

EYES WIDE SHUT: THE AMBIGUOUS  
 “POLITICAL ACTIVITY” PROHIBITION AND ITS  
 EFFECTS ON 501(c)(3) ORGANIZATIONS<sup>1</sup>

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1. EYES WIDE SHUT (Warner Bros. 1999). *Eyes Wide Shut* is a 1999 Stanley Kubrick film that explores the uncertainty and ambiguity of the unconscious. See Roger Ebert, *Eyes Wide Shut*, July 16, 1999, <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/19990716/REVIEWS/907160302/1023>; I.R.C. § 501(c)(3) (2000).

## I. INTRODUCTION

Two weeks before the 2006 congressional elections, Pastor Mac Hammond of the Living Word Christian Center in Brooklyn Park, Minnesota, passionately introduced Congresswoman-elect Michele Bachmann at an event held at the church.<sup>2</sup>

[M]any of you know Michele, know of her pursuit of the United States . . . Congressional seat. . . . But ya [sic] know we can't publicly endorse as a church and would not for any candidate but I can tell you personally that I'm going to vote for Michele Bachmann, because I've come to know her, what she stands for, and I want her to share her testimony with you tonight.<sup>3</sup>

In this two-minute introduction, Pastor Hammond's praise for Michele Bachmann may have cost his church its tax-exempt status.<sup>4</sup> But § 501(c)(3) of the Internal Revenue Code ("the Code") is written so that neither Pastor Hammond nor the Internal Revenue Service ("I.R.S.") can be sure.<sup>5</sup>

A recent report by the I.R.S. indicates that nearly seventy-five percent of tax-exempt organizations are engaged in some type of political activity.<sup>6</sup> In the past two election cycles the I.R.S. has fielded over 200 complaints, half of which led to investigations of organizations' activities.<sup>7</sup> Only a handful have resulted in an organization losing its tax-exempt status under § 501(c)(3).<sup>8</sup>

A 501(c)(3) organization is an entity created for "religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals."<sup>9</sup> Organizations that qualify under

2. Andy Birkey, *Michele Bachmann Speech at Church Could Cause Tax Troubles*, MINNESOTA MONITOR, Oct. 15, 2006, <http://www.minnesotamonitor.com/showDiary.do?diaryId=524>.

3. *Id.* (quoting Pastor Mac Hammond).

4. *See id.*

5. *See* I.R.C. § 501(c)(3) (2000).

6. Internal Revenue Service, IRS Releases Political Activities Guidance, Political Intervention Examination Report, 2006 TNT 38-8 (Feb. 24, 2006); *see also* Remarks of Internal Revenue Commissioner Mark W. Everson at the City Club of Cleveland, Ohio (Feb. 24, 2006), <http://www.irs.gov/irs/article/0,,id=154788,00.html>.

7. *See* William Douglas, *Houses of Worship Fear Wrath of IRS During Election Season*, MCCLATCHY NEWSPAPERS, Oct. 31, 2006, available at <http://www.religionandsocialpolicy.org/newsletters/article.cfm?id=5415>.

8. *See* Everson, *supra* note 6.

9. I.R.C. § 501(c)(3) (2000).

§ 501(c)(3) are exempt from paying taxes because of their charitable or public service functions.<sup>10</sup> Additionally, taxpayers who contribute to 501(c)(3) organizations are allowed to deduct the amount from their individual income taxes.<sup>11</sup> While § 501(c)(3) status provides organizations with desirable tax advantages, organizations seeking to gain or maintain tax-exempt status must adhere to certain limitations.<sup>12</sup> Specifically, § 501(c)(3) prohibits political activity “on behalf of (or in opposition to) any candidate for public office.”<sup>13</sup> Unfortunately, § 501(c)(3) does not explicitly define “political activity,” nor is it defined in other sections of the Code that discuss political organizations.<sup>14</sup> The resulting ambiguity has made it difficult for tax-exempt organizations to confidently advocate for their causes and for the I.R.S. to investigate and review an organization’s tax-exempt status.<sup>15</sup>

Several courts have held that because taxpayer status is a matter of legislative grace, Congress may classify taxpayers and place certain limitations on them in order to maintain that status.<sup>16</sup> In *Regan v. Taxation With Representation*, the Supreme Court also held that allowing the I.R.S. to refuse to give an organization tax-exempt status did not infringe on the organization’s First Amendment right to free speech because the government is not required to subsidize political ideology through tax benefits.<sup>17</sup> But, in imposing those limitations, Congress cannot completely stifle speech.<sup>18</sup> This is precisely what occurs when an organization is held to a standard in which neither Congress and the I.R.S. nor the organization knows the requirements. Consequently, tax-exempt organizations are

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10. *Id.* § 501(a).

11. *Id.* § 170(a)(1).

12. *See Id.* § 501(c)(3).

13. *Id.*

14. *See id.*; *id.* §§ 170(c), 527, 4911, 4955, 6852.

15. *See* I.R.S., PROJECT 302 REPORT: POLITICAL ACTIVITIES COMPLIANCE INITIATIVE (2006), available at [http://www.irs.ustreas.gov/pub/irs-tege/final\\_paci\\_report.pdf](http://www.irs.ustreas.gov/pub/irs-tege/final_paci_report.pdf). However, in a letter to Treasury Secretary Henry Paulson and I.R.S. Commissioner Mark Everson, Representatives Adam B. Schiff and Walter B. Jones criticized the Political Activities Compliance Initiative for its continued ambiguity and called for I.R.S. guidance regarding what activities by tax-exempt organization constitute prohibited political activity. *See* Adam B. Schiff & Walter B. Jones, *Schiff, Jones Call IRS’s Political Intervention Rules Too Vague*, 2006 TNT 183-30 (Sept. 18, 2006). The representatives expressed concern that continuing investigations without a clear prohibition would infringe on the First Amendment rights of the organizations. *Id.*

16. *See* *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547-49 (1983).

17. *Id.* at 548.

18. *Id.*

forced to blindly choose between advocating for their cause and abstaining in order to maintain their § 501(c)(3) status.<sup>19</sup> Thus, it is imperative that Congress, the I.R.S., and the courts provide a clear and predictable definition for organizations to follow. This will enable the I.R.S. to effectively investigate and enforce the “political activity” prohibition and encourage compliance.

This comment addresses the problems of operating under an ambiguous statute and the benefits of refining the definition not only for organizations seeking to qualify for tax-exempt status but also for the I.R.S. Part Two focuses on the history of the “political activity” ban; specifically, how Congress, the I.R.S., and the courts have neglected to address the definitional issue resulting in the blind leading the blind. Part Three tracks the search for the meaning of “political activity” by Congress, the I.R.S., and the courts. This includes the text of § 501(c)(3), legislative history, common usage within the Code, and the apparent intent of Congress in other contexts. Part Four analyzes the role of the courts in defining “political activity,” how applying two different standards of review to “political activity” violations has blindsided 501(c)(3) organizations, and the impact this has had on preventing the formulation of a consistent definition of “political activity.” Finally, Part Five speculates on whether 501(c)(3) organizations will see a definition before campaigning begins for the 2008 presidential elections, or whether they will be forced to continue to operate with their eyes wide shut.

## II. THE BLIND LEADING THE BLIND: BACKGROUND OF § 501(c)(3)

There is a saying that if the blind lead the blind neither will be successful.<sup>20</sup> When the government is unclear as to the meaning of its own statutes and regulations, and organizations cannot see the line between permissible issue advocacy and prohibited “political activity,” the blind are attempting to lead the blind. The development of § 501(c)(3) demonstrates this phenomenon. While each branch has had the opportunity to open its eyes, each has avoided the underlying issue that it

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19. At an August 3rd meeting on I.R.S. enforcement of political activity rules, Bether Kingsley, an attorney at Harmon, Curran, Speilberg & Eisenberg, LLP, and other panelists, expressed concern that the current lack of enforcement has forced practitioners to give their clients a “risk analysis” rather than clear advice, resulting in many clients choosing not to engage in arguably legal activity. Fred Stokeld, *EO Panelists Say Clear Definition of Political Campaign Intervention by Charities Needed*, 2007 TNT 151-5 (Aug. 6, 2007).

20. See, e.g., *Matthew* 15:14 (King James) (“Let them alone: they be blind leaders of the blind. And if the blind lead the blind, both shall fall into the ditch.”).

cannot enforce a statute that it does not understand. This section identifies the failure of Congress, the I.R.S., and the Courts to recognize and adequately address the ambiguity issues in § 501(c)(3).

