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## Getting to “Exempt!”: Putting the Rubber Stamp on Section 501(c)(3)’s Political Activity Prohibition

Michael Fresco

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# GETTING TO “EXEMPT!”: PUTTING THE RUBBER STAMP ON SECTION 501(C)(3)’S POLITICAL ACTIVITY PROHIBITION

Michael Fresco\*

*Under Internal Revenue Code section 501(c)(3), certain public charities are exempt from income taxation. As a condition to this benefit, such organizations are prohibited from participating or intervening in any political campaign on behalf of, or in opposition to, a candidate for public office. The statute and the regulations promulgated thereunder, however, do not clearly define what activities are prohibited. This lack of clarity, combined with the U.S. Supreme Court’s protection of the political speech rights of other business organizations, has led many commentators to question section 501(c)(3) on constitutional grounds. Others have criticized the statutory scheme for creating inefficiencies in enforcement and compliance efforts. This Note examines the constitutional and policy questions surrounding section 501(c)(3), catalogues existing proposals to change it, and proposes its own changes to cure those deficiencies. It concludes that a bright-line rule should be used to determine when revocation of tax-exempt status is appropriate, and that revoked entities should be permitted to file for exemption under section 501(c)(4).*

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#### INTRODUCTION: 501(C)(3) ORGANIZATIONS AND POLITICAL SPEECH

On January 21, 2010, the U.S. Supreme Court issued its most controversial ruling in years. *Citizens United v. FEC*<sup>1</sup> invalidated federal limits on corporate independent expenditures that expressly advocate for election or defeat of political candidates,<sup>2</sup> opening the door to political campaigning by corporations.<sup>3</sup> Public response to, and criticism of, the decision have been vehement and widespread.<sup>4</sup> The decision helped spark a

1. 130 S. Ct. 876 (2010).

2. *Id.* at 913 (invalidating 2 U.S.C. § 441b).

3. See, e.g., Greg Stohr, *Corporate Campaign Spending Backed by U.S. High Court*, BLOOMBERG (Jan. 21, 2010), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aU.fsorJbt3E>.

4. See Editorial, *The Broken System of Campaign Finance*, U-T SAN DIEGO (Dec. 5, 2011), <http://www.utsandiego.com/news/2011/dec/05/the-broken-system-of-campaign-finance/?print&page=all>; *Cornel West Arrested at Supreme Court Protest*, CBS NEWS (Oct. 16, 2011), <http://www.cbsnews.com/stories/2011/10/16/national/main20121158.shtml>; Sam Favate, *Udall: Amend the Constitution, Wipe Out Citizens United*, WALL ST. J. L. BLOG (Nov. 2, 2011, 12:51 PM), <http://blogs.wsj.com/law/2011/11/02/udall-goes-nuclear-proposes-amendment-to-wipe-out-citizens-united/>; Richard L. Hasen, *Super-Soft Money: How Justice Kennedy Paved the Way for "SuperPACS" and the Return of Soft Money*, SLATE (Oct. 25, 2011), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/10/citizens\\_united\\_how\\_justice\\_kennedy\\_has\\_paved\\_the\\_way\\_for\\_the\\_re.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/10/citizens_united_how_justice_kennedy_has_paved_the_way_for_the_re.html); Jim Hightower, *Citizens United Against Citizens United: A Grassroots Campaign to Restore Democracy*, OPEDNEWS (Oct. 23, 2011), <http://www.opednews.com/articles/Citizens-United-Against-Ci-by-Jim-Hightower-111023-31.html>; *New York City Council Passes*

a political movement,<sup>5</sup> a national day of protest,<sup>6</sup> and multiple proposed constitutional amendments.<sup>7</sup>

The Court ruled in *Citizens United* that “Government may not suppress political speech on the basis of the speaker’s corporate identity.”<sup>8</sup> While the decision invalidated campaign restrictions for both nonprofit and for-profit corporations,<sup>9</sup> one type of organization remains shielded from its reach. Public charities<sup>10</sup> exempt from taxation under section 501(c)(3) of the Internal Revenue Code (Code) are prohibited from engaging in political campaign activity.<sup>11</sup> Because of the special deference given to tax laws by the Supreme Court, *Citizens United* did not expressly overrule section 501(c)(3)’s political activity prohibition.<sup>12</sup>

The prohibition, however, is much criticized.<sup>13</sup> The vagueness of its terms<sup>14</sup> causes uncertainty for charities trying to avoid prohibited activity, and makes enforcement difficult for the IRS.<sup>15</sup> The prohibition also faces scrutiny on constitutional grounds for restricting charities’ protected speech.<sup>16</sup> As *Citizens United* floods the “marketplace of ideas”<sup>17</sup> with the voices of other corporations,<sup>18</sup> charities will need to speak louder in order

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*Resolution Opposing Corporate Personhood*, HUFFINGTON POST (Jan. 5, 2012), [http://www.huffingtonpost.com/2012/01/05/new-york-city-council-pas\\_n\\_1186411.html](http://www.huffingtonpost.com/2012/01/05/new-york-city-council-pas_n_1186411.html).

5. See Andrew Fleming, *Adbusters Sparks Wall Street Protest: Vancouver-Based Activists Behind Street Actions in the U.S.*, VANCOUVER COURIER (Sept. 27, 2011), <http://www.vancourier.com/Adbusters+sparks+Wall+Street+protest/5466332/story.html> (noting that the Occupy Wall Street movement began “to protest corporate influence on democracy”).

6. See *Occupy the Courts*, MOVETOAMEND.ORG, <http://movetoamend.org/occupy-courts> (last visited Apr. 21, 2012).

7. S.J. Res. 33, 112th Cong. (2011) (proposing a constitutional amendment “to expressly exclude for-profit corporations from the rights given to natural persons by the Constitution of the United States, prohibit corporate spending in all elections, and affirm the authority of Congress and the States to regulate corporations and to regulate and set limits on all election contributions and expenditures”); H.R.J. Res. 90, 112th Cong. (2011) (proposing a constitutional amendment mirroring the language of S.J. Res. 33); H.R.J. Res. 88, 112th Cong. (2011) (proposing a constitutional amendment stating that “[t]he words people, person, or citizen as used in this Constitution do not include corporations, limited liability companies or other corporate entities”); S.J. Res. 29, 112th Cong. (2011) (proposing a constitutional amendment granting Congress authority to regulate campaign expenditures).

8. *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).

9. *Id.* (“No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”).

10. This Note uses the term “charities” to refer only to organizations described under section 501(c)(3). No other meaning of the word “charity” attaches to its use.

11. I.R.C. § 501(c)(3) (2006).

12. See generally Miriam Galston, *When Statutory Regimes Collide: Will Citizens United and Wisconsin Right to Life Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CONST. L. 867 (2011) (arguing that the prohibition will likely withstand constitutional attack after *Citizens United*).

13. See *infra* Part II.

14. See *infra* Part II.B.ii.

15. See *infra* Part II.A.

16. See *infra* Part II.B.

17. *Citizens United v. FEC*, 130 S. Ct. 876, 896 (2010) (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)).

18. See Eduardo Porter, Editorial, *How the Big Money Finds a Way In*, N.Y. TIMES, Sept. 17, 2011, at SR12 (discussing independent expenditures after *Citizens United*).

to be heard. Taken together, these factors indicate that challenges to section 501(c)(3)'s political activity ban are likely.<sup>19</sup>

This Note addresses the growing call for congressional reform of section 501(c)(3)'s political activity prohibition. It does not advocate total removal of the ban, nor does it inquire whether charities should be allowed to engage in political activity. Instead, this Note accepts Congress's intent as valid, while acknowledging that the current state of the ban is ineffective in guiding charities, and potentially vulnerable to constitutional attack after *Citizens United*. Part I summarizes the landscape of existing law comprising the political activity prohibition, including the Code, Treasury regulations, and revenue rulings. Part II summarizes the prohibition's criticism on practical and constitutional levels. Part III reviews proposals to change the prohibition, grouping them into three categories: definitional,<sup>20</sup> quantitative,<sup>21</sup> and remedial.<sup>22</sup> Part IV analyzes those proposals and suggests a distinct solution, with an eye toward making the ban more efficient and constitutionally secure.

## I. UNDERSTANDING THE CURRENT STATE OF THE PROHIBITION

This part examines the law governing the political activity of section 501(c)(3) organizations. First, it reviews the statute, looking at its legislative history and analyzing its text. Second, it summarizes the regulations promulgated by the Department of the Treasury to enforce the statute. Third, it summarizes the IRS's major revenue rulings in the area. This part concludes by articulating Congress's and the IRS's current understanding of law: (1) the kind of activity that is prohibited, (2) how much of that activity charities may engage in, and (3) the consequences of engaging in such activity.

### A. *The Prohibition According to the Internal Revenue Code*

Charitable organizations are exempt from income taxation under sections 501(a) and 501(c)(3) of the Code.<sup>23</sup> Section 501(a) provides for exemption, while 501(c)(3) describes what kinds of organizations qualify.<sup>24</sup> Donations

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19. See Roger Colinvaux, *The Political Speech of Charities in the Face of Citizens United: A Defense of Prohibition*, 62 CASE W. RES. L. REV. 413, 416 (2012) ("A challenge to the constitutionality of the Political Activities Prohibition thus seems inevitable."); Galston, *supra* note 12, at 873.

20. Definitional proposals focus on changing what activities are and are not considered "intervention" or "participation" under section 501(c)(3). See *infra* Part III.A.

21. Quantitative proposals focus on changing how much "intervention" or "participation" is allowed under section 501(c)(3). See *infra* Part III.B.

22. Remedial proposals focus on changing the consequences facing charities that violate section 501(c)(3)'s prohibition. See *infra* Part III.C.

23. I.R.C. §§ 501(a), (c)(3). Section 501(c)(3) exempts any "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals." *Id.* § 501(c)(3).

24. See *id.* §§ 501(a), (c)(3).

made to section 501(c)(3) organizations are deductible from the donor's own income tax (the charitable deduction).<sup>25</sup> The Supreme Court characterized the exemption of charities and the charitable deduction as a congressional effort to subsidize the activities of nonprofit organizations that promote the public welfare.<sup>26</sup>

The Code requires an organization to meet three criteria in order to receive tax exemption and for its donors to qualify for the charitable deduction: (1) no part of its earnings may inure to the benefit of any private shareholder or individual, (2) the organization does not engage in substantial lobbying activities, and (3) the organization does not engage in political activity.<sup>27</sup> This section discusses the statutory definition of political activity by examining the legislative history and the text of the Code.

### 1. A Brief Legislative History of the Prohibition

Charitable organizations have been exempt from taxation since the enactment of the Tariff Act of 1913.<sup>28</sup> In its original form, the statute did not condition exemption on abstaining from political activity.<sup>29</sup> The first indication of governmental distaste for such activity is found in a regulation enacted by the Bureau of Revenue in 1915.<sup>30</sup> This regulation, Treasury Decision 2137, prevented any business from deducting as a business expense any “[s]ums of money expended for lobbying purposes and contributions for campaign expenses.”<sup>31</sup> In 1919, the Department of the Treasury issued Treasury Decision 2831,<sup>32</sup> stating that organizations “formed to disseminate controversial or partisan propaganda” were not “educational” for purposes of tax exemption.<sup>33</sup>

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25. *Id.* § 170(a).

26. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983); *see infra* notes 219–31.

27. I.R.C. § 501(c)(3). Section 501(c)(3) prohibits intervention in political campaigns as well as substantial lobbying activities. *Id.*

28. Ch. 16, 38 Stat. 114, 172 (exempting from income taxation “any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual”); *see* BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 35 (10th ed. 2011); Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; to What End?*, 42 B.C. L. REV. 903, 905 (2001). While Congress attempted to enact substantially similar language in the Tariff Act of 1894, ch. 349, 28 Stat. 556, that statute was struck down as unconstitutional in *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601 (1895).

29. 38 Stat. 114, 172; *see also* Dessingue, *supra* note 28.

30. Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 8 (2003) (citing T.D. 2137, 17 Treas. Dec. Int. Rev. 48, 57–58 (1915)).

31. T.D. 2137, 17 Treas. Dec. Int. Rev. at 57.

32. T.D. 2831, 21 Treas. Dec. Int. Rev. 170 (1919).

33. *Id.* at 285; ERIKA LUNDER, CONG. RESEARCH SERV., RL 33377, *TAX-EXEMPT ORGANIZATIONS: POLITICAL ACTIVITY RESTRICTIONS AND DISCLOSURE REQUIREMENTS* 3 (2007); Houck, *supra* note 30, at 9.

The modern statutory restrictions on the political activities of charities were first proposed as amendments to the Revenue Act of 1934.<sup>34</sup> As proposed, the amendment would have prevented charities from substantial “participation in partisan politics or . . . carrying on propaganda, or otherwise attempting, to influence legislation.”<sup>35</sup> The amendment was criticized as too broad,<sup>36</sup> however, and the language relating to political participation was dropped.<sup>37</sup> Thus, section 501(c)(3)’s lobbying limitation, but not the political activity ban, was enacted in 1934.<sup>38</sup>

Section 501(c)(3)’s political activity ban was enacted as an amendment to the Revenue Act of 1954. The provision was proposed as a floor amendment by then-Senator Lyndon B. Johnson,<sup>39</sup> and as such was not subject to debate by committee.<sup>40</sup> The congressional record does not reflect the motivation or rationale behind the amendment, other than its intent to deny tax-exempt status “to those who intervene in any political campaign on behalf of any candidate for any public office.”<sup>41</sup> It is now acknowledged that Johnson likely proposed the amendment in response to the support that certain exempt organizations gave to his rival during Texas’s Democratic primary election in 1954.<sup>42</sup>

Congress amended the political activity prohibition in 1987 to include the phrase “in opposition to” any candidate.<sup>43</sup> In enacting the 1987 amendment, Congress determined that the definition of political activity

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34. See Houck, *supra* note 30, at 16.

35. 78 CONG. REC. 5,861 (1934); Houck, *supra* note 30, at 21.

36. 78 CONG. REC. 5,861 (statement of Sen. Reed) (“[T]his amendment goes much further than the committee intended to go.”); HOPKINS, *supra* note 28, at 578; Houck, *supra* note 30, at 21.

37. 78 CONG. REC. 7,831 (statement by Rep. Hill); see also LUNDER, *supra* note 33, at 4; Houck, *supra* note 30, at 22–23.

