COMMENTS

FINDING PROPAGANDA: HOW TO STOP GRASSROOTS LOBBYING COSTS FROM SLIPPING THROUGH THE CRACKS OF SECTION 162(E)*

I. INTRODUCTION

Imagine a local restaurant in a small town. The restaurant buys local produce from picturesque farms to use as ingredients in the home-style creations it sells to customers. And the people who come into the restaurant are the owner's neighbors and friends. The owner of that restaurant looks out for the best interests of her community. Now imagine hydraulic fracturing[1] becomes a hot-button topic in the community. When the restaurant owner, who has a clear stake in the community, gives fracking her blessing, her opinion holds a lot of weight. When the restaurant owner lends her credibility to the assertion that "fracking has been done safely for over sixty-five years,"[2] it goes a long way to quell some neighbors' fears about the environmental effects of fracking.[3]

Precisely this scenario played out in an advertisement[4] produced by the American Petroleum Institute (API), a trade association, as part of a campaign called Energy From Shale.[5] The ad was released online on January 19, 2015,[6]

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* Samuel A. Lapin, J.D. Candidate, Temple University Beasley School of Law, 2017. I would like to thank Professor Alice Abreu for introducing me to the world of tax law and for her guidance and encouragement throughout the writing process and beyond. I would also like to thank the staff and editors of the *Temple Law Review* for their hard work on preparing this Comment for the outside world. Finally, I'd like to thank my parents, Cindi and Avrum, for their unconditional and unending support.

1. Hydraulic fracturing (fracking) is the method by which natural gas has been extracted from the Marcellus Shale, a large gas field under Pennsylvania, New York, Ohio, and West Virginia. Billy Hamilton, *Pennsylvania's Misadventures in Severance Taxation*, 58 ST. TAX NOTES 517, 519 (2010).

2. *Television Ad: Washington, Pennsylvania*, AM. PETROLEUM INST. (Jan. 19, 2015), http://www.api.org/~/media/files/news/ads/tv/2015/washington-pa-energy-from-shale-tv.mp4 [http://perma.cc/B8NH-VP8E].

3. One key concern with fracking is that it "creates a wastewater byproduct laced with radioactive agents and chemicals that if reintroduced into the water supply can cause serious health problems when ingested." Kristen Allen, Comment, *The Big Fracking Deal: Marcellus Shale—Pennsylvania's Untapped Re$ource*, 23 VILL. ENVTL. L.J. 51, 53 (2012).

4. *Television Ad: Washington, Pennsylvania*, *supra* note 2.

5. David Conti, *Natural Gas Industry Buys Share of Super Bowl Spotlight*, TRIBLIVE (Jan 30, 2015, 10:27 PM), http://triblive.com/business/headlines/7676501-74/industry-ads-drilling#axzz3jUJ0YQzG [http://perma.cc/GKN5-ALTS].

exactly one day before Tom Wolf was inaugurated as governor of Pennsylvania.[7] A severance tax on natural gas was a central part of Wolf's campaign, the proceeds of which Wolf promised "to strategically invest in Pennsylvania schools, infrastructure, and the development of clean energy alternatives."[8] Wolf was not the only gubernatorial candidate who supported imposing a severance tax on natural gas producers in Pennsylvania,[9] nor was the 2014 Pennsylvania gubernatorial election the beginning of the debate over a severance tax in the Commonwealth.[10] In fact, state legislators in Pennsylvania have introduced a number of bills aimed at implementing a severance tax, many of them predating Wolf's candidacy.[11] Nonetheless, the gubernatorial election thrust the debate over a severance tax into the spotlight. As of the writing of this Comment, several more proposals for a severance tax, meant to fund various government functions, have been raised for consideration in the Pennsylvania General Assembly.[12]

Generally, businesses are allowed to deduct costs incurred for business

6. *Id.*

7. Steve Esack & Emily Opilo, *Democrat Tom Wolf Sworn in as Pennsylvania's 47th Governor*, MORNING CALL (Jan. 20, 2015, 9:34 PM), http://www.mcall.com/news/nationworld/pennsylvania/mc-pa-gov-tom-wolf-inauguration-20150120-story.html [http://perma.cc/LKM8-Q64C].

8. TOM WOLF FOR GOVERNOR: A FRESH START! 3 (2014).

9. Laura Legere, *Marcellus Shale Coalition Warns Against Tax Proposals,* STATEIMPACT (Oct. 11, 2013, 11:25 AM), http://stateimpact.npr.org/pennsylvania/2013/10/11/marcellus-shale-coalition-warns-against-tax-proposals/ [http://perma.cc/FR2P-6MFF].

10. Allen, *supra* note 3, at 76 (discussing former Governor Edward Rendell's 2010 severance tax proposal).

11. *See, e.g.*, H.B. 2510, 2014 Gen. Assemb., Reg. Sess. (Pa. 2014) (proposing a severance tax at a rate of 5% of gross value plus $0.05/thousand cubic feet of gas); H.B. 2508, 2014 Gen. Assemb., Reg. Sess. (Pa. 2014) (proposing a severance tax at a rate of 5% of gross value plus $0.05/thousand cubic feet of gas); S.B. 1359, 2014 Gen. Assemb., Reg. Sess. (Pa. 2014) (proposing a severance tax with a base rate of $0.25/thousand cubic feet of gas subject to adjustment based on the market price of gas); H.B. 2051, 2014 Gen. Assemb., Reg. Sess. (Pa. 2014) (proposing a severance tax with a base rate of $0.29/thousand cubic feet of gas severed subject to adjustment based on the annual average price of gas); H.B. 1947, 2014 Gen. Assemb., Reg. Sess. (Pa. 2014) (proposing a severance tax with a rate of 5% of gross value of gas severed plus $0.046/thousand cubic feet of gas severed).

Tom Wolf declared his candidacy for the 2014 Pennsylvania Gubernatorial race on April 2, 2013. Associated Press, *Ex-revenue Chief Tom Wolf Running for Pennsylvania Governor*, TRIBLIVE (Apr, 2, 2013, 7:27 AM), http://triblive.com/news/adminpage/3766148-74/wolf-campaign-million#axzz3VQPcLPpF [http://perma.cc/C6PV-W64H].

12. *See, e.g.*, H.B. 1142, 2016 Gen. Assemb., Reg. Sess. (Pa. 2015) (proposing a severance tax with a rate that is 5% of gross value, plus 5% of the average market price, plus $0.047/thousand cubic feet of gas to fund education); H.B. 528, 2015–16 Gen. Assemb., Reg. Sess. (Pa. 2015) (proposing a severance tax with a base rate of $0.10/thousand cubic feet of gas produced at wellhead for funding Low-Income Home Energy Assistance Program (LIHEAP) and property tax/rent rebates); S.B. 741, 2016 Gen. Assemb., Reg. Sess. (Pa. 2015) (proposing a severance tax with a rate of 5% of gross value of gas severed to fund a college tuition assistance fund); S.B. 116, 2015–16 Gen. Assemb., Reg. Sess. (Pa. 2015) (proposing a severance tax with a rate that is 5% of gross value, plus 5% of the average market price, plus $0.047/thousand cubic feet of gas to fund education); S.B. 519, 2015 Gen. Assemb., Reg. Sess. (Pa. 2015) (proposing a 4% severance tax on the gross value of gas severed for the funding of education); H.B. 82, 2016 Gen. Assemb., Reg. Sess. (Pa. 2015) (proposing a severance tax with a rate of 3.5% of gross value on gas severed to fund state pension payments).

purposes from their taxable income, as long as those costs are ordinary and necessary.[13] Congress has decided in some cases to deny deductions for costs that would otherwise be ordinary and necessary business expenses.[14] Section 162(e) of the Internal Revenue Code represents one such case.[15] In § 162(e), Congress provided that certain lobbying and political expenditures, which would almost certainly be considered ordinary and necessary, are not deductible.[16] Section 162(e) specifically mentions four activities for which costs are not deductible: influencing legislation, participating in election campaigns, attempting to influence the public with respect to political or legislative matters, and communicating directly with certain executive branch officials.[17]

With § 162(e) in mind, the concurrence of the advertisement from API with the high profile discussion of a severance tax in Pennsylvania raises a question about the nature and purpose of the ad: was the ad meant to promote the natural gas industry or was it meant to influence the public's attitude towards a potential severance tax, a piece of legislation? The answer to that question should determine whether the members of API could deduct the dues that went towards that ad. If the advertisement was meant to promote the natural gas industry, those businesses could take a deduction for its cost.[18] If, however, the advertisement was meant to influence the public against a severance tax, it should qualify as grassroots lobbying and no deduction could be taken.[19] This Comment will explore this distinction as part of a larger analysis of the treatment of certain advertising expenditures that straddle the line between "promoting the sale of goods"[20] and "influenc[ing] the general public . . . with respect to . . . legislative matters."[21]

Section II of this Comment will trace the history of § 162(e). Section III will argue that advertisements like API's are grassroots lobbying but that their costs are still likely deductible as ordinary and necessary business expenses. Further, Section III will discuss the implications of that deductibility. Section IV will propose steps that policymakers can take to ensure that similar communications will be treated as grassroots lobbying and that the costs of such communications will not be deductible to the businesses that incur them.

13. I.R.C. § 162(a) (2015); *see also* Welch v. Helvering, 290 U.S. 111, 113, 115 (1933) (holding that for the purposes of evaluating deductible business expenses, "[l]ife in all its fullness must supply the answer to" whether an expenditure is ordinary and that an expenditure is necessary if it is "appropriate and helpful").

14. *See* I.R.C. § 162(c) (denying a business deduction for illegal payments including but not limited to bribes and kickbacks); *id.* § 162(f) (denying a business deduction for fines paid to the government as punishment for a violation of the law).

15. *Id.* § 162(e).

16. *Id.*

17. *Id.*

18. *See id.* § 162(a); Treas. Reg. § 1.162-1(a) (as amended in 1993) (listing advertising in items included in business expenses).

19. *See* I.R.C. § 162(e)(1)(C).

20. Sw. Elec. Power Co. v. United States, 312 F.2d 437, 442 (Ct. Cl. 1963).

21. I.R.C. § 162(e)(1)(C).

II. Overview

A. *Treatment of Lobbying Costs Prior to the Revenue Act of 1962*

The Supreme Court's recognition that lobbying required some level of government regulation dates back to well before the first corporate income tax. In the 1874 case, *Trist v. Child*,[22] the Supreme Court declined to enforce a contingency fee lobbying contract on the grounds that it was contrary to public policy.[23]

> The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy.[24]

More than thirty years later, the Supreme Court reiterated its stance that lobbying brought the potential for wielding improper influence over the functioning of the state.[25] Writing for the Court, Justice Holmes ruled that a lobbying contract, paid by contingency fee, "could not be enforced irrespective of the question whether improper means were contemplated or used."[26]

As early as 1915, Treasury took up the mantle of regulating lobbying activities when it declared in a regulation that the costs of lobbying the government and of contributing to political campaigns were not deductible; they were "held not to be an ordinary and necessary expense in the operation and maintenance of the business of a corporation."[27] Treasury's determination may have been an attempt to guard against passing off charitable or public service expenditures as business expenses, since there was not yet a charitable contribution deduction.[28] Treasury expanded the scope of the disallowance in 1918 by including "[s]ums of money expended for . . . the promotion or defeat of legislation, the exploitation of propaganda" alongside direct lobbying expenditures and campaign contributions within the reach of the regulation.[29] The disallowance was again expanded in 1919 to include "advertising other than trade advertising."[30] This wording remained consistent in the regulations until 1959.[31]

22. 88 U.S. (21 Wall.) 441 (1874).

23. *Trist*, 881 U.S. (21 Wall.) at 451.

24. *Id.* at 451.

25. Hazelton v. Sheckells, 202 U.S. 71, 76 (1906).

26. *Id.* at 79.

27. T.D. 2137, 17 Treas. Dec. Int. Rev. 48, 57–58 (1915).

28. George Cooper, *The Tax Treatment of Business Grassroots Lobbying: Defining and Attaining the Public Policy Objectives*, 68 COLUM. L. REV. 801, 805 (1968).

29. T.D. 2137, 20 Treas. Dec. Int. Rev. 197 (1918).

30. T.D. 2831, 21 Treas. Dec. Int. Rev. 295 (1919); *see also* T.D. 3295, 24 Treas. Dec. Int. Rev. 369, 372–73 (1922) (containing wording of the regulation disallowing the deduction for lobbying expenditures remains the same as in 1919).

