Articles

A CASE STUDY OF LEGISLATION VS. REGULATION: DEFINING POLITICAL CAMPAIGN INTERVENTION UNDER FEDERAL TAX LAW

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ABSTRACT

The rules that should govern political campaign intervention by social welfare organizations exempt from taxation under § 501(c)(4) of the Internal Revenue Code have been the subject of recent controversy. Long before all the attention, a group of dedicated and experienced experts on the topic, under the auspices of two well-known nonprofit groups, undertook the task of clarifying the rules regarding tax-exempt political activity. In light of the issues becoming national news, the group, known as the Bright Lines Project, also converted the regulatory proposal into legislative language. These two versions of the same rules—as a set of regulations and as a set of statutes—provide a natural laboratory to compare the administrative law implications of choosing between legislation and regulation to establish a set of tax rules. This Article undertakes that examination. It concludes that, if revenue rulings interpreting regulations are afforded deference under Auer v. Robbins *and* Bowles v. Seminole Rock & Sand Co.*, promulgating the initial definition of political campaign intervention as a set of regulations may well give the Internal Revenue Service greater power to police political campaign intervention by exempt organizations than would the enactment of detailed legislation. It recommends, however, that broad statutory guidance, followed by regulations, and then by revenue rulings strike the best balance between democratic concerns and administrative flexibility.*

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INTRODUCTION

On May 10, 2013, at a session of the American Bar Association Tax Section meeting in Washington, D.C., Lois Lerner, then the director of the Exempt Organization Division of the Internal Revenue Service (IRS, or Service), apologized for IRS mishandling of applications by Tea Party groups for exemption as social welfare groups under § 501(c)(4) of the Internal Revenue Code (I.R.C.).[1] A few days later, the Department of the Treasury (Treasury) Inspector General released a report concluding that the "IRS used inappropriate criteria that identified for review Tea Party and other organizations applying for tax-exempt status based upon their names or policy positions instead of indications of potential political campaign intervention."[2]

A storm of controversy followed, with Republicans leading the charge.[3] During the course of the controversy, those who saw the IRS efforts as inept rather than malicious repeatedly pointed out the difficulty the IRS faced in applying ambiguous regulations to

1. I.R.C. § 501(c)(4) (2012); Fred Stokeld, *IRS Sparks Outrage with Admission It Mistreated Tea Party Groups*, TAX NOTES TODAY, May 13, 2013, *available at* LEXIS, 2013 TNT 92-3.

2. INSPECTOR GEN. FOR TAX ADMIN., DEP'T OF TREASURY, 2013-10-053, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW (2013), *available at* http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf.

3. *See* Memorandum from Majority Staff, Comm. on Oversight and Gov't Reform, to Members, Comm. on Oversight and Gov't Reform, Interim Update on the Committee's Investigation of the Internal Revenue Service's Inappropriate Treatment of Certain Tax-Exempt Applicants (Sept. 17, 2013), *available at* http://oversight.house.gov/wp-content/uploads/2013/09/2013-09-17-Interim-update-on-IRS-Investigation-of-tax-exempt-applicants.pdf. For a discussion of five other hearings held by various House and Senate committees, see Josh Hicks, *Five and Counting: Yet Another IRS Hearing*, WASH. POST FED. EYE BLOG (June 4, 2013, 7:00 AM), http://www.washingtonpost.com/blogs/federal-eye/wp/2013/06/04/five-and-counting-yet-another-irs-hearing.

applications for exemption.[4] Under the language of I.R.C. § 501(c)(4) organizations must be operated "exclusively for the promotion of social welfare."[5] Treasury Regulations § 1.501(c)(4)–1, however, states, "An organization is operated exclusively for the promotion of social welfare if it is *primarily* engaged in promoting in some way the common good and general welfare of the people of the community."[6] The regulations further specify that "promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office"[7]—that is, political campaign intervention. Nowhere, however, has the IRS ever defined what constitutes primary activity, and some practitioners argue that 49 percent of a § 501(c)(4) organization's activities can consist of political intervention.[8]

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4. *See, e.g.*, ERIKA K. LUNDER & L. PAIGE WHITAKER, CONG. RESEARCH SERV., R40183, 501(C)(4)S AND CAMPAIGN ACTIVITY: ANALYSIS UNDER TAX AND CAMPAIGN FINANCE LAWS 5–6 (2013), *available at* https://www.fas.org/sgp/crs/misc/R40183.pdf; NAT'L TAXPAYER ADVOCATE, INTERNAL REVENUE SERV., SPECIAL REPORT TO CONGRESS: POLITICAL ACTIVITY AND THE RIGHTS OF APPLICANTS FOR TAX-EXEMPT STATUS 14–15 (2013), *available at* http://www.taxpayeradvocate.irs.gov/userfiles/file/FullReport/Special-Report.pdf; DANIEL WERFEL, INTERNAL REVENUE SERV., CHARTING A PATH FORWARD AT THE IRS: INITIAL ASSESSMENT AND PLAN OF ACTION 28 (2013), *available at* http://www.irs.gov/pub/newsroom/Initial%20Assessment%20and%20Plan%20of%20Action.pdf; *Conflicting Laws, Ambiguous Language Help Fuel IRS Confusion*, CBS DC (June 5, 2013, 8:23 AM), http://washington.cbslocal.com/2013/06/05/conflicting-laws-ambiguous-language-help-fuel-irs-confusion; Brendan Fischer, *Ambiguity in Tax Rules and Disintegration of Election Law May Have Led to IRS Tea Party Mess*, PR WATCH (May 15, 2013), http://www.prwatch.org/news/2013/05/12109/ambiguity-tax-rules-and-disintegration-election-law-may-have-led-irs-tea-party-me.

