

Thou Shalt Not Politic: A Principled Approach to Section 501 (C)(3)'s Prohibition of Political Campaign Activity

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NOTE

THOU SHALT NOT POLITIC: A PRINCIPLED APPROACH TO SECTION 501(C)(3)'S PROHIBITION OF POLITICAL CAMPAIGN ACTIVITY

Joseph S. Klapach[†]

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INTRODUCTION

Before a charity can save the world, enlighten the masses, or promote spiritual harmony, it first must make a deal with the devil and file for tax exemption under § 501(c)(3) of the tax code.¹ As the boon of this Faustian bargain, a charitable organization gains increased access to charitable contributions. Tax exemption facilitates this access in two ways. First, tax exemption represents a powerful affirmation of the organization's mandate. Knowing that the IRS monitors tax-exempt charities and that it will impose serious sanctions for a charity's misdeeds assures contributors of a charity's legitimacy. In this way, § 501(c)(3)'s stamp of approval increases the likelihood that a contributor will make a donation by relieving him of fears that the charity will divert his contribution from its intended purpose.² Thus, for many potential philanthropists, tax-exempt status provides an important means of distinguishing the Salvation Armies and Red Crosses of the world from the hard-luck panhandlers and self-serving Santa Clauses.

Second, and perhaps more importantly, tax exemption provides individuals with incentives to make donations to charitable organizations. Tax-exempt status under § 501(c)(3) not only frees the charitable organization itself from taxes on the contributions it receives, but also makes it possible for the organization's benefactors to deduct the amount of the contribution on their individual income tax returns.³

¹ I.R.C. § 501(c)(3) (1994). Section 501(c)(3) extends tax exemption to the following organizations:

Corporations, 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 . . . , or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . , and 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.

Id.

² Professor Hansmann attributes this dynamic to the "nondistribution constraint" imposed upon nonprofit organizations. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 *YALE L.J.* 835, 847 (1980). Because contributors to a charity are in a "poor position" to monitor whether the funds actually reach the intended recipient, a for-profit organization would have an incentive "to divert most or all of its revenues directly to its owners." *Id.* Nonprofit organizations, however, are prevented by law from distributing the contributed funds to the owners of the organization. As a result, nonprofit organizations lack the incentive to divert funds and can provide the contributor with an assurance that the organization will use the funds in the intended manner. In short, a contributor to a charity "needs an organization that he can trust, and the nonprofit, because of the legal constraints under which it must operate, is likely to serve that function better than its for-profit counterpart." *Id.*

³ See I.R.C. § 170(c)(D)(2).

As a result, a contributor to a tax-exempt charity enjoys both the good feelings attendant with supporting the charitable cause of his choice and a government subsidy of sorts in the form of lower taxes.

To realize the benefits of this deal with the IRS, however, the charity must sacrifice its "soul" by agreeing to restrict the range of activities it will undertake. Section 501(c)(3) imposes just such a restriction by prohibiting tax-exempt organizations from engaging in political campaign activities.⁴ Thus, to receive tax-exempt status, charitable organizations must relinquish the right to comment on candidates, even though the election of a particular candidate might dramatically aid or hinder that organization's ability to accomplish its exempt purposes. In this way, § 501(c)(3)'s prohibition of political campaign activity effectively silences a charity at a time when it feels most compelled to speak, when its speech might be the most effective in furthering its mission, and when the public debate surrounding issues of concern to it becomes most intense. In essence, § 501(c)(3) forces a charity to sacrifice part of its vision and its institutional character to ensure its operational success.

As a practical matter, most charitable organizations must accept this Faustian bargain. Many charities depend heavily upon donations to fund their operations⁵ and simply could not survive without the competitive advantages that tax exemption under § 501(c)(3) affords them. At the same time, however, charities desire to minimize the compromising effect that § 501(c)(3) has on their core beliefs and to remain as politically active as possible without losing their tax-exempt status. With their vision, ideals, and important First Amendment rights at stake, charitable organizations seek a clearly defined limit to § 501(c)(3)'s prohibition. What constitutes political campaign activity under § 501(c)(3), and how far can charities go without losing their tax-exempt status?

Unfortunately, courts and the IRS have not provided much of an answer.⁶ In fact, they have compounded the uncertainty by defining

⁴ See *id.* § 501(c)(3).

⁵ See, e.g., BRUCE R. HOPKINS, *THE LAW OF FUND-RAISING* 1 (2d ed. 1996) ("[M]ost [charitable organizations] must engage in the solicitation of contributions to continue their work . . ."); Hansmann, *supra* note 2, at 846 (noting that one particular nonprofit charity, CARE, "obtains much of its funding from personal contributions").

⁶ One leading commentator describes § 501(c)(3) jurisprudence as "a consistent saga of ill-considered and piecemeal development." Laura Brown Chisolm, *Sinking the Think Tanks Upstream: The Use and Misuse of Tax Exemption Law to Address the Use and Misuse of Tax-Exempt Organizations by Politicians*, 51 U. PITT. L. REV. 577, 620 (1990). She explains that

[e]xempt organization law in general, and particularly the law concerning . . . political activities of exempt organizations, has been driven by anecdotal accounts of perceived abuses of section 501(c)(3) tax-exempt status. Rule after rule has been passed with little or no discussion, and with little or no serious consideration by anyone but the individuals who are outraged by

political campaign activity to include both "direct[] and indirect[]"⁷ activities and then basing this determination upon "all the surrounding facts and circumstances."⁸ Without more specific guidance, charities have been forced to rely on IRS materials that are sometimes conflicting, sometimes counterintuitive, and almost never judicially proven. Here, perhaps more than anywhere else, the IRS has spoken out of both sides of its mouth—warning that the prohibition is "absolute" and that *any* violation, no matter how small, will result in the loss of tax-exempt status⁹ and then issuing Delphic pronouncements that seem to allow exempt organizations to participate in voter registration drives,¹⁰ sponsor debates between candidates,¹¹ distribute candidates' voting records,¹² publish candidate responses to questionnaires,¹³ and even provide facilities for candidates to make campaign speeches¹⁴ without violating the prohibition. To make matters worse, lingering, unanswered constitutional questions continue to cast doubt upon whether the government may even impose this prohibition upon charities in the first place. In short, § 501(c)(3) jurisprudence lacks certainty, coherence, and a unifying rationale.

This Note surveys and critiques § 501(c)(3)'s ban on political campaign activity with an eye toward resolving the uncertainty and incoherence that surrounds this area of the law. Part I summarizes the statutory framework of § 501(c)(3) and describes the constitutional difficulties raised by both the prohibition against political campaign activity itself and the IRS's enforcement of this prohibition. In addition to providing background information on § 501(c)(3), this Part suggests that the important constitutional concerns implicated by § 501(c)(3) heighten the need for certainty in this area of the law. Part II dissects the judicial decisions and IRS materials that deal with § 501(c)(3)'s ban on political campaign activity to identify those factors that seem to play a dominant role in their mode of analysis. Rather than simply repeating the black-letter rules the IRS has laid

the anecdotes or who sense themselves to have been victimized by the purported abuses. What has emerged is a series of wide-sweeping responses driven by small problems and uninformed by careful consideration of the broader perspective.

Id. at 620-21.

⁷ Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 1990).

⁸ *Id.* § 1.501(c)(3)-1(c)(3)(iv).

⁹ INTERNAL REVENUE SERV., EXEMPT ORGANIZATIONS HANDBOOK § 3(10)(1) (1989).

¹⁰ See Tech. Adv. Mem. 91-17-001 (Sept. 5, 1990).

¹¹ See *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621 (2d Cir. 1989); Rev. Rul. 86-95, 1986-2 C.B. 73.

¹² See Rev. Rul. 80-282, 1980-2 C.B. 178; Gen. Couns. Mem. 38,444 (July 15, 1980).

¹³ See Rev. Rul. 78-248, 1978-1 C.B. 154.

¹⁴ See Gen. Couns. Mem. 35,902 (July 15, 1974); Gregory D. Baird, Comment, *Independent Institutions of Higher Education and I.R.C. § 501(c)(3): Guidelines for Conducting Political Campaign Activities on Campus*, 49 BAYLOR L. REV. 129, 149 (1997).

down, this Part attempts to devise a means to explain these rulings as a coherent whole. In short, this Part seeks to identify those "facts and circumstances" that are relevant to § 501(c)(3)'s prohibition of political campaign activity. Finally, Part III examines the problems with the existing IRS approach to political campaign activities and the statutory structure. This Part then formulates a proposed test from the existing modes of analysis that helps to resolve the uncertainty and inherent tension found in § 501(c)(3) jurisprudence.

I

BACKGROUND

A. Section 501(c)(3)'s Requirements and Interpretations

Section 501(c)(3) of the Internal Revenue Code imposes four requirements upon those organizations seeking tax-exempt status. First, the entity seeking tax exemption must be "organized and operated exclusively for" an exempt purpose.¹⁵ Second, the organization's earnings must not "inure[] to the benefit of any private shareholder or individual."¹⁶ Third, the organization cannot devote a substantial part of its activities to lobbying or attempts to influence legislation.¹⁷ Fourth, the organization must not participate or intervene in a political campaign in support of or in opposition to a candidate.¹⁸ While the legislative history offers scant explanation for the political restrictions,¹⁹ legislators subsequently have justified these restrictions as a means of furthering the "Congressional polic[y] that the U.S. Treasury should be neutral in political affairs."²⁰

¹⁵ I.R.C. § 501(c)(3) (1994).

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ *See id.* In a questionable but understandable exercise of statutory interpretation, the Supreme Court has engrafted a fifth requirement onto § 501(c)(3). *See* Bob Jones Univ. v. United States, 461 U.S. 574, 585 (1983). In addition to the four requirements for tax exemption under § 501(c)(3) listed above, a charitable organization cannot engage in any activity that is "contrary to settled public policy." *Id.*

¹⁹ *See* BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* § 5.2 (7th ed. 1992); Wilfred R. Caron & Deirdre Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J.L. & POL. 169, 186 (1985).

²⁰ H.R. REP. NO. 100-391, pt. 2, at 1625 (1987); *see also* Slee v. Commissioner, 42 F.2d 184, 185 (1930) (opinion of Hand, J.) ("[Political agitation] must be conducted without public subvention; the Treasury stands aside from them."). *But see* 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, 251-52 (1992) ("At present, numerous organizations exempt from the payment of federal income tax under subsections of Section 501 other than Section 501(c)(3) may engage in unlimited amounts of campaign activity . . . [, including those] organizations created *specifically* to raise money for and carry out election campaigns . . ."); Edward McGlynn Gaffney, Jr., *On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics*, 40 DEPAUL L. REV. 1, 32 (1990) (explaining that prior to 1986, the Code afforded "a tax credit for contributions to candidates").

Despite the apparent similarity between attempts to influence legislation and political campaign activities, important differences characterize the two restrictions. As the text of § 501(c)(3) indicates, an exempt organization violates the prohibition against attempting to influence legislation²¹ only when the attempts comprise a "substantial part" of the organization's activities.²² An exempt organization that fails this substantial part test automatically loses its tax-exempt status.²³ Although courts have not carefully defined the amount of activity necessary to constitute a substantial part, substantiality appears to fall somewhere between five and sixteen percent of an organization's total activities.²⁴

To avoid the vagaries and the harsh penalty²⁵ of the substantial part test, most § 501(c)(3) organizations can choose § 501(h)'s safe harbor provisions.²⁶ Section 501(h) permits § 501(c)(3) organizations to spend a set percentage of their exempt-purposes expenditures in a given year on lobbying activities without losing their tax-exempt status.²⁷ Any § 501(h)-electing exempt organization that exceeds the

²¹ The IRS defines "legislation" as "action by the Congress, by any State legislature, by any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure." Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii)(b) (as amended in 1990).

²² I.R.C. § 501(c)(3).

²³ See *id.* § 170(c)(2)(D); Treas. Reg. § 1.501(c)(3)-1(c)(3)(v) (as amended in 1990).

²⁴ See *Haswell v. United States*, 500 F.2d 1133, 1146-47 (Ct. Cl. 1974) (holding that an organization violated the "substantial requirement" limitation when the organization directed 16-17% of its annual budgetary expenditures toward influencing legislation); *Seasongood v. Commissioner*, 227 F.2d 907, 912 (6th Cir. 1955) (finding less than five percent of an organization's activities to be insubstantial); see also Caron & Dessingue, *supra* note 19, at 172-73 & n.16 (discussing the lobbying restriction in general terms).

