PLAYING DEVIL'S ADVOCATE: THE CONSTITUTIONAL IMPLICATIONS OF REQUIRING ADVOCACY ORGANIZATIONS TO PRESENT OPPOSING VIEWPOINTS

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ABSTRACT

For more than sixty years, the Internal Revenue Service has employed a methodology test in determining whether a nonprofit organization's advocacy of a particular viewpoint is sufficiently educational to warrant its designation as a public charity. The test's focus is not upon the viewpoint advocated, but upon the method used by the organization to communicate its viewpoint to others. Consistent with this purpose, the Service has identified four factors that are indicative of a noneducational methodology.

The Service's application of the test, however, suggests the existence of an additional, previously undisclosed factor. This factor regards a refusal to present opposing viewpoints as indicative of a noneducational methodology.

This article concludes that the methodology test is unconstitutional for three reasons. First, the test is void for vagueness because it does not disclose one of the factors considered by the Service in evaluating whether an advocacy organization may be said to employ an educational methodology. Second, the test violates the compelled speech doctrine by requiring advocacy organizations to accommodate the very speech they are organized to oppose. Third, the test imposes an unconstitutional condition by conditioning advocacy organizations' eligibility to receive tax-deductible contributions on the absolute forfeiture of their First Amendment rights.

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I.
INTRODUCTION

Imagine that a nonprofit organization committed to educating the public on the benefits of same-sex marriage was denied tax-exempt status by the Internal Revenue Service (the "Service") because the organization's presentations failed to acknowledge the potential harms of same-sex marriage. Imagine further that the Service did not provide any rationale for the denial, leaving the organization without any guidance as to how to secure tax-exempt status in the future or otherwise effectively challenge the constitutionality of the Service's determination. Unable to receive tax-deductible charitable contributions and being subject to federal income taxation, the organization would have to cease operations.

This scenario is not limited to organizations advocating in favor of same-sex marriage, however. Any nonprofit educational organization advocating a particular position stands to suffer the same fate if they remain true to their founding principles and decline to present opposing viewpoints in their public presentations. This is true regardless of whether an organization happens to be advocating for or against a woman's right to choose, immigration reform, same-

sex marriage, or any other topic on which there is not uniform consensus.

Now imagine that this is not a hypothetical but is instead the established policy of the Internal Revenue Service. To date, the Service's practice of denying tax-exempt status to advocacy organizations refusing to disseminate opposing viewpoints has avoided constitutional challenge because most organizations are unaware of its existence. Similar to the Service's clandestine targeting of Tea Party groups during the 2010 and 2012 election cycles, the "opposing viewpoints" requirement for educational advocacy organizations may well be the latest in a series of constitutional scandals plaguing the Internal Revenue Service.

For more than sixty years, the Internal Revenue Service has employed a methodology test in determining whether an organization's advocacy of a particular viewpoint is sufficiently educational to warrant its designation as a public charity.[1] The test's focus "is not upon the viewpoint or position [advocated], but instead upon the method used by the organization to communicate its viewpoint or position to others."[2] Consistent with this purpose, the Service has identified four factors that are ostensibly indicative of a noneducational methodology. Advocacy organizations whose presentations implicate one or more of these factors may be precluded from obtaining charitable status as an educational organization. Without charitable status such groups are subject to federal income taxation and, more importantly, are unable to raise funds via tax-deductible contributions. Advocacy groups seeking the tax benefits of charitable status, therefore, must be vigilant in ensuring that their presentations do not implicate any of the four published factors.

The Service's application of the methodology test, however, suggests the existence of a previously-undisclosed additional factor. This factor regards advocacy groups' refusal to present opposing viewpoints as indicative of a noneducational methodology. The published methodology test has already been the subject of extensive scholarly criticism,[3] but this de facto fifth factor raises several unique constitutional concerns. First, does the factor violate the void-for-vagueness doctrine by permitting arbitrary and discriminatory enforcement by the Service? Second, is the factor susceptible to a compelled speech challenge by requiring advocacy organizations to speak when they would prefer to remain silent? Third, does the factor impose an unconstitutional condition by making receipt of certain tax benefits contingent upon advocacy organizations' forfeiture of their First Amendment rights?

This Article concludes that the methodology test is unconstitutional. Requiring the presentation of opposing viewpoints violates the void-for-

1. To qualify for charitable status, an entity must be organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes among others. Advocacy groups seek to obtain charitable status as educational organizations.

2. Rev. Proc. 86-43, 1986-2 C.B. 729.

3. *See infra* notes 102–106 and accompanying text.

vagueness, compelled speech, and unconstitutional conditions doctrines. Part II discusses the origin and subsequent evolution of the methodology test. Part III examines the historical impetus for requiring advocacy organizations to present opposing viewpoints, and confirms the Service's continued application of this requirement as part of the methodology test. Part IV analyzes the constitutionality of requiring advocacy organizations to present opposing viewpoints, and determines that the test is unconstitutional and should be struck down.

II.
HISTORICAL DEVELOPMENT OF THE METHODOLOGY TEST

The Internal Revenue Code (the "Code") exempts thirty-one categories of organizations from federal income taxation.[4] Aside from their tax-exempt status, these organizations have relatively little in common; they range from credit unions[5] and religious organizations,[6] to veterans' groups[7] and cemetery companies.[8] One type of organization, however, enjoys particularly favored status under the Code. These organizations are known as public charities. Unlike other tax-exempt organizations, public charities are eligible to receive tax-deductible contributions for income,[9] gift,[10] and estate tax purposes.[11] Accordingly, "for organizations that would generate little income to tax in any event, [charitable] status is most valuable not as a way to save money by avoiding payment of taxes, but as a way actively to generate funds" through receipt of tax-deductible contributions.[12]

Section 501(c)(3) of the Code identifies four requirements to obtain charitable status.[13] First, the entity must be "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports

4. I.R.C. § 501(a) (2006) (referring to I.R.C. §§ 501(c)–(d), 401(a)).
5. I.R.C. § 501(c)(14)(A) (2006).
6. I.R.C. § 501(d) (2006).
7. I.R.C. § 501(c)(19) (2006).
8. I.R.C. § 501(13) (2006).
9. I.R.C. § 170(a), (c)(2) (2006).
10. I.R.C. § 2522(a)(2) (2006).
11. I.R.C. § 2055(a)(2) (2006).
12. Lynn Lu, *Flunking the Methodology Test: A Flawed Tax-Exemption Standard for Educational Organizations that "Advocate a Particular Position or Viewpoint,"* 29 N.Y.U. REV. L. & SOC. CHANGE 377, 385 (2004). *See also* Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 WAKE FOREST L. REV. 855, 866 (1993) (noting that tax-deductible contributions "reduce the cost of contributing to [charitable] organizations and help the organizations raise funds"); Jordana G. Schwartz, *Standing to Challenge Tax-Exempt Status: The Second Circuit's Competitive Political Advocate Theory*, 58 FORDHAM L. REV. 723, 735 n.95 (1990) (recognizing that eligibility to receive tax-deductible contributions facilitates fundraising).
13. I.R.C. § 501(c)(3) (2006).

competition . . . or for the prevention of cruelty to children or animals."[14] Second, no part of the entity's net earnings may "inure to any . . . individual."[15] Third, the entity must not participate in political campaigns.[16] Fourth, the entity cannot devote a substantial portion of its activities to "carrying on propaganda, or otherwise attempting, to influence legislation."[17]

As the agency responsible for enforcing the Code, the Department of the Treasury (the "Treasury") has promulgated various regulations governing public charities.[18] For the purposes of section 501(c)(3), the Treasury defines the term "educational" as relating to "[t]he instruction or training of the individual for the purpose of improving or developing his capabilities; or [t]he instruction of the public on subjects useful to the individual and beneficial to the community."[19] The definition concludes by acknowledging:

> An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.[20]

This "full and fair exposition" standard represents the culmination of more than forty years of debate as to how and when advocacy groups may receive charitable status as educational organizations.

Beginning in 1919, the Treasury promulgated a series of regulations withholding the educational exemption from organizations "formed to disseminate controversial or partisan propaganda."[21] These regulations were premised on a belief that "it was Congress' intention, when providing for the deduction of contributions to educational corporations, not to benefit and assist the aims of one class against another . . . but to foster education in its true and broadest sense, thereby advancing the interest of all, over the objection of none."[22] Underlying this notion was an assumption that the dissemination of propaganda is an inherently selfish endeavor undertaken to further the speaker's own ends whereas the act of educating is an altruistic enterprise devoted to

14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. Treas. Reg. § 1.501(c)(3)-1 (as amended in 2008).
19. *Id.* § 1.501(d)(3)(i).
20. *Id.* This provision is commonly referred to as the full and fair exposition standard.
21. *See* Tommy F. Thompson, *The Availability of the Federal Educational Tax Exemption for Propaganda Organizations*, 18 U.C. DAVIS L. REV. 487, 498 n.26 (1985) (collecting the regulations promulgated under the Revenue Acts of 1918, 1921, 1924, 1926, 1928, 1932, 1934, and 1936).
22. S. 1362, 2 C.B. 152, 154 (1920).

improving individuals' overall knowledge and understanding.[23]

Initially, the Service's application of the educational exemption was relatively even-handed, with groups advocating popular, ostensibly mainstream views as likely to be denied charitable status as groups promoting controversial positions.[24] Toward the end of the 1920s, however, the educational exemption began to reflect a mainstream bias. Organizations advocating minority viewpoints began to face a significantly greater risk of being denied charitable status than their more conventional counterparts.[25] While many denials were subsequently reversed on appeal,[26] courts uniformly upheld denials given to advocacy organizations seeking to influence legislation.[27] In *Slee v. Commissioner*, for example, the Second Circuit upheld the Service's determination that a group advocating in favor of contraception did not qualify for charitable status because achievement of the group's objective would require the repeal of existing state and federal bans on birth control.[28] Acknowledging that "[i]t may indeed be for the best interests of any community voluntarily to control the procreation of children," Judge Learned Hand declared that "[p]olitical agitation as such is outside the statute . . . . Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them."[29]

The specter of charities engaging in taxpayer-subsidized lobbying led Congress to pass the Revenue Act of 1934, which made charitable status contingent upon a finding that "no substantial part of the [organization's] activities . . . is carrying on propaganda, or otherwise attempting, to influence

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23. *Id.*

24. Thompson, *supra* note 21, at 498.

25. *See* Cochran v. Comm'r, 30 B.T.A. 1115, 1119 (1934) (denying the educational exemption to an organization disseminating data of a "highly controversial" nature); Forstall v. Comm'r, 29 B.T.A. 428, 436 (1933) (finding that a certain group was not organized exclusively for educational purposes because the group advocated a position on "a highly controversial" subject); Weyl v. Comm'r, 18 B.T.A. 1092, 1094 (1930) (denying the educational exemption to an organization advocating "highly controversial" views); Slee v. Comm'r, 15 B.T.A. 710, 715 (1929) (contending that organizations "engage[d] in the dissemination of controversial propaganda" are not entitled to charitable status). *See also* Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 215 n.76 (1988) (noting that "the controversiality of an organization's issue or position appears to have played a role in at least some early determinations of eligibility for exempt status"). *Cf.* Leubuscher v. Comm'r, 21 B.T.A. 1022, 1030 (1930) ("The fact . . . —that the subject is controversial—does not serve to render the teaching and spreading of knowledge about it other than education.").

