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## Teaching Elements of Election Law Beyond the Disciplinary Borders of “Election Law”

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## TEACHING ELEMENTS OF ELECTION LAW BEYOND THE DISCIPLINARY BORDERS OF “ELECTION LAW”

FRANCES R. HILL\*

Teaching election law does not invariably mean teaching “Election Law” courses. Many contributors to this Symposium undoubtedly teach well-designed “Election Law” courses. I have done something quite different. I teach elements of election law in two courses on other subjects:<sup>1</sup> Taxation of Exempt Entities<sup>2</sup> and Constitutional Law I, a required first-year course on structural constitutional law.<sup>3</sup> This short Essay begins with some general thoughts on the importance of election law in such disparate courses, the complexity of election law, and the implications of choices of what to teach, how to teach it, and what cannot be addressed.

### I. ELECTION LAW: SOME CONTEXTUAL CONSIDERATIONS IN TEACHING

Election law is an area of practice and scholarship marked by broad scope and technical complexity. Election law consists of four subfields—voting rights, election administration, redistricting, and campaign finance. Each of these four areas of election law is marked by internal complexity that has developed to the point that it may no longer be possible to develop a high degree of expertise in each of the four fields. This is not to say that Election Law courses cannot or should not address all four areas, but it underscores the importance of making carefully considered choices about what to include.

These choices involve not only what issues to consider but also what materials to assign. There is a temptation to focus on Supreme Court decisions in Election Law courses. Some textbook authors have defined a “canon” of such cases. Whether there is an election law “canon” is an interesting

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1. Periodically, I teach a seminar listed as Selected Topics in Election Law, but that is not the topic of this Essay.

2. This is a course mainly for students in Miami’s Graduate Program in Taxation but it is open to J.D. students who have taken Federal Income Tax.

3. Constitutional Law I is a four-credit course taught in the second semester of the first year at the University of Miami School of Law. It focuses on balance of powers and federalism.

question,<sup>4</sup> but it does not serve very well as the basis for deciding how to teach Election Law, either in a separate Election Law course or in other courses that intersect with election law. I find no alternative to beginning with issues and then considering which cases, statutory provisions, regulatory provisions, and other guidance from either the Federal Election Commission (“FEC”) or Internal Revenue Service (“IRS”) is necessary to allow students to understand those issues.<sup>5</sup> Because we are a federal system, state statutes will become relevant even to understanding federal election law, and the U.S. Constitution applies to elections even at the local level, as states and localities are learning in the wake of the Supreme Court’s decision in *Citizens United*.<sup>6</sup>

My own approach to the selection of topics and materials is based on the questions of why and how elections matter. The foundational answer is located in the first sentence of the Constitution, which states that “[w]e the People of the United States . . . do ordain and establish this Constitution for the United States of America.”<sup>7</sup> The Constitution bases legitimate democratic government on the consent and participation of the people, who have a constitutionally defined role in governance.<sup>8</sup> This is a principle of continuing consent through voting in properly conducted campaigns and elections. This principle applies to all four areas of election law. The right to vote, the right to have one’s vote count on a basis equal to other votes, the right to have one’s vote counted properly and honestly, and the right to have one’s voice heard in election campaigns are all part of constitutive voting.<sup>9</sup> They are all elements ensuring that the sovereign people can play their constitutional role in legitimate government. In sum, voting is both an individual right and a structural constitutional principle.

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4. For perhaps the most illuminating use of the concept of a canon focusing on a case that is not commonly read or cited but should be, see Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 296–97 (2000) (discussing *Giles v. Harris*, 189 U.S. 475 (1903)).

5. Teaching students to deal with the materials that they will necessarily need to work with in their professional lives should be one of the goals in every course that we teach. It is part of our duty to our students.

6. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

7. U.S. CONST. pmb.

8. Frances R. Hill, *Constitutive Voting and Participatory Association: Contested Constitutional Claims in Primary Elections*, 64 U. MIAMI L. REV. 535 (2010); Frances R. Hill, *Putting Voters First: An Essay on the Jurisprudence of Citizen Sovereignty in Federal Election Law*, 60 U. MIAMI L. REV. 155 (2006).

