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Playing Devil's Advocate: The Constitutional Implications of Requiring Advocacy Organizations to Present Opposing Viewpoints

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

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INTRODUCTION 

For more than sixty years the Internal Revenue Service has utilized a methodology test to determine when advocacy of a particular viewpoint may be deemed educational so as to qualify the underlying organization as a public charity. 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.”¹ Consistent with this purpose, the Service has identified four factors that are ostensibly indicative of a non-educational methodology. The presence of one or more of these factors in an advocacy organization’s presentations will preclude the group from obtaining charitable status as an educational organization thereby rendering the group subject to federal income taxation and, more importantly, restricting the group’s ability to raise funds via receipt of tax-deductible contributions. Advocacy groups, therefore, must be vigilant in ensuring that their presentations do not implicate one or more of the test’s four factors if they wish to receive the tax benefits afforded by charitable status. 

The Service’s application of the methodology test, however, suggests the existence of an additional, previously undisclosed factor. This factor regards an advocacy group’s refusal to present opposing viewpoints as indicative of the group’s failure to employ an educational methodology. Whereas the methodology test, as published, has been the subject of extensive scholarly criticism,² this de facto fifth factor raises several unique constitutional concerns: First, does the factor permit arbitrary and discriminatory enforcement by the Service so as to violate the void-for-vagueness doctrine? Second, by requiring advocacy organizations to speak

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² See infra pp. 15-16.
when they would prefer to remain silent, is the factor susceptible to a compelled speech challenge? Third, in making receipt of certain tax benefits contingent upon advocacy organizations forfeiture of their First Amendment rights, does the factor impose an unconstitutional condition?

This Article concludes that the methodology test, as understood to require the presentation of opposing viewpoints, is unconstitutional. Part I discusses the statutory and regulatory framework applicable to public charities and educational organizations in particular. Part II 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 III analyzes the constitutionality of requiring advocacy organizations to present opposing viewpoints and determines that while the methodology test may not offend the proscription against compelled speech, the test is likely to be struck down as violative of the void-for-vagueness and unconstitutional conditions doctrines.

I. STATUTORY AND REGULATORY FRAMEWORK GOVERNING EDUCATIONAL ORGANIZATIONS

Section 501(a) of the Internal Revenue Code exempts thirty-one categories of organizations from federal income taxation. But for their tax-exempt status these organizations have relatively little in common, ranging from credit unions and religious organizations to veterans’ groups and cemetery companies. One type of organization, however, enjoys particularly favored status under the Code. These organizations are known as public charities, and unlike their tax-exempt brethren they are eligible to receive tax-deductible contributions for income, gift, and estate tax purposes. 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.

4 Id. § 501(c)(14)(A).
5 Id. § 501(d).
6 Id. § 501(c)(19).
7 Id. § 501(c)(13).
8 Id. §§ 170(a), (c)(2) (2006).
9 Id. § 2522(a)(2) (2006).
10 Id. § 2055(a)(2) (2006).
11 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.
Section 501(c)(3) of the Code identifies four criteria an organization must satisfy in order to obtain charitable status. First, the entity must be “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes.” Second, no part of the entity’s earnings may inure to the benefit of a private individual. Third, the entity may not participate in political campaigns. Fourth, the entity cannot devote a substantial portion of its activities to “carrying on propaganda, or otherwise attempting, to influence legislation.”

As the administrative agency responsible for enforcing the Code, the Department of the Treasury has promulgated regulations governing public charities and educational organizations in particular. For the purposes of section 501(c)(3), the term “educational” is defined 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.” 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.

This provision, commonly referred to as the full and fair exposition standard, represented the culmination of more than forty years of debate as


\[\text{\textsuperscript{12} I.R.C. § 501(c)(3).} \]
\[\text{\textsuperscript{13} Id.} \]
\[\text{\textsuperscript{14} Id.} \]
\[\text{\textsuperscript{15} Id.} \]
\[\text{\textsuperscript{16} Id.} \]
\[\text{\textsuperscript{17} Treas. Reg. § 1.501(c)(3)-1 (as amended in 2008).} \]
\[\text{\textsuperscript{18} Id. § 1.501(c)(3)-1(d)(3)(i).} \]
\[\text{\textsuperscript{19} Id.} \]
to when and under what circumstances may advocacy groups receive charitable status as educational organizations.

Beginning in 1919, Treasury promulgated a series of regulations denying the educational exemption to organizations “formed to disseminate controversial or partisan propaganda.”20 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.”21 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 genuine education is devoted to improving individuals’ reasoning and deductive capabilities irrespective of whatever conclusions they may ultimately draw on any particular subject.22

Initially, the Service’s application of the educational exemption appears to have been relatively even-handed, with groups advocating popular, ostensibly mainstream views as likely to be denied charitable status as groups promoting more controversial positions.23 Toward the end of the 1920s, however, the educational exemption began to reflect a mainstream bias such that organizations advocating minority viewpoints were at a significantly greater risk of being denied charitable status than their more conventional counterparts.24 Whereas a number of these rulings were

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21 S.M. 1362, 2 C.B. 152 (1920).

22 *Id.*

23 Thompson, *supra* note 20, at 498.

24 See *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); Weyl v. Comm’r, 18 B.T.A. 1092, 1094 (1930) (denying the educational exemption to an organization advocating “highly controversial” views); 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); 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); 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.”).
subsequently reversed on appeal, courts unvaryingly denied the exemption to advocacy organizations seeking to influence legislation. 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. After acknowledging that “it may indeed be for the bests 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.”