26. *See* Cochran v. Comm'r, 78 F.2d 176, 178 (4th Cir. 1935) (reversing a prior denial of the exemption where organization "d[id] not have and ha[d] never had any legislative program"); Weyl v. Comm'r, 48 F.2d 811, 812 (2d Cir. 1931) (reversing a prior denial of the exemption where organization did not have a "legislative program hovering over its activities").

27. *E.g.*, Sharpe v. Comm'r, 148 F.2d 179, 180–81 (3d Cir. 1945) (denying charitable exemption for bequest to organization advocating for land value taxation); Marshall v. Comm'r, 147 F.2d 75, 77–78 (2d Cir. 1945) (denying charitable exemption for bequest establishing trusts that would engage in attempts to influence legislation).

28. 42 F.2d 184, 185 (2d Cir. 1930).

29. *Id.*

legislation."[30] Although "[t]he statutory language mentions propaganda, [] the legislative history and the punctuation of the language suggest that it intended to cover only propaganda aimed at influencing legislation."[31] Consistent with this interpretation, the Treasury promulgated a new definition of the term "educational," acknowledging that propaganda organizations may still qualify for charitable status,[32] provided that they abstain from substantial legislative activities and ensure that their "principal purpose and substantially all [] activities [are] clearly of a nonpartisan, noncontroversial, and educational nature."[33] According to one commentator,

> This [new] definition apparently adopted the traditional educational institution—the school, college, or university—as the educational model, and judged other organizations on the basis of how closely they approached or how broadly they deviated from that ideal. No case law construing this definition exists, because the Service never actually attempted to apply this standard. Instead, the Service administered the exemption under a standard, formulated without the benefit of public discussion or debate and not incorporated into the regulations, that granted a propaganda organization tax exempt status if it utilized an educational methodology.[34]

Under this methodology approach, propaganda organizations wishing to be afforded charitable status were required to "present fairly and fully the underlying factual information believed to support the [favored] point of view."[35]

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30. Revenue Act of 1934, § 101(6), 48 Stat. 680, 700 (1934).

31. Thompson, *supra* note 21, at 504 n.34. *See also* REPORT OF THE REECE COMMITTEE, H.R. REP. NO. 83-2681, at 96 (1954) ("Again, the tax law itself, in referring to 'propaganda', ties it to the phrase 'to influence legislation', so that general [] propaganda, however forceful and forthright it may be, does not deprive an [organization] of [the educational] exemption."); 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, 21–22 (2003) (contending that the statute was enacted to preclude organizations with legislative programs from qualifying as public charities).

32. This article uses the term "propaganda organization" to refer to advocacy groups irrespective of their message or methodology. According to Professor Tommy Thompson, "propaganda, like education, is a term that has no clearly defined meaning. After World War I, it took on connotations of deliberate distortion and fabrication. . . . But the usual and customary meaning of propaganda is merely dissemination of doctrine and, as such, it is no more than a means of communication." Thompson, *supra* note 21, at 519-20.

33. Treas. Reg. § 19.101(6)-1 (1940).

34. Thompson, *supra* note 21, at 505.

35. Internal Revenue Service, *Richardson Releases 1960s-Era Memo on Exempt Organizations*, Tax Notes Today, March 20, 1997, 97 TNT 54–63, at 39 [hereinafter "TNT"] ("For all practical purposes since 1945, methodology has been the test of the Service in determining educational purposes, although not expressed as such, and the general criterion for determining educational methodology in regard to controversial subjects has been a 'full and fair exposition' of the underlying facts upon which the organization's conclusions are based.").

Following passage of the Internal Revenue Code of 1954, the Treasury promulgated a new regulation incorporating the Service's "full and fair" standard. Then, as now, the regulation provided that a propaganda organization may be educational within the meaning of the Code "so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion."[36] Although the Service's position had arguably prevailed, an internal I.R.S. memorandum (the "Memo") prepared just a few years later characterized the Treasury's new regulation as "pos[ing] some interpretative problems."[37] In the Memo, which was not made public until 1997, the Service provided an unusually candid assessment of its procedures vis-à-vis "ideological" organizations:

> Effective administration of the [educational exemption] in the ideological area requires consistent application of general criteria formulated from the particular factors relevant in determining the presence of an educational methodology. Consistent use of such a criterion in a carefully planned and executed litigation program is necessary in order to develop a meaningful body of precedent providing factual guides for decision. Such a litigation program has been conspicuously lacking in the Service's treatment of this area, and even the general criterion advanced by the Service has resulted in considerable confusion.[38]

To address these shortcomings, the Memo proposed that in applying the full and fair exposition standard the Service consider six factors ostensibly relevant to the existence of an educational methodology.[39] Unbeknownst to the public, these six

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36. Treas. Reg. §§ 1.501(c)(3)–1(d)(3)(i)(b) (1960).

37. TNT, *supra* note 35, at 22.

38. *Id.* at 38.

39. *Id.* at 43. The six factors were as follows:

> 1. Whether or not the presentation of viewpoints unsupported by a relevant factual basis constitutes a significant portion of the organization's communications.
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> 2. Whether or not the organization, in relating individuals and institutions to the particular subject matter under consideration, makes substantial use of particularly inflammatory and disparaging terms, expressing conclusions based more on strong emotional feelings than objective factual evaluations.
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> 3. Whether or not there is resort to innuendo, suggestion and inference rather than forthright statement of the proposition or viewpoint being advocated.
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> 4. Whether or not an approach to a subject matter is aimed at development of understanding on the part of the addressees, by reflecting consideration of the extent to which they have prior background or training.
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> 5. Whether or not the organization places primary emphasis on dissemination rather than research or inquiry into the subject matter with which it is concerned. In determining where primary emphasis is placed, the allocation of manpower, of physical facilities, financial resources, and other relevant factors will be considered.
>
> 6. The adaptability of the physical context and facilities utilized by the

factors became the means by which compliance with the full and fair exposition standard was assessed between the late 1960s and early 1980s.[40]

The factors' existence remained a secret until a series of declaratory judgment actions forced the Service to publish a four factor version of the methodology test. In *Big Mama Rag, Inc. v. United States*, a feminist organization brought suit in the U.S. District Court for the District of Columbia seeking recognition of its status as a 501(c)(3) educational organization.[41] The group's primary activity was the publication of a monthly newsletter devoted to feminist causes.[42] After noting that the organization refused to publish material antithetical to the women's movement and that "a publication . . . must be sufficiently dispassionate as to provide its readers with the factual basis from which they may draw independent conclusions," the district court found that Big Mama Rag had "adopted a stance so doctrinaire" as to be incapable of satisfying the full and fair exposition standard.[43] On appeal, however, the D.C. Circuit found that the full and fair exposition standard was unconstitutionally vague "both in explaining which applicant organizations are subject to the standard and in articulating its substantive requirements" such that the case was remanded for further proceedings.[44]

Prior to the D.C. Circuit's ruling in *Big Mama Rag*, a second declaratory judgment action was filed by a group calling itself National Alliance.[45] The plaintiff was a white supremacist group[46] whose application for charitable status had been denied based on its failure to comply with the full and fair exposition standard.[47] Several months into the proceeding, the D.C. Circuit issued its opinion in *Big Mama Rag*. While conceding that *Big Mama Rag* was binding precedent, the Service argued that remand was unnecessary because National Alliance did not use an educational methodology in communicating its views to

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> organization in its communications to a program of instruction, especially as they relate to the substantiality of the tie that exists between the communicator and the audience.

Id.

40. The Service's application of these factors is confirmed in several general counsel memoranda from the period. *See, e.g.*, I.R.S. Gen. Couns. Mem. 37,469 (Mar. 23, 1978) (citing three of the six factors); I.R.S. Gen. Couns. Mem. 34,909 (June 15, 1972) (quoting all six factors); I.R.S. Gen. Couns. Mem. 34, 340 (Aug. 28, 1970) (discussing four of the six factors). These memoranda were not made available to the public until the early 1980s. *See* Thompson, *supra* note 21, at 506 n.37.

41. 494 F. Supp. 473, 474–75 (D.D.C. 1979). According to the court, this action was made possible by "26 U.S.C. § 7428, a recently enacted statute which provides for determination of the tax-exempt status *vel non* of an organization by means of a declaratory judgment action." *Id.* at 474.

42. *Id.* at 475.

43. *Id.* at 479.

44. Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1036 (D.C. Cir. 1980).

45. Nat'l Alliance v. United States, No. 79-1885, 1981 WL 1799 (D.D.C. May 27, 1981).

46. *See id.* at *2 (quoting an IRS determination letter finding that the organization used its publications "as an outlet . . . to spread its racial propaganda").

47. *Id.* at *1–2.

the public.[48] The Service identified "four key factors" relevant to this inquiry[49] and contended that National Alliance's publication of "distorted, inflammatory and unfounded hate material" was inconsistent with the existence of an educational methodology.[50] The court rejected this argument, holding that the Service could not "avoid the impact of *Big Mama Rag* by relying on its proposed methodology approach."[51] Accordingly, the district court remanded the case for further proceedings.[52]

On appeal, the D.C. Circuit held that because National Alliance's presentations could not qualify as educational "within any reasonable interpretation of the term," the group was not entitled to charitable status as an educational organization.[53] Although the D.C. Circuit spoke favorably of the methodology test in dictum, the court declined to address whether the test cured the vagueness otherwise inherent in the full and fair exposition standard.[54]

Emboldened by the D.C. Circuit's remarks, the Service published the four-factor version of the methodology test as a 1986 revenue procedure.[55] In pertinent part, Revenue Procedure 86-43 (the "Procedure") provides:

> The presence of any of the following factors in the presentations

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48. *Id.* at *3–4. According to the Service, "[t]he methodology approach looks to whether the presentation of the ideas, beliefs, etc., is such that it encourages an increased understanding of the subject matter. In other words, are the methods in presenting the particular viewpoints generally accepted to be educational in that they impart knowledge, provide training, cultivate the mind, or increase or develop human capacity." *Id.* at *4.

49. The factors were as follows:

> 1. Whether or not the presentation of viewpoints unsupported by a relevant factual basis constitutes a significant portion of the organization's communications.
> 2. To the extent viewpoints purport to be supported by a factual basis, are the facts distorted.
> 3. Whether or not the organization makes substantial use of particularly inflammatory and disparaging terms, expressing conclusions based more on strong emotional feelings than objective factual evaluations.
> 4. Whether or not the approach to a subject matter is aimed at developing an understanding on the part of the addressees, by reflecting consideration of the extent to which they have prior background or training.

Id. at *4.

50. *Id.*

51. *Id.* at *5.

52. *Id.* at *6.

