SPEAKING UP: THE CHALLENGES TO SECTION 501(C)(3)'S POLITICAL ACTIVITIES PROHIBITION IN A POST-*CITIZENS UNITED* WORLD

Hannah Lepow*

Following the Supreme Court's decision in Citizens United v. Federal Election Commission, *there is still one type of corporation that cannot engage in political speech: the nonprofit corporation. Section 501(c)(3) of the Internal Revenue Code prevents nonprofit corporations that hold tax-exempt status from participating in "any political campaign on behalf of (or in opposition to) any candidate for political office." But recent events show a growing call to reform this provision, referred to as the political activities prohibition. These events include new First Amendment developments, charities allegedly flouting the prohibition in recent elections, the 2013 IRS targeting scandal, and finally a notice of proposed rulemaking promulgated by the IRS and the Treasury Department in 2013 that could change the political activity regulations for both section 501(c)(3) and section 501(c)(4) organizations.*

This Note responds to these recent events and discusses the purpose and structure of the political activities prohibition, both within section 501(c)(3) and in connection with section 501(c)(4). The Note then examines different constitutional challenges to the political activities prohibition, including First Amendment and selective prosecution challenges stemming from the IRS' alleged haphazard enforcement of the prohibition. This Note concludes that the political activities prohibition should not be eliminated, but advocates

* J.D. Candidate 2015, Columbia Law School; B.A. 2011, Columbia University. Many thanks to Professor Jamal Greene for his invaluable guidance, as well as Susan and Les Lepow for their feedback and constant support. Additional thanks to the editors of the *Columbia Business Law Review* for their assistance in preparing this Note for publication.

implementing several laws and agency policies to ensure even enforcement of the prohibition.

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I. INTRODUCTION

Since 1954,[1] section 501(c)(3) of the Internal Revenue Code has prevented nonprofit corporations that hold tax-exempt status from participating or intervening in "any political campaign on behalf of (or in opposition to) any candidate for political office."[2] This language—called the political activities prohibition[3]—has never been directly challenged before the Supreme Court on any grounds. However, it has been much criticized, both on its substance and its enforcement.[4] The subject matter of the prohibition raises First Amendment questions, but more troubling is the "haphazard" and allegedly selective enforcement of the prohibition by the Internal Revenue Service ("IRS").[5]

Although reform efforts have been ongoing for many years,[6] four recent events have reignited the debate. First, the Supreme Court has issued strong First Amendment protections in recent cases involving corporate political activity and the government's ability to condition speech on the receipt of a benefit. In the wake of these decisions, the

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1 100 CONG. REC. 694 (1954); Michael Fresco, Note, *Getting to "Exempt!": Putting the Rubber Stamp on Section 501(c)(3)'s Political Activity Prohibition*, 80 FORDHAM L. REV. 3015, 3020 (2012).

2 I.R.C. § 501 (2012).

3 *See, e.g.,* David A. Wimmer, *Curtailing the Political Influence of Section 501(c)(3) Tax-Exempt Machines*, 11 VA. TAX REV. 605, 622 (1992) (calling section 501(c)(3)'s rule that charitable organizations cannot participate in political campaigns the "Political Activities Prohibition").

4 *See* Fresco, *supra* note 1, at 3031–32 for a summary of criticism. *See also* Lloyd Hitoshi Mayer, *Grasping Smoke: Enforcing the Ban on Political Activity by Charities*, 6 FIRST AMEND. L. REV. 1, 4 n.8 (2007) (listing bills introduced in Congress to amend the political activities prohibition that did not make it out of committee).

5 *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, 218 (1992) (describing IRS enforcement of the political activities prohibition as "haphazard" and commenting on "the uncertain and sometimes inconsistent interpretations" the courts and the IRS have given the prohibition).

6 For a summary of reform efforts, see Fresco, *supra* note 1, at 3046–49.

political activities prohibition might soon face a First Amendment challenge.[7] Second, each passing election cycle highlights how section 501(c)(3) charities push the political activities prohibition to—and allegedly past—its limits, with the 2012 election, the first after the Supreme Court's *Citizens United* ruling, illustrating the increased political activity of some charities.[8] Third, allegations that the IRS' enforcement of tax-exempt status is uneven and perhaps politically motivated were highlighted by the 2013 IRS scandal, in which the agency scrutinized organizations with partisan-sounding names applying for section 501(c)(4) tax-exempt status.[9] Section 501(c)(4) applies to social welfare organizations that can engage in some types of political activity,[10] not charities. However, the enforcement of section 501(c)(4) has an effect on (c)(3) charities, as many organizations have a dual structure comprised of both a (c)(3) and a (c)(4) entity.[11] And fourth, in reaction to all of these developments, in November 2013 the Treasury Department and the IRS published a Notice of Proposed Rulemaking ("NPRM") that could clarify and limit the types of political activities in which 501(c)(4) organizations can engage. The NPRM also solicited comments on whether

7 *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding corporations' free speech protected under the First Amendment and striking down a campaign finance law as violative of the First Amendment); Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l Inc., 133 S. Ct. 2321 (2013) (holding that the government cannot condition corporations' receipt of funding to combat disease abroad on the corporation having a policy expressly opposing prostitution). *See infra* Part II.C.1.

8 *See infra* notes 56–60 and accompanying text.

9 *See infra* notes 67–71 and accompanying text.

10 I.R.C. § 501 (2012).

11 *See* 26 C.F.R. § 56.4911-7(f) (2014) (specifically contemplating affiliations between (c)(3) and (c)(4) organizations by describing, as an example of an affiliated group, a (c)(4) organization controlling two (c)(3) organizations).

similar bright-line rules should be extended to the political activity of 501(c)(3) organizations.[12]

This Note addresses the growing call for reform of section 501(c)(3)'s political activities prohibition. Part I summarizes the purpose, legislative history, and penalty structure of the political activities prohibition, examines the functionality and constitutionality of the dual structure of sections 501(c)(3) and 501(c)(4), and discusses the recent developments that make this Note particularly relevant. Part II examines the constitutional problems with the existing structure, looking at First Amendment issues, as well as issues presented by the IRS' alleged selective prosecution and enforcement of the prohibition. Part III suggests that the prohibition should not be eliminated, but that laws and policies should be pursued that ensure even enforcement of the prohibition. These solutions, which could be enacted through IRS guidance or congressional statute, include lowering the burden for (c)(3)s wishing to form (c)(4)s by explicitly allowing the entities to share staffs, creating a safe harbor for violators of the prohibition, and, as the IRS' proposed rule suggests, more clearly defining what "political activity" means. Further research by scholars in other disciplines would aid legislators and agency officials in developing and implementing these solutions.

II. HISTORICAL BACKGROUND AND RECENT DEVELOPMENTS

A. Text, Legislative History, Purpose, and Penalty Structure of the Political Activities Prohibition

Section 501(c)(3) defines political activity as "participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for

[12] Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535 (proposed Nov. 29, 2013). *See infra* Part II.C.4.

public office."[13] The statute does not define any of these terms further.[14] Other sections of the Code discuss political activity, but they do not meaningfully elaborate on its definition in relation to 501(c)(3) organizations.[15] Additional sections of the Code indicate that the political activities prohibition covers participation or intervention on behalf of any candidate, federal, state, local, or foreign, including making statements and spending money for that purpose.[16]

Then-Senator Lyndon Johnson proposed the political activities prohibition as a floor amendment to legislation that became the Revenue Act of 1954.[17] Because the prohibition was proposed in this way there are no committee reports or other direct legislative history supporting the prohibition.[18] Many scholars believe Johnson was politically motivated; funds provided by a charitable foundation had been used to help finance the campaign of one of his recent primary opponents.[19] Johnson only said that the purpose of the amendment was to "deny[] tax-exempt status to not only those people who influence legislation but also to those who intervene in any political campaign on behalf of any candidate for any public office."[20] In 1987, the phrase "(in opposition to)" was added to the provision.[21] There is some legislative history in support of the 1987 amendments: the

13 I.R.C. § 501 (2012).

14 *See* Fresco, *supra* note 1, at 3021.