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 legislation.” 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.” Consistent with this interpretation, Treasury promulgated a new definition of the term “educational” acknowledging that propaganda organizations may qualify for charitable status provided that they abstain from substantial legislative activities. According to one commentator,

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25 See 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”); 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 had never had any legislative program”).

26 E.g., Marshall v. Comm’r, 147 F.2d 75, 77-78 (2d Cir. 1945); Sharpe v. Comm’r, 148 F.2d 179, 180-81 (3d Cir. 1945).

27 42 F.2d 184 (2d Cir. 1930).

28 Id. at 185.

29 Id.


31 Thompson, *supra* note 20, at 503 n.34; *see also* Report of the Reece Committee, H. Rep. No. 2681, 83d Cong. 2d Sess. 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).

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.\footnote{33}

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.”\footnote{34}

Following passage of the Internal Revenue Code of 1954, Treasury promulgated a new regulation incorporating the Service’s “fair and full” 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 conclusion.”\footnote{35} Although the Service’s position had arguably prevailed, an internal memorandum (“Memo”) prepared just a few years later characterized Treasury’s new regulation as “pos[ing] some interpretative problems.”\footnote{36} 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

\footnote{33} Thompson, \textit{supra} note 20, at 505.  
\footnote{34} \textit{INTERNAL REVENUE SERVICE, Richardson Releases 1960s-Era Memo on Exempt Organizations}, 97 Tax Notes Today 54-63, 39, March 20, 1997, available in LEXIS, Fedtax Library, TNT File [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.”).  
\footnote{36} TNT, \textit{supra} note 34, at 22.
area, and even the general criterion advanced by the Service has resulted in considerable confusion.37

To address these shortcomings, the Memo proposed that the Service, in applying the full and fair exposition standard, consider six factors ostensibly relevant to the existence of an educational methodology.38 Unbeknownst to the public, these six factors became the means by which compliance with the full and fair exposition standard was assessed between the late 1960s and early 1980s.39

The factors’ existence remained a secret until a series of declaratory judgment actions forced the Service to publish four of the factors as the methodology test. In Big Mama Rag, Inc. v. United States,40 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 advocating feminist causes.42 After noting that the

37 Id. at 38.
38 Id. at 43. The six factors were as follows: (1) “[w]ether or not the presentation of viewpoints unsupported by a relevant factual basis constitutes a significant portion of the organization’s communications[;]” (2) “[w]ether 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[;]” (3) “[w]ether or not there is resort to innuendo, suggestion and inference rather than forthright statement of the proposition or viewpoint being advocated[;]” (4) “[w]ether 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[;]” (5) “[w]ether 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[;]” and (6) “[t]he adaptability of the physical context and facilities utilized by the 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.
39 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. Thompson, supra note 20, at 506 n.37.
41 Id. at 474-75. According to the court, this action was made possible by 26 U.S.C. § 7428 (1976), “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.
organization refused to publish material antithetical to the women’s movement, 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. On appeal, however, the D.C. Circuit held 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.

Prior to the D.C. Circuit’s ruling in Big Mama Rag, a second declaratory judgment action was filed in D.C. District Court by a group calling itself National Alliance. The plaintiff was a white supremacist group whose application for charitable status had been denied based on its failure to comply with the full and fair exposition standard. Several months into the proceeding, the D.C. Circuit issued its opinion in Big Mama Rag. While conceding that Big Mama Rag constituted binding precedent, the Service argued that a remand was unnecessary because National Alliance did not employ an educational methodology in communicating its views to the public. The Service identified “four key factors” relevant to this inquiry and contended that National Alliance’s publication of “distorted, inflammatory and unfounded hate material” was inconsistent with the existence of an educational methodology. The court rejected this argument, holding that the Service could not avoid the impact of Big Mama

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43 Id. at 479.
44 Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1036 (D.C. Cir. 1980) [hereinafter Big Mama II].
46 Id. at *2.
47 Id. at *3. 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.
48 The factors were as follows: (1) “[w]hether or not the presentation of viewpoints unsupported by a relevant factual basis constitutes a significant portion of the organization’s communications[;]” (2) “[t]o the extent viewpoints purport to be supported by a factual basis, are the facts distorted[;]” (3) “[w]hether 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[;]” and (4) “[w]hether 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.
49 Id.
Rag “by relying on its proposed methodology approach.” Accordingly, the district court remanded the case for further proceedings.

On appeal, the D.C. Circuit did not have occasion to address whether the proposed methodology test cured the vagueness otherwise inherent in the full and fair exposition standard. Rather, in determining that National Alliance was not entitled to charitable status as an educational organization, the court found that National Alliance’s presentations could not qualify as educational “within any reasonable interpretation of the term.” The court, nevertheless, did speak favorably of the methodology test in dicta.

Following this rather timid endorsement, the Service published the four-factor version of the methodology test in a 1986 revenue procedure. In pertinent part, Revenue Procedure 86-43 provides:

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:

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

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50 Id. at *5.  
51 Id. at *6.  
52 Nat’l Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983) [hereinafter Alliance II].  
53 Id. at 875.  
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 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.
readership because it does not consider their background or training in the subject matter.\textsuperscript{56}

Courts addressing 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].”\textsuperscript{57} Thus, by providing “an explanatory gloss”\textsuperscript{58} to the full and fair exposition standard, the Procedure ostensibly eliminated any lingering vagueness concerns vis-à-vis application of the educational exemption.