#### A. *Statutory Ambiguities*

Section 501(c)(3) was ambiguous from its inception. This may be partly attributable to Congress's original reluctance to include the provision in the Code.<sup>21</sup> The first prohibition against "political activity" by charities was proposed for inclusion in the Code in 1934.<sup>22</sup> However, the prohibition was cut from the act for being too broad.<sup>23</sup> It was not until twenty years later that another attempt was made to prohibit "political activity" by tax-exempt organizations.<sup>24</sup> The 1954 addition of the "political activity" ban to § 501(c)(3) was proposed by Senator Lyndon Johnson.<sup>25</sup> However, because Senator Johnson's amendment was made on the floor,<sup>26</sup> there was no opportunity for it to be debated in committee.<sup>27</sup> Accordingly, the legislative history contains no discussion of the intentions of Senator Johnson or the 83rd Congress's thoughts on the definition of "political activity."<sup>28</sup> Thus, the prohibition began without a clear indication of the activities the amendment sought to prohibit, and it remains with the same limited clarity today.

Since § 501(c)(3) was passed, there has been only one amendment attempting to shed light on the "political activity" prohibition. The amendment was an exceptionally minor change to include not only activities on behalf of a particular candidate,

21. See Erika Lunder, Cong. Research Serv., Tax-Exempt Organizations: Political Activity Restrictions and Disclosure Requirements 4 (2006) (citing 78 CONG. REC. 7831 (1934) (statement of Rep. Hill suggesting that, in addition to the ban on legislative lobbying, organizations should also be prohibited from engaging in partisan political propaganda)).

22. *Id.*

23. *Id.*

24. *Id.* (citing 100 CONG. REC. 9604 (1954)); see also David Menz, *Charities, Churches, Campaigns & Candidates*, 39 ARK. LAW. 8, 10 (2004).

25. See Lunder, *supra* note 21, at 4; Menz, *supra* note 24, at 10.

26. A floor amendment is "offered by an individual [Congressman] from the floor during consideration of a bill or other measure." U.S. Senate, Reference Page, [http://www.senate.gov/reference/glossary\\_term/floor\\_amendment.htm](http://www.senate.gov/reference/glossary_term/floor_amendment.htm) (last visited Sept. 15, 2007).

27. A committee is a "[s]ubsidiary organization of the Senate established for the purpose of considering legislation, conducting hearings and investigations, or carrying out other assignments as instructed by the parent chamber." U.S. Senate, Reference Page, [http://www.senate.gov/reference/glossary\\_term/committee.htm](http://www.senate.gov/reference/glossary_term/committee.htm) (last visited Sept. 15, 2007).

28. See Lunder, *supra* note 21, at 4; see also Menz, *supra* note 24, at 10.

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but also those activities which are in *opposition* to such a candidate.<sup>29</sup> While the 1987 amendment provided a bright-line rule that an organization may not engage in activity either in support of or in opposition to any candidate, the types of activities that constitute support or opposition remain ambiguous.<sup>30</sup>

### B. *Regulatory Ambiguities*

The Treasury has tried to fill in the gaps left by Congress by issuing Treasury regulations. However, they too have fallen short of crystallizing the concrete definition needed. In their discussion of tax-exempt purposes, the regulations state that an organization is not engaged in a tax-exempt purpose if a substantial portion of its activity involves “directly or indirectly . . . 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.”<sup>31</sup> Subsection (c)(3)(iii) elaborates by stating that “political activity” is the “publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.”<sup>32</sup> However, as evidenced by the recent cases contesting the denial or revocation of tax-exempt status based on an organization’s “political activities,” the Treasury regulations do little to alleviate the confusion.<sup>33</sup>

In February 2006, the I.R.S. released a fact sheet in an attempt to guide organizations and their leaders in the mid-term elections.<sup>34</sup> The 2006 I.R.S. Fact Sheet describes “political intervention” as “any and all activities that favor or oppose one or more candidates for public office.”<sup>35</sup> The prohibition includes endorsements, public statements, and contributions, as well as the distribution of statements prepared by others.<sup>36</sup> Additionally, a 501(c)(3) organization may not allow a candidate

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29. See Revenue Act of 1987, Pub. L. No. 100-203, § 10711(a)(2), 1987 U.S.C.A.N. (101 Stat. 1330) 464.

30. *Id.*

31. Treas. Reg. § 1.501(c)(3)-1(b)(3)(ii) (1990).

32. *Id.* § 1.501(c)(3)-1(c)(3)(iii).

33. See discussion *infra* Part III.B.

34. I.R.S. FS 2006-17, Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations (Feb. 2006), <http://www.irs.gov/newsroom/article/0,,id=154712,00.html>.

35. *Id.*

36. *Id.*

to use the organization's assets or facilities without giving other candidates a similar opportunity.<sup>37</sup>

However, 501(c)(3) organizations are allowed to participate in non-partisan voter education efforts, including registration and get-out-the-vote drives.<sup>38</sup> 501(c)(3) organizations are also allowed to participate in issue advocacy.<sup>39</sup>

The 2006 I.R.S. Fact Sheet illuminates the subtle differences between "political activity" and "issue advocacy," but the dividing line remains murky.<sup>40</sup> Is it voter education if the organization is only educating voters on supported issues and candidates? Is it issue advocacy when a minister preaches about abortion the Sunday before an election that hinges on voters' feelings on that particular issue? When does a leader of a tax-exempt organization express his own political preferences, and when does his speech indicate the beliefs of the organization?

### C. *Judicial Ambiguities*

Because the I.R.S. has failed to clarify its definition of "political activity," many organizations have been forced to go to court to defend their activities. However, rather than implement an objective standard, courts have applied a subjective "facts and circumstances" test to determine "political activity" violations under the Code.<sup>41</sup> This test allows the courts to evaluate each organization and its activities on an individual basis.<sup>42</sup>

While the development of the "facts and circumstances" test has aided in identifying "political activity," the main concern of the courts in the early cases was to refine the I.R.S.'s powers and

37. *Id.*

38. *Id.*; see also Lunder, *supra* note 21, at 9 (stating that such efforts are allowed so long as they are "unbiased in form, content, and distribution").

39. I.R.S. FS 2006-17, *supra* note 34.

40. Issue advocacy means that an organization may take a position on one particular issue, even if it is one that divides candidates, so long as the organization does not engage in political intervention. An example of issue advocacy that crosses the line into political intervention would be encouraging people to vote for a candidate based on his stance on an issue supported by the organization. *Id.*

41. Joseph S. Klapach, *Thou Shalt Not Politic: A Principled Approach to Section 501(c)(3)'s Prohibition of Political Campaign Activity*, 84 CORNELL L. REV. 504, 520 (1999); see also *United States v. Dykema*, 666 F.2d 1096, 1101-02 (7th Cir. 1981). Similar factors were considered by the Supreme Court in *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547-48 (1983). However, neither in *Dykema* nor in *Taxation With Representation* did the court refer to the factors considered as the "facts and circumstances" test. See *infra* Part IV.A for an expanded introduction to the "facts and circumstances" test.

42. See *Dykema*, 666 F.2d at 1102-03.

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methods of assessing tax-exempt status.<sup>43</sup> Thus, courts have generally neglected to define the actual factors the I.R.S. is allowed to consider. Consequently, organizations continue to engage in questionable activity and the I.R.S. continues to defend needless lawsuits from organizations who believe they have wrongly lost or been denied tax-exempt status.<sup>44</sup>

In summary, the history of § 501(c)(3), the Treasury regulations, and court decisions involving the interpretation of § 501(c)(3) have done little to clarify the ambiguous nature of that statute. Congress created § 501(c)(3) blindly when it enacted the amendment without any committee consideration or floor debate. The I.R.S. has continued the trend by failing to clarify “political activity” in its regulations. Finally, it has been left to courts to help the blind to see; however, they too have been unable to illuminate a distinct and precise definition. Thus, organizations still cannot see the requirements of the “political activity” prohibition and must blindly follow the government as it stumbles along.

### III. IN SEARCH OF A MEANING: DEFINING “POLITICAL ACTIVITY”

All great searches must start with a basic map. In the case of defining “political activity,” the map is the rules of statutory interpretation. The rules of statutory interpretation list a set of methods a court should use in giving meaning to a statute.<sup>45</sup> These rules include using the statute’s plain meaning, evidenced by legislative history and the statute as a whole,<sup>46</sup> its general “usage and custom,”<sup>47</sup> and the policy or legislative intent of the statute.<sup>48</sup>

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43. See *Taxation With Representation*, 461 U.S. at 547-49 (asserting that Congress has broad discretion to make taxation classifications).

