2024

Nonprofit Corporations & Politics: The Entity/Coordination Tension

Lloyd H. Mayer

Nonprofit Corporations & Politics: The Entity/Coordination Tension

Lloyd Hitoshi Mayer[*]

Federal tax law treats separate nonprofit corporations as distinct legal entities for almost all purposes, in common with most other areas of law. With respect to political activity, this means that one nonprofit corporation's lobbying or election-related actions are generally not attributed to another nonprofit corporation. This is the case even if the two entities have overlapping or even identical boards of directors. It is also the case even if the two entities collaborate regarding their respective activities and share employees, facilities, outside vendors, and other resources, as long as the entities reasonably allocate the costs for those shared resources. In addition, longstanding Supreme Court precedents strongly indicate that the First Amendment requires Congress and the IRS to permit this overlapping, collaboration, and sharing.

That lack of attribution is important because different types of nonprofit corporations receive different tax benefits and face different restrictions on their political activity under federal tax law. For example, a charitable nonprofit corporation that is tax-exempt under Internal Revenue Code section 501(c)(3) and eligible to receive tax deductible charitable contributions is limited with respect to lobbying and is prohibited from supporting or opposing candidates for elected public office. In contrast, a social welfare nonprofit corporation that is tax-exempt under Internal Revenue Code section 501(c)(4) but not eligible to receive tax deductible charitable contributions can engage in unlimited lobbying related to its social welfare purpose and can also support or oppose candidates as long as doing so is not its primary activity. And a political organization that is tax-exempt under Internal Revenue Code section 527, although only with respect to contributions received for political purposes, can engage entirely in supporting or opposing candidates. Yet a section 501(c)(3) organization, a section 501(c)(4) organization, and a section 527 organization can have overlapping boards, collaborate about their respective activities, and share resources, as long as they reasonably allocate their expenses and avoid spending directly on political activity that is limited or prohibited given their specific exemption category. There are therefore many groups of nonprofit organizations that consist of affiliated organizations with different federal tax categorizations but a common political purpose.

This lack of attribution is in tension with an aspect of federal election law and the election laws of many states. Under these election laws, if an individual or entity coordinates its activities with a candidate committee or political party, that activity is considered a contribution to the benefitted candidate or party. This result means

[*] Professor, Notre Dame Law School. I am very grateful for the opportunity to participate in this symposium, for the comments and questions from its participants, and for the research assistance of Nathaniel Barry.

that any spending on that activity is subject to existing source and amount limits on such contributions. In effect, the activity is attributed to the candidate or party because of the coordination even though the candidate or party does not legally control that activity. This is a common sense approach because if it did not exist it would be easy for individuals and other entities to evade contribution limits by engaging in activities not only designed to benefit a candidate or party but done at the specific request of that candidate or party. This reasoning also provides the basis for Supreme Court decisions concluding that this approach is constitutional under the First Amendment.

This essay explores the tension created by federal tax law's respect for separate entity status on one hand and the coordination rules of federal and state election law on the other hand. It also revisits whether, given this tension, the Supreme Court was correct to constitutionalize the former approach when it comes to tax-exempt nonprofits. I conclude that whether this difference is appropriate as a policy matter depends on the policy justification for the political activity limits on section 501(c)(3) charities. If the only such justification is to support the broader federal tax policy prohibiting the deduction of expenditures for political activities, then the lack of attribution is appropriate. If instead the justification is that political activity is inconsistent with status as a section 501(c)(3) charity for broader reasons, then there is a policy argument for attributing the political activity of noncharitable nonprofit corporations to closely affiliated charitable nonprofit corporations and so subjecting that activity to the section 501(c)(3) limits. I also conclude that this latter justification could provide a basis for revisiting the Supreme Court precedents that bar this attribution as a constitutional matter.

I. INTRODUCTION

On August 14, 2023, the Ways and Means Committee of the U.S. House of Representatives issued a "Request for Information" (the Request) regarding political activities of tax-exempt

organizations.[1] The Request focused specifically on charitable nonprofits that are tax-exempt under section 501(c)(3) and social welfare organizations that are tax-exempt under section 501(c)(4), including asking whether there were examples of such organizations that violated the existing federal tax limits on their political activity and whether Internal Revenue Service guidance regarding those limits should be updated.[2] The Request also stated that "we are concerned about the political activities that 501(c)(3) organizations may be engaging in, the relationships between 501(c)(3) and 501(c)(4) organizations, and the role of Super PACS in this financial ecosystem."[3] The term "Super PAC" refers to an entity that is registered as a political committee under the applicable election law, is tax-exempt under section 527 as a political organization, and engages in certain election-related activities, but does so independently of any candidate or party and so can receive contributions from any domestic source and in any amount.[4] The Request generated a dozen responses from advocacy groups, law firms, and scholars.[5] It also led to a hearing by the Subcommittee on Oversight on December 15, 2023 titled "Growth of the Tax-Exempt Sector and the Impact on the American Political Landscape."[6]

There is no doubt that tax-exempt organizations spend significant amounts on political activity.[7] And as suggested by the House Ways and Means Committee's Request, often different types of tax-exempt organizations—section 501(c)(3) charities, section 501(c)(4), (5), and (6) noncharitable nonprofits, and

---

1 H.R. COMM. ON WAYS AND MEANS, REQUEST FOR INFO.: UNDERSTANDING AND EXAMINING THE POLITICAL ACTIVITIES OF TAX-EXEMPT ORGANIZATIONS UNDER SECTION 501 OF THE INTERNAL REVENUE CODE (2023), https://perma.cc/XQ4D-N7F2.

2 *Id.* at 2–3. All section references are to the Internal Revenue Code, 26 U.S.C., unless otherwise noted.

3 *Id.* at 7.

4 *See Registering as a Super PAC*, FEDERAL ELECTION COMMISSION, https://perma.cc/NC7F-AGEU; *see also Setting up and Operating a Federal Super PAC*, VENABLE LLP, https://perma.cc/QGG2-58B3.

5 In the interests of full disclosure, note that the author was part of a group of tax-exempt organization scholars who submitted a response. *See* Ellen P. Aprill, Roger Colinvaux, Brian D. Galle, Philip Hackney & Lloyd Hitoshi Mayer, *Response by Tax-Exempt Organization Scholars to Request for Information* (2023), https://perma.cc/Z4H8-RM6M.

