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Bringing Dark Money Into the Light: 501(c)(4) Organizations, Gift Tax, and Disclosure

Tyler J. Kassner*

Political speech funneled through 501(c)(4) organizations and funded by anonymous contributions is not just legal: It's rampant. Could applying the gift tax to 501(c)(4) contributions resolve a legal grey area while curbing this anonymous political speech?

Legally, expanding the gift tax would appear to be a legitimate option. It would be consistent with prior tax expansions and it is not abnormal for tax incentives to influence taxpayer behavior. The problem is not whether Congress could expand the tax, but whether it should. Applying the gift tax to 501(c)(4) contributions may very well curtail anonymous spending by c4s, but it would also hurt legitimate c4s and would not be likely to reduce the scale of anonymous contributions. Instead of using the gift tax as a blunt instrument that is unlikely to fix the problem, Congress should instead focus on mandating disclosure for any organization that engages in political speech.

I. INTRODUCTION

The 2012 Presidential campaign saw unprecedented levels of political spending by corporations and wealthy individual donors. What is perhaps more worrying than the sheer volume of private money is how much of that money came from donations made without public disclosure. The media began referring to these

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2. Id.
contributions as “dark money.” The most significant sources of these anonymous political contributions were 501(c)(4) organizations. These organizations only recently come into the public view when the IRS admitted to using inappropriate criteria to identify which organizations would be the subject of an IRS audit, but spending by 501(c)(4) organizations has been anything but insubstantial. Crossroads GPS, a 501(c)(4) organization run by Karl Rove, claimed it alone planned to spend more than $100 million on politics in 2012, with approximately half of that spent on independent expenditures. This amount is substantial even compared to the largest Super PAC—the pro-Romney Restore Our Future, Inc., spent just over $146.6 million in 2012.

The most alarming aspect of the amount of 501(c)(4) spending is that, unlike Super PACs, who must disclose their donors, individuals can essentially contribute to 501(c)(4)s anonymously. The recent explosion in 501(c)(4) use for political purposes had piqued the interest of certain politicians and members of the media even before the IRS incident. Senator Michael Bennet referred to 501(c)(4) organizations that make independent expenditures as “Super PACs masquerading as nonprofit charities” and stated that voters should

3. Hudson, supra note 1.
5. The significance of 501(c)(6) organizations was not common knowledge at the time this article was written. The extent of 501(c)(6) political activity reinforces the need for reform as (c)(6) organizations allow anonymous contributions similar to (c)(4)s but some contributions may actually qualify as trade or business expenses and be deducted. The IRS has addressed this in proposed regulations; see also Nicholas Confessore, Tax Filings Hint at Extent of Koch Brothers’ Reach, N.Y. TIMES (Sept. 12, 2013), http://www.nytimes.com/2013/09/13/us/politics/tax-filings-hint-at-extent-of-koch-brothers-reach.html?r=0 (indicating that 501(c)(6) organization headed by the Koch brothers contributed $236 million to conservative organizations prior to the 2012 election); see also IRS.gov, Tax treatment of donations—501(c)(6) organizations.
know who is behind the shadowy attack ads they produce.\textsuperscript{11} The IRS initially expressed interest in determining whether the gift tax applies to 501(c)(4) donations, but has since stated it has no immediate plans to examine contributions to 501(c)(4)s pending additional guidance or legislation.\textsuperscript{12} Even though the IRS will not apply gift tax to 501(c)(4) contributions, it does not allow (501(c)(4)) organizations to run rampant. The \textit{New York Times} reported the IRS has recently begun subjecting new organizations that apply for 501(c)(4) status to rigorous questionnaires demanding to know their political leanings and the extent of their political activities.\textsuperscript{13} The extent to which applying the gift tax to 501(c)(4) contributions would affect anonymous political contributions is unknown.

Anonymity in political contributions is valuable to donors for a variety of reasons. Anyone who relies on broad public appeal would do well to avoid potentially alienating a large subset of the population by taking a side on a controversial issue. The recent uproar over Chick-fil-A is a prime example of how a divisive political belief can impact public opinion.\textsuperscript{14} Even individuals who are not public figures may wish to keep their political beliefs private for personal or business reasons. One of the primary arguments against disclosure is that this desire to keep beliefs private reduces political contributions and therefore political speech. Although it is clear why anonymous contributions are appealing to donors, the interests of maintaining an informed electorate and deterring and exposing campaign finance abuses outweigh this interest.\textsuperscript{15}

Although applying the gift tax to 501(c)(4) contributions may decrease anonymous political spending, it is not the most direct or effective method of accomplishing this goal. There are alternative methods of obfuscating the source of political contributions, such as the use of a Limited Liability Company.\textsuperscript{16} Individuals can also skirt the gift tax by giving to a greater number of 501(c)(4) organizations.