44. While the courts have added to the ambiguity, ultimately it is not the judiciary’s role to make law and Congress must step up. See *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (stating that the court’s role is to interpret and enforce a statute based on its plain language).

45. See *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225-26 (11th Cir. 2001). However, while the canons of construction are helpful for determining the legislative intent, they are merely guidelines and not bright line rules for interpretation. See *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). The rules of interpretation applicable to other statutes were held to be applicable to tax regulations in *Dow Corning Corp. v. United States*, 984 F.2d 416, 419 (Fed. Cir. 1993).

46. See *CBS*, 245 F.3d at 1225-27.

47. See *Wasserbauer v. Marine Midland Bank—Rochester*, 400 N.Y.S.2d 979, 984 (N.Y. Supp. 1977); see also 73 AM. JUR. 2D *Statutes* § 69 (2001).

48. See *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.*, 115 P.3d 41, 48 (2005); see also 73 AM. JUR. 2D *Statutes* § 70.



This section looks first at the various methods of statutory construction. Then, using the framework of the rules of construction, it looks at the definitions used by the Federal Election Commission (“F.E.C.”)<sup>49</sup> in order to determine what the legislature may have intended § 501(c)(3) to include or exclude.

#### A. *Plain Language and Legislative History*

The starting point for determining the meaning of a statute is the language itself.<sup>50</sup> A plain language analysis requires the court to look at the actual language used in the statute and may include the use of dictionary definitions.<sup>51</sup> Courts and Supreme Court justices are divided, however, as to whether a plain language analysis should also include the legislative history when the statute is unambiguous.<sup>52</sup>

The plain language of § 501(c)(3) states in pertinent part that a tax-exempt organization as defined in § 501(c)(1)-(2) may 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.”<sup>53</sup> It is clear from the language of the statute that the prohibition against “political activity” is absolute,<sup>54</sup> yet it is uncertain what the prohibition includes.

Black’s Law Dictionary defines “political” as “relating to the conduct of government.”<sup>55</sup> Further, “to participate” or “intervene in” means to take part in or to be involved in something so as to hinder its actions.<sup>56</sup> These definitions seem to indicate that “political activity” is any act in which one takes part in or

49. The F.E.C. similarly places restrictions on the “political activity” of organizations based on their 501(c)(3) status. See 11 C.F.R. § 300.50 (2006).

50. See *Comm’r v. Engle*, 464 U.S. 206, 214 (1984).

51. *CBS*, 245 F.3d at 1223-24.

52. See *id.* at 1224 (stating that the court should not look to those “circumstances that gave rise to that language”). Compare *United States v. Gonzalez*, 520 U.S. 1, 6 (1997) (stating that legislative history only “muddies the water”), with *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 255 (1992) (Stevens, J., concurring) (quoting Judge Learned Hand “Common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it.” Thus, Justice Stevens concluded, “[L]egislative history helps to illuminate those purposes.”). Most courts are in agreement that using the legislative history to determine Congress’ intent is appropriate when the statute is ambiguous. See *CBS*, 245 F.3d at 1224.

53. I.R.C. § 501(c)(3) (2000).

54. The use of the word “any” implies that all “political activity” is prohibited. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 97 (1986). However, § 4955 seems to indicate that the prohibition is not absolute because an organization may engage in “political activity” if it pays an excise tax. See I.R.C. § 4955.

55. BLACK’S LAW DICTIONARY 1196 (8th ed. 2004).

56. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1183, 1646 (1986).

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interferes with actions relating to the government. Taken with the canon that tax laws of inclusion are to be construed broadly,<sup>57</sup> this definition implies that any activity of an organization remotely relating to government actions would constitute “political activity.” However, this results in an absurd interpretation because the prohibition on political activity for tax-exempt organizations is intended to prevent the federal government from subsidizing political speech, not to stifle speech entirely.<sup>58</sup>

Accordingly, the statute’s language is ambiguous, and it is appropriate to look at the legislative intent. In this case, the legislative history for the single amendment does not address “political activity.”<sup>59</sup> Thus, Congress’s intent is unclear and the courts must resort to looking at other sources for guidance.

### B. *Usage and Custom*

#### 1. Use of “Political Activity” Throughout the Internal Revenue Code

The general usage or custom rule states that the meaning of a word or phrase may be interpreted in the context of the area of law at issue.<sup>60</sup> In the case of the “political activity” prohibition, this means that other provisions in the Code involving “political activity” may be indicative of the meaning to be applied to § 501(c)(3).

The most direct reference to “political activity” in the Code is in § 527, which relates to political action committees.<sup>61</sup> Section 527 explicitly allows organizations that fall under that section to engage in “political activity” without paying taxes, so long as the activities are related to its tax-exempt function.<sup>62</sup> This section operates as the converse of § 501(c)(3), by allowing certain types of “political activity” if they are a specific function of the organization.<sup>63</sup> However, the Code’s definition of “exempt

57. *Comm’r v. Glenshaw Glass Co.*, 348 U.S. 426, 432 (1955).

58. *See Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1034-35 (1980); *see also supra* notes 16-19 and accompanying text.

59. *See Lunder supra* note 21 and accompanying text.

60. *See Wasserbauer v. Marine Midland Bank-Rochester*, 400 N.Y.S.2d 979, 984 (N.Y. Sup. Ct. 1977) (citing MCKINNEY’S CONSOL. LAWS OF N.Y., BOOK I. STATUTES, § 127) (“The usage and custom generated from a statutory scheme are . . . influential elements in any judicial review of the legislative intent of a particular statutory section.”).

61. *See* I.R.C. § 527 (2000).

62. *Id.*

63. *See id.* § 527(a), (e)(1), (2).

functions” under § 527, which are the equivalent of “political activity” under § 501(c)(3), is similarly ambiguous.

Sections 4911 and 4955 continue the trend in the Code of ambiguous definitions. Sections 4911 and 4955 both allow the I.R.S. to collect excise taxes from 501(c)(3) organizations that engage in prohibited activity.<sup>64</sup> Section 4911 authorizes the I.R.S. to impose a tax on expenditures for excess lobbying by 501(c)(3) organizations.<sup>65</sup> “Lobbying” is defined as any attempt to influence legislation.<sup>66</sup> Section 4955 authorizes the I.R.S. to impose a tax on organizations and their management for any political expenditure.<sup>67</sup> “Political expenditure” is any amount paid by a 501(c)(3) organization while participating or intervening in a campaign or on behalf of a candidate.<sup>68</sup> Moreover, these sections allow the I.R.S. to charge organizations a fine without defining the level of egregiousness which may give rise to such a fine.<sup>69</sup>

Similarly, § 6852 authorizes the I.R.S. to impose income and excise taxes on 501(c)(3) organizations which are engaged in political activity, either for the year of the activity or the preceding year as a punishment for that activity.<sup>70</sup> Again, the I.R.S. is authorized to punish without providing a precise meaning for “political activity.” Thus, tax-exempt organizations are punished for non-compliance with a standard that is unknown.

Finally, § 170 allows a deduction for taxpayers making charitable contributions to 501(c)(3) organizations.<sup>71</sup> “Charitable contribution” is defined as a contribution of a gift to or for the use of a 501(c)(3) organization which is not disqualified for lobbying or political activity.<sup>72</sup> This section establishes a relationship between the status of a charitable organization and the taxpayer.<sup>73</sup> However, it does not provide the taxpayer with guidance to determine if the tax-exempt organization to which the taxpayer wishes to contribute is in compliance with § 501(c)(3).

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64. *Id.* §§ 4911, 4955.

65. *Id.* § 4911.

66. *Id.*

67. *Id.* § 4955.

68. *Id.* § 4955(d)(1).

69. *See id.* § 4955(b); *see also id.* § 4911.

70. *See id.* § 6852.

71. *Id.* § 170(a), (c).

72. *Id.* § 170(c).

73. *Id.* § 170(a), (c).

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These sections of the Code demonstrate that application of the usage and custom rule of construction does not help in determining the meaning of “political activity.” Usage and custom are only helpful when there is an established usage or custom at which to look. However, in the context of “political activity” by tax-exempt organizations, the term seems to be ambiguous in all instances of the Code, not just § 501(c)(3).