31. Cooper, *supra* note 28, at 804. See *infra* notes 91–94 and accompanying text for a discussion

Courts followed Treasury's lead and decided controversies by evaluating whether or not the expenditures in question were ordinary and necessary.[32] This resulted in courts handing down some rather inconsistent rulings. In *Lucas v. Wofford*,[33] for example, a taxpayer hired an attorney to work with the state legislature to exempt the fuel that he sold from standards testing.[34] According to the facts of the case, the attorney drafted a bill and advocated its passage before the legislature.[35] Nonetheless, the Fifth Circuit held that because "[t]he attorney was employed, not to secure the passage or defeat of any legislation, but to represent . . . to the Governor and to the legislative committees the injurious effect the legislation first proposed would have upon the respondent's business," the taxpayer could deduct the attorney's fees as an ordinary and necessary business expense.[36]

On the other hand, the Ninth Circuit held that expenditures made to promote a statewide referendum aimed at raising the state gasoline tax were not deductible as business expenses because they were not ordinary and necessary[37] and neither were expenditures "for printing and distributing pamphlets, newspaper advertising, and the hire of speakers to argue advisability of the proposed changes in the law."[38] Aside from demonstrating the inconsistency with which courts ruled on lobbying expenditures under an ordinary and necessary analysis, these decisions may also show a tendency to treat grassroots lobbying—influencing legislation by appeals to the public rather than to legislators—more harshly than direct lobbying.

The notion that a lobbying expense did not qualify as a business expense eventually became unjustifiable, however, considering the broad definition of "ordinary and necessary" used to determine what was or was not deductible.[39] By the time the issue of disallowing business deductions for lobbying expenditures reached the Supreme Court in 1941, the justification for the disallowance had shifted from an argument that lobbying expenditures were not ordinary and necessary business expenses to an argument that lobbying was contrary to public policy.[40]

In *Textile Mills Securities Corp. v. Commissioner*,[41] the taxpayer had been hired by a German textile company seeking to recover property that had been seized during World War I.[42] The taxpayer, hired on a contingency fee basis, was

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of the regulations promulgated in 1959 dealing with the treatment of lobbying costs.

32. Lloyd Hitoshi Mayer, *What Is this "Lobbying" that We Are So Worried About?*, 26 YALE L. & POL'Y REV. 485, 496–97 (2008).

33. 49 F.2d 1027 (5th Cir. 1931).

34. *Lucas*, 49 F.2d at 1027.

35. *Id.* at 1027–28.

36. *Id.* at 1028.

37. Old Mission Portland Cement Co. v. Comm'r, 69 F.2d 676, 681 (9th Cir. 1934).

38. Sunset Scavenger Co. v. Comm'r, 84 F.2d 453, 456 (9th Cir. 1936).

39. *See* Welch v. Helvering, 290 U.S. 111, 113, 115 (1933).

40. Mayer, *supra* note 32, at 497.

41. 314 U.S. 326 (1941).

42. *Textile Mills*, 314 U.S. at 335–36.

responsible for all costs in procuring legislation to accomplish the recovery of that property.[43] To this end, the taxpayer hired a publicist "to arrange for speeches, news items, and editorial comment" and two attorneys "to prepare propaganda concerning international relations, treaty rights and the policy of this nation as respects alien property in time of war."[44] Justice Douglas upheld the disallowance of deductions for these expenses because of the well-known policy against "[c]ontracts to spread such insidious influences through legislative halls" and because Treasury had the authority to "employ that general policy in drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction."[45]

There has been some criticism of the public policy justification for denying a deduction for grassroots lobbying expenditures. One commentator has argued that it has been "limited to expenditures stemming from activities which, if not clearly illegal, are shocking to the public conscience," like bribes and criminal fines, and that lobbying simply does not fit in that class of activities.[46]

The Court's ruling in *Textile Mills* did not have much of a clarifying effect, notably with respect to grassroots lobbying. This may have been because the expenditures in question in *Textile Mills* resulted from a contingency fee lobbying contract.[47] Contingency fee lobbying contracts have long been looked upon with particular disdain by the courts.[48] In 1944, in *Smith v. Commissioner*,[49] the United States Tax Court held that an attorney who made a contribution to an organization whose ultimate goal "was to secure the amendment of the Missouri State Constitution with respect to the methods of selecting the judges of certain state courts" could deduct his contribution as an ordinary and necessary business expense.[50] The court came to this conclusion notwithstanding the fact that this organization petitioned to have its question posed to the voters

43. *Id.* at 336.

44. *Id.*

45. *Id.* at 338–39.

46. Cooper, *supra* note 28, at 807–08; *see also* I.R.C. § 162(c) (2015) (disallowing business deductions for illegal bribes, kickbacks, or any other payment that would subject an entity to criminal prosecution); *id.* § 162(f) (disallowing business deductions for fines or penalties paid to the government for a violation of the law); Comm'r v. Heininger, 320 U.S. 467, 474 (1943) (holding that the disallowance of business deductions on public policy grounds is only justified if the "allowance of the deduction would frustrate . . . sharply defined policies").

47. *Textile Mills*, 314 U.S. at 336.

48. *See, e.g.*, Hazelton v. Sheckells, 202 U.S. 71, 79 (1906) (holding a lobbying contract void as contrary to public policy because part of the payment was by contingency fee); Trist v. Child, 88 U.S. (21 Wall.) 441, 451–52 (1874) (holding a contingency fee lobbying contract void as contrary to public policy).

49. 3 T.C. 696 (1944). It is important to note that this case concerned contributions made to an organization that produced its own lobbying communications rather than using a contingency fee lobbying contract.

50. *Smith*, 3 T.C. at 698 (holding that the prior method of selecting judges in Missouri left the courts so politically motivated that citizens were beginning to lose faith in the justice system to the point that the attorney's business was suffering).

as a referendum and then urged voters to adopt the plan it proposed.[51]

In *Addressograph-Multigraph Corp. v. Commissioner*,[52] the Tax Court allowed a business to take deductions for contributions made to the National Association of Manufacturers to fund an advertising campaign called "Re-selling THE AMERICAN WAY to America."[53] The stated purpose of the campaign was "to correct unsympathetic public opinion against manufacturers resulting from attacks upon industry because of unemployment during the depression."[54] The court reversed the disallowance without any real explanation, only holding that such expenditures are ordinary and necessary, which apparently rendered an evaluation of whether the contributions were used for propaganda or grassroots lobbying unnecessary.[55]

The advertisements in *Addressograph* are similar to the API advertisement described at the outset of this Comment because there is evidence that they were more likely related to New Deal labor laws than to the public's feelings toward the manufacturing industry.[56] They, like the API fracking ad, are what one commentator called "covert lobbying."[57] At least one commentator has argued that the government, possibly because of the difficulty of litigating against covert lobbying activities, has at least partially accepted the decision in *Addressograph*.[58]

Shortly after *Addressograph*, two circuit courts ruled that contributions to the National Tax Equity Association (NTEA) were not deductible as ordinary and necessary business expenses. In *Roberts Dairy Co. v. Commissioner*[59] and *American Hardware & Equipment Co. v. Commissioner*,[60] the taxpayers, a dairy goods distributor[61] and a wholesale hardware distributor,[62] respectively, faced

51. *Id.*

52. 4 T.C.M. (CCH) 147 (1945).

53. *Addressograph*, 4 T.C.M. (CCH) at 182 (internal quotation marks omitted).

54. *Id.*

55. *Id.*

56. Cooper, *supra* note 28, at 821–22; *see* DONALD C. BLAISDELL, TEMP. NAT'L ECON. COMM., 76TH CONG., MONOGRAPH 26: ECONOMIC POWER AND POLITICAL PRESSURES 20–22 (Comm. Print 1941) ("[T]he purpose of this prodigious effort is in part to forestall union organization, and in part to sway public opinion in favor of a legislative program approved by the large corporations which control the association, and to influence the electorate in its choice of candidates for office." (quoting S. REP. NO. 76-6, pt. 6, at 219 (1939)).

57. Cooper, *supra* note 28, at 820 (terming "more subtle espousals of economic and political ideas that sometimes pass for institutional advertising" covert lobbying, as opposed to overt lobbying, which enatils "brief and intensive publicity campaigns by a taxpayer openly directed at a single specific pending measure").

58. *Id.* at 822, 851–52 (arguing that the allowance of deductions for good will or institutional advertising, which includes expenditures for "advertising which presents views on economic, financial, social, or other subjects of a general nature," constitutes a partial acceptance of the Tax Court's decision (quoting Treas. Reg. § 1.162-20(a)(2) (as amended in 1995))).

59. 195 F.2d 948 (8th Cir. 1952).

60. 202 F.2d 126 (4th Cir. 1953).

61. *Roberts Dairy Co.*, 195 F.2d at 949.

62. *Am. Hardware & Equip. Co.*, 202 F.2d at 127.

competition from cooperatives.[63] Each made a contribution to the NTEA, a tax-exempt organization whose purpose was "to conduct educational, scientific and research activities" related to tax benefits for certain types of organizations, including cooperatives.[64] The court in *Roberts Dairy* held that the contributions were not deductible as ordinary and necessary business expenses because NTEA was "organized and primarily operated from its inception for carrying on propaganda, the ultimate objective being a revision in the tax structure."[65] The *American Hardware* court, also denying the taxpayer's deduction, made clear that the regulation denying the deduction for the costs of grassroots lobbying applied to expenditures that would otherwise be considered ordinary and necessary.[66]

One case, decided about ten years after *Addressograph*, might have given the government confidence, prompting more aggressive regulation of covert grassroots lobbying communications. In *William T. Stover Co. v. Commissioner*,[67] the court held that a medical supply company could not deduct the cost of sending a journalist to the United Kingdom to write a series of articles that cast socialized medicine in a negative light.[68] In this case, there was no indication that the articles discussed any specific piece of legislation or that they encouraged people to contact their legislators. The Tax Court found only that the purpose of the articles was to discourage the passage of legislation that would implement "some form of socialized medicine in this country" and that the "articles were more unfavorable than favorable toward socialized medicine."[69] Nonetheless, the court ruled that the IRS appropriately denied the deduction for these costs because they were within the scope of the Supreme Court's decision in *Textile Mills*.[70] Despite its victory in *William T. Stover Co.*, however, the government did not gain much confidence in its ability to regulate covert grassroots lobbying.[71]

Even though the disallowance for more traditional, overt grassroots lobbying expenses was upheld in subsequent decisions,[72] the deduction

63. Cooperatives enjoy certain tax advantages that other businesses do not. *See* I.R.C. § 1382 (2015).

64. *Roberts Dairy Co.*, 195 F.2d at 949.

65. *Id.* at 950.

66. *Am. Hardware & Equip. Co.*, 202 F.2d at 130.

67. 27 T.C. 434 (1956).

68. *William T. Stover Co.*, 27 T.C. at 440.

69. *Id.* at 435–36 (internal quotation marks omitted).

70. *Id.* at 440; *see* Textile Mills Sec. Corp. v. Comm'r, 314 U.S. 326, 338–39 (1941) (disallowing a deduction for the cost of lobbying on a contingency fee basis based on a public policy against influencing legislators).

71. See *infra* note 184 and accompanying text for a discussion of the government's appetite for litigating covert grassroots lobbying cases.

72. *See* Revere Racing Ass'n v. Scanlon, 232 F.2d 816, 818–19 (1st Cir. 1956) (holding that expenditures incurred in the promotion of a ballot measure which would benefit the taxpayer's business were not deductible as ordinary and necessary business expenses); Mosby Hotel Co. v. Comm'r, 13 T.C.M. (CCH) 996, 998–99 (1954) (holding that contributions to a trade association for the purposes of supporting a grassroots lobbying campaign to repeal a law prohibiting the manufacture

disallowance for grassroots lobbying expenditures once again came before the Supreme Court in *Cammarano v. United States*,[73] this time with respect to ballot questions.[74] At issue were deductions claimed by two corporations, a beer distributor in Washington and a wholesale liquor distributor in Arkansas.[75] In both states, ballot initiatives that would have completely destroyed the petitioners' respective businesses were put before the electorate.[76] In response, both petitioners contributed to the organized efforts in opposition to the respective ballot measures and attempted to deduct the contributions as business expenses.[77]

The Court reasoned that the Treasury regulations, the wording of which remained unchanged even as Congress approved several reenactments of the Internal Revenue Code, had acquired the force of law.[78] Having acquired the force of law, the regulations represented the "sharply defined policy" that "everyone in the community should stand on the same footing" when it comes to grassroots lobbying.[79] *Cammarano* represented a shift in the Court's justification for the lobbying deduction disallowance—from public policy to neutrality.[80]

Judge Learned Hand, in *Slee v. Commissioner*,[81] is credited with being the first to articulate the neutrality justification for the lobbying deduction disallowance.[82] The justification stems from an oft-cited quote: "Political

and sale of alcohol were not deductible).

73. 358 U.S. 498 (1959).