38. HOPKINS, *supra* note 28, at 36; LUNDER, *supra* note 33, at 4; Houck, *supra* note 30, at 23; see also Revenue Act of 1934, ch. 277, 48 Stat. 700 (exempting charitable organizations, “no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation”).

39. 100 CONG. REC. 9604 (1954); HOPKINS, *supra* note 28, at 608; LUNDER, *supra* note 33, at 4; Johnny Rex Buckles, *Not Even a Peep? The Regulation of Political Campaign Activity by Charities Through Federal Tax Law*, 75 U. CIN. L. REV. 1071, 1078–79 (2007); Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145, 152 (2006). See generally Patrick L. O’Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733 (2001).

40. HOPKINS, *supra* note 28, at 608; Amelia Elacqua, *Eyes Wide Shut: The Ambiguous “Political Activity” Prohibition and Its Effects on 501(c)(3) Organizations*, 8 HOUS. BUS. & TAX L.J. 113, 117 (2007); Kemmitt, *supra* note 39, at 152.

41. 100 CONG. REC. 9604 (statement of Sen. Johnson). Nor does the conference report analyze the provision. HOPKINS, *supra* note 28, at 608 n.7; see also H.R. REP. NO. 83-2543, at 46 (1954) (stating that the House deferred to the Senate amendment regarding campaign intervention).

42. HOPKINS, *supra* note 28, at 608; Kay Guinane, *Wanted: A Bright-Line Test Defining Prohibited Intervention in Elections by 501(c)(3) Organizations*, 6 FIRST AMEND. L. REV. 142, 160 (2007); Houck, *supra* note 30, at 24; Steffen N. Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875, 880–81 (2001); O’Daniel, *supra* note 39, at 740–68.

43. See Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330–464; HOPKINS, *supra* note 28, at 608.

was imprecise, and that this lack of clarity gave rise to difficulties in compliance and enforcement efforts.<sup>44</sup> The change was meant to clarify what activities were prohibited,<sup>45</sup> but expressly did not “change current law.”<sup>46</sup>

In sum, the congressional record is largely silent as to the motivation behind the enactment of the political activity prohibition. It is clear from earlier Treasury rulings and proposed legislation, however, that Congress intended organizations described by section 501(c)(3) to be kept out of the political sphere.

## 2. Examining the Text of the Code

Section 501(c)(3) defines political activity as “participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.” The statute does not further define any of these terms.<sup>47</sup>

Other sections of the Code discuss political activity, but they do not meaningfully elaborate on its definition in relation to section 501(c)(3) organizations.<sup>48</sup> Section 170, which sets forth the deductions allowed for charitable contributions,<sup>49</sup> repeats verbatim section 501(c)(3)’s definition of political activity.<sup>50</sup> Section 4955 offers something slightly different; it describes the tax levied on charities for their political expenditures,<sup>51</sup> defining “political expenditure” as “any amount paid or incurred by a section 501(c)(3) organization in any participation in, or intervention in (including the publication or distribution of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”<sup>52</sup> Section 4955 thus repeats section 501(c)(3)’s primary language, but adds that spending funds is one form of participation or intervention in political campaigns.

Similarly, section 6852, which calls for the immediate determination and collection of taxes payable for charities that engage in flagrant political

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44. SUBCOMM. ON OVERSIGHT OF THE H. COMM. ON WAYS & MEANS, 100TH CONG., REPORT AND RECOMMENDATIONS ON LOBBYING AND POLITICAL ACTIVITIES BY TAX-EXEMPT ORGANIZATIONS 37 (Comm. Print 1987).

45. *Id.* at 42.

46. *Id.* For example, the clarification did not affect the permissibility of voter education projects or other nonpartisan activities. *Id.* at 42–43.

47. *See id.*; *see also* LUNDER, *supra* note 33, at 8.

48. *See* Elacqua, *supra* note 40, at 115.

49. I.R.C. § 170(a).

50. *Compare id.* § 170(c)(2)(D) (defining a “charitable contribution” as one made to an organization “which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office”), *with id.* § 501(c)(3) (defining an exempt organization as one “which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office”).

51. *See id.* § 4955(a)(1)–(2).

52. *Id.* § 4955(d)(1).



expenditures,<sup>53</sup> uses section 4955's definition of political expenditures.<sup>54</sup> Section 6852 continues section 4955's focus on expenditures as political intervention, referring to section 501(c)(3)'s political activity ban itself as "the prohibition against making political expenditures."<sup>55</sup>

Finally, section 527 describes the exemption and treatment of political organizations,<sup>56</sup> but does not discuss political activity of section 501(c)(3) organizations.<sup>57</sup> While section 527 defines "candidate"<sup>58</sup> and "election"<sup>59</sup> in some detail, those definitions apply only for purposes of section 527.<sup>60</sup> No other sections of the Code elaborate on the political activity prohibition.<sup>61</sup>

Taken together, these sections indicate that the prohibition covers participation or intervention in a political campaign on behalf of any candidate, including making statements and spending money for that purpose.

As a sanction for engaging in political activity, the IRS may impose a tax on the infringing organization equal to 10 percent of the amount of any political expenditure.<sup>62</sup> Additionally, the IRS may impose a 2.5 percent tax on individual managers who knowingly agree to the political expenditure.<sup>63</sup> If the organization does not "correct"<sup>64</sup> the political expenditure before assessment of the 10 percent tax, the IRS may impose a tax equal to 100 percent of the uncorrected political expenditure.<sup>65</sup> The IRS also has the inherent authority to revoke the tax-exempt status of any organization that engages in political activity.<sup>66</sup> Any 501(c)(3) organization whose exempt

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53. *Id.* § 6852(a)(1).

54. *Id.* § 6852(b)(1).

55. *Id.* § 6852(a)(1)(B).

56. *See id.* § 527. Political organizations are those formed primarily for the purpose of directly or indirectly accepting contributions or making expenditures toward influencing a political election. *See id.*

57. *See id.*

58. *Id.* § 527(g)(3). "Candidate" is defined as someone who (1) publicly announces that he is a candidate for nomination or election to a federal, state, or local elective public office, and (2) meets the legal qualifications to hold such office. *Id.*

59. *Id.* § 527(j)(6). The definition of "election" includes general, special, primary, or runoff elections for federal office, conventions or caucuses, primary elections for delegates, and presidential primary elections. *Id.*

60. *Id.* § 527(g)(3), (j)(6).

61. Section 501(c)(3)'s "participation or intervention" language is also repeated in sections 162(e)(1)(B); 504(a)(2)(B); 2055(a)(2), (3); 2106(a)(2)(A)(ii), (iii); 2522(a)(2), (b)(2), (3); 7409(a)(2)(B)(i), (b)(1).

62. *Id.* § 4955(a)(1).

63. *Id.* § 4955(a)(2).

64. To correct a political expenditure is to recover all or part of it, implement safeguards to prevent future expenditures if recovery is not possible, and comply with any additional corrective procedures prescribed by the IRS. *Id.* § 4955(f)(3).

65. *Id.* § 4955(b)(1). Additionally, any individual manager who refuses to all or part of a correction is subject to a tax equal to 50 percent of the uncorrected expenditure. *Id.* § 4955(b)(2).

66. *See* *United States v. Dykema*, 666 F.2d 1096, 1101 (7th Cir. 1981) ("It should be noted that exemption is lost . . . by participation in *any* political campaign on behalf of *any* candidate for public office."); H.R. REP. NO. 100-391, pt. 2, at 1624 (1987) (noting that an organization will lose its tax-exempt status "if it engages in any political campaign

status is revoked due to political activity may not subsequently seek exemption under section 501(c)(4),<sup>67</sup> which exempts organizations operated to promote social welfare.<sup>68</sup> While there are no political restrictions placed on 501(c)(4) organizations,<sup>69</sup> contributions made to them are not considered charitable contributions deductible from the donor's taxable income.<sup>70</sup> However, charities whose exempt status has been revoked for political activity are permitted to resubmit an application for exemption under 501(c)(3) by filing a Form 1023.<sup>71</sup>

### B. Treasury Regulations Promulgated Thereunder

This section summarizes the Treasury regulations that expand upon the Code. Congress granted power to the Department of the Treasury to create rules and regulations necessary to enforce the provisions of the statute.<sup>72</sup> The federal tax regulations promulgated thereunder<sup>73</sup> represent the Department's official interpretation of the Code,<sup>74</sup> and are considered reflective of congressional intent.<sup>75</sup> Regulations have the force of law,<sup>76</sup> and are binding on the IRS.<sup>77</sup> While entitled to judicial deference, these regulations are not binding on courts.<sup>78</sup>

Treasury Regulation section 1.501(c)(3)-1 defines a "candidate for public office" as "an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local."<sup>79</sup> The regulation echoes the statute's description of "participation" or "intervention" as including "the publication or distribution of written or printed statements or the making of oral

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activities"); IRS Tech. Adv. Mem. 9635003 (Aug. 30, 1996); HOPKINS, *supra* note 28, at 608. Revocation may be used in conjunction with the excise taxes described above. See LUNDER, *supra* note 33, at 3.

67. I.R.C. § 504(a) (2006).

68. *Id.* § 501(c)(4).

69. *See id.*

70. *See id.* § 170(c)(1)–(5) (defining a charitable contribution as one made to a state or government possession, an organization operated exclusively for religious, charitable, scientific, literary, or educational purposes (section 501(c)(3) organizations), an organization of war veterans, or a cemetery corporation).

71. IRS, RESULTS OF REVOCATION OF IRC 501(C)(3) ORGANIZATIONS, 1988 EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TEXT 2, 3, available at <http://www.irs.gov/pub/irs-tege/eotopicm88.pdf>.

72. I.R.C. § 7805(a).

73. Tax regulations are codified in Title 26 of the Code of Federal Regulations (C.F.R.).

74. HOPKINS, *supra* note 28, at 972; *Tax Code, Regulations, and Official Guidance*, IRS, <http://www.irs.gov/taxpros/article/0,,id=98137,00.html> (last visited Apr. 21, 2012) ("Treasury regulations (26 C.F.R.)—commonly referred to as *Federal tax regulations*—pick up where the Internal Revenue Code (IRC) leaves off by providing the official interpretation of the IRC by the U.S. Department of the Treasury.").

75. HOPKINS, *supra* note 28, at 13.

76. *Id.* at 972.

77. *Id.*

78. *See Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 560–61 (1991) (stating that the Court will defer to Treasury regulations unless unreasonable); *Davis v. United States*, 495 U.S. 472, 484 (1990).

79. Treas. Reg. § 1.501(c)(3)-1(c)(iii) (amended 2008).

statements on behalf of or in opposition to such a candidate.”<sup>80</sup> The regulation adds that such activity may “directly or indirectly” impact a campaign,<sup>81</sup> but it does not define what activity falls into either category.<sup>82</sup> While the Code discusses “political activity” in six different sections,<sup>83</sup> the IRS has promulgated corresponding regulations for only three.<sup>84</sup> These three regulations are largely duplicative of the language used in the Code.<sup>85</sup>

Thus, the regulations clarify that the statute encompasses statements both written and oral, the prohibition applies to *any* elective office (national, state, or local), and activities that indirectly affect a campaign are prohibited. While the regulations do not define “indirectly,” the phrase is important because it expands the prohibition’s reach beyond “express advocacy” as that term has been defined under federal election law.<sup>86</sup>

### C. Revenue Rulings

Revenue rulings represent the IRS’s official interpretation of the Code and regulations.<sup>87</sup> They are determinations of how the law should be applied to specific factual situations.<sup>88</sup> Revenue rulings do not have the force of law, but do have precedential value for taxpayers.<sup>89</sup> Because they contain detailed factual applications of the regulations and statute discussed above, the revenue rulings will be examined here in some detail.

Revenue Ruling 2007-41 applied an IRS Fact Sheet, issued the previous year, to twenty-one hypothetical examples of political activity, asking

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80. *Id.*

81. *Id.*

82. *Id.*

83. See I.R.C. § 170(a), (c)(2)(D) (providing a tax deduction for contributions made to charitable organizations that are not disqualified from tax exemption under § 501(c)(3) for substantial lobbying or political activity); *id.* § 501(c)(3) (setting forth the political activity ban); *id.* § 527(a), (e)(1), (2) (defining a tax-exempt political organization as one operated primarily for an “exempt function,” and defining “exempt function” as influencing or attempting to influence a political election); *id.* § 4911(a), (c)(1) (permitting a tax on excess lobbying expenditures by exempt organizations, and defining lobbying as attempting to influence legislation); *id.* § 4955(a), (d)(1) (permitting a tax on any political expenditure by a § 501(c)(3) organization, and defining “political expenditure” as one incurred by participating or intervening in a political campaign on behalf of a candidate); *id.* § 6852(a) (authorizing the taxation of political activity under § 4955 for the current year or the preceding one).

84. Elacqua, *supra* note 40, at 126–27.

85. See Treas. Reg. § 1.501(c)(3)-1(c)(iii) (stating that an organization is a non-exempt “action organization” if it “participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office”); Treas. Reg. § 1.527-2 (amended 1985) (defining political organizations); Treas. Reg. § 1.170-1(f)(2)(ii) (amended 1972) (denying a deduction under § 170 for contributions made to organizations that participate or intervene in a political campaign on behalf of a candidate, but deferring to § 501(c)(3) to aid in determining if an organization “is engaging in political activities”).

86. See *infra* notes 330–34 and accompanying text.

87. *Understanding IRS Guidance—A Brief Primer*, IRS, <http://www.irs.gov/irs/article/0,,id=101102,00.html> (last visited Apr. 21, 2012).

88. Internal Revenue Bulletin, No. 2012-2 at 3 (Jan. 9, 2012) available at <http://www.irs.gov/pub/irs-irbs/irb12-02.pdf>; *Understanding IRS Guidance—A Brief Primer*, *supra* note 87.