9. Frances R. Hill, *Nonparticipatory Association and Compelled Political Speech: Consent as a Constitutional Principle in the Wake of Citizens United*, 35 N.Y.U. REV. L. & SOC. CHANGE 550 (2011) [hereinafter Hill, *Nonparticipatory Association*]. For a shorter essay based on this article, see Frances R. Hill, *Nonparticipatory Association and Compelled Political Speech: Consent as a Constitutional Principle in the Wake of Citizens United*, in MONEY, POLITICS AND THE CONSTITUTION: BEYOND *CITIZENS UNITED* 77 (Monica Youn ed., 2011).

While I begin with the relationship between elections and the constitutional role of the people of the United States, I do not end there. Focusing only on the “big questions” makes election law appear too tidy. Election law principles and values have to be implemented evenhandedly and honestly in the midst of fierce contests for power, whether at the local or national level, and lawyers play an important role in designing election systems that can be implemented in this context. The following two sections of this Essay illustrate the interplay of this framework with the technical complexity of election law and the law with which it intersects.

## II. TEACHING ELECTION LAW IN CONSTITUTIONAL LAW I

Constitutional Law I is a structural constitutional law course that focuses on the balance of powers and federalism. There is no shortage of important material for this course. Yet, I routinely have students read election law cases that present these issues with particular clarity in contemporary settings.

*Citizens United v. FEC*<sup>10</sup> is a case about, among other things, the balance of powers. Like its predecessor case, *Wisconsin Right to Life* (“*WRTL*”),<sup>11</sup> *Citizens United* takes a strong position limiting the scope of permissible congressional action in matters relating to campaign finance.<sup>12</sup> In the first-year course on structural constitutional law, the theory of balance of powers is a central focus. As presented in the dueling opinions in *McConnell*,<sup>13</sup> and then in *WRTL*, and again in *Citizens United*, there is a passionate difference over which branch of government will control the right of the people to have their voices heard in election campaigns.<sup>14</sup> The larger question is whether this a structural constitutional issue or a matter of the rights of persons, not just people, to speak. *McConnell* takes a structural approach.<sup>15</sup> *WRTL* and *Citizens United* take an absolutist individual rights approach that denies the relevance of contextual factors and interprets the First Amendment with assertive, even pugnacious, literalism.<sup>16</sup> Exploring these cases, students can see a clash between the Court and Congress that is quite remarkable. This is not a subtle difference, and the language used shows little restraint.

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10. *Citizens United*, 130 S. Ct. at 876.

11. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

12. *Citizens United*, 130 S. Ct. at 913.

13. *McConnell v. FEC*, 540 U.S. 93 (2003).

14. See Frances R. Hill, *Corporate Political Speech and the Balance of Powers: A New Framework for Campaign Finance Jurisprudence in Wisconsin Right to Life*, 27 ST. LOUIS U. PUB. L. REV. 267, 270 (2008) (discussing the lack of allocation of financial jurisprudence to any branch of government).

15. See *McConnell*, 540 U.S. at 223–24.

16. For a pointed, albeit indirect rejection of this approach to constitutional interpretation, see Justice David H. Souter, *Harvard's 359th Commencement Address*, 124 HARV. L. REV. 429, 432–34 (2010).

In *McConnell*, the Court repeatedly referenced Congress's broad authority to legislate in the area of campaign finance and the fitness of deferring to the political branches on campaign finance issues.<sup>17</sup> The majority based its opinion on the long history of congressional engagement in this area, which it interpreted as evidence that the people's elected representatives had long protected government from domination by special interests.<sup>18</sup>

Writing in dissent, Justice Kennedy concluded that the electioneering communication provisions of election law "demonstrate Congress' fundamental misunderstanding of the First Amendment."<sup>19</sup> He charged that Congress enacted the provision knowing that it was unconstitutional.<sup>20</sup> In light of this narrative, Justice Kennedy concluded that "we cannot cede authority to the Legislature to do with the First Amendment as it pleases."<sup>21</sup> Justice Kennedy demanded that Congress establish an empirical predicate for legislation beyond the experience or assertions of members of Congress.<sup>22</sup>