6 *See* H.R. COMM. ON WAYS AND MEANS, OVERSIGHT SUBCOMM. HEARING ON GROWTH OF THE TAX-EXEMPT SECTOR AND THE IMPACT ON THE AM. POL. LANDSCAPE, https://perma.cc/S2B2-92KT; H.R. COMM. ON WAYS AND MEANS CHAIRMAN JASON SMITH, CHAIRMAN SMITH AND OVERSIGHT SUBCOMM. CHAIRMAN SCHWEIKERT ANNOUNCE SUBCOMM. HEARING ON GROWTH OF THE TAX-EXEMPT SECTOR AND THE IMPACT ON THE AM. POL. LANDSCAPE (2023), https://perma.cc/G5GJ-6KEG.

7 *See infra* Part I.

section 527 political organizations—work closely together to pursue a common political agenda.[8] The few studies of such networks demonstrate they are common on both sides of the political aisle.[9] And as Roger Colinvaux, Brian Galle, and Miriam Galston have noted, the ability of these groups to work together creates synergies that allow the less tax-favored organizations to leverage the tax benefits enjoyed by their more tax-favored affiliates.[10]

This ability contrasts with the inability of individuals and other entities to work together with candidates and political parties under federal election law and many state election laws without becoming subject to the limits on contributions to candidates and political parties.[11] Under federal election law, if an individual or other entity "coordinates" their spending with a candidate or political party, then that spending is usually considered a contribution to the candidate or political party and so subject to the source and amount limits on such contributions.[12] Similar provisions exist in many, but not all, state election laws.[13] While the definition of coordination is complex and varies by jurisdiction, the effect of the coordination rules is to attribute spending by an individual or entity to a candidate or political party if there are certain connections between that individual or entity and the candidate or party, even if those connections fall well short of legal control by the candidate or party over that spending.[14]

This essay contrasts the federal tax law non-attribution rule with the election law attribution rule and considers whether this difference is supported either by the different policy goals of these two bodies of law or constitutional considerations. It concludes

---

8 *See* H.R. COMM. ON WAYS AND MEANS, *supra* note 1, at 7.

9 *See, e.g.*, Stephen R. Weissman & Kara D. Ryan, *Nonprofit Interest Groups' Election Activities and Federal Campaign Finance Policy,* 54 EXEMPT ORG. TAX REV. 21 (2006).

10 *See* Roger Colinvaux, *Political Activity Limits and Tax Exemption: A Gordian's Knot,* 34 VA. TAX REV. 1, 26 (2014); *see also* Brian Galle, *Charities in Politics: A Reappraisal,* 54 WM. & MARY L. REV. 1561, 1607–09 (2013); Miriam Galston, *Campaign Speech and Contextual Analysis,* 6 FIRST AMEND. L. REV. 100, 109–13 (2007).

11 *See, e.g.*, Richard Briffault, *Coordination Reconsidered,* 113 COLUM. L. REV. SIDEBAR 88, 92–93 (2013); Brent Ferguson, *Beyond Coordination: Defining Indirect Campaign Contributions for the Super PAC Era,* 42 HASTINGS CONST. L.Q. 471, 483–87 (2015); Bradley A. Smith, *Super PACs and the Role of Coordination in Campaign Finance Law,* 49 WILLAMETTE L. REV. 603, 607–09 (2013); Jennifer Sutterer, *Closing Loopholes for Coordination: Proposed Reforms to Federal Campaign Finance Laws,* 49 VA. J. L. & POL. 33, 44–55 (2023).

12 *See Coordinated Communications*, FED. ELECTION COMM., https://perma.cc/PST2-AL3D; Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War Over Coordination*, 9 DUKE J. CONST. L. & PUB. POL'Y 1, 16 (2014).

13 Ferguson, *supra* note 11, at 485–87; Sutterer, *supra* note 11, at 52–55.

14 *See* FEC, *supra* note 12; Briffault, *supra* note 11, at 92; Ferguson, *supra* note 11, at 483–86; Sutterer, *supra* note 11, at 46–49, 52–55.

that the answers to these questions turn on the policy justification for the federal tax rule. One option, apparently assumed by the Supreme Court and embraced by some scholars, is that the only justification is preventing avoidance of the general federal tax rule denying a tax deduction for spending on political activity. If that is the only justification, that rule is fully vindicated by requiring section 501(c)(3) charities to limit the spending of their funds—including tax-deductible charitable contributions they receive—to activities other than political ones. It is also consistent with this rule to permit those charities to be closely affiliated with tax-exempt noncharitable nonprofits that are not eligible to receive tax-deductible charitable contributions but can engage in political activities. That is because this separation of funds is sufficient to keep section 501(c)(3) charities from being used as a vehicle for spending tax-deductible funds on political activity and so undermining the general rule.

The other justification option, suggested by the early history of the political activity limits on tax-exempt charities and embraced by some scholars, is that political activity is inconsistent with the charitable character that federal tax law supports through section 501(c)(3) and other tax provisions benefitting charities. If this justification is the correct one, then there is both a policy basis for expanding the federal tax law limits on political activity by charities to reach political activity conducted by closely affiliated noncharitable nonprofit organizations—effectively attributing that political activity to the charitable nonprofit organization—and a related argument for concluding that expansion is constitutional. However, the constitutional argument will only be successful if the Supreme Court were to reject its current, although contested, view that non-attribution in this federal tax context is constitutionally required.

II. EXTENT OF TAX-EXEMPT NONPROFIT POLITICAL INVOLVEMENT

For the 2022 federal election cycle, Open Secrets reported that section 501(c)(4) social welfare organizations, section 501(c)(5) labor unions, and section 501(c)(6) trade associations disclosed spending over $36 million on federal elections, while Super PACs disclosed spending almost $1.4 billion.[15] Other entities (individuals, taxable corporations, etc.) disclosed spending approximately $630 million.[16] These figures reflect spending done

[15] *Outside Spending*, OPEN SECRETS (2022), https://perma.cc/T6MK-EWCB.
[16] *Id.*

independently of candidates and political parties and do not include contributions to candidates and political parties; by comparison, federal candidates and political parties reported spending approximately $5.9 billion during the same election cycle.[17] The largest Super PACs, such as the Senate Majority PAC, are associated with close allies of elected officials, but other significant Super PACs, such as the Club for Growth ($81 million spent in the 2022 election cycle) and Americans for Prosperity ($69 million spent), appear to be more independent.[18] These figures do not include disclosed spending on lobbying. According to data also compiled by Open Secrets, in calendar year 2022, many of the largest such spenders were non-charitable, tax-exempt nonprofits, including the section 501(c)(6) National Association of Realtors (almost $82 million) and the section 501(c)(6) U.S. Chamber of Commerce (approximately $80 million).[19] These various figures are incomplete for several reasons, including because they are limited to spending related to elections or lobbying that is required to be reported and publicly disclosed, as well as because they do not include spending related to state and local elections or lobbying.[20]

All the largest nonprofit political spenders other than the entities closely associated with elected officials are affiliated with other types of tax-exempt organizations. The amount reported as spent by "Club for Growth" is the aggregate of spending by two Super PACs (Club for Growth Action and School Freedom Fund) affiliated with the Club for Growth, a section 501(c)(4) nonprofit corporation.[21] The amount reported as spent by "Americans for Prosperity" is the amount spent by a Super PAC (Americans for Prosperity Action) affiliated with both Americans for Prosperity, a section 501(c)(4) nonprofit corporation, and Americans for Prosperity Foundation, a section 501(c)(3) nonprofit corporation.[22] The

---

17 Press Release, *Statistical Summary of 24-Month Campaign Activity of the 2021-2022 Election Cycle*, FEC (Apr. 3, 2023), https://perma.cc/8TPB-8GAK.