89. Internal Revenue Bulletin, *supra* note 88.

whether or not each would be deemed political intervention under section 501(c)(3).<sup>90</sup> The ultimate lesson of 2007-41, which also reflects the current state of the law regarding the political activity prohibition, is that whether an activity is permissible “depends upon all of the facts and circumstances of each case.”<sup>91</sup>

2007-41 divides its twenty-one factual scenarios into six broad categories of possible political activity: (1) voter education, voter registration, and get-out-the-vote drives; (2) individual activity by organizational leaders; (3) candidate appearances (as well as candidate appearances in a non-candidate capacity); (4) issue advocacy; (5) business activity; and (6) websites.<sup>92</sup>

### 1. Voter Education

Voter education initiatives include hosting public forums and publishing voter guides.<sup>93</sup> Revenue Rulings 2007-41,<sup>94</sup> 78-248,<sup>95</sup> and 80-282<sup>96</sup> all examine activities in this area. 2007-41, the most recent of the three, makes clear that voter education and registration activities are permitted if they are carried out in a nonpartisan manner.<sup>97</sup> If the conduct is found to favor or oppose one candidate over another, it is prohibited.<sup>98</sup>

2007-41 examines two scenarios to illustrate the distinction. In the first, an organization sets up a booth at a state fair where citizens can register to vote.<sup>99</sup> The booth does not reference any particular candidate or political party, except where the voters may note their party affiliation on the registration form.<sup>100</sup> The ruling concludes that the organization has not engaged in political activity.<sup>101</sup> In the second example, an organization that educates the public on environmental issues establishes a telephone bank and calls voters in the district where a specific candidate is seeking election.<sup>102</sup> The candidate is distinguished from the incumbent candidate on an environmental issue.<sup>103</sup> When the organization calls a voter, it ascertains whether the voter’s environmental view comports with either

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90. See Rev. Rul. 2007-41, 2007-1 C.B. 1421. The 2006 Fact Sheet was an accumulation of all the relevant laws and regulations applicable to § 501(c)(3) organizations in preparation for the 2006 election cycle. See *Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations*, IRS, <http://www.irs.gov/newsroom/article/0,,id=154712,00.html> (last updated Oct. 7, 2011).

91. Rev. Rul. 2007-41, 2007-1 C.B. at 1421. The “facts and circumstances test” is, in practice, a catch-all standard whose application varies with the type of activity at issue. It is the current test for political activity. See *infra* Part I.D; see e.g., *infra* notes 93–115, 125–44, 166–70.

92. Rev. Rul. 2007-41, 2007-1 C.B. at 1422–26.

93. *Id.* at 1422.

94. *Id.*

95. Rev. Rul. 78-248, 1978-1 C.B. 154.

96. Rev. Rul. 80-282, 1980-2 C.B. 178.

97. Rev. Rul. 2007-41, 2007-1 C.B. at 1422.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

candidate.<sup>104</sup> If the voter favors the incumbent's viewpoint, the organization ends the conversation.<sup>105</sup> If the voter favors the new candidate's view, the organization will remind the voter of the upcoming election and offer to provide the voter transportation to the polls.<sup>106</sup> Perhaps not surprisingly, the ruling asserts that this organization has engaged in political activity.<sup>107</sup>

Revenue Ruling 78-248 considers "voter education" activities such as voter guides and candidate questionnaires.<sup>108</sup> The scenarios presented in the ruling, taken together, indicate that voter guides published annually, stating the positions of all candidates, and covering a wide range of issues that are of interest to the electorate as a whole will not constitute political activity under section 501(c)(3).<sup>109</sup> If a voter guide contains questions that "evidence a bias on certain issues," or if the guide covers only one issue, publication of the guide will be deemed political activity in violation of section 501(c)(3).<sup>110</sup>

Revenue Ruling 80-282 amplifies<sup>111</sup> 78-248 by examining the publication of political newsletters.<sup>112</sup> It notes that the format and content of a newsletter may indicate bias.<sup>113</sup> It states, however, that a newsletter describing all congressional incumbents' views on certain issues, and comparing those views to those of the organization, is not political activity where the newsletter is not published during an election cycle, covers all incumbents without noting who sought reelection, and neither compares incumbents nor offers statements supporting or rejecting their views.<sup>114</sup> Similarly, publication of a newsletter does not constitute political activity if it is not widely distributed and is not targeted to a specific electorate, but rather is given only to the organization's members.<sup>115</sup>

Accordingly, voter education activities are permissible if they are carried out in a neutral way. They must give equal treatment to all candidates, may not focus on particular issues, and may not target a specific electorate. If the education initiatives evidence bias toward a particular candidate, the activity will be prohibited.

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104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *See* Rev. Rul. 78-248, 1978-1 C.B. 154.

109. *See id.* at 154-55.

110. *See id.*

111. The term "amplified" is used by the IRS when a position taken in a prior ruling is extended to apply to a new variation of the original factual situation. HOPKINS, *supra* note 28, at 976.

112. Rev. Rul. 80-282, 1980-2 C.B. 178.

113. *Id.* at 179.

114. *Id.* at 178-79.

115. *Id.*

## 2. Individual Activities of Organizational Leaders

Conduct that falls under the “individual activities” heading occurs in the context of organizational leaders expressing themselves in their individual capacity, apart from the organization.<sup>116</sup> 2007-41 states that organizational leaders are free to speak politically in their individual capacity, but cannot “make partisan comments in official organization publications or at official functions of the organization.”<sup>117</sup>

In one hypothetical example, the CEO of a hospital exempt under 501(c)(3) personally endorses a candidate.<sup>118</sup> The CEO allows his name and title to be used in a newspaper ad supporting the candidate, paid for by the candidate’s campaign committee.<sup>119</sup> The ad states that titles and affiliations are provided for identification purposes only.<sup>120</sup> This is not political activity because the hospital did not pay for the ad, the ad did not appear in one of the hospital’s publications, and the endorsement was made in the CEO’s personal capacity.<sup>121</sup>

In a second example, a university president publishes an article in the university’s newsletter under the heading “My Views,” in which he personally endorses a candidate.<sup>122</sup> The president pays for the publication of the article with his own funds.<sup>123</sup> This is political activity, because the endorsement appears in an official university publication.<sup>124</sup>

## 3. Candidate Appearances

Depending on the circumstances, a charity may invite candidates to speak at organizational events, either in their capacity as candidates or as individuals.<sup>125</sup> Candidates may also voluntarily attend organizational events that are open to the public.<sup>126</sup> Revenue Rulings 2007-41,<sup>127</sup> 66-256,<sup>128</sup> 74-574,<sup>129</sup> and 86-95<sup>130</sup> all offer guidance on this issue.

In 1966, Revenue Ruling 66-256 held that an organization formed solely to stage public forums and debates on matters of social or political interest qualified for exemption from federal income tax under section 501(c)(3).<sup>131</sup> The organization in question did not endorse any of the views of its

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116. See Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1422.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1423.

126. *Id.*

127. *Id.*

128. Rev. Rul. 66-256, 1966-2 C.B. 210.

129. Rev. Rul. 74-574, 1974-2 C.B. 160.

130. Rev. Rul. 86-95, 1986-2 C.B. 73.

131. See Rev. Rul. 66-256, 1966-2 C.B. at 210–11.

speakers, nor did the organization hold views of its own.<sup>132</sup> The ruling cited Treasury Regulation section 1.501(c)(3)-1(d)(3), which recognized public forums and debates as valid means for educating the public under the Code.<sup>133</sup> The organization was not engaged in political activity, even though some of its speakers and topics were controversial.<sup>134</sup>

Similarly, Revenue Ruling 74-574 held that an organization operating a broadcast station did not engage in political activity by giving free air time to candidates where the time was provided equally to all candidates.<sup>135</sup> The ruling held that such a presentation was a public service that helped inform the electorate.<sup>136</sup>

Revenue Ruling 86-95 states that an organization that held a series of public forums in congressional districts during election campaigns did not engage in political activity where the forums were of neutral form and content.<sup>137</sup> The forums in question invited all legally qualified candidates to participate; a neutral and independent panel prepared the questions; and the topics covered a wide range of issues of general public interest, with no commentary implying approval or disapproval of any candidate's answers.<sup>138</sup> The ruling did warn, however, that showing bias toward a particular candidate might constitute political activity.<sup>139</sup>

Ruling 2007-41 sets forth factors that section 501(c)(3) organizations should consider in determining whether they may invite candidates to speak at their events.<sup>140</sup> These include whether the organization provides opportunities for all candidates seeking the same office to speak; whether the organization indicates support for, or opposition to, any candidate; and whether any political fundraising occurs at the events.<sup>141</sup> These three factors are, in turn, subject to additional sub-factors.<sup>142</sup> The ruling provides a nonexclusive list of six such sub-factors to consider in evaluating whether

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132. *Id.*

133. *Id.* at 211. Treasury Regulation § 1.501(c)(3)-1(d)(3) would later be struck down as unconstitutionally vague in *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1034-35 (D.C. Cir. 1980). *See infra* Part II.B.2.

134. Rev. Rul. 66-256, 1966-2 C.B. at 211.

135. Rev. Rul. 74-574, 1974-2 C.B. 160, 160-61.

136. *Id.* at 161.

137. Rev. Rul. 86-95, 1986-2 C.B. 73, 73-74.

138. *Id.* at 74.

139. *Id.*

140. *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1423.

141. *Id.*

142. *See id.* For example, to determine if an organization has provided adequate opportunity for other candidates to speak, the IRS will consider whether the questions are prepared and presented by an independent nonpartisan panel, whether the questions asked cover a broad range of issues, whether each candidate has ample opportunity to express their views, whether the candidates are asked to agree or disagree with positions of the organization, and whether a moderator comments on the candidates' answers or otherwise implies approval or disapproval. *Id.* Similar sub-factors exist for determining whether an organization has shown support or opposition toward a candidate and whether fundraising has occurred. *See id.*

a candidate's appearance in a non-candidate capacity constitutes political activity.<sup>143</sup>

Consequently, candidate appearances are permissible if the presentation and questioning are neutral, all candidates seeking the same office receive equal opportunities, and the organization does not express approval or disapproval of any candidate's answers. The rulings are clear that a candidate's presence at an organization-sponsored event does not, by itself, constitute political activity.<sup>144</sup>

#### 4. Issue Advocacy

Issue advocacy refers to charities taking a stance on a particular political issue, and engaging in conduct that furthers its position on that issue.<sup>145</sup> The distinction between issue advocacy and political intervention is particularly important because most charities are issue-focused.<sup>146</sup> Moreover, the line between issue advocacy and political intervention is especially difficult to draw.<sup>147</sup>

2007-41 states that charities "may take positions on public policy issues, including issues that divide candidates in an election for public office."<sup>148</sup> However, if those positions convey any message supporting or opposing a candidate, the organization has engaged in political activity.<sup>149</sup> Support or opposition may be explicit or implicit, and may be characterized by reference to political party affiliation or other "distinctive features of a candidate's platform or biography."<sup>150</sup> While "[a] communication is particularly at risk of political campaign intervention when it makes reference to candidates or voting in a specific upcoming election," the entire context of the communication must be considered.<sup>151</sup>

In the first of three hypothetical examples, a university runs a newspaper advertisement regarding proposed education-related legislation.<sup>152</sup> A state senator, who will soon be running for reelection, has opposed such legislation in the past.<sup>153</sup> The ad urges readers to contact the senator regarding the bill.<sup>154</sup> This is not political intervention, because the ad does not mention any election, educational issues are not divisive in the

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143. *See id.*

144. *Id.*

145. *See id.* at 1424.

146. *Cf. Elacqua, supra* note 40, at 129 ("This type of activity is the most dangerous because of the likelihood that it is related to pending elections and thus political campaign intervention."); *Guinane, supra* note 42, at 154 ("[T]he IRS might be blurring the line between partisan intervention in elections and legitimate issue advocacy. This could have a chilling effect on charities and religious organizations that want to express points of view on current issues of interest to their constituencies.").

147. LUNDER, *supra* note 33, at 11.

148. Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1424.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*



upcoming election, and the timing of the ad directly relates to the proposed legislation.<sup>155</sup>

In the second scenario, an organization created to inform the public about the need for public education produces a radio ad that presents statistics showing that public education is underfunded, and concludes by urging listeners to contact the current governor about underfunded schools.<sup>156</sup> The ad airs shortly before the governor is to run for reelection, and the governor's opponent has made funding of public education an election issue.<sup>157</sup> The ad is not part of an ongoing series of communications from the organization regarding this issue, and there was no proposed legislation regarding education funding at the time the ad was produced.<sup>158</sup> The organization violates the political activity prohibition because the ad identifies the governor, appears shortly before an election, is not part of a series of ongoing communications, is not timed to any proposed legislation, and takes a position on an issue that the governor's opponent has used to distinguish himself.<sup>159</sup>

The ruling indicates that an organization that takes a stance on an issue that distinguishes a particular candidate might be found to engage in political activity, even if the organization is formed to advance that issue.<sup>160</sup> The ruling describes seven factors that should be considered in determining if a communication results in political campaign intervention.<sup>161</sup> However, none of the factors are singularly conclusive. Even a communication that expressly references a candidate or voting, while "particularly at risk" of violating the prohibition, is subject to other (potentially curing) facts and circumstances.<sup>162</sup>

## 5. Business Activity

This section covers potentially political conduct that is incidental to the primary business activity of the organization. For example, 2007-41 states that political activity may arise in the course of business activity "such as selling or renting of mailing lists, the leasing of office space, or the

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155. *Id.* at 1425.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *See id.* In the third example, the director of a charity violates the prohibition by referring to an upcoming election while taking a position on a controversial election issue at a formal organization event. *Id.*

161. *Id.* These include whether the statement identifies one or more candidates for office; whether the communication expresses approval or disapproval of a candidate's positions or actions; the temporal proximity of the statement to an election; whether the statement references voting or an election; whether the issue raised is a distinguishing issue for a particular candidate; whether the communication is one in a series of regular communications on the issue made independent of the timing of an election; whether the timing of the communication relates to some other, non-election-based event, such as proposed legislation by an officeholder who also happens to be a candidate for election. *Id.*

162. *Id.* at 1424.

acceptance of paid political advertising.”<sup>163</sup> Relevant factors include whether the good or service is available to all candidates equally (or to the general public), whether the prices charged to candidates represent the organization’s usual rates, and whether the activity is an ongoing one or is conducted for a specific candidate.<sup>164</sup> The ruling offers one factual circumstance where an organization engages in political activity by providing services to one candidate while refusing service to others.<sup>165</sup>

## 6. Web Content

The IRS views a charity’s website as a form of communication.<sup>166</sup> As such, any opposition or support of candidates on an organization’s website is subject to the “facts and circumstances” analysis.<sup>167</sup> The status of links placed on an organization’s website poses a more difficult question. An organization is responsible for the “consequences of establishing and maintaining” a link, even if the organization does not control the content on the linked site.<sup>168</sup> Links to candidate-related material do not in themselves constitute political activity.<sup>169</sup> Factors to be considered include the context in which the link is presented, whether links to all candidates are present, whether the link serves an exempt purpose, and the directness of any link between the organization’s site and a site containing material favoring or opposing a candidate.<sup>170</sup>

### *D. The Current State of the Prohibition*

The previous three sections described the statute, regulations, and revenue rulings that, taken together, constitute section 501(c)(3)’s political activity prohibition. Given the above, section 501(c)(3)’s political activity prohibition can be described as follows: (1) it prohibits direct or indirect intervention and participation in political campaigns on behalf of, or in opposition to, any candidate for public office, with intervention and participation determined by all the surrounding facts and circumstances; (2) the prohibition is absolute (no political activity is allowed); (3) organizations violating the prohibition are subject to excise tax or revocation of tax-exempt status, and revoked organizations may not seek re-exemption under section 501(c)(4).