²⁵ See Caron & Dessingue, *supra* note 19, at 172 n.16 (identifying the "lack of clarity" of the substantial part test); Edward D. Coleman, *Lobbying Update and Advice for the Coming Election Year*, C693 A.L.I.-A.B.A. 199, 204 (1991) (describing the substantial part test as "vague, subjective, and difficult to apply"); Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities*, 71 TEX. L. REV. 1269, 1279 n.25 (1993) (explaining that "there exists no meaningful measure of what is substantial").

²⁶ See I.R.C. § 501(h). Section 501(h)'s safe harbor provision reads in pertinent part:

In the case of an organization to which this subsection applies, exemption from taxation under subsection (a) shall be denied because a substantial part of the activities of such organization consists of carrying on propaganda, or otherwise attempting, to influence legislation, but only if such organization normally—

(A) makes lobbying expenditures in excess of the lobbying ceiling amount for such organization for each taxable year, or

(B) makes grass roots expenditures in excess of the grass roots ceiling amount for such organization for each taxable year.

Id. § 501(l)(1). Churches and other religious charitable organizations cannot make a § 501(h) election. See *id.* § 501(l)(5). Any organization failing to make a § 501(h) election will be subject to the substantial part test by default. See Treas. Reg. § 1.501(h)-1(a)(1) to -1(a)(2) (as amended in 1990).

²⁷ See I.R.C. § 501(l)(2). The permissible lobbying expenditure amount is calculated according to a sliding scale: 20% of the first \$500,000 in exempt purposes expenditures,

permissible level of expenditures for a given year will face a twenty-five percent excise tax on the excess amount.²⁸ An electing organization will not lose its exempt status, however, unless its lobbying expenditures exceed the annual permissible amount by 150% over a four-year period.²⁹

In contrast to § 501(c)(3)'s prohibition against attempting to influence legislation, its prohibition against participation in a political campaign³⁰ is an absolute restriction without any safe harbor provision.³¹ As a result, an exempt organization may face the revocation of its tax-exempt status for any violation, no matter how insignificant.³² Most exempt organizations can avoid the absolute prohibition and engage in political campaign activity by segregating those political campaign activities into a § 501(c)(4) social welfare organization.³³ Contributors to a § 501(c)(4) affiliate, however, may not deduct these donations on their individual income tax returns.³⁴ Additionally, § 501(c)(4) affiliates may participate only in a limited amount of political campaign activity.³⁵ Although the IRS has not defined the exact amount of permissible political campaign activity, it has ruled that a

\$100,000 plus 15% of the second \$500,000, \$175,000 plus 10% of the third \$500,000, or \$225,000 plus five percent of the exempt purposes expenditures above \$1,500,000. *See id.* § 4911(c)(2). No organization, however, may exceed \$1,000,000 in lobbying expenditures. *See id.*

²⁸ *See id.* § 4911(a)(1).

²⁹ *See id.* § 501(h)(1)-(2); Treas. Reg. § 1.501(h)-3(b)(1)(i), -3(c)(7), -3(c)(8) (as amended in 1990). For a more detailed description of § 501(h)'s provisions, see Galston, *supra* note 25, at 1278-80; David A. Wimmer, *Curtailing the Political Influence of Section 501(c)(3) Tax-Exempt Machines*, 11 VA. TAX REV. 605, 610-12 (1992).

³⁰ The IRS defines "candidate for public office" for purposes of campaign activity 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." Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 1990).

³¹ *See* H.R. REP. NO. 100-391, pt. 2, at 1624-25 (1987) (noting that an organization will lose its tax-exempt status "if it engages in *any* political campaign activities or (except as otherwise provided in sec. 501(h)) in more than an insubstantial amount of lobbying activities" (emphasis added)); INTERNAL REVENUE SERV., *supra* note 9, § 3(10)(1). House Report 391, however, also describes a provision for excise tax penalties for offending § 501(c)(3) organizations, *see* H.R. REP. NO. 100-391, pt. 2, at 1623, which suggests that not every violation was intended to result in revocation. *See* Carroll, *supra* note 20, at 229-30.

³² The IRS may choose to subject an exempt organization to an excise tax on its political expenditures under I.R.C. § 4955. Because the excise tax is purely a remedial alternative, the IRS still may revoke an organization's tax-exempt status for any proscribed political campaign activity. *See* sources cited *supra* note 31. Furthermore, many exempt organizations' political activities will not involve political expenditures that the IRS can subject to an excise tax, which forces the IRS to either revoke the organization's tax-exempt status or ignore the activities altogether.

³³ *See* I.R.C. § 501(c)(4), (h)(3); Rev. Rul. 81-95, 1981-1 C.B. 332.

³⁴ *See* I.R.C. § 170(c)(2) (limiting the types of organizations to which one may make a charitable contribution).

³⁵ Even though the Treasury regulations defining "social welfare" expressly state that "[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns," Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (as amended in

§ 501(c)(4) organization cannot participate in activities so extensive that they prevent the organization from “primarily engag[ing] in activities that promote social welfare.”³⁶

B. Constitutional Attacks on Section 501(c)(3)

Ever since § 501(c)(3)'s prohibition against political campaign activity was first enacted, commentators and litigants have challenged the provision on numerous constitutional grounds.³⁷ Although Supreme Court decisions strongly suggest that the Court will uphold § 501(c)(3) against some of these constitutional attacks,³⁸ three as-

1990), the IRS has ruled that “the regulations do not impose a complete ban on such [political campaign] activities,” Rev. Rul. 81-95, 1981-1 C.B. 332.

³⁶ Rev. Rul. 81-95, 1981-1 C.B. 332.

³⁷ In addition to attacking § 501(c)(3) at the constitutional level, commentators also have attacked § 501(c)(3) interpretations on statutory grounds. One such attack argues that the stringent requirements governing voter education materials are inconsistent with § 501(c)(3)'s limitation of political campaign activity “‘on behalf of a candidate.’” Caron & Dessingne, *supra* note 19, at 198 & n.123 (citing *FEC v. Massachusetts Citizens for Life*, 589 F. Supp. 646 (D. Mass. 1984), in which the court classified similar voter education materials as news to suggest the unreasonableness of the IRS position). Other commentators have argued that the IRS should have a duty of consistency similar to that of other agencies. If subject to this duty, the IRS would be required to follow its prior decisions or adequately explain its deviation from precedent. See 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, § 11.5 (3d ed. 1994); Lawrence Zelenak, *Should Courts Require the Internal Revenue Service to Be Consistent?*, 40 TAX L. REV. 411 (1985).

³⁸ Because § 501(c)(3) exempts churches and other religious organizations, a number of commentators and litigants have argued that § 501(c)(3) violates the Free Exercise Clauses. See, e.g., Caron & Dessingne, *supra* note 19, at 181-93; Gaffney, *supra* note 20, at 35-39. These commentators found support in cases like *Thomas v. Review Board*, 450 U.S. 707 (1981), in which the Court stated:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Id. at 717-18. The Court dramatically altered the Free Exercise Clause test, however, in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court stated that when “the incidental effect of a generally applicable and otherwise valid provision [imposes upon the free exercise of religion], the First Amendment has not been offended.” *Id.* at 878. Because § 501(c)(3) applies generally to all qualifying charitable organizations, religious and nonreligious, it seems to satisfy *Smith's* requirements and thereby avoids an unconstitutional infringement upon the freedom of religion.

The Court also seems to have resolved challenges to § 501(c)(3) under the Establishment Clause. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court set forth the leading Establishment Clause test, the third prong of which requires that “the statute must not foster ‘excessive government entanglement with religion.’” *Id.* at 612-13 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). *But see* *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (calling into question the Court's continued commitment to the *Lemon* test by finding no Establishment Clause violation without explicitly applying the *Lemon* test). In *Walz*, the Court held that granting religious organizations a tax exemption did not violate the Establishment Clause and stated that “[i]n analyzing [the taxation of churches or their exemption] the questions are whether the involvement is excessive, and

pects of § 501(c)(3) continue to raise doubts about the provision's validity. The first constitutional challenge to § 501(c)(3) focuses upon the idea of limiting political involvement itself. It asks whether the government may condition favorable tax status upon the relinquishment of rights to engage in political speech. The second constitutional challenge attacks the congressional expression of that idea. It asks whether the existing text of § 501(c)(3) presents a definition of political campaign activity that is clear enough that ordinary individuals need not guess at its meaning or application. The third challenge addresses the manner in which the IRS has enforced the provision. It asks whether the IRS has selectively prosecuted some organizations while refusing to prosecute other similarly situated organizations. Because these constitutional concerns cast a shadow of uncertainty over the substance of § 501(c)(3) jurisprudence, this Part briefly addresses each of these constitutional challenges in turn.

whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." 397 U.S. at 675; *see also* *Tilton v. Richardson*, 403 U.S. 672, 688 (1971) (opinion of Burger, C.J.) (finding that construction grants to religious colleges do not create excessive entanglement and identifying the existence of a continuing financial relationship and financial audits, especially those requiring a distinction between religious and nonreligious expenditures, as factors). Thus, under *Walz* an excessive entanglement problem would seem to result only if the IRS constantly monitors church services or financial records in an effort to root out any and all statements or activities that might violate § 501(c)(3). *See* Scott W. Putney, *The IRC's Prohibition of Political Campaigning by Churches and the Establishment Clause*, FLA. B.J., May 1990, at 27, 30 (noting that a "comprehensive system of supervision . . . would inevitably lead to an unconstitutional administrative entanglement between church and state" (quoting *Aguilar v. Felton*, 473 U.S. 402, 410 (1985))).

Practically, however, the chances are slim that an IRS investigation of alleged § 501(c)(3) violations will create an excessive entanglement. First, more recent cases indicate that a high level of entanglement may be required to implicate the Establishment Clause. *See* *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 394 (1990) (upholding the extensive auditing and administrative procedures of California's sales and use tax on the ground that their "administrative and recordkeeping burdens d[id] not rise to a constitutionally significant level"); *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 305 (1985) (holding that the Fair Labor Standards Act's requirement that certain financial records be kept by exempt organizations did not create an excessive entanglement). Second, the IRS simply may limit its investigation of proscribed political activities to nonintrusive means. For example, when the IRS merely collects a church newsletter after reports that the newsletter contains an endorsement of a particular candidate, it would be difficult to argue that this action creates an excessive entanglement. *See* Oliver S. Thomas, *The Power to Destroy: The Eroding Constitutional Arguments for Church Tax Exemption and the Practical Effect on Churches*, 22 CUMB. L. REV. 605, 631 & n.146 (1992). For an example of nonintrusive enforcement of § 501(c)(3)'s political activity prohibitions, *see* *Branch Ministries, Inc. v. Richardson*, 970 F. Supp. 11 (D.D.C. 1997), in which the IRS revoked the tax-exempt status of a § 501(c)(3) organization after the organization placed advertisements in two national newspapers opposing a candidate. *See id.* at 13. Part I.B.3, *infra*, offers a more detailed discussion of *Branch Ministries*.

1. *Freedom of Speech*

Some commentators have attacked § 501(c)(3)'s prohibition against political activity for conditioning a government benefit in the form of a favorable tax status on the surrender of First Amendment rights.³⁹ *Speiser v. Randall*⁴⁰ provides the foundation for this argument. In *Speiser*, the Supreme Court struck down a California statute that required veterans to sign a loyalty oath to receive a special property tax exemption, holding that it unconstitutionally infringed upon the freedom of speech.⁴¹ The Court reasoned that the "deterrent effect [of the statute's condition] is the same as if the State were to fine [the veterans] for this speech."⁴² Thus, *Speiser* strongly suggests that § 501(c)(3)'s similar conditioning of an income tax exemption on the nonexercise of political speech rights violates the First Amendment.⁴³

In *Regan v. Taxation With Representation*,⁴⁴ however, the Court upheld § 501(c)(3)'s lobbying restrictions. The Court began with the observation that Taxation With Representation also qualified as a tax-exempt § 501(c)(4) organization.⁴⁵ Because § 501(c)(4) organizations may engage in substantial lobbying activities and still retain all of § 501(c)(3)'s advantages, except the personal tax deduction for contributors, the Court reasoned that an organization may enjoy the favorable § 501(c)(3) contributor deduction and engage in lobbying activities simply by segregating its operations into § 501(c)(3) and § 501(c)(4) components.⁴⁶ The Court then distinguished *Speiser* by concluding that § 501(c)(3)'s restrictions on lobbying activities did not represent an unconstitutional condition; rather, they represented a choice by Congress not to subsidize these activities.⁴⁷ Analogizing tax exemptions to cash grants,⁴⁸ the Court noted that § 501(c)(3)'s restrictions merely represented Congress's "refus[al] to pay for the lobbying out of public moneys."⁴⁹ In a concurring opinion that two

³⁹ See, e.g., Carroll, *supra* note 20, at 254-56; Gaffney, *supra* note 20, at 32.