\textsuperscript{13} Weisman, \textit{supra} note 11.

\textsuperscript{14} SpeechNow.org v. FEC, 599 F.3d 686, 696 (D.C. Cir. 2010).


\textsuperscript{16} SCHADLER, \textit{supra} note 10, at 18.
with similar goals. Instead of aiming the gift tax at 501(c)(4)'s, Congress should seek a more precise solution via legislation: Require all organizations that make political contributions to disclose the source of the contributions.

II. RECENT POLITICAL SPENDING AND DISCLOSURE CASES

Prior to Citizens United, few corporations were able to advocate expressly to anyone besides bona fide members. The Citizens United decision led to a fundamental shift in U.S. campaign finance. Shortly after Citizens United, SpeechNow.org v. Federal Election Commission established the basis for Super PACs. These two cases have been largely responsible for the recent changes in political spending.

A. CITIZENS UNITED V. FEDERAL ELECTION COMMISSION

In Citizens United the Supreme Court held that the First Amendment prevents the government from restricting the ability of corporations or unions to make independent expenditures, but the government may regulate speech by requiring disclaimers and disclosure. An independent expenditure, as defined by the FECA, is a communication that expressly advocates for the election or defeat of a federal political candidate but is not coordinated with a political party or individual candidate. The Court relied heavily on Buckley in its decision. In Citizens United, the Court held the only time free speech may be limited is to avoid the appearance of corruption. Instead of using the more expansive McConnell definition of corruption, the Court limited the definition to quid pro quo. Following this decision, corporations and unions were provided with the ability to spend an unlimited amount on independent political expenditures, but they cannot contribute directly, or in kind, to federal candidates, federal PACs, or federal parties.

17. SCHADLER, supra note 10, at 5.
22. Id., at 901.
23. SCHADLER, supra note 10, at 18.
24. SpeechNow.org, 599 F.3d at 427.
B. *SpeechNow.org v. Federal Election Commission*

The issue in *SpeechNow.org v. Federal Election Commission* was whether the continuous reporting requirements set forth in the Federal Election Campaign Act ("FECA") violated the Constitution's First Amendment rights to freedom of speech and freedom of assembly.\(^25\) *SpeechNow.org* was an unincorporated organization that wished to engage in express advocacy through independent expenditures.\(^26\) The Federal Election Commission ("FEC") issued a draft advisory opinion that found *SpeechNow.org* to be a political committee; *SpeechNow.org* was therefore required to comply with the reporting requirements of the FECA.\(^27\)

The *SpeechNow.org* court held that the First Amendment prevented FECA limits on contributions made by individuals to political organizations that perform only independent expenditures.\(^28\) The court relied heavily on *Citizens United* when making its determination as to the constitutionality of limiting contributions by individuals to organization that perform only independent expenditures.\(^29\) It found that unlimited contributions by individuals did not qualify for exemption under the newly liberalized test for "appearance of corruption."\(^30\) This decision led directly to the formation of federal PACs that only make independent expenditures (i.e., Super PACs).\(^31\)

Unlike limits on independent expenditures, disclosure requirements do not prevent anyone from speaking. Therefore, disclosure requirements are held to a lower standard: "The government may point to any governmental interest that bears a 'substantial relation' to the disclosure requirement."\(^32\) The *SpeechNow.org* court held that the FECA disclosure requirements were constitutional because the public's interest in knowing who is funding speech about a candidate and the deterrence and exposure of campaign finance restrictions outweighs the First Amendment rights.\(^33\)

\(^{25}\) *Id.*
\(^{26}\) *Id.*
\(^{27}\) *Id.* at 436.
\(^{28}\) *SpeechNow.org*, 599 F.3d at 436.
\(^{29}\) *Id.* at 430.
\(^{30}\) Schadler, *supra* note 10, at 18.
\(^{31}\) *SpeechNow.org*, 599 F.3d at 434 (quoting *Citizens United*, 130 S. Ct. at 914).
\(^{32}\) *Id.* at 696.
III. POLITICAL CONTRIBUTIONS BY 501(C)(4) ORGANIZATIONS, SUPER PACS, AND LLCs

501(c)(4) organizations, Super PACs, and LLCs all have the ability to make some form of political contribution. There are, however, differences in the types, amounts, and disclosure requirements associated with the contributions. These differences affect the utility of how each are used.