74. *Cammarano*, 358 U.S. at 500, 502.

75. *Id.*

76. *Id.* The Washington ballot measure would have given the state exclusive domain over the retail sale of beer and wine, while the Arkansas measure would have prohibited the sale of alcohol completely. *Id.*

77. *Id.* at 501–02.

78. *Id.* at 510–11.

79. *Id.* at 512–13.

80. Mayer, *supra* note 32, at 497–98. The First Amendment ruling in *Cammarano* concerned a similar but distinct issue from that which was considered by the Court in *Citizens United v. FEC*. *See* Citizens United v. FEC, 558 U.S. 310, 319 (2010). In *Citizens United*, the Court held that independent electioneering communications made by tax-exempt and for-profit corporations are protected by the First Amendment. *Id.* at 365. In *Cammarano*, on the other hand, the Court ruled that the petitioners' First Amendment rights were not violated by the denial of a business deduction for grassroots lobbying costs because they "[were] not being denied a tax deduction because they engage[d] in constitutionally protected activities, but [were] simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities [was] required to do under the provisions of the Internal Revenue Code." *Cammarano*, 358 U.S. at 513. *Cammarano* stands for the proposition that businesses cannot claim a tax benefit for political speech simply because it is constitutionally protected, *id.*, while *Citizens United* expands the range of activities that fall within the activities protected by the First Amendment. *Citizens United*, 558 U.S. at 365.

81. 42 F.2d 184, 185–86 (2d Cir. 1930) (holding that a contribution to an organization that provided medical treatment and information about birth control to women could not be deducted as a charitable contribution because the organization lobbied for the "repeal and amendment" of laws banning contraception).

82. *E.g.*, Jasper L. Cummings, Jr., *Tax Policy, Social Policy, and Politics: Amending Section 162(e)*, 61 TAX NOTES 595, 603–04 (1993); Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities*, 71 TEX. L. REV. 1269, 1285

agitation as such is outside the statute . . . though it adds nothing to dub it 'propaganda,' a polemical word used to decry the publicity of the other side. Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them."[83]

Judge Hand's declaration has been interpreted by observers to require various manners of neutrality in the tax treatment of lobbying.[84] The *Cammarano* court subscribed to the school of thought that all lobbying expenditures should be treated the same for tax purposes, no matter who makes them, so that no person or entity is better able to influence legislation "which will affect, directly or indirectly, all in the community."[85]

There has been much criticism of the neutrality justification of the lobbying deduction disallowance as a matter of tax policy.[86] The argument against it is that it forces businesses to weigh lobbying against other methods of achieving their goals, with the knowledge that they can get their full dollar's worth of results out of almost all options except lobbying.[87] This argument notes that a business incurs lobbying costs with the goal of turning a profit, and, because a business cannot deduct the cost of lobbying under § 162(e) and its predecessors, successful lobbying with after-tax dollars earns that profit less the full cost of lobbying.[88] Thus, lobbying is more expensive than the other available routes to achieving a business's goals because the costs of a business's other options are deductible business expenses. On the other hand, a nonbusiness taxpayer, apparently unconcerned with its balance sheet, can lobby to achieve personal or societal goals without concern that lobbying may be a more expensive route.[89] Thus, treating all taxpayers the same with respect to lobbying makes lobbying more expensive for a business than for a nonbusiness, relative to each taxpayer's other options. Put simply, "[b]usiness taxpayers are required to use after-tax dollars in order to generate pre-tax income. Nonbusiness taxpayers, on the other hand, use after-tax dollars to create after-tax benefits."[90]

(1993); Shannon King, *The Lobbying Deduction Disallowance: Policy Considerations, Comparisons, and Structuring Activities Under Amended Section 162(e)*, 15 VA. TAX REV. 551, 555 (1996); Mayer, *supra* note 32, at 497.

83. *Slee*, 42 F.2d at 185. This quote is also credited with inspiring the "substantial part rule" regarding the proportion of lobbying activities that a public charity is allowed to participate in while maintaining its tax-exempt status. Galston, *supra* note 82, at 1284.

84. Cummings, *supra* note 82, at 604. Cummings explains that some observers have taken the quote to require "judicial neutrality," or the idea that government should not both encourage and entertain lobbying efforts; that others understood it to require "wealth neutrality," or that these deductions would be worth more to wealthier taxpayers; and that others still understood the quote to require "deduction neutrality," or that lobbying expenditures should be treated the same no matter who or what is making them. *Id.*

85. *Cammarano*, 358 U.S. at 513.

86. *See, e.g.*, Cooper, *supra* note 28, at 813; Cummings, *supra* note 82, at 604; Galston, *supra* note 82, at 1286.

87. Cooper, *supra* note 28, at 813.

88. *See id.*

89. *See id.*

90. Michael Halberstam & Stuart Lazar, *Business Lobbying as an Informational Public Good:*

B. The Revenue Act of 1962 and Its Effect on the Treatment of Lobbying Costs

After *Cammarano*, Treasury promulgated regulations in 1959 relating to lobbying expenditures under § 162(e). The regulations specified that expenditures for which a business deduction was denied will

> include, but shall not be limited to, expenditures for the purpose of attempting to—
>
> (i) Influence members of a legislative body directly or indirectly, by urging or encouraging the public to contact such members for the purpose of proposing, supporting, or opposing legislation, or
>
> (ii) Influence the public to approve or reject a measure in a referendum, initiative, vote on a constitutional amendment, or similar procedure.[91]

The 1959 regulations also added an exception to the deduction disallowance for institutional or good will advertising, which, of particular importance to this Comment, includes the presentation of a taxpayer's "views on economic, financial, social, or other subjects of a general nature."[92] Additionally, the new regulations declared that dues paid to organizations such as labor unions and trade associations were deductible in full, as long as they were normally considered a business expense.[93] However, dues to a trade association were not deductible to the extent the association influenced legislation, participated in political campaigns, or disseminated propaganda as a substantial portion of its activities.[94] As Treasury's 1959 regulations were being promulgated, there were rumblings that Congress did not agree with the Court's conclusion in *Cammarano* or with Treasury's subsequently promulgated regulations and that a change was in order.[95]

That change came to be when Congress passed the Revenue Act of 1962, rejecting the Court's reasoning in *Cammarano* and amending the Internal Revenue Code to allow business deductions for expenditures for and in connection with direct lobbying.[96] Specifically, the Act added § 162(e) to the Internal Revenue Code, which statutorily reversed the decades-old denial of the business deduction for direct lobbying costs and allowed business deductions for "expenses in direct connection with appearances, submission of statements or

Can Tax Deductions for Lobbying Expenses Promote Transparency?, 13 ELECTION L.J. 91, 106 (2014).

91. Treas. Reg. § 1.162-15 (1960) (amended by T. D. 6435, 1960-1 C.B. 79, 79–80).

92. *Id.*

93. *Id.*

94. *Id.*

95. STAFF OF J. COMM. ON INTERNAL REVENUE TAXATION, DEDUCTION FOR EXPENSES TO INFLUENCE LEGISLATION, ETC. 1–3 (Comm. Print 1960) (arguing that the 1959 regulations created administrative problems—the recordkeeping required of taxpayers was very complex—and several substantive problems: these expenditures were ordinary and necessary business expenses and should have been treated that way; lobbying was legal so it did not "frustrate sharply defined public policy"; Congress, not Treasury, should have determined which deductions should have been disallowed; and any statement on policy towards lobbying should have been stated in a law governing lobbying directly, not in a tax law).

96. S. REP. NO. 87-1881, at 22 (1962).

sending of communications . . . . to committees or individual Members of Congress or to committees or individual members of State and local governmental legislatures."[97] In addition, the Act provided that taxpayers could deduct membership dues to organizations that participate in the lobbying activities for which a deduction was allowed by this amendment, but only to the extent that the dues were applied to those direct lobbying ends.[98]

The reason for this about-face in the tax treatment of direct lobbying costs was the feeling in Congress that the 1959 regulations created serious administrative and enforcement problems and that *Cammarano*, in combination with those regulations, created even more serious substantive problems.[99] Congress felt that taxpayers would have trouble distinguishing expenditures for which a deduction was allowed from those for which one was not in meeting the reporting requirements in the 1959 regulations.[100] Similarly, Congress was concerned that membership organizations would not be able to determine whether their lobbying activities were substantial or not.[101]

The substantive policy issues brought to light by *Cammarano* and the 1959 regulations were more concerning to Congress than enforcement problems.[102] One such issue was that businesses could not deduct the costs of communicating with legislatures, while they could deduct the costs of communicating with administrative agencies and of pursuing their interests by litigation.[103] Another was that the denial of a deduction would discourage "taxpayers who have information bearing on the impact of present laws, or proposed legislation, on their trades or businesses" from "making this information available to the Members of Congress or legislators at other levels of government."[104] Finally, Congress believed that this deduction was necessary to ensure that businesses were taxed on their net income rather than their gross income.[105]

The Revenue Act of 1962, however, did not change the government's stance toward grassroots lobbying.[106] Rather it codified the denial of business deductions for expenditures meant to "influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums."[107] This left the tax treatment of grassroots lobbying expenditures in roughly the same place that it had been in 1922.[108]

97. *Id.* at 729.

98. *Id.* at 728–29.

99. H.R. REP. NO. 87-1447 (1962).

100. *Id.* at 421.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *See* Revenue Act of 1962, Pub. L. No. 87-834, § 3(a), 76 Stat. 960, 973.

107. *Id.*

108. *See* T.D. 3295, 24 Treas. Dec. Int. Rev. 369, 373 (1922) (expanding the disallowance to include "[s]ums of money expended for . . . the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising").

In *Southwestern Electric Power Co. v. United States*,[109] which was pending at the time of the 1962 Act's enactment, the United States Court of Claims upheld the denial of a deduction for the cost of ads opposing the funding of a central electrical grid in the company's territory because the ads qualified as propaganda.[110] Deducting the cost of these advertisements was not appropriate, in the court's opinion, because they were not "trade advertising" or "promoting the sale of goods."[111] Notably, in his concurrence, Judge Davis argued that a policy of neutrality was behind the regulation on which the ruling was based:

> The basic theory was that everyone should participate in the electoral and legislative process purely as an unsubsidized citizen, not some few with the added help of financial backing by the federal treasury. Plaintiff seeks this semi-subsidized status which the law at that time deliberately chose not to accord it.[112]

The Supreme Court echoed this argument twenty years later in *Regan v. Taxation with Representation of Washington*.[113] This case was a First Amendment challenge to the requirement that public charities limit their lobbying activities to an insubstantial level in order to continue receiving tax-deductible contributions.[114] The Court rejected the challenge on the grounds that "Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare" and that "[t]his Court has never held that Congress must grant a benefit such as TWR [Taxation with Representation of Washington] claims here to a person who wishes to exercise a constitutional right."[115] Even though this case concerned the tax treatment of a public charity's lobbying activity rather than that of a business, the common thread is Congress's decision that it was not appropriate to extend a tax benefit to certain taxpayers to subsidize lobbying activities.[116]

Even as the justification for denying a business deduction for grassroots lobbying remained the same into the 1980s, some small changes in the treatment of grassroots lobbying began to appear during the 1960s and 70s. Shortly after enactment of the 1962 Act, Treasury amended the regulations for § 162(e), devoting a section of the regulation to the deductibility of organizational dues as business expenses and adding a section to provide clarity on what types of activities trigger § 162(e).[117]

109. 312 F.2d 437 (Ct. Cl. 1963).

110. *Sw. Elec. Power Co.*, 312 F.2d at 442.

111. *Id.*

112. *Id.* at 448 (Davis, J., concurring).

113. 461 U.S. 540 (1983).

114. *Taxation with Representation*, 461 U.S. at 542.

115. *Id.* at 544–45.