⁴⁰ 357 U.S. 513 (1958).

⁴¹ See *id.* at 515, 529.

⁴² *Id.* at 518.

⁴³ See Thomas, *supra* note 38, at 620-21 ("If it is unconstitutional to require . . . [the] surrender [of] . . . speech rights in order to qualify for a property tax exemption, why is it not equally unconstitutional for an income tax exemption?").

⁴⁴ 461 U.S. 540 (1983).

⁴⁵ See *id.* at 543.

⁴⁶ See *id.* at 544.

⁴⁷ See *id.* at 545-46. The Court relied upon *Cammarano v. United States*, 358 U.S. 498 (1959), to conclude that the First Amendment does not obligate Congress to subsidize lobbying. See *Taxation With Representation*, 461 U.S. at 546. In *Cammarano*, the Court held that the denial of a deduction for lobbying as a business expense did not infringe upon the First Amendment. See 358 U.S. at 513.

⁴⁸ See *Taxation With Representation*, 461 U.S. at 544.

⁴⁹ *Id.* at 545.

other Justices joined, Justice Blackmun emphasized the importance of the § 501(c)(4) alternative to the constitutionality of § 501(c)(3):

Section 501(c)(3) does not merely deny a subsidy for lobbying activities; it deprives an otherwise eligible organization of its tax-exempt status and its eligibility to receive tax-deductible contributions for all its activities, whenever one of those activities is "substantial lobbying." Because lobbying is protected by the First Amendment, § 501(c)(3) therefore denies a significant benefit to organizations choosing to exercise their constitutional rights.

The constitutional defect that would inhere in 501(c)(3) alone is avoided by § 501(c)(4).⁵⁰

The subsequent decisions of *Rust v. Sullivan*⁵¹ and *FCC v. League of Women Voters*⁵² confirm the reasoning of *Taxation With Representation*. In *Rust*, the Court upheld regulations denying federal Title X funds to family planning organizations that provide abortion counseling.⁵³ The Court determined that the regulations did not prevent these organizations from engaging in abortion-related speech generally, but merely required that they conduct this speech separately from those projects receiving Title X funds.⁵⁴ By contrast, in *League of Women Voters*, the Court struck down a law withholding federal funds from those public television and radio stations offering editorial opinions because the stations could not form affiliate organizations that did not receive federal funds to engage in this editorializing.⁵⁵ Thus, *Taxation With Representation*, *Rust*, and *League of Women Voters* suggest that the government may condition the receipt of a benefit on the relinquishment of free speech rights only if the recipient can segregate its activities in a manner that enables it to engage in the prohibited speech and still obtain the desired benefit for its other activities.

Unfortunately, this rule leaves several serious constitutional questions regarding § 501(c)(3) unanswered.⁵⁶ First, *Taxation With Representation's* rationale suggests that § 501(c)(3)'s prohibition against political campaign activity creates an unconstitutional condition. While § 501(c)(4) organizations may engage in "substantial lobbying

⁵⁰ *Id.* at 552 (Blackmun, J., concurring) (footnote and citations omitted).

⁵¹ 500 U.S. 173 (1991).

⁵² 468 U.S. 364 (1984).

⁵³ *See Rust*, 500 U.S. at 198-99, 203.

⁵⁴ *See id.* at 203.

⁵⁵ *See League of Women Voters*, 468 U.S. at 400-01.

⁵⁶ In *Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849, 856-57 (10th Cir. 1972), the Tenth Circuit found § 501(c)(3)'s prohibition against political campaign activity constitutional. The court reasoned that the loss of tax-exempt status did not unconstitutionally burden speech because tax exemptions are merely privileges. *See id.* at 857. The court, however, did not consider *Speiser's* unconstitutional condition doctrine, leading some commentators to remark that *Christian Echoes* "is of questionable precedential value." Caron & Dessingue, *supra* note 19, at 189.

to advance their exempt purposes,⁵⁷ the IRS places limits upon the amount of political campaign activity in which *both* § 501(c)(3) and § 501(c)(4) organizations may participate.⁵⁸ Thus, a § 501(c)(3) exempt organization wishing to endorse a particular candidate—an activity that § 501(c)(4) forbids as well⁵⁹—cannot then segregate its political activities into § 501(c)(3) and § 501(c)(4) components in accordance with *Taxation With Representation*. Instead, the organization must choose either to lose its favorable tax status and provide the endorsement or to refrain from providing the endorsement and maintain its tax exemption.⁶⁰

Second, *Taxation With Representation* fails to address those situations in which nonpolitical exempt activities and political activities are so intertwined as to make their separation impossible. For instance, the severance of political expression from a religious organization's otherwise exempt activities would be impossible when a religious leader gives a sermon or other religious instruction.⁶¹ As several commentators asked, "Should a priest announce at the outset of his sermon that he is now speaking not for the § 501(c)(3) church but for its § 501(c)(4) affiliate?"⁶² The difficulty of severing exempt from non-exempt activities suggests that a § 501(c)(4) affiliate may not provide the adequate alternative means for the exercise of free speech that *Taxation With Representation* and its progeny require.⁶³

2. Vagueness

Commentators also have attacked § 501(c)(3) and the related regulations by arguing that they are void for vagueness in failing to distinguish adequately between those permissible and prohibited

⁵⁷ *Regan v. Taxation With Representation*, 461 U.S. 540, 543 (1983).

⁵⁸ See *supra* notes 30-36 and accompanying text.

⁵⁹ See Rev. Rul. 81-95, 1981-1 C.B. 332; *Developments in the Law—Nonprofit Corporations*, 105 HARV. L. REV. 1578, 1665 & n.57 (1992).

⁶⁰ Even if § 501(c)(4) organizations were able to participate in extensive political campaign activities, the organization-specific nature of an endorsement as political speech raises concerns similar to those Justice Blackmun expressed in his concurrence to *Taxation With Representation*, when he stated that "[i]t hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him." 461 U.S. at 553 (Blackmun, J., concurring); see also Caron & Dessingue, *supra* note 19, at 192 (noting that "although the section 501(c)(4) affiliate might satisfy the articulated government interest in nonsubsidization of political activity, it nonetheless would curtail the First Amendment rights of Exempt Organizations").

⁶¹ See Caron & Dessingue, *supra* note 19, at 193.

⁶² *Id.*

⁶³ Cf. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 258-63 (1986) (finding federal election law provisions mandating that organizations make certain independent expenditures through separately funded political action committees an unconstitutional burden upon the organizations' political speech).

political activities and speech.⁶⁴ Those phrases of § 501(c)(3) that commentators have perceived as unconstitutionally vague include the following: "participate in . . . any political campaign," "carrying on propaganda," "attempting to influence legislation," and a "substantial part."⁶⁵ Although explanatory regulations conceivably could remedy the vagueness problem, the open-ended definitions and tests in this area of the law merely compound the uncertainty, arguably creating a situation in which exempt organizations lack identifiable guidelines upon which to base their behavior.⁶⁶ The absence of any meaningful legislative history for the political activities provisions of § 501(c)(3) further complicates matters.⁶⁷

A statute may be void for vagueness when (1) it is so indeterminate that ordinary individuals must guess at its meaning or application⁶⁸ or (2) it lacks sufficient definiteness for enforcement in a nonarbitrary manner.⁶⁹ In *Thomas v. Collins*,⁷⁰ for example, the Court struck down a statute restricting "solicitation" by labor unions, stating that "the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker . . . wholly at the mercy of the varied understanding of his hearers Such a distinction offers no security for free discussion . . . [and] blankets with uncertainty whatever may be said."⁷¹ In *Big Mama Rag v. United States*,⁷² the leading case that addresses the question of vagueness and tax-exempt organizations, a feminist organization challenged as unconstitutionally vague certain Treasury regulations requiring § 501(c)(3) educational organizations that "'advocate [] a particular position'" to present a "full and fair exposition" of the pertinent facts.⁷³ The court agreed with the challenge and struck down the regulations as unconstitutionally vague for failing to "explain[] which applicant organizations are subject to the standard and . . . [to] articulat[e] its substantive requirements."⁷⁴ The court first criticized the IRS for equating the terms "advocates a particular position" with "controversial," noting that this definition "gives IRS officials no objective standard by which to judge which applicant organizations are advo-

⁶⁴ See, e.g., Caron & Dessingue, *supra* note 19, at 193-97; Carroll, *supra* note 20, at 256-59.

⁶⁵ See Charles Capetanakis, *Abortion Rights Mobilization and Religious Tax Exemptions*, 34 CATH. LAW. 169, 189 (1991).

⁶⁶ See *id.*

⁶⁷ See sources cited *supra* note 19.

⁶⁸ See *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

⁶⁹ See *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035 (D.C. Cir. 1980).

⁷⁰ 323 U.S. 516 (1945).

⁷¹ *Id.* at 535.

⁷² 631 F.2d 1030 (D.C. Cir. 1980).

⁷³ *Id.* at 1036 (quoting Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959)).

⁷⁴ *Id.*

cacy groups . . . [and leaves only] one's subjective notion [as the measure] of what is 'controversial.'"⁷⁵ The court then challenged the "full and fair exposition" standard with a barrage of questions:

What makes an exposition "full and fair"? Can it be "fair" without being "full"? Which facts are "pertinent"? How does one tell whether an exposition of the pertinent facts is "sufficient . . . to permit an individual or the public to form an independent opinion or conclusion"? And who is to make all of these determinations?⁷⁶

Unable to find satisfactory answers to these questions, the court concluded that "[t]he regulation's vagueness is especially apparent . . . [from the] individualistic . . . standard: the reactions of members of the public."⁷⁷

One could make similar 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." What is propaganda, and who makes that determination? How does one distinguish attempts to influence legislation and participation in a political campaign from attempts to educate about legislation and participation in educational and religious exercises involving an election? And exactly how much is a substantial part? The difficult lines that § 501(c)(3)'s prohibition of political activity calls the courts and the IRS to draw very well may approach the type of subjectivity that the *Big Mama Rag* court found unacceptable.⁷⁸

A number of problems, however, weaken the argument that § 501(c)(3)'s prohibition of political campaign activity is unconstitutionally vague. First, the terms "participation in a political campaign" and "attempts to influence legislation" are not so indeterminate that ordinary people must guess at their meanings. If these provisions meet the vagueness standard, then few statutes will pass muster. Second, *Big Mama Rag* no longer may be the law in the District of Columbia Circuit. In a subsequent case, the D.C. Circuit upheld an IRS ruling dealing with the same regulations without addressing directly their constitutionality.⁷⁹ Third, because the statute already has survived a First Amendment challenge, many courts may hesitate to find the statute unconstitutionally vague.⁸⁰ Finally, even if courts were to find the political prohibition portions of § 501(c)(3) unconstitution-

⁷⁵ *Id.*

⁷⁶ *Id.* at 1037 (omission in original).

⁷⁷ *Id.*

⁷⁸ *See id.*

⁷⁹ *See National Alliance v. United States*, 710 F.2d 868 (D.C. Cir. 1983).