A. 501(C)(4)

501(c)(4) organizations are described by the Internal Revenue Code as organizations not organized for profit, and operated exclusively for the promotion of social welfare. The income of 11 organizations listed in 501(c) is generally exempt from taxation. A 501(c)(4) organization may be formed as either an independent organization or by an associated 501(c)(3). The two associated organizations may have many of the same officers and members, but the funding for each must be distinct. 501(c)(4) organizations formed by 501(c)(3) organizations tend to be used to do the lobbying or political activities the 501(c)(3) is unable to do itself. Independent 501(c)(4)s are generally organizations concerned with public welfare, but are disqualified from being 501(c)(3)s due to their purpose, the extent of their lobbying, or their desire to engage in political activities.

501(c)(4)s differ from 501(c)(3)s in a number of important ways. 501(c)(3)s must be operated exclusively for religious, charitable, or scientific purposes while 501(c)(4)s must only have a stated primary purpose that benefits a broad group of people. Substantial limits have
been placed on a 501(c)(3)’s ability to their lobby.\textsuperscript{42} However, 501(c)(4)s may conduct an unlimited amount of lobbying.\textsuperscript{43} Donations to 501(c)(3)s are deductible by the donors\textsuperscript{44} while donations to 501(c)(4)s are not.\textsuperscript{45} Essentially, A 501(c)(4) trades a donor’s ability to deduct their donations for the donor’s ability to attempt to influence legislation.

A 501(c)(4)’s stated primary purpose must be for the promotion of social welfare.\textsuperscript{46} This requirement is satisfied if it is primarily engaged in promoting the common good and social welfare of a community as a whole.\textsuperscript{47} The stated primary purpose of a 501(c)(4) must benefit the general public as a whole rather than a small or select group of citizens.\textsuperscript{48} A 501(c)(4) may not have as its primary purpose the participation in or intervention in political campaigns on behalf of any candidate for public office.\textsuperscript{49}

The primary advantages of a 501(c)(4) over a 501(c)(3) are its abilities to conduct an unlimited amount of lobbying and to make independent expenditures. Although \textit{Citizens United} allows all organizations to make independent expenditures,\textsuperscript{50} section 501(h) of the tax code explicitly limits a 501(c)(3)’s lobbying\textsuperscript{51} and 501(c)(3) itself prohibits intervening in any political campaign on behalf of any candidate for public office.\textsuperscript{52} A 501(c)(4)’s ability to make independent expenditures are restricted by both section 527(f) taxation\textsuperscript{53} and the “primary purpose” test.\textsuperscript{54} Initially, these restrictions serve to make 501(c)(4)s appear less attractive than Super PACs as vehicles for making independent expenditures. Super PACs are, in fact, advantageous for these very reasons, but unlike Super PACs, 501(c)(4) organizations are generally not required to disclose the identity of their donors.\textsuperscript{55} This anonymity is what has made 501(c)(4)s a popular vehicle for independent expenditures in recent

\begin{itemize}
\item \textsuperscript{42} SCHADLER, supra note 10, at 11.
\item \textsuperscript{43} \textit{Id.} at 3.
\item \textsuperscript{44} \textit{Id.}
\item \textsuperscript{45} 26 U.S.C. § 501 (2010).
\item \textsuperscript{46} 26 C.F.R. § 1.501(c)(4)-1 (2013).
\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{49} \textit{Citizens United}, 130 S. Ct. 876.
\item \textsuperscript{50} 26 U.S.C. § 501 (2010).
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} 26 U.S.C. § 527 (2003).
\item \textsuperscript{53} 26 C.F.R. § 1.501(c)(4)-1 (2013).
\item \textsuperscript{54} SCHADLER, supra note 10, at 3.
\item \textsuperscript{55} 26 U.S.C. § 527 (2003).
\end{itemize}
elections.

Under IRC 527(f), a 501(c)(4) may be taxed at the maximum corporate tax rate on the lesser of its investment income and its expenditures for political activities.\[56\] 501(c)(4)s with significant investment income are, therefore, dissuaded from making independent expenditures. In contrast, a 501(c)(4) with little to no investment income faces a much less daunting potential tax liability. The reason 527(f) uses the amount of investment income as the metric for determining tax liability is that 501(c)(4)s are not taxed on their investment income. 527(f) thus prevents 501(c)(4)s from spending untaxed investment income on independent expenditures.

A 501(c)(4) is further limited in its spending flexibility by the requirement that at least 50 of its expenditures must be toward its primary purpose.\[57\] A 501(c)(4)'s independent expenditures count as spending not for its primary purpose.\[58\] If an organization exceeds the 50 limit, it will not qualify as a 501(c)(4).\[59\] This test serves to place a hard cap on the upper limit of 501(c)(4) independent expenditures.