5. I.R.C. § 501(c)(4)(A).

6. Treas. Reg. § 1.501(c)(4)–1(a)(2)(i) (as amended in 1990) (emphasis added); *see also* Ellen P. Aprill, *The IRS's Tea Party Tax Row: How 'Exclusively' Became 'Primarily*,*'* PAC. STANDARD (June 7, 2013, 8:00 AM), http://www.psmag.com/politics/the-irss-tea-party-tax-row-how-exclusively-became-primarily-59451 (noting the seeming conflict between the language of the statute and the regulation, but recognizing that "problems regarding excessive campaign intervention by these kinds of organizations will not be solved, at a penstroke [*sic*], by simply returning to the statutory requirement" of exclusivity).

7. Treas. Reg. § 1.501(c)(4)–1(a)(2)(ii).

8. *See, e.g.*, SECTION OF TAXATION, AM. BAR ASS'N, COMMENTS OF THE INDIVIDUAL MEMBERS OF THE EXEMPT ORGANIZATION COMMITTEE'S TASK FORCE ON SECTION 501(C)(4) AND POLITICS (2004), *available at* http://www.americanbar.org/content/dam/aba/migrated/tax/pubpolicy/2004/040525exo.authcheckdam.pdf; Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After* Citizens United, 10 ELECTION L.J. 363, 381 (2011); Lily Kahng, *The IRS Tea Party Controversy and Administrative Discretion*, 99 CORNELL L. REV. ONLINE 41, 45 (2013), http://cornelllawreview.org/files/2013/09/99CLRO411.pdf. *See generally* Miriam Galston, Vision Service Plan v. U.S.*: Implications for Campaign Activities of 501(c)(4)s*, 53 EXEMPT ORG. TAX REV. 165 (2006).

Quantifying the permissible amount of political campaign intervention for § 501(c)(4) organizations, however, will not be sufficient to resolve the current problems regarding classification of § 501(c)(4) organizations. Exempt organizations and their advisors also need to know what constitutes political campaign intervention before they can know how much of it there is or should be.[9] As the Bright Lines Project (BLP)—the focus of this Article—has explained, "[I]t has become apparent that a major factor in this systematic breakdown of the review process is the lack of clear, neutral, objective standards by which IRS employees and managers could determine whether applicants were engaged in political intervention."[10] Similarly, a 2013 IRS report stated, "One of the significant challenges . . . has been the lack of a clear and concise definition of 'political campaign intervention.'"[11]

Currently, the IRS uses the same criteria to define political campaign intervention by § 501(c)(4) organizations, which are permitted to engage in some uncertain quantity of political campaign intervention, as it does in the context of § 501(c)(3) charitable organizations, which are prohibited from any political campaign intervention.[12] Revenue Ruling 2007-41, the most recent and

9. The IRS and Treasury included "[g]uidance under §501(c)(4) relating to measurement of an organization's primary activity and whether it is operated primarily for the promotion of social welfare, including guidance relating to political campaign intervention" in their first-quarter update, *see* MARK J. MAZUR, DANIEL I. WERFEL & WILLIAM J. WILKINS, DEP'T OF TREASURY, FIRST QUARTER UPDATE TO THE 2013–2014 PRIORITY GUIDANCE PLAN (2013), *available at* http://www.irs.gov/pub/irs-utl/2013-2014_pgp_1st_quarter_update.pdf, as well as in the 2013–2014 Priority Guidance Plan, *see* MARK J. MAZUR, DANIEL I. WERFEL & WILLIAM J. WILKINS, DEP'T OF TREASURY, 2013–2014 PRIORITY GUIDANCE PLAN (2013), *available at* http://www.irs.gov/pub/irs-utl/2013-2014_pgp.pdf. However, when proposed regulations relating to § 501(c)(4), discussed in Part III, were released in late November 2013, they did not make a proposal regarding the definition of "primary activity," but simply asked for comments on the issue. *See* Prop. Treas. Reg. § 1.501(c)(4)–1(a)(2), 78 Fed. Reg. 71,535, 71,537–38 (Nov. 29, 2013). Instead, as a first step, the guidance proposed a definition of candidate-related political activities for § 501(c)(4) organizations. *See id.* at 71,538–40. The notice of proposed rulemaking (NPRM) asked for comments on the meaning of primary activity. *Id.* at 71,537–38.