⁸⁰ *See, e.g., Regan v. Taxation With Representation*, 461 U.S. 540 (1983); *see also Capetanakis, supra* note 65, at 190 ("It seems unlikely, however, that the statute will be struck down on vagueness grounds, as its constitutionality has previously been upheld on other first and fifth amendment challenges.").

ally vague, the statute still could survive with a narrower construction of the political activity prohibitions.⁸¹

3. *Equal Protection and Selective Prosecution*

Perhaps the most troubling constitutional concern relating to § 501(c)(3) revolves around the IRS's "haphazard" pattern of enforcement.⁸² By ignoring a number of high profile cases of political involvement by exempt organizations, the IRS has placed itself in a position in which any crackdown on the political activity of exempt organizations appears to result from political motivations or expediency. For instance, Humberto Cardinal Medeiros, the Archbishop of Boston, publicly encouraged Catholics not to vote for pro-abortion candidates the day before the Democratic primary⁸³ without drawing any response from the IRS. Similarly, during the 1988 presidential campaign, a number of prominent black ministers endorsed Jesse Jackson⁸⁴ and took part in a well-publicized tour of 500 churches, raising as much as \$300,000 in campaign contributions from offering plate collections.⁸⁵ Even President Clinton has been a party to these questionable campaign activities, preaching a Sunday morning sermon in a Los Angeles church in which he "weave[d] scriptural references into his standard campaign speech."⁸⁶ Despite the extensive political involvement by churches and other exempt organizations

⁸¹ See Caron & Dessingue, *supra* note 19, at 196-97. *But see* Carroll, *supra* note 20, at 259 ("[T]he rulings demonstrate that merely narrowing the application of the prohibition, while retaining the vague language of the current statute, regulations, and Treasury rulings, would not resolve the intricate definitional and enforcement problems posed by religiously inspired political expression.").

⁸² Carroll, *supra* note 20, at 218, 219 (identifying IRS enforcement of § 501(c)(3) as "haphazard" and commenting on "the uncertain and sometimes inconsistent interpretations given the campaign activity prohibition"). Carroll also presents a cogent summary of the political activity of religious organizations throughout the 1980s. *See id.* at 220-27; *see also* Beth A. Sabbath, *Tax Exempt Political Educational Organizations: Is the Exemption Being Abused?*, 41 TAX LAW. 847, 861 (1988) (noting that "the basis for the exemption [of educational organizations], the free flow of the information, cannot be achieved if the exemption restrictions are not equally enforced").

⁸³ See James Nelson Goodsell, *Cardinal's Abortion Letter Stirs Political Controversy*, CHRISTIAN SCI. MONITOR, Sept. 15, 1980, at 4; Michael Knight, *Cardinal Cautions Voters on Abortion*, N.Y. TIMES, Sept. 16, 1980, at A20.

⁸⁴ See Laurent Belsie, *Black Churches and US Politics*, CHRISTIAN SCI. MONITOR, May 2, 1988, at 1; Margaret B. Carlson, *More than a Crusade*, TIME, Mar. 7, 1988, at 16.

⁸⁵ See *Passing the Plate*, U.S. NEWS & WORLD REP., Feb. 15, 1988, at 20. The Americans United for Separation of Church and State protested Jackson's activities and requested an IRS investigation, but the IRS took no action. *See I.R.S. Is Urged to Investigate Jackson's Church Collections*, N.Y. TIMES, Feb. 17, 1988, at B6.

⁸⁶ Gwen Ifill, *Campaigning on Sundays Brings out a Different Bill Clinton*, N.Y. TIMES, June 1, 1992, at A14.

during this period, however, the IRS chose only to reprimand Jimmy Swaggert Ministries for its endorsement of Pat Robertson.⁸⁷

This inconsistent pattern of enforcement culminated in *Branch Ministries, Inc. v. Richardson*.⁸⁸ Four days before the 1992 presidential election, Branch Ministries placed full-page advertisements in the *Washington Times* and *USA Today* that described Bill Clinton's views on abortion, homosexuality, and condom distribution in public schools and urged Christians not to vote for him.⁸⁹ The IRS subsequently revoked Branch Ministries's tax-exempt status, prompting Branch Ministries to bring suit.⁹⁰ Relying on *United States v. Armstrong*,⁹¹ the court found that Branch Ministries had presented a colorable claim of selective prosecution and opened IRS records for discovery.⁹² In particular, the court cited the involvement of the Catholic Church in the abortion issue and the black churches' activities during the 1988 election as examples of the IRS's failure to revoke the exempt status of other politically active churches.⁹³ The court felt that the IRS's past enforcement efforts indicated a disparity in treatment of those similarly situated and that the rare and "draconian" measure of revocation provided some evidence of discriminatory intent.⁹⁴

Exempt organizations seeking to be both politically active and tax exempt, however, cannot place their faith solely upon a selective prosecution defense. Even the receptive *Branch Ministries* court conceded that "[a] plaintiff bringing a selective prosecution claim carries a heavy burden."⁹⁵ These claims are rare and difficult to prove. *Branch Ministries* does not create a safe harbor for exempt organizations, but it strikingly illustrates the utter confusion that shrouds § 501(c)(3) jurisprudence.

⁸⁷ See *Shun Politics, Tax-Exempt Groups Told*, L.A. TIMES, Jan. 12, 1992, at B5. Recently, the IRS appears to have taken a more active role in investigating prohibited political campaign activity. See Elizabeth MacDonald & Jacob M. Schlesinger, *Group Targets Politically Active Churches for Audits*, WALL ST. J., Mar. 20, 1997, at A18. Conservatives assert that these investigations focus on organizations that have criticized the current administration. See *id.*

⁸⁸ 970 F. Supp. 11 (D.D.C. 1997).

⁸⁹ See *id.* at 13.

⁹⁰ See *id.*

⁹¹ 517 U.S. 456 (1996). *Armstrong* holds that for discovery to proceed on a selective prosecution claim, the defendant must show (1) discriminatory effect on those prosecuted with regard to those similarly situated and (2) discriminatory intent. See *id.* at 465.

⁹² See *Branch Ministries*, 970 F. Supp. at 15-17.

⁹³ See *id.* at 16.

⁹⁴ *Id.* at 17.

⁹⁵ *Id.* at 15.

II

FACTORS INVOLVED IN SECTION 501(C)(3) ANALYSIS

The regulations governing § 501(c)(3) prohibit exempt organizations from “[d]irectly or indirectly . . . participat[ing] in, or interven[ing] in . . . any political campaign on behalf of or in opposition to any candidate for public office.”⁹⁶ While the regulations expressly identify the “publishing or distributing of statements”⁹⁷ as a prohibited activity, they fail to offer a more detailed method of determining what constitutes proscribed campaign activity. Instead, the IRS considers “all the surrounding facts and circumstances” and makes a decision on a case-by-case basis.⁹⁸ As one might expect, however, the IRS does not truly consider “all the surrounding facts and circumstances.” Common sense dictates that *some* set of “facts and circumstances” must be particularly relevant to the inquiry, and the presence or absence of *some* identifiable “fact” is necessary as a practical matter to distinguish meaningfully between those activities that are permitted and those that are prohibited. This Part explores the following four factors that shape the analysis that the courts and the IRS employ: (1) whether the reasonable consequences of the activity have the potential to influence voter opinion or provide financial or volunteer assistance to the candidate; (2) whether the organization favors or disfavors a particular candidate or candidates; (3) whether the activity corresponds with the organization’s legitimate exempt purpose; and (4) whether circumstances exist that call for the exercise of leniency.

A. Whether the Reasonable Consequences of the Organization’s Activity Have the Potential to Influence Voter Opinion or Provide Financial or Volunteer Assistance to a Candidate

An exempt organization participates in a political campaign whenever the reasonable consequences of the organization’s activity have the potential to influence voter opinion or to provide financial

⁹⁶ Treas. Reg. § 1.501(c)(3)-1(b)(3)(ii) (as amended in 1990).

⁹⁷ *Id.*

⁹⁸ *Id.* § 1.501(c)(3)-1(c)(3)(iv). Although this specific regulation addresses whether an exempt organization is properly characterized as a § 501(c)(4) “action” organization, the analysis also applies to § 501(c)(3) organizations because an organization does not qualify for exemption under § 501(c)(3) if it “engage[s] in activities which characterize it as an *action* organization.” *Id.* § 1.501(c)(3)-1(b)(3)(iii). Accordingly, IRS materials explain that “[w]hether a particular activity, action, or expenditure constitutes the conduct of prohibited political activity [for a § 501(c)(3) organization] depends on all the facts and circumstances.” I.R.S. Notice 94-111, 1994-37 I.R.B. 36; *see also* I.R.S. News Release IR-96-23 (Apr. 24, 1996) (“Whether an organization [exempt under § 501(c)(3)] is engaging in prohibited political campaign activity depends upon all the facts and circumstances in each case.”).

or volunteer aid to a candidate.⁹⁹ This factor divides into two components. The first component seeks to describe what the IRS means by "political campaign activity." The IRS appears to define broadly political campaign activity to include any activity that has the potential to influence voter opinion or that provides financial or volunteer assistance to a candidate.¹⁰⁰ Clearly, inherently political activities such as endorsements,¹⁰¹ campaign contributions,¹⁰² and the distribution of voting records¹⁰³ have the potential to influence voter opinion or provide financial or volunteer aid to a candidate. They thereby constitute political campaign activity.¹⁰⁴ Political campaign activity, however, is not limited to inherently political activities. An exempt organization may influence an election even when it engages in seemingly nonpolitical activities.

The IRS considers three factors when determining whether an action has the potential to influence voter opinion: the manner of distribution, the manner of presentation, and the timing of the distribution.¹⁰⁵ Activities during a political campaign, distributions that are targeted to a particular geographic area or presented to the general public, and materials that present a candidate in a favorable light all increase the likelihood that the IRS will identify the activity as involvement in a political campaign. Thus, when an exempt organization runs television advertisements during a campaign to promote its annual fundraising drive and those advertisements feature a candidate for office, IRS materials suggest that the organization has engaged in impermissible political campaign activity.¹⁰⁶ The IRS apparently believes that advertisements that charities air during an election posi-

⁹⁹ See, e.g., Priv. Ltr. Rul. 98-08-037 (Feb. 20, 1998) (identifying voter guides as prohibited political campaign activity because "they were aimed at influencing the public's judgment about the . . . positions of candidates").

¹⁰⁰ Whether or not these activities *actually* influence voter opinion appears to be irrelevant. See, e.g., Tech. Adv. Mem. 96-09-007 (Dec. 6, 1995) (rejecting the argument that because these activities would amount to no more than "a pastor preaching to the choir," "ideological entities could directly communicate with their memberships or selected audiences on political candidate preference").

¹⁰¹ See, e.g., I.R.S. Notice 94-111, 1994-37 I.R.B. 36 ("Contributions to political campaign[s] and public statements of position (verbal and written) in favor of or in opposition to candidates for office . . . would clearly violate the prohibition against political activity").

¹⁰² See *id.*

¹⁰³ See Rev. Rul. 80-282, 1980-2 C.B. 178; Gen. Couns. Mem. 38,444 (July 15, 1980).

¹⁰⁴ This category also includes activities such as campaign financing arrangements, the provision of campaign workers, voter registration drives, debates between candidates, the publication of candidate responses to questionnaires, and the provision of facilities for candidates to make campaign speeches. See Rev. Rul. 86-95, 1986-2 C.B. 73; Rev. Rul. 78-248, 1978-1 C.B. 154; Tech. Adv. Mem. 91-17-001 (Sept. 5, 1990); Baird, *supra* note 14, at 149-50.

¹⁰⁵ See, e.g., Rev. Rul. 80-282, 1980-2 C.B. 178 (applying these elements to a hypothetical fact situation).

¹⁰⁶ See Gen. Couns. Mem. 38,137 (Oct. 22, 1979).

tively associate the candidate with the charity, giving the advertisements the potential to influence voter opinion.

The second component addresses the question of what kind of "participation" violates the prohibition. The IRS's inquiry focuses not upon whether the organization intends to be involved in a political campaign, but upon whether "the reasonable consequences of [the organization's] activities" amount to involvement in a political campaign.¹⁰⁷ In this way, the IRS adopts an objective approach in defining participation in campaign activities under § 501(c)(3). Any activity that results in an exempt organization's involvement in a political campaign triggers the prohibition regardless of the organization's motivation. Subjective questions concerning the organization's actual motivations are simply "irrelevant."¹⁰⁸ Thus, "[a]n organization can violate the proscription even if it acts for reasons other than intervening in a political campaign."¹⁰⁹

A difficult question arises, however, when an organization unintentionally or inadvertently engages in activities that influence an election. The plain meaning of § 501(c)(3) suggests that unintentional or inadvertent activities do not violate the prohibition. "Participation" in an activity suggests more than merely affecting the outcome of an event; it implies some kind of intentional involvement. Thus, a bank teller who mistakenly leaves the bank's doors unlocked hardly has "participated" in a subsequent bank robbery. Indeed, some courts interpret "participation" in a criminal enterprise under an aiding and abetting charge to require a showing that the "defendant . . . participated in [the criminal venture] as something he wished to bring about, and sought by his actions to make it succeed."¹¹⁰ The term "intervene" carries an even stronger connotation of intentional involvement. For example, a party who intervenes in pending court proceedings is one who "voluntarily interposes"¹¹¹ himself into those proceedings.¹¹² Although the existing materials concerning these "in-

¹⁰⁷ Gen. Couns. Mem. 35,902 (July 15, 1974) (quoting a memorandum dated May 18, 1960).