15 *Id.* (citing Amelia Elacqua, *Eyes Wide Shut: The Ambiguous "Political Activity" Prohibition and Its Effects on 501(c)(3) Organizations*, 8 HOUS. BUS. & TAX L.J. 113, 115 (2007)).

16 See *id.* at 3021–22 for an analysis of other sections of the Code that discuss political activity. *See also* BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 678 (9th ed. 2007).

17 100 CONG. REC. 9604 (1954).

18 HOPKINS, *supra* note 16, at 678.

19 *Id. See also* Roger Colinvaux, *The Political Speech of Charities in the Face of* Citizens United*: A Defense of Prohibition*, 62 CASE W. RES. L. REV. 685, 690 n.25 (2012) (detailing more scholarship on Johnson's motives).

20 100 Cong. Rec. 9604 (1954).

21 Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101. Stat. 1330-464; HOPKINS, *supra* note 16, at 678.

House Report accompanying the bill stated, "[t]he prohibition on political campaign activities . . . reflect[s] congressional policies that the U.S. Treasury should be neutral in political affairs."[22] This mirrored language was used fifteen years earlier by the Tenth Circuit, describing the Congressional policy behind section 501(c)(3)'s lobbying prohibition when it upheld the revocation of a religious ministry organization's tax-exempt status for engaging in lobbying activities and intervening in political campaigns.[23]

Following limited legislative history and little textual precision, subsequent judicial and agency interpretation of the prohibition also lacks specificity. Neither the IRS nor a court has articulated a bright-line rule regarding which activities violate the political activities prohibition;[24] however, the IRS has published various guidance documents explaining the parameters of the rule. For instance, charities can sponsor candidate debates and forums that are educational and impartial,[25] but evaluating the qualifications of candidates or supporting a slate of candidates violates the prohibition.[26] The IRS has provided twenty-one examples of permitted and prohibited activities in six areas of political activity: voter education and registration, individual activity by organization leaders, candidate appearances, issue advocacy, business activity, and activity on websites.[27] However, while the examples posed by these guidance documents are often specific, the IRS ultimately looks to the facts and circumstances of a

22 H.R. REP. NO. 100-391, at 1625 (1987).

23 Christian Echoes Nat. Ministry, Inc. v. United States, 470 F.2d 849, 854 (10th Cir. 1972) ("The limitations in Section 501(c)(3) stem from the Congressional policy that the United States Treasury should be neutral in political affairs and that substantial activities directed to attempts to influence legislation or affect a political campaign should not be subsidized.").

24 HOPKINS, *supra* note 16, at 681.

25 Rev. Rul. 66-256, 1966-2 C.B. 210. Revenue Rulings are the IRS' official interpretations of the Code and regulations. They do not have the force of law, but do have precedential value for taxpayers.

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

27 Rev. Rul. 2007-41, 2007-1 C.B. 1421.

particular activity to determine whether it violates the political activities prohibition.[28] The absence of a bright-line rule or a way of knowing in advance whether a contemplated activity is prohibited can make it difficult for charities to know how to proceed.

The penalties for violating the political activities prohibition are potentially harsh. The IRS can revoke the tax-exempt status of any organization that engages in political activity.[29] Any 501(c)(3) organization whose exempt status is revoked due to political activity may not re-form under section 501(c)(4) (the section of the tax code that provides tax-exempt status to social welfare organizations engaging in political activity),[30] although the organization may resubmit an application for exemption under section 501(c)(3).[31] The IRS may also impose a tax on political expenditures by a 501(c)(3) organization, either alone or in conjunction with revocation of its tax-exempt status.[32]

B. The Dual Structure of Sections 501(c)(3) and 501(c)(4), Functionally and Constitutionally

Section 501(c)(3) organizations (also called charities) have two significant and unique benefits in addition to tax-exempt status. First, donations to 501(c)(3) organizations are

[28] *See, e.g.*, Rev. Rul. 78-248, 1978-1 C.B. 154 ("Whether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case."). *See also* Donald B. Toobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1350 (2007) ("The facts and circumstances approach has been widely criticized and poses significant problems for 501(c)(3) organizations.").

[29] *See* United States v. Dykema, 666 F.2d 1096, 1101 (7th Cir. 1981) ("It should be noted that exemption is lost . . . by participation in any political campaign on behalf of any candidate for public office."); *see also* HOPKINS, *supra* note 16, at 679.

[30] I.R.C. § 504(a) (2012).

[31] IRS, Results of Revocation of IRC 501(c)(3) Organizations, in 1988 Exempt Organizations Continuing Professional Education Text 2, 3, *available at* http://perma.cc/C7SZ-3M3U.

[32] I.R.C. § 4995(a)(1)–(2) (2012); HOPKINS, *supra* note 16, at 696–99.

deductible from the donor's income tax.[33] Second, donation restrictions make it much easier for private foundations to give grants to 501(c)(3) organizations than to other types of organizations, including 501(c)(4) social welfare organizations.[34] To maintain these benefits, a 501(c)(3) must comply with three requirements: (1) no part of its net earnings may inure to the benefit of a private shareholder or individual, (2) the organization cannot engage in "substantial" lobbying activities, and (3) the organization cannot "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."[35]

Section 501(c)(4) organizations enjoy unique benefits as well. These organizations (also called social welfare organizations) are tax-exempt,[36] and unlike (c)(3)s, may engage in a variety of political campaign activities, provided that these activities are not the primary purpose of the (c)(4).[37] However, donations to 501(c)(4) organizations are not eligible for the charitable deduction, and because of

33 *Id.* § 170(c) (2012).

34 *Id.* § 4942 (2012). A private foundation must distribute a minimum amount of money for charitable purposes to avoid a thirty percent tax on undistributed income. *Id.* The amount distributed must be in the form of "qualifying distributions," which generally include grants to (c)(3) organizations but not to (c)(4) organizations. *Id.* § 4942(g)(3) (2012).

35 *Id.* § 501 (2012).

36 *Id.* Section 501(c)(4) exempts "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes."

37 Rev. Rul. 81-95, 1981-1 C.B. 332. *See also* Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 153 n.1 (2003) ("An organization 'may carry on lawful political activities and remain exempt under section 501(c)(4) as long as it is primarily engaged in activities that promote social welfare.'" (quoting Rev. Rul. 81-95)). A 501(c)(4) organization may also engage in unlimited lobbying provided the subject of the legislation it seeks to influence is related to the (c)(4)'s exempt purpose. Rev. Rul. 61-177, 1961-2 C.B. 117.

restrictions on private foundations, 501(c)(4)s are much less competitive for foundation grants. Given the benefits and drawbacks associated with (c)(3) and (c)(4) organizations, it is unsurprising that many nonprofit corporations utilize a dual structure, maintaining both a (c)(3) and a (c)(4) entity for practical and financial reasons.[38] As long as a nonprofit maintains a barrier between its (c)(3) and (c)(4) entities to ensure the political activities of the (c)(4) are not attributed to the (c)(3),[39] it can engage in political advocacy while also enjoying provisions that make it easier to receive donations and grants to fund its non-political activity.

This dual structure also serves a constitutional purpose. Section 501(c)(4) organizations provide an alternate channel for a section 501(c)(3) organization's political speech. Although the Supreme Court has never examined the political activities prohibition, it considered and upheld the constitutionality of section 501(c)(3)'s lobbying restriction in *Regan v. Taxation With Representation of Washington ("TWR").*[40] Concurring in *TWR*, Justice Blackmun, joined by Justices Marshall and Brennan, stressed that the ban on "substantial lobbying" in section 501(c)(3), viewed in isolation, violated the principle that the government may not deny a benefit—tax exempt status and the ability to receive tax-deductible contributions—to an entity because the entity exercises a constitutional right[41]—lobbying activity.[42] Given

38 Organizations that have both a (c)(3) and a (c)(4) entity include the American Civil Liberties Union, the Sierra Club, the National Rifle Association, and Planned Parenthood.