53. Nat'l Alliance v. United States, 710 F.2d 868, 875 (D.C. Cir. 1983).

54. *See id.* ("We observe that, starting from the breadth of terms in the [Treasury] regulation, application by IRS of the Methodology Test would move in the direction of more specifically requiring, in advocacy material, an intellectually appealing development of the views advocated."). The D.C. Circuit noted that "[t]he four criteria tend toward ensuring that the educational exemption be restricted to material which substantially helps a reader or listener in a learning process" such that "[t]he test reduces the vagueness found by the *Big Mama* decision." *Id.*

55. Rev. Proc. 86-43, 1986-2 C.B. 729. As defined by the Service, "[a] 'revenue procedure' is an official statement of a procedure . . . that either affects the rights or duties of taxpayers or other members of the public . . . or, although not necessarily affecting the rights and duties of the public, should be a matter of public knowledge." Rev. Proc. 89-14, 1989-1 C.B. 814.

> made by an organization is indicative that the method used by the organization to advocate its viewpoints or positions is not educational:
> 1. The presentation of viewpoints or positions unsupported by facts is a significant portion of the organization's communications.
> 2. The facts that purport to support the viewpoints or positions are distorted.
> 3. The organization's presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations.
> 4. The approach used in the organization's presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter.[56]

The few courts that have had cause to address the full and fair exposition standard's constitutionality post-1986 have concluded that the provisions of Revenue Procedure 86-43 "are sufficiently understandable, specific, and objective both to preclude chilling of expression protected under the First Amendment and to minimize arbitrary or discriminatory application by the [Service]."[57] Thus, by furnishing "an explanatory gloss" on the full and fair exposition standard,[58] the Procedure ostensibly cured any lingering vagueness concerns vis-à-vis application of the educational exemption.[59]

III.
THE PRESENTATION OF OPPOSING VIEWPOINTS: A FIFTH FACTOR

Although Revenue Procedure 86-43 purports "to publish the criteria used by the [Service] to determine the circumstances under which advocacy of a particular viewpoint or position by an organization is considered educational,"[60] the Service has demonstrated a willingness to consider an additional, previously undisclosed factor: whether an advocacy organization presents opposing

56. Rev. Proc. 86-43, 1986-2 C.B. 729, 730.

57. Nationalist Movement v. Comm'r, 102 T.C. 558, 589 (1994). *See also* Families Against Gov't Slavery v. Comm'r, 93 T.C.M. (CCH) 958, 959 (2007) (applying Revenue Procedure 86-43); Nationalist Found. v. Comm'r, 80 T.C.M. (CCH) 507, 510–11 (2000) (upholding *Nationalist Movement*, 102 T.C. 558, affirming the constitutionality of Revenue Procedure 86-43).

58. *Nat'l Alliance*, 710 F.2d at 870.

59. Perhaps fearing that robust enforcement of the full and fair exposition standard would provoke further litigation over its constitutionality, the Service's application of the methodology test has been surprisingly meek. Hate groups masquerading as educational organizations have been successful in obtaining charitable status. Alex Reed, *Subsidizing Hate: A Proposal to Reform the Internal Revenue Service's Methodology Test*, 17 FORDHAM J. CORP. & FIN. L. 823, 825–26 (2012).

60. Rev. Proc. 86-43, 1986-2 C.B. 729.

viewpoints in its presentations.[61] This fifth factor appears to be a holdover from the Service's application of the full and fair exposition standard in the years prior to the formal publication of the methodology test.[62] The omission of this factor from Revenue Procedure 86-43 ostensibly reflected the Service's determination that the presentation of opposing viewpoints was irrelevant to the existence of an educational methodology, but the Service has continued to consider this criterion in administering the educational exemption.

Historically, application of the full and fair exposition standard had been understood to require the presentation of opposing viewpoints.[63] In 1979, however, the U.S. District Court for the District of Columbia's decision in *Big Mama Rag* expressly rejected the proposition that an advocacy organization "must . . . present views inimical to its philosophy" in order to satisfy the full and fair exposition standard.[64] The D.C. Circuit upheld the district court's view even while finding the full and fair exposition standard to be unconstitutionally vague.[65] Despite the D.C. Circuit's ruling, the Treasury declined to repeal or otherwise amend Regulation section 1.501(c)(3)-1(d)(3),[66] and the Service

61. *See infra* text accompanying notes 71–77.

62. The origins of this factor are not entirely clear. The relevant Treasury regulation requires "a sufficiently full and fair exposition of the pertinent *facts* as to permit an individual or the public to form an independent opinion or conclusion." Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (emphasis added). The regulation does not purport to impose a concomitant duty to present a sufficiently full and fair exposition of the pertinent viewpoints. *Id.*

Rather, like the methodology test itself, this requirement appears to have originated with the Service. In addition to proposing the original six-factor methodology test, the Memo identified five other factors that "d[id] not relate to methodology, but merely constitute[d] an empirical observation that as these factors become increasingly prevalent, an educational method is more frequently absent." TNT, *supra* note 35, at 45. One of these supplemental factors provided: "The organization seldom or never provides a forum making available its facilities or presents its point of view in a context enabling people who could be expected to disagree with the organization's fundamental viewpoint to express their views on the subject matter with which the organization is primarily concerned." *Id.* at 44. The requirement that advocacy organizations present opposing viewpoints, thus, appears to reflect the assimilation of one of these empirical factors into the methodology test.

63. *See, e.g.*, I.R.S. Gen. Couns. Mem. 37,173 (June 21, 1977) (declaring that the advocacy organization "must, to be exempt, present other viewpoints"). *See also* Nat'l Ass'n for the Legal Support of Alternative Sch. v. Comm'r, 71 T.C. 118, 123–24 (1978) (finding the full and fair exposition standard satisfied where an advocacy organization published court documents filed by opposing parties and encouraged individuals with different positions to submit their viewpoints for publication in the organization's newsletter); I.R.S. Gen. Couns. Mem. 35,067 (Oct. 5, 1972) (conferring charitable status on an advocacy organization willing to present opposing viewpoints); I.R.S. Gen. Couns. Mem. 32,280 (May 9, 1962) (finding the full and fair exposition standard satisfied where an advocacy organization's publications "present[ed] enough differing points of view on a given topic to provide the reader with a basis for reaching an independent judgment on the issues under consideration").

64. Big Mama Rag, Inc. v. United States, 494 F. Supp. 473, 479 (D.D.C. 1979).

65. Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1039 n.18 (D.C. Cir. 1980).

66. Lu, *supra* note 12, at 406 (acknowledging that "the vague Treasury regulation remained on the books" post-*Big Mama Rag*).

continued to apply the full and fair exposition standard for another six years until publishing a new test.[67]

Then, in 1986, the Service published Revenue Procedure 86-43. Conspicuously absent from the list of factors identified as being indicative of a noneducational methodology was an organization's failure to present opposing viewpoints.[68] On at least one occasion, moreover, the Service has suggested that Revenue Procedure 86-43 does not require the presentation of opposing viewpoints,[69] and this interpretation was separately endorsed by the U.S. Tax Court.[70]

Recent applications of the methodology test, however, suggest that the presentation of opposing viewpoints continues to be relevant to the Service's analysis such that, for all intents and purposes, this criterion has become the unofficial fifth factor of Revenue Procedure 86-43.[71] In one instance, the Service's determination that an advocacy organization's presentations were educational within the meaning of Regulation section 1.501(c)(3)-1(d)(3) was expressly predicated on the fact that they "to some extent set forth the opposition's positions."[72] Conversely, where an advocacy organization's newsletters were found to provide "minimal factual information concerning the arguments advanced by those who [were] not in agreement with its position," the organization was denied charitable status for ostensibly failing to comply with the methodology test.[73]

The most striking application of the de facto fifth factor occurred in 2004 when the director of the Service's Exempt Organizations Division explicitly cited an advocacy group's failure to present opposing viewpoints in denying its application for the educational exemption.[74] The director noted that "[w]hile some of the documents published and/or circulated by the organization mention

67. *See* Daniel Shaviro, *From* Big Mama Rag *to* National Geographic*: The Controversy Regarding Exemptions for Educational Publications*, 41 TAX L. REV. 693, 700 (1986). *See also* I.R.S. Gen. Couns. Mem. 38,845 (May 4, 1982) ("[I]t is [the Service's] opinion . . . that the court in *Big Mama Rag* was incorrect as a matter of law when it directly utilized first amendment considerations in declaring the 'educational' regulations unconstitutional."); Chisolm, *supra* note 25, at 217 n.84 (noting that the Service is not required to change its procedures and asserting that "the IRS will often relitigate issues, hoping for a split in the circuits or outright reversals").

68. Rev. Proc. 86-43, 1986-2 C.B. 729, 730.

69. *See* I.R.S. Field Serv. Adv. 1,866,104 (Jan. 10, 1994) ("We do not find that educational organizations are required to present evidence and arguments to support any contrary positions. . . ."). Significantly, the scope of the advisory was limited to the Procedure's third factor such that the Service has not had occasion to address whether the presentation of opposing viewpoints is required under one of the other three factors or by the full and fair exposition standard generally. *Id.*

70. Nationalist Movement v. Comm'r, 102 T.C. 558, 586–87 (1994) (noting that while "petitioner apparently reads [the Procedure] to require organizations to present and rebut opposing views, . . . the revenue procedure . . . does not by its terms require this type of presentation").

71. *See infra* text accompanying notes 72–77.

72. I.R.S. Tech. Adv. Mem. 99-07-021 (Feb. 19, 1999).

73. I.R.S. Priv. Ltr. Rul. 04-40-40E, at 6 (Apr. 16, 2004).

74. *Id.* at 12–13.

opposing viewpoints and arguments advanced by [those advocating contrary positions], minimal information is provided concerning these positions and the facts supporting them."[75] Moreover, although "[t]he applicant's newsletters contain[ed] reprints or reports of articles from other sources [supportive of the applicant's position], [the newsletters did not contain any] examples of . . . articles [advocating contrary positions] or responses with differing viewpoints."[76] The director, therefore, concluded that the presentations did not comport with the methodology test and denied the group's application for charitable status.[77]

Two confirmed applications would hardly be sufficient to prove the existence of a de facto fifth factor had the methodology test been codified as a federal statute. But the test's publication as a revenue procedure—meant to inform the Service's application of a separately promulgated Treasury regulation—requires that these two authorities be afforded near-seminal significance. Indeed, "post-*Big Mama Rag* legal challenges to the regulatory scheme for educational advocacy organizations outside the white supremacist context have been non-existent [in the federal court system],"[78] meaning that for the vast majority of advocacy organizations "the views of the Service are effectively final."[79]

However, because the Service does not publish a written rationale for its decision to confer or deny charitable status on any particular organization, a dearth of authority exists as to what criteria the Service actually considers in administering Revenue Procedure 86-43 or "how often the Service engages in analysis of educational methodology."[80] Rather, "only where requests are made for technical advice by organizations applying for recognition of exempt status or when internal clarification of evolving legal positions is required does the IRS issue" substantive guidance regarding the charitable exemption,[81] and these documents are heavily redacted to protect applicant organizations' privacy.[82] For example, the 1999 memorandum reflecting a recent application of the de facto fifth factor begins "X was originally organized as Y in the year aa-3 under the laws of M."[83] What little interpretative guidance the Service provides, thus, must be interpreted in a factual vacuum devoid of any context. Consequently, the fact that there have been two documented instances within the last fifteen years in which the Service has predicated an award of charitable status on the applicant

75. *Id.* at 6.