II. 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,”\textsuperscript{59} the Service has demonstrated a willingness to consider an additional, previously undisclosed factor: Whether an advocacy organization presents opposing viewpoints in its presentations.\textsuperscript{60} 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.\textsuperscript{61} Whereas the omission of this factor from Revenue

\textsuperscript{58} Alliance II, 710 F.2d at 870.
\textsuperscript{60} Generally, the Service does not publish a written record of its decision to confer or deny charitable status on any particular organization. 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” written records of its decisions. Lu, supra note 11, at 415 n.186. These records are heavily redacted to protect taxpayer privacy, and they often fail to articulate a rationale for their conclusions. See id. This “lack of public information on the reasons for denials and grants of exemption to individual organizations, therefore, renders it difficult to state with certainty how often the IRS engages in analysis of educational methodology” or what criteria the Service actually applies in evaluating educational methodology. Id.
\textsuperscript{61} The origins of this factor are not 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 supplied). Nowhere does the regulation purport to impose a concomitant duty to present a sufficiently full and fair exposition of the pertinent viewpoints. See id.
Procedure 86-43 ostensibly reflected the Service’s determination that the presentation of opposing viewpoints was irrelevant to the existence of an educational methodology, the Service has time and again considered this criterion in administering the educational exemption.

Historically, application of the full and fair exposition standard was understood to require the presentation of opposing viewpoints. In 1979, however, the U.S. District Court for the District of Columbia 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. The D.C. Circuit concurred with the district court’s assessment even while finding the broader Treasury regulation to be unconstitutionally vague. Despite the D.C. Circuit’s ruling, Treasury declined to repeal or otherwise amend Regulation section 1.501(c)(3)-1(d)(3), and the Service continued to apply the full and fair exposition standard, including the requirement that advocacy organizations present opposing viewpoints, for another six years.

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 “did not relate to methodology, but merely constitute[d] an empirical observation that as these factors become increasingly prevalent, an educational methodology is more frequently absent.” TNT, supra note 34, 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.

62 See, e.g., I.R.S. Gen. Couns. Mem. 37,173 (June 21, 1977) (declaring that an advocacy organization “must, to be exempt, present other viewpoints”); see also I.R.S. Gen. Couns. Mem. 35,067 (Oct. 5, 1972) (conferring charitable status on an advocacy organization willing to present opposing viewpoints); 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).  

63 Big Mama I, 494 F. Supp. at 479.  

64 Big Mama II, 631 F.2d at 1039 n.18.  

65 See Chisolm, supra note 24, at 217 (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”).  

66 See, e.g., I.R.S. Gen. Couns. Mem. 32,280 (May 9, 1982) (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”).
Then, in 1986, the Service published a four-factor version of the methodology test as Revenue Procedure 86-43. Conspicuously absent from the list of factors identified as being indicative of a non-educational methodology was an organization’s failure to present opposing viewpoints.\(^6^7\) On at least one occasion, moreover, the Service has suggested that Revenue Procedure 86-43 does not require the presentation of opposing viewpoints,\(^6^8\) and this interpretation was separately endorsed by the U.S. Tax Court.\(^6^9\)

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. 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.”\(^7^0\) 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.\(^7^1\)

The most striking application of the de facto fifth factor occurred in 2004 when the director of the Service’s exempt organizations division was asked to determine whether a particular advocacy group qualified for the educational exemption.\(^7^2\) The director noted that “[w]hile some of the documents published and/or circulated by the organization mention opposing viewpoints and arguments advanced by [those advocating contrary positions], minimal information is provided concerning these

\(^{6^8}\) See I.R.S. Field Serv. Adv. 1866104 (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. See id.
\(^{6^9}\) Nationalist Movement, 102 T.C. at 586-87 (noting that while “petitioner apparently reads [Revenue Procedure 86-43] to require organizations to present and rebut opposing views, . . . the revenue procedure . . . does not by its terms require this type of presentation”).
\(^{7^2}\) See id.
positions and the facts supporting them.” 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.” The director, therefore, concluded that the presentations did not comport with the methodology test such that the advocacy group was not entitled to charitable status.

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 an inartful articulation of the full and fair exposition standard is 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.

Thus, in making charitable status contingent upon an advocacy organization’s presentation of opposing viewpoints, the Service has ostensibly 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.

III. 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 implicates three distinct principles of constitutional law: the void-for-vagueness, compelled speech, and unconstitutional conditions doctrines.

A. Vagueness

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73 Id.
74 Id.
75 Id.
76 Thompson, supra note 20, at 527 n.89.
A regulation will be invalidated under the void-for-vagueness doctrine if its text is so ambiguous that enforcement would work a denial of due process. 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. "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." Because the full and fair exposition standard, as originally drafted, did not comport with either of these principles, the U.S. Court of Appeals for the District of Columbia Circuit sought to invalidate 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 because it failed to specify the circumstances under which an organization could be said to “advocate a particular position or viewpoint” so as to be subject to the full and fair exposition standard. After noting 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.’”

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?” Because the regulation did not provide objective criteria for assessing whether an advocacy organization had complied with the full

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79 Tilden, supra note 77, at 1549.
80 Big Mama II, 631 F.2d at 1036-37.
81 Id. at 1036.
82 Id. at 1037.
and fair exposition standard, the potential for arbitrary and discriminatory enforcement by the Service required that the regulation be invalidated.  