116. See *infra* Part II.D for a discussion of the tax treatment of lobbying expenditures by public charities.

117. Treas. Reg. § 1.162-15 (1965) (as amended by T.D. 6819, 1965-1 C.B. 90, 90–95), which was previously devoted to defining the types of activities for which expenditures are disallowed to cover the deductibility of membership dues under § 162(a) and adding Treas. Reg. § 1.162-20 (1965) (as

In 1980, Treasury proposed an amendment to regulations that would have expanded the definition of grassroots lobbying for the purposes of § 162(e).[118] Specifically, the proposal set out a three-part definition of grassroots lobbying.[119] First, "[i]t pertains to legislation being considered by, or likely in the immediate future to be proposed to, a legislative body, or seeks or opposes legislation."[120] Second, "[i]t reflects a view with respect to the desirability of legislation."[121] And third, "[i]t is communicated in a form and distributed in a manner so as to reach individuals as members of the general public, that is, as voters or constituents, as opposed to a communication designed for academic, scientific, or similar purposes."[122] In addition, Treasury proposed a change to the exception for "expenditures for advertising which presents views on economic, financial social, or other such issues," adding the qualification that such material "does not attempt to influence the public with respect to legislative matters . . . or involve[] any of the other activities specified in paragraph (c) of this section for which a deduction is not allowable."[123] This proposed regulation, partially inspired by a case out of the United States District Court for the Eastern District of Michigan,[124] was never finalized.

amended by T.D. 6819, 1965-1 C.B. 90, 90–95), to provide guidance as to which expenditures can be deducted and which cannot under § 162(e)); *see also* Rev. Rul. 78-111, 1978-1 C.B. 41, 41–42 (declaring that expenditures incurred in connection with distributing a speech given before the legislature articulating opposition to a bill being considered to a company's shareholders were not deductible as an ordinary and necessary business expense because doing so qualified as attempting to influence the general public); Rev. Rul. 78-112, 1978-1 C.B. 42, 42–43 ("It is not necessary that an advertisement specifically request the general public or a segment thereof to contact their representatives, [because] . . . . an advertisement through words, pictures, etc., is an attempt to develop a 'grassroots' point of view by influencing the general public to propose, support, or oppose legislation."); Rev. Rul. 78-113, 1978-1 C.B. 43, 43–44 (declaring that expenditures incurred by a trade association in connection with urging its members to ask their employees and customers to contact legislators are not deductible because the employees and customers are part of the public); Rev. Rul. 78-114, 1978-1 C.B. 44, 44 (declaring that expenditures incurred by a trade association in connection with urging its member organizations to contact their representatives are deductible when the legislation is of direct interest to the trade association or one of its member organizations, but if the communications are made to prospective members, it is not deductible because they are members of the public).

118. 45 Fed. Reg. 78,167, 78,168–72 (proposed Nov. 25, 1980). This proposed regulation would have defined grassroots lobbying in Treas. Reg. § 1.162-20. 45 Fed. Reg. at 78,169. Currently, grassroots lobbying is defined for the purpose of public charities in Treas. Reg. § 56.4911-2 (as amended in 1994), but there is no guarantee that the IRS would apply this definition to other tax-exempt organizations or businesses. *See* King, *supra* note 82, at 586 n.251.

119. 45 Fed. Reg. at 78,168.

120. *Id.* at 78,169.

121. *Id.*

122. *Id.* (noting that a communication that simply pertains to legislation but does not express an explicit view on it will be considered to have satisfied the second prong, and that a message communicated indirectly—through the news media, for instance—would satisfy the third prong).

123. *Id.*

124. Consumers Power Co. v. United States, 299 F. Supp. 1180, 1182–84 (E.D. Mich. 1969) (holding that if any part of an advertisement would be disallowed under Treas. Reg. § 1.162-20 (1965), the cost of the whole advertisement is disallowed), *rev'd on other grounds*, 427 F.2d 78 (6th Cir. 1970).

C. The Omnibus Budget Reconciliation Act of 1993 and Disequilibrium Rationale

Congress decided once again that the tax treatment of lobbying expenditures required reform and, in enacting the Omnibus Budget Reconciliation Act of 1993 (OBRA '93), amended § 162(e) to deny business deductions for most lobbying and political expenditures.[125] OBRA '93 denied business deductions for expenditures incurred in connection with four types of activities: influencing legislation, participating in election campaigns, attempting to influence the public with respect to political or legislative matters, and communicating directly with certain executive branch officials.[126] In extending the statute's denial to include direct lobbying expenses, Congress defined "influencing legislation" as "any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of legislation."[127]

In extending the § 162(e) denial of deductions for expenditures in connection with lobbying certain executive branch officials,[128] Congress included the president, the vice president, anyone who works in the White House office of the executive office of the president, the highest two officials in any other office of the executive office of the president, and cabinet level officials and their immediate deputies.[129]

In addition, OBRA '93 provided that membership dues paid to tax-exempt organizations are not deductible to the extent that a portion of the dues were used in any activity listed in § 162(e)(1).[130] On the other hand, OBRA '93 carved out exceptions for local legislation (using essentially the same language as the 1962 Act to allow the deduction)[131] and for certain other lobbying expenditures, including those incurred by professional lobbyists in their capacities as professional lobbyists[132] and for de minimis in-house lobbying expenditures.[133]

OBRA '93 also provided new rules regarding tax-exempt organizations—these rules operate in conjunction with the amendments the Act made to § 162(e). It amended § 170(f) to disallow deductions for contributions to public charities that are meant to avoid § 162(e).[134] It also provided in § 6033(e) that

125. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13222, 107 Stat. 312, 477–81 (codified as amended at I.R.C. § 162(e) (2015); § 6033(e) (2015)).

126. *See* I.R.C. § 162(e)(1) (2015).

127. *Id.* § 162(e)(4)(A).

128. *See id.* § 162(e)(1)(D).

129. *See id.* § 162(e)(6).

130. *See id.* § 162(e)(3).

131. *Id.* § 162(e)(2) (2014); *see* Revenue Act of 1962, Pub. L. No. 87-834, § 3(a), 76 Stat. 960, 973.

132. *See* I.R.C. § 162(e)(5)(A).

133. *See id.* § 162(e)(5)(B). The Code limits the de minimis exception to $2,000 in expenditures per taxable year and can be used neither for costs of hiring professional lobbyists nor for dues to an organization that lobbies or participates in elections. *Id.*

134. *See* I.R.C. § 170(f)(9) (2015).

noncharitable, tax-exempt organizations must report the amount of money that they spend in connection with any activity contemplated by § 162(e) and must notify contributors regarding how much of their dues or contributions will be spent on activities contemplated by § 162(e).[135] If a tax-exempt organization—with the exception of public charities—fails to comply with reporting requirements, it must pay a proxy tax, which is determined by applying the highest corporate income tax rate to the amount not reported.[136]

In 1995, Treasury amended regulations under § 162(e) regarding dues to noncharitable tax-exempt organizations to ensure that they corresponded to the new reporting requirements in § 6033(e).[137] In addition, it amended the regulations to establish methods of allocating costs to activities contemplated in § 162(e) as well as those for which the cost would be a deductible business expense.[138] Finally, Treasury amended the regulations to clarify which types of activities would trigger § 162(e) with respect to "influencing legislation" or direct lobbying.[139] The IRS provided tax-exempt organizations with further guidance in a revenue procedure that set out the circumstances in which organizations would be treated as having satisfied the reporting requirements in § 6033(e).[140]

Congress did not made it clear why it reinstituted the lobbying deduction disallowance in OBRA '93. It simply provided that "in the context of deficit reduction legislation, it is appropriate to limit the business deduction for lobbying expenses."[141] As discussed above, tax neutrality was unlikely the policy behind OBRA '93 because the Act has been criticized for its potential to create disparate tax results between business and nonbusiness taxpayers.[142] There is reason to believe that § 162(e), post-1993 even more than pre-1962, creates disparate tax consequences because a public charity can, since 1976, elect to have a "safe harbor" amount of money that it can put towards lobbying expenses without endangering its ability to receive tax-deductible contributions.[143]

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135. See I.R.C. § 6033(e)(1) (2015). A trade association is an example of noncharitable tax-exempt organization. I.R.C. § 501(c)(6) (2015).

136. I.R.C. § 6033(e)(2). Public charities are exempt from the reporting requirements. *Id.* § 6033(a)(3)(C).

137. Treas. Reg. § 1.162-20 (as amended by T.D. 8602, 1995-2 C.B. 15, 20).

138. Treas. Reg. § 1.162-28 (as amended by T.D. 8602, 1995-2 C.B. 15, 20–23).

139. Treas. Reg. § 1.162-29 (as amended by T.D. 8602, 1995-2 C.B. 15, 24–26).

140. Rev. Proc. 95-35, 1995-2 C.B. 391, 391 (exempting public charities and noncharitable tax-exempt organizations that can show "that substantially all the dues they receive are not deductible without regard to § 162(e)" or that their § 162(e) expenditures are de minimis within the meaning of § 162(e)(5)(B)).

141. H.R. REP. NO. 103-111, at 659 (1993).

142. See *supra* notes 86–90 and accompanying text for a discussion of criticism of the neutrality justification for the lobbying deduction disallowance. *See also* H.R. REP. NO. 1447 (1962) (arguing that a denial of a business deduction for direct lobbying expenses would lead to a tax on businesses' gross income rather than net income).

143. *Cf.* Cummings, *supra* note 82, at 602–03 (noting that there are exceptions to the definition of lobbying that are applicable to public charities in I.R.C. § 4911 (2015) and the regulations under § 4911 that are not available to businesses); *see also* STAFF OF J. COMM. ON TAXATION, 94TH CONG., SUMMARY OF THE TAX REFORM ACT OF 1976 68–69 (Comm. Print 1976) (adding I.R.C. § 501(h)

There is some evidence, however, that the 1993 changes were driven by a variation on the neutrality or anti-subsidy justification raised by Judge Learned Hand[144] and cited by the Supreme Court in *Cammarano*[145] and *Taxation With Representation*.[146] In its 1993 proposal summary, Treasury argued that the deduction for lobbying expenditures should be disallowed for businesses and trade groups because it "inappropriately benefits corporations and special interest groups for intervening in the legislative process."[147]

This justification approaches what one commentator called "judicial neutrality," the proposition that the government should not be both the source and the recipient of tax subsidized lobbying.[148] The argument is that access to legislators, or the ability to influence legislation, is a public good (like streets or national defense) but that it is a different type of public good because it is "of such limited supply that it must be rationed"[149] in a way that the disparities in access or ability to influence do not create unjust laws that will "affect, directly or indirectly, all in the community."[150]

The notion that lobbying by business interests has to be watched closely is not new, especially with respect to grassroots lobbying. In 1941, eighteen years before *Cammarano* was decided, a senate committee investigating the political power wielded by business interests found that a 1930s covert grassroots lobbying campaign by the National Association of Manufacturers "stem[med] from the almost limitless resources of corporate treasuries. Not individuals but corporations constitute[d] the membership of the association and suppl[ied] its funds. It is this fact that ma[de] the political aspects of the association's campaign of propaganda a matter of serious concern."[151]

Similarly, in 1957 a senate committee convened to investigate misdeeds with respect to political activities, lobbying, and campaign contributions focused on "a broad, national, long-range educational campaign" to give the American public "at the grassroots a better understanding of the natural-gas industry."[152] It was

(2015) to the Internal Revenue Code, under which "a public charitable tax-exempt organization may elect to replace the present 'substantial part of activities' test with a sliding-scale limitation on lobbying activities defined in terms of expenditures for influencing legislation, which allows proportionately less expenditures for larger organizations").

144. Slee v. Comm'r, 42 F.2d 184, 185 (2d Cir. 1930).

145. See *supra* notes 78–85 and accompanying text for a discussion of the Court's reasoning in *Cammarano*.

146. See *supra* notes 113–16 and accompanying text for a discussion of the Court's reasoning in *Taxation with Representation*.

147. DEP'T OF THE TREASURY, SUMMARY OF THE ADMINISTRATION'S REVENUE PROPOSALS 45 (1993) [hereinafter DEP'T OF THE TREASURY, SUMMARY].

148. Cummings, *supra* note 82, at 604.

149. *Id.*

150. Cammarano v. United States, 358 U.S. 498, 513 (1959) (Douglas, J., concurring).

151. BLAISDELL, TEMP. NAT'L ECON. COMM., 76TH CONG., *supra* note 56, at 20–21 (S. REP. NO. 76-6, pt. 6, at 221–22 (1939)); *see also* Addressograph-Multigraph Corp. v. Comm'r, 4 T.C.M. (CCH) 147, 181 (1945) (allowing deductions for funding a National Association of Manufacturers covert grassroots lobbying campaign that was aimed at turning the public against New Deal labor laws).

152. S. REP. NO. 85-395, at 8–17 (1957).

executed by a trade association called the National Gas and Oil Resources Committee (NGO).[153] In fact, the NGO campaign was aimed at passing the Harris-Fulbright amendment to the Natural Gas Act, which would exempt natural gas producers from regulation by the Federal Power Commission.[154] NGO was funded by various natural gas companies, which contributed close to $2,000,000.[155] Notably, the senate committee also singled out "advertisements by varied interests which do not expressly support or oppose legislation but tend to accomplish the same result indirectly by subtle means" as worthy of close examination by the IRS.[156] This sounds very much like covert grassroots lobbying and the API advertisement discussed in the Introduction.

