) (2000) (defining contribution), (9)(A)(i) (2000) (defining expenditure).

28. *See* Buckley v. Valeo, 424 U.S. 1, 79 (1976). According to the Supreme Court in *FEC v Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 262 (1986), an

requirement is triggered only if an organization satisfies both the statutory and the judicially created tests.[29]

Under current law, it is often unclear whether a 527 organization that is active during a federal election conforms to these legal standards and, as a consequence, must register as a political committee with the FEC. Some 527 groups active in recent federal elections have registered with the FEC as political committees and, thus, have voluntarily submitted to FECA regulation. Other 527 groups have taken the position that they did not need to register, either because their electoral activities were not the type that trigger such regulation[30] or because their FECA-type activities constituted a small part of their mission and

---

organization may become subject to the FECA registration requirement if its independent expenditures become so "extensive" that "its major purpose may be regarded as campaign activity." The *MCFL* formulation is ambiguous: it may mean that an organization could become a political committee if independent spending becomes its major purpose, or it may mean that "extensive" amounts of independent spending may be an important, or even conclusive, indication that an organization's major purpose is to influence the election of candidates for federal office. "Independent expenditures" are defined as spending for express advocacy that is not coordinated with a candidate or political party. 2 U.S.C. § 431(17) (2000). The term "express advocacy" refers to communications like "Elect Smith" or "Defeat Jones." *See Buckley*, 424 U.S. at 14, 41-44, 80 (1976).

29. *See* FEC Notice 2007-3, *supra* note 10, at 5596-97 (stating the FEC's position). For a discussion of other authorities as well as the development of the FEC's position, see Miriam Galston, *Emerging Constitutional Paradigms and Justifications for Campaign Finance Regulation: The Case of 527 Groups*, 95 GEO. L.J. 1181, 1220-21 (2007).

30. According to these groups, only campaign activities that are "express advocacy" count in determining whether an organization has satisfied either the statutory or the judicially created standard. *See* Wis. Right to Life v. Paradise, 138 F.3d 1183, 1186 (7th Cir. 1998), *cert. denied*, 525 U.S. 873 (1998); *see also* Nat'l Fed'n of Republican Assemblies v. United States, 218 F. Supp. 2d 1300, 1323 (S.D. Ala. 2002), *rev'd sub nom.* Mobile Republican Assemblies v. United States, 353 F.3d 1357, 1359-60 (10th Cir. 2003). The FEC agrees that only express advocacy can be counted in assessing the extent of a group's *expenditures* for FECA purposes. *See* Notice 2007-3, *supra* note 10, at 5597. However, it argues that the definition of a *contribution* includes a much broader range of campaign related activities, including communications that support or attack a candidate for federal office, even if they do not expressly advocate the candidate's election or defeat. *See id.* at 5602.

operations.[31] As a consequence, the latter groups have been able to raise soft money, i.e., sums in excess of the hard-money limits[32] and contributions made from unions' and corporations' general treasury funds.[33] Although it is primarily the unregistered 527 groups that have been charged by critics with making it possible to circumvent the soft money reforms enacted in 2002, it is also possible for groups described in 501(c) of the Code to be implicated in circumvention. In 2006, for example, the FEC found that an organization operating under § 501(c)(4) of the Code should have registered as a political committee with the FEC, and the agency indicated that it would continue to investigate organizations active in political campaigns without regard to the section of the Code underlying a group's exemption.[34]

Whether an unregistered 527 or 501(c) group is operating within the law or should be registered with the FEC depends upon three issues: (1) what kind of electioneering activities are counted for determining registration; (2) how extensive these electioneering activities must be for a group to have influencing federal elections as its major purpose; and (3) what method should be used to assess an organization's major

---

31. In response to its concern that many 527 groups have wrongly failed to register, each Congress since 2004 has introduced a "527 Reform Act," designed to require 527 groups engaged in even minimal amounts of certain kinds of election activities to register with the FEC. *See* Reform of Section 527 Organizations, SA 2958, 109th Cong. (2006); Lobbying Accountability and Transparency Act, H.R. 4975, 109th Cong. (2006); 527 Reform Act of 2006, H.R. 513, 109th Cong. (2006); S. 1053, 109th Cong. (2005); 527 Reform Act of 2005, S. 271, 109th Cong. (2005); 527 Reform Act of 2005, H.R. 513, 109th Cong. (2005); 527 Reform Act of 2004, S. 2828, 108th Cong. (2004); 527 Reform Act of 2004, H.R. 5127, 108th Cong. (2004). *See also supra* note 4.

32. More than 150 individuals contributed $100,000 or more and twenty-four people gave $2,000,000 or more during the 2004 election. *See* PoliticalMoneyLine, *2004 Cycle Large Donors to CQLine's Key 527 Groups*, http://www.fecinfo.com/cgi-win/irs_ef_527.exe?DoFn=&sYR=2004 (listing, based upon I.R.S. filings, large contributors to 527 groups in the 2004 election cycle). Some of the 527 groups listed on the website were registered as political committees under FECA and maintained both federal and nonfederal accounts.

33. *See* Weissman and Ryan, *supra* note 13, at 90-91, who observe that, although unions contributed large sums during the 2004 campaign to certain 527 groups not registered with the FEC, corporations contributed relatively little to them.

34. *See* Notice 2007-3, *supra* note 10, at 5605-06.

purpose.[35] Although the first two questions are critical to a final resolution of the problem of registration, this Article focuses primarily on the last, or methodological, question.

II. EMPIRICAL FINDINGS AND A NETWORK APPROACH

In the past, the determination of an organization's major purpose has been made by looking at the group in isolation and assessing the relative importance of its various activities. That this method may not accurately identify an organization's primary mission is one inference that can be drawn from the empirical investigation of politically active exempt organizations published in 2006 by Steve Weissman and Kara Ryan. The authors examined "12 major nonprofit interest groups that were heavily involved in influencing federal elections . . . ([from] 2000 through 2004)."[36] Half of the groups studied were Republican in orientation and half were oriented toward the Democratic party. The groups investigated spanned a wide range of interests (business, labor, issues, and party support), and they organized under §§ 501(c)(4)-501(c)(6) of the Code or as registered or unregistered 527s.[37] The authors found that all but two of the twelve entities studied had at least one affiliated organization that was commonly managed.[38] Most of the 501(c)(4)s, (5)s, and (6)s were affiliated with an unregistered 527, a

35. On one level, the ambiguity surrounding the scope of the relevant election-related activity is irrelevant for the question examined in this paper. On another level, the broader the definition of the relevant electoral activity, the more far-reaching would be the impact of the network approach.

36. Weissman & Ryan, *supra* note 13, at 2 (alteration added).

37. *Id.* at 2-5. The authors selected groups that were in existence for more than one election cycle. Thus, they did not study groups like Americans Coming Together (ACT) or Swift Boat Veterans, since such groups were established for the 2004 presidential election and were "no longer active" after that. *Id.* at 2. In this sentence and the rest of the Article, the phrase "unregistered 527" refers to a 527 group that has not registered with the FEC. Such a group would, however, have to register with the IRS and be subject to the reporting and disclosure rules provided for in § 527 and the accompanying regulations.

38. *Id.* at 5. The groups studied that had no commonly managed affiliates were Progress for America, a 527 group that did not register with the FEC as a political committee, and Americans for Job Security, a §501(c)(6) organization.

registered 527, or both.[39] Six instances involved a pair of 527 groups, one of which was registered with the FEC and one of which was not. Several of the 501(c) organizations were active in federal elections using their general funds, rather than, or in addition to, working through an associated PAC, because IRS rules permit such organizations to engage in a significant amount of electioneering in their own right (although they may be subject to tax on the amounts thus spent).[40]

Based upon an analysis of their findings, Weissman and Ryan conclude that the current debate about the proper treatment of 527 groups and other advocacy nonprofits is inadequate because it "has failed to incorporate a real world understanding of the specific ways in which various nonprofit interest groups—and their large donors—engage in elections and relate to campaigns."[41] They argue that an accurate assessment of the role of such groups in elections "must take into account all of an interest group's *cumulative and coordinated* election activities,"[42] which would include the activities of the other members of the network, rather than looking at individual members in the network in isolation.[43]

---

39. *Id.* at 6.

40. *Id.* at 6. Section 527(f) of the Code provides that 501(c) groups that engage in 527-type election activities using their own funds, without creating a 527 organization to pursue those activities, must pay a tax on the amount they spend on such activities or on their net investment income, whichever is less. One consequence of this formula is that a 501(c) group can engage in 527-type activities without using a 527 organization, yet without the risk of taxation, if it has little or no net investment income. For example, unions tend to have endowments generating considerable net investment income; however, organizations that spend virtually all their annual revenues each year tend not to have much, if any, net investment income and thus could engage in political activity without any tax exposure under the "lesser of" formula. There would still be some limits on the amount of political activity such organizations could undertake because groups exempt under § 501(a) of the Code must be primarily engaged in their exempt purpose, and political activity is not an exempt purpose for § 501(c) groups.