10. *Regulatory Solutions*, BRIGHT LINES PROJECT, http://www.brightlinesproject.org/summary (last visited Jan. 28, 2014).

11. WERFEL, *supra* note 4, at 20.

12. *See* Aprill, *supra* note 8, at 391. At the end of November 2013, the IRS and Treasury issued proposed regulations defining candidate-related activity for § 501(c)(4) organizations. *See supra* note 9. The NPRM asked whether similar regulations should be adopted for § 501(c)(5) and § 501(c)(6) and perhaps even § 501(c)(3) organizations, although the NPRM stated that, because political campaign intervention is absolutely prohibited for § 501(c)(3) organizations, "a more nuanced consideration of the totality of facts and circumstances may be appropriate in that context." Prop. Treas. Reg. § 1.501(c)(4)–1(a)(2), 78 Fed. Reg. at 71,537.

comprehensive official IRS pronouncement on the subject, explains that "[w]hether 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."[13] As I have written elsewhere, IRS reliance—in these and other revenue rulings—on facts and circumstances "reaches broadly, gives discretion to the administrators, and leaves many organizations and their advisors with little certainty on how to conduct their activities day to day."[14] A number of commentators, including myself, have called for the IRS and Treasury to promulgate clear rules as to what constitutes political campaign intervention.[15]

A dedicated group of experienced, well-known, and respected experts on exempt organizations has taken it upon itself to accomplish this task, calling its efforts the BLP. This group has operated under the chairmanship of Gregory Colvin of Adler & Colvin in San Francisco, and the vice chairmanship of Elizabeth Kingsley of Harmon, Curran, Spielberg, & Eisenberg in Washington, D.C.[16] The group developed its proposals under the sponsorship of two well-known nonprofit organizations. Starting in 2008, the group worked under the auspices of OMB Watch (now the Center for

13. Rev. Rul. 2007-41, 2007-1 C.B. 1421. Issuance of the revenue ruling followed issuance of an IRS fact sheet which included similar but not identical examples, but which did not represent official guidance or advice of the national IRS office and thus was not a document on which taxpayers could rely as authority. *See* Fred Stokeld, *IRS Issues Guidance on Charities and Politics as Election Year Looms*, TAX NOTES TODAY, June 8, 2007, *available at* LEXIS, 2007 TNT 111-4 (compiling comments of exempt-organization specialists comparing the fact sheet to the revenue ruling).

14. Aprill, *supra* note 8, at 386.

15. *See, e.g.*, Ellen P. Aprill, *Why the IRS Should Want To Develop Rules Regarding Charities and Politics*, 62 CASE W. RES. L. REV. 643, 668–69 (2012); James Bopp, Jr. & Zachary S. Kester, *Holding the Service's Feet to the Fire: Applying* Citizens United *and the First Amendment to the IRC § 501(c)(3) Political Prohibition*, ENGAGE, Dec. 2010, at 75, 77; Kay Guinane, *Wanted: A Bright-Line Test Defining Prohibited Intervention in Elections by 501(c)(3) Organizations*, 5 FIRST AMEND. L. REV. 142, 143 (2007); Elizabeth Kingsley, *Bright Lines? Safe Harbors?*, 20 TAX'N EXEMPTS, July/Aug. 2008, at 38, 42.

16. *See Staff and Drafting Committee*, BRIGHT LINES PROJECT, http://www.brightlinesproject.org/blp-team (last visited Jan. 30, 2014). Other members of the drafting committee are Eve Borenstein, Borenstein and McVeigh; Terence Dougherty, American Civil Liberties Union; Rosemary Fei, Adler & Colvin; James Joseph, Arnold & Porter; Abby Levine, Alliance for Justice; John Pomeranz, Harmon, Curran, Spielberg + Eisenberg; and Ezra Reese, Perkins Coie. *Id.*

Effective Government); since November 2012, it has been housed at Public Citizen.[17]

The BLP's effort began "many years ago with the assumption that the project should focus on encouraging the IRS to modify its regulations regarding tax exempt political activity so that the rules are clearer."[18] Recently, however, in "light of the tax exemption determination process becoming national news" and attracting congressional attention, "leaders in the [BLP] have worked to convert the regulatory proposal developed over four years into legislative language" as a possible alternative.[19] The BLP describes its proposed § 4956 on political campaign intervention as tracking its regulatory proposal.[20]

Participants in the BLP have been discussing its suggestions with both tax administrators and legislators.[21] Recently, a number of other nonprofit groups have endorsed its efforts, including, perhaps most importantly, Independent Sector,[22] which is a coalition of some six hundred nonprofit organizations that describes itself as "the leadership network for nonprofits, foundations, and corporate giving programs committed to advancing the common good in America and around the world."[23] Other well-known groups that have endorsed the BLP include the Brennan Center for Justice, the Center for Responsive Politics, and the Citizens for Responsibility and Ethics in Washington.[24]

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17. *See About Us*, BRIGHT LINES PROJECT, http://www.brightlinesproject.org/about-us (last visited Jan. 30, 2014). Public Citizen has a four-decades-long history of successfully influencing public policy. *See About Us*, PUB. CITIZEN, http://www.citizen.org/Page.aspx?pid=2306 (last visited Jan. 30, 2014).