B. SUPER PACS

A Super PAC is a special type of federal political action committee ("PAC") that can only make independent expenditures and must publicly disclose donors.\[60\] Super PACs are also known as Independent Expenditure Only PACs, primarily to distinguish them from traditional federal PACs. Super PACs differ from traditional federal PACs in that they may receive unlimited contributions but may only make independent expenditures.\[61\] Traditional federal PACs, on the other hand, have significant limitations on their fundraising, but may make contributions directly to candidates or to other PACs.\[62\] Traditional Federal PACs have a $5,000 cap per individual donor and cannot receive contributions from either corporations or unions.\[63\] Super PACs and Federal PACs can actually

\[56\] SCHADLER, supra note 10, at 3; See also Ellen P. Aprill, Once and Future Gift Taxation of Transfers to Section 501(c)(4) Organizations: Current Law, Constitutional Issues, and Policy Considerations, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 289, 302 (2012).
\[58\] SCHADLER, supra note 10, at 13; see also Aprill, supra note 56, at 302.
\[59\] SCHADLER, supra note 10, at 50.
\[60\] Id.
\[61\] Id.
\[62\] Id. at 64.
\[63\] Id. at 72.
be a single PAC if their funds and activities are kept separate.64 Federal PACs are explicitly exempted from the gift tax.65

A 501(c)(4) may generally associate with a federal PAC and treat the PAC as a separate segregated fund ("SSF"), but the ability for a super PAC to associate as a SSF has yet to be determined.66 A 501(c)(4) with a PAC as a SSF is able to pay for the costs of establishing, administering, and fundraising for the PAC, but must otherwise keep the two funds separate.67 These costs are not subject to the 527(f) tax, but are counted as spending not for the 501(c)(4)'s primary purpose.68 A 501(c)(4) may only solicit contributions to a PAC as SSF from its restricted class.69 A corporation's restricted class consists of bona fide members, executive and administrative personnel, and their families.70

The FEC has approved an alternative method for a 501(c)(4) to establish a Super PAC.71 A 501(c)(4) may establish a Super PAC as a nonconnected PAC.72 Similar to forming a PAC as a SSF, a nonconnected Super PAC may share officers, office space, and staff with the organizing 501(c)(4).73 The primary advantage of forming a nonconnected PAC, rather than an SSF, is that the nonconnected PAC is able to solicit contributions from the general public, labor unions, and other federally-permissible sources.74 The main drawback to establishing a nonconnected Super PAC is that the FEC has not yet made clear whether a 501(c)(4) is liable under 527(f) if it pays the costs of establishing, administering, and fundraising for the nonconnected Super PAC.75

A 501(c)(4) benefits from establishing a nonconnected Super PAC because the Super PAC may make unlimited independent expenditures.76 A 501(c)(4) alone would be limited by the "primary purpose" test77 and may also be taxed on the independent

65. SCHADLER, supra note 10, at 73.
66. Id. at 50.
67. Id. at 73.
68. Id. at 50.
69. Id.
70. Id. at 73; See also Federal Election Commission, Advisory Opinion 2010-09 (July 22, 2010), available at http://saos.nictusa.com/aodocs/AO202010-09.pdf [hereinafter FEC, AO 2010-09].
71. SCHADLER, supra note 10, at 73; FEC, AO 2010-09, supra note 70.
72. Id.
73. Id.
74. Id.
75. SCHADLER, supra note 10, at 74.
76. Id. at 13; see also Aprill, supra note 56.
expenditures it did make. An existing 501(c)(4) that wishes to make independent expenditures can limit tax liabilities by establishing a nonconnected Super PAC. The 501(c)(4) with investment income will not be taxed under 527(f) unless it makes independent expenditures and the nonconnected Super PAC will not be taxed for making independent expenditures.

While a 501(c)(4) organization that only engages in lobbying forming a nonconnected Super PAC that only makes independent expenditures results in the most favorable tax treatment, it is not necessarily the ideal solution when some of the donors wish to remain anonymous. The FEC requires Super PACs to disclose all of their donors. 501(c)(4)s, on the other hand, are only required to disclose their donors in rare circumstances.

Donors who wish to remain anonymous, but still prefer their donations to be used on independent expenditures, are able to do so by donating to the 501(c)(4) instead of the Super PAC. The 501(c)(4) can then either use the money to make independent expenditures on its own or to give the money to the nonconnected Super PAC (or another organization) to be used for independent expenditures. In either situation, the spending is political in nature and therefore may be subject to taxation under 527(f). Even if the 501(c)(4) is willing to pay the 527(f) tax, the spending would still qualify as spending not for the 501(c)(4)’s primary purpose.