18 *See 2022 Outside Spending, by Group*, OPEN SECRETS, https://perma.cc/9J74-99DG.

19 *See Lobbying, Top Spenders*, OPEN SECRETS (2022), https://perma.cc/82SD-LWXS.

20 *See Methodology*, OPEN SECRETS, https://perma.cc/G2FB-JXEE; Taylor Giorno & Pete Quist, *Total Cost of 2022 State and Federal Elections Projected to Exceed $16.7 Billion*, OPEN SECRETS NEWS (Nov. 3, 2022, 12:55 PM), https://perma.cc/V349-AZNM (estimating that state candidates, political committees, and ballot measure committees raised $7.8 billion during the 2022 election cycle).

21 *See Club for Growth Outside Spending*, OPEN SECRETS (2022), https://perma.cc/B2H7-YNN6; Club for Growth, Form 990, at 1, 42 (Schedule R, Part II) (2022), https://perma.cc/6957-YT4W.

22 *See Americans for Prosperity Outside Spending 2022*, OPEN SECRETS (2022), https://perma.cc/973J-JUEN; Americans for Prosperity, Form 990, at 1, 48 (Schedule R, Part II) (2021), https://perma.cc/RTL4-D3S7.

National Association of Realtors has eight affiliated tax-exempt nonprofits, including three 501(c)(3)s and three 527s.[23] And the U.S. Chamber of Commerce has two affiliated section 501(c)(3) organizations.[24] This demonstrates that having affiliated entities that enjoy greater tax benefits, but also greater restrictions on political activity, is common, even if this pattern is not necessarily replicated for all or even most smaller nonprofits engaged in political activity.

Such affiliations do not necessarily mean that the spending by, for example, a section 501(c)(3) organization is designed to enhance the political activity of its less restrained affiliates. For example, one of the 501(c)(3)s associated with the National Association of Realtors is a small foundation that focuses on funding international educational efforts outside of the United States.[25] By contrast, the U.S. Chamber of Commerce Foundation has as one of its activities a Corporate Citizenship Center that it describes as "a leading resource for educating the public on how businesses can and do make a difference by solving the complex challenges facing society," which could easily encompass communications that enhance the Chamber's pro-business lobbying and election-related efforts.[26] And one need look no closer than the chief executive officer position to see the close affiliation between the 501(c)(6) Chamber and the 501(c)(3) Foundation, as the same person serves in that role for both organizations.[27] And this strategy is not reserved for the largest nonprofits, as illustrated by advice from the California Association of Nonprofits.[28]

III. CURRENT LAW

A. Federal Tax Law

Federal tax law has a long history of permitting taxpayers to create separate legal entities that will be treated as separate taxpayers even if the first taxpayer controls that entity, as long as

---

[23] *See* Nat'l Ass'n of Realtors, Form 990, at 1, 89 (Schedule R, Part II) (2022), https://perma.cc/4R3X-LNNA.

[24] *See* Chamber of Commerce of the USA, Form 990, at 1, 41 (Schedule R, Part II) (2022), https://perma.cc/83LY-X88J.

[25] *See Reaume Foundation*, NAT'L ASS'N OF REALTORS, https://perma.cc/7JMZ-44YH.

[26] *See* U.S. Chamber of Commerce Foundation, Form 990, at 2 (2022), https://perma.cc/2XYA-HQX7.

[27] *See id.* at 7; Chamber of Commerce of the USA, *supra* note 24, at 7.

[28] *See What Should Nonprofits Know About 501(c)(4) organizations? Especially in an Election Year?*, CAL. ASS'N OF NONPROFITS, https://perma.cc/WV59-LMGS (explaining why a section 501(c)(3) organization may want to create a section 501(c)(4) affiliate).

for financial and legal purposes the separate taxpayer status of the legal entity is respected. The Supreme Court upheld this principle in 1943 in the face of a taxpayer trying to argue against that separate status.[29] As the Court noted, there are exceptions to this principal in the tax context where the separate legal status is "a sham or unreal" and in non-tax contexts when a particular legislative purpose indicates the separate legal status should be disregarded.[30] And Congress allows taxpayers to choose to disregard separate legal status for federal tax purposes in a variety of contexts, including by allowing taxpayers to choose "pass-through" business forms such as the S corporation and partnership that allow income and expenses to be attributed to owners, and by allowing corporations that are closely affiliated, as a legal matter, to file consolidated tax returns.[31] Congress has also given the IRS broad authority to reallocate income, deductions, credits, and allowances between otherwise separate legal entities if they have common control and such reallocation is necessary to prevent tax evasion or to clearly reflect income.[32] Nevertheless, as a general matter federal tax law allows taxpayers to treat separate legal entities as separate taxpayers even when those entities share common control or otherwise are closely affiliated, as long as they respect the financial and legal formalities of separate status.[33]

As a result, under federal tax law, as well as more generally, the actions of one entity usually may only be attributed to another entity if certain legal relationships exist. The most obvious such situation is when the two entities are in a principal-agent relationship, such that the actions of the agent are attributable to the principal.[34] And of course artificial entities, including nonprofit corporations, act through natural persons such as their

---

29 Moline Properties v. Comm'r, 319 U.S. 436 (1943).

30 *Id.* at 439.

31 *See* Stephen B. Land, *Entity Identity: The Taxation of Quasi-Separate Enterprises,* 63 TAX LAW. 99, 100 (2009); Martin J. McMahon, Jr., *Understanding Consolidated Returns,* 12 FLA. TAX REV. 125 (2012); Walter D. Schwidetzky, *Integrating Subchapters K and S – Just Do It,* 62 TAX LAW. 749, 751–52 (2009).

32 26 U.S.C. § 482; *see also* 26 U.S.C. § 269A (allowing the IRS to reallocate income, etc. between separate entities in certain specific circumstances to prevent tax evasion).