## 2. Interpretation of “Political Activity” in the Federal Election Code

In determining the meaning of “political activity” as it relates to tax, it is useful to look at other contexts in which 501(c)(3) organizations are subject to a “political activity” restriction. Like the I.R.C., the Federal Election Commission Act (“FECA”) prescribes certain rules and limitations on “political activity” by tax-exempt organizations.<sup>74</sup> Additionally, because the FECA is focused on election law, its definition of “political activity” is helpful in ascertaining Congress’s intent for the I.R.C. “political activity” ban.

The FECA was enacted in 1971 to prevent “corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office.”<sup>75</sup> In 2002, Congress passed the Bipartisan Campaign Reform Act, an amendment to FECA, to further limit the influence of large financial donations in elections.<sup>76</sup>

The FECA defines two types of “political activity”: generic and federal.<sup>77</sup> “Generic political activity” similar to the § 501(c)(3) definition, states that “political activity” is any activity in support of or in opposition to a political party, as opposed to a candidate for government office.<sup>78</sup> “Federal political activity,” on the other hand, has a much more elaborate definition.<sup>79</sup> “Political activity” under this section includes voter identification and get-out-the-vote efforts such as printing and distributing voting information, assisting with registration, telemarketing, providing rides to polls, and acquiring

74. 11 C.F.R. § 300.50 (2006).

75. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (per curiam).

76. 11 C.F.R. § 300.1 (2007); Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U.L. REV. 625, 632-33 (2007).

77. See 11 C.F.R. §§ 100.24 (federal), 100.25 (generic) (2006). Both sections refer to “political activity” as “campaign activity,” but for simplicity, this comment will continue to use the phrase “political activity.”

78. *Id.* § 100.25; see also I.R.C. § 501(c)(3) (2000).

79. See 11 C.F.R. § 100.24.

information about voters in order to understand voting trends and predict future voter turnout.<sup>80</sup> However, under this section, an organization is still not permitted either to engage in activity that clearly supports one candidate over another or to distribute campaign materials<sup>81</sup>

This definition is much more comprehensive than the guidance provided by the Code or Treasury regulations.<sup>82</sup> Unfortunately, because the FECA is attempting to encourage responsible election activity, not prohibit it altogether, it only provides a framework for determining Congress's intent for the Code and cannot be interpreted as a comprehensive list of activities intended to be included in § 501(c)(3).<sup>83</sup>

### 3. Administrative Meaning

There is no clear meaning apparent from the plain language of § 501(c)(3), nor is there a common meaning ascertainable from the use of "political activity" in other sections of the Code or the FECA. Consequently, it is left to the I.R.S. through the Treasury Department to define "political activity."<sup>84</sup> The Commissioner of the I.R.S. has broad authority to make regulations regarding the interpretation and application of the Code.<sup>85</sup> The I.R.S. is authorized to issue guidance to taxpayers and clarify rules to encourage § 501(c)(3) organizations' compliance.<sup>86</sup>

Further, the Supreme Court recognized administrative authority to interpret statutes when it held in *Chevron U.S.A. Inc. v. Natural Resources Defense Council* that when construing a statute, the court should defer to the definition provided by the

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80. *Id.*

81. *Id.*

82. *See* I.R.C. § 501(c)(3); Treas. Reg. 1.501(c)(3) (1990).

83. However, based on their similarity, the I.R.S. likely took the FECA regulations into account in compiling the 2006 Fact Sheet.

84. *See* I.R.C. § 7801 (delegating authority to the Treasury Department to administer and enforce the Internal Revenue Code through the Internal Revenue Service); *see also* *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006) (stating that administrative interpretation of ambiguous statutes is only appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority") (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)).

85. I.R.C. § 7805(a) ("[T]he Secretary shall prescribe all needful rules and regulations for the enforcement of [Title 26], including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue."); *see also* *Comm'r v. Engle*, 464 U.S. 206, 227 (1984); *United States v. Correll*, 389 U.S. 299, 306-07 (1967).

86. *See* I.R.C. § 7805.

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administrative agency charged with implementing the statute.<sup>87</sup> Under *Chevron*, a court must defer to the administrative agency's interpretation only if the agency has the authority to regulate and the regulation is reasonable.<sup>88</sup> First, in construing the agency's interpretation, the court must consider "whether Congress has directly spoken to the precise question at issue."<sup>89</sup> If the congressional intent is clear, then the court applies that meaning and no further analysis is necessary.<sup>90</sup> If Congress has not addressed the issue, then instead of applying its own definition as would be the case in the absence of administrative regulations, the court must look at the construction used by the agency.<sup>91</sup> The agency's interpretation must be based on a "permissible construction of the statute."<sup>92</sup> However, the agency's interpretation does not have to be the only one possible, it merely must be reasonable.<sup>93</sup> The reasonability standard only requires a fit between the statute and the regulation; it does not have to be the best interpretation, nor the interpretation preferred by the court.<sup>94</sup>

While these rules are helpful, problems arise when the agency's definition is also ambiguous.<sup>95</sup> The I.R.S., through regulations and its recent fact sheet, has unsuccessfully tried to clarify the restrictions on "political activity."<sup>96</sup> Notably, of the six sections of the Code that mention "political activity," the I.R.S.

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87. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 843-45 (1984). While *Chevron* is applicable to Treasury regulations, because of the explicit power vested in the Commissioner of the I.R.S. and the Secretary of the Treasury Department to enact and enforce regulations, the Court recognized a degree of deference to Treasury regulations prior to the general deference promulgated in *Chevron*. See *Orgill Bros & Co. v. United States*, 375 F. Supp. 125, 127 (W.D. Tenn. 1974) ("Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes.") (quoting *Comm'r v. S. Tex. Co.*, 333 U.S. 496, 501 (1948)).

88. *Chevron*, 467 U.S. at 843-44; see also *Cottage Savings Ass'n v. Comm'r*, 499 U.S. 544, 560-61 (1991) (confirming that the I.R.S. has the power to promulgate and enforce tax regulations).

89. *Chevron*, 467 U.S. at 842.

90. *Id.* at 843. In determining congressional intent, the court applies the general rules of construction, looking first at the plain meaning, then legislative intent, and finally context and usage. See *supra* Part III.A-B.

91. *Chevron*, 467 U.S. at 843.

92. *Id.*

93. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981).

94. *Id.*

95. See *Auer v. Robbins*, 519 U.S. 452, 461-63 (1997) (suggesting that while the court must still defer to a reasonable regulation even if it too is ambiguous, an ambiguous regulation creates problems with application).

96. See *Treas. Reg. § 1.501(c)(3)-1(b)(3)(ii), (c)(3)(iii)* (1990); see also *I.R.S. FS 2006-17*, *supra* note 34 (discussing types of political activity the I.R.S. examined during the 2004 election cycle).

has only issued regulations for three.<sup>97</sup> Moreover, none of those regulations shed any light on the activities considered by the I.R.S. to constitute “political activity.” For example, Treasury Regulation 1.501(c)(3)-1(b)(3) states that an organization is not established for an exempt purpose if it engages in “political activity.”<sup>98</sup> The regulation explains that the articles of organization cannot empower the organization to “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.”<sup>99</sup> Disappointingly, this is another regulation which does not elaborate on what activity constitutes participation or intervention in a political campaign.

The ambiguity of the Treasury regulations makes it difficult for the courts to apply *Chevron* and defer to the administrative definition. First, if the regulation is just as ambiguous as the statute, it is not entitled to deference under *Chevron*, and the courts may then construe § 501(c)(3) without reference to the Treasury regulations.<sup>100</sup> Essentially, the courts are allowed to circumvent Congress and the I.R.S. and make their own Tax Code. Second, if the regulation is not ambiguous because it clearly supports the statute, the courts are stuck applying a regulation that does not mean anything and thus does not really provide guidance to tax-exempt organizations.

Further, as with the statutory interpretation of § 501(c)(3), comparison of Treasury Regulation 1.501(c)(3) to related regulations is not helpful. Treasury Regulation 1.170, regarding whether certain charitable contributions are tax-deductible, merely points the taxpayer to 1.501(c)(3) to “determin[e] whether an organization is attempting to influence legislation or is engaging in political activities.”<sup>101</sup> Treasury Regulation 1.527-2, which provides definitions for certain terms used in § 527, asserts that an exempt function under § 527 “includes all activities that are directly related to” political campaigns and indirect activities “necessary to support the directly related

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97. See Treas. Reg. § 1.170-1(f)(2)(ii) (1972) (the I.R.S. does not allow charitable deductions for contributions to organizations involved in political campaigns); *id.* § 1.501(c)(3)-1(b)(3), 1(c)(3)(iii) (1990) (setting out organizational and operational tests to determine whether an organization’s legislative or political activity disqualifies it from being exempt under § 501(c)(3)); *Id.* § 1.527-2 (as amended in 1985) (setting out the definition and characteristics of a “political organization”).