## II. A SUMMARY OF CRITICISM

Part I examined and defined the political activity prohibition of section 501(c)(3). Part II examines potential problems with the prohibition, and

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163. *Id.* at 1425.

164. *Id.*

165. *Id.*

166. *Id.* at 1425–26.

167. *Id.* at 1426.

168. *Id.*

169. *Id.*

170. *Id.*

why many commentators have called for its reform. First, it describes the practical limitations of the ban, as evidenced by the confusion of charities trying to avoid violation, a lack of compliance, and IRS enforcement problems. Second, it examines and evaluates potential constitutional attacks to the current regulatory regime. Briefly summarized, the absoluteness of the ban, and the subject matter it regulates, give rise to potential First Amendment challenges. The lack of a clear definition for political intervention gives rise to potential vagueness and overbreadth challenges. Though the probability of success of any of these challenges is uncertain, they have been, and will likely continue to be, brought to court. Taken together, these considerations justify proposals to amend the prohibition.

#### A. *Practical Limitations in Compliance and Enforcement*

While the language of section 501(c)(3) is phrased simply, its exact meaning has eluded charities, tax professionals, and perhaps the IRS itself.<sup>171</sup> What is political intervention? What does it actually mean to intervene on behalf of a candidate? The current regulatory regime does not directly answer these questions.<sup>172</sup> This section highlights the practical difficulties engendered by the current state of the political activities prohibition, and suggests why the prohibition would benefit from change.

Though the body of law governing the political activities of charities is multilayered,<sup>173</sup> there is a distinct lack of clarity surrounding its meaning.<sup>174</sup> Part of the prohibition's problem with precision stems from its murky origins; the lack of legislative history associated with the enactment of the prohibition<sup>175</sup> leaves those organizations being regulated without an

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171. See Elacqua, *supra* note 40, at 115 (“The resulting ambiguity has made it difficult for tax-exempt organizations to confidently advocate for their causes and for the IRS to investigate and review an organization’s tax-exempt status.”); Guinane, *supra* note 42, at 145 (“501(c)(3) organizations must draw on a hodge-podge of resources in order to piece together a best guess of how the IRS might view their advocacy or voter education and mobilization activities.”); Lloyd Hitoshi Mayer, *Grasping Smoke: Enforcing the Ban on Political Activity by Charities*, 6 FIRST AMEND. L. REV. 1, 2 (2007) (“[V]iolations of this prohibition seem to be as elusive as smoke, being both difficult to detect and difficult to separate from permissible charitable activities.”).

172. See LUNDER, *supra* note 33, at 8 (noting that “the statute and regulations do not offer much insight as to what activities are prohibited”); Elacqua, *supra* note 40, at 115 (“Unfortunately, § 501(c)(3) does not explicitly define ‘political activity,’ nor is it defined in other sections of the Code that discuss political organizations.”); Johnson, *supra* note 42, at 880 (“[T]here are definitional questions concerning what constitutes ‘participation’ or ‘intervention’ in a ‘campaign for public office’ as well as who qualifies as a ‘candidate.’”); Mayer, *supra* note 171, at 3 (“[The prohibition’s] exact parameters remain frustratingly unclear.”).

173. See *supra* Part I (discussing the statute, regulations, and revenue rulings governing political activity).

174. HOPKINS, *supra* note 28, at 610 (“The standard to apply in determining whether an organization is involved in a political campaign should be amply clear by this time . . . but it is not.”).

175. See *supra* Part I.A.1 (discussing the legislative history of the political activity prohibition); see also LUNDER, *supra* note 33, at 3–4 (stating that the legislative history is “sparse”); JUDITH E. KINDELL & JOHN FRANCIS REILLY, ELECTION YEAR ISSUES, 2002

understanding of congressional intent.<sup>176</sup> Furthermore, the regulations promulgated by the IRS to enforce the Code do little to elucidate its meaning.<sup>177</sup> While revenue rulings offer more factual explanation than the statute or regulations,<sup>178</sup> in practice they are difficult to apply. Revenue rulings generally, and 2007-41<sup>179</sup> in particular, examine scenarios where an organization has engaged in a single type of political activity.<sup>180</sup> Real world political activities will often be far more varied and nuanced than the relatively obvious scenarios presented in the revenue rulings. 2007-41 states that if an organization engages in more than one type of activity, “the interaction among the activities may affect the determination of whether or not the organization is engaged in political campaign intervention.”<sup>181</sup> The ruling, however, offers no insight into how the combination of activities affects that determination.<sup>182</sup> While it lists many factors to consider when analyzing each individual scenario,<sup>183</sup> the ruling does not indicate how those factors are to be weighed, or if any are determinative.<sup>184</sup> Thus, unless its precise scenario can be found in a revenue ruling, a charity is forced to guess whether it has a mix of factors that create “political activity.”<sup>185</sup>

This lack of clarity creates certain problems. The risk involved with engaging in activity that is debatably political causes many charities to abstain from activities that might otherwise further their charitable

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EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TEXT 335, 337, *available at* <http://www.irs.gov/pub/irs-tege/eotopici02.pdf> (“The amendment was accepted; no debate or discussion took place. The Conference Report contains no further discussion of the amendment.”); Kemmitt, *supra* note 39, at 152 (“Because the campaign prohibition was raised as a floor amendment and not subject to debate, the legislative record is essentially silent.”).

176. *See* Dessingue, *supra* note 28, at 916 (“Because of the paucity of legislative history, attribution of rationales to the political activity prohibition has been largely an exercise in projection.”); *see also* Elacqua, *supra* note 40, at 117 (“[T]he prohibition began without a clear indication of the activities the amendment sought to prohibit, and it remains with the same limited clarity today.”); Johnson, *supra* note 42, at 880 (“[T]he formal legislative history of these provisions sheds little light on their purpose, let alone Congress’s thoughts about their application to religious organizations.”); *infra* Part IV (discussing the effect of the prohibition’s lack of legislative history on its meaning).

177. *See supra* Part I.B; *see also* LUNDER, *supra* note 33, at 8 (stating that the regulations “add little” to the statutory prohibition); Elacqua, *supra* note 40, at 118 (“[T]he Treasury regulations do little to alleviate the confusion.”).

178. *See supra* Part I.C.

179. Rev. Rul. 2007-41, 2007-1 C.B. 1421 (2007).

180. *See id.* at 1422 (“Note that each of these situations involves only one type of activity.”); *see also* Guinane, *supra* note 42, at 149 (“The scenarios in the Revenue Ruling are fairly simple, and each one illustrates only one type of activity.”); *supra* Part I.C (examining scenarios involving voter education, business activity, and issue advocacy separately).

181. Rev. Rul. 2007-41, 2007-1 C.B. 1421; Guinane, *supra* note 42, at 149.

182. *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421 (omitting any discussion of the ramifications of a mix of activities).

183. *See supra* Part I.C.

184. *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421.

185. *See* Guinane, *supra* note 42, at 149 (“This forces 501(c)(3) organizations facing more complex situations to guess what the IRS would think and to risk an investigation if they guess incorrectly.”).

purpose.<sup>186</sup> The uncertainty also poses problems in planning for charities that feel compelled to engage in advocacy that borders the political.<sup>187</sup> As a result, the IRS has encountered a significant amount of noncompliance among charities.<sup>188</sup>

In 2004, the IRS began the Political Activities Compliance Initiative (PACI) in response to anticipated increases in noncompliance.<sup>189</sup> PACI consists of a formal set of procedures for educating charities on prohibited political activity, and examines cases of noncompliance.<sup>190</sup> Under PACI, the IRS investigates potential infringement based on referrals from internal and external sources.<sup>191</sup> If the Referral Committee decides that a case is worth pursuing, it will categorize the referral as one of three types based on its complexity and egregiousness.<sup>192</sup> The IRS will then send a letter to the organization informing it of the referral, and requesting an explanation of the organization's conduct.<sup>193</sup> If the organization "exhibits an understanding of the IRS's position that a prohibited activity occurred," and

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186. See Elacqua, *supra* note 40, at 115 (stating that "[t]he resulting ambiguity has made it difficult for tax-exempt organizations to confidently advocate for their causes"); Joseph S. Klapach, Note, *Thou Shalt Not Politic: A Principled Approach to Section 501(c)(3)'s Prohibition of Political Campaign Activity*, 84 CORNELL L. REV. 504, 506 (1999) ("In essence, § 501(c)(3) forces a charity to sacrifice part of its vision and its institutional character to ensure its operational success."). Whether political activity by charities is good for charities themselves, society at large, or neither is a point of some contention, and is beyond the scope of this Note. This Note assumes that Congress's intent, to the extent it can be divined, is valid, and suggests changes to honor that intent. For an analysis of the above questions, see Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313 (2007) (arguing that political intervention by charities would be harmful to the charitable sector and to politics) and Johnny Rex Buckles, *Is the Ban on Participation in Political Campaigns by Charities Essential to Their Vitality and Democracy? A Reply to Professor Tobin*, 42 U. RICH. L. REV. 1057 (2008) (arguing that some amount of political participation is proper).

187. See Guinane, *supra* note 42, at 145 ("Even groups that can afford to pay for legal advice cannot obtain certainty, because the lawyers can only give their best estimate on how the IRS might view the facts and circumstances." (citing Peter Panepento, *Tax Lawyers Ask IRS to Clarify Election Rules for Nonprofit Groups*, CHRON. PHILANTHROPY (Aug. 6, 2007), <http://philanthropy.com/news/updates/2806/tax-lawyers-ask-irs-to-clarify-rules-for-nonprofit-groups-on-election-activities>)).

188. Press Release, IRS, IRS Releases New Guidance and Results of Political Intervention Examinations (Feb. 24, 2006), <http://www.irs.gov/newsroom/article/0,,id=154780,00.html> ("[O]ur examinations substantiated a disturbing amount of political intervention in the 2004 electoral cycle."); see also HOPKINS, *supra* note 28, at 609 ("This prohibition is repeatedly violated, with IRS enforcement of this aspect of the law of tax-exempt organizations historically erratic and scant."); O'Daniel, *supra* note 39, at 739 ("[T]here is arguably widespread non-compliance with the prohibition and certainly no groundswell of public support for it.").

189. IRS, FINAL REPORT: PROJECT 302 POLITICAL ACTIVITIES COMPLIANCE INITIATIVE 1 (2006) [hereinafter 2004 PACI REPORT].

190. *Examination Procedures—Prohibited Political Campaign Intervention by Section 501(c)(3) Organizations*, IRS (July 1, 2011), <http://www.irs.gov/charities/charitable/article/0,,id=179671,00.html>.

191. 2004 PACI REPORT, *supra* note 189, at 1 n.1.

192. IRS, POLITICAL ACTIVITIES COMPLIANCE INITIATIVE: PROCEDURES FOR 501(C)(3) ORGANIZATIONS 2 (Feb. 22, 2006) [hereinafter PACI PROCEDURES]. The types are A (single-issue/non-complex), B (multiple issue/complex), and C (egregious/repetitive). *Id.*

193. *Id.* at 4.

if the violation was singular, isolated, and unlikely to be repeated, the IRS will close the case with a written advisory.<sup>194</sup> If the organization does not agree that it has engaged in prohibited activity, the IRS will consider levying an excise tax and revocation.<sup>195</sup>

In 2004, PACI found that 72 percent of the organizations examined engaged in some form of political activity.<sup>196</sup> The rate of infringement was similar in 2006.<sup>197</sup> However, only four organizations faced revocation in 2004, out of 105 closed cases.<sup>198</sup> Though the 2004 report urged future compliance officers to more readily invoke revocation,<sup>199</sup> they did not; no revocations were issued for the 2006 election cycle at the time of the 2006 report's publication.<sup>200</sup> In both 2004 and 2006, over 60 percent of all closed cases ended with a written advisory letter.<sup>201</sup> While PACI focuses on expediting election period procedures,<sup>202</sup> its success in this endeavor is questionable. Too few cases were closed by the time of the 2006 report's publication to merit discussion,<sup>203</sup> and the results of the 2008 election cycle are yet to be released.<sup>204</sup> The 2004 report also acknowledges the need for further guidance for agents and possible legislative modifications.<sup>205</sup>

Given that there are over one million section 501(c)(3) organizations, the challenge facing PACI is tremendous.<sup>206</sup> The IRS acknowledges that the lack of clarity in the prohibition itself exacerbates this already difficult task.<sup>207</sup> While written advisories are reportedly used for cases where the political act was isolated, inadvertent, or corrected,<sup>208</sup> failure to enforce the prohibition for small-scale violations might subject it to a snowball effect.<sup>209</sup> The rarity with which the IRS imposes excise taxes and revocation could thus undermine the prohibition, even if most of the cases it encounters feature only *de minimis* infringement.

In sum, the political activity prohibition, as it is currently stated, has been ineffective in guiding both charities and the IRS. Combined with the

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194. *Id.* at 5.

195. *Id.* at 6.

196. 2004 PACI REPORT, *supra* note 189, at 25.

197. IRS, 2006 POLITICAL ACTIVITIES COMPLIANCE INITIATIVE 1 (May 30, 2007) [hereinafter 2006 PACI REPORT].

198. *Id.* at 5.

199. 2004 PACI REPORT, *supra* note 189, at 26.

200. 2006 PACI REPORT, *supra* note 197, at 5. As of the publication of the 2006 report, however, only 40 out of 100 cases were closed. *See id.* at 1, 5.