41. *Id.* at 3; *see also id.* at 31.

42. *Id.* at 5 (emphasis added).

43. Weissman and Ryan reach these conclusions about the nature of the activities of groups that operate as part of a network. They do not, however, take a position on the implications of their findings for federal campaign finance law. *Id.* at 31-32.

Although Weissman and Ryan make no recommendations for reforming the regulation of campaign finance, their findings suggest the need to reconsider the manner in which campaign finance law should be applied to groups operating as part of a network. In particular, in light of the pervasiveness of affiliated groups of nonprofits, it would seem desirable to adopt a network approach in applying campaign finance rules, especially when deciding which groups should register as political committees under FECA. This result is dictated by the fact that the state interest in imposing restrictions on political speech in FECA is to avoid corruption or the appearance of corruption. Corruption is a broad concept. It includes public officials granting special access and influence to contributors as well as quid pro quo transactions, in which public officials sponsor (or oppose) specific legislation or commit to some other action in exchange for campaign contributions.[44] As Weissman and Ryan observe, focusing on organizational networks is important because the impact of individual entities (and their donors) on the perceptions of candidates and parties is likely to be a function of the conduct of the entire network rather than the conduct of the individual members.[45] In other words, networks matter for assessing the risk of corruption or its appearance because candidates and office holders typically will view the network as a unitary group, even if the members of the network are independent legal entities and do not coordinate with one another. Indeed, often the names of several members of a network of affiliated groups share common elements, like "MoveOn.org Voter Fund,"

---

44. For the evolution of the constitutional jurisprudence relating to the concept of corruption, see Galston, *supra* note 29, at 1229-35 and the sources cited. *See also* FEC v. Wisconsin Right to Life, 127 S. Ct. 2652, 2678 (2007) (Scalia, J., concurring) (criticizing the "new" theory of corruption recognized in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990) on the ground that it was inconsistent with *First National Bank v. Bellotti* and *Buckley v. Valeo*).

45. *See* Weissman & Ryan, *supra* note 13, at 3. *See also id.* at 27 (noting that the result, when a donor can contribute large sums of soft money while also contributing hard money to a range of candidates, is to create the appearance of a "unified strategy" on the part of the donor). Despite this result, Weissman and Ryan claim that, as a policy matter, it is still possible to "maintain that the benefits brought to our democratic conversation by nonprofit advocacy and civic engagement outweigh the costs of potential big donor influence over its outcome and elected officials." *Id.* at 31.

"MoveOn.org Civic Action," and "MoveOn.org Political Action." They may be located at the same address or share offices or a website.[46] Most importantly, the member groups are commonly managed and share some or all of their staff. As a consequence, members of a network of organizations will be acting in concert or appear to be acting in concert in the eyes of candidates for office and the public at large. In such situations, an office holder's sense of gratitude is likely to be prompted by the aggregate influence of the members of a network rather than compartmentalized to reflect formal indicia of corporate boundaries buried deep in some filing office in a state capital.

Thus, if each member of a network is examined separately to determine if it should register with the FEC as a political committee and be subject to FECA's source, amount, and disclosure rules, the result will be as follows. The member of the network that is registered as a political committee will engage in activities that explicitly urge or work toward the election or defeat of a specific candidate. Because it is a registered political committee, its ability to raise money will be constrained by FECA's rules that cap the amount it can receive from individuals and groups as well as by the rules preventing it from accepting money from corporations and unions (other than from their PACs, which raise money subject to the same limitations). Another member of the network may not be registered as a political committee and, thus, it will be able to accept unlimited amounts of money from individuals, corporations, and unions (the latter two groups using their general treasury funds rather than the less abundant money they have in their PACs). If the registered member raises $N, the unregistered member may raise another $N, $3N, or more because it is not constrained by the source and amount rules.[47]

46. *See*, *e.g.*, http://www.moveon.org/about.html (web page for the "MoveOn Family of Organizations") (last visited Nov. 4, 2007). MoveOn.org Voter Fund, an unregistered 527 group, is no longer in existence. *See* MUR 5754, *supra* note 10. MoveOn.org Civic Action is a section 501(c)(4) organization. MoveOn.org Political Action is a 527 group registered with the FEC.

47. *See* Weissman & Ryan, *supra* note 13, at 9-10. In the 2004 presidential cycle, for example, the Service Employees International Union (SEIU) spent roughly $12.5 million from its registered PAC and $46.7 million from its unregistered 527 group. *Id.* The Sierra Club spent $882,525 from its registered PAC and $6.26 million from its unregistered 527 group. *Id.* The Club for Growth spent $1.9 million from its registered PAC and $9.6 million from its unregistered 527 group.

Thus, the amount that a candidate receives from the overtly political, registered member is magnified by the additional sums spent by the unregistered member, and a candidate or the public is likely to perceive that the aggregate amount was spent by a single organization on the candidate's behalf. The influence the network can have on the candidate is commensurately increased, as is the potential for corruption or the appearance of corruption. Add to this the fact that the unregistered member can engage in numerous activities that are likely to be perceived as unambiguously attempting to influence a campaign for federal office by anyone not trained in the Byzantine complexities of FECA,[48] and a candidate would be reasonable in assuming that either member of the network was devoting all the network's resources to electing the candidate or defeating his or her opponent.

If we believe that the law should regulate the world as it really is, it follows that the real world flow of money and influence should be an important datum for designing campaign finance regulation from both a legal and a policy perspective. Thus, a network approach should provide an attractive model for lawmakers involved in campaign finance reform to consider when drafting rules for determining when an organization should be classified as a political committee and required to observe the reporting, source, and amount rules of FECA.

III. *TAXATION WITH REPRESENTATION OF WASHINGTON* AND THE ALTERNATE CHANNEL DOCTRINE

Nonetheless, there exists a potential constitutional barrier to the network approach that derives from a 1983 Supreme Court case, *Regan v. Taxation with Representation of Washington* (*TWR*).[49] The decision centered on a challenge to the provision in the Internal Revenue Code

---

Id. MoveOn.Org spent $30 million from its registered PAC and $21 million from its unregistered 527 group. *Id.*

48. For example, according to the FEC, in general, expenditures for messages that support or oppose a candidate for federal office are not considered the type of campaign expenditures that are counted to determine if an entity is a political committee unless the messages expressly advocate the election or defeat of a clearly identified federal candidate. *See* Notice 2007-3, *supra* note 10, at 5604.

49. 461 U.S. 540 (1983).

that prohibits § 501(c)(3) organizations from engaging in substantial amounts of lobbying.[50] The plaintiffs argued, among other things, that the lobbying restriction unconstitutionally conditioned their entitlement to charitable tax status on surrendering a considerable portion of their ability to engage in speech protected by the First Amendment.[51]

In upholding the tax law's limitation on the amount of permissible lobbying, the Court first likened the tax exemption to a government subsidy[52] and then noted that Congress was under no obligation to subsidize even constitutionally protected speech. Because the plaintiff in *TWR* was a § 501(c)(3) organization, it received two tax benefits: exemption from income taxation at the entity level and the ability to raise money from contributions favored by the charitable contribution deduction.[53] The Court observed that TWR was free to establish a sister exempt organization, which would be unable to receive deductible contributions, that could lobby on behalf of TWR, as long as the second organization did not receive any funds from TWR.[54] This bifurcated arrangement would secure Congress's goal of preventing sums raised through deductible contributions being used to fund substantial lobbying, while providing TWR with an ample alternative channel for lobbying to promote its mission.

The alternate channel option was critical to upholding the lobbying limitation in the Code, according to Justice Blackmun, who

---

50. *See* I.R.C. § 501(c)(3) (2000); *see also* Treas. Reg. § 1.501(c)(3)-1(b)(3)(i), -1(c)(3)(ii), (iv) (2007).

51. *TWR*, 461 U.S. at 542.

52. *Id.* at 544 ("A tax exemption has much the same effect as a cash grant to the organization of the amount of tax that it would have to pay on its income."). The Court did not, however, fully equate exemptions with subsidies, noting that they are not in all respects identical. *Id.* at 544, n.5 (citing Walz v. Tax Comm'n, 397 U.S. 664, 674-76 (1970)).

53. *See* I.R.C. § 170(a) (2000). Strictly speaking, the charitable contribution deduction is a subsidy to the donor, whose taxable income is reduced. The Court and most commentators, however, view the donor's subsidy as a tax benefit to the recipient organization as well since it makes it easier for the organization to raise money.