¹⁰⁸ Tech. Adv. Mem. 96-35-003 (Apr. 19, 1995) (asserting that the IRS has "consistently held that the motivation of an organization is irrelevant when determining whether the political campaign prohibition has been violated"); see I.R.S. News Release IR-96-23 (Apr. 24, 1996) ("The motivation of an organization is not relevant in determining whether the political campaign prohibition has been violated.").

¹⁰⁹ Gen. Couns. Mem. 38,137 (Oct. 22, 1979); cf. *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849, 854 (10th Cir. 1972) ("A religious organization that engages in substantial activity aimed at influencing legislation is disqualified from tax exemption, whatever the motivation.").

¹¹⁰ *United States v. Cowart*, 595 F.2d 1023, 1035 (5th Cir. 1979) (quoting *United States v. Congoria*, 569 F.2d 422, 425 (5th Cir. 1978)).

¹¹¹ BLACK'S LAW DICTIONARY 820 (6th ed. 1990).

¹¹² See, e.g., FED. R. CIV. P. 24.

advertent" activities are vague,¹¹³ the IRS seems to buckle and read some element of control or intent into the inquiry. Thus, the IRS may look for a choice by the exempt organization to involve itself in a campaign. Once the organization makes that choice, however, its motivations become irrelevant.

Two hypotheticals the IRS raises nicely illustrate these elements of control and choice. Suppose a candidate suffers a heart attack on the campaign trail and is taken to a tax-exempt hospital in which he receives lifesaving medical attention. By saving the life of the candidate, the hospital certainly aided the candidate. The hospital, however, has not participated in a political campaign any more than it would have participated in a football game by treating an injured player or a bank robbery by treating an injured suspect. The law may even require the hospital to treat all emergency patients that come to the hospital. The hospital made no conscious choice to assist the individual's candidacy for public office, and its rendering of lifesaving aid to the candidate was simply fortuitous. As a result, IRS materials suggest that the hospital's "inadvertent" or peripheral involvement in a political campaign is not enough to violate the prohibition.¹¹⁴

Similarly, suppose that an exempt organization invites a speaker to provide the keynote address at an annual economics symposium. The day before the event, the speaker announces his candidacy for office. If the organization allows the candidate to speak at the symposium, has the organization participated in a political campaign? Surely the fact that the candidate will speak at a well-publicized symposium has the potential to influence voter opinion. Again, however, the organization did not choose its political involvement, and penalizing the organization for the unilateral actions of its speaker seems unfair. As a result, IRS materials suggest that this unintentional involvement in a political campaign does not violate the prohibition.¹¹⁵

This factor alone, however, explains only a small amount of § 501(c)(3) jurisprudence. If political campaign activities include all types of financial or volunteer aid and any actions that may influence voter opinion, then exempt organizations should not be able to participate in voter registration drives,¹¹⁶ sponsor debates between candi-

¹¹³ Compare Gen. Couns. Mem. 38,137 (Oct. 22, 1979) ("We do not mean to imply that every activity that has an effect on a political campaign is prohibited political activity. We recognize that organizations may inadvertently support political candidates."), with Tech. Adv. Mem. 96-09-007 (Dec. 6, 1995) ("[I]ntervention in a political campaign may be subtle or blatant It may even be inadvertent.")

¹¹⁴ Gen. Couns. Mem. 38,137 (Oct. 22, 1979).

¹¹⁵ See *id.*

¹¹⁶ See Tech. Adv. Mem. 91-17-001 (Sept. 5, 1990).

dates,¹¹⁷ distribute candidates' voting records,¹¹⁸ publish candidate responses to questionnaires,¹¹⁹ or provide facilities for candidates to make campaign speeches.¹²⁰ Yet the IRS permits these activities in certain situations. Thus, the inquiry must involve additional considerations.

B. Whether the Organization Favors or Disfavors a Particular Candidate or Candidates

Section 501(c)(3) does not prohibit exempt organizations from all involvement in political campaigns; it merely prohibits their involvement "on behalf of (or in opposition to) a candidate for public office."¹²¹ Thus, in order to violate § 501(c)(3)'s prohibition, an exempt organization either must support or oppose a candidate. In many instances, the nature of the activity itself establishes the organization's support or opposition of a particular candidate. Sometimes, however, the IRS must proceed by implication, basing its finding of favoritism or bias on the manner of presentation, the manner of distribution, or the timing of the distribution. As a result, this factor has the practical effect of dividing political campaign activities into two categories—those campaign activities in which a charity may never take part and those activities in which it may take part so long as it does so in a neutral fashion.

The first category represents those political campaign activities that demonstrate the charity's favoritism or bias by their very nature. Because these activities are inherently biased, the IRS need only prove that the exempt organization engaged in the activity to establish a violation of § 501(c)(3). Campaign contributions and public statements for or against a candidate clearly fall within this category. By providing financial contributions or endorsing a candidate, an exempt organization necessarily favors the candidate.¹²² Thus, when a tax-exempt religious organization finances the campaigns of its members who are running for political office, organizes a team of campaign workers from the exempt organization's membership, and endorses the candidates in the organization's publications and meetings, the organization participates in prohibited campaign activity.¹²³ Because

¹¹⁷ See Rev. Rul. 86-95, 1986-2 C.B. 73.

¹¹⁸ See Rev. Rul. 80-282, 1980-2 C.B. 178; Gen. Couns. Mem. 38,444 (July 15, 1980).

¹¹⁹ See Rev. Rul. 78-248, 1978-1 C.B. 154.

¹²⁰ See sources cited *supra* note 14.

¹²¹ I.R.C. § 501(c)(3) (1994).

¹²² See, e.g., I.R.S. Notice 94-111, 1994-37 I.R.B. 36 ("Contributions to political campaign[s] and public statements of position (verbal and written) in favor of or in opposition to candidates for office . . . would clearly violate the prohibition against political activity.")

¹²³ See Gen. Couns. Mem. 39,414 (Sept. 25, 1985).

these activities inherently provide a particular candidate with an advantage in the election, the IRS expressly forbids them.

An exempt organization also demonstrates favoritism or bias when it evaluates candidates. Any attempt to rate the qualifications of candidates will violate § 501(c)(3)'s prohibition even if the evaluation employs neutral, identifiable criteria such as professional competence or character. Thus, when an exempt educational organization rates candidates for the school board and then supports a slate of the most qualified, the organization participates in a campaign in violation of the prohibition.¹²⁴ Similarly, an organization that solicits candidates to conduct their campaigns in accordance with a code of ethics and then publicizes the names of those candidates who refuse to sign the code violates the prohibition.¹²⁵ Despite the civic good inherent in publicizing qualified or ethical candidates, these activities violate the proscription because they necessarily require the exempt organization to favor or disfavor a particular candidate or candidates.

The Second Circuit recognized the inherent bias in evaluating candidates in *Association of the Bar v. Commissioner*.¹²⁶ In *Association of the Bar*, the court addressed the New York City Bar Association's practice of rating candidates for elective judicial office.¹²⁷ The court held that rating the candidates constituted impermissible political campaign activity and expressly noted that "'ratings, by their very nature, necessarily will reflect the philosophy of the organization conducting such activities.'"¹²⁸ Thus, in the court's eyes, "[a] candidate who receives a 'not qualified' rating will derive little comfort from the fact that the rating may have been made in a nonpartisan manner."¹²⁹

Association of the Bar highlights the sensitivity of the inquiry into whether an organization has supported a candidate. The Bar Association rates all candidates for elective judicial office on the basis of "professional ability, experience, character, temperament and the possession of such special qualifications as the Committee deems desirable for judicial office."¹³⁰ Many campaigns will involve multiple candidates receiving the same rating of "approved," "not approved," or "approved as highly qualified." As a result, an organization may support a candidate even when it treats two opposing candidates equally. Furthermore, a candidate rated by the Bar Association may run unopposed. In this situation, the rating that the candidate re-

¹²⁴ See Rev. Rul. 67-71, 1967-1 C.B. 125.

¹²⁵ See Gen. Couns. Mem. 36,557 (Jan. 19, 1976).

¹²⁶ 858 F.2d 876 (2d Cir. 1988).

¹²⁷ See *id.* at 877.

¹²⁸ *Id.* at 880 (quoting *Association of the Bar v. Commissioner*, 89 T.C. 599, 610 (1987)).

¹²⁹ *Id.*

¹³⁰ *Id.* at 877.

ceives would have only a minimal impact on the actual outcome of the race. Yet *Association of the Bar* identifies even this relatively inconsequential rating as prohibited campaign activity.¹³¹ Because these ratings unavoidably result in the charity's expression of a favorable or unfavorable opinion of a candidate and because voters will experience a favorable or unfavorable reaction to a candidate as a result, even those ratings that arguably would not affect the outcome of a particular campaign amount to participation in political campaign activity.

By contrast, an exempt organization may conduct some political campaign activities without showing favoritism or bias to a candidate. To be sure, these activities are certain to shape voter opinion of a candidate; however, exempt organizations may undertake these activities without violating the prohibition if they do so in a neutral manner. Thus, a public television station may provide candidates with free air time to present their views so long as it grants every candidate equal access and it does not endorse any of the views presented.¹³² Similarly, an exempt organization may sponsor a debate between candidates so long as it structures the debate in a neutral manner by inviting all qualified candidates, by using questions that an independent panel prepares and that cover a wide range of issues, and by granting candidates "an equal opportunity to discuss [their] views on each of the issues discussed."¹³³

The restrictions imposed on the distribution of the candidates' voting records further demonstrate circumstances under which an exempt organization's neutrality allows it to participate in political campaign activities. First, while the organization may select certain issues and present its position on those issues, the distribution cannot make any comparison among the candidates or exclude incumbents who are not currently running for office.¹³⁴ Second, the distribution of voting records must be limited in amount—preferably to those people who regularly receive publications from the organization—and cannot focus on a particular geographic area in which elections are taking place.¹³⁵ Finally, the publication must both explain that selected votes do not provide an adequate basis for evaluating a candidate and suggest that the recipient consider other off-the-record factors.¹³⁶ The IRS has designed these restrictions to ensure an even-handed

¹³¹ See *id.* at 881.

¹³² See Gen. Couns. Mem. 35,902 (July 15, 1974).

¹³³ Rev. Rul. 86-95, 1986-2 C.B. 73.

¹³⁴ See Rev. Rul. 80-282, 1980-2 C.B. 178; Gen. Couns. Mem. 38,444 (July 15, 1980). These publications mark a retreat by the IRS from the position set forth in Revenue Ruling 78-248, 1978-1 C.B. 154. In this Ruling, the IRS forbid exempt organizations from disclosing their own position or presenting a limited number of issues. See *id.*

¹³⁵ See Rev. Rul. 80-282, 1980-2 C.B. 178.

¹³⁶ See *id.*

presentation and to reduce the possibility that an exempt organization will act on behalf of a candidate by presenting a biased or partisan voting record.¹³⁷

In determining whether an organization has shown favoritism or bias toward a particular candidate, the IRS again considers the manner of presentation, the manner of distribution, and the timing of the activity. Thus, when voter registration materials that an exempt organization mailed “contained language intended to induce conservative voters to register and vote in the 1984 General Election”¹³⁸ and were specifically “targeted to influence a segment of voters to vote for President Reagan,”¹³⁹ the organization demonstrated impermissible bias. Similarly, when an organization’s campaign-worker school advertised for students that were “[q]ualified, dedicated conservatives,”¹⁴⁰ predominantly used Republican-based course materials, and almost exclusively hired staff associated with the Republican Party,¹⁴¹ the organization revealed a “coordinated political agenda,”¹⁴² making it reasonable to assume that the organization calculated its activities to support particular candidates.