Two lines of inquiry advanced by the Service as a means of clarifying the standard’s substantive requirements were rejected. Whereas the district court had found the full and fair exposition standard “‘capable of objective application’ because ‘it asks only whether the facts underlying the conclusions are stated,’” the D.C. Circuit dismissed this distinction as illusory:

[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.

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.” 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. Nonetheless, a number of scholars have argued that the methodology test itself is impermissibly vague such that Revenue Procedure 86-43 fails to elucidate the full and fair exposition standard’s substantive requirements. Whereas the Procedure’s first and third factors

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83 Id. at 1040.
84 Id. at 1038.
85 Id. at 1039.
86 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, [Revenue Procedure 86-43] merely exacerbated the [vagueness] problem” such that the current regulatory scheme “remains seriously flawed.” Lu, supra note 11, at 383.
87 See Chisolm, supra note 24, 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-
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. 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 constitutes a distortion of fact. The Procedure’s savings clause, meanwhile, allegedly “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.” 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 conceivably fail to alleviate the substantive ambiguity otherwise inherent in the full and fair exposition standard.

The existence of a de facto fifth factor only exacerbates 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.” 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 as educational organizations. Consequently, groups that would be found to employ educational methodologies based on the Procedure’s four published factors may nevertheless have their neutral.”); Lu, *supra* note 11, 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.”); Thompson, *supra* note 20, at 521 (contending that the methodology test requires “subjective, value-laden” judgments by the Service).


89 *Id.* at 580-81.

90 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.


applications for charitable status denied on account of their failure to comply with this unpublished, fifth factor. Revenue Procedure 86-43, therefore, is unconstitutionally vague because it fails to disclose one of the factors considered by the Service in evaluating whether an advocacy organization may be said to employ an educational methodology, thereby denying these organizations an opportunity to “act accordingly” and present opposing viewpoints.

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”\(^\text{93}\) so that “only a very few organizations, whose views [were] not in the mainstream of political thought, ha[d] been deemed advocates”\(^\text{94}\) subject to the full and fair exposition standard. As noted by one scholar,

> It seems, then, that the 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.\(^\text{95}\)

Similarly, by omitting the de facto fifth factor from the published version of the methodology test, the Service has failed to provide explicit standards for the factor’s enforcement such that the factor may be utilized to suppress disfavored speech. Whereas organizations endorsing mainstream positions may be evaluated using the Procedure’s four published factors, groups advocating controversial or unpopular positions may be subjected to this additional fifth factor. As published then, Revenue Procedure 86-43 is unconstitutionally vague because it fails to establish explicit guidelines for the de facto fifth factor’s application, thereby creating a potential for arbitrary and discriminatory enforcement by the Service with the attendant

\(^{93}\) *Big Mama II*, 631 F.2d at 1037.  
\(^{94}\) *Id.* at 1036.  
risk that this “latitude for subjectivity” will be used to suppress disfavored speech in violation of the First Amendment.

Even if the Service was to publish the de facto fifth factor as part of Revenue Procedure 86-43, however, the Procedure would still be susceptible to a vagueness challenge. 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 as educational organizations 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. Based on the wording of the other four factors, 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:

\[\ldots\]

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 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.\(^{96}\) Because answers to the foregoing inquiries are “likely to be colored by one’s attitude toward the author’s point of view,” Revenue Procedure 86-43, as amended, would continue to pose a risk of arbitrary and discriminatory enforcement by the Service.

\(^{96}\) See Nationalist Movement, 102 T.C. at 586-87 (requiring advocacy organizations to present and rebut opposing viewpoints would increase the Service’s administrative discretion, thereby implicating the void-for-vagueness doctrine); I.R.S. Field Serv. Adv. 1866104 (Jan. 10, 1994) (same).
In response to a facial vagueness challenge, the Service would likely argue that any imprecision vis-à-vis the Procedure is not constitutionally severe. In National Endowment for the Arts v. Finley, a group of artists asserted that the National Foundation on the Arts and the Humanities Act of 1965 (“Arts Act”), as amended in 1990, was unconstitutionally vague to the extent it required the NEA’s chairperson 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.” 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 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.

Similar to the artists in Finley, advocacy organizations seeking to comply with Revenue Procedure 86-43 may well “conform their speech to what they believe to be the decisionmaking criteria,” i.e., they may choose to (1) “laboriously includ[e] their reasoning from stated fact to conclusion;” (2) “us[e] independently verifiable facts;” (3) abstain from using offensive language; (4) “includ[e] [relevant] historical background;” 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, the Service is arguably acting as patron rather than as sovereign when administering the Procedure. Accordingly, the

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99 Finley, 524 U.S. at 572 (quoting 20 U.S.C. § 954 (d)(1)).
100 Id. at 588-89.
101 Id. at 589.
102 Hill, supra note 88, at 583.
103 Id.
104 Id.
105 Id.
106 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.”).
Service would likely argue that Revenue Procedure 86-43 is facially valid based on the Supreme Court’s ruling in Finley.¹⁰⁷

There are, however, several key differences between the Arts Act and section 501(c)(3) of the Internal Revenue Code such that a court would, in all likelihood, find Finley distinguishable. First, the Act’s enabling statute “vests the NEA with substantial discretion to award grants [by] identif[y]ng] 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.”¹⁰⁸ Section 501(c)(3), in contrast, limits Treasury’s discretion ab initio by imposing restrictions on the types of organizations that may qualify for charitable status.¹⁰⁹ Unlike 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.”¹¹⁰ The charitable exemption, meanwhile, is available to all entities organized and operated for a charitable purpose within the meaning of the Code, thereby obviating the need for 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,”¹¹¹ 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, organizations awarded charitable status qualify for certain tax benefits, e.g., exemption from federal income taxation and eligibility to receive tax-deductible contributions. Although the Supreme Court has analogized these benefits to cash subsidies,¹¹² it has been careful