The idea that lobbying by business interests deserves special treatment also appears in the government's brief in *Cammarano*.[157] In it, the government argues that the regulations at the heart of the case were inspired by a number of historical attempts by business interests to influence legislation through grassroots lobbying campaigns.[158] The government argued that "[t]his history reflects a continued Congressional concern with the use of large sums of money to finance 'the engineering of consent'—to 'make' public opinion on matters of legislation—particularly where large economic interests are all on one side of the controversy."[159]

Some commentators have argued that this "[n]eed for tax disequilibrium"—the notion that the tax treatment of businesses and nonbusiness taxpayers should lead to different results—is the best justification for the business lobbying deduction disallowance.[160] The disallowance, unlike traditional principles of tax policy, emphasizes practical realities regarding the ability of business interests to fund and mobilize grassroots lobbying campaigns.[161] At least one commentator has posited that disparate tax treatment for business and nonbusiness interests is itself a form of neutrality because of the stark practical differences between such actors.[162]

153. *Id.* at 11–17.

154. *Id.* at 9.

155. *Id.* at 13.

156. *Id.* at 82.

157. Brief for the Respondents at 31–32, Cammarano v. United States, 358 U.S. 498 (1959) (Nos. 29 & 50).

158. *Id.* at 32–35 (tracing the history of congressional responses to corporate grassroots lobbying efforts, including opposition to the Underwood Tariff Act of 1913 and the National Association of Manufacturers campaign, against New Deal era regulations).

159. *Id.* at 35 (footnote omitted) (quoting Edward L. Bernays, *The Engineering of Consent*, *in* THE ANNALS OF THE AMERICAN ACADEMY 113, 114 (1947)).

160. Cooper, *supra* note 28, at 813.

161. *Id.* at 813–14 (noting a discrepancy in the ability to influence legislation between business and nonbusiness interests because business interests have the benefit of built-in infrastructure in the form of trade associations and the ability to self-finance campaigns by pooling resources from wealthy businesses).

162. Galston, *supra* note 82, at 1273–74. See *infra* notes 225–34 and accompanying text for a discussion of the practical differences between businesses and public charities.

D. Public Charities and Grassroots Lobbying

Grassroots lobbying for the purposes of public charities, which are viewed as the organizations most likely to represent interests with social or nonbusiness policy goals, is defined in the Internal Revenue Code.[163] Section 4911, similar to § 162(e), defines grassroots lobbying by public charities as "any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof."[164] That definition, however, is narrowed in an accompanying regulation, which lists three elements of a grassroots lobbying communication for public charities: that it "[r]efers to specific legislation,"[165] that it "[r]eflects a view on such legislation,"[166] and that it "[e]ncourages the recipient of the communication to take action with respect to such legislation."[167] That definition is further narrowed by a list of five activities—most of which pertain to direct lobbying—that are not included in the definition of lobbying for public charities, notwithstanding the three-part definition in the regulation.[168] The narrow definition of grassroots lobbying is broadened in the case of certain paid advertisements by public charities.[169] If a charity releases such an advertisement within the two weeks before a legislative body or committee is scheduled to take a vote "on a highly publicized piece of legislation," there is a presumption that the advertisement constitutes grassroots lobbying if it meets a relaxed standard.[170] In these situations, there is a presumption that any such advertisement that refers to the legislation or that encourages the public to contact their legislators regarding the legislation is grassroots lobbying.[171]

163. I.R.C. § 4911(d)(1)(A) (2012).

164. *Id.*

165. Treas. Reg. § 56.4911-2(b)(2)(ii)(A) (1990). The regulation goes on to define "specific legislation" as "legislation that has already been introduced in a legislative body and a specific legislative proposal that the organization either supports or opposes." Treas. Reg. § 56.4911-2(d)(1)(ii).

166. Treas. Reg. § 56.4911-2(b)(2)(ii)(B).

167. Treas. Reg. § 56.4911-2(b)(2)(ii)(C).

168. I.R.C. § 4911(d)(2). The activities not included in the definition of lobbying for public charities are: making available the results of nonpartisan analysis, study, or research; providing technical advice to a governmental body or committee in response to a written request; any communication with a legislative body with respect to an issue pertaining to the existence of the organization as a public charity; any communication with members of the organization with respect to legislation; and communication with a government official or employee that does not work for a legislative body or that does not mean to influence legislation. *Id.*

169. Treas. Reg. § 56.4911-2(b)(5)(ii).

170. *Id.* In order for there to be a presumption of grassroots lobbying, there is a requirement that "the paid advertisement both reflects a view on the general subject of such legislation and either: refers to the highly publicized legislation; or encourages the public to communicate with legislators on the general subject of such legislation." *Id.*

171. *Id.* For the purposes of this section, "mass media" includes "television, radio, billboards and general circulation newspapers and magazines," *id.* § 56.4911-2(b)(5)(iii)(A), and "highly publicized" requires that a piece of legislation receive "frequent coverage on television and radio, and in general circulation newspapers, during the two weeks preceding the vote by the legislative body or committee" and that "the pendency of the legislation or the legislation's general terms, purpose, or effect are known to a significant segment of the general public . . . in the area in which the paid mass

Of the purposes that an organization must serve in order to achieve § 501(c)(3) status, "educational"[172] is most analogous to the "institutional or 'good will' advertising" exception in the § 162(e) implementing regulations.[173] Educational, for the purposes of public charities, is defined as either 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."[174] The IRS uses a four-prong "methodology test," to determine whether a public charity's advocacy is, in fact, educational.[175] The methodology test, according to the IRS, focuses on the method by which a communication is made, rather than its content, in determining whether or not it is educational for the purposes of section 501(c)(3).[176]

III. BUSINESSES CAN DEDUCT COVERT GRASSROOTS LOBBYING COSTS, EVEN THOUGH THEY ARE GRASSROOTS LOBBYING COSTS

Notwithstanding the fact that businesses employ covert lobbying campaigns to "make public opinion,"[177] the fairly porous scheme that governs grassroots lobbying by businesses almost certainly allows deductions for the cost of such campaigns. The most obvious vehicle through which businesses avoid the deduction-denying effect of § 162(e) is the institutional or good will advertising exception contained in the regulations.[178] This exception allows businesses to pass off grassroots lobbying as "advertising which presents views on economic, financial, social, or other subjects of a general nature," and it enables the passive stance the IRS takes toward covert grassroots lobbying.[179]

A prominent example of the IRS's failure to effectively police covert grassroots lobbying is the campaign from the National Association of Manufacturers (NAM) in the 1930s. Between 1933 and 1938, NAM "blanketed the country with a propaganda which in technique has relied upon indirection of meaning."[180] The IRS was sued after it denied a deduction to some of the

media advertisement appears," *id.* § 56.4911-2(b)(5)(iii)(C).

172. Treas. Reg. § 1.501(c)(3)-1(d)(1)(i) (as amended in 2014) (providing that an organization must serve one of these purposes in order to be public charity: religious, charitable, scientific, testing for public safety, literary, educational, or prevention of cruelty to children or animals).

173. *See* Treas. Reg. § 1.162-20(a)(2) (as amended in 1995) (allowing a deduction for expenditures on "advertising which presents views on economic, financial, social, or other subjects of a general nature").

174. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (as amended in 2014).

175. Rev. Proc. 86-43, 1986-2 C.B. 729, 729–30; *see also* Nat'l All. v. United States, 710 F.2d 868, 875–76 (D.C. Cir. 1983).

176. Rev. Proc. 86-43, 1986-2 C.B. 729, 729–30; *Nat'l All.*, 710 F.2d at 874.

177. Brief for the Respondents, *supra* note 157, at 35 (internal quotation marks omitted).

178. Treas. Reg. § 1.162-20(a)(2) (as amended in 1995).

179. *Id.*; *see also* Cooper, *supra* note 28, at 822–23.

180. BLAISDELL, TEMP. NAT'L ECON. COMM., 76TH CONG., *supra* note 56, at 20–21 (quoting S. REP. NO. 76-6, pt. 6, at 218 (1939)).

NAM's member businesses that funded the propaganda campaign.[181] The Tax Court, in *Addressograph*, held that the "purpose of the campaign of the committee . . . was to correct unsympathetic public opinion against manufacturers resulting from attacks upon industry because of unemployment during the depression" and overturned the denial.[182] Since this defeat, the IRS has almost completely refrained from litigating grassroots lobbying cases.[183] In this light, it is understandable that Professor George Cooper has argued that the allowance of a deduction for certain institutional or good will advertising costs—"advertising which presents views on economic, financial, social, or other subjects of a general nature"[184]—is an acceptance of the Tax Court's decision in *Addressograph*.[185]

A. *There Should Be Neutral Treatment of Grassroots Lobbying Costs*

The breadth of the exception for institutional or good will advertising, in addition to the hesitance of the IRS to litigate grassroots lobbying cases, allows businesses to design their messages in such a way that they can claim a deduction for an advertisement, notwithstanding the fact that it presents views on legislation. The only limits on the exception are (1) if a substantial part of the organization's activities include lobbying activities, the dues that a business pays to that organization are only deductible to the extent that they did not go towards funding the lobbying activities;[186] (2) the advertisements may not constitute an "attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums";[187] and (3) the costs must "otherwise meet the requirements of the regulations under section 162."[188]

181. Addressograph-Multigraph Corp. v. Comm'r, 4 T.C.M. (CCH) 147, 181 (1945). See also *supra* notes 51–58 and accompanying text for additional discussion of NAM's 1930s covert grassroots lobbying campaign against New Deal labor laws.

182. *Addressograph*, 4 T.C.M. (CCH) at 182.

183. *See* Cooper, *supra* note 28, at 822. See also *Washburn v. Commissioner*, 283 F.2d 839 (8th Cir. 1960) and *Geary v. Commissioner*, 235 F.3d 1207 (9th Cir. 2000) for cases in which the IRS did challenge a deduction claimed for the costs of grassroots lobbying. In *Washburn*, the court upheld the denial of a deduction for the costs of obtaining petition signatures for a ballot question aimed at exempting livestock and poultry feed from a sales tax. *Washburn*, 238 F.2d at 840–41, 844. In *Geary*, the court upheld the denial of a deduction for the costs of obtaining petition signatures for a referendum campaign to allow the use of a puppet in policing. *Geary*, 235 F.3d at 1208–09, 1211. It is notable that neither case dealt with covert grassroots lobbying.

184. Treas. Reg. § 1.162-20(a)(2) (as amended in 1995).

185. *See* Cooper, *supra* note 28, at 822 (citing Treas. Reg. § 1.162-20(a)(2) (as amended in 1995)).

186. Treas. Reg. § 1.162-20(c)(3) (as amended in 1995).

187. Treas. Reg. § 1.162-20(c)(4).

188. Treas. Reg. § 1.162-20(a)(2). As noted above, the definitions of "ordinary" and "necessary" for the purpose of § 162(a) are broad. See *supra* note 13 for the applicable standard for an ordinary and necessary business expense. Moreover, a proposed regulation that would have narrowed the definition of institutional and good will advertising and broadened the definition of grassroots lobbying for businesses was never finalized. *See* Consumers Power Co. v. United States, 299 F. Supp. 1180, 1183–84 (E.D. Mich. 1969); Prop. Treas. Reg. § 1.162-20, 45 Fed. Reg. 78,167, 78,167–72 (Nov. 25, 1980).

Moreover, the exception is not limited by subject matter; the regulation suggests "economic, financial, [or] social," but allows the exception for advertisements that present views on "other subjects of a general nature."[189] What in the language of the regulation would stop a marijuana grower from deducting the cost of placing an advertisement that touts the health benefits of marijuana in a state in which the legalization of medical marijuana is being considered? Seemingly nothing. Similarly, there is nothing to stop the businesses that funded the API fracking commercial discussed above from deducting the costs of that advertisement.[190] The effect of this scheme is that businesses can deduct the costs of advertisements that are, in substance, grassroots lobbying, while nonbusinesses must bear the full economic costs of such advertisements. The current treatment of covert grassroots lobbying undermines the policy at the heart of OBRA '93: neutral treatment that leads to disparate effects.[191]

Neutral treatment of the costs of grassroots lobbying can apply in either of two ways: it could either mean allowing tax benefits for grassroots lobbying across the board or denying deductions for grassroots lobbying across the board. The government has not clearly stated its policy behind denying deductions for regulating grassroots lobbying.[192] Two practitioners, however, have argued that the rationale for greater regulation of grassroots lobbying is "based upon the paternalistic notion that the government needs to regulate grassroots organizations because citizens are naïve, gullible, and incapable of making well-informed decisions about public policy on their own."[193] These practitioners argue that grassroots lobbying should be encouraged because it "increases citizen participation in the democratic process,"[194] which is "a good to be encouraged, not an evil to be contained."[195] Moreover, they argue, grassroots lobbying is the most democratic method of influencing legislation because it is "simply the efforts of average Americans to share their viewpoints with their elected representatives and encourage other Americans to do the same."[196]

189. Treas. Reg. § 1.162-20(a)(2).

190. See *infra* notes 265–75 and accompanying text for an application of a proposed update to the institutional or good will exceptions to the API ad.