Despite the requirement of neutrality, however, the IRS has permitted exempt organizations in some circumstances to take part in political campaign activities in a partisan manner. Furthermore, even some of the allegedly “neutral” activities have partisan effects. For example, when the local Catholic church sends voting records that include the candidates’ position on abortion to its membership, the natural consequence of the mailing will be to favor those candidates who ascribe to the Catholic Church’s stance on abortion and to oppose those candidates who do not. Yet subject to some qualifications, the church may distribute these voting records under current law without jeopardizing its tax-exempt status.¹⁴³ Similarly, an exempt organization taking part in a voter registration drive may target a specific class of people such as minorities or young people even though it is statistically more probable that these groups will vote for candidates of a particular party.¹⁴⁴ Thus, further factors are necessary to explain why the IRS and the courts permit these activities.

¹³⁷ For an example of how strictly the IRS has enforced these restrictions, see General Counsel Memorandum 39,811 (Feb. 9, 1990) (finding that a published questionnaire describing the views of the candidates on abortion and homosexual rights and then urging the recipients to “vote conscientiously” constituted implied electioneering).

¹³⁸ Tech. Adv. Mem. 91-17-001 (Sept. 5, 1990).

¹³⁹ *Id.*

¹⁴⁰ *Id.* (quoting the registration materials).

¹⁴¹ *See id.*

¹⁴² *Id.*

¹⁴³ *See* Rev. Rul. 80-282, 1980-2 C.B. 178; Gen. Couns. Mem. 38,444 (July 15, 1980).

¹⁴⁴ *See* Milton Cerny, *Advocacy Organizations—Litigation, Legislation, and Politics*, C574 A.L.I.-A.B.A. 97, 110 (1990).

C. Whether the Activity Corresponds with the Organization's Legitimate Exempt Purpose¹⁴⁵

When an organization engages in activities relating to a political campaign to further its exempt purposes, the courts and the IRS may permit the activities because they support the desired social goals underlying the exemption.¹⁴⁶ This result holds true even if the organization participates in the activities in a partisan manner. In this way, the courts and the IRS create an exception to § 501(c)(3)'s absolute ban and excuse conduct by exempt organizations that otherwise would constitute political campaign activity. Thus, a tax-exempt university will not lose its exemption for financial and advisory support of a student newspaper even though the newspaper unequivocally endorses particular candidates.¹⁴⁷ Under normal circumstances, the IRS would impute to the exempt organization the political activities of any organization that it funds.¹⁴⁸ Because student newspaper activities are so intertwined with the educational purposes of the university, however, the IRS refuses to find a violation. For much the same reason, a tax-exempt university will not lose its exemption for requiring students to

¹⁴⁵ A legitimate exempt purpose is required to implicate this principle. Courts and the IRS frequently deny exemption to organizations whose purposes are too intertwined with or dependent upon political action for their realization. See *Smith v. Commissioner*, 3 T.C. 696 (1944) (finding an organization had no valid exempt educational purpose when formed solely to obtain an amendment to the state constitution); Rev. Rul. 74-117, 1974-1 C.B. 128 (refusing exempt status to an organization "formed . . . [to] implement[] an orderly change of [state Governor's] administration" because the purpose of such an organization too closely "correspond[s] with the partisan political interests of both the Governor-elect and the political party he represents").

¹⁴⁶ In some limited situations, the IRS permits an organization to engage in political campaign activities that otherwise do not correspond with the organization's legitimate exempt purpose. For example, an exempt organization may sell its membership mailing lists to candidates under the same terms afforded to other purchasers if it then pays the applicable unrelated business income tax. See *Cerny*, *supra* note 144, at 111. For simplicity's sake, this discussion does not include this narrow circumstance.

¹⁴⁷ See Rev. Rul. 72-513, 1972-2 C.B. 246. Revenue Ruling 72-513 states:

The publication and dissemination of the editorial statements . . . are acts and expressions of opinion by students occurring in the course of bona fide participation in academic programs and academic-related functions of the educational institution. In such circumstances, the fact that the university furnishes physical facilities and faculty advisors in connection with the operation of the student newspaper does not make the expression of political views by the students in the publishing of the newspaper the acts of the university within the intendment of section 501(c)(3)

Id. Revenue Ruling 72-513 also requires that a student newspaper be run in a customary journalistic manner, that the students determine the editorial policy without the university's intervention, and that the newspaper carry a statement identifying the editorial views as those of the students rather than the university. See *id.*

¹⁴⁸ See Tech. Adv. Mem. 98-12-001 (Aug. 21, 1996) (finding that an exempt organization violated the prohibition by funding a nonexempt organization that engaged in political activities).

participate in a political campaign as part of a political science course.¹⁴⁹

This factor also may permit an exempt organization to involve itself directly in a campaign. In a Private Letter Ruling, a tax-exempt mail-bundling organization that had formed to give employment opportunities to mentally disabled persons posed the question of whether providing mailing services to political campaigns would violate the proscription against political campaign activity.¹⁵⁰ The IRS concluded that this activity would not violate § 501(c)(3) because it merely would be incidental to the organization's charitable purpose.¹⁵¹ Generally, if an exempt organization provides campaign workers from its membership, it violates § 501(c)(3).¹⁵² Here, the IRS permitted the organization to provide services to a political campaign simply because doing so furthered the exempt organization's purpose of providing jobs for mentally disabled persons.

*Fulani v. League of Women Voters Education Fund*¹⁵³ further demonstrates the flexibility that courts are willing to grant exempt organizations to pursue their exempt purposes. In *Fulani*, an independent and minor party candidate for President sued the League of Women Voters for excluding her from televised primary debates for the Republican and Democratic presidential nominations.¹⁵⁴ While noting that "an organization's selective promotion of certain *parties* over others would be inconsistent with its § 501(c)(3) tax-exempt status," the court emphasized that the "function [of primary contests] in our current electoral system [is] separate and distinct" and held that the exclusion of an independent candidate from primary debates did not constitute proscribed political activity.¹⁵⁵ Thus, because the League's sponsorship of the primary debates coincided with the organization's exempt purpose of "help[ing] voters and supporters make an informed choice when time came to vote in the Republican and Democratic primary contests,"¹⁵⁶ the court overlooked both the partisan exclusion of independent candidates from primary debates that its decision necessitated and the possible inconsistency of this position with the organization's broader goal of voter education.

¹⁴⁹ See Rev. Rul. 72-512, 1972-2 C.B. 246. To ensure compliance with § 501(c)(3)'s restrictions, universities only should offer courses requiring involvement with a political campaign as electives and permit the students to choose the candidate for whom they wish to work. See Baird, *supra* note 14, at 144.

¹⁵⁰ See Priv. Ltr. Rul. 91-52-039 (Sept. 30, 1991).

¹⁵¹ See *id.*

¹⁵² See Tech. Adv. Mem. 91-17-001 (Sept. 5, 1990).

¹⁵³ 882 F.2d 621 (2d Cir. 1989).

¹⁵⁴ See *id.* at 623.

¹⁵⁵ *Id.* at 629.

¹⁵⁶ *Id.*

Fulani, therefore, stands for three significant propositions. First, *Fulani* reveals that an organization's legitimate exempt purpose may operate with such force that it justifies, in some circumstances, partisan political activity with a high probability of favoring and disfavoring particular candidates. The court permitted the exclusion of *Fulani* from the nationally televised debates even though the exclusion undeniably gave Republican and Democratic primary candidates greater publicity and thus a decided advantage in the overall election. Second, *Fulani* suggests that an exempt organization's choice of which activities to undertake in pursuit of its legitimate exempt purposes is entitled to a measure of deference. The court affirmed the League's conclusion that the importance of educating voters about the candidates in a partisan primary election justified significant expenditures even though this choice necessarily reduced the funds available to educate voters about the positions of independent candidates for the same office in the general election.

Third, *Fulani* indicates the court's recognition that practical limitations sometimes require an exempt organization to make decisions that adversely affect a particular candidate to fulfill its exempt purpose. The court noted that "approximately 280 individuals had filed statements with the Federal Election Commission . . . indicating that they considered themselves to be candidates for the office of President."¹⁵⁷ Because the inclusion of all 280 candidates in each debate would not only present a logistic impossibility but also frustrate the purpose of voter education, the court implicitly adopted the position that the exempt organization may use "*non-partisan* criteria" in assessing the "'significance' of an individual's candidacy."¹⁵⁸

The analysis thus far has shown that the IRS broadly defines political campaign activity to include activities that either result in financial or volunteer assistance to a candidate's campaign or influence voter opinion. Exempt organizations may engage in political campaign activities, however, whenever it is possible to do so in a neutral manner.

¹⁵⁷ *Id.* at 625.

¹⁵⁸ *Id.* The IRS acknowledged this fact in Technical Advice Memorandum 96-35-003 (Apr. 19, 1995), stating that "where the number of legally qualified candidates for a particular office is large, a sponsoring organization . . . might determine that holding a debate to which all legally qualified candidates were invited would be impractical and deter from the educational purposes of the organization." The IRS went on to identify four factors to be considered:

- (1) Whether inviting all legally qualified candidates is impractical;
- (2) Whether the organization adopted reasonable, objective criteria for determining which candidate to invite;
- (3) Whether the criteria were applied consistently and non-arbitrarily to all candidates; and
- (4) Whether other factors . . . indicate that the debate was conducted in a neutral, nonpartisan manner.

Furthermore, exempt organizations sometimes may engage in these activities in a partisan manner when doing so is necessary as a practical matter to further the organization's legitimate exempt purposes. This scheme, however, still contains some rough edges. The potential for harsh results calls for equitable considerations.

D. Whether Mitigating Circumstances Exist that Call for the Exercise of Leniency

The last factor involved in § 501(c)(3) political campaign activity analysis focuses upon mitigating circumstances that call for the exercise of leniency. Unfortunately, the IRS has been somewhat inconsistent in its consideration of mitigating circumstances. On the one hand, IRS materials identify § 501(c)(3)'s prohibition as an "absolute prohibition"¹⁵⁹ that "does not permit a de minimis amount of political intervention."¹⁶⁰ On the other hand, numerous IRS materials refer to a de minimis standard that may permit "something less than an 'insubstantial' amount of political activity."¹⁶¹ The passage of § 4955's excise tax on political expenditures as an alternative remedy to revocation for § 501(c)(3) political campaign activity violations assures, however, that the IRS will consider mitigating circumstances, even if only as a remedial matter.¹⁶² As the IRS itself puts it, "[T]here may be individual cases where . . . the IRS may exercise its discretion to impose a tax under section 4955 but not to seek revocation of the organization's tax-exempt status."¹⁶³

The IRS appears to consider four mitigating circumstances important in deciding whether to seek revocation of an organization's tax-exempt status. First, the IRS will consider the nature of the particular activity in question. When a political activity is "of [a] trifling nature" or otherwise insubstantial in relation to the organization's other activities, the IRS may not revoke the organization's exempt status as a matter of equity.¹⁶⁴ The IRS sometimes refers to this factor as

¹⁵⁹ INTERNAL REVENUE SERV., *supra* note 9, § 3(10)1.

¹⁶⁰ Political Expenditures by Section 501(c)(3) Organizations, 60 Fed. Reg. 62,209, 62,209 (1995) (to be codified at 26 C.F.R. pts. 1, 53, 301) (explaining that the § 4955 excise tax is also subject to this § 501(c)(3) "substantive standard[]").

¹⁶¹ Gen. Couns. Mem. 33,682 (Nov. 9, 1967).

¹⁶² See I.R.C. § 4955 (1994). With § 4955, Congress attempted to reduce the harsh outcomes resulting from the absolute prohibition against political activity by imposing an excise tax on taxable expenditures as an alternative to revocation. This scheme, however, cannot completely replace a de minimis or insubstantiality analysis, for just as the revocation penalty may be too harsh, this penalty may be too lenient. Because many exempt organizations' political activities will not involve political expenditures that may be subject to an excise tax, the IRS will be forced once again either to revoke the organization's tax-exempt status or to ignore its political activity as insubstantial.

¹⁶³ Political Expenditures by Section 501(c)(3) Organizations, 60 Fed. Reg. at 62,209.