33 This federal tax treatment is consistent with state nonprofit corporation law, which is usually based on state (for-profit) corporation law that treats separate corporations as distinct entities that are legally and financially separate from their owners and other legal entities for most purposes, absent a failure to abide by corporate formalities. *See* Eric C. Chaffee, *Collaboration Theory: A Theory of the Charitable Tax-Exempt Nonprofit Corporation,* 49 U.C.D. L. REV. 1719, 1729–34 (2016).

34 *See generally* RESTATEMENT (THIRD) OF AGENCY (AM. L. INST. 2006).

employees and so the actions or liabilities of those employees as employees are usually attributed to their employer entity.[35]

This separate entity treatment extends to the limitations on tax-exempt nonprofit corporations with respect to political activity. A section 501(c)(3) organization is limited with respect to lobbying and prohibited from supporting or opposing candidates in any way (the latter activity is referred to as "political campaign intervention").[36] In contrast several other types of section 501(c) organizations are permitted to lobby without limit if the lobbying furthers their exempt purpose and to engage in political campaign intervention as long as other activity furthering their exempt purpose (which can be lobbying) remains their primary activity.[37] Finally, section 527 political organizations can engage entirely in political campaign intervention and in fact their tax exemption only extends to contributions dedicated to such activity.[38] And these tax classifications matter not only with respect to limits on political activity but also with respect to eligibility to receive tax-deductible charitable contributions, as only section 501(c)(3) charities generally enjoying that eligibility.[39]

---

[35] *See generally* Joachim Dietrich & Iain Field, *Statute and Theories of Vicarious Liability,* 43 MELB. U. L. REV. 515 (2019).

[36] *See* 26 U.S.C. §§ 170(c)(2), 501(c)(3).

[37] *See* I.R.S. Gen. Couns. Mem. 34,233 (Dec. 30, 1969); T.D. 6391, 1959-2 C.B. 139, 145–46 (reaching this conclusion with respect to section 501(c)(4) organizations); Ellen P. Aprill, *A Case Study of Legislation vs. Regulation: Defining Political Campaign Intervention Under Federal Tax Law,* 63 DUKE L.J. 1635, 1664–65 (2014); Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities,* 71 TEX. L. REV. 1269, 1276–77 (1993); Judith E. Kindell & John Francis Reilly, *Election Year Issues,* EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FY2002, at 340 n.56 (2001), https://perma.cc/QV5Z-ELD4 [hereinafter Kindell & Reilly, *Election Year Issues*]; Judith E. Kindell & John Francis Reilly, *Lobbying Issues, in* EXEMPT ORGANIZATIONS – TECHNICAL INSTRUCTION PROGRAM FOR FY 1997, at 236–37 (1997), https://perma.cc/VVM6-NUM3 [hereinafter, Kindell & Reilly, *Lobbying Issues*]; John Francis Reilly & Barbara A. Braig Allen, *Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations, in* EXEMPT ORGANIZATIONS – TECHNICAL INSTRUCTION PROGRAM FOR FY 2003, at L-1 to L-3 (2002), https://perma.cc/QXL7-AETG.

[38] *See* 26 U.S.C. § 527.

[39] *See* 26 U.S.C. § 170(a)(1), (c)(2). Certain veterans' organizations, cemetery companies, fraternal organizations (for gifts dedicated exclusively for charitable, religious, and similar purposes), and government entities (for gifts dedicated exclusively to public purposes) are also eligible to receive deductible charitable contributions. *See id.* § 170(c)(1), (3), (4). Contributions to section 501(c)(3) organizations are also generally deductible for gift and estate tax purposes, while contributions to section 501(c)(4), 501(c)(5), 501(c)(6), and 527 organizations are generally not subject to gift tax (but are not deductible or exempt for estate tax purposes). *See* 26 U.S.C. §§ 2055(a)(2), 2106(a)(2)(A)(ii), 2501(a)(4), (6), 2522(a)(2), 2522(b)(2).

Yet the IRS has a longstanding policy that predates the relevant Supreme Court decisions in this area discussed below of allowing a section 501(c)(3) organization to be closely affiliated with a section 501(c)(4), (5), or (6) organization, which can in turn be closely affiliated with a section 527 political organization.[40] This close affiliation can include overlapping governing body members, shared employees, facilities and other resources, and similar names.[41] The only requirements imposed by the IRS are that any expenses be reasonably allocated between the organizations, that no organization funds be used for activity that the organization would be prohibited from paying for directly, and that a section 501(c)(3) organization cannot be directly affiliated with a section 527 political organization.[42] If the organizations satisfy these requirements, the IRS will not attribute the activities of one organization, including political activities, to another organization.[43]

B. Federal & State Election Law

In contrast, under federal election and some state election laws, there is a significant attribution rule. Even when legal control does not exist, if an individual or other entity "coordinates" its spending with a candidate or political party, then the entity is usually deemed to have made a contribution to the candidate or political party and so its spending in this regard becomes subject to the source and amount limits for contributions to the candidate or political party.[44] There is much debate over the appropriate definition of "coordination" for both policy and constitutional reasons.[45] But it is undisputed that coordination goes beyond formal legal relationships, such as principal-agent, to include informal arrangements and information sharing.

More specifically, current federal regulations state "[c]oordination means made in cooperation, consultation or concern with, or at the request or suggestion of."[46] For communications paid for by a person other than a candidate or political party, the

---

40 *See* Ward L. Thomas & Judith E. Kindell, *Affiliations Among Political, Lobbying and Educational Organizations,* EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FY2000, at 255 (1999), https://perma.cc/G9X9-W37J.

41 *Id.* at 258 (citing Center on Corporate Responsibility, Inc. v. Schultz, 368 F.Supp. 863 (D.D.C. 1973)).

42 *Id.* at 259–60.

43 *Id.*

44 *See supra* notes 11–12 and accompanying text.

45 *See, e.g.*, *supra* note 11.

46 26 C.F.R. § 109.20.

regulations illustrate specific conduct that constitutes coordination. For example, this conduct includes if that person who is paying suggests the communication and the candidate or party assents to that suggestion or, under certain circumstances, that person and the candidate or party share a common vendor.[47] Some states have similarly broad definitions of coordination for election law purposes.[48]

IV. ORGANIZATIONAL LAW & CONSTITUTIONAL LAW

Understanding both why artificial entities are treated as separate entities for most purposes and why sometimes they are not, especially in the political activity context, requires consideration of two bodies of law: organizational law and constitutional law.

A. Organizational Law

At its core, organizational law addresses the extent to which artificial entities such as nonprofit corporations should have the facets of legal personality that we attribute to natural persons separate and apart from any other person, natural or artificial.[49] Paul Miller describes those facets as: "legal agency; entitlements and burdens premised on possession of recognized interests; and legal status."[50] An implicit assumption of this approach is that each artificial entity is a distinct, nonreducible person, as is the case with natural persons. Of course, both natural and artificial persons may be grouped together for certain legal purposes. For example, natural persons may be grouped into married couples, households, associations, or partnerships. And as detailed in this Section, the actions, characteristics, or liability of one person—natural or artificial—may be legally attributed to another person in some situations. But in general the law starts from the position that, similar to natural persons, each artificial entity is a single, indivisible person, distinct from all other persons.