¹⁰⁷ In 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.
¹⁰⁸ Finley, 524 U.S. at 573 (quoting 20 U.S.C. §§ 954(c)(1)-(10)).
¹⁰⁹ I.R.C. § 501(c)(3) (prohibiting 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 from qualifying as section 501(c)(3) charitable organizations).
¹¹⁰ Finley, 524 U.S. at 585.
¹¹¹ Id. at 590.
¹¹² Taxation with Representation, 461 U.S. at 544 (“A tax exemption has much the
to note “in stating that exemptions and deductions, on one hand, are like cash subsidies, on the other, we of course do not mean to assert that they are in all respects identical.” Thus, to the extent the Court’s holding in *Finley* was predicated on the fact that the NEA awards actual cash grants rather than tax benefits having grant-like qualities, the Service would not be able to rely on *Finley* to 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.” 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.” 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 is likely to 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 so as to render the Procedure void for vagueness. 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 employ an educational methodology, thereby providing a second, wholly separate basis for voiding the Procedure.

**B. Compelled Speech**

After lurking in the background of our nation’s First Amendment jurisprudence for more than 150 years, the proscription against compelled

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113 *Id.* at 544 n.5.
115 *Finley*, 524 U.S. at 589.
speech was finally recognized in 1943 when the Supreme Court 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.” 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.”

Laws requiring schoolchildren to recite the Pledge of Allegiance and salute the flag are, therefore, unconstitutional as are laws requiring the display of ideological messages on private property. 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.”

The Court’s compelled-speech cases are not limited to situations in which an individual must personally speak the government’s message, however. The First Amendment also restricts “the government’s ability to force one speaker to host or accommodate another speaker’s message.” 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 editorial criticism. Similarly, in Pacific Gas & Electric Co. v. Public Utilities Commission of California, the Court overturned a state administrative order requiring a privately-owned utility company to include a third-party newsletter in its billing envelopes.

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118 Barnette, 319 U.S. at 642.
119 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).
120 Barnette, 319 U.S. at 642.
122 Id.
123 Id. at 256-58. 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. Riley v. Nat’l Fed’n of the Blind of N.C., Inc., 487 U.S. 781, 797 (1988).
125 Id. at 20-21; see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 566 (1995) (overruling state courts’ interpretation of public accommodations law as requiring private parade organizers to include certain groups whose messages the organizers did not wish to convey).
both of these cases, the complaining speaker was required to accommodate
the speech of a private third-party rather than the government. The
Supreme Court has indicated that this is a distinction without a difference,
however, such that the source of compelled speech is irrelevant insofar as
the First Amendment is concerned.

To the extent Revenue Procedure 86-43 is understood to require the
presentation of opposing viewpoints, the Procedure ostensibly forces
advocacy organizations to accommodate the speech of private third-parties
in violation of the First Amendment. The Service, however, would likely
argue that the Procedure is distinguishable from the Court’s prior
compelled-speech cases on the ground that advocacy organizations, unlike
the complaining speakers in Tornillo and Pacific Gas, are given editorial
control over the content of the compelled speech. Whereas the right-of-
reply statute at issue in Tornillo required newspapers to print, verbatim,
candidates’ responses to editorial criticism\(^{127}\) and the agency ruling in
Pacific Gas required a utility to disseminate, without alteration, a third
party’s newsletter,\(^ {128}\) Revenue Procedure 86-43 permits advocacy
organizations a certain amount of discretion in composing the speech they
are forced to disseminate. The Supreme Court, however, would likely
dismiss this distinction as irrelevant and find that in forcing advocacy
groups to articulate the very views they are organized to oppose, the
Procedure infringes on these organizations’ freedom of thought in violation
of the First Amendment.\(^ {129}\)

The Service may also argue that violations of the laws in Tornillo and
Pacific Gas resulted in the imposition of administrative or criminal
sanctions\(^ {130}\) 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.\(^ {131}\) Thus, any argument that advocacy organizations are free to
forego charitable status and present only sincerely-held viewpoints
misapprehends these organizations economic viability. Rather, advocacy

\(^{127}\) Tornillo, 418 U.S. at 244 n.2.
\(^{128}\) Pacific Gas, 475 U.S. at 6-7.
\(^{129}\) 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 Barnette, 319
U.S. at 631, 642 (suggesting that compelled speech violates “a right of self-determination
in matters that touch individual opinion and personal attitude”).
\(^{130}\) Tornillo, 418 U.S. at 244 n.2; Pacific Gas, 475 U.S. at 6-7.
\(^{131}\) Lu, supra note 11, at 384-85.
groups are confronted with a Hobson’s choice. Either present opposing viewpoints and remain solvent or stay true to your beliefs and cease operations. In this context, denial of charitable status more closely resembles the imposition of a sanction rather than the withholding of a subsidy such that the consequences of an advocacy organization’s failure to present opposing viewpoints may, nevertheless, be found to implicate the compelled speech doctrine.