The rhetoric escalated in *WRTL*, in which the *McConnell* dissenters now formed the majority. The Court held that the electioneering communications before the Court in this case could be paid for with the organization's general treasury funds.<sup>23</sup> The Chief Justice's opinion stated that the case was about "political speech."<sup>24</sup> He took the quite remarkable position, especially in an as-applied challenge to a statute, that litigation and discovery can be burdens on political speech.<sup>25</sup>

In his concurrence, Justice Scalia expressed utter impatience with Chief Justice Roberts's opinion.<sup>26</sup> He claimed that the Court is "primarily responsible" for the First Amendment and asserted that it is "perhaps our most important constitutional task to ensure freedom of political speech."<sup>27</sup> Justice Scalia seems to present a theory of balance of powers as a series of interpretive monopolies over various parts of the Constitution. Students tend to find that considering this possibility enlarges their understanding of balance of powers as a contested concept. Contested issues include whether judicial review

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17. *McConnell*, 540 U.S. at 137, 203, 208.

18. *Id.* at 189–210.

19. *Id.* at 339 (Kennedy, J., dissenting).

20. *Id.*

21. *Id.* at 330.

22. *See McConnell*, 540 U.S. at 298 (Kennedy, J., dissenting) (explaining that the standard of corruption should not be "whether some persons, even Members of Congress, conclusorily assert that the regulated conduct appears corrupt to them," but must instead look for inherent quid pro quo dangers).

23. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. at 481.

24. *Id.*

25. *Id.* at 468 n.5.

26. *Id.* at 499–501 (Scalia, J., concurring) (stating that as-applied challenges cannot protect First Amendment rights).

27. *Id.* at 503.

means that only the courts interpret the Constitution and whether the courts can establish standards for the legislative processes, including what kind of factual record, if any, Congress must prepare. It is possible for students to see that the current majority has merged the standards applied for the purpose of interpreting Section Five of the Fourteenth Amendment in substantive due process cases to its First Amendment jurisprudence in campaign finance cases.

My structural constitutional law class generally ends with *Bush v. Gore*.<sup>28</sup> The class reads the entire case. I would do this even if I did not teach in Florida. For purposes of this course, *Bush v. Gore* offers a complex analysis of the intersection of the balance of powers and federalism, with the United States Supreme Court majority claiming that it had a right and a duty to protect the Florida Legislature from the Florida Supreme Court and summarily dismissing the Florida Supreme Court's role in interpreting Florida statutes.<sup>29</sup> The case is far more remarkable for its concept of federalism and the balance of powers than it is for the inversion of the usual position of the Justices on the Court. This is an issue that first-year students can understand. It makes structural issues real and contemporary in a way that many of the older cases cannot.

The core structural issue raises questions about the federal courts' jurisdiction in this matter. Students in a first-year class can think about this issue once they have considered *Marbury v. Madison*,<sup>30</sup> where the Court appeared to find that Marbury would prevail but concluded on very problematic grounds that the Court lacked jurisdiction. At the same time, the Court included dicta asserting the Court's role in judicial review, thus consolidating the Court's role as a co-equal branch of government.<sup>31</sup>

In contrast to *Marbury*, the majority in *Bush v. Gore* did not find it necessary to include a jurisdictional statement or even to discuss jurisdiction. Does the cursory reference to equal protection<sup>32</sup> constitute a statement of jurisdiction? The majority did not say. The concurring opinion, written by Chief Justice Rehnquist and joined by Justice Scalia and Justice Thomas, represents an effort to resolve the dissonance between the majority opinion and the Rehnquist Court's development of federalism as a limit on the scope of federal government power.<sup>33</sup> Chief Justice Rehnquist's premise is that presidential elections implicate federal interests even though presidential

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28. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

29. *Id.* at 109–11.

30. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

31. *Id.* at 176–77. In addition, *Marbury* developed the initial formulation of the political question doctrine, which links *Marbury* to *Baker v. Carr*, 369 U.S. 186 (1962), in which the Court held that the political question doctrine did not preclude Court consideration of vote dilution arising from impermissibly drawn state legislative districts.

32. *Bush*, 531 U.S. at 103.

33. *Id.* at 112–22 (Rehnquist, C.J., concurring).

electors are not themselves federal officers or agents.<sup>34</sup> He then makes a passing reference to the Guarantee Clause,<sup>35</sup> observing that “in ordinary cases, the distribution of powers among the branches of a State’s government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character.”<sup>36</sup> Based on the premise that this is not an ordinary case, Chief Justice Rehnquist emphasized the role of state legislators in appointing electors for President and Vice President.<sup>37</sup> He concluded that “[a] significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.”<sup>38</sup>

Chief Justice Rehnquist’s concurrence found that the Florida Supreme Court usurped the authority of the Florida Legislature, which violated the United States Constitution and created the basis for the United States Supreme Court’s jurisdiction. The concurrence concluded that “the Florida Supreme Court’s interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.”<sup>39</sup> Chief Justice Rehnquist then attempted to reconcile the majority’s action in this case with his theory of federalism, claiming that the Court’s reasoning “does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*.”<sup>40</sup> In any case, Chief Justice Rehnquist emphasized the lack of time for a state recount.<sup>41</sup> Federalism, it seems, is inconsistent with statutory deadlines.

The three dissents of *Bush v. Gore* present alternative analyses of federalism, balance of powers, and standing. At the same time, the dissents differ among themselves. This range of opinions permits students to develop their own ideas with the confidence that at least one other member of the Court might find merit in their ideas. This makes class discussions more focused and

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34. *Id.* at 112. Chief Justice Rehnquist stated:

We deal here not with an ordinary election, but with an election for the President of the United States. In *Burroughs v. United States*, 290 U.S. 534, 545 (1934), we said: “While presidential electors are not officers or agents of the federal government (In re *Green*, 134 U.S. 377, 379 [(1890)]), they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated.”

*Id.*

35. U.S. CONST. art. IV, § 4.

36. *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring).

37. *Id.* (citing U.S. CONST. art. II, § 1, cl. 2).

38. *Id.* at 113.

39. *Id.* at 115. *But see* Souter, *supra* note 16 (providing a critique of the “fair reading” model of constitutional interpretation).

40. *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring) (emphasis in original).

41. *Id.* at 121–22.

more vigorous than they tend to be when a few students are simply arguing for their personal views on a policy topic.

Constitutional Law I is not an Election Law course, but *Citizens United* and *Bush v. Gore* are integral parts of it. They address the framework question of the relationship between elections and legitimate government. They introduce first-year students to statutes. They make constitutional law part of the everyday law that they will work with as lawyers, not a remote topic suitable only for scholarly articles.

### III. TEACHING ELECTION LAW IN TAXATION OF EXEMPT ORGANIZATIONS

Lawyers who represent tax-exempt entities will find that their clients face complex issues of reconciling advocacy of various types with protecting their tax-exempt status.<sup>42</sup> Addressing these technical issues necessarily involves tax lawyers in constitutional law and in election law. Tax lawyers face such issues as whether an exempt entity is operating as a political committee that must report to the FEC as well as to the IRS.