54. In fact, an uncontested fact in the case was that TWR had originally operated through a § 501(c)(3) organization and an affiliated § 501(c)(4) group, and that the latter had engaged in most of the lobbying related to the goals of both organizations. *See TWR*, 461 U.S. at 543.

wrote the concurrence. Although the decision for the Court also mentioned the option, it did not appear to have the same centrality for the decision as it did for the concurrence. Blackmun agreed with the majority that "merely [refusing] to pay for the lobbying out of public [moneys]" does not implicate the First Amendment.[55] However, he also believed that it would violate the First Amendment to deprive the organization of its right to petition government. The alternative channel option enabled TWR, and thus Blackmun, to reconcile the law's competing objectives. Further, because of his insistence on the organization's constitutional right to lobby to make its views known to lawmakers, Blackmun emphasized that TWR must be permitted not only to establish but also to control its 501(c)(4) affiliate.[56]

> Should the IRS attempt to limit the control these organizations exercise over the lobbying of their § 501(c)(4) affiliates, the First Amendment problems would be insurmountable. It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him. Similarly, an attempt to prevent § 501(c)(4) organizations from lobbying explicitly on behalf of their § 501(c)(3) affiliates would perpetuate § 501(c)(3) organizations' inability to make known their views on legislation without incurring the unconstitutional penalty. Such restrictions would extend far beyond Congress' mere refusal to subsidize lobbying.[57]

For Blackmun, then, the existence of an alternate channel for speech was absolutely necessary to prevent an "insurmountable" constitutional defect.[58]

TWR was a unanimous decision and, thus, the Supreme Court did not need Blackmun's concurrrence to uphold the constitutionality of the lobbying limitation. As a result, if the decision is viewed in isolation,

55. *TWR*, 461 U.S. at 545 (majority opinion) (alteration added), 551-52 (Blackmun, J., concurring).

56. *Id.* at 552-53.

57. *Id.* at 553.

58. *Id.*

it is possible that the alternative channel doctrine might not be seen as an integral part of the decision's reasoning in the eyes of the six justices who joined the opinion but not the concurrence. In other words, based upon *TWR* alone, it is not obvious that the alternative channel doctrine had precedential value as a component of the Court's First Amendment jurisprudence. However, subsequent decisions of the Supreme Court and lower courts suggest the opposite. In *FCC v. League of Women Voters*,[59] decided the year after *TWR*, the majority decision of the Court cited *TWR*'s alternative channel doctrine when it struck down the portion of a federal statute for funding public broadcasting that prohibited recipients of federal funds from engaging in "editorializing" during an election.[60] The law at issue would have denied public funds to public broadcasting stations that engaged in such editorializing even if they segregated their funds and paid for the editorials with nonfederal funds.[61] The Court invalidated the funding restriction, reasoning in part that the provision denied the stations the alternative channel for speech that made the lobbying restriction in *TWR* constitutional.[62] Similarly, in *Rust v. Sullivan*,[63] decided in 1991, the Court cited *TWR*'s alternative channel doctrine[64] in upholding certain restrictions on the use of Title X family planning funds. In *League of Women Voters*, the Court cited both the main *TWR* opinion and the concurrence for the alternative channel doctrine.[65] In *Rust*, the Court cited the main *TWR* opinion rather than the concurrence for the doctrine,[66] thereby making clear its view that the doctrine was essential to the *TWR* majority as well as to the concurrence. Similarly, several district courts and courts of appeal have also treated

---

59. 468 U.S. 364 (1984).
60. *Id.* at 399-400.
61. *Id.* at 400.
62. *Id.* at 400-01.
63. 500 U.S. 173 (1991).
64. *Id.* at 197-98.
65. *See League of Women Voters*, 468 U.S. at 399-400.
66. *Rust*, 500 U.S. at 197-98 (reiterating the doctrine that the government does not violate First Amendment rights by failing to fund certain types of speech as long as an alternative means exists to engage in such speech without tax favored funds).

the alternative channel doctrine as integral to the decision reached in *TWR*.[67]

The alternative channel doctrine, as developed in this line of cases, raises questions for the tenability of a network approach in the area of campaign finance regulation. To see this clearly, consider a hypothetical 527 group that is established independently of any candidate and that is devoted to election-related activities that are not the type to trigger FECA registration. For example, on the expenditure side, the hypothetical organization does not engage in or fund express advocacy in support of or in opposition to one or more federal candidates; on the contribution side, it neither gives money to any federal candidate nor solicits funds by promising to support or oppose particular federal candidates for public office.[68] If that organization is viewed in isolation to determine its major purpose, the FEC would examine the group's organizing documents, its public statements about its mission, statements made to potential contributors when soliciting funds, internal memoranda and other documents, as well as the character of the activities the group engages in and expenditures it makes in connection with campaigns.[69] Now, suppose that the organization is also affiliated with a PAC registered with the FEC, e.g., that the two groups share offices, a website, some or all of their personnel, and some part of their names. They may hold joint fundraising events, although they will be careful to

---

67. *See, e.g.*, Branch Ministries v. Rossotti, 211 F.3d 137, 143 (D.C. Cir. 2000) (rejecting the plaintiff's "no alternative channel" argument on the ground that the plaintiff could set up a PAC to engage in campaign speech using the intermediary of a 501(c)(4) organization). As part of reaching its conclusion, the court observed that Blackmun's view in *TWR* was "subsequently confirmed" by the Supreme Court in *League of Women Voters* as "an accurate description of its holding." *Id.* (citing *League of Women Voters*, 468 U.S. at 400); *see also* Alliance for Open Soc'y Int'l, Inc. v. United States Agency for Int'l Dev., 430 F. Supp. 2d 222, 259 (S.D.N.Y. 2006) (referring to both the main opinion and the concurrence for the proposition that the existence of a § 501(c)(4) "safety valve" was necessary to avoid constitutional infirmity in *TWR*). The *Alliance* court also stated that when the Supreme Court in *Rust* upheld the regulation, it explicitly cited as one consideration the fact that grant recipients had an alternative channel for abortion-related messages. *See id.* at 259.

68. For the standard assumed by this hypothetical, see FEC Notice 2007-3, *supra* note 10, at 5604-5605; 11 C.F.R. § 100.57 (2007).

69. *See* FEC Notice 2007-3, *supra* note 10, at 5601.

route hard money contributions to the PAC and other contributions to the unregistered 527 group. Under a network approach it would seem that, to an as yet unspecified degree, the PAC's purposes, statements, solicitations, internal documents, and activities would be taken into account in assessing the unregistered 527 group's mission and major purpose. A similar analysis could be applied to organizations described in § 501(c) that are part of a network, if one or more members of the network are engaged in FECA-type campaign activities.[70]

A network approach thus seems to require a 527 group or other exempt organization seeking to stay clear of FECA registration to be independent of other entities engaged in FECA-type electioneering activities, not only in the sense of not coordinating its activities with such entities, but also in the more comprehensive sense of not being part of a network in which one or more members engage in such electioneering.[71] Arguably, then, a network approach seems to create a situation in which the price of obtaining exemption under the Code is to deny certain groups two opportunities: first, the opportunity to engage in FECA-type electioneering through the alternative channel of a separate affiliated entity that registers with the FEC and, second, the opportunity even to affiliate with other entities that so engage.

Either way, as part of its laudable attempt to attain a more realistic assessment of the real world characteristics of organizations involved in elections, a network approach would appear to bump up against the First Amendment alternate channel doctrine that both justifies and circumscribes restrictions on certain types of political speech.

---

70. It is unclear, based upon *TWR*, whether a 501(c)(3) organization with a 501(c)(4) affiliate must be permitted even if the 501(c)(4) engages in electoral politics or establishes a PAC for such purposes. The court in *Branch Ministries* appeared to believe that such an affiliate is constitutionally required. *Branch Ministries*, 211 F.3d at 143. However, the court erroneously thought that a 501(c)(4) organization is not permitted to engage in political campaign activity unless it does so through a PAC. *See id.* It is possible that this erroneous view influenced its belief that a 501(c)(4) affiliate was constitutionally required.

71. A "network effect" would be possible even without coordination between the group seeking to avoid registering with the FEC and other members of the network, since Weissman and Ryan argue that cumulative activities of a network of commonly managed groups should also be considered in a "real world" assessment for campaign finance purposes. *See* Weissman and Ryan, *supra* note 13, at 3.

IV. THE INTERNAL REVENUE CODE, CONTEXT, AND ATTRIBUTION

As Part III suggests, a network approach appears to be in some tension with the alternative channel doctrine of *Taxation with Representation of Washington*. Recall that *TWR* involved the relationship between a § 501(c)(3) and a § 501(c)(4) organization. The 501(c)(3) group was entitled to the tax benefit of exemption at the entity level, and its contributors were entitled to deduct from their taxable income an amount equal to some portion of their donations to the 501(c)(3) group.[72] The problem confronting the Supreme Court was to find a way to enable the 501(c)(3) group to lobby certain public officials more than an insubstantial amount without having tax deductible contributions used to fund the group's lobbying. Section 501(c)(4) groups also benefit from exemption from income tax at the entity level, but they are permitted to lobby as much as is useful to achieve the purpose(s) for which their exemption was granted.[73] Since they cannot receive tax-deductible donations, their lobbying activities are not paid for by the deductible contribution subsidy.[74] Permitting a 501(c)(3) group to use an affiliated entity or partner to engage in the 501(c)(3) group's lobbying thus preserved that group's ability to lobby lawmakers without quantitative restrictions while depriving such speech of funding raised through tax deductible contributions.