39 If the two entities have the same board members, or if the (c)(3) directors comprise a majority of the board of the (c)(4), the activities of the (c)(4) may be attributed to the (c)(3). *See* I.R.S. Priv. Ltr. Rul. 91-08-016 (Feb. 22, 1990). *See also* Regan v. Taxation With Representation of Washington [hereinafter "TWR"], 461 U.S. 540, 544 n.6 (1983) (explaining that (c)(3) and (c)(4) entities must maintain separate records to demonstrate that tax-deductible donations to the (c)(3) do not subsidize the political activities of the (c)(4)).

40 TWR, 461 U.S. at 549–50.

41 *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("[The government] may not deny a benefit to a person on a basis that infringes

the dual structure of sections 501(c)(3) and 501(c)(4), the Court found that Congress' purpose in imposing the lobbying restriction was merely to ensure that "no tax-deductible contributions are used to pay for substantial lobbying."[43] Consistent with that purpose, the IRS "apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax deductible contributions are not used to pay for lobbying."[44] The majority held this was not unduly burdensome.[45] Justice Blackmun agreed that "as long as the IRS goes no further than this," a 501(c)(3) organization's right to speak is not infringed because it is free to make its views on legislation known through a 501(c)(4) affiliate without losing tax benefits for its non-lobbying activities.[46]

However, Justice Blackmun was careful to note that "[s]hould the IRS attempt to limit the control [501(c)(3)] organizations exercise over the lobbying of their 501(c)(4) affiliates, the First Amendment problems would be insurmountable."[47] Although *TWR* examined the dual structure as it applied to the lobbying restriction, the same argument exists for the political activities prohibition: The failure of a 501(c)(4) affiliate to serve as an alternate channel for its 501(c)(3) organization's political speech would create First Amendment issues.

C. Recent Developments

Four recent events indicate that legislators, agency officials, and regulated parties are likely to challenge or reform the political activities prohibition in the near future.

his constitutionally protected interests—especially, his interest in freedom of speech.").

42 TWR, 461 U.S. at 552 (Blackmun, J., concurring). Lobbying is protected by the First Amendment. *Id.* (citing E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 137–38 (1961)).

43 *Id.* at 544 n.6.

44 *Id.*

45 *Id.*

46 *Id.* at 553 (Blackmun, J., concurring).

47 *Id.*

1. Recent First Amendment Developments: *Citizens United* and *Open Society*

First, the Supreme Court has issued strong First Amendment protections in recent cases involving corporate political activity and the government's ability to condition speech on the receipt of a benefit. In 2010, the Court held in *Citizens United v. Federal Election Commission* that "the Government may not suppress political speech based on the speaker's corporate identity."[48] Accordingly, the Court struck down a provision of the Federal Election Campaign Act that barred corporations from using their general treasury funds to make independent expenditures and electioneering communications (the "electioneering rule") as an unconstitutional burden on corporations' free speech under the First Amendment.[49] The Court found the electioneering rule unconstitutional even though corporations could engage in political speech through an alternate channel by forming a political action committee (PAC)—an entity that did not use general treasury funds.[50] The Court's holding in *Citizens United* is likely to prompt a challenge to the political activities prohibition for two reasons. First, given the important role that alternate channel analysis played in upholding the constitutionality of the lobbying restriction of section 501(c)(3) in *TWR*, any court evaluating the constitutionality of the political activities prohibition will have to consider the much less forgiving alternate channel analysis presented by *Citizens United*. Second, as *Citizens United* gives corporations unprecedented means to engage in political activity, charities will likely need to speak louder in order to be heard.[51] Taken together, these factors indicate that challenges to the political activities prohibition are likely.

48 Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010).

49 *See id*. at 372.

50 *Id.* at 365. ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

51 *See* Fresco, *supra* note 1, at 3017–18.

Even more recently, the Court protected the First Amendment rights of organizations receiving funding from the government. In 2013, the Court held in *Agency for International Development v. Alliance for Open Society International, Inc.* that a law conditioning an organization's receipt of government funds to combat HIV/AIDS abroad on whether the organization had a policy explicitly opposing prostitution violated the organization's First Amendment rights.[52] Although section 501(c)(3) organizations do not receive government funds, they do receive tax-exempt status, a benefit that the Court has held has "much the same effect as a cash grant to the organization."[53] The Court also rejected an argument that the otherwise unconstitutional burden on free speech was alleviated by the ability of funding recipients to work with affiliates who did not need to abide by the conditions of the law so long as the organizations remained independent from the affiliates.[54] This rejected argument, like the one in *Citizens United*, again mirrors the existing current dual structure of charities under which an organization may have both a (c)(3) and a (c)(4) entity. Although the court affirmed this dual structure while examining a challenge to the lobbying prohibition in 501(c)(3) in *TWR*, Justice Blackmun, concurring in *TWR*, stated that the option for a (c)(3) to have a (c)(4) affiliate was necessary to cure the "constitutional defect" that would otherwise "inhere."[55] After *Citizens United* and *Open Society*, the defense that the political activities prohibition is constitutional because organizations have an alternate channel for speech is weaker.

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[52] *See* Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2332 (2013).

[53] *Id.* at 2328 (quoting TWR*,* 461 U.S. 540, 544 (1983)).

[54] *Id.* at 2331.

[55] TWR*,* 461 U.S. 540, 552–53 (1983) (Blackmun, J., concurring). *See also* FCC v. League of Women Voters of California, 468 U.S. 364, 399–401 (1984) (noting same).

2. Recent Election Cycles

Second, recent election cycles indicate that charities are increasingly pushing the political activities prohibition to—and allegedly past—its limits.[56] IRS enforcement of the political activities prohibition has been uneven and has the potential to be politically biased.[57] During the 2012 election, the Billy Graham Evangelical Association published newspaper advertisements in the *Wall Street Journal* and *USA Today* asking voters to back candidates who support "the biblical definition of marriage between a man and a woman."[58] A Texas church advised on its marquee to "Vote for the Mormon, not the Muslim!"[59] During the 2008 election, the General Baptist State Convention of North Carolina invited Michelle Obama to speak at an event that Americans United for Separation of Church and State characterized as a campaign rally.[60] In response to the IRS' inattention to these charities' political activities, the Freedom From Religion Foundation brought a case against the IRS, alleging that the agency had a policy of not enforcing the political activities prohibition against churches and religious organizations while at the same time enforcing it fully against other tax-exempt organizations.[61] The Foundation, itself a 501(c)(3), claimed that the IRS' policy of disparate treatment violated its rights under both the establishment clause and the equal protection clause of the Fifth Amendment.[62] The IRS moved to dismiss on two grounds:

56 *See* Mary Wisniewski, *Election Blurring of Church, State Separation Draws Complaints*, REUTERS, Nov. 12, 2012, *available at* http://perma.cc/T4DW-D5PG.

57 Colinvaux, *supra* note 19, at 701.

58 Wisniewski, *supra* note 56.

59 *Id.*

60 *Id. See also* Press Release, Ams. United for the Separation of Church and State, AU Asks IRS to Investigate N.C. Baptist Group That Hosted Obama Rally (Oct. 30, 2008), http://perma.cc/YT9A-5ALD.

61 Freedom From Religion Found., Inc. v. Shulman, 961 F. Supp. 2d 947, 950 (W.D. Wis. 2013).

62 *Id.*

sovereign immunity and lack of standing.[63] In August 2013 the District Court for the Western District of Wisconsin denied the IRS' motion to dismiss.[64] This surprising ruling provided organizations that have not been targeted by the IRS, and therefore do not have a clear injury in fact, with support for an argument that they have standing to challenge the political activities prohibition. The Foundation and the IRS reached a settlement in July 2014 and the case was dismissed without prejudice.[65] However, the Foundation stated in a press release that, although the IRS has now "adopted procedures for reviewing, evaluating, and determining whether to initiate church investigations" and "no longer has a blanket policy or practice of non-enforcement of political activity restrictions as to churches," the Foundation would take further legal action to enforce the political activities prohibition in the future if necessary.[66]

3. The 2013 IRS Scandal

Third, allegations that IRS enforcement of tax-exempt status is uneven are highlighted by the 2013 IRS scandal. After *Citizens United*, many corporations sought to form 501(c)(4)s for political activity purposes,[67] as (c)(4)s (unlike super PACs) do not have to disclose the names of donors.[68] In

63 *See id.*; *see also* H. Chandler Combrest, *Symbolism as Savior: A Look at the Impact of the IRS Ban on Political Activity by Tax-Exempt Religious Organizations*, 61 ALA. L. REV. 1121, 1138–40 (2010) (discussing how standing has prevented plaintiffs from bringing cases to challenge the political activities prohibition).