76. *Id.*

77. *Id.* at 12–13. The advocacy group's failure to meet the organizational and operational tests provided two additional, independent bases for the denial. *Id.* at 7–8.

78. Lu, *supra* note 12, at 415 n.186.

79. Shaviro, *supra* note 67, at 700.

80. Lu, *supra* note 12, at 415 n.186.

81. *Id.*

82. *Id.*

83. I.R.S. Tech. Adv. Mem. 99-07-021 (Feb. 19, 1999).

organization's willingness to present opposing viewpoints indicates that this criterion operates as the unofficial fifth factor of Revenue Procedure 86-43.

The Service's clandestine targeting of certain conservative groups in what has come to be known as the "I.R.S. Tea Party Scandal" confirms that two reported applications of the de facto fifth factor are significant.[84] After several conservative groups seeking 501(c)(4) status complained that they had received burdensome information requests from the Service,[85] the I.R.S. Commissioner assured members of Congress that "[t]here's absolutely no targeting [of Tea Party-affiliated groups]."[86] This statement was directly contradicted by a May 2013 audit prepared by the Treasury Inspector General for Tax Administration (the "Inspector General"). The Inspector General concluded that the Service "used inappropriate criteria to identify applications from organizations with the words ['Tea Party,' 'Patriots,' and '9/12 Project'] in their names" for additional scrutiny.[87] Therefore, had Republican members of Congress not pressured the Inspector General to conduct an independent investigation, the I.R.S. Tea Party Scandal ostensibly would never have come to light as no publicly-available document prepared by the Service ever acknowledged that these groups were being targeted for extra scrutiny on the basis of their political views. The fact that the Service has at least implicitly acknowledged the opposing viewpoints requirement in two separate publications, therefore, provides persuasive evidence of the de facto fifth factor's existence.

Any suggestion that application of the de facto fifth factor is harmless error to the extent the Service is merely conflating one or more of the methodology test's four published factors or providing a clumsy articulation of the full and fair exposition standard is ostensibly mistaken. According to Professor Tommy Thompson, a former attorney in the Service's Office of Chief Counsel:

> The origin of the requirement that an organization present other viewpoints in addition to its own is unclear. It certainly cannot be extrapolated from any of the four factors that make up the methodology approach. Moreover, the full and fair exposition standard focuses on the quality of an organization's presentation of its own viewpoint, and does not purport to require a presentation of other viewpoints.[88]

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84. *See generally* Andy Kroll, *The IRS Tea Party Scandal, Explained*, MOTHER JONES (May 14, 2013, 3:00 AM), http://www.motherjones.com/politics/2013/05/irs-tea-party-scandal-congress-nonprofit-obama (providing a succinct overview of the scandal).

85. *Id.*

86. Josh Hicks, *Lingering Questions About the IRS Targeting of Conservative Groups*, WASH. POST (May 13, 2013), http://www.washingtonpost.com/blogs/federal-eye/wp/2013/05/13/lingering-questions-about-the-irs-targeting-of-conservative-groups/.

87. TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 6 (May 14, 2013), *available at* http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf.

88. Thompson, *supra* note 21, at 527 n.89 (citation omitted).

Nor is the presentation of opposing viewpoints implicit in the methodology test's fourth factor. In applying the factor, the Service has focused on presentations' formatting and readability rather than their inclusion of opposing viewpoints.[89] Thus, in making charitable status contingent upon an advocacy organization's presentation of opposing viewpoints, the Service has seemingly incorporated a new, wholly separate factor into the methodology test. Although this factor is not without historical precedent, the clandestine manner of its application has, to date, allowed the factor to escape constitutional challenge.

IV.
THE CONSTITUTIONAL IMPLICATIONS OF A FIFTH FACTOR

By requiring advocacy organizations to present opposing viewpoints in their public presentations if they wish to be afforded charitable status, the Service's de facto fifth factor violates three distinct principles of constitutional law: the void for vagueness, compelled speech, and unconstitutional conditions doctrines.

A. Vagueness

Because Revenue Procedure 86-43 (both as currently published and as likely to be amended) has no explicit guidelines for the de facto fifth factor's application, there is a significant risk of arbitrary and discriminatory enforcement by the Service. This risk renders the Procedure void for vagueness.[90] The Procedure is also void because it fails to provide notice of one of the factors considered by the Service in assessing whether an advocacy organization may be said to employ an educational methodology. The third reason the Procedure is unconstitutionally vague is that the Supreme Court decision most likely to be cited in defense of Revenue Procedure 86-43 is legally and factually inapposite.[91]

1. As Published, Revenue Procedure 86-43 Fails to Eliminate the Vagueness Otherwise Inherent in the Full and Fair Exposition Standard.

A regulation will be invalidated under the void-for-vagueness doctrine if its text is so ambiguous that enforcement would be a denial of due process.[92]

89. I.R.S. Field Serv. Adv. 1,866,104 (Jan. 10, 1994) (finding the fourth factor was not implicated since the organization's "flyer reflects a consideration of a readership composed of the general public because the design is a modified newspaper style with many short sections that are easy to read quickly" and "the factual discussions and the references in the flyer [i.e., quotations from American leaders and a religious text 'which has often been referred to in Western culture,'] should be familiar to most in American society.").

90. *See infra*, Part IV.A.1.

91. *See infra*, Part IV.A.3, discussing *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

92. Jeffrey I. Tilden, Big Mama Rag*: An Inquiry into Vagueness*, 67 VA. L. REV. 1543, 1548 (1981).

Accordingly, if "men of common intelligence must necessarily guess at [a regulation's] meaning and differ as to its application," the regulation will be struck down as unconstitutionally vague.[93] "Implicit in this standard are two of the guiding principles of vagueness jurisprudence: the [regulation] must give fair notice to persons potentially subject to it, and it must be explicit enough to protect against arbitrary and discriminatory enforcement."[94] Because the full and fair exposition standard, as originally drafted, did not comport with either of these principles, the D.C. Circuit invalidated Treasury Regulation section 1.501(c)(3)-1(d)(3) on vagueness grounds.

In *Big Mama Rag, Inc. v. United States*, the D.C. Circuit found Treasury Regulation section 1.501(c)(3)-1(d)(3) unconstitutionally vague for two reasons. First, the regulation did not clearly indicate which organizations were required to comply with the full and fair exposition standard.[95] Citing the Service's historic tendency to equate the term "advocacy" with "controversial," the court held that "such a gloss clearly cannot withstand First Amendment scrutiny [because] it gives IRS officials no objective standard by which to judge which applicant organizations are advocacy groups—the evaluation is made solely on the basis of one's subjective notion of what is 'controversial.'"[96]

The Treasury's failure to specify the substantive requirements of the full and fair exposition standard was found to provide a second, wholly separate basis for voiding the regulation. To illustrate the standard's ambiguity, the D.C. Circuit posed a series of rhetorical questions:

> What makes an exposition "full and fair"? Can it be "fair" without being "full"? Which facts are "pertinent"? How does one tell whether an exposition of the pertinent facts is "sufficient to permit an individual or the public to form an independent opinion or conclusion"? And who is to make all of these determinations?[97]

Without objective criteria for assessing whether an organization had complied with the full and fair exposition standard, the potential for arbitrary and discriminatory enforcement by the Service was sufficiently great to warrant the regulation's invalidation.[98]

The decision rejected two lines of inquiry advanced by the Service as a means of clarifying the standard's substantive requirements. First, the D.C. Circuit dismissed as illusory the district court's view that the full and fair exposition standard was "'capable of objective application' because 'it asks only whether the facts underlying the conclusions are stated,'"

93. Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926).
94. Tilden, *supra* note 92, at 1549.
95. Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1036–37 (D.C. Cir. 1980).
96. *Id.* at 1036.
97. *Id.* at 1037.
98. *Id.* at 1040.

> [D]istinguishing facts, on the one hand, and opinion or conclusion, on the other, does not provide an objective yardstick by which to define "educational." The distinction is not so clear-cut that an organization seeking tax-exempt status or an IRS official reviewing an application for exemption will be able to judge when any given statement must be bolstered by another supporting statement.[99]

Regarding the Service's second proposed distinction between appeals to the emotions and appeals to the mind, with only the latter qualifying as "educational," the D.C. Circuit noted the difficulty of engaging in the "required linedrawing" and asserted that "nowhere does the regulation hint that the definition of 'educational' is to turn on the fervor of the organization or the strength of its language."[100] Consequently, neither of the Service's proposed distinctions could save the standard from invalidation under the void-for-vagueness doctrine.

Any ambiguity regarding the standard's substantive requirements, however, was arguably eliminated by the Service's publication of the methodology test in 1986.[101] Nonetheless, a number of scholars have argued that the methodology test itself is impermissibly vague.[102] Whereas the Procedure's first and third factors largely mirror the fact/opinion and intellect/emotion distinctions rejected by the D.C. Circuit in *Big Mama Rag*, two other provisions have been identified as raising vagueness concerns of their own.[103]

One commentator has argued that the Procedure's second factor "effectively makes the Service the arbiter of truth by requiring it to determine whether stated facts are distorted" but fails to provide any objective guidance as to what

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99. *Id.* at 1038.

100. *Id.* at 1039.

101. One commentator has argued that "by shifting the focus away from the problem of how to identify organizations that advocate a particular position or viewpoint to that of how to evaluate such an organization's educational methodology once it has already been so identified, [the Procedure] merely exacerbated the [vagueness] problem" such that the current regulatory scheme "remains seriously flawed." Lu, *supra* note 12, at 383.

102. *See* Chisolm, *supra* note 25, at 219 ("There can be little serious argument that inquiries into whether opinions are adequately supported, whether facts are distorted, whether terms are 'particularly inflammatory,' and whether conclusions are 'based more on strong emotional feelings than objective factual evaluations' can really be content-neutral."); Lu, *supra* note 12, at 381–82 ("Whether and when 'advocacy' ceases to be of educational benefit and becomes disfavored . . . depends on factors that can be broadly interpreted and applied by IRS officials. The use of substantial discretion in making such decisions raises the specter of unfair application of exemption standards to unpopular organizations on the basis of their viewpoints despite clearly established IRS policy—and constitutional values—to the contrary."); Thompson, *supra* note 21, at 521 (contending that the methodology test requires "subjective, value-laden" judgments by the Service).