18. *Regulatory Solutions*, *supra* note 10.

19. *Legislative Solutions*, BRIGHT LINES PROJECT, http://www.brightlinesproject.org/legislative-solutions (last visited Jan. 19, 2014).

20. *Id.* The legislative proposal also makes modifications to § 527, the provision governing political organization, in order to make it "easier for tax-exempt groups that may engage in too much political activity to move those activities to a 527 organization." *Id.* While amending § 527 would be an important and useful legislative change, this Article will not discuss it further because it does not have a parallel regulatory proposal. Bringing consistency to § 501(c) and § 527, however, would be an important advantage of the legislative proposal. *See* Aprill, *supra* note 8, at 392.

21. *See* Email from Tom Halloran, Project Coordinator, Bright Lines Project, to author (Oct. 3, 2013, 9:39 AM) (on file with the *Duke Law Journal*).

22. BRIGHT LINES PROJECT, http://www.brightlinesproject.org (last visited Jan. 30, 2014).

23. *About Us*, INDEP. SECTOR, http://www.independentsector.org/about#sthash.xKIcWwdJ.dpbs (last visited Jan. 30, 2014).

24. *See* BRIGHT LINES PROJECT, *supra* note 22.

A number of commentators active in the nonprofit community have raised questions about aspects of the BLP.[25] Consideration of particular criticisms, however, is not this Article's focus. Instead, I want to take advantage of the BLP as a kind of natural laboratory for purposes of the intersection of tax law and administrative law. The BLP has provided a set of provisions intended to create the same definition of political campaign intervention for § 501(c) organizations in two different forms—as a set of regulations and as a set of statutes. Both approaches, however, will call for further administrative guidance, guidance that could take a number of forms. Depending on whether the initial set of definitions is embodied in a statute or in regulations, administrative guidance will have different levels of authority and will call for different degrees of judicial deference. That is, the BLP regulatory proposal and the BLP legislative proposal offer a unique opportunity to examine and compare the administrative law implications of choosing between regulations and legislation to establish a set of tax rules.

A likely assumption would be that establishing this definition of political campaign intervention in legislation would give government agencies the greatest possible authority to impose limits on such activity. My thesis is that the opposite is likely to be the case. Establishing these definitions as regulations will offer advantages to the tax administrative agencies. If the concept is defined in statutory language, regulations later promulgated by the IRS and Treasury to clarify aspects of the statute run some risk that a court would hold them invalid as inconsistent with congressional intent. Promulgating the definition initially as a set of regulations without new statutory authority does not carry the same risk, given the ambiguity in the current statutory language. Moreover, whether the initial set of definitions comes in regulations or in the I.R.C., it is also likely that at least some later guidance would come in the form of revenue rulings,

25. *See, e.g.*, Barnaby Zall, The Tie Goes to the Speaker, Not the Censor: Proposals To Change Definitions of Permissible Political Activities by Section 501(c)(4) Organizations (Sept. 20, 2013) (unpublished manuscript), *available at* http://meetings.abanet.org/meeting/tax/FALL13/media/jt-eo-cpg-helping-zall-paper.pdf; Bob Bauer, *The IRS and "Bright Lines,"* MORE SOFT MONEY HARD LAW (May 28, 2013), http://www.moresoftmoneyhardlaw.com/2013/05/irs-bright-lines; Nonprofit Blogger, *The Bright Lines Project: Good Work, but It Needs Another Bright Line*, NONPROFIT L. PROF BLOG (June 24, 2013), http://lawprofessors.typepad.com/nonprofit/2013/06/the-bright-lines-project-good-work-but-it-needs-another-bright-line.html; Joe Trotter, "*Bright Lines Project" Fails To Live Up to Its Name*, CENTER FOR COMPETITIVE POL. (July 12, 2013), http://www.campaignfreedom.org/2013/07/12/bright-lines-project-fails-to-live-up-to-its-name-2.

which are interpretations of a particular set of facts published by the IRS in the Internal Revenue Bulletin.[26] In the case of revenue rulings, judicial application of deference under *Auer v. Robbins*[27] and *Bowles v. Seminole Rock & Sand Co.*[28] (*Auer*/*Seminole Rock* deference) to tax revenue rulings would give greater authority to revenue rulings interpreting regulations than to revenue rulings interpreting a statute.[29] In short, promulgating the initial definition of political campaign intervention as a set of regulations may well give the IRS greater power to police political campaign intervention by exempt organizations than would enactment of legislation.