¹⁶⁴ Gen. Couns. Mem. 33,682 (Nov. 9, 1967).

the "de minimis" standard,¹⁶⁵ which is "decided case by case"¹⁶⁶ based on "all the surrounding circumstances."¹⁶⁷ In an internal memorandum, for example, the IRS considered an exempt organization's 1960 publication that suggested that the election of a "non-independent Catholic" would endanger the separation of church and state.¹⁶⁸ Even though the statement implied bias against the candidacy of John F. Kennedy, the IRS elected not to revoke the organization's tax-exempt status for "a mere espousal of the view" and looked to the relative overall importance of the statement to the organization in determining the appropriateness of imposing sanctions.¹⁶⁹ Thus, the trivial nature of a particular proscribed campaign activity or its existence as an anomaly in relation to the organization's other activities may serve an important mitigating function in borderline cases.

Second, the IRS may consider whether participation in a proscribed political campaign activity is widespread among exempt organizations. By considering the prevalence of a particular activity, the IRS both avoids unduly penalizing one organization for what might be a profession-wide misunderstanding of the rules and manages to avoid allegations of selective prosecution. Thus, the IRS has explained:

We are not indicating that the *de minimis* principle can or should be invoked in every case where a number of organizations have engaged in substantially similar activities. However, we do think that in a case where it is questionable whether more than a *de minimis* amount of political activity has taken place, and where to revoke an exemption would give the appearance of dissimilar treatment of organizations similarly situated, the principle should be invoked.¹⁷⁰

¹⁶⁵ *Id.*; see also Gen. Couns. Mem. 39,441 (Sept. 27, 1985) (defining *de minimis* as "so trivial as to be without legal significance"); Gen. Couns. Mem. 39,414 (Sept. 25, 1985) (describing *de minimis* as "something less than an 'insubstantial' amount of political activity").

¹⁶⁶ Gen. Couns. Mem. 39,414 (Sept. 25, 1985). In support of its determination that a particular organization has engaged in proscribed political activity, the IRS may expressly compare the activity in question to the *de minimis* "triviality" standard. See *id.* ("We conclude based on the facts and circumstances of the case that the [organization]'s political activity is of such an extensive and continuing nature that it far exceeds the *de minimis* standard applicable to political activity.")

¹⁶⁷ Gen. Couns. Mem. 34,267 (Feb. 20, 1970).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* The IRS stated:

There likewise appears to be no room for doubt that the Service is also logically obliged to give due consideration to all the other publishing and nonpublishing activities of the subject organization in connection with any attempt to determine how much or how little relative importance can properly be attached to its publication of the particular items mentioned above.

Id.

¹⁷⁰ *Id.*

Third, the IRS may consider the likelihood of further political activity by the organization in question. When an organization "subsequently adopts procedures to assure no [prohibited expenditures occur in the] future," IRS materials suggest that the organization may escape revocation of its tax-exempt status.¹⁷¹ In many regards, this factor mimics the *de minimis* question of whether the particular activity is an anomaly in relation to the organization's other activities. By swiftly implementing measures designed to prevent any further political campaign participation, an exempt organization demonstrates that it will not continue the prohibited activity as a regular part of its operations. These measures provide the IRS with a rational basis for determining that the proscribed conduct is either a fluke or the act of a loose cannon within the organization.

Fourth, the IRS may consider as a mitigating circumstance whether the conduct resulted from deeply-held religious beliefs.¹⁷² Some commentators have criticized the IRS's consideration of this factor as "unworkable" because it requires the IRS "to determine which actions are 'religiously' motivated or which 'convictions' are 'deeply held.'" ¹⁷³ The factor may be justified, however, as another reflection of the concern that the IRS should not punish an otherwise legitimate exempt organization for a one-time, deeply motivated involvement in political campaign activity. Consideration of deeply held religious beliefs also may be justified when the line between the political and religious activity is especially fuzzy. As one court has noted:

[A] sermon on the holiness of the Sabbath Day may legitimately include an exhortation to the congregation or church group to observe and preserve the sanctity of the Sabbath. It would not be any less religious, or, for that matter, any more political, if the exhortation included expressions of approval of Sunday observance laws.¹⁷⁴

Thus, the IRS may consider religious motivation as a means of avoiding contentious First Amendment disputes when an organization has undertaken only a limited amount of political activity and, presumably, would be unlikely to become politically involved in the future.

¹⁷¹ Political Expenditures by Section 501(c)(3) Organizations, 59 Fed. Reg. 64,359, 64,360 (1994) (to be codified at 26 C.F.R. pts. 1, 53, 301); *see also* Political Expenditures by Section 501(c)(3) Organizations, 60 Fed. Reg. 62,209, 62,209 (1995) (to be codified at 26 C.F.R. pts. 1, 53, 301) (explaining that an organization may avoid revocation when the organization takes "measures . . . to prevent a recurrence").

¹⁷² *See* Gen. Couns. Mem. 34,071 (Mar. 11, 1969) ("It may well be that political intervention inspired by deeply-held religious convictions furnishes a prime example of a situation calling for application of the *de minimis* rule . . .").

¹⁷³ Sabbath, *supra* note 82, at 862-63.

¹⁷⁴ *Lord's Day Alliance v. United States*, 65 F. Supp. 62, 65 (E.D. Pa. 1946). Although the *Lord's Day Alliance* court addressed § 501(c)(3)'s prohibition against attempts to influence legislation, its reasoning is equally applicable to the prohibition against political campaign activity.

III

CRITICISMS, OBSERVATIONS, AND A PROPOSITION

Part II outlined four factors that shape the analysis the courts and the IRS employ under the existing facts and circumstances test. This Part broadens the scope of the inquiry in an attempt to accomplish three distinct goals. First, this Part identifies the weaknesses that characterize the existing facts and circumstances test. Second, this Part highlights an inherent tension within § 501(c)(3) that exacerbates the uncertainty flowing from the existing test. Finally, this Part proposes a test that attempts to resolve the problems raised by the existing test and the statute's inherent tension.

A. Problems with the Existing Approach

1. *Undue Flexibility*

By failing to provide IRS decision makers with enough meaningful guidance to prevent them from concocting their own idiosyncratic definitions of political campaign activity, the existing facts and circumstances test proves much too flexible. As a result, the existing test exacerbates two of the most pressing problems facing § 501(c)(3) jurisprudence. First, by granting IRS decision makers seemingly unchecked discretion, the existing test invites the consideration of invidious factors.¹⁷⁵ The existing test's flexibility enables IRS decision makers to mercilessly pursue exempt organizations with disfavored political or religious affiliations while allowing favored exempt organizations to slip through the doctrinal net.

Second, the existing test's undue flexibility erects an almost insurmountable hurdle to clarity and consistency. Without guidance concerning which facts and circumstances to consider, IRS decision makers have reached contrary results in nearly identical situations. Consider, for example, IRS materials dealing with issue advocacy. In one memorandum, the IRS considered an exempt organization that had run television advertisements in twelve large media markets around the time of a key Reagan/Mondale debate encouraging the listener to vote to avoid nuclear proliferation.¹⁷⁶ The organization's purpose for running these advertisements was to "educate the citizens about peace and arms control issues by injecting these issues into Congressional and Presidential races."¹⁷⁷ Despite the timing of the advertisements and their clear support for Mondale's position on defense,

¹⁷⁵ See, e.g., Carl E. Schneider & Margaret F. Brinig, AN INVITATION TO FAMILY LAW 791-92 (1996) ("The most prominent drawback [of discretion] . . . is that it makes it easier than rules usually do for a decision-maker to employ illegitimate considerations.").

¹⁷⁶ See Tech. Adv. Mem. 89-36-002 (May 24, 1989).

¹⁷⁷ *Id.*

the IRS found that the organization had not engaged in political campaign activity.¹⁷⁸ A recent Private Letter Ruling, however, reached the opposite conclusion under similar circumstances.¹⁷⁹ In this Ruling, the IRS addressed an exempt organization's "public education program to raise public consciousness about the importance of social and economic values that it favors."¹⁸⁰ The organization selected "certain issues based on their importance to the Fund's agenda and their expected resonance with the public in present and future political campaigns, for special emphasis in the Fund's voter education program."¹⁸¹ Here, the IRS found that the organization's proposed distribution of educational materials would constitute prohibited political campaign activity.¹⁸² Without a more clearly defined test, exempt organizations only can guess at what "facts and circumstances" distinguish these two decisions.

Section 501(c)(3) jurisprudence cannot tolerate this lack of clarity and consistency for several reasons. First, the penalty of exempt-status revocation for engaging in political activity effectively could spell financial doom for the exempt organization.¹⁸³ At best, the revocation would result in the organization incurring a substantial tax liability. At worst, contributors would withdraw their support in favor of a similar organization that could offer them a personal tax deduction.¹⁸⁴ Second, the prohibition of political campaign activity is absolute.¹⁸⁵ Consequently, the IRS requires only a single misstep by the organization to justify revocation. Third, the prohibition applies to a course of conduct—political campaign activity—that is inherently ambiguous. The line between political activities and educational or religious activities is already a blurry one. Fourth, the prohibition involves fundamental First Amendment freedoms.¹⁸⁶ A vague definition of political campaign activity chills an exempt organization's legitimate exercise of its First Amendment freedoms. Finally, because exempt organizations may win or lose important policy battles affecting them and their goals with the outcome of political campaigns, they have a tremendous incentive to become involved in elections. Thus, a vague definition of proscribed political activity frustrates an

178 *See id.*

179 *See* Priv. Ltr. Rul. 98-08-037 (Nov. 21, 1997).

180 *Id.*

181 *Id.*

182 *See id.*

183 When the IRS revokes an organization's § 501(c)(3) tax-exempt status for participation in political campaign activity, the organization may not simply shift to a § 501(c)(4) social welfare organization to retain its tax-exempt status. *See* I.R.C. § 501(c)(4)(a) (1994).

184 *See supra* note 5 and accompanying text.

185 *See supra* note 31 and accompanying text.

186 *See supra* Part I.B.1.

exempt organization seeking to further its cause to the greatest extent possible in the political realm.

2. *Perverse Incentives*

In addition to problems of flexibility, the uncertainty surrounding the existing test creates perverse incentives for aggressive exempt organizations to violate the prohibition. These perverse incentives occur because “[f]acts and circumstances tests tend to penalize those who are faint of heart while rewarding the daring.”¹⁸⁷ To understand why these incentives are created, imagine that because of the uncertainty in applying a test based on all the facts and circumstances, the probability that an organization would be sanctioned for its political involvement ranges from a chance of never being caught to a chance of always being caught. Reacting to this uncertainty, risk-averse exempt organizations would guard against the worst-case scenario and thereby refrain from engaging in political activity. Aggressive exempt organizations, on the other hand, more likely would believe that the IRS will not catch them and thereby would engage in political campaign activity. Thus, because the decision to participate in a political campaign implicates an organization’s assessment and tolerance of risk, the uncertainty surrounding the existing test encourages aggressive exempt organizations to push the spirit of § 501(c)(3)’s prohibition, while prompting more risk-averse organizations to play it safely.¹⁸⁸

The nature of § 501(c)(3)’s prohibition creates an additional incentive for aggressive risk-taking organizations to engage in political campaign activity. Because the prohibition serves to silence risk-averse organizations by keeping them out of the political debate, the political viewpoints of the aggressive exempt organization enter the marketplace of ideas without competition. Thus, the uncertainty in the existing test encourages aggressive exempt organizations to violate the prohibition and then rewards these law-breaking organizations by increasing the effectiveness of their political speech. As a result, the facts and circumstances test gives those organizations that would be the most likely to violate the prohibition another reason to do so while doubly penalizing those organizations that adhere to the letter of the law.

¹⁸⁷ Richard J. Kovach, *Bright Lines, Facts and Circumstances Tests, and Complexity in Federal Taxation*, 46 SYRACUSE L. REV. 1287, 1312 (1996).