C. LLC

A limited liability company ("LLC") is a relatively new form of business entity that combines elements of both corporations and partnerships. An LLC is not taxed at the entity level, like a subchapter C corporation; rather, the income passes through to the LLC's members in accordance with the LLC's operating agreement. The members are then taxed at according to their individual tax brackets. The large variation in state law regarding disclosure of LLC members makes them attractive options for anonymous political contributions. In states where public disclosure of the members of an

78. Schadler, supra note 10, at 50.
80. Some states, such as Arizona, also allow LLCs to list only a trust if that trust is a part owner of the LLC. See Richard Keyt, The Confidential LLC, http://www.keylaw.com/azllclaw/forming-llcs/confidential-llc/ (last visited Mar. 16, 2013).
LLC is not mandated, LLCs may be used to make anonymous political contributions to Super PACs.\textsuperscript{81}

Creating and maintaining an LLC is not as convenient as writing a check to a 501(c)(4) organization, but LLCs do offer some advantages over 501(c)(4)s. LLCs are especially attractive for large donors, since the cost of creating and maintaining a LLC is relatively low.\textsuperscript{82} LLCs are also able to donate the entirety of a contribution to a Super PAC, which may then spend it on independent expenditures. Because 501(c)(4)s are limited to spending fifty percent or less of their funds on political expenditures and the other fifty percent mostly goes towards lobbying for the 501(c)(4)’s primary purpose, donors who would prefer their money to be spent solely on independent expenditures would benefit even more from using a LLC.

The use of an LLC as a vehicle for obfuscating the source of donations received press coverage during the 2012 election.\textsuperscript{83} These donations primarily took one of two forms. The first involved individuals skirting campaign contribution limits by making the maximum contribution allowed for an individual while making subsequent contributions in the name of LLCs owned by the individual.\textsuperscript{84} The second method consisted of making contributions to Super PACs through LLCs that were not easily traceable to the individual actually making the contribution.\textsuperscript{85}

IV. GIFT TAX AND 501(C)(4) CONTRIBUTIONS

The primary purpose of the gift tax is to prevent decedents from transferring their assets prior to death in an attempt to avoid the


The gift tax also serves to discourage taxpayers from transferring income producing property to family members in lower income brackets to decrease tax liability. The gift tax has existed in some form since 1924, with a six-year gap from 1926 to 1932. The gift tax is payable by the donor. It applies to all inter vivos transfers of property not made in the course of business that are made for less than fair market value. Donative intent is not required, but it is a factor. Donative intent may also affect whether the donee must claim the transfer as income. Transfers of property from individual donors to organizations that are not made in the course of business are generally considered gifts, but transfers to certain organizations are exempt from the gift tax.

Relatively few taxpayers ever pay gift or estate tax due to the exclusions and credits in place. The IRC provides both an annual per-donee exclusion and a unified credit against gift tax. Section 2503 provides a $14,000 per donee per year exception for inter vivos gifts. A married couple may give $28,000 to each donee. Only donations exceeding this amount serve to reduce the unified credit against gift tax. Any gifts exceeding the yearly limit serve to reduce the unified credit against gift tax by the excessive amount. The unified credits against gift tax and estate tax are each currently $5.25 million for an individual taxpayer. However, the two credits are essentially one since reductions in the unified credit against gift tax results in a reduction of the unified credit against estate tax. Because reductions in the unified credit against gift tax result in corresponding reductions in the unified credit against estate tax, a taxpayer who will have an estate near or exceeding the credit amount will incur future estate tax liability with any reduction in the unified credit against gift tax.

The gift and estate taxes are very similar and are both found in

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86. April, supra note 56, at 294; see also Dickmin, 465 U.S. at 338.
87. April, supra note 56, at 294.
89. Dickmin, 465 U.S. at 335.
94. Id.
96. Id. at § 2010.
97. Id.
section 2001,\textsuperscript{99} although the highest brackets have been adjusted by the American Taxpayer Relief Act of 2012.\textsuperscript{100} The maximum tax rate under the American Taxpayer Relief Act of 2012 is forty percent.\textsuperscript{101} The Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), reduced the maximum rate from fifty-five percent to an amount fluctuating between thirty-nine percent and forty-nine percent.\textsuperscript{102} The EGTRRA changes were set to expire in 2011, but Congress passed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, which provided a temporary rate that was to expire in 2012.\textsuperscript{103} Congress then passed the American Taxpayer Relief Act of 2012, which established forty percent as the maximum rate.\textsuperscript{104}