201. *Id.* at 5.

202. *See* PACI PROCEDURES, *supra* note 192, at 6.

203. 2006 PACI REPORT, *supra* note 197, at 1.

204. *See Political Activities Compliance Initiative (2008 Election)*, IRS (Aug. 10, 2010), <http://www.irs.gov/charities/charitable/article/0,,id=181565,00.html>.

205. 2004 PACI REPORT, *supra* note 189, at 26.

206. *See id.* at 2.

207. *See id.* at 1.

208. *See id.* at 18.

209. *See* Mayer, *supra* note 171, at 6–7 (“Failing to enforce the prohibition today risks having the noncompliance grow in the future beyond the IRS’s limited ability to check it, causing significant damage to the charitable sector as a whole, and exerting undue influence over elections because of the use of charitable platforms to engage in partisan activity.”).

constitutional issues associated with restricting political speech, these realities have led many to call for a change to the prohibition.

### B. Questioning the Constitutionality of the Prohibition

Courts and commentators have addressed various constitutional infirmities associated with section 501(c)(3)'s political activity prohibition.<sup>210</sup> This section analyzes three: infringement on First Amendment rights, vagueness, and overbreadth.

#### 1. First Amendment Analysis: A Burden on Speech?

Many have questioned section 501(c)(3)'s political activity prohibition on First Amendment grounds.<sup>211</sup> Speech, including political speech, is a fundamental right, and laws burdening it are subject to strict constitutional scrutiny.<sup>212</sup> Conversely, laws that do not constitute a burden on speech are evaluated under the highly deferential rational basis standard.<sup>213</sup> The threshold question in assessing a First Amendment challenge to section 501(c)(3), then, is whether the political prohibition is a burden on the speech rights of charities.<sup>214</sup>

One way a law might burden speech is by conditioning a tax exemption on the requirement that a person abstain from their constitutional right to

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210. See, e.g., *Catholic Answers, Inc. v. United States*, No. 09-CV-670, 2009 WL 3320498 (S.D. Cal. Oct. 14, 2009), *aff'd*, 438 F. App'x 640 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1143 (2012) (hearing vagueness and overbreadth challenges to the prohibition); see also *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983) (hearing a constitutional challenge to 501(c)(3)'s lobbying restriction); Galston, *supra* note 12 (analyzing constitutional challenges to the prohibition); Scott W. Putney, *The IRC's Prohibition of Political Campaigning by Churches and the Establishment Clause*, 64 FLA. B.J. 27 (1990) (arguing that the prohibition violates the Establishment and Free Exercise Clauses).

211. See *Branch Ministries v. Rossotti*, 211 F.3d 137, 142, 144 (D.C. Cir. 2000) (hearing a challenge to section 501(c)(3) on free exercise and viewpoint discrimination grounds); *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 856 (10th Cir. 1972) (hearing a challenge to section 501(c)(3) on free exercise grounds); Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217, 254 (1992); Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308, 319–20 (1990); Johnson, *supra* note 42, at 887–90; Klapach, *supra* note 186, at 513.

212. *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010). Under strict scrutiny, the government must “prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’” *Id.* (quoting *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

213. See *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 359 (2009) (“Given that the State has not infringed the unions’ First Amendment rights, the State need only demonstrate a rational basis to justify the ban on political payroll deductions.”). The rational basis test asks whether the law at issue is “rationally related to a legitimate state interest.” *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976). The rational basis test is highly deferential to Congress and the law at issue. See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 678 (3d ed. 2006) (“There is a strong presumption in favor of laws that are challenged under the rational basis test.”).

214. Cf. CHEMERINSKY, *supra* note 213, at 969.

speak.<sup>215</sup> In *Speiser v. Randall*, the Supreme Court struck down a law requiring potential recipients of a property tax exemption to sign an oath swearing that they did not advocate the overthrow of the U.S. government.<sup>216</sup> The Court reasoned that “[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.”<sup>217</sup> That characterization seems analogous to the condition placed on charities by section 501(c)(3) to abstain from political speech.<sup>218</sup>

The Court, however, heard and rejected such an argument in *Regan v. Taxation with Representation of Washington (TWR)*.<sup>219</sup> In *TWR*, a nonprofit organization challenged section 501(c)(3)’s lobbying restriction,<sup>220</sup> claiming it was an “‘unconstitutional condition’ on the receipt of tax-deductible contributions.”<sup>221</sup> The Court rejected the organization’s reliance on *Speiser*, stating that Congress, through the lobbying restriction, did not deny the organization any “independent benefit,” but rather “merely refused to pay for the lobbying out of public moneys.”<sup>222</sup> This is the notion that underlies First Amendment jurisprudence in the area of tax law<sup>223</sup>: exemption is seen as a form of government subsidy,<sup>224</sup> and “a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.”<sup>225</sup> Under this logic, section 501(c)(3)’s political activity prohibition is Congress’s legitimate choice not to subsidize certain activities, and the prohibition would be evaluated under a rational basis standard.<sup>226</sup>

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215. See *Speiser v. Randall*, 357 U.S. 513, 518 (1958) (“It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech.”); CHEMERINSKY, *supra* note 213, at 980.

216. *Speiser*, 357 U.S. at 515, 529.

217. *Id.* at 518.

218. See Klapach, *supra* note 186, at 513; *supra* Part I.A.

219. 461 U.S. 540 (1983).

220. No “substantial part” of the activities of a 501(c)(3) organization may consist of “carrying on propaganda, or otherwise attempting, to influence legislation.” I.R.C. § 501(c)(3).

221. *TWR*, 461 U.S. at 545.

222. *Id.* The Court also stated that “[t]he Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activity.” *Id.* The accuracy of this statement might be questioned with respect to the political activity prohibition. See *infra* notes 398–400 and accompanying text.

223. See Galston, *supra* note 12, at 891–97 (discussing the deferential approach used in tax law First Amendment cases).

224. *TWR*, 461 U.S. at 544; *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (“Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets.”); Galston, *supra* note 12, at 895.

225. *TWR*, 461 U.S. at 549; see also *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 358–59 (2009) (ruling that a state’s withholding of payroll deductions did not burden a union’s political speech rights).

226. See Galston, *supra* note 12, at 903–11 (examining tax law jurisprudence and concluding that rational basis is the correct standard for evaluating section 501(c)(3)). Many legitimate state interests behind the political activity prohibition have been articulated by courts and commentators: that government should not participate in partisan politics by subsidizing organizations with legislative or electoral goals, see *Christian Echoes Nat’l*



Alternatively, heightened scrutiny may be triggered if a law is determined to be a content-based restriction on speech.<sup>227</sup> A content-based restriction is one that inhibits speech because of its message, viewpoint, or subject matter.<sup>228</sup> One might argue that since the political activity prohibition regulates speech based on its message (vote for candidate X) or its subject matter (politics), it is a content-based restriction.

*TWR* and *Cammarano v. United States*, however, probably foreclose this argument. After explaining that refusal to subsidize speech is not an infringement on the right to speak, the Court in *TWR* noted that “[t]he case would be different” if Congress based its choice of subsidy on the “suppression of dangerous ideas.”<sup>229</sup> Instead, relying on *Cammarano*,<sup>230</sup> the Court did not find such intent in section 501(c)(3)’s lobbying restrictions.<sup>231</sup> If regulations based on lobbying are not content-based restrictions, those regulating political speech might not be either.

Given the Court’s tax law jurisprudence, it is unclear whether a First Amendment challenge to the political activity prohibition would be successful. However, it must be noted that *Citizens United v. FEC*<sup>232</sup> not only reaffirmed the fervor with which the Court will guard the First Amendment rights of business entities,<sup>233</sup> but also guaranteed that charities will metaphorically need to “speak louder” to make their voices heard

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Ministry, Inc. v. United States, 470 F.2d 849, 857 (10th Cir. 1972), that allowing charities to participate in politics would result in their serving private, rather than public, interests, *see e.g.*, *TWR*, 461 U.S. at 550, or that involvement in partisan politics is not consistent with a charitable purpose, *see Galston, supra* note 12, at 913–15; *see also* Buckles, *supra* note 39, at 1078–95 (discussing each rationale). While the political activity prohibition might not be narrowly tailored to meet those goals, rational basis review does not require such exacting standards. Galston, *supra* note 12, at 912.

227. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (“Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”); *Leathers v. Medlock*, 499 U.S. 439, 450 (1991) (“[A] tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates on the basis of ideas.”); *CHEMERINSKY, supra* note 213, at 933; Galston, *supra* note 12, at 894–95.

228. *See Turner Broad. Sys.*, 512 U.S. at 641–43.

229. *TWR*, 461 U.S. at 548 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)).

230. 358 U.S. at 513 (“Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not ‘aimed at the suppression of dangerous ideas.’” (quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958))).

231. *TWR*, 461 U.S. at 548. This holding might not prove binding should a court hear a content-based challenge to the political activity prohibition. The *TWR* Court considered the “suppression of ideas” argument in response to allegations that 501(c)(3)’s lobbying restrictions violated equal protection, since veterans organizations were permitted to engage in lobbying under I.R.C. § 501(c)(19). *See id.* The Court held that the denial of exemption to one speaker and not the other was not aimed at the suppression of ideas. *Id.* at 549. It did not consider whether a ban on the subject of lobbying amounted to a suppression of ideas. The Court ruled precisely that in *Cammarano*, however. *See Cammarano*, 358 U.S. at 513. *Cammarano* held that a Treasury regulation denying business expense deductions for lobbying efforts was constitutional. *Id.* That it regulated based on lobbying did not make the regulation a content-based restriction. *Id.*

232. 130 S. Ct. 876 (2010).

233. *See id.* at 913 (“Government may not suppress political speech on the basis of the speaker’s corporate identity.”).

among the cacophony of corporate expenditure. This means both that further challenges are likely, and that they might be looked at differently than in previous cases.

## 2. Vagueness Analysis: Does the Prohibition Clearly Describe What Is Prohibited?

The constitutional doctrine of “vagueness” provides that a law may be struck down as unconstitutional if a person “of common intelligence must necessarily guess at its meaning,”<sup>234</sup> or when it fails to give officials explicit guidelines to prevent arbitrary enforcement.<sup>235</sup> The vagueness doctrine is partly premised on fairness; it is unjust to punish a person without providing clear notice of what is prohibited.<sup>236</sup> It is also a means of protection against the potential for discriminatory enforcement inherent in laws that delegate large subjective and interpretive responsibility to non-legislative bodies.<sup>237</sup>

In the context of the First Amendment, the vagueness doctrine has special significance.<sup>238</sup> Vague laws will likely cause those affected to “steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked,”<sup>239</sup> thereby inhibiting or “chilling” otherwise constitutionally protected speech.<sup>240</sup> Due to these concerns, the standard of statutory specificity is higher in the First Amendment context.<sup>241</sup>

Section 501(c)(3)’s political activity prohibition has been challenged in federal court on vagueness grounds only once. In *Catholic Answers, Inc. v.*

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234. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

235. *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035 (D.C. Cir. 1980); see Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 280 (2003).

236. See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”); CHEMERINSKY, *supra* note 213, at 942.

237. *Grayned*, 408 U.S. at 108–09 (“A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”); CHEMERINSKY, *supra* note 213, at 942 (“[U]nder vague statutes and ordinances the government can choose who to prosecute based on their views or politics.”).

238. See CHEMERINSKY, *supra* note 213, at 942; Goldsmith, *supra* note 235, at 281.

239. *Grayned*, 408 U.S. at 109 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)) (internal quotation marks omitted).

240. CHEMERINSKY, *supra* note 213, at 942; Goldsmith, *supra* note 235, at 284.

241. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (“If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.”); *NAACP v. Button*, 371 U.S. 415, 432–33 (1963) (“[S]tandards of permissible statutory vagueness are strict in the area of free expression. . . . [The] government may regulate in the area only with narrow specificity.”); CHEMERINSKY, *supra* note 213, at 942. Courts use varying standards in evaluating vagueness challenges depending on the nature of the statute. *Vill. of Hoffman Estates*, 455 U.S. at 498. Economic regulations are less strictly evaluated, and civil statutes are allowed less certainty than criminal statutes. *Id.* at 498–99.

*United States*,<sup>242</sup> a church challenged section 4955,<sup>243</sup> Treasury Regulation section 53.4955-1,<sup>244</sup> and Treasury Regulation section 1.501(c)(3)-1(c)(3)(iii)<sup>245</sup> as unconstitutionally vague.<sup>246</sup> Based on the facts of the case, however, the district court dismissed Catholic Answers's claims as moot, since the IRS had already abated the disputed excise taxes.<sup>247</sup> Thus, the court failed to reach the merits of the vagueness challenge.<sup>248</sup> The Ninth Circuit affirmed the dismissal,<sup>249</sup> and the Supreme Court denied Catholic Answers's petition for writ of certiorari concerning the finding of mootness.<sup>250</sup>

It is unclear how a court would rule were it to hear a vagueness challenge to section 501(c)(3).<sup>251</sup> In *Big Mama Rag, Inc. v. United States*,<sup>252</sup> the D.C. Circuit considered a vagueness challenge to Treasury Regulation section 1.501(c)(3)-1(d)(3)(i).<sup>253</sup> Big Mama Rag, an organization that operated a feminist newspaper, appealed the IRS's determination that it did not qualify for exemption under 501(c)(3) because its activities were not "educational."<sup>254</sup> The IRS based its determination in part on the fact that Big Mama Rag's activities promoted lesbianism.<sup>255</sup>

Treasury Regulation section 1.501(c)(3)-1(d)(3)(i) defined "educational" for purposes of section 501(c)(3) as relating to instruction on subjects

242. No. 09-CV-670, 2009 WL 3320498 (S.D. Cal. Oct. 14, 2009), *aff'd*, 438 F. App'x 640 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1143 (2012).

243. I.R.C. section 4955 describes the excise taxes imposed for political expenditures. *See supra* notes 24–25 and accompanying text.

244. Treas. Reg. § 53.4955-1 (1995) provides further detail as to the excise taxes set forth in section 4955.

245. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) expands on the definition of "candidate" and political intervention set forth in section 501(c)(3). *See supra* notes 51–54 and accompanying text.