103. Brian A. Hill, *First Amendment Vagueness and the Methodology Test for Determining Exempt Status:* Nationalist Movement v. Commissioner, 48 TAX LAW 569, 580 (1995).

constitutes a distortion of fact.[104] The Procedure's savings clause,[105] meanwhile, potentially "gives the Service the authority to exempt some otherwise non-educational organizations and refuse to exempt others," thereby permitting the Service to "discriminate among organizations by omission rather than through overt action."[106] Thus, despite favorable rulings from the U.S. Tax Court and supportive dictum from the D.C. Circuit, the published provisions of Revenue Procedure 86-43 fail to alleviate the substantive ambiguity otherwise inherent in the full and fair exposition standard.

2. As Applied, Revenue Procedure 86-43 Only Exacerbates the Vagueness Otherwise Inherent in the Full and Fair Exposition Standard.

The existence of a de facto fifth factor only heightens the Procedure's susceptibility to a vagueness challenge. The notions of fundamental fairness embodied in the vagueness doctrine require that "laws . . . give [a] person of ordinary intelligence a reasonable opportunity to know what is [required], so that he may act accordingly."[107] As published, however, Revenue Procedure 86-43 fails to notify advocacy groups that they must present opposing viewpoints in their public presentations if they wish to be afforded charitable status. Consequently, groups that would be approved based on the Procedure's four published factors may nevertheless have their applications for charitable status denied on account of their failure to comply with this unpublished, fifth factor. Revenue Procedure 86-43 is therefore unconstitutionally vague because it fails to disclose one of the factors considered by the Service in evaluating whether an advocacy organization employs an educational methodology.

The de facto fifth factor's omission from the text of the Procedure also creates a risk of arbitrary and discriminatory enforcement by the Service. In *Big Mama Rag*, the D.C. Circuit found that "the latitude for subjectivity afforded by [Treasury Regulation section 1.501(c)(3)-1(d)(3)] ha[d] seemingly resulted in the selective application of the 'full and fair exposition' standard."[108] As a result, "only a very few organizations, whose views [were] not in the mainstream of political thought, ha[d] been deemed advocates" subject to the full and fair exposition standard.[109] As noted by one scholar,

104. *Id.* at 580–81. At the very least, the second factor should be interpreted as prohibiting the use of discredited factual data. Reed, *supra* note 59, at 865–69.

105. After listing the methodology test's four published factors, the Procedure concludes by noting that "[t]here may be exceptional circumstances . . . where an organization's advocacy may be educational even if one or more of the [four] factors . . . are present. The Service will look to all the facts and circumstances to determine whether an organization may be considered educational despite the presence of one or more of such factors." Rev. Proc. 86-43, 1986-2 C.B. 729.

106. Hill, *supra* note 104, at 581.

107. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

108. Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1037 (D.C. Cir. 1980).

109. *Id.* at 1036.

> [T]he sub-text of the vagueness discussion in *Big Mama Rag* was the [D.C. Circuit]'s concern that the Service was using the regulation's malleable standards to suppress certain kinds of ideas it found distasteful or contrary to prevailing public norms. This possibility is reinforced by the fact that, in developing its view of the strict standard to be applied to vagueness challenges in the First Amendment area, the [D.C. Circuit] relied on precedents involving content discrimination and the suppression of viewpoints.[110]

Similarly, by omitting the de facto fifth factor from the published version of the methodology test, the Service fails to provide explicit standards for the factor's enforcement. Without such standards, the factor may be utilized to suppress disfavored speech: organizations endorsing mainstream positions may be evaluated using the Procedure's four published factors, but groups advocating controversial or unpopular positions may be subjected to this additional fifth factor. As published, Revenue Procedure 86-43 is unconstitutionally vague because it creates a potential for arbitrary and discriminatory enforcement by the Service with the attendant risk that this "latitude for subjectivity" will be used to suppress disfavored speech.

Even if the Service published the fifth factor as part of Revenue Procedure 86-43, however, the Procedure would still be unconstitutionally vague. While the factor's publication would put advocacy groups on notice that they must present opposing viewpoints if they wish to be afforded charitable status, and at the same time lessen the Service's discretion in applying the factor, the Procedure would remain unconstitutionally vague to the extent it failed to specify the de facto fifth factor's substantive requirements. Given the perfunctory wording of the other four factors, and the lack of objective criteria for assessing when these four factors are implicated, it is reasonable to assume that the Service's articulation of the de facto fifth factor would be limited to the following:

> The presence of any of the following factors in the presentations made by an organization is indicative that the method used by the organization to advocate its viewpoints or positions is not educational. . .
>
> 5. The organization's presentations do not present opposing viewpoints.

This failure to provide explicit guidelines for the factor's application would vest the Service with significant administrative discretion in determining: (1) the position advocated by the organization seeking exemption; (2) the number of contrary positions; (3) which of these contrary positions warrant inclusion in the

110. Miriam Galston, *When Statutory Regimes Collide: Will* Citizens United *and* Wisconsin Right to Life *Make Federal Tax Regulation of Campaign Activity Unconstitutional?* 13 U. PA. J. CONST. L. 867, 922 (2011).

organization's presentations; (4) the extent of coverage that must be afforded to each of these contrary positions; and (5) whether the organization seeking exemption has presented a "sufficiently full and fair exposition" of the contrary positions – i.e., whether the organization has presented a balanced assessment of the contrary positions or instead limited its discussion to only the weakest, most tenuous arguments advanced by the opposition.[111] Because answers to the foregoing inquiries will "likely be colored by one's attitude towards the author's point of view,"[112] the Procedure, as amended, would continue to pose a risk of arbitrary and discriminatory enforcement by the Service.

3. The Supreme Court's Decision in National Endowment For The Arts v. Finley *Cannot Save Revenue Procedure 86-43 From Invalidation.*

In response to a facial vagueness challenge, the Service might argue that any imprecision vis-à-vis the Procedure is not constitutionally severe. In *National Endowment for the Arts v. Finley*,[113] a group of artists asserted that the National Foundation on the Arts and the Humanities Act of 1965 as amended in 1990 (the "Arts Act"),[114] was unconstitutionally vague to the extent it required the chairperson of the National Endowment for the Arts ("NEA") to ensure that "artistic excellence and artistic merit are the criteria by which grant applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[115] After acknowledging that "the terms of the provision [were] undeniably opaque" such that "if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns," the Supreme Court upheld the Arts Act as facially valid:

> We recognize, as a practical matter, that artists may conform their speech to what they believe to be the decisionmaking criteria in order to acquire funding. But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.[116]

Similar to the artists in *Finley*, advocacy organizations seeking to comply with Revenue Procedure 86-43 may well "conform their speech to what they

111. *See* Nationalist Movement v. Comm'r, 102 T.C. 558, 586–87 (1994) (requiring advocacy organizations to present and rebut opposing viewpoints would increase the Service's administrative discretion, thereby implicating the void-for-vagueness doctrine). *Cf.* I.R.S. Field Serv. Adv. 1,866,104 (Jan. 10, 1994), at 6 (noting the inappropriateness of requiring the organization in question to present opposing viewpoints).

112. *Big Mama Rag*, 631 F.2d at 1038.

113. 524 U.S. 569 (1998).

114. 20 U.S.C. § 954 (2006).

115. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572 (1998) (quoting 20 U.S.C. § 954 (d)(1)).

116. *Id.* at 588–89.

believe to be the decisionmaking criteria,"[117] i.e., they may choose to (1) "laboriously includ[e] their reasoning from stated fact to conclusion;"[118] (2) "us[e] independently verifiable facts;"[119] (3) abstain from using "offensive words;"[120] (4) "includ[e] [relevant] historical background;"[121] and (5) present opposing viewpoints, in the hope that by doing so they will be found to have satisfied the Procedure's substantive requirements. Nonetheless, because the tax benefits afforded by charitable status are analogous to cash grants,[122] the Service is arguably acting as patron rather than as sovereign when administering the Procedure. Accordingly, the Service would argue that the Procedure is facially valid based on the Supreme Court's ruling in *Finley*.[123]

There are, however, several key differences between the Arts Act and section 501(c)(3) of the Internal Revenue Code that make *Finley* distinguishable. First, the Arts Act's enabling statute

> vests the NEA with substantial discretion to award grants [by] identif[ying] only the broadest funding priorities, including artistic and cultural significance, giving emphasis to American creativity and cultural diversity, professional excellence, and the encouragement of public knowledge, education, understanding, and appreciation of the arts.[124]

Section 501(c)(3), in contrast, limits the Treasury's discretion from the outset by imposing restrictions on the types of organizations that may qualify for charitable status.[125]

Unlike the Treasury, moreover, the NEA cannot provide grants to every applicant proposing an "artistically excellent" project and "may decide to fund particular projects for a wide variety of reasons."[126] The charitable exemption, meanwhile, is available to *all* entities organized and operated for a charitable purpose within the meaning of the Code. The fact that entities are not competing

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117. *Id.* at 589.

118. Hill, *supra* note 104, at 583.

119. *Id.*

120. *Id.*

121. *Id.*

122. *See* Regan v. Taxation with Representation of Washington, 461 U.S. 540, 544 (1983) ("Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system.").

123. In Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1036 (D.C. Cir. 1980), finding Treasury Regulation section 1.501(c)(3)-1(d)(3) unconstitutionally vague, the D.C. Circuit did not have occasion to address the patron/sovereign distinction as *Big Mama Rag* predated *Finley* by eighteen years.

124. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 573 (1998) (internal quotation marks omitted) (quoting 20 U.S.C. §§ 954(c)(1)–(10)).

125. I.R.C. § 501(c)(3) (2006) (denying charitable status to organizations participating in political campaigns, organizations devoting a substantial part of their activities to carrying on propaganda or otherwise attempting to influence legislation, and organizations permitting any part of their net earnings to inure to the benefit of private shareholders).

126. *Finley*, 524 U.S. at 585.

against one another for charitable status obviates the need for the Treasury to engage in subjective, content-based assessments of applicant organizations' activities. Consequently, whereas the provision at issue in *Finley* was found to "merely add[] some imprecise considerations to an already subjective selection process,"[127] Revenue Procedure 86-43 conceivably adds some imprecise considerations to what was a relatively *objective* selection process.

Second, in administering section 501(c)(3) of the Code, the Service may be acting as sovereign rather than as patron. Whereas beneficiaries of the Arts Act receive cash grants, charitable organizations qualify for certain tax benefits, such as exemption from federal income taxation and eligibility to receive tax-deductible contributions. Although the Supreme Court has analogized these benefits to cash subsidies,[128] it has been careful to note that they are not "in all respects identical."[129] To the extent that *Finley* was predicated on this distinction between actual cash grants and tax benefits having grant-like qualities, the decision will not save the Procedure from a vagueness challenge.

Third, the controversial provision at issue in *Finley* is part of the Arts Act's statutory text. The Act, therefore, puts artists on notice that grant applications submitted to the NEA will be judged based on their artistic excellence and artistic merit, "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[130] As a result, artists are at least given an opportunity to "conform their speech to what they believe to be the decision-making criteria in order to acquire funding."[131] The Procedure's text, in contrast, fails to notify advocacy groups that they must present opposing viewpoints if they wish to be afforded charitable status as educational organizations. Unlike the artists in *Finley* then, advocacy organizations are denied an opportunity to incorporate opposing viewpoints into their public presentations in a manner they believe to be consistent with the Procedure's de facto fifth factor.