*Citizens United*, like many of the leading campaign finance cases, involves a tax-exempt entity but not tax-exempt organization law.<sup>43</sup> The Supreme Court has scarcely acknowledged that the entities are exempt from taxation and that they are exempt as particular types of exempt entities. Tax lawyers cannot follow the same approach. Tax lawyers have to consider what the Supreme Court's decontextualized pronouncements mean for their particular clients. First Amendment absolutism is inconsistent with this undertaking. Even though *WRTL*<sup>44</sup> and *Citizens United* broaden the scope of electoral participation for certain exempt entities, these two cases, considered separately and together, pose difficult issues that tax lawyers must address when advising their exempt entity clients. Tax lawyers have a duty to advise clients how to retain their exempt status while pursuing their exempt missions. Playing a role in public policy can be an important part of the mission. Simply advising clients not to engage in politics is completely inadequate. Simply assuring clients that the First Amendment answers all of their tax questions and protects their tax-exempt status would also be completely inadequate. At the same time, exempt entities are likely to have many supporters with divergent political views but with a common interest in a particular organization's mission. A tax-exempt organization has to protect both its exempt status and

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42. In our treatise for tax professionals who represent tax-exempt entities, Douglas Mancino and I address issues relating to lobbying, issue advocacy, and campaign participation by a broad range of exempt entities. The technical elements of the tax discussions in this short article can be found in FRANCES R. HILL & DOUGLAS M. MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS* (2002). A cumulative supplement is updated twice each year.

43. See *Citizens United v. FEC*, 130 S. Ct. 876, 881 (2010).

44. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).



its ability to pursue its mission, which means that it cannot alienate its members and contributors. Tax lawyers will be called upon to consider how to give members and contributors opportunities to support only the exempt mission without having their funds used to support candidates for elective office. Organization managers quite understandably resist efforts by members and contributors to direct their contributions in this way.

*Citizens United* and *WRTL* raise two issues at the core of exempt entity representation. One is the method of reasoning that applies. The second is what is meant by a general treasury.

The issue of what kind of legal reasoning is consistent with the First Amendment has received less attention than it deserves in discussions of *Citizens United*. For tax lawyers, this is a crucial element of the Court's reasoning. While the exempt organization provisions are stated in a very broad general terms, these broad concepts have to be interpreted in light of the facts and circumstances of each particular case. If tax lawyers had a professional mantra, this would be it. This phrase recurs throughout the regulations interpreting the Internal Revenue Code, including the provisions relating to exempt status. The most recent guidance from the IRS is a Revenue Ruling that sets forth twenty-one examples.<sup>45</sup> The examples turn on particular facts and circumstances.

In *WRTL*, Chief Justice Roberts claimed to have developed a test that would replace a subjective facts-and-circumstances approach with an objective test for determining whether a communication was the functional equivalent of express advocacy.<sup>46</sup> Chief Justice Roberts found that First Amendment jurisprudence "must eschew 'the open-ended rough-and-tumble of factors,' which 'invit[es] complex argument in a trial court and a virtually inevitable appeal.'"<sup>47</sup> In the same vein, Chief Justice Roberts found that prolonged discovery was inconsistent with the First Amendment.<sup>48</sup>

In *Citizens United*, Justice Kennedy excoriated the FEC for developing a multi-part test in response to the Court ruling in *WRTL*.<sup>49</sup> He analogized this approach to prior restraint, asserting that:

This regulatory scheme may not be a prior restraint on speech in the strict sense of that term, for prospective speakers are not compelled by law to seek an advisory opinion from the FEC before the speech takes place. As a practical matter, however, given the complexity of the regulations and the

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45. Rev. Rul. 2007-41, 2007-1 C.B. 1421. This ruling predates both *WRTL* and *Citizens United*. The IRS has issued no further guidance, although it is sorely needed.

46. *WRTL*, 551 U.S. at 469–70.

47. *Id.* at 469 (quoting *James B. Grubart, Inc. v. Great Lakes Dredging & Dock Co.*, 513 U.S. 527, 547 (1995)) (alteration in original).