More specifically and as already noted, federal tax law permits persons to choose to be grouped together for certain legal

---

47 26 C.F.R. § 109.21(d)(1)(ii), (4).

48 *See, e.g.*, CAL. ELEC. CODE § 18225.7 (request, suggestion, direction, corporation, or consultation); ME. REV. STAT. tit. 21-A, § 1125 (cooperation or consultation).

49 *See generally* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 391–93 (2000).

50 PAUL B. MILLER, *The Concept of Personality in Private Law in* INTERSTITIAL PRIVATE LAW (Samual J. Bray, John C.P. Goldberg, Paul B. Miller & Henry E. Smith eds., forthcoming) (manuscript at 4), https://perma.cc/JE9N-7EKN.

purposes.[51] But it is notable that such groupings are usually permitted but not legally required.[52] With respect to attribution of actions between distinct persons, for corporations this tends to only occur either when a formal legal relationship such as principal-agent exists[53] or when the veil piercing doctrine is applicable with respect to financial liability.[54] As Jonathan Macey and Joshua Mitts have demonstrated, courts usually apply that doctrine only when separate status is contrary to a legislative or regulatory purpose, facilitates fraud or other dishonesty, or undermines bankruptcy administration (which arguably is a specific application of the first situation).[55] In addition, Mariana Pargendler has identified a variation on veil piercing, which she labelled "veil peeking," where a corporation's actions are attributed to managers or owners for regulatory liability purposes.[56] She argues that veil peeking should occur if treating each corporation as a distinct entity from its managers and owners for regulatory purposes ("regulatory partitioning") would "frustrate the purpose of the regulatory scheme in question."[57] These broad conclusions suggest that in the narrow but important area of political activity, the actions of one person, natural or artificial, should only be attributed to another person if certain specific conditions exist: a legal relationship such as principal-agent; a legislative or regulatory purpose that would be frustrated absent attribution; or if required, to prevent fraud.

B. Constitutional Law

Of course, even if a sufficient policy justification exists for attributing the actions of one person to another person, that attribution will be barred if it runs afoul of a constitutional protection. It is therefore also important for the purposes of this essay to determine the extent to which artificial entities and particularly nonprofit corporations enjoy, and should enjoy, the legal

---

51 *See supra* note 31 and accompanying text.

52 *See id.*

53 *See* AM. L. INST., *supra* note 34 and accompanying text.

54 *See generally* Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479 (2001).

55 Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil,* 100 CORNELL L. REV. 99 (2014).

56 Mariana Pargendler, *Veil Peeking: The Corporation as a Nexus for Regulation,* 169 U. PA. L. REV. 717, 719–21 (2021).

57 *Id.* at 724.

entitlements embodied in rights guaranteed by the U.S. Constitution and in particular with respect to political activity. In this regard, the Supreme Court has established some clear markers, although not without controversy, even among the Justices.

First, the Supreme Court's decision in *Citizens United*[58] solidified the principle that corporations, including nonprofit corporations such as the one involved in that case, enjoy the full protection of the First Amendment's free speech clause when it comes to their political speech, albeit over a dissent by Justice Stevens, joined by three other Justices. The principle was not completely novel in that the Supreme Court had previously held that the free speech clause protects the rights of hearers as well as speakers.[59] Furthermore, as Adam Winkler has documented, *Citizens United* is also part of a long line of Supreme Court decisions extending constitutional protections to corporations that many previously thought only applied to natural persons.[60] Any attempt to attribute political speech between persons, natural or artificial, that burdens such speech must therefore overcome any constitutional objections based on the First Amendment.

Second, when the Supreme Court upheld the congressionally imposed limitation on lobbying by section 501(c)(3) organizations as against a First Amendment free speech challenge in *Regan v. Taxation with Representation*,[61] Justice Blackmun in concurrence stated he only agreed with the Court's conclusion because the IRS permitted a section 501(c)(3) organization to easily create and maintain a closely affiliated section 501(c)(4) organization that could (with non-deductible funds) engage in unlimited lobbying. His reasoning was that under the First Amendment, Congress and the IRS could do only what was necessary "to ensure that no tax-deductible contributions are used to pay for substantial lobbying."[62] In his view, prohibiting a section 501(c)(3) organization from having a closely affiliated section 501(c)(4) organization (which was not eligible to receive tax-deductible contributions but

---

[58] 558 U.S. 310, 342–43, 423–25 (Stevens, J., dissenting) (2010) (concluding that under the First Amendment, Congress has more leeway to regulate political speech by corporations as opposed to speech by natural persons).

[59] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756–57 (1976) (citing cases).

[60] *See generally* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018).

[61] 461 U.S. 540, 552–54 (Blackmun, J., concurring) (1983). The majority also mentioned the IRS' treatment of 501(c)(3) and 501(c)(4) affiliates, but only in a footnote. *Id.* at 544 n.6.

[62] *Id.* at 553 (Blackmun, J., concurring) (citations omitted).

was able to engage in substantial lobbying) would go beyond what was necessary to accomplish this goal and so was not constitutionally permitted.[63] He therefore stated he supported the majority's decision only because the IRS apparently did permit such close affiliations, subject only to the requirement that the two organizations "be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying."[64]

Later Supreme Court decisions endorsed Justice Blackmun's approach.[65] That said, some Justices disagreed with it, arguing that the receipt of public funds (including presumably in the form of tax benefits) had the effect of subsidizing all speech by the recipient and therefore Congress could constitutionally impose any speech restriction that was rationally related to the purpose of the public funding.[66] More recently, Justices Scalia and Thomas have also rejected this reasoning, with Justice Scalia arguing in a 2013 dissent that "[t]oday's opinion stresses the fact that these nonprofits were permitted to use a separate § 501(c)(4) affiliated for their lobbying – but that fact . . . was entirely nonessential to the Court's holding [in *Taxation with Representation*]."[67] Any attempt to alter the existing lack of attribution of political activity, or at least political speech, between affiliated tax-exempt nonprofit corporations must therefore also address the line of First Amendment cases endorsing Justice Blackmun's position.

Third and in contrast, the Supreme Court has repeatedly upheld as constitutional the coordination rules found in election law, albeit not without some caveats and disagreement among the Justices. In *Buckley v. Valeo*,[68] the Court read federal election law as "operat[ing] to treat all expenditures placed in cooperation with or with the consent of a candidate . . . as contributions" and so subject to contribution limits. It indicated that this reading was constitutional because it "prevent[s] attempts to circumvent [federal election law] through prearranged or coordinated

---

63 *Id.*

64 *Id.* (citations omitted).