Part I describes the BLP. Part II considers the administrative law implications of the BLP legislative proposal. Part III does the same for the regulatory proposal.

I. SUMMARY OF THE BRIGHT LINES PROJECT

The BLP describes the central principle guiding its efforts as follows: "[T]he federal tax definition of political speech . . . reaches beyond express advocacy and covers all speech that supports or opposes a candidate for elective public office."[30] In order to provide needed guidance to § 501(c) organizations and to carry out this principle, the BLP has developed a set of provisions to define political campaign intervention. These provisions explain the scope of the provisions, detail their application to other provisions of the I.R.C., and set forth what activities would always be treated as political campaign intervention, what activities might be treated as political campaign intervention, and what safe harbors are available.

The BLP is structured as six categorical rules.[31] The first rule gives the basic scope of the proposal by defining some key preliminary terms. It calls for the BLP proposal to apply to any "[f]ederal, state, local, and foreign election" and includes in the

26. For a discussion of revenue rulings, see *infra* notes 63–65 and accompanying text.

27. Auer v. Robbins, 519 U.S. 452 (1997).

28. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

29. *See infra* notes 170–75 and accompanying text.

30. THE BRIGHT LINES PROJECT, THE BRIGHT LINES PROJECT: CLARIFYING IRS RULES ON POLITICAL INTERVENTION, DRAFTING COMMITTEE EXPLANATION INTERIM DRAFT 2 (2013), *available at* http://www.citizen.org/documents/Bright%20Lines%20Project%20Explanation.pdf (emphasis omitted).

31. *See* THE BRIGHT LINES PROJECT, THE BRIGHT LINES PROJECT: CLARIFYING THE IRS RULES FOR POLITICAL INTERVENTION (2013), *available at* http://www.citizen.org/documents/Bright-Lines-Proposal-(May%202013).pdf.

definition of *candidate* "a person who offers himself or herself for election to public office or whose election the organization expressly proposes, supports, or opposes."[32]

The second rule proposes a broad application of the BLP's definition of political campaign intervention. The BLP would apply its proposal to "the prohibition on IRC 501(c)(3) organizations and the tax penalties under 4955 and 4945, . . . political intervention that is not within exempt purposes for other 501(c) groups, . . . the proxy tax paid by some 501(c) entities under 6033(e), and . . . the denial of a business expense deduction under 162(e)(1)(B)."[33]

The BLP's third rule defines political campaign intervention to include express advocacy,[34] including any communication that is the functional equivalent of express advocacy.[35] The Drafting Committee includes the following example of a communication that is the functional equivalent of express advocacy:

> An organization in State X runs a television advertisement with the following text:
>
> What kind of leader is Senator Doe? Ineffective. Ultra-liberal. Unrepresentative of our state's values. Senator Doe voted for increasing Tricare premiums to nickel and dime America's heroes. Veterans and service men and women know better than to trust Senator Doe. This November: support new voices, support your military, support State X values.[36]

The Drafting Committee also notes,

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32. *Id.*

33. *Id.* The IRS and Treasury have recently proposed a definition of "candidate-related political activity" for § 501(c)(4) organizations. They asked whether the proposed regulations should apply as well to other § 501(c) organizations, but suggested a different set of regulations might be appropriate for § 501(c)(3) organizations. *See supra* note 9; *infra* note 135.

34. The rule describes express advocacy as:

> (a) the election, defeat, nomination, or recall of a clearly-identified candidate;
>
> (b) the election or defeat of candidates affiliated with a specific political party;
>
> (c) that voters select candidates for support or opposition based on one or more criteria that clearly distinguish certain candidates from other candidates;
>
> (d) the making of contributions to a candidate, party, or any organization that has the primary purpose of engaging in political intervention.

THE BRIGHT LINES PROJECT, *supra* note 31.

35. *See* THE BRIGHT LINES PROJECT, *supra* note 30, at 9.

36. *Id.* at 9–10. Parts II and III focus on the format in which administrative guidance incorporating examples would be issued and the deference courts would give that guidance.

> Historically, the IRS interpretation of the ban on political intervention by charities has been widely understood to go beyond express advocacy . . . . However, it is important to capture those instances of speech that do constitute express advocacy as a starting point for determining what speech undeniably should be within the definition of political intervention . . . .[37]

Consistent with its central principle, the BLP goes further. Its fourth rule, dubbed the General Speech Rule, broadens the definition of political campaign intervention to cover "any communication to any part of the electorate" if the communication both "refers to a clearly identified candidate" and "reflects a view on that candidate."[38] This fourth rule offers four safe harbors, which are applicable only if the communication does not consist of paid media advertising. The safe harbors comprise influencing official action, comparing candidates, acting in self-defense, and making personal oral remarks at official meetings.[39] The Drafting Committee Explanation offers a nice example of the distinction between the general rule and the safe harbors:

> Organization S prepares and distributes a posting on a social media site criticizing the fact that state C's two senators voted against the Marriage Protection Amendment, and asking viewers to call them to urge them to support it. Contemporary news reports indicate that it is likely, but not certain, that a vote will be scheduled on the Marriage Protection Amendment in the near future. Organization S has not engaged in political intervention. However, if there was no reasonable chance that a vote on the issue would be held before the election, the communication would not qualify for the safe harbor.[40]

The fifth rule further expands the definition of political campaign intervention to cover supplying any of the organization's resources to another person or entity for use in political campaign intervention, at least if such use is reasonably foreseeable.[41] According to the Drafting

37. *Id.* at 8.