64 Freedom From Religion Found., Inc., 961 F. Supp. 2d at 954.

65 *See* Freedom From Religion Found., Inc. v. Koskinen, No. 12-C-0818, 2014 WL 3811050, at *1 (W.D. Wis. Aug. 1, 2014).

66 Press Release, FFRF, IRS Settle Suit Over Church Politicking, FREEDOM FROM RELIGION FOUND. (July 17, 2014), http://perma.cc/ZM32-2JTR.

67 Michael Luo & Stephanie Strom, *Donor Names Remain Secret as Rules Shift*, N.Y. TIMES, Sept. 21, 2010, at A1 (noting that political 501(c)(4)s include Crossroads Grassroots Policy Strategies and Americans for Prosperity).

68 Elizabeth J. Kingsley, *Nonprofits, Disclosure, and Electioneering After* Citizens United, TAX'N OF EXEMPTS, Mar.–Apr. 2011, at 42, 42.

2013, news organizations widely reported that the IRS had been closely scrutinizing some applications for tax-exempt status under sections 501(c)(3) and 501(c)(4) since the post-*Citizens United* deluge of applications began in 2010,[69] searching for political keywords in applications, including "Tea Party," "patriot," "9/12,"[70] and "progressive."[71] There is debate over whether the enforcement effort specifically targeted conservative groups, or whether it targeted political groups and the majority of applications that were stalled happened to be from conservative groups.[72] Regardless, the keyword screening lasted eighteen months, during which "no work was completed on the majority of these applications for [thirteen] months."[73] In addition to emphasizing the current public policy difficulties with regulations surrounding nonprofit political speech, the scandal also provided grist for legislators seeking to reform the tax code.[74] This further indicates that the political activities prohibition may come under scrutiny from Congress, if not the courts.

4. The Treasury Department and the IRS' 2013 Notice of Proposed Rulemaking

Fourth, in reaction to these developments, the Treasury Department and the IRS published a notice of proposed rulemaking (NPRM) in November 2013 that would explicitly clarify and limit the political campaign activities in which

69 *See* Juliet Eilperin, *Five Takeaways from the IRS Report*, THE FIX, WASH. POST, May 15, 2013, http://perma.cc/AS6R-2NS7.

70 TREASURY INSPECTOR GEN. FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW 5 (2013) [hereinafter IG REPORT], *available at* http://perma.cc/42C5-NF2Y.

71 Press Release, New IRS Information Shows "Progressives" Included on BOLO Screening List, WAYS & MEANS COMM. DEMOCRATS (June 24, 2013), http://perma.cc/JP7-46TF.

72 IG REPORT, *supra* note 70, at 12; Press Release, Levin: New IRS Information Underscores that IG Report Fundamentally Flawed, WAYS & MEANS COMM. DEMOCRATS (July 12, 2013), http://perma.cc/DK4S-NVTS.

73 IG REPORT, *supra* note 70, at 2.

74 Jonathan Weisman, *Some Republicans See I.R.S. Troubles as Means to a Big Goal: Tax Overhaul*, N.Y. TIMES, June 4, 2013, at A15.

section 501(c)(4) organizations can engage.[75] The NPRM also requested comments on whether the agency should make any changes affecting section 501(c)(3) organizations.[76] Current 501(c)(4) regulations, which have not been amended since 1959 despite shifts in case law and practice, allow organizations promoting social welfare to engage in some political activity and unlimited amounts of lobbying.[77] The new proposal would narrow the types of acceptable political activity. 501(c)(4) organizations would no longer be able to pay for advertisements or other public communications such as mass mailing or phone banking that mention a candidate within 60 days of a general election or 30 days of a primary election.[78] This would be a drastic change. Some of the largest 501(c)(4) organizations, such as Crossroads Grassroots Policy Strategies and Americans for Prosperity, currently make significant expenditures on advertisements.[79] The proposed rule would also prohibit get-out-the-vote drives, voter registration, voters' guides, and ballot initiatives to recall specific candidates, regardless of when they occur, and 501(c)(4) organizations would not be able to make any grants or contributions to another 501(c) organization if the recipient organization engaged in any candidate-related political activity.[80]

75 Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,536 (proposed Nov. 29, 2013).

76 *Id.* at 71,537. The agencies make clear that they will make no changes to section 501(c)(3) in response to this NPRM. Any changes to section 501(c)(3) will be introduced through proposed regulations to provide an opportunity for public comment.

77 *Id.* at 71,536; Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (2012).

78 Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. at 71,539 (proposed Nov. 29, 2013).

79 Nicholas Confessore, *New Rules Would Rein in Nonprofits' Political Role*, N.Y. TIMES, Nov. 27, 2013, at A1.

80 Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. at 71,539–40 (proposed Nov. 29, 2013).

During the comment period, which ended February 27, 2014, the NPRM received over 150,000 comments.[81] This was a record for an IRS rulemaking comment period, and in fact was more than twice the number of public comments that the Treasury Department and the IRS had received for all of their draft proposals combined over the past seven years.[82] Any change to the regulations surrounding section 501(c)(4) political activity will affect 501(c)(3) charities and their political activity because many party organizations have both a (c)(3) and (c)(4) entity. Several of the comments to the proposed rule discussed this. One argued that confining the proposed bright-line rules on acceptable political activity to 501(c)(4)s while leaving the current "facts and circumstances" rule in effect for political activity under section 501(c)(3) could prompt parent organizations to shift political activity to a (c)(3) because of its vague test.[83] The comment also argued that even if the proposed regulation's definitions of unacceptable political activity, including nonpartisan voter registration and get-out-the-vote drives, were not extended to 501(c)(3) charities, the new definitions could have a chilling effect on charities and their donors, and two different sets of rules for 501(c)(3)s and 501(c)(4)s could create confusion.[84]

III. IS THE POLITICAL ACTIVITIES PROHIBITION UNCONSTITUTIONAL, AND WHO CAN CHALLENGE IT?

Legislators, agency officials, or regulated parties seeking to challenge or reform the political activities prohibition in

81 Submitted Comments, Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, *available at* http://perma.cc/VBV4-ZSVQ.

82 John Koskinen, Comm'r, Internal Revenue Serv., Remarks Before the National Press Club (Apr. 2, 2014), *available at* http://perma.cc/5V86-UYBH.

83 Public Citizen, The Bright Lines Project, Comment Re: Proposed Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities (Feb. 27, 2013), http://perma.cc/R3RA-RYNL.

84 *Id.*

light of these four recent developments will have strong arguments that the prohibition is constitutionally flawed on First Amendment grounds and selective prosecution grounds. However, they will need to contend with doctrinal and jurisdictional reasons why these flaws have not yet been resolved. First, the absoluteness of the prohibition and the subject matter it regulates give rise to potential First Amendment challenges, both under the unconstitutional conditions doctrine and through the lens of recent corporate speech case law. The use of section 501(c)(4) as a potential alternate channel for political speech could stymie such challenges, although the Court's recent decision in *Citizens United* indicates that overly burdensome alternatives might still violate the First Amendment. Second, the IRS' uneven enforcement of the statute, creating perceived rifts in treatment between politically conservative and liberal charities and between secular and religious charities, gives rise to allegations of selective prosecution and other challenges. But the burden for a selective prosecution case is high, and in order for an organization to bring one, the IRS would have to enforce the prohibition against that organization. If standing requirements were relaxed, as a recent district court case indicates they could be,[85] other charities could challenge the IRS' haphazard enforcement of the provision. This could lead to a direct challenge of the provision's constitutionality.