While contributions to 501(c)(3) organizations\textsuperscript{105} and 527 political organizations (including Super PACs) are expressly exempt from gift tax liability,\textsuperscript{106} contributions to 501(c)(4)s have not been expressly exempted from gift tax liability. Section 2522 provides an offsetting deduction for charitable gifts to charitable organizations not disqualified under 501(c)(3).\textsuperscript{107} Section 2501 provides an exception for contributions to political organizations which are defined in 527(e)(1).\textsuperscript{108}

There is little authority answering the question of whether contributions 501(c)(4) organizations are taxable gifts has minimal authority, but the existing authority supports the taxability of such contributions.\textsuperscript{109} In Revenue Ruling 82-216, the IRS stated that transfers to organizations other than 527(e) political organizations are "subject to the gift tax absent any specific statute to the contrary . . . ."\textsuperscript{110} Between issuing this ruling in 1982 and 2011, when it stated it would take no action until it received further guidance, the IRS took no action on the topic.\textsuperscript{111}

\begin{flushright}
\textsuperscript{100} Id.
\textsuperscript{101} Rhomberg, supra note 38, at 63.
\textsuperscript{102} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at § 2501.
\textsuperscript{108} Rhomberg, supra note 38, at 65–66.
\textsuperscript{109} Id. at 66; Rev. Rul. 82-216, 1983-50 I.R.B. 12.
\textsuperscript{111} See Citizens United, 130 S. Ct. 876; see also SpeechNow.org, 599 F.3d 686.
\end{flushright}
V. EFFECT OF THE 501(C)(4) GIFT TAX ON ANONYMOUS POLITICAL CONTRIBUTIONS

When considering whether the gift tax would be a proper means of curbing anonymous political contributions, it is necessary to determine if it would even be effective. If Congress chooses to apply the gift tax to 501(c)(4) contributions, individuals will most likely respond by making fewer and smaller contributions. The rationale for this assumption is that individuals will contribute money with the goal of maximizing its impact. Individuals may still contribute to a particular 501(c)(4), but they would be less likely to contribute amounts larger than the yearly gift tax exclusion amount in order to avoid gift tax liability. Individuals who do choose to make contributions exceeding the yearly limit have to factor in the cost of the gift tax when deciding how much to contribute. For example, an individual who wishes to contribute $100,000 after-tax dollars to a particular 501(c)(4) would contribute $71,430 in anticipation of the 40 percent tax. Many individuals may also stop contributing to 501(c)(4)s altogether. The largest contributors will be the most likely to stop contributing altogether because they would both save the most money and have the means to more easily make anonymous contributions using alternative methods.

The gift tax would almost certainly cause contributions to 501(c)(4)s to decrease, but it would be unlikely to have a large impact on anonymous political contributions as a whole. Because only individuals contributing over $14,000 to any single 501(c)(4) would be impacted, only the largest donors would even face taxation if the gift tax was applied to 501(c)(4) contributions. It is precisely these donors who are in the best position to take advantage of alternative methods of making anonymous contributions. When faced with a forty percent tax on 501(c)(4) contributions exceeding the yearly gift limit, either creating an LLC solely for the purpose of handling political contributions or using an existing LLC would easily become more economical than contributing to 501(c)(4)s and paying the gift tax.

The impact of applying the gift tax would be further diluted if 501(c)(4) organizations became smaller but greater in number. There is no limit on the number of 501(c)(4)s with similar goals that may exist. Individuals could, therefore, simply donate the yearly limit to an unlimited number of 501(c)(4)s with similar goals. These contributions could very easily find their way to the same place they...
would have otherwise with little overall impact on the aggregate anonymous political contributions.

There are some drawbacks to creating a number of smaller 501(c)(4)s. Each new 501(c)(4) would require additional administrative costs. Individuals would also be required to make a slightly greater effort when determining to which 501(c)(4)s they wish to contribute. This option is also much easier for the person making the contributions; instead of having to form an LLC the person making the contributions is only required to write a few more checks. Ultimately, it is not important which method is used, but it is clear that the gift tax will do little to hamper anonymous political contributions.

It is very unlikely that the costs of either forming additional 501(c)(4)s or forming LLCs would exceed the gift tax paid by large donors but that does not necessarily mean anonymous political contributions would not decrease. Either solution is decidedly more difficult than writing a single check to a single 501(c)(4). This increased complexity would most likely result in at least some decrease in the overall amount of anonymous political contributions.

VI. LEGAL AND POLICY ARGUMENTS

Because the IRS has chosen not to pursue applying the gift tax to 501(c)(4) contributions without further guidance, the decision will most likely fall to Congress. In deciding whether to introduce legislation, Congress must determine whether the tax would be favorable for public policy, whether it would be consistent with current law, and whether it would be likely to survive a constitutional challenge.