38. THE BRIGHT LINES PROJECT, *supra* note 31.

39. THE BRIGHT LINES PROJECT, *supra* note 30, at 15–24. The last safe harbor represents a major change. In many cases, it would, for example, protect remarks of a minister made from the pulpit. *See* Nonprofit Blogger, *supra* note 25.

40. THE BRIGHT LINES PROJECT, *supra* note 30, at 17. The Drafting Committee Explanation includes a total of thirty-five examples, *see id.* at 9–10, 16–18, 20–23, 27–29, 31–33, of which twenty-one relate to the safe harbors, *see id.* at 16–18, 20–23.

41. THE BRIGHT LINES PROJECT, *supra* note 31.

Committee Explanation, an example of such use of resources is the following:

> Save the Canines, a tax-exempt organization, allows City Council Member W to use its auditorium, free of charge, for a Town Hall Forum to discuss City Council business, including a proposed dog park. W is running for reelection, and her campaign sets up a table in the auditorium handing out campaign literature, bumper stickers, and requests for campaign contributions. There is no written rental agreement, and Save the Canines officials are present at the event and do not say anything about the campaign activity. Under local election law, in-kind contributions of $500 or more must be reported as campaign contributions.[42]

A number of exceptions apply to the "transfer of resources" category as well: transfers at no less than fair market value, a history of similar transactions by the organization, and transfers that do not favor any candidate.[43]

The sixth rule introduces "facts and circumstances" to the BLP.[44] For communications that do not meet the threshold of the General Speech Rule, that are not targeted to voters, and that do not come within an exception, the BLP's sixth recommended rule would permit consideration of such factors as "timing, the range of issues discussed, disclaimers and disclosures, the organization's history, the impartiality of its methods, or corrective steps taken" in both determining whether political campaign intervention has taken place and in considering any penalty for violations.[45] The Drafting Committee Explanation includes the following example:

> On October 5, Louisiana Moms Against Guns runs a final newspaper ad thanking Governor D for his courageous act in signing into law a bill banning the carrying of concealed weapons on school grounds, after running a series of ads urging him to do so. Louisiana Moms makes a practice of running "thank you" ads when the target of a lobbying campaign takes the requested action. Governor D is up for re-election in November. The Governor signed the bill on October 4. The ad does not include express advocacy, but refers to a clearly-identified candidate and reflects a view on that candidate. It

42. THE BRIGHT LINES PROJECT, *supra* note 30, at 28.

43. THE BRIGHT LINES PROJECT, *supra* note 31.

44. *Id.* Because this set of provisions relies on facts and circumstances, rather than bright lines, it has been particularly controversial. *See supra* note 25 and accompanying text.

45. THE BRIGHT LINES PROJECT, *supra* note 31.

> is a paid mass media ad and therefore cannot fall within any of the safe harbor exceptions. Considering these as the only pertinent facts and circumstances, due to the close proximity of the ad to the official action, the fact that the ad does not mention the Governor's reelection, and the organization's history of running similar ads, the organization has met its burden of proof that intervention did not occur.[46]

The BLP legislative proposal does not, of course, include the Drafting Committee's examples. It does, however, grant regulatory authority. This regulatory authority is unusual in that it is, on the one hand, very detailed and, on the other hand, sweeping in its goals:

> The Secretary of the Treasury shall prescribe, update, and modify such regulations as may be necessary or appropriate to clarify further the standards set forth in this section in light of current and future changes in campaign practices, to meet the objectives of this section to promote civic participation in democracy, curb abuses, and allow organizations to reasonably anticipate the tax consequences of their activities in advance.[47]

Other broad delegations of regulatory authority, in contrast, do not specify motive or purpose.[48] For example, § 1502, perhaps the broadest grant of regulatory authority in the I.R.C., given the sparseness of the legislative language in § 1501 providing the statutory rules governing consolidated returns, states that

> [t]he Secretary shall prescribe such regulations, as he may deem necessary in order that the tax liability of any affiliated group of corporations making a consolidated return and of each corporation in the group . . . may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income-tax liability and the various factors necessary for the

46. THE BRIGHT LINES PROJECT, *supra* note 30, at 32.

47. THE BRIGHT LINES PROJECT, LEGISLATIVE SOLUTIONS: NEW SECTION 4956, at 5 (2013), *available at* http://www.citizen.org/documents/new-section-4956-political-intervention.pdf. For the reasons explained below, the BLP should amend the regulatory grant in its legislative proposal to more closely resemble other broad grants of regulatory authority. *See infra* notes 61–62 and accompanying text.