Assuming the Service’s application of Revenue Procedure 86-43 is understood to compel speech consistent with the Tornillo-Pacific Gas line of cases, the Procedure would almost certainly be struck down as a content-based regulation of speech. Whereas “deciding whether a particular regulation is content based [and therefore subject to strict scrutiny] or content neutral [and hence subject to intermediate scrutiny] is not always a simple task,” a law compelling speech is content based if it requires speakers to accommodate only hostile viewpoints. 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.”

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.” Thus, to the extent Revenue Procedure 86-43 requires advocacy organizations to present only hostile viewpoints, the Procedure arguably constitutes a content-based regulation of speech subject to strict scrutiny.

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132 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).

133 For a discussion of the unconstitutional conditions implications of this distinction, see Section III(C), infra.

134 A content-based regulation will be sustained under strict scrutiny if “it is justified by a compelling government interest and is narrowly drawn to serve that interest.” Brown v. Entm’t Merch. Ass’n, --- U.S. ---, 131 S. Ct. 2729, 2738 (2011).

135 A content-neutral regulation will be sustained under intermediate scrutiny if “it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994) (quoting United States v. O’Brien, 391 U.S. 367, 377 (1968)).

136 Id. at 642.

137 Pacific Gas, 475 U.S. at 13-14.

138 Id. at 10.

139 Id. at 14.
By forcing advocacy organizations to present opposing viewpoints, moreover, Revenue Procedure 86-43 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,\footnote{Id. at 15.} and 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.\footnote{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.’” \textit{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. \textit{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”).} Revenue Procedure 86-43, therefore, creates a danger that advocacy organizations “will be required to alter [their] own message as a consequence of the government’s coercive action,”\footnote{Id. at 16.} and “where . . . the danger is one that arises from a content-based grant of access to private property, it is a danger that the government may not impose absent a compelling interest.”\footnote{Id. at 16-17.}

In an attempt to save the Procedure from being struck down as a content-based regulation of speech, the Service would likely contend that Revenue Procedure 86-43 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.”\footnote{Thompson, \textit{supra} note 20, at 498.} 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.\footnote{\textit{STAFF OF J. COMM. ON TAXATION, 109TH CONG., HISTORICAL DEVELOPMENT AND PRESENT LAW OF THE FEDERAL TAX EXEMPTION FOR CHARITIES AND OTHER TAX-EXEMPT ORGANIZATIONS} at 13-14, 17 (Comm. Print 2005).}

Because propaganda groups would have their audiences reach preordained conclusions based less on appeals to logic and reason than a
lack of access to competing viewpoints, the Service would argue that an advocacy organization’s failure to reference opposing viewpoints is indicative of a non-educational methodology. In 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, advocacy groups engaged in propaganda refuse to concede the existence of opposing viewpoints for fear 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, Revenue Procedure 86-43 ostensibly ensures that propaganda groups seeking to further their own selfish ends do not qualify as educational organizations under section 501(c)(3) of the Code.

Whether a court would find this interest compelling, however, is not clear. Although the regulations defining the term “educational” once imposed a categorical ban on propaganda groups, Treasury abandoned that position following Congress passage of the Revenue Act of 1934 which amended the Code so that only propaganda groups engaged in legislative activities were ineligible to receive charitable status. In response to subsequent revisions of the Code, 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 . . . .” Thus, whereas preventing propaganda groups from receiving the tax benefits afforded by charitable status may have once constituted a compelling state interest, the Service would likely have difficulty convincing a court that this interest continues to be compelling in light of superseding revisions to the Code.

Assuming arguendo that preventing propaganda groups from qualifying as 501(c)(3) educational organizations constitutes a compelling state interest, Revenue Procedure 86-43 is not narrowly tailored to achieve that

148 Id. at 700.
end. The Procedure purports “to publish the criteria used by the Internal Revenue Service to determine the circumstances under which advocacy of a particular viewpoint or position by an organization is considered educational within the meaning of . . . the [Code].”¹⁵⁰ The de facto fifth factor’s omission from the text of the Procedure presumably reflects a determination by the Service that the presentation of opposing viewpoints has no bearing on the existence of an educational methodology. The factor, therefore, is not closely correlated to advancing the state’s asserted interest,¹⁵¹ and even if it was, the factor would not represent the least restrictive means of furthering that interest because the government may achieve its objective just as effectively by applying the Procedure’s four published factors.¹⁵²

Alternatively, the Service may argue that Revenue Procedure 86-43 furthers a compelling state interest in promoting speech by making a variety of viewpoints available to advocacy organizations’ audiences. Because “this interest is not furthered by an order that is [content based],” however, the Service cannot rely on this theory to save the Procedure.¹⁵³ Moreover, “the means chosen [by the Service] to advance variety tend to inhibit expression of [advocacy organizations’] views in order to promote [third parties’],” and the Supreme Court has held that the “state [may not] advance some points of view by burdening the expression of others.”¹⁵⁴ Revenue Procedure 86-43, therefore, does not represent a narrowly tailored means of promoting speech such that the Procedure is likely to be struck down as offensive to the First Amendment.

C. Unconstitutional Conditions

As demonstrated in Section III(B), supra, a law requiring advocacy organizations to present opposing viewpoints under threat of administrative or criminal sanctions would almost certainly be struck down as a violation

¹⁵¹ See, e.g., FTC v. Superior Court Trial Lawyers Ass’n, 493 U.S. 411, 440 (1990) (“Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals; rather, government must ensure that … the restriction narrowly focuses on the source of the evils the State seeks to eliminate.”).
¹⁵² See, e.g., Sable Commc’ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (“The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”).
¹⁵³ Pacific Gas, 475 U.S. at 20.
¹⁵⁴ Id.
of the First Amendment’s proscription against compelled speech. To the extent denial of 501(c)(3) status may be said to result in the withholding of a benefit rather than the imposition of a penalty, however, the fate of Revenue Procedure 86-43 is more appropriately evaluated under the Supreme Court’s unconstitutional conditions jurisprudence.