48. *Id.*

49. *Citizens United v. FEC*, 130 S. Ct. 876, 895–96 (2010) (citing 11 C.F.R. § 112.1 (2009)).

deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit.<sup>50</sup>

Based on this analogy to prior restraint, Justice Kennedy claimed that the resulting bootstrap supported very muscular practical consequences.<sup>51</sup> If an organization finds it necessary or prudent to retain a campaign finance lawyer or to seek a private letter ruling or a decision by the FEC, Justice Kennedy would treat these actions as evidence that the law violated the First Amendment.<sup>52</sup>

Justice Kennedy found that courts themselves would chill political speech if they engaged in this kind of reasoning.<sup>53</sup> He concluded that “[t]he interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable.”<sup>54</sup> Justice Kennedy again considered facts-and-circumstances reasoning when he rejected Citizens United’s position in its briefs that the *Massachusetts Citizens For Life* (“MCFL”) exemption<sup>55</sup> should be relaxed to permit it to accept a limited amount of contributions from taxable corporations.<sup>56</sup> Justice Kennedy explained that “[w]e decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially if we are convinced that, in the end, this corporation has a constitutional right to speak on this subject.”<sup>57</sup>

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50. *Id.* at 895–96 (citations omitted).

51. *Id.* at 896.

52. Justice Kennedy stated:

The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech . . . . The Government may not render a ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation.

*Id.* at 889.

53. *Id.* at 891.

54. *Citizens United*, 130 S. Ct. at 891.

55. In *MCFL*, the Court exempted nonprofit corporations from 2 U.S.C. § 441b’s restriction on spending, provided the corporation was formed for the express purpose of promoting political ideas, did not engage in business activities, and did not accept contributions from for-profit entities. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263–64 (1986).

56. *Citizens United*, 130 S. Ct. at 891–92.

57. *Id.* at 892.

The Supreme Court thus found the method of reasoning central to tax analysis inconsistent with the kind of analysis required for First Amendment purposes, including campaign finance. This leaves tax lawyers in a quandary. The IRS has issued no guidance based on *Citizens United*. What authority do tax lawyers cite when advising their clients?

One approach is to read *Citizens United* as defining what tax-exempt entities can do but not what they must do. *Citizens United* does not compel exempt entities to make independent expenditures. This is not, however, the fact pattern that most exempt organizations will bring to their tax lawyer. Instead, exempt entities will want to know how to characterize a particular activity or whether a particular communication is an issue ad or an independent expenditure or lobbying. *Citizens United* offers no guidance. The question is whether it has made application of the existing tax guidance based on facts and circumstances inconsistent with the First Amendment and a constitutionally impermissible burden on the entity's political speech. The most likely interim result is that tax lawyers will continue to rely on tax guidance in characterizing communications and will treat *Citizens United* as having expanded their ability to engage in independent expenditures that expressly advocate the election or defeat of a particular candidate for public office. *Citizens United* is silent on the tax consequences of exercising this newly defined First Amendment right. Presumably, § 501(c)(4) social welfare organizations, § 501(c)(5) unions and agricultural organizations, and § 501(c)(6) business leagues that make independent expenditures would not jeopardize their exempt status provided such expenditures are not the organizations' primary activity.<sup>58</sup>

How is an exempt entity's primary activity determined? No one knows, and the IRS has offered no guidance on the subject. Even though *Citizens United* involved a § 501(c)(4) organization, the Court never addressed this issue. The IRS has never addressed this issue more generally. New § 501(c)(4) independent expenditure organizations have addressed this issue by claiming that lobbying will be their primary activity.

The Court in *Citizens United* refers repeatedly to general treasury funds.<sup>59</sup> To a tax lawyer, it is far from clear what this means when one moves beyond broad rhetoric to operational realities. This issue arises because exempt organizations commonly hold their resources in various funds dedicated to specific activities. It is far from clear how this practice relates to the concept of a general treasury. Problems arise when certain members or contributors object to the use of the organization's resources to support or oppose a particular candidate. In this context, tax lawyers must consider how to keep tax-exempt organizations running smoothly when members and contributors do not share the same political interests despite their shared interest in the

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58. See I.R.C. § 501(c) (2006).