For these reasons, a court would find *Finley* inapposite and subject Revenue Procedure 86-43 to a traditional vagueness analysis. Because the Procedure, both as currently published and as likely to be amended, fails to provide explicit guidelines for the de facto fifth factor's application, there is a significant risk of arbitrary and discriminatory enforcement by the Service. Furthermore, in its current form, the Procedure fails to give notice of one of the factors considered by the Service in assessing whether an advocacy organization may be said to

127. *Id.* at 590.

128. Regan v. Taxation with Representation of Washington, 461 U.S. 540, 544 (1983) ("A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions.").

129. *Id.* at 544 n.5.

130. 20 U.S.C. § 954(d)(1) (2006).

131. *Finley*, 524 U.S. at 589.

employ an educational methodology, thereby providing a second, wholly separate basis for voiding the Procedure.

B. Compelled Speech

By compelling advocacy organizations to present opposing viewpoints in their public presentations, Revenue Procedure 86-43 imposes a content-based regulation of speech subject to strict scrutiny. Because the Procedure is not narrowly tailored to serve a compelling government interest, the Procedure should be struck down as a violation of the First Amendment.

1. Revenue Procedure 86-43 Forces Advocacy Organizations to Accommodate the Very Speech They Are Organized to Oppose.

After lurking in the background of First Amendment jurisprudence for more than 150 years, the proscription against compelled speech was finally recognized in 1943 when the Supreme Court famously declared, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[132] The Court has since confirmed that "the right of freedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all."[133] Laws requiring schoolchildren to recite the Pledge of Allegiance and salute the flag are therefore unconstitutional,[134] as are laws requiring the display of ideological messages on private property.[135] The rationale for invalidating such laws is that by compelling citizens to affirm a particular belief, the government "invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control."[136]

The Court's compelled-speech cases are not limited to situations in which an individual must personally speak the government's message, however.[137] The First Amendment also restricts "the government's ability to force one speaker to host or accommodate another speaker's message."[138] In *Miami Herald Publishing Co. v. Tornillo*, for example, the Supreme Court struck down a Florida statute requiring newspapers to print political candidates' responses to

132. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

133. Wooley v. Maynard, 430 U.S. 705, 714 (1977).

134. *Barnette*, 319 U.S. at 642.

135. *Wooley*, 430 U.S. at 717 (invalidating law requiring New Hampshire motorists to display the state motto—"Live Free or Die"—on their private automobiles via state-issued license plates).

136. *Barnette*, 319 U.S. at 642.

137. Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 63 (2006).

138. *Id.* at 63.

editorial criticism.[139] Similarly, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,[140] the Court overturned a state administrative order requiring a private utility to include a third-party newsletter in its billing envelopes.[141] In both of these cases, the complaining speaker was required to accommodate the speech of a private third-party rather than the government.

The Procedure likewise violates the First Amendment's proscription against compelled speech by forcing advocacy organizations to accommodate the speech of private third-parties. However, the Service may argue that the Procedure is distinguishable from the Court's prior compelled-speech cases because advocacy organizations, unlike the complaining speakers in *Tornillo* and *Pacific Gas*,[142] are given editorial control over the content of the compelled speech. The Supreme Court should dismiss this distinction as immaterial and find that the Procedure infringes on these organizations' freedom of thought by forcing advocacy groups to articulate the very views they are organized to oppose.

The Service may also argue that violations of the laws in *Tornillo* and *Pacific Gas* resulted in the imposition of administrative or criminal sanctions,[143] whereas a failure to present opposing viewpoints merely leads to the withholding of a government subsidy. Most 501(c)(3) organizations, however, depend upon the tax benefits afforded by charitable status for their survival.[144] Thus it is not the case that advocacy organizations are free to forego charitable status and present only their sincerely-held viewpoints. Rather, advocacy groups are confronted with a Hobson's choice.[145] They must either present opposing viewpoints and remain solvent or cease operations. In this context, denial of

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139. 418 U.S. 24, 256–58 (1974). Although the right-of-reply statute at issue in *Tornillo* ostensibly concerned the freedom of the press, the Court has not limited *Tornillo* to its facts but has instead demonstrated a willingness to apply its rationale broadly. *See* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797 (1988) (noting that the *Tornillo* rule extends beyond government acts "restrain[ing] the press, and has been applied to cases involving expression generally").

140. 475 U.S. 1 (1986).

141. *Id.* at 20–21. *See also* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 566 (1995) (holding it a violation of the First Amendment to require private parade organizers to include certain groups whose messages the organizers did not wish to convey).

142. The right of reply statute at issue in *Tornillo* required newspapers to print, verbatim, candidates' responses to editorial criticism (*Tornillo*, 418 U.S. at 244 n.2) and the agency ruling in *Pacific Gas* required a utility to disseminate, without alteration, a third party's newsletter (*Pacific Gas*, 475 U.S. at 6–7). *See Hurley*, 515 U.S. at 576 ("[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."). *See also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943) (suggesting that compelled speech violates "a right of self-determination in matters that touch individual opinion and personal attitude").

143. *See Pacific Gas*, 475 U.S. at 6–7 (administrative decision required compelled speech in utility newsletter); *Tornillo*, 418 U.S. at 244 n.2 (statute classified newspapers' failure to publish the required reply as a misdemeanor).

144. Lu, *supra* note 12, at 384–85.

145. A Hobson's choice is defined as "an apparent freedom of choice where there is no real alternative." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1076 (3d ed. 1993).

charitable status more closely resembles the imposition of a sanction so that an advocacy organization's failure to present opposing viewpoints may be found to implicate the compelled speech doctrine.[146]

If the Service's application of the Procedure is understood to compel speech consistent with the *Tornillo–Pacific Gas* line of cases, the Procedure would be struck down as a content-based regulation of speech. A law compelling speech is content-based, and therefore subject to strict scrutiny, if it requires speakers to accommodate only hostile viewpoints.[147] In *Tornillo*, for example, it was a "newspaper's expression of a particular viewpoint [that] triggered an obligation to permit other speakers, with whom the newspaper disagreed, to use the newspaper's facilities to spread their own message."[148] Likewise, although third parties' right of access to the billing envelopes in *Pacific Gas* was not conditioned on the utility's expression of a particular viewpoint, the law was nonetheless found to impose a content-based restriction on speech "because access [was] awarded only to those who disagree[d] with [the utility]'s views."[149] Thus, in forcing advocacy organizations to present only hostile viewpoints, the Procedure imposes a content-based regulation of speech subject to strict scrutiny.

Moreover, by requiring advocacy organizations to present opposing viewpoints, the Procedure hampers these organizations' ability to disseminate their own constitutionally protected speech. Advocacy groups must devote a portion of their presentations to refuting the accommodated speech or risk acquiescing in the very views they are organized to oppose.[150] The more resources these organizations are forced to expend rebutting the views of hostile third parties, the fewer they have to advocate their own desired messages.[151] The Procedure, therefore, creates a danger that advocacy organizations "will be required to alter [their] own message[s] as a consequence of the government's coercive action."[152] And "where . . . the danger is one that arises from a content-

146. For a discussion of the unconstitutional conditions doctrine implications of this distinction, see *infra* notes 163–217 and accompanying text.

147. Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1, 13–14 (1985).

148. *Id.* at 10.

149. *Id.* at 14.

150. *Id.* at 15.

151. The Supreme Court has indicated that "th[e] pressure to respond [to compelled speech] 'is particularly apparent when the [complaining speaker] has taken a position opposed to the view it is forced to accommodate.'" *Id.* at 15–16 (quoting Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 100 (1980)). Advocacy organizations' ability to identify opposing viewpoints as compelled speech originating from third parties does not alleviate this pressure. *See id.* at 15 n.11 (finding that the presence of a disclaimer on a third party's message "serves only to avoid giving readers the mistaken impression that [the third party's] words are really those of [the complaining speaker]" and "does nothing to reduce the risk that [the complaining speaker] will be forced to respond").

152. *Id.* at 16.

based grant of access to private property, it is a danger that the government may not impose absent a compelling interest."[153]

2. Revenue Procedure 86-43 Fails Strict Scrutiny.

In an attempt to save the Procedure from being struck down as a content-based regulation of speech, the Service may argue that the Procedure is narrowly tailored to further two ostensibly compelling state interests. First, the Procedure arguably helps to ensure that propaganda groups do not qualify for charitable status as educational organizations. Whereas "'true education' . . . is directed at and for the benefit of the individual," propaganda "is directed at the individual only as a means to accomplish the purpose of the organization instigating it."[154] According to this logic, education serves a socially desirable purpose worthy of government assistance while the dissemination of propaganda represents an inherently selfish endeavor undeserving of taxpayer support.[155]

The Service would argue that an advocacy organization's failure to accommodate opposing viewpoints is indicative of a noneducational methodology. They would contend that propaganda groups seek to have their audiences reach preordained conclusions based on ignorance of competing viewpoints rather than appeals to logic and reason. Under this theory, advocacy organizations operated for educational purposes present opposing viewpoints because their own positions' merits are more readily apparent when evaluated against competing arguments. Conversely, propaganda groups ignore opposing viewpoints for fear that the public will not find their messages persuasive in light of rival arguments. Accordingly, by making receipt of charitable status contingent upon the presentation of opposing viewpoints, the Procedure ensures that propaganda groups seeking to further their own selfish ends do not qualify as 501(c)(3) educational organizations.

It is not clear whether a court would find this interest compelling. The regulations defining the term "educational" once imposed a categorical ban on propaganda groups.[156] But the Treasury abandoned that position following Congress's passage of the Revenue Act of 1934.[157] The Revenue Act amended the Code so that only propaganda groups engaged in legislative activities were ineligible to receive charitable status.[158] In response to subsequent revisions of

153. *Id.* at 16–17.

154. Thompson, *supra* note 21, at 498.

155. Reed, *supra* note 59, at 828–29.

156. Treas. Reg. 86, Art. 101(6)-1 (Revenue Act of 1934); Treas. Reg. 77, Art. 527 (Revenue Act of 1932); Treas. Reg. 74, Art. 527 (Revenue Act of 1928); Treas. Reg. 69, Art. 517 (Revenue Act of 1926); Treas. Reg. 65, Art. 517 (Revenue Act of 1924); Treas. Reg. 62, Art. 517 (Revenue Act of 1921); Treas. Reg. 45, Art. 517 (Revenue Act of 1918). These regulations "denied [the educational] exemption to organizations formed to disseminate controversial or partisan propaganda." Thompson, *supra* note 21, at 498 n.26.

157. 48 Stat. 680 (1934).

158. *Id.* at 700.

the Code, the Treasury has gone so far as to acknowledge that "an organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts."[159] Whereas preventing propaganda groups from receiving the tax benefits afforded by charitable status may once have constituted a compelling state interest, the Service would have difficulty convincing a court that this interest continues to be compelling in light of superseding revisions to the Code permitting apolitical propaganda groups to obtain charitable status.