98. *Id.* § 1.501(c)(3)-1(b)(3) (1990).

99. *Id.* § 1.501(c)(3)-1(b)(3)(ii).

100. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

101. Treas. Reg. § 1.170-1(f)(2) (1972).

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activities of the political organization.”<sup>102</sup> This definition appears to be broader than the definitions for §§ 1.501(c)(3) and 1.170 because it includes “all activity” on behalf of a political campaign and “indirect” activities that support the direct activities.<sup>103</sup> This would imply that Congress intended § 501(c)(3)’s prohibition of “political activity” to include all direct and indirect activities necessary to implement an organization’s political agenda.<sup>104</sup> Accordingly, while the application of 1.527-2 aids in understanding the extent of the activity involved, as with the other regulations regarding “political activity,” it falls short of actually describing the direct activities to be included.<sup>105</sup> The regulations therefore have no effect on the interpretation of “political activity” because they fail to mention the phrase or merely repeat the verbiage already used in § 501(c)(3).

Recently the I.R.S. issued a Fact Sheet intended to assist tax-exempt organizations’ preparation for the 2006 congressional elections and avoid prohibited “political activity.”<sup>106</sup> The Fact Sheet is the most comprehensive effort by the I.R.S. to define and enforce prohibited “political activities.”<sup>107</sup> Both the Fact Sheet and the Revenue Ruling divided possible “political activity” into six different areas where violations are the most common.<sup>108</sup> First, the Fact Sheet addressed voter education, registration, and get-out-the-vote drives.<sup>109</sup> This includes publishing candidate voting records or platforms, educating voters on particular issues,<sup>110</sup> registering new voters, and encouraging people to vote.<sup>111</sup> Such activity is generally permitted so long as it occurs in a non-partisan manner.<sup>112</sup> Organizations usually get into trouble when they attempt to advocate for or against particular candidates or fail to include candidates in the materials they

102. *Id.* § 1.527-2(c)(1) to (2) (as amended in 1985).

103. *Id.*

104. *See* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (affirming that a statute and its regulatory applications must be read in context with other provisions in order to understand the “statutory scheme”).

105. *See* *Treas. Reg. § 1.527-1 to 2* (as amended in 1985).

106. *See* *I.R.S. FS 2006-17*, *supra* note 34.

107. The I.R.S. has since issued Revenue Ruling 2007-41. *Rev. Rul. 2007-41, 2007-25 I.R.B. 1421* (applying the guidance of the Fact Sheet to twenty-one hypothetical situations in an effort to further clarify the prohibition). However, while the ruling is a “great advance in I.R.S. rulemaking . . . it is still not a bright line.” *See* *Stokeld*, *supra* note 19, at 2.

108. *See* *I.R.S. FS 2006-17*, *supra* note 34; *Rev. Rul. 2007-41*, *supra* note 107.

109. *I.R.S. FS 2006-17*, *supra* note 34, at 2, 6-7.

110. Generally this is referred to as issue advocacy. *See id.* at 5-6.

111. *I.R.S. FS 2006-17*, *supra* note 34, at 2, 6-7.

112. *Id.* at 2.



distribute.<sup>113</sup> Further, an organization involved in voter registration must attempt to register all interested voters, not just those interested in one particular party.<sup>114</sup>

Second, the I.R.S. limits an organization's ability to have candidates speak to its members.<sup>115</sup> An organization may only invite a candidate to speak in his capacity as such, if the invitation is open to all candidates seeking the same office.<sup>116</sup> Further, the organization may not show any support or opposition to the candidates.<sup>117</sup> A candidate may also make an appearance in his individual capacity if he has non-political reasons to appear before the particular organization.<sup>118</sup> An organization should be cautious, however, to clearly indicate the reasons for the candidate's appearance.<sup>119</sup>

Third, an organization may engage in issue advocacy.<sup>120</sup> This type of activity is the most dangerous because of the likelihood that it *is* related to pending elections and thus political campaign intervention.<sup>121</sup> The I.R.S. Fact Sheet and Revenue Ruling list the following key factors of a communication as indicative of "political activity" beyond issue advocacy:

- Identifies one or more candidates
- Expresses approval or disapproval of a candidate's position and/or actions
- Occurs close in time to an election
- Is an issue that distinguishes candidates

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113. *See id.* at 2-7; *see also* Branch Ministries v. Rossotti, 211 F.3d 137, 139 (D.C. Cir. 2000) (holding church violated "political activity" ban by placing advertisement four days prior to 1992 presidential election urging voters not to elect Bill Clinton); Ass'n of the Bar of the City of N.Y. v. Comm'r, 858 F.2d 876, 877 (2d Cir. 1988) (holding that the bar association's ranking of judicial candidates violated the ban on "political activity").

114. I.R.S. FS 2006-17, *supra* note 34, at 2.

115. *Id.* at 3-4.

116. *Id.*

117. *Id.* at 4.

118. *Id.* at 3.

119. *See id.* at 4. (emphasizing that candidates may attend "public" events of a tax exempt organization in their "non-candidate" capacity, but warning that the organization should take steps to insulate itself from possible violations). *Compare with supra* notes 2-4 and accompanying text (discussing how a pastor in Minnesota may have violated his church's tax exempt status by endorsing a candidate and by passively allowing the candidate to talk about her campaign during the church service). *See also* Rev. Rul. 2007-41, *supra* note 107, at 1423-24.

120. I.R.S. FS 2006-17, *supra* note 34, at 5.

121. *Id.* at 6.

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- Frequency of occurrences or is an issue not part of the organization's expressed purpose.<sup>122</sup>

As with the other forms of permissible activity, an organization involved in issue advocacy must walk a fine line in order to avoid violating the "political activity" prohibition.<sup>123</sup>

Lastly, the I.R.S. discusses three minor activities that could be classified as "political activity": leadership activities, business activities, and websites.<sup>124</sup> Leaders of organizations are prohibited from making partisan comments while engaged in official functions and are encouraged to clarify the personal nature of comments made outside of their role as leaders of tax-exempt organizations.<sup>125</sup> An organization may also engage in some business activity with candidates, such as selling membership lists, renting meeting space, or accepting paid political advertising.<sup>126</sup> However, these opportunities must be available to all candidates, and the rates must be consistently applied.<sup>127</sup> Finally, if an organization chooses to host a web site, it must be cautious that the website's contents are not political and ensure the web site does not have links to politically biased websites.<sup>128</sup>

The I.R.S. has made substantial strides to define "political activity." However, as evidenced by recent congressional elections and further calls for improvement,<sup>129</sup> the I.R.S. still has a long way to go. While the Fact Sheet is a good step toward clarification, it does not have the force of law, and there has not been a judicial or legislative determination of whether an organization will be able to use adherence to the Fact Sheet guidelines in defense of its activities.

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122. *Id.*; Rev. Rul. 2007-41, *supra* note 107, at 1424.

123. For example, in *In re U.S. Catholic Conference*, the court reviewed whether the Catholic Church's anti-abortion efforts constituted "political activity" or mere issue advocacy. Unfortunately, the Supreme Court and the Second Circuit eventually found that the plaintiff lacked standing to bring suit and avoided reviewing the tax-exempt status of the Catholic Church. *See* *Abortion Rights Mobilization Inc., v. Baker (In re U.S. Catholic Conference)*, 885 F.2d 1020, 1031 (2d Cir. 1989).

124. I.R.S. FS 2006-17, *supra* note 34, at 2-3, 8-9.

125. *Id.* at 2; *see also* Paul Streckfus, *Did the IRS Shoot Itself in the Foot By Going After NAACP?*, TAX NOTES, 1445 (Mar. 21, 2005) (discussing the I.R.S.'s investigation of NAACP Board Chair Julian Bond for allegedly making partisan comments during remarks at the NAACP National Convention in 2004).

126. I.R.S. FS 2006-17, *supra* note 34, at 8.

127. *Id.*

128. *Id.* at 8-9.

129. *See supra* notes 2-4 and accompanying text; *supra* notes 15 & 34, at 5.