191. *See* DEP'T OF THE TREASURY, SUMMARY, *supra* note 147, at 45 ("The [business] deduction for lobbying expenses inappropriately benefits corporations and special interest groups for intervening in the legislative process.").

192. *See* H.R. REP. NO. 103-111, at 659 (1993) (providing that the denial of deductions for business lobbying expenses is justified because "in the context of deficit reduction legislation, it is appropriate to limit the business deduction for lobbying expenses").

193. Jay Alan Sekulow & Erik M. Zimmerman, *Weeding Them Out by the Roots: The Unconstitutionality of Regulating Grassroots Issue Advocacy*, 19 STAN. L. & POL'Y REV. 164, 175 (2008).

194. *Id.* at 165.

195. *Id.* at 174–75.

196. *Id.* at 174. Grassroots lobbying, the argument goes, is essentially the opposite of direct lobbying because it consists of citizens talking to their elected officials and to their fellow citizens. In contrast, direct lobbying favors the wealthy and connected because "[m]illions of Americans lack the resources and connections necessary to hire a professional lobbyist to convey their viewpoints to members of Congress." *Id.*

Professor Lloyd Mayer argues that grassroots lobbying will spur citizens to offer information to policymakers—information to which government officials might not otherwise have access.[197] Moreover, Mayer argues that grassroots lobbying helps to increase government transparency by maintaining an informed electorate.[198]

These policy arguments offer an oversimplified picture of grassroots lobbying. Business interests have used grassroots lobbying campaigns effectively since the early twentieth century to promote their self-interested legislative agendas.[199] These campaigns are often large, sophisticated undertakings that require businesses or trade organizations to hire professional advisors and consultants.[200] Contrary to the policy arguments in favor of allowing grassroots lobbying to go unregulated, these professionals' services cost a lot of money, likely more than "average Americans" could afford.[201] Moreover, Professor Miriam Galston has argued that grassroots lobbying "could . . . inject a level of coercive tactics into the surrounding legislative decisionmaking process" that is similar to those in election campaigns.[202] This argument is premised on the notion that there is a connection between wealth and the ability to influence legislation; there is "an understanding, unspoken or explicit, that the wealthy may prove helpful to [policymakers] in the future or out of gratitude for favors already received."[203] Galston argues that the inverse is just as true: "The promise, or threat, of a grass roots lobbying campaign may be difficult to distinguish from the promise of electoral assistance or the threat of its opposite."[204]

197. Mayer, *supra* note 32, at 561.

198. *Id.*

199. Brief for the Respondents, *supra* note 157, at 32–34 (noting that a corporate grassroots lobbying campaign opposed the Underwood Tariff Act of 1913).

200. *See, e.g.*, Textile Mills Sec. Corp. v. Comm'r, 314 U.S. 326, 336 (1941) ("A publicist was retained to arrange for speeches, news items, and editorial comment. Two legal experts were retained to prepare propaganda concerning international relations, treaty rights and the policy of this nation as respects alien property in time of war.").

201. *See* Buckley v. Valeo, 424 U.S. 1, 19 (1976) ("[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.").

202. *See* Galston, *supra* note 82, at 1342.

203. *Id.* at 1331.

204. *Id.* at 1342. This line of argument brings to mind the now infamous holding made by the Court in *Citizens United*: "[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." Citizens United v. FEC, 558 U.S. 310, 357 (2010); *see also* David Weigel, *Bob Menendez's Donor Problem: Did* Citizen's United *Cause It?*, BLOOMBERG POLITICS (Apr. 2, 2015, 4:31 PM), http://www.bloomberg.com/politics/articles/2015-04-02/bob-menendez-s-donor-problem-did-citizen-s-united-cause-it- [http://perma.cc/NSR3-BTDN] (explaining that the corruption charges against United States Senator Bob Menendez stemmed from assistance that he gave to a supporter who gave $600,000 to a Super PAC that made independent expenditures favorable to Sen. Menendez).

The tax policy arguments against neutral treatment of grassroots lobbying costs center on the idea that we should tax net income rather than gross income,[205] allowing deductions for the costs of earning income.[206] Professor Cooper makes the argument that, as far as tax policy is concerned, a business deduction for the cost of grassroots lobbying should be given because it ensures that businesses are taxed on their net income rather than their gross income.[207] He further argues that neutral tax treatment of business and nonbusiness lobbying costs forces businesses to make irrational economic decisions because it assigns a greater economic cost to lobbying.[208]

Cummings updates that argument with the effects of the 1976 additions of § 501(h) and § 4911 to the Internal Revenue Code.[209] He points out that § 501(h) provides charities with a safe harbor for lobbying costs that are paid for with charitable contributions deductible to their funders, which conceivably allows them to spend more on lobbying than they would under the traditional "substantial part" test.[210] Moreover, he points out that the definition of lobbying for the purpose of charitable organizations contains several exceptions that are not available to businesses.[211] Cummings argues that while neither businesses nor charities can deduct the costs of grassroots lobbying, the effects of § 501(h) and § 4911 exacerbate the disparate impact of neutral treatment of grassroots

205. *See* Cummings, *supra* note 82, at 602–04.

206. Galston, *supra* note 82, at 1288.

207. See *supra* notes 86–90 and accompanying text for a discussion of criticism of the neutrality justification for denying a deduction for lobbying costs. Cummings put the anti-neutrality argument in the larger context of the global economy.

> [T]he inconsistency of the deduction disallowance with the theory of a net income tax is not just a matter of tax "tidiness," but it is more importantly a matter of concern to the general economy. If, for example, a business believes that it can achieve a greater increase in profits by expending a dollar on lobbying as compared with maintenance, the disallowance of a lobbying deduction can skew the business decision toward maintenance. In theory, more maintenance will be used than is needed. This result, when compounded, will tend to diminish the overall output of goods and services in the economy.

Cummings, *supra* note 82, at 601.

208. See *supra* notes 86–90 and accompanying text for a discussion of criticism of the neutrality justification for denying a deduction for lobbying costs.

209. Cummings, *supra* note 82, at 602–03; *see also* I.R.C. § 501(h) (2015) (allowing public charities to opt out of the "substantial part" test and to elect to have a ceiling calculated for lobbying expenditures); *id.* § 4911 (imposing an excise tax on spending by charitable organizations above an insubstantial level).

210. Cummings, *supra* note 82, at 602–03; *see* I.R.C. § 501(h); *see also* Seasongood v. Comm'r, 227 F.2d 907, 912 (6th Cir. 1955) (holding that five percent does not constitute a substantial part for purposes of a charity's lobbying).

211. Cummings, *supra* note 82, at 602–03; *see* I.R.C. § 4911(d)(2) (exempting five activities from the definition of influencing legislation as it pertains to charities, including (1) making nonpartisan analysis, studies, or research available; (2) providing technical advice to a governmental body that has requested it; (3) appearing before or communicating with a legislative body concerning issues of an existential nature to the charity; (4) communicating in certain ways with its members concerning legislation of direct interest to the organization; and (5) communicating with a government official or employee, with the exception of legislators or their staff, that is not meant to influence legislation).

lobbying costs—treatment that disadvantages businesses.[212]

This anti-neutrality argument is premised on two assumptions. First, business and public interest actors each have specific goals in lobbying: respectively, to maximize profits and to achieve some personal or societal goal. And second, because public charities are not motivated by profit, their funding does not seem to play a role in their decision-making process beyond ensuring that they have the financial capabilities to achieve a specific legislative goal. The truth of the former assumption aside, the notion that charities are less conscious of the costs of achieving their goals oversimplifies the operation of charities in society.

Consider *Slee v. Commissioner*[213] as an example. The organization in question, the American Birth Control League, was created with a stated purpose of removing legal barriers to the use of contraception and to publish a magazine that discussed the societal effects of contraception bans.[214] In practice, however, the League operated a clinic where women could obtain information about contraception and advice about whether it was right for them.[215] In addition, this clinic conducted research based on its clients' visits and follow-up visits, the results of which it published within the medical community.[216] The services provided to these women were often free, and the League operated at a loss.[217] While the League was denied charitable status based on the law at the time, Judge Learned Hand wrote "[t]hat the League is organized for charitable purposes seems to us clear."[218]

It is clear that from this example that, while charities may exist to achieve a narrow goal, they, like businesses, do not rely solely on the legislative process for the realization of that goal. By law, in fact, a charity's lobbying activities must be insubstantial.[219] Assuming that a charity's non-lobbying activities cost money, its balance sheet is likely just as important to its board of trustees as it would be to the directors of any for-profit business. While making a profit is not its goal, a charity must still weigh the potential economic costs and benefits of any decision that it faces in furtherance of its goal. Just as a business must determine whether lobbying or some other strategy will best position it to maximize profit, so must a charity determine whether lobbying or some other strategy will best achieve its purpose.[220] Since decision-making based on financial capacity is not a phenomenon unique to businesses, and because the substantial part rule

212. Cummings, *supra* note 82, at 602–03.

213. 42 F.2d 184 (2d Cir.1930).

214. *Slee*, 42 F.2d at 184.

215. *Id.*

216. *Id.* at 185.

217. *Id.*

218. *Id.*

219. While charities are allowed to opt out of the "substantial part" test in favor of a calculated ceiling, those organizations that do opt out are subject to an excise tax of twenty-five percent of the amount of lobbying that exceeds the specified purposes. I.R.C. § 4911(a)(1) (2015).

220. Treas. Reg. § 1.501(c)(3)-1(d) (as amended in 2014) (listing the exempt purposes for which a public charity can be organized and operate).

explicitly disincentivizes lobbying by charities, the fact that their bottom lines factor into decisions is not a worthy justification for conferring a tax benefit on businesses for lobbying.[221]

Even assuming arguendo that the anti-neutrality argument is correct in terms of tax policy, the analysis does not end there. Professor Galston has argued that tax policy does not exist in a vacuum and that "what is counted as a cost of earning income often reflects policy considerations in addition to (or as much as) technical determinations."[222] The nontax policy concerns that pertain to the tax treatment of the costs of lobbying favor consistent treatment of grassroots lobbying across the board. This is true even if—indeed, due to—the fact that neutral treatment of these costs affects businesses differently from nonbusinesses.

B. The Neutral Treatment of Grassroots Lobbying Costs Should Result in Disparate Effects

The practical realities underlying the tax disequilibrium justification begin with the notion that grassroots lobbying would only be utilized when a large, public issue concerning large groups of businesses and individuals is at stake.[223] In other words, there would be no use in appealing to the public if the issue at stake were not large enough to be publically familiar.[224] Moreover, the issue has to have an effect—or at least a perceived effect—at an individual level for grassroots lobbying to have value. If not, the people who consume the lobbying communications are less likely to act.[225] The debate over a severance tax on fracking in Pennsylvania—likely the impetus for the API advertisement—was such an issue: Segments of the voting public were likely to mobilize in favor of both the potential jobs created by fracking and the warnings of fracking's dangers to air and water quality.[226]

Another consideration is the practical reality that businesses have vast amounts of money available to fund grassroots lobbying campaigns.[227] This

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221. The consequence to charities of overuse of lobbying—the loss of the charity's exempt status—is much more dire than the consequence to businesses—bearing lobbying's full economic cost. *See* Treas. Reg. § 1.501(c)(3)-1(b)(3).

222. Galston, *supra* note 82, at 1288–89. In order to demonstrate this argument, Professor Galston noted that "employees are frequently not entitled to deduct the costs of earning income, although the identical costs would be deductible if the employees were self-employed persons" and that "whether corporations should be permitted deductions for dividends to shareholders" does not turn solely on whether net income is measured accurately. *Id.*

223. Cooper, *supra* note 28, at 814.

224. See *supra* notes 199–201 and accompanying text for a discussion of the costs of grassroots lobbying.

225. See *supra* notes 1–3 and accompanying text for an example of an issue that affects the public enough to justify the use of grassroots lobbying.

226. *See Keep Pennsylvania Safe from Drilling*, PENNENVIRONMENT, http://www.pennenvironment.org/programs/pae/keep-pennsylvania-safe-drilling (last visited Feb. 15, 2017) [http://perma.cc/633W-RRAJ].