246. *Catholic Answers*, 2009 WL 3320498, at \*2. In its complaint, Catholic Answers alleged that the statute and regulations were "vague and lacking in terminology susceptible to objective assessment." First Amended Complaint for Tax Refund and Declaratory Judgment at ¶¶ 58–60, *Catholic Answers*, 2009 WL 3320498 (No. 09-0670) [hereinafter *Catholic Answers Complaint*].

247. *See Catholic Answers*, 2009 WL 3320498 at \*10.

248. *See id.* at \*9–10.

249. *Catholic Answers, Inc. v. United States*, 438 F. App'x 640, 641 (9th Cir. 2011).

250. *Catholic Answers, Inc. v. United States*, 132 S. Ct. 1143 (2012).

251. *See* Wilfred R. Caron & Deirdre Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J.L. & POL. 169, 196–97 (1985) (noting that "the political activity prohibition of section 501(c)(3), as interpreted in the regulations and IRS rulings, fails to meet constitutional standards," but predicting that "the Court would strive for a limiting construction like that in *Buckley*, rather than invalidate the provision altogether as unconstitutionally vague"); Galston, *supra* note 12, at 922–29 (stating that "it is possible that the standard is not precise enough to afford constitutionally sufficient notice to taxpayers attempting to comply with its strictures, nor to prevent arbitrary, viewpoint based enforcement," but concluding that the statute would likely pass intermediate scrutiny); Klapach, *supra* note 186, at 517 (noting possible arguments about "the inherent vagueness of § 501(c)(3) terms such as 'propaganda,' 'substantial part,' 'attempts to influence legislation,' and 'participation in a political campaign'").

252. 631 F.2d 1030 (D.C. Cir. 1980).

253. *Id.* at 1032.

254. *Id.* at 1032–33.

255. *Id.* at 1033.

“useful to the individual and beneficial to the community.”<sup>256</sup> The regulation allowed such educational organizations to advocate particular viewpoints only if the organization presented “a sufficiently full and fair exposition” of facts that would allow an individual to reach an independent conclusion on the issue.<sup>257</sup> *Big Mama Rag* challenged the regulation as unconstitutionally vague.<sup>258</sup> The circuit court affirmed the district court’s conclusion that the terms “useful” and “beneficial” as used by the regulation were too subjective, and thus unconstitutionally vague.<sup>259</sup>

The D.C. Circuit also invalidated the “full and fair exposition” standard for two reasons. First, it was unclear which organizations were required to meet this standard.<sup>260</sup> The regulation required organizations that advocated for a particular viewpoint to meet the standard, but did not define “advocacy.”<sup>261</sup> The Court noted that the subjective judgment of which views were “controversial” lent itself to the selective application of the “full and fair exposition” standard, in contravention of the vagueness doctrine.<sup>262</sup> Second, it was unclear what the “full and fair exposition” standard required.<sup>263</sup> The Court decried as too subjective that part of the test which asked whether the facts presented were sufficient “to permit an individual . . . to form an independent opinion,” since the answer would necessarily vary among individuals.<sup>264</sup> The Court noted the difficulty of distinguishing facts from opinions,<sup>265</sup> and questioned the relevance of distinguishing between statements that appeal to the mind as opposed to emotions.<sup>266</sup>

There are at least some parallels between the regulation at issue in *Big Mama Rag* and the current scheme defining political activity under section 501(c)(3).<sup>267</sup> While not couched in individualistic language, the current “facts and circumstances” test used by the IRS to identify political intervention<sup>268</sup> evinces the same “I know it when I see it”<sup>269</sup> ethos embodied by the “full and fair exposition” standard. Similarly, revenue

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256. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (1959).

257. *Id.*

258. *See Big Mama Rag*, 631 F.2d at 1034–35.

259. *Id.* at 1035–37.

260. *Id.* at 1037.

261. *Id.* The IRS attempted to equate advocacy groups with those taking stances on controversial issues. *Id.* at 1036 (citing 3 Int. Rev. Manual-Admin. (CCH) pt. 7751, § 345.(12), at 20,572 (Apr. 28, 1977)).

262. *Id.* at 1036–37. The Court found that the standard had, in fact, been applied selectively to a homosexual organization and others with views “not in the mainstream of political thought.” *Id.* at 1036.

263. *Id.* at 1037.

264. *Id.*

265. *Id.* at 1038.

266. *Id.* at 1038–39.

267. Klapach, *supra* note 186, at 517.

268. *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1421; *supra* Part I.C.

269. *Big Mama Rag*, 631 F.2d at 1040 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)); *see also* *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 290 (4th Cir. 2008) (“[A] ‘we’ll know it when we see it approach’ simply does not provide sufficient direction to either regulators or potentially regulated entities.”).

rulings that ask whether an organization's activities "evidence a bias"<sup>270</sup> afford implementing agents some "latitude for subjectivity"<sup>271</sup> in determining which organizations intervene politically.<sup>272</sup> Allegations of selective enforcement have been targeted at the IRS,<sup>273</sup> though an investigation by the Treasury Inspector General of Tax Administration in 2005 found no evidence of subjective investigation.<sup>274</sup> Additionally, the public reporting requirements of PACI<sup>275</sup> likely deter selective enforcement,<sup>276</sup> or will at least bring any such transgression to light.

Other hurdles exist for a vagueness challenge to the political prohibition.<sup>277</sup> The Supreme Court allows more statutory uncertainty when a law subsidizes, rather than regulates, speech.<sup>278</sup> In *National Endowment for the Arts v. Finley*,<sup>279</sup> the Court stated that "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe."<sup>280</sup> This principle may be relevant to charities, since the Court declared in *TWR* that "[b]oth tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system."<sup>281</sup> In *TWR*, the Court upheld section 501(c)(3)'s limit on

270. See Rev. Rul. 78-248, 1978-1 C.B. 154.

271. *Big Mama Rag*, 631 F.2d at 1037.

272. See Kemmitt, *supra* note 39, at 176 ("As currently written, the campaign activity prohibition requires the IRS to undertake a highly subjective, fact-intensive inquiry in order to determine what behavior is acceptable and what behavior is not.").

273. See TREASURY INSPECTOR GEN. FOR TAX ADMIN., REVIEW OF THE EXEMPT ORGANIZATIONS FUNCTION PROCESS FOR REVIEWING ALLEGED POLITICAL CAMPAIGN INTERVENTION BY TAX EXEMPT ORGANIZATIONS 1 (2005) [hereinafter TIGTA 2005 REPORT] ("There had been several media reports of allegations that the [Tax Exempt and Government Entities] Division was examining [political] activity just before the 2004 Presidential election for politically motivated reasons."); Galston, *supra* note 12, at 922 n.259 and accompanying text (citing *Branch Ministries, Inc. v. Rossotti*, 40 F. Supp. 2d 15, 19 (D.D.C. 1999) ("Plaintiffs also contend that the IRS selectively prosecuted the Church on the basis of its political and/or religious views in violation of the Equal Protection Clause and that the revocation violated the First Amendment and the Religious Freedom Restoration Act."); Tobin, *supra* note 186, at 1316 ("[S]ome critics of the IRS's actions argue that the IRS is engaged in politically-biased enforcement and is using the Internal Revenue Code to attack opponents of President Bush.").

274. TIGTA 2005 REPORT, *supra* note 273, at 2 ("[W]e did not identify any indications that the EO function inappropriately handled the information items we reviewed."); Galston, *supra* note 12, at 922-23.

275. See *supra* Part II.A.

276. Galston, *supra* note 12, at 923.

277. A vagueness challenge to the political activity prohibition might fail simply because intervention or participation in a political campaign is not so vague that an ordinary person must guess at its meaning. See Klapach, *supra* note 186, at 517.

278. See CHEMERINSKY, *supra* note 213, at 942 n.66.

279. 524 U.S. 569 (1998) (holding that a statute that granted discretion to the National Endowment for the Arts to consider standards of public decency in selecting grant recipients did not violate artists' First Amendment rights).

280. *Id.* at 589.

281. 461 U.S. 540, 544 (1983).

“substantial lobbying,”<sup>282</sup> sanctioning Congress’s choice “not to subsidize lobbying as extensively as” other activities of nonprofits.<sup>283</sup>

The holding in *Finley* is not dispositive of a hypothetical vagueness challenge to section 501(c)(3), however. *Finley* concerned a vagueness challenge to a statute that granted discretion to the National Endowment for the Arts in selecting recipients of government grants for the arts.<sup>284</sup> The Court ruled that the statute, which required the commissioner to consider “general standards of decency” and American values in selecting grant recipients,<sup>285</sup> passed constitutional muster because “[i]t is unlikely . . . that speakers will be compelled to steer too far clear of any ‘forbidden area’ in the context of grants of this nature.”<sup>286</sup> The Court recognized that “artists may conform their speech to what they believe to be the decisionmaking criteria in order to acquire funding,” but did not find this result “constitutionally severe.”<sup>287</sup> In contrast, 501(c)(3) organizations are likely to steer clear of the “forbidden area” because the penalty for their political activity is relatively harsh;<sup>288</sup> revocation of tax-exempt status would threaten the existence of most charities.<sup>289</sup> Additionally, the Court would likely look at the chilling of political speech as more constitutionally severe than the modification of artistic expression.<sup>290</sup> The Court in *Finley* also noted that the “general standards of decency” provision merely “add[ed] some imprecise considerations to an already subjective selection process,”<sup>291</sup> since the statute otherwise called for consideration of “artistic excellence” and merit.<sup>292</sup> This reasoning does not apply to section 501(c)(3)’s political prohibition.

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282. *Id.*

283. *TWR*, 461 U.S. at 544. *TWR* is not dispositive of a vagueness challenge to section 501(c)(3), since the plaintiff there did not challenge the statute on those grounds. *See Taxation with Representation of Wash. v. Regan*, 676 F.2d 715, 726 n.22 (D.C. Cir. 1982).

284. *Finley*, 524 U.S. at 572–73.

285. *Id.* at 576.

286. *Id.* at 588.

287. *Id.* at 589.

288. *See Guinane*, *supra* note 42, at 168 (“501(c)(3) organizations are risk averse when it comes to electoral activity . . . due to both the severity of possible sanctions and the high cost of time, money, and negative publicity caused by an IRS examination.”).

289. *Cf. Chisolm*, *supra* note 211, at 319 (“Thus, with very narrow exceptions, a section 501(c)(3) organization must steer carefully clear of all election-related activity. Failure to do so will almost certainly mark the end of its existence.”); Klapach, *supra* note 186, at 506 (“Many charities . . . simply could not survive without the competitive advantages that tax exemption under § 501(c)(3) affords them.”); Erik J. Ablin, Note, *The Price of Not Rendering to Caesar: Restrictions on Church Participation in Political Campaigns*, 13 NOTRE DAME J.L. ETHICS & PUB. POL’Y 541, 557 (1999) (discussing “revocation of a church’s tax-exempt status—on which many churches depend for financial survival”).

290. *Compare Finley*, 524 U.S. at 589, with *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (“The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.” (internal citations omitted)).

291. *Finley*, 524 U.S. at 590.

292. *Id.* at 572.

### 3. Overbreadth Analysis: How Much Regulation Is Too Much?

The political activity prohibition has also been challenged for overbreadth.<sup>293</sup> The doctrine of overbreadth provides that a law is unconstitutional if it regulates more speech than the Constitution allows to be regulated.<sup>294</sup> For a law to be unconstitutionally overbroad, however, the overbreadth must be “substantial.”<sup>295</sup> To meet the substantiality requirement, the challenger must do more than “conceive of some impermissible applications of a statute.”<sup>296</sup> Rather, there must be a “realistic danger” that the statute will chill or prohibit the speech of third parties not before the court.<sup>297</sup> Because the doctrine so focuses on the rights of third parties, litigants may bring overbreadth challenges even if their own speech is not subject to First Amendment protection.<sup>298</sup> To meet the substantiality requirement, then, the challenger must show that the law would be overbroad in a significant number of scenarios.<sup>299</sup>

Challenging section 501(c)(3)’s political activity prohibition for overbreadth would require proving that in a significant number of situations, the prohibition impermissibly restricts the First Amendment rights of charities.<sup>300</sup> This, however, first requires proof that the prohibition even constitutes a burden on charities’ First Amendment rights.<sup>301</sup> As discussed above, the success of such a claim is uncertain.<sup>302</sup> Indeed, the Supreme Court has already stated that “Congress has not infringed *any* First Amendment rights or regulated *any* First Amendment activity” through section 501(c)(3)’s restrictions.<sup>303</sup>

293. See *Catholic Answers, Inc. v. United States*, No. 09-CV-670, 2009 WL 3320498, at \*2 (S.D. Cal. Oct. 14, 2009), *aff’d*, 438 F. App’x 640 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1143 (2012); Complaint for Tax Refund at ¶ 89e, *Christian Coalition of Fla., Inc. v. United States*, 2009 WL 1890990 (M.D. Fla. Apr. 3, 2009) (No. 09-00144).

294. CHEMERINSKY, *supra* note 213, at 943; see also *Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574–75 (1987) (striking down a resolution that prohibited all First Amendment activity within an airport because it reached “even talking and reading, or the wearing of campaign buttons or symbolic clothing”); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66, 76–77 (1981) (striking down an ordinance enacted to prohibit nude dancing that unconstitutionally prohibited live entertainment of all kinds).

295. *Jews for Jesus*, 482 U.S. at 574 (citing *Houston v. Hill*, 482 U.S. 451, 458–59 (1987)); CHEMERINSKY, *supra* note 213, at 944.

296. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

297. *Id.* at 801.

298. *Jews for Jesus*, 482 U.S. at 574; *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). This is a departure from the usual rule that litigants may not assert third-party standing. See *Broadrick*, 413 U.S. at 610; CHEMERINSKY, *supra* note 213, at 946. The exception is allowed because those adversely affected by the overbroad law will, presumably, be deterred from engaging in otherwise protected speech. *Broadrick*, 413 U.S. at 612.

299. See CHEMERINSKY, *supra* note 213, at 945; Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 863 (1991).

300. See Galston, *supra* note 12, at 916.

301. See *id.* (“The answer to an overbreadth challenge thus presupposes an answer to the prior, substantive question of the appropriate reach of the Code’s political restrictions.”).

302. See *supra* Part II.B.

303. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546 (1983) (emphases added).