48. *See generally* Kimberly S. Blanchard, N.Y.S. Bar Ass'n Tax Section, *Report on Legislative Grants of Regulatory Authority*, TAX NOTES TODAY, Nov. 7, 2006, *available at* LEXIS, 2006 TNT 215-22 (cataloguing and comparing regulator grants in the I.R.C.).

> determination of such liability, and in order to prevent avoidance of such tax liability.[49]

The regulations under § 1502 run to almost 350 pages of small print. The regulatory grant under § 469, the passive loss provisions, states that "the Secretary shall prescribe such regulations as may be necessary or appropriate to carry out provisions of this section,"[50] although it also names some specific issues the regulations might address.[51]

Regulations promulgated under the statutory grant of authority proposed by the BLP could well include the examples discussed in the Drafting Committee Explanation.[52] Such regulations, however, would stand on a slightly different ground than regulations promulgated without such a specific statutory grant of authority, as detailed further below.

II. IMPLICATIONS OF THE BRIGHT LINES PROJECT'S LEGISLATIVE PROPOSAL

Article I, Section 1 of the U.S. Constitution declares, "All legislative Powers herein granted shall be vested in a Congress of the United States."[53] Section 8 grants Congress authority "to make all Laws which shall be necessary and proper for carrying into Execution" enumerated powers and "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[54]

As a result, both courts and administrative agencies must defer to enacted legislation. As the Supreme Court stated in the now-famous Step One of *Chevron U.S.A. Inc. v. Natural Resources*

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49. I.R.C. § 1502 (2012). The regulatory grant does contain some additional general direction. For example, it specifies that "the Secretary may prescribe rules that are different from the provisions of chapter 1 that would apply if such corporations filed separate returns." *Id.*

50. *Id.* § 469(l).

51. Section 469(l) lists four possible regulatory topics, including, for example, "what constitutes an activity, material participation, or active participation for purposes of this section." *Id.*

52. Treasury regulations frequently include examples. *See, e.g.*, Treas. Reg. § 1.117-2(b)(3) (1960) (scholarships); Treas. Reg. § 1.170A-9T(f)(4)(iv) (2008) (public support test for charities); Treas. Reg. § 20.2031-7(d)(2)(iv) (as amended in 2011) (valuation of annuities for estate tax purposes).

53. U.S. CONST. art. I, § 1.

54. *Id.* art. I, § 8, cl. 18.

Defense Council, Inc.,[55] "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[56] Thus, if the BLP legislative proposal is adopted—thereby rendering its recommendations as statutory provisions, its recommendations themselves, at least to the extent they are clear, would have greater authority than essentially the same provisions adopted in the form of regulations promulgated under current I.R.C. provisions.

Step Two of *Chevron*, however, directs that, if Congress has not unambiguously expressed its intent, a court is to ask only "whether the agency's answer is based on a permissible construction of the statute."[57] If so, *Chevron* explains, the court is to defer to the administrative agency. In the words of Professor Cass Sunstein, this highly deferential standard to administrative agencies represents "a kind of revolution[,] . . . not only as a counter-*Marbury* for the modern era but also as a kind of *McCulloch v. Maryland*, granting the executive broad discretion to choose its own preferred means to promote statutory ends."[58]

Under Step Two of *Chevron*, were the IRS and Treasury to follow up on the BLP legislative proposal with regulations—at least those that go through notice-and-comment rulemaking,[59] examples of

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55. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

56. *Id.* at 842–43. Of course, statutes themselves can be held unconstitutional. Some critics of the BLP find its broad definition of political campaign intervention inconsistent with current First Amendment doctrine. *See* Zall, *supra* note 25, at 33–34; Trotter, *supra* note 25. Under *Chevron* if the statute is not clear, courts move to Step Two and defer to administrative agencies unless the agency interpretation is unreasonable. *See infra* note 57 and accompanying text. However, "[t]he Supreme Court has reversed an agency interpretation as unreasonable under Step Two only twice, so most of the judicial focus has targeted Step One and the search for unambiguous statutory meaning." WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 328–29 (2d ed. 2006) (footnote omitted).

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

58. Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2596 (2006) (footnote omitted).

59. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Supreme Court wrote that *Chevron* deference would apply

> when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

Id. at 226–27. As Professor Hickman notes, "Since deciding *Mead*, the Court has often linked the agency's use of notice-and-comment rulemaking procedures with a rule's eligibility for

which are included in the BLP regulatory proposal—it is likely that courts would defer to these regulations and give them the force of law, given the need to further explain the statutory terms and the broad grant of regulatory authority in the proposed legislation.[60] This treatment would particularly be the case if the legislative history of the statute were to include examples that now appear in the Drafting Committee Explanation.