59. See, e.g., *Citizens United*, 130 S. Ct. at 886–87.

organization's exempt activity. This is not a serious problem for organizations created for the sole purpose of supporting particular candidates, and those organizations will do just enough lobbying to qualify for exemption under § 501(c)(4). But it may well be a problem for organizations that have other purposes. In these organizations, use of the general treasury funds to support or oppose a particular candidate results in compelled speech by those who do not share the organization managers' choice of candidates to support or oppose.<sup>60</sup>

Writing for the majority in *Citizens United*, Justice Kennedy dismissed this issue with a breezy reference to "the ordinary mechanisms of corporate democracy."<sup>61</sup> Experts in corporation law have expressed little confidence in this analysis.<sup>62</sup> Tax lawyers will not be able to satisfy their clients' legitimate concerns by reference to Justice Kennedy's dismissive language. Instead, tax lawyers have to think about how to structure funds within the general treasury so that contributors who do not want their contributions used for independent expenditures can be confident that they will be used for the organizations' exempt purposes. Tax lawyers have to understand why creating a fund for persons who want their contributions used for independent expenditures would risk having their section 501 organization clients become political committees under federal law, thus requiring disclosure to the FEC.<sup>63</sup> By focusing on the technical issues arising from the operation of exempt entities, tax lawyers find themselves considering the implications of *Citizens United's* focus on entity speech even though it results in compelled speech when considered from the perspective of members and contributors.

In addition to the technical tax issues arising from *Citizens United*, tax lawyers will be called upon to advise their clients on issues relating to disclosure of contributions and expenditures. In the wake of *Citizens United*, various exempt entities have been able to collect very large sums of money and use that money to finance ads that expressly advocate the election or defeat of clearly identified candidates for public office without disclosure to the FEC or the public. Directing money to and through a § 501(c)(4) social welfare organization, a § 501(c)(5) union, or a § 501(c)(6) business league creates a money trail with uncertain implications for disclosure. This is an election law

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60. See Hill, *Nonparticipatory Association*, *supra* note 9.

61. *Citizens United*, 130 S. Ct. at 911.

62. Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010) (critiquing managerial control of corporate political speech). For the classic critique of managerial control of corporate governance, see ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

63. Independent expenditure-only organizations register with the FEC as political committees and agree that they will satisfy the disclosure requirements of political committees. *Independent Expenditure-Only Committees*, FED. ELECTION COMMISSION, [http://www.fec.gov/press/press2011/ieoc\\_alpha.shtml](http://www.fec.gov/press/press2011/ieoc_alpha.shtml) (last updated Feb. 26, 2012).

issue that becomes more apparent when one considers the intersection of tax law and election law.<sup>64</sup> Exempt organizations have generally sought to limit disclosure. At the same time, they do not want the negative implications of serving as barriers to disclosure of the true source of large amounts of money ultimately used by an entity that does disclose to the FEC for independent expenditures that expressly advocate the election or defeat of clearly identified candidates for the public office. In this scenario, the independent expenditure entity need only disclose that the money came from the exempt entity, which is not required to disclose the source of the funds. Tax lawyers will find themselves in quite unfamiliar legal territory, but this is territory that they will be expected to master.

#### CONCLUSION

Teaching election law in a structural constitutional law course and in a course on tax-exempt organizations suggests that the larger purpose of election law will be realized through addressing quite complex technical issues that arise as election law intersects with other bodies of law. The first sentence of the Constitution states that the people of the United States ordain and establish the Constitution. This right and this duty are meaningless unless the people can participate meaningfully. Teaching election law in a structural constitutional law course and in a course on tax-exempt organizations suggests that meaningful participation in our constitutional system implicates election law in a broad sense.

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64. The tensions over disclosure by exempt entities involved in campaign finance are certainly not a new issue. The contours of the debate have been apparent for almost twenty years, if not longer. See Frances R. Hill, *Newt Gingrich and Oliver Twist: Charitable Contributions and Campaign Finance*, 11 EXEMPT ORGS. TAX REV. 43 (1995), reprinted in 66 TAX NOTES 237 (1995); see also Frances R. Hill, *Softer Money: Exempt Organizations and Campaign Finance*, 32 EXEMPT ORGS. TAX REV. 205 (1999), reprinted in 91 TAX NOTES 477 (2001).