In *Catholic Answers*, the plaintiffs claimed that the political prohibition is overbroad because it “encompass[es] speech that is not . . . express advocacy” for or against a candidate’s election.<sup>304</sup> Their argument was that, while the ban may be constitutional for reasons specific to political speech, it is overbroad because it chills speech that is not political.<sup>305</sup> This reasoning would likely fail for a number of reasons<sup>306</sup> if a court were to reach the merits.<sup>307</sup> First, the court would likely apply a rational basis test, given that tax laws are considered matters of legislative grace.<sup>308</sup> Even if a challenger could first prove that the prohibition regulates conduct that is not political activity,<sup>309</sup> it would not be difficult for the Government to then articulate similar justifications for chilling conduct that is almost, but not quite, political intervention.<sup>310</sup> Additionally, the existing rationales in themselves might be enough to justify the prohibition of near-political conduct, since the rational basis test does not require narrow tailoring.<sup>311</sup> Moreover, courts view the overbreadth doctrine as “strong medicine,” and enforce it “only as a last resort.”<sup>312</sup> Wherever possible, courts will construe statutes narrowly in order to avoid overbreadth concerns.<sup>313</sup>

While constitutional challenges to the political activity prohibition on First Amendment grounds of vagueness and overbreadth face significant hurdles, their failure is not a certainty. Regardless of their likelihood of success, such challenges have been initiated and are likely to continue.<sup>314</sup> Amending the prohibition—its definition, its extent, and its penalties—can bolster the provision’s constitutional strength, and perhaps preempt many challenges. The practical limitations of planning and enforcement engendered by the current state of the prohibition could also be alleviated through change. With these issues in mind, this Note turns to the consideration of proposed alternatives.

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304. Catholic Answers Complaint, *supra* note 246, ¶ 69.

305. The Catholic Answers Complaint defined “political activity” as express advocacy, but this distinction is not necessary to the argument. The merit of the argument is the same regardless of how political activity is defined.

306. See Galston, *supra* note 12, at 915–18 (conducting an overbreadth analysis and concluding that there are “considerable obstacles” to a successful claim).

307. The court in *Catholic Answers* did not reach the merits of the constitutional claims. See *supra* notes 242–48 and accompanying text.

308. See *TWR*, 461 U.S. at 547 (“Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.”); Galston, *supra* note 12, at 916–17.

309. While commentators consider this proposition a foregone conclusion, it has not been so held by courts. Its legitimacy may be tied to the outcome of a vagueness challenge; both ask whether the “facts and circumstances” test can accurately define political activity. See *supra* Part II.B.2.

310. See *supra* note 213 (discussing the ease with which legitimate state interests are articulated under the rational basis test).

311. See *id.*

312. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

313. See *id.*; CHEMERINSKY, *supra* note 213, at 947.

314. See *supra* note 19 and accompanying text.



## III. EXAMINING PROPOSALS FOR CHANGE

Part III of this Note examines proposals to reform the ban put forth by practitioners, scholars, and commentators. As in Part I.D, this part groups proposals into three categories based on the aspect of the ban the author seeks to reform. It first discusses proposals to change the definition of prohibited political activity. It then turns to proposals that advocate for change in how much political activity should be permitted. Finally, it analyzes proposals to alter the penalties that the IRS may impose on charities violating the prohibition.

A. *Definitional Proposals: What Is Prohibited?*

The following are existing proposals put forth by academics and practitioners to change the definition of “political intervention” as it applies to section 501(c)(3) and the related sections and regulations. These proposals seek to cure the vagueness of the prohibition’s current definition by identifying with greater precision what does or does not constitute political intervention. They also strive to simplify planning by charities and compliance efforts by the IRS by redefining the process of judging whether an activity constitutes political activity.

In June 2009, OMB Watch<sup>315</sup> assembled a group of tax law experts and practitioners to examine whether and how to change the political prohibition.<sup>316</sup> The committee, headed by Greg Colvin (Colvin Committee), proposed six rules to interpret the current statute through new regulations governing the political activity of 501(c)(3) organizations.<sup>317</sup> The Colvin Committee’s first draft proposes a new, two-pronged definition of “participation or intervention in a campaign in support of or opposition to any candidate for elective public office.”<sup>318</sup> Under the first prong, an action that consists purely of speech will be political intervention only if (1) it refers to a clearly identified candidate, and (2) it reflects a view on that candidate.<sup>319</sup> This definition adopts the current IRS test for direct

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315. OMB Watch is a nonprofit research and advocacy group focusing on the federal budget, taxation, and nonprofit speech and advocacy rights. *About Us*, OMB WATCH, [http://www.ombwatch.org/about\\_us](http://www.ombwatch.org/about_us) (last visited Apr. 21, 2012).

316. OMB Watch, *Clarifying IRS Rules on Political Intervention: A Discussion Draft from the Colvin Committee I* (Mar. 24, 2011) (unpublished manuscript) (on file with author) [hereinafter *Colvin Committee Draft*].

317. *Id.*

318. *Id.* at 2. While the Committee states that no change to the statutory definition of “political intervention” is needed, the proposed tests for speech and conduct effectively redefine, or at least more clearly define, what is political intervention. *See id.* at 4.

319. *Id.* The Committee offers three exceptions to this rule. First, communications regarding public officials relating to actions they may yet perform in the current term, without mention of an upcoming election or candidacy, are tolerated. *Id.* at 2. Second, organizations may present information gathered using impartial methodology. *Id.* Third, organizations may respond to statements made by a candidate either about the organization itself or about a public policy issue on which the organization focuses. *Id.* at 3. Such response must be limited to the subject matter of the candidate’s statement, and must not be more publicly available than the candidate’s statement. *Id.* at 3.

lobbying.<sup>320</sup> Speech that meets these characteristics is presumptively political intervention, but the offending organization may rebut the presumption by showing that the statements furthered the organization's charitable purpose and were unrelated to any campaign.<sup>321</sup> Under the second prong, non-speech activities (resource deployment) are political intervention if they consist of a "gift, subscription, loan, advance, deposit, purchase, payment, or distribution of money or anything of value for the purpose of influencing any election for public office," or payment to any person for services rendered to a candidate.<sup>322</sup> This second definition adopts the language of the Federal Election Campaign Act<sup>323</sup> (FECA), and defers to FECA's definition of "contribution" at that time.<sup>324</sup>

Kay Guinane suggests that any new bright-line rule should be guided by the Supreme Court's conception of genuine issue advocacy found in *Federal Election Commission v. Wisconsin Right to Life, Inc. (WRTL)*.<sup>325</sup> In *WRTL*, the Court held that a communication that (1) focuses on a legislative issue, takes a position on the issue, and calls on the public to adopt that position; (2) without reference to any election, candidacy or political party; and (3) takes no position on a candidate's "character, qualifications, or fitness for office" is not the functional equivalent of express advocacy.<sup>326</sup> This proposal also follows the *WRTL* Court's assertions that neither the timing of a communication<sup>327</sup> nor the relevance of an issue to electoral debates may be considered to determine if the communication is electioneering,<sup>328</sup> in contravention of Revenue Ruling 2007-41.<sup>329</sup>

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320. See Treas. Reg. § 56.4911-2(b)(ii) (1990) (defining "direct lobbying" as communication that "refers to specific legislation . . . and . . . [r]eflects a view on such legislation"); Colvin Committee Draft, *supra* note 316, at 6.

321. Colvin Committee Draft, *supra* note 316, at 3.

322. *Id.* In-kind contributions are included in the definition of political intervention. *Id.*

323. See 2 U.S.C. § 431(8) (2006); Colvin Committee Draft, *supra* note 316, at 14.

324. Colvin Committee Draft, *supra* note 316, at 3.

325. 551 U.S. 449 (2007) (holding section 203 of the Bipartisan Campaign Reform Act, which restricted corporate expenditures for electioneering communications, unconstitutional as applied to ads that were not the "functional equivalent" of express advocacy); see also Guinane, *supra* note 42, at 167-78.

326. *WRTL*, 551 U.S. at 470; see also Guinane, *supra* note 42, at 167-68 (summarizing the test).

327. *WRTL*, 551 U.S. at 472 ("That the ads were run close to an election is unremarkable in a challenge like this.").

328. *Id.* at 474 ("Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election.").

329. See Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1424 ("Key factors in determining whether a communication results in political campaign intervention include the following: . . . Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office; . . . Whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election."); *supra* Part I.C. Miriam Galston notes that "the ["facts and circumstances"] method now employed by the IRS to determine whether a nonprofit organization has intervened in a political campaign is exactly the method the Court rejected in *Wisconsin Right to Life*." Galston, *supra* note 12, at 890.

Some have suggested the IRS adopt the “express advocacy” standard,<sup>330</sup> set forth in *Buckley v. Valeo*,<sup>331</sup> which once governed corporate expenditures under FECA.<sup>332</sup> Under this standard, charities would be able to engage in political speech that does not advocate, in express terms, for the defeat or election of a candidate for public office.<sup>333</sup> For nonspeech activities, charities would be able to engage in any advocacy conduct that does not constitute a direct campaign contribution.<sup>334</sup>

Chris Kemmitt proposes to define political activities as those that involve the expenditure of tax-exempt funds for partisan purposes.<sup>335</sup> Under this definition, activities for which a charity does not spend funds—a church endorsing candidates from the pulpit (and, by analogy, an organization’s communications to its members), distribution of voter guides not prepared by the organization, and certain candidate forums—would be permissible.<sup>336</sup> Activities such as political fundraising, donations to campaigns, and paid advertising would be impermissible.<sup>337</sup>

Joseph Klapach proposes two safe harbor provisions, which aim to take certain activities out of the realm of political intervention.<sup>338</sup> The first safe harbor provides that an organization will not have engaged in political intervention if it conducts its activities in “as neutral and nonpartisan a manner as is practicable under the circumstances,” even if those activities have the potential to influence voter opinion.<sup>339</sup> Neutrality would be determined based on three factors: “the manner of presentation, the manner of distribution, and the timing of the activity.”<sup>340</sup> Thus, political

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330. See Ablin, *supra* note 289, at 583–84; Carroll, *supra* note 211, at 259–63 (proposing to allow 501(c)(3) organizations to engage in political speech that is not express advocacy as defined by FECA through the creation of a separate segregated fund under I.R.C. section 527(f)); Chisolm, *supra* note 211, at 362 (“[T]he reach of [section 501(c)(3)] should be curtailed and clarified by defining participation and intervention to encompass only activities that are ‘contributions’ or ‘expenditures’ for purposes of the Federal Election Campaign Act.”).

331. 424 U.S. 1, 43–44 (1976) (per curiam) (construing section 608(e)(1) of FECA narrowly to limit expenditures for communications that advocate for the election or defeat of a candidate in express terms).

332. See 2 U.S.C. § 431(17), (18) (2006) (defining an “independent expenditure” as one made by a person “expressly advocating the election or defeat of a clearly identified candidate,” and defining “clearly identified” as using the name or photograph of, or unambiguous reference to, a candidate). *But see* Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) (invalidating 2 U.S.C. § 441b’s restrictions on corporate independent expenditures).

333. Chisolm, *supra* note 211, at 362. In *Buckley*, the Court defined express advocacy as any communication “containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” 424 U.S. at 44 n.52.

334. Chisolm, *supra* note 211, at 362.

335. See Kemmitt, *supra* note 39, at 176.

336. *Id.* at 177.

337. See *id.* This proposal was formulated with the free exercise concerns of the politico-religious activity of churches in mind. See *id.* at 176–77.

338. See Klapach, *supra* note 186, at 539–42.

339. *Id.* at 539.

340. *Id.* The test also considers and forgives special circumstances that would make pure neutrality impossible, such as when there are too many candidates to give equal treatment to all. *Id.* at 540.

intervention is determined by the manner in which the activity is executed, rather than the type of activity.<sup>341</sup> The second safe harbor provides that if an organization is not able to show neutrality as described above, the activity will not be considered political intervention if “the expression of favoritism for the candidate is peripheral to the furtherance of the organization’s legitimate exempt function.”<sup>342</sup> Consequently, if the political activity is merely incidental to an organization’s exempt function, it will not be penalized.<sup>343</sup>

### B. *Quantitative Proposals: How Much Is Prohibited?*

The previous section summarized existing proposals to change the definition of political intervention in relation to section 501(c)(3). This section discusses proposals that seek to change the amount of political activity that is permissible. These proposals strive to eliminate First Amendment concerns by giving charities the right to engage in some political speech.<sup>344</sup> They also hope to aid charities in planning how much activity they may conduct, and assist the IRS in determining when a charity has crossed the line.

Perhaps the most well-known proposal to change the quantitative scope of the political prohibition came from Congress. In 1996, Representatives Philip Crane and Charles Rangel proposed the Religious Political Freedom Act (Crane-Rangel Amendment).<sup>345</sup> The bill would have altered the political prohibition in the following ways: churches could spend up to 5 percent of their gross revenues on political campaigning, and up to 20 percent of their gross revenues on lobbying activities, but no more than 20 percent of their gross revenues on electioneering and lobbying combined.<sup>346</sup> The Crane-Rangel amendment would have applied only to churches, leaving non-religious charities under the existing regulatory scheme.<sup>347</sup> The bill was not passed.<sup>348</sup>

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341. *See id.* at 541 (“Under the proposed tests, IRS decision makers only need to consider (1) whether an activity has the potential to influence voter opinion and (2) if so, whether the organization has conducted the activity in a neutral fashion.”).

342. *Id.* at 540.

343. *See id.* Klapach provides the example of a tax-exempt mail bundling service formed to provide jobs for the mentally disabled. If the organization provides mail service to political campaigns, any influence on the associated election is incidental to the organization’s goal of providing such employment. *Id.* (citing Priv. Ltr. Rul. 91-52-039 (Sept. 30, 1991)).

344. *See* Jennifer Rigterink, Comment, *I’ll Believe It when I “C” It: Rethinking § 501(c)(3)’s Prohibition on Politicking*, 86 TUL. L. REV. 493, 514 (2011).

345. H.R. 2910, 104th Cong. (2d Sess. 1996).

346. *Id.*

347. *Id.* Other commentators have called for exceptions to the political activity prohibition specifically for churches. *See, e.g.,* Judy Ann Rosenblum, *Religion and Political Campaigns: A Proposal to Revise Section 501(c)(3) of the Internal Revenue Code*, 49 FORDHAM L. REV. 536, 555–56 (1981).

348. *See* Ablin, *supra* note 289, at 586.