Alternatively, the Service may argue that the Procedure furthers a compelling state interest in promoting speech by making a variety of viewpoints available to advocacy organizations' audiences. However, the Supreme Court has held that the government's interest in promoting speech cannot justify the imposition of content-based restrictions.[160] The Service, therefore, cannot rely on this theory to save the Procedure.[161] Moreover, "the means chosen [by the Service] to advance variety tend to inhibit expression of [advocacy organizations'] views in order to promote [third parties' views]," and the Supreme Court has held that the "[s]tate [may not] advance some points of view by burdening the expression of others."[162] Revenue Procedure 86-43, therefore, does not represent a narrowly tailored means of promoting speech.

C. Unconstitutional Conditions

As demonstrated in Part B, *supra*, a law requiring advocacy organizations to present opposing viewpoints under threat of administrative or criminal sanctions would almost certainly violate the First Amendment's proscription against compelled speech. To the extent denial of 501(c)(3) status represents the withholding of a benefit rather than the imposition of a penalty, however, the Procedure is more appropriately evaluated under the Supreme Court's unconstitutional conditions jurisprudence. By making receipt of certain tax benefits contingent upon advocacy organizations' absolute forfeiture of their First Amendment right to remain silent and abstain from compelled speech, the Procedure violates the unconstitutional conditions doctrine.

1. The Unconstitutional Conditions Doctrine Has No Succinct Formulation.

When acting as benefactor rather than sovereign, the government is generally free to condition receipt of federal largesse upon recipients' willingness to abide by certain limitations or restrictions.[163] Nonetheless, the

159. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i).

160. Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1, 20 (1986).

161. *Id.*

162. *Id.*

163. *See* Samuel C. Salganik, *What the Unconstitutional Conditions Doctrine Can Teach Us About ERISA Preemption*, 109 COLUM. L. REV. 1482, 1509–10 (2009) (describing the

unconstitutional conditions doctrine "holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."[164] As Kathleen Sullivan has explained:

> Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference. The "exchange" thus has two components: the conditioned government *benefit* on the one hand and the affected constitutional *right* on the other. The imposition of the condition on the benefit poses a dilemma: allocation of the benefit would normally be subject to deferential review, while imposition of a burden on the constitutional right would normally be strictly scrutinized. Which sort of review should apply? The doctrine of unconstitutional conditions says the latter.[165]

Whereas articulation of the doctrine is relatively simple, its application is considerably more nuanced. Scholars have criticized the unconstitutional conditions doctrine as "logically incoherent,"[166] and "less a 'doctrine' than a case-by-case" assessment.[167] Despite reams of commentary, scholars have been unable to formulate a coherent, unifying theory with which to tame the Court's unconstitutional conditions jurisprudence.[168] Indeed, some observers have

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government's power to condition spending so long as it is not a "sufficiently coercive . . . penalt[ty for] the exercise of constitutional rights").

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

165. *Id.* at 1421–22.

166. Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 10 (1988).

167. Michael Fitzpatrick, *Rust Corrodes: The First Amendment Implications of* Rust v. Sullivan, 45 STAN. L. REV. 185, 196 (1992). *See also* Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1120 (1987) (concluding that the doctrine's general principles "are seldom useful in solving specific cases"). One commentator has characterized the doctrine as "roam[ing] about constitutional law like Banquo's ghost, invoked in some cases, but not in others." Epstein, *supra* note 166, at 10.

168. *See* Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1186 (1990) ("Despite wide acknowledgement of the doctrine's importance in modern constitutional law, attempts to explain how it arises or what it does have been largely unsuccessful."); Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L. J. 1, 3 (2001) ("Regrettably, more than a century of judicial and scholarly attention to the problem has produced few settled understandings."); Lillian BeVier & John Harrison, *The State Action Principle and its Critics*, 96 VA. L. REV. 1767, 1781 (2010) (same); Charles R. Bogle, *"Unconscionable" Conditions: A Contractual Analysis of Conditions on Public Assistance Benefits*, 94 COLUM. L. REV. 193, 213 (1994) (asserting that each scholarly proposal for reconciling the doctrine "is problematic and incomplete in some way"); Renee Lettow Lerner, *Unconstitutional Conditions, Germaneness, and Institutional Review Boards*, 101 NW. U. L. REV. 775, 775 (2007) (describing the field as "a doctrinal and scholarly morass").

dismissed such attempts as futile and instead focused their efforts on clarifying the doctrine's application within a particular field.[169] Consistent with the latter view, this Article will limit its analysis of the unconstitutional conditions doctrine to matters of taxation, leaving study of the doctrine's remaining applications to those better suited to the task.[170]

2. *The Supreme Court Has Sought to Clarify the Unconstitutional Conditions Doctrine in the Area of Taxation.*

The first tax case to implicate the unconstitutional conditions doctrine was *Speiser v. Randall*.[171] There, the Supreme Court struck down a California statute conditioning the receipt of a property-tax exemption on veterans' willingness to sign a loyalty oath.[172] Justice Brennan began the majority opinion by declaring "that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech."[173] The Court rejected the State's contention that tax exemptions are a matter of government largesse and therefore immune from First Amendment scrutiny:

> To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech.[174]

Because the exemption was "aimed at the suppression of dangerous ideas,"[175] the statute was declared unconstitutional.[176]

One year later, the Court revisited the unconstitutional conditions doctrine in *Cammarano v. United States*.[177] Petitioners were taxpayers who wished to deduct certain lobbying expenditures as "ordinary and necessary" business expenses in contravention of existing Treasury regulations.[178] Although

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169. Berman, *supra* note 168, at 5. *See also* Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech and Abortion)*, 70 B.U. L. REV. 593, 620–21 (1990) (suggesting the doctrine should be abandoned).

170. *See* Rosenthal, *supra* note 167, at 1123 (noting that although the Court has demonstrated a willingness to treat tax benefits as the constitutional equivalent of spending, the two have generally been treated differently, both politically and constitutionally).

171. 357 U.S. 513, 529 (1958).

172. *Id.* The oath provided: "I do not advocate the overthrow of the Government of the United States or the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in the event of hostilities." *Id.* at 515.

173. *Id.* at 518.

174. *Id.* at 518.

175. *Id.* at 519.

176. *Id.* at 529.

177. 358 U.S. 498 (1959).

178. *Id.* at 499–501. The regulations, in pertinent part, provided "no deduction shall be allowed to sums of money expended for lobbying purposes [or] the promotion or defeat of

petitioners had failed to raise the argument below, the Court nonetheless considered and promptly dismissed their First Amendment challenge based on *Speiser*:

> *Speiser* has no relevance to the cases before us. Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities[, i.e., lobbying], but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the . . . Code.[179]

Unlike the property tax exemption at issue in *Speiser*, the Treasury's "nondiscriminatory denial" of a deduction for lobbying expenditures in *Cammarano* was "plainly not aimed at the suppression of dangerous ideas," leading the Court to uphold the regulations as constitutional.[180]

While the Court's unconstitutional conditions jurisprudence expanded dramatically between 1960 and 1980, the cases of that era did not address matters of tax law.[181] This changed in 1983, when the Court issued its opinion in *Regan v. Taxation with Representation of Washington*.[182] TWR, a nonprofit corporation organized to represent the public interest in matters of taxation, applied for and was denied 501(c)(3) status because a substantial part of its activities were to consist of lobbying.[183] Relying on *Speiser*, TWR argued "that the prohibition against substantial lobbying by § 501(c)(3) organizations imposes an 'unconstitutional condition' on the receipt of tax-deductible contributions."[184] Although the Court acknowledged that "the government may not deny a benefit to a person because he exercises a constitutional right,"[185] it found *Speiser* inapposite. The Court held that "[t]he Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby."[186] Instead, *Cammarano* was found to be controlling such that the Code's lobbying proscription withstood First Amendment scrutiny.[187]

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legislation." *Id.* at 500–501.

179. *Id.* at 513.

180. *Id.* (internal quotation marks omitted).

181. *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980) (restrictions on federally funded abortions); Maher v. Roe, 432 U.S. 464 (1977) (same); Buckley v. Valeo, 424 U.S. 1 (1976) (restrictions on campaign expenditures); Perry v. Sindermann, 408 U.S. 593 (1972) (nonrenewal of government employment contract); Sherbert v. Verner, 374 U.S. 398 (1963) (denial of unemployment benefits).

182. 461 U.S. 540 (1983).

183. *Id.* at 541–542

184. *Id.* at 545.

185. *Id.*

186. *Id.*

187. *Id.* at 546.

Central to the Court's holding was the fact that TWR could channel its lobbying activity through a separate 501(c)(4) organization,[188] while continuing to receive 501(c)(3) status for its nonlobbying activities.[189] Ironically, TWR had been formed to consolidate the operations of two existing nonprofit corporations, a 501(c)(4) organization devoted to lobbying and a 501(c)(3) organization engaged in educational activities.[190] TWR's ability to return to this "dual structure" thus saved the Code's lobbying proscription from violating the prohibition against unconstitutional conditions.[191]

TWR's inability to lobby using tax-deductible contributions was not a penalty implicating the unconstitutional conditions doctrine because the group was "free to make known its views on legislation through its § 501(c)(4) affiliate without losing tax benefits for its nonlobbying activities."[192] Instead, the rule reflected a decision by Congress "not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare."[193]

Although not a tax case, the Supreme Court's decision in *Rust v. Sullivan* is also noteworthy to the extent that it clarifies the Court's unconstitutional conditions doctrine generally and the significance of its opinion in *Regan* specifically.[194] The petitioners in *Rust* were a collection of healthcare providers receiving grants pursuant to Title X of the Public Health Service Act of 1970[195] for the purpose of providing family planning services.[196] Under Department of Health and Human Services ("HHS") regulations, petitioners were barred from providing abortion counseling as part of any program receiving Title X funds.[197] Petitioners argued that the regulations created an unconstitutional condition by

188. I.R.C. § 501(c)(4) (2006).

189. Sullivan, *supra* note 164, at 1465.

190. *Regan*, 461 U.S. at 543.

191. As Justice Blackmun explained in concurrence:

> If viewed in isolation, the lobbying restriction contained in § 501(c)(3) violates the principle, reaffirmed today, "that the Government may not deny a benefit to a person because he exercises a constitutional right." Section 501(c)(3) does not merely deny a subsidy for lobbying activities; it deprives an otherwise eligible organization of its tax-exempt status and its eligibility to receive tax-deductible contributions for all its activities, whenever one of those activities is "substantial lobbying." Because lobbying is protected by the First Amendment, § 501(c)(3) therefore denies a significant benefit to organizations choosing to exercise their constitutional rights.
>
> The constitutional defect that would inhere in § 501(c)(3) alone is avoided by § 501(c)(4).

Id. at 552–53 (Blackmun, J., concurring).

192. *Id.* at 553.

193. *Id.* at 544.