A § 527 organization is a political organization that also realizes certain tax benefits as a result of its exempt status under § 527 of the Code.[75] The exact nature of the tax benefits accruing to 527 groups is a

---

72. *See* I.R.C. § 170(c) (2000).

73. *See* Rev. Rul. 71-530, 1971-2 C.B. 237 (holding that a 501(c)(4) social welfare organization may have lobbying as its sole purpose).

74. Although exemption from income tax alone may provide organizations described in any subsection of § 501(c) with a substantial tax benefit, the cases do not discuss this benefit in terms of a subsidy. Similarly, the Tax Expenditure tables produced yearly by the U.S. Department of Treasury list deductible contributions as a tax expenditure, but do not list exemption under 501(a). *See* STAFF OF THE JOINT COMMITTEE ON TAXATION, 109TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2006-2010 (Comm. Print 2006), http://www.house.gov/jct/s-2-06.pdf.

75. I.R.C. § 527 (2000).

matter of some debate. Some commentators have argued that the § 527 provision relieving such groups' "exempt function" income[76] from taxation confers no economic benefit because the law prior to the enactment of § 527 did not tax such amounts in any event.[77] Current law, however, makes clear that the conditions set forth in the statute and the regulations must be satisfied for a 527 group to be entitled to exemp from income of various types of revenue that will otherwise be subject to tax.[78] For example, if a 527 group commingles the funds it spends on the influencing activities authorized by the statute with the funds it spends on other activities, it risks losing the exemption for all the commingled funds. This result suggests that Congress saw § 527 as affording certain political groups a tax-preferred status that would not necessarily otherwise exist. Further, most commentators agree that § 2501(a)(4), which relieves donors to 527 groups from gift tax exposure for gifts in excess of the annual gift tax exclusion, constitutes a benefit to the organization as well as to the donors.[79] It seems, therefore, that if a network approach would cause an otherwise independent 527 organization[80] to be denied the tax benefits of § 527 unless it either registers as a political committee subject to FECA's source, amount, and disclosure requirements or gives up the opportunity to partner with a political committee subject to FECA, then the approach would deny the organization the opportunities for political speech required by *TWR*, *Rust*, and *League of Women Voters*. A similar argument could be made

76. Under I.R.C. § 527(c)(1) (2000), the organization's taxable income is calculated by subtracting its exempt function income and its allowable deductions from its gross income. "Exempt function income" is the organization's income from contributions, member dues, fundraising, or bingo games insofar as it is segregated for using to influence, or attempting to influence, "the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office . . . ." *See* I.R.C. § 527(c)(3), (e)(2) (2000).

77. *See* Roger Colinvaux, *Regulation of Political Organizations and the Red Herring of Tax Exempt Status*, 59 NAT'L TAX J 531, 535-37 (2006); Gregg D. Polsky & Guy-Uriel E. Charles, *Regulating Section 527 Organizations*, 73 GEO. WASH. L. REV. 1000, 1015-16 (2005). The groups are taxed on interest and divided income as well as on capital appreciation. *See* I.R.C. §§ 527(b)(2), (c).

78. *See* I.R.C. § 527 (2000).

79. *See* Colinvaux, *supra* note 77, at 538-39.

80. The hypothetical posits a 527 group not coordinating with a candidate, party, or a committee of either.

in connection with exempt organizations described in § 501(c), if they risked losing their status because they maintained a close relationship with a political committee subject to FECA.

A second obstacle to applying a network approach is the fact that the legislative history of § 527 of the Code specifically provides that, if a 501(c) organization establishes an affiliated 527 group, the activities of the 527 group will not be attributable to the 501(c) organization.[81] After making clear Congress' "expectation" that eligible 501(c) organizations would establish the separate entities authorized by § 527 to fund any campaign-related activities the organizations intended to sponsor, rather than continue to engage in such activities as part of their own operations,[82] the legislative history states that, if a § 501(c) organization establishes and maintains a 527 political organization, the latter will be "treated as an entity which is separate from the exempt organization maintaining the fund."[83] As a consequence, amounts funneled through the exempt organization to the 527 organization will not be treated as having been spent by the exempt organization or as taxable to it as long as the exempt organization transfers the money to the 527 group promptly.[84] By the same token, even though tax law caps the amount of campaign activities that a 501(c) group can engage in as a condition of retaining its exempt status,[85] a 501(c) group permitted to establish a 527 organization will not put its exemption at risk no matter how much

81. Section 501(c)(3) groups, however, are not permitted to set up 527 political organizations. *See infra* note 89 and accompanying text.

82. *See* S. REP. NO. 93-1357, at 30 (1974) (observing that taking "the campaign-type activities . . . entirely out of the section 501(c) organization[ ] [would be] to the benefit both of the organization and the administration of the tax laws") (alterations added)).

83. *Id.*

84. *Id.* The exempt organization will, however, be treated as having spent the money for political purposes if it earns interest on the funds while they are under its control. *Id.*

85. *See*, *e.g.*, Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (2003) (stating that a 501(c)(4) organization must be "primarily engaged in promoting in some way the common good and general welfare of the people of the community"), § 1.501(c)(4)-1(a)(2)(ii) (2003) (stating 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[,]" among other things (alterations added)).

campaign activity the affiliated 527 group engages in. In contrast, if exempt organizations engage in campaign activities as part of their own operations, rather than segregating them in an affiliated 527 group, they have to pay a tax based upon the amounts spent on such activities or upon their net investment income, whichever is less.[86]

The preceding legislative history thus makes clear that Congress did not intend the activities of a 527 group connected to a 501(c) organization to be attributed to the latter for purposes of determining whether the 501(c) organization is entitled to its exempt status. Nevertheless, it does not appear that Congress's reason for characterizing the relation between the two types of organization was a general belief that the activities of separately organized entities cannot be attributed to one another. That Congress did not hold such a belief is evidenced by the fact that it explicitly prohibited § 501(c)(3) organizations from establishing a related 527 group.[87] Instead, it limited the establishment of 527 groups[88] to 501(c) organizations that are themselves permitted to engage in campaign activities, i.e., to several exempt groups described in section 501(c) other than subsection 501(c)(3).[89] We can only speculate as to the reason why Congress did not authorize 501(c)(3) organizations to set up affiliated 527 groups on the condition that funds from the former would not be transferred to or used to maintain the latter. Since a structure of this kind would have prevented money attributable to deductible charitable contributions from being used to support 527 groups, Congress's failure to allow 501(c) organizations this option reveals that it must have been concerned with more than protecting the

86. I.R.C. § 527(f)(1) (2000).

87. *See* S. REP. NO. 93-1357, *supra* note 82, at 30. This is the case when the purpose would be to promote or oppose the election of a candidate to elected office. They are, however, permitted to establish a 527 organization to raise and spend money in connection with non-elective offices, e.g., to influence the selection of a judicial nomination.

88. Of course, not all 527 groups are connected to another entity. Section 527 also contemplates the existence of freestanding 527 groups.

89. *See* S. REP. NO. 93-1357, *supra* note 82, at 30. The most common 501(c) organizations that establish a connected 527 group, and the ones mentioned in the Senate Report, are those described in sections 501(c)(4)-501(c)(6), i.e., social welfare groups, labor organizations, trade associations, and chambers of commerce. *Id.*

public fisc. Based upon the legislative history of § 527, it seems likely that the exclusion for 501(c)(3) groups derives from the underlying policy objective to keep charities themselves, and not just charities' money, out of political campaigns. Since 501(c)(3) groups are not permitted, much less encouraged, to engage in campaign activities even minimally,[90] Congress did not authorize them to create affiliated, albeit separate, 527 groups, as other 501(c) entities can do. That Congress prevented 501(c)(3) organizations from having a connected 527 group thus suggests that in its view, the activities of a connected 527 group would somehow be attributable to the charity and thus violate the prohibition against 501(c)(3) groups intervening in political campaigns. This would be the case even though the two organizations would have been legally distinct and financially separate.[91]

The preceding analysis suggests that the separate legal entity paradigm that explained and justified the holding in *Taxation with Representation of Washington* cannot automatically be generalized to affiliated entities one of which is engaged in political campaigns. To avoid attributing a significant inconsistency to Congress based upon its encouraging some 501(c) groups to establish 527 organizations while prohibiting this to 501(c)(3) organizations, it is necessary to reject an otherwise plausible assumption that Congress enabled some 501(c) groups to create § 527 affiliates because it believed that their separate legal existence precluded attributing the activities of one affiliated group to another. It appears more likely that Congress was motivated by consistent policy objectives, namely, (1) facilitating the ability of exempt organizations *already permitted* to participate in campaigns to do so without threatening their exempt status, (2) encouraging such groups to take the campaign activity "entirely out" of their own operations by creating a tax-favored campaign vehicle in which to segregate the

90. The prohibition against political campaign activity by 501(c)(3) organizations is absolute. *See* I.R.C. § 501(c)(3) (2000).