65 *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 198 (1991); FCC v. League of Women Voters, 468 U.S. 364, 399–400 (1984).

66 *See League of Women Voters*, 468 U.S. at 406–07 (Rehnquist, J., dissenting) (joined by two other justices).

67 Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, 133 S.Ct. 2321, 2334 (Scalia, J., dissenting) (joined by Justice Thomas) (citations omitted) (2013) [hereinafter *AOSI*]; *see also* Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, 140 S.Ct. 2082, 2090 (Thomas, J., concurring) (emphasizing his continued support for the position taken in Justice Scalia's *AOSI* dissent) (2020).

68 424 U.S. 1, 46–47 n.53 (1976); *see also id.* at 78 (repeating this conclusion).

expenditures amounting to disguised contributions."[69] The rationale for upholding the limits on contributions as constitutional was those limits prevent corruption and the appearance of corruption and so were "closely drawn" to match a "sufficiently important interest," as required under the First Amendment given the impact of those limits on speech.[70] In later decisions, the Court clarified that this coordination rule extended to political parties coordinating with candidates, but that coordination could not be presumed as political parties could act independently of candidates, albeit with some disagreement on these points among the Justices.[71] And in *McConnell v. FEC*,[72] the Court upheld as constitutional a congressional revision of the definition of coordination that explicitly stated coordination did not necessarily "require agreement or formal collaboration," although again not unanimously. So under existing Supreme Court precedent, the attribution of expenditures from other entities to candidates and political parties is permitted constitutionally.

V. RESOLVING THE ENTITY/COORDINATION TENSION

There are therefore two issues when it comes to determining if the separate entity approach of federal tax law on one hand and the coordination approach of federal election law and the election laws of some states on the other are in tension or can be reconciled. The first issue is whether organizational law, and specifically the policy goals underlying these different regulatory schemes, provides a rationale for this differing treatment. The second issue is whether constitutional law, and specifically the

---

69 *Id.* at 47.

70 *Id.* at 25; *see also id.* at 26–27 (concluding contribution limits satisfied this constitutional standard); McCutcheon v. FEC, 572 U.S. 185, 199 (2014) (concluding that preventing quid pro quo corruption or its appearance is a sufficiently important governmental interest when considering whether contribution limits survive First Amendment challenge, such that the limits will survive that challenge if they fit that that objective closely).

71 *See* FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 437 (upholding application of coordination rule to political party expenditures), 467–69 (Thomas, J., dissenting) (joined by three other justices) (arguing the existing definition of coordination and the application of the coordination rule were both unconstitutional) (2001); Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 619–23 (Breyer, J., plurality), 626–30 (Kennedy, J., dissenting) (joined by two other Justices) (arguing that coordination rule should not apply to political parties), 631 (Thomas, J., dissenting) (joined by same two other Justices) (same), 648 (Stevens, J., dissenting) (joined by one other Justice) (arguing that all political party spending to support a particular candidate should be considered coordinated and so a contribution to the candidate's campaign) (1996).

72 540 U.S. 93, 221–23, 273 (Thomas, J., dissenting) (2004).

First Amendment's protection of speech, requires this differing treatment.

A. Do Different Policy Goals Justify Different Treatment?

As noted earlier, organizational law permits the actions of one person, and particularly those of corporations, to be attributed to other persons for financial or regulatory liability purposes under only a limited set of circumstances.[73] Of those circumstances, the only applicable one for purposes of this essay is whether the policy goals of the federal tax law rules relating to political activity and the policy goals of federal and state election law justify no attribution for the former and attribution for the latter.

Turning first to federal tax law and its varying limitations on political activity depending on tax exemption category, it unfortunately is unclear what specific goals Congress had in mind when it imposed the limits on lobbying and the prohibition on political campaign intervention by section 501(c)(3) organizations.[74] For the older lobbying limitation, which Congress enacted in 1934, the limited legislative history indicates some members were primarily concerned about lobbying that promoted the private interests of individuals as opposed to lobbying generally but were unable to craft statutory language that did not reach all lobbying.[75] But there are also indications that other members felt that lobbying was somehow inconsistent with charitable status under the predecessor to section 501(c)(3), a sentiment that appears to have driven earlier restrictions on lobbying imposed by the Treasury Department and a federal appellate court.[76]

---

73 *See supra* notes 55–57 and accompanying text.

74 *See* JOHN SIMON, HARVEY DALE & LAURA CHISOLM, *The Federal Tax Treatment of Charitable Organizations, in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 267, 285 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006) ("[i]t is generally agreed that no cogent, consistent rationale for the various restrictions on political activity in § 501(c)(3) and related provisions can be unearthed in the legislative record of their enactment.").

75 *See* 78 CONG. REC. 5861, 5959 (1934) (statement of Senator David Reed); Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws,* 69 BROOK. L. REV. 1, 16–23 (2003) (detailing Senator Reed's long running battle with the National Economy League over veteran's benefits and his citing of it as the prime example for why the lobbying restriction on charities should be enacted); William J. Lehrfeld, *The Taxation of Ideology,* 19 CATH. U. L. REV. 50, 63–64 (1969) (reaching the same conclusion).

76 *See* T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919) (regulation stating that disseminating controversial or partisan propaganda was not "educational" within the meaning of

Similarly, the reasons for the 1954 prohibition on political campaign intervention by section 501(c)(3) organizations are also obscure, in large part because then-Senator Lyndon Johnson added the prohibition to soon-to-be-enacted tax legislation on the floor of the Senate with no formal explanation or legislative history.[77] The IRS identified at least four possible theories for the prohibition's enactment, ultimately concluding "[p]erhaps all four are true; nothing is certain."[78] Scholars have tried after the fact to justify the prohibition, but their views have also varied. Some scholars have relied exclusively or primarily on the general tax rule that expenditures for lobbying and political campaign intervention are not deductible, reasoning that allowing a section 501(c)(3) organization, which is eligible to receive tax-deductible charitable contributions, to engage in those activities would then undermine that rule.[79] Other scholars have focused on various reasons for considering political activity, and particularly political campaign intervention, as inconsistent with and even harmful to the aspects of charitable organizations that section 501(c)(3) and other relevant tax provisions seek to incentivize.[80]

More specifically, John Simon, Harvey Dale, and Laura Chisolm identified four arguments for why both lobbying and political campaign intervention are inconsistent with being a charity: (1) political activity is "inherently inconsistent with the historical definition of charity"; (2) political activity diverts the attention of a charity from its charitable mission; (3) political activity by charities is socially inefficient; and (4) political activity by charities

---

the charitable contribution deduction statute); Slee v. Comm'r, 42 F.2d 184, 185 (2d Cir. 1930) (concluding lobbying was inconsistent with eligibility to receive deductible charitable contributions); Kindell & Reilly, *Lobbying Issues, supra* note 37, at 261 (opining that Congress may have enacted the lobbying limitation "simply because there was a general sentiment that lobbying by charities should be restricted").