A. LEGAL FRAMEWORK AND CONSTITUTIONALITY

A more fundamental question than what effect the gift tax would have on anonymous political speech is whether the government should allow any form of anonymous political speech. Courts have consistently ruled that mandating disclosure of donors to political organizations is constitutional.\(^\text{112}\) In *SpeechNow.org*, the court referenced the decision in *Buckley* and explained that permitting mandatory disclosure is, “based on a governmental interest in ‘provid[ing] the electorate with information’ about the sources of

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112. *SpeechNow.org*, 599 F.3d at 696.
political campaign funds, not just the interest in deterring corruption and enforcing anti-corruption measures.113 Because 501(c)(4)s are able to participate in a significant amount of political speech via independent expenditures, it makes little sense that they should avoid the disclosure requirements imposed on Super PACs. A 501(c)(4) could make the exact same independent expenditure as a Super PAC or even contribute money to the Super PAC. It follows that the electorate has an equal interest in the sources of either expenditure.

The argument against mandatory disclosure centers around the First Amendment’s mandate that “Congress shall make no law . . . abridging the freedom of speech.”114 Therefore, the pertinent question is what qualifies as an abridgement of freedom of speech. In Citizens United the Supreme Court held that the government has no anticorruption interest in limiting independent expenditures.115 However, in SpeechNow.org, the court did not find that FECA disclosure requirements alone violated the First Amendment.116

The application of the gift tax to 501(c)(4) contributions raises a First Amendment issue similar to but distinct from the one posed in Citizens United.117 In Citizens United the Court held that restricting the ability of organizations to make independent expenditures violated the First Amendment.118 The gift tax would not directly place limits on 501(c)(4) independent expenditures, but would reduce the funding available for the independent expenditures. The pertinent distinction is that the gift tax would affect independent expenditures incidentally rather than targeting them directly.

Taking a brief look at the past treatment of similar taxes is useful to determine whether the Supreme Court is likely to uphold the constitutionality of extending the gift tax. The Supreme Court has regularly upheld broad based taxes in the face of First Amendment scrutiny.119 In Jimmy Swaggart Ministries v. Board of Equalization, the Supreme Court rejected the plaintiff’s argument that the taxation of religious materials violated the Free Exercise Clause of the First Amendment because California’s Sales and Use tax was not targeted specifically at the religious material, but rather applied generally to

113. U.S. CONST. amend. I.
114. See Citizens United, 130 S. Ct. at 884.
115. SpeechNow.org, 599 F. 3d at 698.
116. Aprill, supra note 56, at 311; Citizens United, 130 S. Ct. 876.
117. See Citizens United, 130 S. Ct. 876.
118. Aprill, supra note 56, at 315.
all sales.\textsuperscript{120} In \textit{Regan v. Taxation With Representation} ("TWR"), the Supreme Court held not only that "statutory classifications are generally 'valid if they bear a rational relation to a legitimate governmental purpose,' but also that legislatures are given particular discretion in creating tax classifications."\textsuperscript{121} In \textit{Leathers} the court relied on the TWR decision and extended the TWR analysis to sales tax.\textsuperscript{122} Each Court refused to apply a heightened level of scrutiny.\textsuperscript{123}

Similar to the aforementioned Supreme Court cases, the gift tax is also broad based. The gift tax is broad based because it would apply to all 501(c)(4) organizations, regardless of whether they make independent expenditures. The TWR Court's statement regarding Congress's discretion in creating tax classifications is further evidence that the constitutionality of the tax would be upheld. The \textit{Leathers} Court's extension of the TWR analysis to sales tax increases the likelihood that the TWR analysis would also be used for the gift tax.\textsuperscript{124}

\section{B. Public Policy}

The fundamental policy question is whether it is appropriate to use the gift tax as a means to curb anonymous political contributions via 501(c)(4)s. This question has two distinct parts: (1) Should we curb anonymous political contributions; and (2) is the gift tax a reasonable means to that end?

The court in \textit{Buckley} described the policy issue raised by anonymous political speech as a compromise of the countervailing governmental interests of upholding free speech and informing the electorate.\textsuperscript{125} Extending the logic of the \textit{Buckley} decision, the policy question becomes whether anonymous political contributions are consistent with democracy in the U.S.

As Thomas Jefferson noted, a well informed electorate is a fundamental requirement of any democracy.\textsuperscript{126} A democratic government requires citizens to vote for their preferred candidate. Citizens must necessarily have information about whom they are

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\textsuperscript{120} Aprill, \textit{supra} note 56, at 318 (quoting Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1997)).


\textsuperscript{122} Aprill, \textit{supra} note 56, at 316-17.