91. When it enacted § 527, Congress chose to allow the host 501(c) organization to pay for the cost of setting up and administering the 527 group, although the 501(c) organization is not itself permitted to contribute to the 527 group. If Congress had wanted to permit 501(c)(3) organizations to set up 527 groups as long as no money or other property flowed from the former to the latter, it could have provided that 501(c)(3) organization could set up 527 groups but not pay the administrative costs of setting them up or maintaining them.

campaign activity, and (3) reinforcing the policy against 501(c)(3) organizations engaging in campaign activity either directly or indirectly.[92]

The Internal Revenue Service enlarged the statutory framework created by Congress when the Service explicitly blessed the existence of organizational networks consisting of a § 501(c)(3) charity affiliated with an organization described in another subsection of 501(c) that has, in turn, established an affiliated 527 political organization. For example, in a training manual for its agents, the IRS asserts that a 501(c)(3) organization can create a 501(c)(4) organization which, in turn, can create one or more 527 organizations without jeopardizing the 501(c)(3)'s charitable exemption as long as the groups "do not commingle their finances or other resources, conduct separate activities in furtherance of their exempt purposes, and maintain and respect their separate entities."[93] Further, the IRS training manual blesses such networks of affiliated organizations even when all members of a network have a distinctive name in common.[94]

The IRS position arguably allows 501(c)(3) organizations to circumvent Congress's ban on 501(c)(3) organizations establishing 527

92. *See* S. REP. NO. 93-1357, *supra* note 82, at 30.

93. Judith E. Kindell & John F. Reilly, *Election Year Issues*, 335, 477-78 (2002), http://www.irs.gov/pub/irs-utl/topici02.pdf (offering examples involving state PACs and federal PACs). The 501(c)(3) organization cannot contribute any funds to any of the PACs connected to its affiliated 501(c)(4) organization (Example 11), nor earmark any funds it provides to an affiliated organization for campaign activity (Example 6). *See id.* at 479, 475-76. Although the IRS warns in the introduction to the training manual that the doctrines and examples discussed there cannot be relied upon by taxpayers in a court of law, this and other training manuals are widely studied and relied upon as indicating the Service's understanding of the issues discussed.

94. *Id.* at 479 (offering as a permissible network the Downtown Business League (a 501(c)(6) organization), the Downtown Business League Education Fund (a 501(c)(3) organization), and the Downtown Business League PAC (a 527 organization), at 477 (noting that a 501(c)(3) entity cannot contribute to a 527 group even if the 527 group is part of a network of affiliated organizations that includes the 501(c)(3) entity). *Cf. id.* at 475-76 (noting that a 501(c)(3) entity can pay membership fees to a 501(c)(6) trade association that engages in political campaign activity as long as the 501(c)(3) group does not earmark any of its contributions for such activity). Given that money is fungible, the membership fees permitted a 501(c)(3) organization would free other 501(c)(6) funds to spend on campaigns.

groups.[95] At the very least, its position seems to contravene the general tax policy against permitting a taxpayer to avoid undesirable tax consequences by creating a series of formally distinct transactions to accomplish what is in substance an integrated transaction.[96] It may be this tax policy, in whole or in part, that led Congress to deny 501(c)(3) organizations the ability to establish their own 527 affiliates. In contrast, the Service's position permitting 501(c)(3)–501(c)(4)–527 organization networks appears to derive from its longstanding policy of respecting corporate or entity boundaries.[97] In the exempt area, this policy appears prominently when the IRS considers whether the operations of an exempt organization's taxable subsidiary or subsidiaries should affect the organization's own exempt status or its liability for tax on unrelated business income.[98] Both the Service and the courts suspend this policy if separate entities are created to avoid taxes, for example, to shift income, if they disregard the entity boundaries themselves, or if one entity serves solely as the agent or instrumentality of the other.[99]

The test used to determine if organizations' boundaries should be respected when for-profit entities are involved is often characterized in terms of business purpose or economic reality.[100] The criteria employed

---

95. *See* Chris Kemmit, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145, 161 (2006) (describing how churches have formed related 501(c)(4) organizations with PACs to conduct campaign activities). *See supra* note 70.

96. *See* Penrod v. Comm'r, 88 T.C. 1415, 1427-28 (1987) (stating "the fundamental principle of tax law that the substance of a transaction, and not its form, controls its tax consequences").

97. This policy is based upon *Moline Prop., Inc. v. Comm'r*, 319 U.S. 436 (1943) (holding that income of a corporation could not be passed through to the sole stockholder for income tax purposes because it belonged to the corporation as a tax entity).

98. *See* Evelyn Brody, *Business Activities of Nonprofit Organizations: Legal Boundary Problems*, in NONPROFITS AND BUSINESS (C. Eugene Steuerle and Joseph Cordes, eds. forthcoming 2008); Francis R. Hill and Douglas M. Mancino, TAXATION OF EXEMPT ORGANIZATIONS 27–6 to 27-10 (2002).

99. *See Moline Prop.*, 319 U.S. at 440; I.R.S. Priv. Ltr. Rul. 2005-02-046 (Oct. 18, 2004); and *infra* notes 100-02 and accompanying text.

100. *See* Ocean Drilling & Exploration Co. v. United States, 988 F.2d 1135, 1151-52 (Fed. Cir. 1993) (holding that a parent corporation could deduct premiums paid to its wholly owned subsidiary insurance company because the latter had a valid business existence, its business operations were separate from those of the parent,

in determining whether entity boundaries will be respected in circumstances involving nonprofits seem to be less clear cut. For example, entity boundaries may be disregarded where one entity is an "integral part" of the operations of another. In such situations, an entity that does not qualify as exempt in its own right is typically seeking to gain exempt status by virtue of its relationship with an organization that is exempt.[101] Qualitative considerations enter into this determination, seemingly to a greater extent than with for-profits. Entity boundaries have also been disregarded between nonprofits if two or more entities share directors, officers, employees, facilities, or services, but only if one or more of the entities exercises significant control over the daily operations of one or more of the others in addition to these common features.[102]

In a Technical Advice Memorandum (TAM) issued in 1999, the IRS stated its belief that, in addition to considering the operations conducted by an exempt entity,[103] "it is also important to review preceding and contemporaneous activities and motivations of related organizations and individuals" in order to determine an entity's exempt status.[104] The organization under review in the TAM was the Progress and Freedom Foundation, a group created to develop, market, and distribute materials for college courses taught by Newt Gingrich (then a member of the House of Representatives), publish newsletters and books, and hold conferences.[105]

---

and it insured a significant amount of risk for unrelated parties). *Cf.* Humana Inc. v. Comm'r, 881 F.2d 247, 254-55 (6th Cir. 1989) (contrasting the business purpose and economic reality doctrines).

101. *See* Geisinger Health Plan v. Comm'r, 100 T.C. 394 (1993), *aff'd*, 30 F.3d 494 (3rd Cir. 1994); I.R.S. Gen. Couns. Mem. 39,830 (Aug. 30, 1990); Rev. Rul. 75-282, 1975-2 C. B. 201; Rev. Rul. 68-26, 1968-1 C. B. 272; Hill and Mancino, *supra* note 98, ¶ 27.04.

102. *See* Hill and Mancino, *supra* note 98, ¶ 27.03.

103. Or an entity applying for exemption.

104. Unreleased IRS Technical Advice Memorandum issued to the Progress and Freedom Foundation, Facts, Part II, in 23 EXEMPT ORG. TAX REV. 512, 520 (1999) (hereafter the "PFF TAM"). This TAM was also published by Tax Analysts, Tax Notes Today (Feb. 5, 1999), Doc 1999-5081 (1999 TNT 24-25).

105. These and other educational activities of PFF are summarized in the PFF TAM, *id.* at 519-20.

Among other issues, the Service examined whether the Progress and Freedom Foundation had provided a substantial private benefit to individuals or to other organizations, such as the Republican Party, which would have disqualified it for exemption as a 501(c)(3) organization.[106] Understanding the Foundation's "context" was critical to this inquiry, according to the IRS, and a significant portion of the seventy-three page ruling was devoted to the contextual inquiry.[107] The Service based its contextual approach on the mode of analysis employed by the Tax Court in *American Campaign Academy v. Commissioner*,[108] which it cited.[109] However, in contrast to the Tax Court, the IRS stated in the TAM that it would look to an organization's "association with outside entities only where there is already evidence of private benefit in the activities of the organization at issue."[110]

It is unclear how these precedents would be applied to networks of exempt organizations, some or all of which are engaged in campaign activity. As was discussed earlier, in *Regan v. Taxation with Representation of Washington* the Supreme Court reduced the relevant tax law inquiries when a 501(c)(3) organization establishes a 501(c)(4) entity to lobby on its behalf to determining whether the two entities have completely segregated their finances and maintain records to verify this arrangement.[111] Based on the Court's reasoning in *TWR*, it seems that the presence of common directors or staff, shared facilities, or similar organizational names are not relevant to the question of respecting entity boundaries.