## IV. BLINDSIDING TAX-EXEMPT ORGANIZATIONS: INCONSISTENT STANDARDS OF REVIEW

Tax-exempt organizations are blindsided when they are held to an unidentifiable standard and cannot accurately predict whether they will be held accountable. This situation is exacerbated by the current inconsistent standards of review used by courts in cases involving violations of “political activity” restrictions.<sup>130</sup> When reviewing Tax Code violations, the courts use a “facts and circumstances” test.<sup>131</sup> When reviewing Federal Election Code violations, courts use an “express advocacy” test.<sup>132</sup> However, because the courts are reviewing “political activity” as applied to 501(c)(3) organizations under both standards, the conclusion becomes based on the prosecuting agency, rather than the nature of the violation itself. Accordingly, the definition of “political activity” becomes incomprehensible and organizations are ambushed when compliance under one standard results in violation under the other.

A. *Inconsistent Tests: The “Facts and Circumstances” Test and the “Express Advocacy” Test*

Generally, “political activity” violations are reviewed using the “facts and circumstances” test when allegations are brought by the I.R.S., and the “express advocacy” test when allegations are brought by the F.E.C.<sup>133</sup> Under the “fact and circumstances” test, the court considers all of the actions of an organization.<sup>134</sup> This method affords the courts broad discretion in determining if an organization engaged in improper activity.<sup>135</sup> While broad discretion allows review on a case by case basis, it also can result

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130. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357-59 (1997). The court is not required to apply the same standard to every type of violation. For example, challenges to regulations that implicate the First Amendment are reviewed under a rational relationship, intermediate or strict scrutiny standard. Katherine C. Den Bleyker, *The First Amendment Versus Operational Security: Where Should the Milblogging Balance Lie?*, 17 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 401, 412-15 (2007) (discussing the three general levels of scrutiny for First Amendment cases); see generally *Sable Comm'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *NAACP v. Button*, 371 U.S. 415 (1963); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988). However, in these cases, the choice of which standard to apply is based on the nature of the language, not the identity of the prosecuting agency. *Id.*

131. See Klapach, *supra* note 41, at 520.

132. *Buckley v. Valeo*, 424 U.S. 1, 29 (1976) (per curiam).

133. See Klapach, *supra* note 41, at 520; *Buckley*, 424 U.S. at 29.

134. See Klapach, *supra* note 41, at 520.

135. See Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*, 31 *WM. MITCHELL L. REV.* 55, 106 (2004).

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in inconsistent application and, potentially, abuse.<sup>136</sup> These dangers are more likely when the reviewer has no standard upon which to evaluate the facts and circumstances of the activity.

*United States v. Dykema* presents the most detailed outline of the factors considered in the “facts and circumstances” test.<sup>137</sup> In *Dykema*, the Seventh Circuit considered whether an I.R.S. inquiry into the tax-exempt status of the Christian Liberty Church was appropriate when auditing the church’s pastor, Dale Dykema.<sup>138</sup> The I.R.S. requested documents relating to the church’s activities in order to determine if the church could properly receive the charitable contributions claimed as a deduction by Dykema.<sup>139</sup> The Seventh Circuit held that the I.R.S. had the right to request such information so long as the investigation was legitimate and relevant.<sup>140</sup> More importantly, the court discussed factors to review in determining tax-exempt status.<sup>141</sup>

The factors include:<sup>142</sup>

1. Is the organization properly organized?<sup>143</sup>
2. Is the purpose of the organization exclusively for one of the stated purposes allowed in 501(c)(3)?<sup>144</sup>
3. Does a substantial part of the activities consist of attempting to influence legislation?<sup>145</sup>
4. Does the organization participate in political campaigns?<sup>146</sup>

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136. *Id.*

137. *United States v. Dykema*, 666 F.2d 1096 (7th Cir. 1981).

138. *Id.* at 1098.

139. *Id.*

140. *Id.*

141. *Id.* at 1100-04.

142. Only the factors pertinent to “political activity” have been listed. Factors not listed include those relating to whether financial earnings of the organization benefit an individual and other financial considerations. *Id.* at 1102-03.

143. *Id.* at 1100.

144. *Id.* This inquiry requires the I.R.S. to “survey all of the activities of the organization,” including publications, financial books, minutes, and memoranda. *Id.*

145. *Id.* at 1101. A review of the organization’s entire activity is necessary to determine whether the activities reach the “substantial” threshold, including financial records, correspondence, and publications. *Id.*

146. *Id.* This inquiry requires review of the same information stated in factor 3. However, unlike review of legislative activities, this factor is absolute because no portion of the organization’s activities may be political. *Id.*

The Seventh Circuit stated that the inquiry used by the I.R.S. was sufficient to determine whether the church was engaged in improper activity.<sup>147</sup> Particularly, parts two, three and four of the test required the I.R.S. to look at the total “facts and circumstances” of the church’s activities before concluding that the church was engaged in prohibited activity.<sup>148</sup>

Further, *Dykema* illustrates the subjective nature of the “facts and circumstances” test. The test directs the I.R.S. to use publications, financial documents, and correspondence.<sup>149</sup> The documents are objective in that they are concrete items that the I.R.S. can assume are accurate because of their use in the everyday activities of the organization.<sup>150</sup> However, while the actual documents may be “objective,”<sup>151</sup> their application is not. The test does not guide the I.R.S. or courts on how to review the documents or what contents indicate “political activity.” Rather, it is up to individual I.R.S. agents to determine what, in their minds, is a violation.<sup>152</sup> Leaving the determination up to individual officials creates inconsistent application and can result in disfavored organizations being targeted and more susceptible to losing their status.<sup>153</sup>

The Supreme Court implicitly applied the “facts and circumstances” test in *Regan v. Taxation With Representation of Washington* (“TWR”) to deny TWR 501(c)(3) status.<sup>154</sup> The I.R.S. found that a substantial part of TWR’s stated purpose was to influence legislation.<sup>155</sup> Specifically, TWR was a public interest organization that sought to promote its views regarding federal taxation by publishing a journal and engaging in litigation.<sup>156</sup> TWR argued that the portion of its activities that were not related to prohibited political activity should continue to be tax-

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147. *Id.* at 1103.

148. *Id.* at 1101.

149. *Id.*

150. *Id.* at 1100 (claiming that the test provided an objective means of determination).

151. *See id.*

152. *Id.* at 1102 (“[A] high-ranking I.R.S. officer must believe that the organization may be engaged in carrying on an unrelated trade or business or otherwise taxable activity.”). There are claims that this determination is actually made by lower-level I.R.S. employees, making the lack of a clear standard more distressing. *See Stokeld, supra* note 19.

153. *See Klapach, supra* note 41, at 534.

154. *See Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 550-51 (1983).

155. *Id.* at 542.

156. *Id.* at 543.

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exempt.<sup>157</sup> In denying TWR 501(c)(3) status, the court considered all of the “facts and circumstances” surrounding TWR’s activities, not just those which were previously tax-exempt.<sup>158</sup>

In addition to the “fact and circumstances” test, courts also review alleged “political activity” violations under the “express advocacy” test.<sup>159</sup> The “express advocacy” standard is used when reviewing alleged election code violations of “political activity” restrictions.<sup>160</sup> In *Buckley*, a statute limiting political expenditures that expressly advocated the election of a specific candidate was a permissible restriction on speech.<sup>161</sup> The court elaborated that “express advocacy” included use of specific words such as elect, support, vote for, reject, and defeat.<sup>162</sup>

The “express advocacy” standard is much narrower than the “facts and circumstances” test because it requires the court to look at the precise activity that triggered the charge and only bans activities which expressly advocate the election of a candidate.<sup>163</sup> However, like the “facts and circumstances” test, it does not enumerate a specific type of conduct that is prohibited.<sup>164</sup> Rather, the “express advocacy” test merely requires the use of precise words such as elect, vote for/against, or support.<sup>165</sup> Thus, an organization accused of violating the “political activity” prohibition is blindsided by the standard of review that applies because it has no notice of the requirements with which it will be expected to comply. As the following cases

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157. TWR was created from the merger of two previously tax-exempt organizations: one was a 501(c)(3), and the other was a 501(c)(4). *Id.* The § 501(c)(4) organization participated in some “political activity” permissible under that section, whereas the 501(c)(3) organization did not. *See id.* Because TWR continued the “political activity” after the two organizations joined as a 501(c)(3) organization, the court held it was appropriate for the I.R.S. to review all of the new organization’s activities. *Id.* at 542-43.

158. *Id.* at 543-44.

159. *Buckley v. Valeo*, 424 U.S. 1, 44 (1976) (per curiam).

160. *Id.*; *see also* *FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 53 (D.D.C. 1999) (affirming the use of “express advocacy” as stated in *Buckley*).