\textsuperscript{123} \textit{Id}. at 317.

\textsuperscript{124} \textit{Buckley}, 424 U.S. 1.


\textsuperscript{126} Aprill, \textit{supra} note 56, at 321.
voting or all meaning is removed from casting the ballot. It follows that the U.S. government should do as much as possible to encourage its citizens to remain well informed.

A citizen must know the source of information in order to determine whether or not to believe the information. For example, a study showing evidence of decreased crime in a place where it is legal to carry concealed weapons will be significantly more persuasive coming from an independent organization than a pro-gun organization. Similarly, advertisements about candidates would be viewed differently if the organization funding the advertisement were clearly partisan in nature.

Next, the question turns to whether the gift tax is the right tool for limiting anonymous contributions. The Internal Revenue Code already influences taxpayer behavior through tax incentives. It might, therefore, seem logical to use the gift tax to discourage anonymous political spending. However, applying the gift tax to 501(c)(4) contributions does not affect anonymous political speech directly, but rather discourages it. Furthermore, applying the gift tax to 501(c)(4) contributions is inconsistent when the tax is not applied to contributions to 501(c)(3) or 527 organizations. 501(c)(4) organizations share qualities of both 501(c)(3) and 527 organizations. 127 501(c)(4) organizations provide social welfare benefits similar to 501(c)(3) organizations and may engage in political activities similar to 527 organizations.128 If Congress chose to modify existing law with the intent of curbing anonymous political speech, it would be tantamount to punishing all 501(c)(4) organizations for the actions of the few that abuse this ability. This is especially illogical considering that Congress could just as easily require disclosure for 501(c)(4) organizations thus stopping the undesirable action without causing collateral harm.

If the gift tax is applied to all 501(c)(4) contributions, it will place a large and unintended burden on both social welfare lobbying in the U.S. and 501(c)(4) organizations generally. Previous articles addressing the negative impact of the gift tax on 501(c)(4) organizations have correctly presented ballot committees as an example of a legitimate and desirable organization that would be significantly harmed by the gift tax.129 Ballot committees are normally

127. Id. at 322.
128. Aprill, supra note 56, at 321; Rhomberg, supra note 38, at 65.
129. Aprill, supra note 56, at 322.
501(c)(4) organizations because their primary activity involves getting measures included on ballots. This activity is considered influencing legislation and therefore disqualifies these organizations from 501(c)(3) status.

If Congress chooses to introduce legislation that applies the gift tax to all 501(c)(4) contributions, 501(c)(4) organizations that do not make independent expenditures will be unnecessarily burdened. It would be more fair to only apply the gift tax to the same percentage of each contribution as the percentage a 501(c)(4) spends on political expenditures but this would undoubtedly raise questions of constitutionality. The best solution would be to require all organizations that make independent expenditures to list the source of the money.

VII. CONCLUSION

Applying the gift tax to 501(c)(4) contributions initially appears to pose a threat to anonymous political contributions. However, once the already large exemptions and simple workarounds are taken into consideration, it becomes clear that the gift tax would, at most, be an inconvenience. Before Congress concerns itself with taxing 501(c)(4) contributions, a more candid assessment regarding anonymous political speech is in order. The two most glaring loopholes (i.e. 501(c)(4)s and LLCs) could be easily fixed if Congress instead introduced legislation requiring all organizations that make political expenditures to disclose the identities of their contributors.

Requiring disclosure is a preferable method to applying the gift tax for a number of reasons. Instead of attempting to influence donors, it closes the hole entirely. Other organizations that make independent expenditures are already required to disclose their donors and the constitutionality of these requirements has been consistently upheld. Requiring disclosure has the added benefit of not punishing 501(c)(4) organizations that do not engage in political activities. Furthermore, applying the gift tax to 501(c)(4)

131. See discussion supra Part VI.A.
132. The IRS has recently proposed new, stricter, guidelines for qualifying as a 501(c)(4). If these rules are codified 501(c)(4) may very well fall from favor but the fundamental criticisms of allowing any anonymous political contributions remain; see Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71535 (Nov. 29, 2013), available at https://www.federalregister.gov/articles/2013/11/29/2013-28492/guidance-for-tax-exempt-social-welfare-organizations-on-candidate-related-political-activities#h-14
contributions does nothing to prevent individuals from making anonymous contributions through LLCs. It is possible the IRS will receive the guidance it desires, but the motivation for this guidance should not be a desire to influence political activities by 501(c)(4)s. By introducing legislation requiring organizations that make political expenditures to disclose the identities of their contributors, Congress will return 501(c)(4)s to lobbying organizations and funnel political contributions to Super PACs where they belong.