How can the approach adopted in *TWR* be reconciled with the approach taken by the Progress and Freedom Foundation TAM? *TWR*

---

106. *See id.* at 530-34 (discussing whether the Gingrich courses improperly benefited the Republican Party and concluding that they did not).

107. *See id.* at 520-25, 533-534.

108. 92 T.C. 1053 (1989).

109. *See* PFF TAM, *supra* note 104, at 533 (contrasting the contextual approach of *American Campaign Academy* with the approach of other decisions). In *American Campaign Academy*, the Tax Court examined the exempt entity's relationship with the Republican Party, its committees and agents, and Republican candidates and officeholders in addition to examining the educational programs that it conducted. *See* 92T.C. at 1070-73.

110. PFF TAM, *supra* note 104, at 533.

111. 461 U.S. 540, 544, n.6 (1983).

involved lobbying, not campaign activity, and the relationship analyzed was between organizations described in § 501(c)(3) and § 501(c)(4).[112] The Progress and Freedom Foundation TAM examined the exempt status of a 501(c)(3) entity with ties to a § 527 political organization. In the TAM, the Service inquired into the programs, founders, directors, and sources of funding of the two entities.[113] The difference between the two approaches may be that the concern in *TWR* was exclusively the need to prevent money raised through contributions entitled to the charitable deduction from being used for lobbying, whereas the concern in the TAM was whether the exempt entity was operated in substantial part for private benefit. In other words, the issue in the TAM was the threshold question of the character of the organization's mission.

Private benefit may sometimes occur through financial enrichment, as is the case when an exempt organization enters into a contract and the primary purpose is to profit the other party to the contract rather than to facilitate the mission that qualified the organization for exemption in the first place.[114] Private benefit also occurs when an exempt organization operates, in whole or in part, to further the purposes of a third party, whether an individual or a group. For example, in the *American Campaign Academy* case, the school in question trained young adults to become political "campaign professionals." The Tax Court found that because of the partisan nature of the admissions process and some of the courses, the fact that the school was exclusively financed by sources associated with the Republican Party, and the circumstance that most, if not all, of the

112. In *TWR* the plaintiff was a 501(c)(3) group that had assumed the lobbying activities of its former 501(c)(4) affiliate, so there was a single organization in existence at the time of trial. The relationship between § 501(c)(3) and § 501(c)(4) organizations was raised by the Court as part of its determination that the 501(c)(3) group would not be harmed by its holding, since it could establish an affiliated 501(c)(4) group to perform a substantial amount of lobbying on its behalf.

113. *See* PFF TAM, *supra* note 104, at 519, 522-23, 526-28, 533-34.

114. Not all private benefit disqualifies an exempt organization, even a charity. For example, educational institutions provide a substantial private benefit to individual students (even if society also benefits from an educated citizenry indirectly). However, in most cases the students will be considered to form a charitable class and, thus, the benefit they receive is not in conflict with the idea of charitable exemption.

graduates went to work for Republican officeholders or committees, the school conferred a substantial private benefit on the Republican Party, even though a large part of the curriculum was nonpartisan and academically rigorous in nature.[115] Since Republican Party sources supplied most of the school's operating budget, the Party did not benefit financially from the school directly or in the short run. Yet it clearly benefited by the increased pool of knowledgeable Republican-oriented campaign professionals. As a result, the school's mission was hybrid in nature—partly educational and partly partisan—and the partisan element disqualified it for 501(c)(3) exempt status.

The Progress and Freedom TAM and the *American Campaign Academy* decision thus provide a legal basis for distinguishing *Taxation with Representation of Washington*. The former two rulings focus on the nature of an exempt organization's mission, and for that inquiry it may be appropriate to inquire into an exempt entity's relationships with external parties, whether individuals or groups, as part of the process of determining the purpose for which the entity exists and operates. Such an inquiry should not undermine First Amendment values, whether of speech or association, because an organization is not entitled to exempt status in the first place unless it operates primarily for the purpose that supports the exemption. In the *American Campaign Academy* case, the court concluded that the context in which the school operated undermined its claim to exemption as a 501(c)(3) educational organization. In the Progress and Freedom Foundation TAM, in contrast, the result of the Service's lengthy investigation into the context in which the Foundation was created and operated resulted in upholding the organization's claim to exempt status.

These findings support the legitimacy of looking at an exempt organization's context as well as its purpose. That conclusion validates a network approach for certain purposes of tax law and possibly other legal regimes in which speech is restricted to achieve a state interest. The First Amendment cases[116] emphasizing the importance of an alternative

115. *See* American Campaign Academy v. Comm'r, 92 T.C. 1053, 1059, 1069-73 (1989).

116. *See* Rust v. Sullivan, 500 U.S. 173 (1991) (challenging the manner in which the Department of Health and Human Services enforced a law for the funding of family planning services); FCC v. League of Women Voters of Cal., 468 U.S. 364

channel for expression are not apposite because they revolve around the source and use of government funds by entities whose purpose or mission is not under review. When the issue is the use (or abuse) of government funding, segregation of accounts rather than separation of entities is adequate to address the problem. It remains to examine how First Amendment doctrines developed specifically in the context of campaign finance jurisprudence would affect the speech issues raised if a network approach were used to classify organizations as political committees for federal election purposes.

V. THE PLACE OF CONTEXTUAL ANALYSIS IN FEDERAL CAMPAIGN FINANCE LAW

The alternate channel doctrine is a constitutional doctrine that assumes the propriety, indeed the necessity, of taking into account the context in which an organization operates when determining whether its First Amendment rights have been violated by regulations restricting its political speech in order to preserve the integrity of public funds. Recourse to context has also played a role in various situations that are regulated by campaign finance law. Because campaign finance regulations impact speech at the heart of democratic processes, a high burden of justification is usually imposed upon state actors who would impose restrictions on political speech.[117]

The FEC examines the context in which organizations operate in numerous circumstances. For example, FECA limits the dollar amounts that can be contributed by individuals or groups to candidates or political committees.[118] These limitations could be easily evaded by one organization creating numerous separately organized entities if each entity was entitled to the statutory maximum and the related entities could then operate in a coordinated manner. To prevent such an outcome, FECA requires that the FEC analyze the relationship between two or more organizations to determine whether they should be counted as a

(1984) (challenging the manner of the Federal Communications Commission's enforcement of a telecommunications statute).

117. *See* First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978); Buckley v. Valeo, 424 U.S. 1, 44-45 (1976).

118. *See* 2 U.S.C. § 441a(a) (2000).

single organization for purposes of contribution limits.[119] In such instances, the FEC does not limit itself to determining formal relations between and among entities, i.e., whether one of the entities is a parent or sister of another as a matter of corporate law, or whether one has the power to direct the affairs of the other through provisions of bylaws or contracts.[120] Rather, it also examines relations of influence among the entities based upon informal practices, whether the entities share personnel, whether they have overlapping memberships, or even whether the employees of one organization were formerly associated with the other.[121] The FEC also takes into consideration whether one of the entities "had an active or significant role" in creating the related entity and whether related entities have "similar patterns of contributions or contributors," suggestive of an informal "ongoing relationship" among them.[122] Further, when independent entities themselves *seek* to be classified as affiliated with one another so that they can both raise funds from their respective memberships for a single PAC, the FEC undertakes a similar context-oriented analysis.[123]

In a recently published Notice, the FEC addressed directly which constellation of facts, taken together, will result in an entity organized under § 527 being classified as a political committee and made subject to FECA's disclosure, source, and amount rules.[124] The FEC published the Notice in response to a directive by the Federal District Court of the District of Columbia requiring the agency either to promulgate a rule clarifying the conditions that trigger classification as a political committee or to explain its reasons for not doing so.[125] The Notice

119. *See* 2 U.S.C. § 441a(a)(5) (2000); 11 C.F.R. §§ 100.5(g), 110.3 (2007).

120. *See* 11 C.F.R. § 100.5(g)(2), (3), (4)(ii)(B), (C) (2007).

121. *See* 11 C.F.R. §§ 100.5(g)(4)(ii)(B), (E), (F), 110.3(a)(3)(ii)(B), (E), (F) (2007).

122. *See* 11 C.F.R. §§ 100.5(g)(4)(ii)(I), (J), 110.3(a)(3)(ii)(I), (J) (2007).

123. *See* FEC Advisory Op. 2002-15, Feb. 19, 2003, *available at* http://saos.nictusa.com/saos/searchao?SUBMIT=continue.

124. *See* Notice 2007-3, *supra* note 10, at 5596.