A. Unconstitutional Conditions Challenges and the Alternate Channel of Section 501(c)(4)

The political activities prohibition's challengers will argue that the prohibition conditions the receipt of a government benefit of tax-exempt status on the surrender of the organization's First Amendment right to engage in political

[85] Freedom From Religion Found., Inc. v. Shulman, 961 F. Supp. 2d 947, 951 (W.D. Wis. 2013), *dismissed on other grounds sub nom*. Freedom From Religion Found., Inc. v. Koskinen, No. 12-C-0801, 2014 WL 3811050, at *2 (W.D. Wis. Aug. 1, 2014).

activity.[86] The unconstitutional conditions doctrine protects against such action, but is inconsistently applied. *Speiser v. Randall* provides the foundation for the argument that the political activities prohibition is unconstitutional under the First Amendment.[87] In *Speiser*, the Court struck down a California law that required veterans to declare their loyalty to the United States in order to receive a property tax exemption, reasoning that the "deterrent effect [of the condition] is the same as if the State were to fine [the veterans] for this speech."[88] Section 501(c)(3)'s conditioning of an income tax exemption on the non-exercise of political speech is similar. However, as discussed in Part I, the Court upheld the lobbying restrictions in section 501(c)(3) in *TWR*, with Justice Blackmun concurring to emphasize that without section 501(c)(4) as an alternate channel for lobbying, the lobbying prohibition in section 501(c)(3) would be an unconstitutional condition.[89]

The Court's subsequent decisions in *Rust v. Sullivan*[90] and *FCC v. League of Women Voters*[91] suggest that the government may only condition the receipt of a benefit on the surrender of First Amendment rights if the recipient of the benefit can still engage in protected speech through an alternate channel while receiving the benefit for other activities. However, comparing the facts of these cases, there seems to be flexibility in determining whether such an alternate channel exists. In *Rust*, the Court upheld regulations denying federal funds to organizations that provided abortion counseling, determining that the regulations did not prevent the organizations from speaking out about abortion generally; the organizations merely had to conduct this speech separately from projects that used the

86 *See* Carroll, *supra* note 5, at 254–56.

87 Speiser v. Randall, 357 U.S. 513, 528–29 (1958).

88 *Id.* at 518.

89 TWR, 461 U.S. 540, 552 (1983) (Blackmun, J., concurring).

90 Rust v. Sullivan, 500 U.S. 173, 196, 198 (1991).

91 Fed. Commc'ns Comm'n v. League of Women Voters of Cal., 468 U.S. 364, 400 (1984).

federal funds.[92] In *League of Women Voters*, the Court struck down a law withholding federal funds from public broadcasting stations that editorialized because the stations could not develop another outlet through which to speak without federal funds.[93] The Court's most recent case on this issue, *Open Society*, also follows this basic rule.[94] The case involved a law requiring government-funded organizations combating HIV/AIDS to have a policy explicitly opposing prostitution. In striking down this law, the Court rejected an argument that funding recipients had an alternate channel for speech because they could work with affiliates that did not need to abide by the conditions of the law.[95]

Under this rule, two substantial questions remain about the political activities prohibition's constitutionality. First, even assuming the alternate channel analysis from *TWR* were to control if a court took up the constitutionality of the prohibition, the result would not be a foregone conclusion because *TWR* concerned lobbying activity, not political activity. The provisions in sections 501(c)(3) and (c)(4) concerning lobbying activity are not perfectly parallel to the provisions concerning political activity. Section 501(c)(4) organizations may engage in an unlimited amount of lobbying, provided it is related to their tax-exempt purpose, therefore alleviating the otherwise unconstitutional condition of section 501(c)(3)'s ban on "substantial" lobbying.[96] But section 501(c)(4) organizations do not have similar *carte blanche* to engage in political activity, meaning there are types of political activity in which neither a section 501(c)(3) organization nor a section 501(c)(4) organization can engage.[97] Sanctions for violating the lobbying provision

92 Rust, 500 U.S. at 203.

93 League of Women Voters of Cal., 468 U.S. at 400–01.

94 Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2332 (2013).

95 *Id.* at 2331.

96 I.R.C. § 501 (2012).

97 Joseph S. Klapach, *Thou Shalt Not Politic: A Principled Approach to Section 501(c)(3)'s Prohibition of Political Campaign Activity*, 84 CORNELL L. REV. 504, 514–15 (1999).

and the political activities provision differ as well. A buffer zone in section 501(h) allows section 501(c)(3) organizations to engage in some otherwise prohibited lobbying without losing their tax-exempt status.[98] The IRS will only revoke a (c)(3)'s status if it has engaged in excessive lobbying for four consecutive years, allowing organizations the opportunity to correct bad behavior.[99] But the political activities prohibition is absolute; if an organization violates it once, the IRS can take action against the organization.[100] These distinctions give rise to a potential constitutional issue. If a section 501(c)(3) organization wishes to participate in a type of political speech for which section 501(c)(4) does not provide an alternate channel, existing case law suggests that the fact that it would be prohibited from doing so while still maintaining its tax-exempt status could be unconstitutional. The NPRM that the Treasury Department and the IRS recently proposed could further curtail acceptable political activity for section 501(c)(4) organizations,[101] creating more situations where there would be no alternate channel for political speech.

Second, *TWR* assumes that lobbying activity can be separated from a section 501(c)(3)'s actions and shifted entirely to another part of the organization, the section 501(c)(4) entity. Severing political speech from a charity's actions may prove more challenging. There is an initial burden to creating a separate entity with a staff removed enough from the section 501(c)(3) that political activity will not be conflated with the actions of the (c)(3).[102] However, this burden would also exist in the lobbying context, and did

98 *Id.* at 509; *see* I.R.C. § 501(h) (2012).

99 *Measuring Lobbying Activity: Expenditure Test*, INTERNAL REVENUE SERV., http://perma.cc/FK63-UXTB (last updated Apr. 18, 2014).

100 *Id.*

101 *See* Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. at 71,537 (proposed Nov. 29 2013); see *supra* notes 78–80 and accompanying text for a discussion of the NPRM's proposed limitations on section 501(c)(4) organizations' political activity.

102 *See supra* note 39 and accompanying text.

not appear to trouble the Court in *TWR*. But political activity is also more difficult to cabin to the 501(c)(4) entity than lobbying is. Specific licensed professionals engage in lobbying; all members of an organization can engage in political speech. This is preeminently an issue with churches; as several commentators have asked, "[s]hould a priest announce at the outset of his sermon that he is now speaking not for the section 501(c)(3) church but for its section 501(c)(4) affiliate?"[103] While houses of worship have additional claims against the prohibition that are beyond the scope of this Note,[104] the difficulty of severing exempt political activity from nonexempt political activity also applies to secular charities, and could weaken the argument that a section 501(c)(4) affiliate provides adequate alternative means for political speech as required by *TWR* and its progeny.

B. The Effect of *Citizens United* on Alternate Channel Analysis

The argument that an alternate channel for political speech cures the constitutional defect otherwise inherent in the political activities prohibition is weakened by the Court's decision in *Citizens United*.[105] In *Citizens United*, the Court characterized the electioneering rule as a complete ban on speech, despite the ability of corporations to establish a PAC as an alternate channel for political speech. This characterization was critical to the Court's finding the rule unconstitutional. The Court held that the electioneering rule was a ban on speech "notwithstanding the fact that a PAC

103 Wilfred R. Caron & Deirdre Dessingue, *I.R.C. § 501(c)(3): Practical and Constitutional Implications of "Political" Activity Restrictions*, 2 J.L. & POL. 169, 193 (1985).

104 For a discussion of the additional claims houses of worship can bring against the political activities prohibition, see, e.g., NINA J. CRIMM & LAURENCE H. WINER, POLITICS, TAXES, AND THE PULPIT: PROVOCATIVE FIRST AMENDMENT CONFLICTS 280–81, 315–16 (2011) (noting that case law relevant to analysis of the constitutionality of the prohibition may not exhaust all issues in the context of houses of worship).