161. *Buckley*, 424 U.S. at 44.

162. *Id.* at 44 n.52.

163. *Id.* at 44.

164. *See Christian Coal.*, 52 F. Supp. 2d at 53.

165. *Id.* Despite holdings by some courts that “express advocacy” is not limited to certain words or phrases, most courts continue to apply the test strictly as enumerated in *Buckley*. *Compare* *FEC v. Furgatch*, 807 F.2d 857, 863 (9th Cir. 1987) (“The short list of words included in the Supreme Court’s opinion in *Buckley* does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate. . . . A proper understanding of the speaker’s message can best be obtained by considering speech as a whole.”), *with Christian Coal.*, 52 F. Supp. 2d at 61 (“[Express advocacy] is determined first and foremost by the words used. More specifically, the ‘express advocacy’ standard requires focus on the verbs.”).

illustrate, tax-exempt organizations continue to operate blindly without a clear mandate from the courts.

B. *Inconsistent Application: Three Types of Inconsistencies*

Review under the “facts and circumstances” test and the “express advocacy” test has resulted in three different inconsistencies. The first inconsistency is when two organizations engage in similar activity. One organization can be found in violation of the “political activity” prohibition under the “facts and circumstances” test while the second organization, reviewed under the “express advocacy” test, can be found not in violation.<sup>166</sup> Accordingly, a tax-exempt organization must blindly decide between complying with the stricter I.R.S. restrictions and engaging in permissible federal election activity at the cost of its 501(c)(3) status. The second inconsistency occurs when the same standard is not applied uniformly to the same activity by the same organization.<sup>167</sup> Consequently, an organization in this situation has no incentive to comply because the requirements of compliance are unclear. The organization has no guarantee that following any requirements would result in a finding of compliance. Finally, when an activity is found to violate the prohibition under both tests, organizations still may be unable to comply because the factors considered are inconsistent.<sup>168</sup> All three of these inconsistencies entrap tax-exempt organizations because they cannot accurately and reliably predict what, if any, activity will warrant investigation by any number of agencies for possible violation of the “political activity” prohibition.

The first possible inconsistency occurs when the I.R.S. and F.E.C. tests result in opposing rulings on similar activity. In *Association of the Bar of the City of New York v. Commissioner* and *FEC v. Christian Coalition*, both tax-exempt organizations were involved in similar political soliciting and election information distribution.<sup>169</sup> However, the New York City Bar Association’s activities were reviewed under the “facts and

166. *Compare* *Assoc. of the Bar of the City of N.Y. (N.Y. Bar) v. Comm’r*, 858 F.2d 876 (2d Cir. 1988) (ranking candidates constituted “political activity” under the “facts and circumstances” test), *with* *Christian Coal.*, 52 F. Supp. 2d 45 (ranking candidates did not constitute “political activity” under the “express advocacy” test.).

167. Paul Streckfus, *Is the IRS Letting the Heritage Foundation Off the Hook?*, TAX NOTES, 653 (February 6, 2006).

168. *Compare* *Branch Ministries v. Rossotti*, 211 F.3d 137, 141-42, 144-45 (D.C. Cir. 2000) (upholding the revocation because it did not violate the Constitution or the I.R.S.’s ability to revoke the organization’s tax-exempt status), *with* *Furgatch*, 807 F.2d at 863-64 (showing the revocation of the tax exemption was based on political advertisement).

169. *See* *N.Y. Bar*, 858 F.2d at 877; *Christian Coal.*, 52 F.Supp. 2d at 49-50.

circumstances” test and found to be prohibited “political activity,” while the Christian Coalition’s activities were reviewed under the “express advocacy” standard and found not to violate the “political activity” prohibition.<sup>170</sup>

In *N.Y. Bar*, the New York City Bar Association published a list of judicial candidates that included a review of the candidates’ qualifications, experience, and professional responsibility.<sup>171</sup> The information about each candidate was non-partisan and did not direct voters on whom to vote.<sup>172</sup> In holding that the activity was political, the court asserted that ranking candidates is always “political activity” because even if it does not expressly solicit votes, a reasonable person would believe the New York City Bar discouraged voting for candidates with low scores.<sup>173</sup> Thus, the organization was engaged in “political activity” and not entitled to § 501(c)(3) status.<sup>174</sup>

Conversely, the candidate ratings distributed by the Christian Coalition were not prohibited “political activity.”<sup>175</sup> In 1994, the Christian Coalition mailed a six-page letter signed by Coalition President Pat Robertson and a Congressional Scorecard entitled “Reclaiming America.”<sup>176</sup> The scorecard contained the voting records of all Congresspersons and rated each member based on their tendency to agree with the Christian Coalition’s position on certain issues.<sup>177</sup> The scorecard was similar to others sent out regularly by the organization.<sup>178</sup> While the letter did mention that it was an election year, the scorecard did not single-out a particular candidate.<sup>179</sup>

In reviewing the mailing, the court considered three factors. First, whether the communication contained an “explicit

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170. See *N.Y. Bar*, 858 F.2d at 877; *Christian Coal.*, 52 F. Supp. 2d at 57, 64.

171. *N.Y. Bar*, 858 F.2d at 877.

172. *Id.* at 879.

173. *Id.* at 880.

174. *Id.* at 880-81.

175. *Christian Coal.*, 52 F. Supp. 2d at 64 (“[N]either Robertson’s letter nor the Scorecard explicitly direct the reader as to how to vote in any given direction.”). A stated purpose of the Christian Coalition of America is to represent Christians in legislative proceedings and train them to engage in political actions. See *id.* at 49. As such, the Christian Coalition does not qualify for 501(c)(3) tax-exempt status. However, because the tax-exempt status of an organization is not important for FECA violations, this case still presents an excellent comparison of “express advocacy” review and “facts and circumstances” review and highlights the possible pitfall for a 501(c)(3) organizations attempting to comply with both FEC and I.R.S. regulations.

176. *Christian Coal.*, 52 F. Supp. 2d at 57.

177. *Id.*

178. *Id.*

179. *Id.*



directive.”<sup>180</sup> Second, whether a “verb or its immediate equivalent, considered in the context of the entire communication” led a reader to the conclusion that he should take action in support of a specified candidate.<sup>181</sup> Finally, whether “a reasonable person would have understood a communication to “expressly advocate a candidate’s election or defeat.”<sup>182</sup> The court concluded that the “Reclaiming America” mailing did not violate the FECA because it did not expressly direct the reader to vote or take action based on the congressional ratings, and a reasonable person could have understood the mailing as merely a means of educating Christians on congressional activity.<sup>183</sup>

Both the New York City Bar and the Christian Coalition were advocating issues and candidates that supported their goals.<sup>184</sup> Both organizations mailed information to potential supporters in order to gain votes for their causes and possibly garner donations.<sup>185</sup> But because the activities were challenged by different government agencies, the courts reviewed these identical activities under different standards.

If a tax-exempt organization follows the guidelines set by the FECA, the organization may distribute scorecards and even rate and identify candidates that support the organization, so long as it does not “expressly advocate” voting for a specified individual.<sup>186</sup> But a tax-exempt organization would then be violating § 501(c)(3)’s prohibition on “political activity” and could lose its status, leading to a loss of charitable donations which are the backbone of the organization.<sup>187</sup> Alternatively, a tax-exempt organization can play it safe and comply with the Code’s total prohibition; however, this could cause the organization to lose significant political ground while its opponents zealously advocate for their cause. Thus, a 501(c)(3) organization must chose between tax-exempt status and donations and involvement in the political process.

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180. *Id.* at 61.

181. *Id.*

182. *Id.* at 62.

183. *Id.* at 64.

184. In the case of *N.Y. Bar*, they endorsed candidates who were legally and professionally qualified and had adequate experience. *Assoc. of the Bar of the City of N.Y. (N.Y. Bar) v. Comm’r*, 858 F.2d 876, 881 (2d Cir. 1988). In the case of the Christian Coalition, they endorsed candidates who supported Christian beliefs. *Christian Coal.*, 52 F. Supp. 2d at 64.

185. *See N.Y. Bar*, 858 F.2d at 877; *Christian Coal.*, 52 F. Supp. 2d at 49.

186. *Christian Coal.*, 52 F. Supp. 2d at 62, 64.

187. I.R.S. FS 2006-17 *supra* note 34 (stating that an organization may not rate candidates or otherwise indicate a candidate’s support or opposition to the organization).