77 *See, e.g.*, Houck, *supra* note 75, at 28–29 (attributing the prohibition to then-Senator Lyndon B. Johnson's desire to stop certain charities from opposing his re-election); Ann M. Murphy, *Campaign Signs and the Collection Plate,* 1 PITT TAX REV. 35, 54, 62 (2003) (arguing that the prohibition arose from a longstanding suspicion of political activities by charities that was strengthened by the McCarthy paranoia of the time, not primarily because of Senator Johnson's desire to stop his political opponents).

78 Kindell & Reilly, *Election Year Issues, supra* note 37, at 448–51 (including three variations of the view that the prohibition was a reaction by Senator Johnson to his political opponents and an unrelated theory positing that the prohibition was a successful attempt to preempt a much more restrictive limitation on the activities of charities).

79 *See, e.g.*, Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction,* 42 B.C. L. REV. 843, 844 (2001); Lloyd Hitoshi Mayer, *Nonprofits, Taxes, and Speech,* 56 LOYOLA L.A. L. REV. 1291, 1345–46 (2023).

80 *See, e.g.*, Galle, *supra* note 10, at 1591, 1625–27; SIMON, DALE & CHISOLM, *supra* note 74, at 286–87.

"simply amplifies the voices of those who are already heard."[81] At the same time, they acknowledged that there are reasonable counter-arguments to each of those points, which support instead the position that political activity is consistent with being a charity and indeed, at least in some instances, furthers the charity's charitable mission.[82] As a result, they did not ultimately take a position regarding which side should prevail with respect to any of these points.[83]

Similarly, Brian Galle has identified several ways that subsidizing political activity—whether lobbying or political campaign intervention—by permitting subsidized charities to engage in that activity may hurt charities.[84] These ways include by increasing the difficulty of overseeing charity managers, reducing the "warm glow" benefit that donors and other charity supporters enjoy, subsidizing activity that would have occurred anyway, and distracting managers from pursuit of the charitable mission.[85] At the same time, he was careful to note both that there is limited or no empirical support for at least some of these reasons and that there are counter-arguments (of varying strength) to some of the reasons that support permitting political activity by charities.[86] That said, he ultimately concludes that the concerns he identifies support limits on political activity by charities, even given the counter-arguments he considers.[87]

It is beyond the scope of this essay to resolve this dispute. For purposes of this essay, it is sufficient to note that the lack of definitive legislative history and consensus among later commentators, including the IRS, regarding the justification for the political activity limits on tax-exempt charitable organizations makes it difficult to determine if the lack of attribution for political activity between closely affiliated but separate tax-exempt nonprofit corporations is consistent with the policy goals for those rules. More specifically, if the justification is only to prevent the deductibility of expenditures for lobbying and political campaign intervention, then the lack of attribution does not undermine that goal. This is because by requiring reasonable allocation of expenses among affiliated tax-exempt organizations and prohibiting or sharply limiting the use of, for example, a section 501(c)(3) organization's

---

81 SIMON, DALE & CHISOLM, *supra* note 74, at 286–87.
82 *Id.*
83 *Id.*
84 *See* Galle, *supra* note 10, at 1590–91, 1624–25.
85 *Id.* at 1591–1607.
86 *Id.* at 1595–96, 1599–60, 1607–12.
87 *Id.* at 1612–13.

(possibly deductible charitable contribution) funds for political activity, the goal of preventing tax-deductible contributions from being used for political activities is fully vindicated.

But the limits on political activity might instead be based on a broader view that lobbying and political campaign intervention are inconsistent with the charitable status recognized and supported by section 501(c)(3), as may have been the position of some members of Congress and as suggested by some scholars.[88] In that situation, allowing a section 501(c)(3) organization to be closely affiliated with, for example, a politically active section 501(c)(4) organization through overlapping governance, shared resources, and even a shared name would undermine this goal. This is particularly true given that such close affiliation can lead to a section 501(c)(3) organization's activities enhancing the political activity of an affiliated section 501(c)(4) organization. For example, a 501(c)(3) could engage in a public education campaign on a particular issue that then makes the public more receptive to the 501(c)(4)'s later lobbying or political campaign intervention communications.

In contrast to the federal tax rules limiting political activity by section 501(c)(3) charitable organizations, the policy goal of federal and state election law coordination rules are well known and broadly accepted. These rules exist to prevent easy avoidance of election law rules limiting the sources and amounts of contributions to candidates and political parties, which limits are in turn designed to prevent corruption and the appearance of corruption.[89] Absent the coordination rules, an entity that was prohibited from making contributions or that had reached the maximum permitted contribution amount could effectively contribute more to a particular candidate or political party by agreeing to spend funds directly on expenses desired by the candidate. Existing constitutional law requires election law to allow such spending if done "independently" of candidates and political parties, based on the rationale that uncoordinated expenditures are less likely to help—and may in fact unintentionally hurt—the favored candidate or political party.[90] But the common sense reasoning is that spending done in coordination with the candidate or political party is essentially equivalent to giving the funds to the candidate or political party. This rationale appears sound (even though

---

88 *See supra* notes 76, 80–87 and accompanying text.

89 *See* Briffault, *supra* note 11, at 88–89; Smith, *supra* note 11, at 607–08; Sutterer, *supra* note 11, at 44–45; *supra* note 68 and accompanying text.

90 *See supra* notes 68–72 and accompanying text.

there are disputes over where the line is between independent and coordinated expenditures) and so supports the attribution of spending by separate entities, including nonprofit corporations, to the benefitted candidates and political parties.

The bottom line is therefore that attribution through the coordination rules in federal and state election laws are supported by, and indeed required, to further the policy goal of such law to limit contributions to candidates and political parties to prevent corruption and the appearance of corruption. The lack of attribution under federal tax law of political activity between closely affiliated tax-exempt nonprofit corporations is less clearly justified because the policy goals of relevant political activity rules is uncertain. That said, there is an argument that this lack of attribution is problematic if one accepts that view that lobbying and political campaign intervention are inconsistent and indeed undermine the charitable status of section 501(c)(3) organizations and so allowing other types of tax-exempt organizations to be closely affiliated with section 501(c)(3) organizations and still engage in this political activity is unwise. But even if one accepts this policy argument, there is an additional hurdle: the Supreme Court's decisions requiring this lack of attribution based on the free speech clause of the First Amendment.