105 Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 310 (2010).

created by a corporation can still speak."[106] The Court stressed that a "PAC is a separate association from the corporation," and therefore the availability of the option to speak through a PAC still does not allow the corporation to speak.[107] This holding gives a charity wishing to challenge the political activities prohibition the strong argument that although it can form a section 501(c)(4) entity, that social welfare organization would be a separate association from the charity and would not alleviate the constitutional defect in the prohibition. The Court mentioned in dicta that even if a PAC allowed a corporation to speak, the option to form one would not alleviate the First Amendment problem with the electioneering rule because PACs "are burdensome alternatives."[108] A charity could also argue that forming an affiliated section 501(c)(4) is a burden, as the organization must take steps to ensure that the political activities of the (c)(4) are not attributable to the (c)(3).

The Court's conclusion that the electioneering rule is unconstitutional despite the availability of an alternate channel for political speech seems to undermine the defense of the political activities prohibition from *TWR* and its progeny. But while *Citizens United* gives any charity challenging the political activities prohibition more ammunition than was available in the past, there are still substantial differences between the political activities prohibition and the electioneering rule.[109] In deciding that the electioneering rule was a burden on speech, the Court examined more features than just the nature of the rule as a ban on speech, despite the availability of an alternate channel. The Court also found that the purpose of the rule was to suppress speech, and focused on the fact that corporations faced criminal sanctions for violating the rule.[110] Roger Colinvaux, a professor at Columbus School of

106 *Id.* at 337.

107 *Id.*

108 *Id.*

109 *See generally* Colinvaux, *supra* note 19, at 707–25 (distinguishing the political activities prohibition from the electioneering rule).

110 *Id.* at 709; Citizens United, 558 U.S. at 336–37.

Law who defends the political activities prohibition in the face of *Citizens United*, argues that the political activities prohibition is distinguishable on these factors.[111]

The purpose of the political activities prohibition is not clear from legislative history. Within section 501(c)(3) the prohibition serves the purpose of defining a charity. A section 501(c)(3) charity is defined by four requirements, one of which is not participating or intervening in any political campaign.[112] Therefore, even if one of the purposes of the prohibition is to suppress the political speech of charities, it is not the only one. Statements by Congress, the Treasury Department, and the courts also suggest other purposes for the prohibition, such as that Congress wanted charities to be untainted by partisan activity, wanted to protect charities from political capture, and did not want to subsidize political activity through tax exemption.[113] However, while these multiple potential purposes indicate that the political activities prohibition does not exist solely to suppress speech, it is important to note that the Federal Election Commission argued that the electioneering rule at issue in *Citizens United* had multiple purposes as well.[114] It is unclear whether the Court would be more accepting of a multiple purpose defense of the political activities prohibition.

The political activities prohibition differs from the electioneering rule in its sanctions as well. The electioneering rule made it a felony for corporations to expressly advocate for the election or defeat of a candidate or to broadcast electioneering communications within 30 days of a primary election or 60 days of a general election.[115] The sanctions for violating the political activities prohibition are

111 Colinvaux, *supra* note 19, at 709.

112 I.R.C. § 501(c)(3) (2012).

113 Colinvaux, *supra* note 19, at 702–04.

114 *See* Citizens United, 558 U.S. at 314 (rejecting the government's argument that the electioneering rule prevented corruption or the appearance of corruption).

115 *Id.* at 337; 2 U.S.C. 434(f)(3); 2 U.S.C. § 441b, *partially invalidated by* Citizens United v. Fed. Election Comm'n 558 U.S. 310 (2010).

severe,[116] but they are not criminal. Still, losing its tax-exempt status could be a death knell to a charity; not only would it have to pay taxes, it could lose donations from private donors because they would not receive a charitable deduction and it could lose foundation grants because it is substantially easier for foundations to give to section 501(c)(3) organizations than other types of organizations.[117] In reaction to the severity of the sanction, charities may avoid engaging in any activity that could be construed as political,[118] potentially chilling lawful speech.[119] The loss of all of these benefits could make the sanction for violating the political activities prohibition rise to the level of unconstitutionality.

Concurring in *Cammarano v. United States*, a case upholding the constitutionality of a Treasury regulation that denied a deduction for business expenses if the expense was for lobbying, Justice Douglas stated that he would have ruled differently if the result of lobbying was that the taxpayer lost *all* his deductions, instead of just those for the lobbying expense.[120] That would "plac[e] a penalty on the exercise of First Amendment rights."[121] A 501(c)(3) organization can lose the entire benefit of its tax exemption

116 *See* United States v. Dykema, 666 F.2d 1096, 1101 (7th Cir. 1981); *see* HOPKINS, *supra* note 16, at 679.

117 I.R.C. § 170(c) (2012); § 4942(a), (g)(3) (2012).

118 *See* Elacqua, *supra* note 15, at 115 ("The resulting ambiguity has made it difficult for tax-exempt organizations to confidently advocate for their causes and for the IRS to investigate and review an organization's tax-exempt status.").

119 *See* Colinvaux, *supra* note 19, at 733–39 (analyzing whether rule might penalize speech); *see generally* Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991 (2012) (discussing how courts confronting First Amendment claims do not often consider the severity of the speaker's punishment); see *infra* Part IV.B for a discussion on creating a safe harbor for violating the political activities prohibition to resolve potential constitutional challenges.

120 Cammarano v. United States, 358 U.S. 498, 515 (1958) (Douglas, J., concurring).

121 *Id.*

for violating the political activities prohibition. In ruling that the electioneering rule is unconstitutional, *Citizens United* does not spell the sure unconstitutionality of the political activities prohibition. However, it certainly weakens the assumption from *TWR* and its progeny that an available alternate channel for speech makes the political activities prohibition constitutional.

C. Selective Enforcement Challenges and Standing

The IRS' "haphazard" enforcement of the political activities prohibition gives rise to another constitutional concern—that the IRS is selectively prosecuting certain types of organizations.[122] During the 2012 election, a number of charities engaged in political activity that arguably violated the political activities prohibition.[123] By ignoring cases of political involvement by exempt organizations, the IRS has placed itself in a position in which any enforcement of the political activity of exempt organizations appears to be the result of selective and political motivations.[124] This is mirrored in the 501(c)(4) context, as the 2013 IRS scandal showed that the IRS was screening applications for section 501(c)(4) status for indications of the group's political persuasion, a process which resulted in delayed approval for some politically conservative groups.[125]

This inconsistent pattern of enforcement is another means by which to challenge the political activities prohibition, albeit a very difficult one. The principal way for this challenge to be raised is for a charity that the IRS has enforced the prohibition against to bring an action, claiming that the IRS is engaging in selective prosecution. The case of Branch Ministries illustrates this option. After ignoring the political activity of many charities in the 1992 election, the

122 *See* Klapach, *supra* note 97, at 518 (summarizing the IRS' selective enforcement of the political activities prohibition in the late 1980s and early 1990s).

123 *See supra* notes 56–60 and accompanying text.

124 *See* Klapach, *supra* note 97, at 518.

125 *See supra* notes 69–74 and accompanying text.

IRS revoked the tax-exempt status of Branch Ministries, a group that placed full-page advertisements in the *Washington Times* and *USA Today* describing Bill Clinton's views on abortion and urging Christians not to vote for him.[126] Branch Ministries brought a selective prosecution claim against the IRS.[127] Following the doctrine of *United States v. Armstrong*,[128] the district court held that Branch Ministries had presented a colorable claim of selective prosecution, enough to open the IRS records for discovery.[129] The court compared the IRS' focus on Branch Ministries with their non-enforcement of the political activities prohibition against other similarly situated charities in the 1988 election.[130] While the selective enforcement of the political activities prohibition is perhaps the most troublesome problem with the statutory provision, it is not the easiest legal argument against it. In granting discovery, the district court stressed that "[a] plaintiff bringing a selective prosecution claim carries a heavy burden."[131] After discovery, the IRS again moved for summary judgment which the district court granted, finding that the IRS did not engage in selective prosecution by revoking Branch Ministries' exemption.[132] This case highlights how difficult it is to challenge the haphazard enforcement of the political activities prohibition.

126 Branch Ministries, Inc. v. Richardson, 970 F. Supp. 11, 13 (D.D.C. 1997). Branch Ministries, Inc. was an organization that included the Church at Pierce Creek. The church's pastor was also a plaintiff.