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The second inconsistency faced by a 501(c)(3) organization occurs when it engages in the same activity more than once, but the rulings against it are inconsistent.<sup>188</sup> In 1996, the Heritage Foundation sent out fundraising letters signed by presidential candidate, Bob Dole.<sup>189</sup> The letter solicited funds and support for the Republican Party and was sent immediately prior to the 1996 presidential elections.<sup>190</sup> The Heritage Foundation received a technical advice memorandum from the I.R.S. stating that the letter was “prohibited political campaign intervention” based on the letter’s content and the timing.<sup>191</sup>

In 2002, the Heritage Foundation sent a similar letter containing the signatures of various Representatives and Senators who were candidates in the upcoming election.<sup>192</sup> However, in a 2006 Private Letter Ruling sent to the Heritage Foundation, the I.R.S. determined the solicitations were not “political activity.”<sup>193</sup> The I.R.S. apparently based the different result on the fact that the letters did not have a clearly identified opponent and that none of the letters went to the jurisdictions of the signer, meaning that the recipients could not vote for the person endorsing their letter.<sup>194</sup>

While the result of the 2006 Private Letter Ruling is beneficial for the Heritage Foundation, it sends the wrong message to organizations. The I.R.S.’s inconsistent treatment of identical situations indicates that even the I.R.S. is still unsure of the kinds of activities included in the “political activity” prohibition.<sup>195</sup> Further, this ruling encourages organizations to push the limits and take their chances because the I.R.S. is likely to misinterpret “political activities” or miss them altogether. This mindset will result in the I.R.S. losing its power to enforce and adjudicate “political activity” violations, a right it has fought hard to maintain.<sup>196</sup>

The final inconsistency occurs when an activity is found to violate the “political activity” prohibition under both the “facts and circumstances” test and the “express advocacy” test, but the

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188. See Streckfus, *supra* note 167.

189. *Id.*

190. *Id.*

191. *Id.* (citing I.R.S. Tech. Adv. Mem. 2000-44-038 (July 24, 2000)).

192. *Id.*

193. I.R.S. Priv. Ltr. Rul. 2006-02-042 (Jan. 13, 2006).

194. Streckfus, *supra* note 167.

195. See *id.*

196. See *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547-49 (1983); *United States v. Judicial Watch, Inc.*, 266 F. Supp. 2d 1, 19 (D.D.C. 2002); *Branch Ministries v. Rossotti*, 211 F.3d 137, 141-42 (D.C. Cir. 2000).

factors considered in reaching that conclusion are different.<sup>197</sup> While this situation provides organizations with some guidance by clearly holding a particular activity to violate the “political activity” prohibition, an organization still cannot comply when the factors considered are unclear.

In *Branch Ministries v. Rossotti*, a church’s advertisement was found to be prohibited “political activity.”<sup>198</sup> Branch Ministries, a tax-exempt church, placed a newspaper advertisement just before the 1992 election telling people not to vote for Bill Clinton.<sup>199</sup> Not only did the advertisement clearly advocate one candidate over another, it also directed readers to contact the church for more information and solicited donations.<sup>200</sup> Applying the “facts and circumstances” test, the IRS determined the timing of the advertisements, less than one week before the presidential elections, strongly indicated the advertisement was “political activity.”<sup>201</sup> Second, the IRS noted that Branch Ministries’ intent to demonstrate that Bill Clinton did not conform to Biblical precepts was not a tax-exempt purpose.<sup>202</sup> By affirming the summary judgment ruling, the court of appeals implicitly held that the advertisement constituted prohibited “political activity,” and that the IRS had the authority to revoke the church’s tax-exempt status.<sup>203</sup>

Similarly, in *FEC v. Furgatch*, a citizen twice placed an advertisement directing voters not to vote for Jimmy Carter.<sup>204</sup> The Ninth Circuit held the advertisement violated the FECA even though it did not “expressly advocate” Carter’s defeat.<sup>205</sup> The court expanded the *Buckley* test beyond certain words or phrases, and chose to look at the context of the advertisement as a whole.<sup>206</sup> Further, the court concluded that a speaker need not intend to “expressly advocate” so long as the effect is such.<sup>207</sup> Thus, because the context of the advertisement could most

197. Compare *Branch Ministries v. Rossotti*, 211 F.3d at 140, with *FEC v. Furgatch*, 807 F.2d 857, 865 (9th Cir. 1987).

198. *Branch Ministries*, 211 F.3d at 140, 145.

199. *Id.* at 139.

200. *Id.* at 140.

201. *Id.* Although the IRS did not explicitly state that it was applying the “facts and circumstances” test, it appears the test’s factors were considered important in denying Branch Ministries 501(c)(3) status. See *id.*; see also *supra* notes 144-47 and accompanying text for “facts and circumstances” factors.

202. See *Branch Ministries*, 211 F.3d at 142.

203. *Id.* at 140, 145.

204. *FEC v. Furgatch*, 807 F.2d 857, 858-59 (9th Cir. 1987).

205. *Id.* at 864-65.

206. *Id.* at 863.

207. *Id.*

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reasonably be read to call for express action not to vote for Jimmy Carter and the timing was immediately prior to the presidential election, the court held it was prohibited “political activity.”<sup>208</sup>

These cases illustrate that even when the application of the “facts and circumstances” and the “express advocacy” tests both result in a finding that a certain activity is political, the factors considered are not always clear or consistent. In *Branch Ministries v. Rossotti*, the court focused on the intent of the organization to influence the election of the president.<sup>209</sup> In *Furgatch*, the court considered the effect the advertisement had on the recipient more important, and focused on the reasonable belief of the intended reader.<sup>210</sup> This inconsistency makes it difficult for organizations to comply with the “political activity” prohibition because, without a clear definition, they do not know what factors will be determinative.

## V. EYES WIDE OPEN?: IMPACTS AND CONCLUSIONS

Despite efforts, the definition of “political activity” remains ambiguous. Statutory construction is not helpful because the statute has multiple potential meanings. No legislative history exists because of the hasty method in which the amendment was enacted. Further, consideration of other Code sections and Treasury Regulations is equally disappointing due to the lack of specificity and circular references.

Finally, efforts by the courts to extrapolate a meaning have merely caused more confusion by creating an additional layer of ambiguity in the standard of review. Using a “facts and circumstances” test in some situations while applying an “express advocacy” test in others without providing a clear distinction as to the reason for the tests’ application has resulted in non-compliance and rogue organizations, diminishing the I.R.S.’s ability to enforce the Code.

Thus, while the government should not be required to subsidize political thought, an organization should not be forced to choose blindly between participation in the political process or maintaining tax-exempt status. A tax-exempt organization is entitled to make an intelligent and voluntary choice as to whether it wishes to maintain its § 501(c)(3) status. If that organization chooses affirmatively to maintain its tax-exempt

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208. *Id.* at 864-65.

209. *See Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000).

210. *See Furgatch*, 807 F.2d at 865.

status, then it likewise should be able to determine those activities which are clearly not violations of prohibitions against “political activity.” If the types of activities and factors considered in defining “political activity” are blurred, these organizations are denied the opportunity to make clear choices.

A uniform definition of “political activity” could alleviate some of these problems by holding 501(c)(3) organizations involved in the political process to the same standard regardless of which agency is reviewing their activity. Further, if the definition is uniform, the different standards of review will make more sense because they will reflect the different intent and purpose of the prohibition in each context, rather than basing review on which organization happens to be challenging the activity.

Consequently, the political environment encourages 501(c)(3) organizations, such as churches and public charities, to increase their involvement in politics<sup>211</sup> and the problem is exacerbated. Organizations feel more pressure to push the limits of the “political activity” prohibition. Without concise determinations of activities which are allowed or disallowed, these organizations are more likely to engage in questionable activity and risk loss of their tax-exempt status. Moreover, without I.R.S. action and judicial support, organizations will continue to maintain tax-exempt status or engage in “political activity” with their eyes wide shut.

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211. See, e.g., *Branch Ministries*, 211 F.3d 137 (church placed advertisement opposing election of Bill Clinton); Peter Slevin, *Ohio Churches' Political Activity Challenged*, WASHINGTON POST, Apr. 25, 2006, at A3; Susan Jones, *NAACP Challenging IRS Probe Into Its Tax-Exempt Status*, CYBERCAST NEWS SERVICE (Mar. 31, 2006), <http://www.cnsnews.com/ViewPolitics.asp?Page=/Politics/archive/200603/POL20060331d.html> (NAACP chairman expressed opposition to President Bush's handling of the Iraq War).