125. *See* Shays v. FEC, 424 F. Supp. 2d 100 (D.D.C. 2006) ("*Shays II*"). The FEC had taken the position that its regulations together with rules promulgated in 2004 addressed the issue adequately, especially since it had concluded that political committee status was best determined on a case-by-case basis. *See id.* at 112-13; Notice 2007-3, *supra* note 10, at 5596. However, the court found that the agency had

makes clear that the FEC will look to all the facts and circumstances surrounding a group's activities to determine if its major purpose is to influence federal elections, and the Notice elaborates the type of contextual inquiries that will influence the FEC's assessment. For example, the agency will look at the representations that a group makes, orally or in writing, when it solicits funds and how the group characterizes itself and its projects on its website and in internal memoranda rather than limit itself to a review of the group's expenditures, organizing documents, and formal statements.[126]

Although the FEC's Notice 2007-3 does not mention the existence of networks of organizations as a factor that will contribute to its assessment of a group's classification as a political committee, the conciliation agreements executed by the agency and certain 527 groups in 2006 reveal that the agency does in fact take network relationships into account. For example, in the conciliation agreement concluded with the League of Conservation's two 527 groups, neither of which had registered as a political committee, the FEC noted that the League's associated 501(c)(4) organization (League of Conservation Voters, Inc.) had raised funds for the two affiliated 527 groups.[127] The agreement also recognized that the 501(c)(4) organization, the two 527 groups, and a League of Conservation Voters PAC (registered with the FEC) jointly

---

failed to explain adequately its decision to proceed through adjudication rather than through rule making and it deemed the agency's actions insufficient to put entities on notice of the circumstances creating an obligation to register. *See Shays II* at 114, 116. Thus, the court remanded the case to the FEC "either to articulate its reasoning for its decision to proceed by case-by-case adjudication or to promulgate a rule if necessary." *Id.* at 103. FEC Notice 2007-3 was the agency's response. *See supra* note 10.

126. *See* Notice 2007-3, *supra* note 10, at 5601-02, 5605..

127. *See* Conciliation Agreement in MUR 5753 (2006), at 7, *available at* http://eqs.nictusa.com/eqsdocs/00005905.pdf (noting that raising contributions in excess of $10,000 was "[o]ne of the primary responsibilities of LCV Inc.") (alteration added)). Nonetheless, the agency chose not to assert violations of FECA by the 501(c)(4) organization. *Id.* at 12. That the FEC is willing, under the right circumstances, to bring an enforcement action against a 501(c)(4) group that fails to register as a political committee can be seen from its conciliation agreement with Freedom Inc., a 501(c)(4) group. *See* Conciliation Agreement in MUR 5492 (2006), *available at* http://eqs.nictusa.com/eqsdocs/00005949.pdf.

funded the main project undertaken by the organizations together.[128] In analyzing the major purpose of the League's 527 groups, the FEC cited the electoral objectives of that project and treated the four "LCV organizations" as engaged in a joint enterprise.[129] For the FEC, then, to determine whether a 527 organization should be classified as a political committee, it is necessary to view the organization's activities and statements in context, and this inquiry may include considering whether and how the organization interacts with affiliated organizations.

The FEC's contextual approach, as it was employed in connection with a different provision of federal campaign finance law, was recently challenged successfully in the Supreme Court.[130] The plaintiff in the case was Wisconsin Right to Life, Inc., a corporation exempt under § 501(c)(4) of the Internal Revenue Code as an advocacy organization.[131] The plaintiff challenged the provision of federal campaign finance law that prevents corporations from paying for "electioneering communications" using their general treasury funds, rather than the hard money in their PACs, insofar as that provision required the organization to use hard money to pay for communications that it believed constituted grass roots lobbying.[132]

Congress's purpose in enacting the electioneering communication provisions was to end the common practice of unions and corporations using soft money to pay for advertising that purported to advocate for issues or legislation, but that was really intended to

128. *See* Conciliation Agreement in MUR 5753, *supra* note 128, at 8.

129. *See id.* at 8-9.

130. FEC v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007).

131. *Id.*

132. *Id.* at 2665. Electioneering communications, a category of campaign speech introduced as part of the McCain-Feingold campaign finance reform, are public communications that mention a candidate for federal office, are made on the eve of a primary or general election, and are conveyed using broadcast or similar media. *See* 2 U.S.C. §§ 434(f)(3)(A), 441b(c) (2000). Communications utilizing cable or satellite are also covered, and the provision is applicable during the sixty days preceding a general election and thirty days preceding a primary. *See* 2 U.S.C. §§ 434(f)(3)(A)(i)(II) (2000). The operative provisions of FECA require that corporations and unions pay for such communications with hard money, rather than their general treasury funds, and that any person or entity who makes or funds such communications must comply with special reporting requirements when the sums involved in a year exceed $10,000. *See* 2 U.S.C. §§ 441b(b)(2), 434(f) (2000).

influence the election of one or more federal candidates and was likely to have such an effect. The ads could claim to be something other than endorsement of or opposition to a candidate for federal office because they would refer to an issue or pending legislation and urge listeners or viewers to contact a candidate and tell him or her the caller's opinion about the issue or legislation. However, the issues chosen were invariably defining issues in the election in the district targeted to receive such ads, and the substantive discussion of the issue in the ads was relatively modest. The ads were understood by most of those who heard them as intended to mobilize voters in support of or in opposition to particular federal candidates. Further, because ads of this type tended to be taken off the air the day after an election, even if the issue referred to was still unresolved or the legislation was still pending, the ads were widely viewed as electioneering masquerading as issue advocacy so that they could be financed with soft money.[133]

The content of the ads under discussion in *Wisconsin Right to Life* was devoted to the subject of filibustering judicial nominations in the Senate.[134] The ads disparaged senators who used filibusters as a device to delay or prevent judicial nominations from being considered on the floor of the Senate, and they urged listeners to contact their two senators, who were named, and to communicate the listeners' opposition to filibustering in the Senate. Based on the literal text, the ads did not appear to involve campaigning for or against either of the state's senators, only one of whom was up for reelection.[135] The background of the ads, in contrast, suggested strongly that the ads were intended to attack Senator Feingold, who was seeking reelection and who had joined in filibustering certain judicial nominations.[136] As a consequence, the

133. *See* the discussion in *McConnell v. FEC*, 540 U.S. 93, 126-29 (2003).

134. *See Wisconsin Right to Life*, 127 S. Ct. at 2660-2661.

135. The ads did not mention the campaign or a political party, identify either senator as a candidate (only Russell Feingold was up for re-election), or speak to a candidate's qualifications for office. *See id.* at 2667.

136. *See id.* at 2667-69 (summarizing and rejecting the FEC's position), *id.*, at 2697-99 (Souter, J., dissenting); Brief of Appellant Petitioner at 43-48, FEC v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007) (No. 06-969). *Cf. Wisconsin Right to Life*, 127 S.Ct. at 2684 n.8 (Scalia, J., concurring) (asserting that the "purpose of the ad was to put political pressure upon Senator Feingold to change his position on the filibuster—not only through the constituents who accepted the invitation to

Court's holding depended largely on whether it would look beyond the four corners of the text of the ads to the larger context in which the ads were produced and aired as part of the process of determining whether they should be classified as discussion or advocacy of issues, on the one hand, or electioneering with respect to candidates, on the other.

Both the plaintiff organization and the FEC agreed that the ads in question conformed to the definition of "electioneering communications" in FECA and, thus, that they must be paid for with hard money unless the Court found the statutory provision unconstitutional as applied to the facts of the case.[137] The FEC argued that the character of the ads could not be evaluated without looking at the context in which they were written and aired because the relevant legal standard included determining whether the organizations intended to influence the federal election with the ads and the ads were likely to have that effect.[138] The Supreme Court disagreed. It ruled that to avoid unconstitutionally burdening the speaker, the ads must be judged without reference to their context, or with only a minimal reference to context.[139] So judged, the Court concluded, the ads were neither express advocacy nor its functional equivalent.[140] As a result, the Court concluded that the

---

contact him, but also through the very existence of an ad bringing to the public's attention that he, Senator Feingold, stood athwart the allowance of a vote on judicial nominees").

137. *See Wisconsin Right to Life*, 127 S. Ct. at 2663. The Supreme Court had upheld the electioneering provisions against a facial challenge four years earlier, in *McConnell v. FEC*, 540 U.S. at 189-94.

138. *See Wisconsin Right to Life*, 127 S. Ct. at 2663-2664.

139. *See id.* at 2664-66. The Court allowed that courts "need not ignore basic background information that may be necessary to put an ad in context—such as 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 2669. Thus, it seems that the Swift Boat Veterans for Truth ads disputing aspects of Senator John Kerry's Vietnam service would not qualify as issue ads under the Court's definition, since they addressed the character and fitness for office of a candidate rather than a legislative proposal under consideration or likely to be considered by Congress in the near future. *But see id.* at 2683 n.7 (Scalia, J., concurring) (conjecturing that the majority's holding "arguably protects" the Bill Yellowtail ad that the *McConnell* Court considered the paradigmatic case of a sham issue ad).

140. *See id.* at 2670.

electioneering communication provisions of FECA would violate the First Amendment if they were enforced against the plaintiff in the case.