¹⁸⁸ *Cf. id.* at 1313 (explaining that aggressive players come out ahead in a tax system that uses a facts and circumstances test by noting, for example, that “aggressive taxpayers will exploit the implications of the limited audit resources and a relatively short period of limitations on tax assessments”). Professor Kovach goes on to suggest that “policy makers . . . might well consider the direct and honest . . . approach” instead of the existing facts and circumstances “timidity tax.” *Id.*

3. *Doctrinal Confusion*

The existing test's imprecision also breeds doctrinal confusion. By opening the scope of the inquiry to all the surrounding facts and circumstances, the existing test encourages the IRS to stray from the plain language of the statute. As several commentators note, "The primary deficiency of the [existing] IRS approach is that it appears to have ignored the words 'on behalf of a candidate' . . . [and to have made a] subtle shift to the concept of 'influencing the outcome of an election.'"¹⁸⁹ Some IRS materials demonstrate even more egregious analytic confusion. One publication, for example, asserts that the prohibition encompasses "any . . . activities that may be beneficial or detrimental to any candidate."¹⁹⁰ Certainly, participation in a political campaign on behalf of a candidate is conceptually distinct from those activities that prove beneficial or detrimental to a candidate. Indeed, the IRS specifically has approved participation by exempt organizations in a number of activities that are all but certain to benefit or harm a candidate.¹⁹¹

B. Problems with the Statutory Structure

The existing facts and circumstances test does not provide the only source for the confusion in § 501(c)(3) jurisprudence. The statute itself struggles with an inherent tension. On the one hand, tax exemptions subsidize¹⁹² the work of organizations that contribute to the well-being of society and thereby reduce the strain upon government resources.¹⁹³ Thus, § 501(c)(3) represents a conscious choice by Congress to support the very broad category of organizations that operate "for religious, charitable, scientific, testing for public safety, literary, or educational purposes."¹⁹⁴ On the other hand, § 501(c)(3)'s prohibition of political campaign activity seeks to keep the U.S. Treasury "neutral in political affairs."¹⁹⁵

¹⁸⁹ Caron & Dessingue, *supra* note 19, at 198.

¹⁹⁰ I.R.S. News Release IR-96-23 (Apr. 24, 1996).

¹⁹¹ See *supra* text accompanying notes 132-37.

¹⁹² See *United States v. Taxation With Representation*, 461 U.S. 540, 545-46 (1983).

¹⁹³ See *Trinidad v. Sagrada Orden de Predicadores*, 263 U.S. 578, 581 (1924); H.R. REP. NO. 75-1860, pt. 2, at 18 (1938); HOPKINS, *supra* note 19, §§ 1.1-1.2; Stephen Schwarz, *Limiting Religious Tax Exemptions: When Should the Church Render unto Caesar?*, 29 U. FLA. L. REV. 50, 55 (1976). Whether this rationale can support the exemption of religious organizations is subject to dispute. Compare *id.* at 55-56 (arguing that a "broader secular purpose" of contributing to a pluralistic society avoids these difficulties), with Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 265-66 (1987) (arguing that this justification cannot apply to religious organizations because of the constitutional limitation on the government "from engaging in or directly supporting religious activity").

¹⁹⁴ I.R.C. § 501(c)(3) (1994).

¹⁹⁵ H.R. REP. NO. 100-391, pt. 2, at 1625 (1987).

Yet the goals of furthering the work of exempt organizations and of keeping the Treasury neutral sit at cross-purposes when the exempt organization is inextricably linked to the political scene. For example, if the League of Women Voters is going to accomplish its goal of "help[ing] voters and supporters make an informed choice when the time [comes] to vote in the Republican and Democratic primary contests,"¹⁹⁶ then it must become involved in political campaigns. Furthermore, because the outcome of elections frequently hinges on both voter turnout and voter understanding of the candidates and the issues, voter education activities never will be completely neutral. Issue-oriented groups raise a similar problem. The educational activities of exempt organizations such as National Right to Life and Planned Parenthood almost certainly will coincide with political campaigns in which these issues are hotly contested. In addition, the promotion and advocacy of these issues necessarily translates into tangible support for candidates with favorable positions on these issues by building and sustaining a voter base to which this issue is important. Thus, for the government to realize the contributions to society's well-being rendered by exempt organizations, it must depart from absolute neutrality.

This tension between purposes within § 501(c)(3) may explain the nervousness some courts and the IRS have expressed at interfering unduly with an exempt organization's pursuit of its exempt purposes. Thus, the discretion that the *Fulani* court afforded the League of Women Voters in structuring its voter education activities may reflect the court's concern that a strict reading of § 501(c)(3)'s prohibition of political campaign activity would frustrate the League's educational efforts. A similar motivation may have prompted the IRS to allow exempt organizations to indicate on some voter education materials whether the candidate supports or opposes the organization's position.¹⁹⁷ The courts and the IRS, however, cannot adequately address the tension between maintaining government neutrality and furthering the work of exempt organizations by allowing the tension to linger beneath the surface of their decisions. The standard must attempt to strike a balance that allows exempt organizations to be involved in the political sphere when necessary to accomplish their exempt purposes but that prevents them from becoming pseudo-political action committees.

¹⁹⁶ *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 629 (2d Cir. 1989).

¹⁹⁷ *See Rev. Rul. 80-282*, 1980-2 C.B. 178.

C. A Proposed Test

1. *The Test*

Thus far, Part III of this Note has highlighted some of the problems with the existing IRS test and the statutory structure. This section now proposes a two-part test that both addresses the need for clarity and attempts to resolve the inherent tension between maintaining government neutrality and furthering the work of exempt organizations. In an effort to remain consistent with the statutory authority and existing precedent, the test consciously incorporates some aspects of the existing modes of analysis as described in Part II. The test departs from this analysis, however, when necessary to increase the clarity and consistency of § 501(c)(3) jurisprudence and to remove unreasonable obstacles to the pursuit of legitimate charitable functions.

The first part of the proposed test establishes the following presumption: an exempt organization will not violate § 501(c)(3)'s prohibition against political campaign activity when it engages in activities that have the potential to influence voter opinion as long as it conducts the activities in as neutral and nonpartisan a manner as is practicable under the circumstances.¹⁹⁸ As a result, the first part of the test establishes a safe harbor. An exempt organization need only demonstrate that it acted in a neutral manner to escape the prohibition. A court or the IRS would determine neutrality, for purposes of the presumption, by reference to the following three factors: the manner of presentation, the manner of distribution, and the timing of the activity.

The inquiry into the manner of presentation focuses on the nature of the activity and the content and reasonable implications of any distributed materials in determining whether the organization showed favoritism or bias. Partisan political identifications or phrasing that strongly imply support or opposition to a particular candidate would indicate a lack of neutrality, whereas objective reporting and equal treatment of the candidates would suggest impartiality. By contrast, the manner of distribution focuses not on the activity itself but on how the organization undertook the activity. Evidence that an organization targeted an activity or distribution to a particular geographic area, for example, may show a deliberate attempt to support or oppose a particular candidate, whereas general availability or limited dis-

¹⁹⁸ For simplicity's sake, the presumption excludes situations in which the exempt organization provides financial or volunteer aid to a campaign. These activities, by their very nature, inherently support a candidate's campaign, *see supra* text accompanying notes 121-31, and absent unusual circumstances, an exempt organization could never provide financial or volunteer aid to a campaign in a neutral manner so as to enjoy the presumption, *see supra* note 122 and accompanying text.

tribution to established membership may suggest neutrality. Finally, the timing of the activity may indicate partisan bias. Although many types of voter education activities can occur only during a campaign, timing an activity to maximize support for a particular candidate may reveal an organization's partiality.

The first part of the test, however, does not require absolute neutrality. An organization need only demonstrate as much neutrality as is practicable under the circumstances. This language addresses situations such as that raised by *Fulani* in which the sheer number of candidates makes equal treatment of every candidate impossible. Thus, an organization may make decisions that adversely affect particular candidates when the circumstances so demand. When an exempt organization can treat the candidates equally, however, an organization must make every effort to retain neutrality to enjoy the presumption.

The second part of the test offers another chance to avoid sanction to those organizations that cannot show the neutrality required to satisfy the first part's presumption. The second part provides as follows: an exempt organization may engage in activities that provide financial or volunteer assistance or that have the potential to influence voter opinion as long as the expression of favoritism for the candidate is peripheral to the furtherance of the organization's legitimate exempt function. In this way, the second part of the test creates an exception for situations in which an exempt organization's pursuit of its legitimate exempt purposes overwhelms its political involvement. In these situations, the activity is more charitable than political. For example, when individuals form a tax-exempt mail-bundling organization to give employment opportunities to mentally disabled persons, and it provides mailing services for political campaigns,¹⁹⁹ it escapes violating the prohibition under the second part of the test. The organization's desire to further its exempt purposes by providing employment opportunities for the mentally handicapped so outstrips its political involvement as to render the involvement inconsequential.

The tax-exempt financing for the college courses that Newt Gingrich taught further illustrates the second part of the test. In 1993 and 1994, the former Speaker of the House taught a televised college course entitled "Renewing American Civilization" at two small colleges in Georgia.²⁰⁰ These courses were funded in part by tax deductible contributions from two private, nonprofit foundations.²⁰¹ This arrangement would pass the second part of the proposed test because any support for Gingrich's campaign was secondary to the organiza-

199 See Priv. Ltr. Rul. 91-52-039 (Sept. 30, 1991).

200 See Ruth Marcus, *Gingrich Probe to Chart Murky Area of Tax Law*, WASH. POST, Dec. 27, 1995, at A4.

201 See *id.*

tion's attainment of its educational goals. As a former history professor, Speaker of the House, and leader of the Republican Revolution, Gingrich was certainly well-qualified to teach a course on "Renewing American Civilization." In fact, Gingrich's courses gave these colleges the opportunity to offer their students a unique and probably unforgettable educational experience. Thus, under the second part of the test, the colleges may offer these courses because any advancement of Gingrich's candidacy was peripheral to the courses' educational opportunities.²⁰²

2. *Advantages of the Test*

The proposed test offers several advantages over the existing facts and circumstances inquiry. First, by establishing a presumption that political campaign activities undertaken in a neutral fashion do not violate the prohibition, the proposed test helps to resolve the uncertainty surrounding the application of § 501(c)(3). Under the test, exempt organizations that wish to engage in activities that have the potential to influence voter opinion need not worry about the idiosyncrasies of IRS decision makers because they can ensure compliance merely by taking steps from the outset to create a record of their neutrality. In this way, the proposed test removes the perverse incentives that the existing facts and circumstances test creates by freeing risk-averse organizations to engage in identifiable political activities without the fear of having their tax-exempt status revoked.²⁰³ The presumption also decreases the risk that IRS decision makers will consider invidious factors by constraining their discretion. 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. The proposed test constrains discretion even further by identifying the manner of presentation, the manner of distribution, and the timing of the activity as relevant factors. Thus, the proposed test provides a principled basis for enforcement and thereby helps to avoid selective prosecution problems. Finally, by focusing upon an exempt organization's neutrality, the proposed test directs the inquiry back toward the statutory language. Section 501(c)(3) does not prohibit all political campaign activities but only those that an exempt organization undertakes "on behalf of (or in opposition to) a candidate for public office."²⁰⁴ This renewed focus upon the statutory language ensures that doctrinal mischief will be minimized.

²⁰² Cf. *id.* (noting that the attorney for one of the colleges had obtained a letter from the IRS approving the courses).

²⁰³ See *supra* Part III.A.2.

²⁰⁴ I.R.C. § 501(c)(3) (1994).

Second, the proposed test strikes a workable balance between maintaining government neutrality and fostering the work of exempt organizations. The first part of the test gives exempt organizations an incentive to strive for neutrality when engaging in political campaign activities so they may enjoy the benefits of the safe harbor presumption. The second part of the test then creates a limited exception, allowing exempt organizations to participate in a partisan political campaign activity when that partisan activity is secondary to furthering their legitimate exempt interests. As a result, exempt organizations have incentives to deviate from neutrality only when such a departure would facilitate the attainment of their socially beneficial goals.

CONCLUSION

Section 501(c)(3)'s prohibition of political campaign activity represents a serious limitation on the First Amendment liberties of tax-exempt organizations. By continuing to characterize this imposition upon free speech and religious exercise with oracular pronouncements, vague standards, and haphazard enforcement practices, the courts and the IRS have created tremendous uncertainty when clear guidance is needed. The existing facts and circumstances test must be replaced with a scheme that better reflects the realities of § 501(c)(3) jurisprudence, its underlying purposes, and its statutory mandate. Until the courts and the IRS establish rational and understandable boundaries to § 501(c)(3)'s prohibition, they will continue to stifle the valuable contributions of exempt organizations to the marketplace of political and moral ideas and to discourage the uninhibited pursuit of their beneficial exempt purposes.