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.155 Nonetheless, 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.”156 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.157

Thus, the critical inquiry is whether the withholding of 501(c)(3) status based on advocacy organizations failure to present opposing viewpoints burdens these groups’ First Amendment right to remain silent and abstain from compelled speech so as to violate the unconstitutional conditions doctrine.

Whereas articulation of the doctrine is relatively simple, its application is considerably more nuanced. This, in turn, has led scholars to criticize the unconstitutional conditions doctrine as “logically incoherent”158 and “less a ‘doctrine’ than a case-by-case” assessment.159 Despite reams of 

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157 Id. at 1421-22.
159 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
commentary, however, scholars have been unable to formulate a coherent, unifying theory with which to tame the Court’s unconstitutional conditions jurisprudence. Indeed, some observers have dismissed such attempts as futile and instead focused their efforts on clarifying the doctrine’s application within a particular field. Consistent with this latter view, the 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.

The first tax case to implicate the unconstitutional conditions doctrine was Speiser v. Randall. 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. Justice Brennan, writing for the majority, began the opinion by declaring, “[i]t cannot be gainsaid that a...
discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech.”165 The Court then rejected the State’s contention that tax exemptions are a matter of government largesse 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. [Thus,] the appellees are plainly mistaken in their argument that, because a tax exemption is a “privilege” or “bounty,” its denial may not infringe speech.166

Because the exemption was “aimed at the suppression of dangerous ideas,” the statute was declared unconstitutional.167

One year after its opinion in Speiser, the Court had occasion to revisit the unconstitutional conditions doctrine in Cammarano v. United States.168 Petitioners were taxpayers who wished to deduct certain lobbying expenditures as ordinary and necessary business expenses in contravention of existing Treasury regulations.169 Although petitioners had not preserved the argument for appeal, the Court nonetheless considered and promptly dismissed a 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.170

Unlike the property-tax exemption at issue in Speiser, Treasury’s “nondiscriminatory denial” of a deduction for lobbying expenditures was “plainly not aimed at the suppression of dangerous ideas,” leading the Court to uphold the regulations as constitutional.171

Whereas the Court’s unconstitutional conditions jurisprudence expanded dramatically between 1960 and 1980, these cases did not touch on

165 Id. at 518.
166 Id.
167 Id. at 519, 529.
169 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 legislation.” Id. at 500-501.
170 Id. at 513.
171 Id.
matters of tax law.\textsuperscript{172} In 1983, however, the Court issued its opinion in the seminal case of \textit{Regan v. Taxation with Representation of Washington}.\textsuperscript{173} TWR, a non-profit 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.\textsuperscript{174} Relying on \textit{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.”\textsuperscript{175} After acknowledging that “the government may not deny a benefit to a person because he exercises a constitutional right,”\textsuperscript{176} the Court found \textit{Speiser} inapposite: “The Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby.”\textsuperscript{177} Instead, \textit{Cammarano} was found to be controlling such that the Code’s lobbying proscription withstood First Amendment scrutiny.\textsuperscript{178}

Central to the Court’s holding was the fact that TWR could channel its lobbying activity through a separate 501(c)(4)\textsuperscript{179} organization while continuing to receive 501(c)(3) status for its nonlobbying activities.\textsuperscript{180} Ironically, TWR had been formed to consolidate the operations of two existing non-profit corporations, one of which was a 501(c)(4) organization devoted to lobbying whereas the other was a 501(c)(3) organization engaged in educational activities.\textsuperscript{181} TWR’s ability to return to this “dual structure,” thus, saved the Code’s lobbying proscription from being struck down as imposing an unconstitutional condition:

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

\begin{itemize}
  \item \textsuperscript{173} 461 U.S. 540 (1983).
  \item \textsuperscript{174} \textit{Id.} at 541-42.
  \item \textsuperscript{175} \textit{Id.} at 545.
  \item \textsuperscript{176} \textit{Id.}
  \item \textsuperscript{177} \textit{Id.}
  \item \textsuperscript{178} \textit{Id.} at 546.
  \item \textsuperscript{179} \textit{I.R.C.} § 501(c)(4).
  \item \textsuperscript{180} Sullivan, \textit{supra} note 156, at 1465.
  \item \textsuperscript{181} \textit{Regan}, 461 U.S. at 543.
\end{itemize}
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).\(^{182}\)

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,”\(^{183}\) TWR’s inability to lobby using tax-deductible contributions did not impose a penalty so as to implicate the unconstitutional conditions doctrine but instead 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.”\(^{184}\)

Although not a tax case, the Supreme Court’s decision in Rust v. Sullivan\(^{185}\) is noteworthy to the extent it clarifies the Court’s unconstitutional conditions jurisprudence generally and the significance of its opinion in Regan specifically. The petitioners in Rust were a collection of healthcare providers receiving grants pursuant to Title X of the Public Health Service Act of 1970\(^{186}\) for the purpose of providing family-planning services.\(^{187}\) Under regulations promulgated by the Department of Health and Human Services (“HHS”), petitioners were barred from providing abortion counseling as part of any program receiving Title X funds.\(^{188}\) Petitioners argued that the regulations created an unconstitutional condition by making receipt of Title X funding contingent upon the forfeiture of their First Amendment rights.\(^{189}\)

For support, petitioners relied on Federal Communications Commission v. League of Women Voters of California.\(^{190}\) In League of Women Voters, the Court struck down a law barring editorializing by noncommercial

\(^{182}\) Id. at 552-53 (Blackmun, J., concurring).