127 *Id.*

128 United States v. Armstrong, 517 U.S. 456 (1996). Armstrong holds that for discovery to proceed on a selective prosecution claim, the defendant must show the government declined to prosecute similarly situated parties. *Id.* at 458. After discovery, the defendant must also show discriminatory intent for the case to proceed. *Id.* at 465.

129 *Branch Ministries*, 970 F. Supp. at 15–17.

130 *Id.* at 16.

131 *Id.* at 15. The majority of circuits have used this language. *See* United States v. Bustamante, 805 F.2d 201, 202 (6th Cir. 1986) (listing cases).

132 Branch Ministries v. Rossotti, 40. F. Supp. 2d 15, 17 (D.D.C. 1999), *aff'd*, 211 F.3d 137, 145 (D.C. Cir. 2000).

Recently, another organization took a different tactic in challenging the selective enforcement of the political activities prohibition. In 2012, the secular 501(c)(3) organization Freedom From Religion Foundation sued the IRS, claiming the agency had a policy of not enforcing the political activities prohibition against churches and religious charities, while fully enforcing it against secular charities.[133] But unlike with Branch Ministries, the IRS had not taken any action against the Foundation when the Foundation sued the agency. Lacking an obvious injury in fact, the Foundation argued that the IRS' policy violated its equal protection and establishment clause rights and sought to enjoin the agency from continuing this policy and to order it to enforce the policy equally.[134] The IRS moved to dismiss the case for lack of standing and sovereign immunity. In a surprising decision, the district court denied the IRS' motion to dismiss.[135]

Standing, like the 501(c)(4) alternate channel, had seemed to be a method of circumventing the constitutional problems with the political activities prohibition. As long as charities the IRS had not taken action against did not have standing to challenge the prohibition, the policy could continue unchallenged until the IRS revoked the tax-exempt status of a section 501(c)(3) organization and that organization chose to sue. The Foundation and the IRS settled and the case was dismissed without prejudice in August 2014.[136] However, as the case was dismissed because

133 Freedom From Religion Found., Inc. v. Shulman, 961 F. Supp. 2d 947, 947 (W.D. Wis. 2013).

134 *Id.*

135 *Id.* at 954. Courts had previously denied standing to third parties seeking IRS enforcement of the political activities prohibition against an organization. *See* In re U.S. Catholic Conference, 855 F.2d 1020, 1030 (2d Cir. 1989), *cert. denied sub nom.* Abortion Rights Mobilization, Inc. v. U.S. Catholic Conference, 495 U.S. 918 (1990) (holding that plaintiffs—abortion rights activists—lacked standing to bring a claim that the Roman Catholic Church's section 501(c)(3) status should be revoked because the church had violated the political activities prohibition).

136 Freedom From Religion Found., Inc. v. Koskinen, No. 12-C-0801, 2014 WL 3811050, at *2 (W.D. Wis. Aug. 1, 2014).

the parties requested it, and not because the plaintiff could not meet its burden to prove standing, *Freedom From Religion Foundation* still opens the door for other parties that the IRS has not taken action against to challenge the prohibition. The Foundation itself has indicated that it would bring further legal action in the future if necessary.[137]

IV. SOLUTIONS TO THE PROHIBITION'S CONSTITUTIONAL AND PRACTICAL PROBLEMS

There are various avenues of change legislators, agency officials, and charities seeking to reform the political activities prohibition can pursue. This Note finds the unequal enforcement of the political activities prohibition more troubling than the rule's possible First Amendment problems, and therefore advocates implementing laws and policies to ensure that it is enforced uniformly. Three changes in particular could aid consistent enforcement and ensure that charities' First Amendment rights are not being violated. First, clearly defining "political activity," as the Treasury Department and IRS' current NPRM could potentially do for both sections 501(c)(4) and 501(c)(3), would make the prohibition easier for charities to follow, lower the risk of chilling speech, and make the prohibition easier for the IRS to enforce uniformly. Second, creating a safe harbor, so that organizations that violate the prohibition would not automatically lose their tax exempt status, could also make the prohibition easier to enforce. A safe harbor would also help alleviate a potential constitutional defect, as the severity of the sanction of the electioneering rule was a criterion for the *Citizens United* Court in finding that rule unconstitutional. Finally, lowering the burden for section 501(c)(3) organizations wishing to create a section 501(c)(4) affiliate would alleviate constitutional concerns by making it easier for charities to engage in an alternate channel for political activity. Further research by economists, political

137 Press Release, FFRF, IRS Settle Suit Over Church Politicking, FREEDOM FROM RELIGION FOUND. (July 17, 2014), http://perma.cc/ZM32-2JTR.

scientists, and other specialists would aid legislators and agency officials in developing and implementing these reforms.

A. Defining "Political Activity"

Clearer guidance of what activity is permissible under section 501(c)(3) would make it easier for charities to follow the political activities prohibition and easier for the IRS to enforce it, addressing the current problem of haphazard enforcement. Currently the IRS employs a "facts and circumstances" test to determine whether an activity is permissible for both section 501(c)(3) and (c)(4) organizations.[138] However, the IRS and the Treasury Department have proposed a rule that would replace the "facts and circumstances" test for section 501(c)(4) organizations intervening in political campaign activity with a bright-line rule drawn from existing Federal Election Commission regulations.[139] The proposal does not address the definition of political activity under section 501(c)(3), stating "[t]he Treasury Department and the IRS recognize that, because [political campaign intervention] is absolutely prohibited under section 501(c)(3), a more nuanced consideration of the totality of facts and circumstances may be appropriate in that context."[140] However, the Treasury Department and the IRS have requested comments on whether a similar bright-line rule should be adopted for the section 501(c)(3) context, either to replace the facts and circumstances approach or in conjunction with a safe harbor. The agencies make clear that any change to section 501(c)(3) would be introduced through another NPRM to allow further opportunity for public comment.[141]

138 *See supra* note 28 and accompanying text.

139 *See* Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535 (proposed Nov. 29, 2013).

140 *Id.*

141 *Id.*; *see supra* note 76.

Replacing the "facts and circumstances" test of section 501(c)(4) with a bright-line rule will have ramifications for section 501(c)(3) organizations. If a bright-line rule is established for (c)(4) entities, one should also be established for (c)(3) entities. Organizations that comprise both types of entities would have to deal with a lot of confusion if different tests governed political activity for each. More importantly, different tests could motivate such an organization to shift its political activity to the entity that has the more vague test.[142] Although such activity would likely be impermissible under the political activities prohibition, the organization might be willing to risk a violation given the haphazard enforcement of the prohibition.

Regardless of what reforms could affect section 501(c)(4), replacing the "facts and circumstances" test of section 501(c)(3) with a bright-line rule could aid both the section's enforcers and beneficiaries in carrying out the purpose of the provision. A bright-line rule defining political activity under the prohibition would make it easier for the IRS to enforce the prohibition, or if the IRS maintained its haphazard enforcement, would make it easier for legislators or other organizations to challenge its uneven enforcement. This would resolve the most troubling constitutional issues with the provision. Implementing a bright-line rule is also a particularly attractive option because, although it would be controversial and would likely receive many comments should the Treasury Department and the IRS propose it, it could be promulgated by the agencies, rather than having to go through Congress.

Deciding between a bright-line rule and a more flexible standard always involves compromise. There are drawbacks to a bright-line definition of political activity. As technology advances, methods of speech and political activity also advance, and there is always the possibility that if a bright-line rule were adopted a new type of conduct could arise allowing organizations to thwart the spirit, but not the letter, of the bright-line rule. Legislators should keep this

142 *See supra* note 83 and accompanying text.

possibility in mind while crafting the definition. Political speech also involves a great amount of nuance. The "magic words" test introduced in *Buckley v. Valeo* prompted speakers to be creative in their political advocacy, avoiding the particular words in the relatively bright-line test but still managing to influence voters for or against a candidate.[143] However, despite these drawbacks, a bright-line rule is still the best way to encourage consistent enforcement of the political activities prohibition.