194. 500 U.S. 173 (1991).

195. 42 U.S.C. §§ 300 to 300a-6 (1970).

196. *Rust*, 500 U.S. at 181.

197. *Id.* at 179–80 (citing 53 Fed. Reg. 2923-24 (1988)).

making receipt of Title X funding contingent upon the forfeiture of their First Amendment rights.[198]

For support, petitioners relied on *Federal Communications Commission v. League of Women Voters of California*.[199] In *League of Women Voters*, the Court struck down a law barring editorializing by noncommercial television stations receiving federal grants.[200] Citing *Regan*, the government argued that the law did not penalize stations for exercising their First Amendment rights but instead reflected a determination by Congress not to subsidize editorializing by public broadcasting stations.[201] Because these stations could not segregate federally-funded, noneditorializing activities, however, the law did not provide an organizational alternative similar to the 501(c)(3)–501(c)(4) dichotomy that had been critical in *Regan*.[202] Indeed, after declaring the law unconstitutional in *League of Women Voters*, the Supreme Court made a point of acknowledging that "if Congress were to adopt a revised version of [the law] that permitted noncommercial educational broadcasting stations to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid under the reasoning of [*Regan*]."[203]

The *Rust* Court ultimately found *League of Women Voters* distinguishable because HHS's ban on abortion counseling was not absolute but was instead limited to Title X projects. Grantees, thus, were free to provide abortions and abortion-related services outside of the project receiving Title X funds. Justice Rehnquist, writing for the majority, explained this distinction in detail:

> The [HHS] regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X *grantee* and a Title X *project*. The grantee, which normally is a healthcare organization, may receive funds from a variety of sources for a variety of purposes. The grantee receives Title X funds, however, for the specific and limited purpose of establishing and operating a Title X project. The regulations govern the scope of the Title X *project's* activities and leave the grantee unfettered in its other activities.[204]

After noting that the government is generally free to condition grants on recipients' willingness to abide by certain restrictions, the Court upheld the HHS

198. *Id.* at 196.
199. 468 U.S. 364 (1984).
200. *Id.* at 371–73.
201. *Id.* at 399.
202. *Id.* at 400.
203. *Id.*
204. Rust v. Sullivan, 500 U.S. 173, 196 (1991).

regulations: "By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in *League of Women Voters* and *Regan*, not denied it the right to engage in abortion-related activities" but "has merely refused to fund such activities out of the public [coffers]."[205]

3. By Making Advocacy Organizations' Receipt of Certain Tax Benefits Contingent upon an Absolute Forfeiture of Their First Amendment Right to Remain Silent and Abstain from Compelled Speech, Revenue Procedure 86-43 Violates the Unconstitutional Conditions Doctrine.

The government may condition the receipt of a benefit it is not otherwise obligated to provide on the recipient's relinquishment of a constitutional right so long as the condition does not work an absolute forfeiture of the right.[206] In *Regan*, the Code's lobbying proscription was found to withstand constitutional scrutiny because receipt of the relevant tax benefits was not conditioned upon section 501(c)(3) organizations' categorical abstention from lobbying.[207] Rather, the Code simply required that public charities wishing to engage in lobbying do so through a separate 501(c)(4) affiliate.[208] Similarly, HHS's ban on abortion counseling was upheld in *Rust* because receipt of Title X funds was not conditioned upon grantees' categorical abstention from abortion-related speech.[209] Instead, the regulations merely required that healthcare organizations wishing to provide abortion-counseling do so through non-Title X-funded programs.[210] In both cases, the Court's holding was predicated on the availability of some alternate means by which the recipient could continue to engage in the burdened speech without forfeiting the desired subsidy.

For advocacy organizations, however, the receipt of a particular benefit—eligibility to receive tax-deductible contributions—is conditioned upon the absolute forfeiture of a constitutional right—freedom of speech—so as to violate the unconstitutional conditions doctrine. The de facto fifth factor requires that advocacy organizations wishing to receive tax-deductible contributions relinquish their First Amendment right to remain silent and agree to present opposing viewpoints. Groups presenting only one perspective on a given issue will not qualify for 501(c)(3) status.[211] In other words, receipt of the benefit and

205. *Id.* at 198.

206. Joseph S. Klapach, *Thou Shalt Not Politic: A Principled Approach to Section 501(c)(3)'s Prohibition of Political Campaign Activity*, 84 CORNELL L. REV. 504, 514 (1999) ("[T]he government may condition the receipt of a benefit on the relinquishment of free speech rights only if the recipient can segregate its activities in a manner that enables it to engage in the prohibited speech and still obtain the desired benefit for its other activities.").

207. Regan v. Taxation with Representation, 461 U.S. 540, 544–46, 552 (1983).

208. *Id.* at 544, 552.

209. *Rust*, 500 U.S. at 196.

210. *Id.*

211. Exemption from federal income taxation is not at issue since organizations refusing to

exercise of the right are mutually exclusive; advocacy organizations must choose one and forego the other in violation of the Court's prohibition against unconstitutional conditions.

Indeed, unlike their counterparts in *Regan* and *Rust*, advocacy organizations cannot segregate their activities so that they may receive the desired benefit while continuing to exercise the burdened constitutional right. Whereas the charity in *Regan* was able to form a section 501(c)(4) affiliate organization through which to engage in lobbying without jeopardizing its ability to receive charitable contributions for its educational activities, advocacy organizations cannot form affiliate organizations through which to exercise their right to remain silent while continuing to receive tax-deductible contributions for their remaining charitable endeavors.[212] This is because these organizations generally do not engage in charitable activities beyond their advocacy work. For these organizations, advocacy is not an ancillary activity undertaken to supplement their core mission of providing generalized instruction to the public but instead represents their primary and indeed only activity. Advocacy organizations' ability to form section 501(c)(4) affiliates, therefore, cannot save the Procedure from being struck down as imposing an unconstitutional condition on the receipt of tax-deductible contributions.

Unlike lobbying, moreover, Congress has not expressly forbidden education-oriented advocacy by public charities.[213] Rather, by acquiescing in the Treasury's definition of the term "educational" as including certain types of advocacy organizations, Congress has implicitly endorsed these groups' inclusion among section 501(c)(3) charities.[214] Segregating their advocacy

present opposing viewpoints would likely qualify for tax-exempt status under section 501(c)(4) of the Code. *See* I.R.C. § 501(c)(4) (2006) (exempting "social welfare" organizations).

212. *See, e.g.*, Nat'l Ass'n for the Legal Support of Alt. Sch. v. Comm'r, 71 T.C. 118, 124 (1978) (finding that all of the advocacy organization's activities were designed to advocate the advantages of alternative schools over public schools); I.R.S. Gen. Couns. Mem. 37,173 (June 21, 1977) (noting that all of the advocacy organization's activities—including forums, seminars, discussion groups, printed materials, and production of radio and television shows—were designed to advocate "the position that homosexuality is a mere preference, rather than a pathology"). *See also* Nat'l Alliance v. United States, 710 F.2d 868, 869 (D.C. Cir. 1983) ("National Alliance . . . publishes a monthly newsletter and membership bulletin, organizes lectures and meetings, issues occasional leaflets, and distributes books; all for the stated purpose of arousing in white Americans of European ancestry an understanding of and a pride in their racial and cultural heritage and an awareness of the present dangers to that heritage."); Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1032 (D.C. Cir. 1980) (noting that although the group's primary activity was the production of a feminist newspaper, the group devoted "a considerable minority of its time to promoting women's rights through workshops, seminars, lectures, a weekly radio program, and a free library"); Nationalist Found. v. Comm'r, 80 T.C.M. (CCH) 507, 512 (2000) (finding that all of the group's activities "serve[d] the purpose of increasing social activism of pro-majority and rightist beliefs").

213. I.R.C. § 501(c)(3) (2006).

214. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 599 (1983) (noting that congressional inaction generally should not be used to gauge legislative intent but may, in limited instances, support a finding of congressional acquiescence).

activities into a separate section 501(c)(4) affiliate would undermine the determination of Congress and the Treasury that advocacy organizations provide a sufficient public benefit to merit tax-deductible contributions.

The grantee–project distinction relied on in *Rust* is similarly unavailing. The *Rust* Court emphasized that because the text of Title X "expressly distinguishes between a Title X grantee and a Title X project," HHS's regulations "govern [only] the scope of the Title X *project's* activities, and leave the grantee unfettered in its other activities."[215] Healthcare providers receiving Title X grants could therefore continue to provide abortion services outside of the Title X project.[216]

In contrast, neither the Internal Revenue Code nor applicable Treasury regulations distinguish between advocacy organizations and the activities they undertake. Thus, it is not as though advocacy organizations may exercise their right to abstain from compelled speech in their organizational capacity such that forfeiture of their First Amendment rights is ostensibly limited to the activities for which they are eligible to receive tax-deductible contributions. Rather, the Service's application of Revenue Procedure 86-43 to require the presentation of opposing viewpoints "place[s] a condition on the *recipient* of the subsidy [i.e., advocacy organizations] rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct."[217]

Because *Regan* and *Rust* are inapposite, *Speiser v. Randall* is dispositive. Just as California sought to condition receipt of a property tax exemption on veterans' willingness to sign a loyalty oath, the Procedure seeks to condition receipt of tax-deductible contributions on advocacy organizations' willingness to present opposing viewpoints. Both conditions require the relinquishment of recipients' First Amendment right to abstain from compelled speech whereas the conditions upheld in *Regan* and *Rust* ostensibly sought to compel silence by declining to subsidize certain types of speech.

Finally, unlike *Regan* and *Rust*, the California statute and the Procedure condition the receipt of certain tax benefits on recipients' absolute forfeiture of their First Amendment rights. The veterans in *Speiser*, like advocacy organizations, were not able to segregate their activities so that they could receive the desired benefit – exemption from property taxes – while continuing to exercise the burdened constitutional right – antigovernment speech. Instead, receipt of the exemption represented an all-or-nothing proposition such that the statute, like Revenue Procedure 86-43, was found to impose an unconstitutional condition.

215. Rust v. Sullivan, 500 U.S. 173, 196 (1991).

216. *Id.*

217. *Rust*, 500 U.S. at 197.

V.
CONCLUSION

In finding the full and fair exposition standard unconstitutionally vague, the D.C. Circuit acknowledged that the "Treasury bravely made a pass at defining 'educational,' but the more parameters it tried to set, the more problems it encountered."[218] The same may be said of the Service's methodology test. Rather than curing the constitutional defects inherent in the test's four published factors, application of the de facto fifth factor only exacerbates the Procedure's constitutional shortcomings.

The Service, therefore, must cease applying the de facto fifth factor unless and until the factor is reformulated to comport with constitutional principles. Given the educational exemption's tumultuous and tortured history, such an endeavor will likely prove difficult if not altogether impossible, but as recognized by the D.C. Circuit in *Big Mama Rag*, "the difficulty of the task neither lessens its importance nor warrants its avoidance."[219]

218. Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1035 (D.C. Cir. 1980).
219. *Id.* at 1040.