\(^{183}\) Id. at 553.

\(^{184}\) Id. at 544.


\(^{186}\) 42 U.S.C. §§ 300 to 300a-6 (1970).

\(^{187}\) Rust, 500 U.S. at 181.

\(^{188}\) Id. at 179-80 (citing 53 Fed. Reg. 2923-24 (1988)).

\(^{189}\) Id. at 196.

television stations receiving federal grants.\textsuperscript{191} Citing Regan, the government had 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.\textsuperscript{192} Because these stations could not segregate federally-funded, non-editorializing activities from any state or privately-funded editorializing activities, however, the law did not provide an organizational alternative similar to the 501(c)(3)/501(c)(4) dichotomy that had been critical to the Court’s holding in Regan.\textsuperscript{193} Indeed, after declaring the law unconstitutional, 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].”\textsuperscript{194}

The Rust Court found League of Women Voters distinguishable, however, on the grounds that HHS’ 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.\textsuperscript{195}

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

\textsuperscript{191} Id. at 371-73.  
\textsuperscript{192} Id. at 399.  
\textsuperscript{193} See id. at 400.  
\textsuperscript{194} Id.  
\textsuperscript{195} Rust, 500 U.S. at 196.
not denied it the right to engage in abortion-related activities” but “has merely refused to fund such activities out of the public [coffers].”

The Supreme Court’s decisions in Regan and Rust suggest that 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. 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. Rather, the Code simply required that public charities wishing to engage in lobbying do so through a separate 501(c)(4) affiliate. Similarly, HHS’ 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. Instead, the regulations merely required that healthcare organizations wishing to provide abortion-counseling do so through non-Title X-funded programs. 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. Pursuant to Revenue Procedure 86-43, advocacy organizations wishing to receive tax-deductible contributions must relinquish their First Amendment right to remain silent and agree to present opposing viewpoints as groups presenting only one perspective on a given issue will not qualify for 501(c)(3) status. Receipt of the benefit and exercise of the right, thus, are mutually exclusive

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196 Id. at 198.
197 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.”).
198 Regan, 461 U.S. at 544-46, 552.
199 Id. at 544, 552.
200 Rust, 500 U.S. at 196.
201 Id.
202 Exemption from federal income taxation is not at issue since organizations refusing to 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).
propositions such that advocacy organizations must choose one and forego the other in violation of the Court’s unconstitutional conditions jurisprudence.

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 for the simple reason that these organizations generally do not engage in charitable activities beyond their advocacy work. 203 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 Revenue Procedure 86-43 from being struck down as imposing an unconstitutional condition on the receipt of tax-deductible contributions. 204

203 See, e.g., Nat’l Ass’n for the Legal Support of Alternative Sch. v. Comm’r, 71 T.C. 118 (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 Big Mama II, 631 F.2d at 1032 (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”); Alliance II, 710 F.2d at 869 (“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.”); Nationalist Foundation, 80 T.C.M. (CCH) at 512 (finding that all of the group’s activities “serve[d] the purpose of increasing social activism of pro-majority and rightist beliefs”).

204 Unlike lobbying, moreover, Congress has not expressly forbidden education-oriented advocacy by public charities. See I.R.C. § 501(c)(3). Rather, by acquiescing in Treasury’s definition of the term “educational” to include certain types of advocacy organizations, Congress has implicitly endorsed these groups inclusion among 501(c)(3) charities. Consequently, any suggestion that these organizations should be required to channel their advocacy activities through a separate 501(c)(4) affiliate would necessarily
The grantee/project distinction relied on in Rust is similarly unavailing. In its opinion, the Rust Court emphasized that the text of Title X “expressly distinguishes between a Title X grantee and a Title X project” such that HHS’ regulations “govern [only] the scope of the Title X project’s activities and leave the grantee unfettered in its other activities.”\(^\text{205}\) As a result, healthcare providers receiving Title X grants could continue to provide abortion services outside of the Title X project.\(^\text{206}\) 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 as requiring the presentation of opposing viewpoints arguably “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 outside the scope of the”\(^\text{207}\) Code in violation of the unconstitutional conditions doctrine.

Having found Regan as elaborated by Rust to be inapposite, the Supreme Court’s holding in Speiser v. Randall becomes dispositive. Just as California sought to condition receipt of a property-tax exemption on veterans’ willingness to sign a loyalty oath, Revenue Procedure 86-43 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 remain silent and 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.

Unlike Regan and Rust, moreover, the California statute and Revenue Procedure 86-43 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

\(^{205}\) Rust, 500 U.S. at 196.

\(^{206}\) Id.

\(^{207}\) Id. at 197.
property taxes – while continuing to exercise the burdened constitutional right – anti-government speech – via some alter ego as in Regan or some alternate funding channel as in Rust. 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.

CONCLUSION

In finding the full and fair exposition standard unconstitutionally vague, the D.C. Circuit acknowledged that “Treasury bravely made a pass at defining ‘educational,’ but the more parameters it tried to set, the more problems it encountered.” 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 until such time as the factor may be 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.”

208 Big Mama II, 631 F.2d at 1035.
209 Id. at 1040.