Some have called for Congress to impute the “substantial part” test of section 501(c)(3)’s lobbying restriction<sup>349</sup> to the political prohibition.<sup>350</sup> Under that standard, a charity may engage in political activity as long as it does not constitute a substantial part of its activities. By the same logic, charities might make an election similar to the one made for lobbying under section 501(h),<sup>351</sup> to have the amount of their political activities held to a quantifiable standard.<sup>352</sup>

### C. Remedial Proposals: What Happens when Violations Occur?

This section summarizes proposals to change the repercussions faced by charities that violate the prohibition, however it is defined. These proposals potentially assuage the First Amendment concerns of the current prohibition, since lesser penalties will likely chill less speech.

Roger Colinvaux, after examining other proposals, asserts that if prohibiting political speech by charities is unconstitutional, the best solution is to “allow” political activity, but to tax it.<sup>353</sup> This proposal would eliminate revocation of exempt status as a penalty for political activity, while continuing the current taxation regime.<sup>354</sup> Colinvaux also proposes to discount the charitable deductions available to donors whose funds are used for political activity.<sup>355</sup> Under this system, Congress would not subsidize the political speech of charities, since no exempt funds could be used toward those activities.<sup>356</sup>

Johnny Rex Buckles proposes an entirely new statutory regime, centered on the distinction between independently and privately controlled charities.<sup>357</sup> An “independent” charity would be one whose governing board does not consist of a majority of “disqualified persons,” as defined by section 4946(a)(1) of the Code.<sup>358</sup> Political expenditure made by independent charities free from the influence of disqualified persons would not be taxed.<sup>359</sup> Those made by non-independent charities, or by

349. See I.R.C. § 501(c)(3) (defining a charity as an entity wherein “no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation”).

350. See Putney, *supra* note 210, at 32 n.88; Rigerink, *supra* note 344, at 514.

351. See I.R.C. § 501(h) (describing the permissible amount of lobbying by 501(c)(3) organizations that elect to have 501(h) apply).

352. See Guinane, *supra* note 42, at 170.

353. Colinvaux, *supra* note 19, at 478.

354. See *id.*

355. *Id.* at 481.

356. *Id.*

357. See Buckles, *supra* note 39, at 1108–11. This proposal falls under the “remedial” heading because it primarily alters who is penalized for political activity, and how such penalty is carried out.

358. *Id.* at 1109. Section 4946 defines “disqualified person” as one who is a substantial contributor to the organization, a foundation manager, owns 20 percent or more of either the organization’s voting power (if a corporation), profits interest (if a partnership), or beneficial interest of a trust that contributes to the organization, a family member of a disqualified person, a business owned by a disqualified person, or a government official. See I.R.C. § 4946(a)(1).

359. Buckles, *supra* note 39, at 1102.

independent charities whose decision to act has been influenced by a disqualified person, will be subject to an excise tax.<sup>360</sup> Under this proposal, revocation of exempt status would not be an available remedy for political activity, but charities would be subject to a ceiling on the amount of non-independent, taxed political expenditures incurred yearly.<sup>361</sup>

#### IV. WHAT SHOULD AND SHOULD NOT CHANGE

This Note seeks to advance proposals to change the political activity prohibition of section 501(c)(3) with the following goals in mind: ease of use for charities and the IRS, furtherance of congressional intent, and constitutionality. While Congress's motivation for enacting the prohibition may be uncertain,<sup>362</sup> it is clear that Congress intended for organizations exempt under 501(c)(3) to be kept out of politics.<sup>363</sup> Furthermore, there are three legitimate justifications for the prohibition, as discussed above: government should not, or does not want to, subsidize political speech and thus become entangled in partisanship (entanglement); public charities, if allowed to engage in politics, might serve private interests (private benefit); and that the charitable purpose is, by definition, incompatible with partisan politics (definitional).<sup>364</sup> This part evaluates the proposals discussed in Part III in light of these rationales and goals, and offers its own proposals.

##### A. Considerations in Crafting Proposals

At the outset, this Note concludes that quantitative proposals,<sup>365</sup> such as allowing charities to engage in some small amount of political activity, are not workable solutions to the problems posed by the current prohibition. Those proposals are inapposite to the rationales of the prohibition, and would likely lead to a swell of infringement, as some charities would use their newfound political freedom to test the boundaries of the prohibition.<sup>366</sup> Moreover, increased political participation would exacerbate the difficulties faced by the IRS in enforcing the ban,<sup>367</sup> as the number of charities engaging in political activity would increase dramatically. Finally, quantitative proposals aim primarily to cure constitutional questions surrounding the complete deprivation of political speech;<sup>368</sup> yet, based on existing case law, those questions might be

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360. *Id.* at 1101.

361. *Id.* at 1103–04. The amount exceeding the ceiling would be taxed at a rate of 200 percent, and would be paid by the organization's managers. *Id.* at 1104.

362. *See supra* Part I.A.1.

363. *See supra* note 41 and accompanying text.

364. *See supra* note 226.

365. *See supra* Part III.B.

366. *See supra* note 209 and accompanying text (discussing the possible snowball effect of allowing small amounts of political activity to go unnoticed).

367. *See supra* Part II.A.

368. *See supra* note 344 and accompanying text.

inconsequential.<sup>369</sup> Thus, quantitative proposals are more likely to harm, rather than enhance, section 501(c)(3).

This Note also acknowledges the inherent difficulty in crafting a singular definition of political activity,<sup>370</sup> which can take many and varied forms.<sup>371</sup> While bright-line rules such as the express advocacy<sup>372</sup> or direct lobbying standards<sup>373</sup> offer ease of application, they can also be circumvented by organizations that employ clever tactics to evade the strictures of the rule. Although the “facts and circumstances” test offers considerable gray area within which charities may operate politically,<sup>374</sup> they are at least subject to investigation under that test. Thus, bright-line rules must be carefully drafted to avoid compromising the spirit of the prohibition just for usability’s sake. Additionally, limiting the definition of political activity to expenditures<sup>375</sup> would not further the purpose of the prohibition. Under such a regime, charities would engage in unchecked advocacy in the form of oral expression. Finally, safe harbors are useful in creating exceptions to a general rule,<sup>376</sup> but will necessarily suffer the same weaknesses as the larger rule. For example, giving safe harbor to activity that is conducted in as neutral a manner as possible,<sup>377</sup> or that is more charitable than political,<sup>378</sup> calls for the same subjective assessment that the “facts and circumstances” test involves.

Remedial proposals<sup>379</sup> do not suffer the inherent weaknesses of the other types of proposals, but they must also be carefully crafted. They risk encouraging more political activity if sanctions are weakened, and exacerbating constitutional questions if they are strengthened. A common theme of the remedial proposals is eliminating revocation as a sanction and simply taxing political activity.<sup>380</sup> To the extent that entanglement concerns<sup>381</sup> justify the prohibition, this is a sound proposal. Taxing political activity would remove the government subsidy of those activities, while avoiding the potential constitutional issues associated with stripping all exemption benefits from an organization that engages in protected speech.<sup>382</sup> But, without the deterrent effect of revocation,<sup>383</sup> a modest excise tax would encourage more political activity than the current standard. Moreover, taxing political activity means that the activity is

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369. *See supra* Part II.B (discussing the difficulties facing different constitutional challenges to the prohibition).

370. *See supra* Part III.A.

371. *See supra* Part I.C.

372. *See supra* notes 330–34 and accompanying text.

373. *See supra* note 320 and accompanying text.

374. *See supra* notes 173–85 and accompanying text.

375. *See supra* notes 335–37 and accompanying text.

376. *See supra* notes 319, 338–43 and accompanying text.

377. *See supra* note 339 and accompanying text.

378. *See supra* note 342 and accompanying text.

379. *See supra* Part III.C.

380. *See supra* Part III.C.

381. *See supra* note 226 and accompanying text.

382. *See supra* Part II.B.1.

383. *See supra* notes 288–89 and accompanying text.

permitted.<sup>384</sup> This result is inconsistent with the private benefit and definitional rationales discussed above.<sup>385</sup>

Revocation should be preserved as a sanction, but its application should be retooled. Accordingly, this Note proposes two changes to section 501(c)(3), both of which focus on the remedial aspect of the political activity prohibition.

### *B. Implement a Bright-Line Rule for Revocation*

This Note first proposes to implement a bright-line rule, not for determining political activity, but for determining when revocation is an appropriate remedial measure. To make this determination, the IRS should adopt the test proposed by the Colvin Committee,<sup>386</sup> which applies the direct lobbying test to political communications.<sup>387</sup> Speech will constitute revocable political intervention when it refers to a clearly identified candidate and reflects a view on that candidate.<sup>388</sup> This proposal responds to the concern that, under the current regime, charities simply do not know when they are engaging in activity that warrants revocation.<sup>389</sup> The consequences of revocation are severe,<sup>390</sup> and to tie its use to the “facts and circumstances” test is to force charities to walk a minefield; charities and their legal counsel might interpret their actions differently than the IRS, and unwittingly stumble into revocation.<sup>391</sup> The proposed rule allows charities to feel confident that their actions, even those that might test the boundaries of the political activity prohibition, will not result in revocation unless they meet specific criteria.

Although revocation is currently used sparingly,<sup>392</sup> the fear felt by charities due to the uncertain application of such a strong measure is real and should be alleviated.<sup>393</sup> To ensure deterrence, the IRS should more readily use revocation where activity meets the test set forth above. Charities should know what activities are subject to revocation, yet they should also have good reason to avoid those activities.

This Note does not advocate a bright-line rule for determining all political speech. Given the substantial amount of infringement presently occurring,<sup>394</sup> the IRS should not be limited in its ability to issue excise taxes.<sup>395</sup> By narrowing the definition of political activity, a bright-line rule would necessarily exclude some activity that might otherwise be caught by

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384. *See supra* note 353 and accompanying text.

385. *See supra* note 226 and accompanying text.

386. *See supra* notes 316–17 and accompanying text.

387. *See supra* note 320 and accompanying text.

388. *See supra* note 319 and accompanying text.

389. *See supra* notes 171, 185 and accompanying text.

390. *See supra* note 289 and accompanying text.

391. *See supra* note 185 and accompanying text.

392. *See supra* notes 198–200 and accompanying text.

393. *See supra* notes 288–89 and accompanying text.

394. *See supra* notes 196–97 and accompanying text.

395. *See supra* notes 62–65 and accompanying text.



the “facts and circumstances” test.<sup>396</sup> The IRS should maintain flexibility in its capacity to tax political activity under a “facts and circumstances” approach given the myriad forms of political advocacy,<sup>397</sup> and in anticipation of forms yet unknown.

Revocation should be treated differently because it is the aspect of the prohibition that raises constitutional issues. The Supreme Court found section 501(c)(3) constitutional in the past because it viewed the restrictions as Congress’s choice not to subsidize political activities, while still giving charities the benefit of subsidy in other areas.<sup>398</sup> Yet this characterization is only true with respect to *taxation* as a penalty for political activity.<sup>399</sup> Revocation of tax-exempt status for political activity has the collateral effect of denying all subsidy—even of non-political activity.<sup>400</sup> Because of these concerns, the “facts and circumstances” test should not be used to determine when revocation is appropriate.

### C. Repeal Section 504

This Note next proposes the repeal of section 504, which prevents charities whose exempt status has been revoked from filing for exemption under section 501(c)(4).<sup>401</sup> Concurrently, a section should be enacted expressly stating that charities whose exempt status has been revoked may not refile for exemption under 501(c)(3). This modification serves three purposes. First, allowing re-exemption under 501(c)(4) will remove the constitutionally questionable proposition of losing *all* exempt benefits through revocation.<sup>402</sup> Second, this change will chill less protected speech. Organizations that value political discourse will venture closer to the prohibited zone,<sup>403</sup> knowing that violation will at worst strip them of some benefit (the charitable deduction), but not all benefits, since 501(c)(4) organizations are exempt.<sup>404</sup> Finally, allowing charities whose exempt status has been revoked simply to refile for exemption under 501(c)(3) undermines the deterrent effect of revocation.<sup>405</sup>

These proposals aim to provoke self-assessment from charities. By clearly articulating what conduct will result in revocation, and by allowing those revoked to re-file under 501(c)(4), charities are given the opportunity to decide whether they are better defined by section 501(c)(3) or 501(c)(4). By its plain text, section 501(c)(3) defines eligible organizations as ones that do not participate in political campaigns. By definition, then, a charity

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396. *See supra* notes 370–74 and accompanying text. For example, some communications might not clearly identify a particular candidate, but are sufficiently biased to constitute political activity subject to an excise tax.

397. *See supra* note 371 and accompanying text.

398. *See supra* notes 219–26 and accompanying text.

399. *See supra* note 382 and accompanying text.

400. *See supra* note 222, 289 and accompanying text.

401. *See supra* notes 67–70 and accompanying text.

402. *See supra* notes 222, 289, 398–400 and accompanying text.

403. *See supra* notes 239–40 and accompanying text.

404. *See supra* note 68 and accompanying text.

405. *See supra* note 71 and accompanying text.

that engages in political activity is simply not a charity. Revocation can be more accurately described as a re-categorization than a sanction—a shooing of an organization that has filed for exemption under the wrong heading.

These proposals strive to move the political activity prohibition toward a regime under which only those who have made a conscious choice to define their organization by political activity will face the harshest penalty. More innocent infringers need not worry about stumbling into revocation, and, as a result, should engage in more protected speech.

#### CONCLUSION

The effectiveness of any proposal will depend largely on how the IRS enforces the prohibition. Currently, most cases of infringement result in a warning letter.<sup>406</sup> Even if those violations are small,<sup>407</sup> allowing them to escape with only a warning forces the government to subsidize them—cumulatively, the effect is large. The proposals set forth above will only have their intended effect if the IRS more readily utilizes the sanctions at its disposal. More proactive enforcement, combined with the retooled remedial measures discussed above, will provide section 501(c)(3) with the proper balance of deterrence and constitutional protection.

While the IRS faces a daunting task in enforcing the political activity prohibition, Congress can help by tweaking its mechanics. The definitional and remedial changes discussed above will provide greater certainty for charities, clearer guidance for the IRS, and increased constitutional security for section 501(c)(3). Now more than ever, charities will need to advocate for their causes in ways that are not campaign intervention. The proposals discussed here will allow them to do that, while keeping the spirit of section 501(c)(3) intact.

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406. *See supra* note 201 and accompanying text.

407. *See supra* note 208 and accompanying text.