Although the question decided in *Wisconsin Right to Life* is quite different from the question examined in this Article, the two situations have in common the propriety of relying on contextual inquiries for purposes of determining whether an organization's political speech is subject to regulation consistent with the First Amendment. At the same time, the differences between the issues adjudicated in *Wisconsin Right to Life* and the issues surrounding the classification of organizations as political committees suggest that the Supreme Court's insistence on disregarding context in the former situation will not necessarily carry over to the latter.

First and foremost, the Court in *Wisconsin Right to Life* was concerned that an "intent-and-effect" standard would introduce an unacceptable amount of subjectivity into the analysis of political speech.[141] The Court asserted that, because of the nation's "profound commitment" to robust debate on "public issues," interpretive approaches such as safe harbors were preferred, and intent-and-effect analysis was impermissible.[142] Quoting *Buckley v Valeo*, the Court concluded that an intent-and-effect standard "would afford 'no security for free discussion.'"[143] In contrast, the process of determining whether an organization operating as part of a network should be classified as a political committee would rely on relatively objective criteria. As noted earlier, to determine an organization's correct classification, the FEC would look at overlapping or shared directors and officers and similar objective indicia of common management, as it already does when it examines the relationships among organizations to ascertain whether contribution limits are being evaded by affiliated organizations or to permit distinct entities to fund a single PAC jointly.[144] It would look at the representations that groups make to their supporters and potential contributors about the nature of their activities and objectives, rather than attempt to discern what people are thinking and how audiences are reacting to them. For example, if an unregistered group operating as part

141. *See id.* at 2665-66, 2668.
142. *See id.* at 2665.
143. *Id.*
144. *See supra* notes 118-123 and accompanying text.

of a network of affiliated entities promises its supporters that the impact of their contributions, which will not be spent on express advocacy, will nonetheless be to further the election prospects of one or more specific candidates because of the aggregate impact of the activities of the members of the network, then the aggregate impact of the network relationships should be an important factor in the FEC's assessment of the group's character. Similarly, if such a group focuses attention on its relationship with its affiliated organizations—e.g., by sharing a letterhead and logo, or by holding joint fundraising events that are geared to the election or defeat of specific federal candidates—this conduct should be considered as part of the process of classifying the group for FECA purposes. Some of the FEC's inquiries would involve a greater degree of judgment, however. For example, the FEC might look at common patterns of contributions and contributors between and among members of a network as part of its determination. Although such considerations are arguably less objective because they are less clear cut, the FEC already is required to make exactly such judgments to determine how to treat related entities for other purposes.[145] The element of judgment would be the greatest when the FEC engages in weighing the various factors to make its final determination. Yet here too, the agency would be engaging in exactly the kind of balancing that it undertakes routinely as part of characterizing the relationships among related entities for other purposes.[146]

Second, and relatedly, the Supreme Court in *Wisconsin Right to Life* also expressed concern that the FEC's interpretation of the electioneering communication provisions of FECA would open "the door to a trial on every ad within the terms of [the definition of electioneering communications]."[147] The determination of an entity's classification, in contrast, would have to be made only once or at infrequent intervals because the basis for the determination would be structural rather than transactional. The burden imposed would be no greater than occurs currently when the FEC undertakes to ascertain the extent and character of relations among two or more entities for purposes of other provisions

---

145. *See id.*

146. *See, e.g.*, FEC Advisory Opinions 2007-13, 2005-17, 2004-41, 2002-15, 1996-50.

147. *See Wisconsin Right to Life*, 127 S.Ct. at 2665-2666 (alteration added).

of FECA.[148] When the classification is made at the entity level, rather than at the level of specific communications, the goals or missions of institutions are the object of inquiry, rather than the motivations behind particular actions or actors. As a consequence, the type of evidence implicated is different. When the parties disagree about the correct assessment of an organization's mission, and thus about the validity of the FEC's determination that an organization should be classified as a political committee, the relevant contextual data will be derived from relatively objective indicia, such as the organization's conduct (and the conduct of the affiliated groups that comprise its network), rather than the subjective criteria of individuals' thoughts and feelings.[149]

Finally, in *Wisconsin Right to Life*, the FEC's contextual analysis would have to be made during the two months preceding an election or the month preceding a primary. At such times, it would be difficult for the agency to render a decision quickly enough to satisfy First Amendment concerns raised by restricting political speech on the eve of an election. In contrast, members of a network could seek the FEC's classification of their organizations before an election cycle begins or in its early stages so that a decision could be rendered in time for the entities involved to know which campaign finance regulations would apply to each of them.

In short, the circumstances that caused the Supreme Court to break the "tie"[150] in favor of the speaker whose campaign speech in the final two months of a campaign would be subject to the burden of being funded with hard money if it aired its messages using broadcast media need not be present in the context of classifying members of a network to determine which ones, if any, must register with the FEC as a political committee. When organizations operate through networks that are commonly managed, the structural arrangements that they create and through which they operate, and the representations about their mission

148. *See supra* notes 118-123 and accompanying text.

149. A network approach does, however, make certain assumptions about the differing impact on candidates and officeholders of the activities of single organizations as compared with those operating as part of a network that includes entities explicitly attempting to influence the election or defeat of individual federal candidates.

150. *See Wisconsin Right to Life*, 127 S.Ct. at 2669, and n.7.

that they make in public and private pronouncements, should contribute to their classification for FECA purposes in the same way that the character of their own activities contributes to that assessment. This result is required by the need to prevent corruption and the appearance of corruption in campaigns—the goal that both justifies and restrains the regulation of campaign speech.[151] Thus, the Court's decision in *Wisconsin Right to Life* should not be a bar to classifying individual organizations active in political campaigns while operating as part of a network based, in part, upon examining their network relationships.

CONCLUSION

The test of the preceding account of a network approach to classifying entities as political committees is whether, or the degree to which, they meet the objectives outlined in the beginning of this Article. The single most important test of campaign finance restrictions is whether they have as their touchstone avoiding corruption or the appearance of corruption. The argument of Part I of this Article is that the potential for corruption or its appearance during a campaign can be magnified when politically active organizations operate as part of a network. This is largely due to the circumstance that contributors to a network's members may appear to be giving to individual candidates and parties sums far in excess of the amounts permitted under campaign finance contribution limits because they can augment the influence of their hard money contributions with unlimited amounts of unregulated or soft money. Because of the constitutional protections afforded political speech by the First Amendment, those contribution limits have as their sole justification preventing, or at least reducing, the opportunities for corrupting or appearing to corrupt candidates for federal office. A network approach to classification would contribute to the goal of contribution limits by enabling the FEC to determine that an unregistered or soft money organization has influencing the nomination or election of specific candidates as its primary purpose based upon both the organization's own activities viewed in isolation and its role in furthering a joint enterprise with other members of the network, if such exists.

---

151. *See supra* Part I.

The second objective of campaign finance regulation is to treat similarly situated participants in campaigns equally. This entails judging participants by the functions they actually perform rather than by their titles or formal roles. It is the failure to assess participants by their actual functions that creates loopholes or the ability of organizations, events, and transactions to make misleading claims about their activities and character. By the same token, it is the failure to assess campaign participants functionally that creates public cynicism, since ordinary citizens perceive a lack of reality when formal criteria triumph over substantive ones, even if they are unable to articulate the difference. A network approach would address this problem with the current tendency to apply campaign finance regulations in a vacuum, that is, without reference to context, by grounding campaign finance regulation in a more realistic understanding of the character and conduct of entities active in political campaigns.

The third test of campaign finance regulation is that it formulate rules with sufficient clarity that participants in campaigns are on notice of the legal standards by which they will be judged. This objective is dictated by considerations of fairness as well as by the dictates of the First Amendment. The approach advanced in this Article cannot claim to achieve this goal perfectly. In fact, the very considerations that enable a network approach to afford a more accurate account of which activities and entities influence or seek to influence the prospects of specific candidates also render the approach less mechanical and its determinations less predictable. The goal of clarity, therefore, is in some tension with the goals of preventing corruption and making judgments based upon function rather than form. This tension is the inevitable consequence of attempting to fashion rules to describe and order a complex state of affairs, i.e., the conduct of political campaigns. This tension should give regulators pause, but it should not cause them to abandon hope for crafting a more realistic framework for campaign finance regulation. A good first step would be to develop a procedure to enable organizations already operating as part of networks or contemplating a network arrangement to seek a determination from the

FEC as to their classification before a campaign is in full swing, rather than relying on an audit process after the fact.[152]

152. As was noted earlier, many related organizations already seek a ruling of this kind from the FEC to determine whether the groups will be considered "affiliated" for purposes of the contribution limits. *See supra* notes 118-122 and accompanying text. To judge by the Advisory Opinions issued by the FEC in recent decades, few groups request a ruling as to their classification as political committees. On the relative competence of the IRS as compared with the FEC to regulate political activity of 527 organizations, see Lloyd H. Mayer, *The Much Maligned and Institutional Choice*, 87 B.U. L. REV. 625 (2007).