227. *See* Cooper, *supra* note 28, at 814; Galston, *supra* note 82, at 1330–31.

means that they can more readily oppose legislation than an individual or group of individuals.[228] Furthermore, nonbusinesses, often in the form of public charities, have to raise donations from the public to implement such efforts. In addition to financial capabilities, business interests are also more likely to have a smoother and more effective infrastructure for executing a grassroots lobbying campaign.[229] Indeed, businesses in given industries tend to have this infrastructure in the form of trade associations.[230] Often lack of organization and public apathy puts charities and their causes at a considerable disadvantage to businesses,[231] notwithstanding the fact that donors to public charities can deduct contributions.[232]

Furthermore, with the IRS's lack of appetite to challenge covert grassroots lobbying in court and the relatively broad definition of institutional or good will advertising, the legal and practical opportunities to create these covert grassroots lobbying advertisements are greater for businesses than for charities. The test governing whether a charity's advocacy is, in fact, educational[233] is more exacting than the test governing whether or not a business's advocacy falls within the exception to § 162(e) for institutional or good will advertising.[234] That the test affecting charities is tougher than those affecting businesses is only true, however, in the sense that the rules affecting charities actually exist.[235]

The only guidance we are given on what constitutes the type of institutional or good will advertising with which this Comment is concerned is the language of the regulation that grants the exception. It states that such advertising

> which presents views on economic, financial, social, or other subjects of a general nature, but which does not involve any of the activities specified in paragraph (b) or (c) of this section for which a deduction is not allowable, are deductible if they otherwise meet the requirements of the regulations under section 162.[236]

As discussed above, the additional restrictions on institutional or good will

228. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659 (1990) (holding that due in part to benefits conferred on for-profit corporations by states in order to promote economic growth, businesses are able "to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace'" (quoting FEC v. Mass. Citizens for Life, 479 U.S. 238, 257 (1986) *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010))).

229. Cooper, *supra* note 28, at 814.

230. See *supra* notes 151–56 and accompanying text for two examples of large and effective covert grassroots lobbying campaigns implemented by trade associations. API, which made the fracking ad discussed at the beginning of this Comment, is also a trade association.

231. Cooper, *supra* note 28, at 814.

232. I.R.C. § 170(a)(1) (2015).

233. Rev. Proc. 86-43, 1986-2 C.B. 729, 729–30.

234. Treas. Reg. § 1.162-20(a)(2) (as amended in 1995).

235. The absence of any criteria for determining whether a communication constitutes an institutional or good will advertising may be due to the lack of litigation over covert grassroots lobbying. In fact, the criteria that the IRS uses to evaluate whether a charity's advocacy is educational was only published in response to its previous test being ruled unconstitutionally vague. Nat'l All. v. United States, 710 F.2d 868, 874 (D.C. Cir.1983).

236. Treas. Reg. § 1.162-20(a)(2) (as amended in 1995).

advertisements are limited to the rules regarding dues paid to trade associations that go towards costs that fall within § 162 and the extremely broad standard for what constitutes an ordinary and necessary business expense.[237] The language of the regulation says nothing about how the views can be presented and sets no standard for the reliability of the information presented; it only states that the subjects addressed must be "economic, financial, social, or other subjects of a general nature."

In contrast, the IRS uses what it has called the methodology test[238] to evaluate whether a charity's advocacy is educational within the meaning of section 501(c)(3) and the applicable regulation.[239] The methodology test is four-pronged; if any of the prongs are present in an organization's communications, it indicates that the communication may not be educational.[240] The four prongs are as follows: First, a significant part of the communications consists "of viewpoints or positions unsupported by facts."[241] Second, "[t]he facts that purport to support the viewpoints or positions are distorted."[242] Third, the communications make statements based on emotion rather than objective evaluation and "make substantial use of inflammatory and disparaging terms."[243] Fourth, the communications, unconcerned with the audience's background knowledge in the area, are not aimed at actually developing the audience's understanding of the subject.[244]

Under the methodology test, a charity has a narrower window through which it can present its views to the public while serving an educational purpose than a business does for presenting its views to the public as institutional or good will advertising.[245] There is nothing in the regulations under § 162(e) requiring a business to support its views with facts or to refrain from distorting facts in order for it to deduct the costs of institutional or good will advertising.[246] This theoretically allows businesses to make claims in advertisements that charities

237. See *supra* notes 183–85 and accompanying text for a discussion of the qualifications placed on a business's use of the institutional or good will advertising exception.

238. *Nat'l All.*, 710 F.2d at 870.

239. Treas. Reg. § 1.501(c)(3)-1(d)(3) (as amended in 2014).

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

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*; *see* Nat'l All. v. United States, 710 F.2d 868, 873 (D.C. Cir. 1983) (holding that a white supremacist group's communications did not meet the definition of educational because "there [was] no reasoned development of the conclusions" in its newsletter and, on this ground, its tax-exempt status should be terminated); *see also* Nationalist Movement v. Comm'r, 102 T.C. 558, 596 (1994) (holding that Rev. Proc. 86-43's test was constitutional and that a white supremacist organization was appropriately denied tax-exempt status because the organization's communications did not meet the statutory definition of educational).

245. See Treas. Reg. § 1.162-20(a)(2) (as amended in 1995) for the standard a business must meet to take advantage of the institutional or good will advertising exception. See also *supra* notes 240–44 and accompanying text for the four prongs of the methodology test applied to public charities.

246. See *supra* notes 186–89 and accompanying text for a discussion of the qualifications placed on the institutional or good will advertising exception.

would not be able to make: Businesses can make claims without sufficient factual support about financial, social, or economic issues or can support those claims with cherry-picked or distorted facts.

It is not clear whether the API advertisement discussed above, for example, would be considered educational under the methodology test.[247] Nonetheless, the advertisement likely would fall within the institutional or good will advertising exception to § 162(e). If API were a charity, it would be much more constrained in the methods it could use to persuade the audience. It could choose instead to make an advertisement touting the environmental and aesthetic value of the natural wonders that Pennsylvania has to offer—without explicitly mentioning fracking—in order to avoid straying outside of the definition of "educational." Or it could instead feature the results of environmental studies that it or its partners have done on the effects of fracking. It seems unlikely that either of those two hypothetical advertisements would be very effective; they would either leave viewers pondering the advertisement's aim or leave them bored and overwhelmed with facts and figures. To make an effective commercial about fracking, a charity would likely have to dip into its limited allowance for lobbying expenditures, which would constrict the charity's future choices for the taxable year.[248] A business, on the other hand, can deduct the cost of making an institutional or good will advertisement without limiting its future options.

Admittedly, the methodology test, unlike the regulation detailing institutional and good will advertising, does not serve to determine whether a charity's communications should be considered lobbying or not; it exists to determine whether a charity is organized to serve an exempt purpose, namely education.[249] Businesses, on the other hand, are not organized and operated to further some exempt purpose but rather to make a profit by selling goods and services. They should be and are able to deduct the costs of advertisements that promote themselves and their products.[250] Institutional and good will advertising, however, allows too much space for businesses to stray from promotion of their businesses or industries toward promotion of legislative or political agendas. If "[p]olitical agitation . . . . must be conducted without public subvention,"[251] a more effective method of determining whether a business's advertising is meant to influence the general public regarding legislation is required.

247. See *infra* notes 282–86 and accompanying text for an application of the methodology test to the API advertisement.

248. *See* I.R.C. § 501(c)(3) (2015); *see also id.* § 501(h) (imposing an excise tax on lobbying costs above the ceiling calculated for those charities that make an election to have a lobbying safe harbor); Treas. Reg. § 1.501(c)(3)-1(a), (b)(3)(iii) (as amended in 2014) (providing that a charity can lose its tax-exempt status "if more than an insubstantial part of its activities" include "attempting to influence legislation by propaganda or otherwise").

249. Treas. Reg. § 1.501(c)(3)-1(d) (as amended in 2014).

250. I.R.C. § 162(a); Treas. Reg. § 1.162-1(a) (as amended in 1993) (listing advertising in items included in business expenses).

251. Slee v. Comm'r, 42 F.2d 184, 185 (2d Cir. 1930).

IV. RECOMMENDATIONS FOR IMPROVING THE REGULATION OF BUSINESS DEDUCTIONS FOR GRASSROOTS LOBBYING COSTS

In order to effectuate a more neutral treatment of grassroots lobbying among business and nonbusiness taxpayers, there are two routes by which policymakers can proceed. Treasury should amend the relevant regulations to broaden the definition of grassroots lobbying for businesses. Alternatively, the IRS should issue a revenue procedure that narrows the scope of the institutional and good will advertising exception. The effectiveness of these routes is predicated on the IRS taking a more aggressive stance toward covert grassroots lobbying by businesses and trade associations.[252]

Professor Cooper's recommendations were aimed at achieving these same goals, though some of this Comment's recommendations differ from his. This difference is partly because these recommendations are based, to some extent, on regulations and administrative material that postdated Professor Cooper's writing.[253] One recommendation that this Comment shares with Professor Cooper, however, is that the regulatory definitions of grassroots lobbying and institutional and good will advertising should be respectively broadened and narrowed.[254]

In 1980, Treasury proposed amendments[255] to its regulations under § 162(e), based on the holding of *Consumers Power Co. v. United States*,[256] which defined grassroots lobbying in more specific terms than "any attempt to influence the general public, or segments thereof, with respect to elections, legislative matters, or referendums."[257] This proposed regulation was never finalized and, as of the writing of this Comment, is not listed as one of Treasury's current priorities.[258] The absence of this and any regulation dealing with political

252. *See* Cooper, *supra* note 28, at 850–56.

253. *Id.* at 850–59. Professor Cooper first recommended that the IRS be more aggressive in enforcing the denial deductions for covert grassroots lobbying costs. *Id.* at 852–53. He further argued that the regulations under § 162(e) be amended to require that institutional and good will advertising be more in line with the holding in *Southwestern Electric Power Co.*, which denied a deduction for ads that were not "within the normal concept of advertising; *i.e.*, promoting the sale of goods." *Id.* at 851–52 (quoting Sw. Elec. Power Co. v. United States, 312 F.2d 437, 442 (Ct. Cl. 1963)). In administering that standard, Professor Cooper would implement a presumption against the taxpayer that questions whether an advertisement is, in fact, institutional or good will advertising or grassroots lobbying. *Id.* at 853–54. A taxpayer could rebut this presumption by showing that the ad's primary purpose was to "promote the sale of [the] taxpayer's goods or services" or to serve another purpose that would be considered an ordinary and necessary business goal. *Id.* Professor Cooper wanted to apply the same standard to advertisements by trade and professional associations: to put the burden on the businesses that paid the dues that funded those advertisements to show that they were not grassroots lobbying. *Id.* at 855–56.

254. Cooper, *supra* note 28, at 850–59.

255. Prop. Treas. Reg. § 1.162-20, 45 Fed. Reg. 78,167, 78,167–72 (Nov. 25, 1980).

256. 299 F. Supp. 1180 (E.D. Mich. 1969).

257. I.R.C. § 162(e)(1)(C) (2015); Treas. Reg. § 1.162-20(c)(4) (as amended in 1995).

258. *See* OFFICE OF TAX POLICY & INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, 2016–2017 PRIORITY GUIDANCE PLAN (2016). The proposed regulation was not included in the 2015–16 list of priorities either. *See* OFFICE OF TAX POLICY & INTERNAL REVENUE SERV., DEP'T OF THE

spending is likely due to the toxic air around the IRS's treatment of political spending, which has remained following the scandal about the IRS's evaluation of applicants for tax-exempt status during the 2012 election cycle.[259]

The proposed regulation suggests changes, including a three-part test by which grassroots advertising would be identified: (1) the content of the ad "pertains to legislation being considered by, or likely in the immediate future to be proposed to, a legislative body, or seeks or opposes legislation"; (2) the ad "reflects a view with respect to the desirability of legislation"; and (3) the ad "is communicated in a form and distributed in a manner so as to reach individuals as members of the general public, that is, as voters or constituents, as opposed to a communication designed for academic, scientific, or similar purposes."[260] The proposed regulation narrows the definition of institutional and good will advertising by adding a qualification based on the proposed three-part definition of grassroots lobbying.[261] That qualification pertains to the portion of institutional and good will advertising that includes the presentation of a business's view to the public.[262] It adds that such advertisements must "not attempt to influence the public with respect to legislative matters . . . or involve[] any of the other activities specified in paragraph (c) of this section for which a deduction is not allowable."[263] By broadening the definition of grassroots lobbying and narrowing the institutional and good will advertisement exception, the proposed regulation would add an element of substance to an analysis that currently focuses very much on form.[264]

Applying this test to the API fracking ad, the first prong of the test, which requires that the ad "pertains to legislation being considered by . . . a legislative body,"[265] is likely satisfied. As discussed above, the ad debuted one day after Governor Wolf was inaugurated, after he campaigned on the promise to enact a severance tax on natural gas, which gave the proposals considerable

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TREASURY, 2015–2016 PRIORITY GUIDANCE PLAN (2015).