B. Creating a Safe Harbor

The severity of the penalty for violating the political activities prohibition, coupled with the current lack of bright-line rules for which activities violate the prohibition and which do not, can make it difficult for charities to know whether a particular activity is allowed before engaging in it. This could chill otherwise allowed speech.[144] Furthermore, the severity of the penalty was a criterion for the *Citizens United* Court in deciding that the electioneering rule was unconstitutional.[145] Creating a safe harbor for charities that have engaged in activity that violates the political activities prohibition would resolve these issues.

The potential for a safe harbor has already been recognized. In their NPRM, the IRS and the Treasury Department request comments on whether a bright-line rule should be adopted to interpret the political activities prohibition and suggest that it could be combined with the existing "facts and circumstances" test to form a "clearly defined presumption or safe harbor."[146] Gentler penalties

143 Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976) (limiting the reach of campaign finance laws of the time to express advocacy, and defining express advocacy as communications containing words "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' ' defeat,' [and] 'reject'").

144 *See supra* notes 118–19 and accompanying text.

145 *See supra* note 110.

146 Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities, 78 Fed. Reg. 71,535 (proposed Nov. 29, 2013).

also already exist within section 501. For instance, section 501(h) creates a buffer zone for lobbying violations.[147] Certain types of section 501(c)(3) organizations can elect an alternate method for measuring lobbying activity in which the IRS cannot revoke the organization's tax-exempt status unless the organization engages in excessive lobbying for four consecutive years.[148] If the organization spends too much money on lobbying one year, it can correct the excesses the next year. This enforcement holiday provision could be mirrored for violations of the political activities prohibition.

There are two potential issues with creating this type of safe harbor. The first is textual. Section 501(c)(3) prohibits charities from engaging in "substantial" lobbying, allowing for wiggle room over what does or does not violate the text of the statute.[149] The political activities prohibition, in contrast, is an absolute ban;[150] however, the IRS' enforcement of the prohibition is incomplete, so although the ban is absolute in text it is not absolute in practice. The second problem is that in the event that the safe harbor would have to be enacted by Congress, similar bills have failed to succeed. Since 1987, a number of bills have been introduced in Congress to relax the political activities prohibition, but none has made it out of committee.[151] The House Committee on Ways and Means took up safe harbor legislation in 2004, but it was dropped as being too controversial.[152] That proposed safe harbor provision would have allowed churches to keep their charitable tax status for up to three violations of the prohibition, but the church would be subject to taxes based on its gross income, with the rate of tax increasing for each violation.[153] Although legislation would likely still be

147 I.R.C. § 501 (2012).

148 *Measuring Lobbying Activity: Expenditure Test*, INTERNAL REVENUE SERV., http://perma.cc/FK63-UXTB (last updated Apr. 18, 2014).

149 I.R.C. § 501(c)(3) (2012).

150 *Id.*

151 *See* Mayer, *supra* note 4, at 4 n.8.

152 Colinvaux, *supra* note 19, at 756; H.R. 4520, 108th Cong. § 692 (2004).

153 H.R. 4520, 108th Cong. § 692 (2004).

controversial now, legislators should heed the current growing call for reform of the prohibition and propose a new safe harbor bill.

C. Lowering the Burden of an Alternate Channel

Finally, given the importance of alternate channel analysis to the constitutionality of the political activities prohibition, lowering the burden of creating a section 501(c)(4) organization would protect First Amendment rights and maintain the prohibition. A section 501(c)(3) can both establish and control an affiliated (c)(4) organization.[154] The two organizations can be affiliated in a variety of ways, but if the two entities have the same board members, or if the (c)(3) directors comprise a majority of the board of the (c)(4), the activities of the (c)(4) may be attributed to the (c)(3).[155] The section 501(c)(4) must also maintain its own system of financial recordkeeping and make separate filings to the IRS.[156] This level of separation, especially between the staffs of the entities, could be a burden to establishing a section 501(c)(4). While the *TWR* Court seemed to endorse the separation between the organizations in upholding the constitutionality of the lobbying prohibition,[157] in its alternate channel analysis the *Citizens United* Court suggested in dicta that the burden of creating a PAC would place an unconstitutional burden on the corporation's First Amendment rights, even if the PAC were speaking for the corporation.[158]

154 TWR, 461 U.S. 540, 552–53 (1983).

155 *See* I.R.S. Priv. Ltr. Rul. 91-08-016 (1990).

156 Ward L. Thomas & Judith E. Kindell, *Affiliations Among Political, Lobbying and Educational Organizations*, *in* EXEMPT ORGANIZATIONS—TECHNICAL INSTRUCTION PROGRAM FOR FY 2000 259–62, http://perma.cc/85S9-AE7T (declaring that this separation is implicit in Moline Properties, Inc. v. Commissioner, 319 U.S. 436 (1943)). *See also* TWR, 461 U.S. at 544 n.6 (explaining that a (c)(3) that establishes a (c)(4) must maintain separate records to demonstrate that public funds do not subsidize the political activities of the (c)(4)).

157 TWR, 461 U.S. at 544 n.6.

158 Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 337 (2010).

The IRS should issue guidance clearly allowing section 501(c)(3) and section 501(c)(4) entities to share staffs, and only requiring that each entity demonstrate that its records are separate to make it clear that the (c)(3) is not funneling money to a purpose it would not be able to pursue on its own. Such a rule would acknowledge the role that *Citizens United* will play in any court's future evaluation of the constitutionality of the prohibition and acknowledge the practical fact that many charities have small staffs. Enabling charities to engage in political speech through an alternate channel with minimal burden will also stem the tide of section 501(c)(3) organizations violating the political activities prohibition. Lowering the amount of separation required between section 501(c)(3) and section 501(c)(4) entities can also be done through IRS guidance, making it easier to promulgate.

Lowering the walls between a section 501(c)(3) and a section 501(c)(4) may seem to defeat the purpose of the political activities prohibition. It would certainly make it easier for a 501(c)(3) to establish an entity that could engage in political activity. However, this reform is still the best course of action because of the precarious constitutional position the prohibition finds itself in after *Citizens United*. Given the newfound importance of an alternate channel for a corporation's political speech, lowering the burden for establishing this alternate channel is a way to maintain some restrictions against nonprofit political activity, as opposed to the entire scheme being found unconstitutional.

D. A Call for Cross-Disciplinary Research

The issues involved in reforming the political activities prohibition go beyond purely legal ones to incorporate questions of political science, economics, and statistics. Collaboration between legal scholars and researchers in these fields would therefore aid legislators, agency officials, and judges in determining how the prohibition should evolve. Political scientists should examine political activity by 501(c)(3) organizations, particularly secular charities, in the upcoming presidential election to determine the types of

activity these organizations are involved in and if it has an effect on voters. This would help agency officials craft a comprehensive bright-line rule defining political activity. Economists and political scientists should study what effect the penalties for violating the political activities prohibition have on 501(c)(3) organizations, and whether the threat of penalties chills potentially allowed speech. This would help legislators determine whether to propose a safe harbor provision, and if so, what it should involve. Consultants and corporate governance specialists should survey the structure of organizations that have both a 501(c)(3) entity and a 501(c)(4) entity, to determine what overlap currently exists between the two entities, and question 501(c)(3) organizations that do not have a (c)(4) entity as to whether the IRS requirement that a (c)(3) and (c)(4) have separate board members is a burden to (c)(3) organizations wishing to establish a social welfare organization. This would help agency officials determine how to change the existing regulations governing the separation of 501(c)(3) and 501(c)(4) entities to protect the organization's First Amendment rights.

V. CONCLUSION

The effectiveness of any proposal will depend on whether the IRS evenly enforces the political activities prohibition. In its current state, section 501(c)(3)'s political activities prohibition can be interpreted as a limitation on the First Amendment rights of charities, but more troubling is the political motivation that allegedly underlies its haphazard enforcement. The public and congressional reaction to the 2013 IRS scandal and the IRS and Treasury Department's NPRM indicate that changes could be on the horizon for the political activities prohibition. Post-*Citizens United*, charities are incentivized to speak louder than before in order to be heard over the voices of corporations. Until the courts and the IRS establish reasonable boundaries for section 501(c)(3)'s political activities prohibition, charities will remain uncertain over what speech is allowed.