

Responses To Arguments Against Reforming IRS Treatment of Section 501(c)(4) Groups

Although the tax code says section 501(c)(4) groups must be “operated exclusively” for social welfare purposes, IRS regulations say they need only be “primarily engaged” in promoting the general welfare of the community. This misinterpretation has allowed these groups to spend hundreds of millions of dollars on politics without disclosing their donors. Opponents of regulatory and legislative responses to the upsurge in dark money spending have advanced several arguments for leaving the current system as it is.

- The IRS’s interpretation deserves deference because agencies may interpret ambiguous laws.
 - *Response*: Agencies don’t have discretion to interpret clear laws. The plain meaning of the word “exclusively” is unambiguous – it means “solely” or excluding everything else.
- Court decisions support the IRS’s interpretation.
 - *Response*: Courts cannot override the plain meaning of a statute except when it would produce absurd results or results at odds with the drafters’ intent. Congress understood “exclusively” meant “solely” when it passed the law in 1913. The decisions equating “exclusively” and “primarily” misconstrue earlier cases that actually said nonprofits can engage in non-exempt activities only that are “incidental and less than substantial.”
- The legislative history of section 527 supports the IRS’s interpretation.
 - *Response*: A comment in a Senate report written nearly 60 years later saying that under present law section 501(c)(4) groups may engage in political activities sheds no light on Congress’ original intent. Further, the report specifically notes Congress expected section 501(c) organizations engaged in politics to do so through separate political organizations required to disclose their donors.
- Political activity actually promotes social welfare.
 - *Response*: Social welfare means the activity promotes the general welfare of the “community as a whole.” Campaign activity for or against a candidate for elected office benefits the supported candidate, not the community as a whole, and certainly not the candidate’s opponent.
- Giving “exclusively” its plain meaning will force section 501(c)(4)s to reveal all their donors.
 - *Response*: Fixing the regulations will not result in disclosure of *all* donors, only those giving money to engage in politics. Section 501(c)(4) groups would not be permitted to engage in political activity themselves, but they could set up separate affiliates or funds to do so. Only contributors to the separate group would be disclosed.
- Fixing the regulations is an effort to get around the Supreme Court’s *Buckley v. Valeo* ruling that only groups whose “major purpose” is politics can be required to disclose their donors.
 - *Response*: *Buckley* held only one provision of the Federal Election Campaign Act was too vague. Most lower courts have declined to extend that holding to laws that are not vague. *Buckley* also upheld another provision requiring disclosure of contributors who gave money for the purpose of influencing of federal elections to groups whose major purpose was not politics. Fixing the regulations would require disclosure of exactly these donors.

Claims Section 501(c)'s Restrictions on Political Spending Violate the First Amendment

Section 501(c)(3)'s prohibition on political activity has long been attacked for supposedly violating the First Amendment. This argument, rooted in the doctrine the government may not deny a benefit because a person exercises a constitutional right, asserts it is an "unconstitutional condition" to deny a group tax-exempt status unless it gives up the right to political speech.

In *Regan v. Taxation With Representation of Washington* ("TWR"), however, the Court held a restriction on speech by section 501(c)(3) groups was valid. Section 501(c)(3) groups are prohibited from substantial lobbying, but the Court ruled this condition is not unconstitutional because the tax code subsidizes these groups by providing tax-exempt status and allowing donors to take a deduction, and the First Amendment does not require Congress to subsidize exercising a constitutional right such as lobbying.

The Court also noted TWR could exercise its right to speak if it established a separate section 501(c)(4) organization for its lobbying activities. The Court's unanimous opinion does not rest on this rationale, but a three-justice concurrence focused on the existence of an alternative channel of communication and said a restriction is valid if that alternative channel is not unduly burdensome. Several later Supreme Court decisions adopted the concurrence's view, but the Court has not struck down TWR and relied on its reasoning in some recent decisions to conclude the government may put limits on activity it subsidizes.

As a result, section 501(c)(3) and 501(c)(4)'s restrictions on political activity should be constitutional because both provide subsidies, and both types of groups can engage in political activity through alternative channels. The law, however, is in a state of flux, and some have argued the restrictions are invalid for several reasons addressed below.

- TWR involved lobbying and thus does not apply to political activity.
- *Response*: A federal appeals court applied TWR to a section 501(c)(3) church that wanted to engage in politics, reasoning the restriction was valid because the church could establish a political action committee through an affiliated section 501(c)(4) group.
- Tax-exempt status does not provide a subsidy because section 501(c) groups are taxed on their political spending.
- *Response*: Tax-exempt organizations are taxed on the lesser of (1) their political spending, or (2) their investment income. As a factual matter, tax-exempt groups engaged in politics do not pay much, if any, tax under section 527, and thus do receive a subsidy. They also receive a subsidy because contributions to them are exempt from the gift tax.
- *Citizens United* held political action committees are burdensome alternatives. As a result, the tax code's restrictions are not valid because the alternative channel is unduly burdensome.
- *Response*: Under TWR, an alternative channel is not necessary for the restriction to be valid as long as there is a subsidy. Even if the alternative channel doctrine applies, establishing a political action committee may not be *unduly* burdensome.
- The restrictions improperly disfavor certain speakers.
- *Response*: The rules apply equally to all section 501(c)(3) and 501(c)(4) groups and do not disfavor unpopular groups. In addition, the Supreme Court has held the government may treat certain types of tax-exempt organizations differently than others.