B. Does the Constitution Require Different Treatment?

The Supreme Court's relevant constitutional decisions did not create the lack of attribution found in the federal tax law political activity rules for tax-exempt organizations, nor did they create the attribution found in the federal and state election law coordination rules. Such decisions instead reinforce the former and (for the most part) bless the latter. The blessing of the latter is evident from the Supreme Court decisions cited earlier and, since it is consistent with the policy goals already discussed, is not in tension with those policy goals.[91] But the policy argument that supports changing the federal tax rules to require attribution of political activity between closely affiliated tax-exempt nonprofit corporation is moot unless it also provides a basis for revisiting the Supreme Court precedents that prohibit such attribution.[92]

---

91 *See supra* notes 68–72 and accompanying text.

92 *See supra* notes 61–65 and accompanying text.

The 1983 Supreme Court decision in *Regan v. Taxation with Representation*[93] involved a section 501(c)(3) nonprofit corporation challenging the limits on lobbying imposed by that section under the free speech clause of the First Amendment. The organization had actually been operating as two separate but closely affiliated nonprofit corporations, one tax-exempt under section 501(c)(3) and the other tax-exempt under section 501(c)(4), without apparent IRS concern.[94] It was only when the leaders of the two corporations decided to merge their activities, including substantial lobbying, into a new, single, section 501(c)(3) nonprofit corporation that the IRS objected.[95]

As noted earlier, the majority only mentioned the IRS policy of allowing close affiliation of section 501(c)(3) and section 501(c)(4) organizations in a footnote, but Justice Blackmun in concurrence took the position that this policy was essential to concluding that the lobbying limit was constitutional.[96] Later Supreme Court decisions endorsed Justice Blackmun's position, albeit not unanimously.[97] These decisions therefore indicate that the lack of attribution under the federal tax rules relating to the political activity of tax-exempt organizations is constitutionally required.

There is, however, a counter-argument suggested by disagreeing Justices. That argument is that once a nonprofit corporation accepts the benefits of section 501(c)(3) status—including the ability to receive tax-deductible charitable contributions under section 170(c)(2)—Congress can impose any speech limitation that is rationally related to the reasons for that status.[98] As noted above, there are rational arguments that lobbying and political campaign intervention are inconsistent with the charitable status recognized and promoted by section 501(c)(3), including if such activity is associated with a section 501(c)(3) organization through a closely related affiliate.[99] The *Taxation with Representation* majority did not address this argument, as it assumed in its brief discussion that the basis for the limit on lobbying was "the congressional purpose of ensuring that no tax-deductible

---

93 461 U.S. 540 (1983). The organization also challenged the limit under the equal protection clause of the Fifth Amendment based on the differing treatment of tax-exempt veterans organizations, but the Court also rejected that argument. *Id.* at 550–51.

94 *Id.* at 543, 544 n.6.

95 *Id.* at 542, 543.

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

97 *See supra* note 65 and accompanying text.

98 *See supra* notes 66–67 and accompanying text.

99 *See supra* note 80 and accompanying text.

contributions are used to pay for substantial lobbying."[100] Nor did Justice Blackmun's concurrence, or any of the later decisions endorsing that concurrence, discuss this argument, even given the disagreement of some Justices with that endorsement.[101]

There is therefore a basis for arguing that the Constitution would allow Congress, or even the IRS, to require attribution of the political activities of tax-exempt noncharitable nonprofits to their affiliated tax-exempt charitable nonprofits, effectively subjecting those activities to the political activity limits imposed on charities. To be clear, this argument requires two steps. First, Congress would need to clarify, or commentators would have to convincingly establish, that political activities—specifically lobbying and political campaign intervention—are inconsistent with the "charitable" activities that Congress seeks to support through section 501(c)(3) and other federal tax law benefits provided to charities, including eligibility to receive tax-deductible charitable contributions. Second, the Supreme Court would have to reject its embrace of Justice Blackmun's concurrence in later decisions,[102] instead accepting what until this point has been a minority position—that as long as there is a rational basis for requiring this attribution, the government can do so.

VI. CONCLUSION

In general, laws in the United States start with a presumption that persons—whether natural or artificial—are distinct and so attribution of the activities of one person to another is the exception. Yet exceptions do exist, including with respect to corporations (both for-profit and nonprofit). These exceptions include ones based on certain legal relationships, on the purposes of specific legal or regulatory schemes, and on preventing fraud.

With respect to political activity by nonprofit corporations, federal tax law and federal and state election law take differing approaches to attribution. Federal tax law does not attribute the political activity of a tax-exempt noncharitable nonprofit organization to a tax-exempt section 501(c)(3) charitable nonprofit organization even when the two organizations are under common control, coordinate activities, and share resources, as long as the latter organization's funds are only spent on permitted activities

---

[100] *Taxation with Representation*, 461 U.S. at 544 n.6.

[101] *See id.* at 553 (Blackmun, J., concurring) (asserting that "Congress' purpose in imposing the lobbying restriction was merely to ensure that no tax-deductible contributions are used to pay for substantial lobbying").

[102] *See supra* 65 and accompanying text.

(including only limited lobbying and no political campaign intervention). In contrast, federal election law and the election laws of some states attribute the election-related spending of a nonprofit corporation (and any other person) to a candidate or political party if that spending is done in coordination with them, thereby subjecting that spending to any applicable contribution limits.

The election law approach is justified by the need to prevent easy avoidance of contribution limits, which also provides the basis for concluding it is constitutional. Whether the federal tax law approach is justified depends on the policy goals of the limitation on political activity by section 501(c)(3) organizations. If those goals are only to prevent the deduction of spending on that activity, as the Supreme Court appears to have assumed and as some scholars argue, then the lack of attribution is justified and may be constitutionally required under the First Amendment's free speech clause. If, however, those goals also include distancing section 501(c)(3) organizations from political activity because that activity undermines their charitable nature in some manner, as some members of Congress may have thought and some other scholars argue, then attributing the political activity of closely affiliated noncharitable tax-exempt nonprofit organizations to tax-exempt charitable organizations may both be justified as a policy matter and provide a basis for arguing against a constitutional requirement of non-attribution.

Given the significant amount spent not only by separate tax-exempt nonprofit corporations on political activity but done so in coordination by groups of affiliated tax-exempt nonprofit corporations of different types, it is important to clarify the justification for the political activity limits on section 501(c)(3) organizations. Unfortunately, the legislative history is not helpful and commentator views are divided. This result suggests that either congressional clarification or further scholarship is needed to establish which justification applies and so whether a change to the federal tax rule of non-attribution is both needed and constitutional.