259. *See* TREASURY INSPECTOR GEN. FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW (2013) [hereinafter TIGTA REPORT]; *see also* H.R. Res. 494, 114th Cong. (2015) (introducing articles of impeachment against IRS Commissioner John Koskinen because of the way he responded to the exempt organization scandal).

260. Prop. Treas. Reg. § 1.162-20(c)(4)(B), 45 Fed. Reg. 78,167, 78,169 (Nov. 25, 1980). The proposed regulation makes clear, with respect to the second prong of the test, that "for this purpose, a communication that pertains to legislation but expresses no explicit view on the legislation shall be deemed to reflect a view on legislation if the communication is selectively disseminated to persons likely to share a common view of the legislation." *Id.* Additionally, with respect to the third prong, the fact that a communication is made to the general public indirectly—through mass media, for example—does not mean that the prong is not met.

261. *Id.*

262. *Id.*

263. *Id.* Paragraph (c) of the section is the paragraph defining grassroots lobbying.

264. *See id.* at 78,170 (noting in "*Example 2*" that the prong requiring the expression of a view on the desirability of a piece of legislation can be satisfied if an advertisement advocates for an action that cannot be achieved without legislation, even if that view was not explicitly expressed in the advertisement).

265. *Id.* at 78,169.

prominence.[266] More importantly, legislation proposing a severance tax on natural gas had been debated regularly in the Pennsylvania General Assembly in the preceding years.[267] While the ad does not mention any specific legislation, it would still satisfy the first prong. On this point, "*Example (2)*" in the proposed regulation is instructive.[268] It says that the three-part test for grassroots lobbying is satisfied if an ad, while not calling for any specific legislative action, advocates some kind of change that could not be achieved without legislation.[269] Since the advertisement touted the merits of fracking, rather than the merits of natural gas, an argument that the ad is meant to promote the sale of natural gas rather than to influence the debate over a severance tax would seem farfetched. Moreover, the ad ends with a voiceover asking viewers to "join the conversation."[270] With that, once again, it is unlikely that the ad is referring to a conversation about the pros and cons of natural gas as a source of energy because the ad is about the process of extraction, not the final product.[271] And fracking can only be regulated by legislation or administrative regulation, whereas the consumer marketplace governs the relative preference for natural gas as an energy source.

The ad also likely satisfies the second prong of the grassroots lobbying test, which carries the requirement that the ad "reflects a view with respect to the desirability of legislation."[272] While the ad does not articulate any explicit stance on the desirability of a severance tax on natural gas, it clearly conveys the opinion that fracking is an activity that will benefit the community and should be encouraged. Tax laws are often used as a vehicle for encouraging or discouraging certain activities that have been deemed desirable or undesirable by the legislature.[273] It is common sense that those who believe a practice should be encouraged would be also believe that practice should not be taxed. Thus, because the ad, in context, pertains to the general proposal of a severance tax on natural gas, which is extracted by fracking, and since those who believe that an activity should be encouraged generally do not support taxing that activity, it follows that the ad does express "a view with respect to the desirability of the

266. See *supra* notes 4–7 and accompanying text for a discussion of the role the 2014 Pennsylvania gubernatorial election played in the debate over a severance tax on natural gas.

267. See *supra* notes 9–12 and accompanying text for a discussion of proposals for a severance tax on natural gas.

268. Prop. Treas. Reg. § 1.162-20, 45 Fed. Reg. 78,167, 78,170 (Nov. 25, 1980).

269. *Id.* In the example, the change advocated for is the implementation of some type of tax incentive to increase capital formation for businesses. *Id.*

270. *Television Ad: Washington, Pennsylvania*, *supra* note 2.

271. *See id.* Moreover, the ad prompts viewers to visit the website, EnergyFromShale.org, which also touts the benefits of fracking. *Id.*; *see* ENERGYFROMSHALE.ORG, http://www.energyfromshale.org/ (last visited Feb. 15, 2017) [http://perma.cc/EHE4-ZL9Y].

272. Prop. Treas. Reg. § 1.162-20, 45 Fed. Reg. 78,167, 78,169 (Nov. 25, 1980).

273. See, for example, I.R.C. § 162(e) (2015), in which Congress uses the tax code to discourage an activity that has been deemed unworthy of encouragement: it denies businesses a deduction for the costs of political spending expenditures. Additionally, see I.R.C. § 163(h)(2)–(3), which allows a deduction for interest accrued on mortgage loans for qualified residences as a means of encouraging home ownership.

legislation" by encouraging fracking.[274]

Finally, the third prong, which requires that the ad be "distributed in a manner so as to reach individuals as members of the general public . . . as voters or constituents,"[275] is clearly satisfied. The ad was originally broadcast to Pennsylvanians during Super Bowl XLIX on February 1, 2015.[276] Super Bowl XLIX is, as of this writing, the most viewed broadcast in U.S. television history, with 114.4 million viewers.[277] This scope, without question, satisfies the requirement that the ad be distributed to the general public in a manner in which they will receive it as voters or constituents.

By application of this narrower three-prong test to the API fracking ad, it is clear that the application of the 1980 proposed § 162(e) regulation would greatly increase the IRS's ability to enforce § 162(e). It has been over thirty-five years since this regulation was proposed and, considering the current trends in campaign finance law,[278] Treasury should add this proposal to its list of priorities.

As an alternative to amending the regulation under § 162(e), the IRS could narrow the definition of institutional and good will advertising by applying the criteria it uses to determine whether a public charity's advocacy is educational within the meaning of § 501(c)(3) to advertisements potentially within the scope of the exception.[279] The criteria that the IRS uses to evaluate the educational value of charities' advocacy—collectively called the methodology test—are designed to evaluate the manner in which views are presented rather than the content of the views.[280] The four criteria, the presence of any of which are taken as an indication that the advocacy is not educational, are (1) "[t]he presentation of viewpoints or positions unsupported by facts is a significant portion of the organization's communications," (2) "[t]he facts that purport to support the viewpoints or positions are distorted," (3) "[t]he 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," and (4) "[t]he approach used in the organization's presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter."[281]

274. Prop. Treas. Reg. § 1.162-20(c)(4)(A), 45 Fed. Reg. 78,167, 78,169 (Nov. 25, 1980).

275. *Id.*

276. Conti, *supra* note 5.

277. Frank Pallotta, *Super Bowl XLIX Posts the Largest Audience in TV History*, CNN MONEY (Feb. 2, 2015, 6:29 PM), http://money.cnn.com/2015/02/02/media/super-bowl-ratings/ [http://perma.cc/K2NX-HDAP].

278. *See* Citizens United v. FEC, 558 U.S. 310, 312 (2010) (holding that the government has no authority to limit corporate independent expenditures); *see also* Theodore Seto, *Keeping Tax-Subsidized Corporate Money out of Politics*, 127 TAX NOTES 1476, 1476–77 (2010) (arguing that *Citizens United* has created the need to amend § 162(e) so that tax benefits beyond a business expense deduction are conditioned on a business's limiting its political spending).

279. Rev. Proc. 86-43, 1986-2 C.B. 729, 729–30.

280. *Id.* at 729.

281. *Id.* at 730.

It is not clear, and is even unlikely, that the API ad would pass muster under the methodology test. The ad claims that "fracking has been done safely for over sixty-five years" but provides no factual support or explanation for that assertion.[282] This assertion could also be considered a distortion of the facts used to support the view that fracking is good; it is unclear what the advertisement meant when it used the word "safely." [283] While it is clear that the advertisement did not use any disparaging or inflammatory language nor appeal to strong emotional reactions, it may have failed to consider the audience's "background or training in the subject" of fracking.[284] Indeed, it likely counted on the audience's limited knowledge of the fracking process, the environmental effects that follow, and the economic effects on the community.[285] Since the satisfaction of any of the four prongs is an indication that a communication is not educational,[286] there are sure to be questions about whether the API ad would qualify as an institutional or good will advertisement under this scheme or whether it would be grassroots lobbying.

While there is no requirement inherent in the concept of a business that it should educate the public, if it undertakes to present its "views on economic, financial, social, or other subjects of a general nature,"[287] it should be required to present information in a responsible way. Furthermore, since businesses can deduct the cost of advertisements that present their views on such subjects as an exception to the denial of a deduction for communications that "influence the general public, or segments thereof, with respect to elections, legislative matters, or referendums"[288] there should be a more rigorous test for responsible presentation than the current, overly permissive test.[289] The methodology test is not only a rigorous test necessary to ensure that businesses and trade associations are presenting their views responsibly, but it has also survived a First Amendment challenge.[290] Applying the methodology test to covert grassroots lobbying would, moreover, complement the value of grassroots lobbying in keeping the electorate informed and government transparent.[291]

282. *Television Ad: Washington, Pennsylvania*, *supra* note 4; *see* Nationalist Movement v. Comm'r, 102 T.C. 558, 591–92 (1994) (applying the methodology test).

283. *See* Rev. Proc. 86-43, 1986-2 C.B. 729, 730.

284. *See id.*

285. *See Nationalist Movement*, 102 T.C. at 593–94 (holding that a white supremacist organization's communications were not educational, in part, because it took advantage of the lack of knowledge about the Civil Rights Movement among its younger readers when presenting its views on race relations in America).

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

287. Treas. Reg. § 1.162-20(a)(2) (as amended in 1995).

288. I.R.C. § 162(e)(1)(C) (2015).

289. See *supra* notes 186–89 and accompanying text for a discussion of the qualifications placed on a business's use of the institutional or good will advertising exception.

290. *Nationalist Movement*, 102 T.C. at 588–89; *see also* Rev. Proc. 86-43, 1986-2 C.B. 729, 729–30 (explaining that it evaluates the method of a presentation of views rather than the views themselves).

291. See *supra* notes 193–98 and accompanying text for arguments against government regulation of grassroots lobbying.

V. CONCLUSION

The IRS should take a more aggressive stance towards preventing business deductions for grassroots lobbying expenses. Currently, the costs of covert grassroots lobbying advertisements are deductible as ordinary and necessary business expenses under an exception to § 162(e) for institutional and good will advertising.[292] Public charities, on the other hand, enjoy no such exception and must bear the full costs of their grassroots lobbying campaigns.[293] The result is a scheme in which business interests—which already have certain structural advantages[294]—have an upper hand in the legislative forum. Both the practical realities with respect to business interests' ability to implement grassroots lobbying campaigns and the public policy of preventing concentrated economic power from exercising control over the legislative process[295] demand the denial of a deduction for grassroots lobbying costs across the board.

To that end, this Comment proposes broadening the definition of grassroots lobbying and narrowing the exception for institutional and good will advertisements to facilitate a more aggressive pursuit of covert grassroots lobbying costs by the IRS. Finalizing a regulation proposed in 1980 would accordingly both broaden the definition of grassroots lobbying and would narrow the institutional and good will advertising exception.[296] Alternatively, the application of the methodology test, which is currently applied to public charities, would ensure that businesses do not abuse the institutional or good will advertising exception and would help ensure that that businesses' views were responsibly presented to the American public.[297]

Unfortunately, given the political realities in the aftermath of the IRS tax-exempt targeting scandal,[298] the likelihood that either of these changes is implemented in the near future is fairly low. Republicans in Congress, concerned about partisan bias in the IRS, have called for a moratorium on new regulations that would impose new requirements on tax-exempt organizations organized under section 501(c)(4).[299] This lack of confidence in the IRS as a neutral

292. See *supra* notes 186–89 and accompanying text for a discussion of the breadth of the institutional or good will advertising exception.

293. See *supra* Part II.D for a discussion of the treatment of public charities' grassroots lobbying costs.

294. See *supra* notes 227–32 and accompanying text for a discussion of the structural advantages the business interests have over the public interests in grassroots lobbying campaigns.

295. *See* DEP'T OF THE TREASURY, SUMMARY, *supra* note 147, at 45 (arguing that the business deduction for lobbying expenditures "inappropriately benefits corporations and special interest groups for intervening in the legislative process"); *see also* BLAISDELL, TEMP. NAT'L ECON. COMM., 76TH CONG., *supra* note 56, at 20–22.

296. See *supra* notes 260–64 and accompanying text for a discussion of the changes suggested by the proposed regulation.

297. See *supra* notes 279–81 and accompanying text for a discussion of the effects of the methodology test.

298. *See* TIGTA REPORT, *supra* note 259.

299. Kelsey Snell, *Two Years After Scandal, the IRS Still Struggling*, WASH. POST: POWERPOST (Aug. 5, 2015), http://www.washingtonpost.com/news/powerpost/wp/2015/08/05/two-years-after-

regulator of political spending is likely to undercut the political support necessary for either of this Comment's proposals to get off the ground.

scandal-the-irs-still-struggling/ [http://perma.cc/C9WS-E9SD].