Nonetheless, enactment of the rules as a statute could constrain the IRS and Treasury in promulgating regulations. "The judiciary . . . must reject administrative constructions which are contrary to clear congressional intent."[61] It is thus conceivable that a court could view some regulation promulgated in the future as inconsistent with the statute. In this regard, the detailed language of the regulatory grant could prove problematic. For example, a court could decide that some old regulation promulgated under this proposed statute no longer reflected current campaign practices or could deem some future regulation adopted for administrative convenience as inconsistent with the regulatory requirement that regulations "promote civic participation in democracy."[62]

The IRS, however, could well choose to give guidance through a series of revenue rulings interpreting the statute rather than through promulgating regulations. Revenue rulings are official IRS interpretations that appear in the Internal Revenue Bulletin. Revenue Procedure 2012-4 further defines a revenue ruling as "the conclusion of the Service on how the law is applied to a specific set of facts . . . published for the information and guidance of taxpayers, Service personnel, and other interested parties."[63] Procedural IRS regulations state that the purpose of revenue rulings is

> to promote correct and uniform application of the tax laws by Internal Revenue Service employees and to assist taxpayers in attaining maximum voluntary compliance by informing Service

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Chevron deference." Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 489 (2013); *see id.* at 489 n.125 (citing cases). For further discussion of *Mead*, see *infra* notes 75–93 and accompanying text.

60. *See* Hickman, *supra* note 59, at 475–77.

61. *Chevron*, 467 U.S. at 843 n.9.

62. THE BRIGHT LINES PROJECT, *supra* note 47, at 5.

63. Rev. Proc. 2012-4, 2012-1 I.R.B. 125, 130. The IRS also explains in the introduction to each issue of the Internal Revenue Bulletin that guidance published therein, such as revenue procedures and revenue rulings, "do[es] not have the force and effect of Treasury Department Regulations." 2013-44 I.R.B. 426.

> personnel and the public of National Office interpretations of the internal revenue laws, related statutes, treaties, regulations, and statements of Service procedures affecting the rights and duties of taxpayers.[64]

Taxpayers generally may rely on revenue rulings as guidance regarding the application of the tax law to "substantially the same" facts.[65]

The current precedential guidance regarding the meaning of political campaign intervention relies on revenue rulings and the examples they contain. Revenue Ruling 2007-41, in addition to stating the facts-and-circumstances standard, provides twenty-one situations to illustrate its principle as to what is and is not political campaign intervention for § 501(c)(3) organizations.[66] Revenue Ruling 2004-6 offers six situations to clarify political campaign intervention for purposes of § 527, the provision governing political organizations.[67]

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64. Treas. Reg. § 601.601(d)(2)(iii) (as amended in 1987).

65. *Id.* § 601.601(d)(2)(v)(e).

66. *See* Rev. Rul. 2007-41, 2007-1 C.B. 1421, 1422–26. Situation 13, for example, states:

> Mayor *G* attends a concert performed by Symphony *S*, a section 501(c)(3) organization, in City Park. The concert is free and open to the public. Mayor *G* is a candidate for reelection, and the concert takes place after the primary and before the general election. During the concert, the chairman of *S*'s board addresses the crowd and says, "I am pleased to see Mayor *G* here tonight. Without his support, these free concerts in City Park would not be possible. We will need his help if we want these concerts to continue next year so please support Mayor *G* in November as he has supported us." As a result of these remarks, Symphony *S* has engaged in political campaign intervention.

Id. at 1424.

67. Rev. Rul. 2004-6, 2004-1 C.B. 328, 330–32. In Situation 2, for example:

> *O*, a trade association recognized as tax exempt under § 501(c)(6), advocates for increased international trade. Senator *C* represents State *V* in the United States Senate. *O* prepares and finances a full-page newspaper advertisement that is published in several large circulation newspapers in State *V* shortly before an election in which Senator *C* is a candidate for nomination in a party primary. The advertisement states that increased international trade is important to a major industry in State *V*. The advertisement states that S. 24, a pending bill in the United States Senate, would provide manufacturing subsidies to certain industries to encourage export of their products. The advertisement also states that several manufacturers in State *V* would benefit from the subsidies, but Senator *C* has opposed similar measures supporting increased international trade in the past. The advertisement ends with the statement "Call or write Senator *C* to tell him to vote for S. 24." International trade concerns have not been raised as an issue distinguishing Senator *C* from any opponent. S. 24 is scheduled for a vote in the United States Senate before the election, soon after the date that the advertisement is published in the newspapers.

Id. at 331. Because the advertisement names specific legislation on which Senator *C* is going to vote, the revenue ruling concludes that it does not constitute political campaign intervention for the purpose of § 527. *Id.*

Using revenue rulings to clarify statutory language would avoid the burden of promulgating regulations. Regulations, unlike revenue rulings, are subject to the highest levels of review within the IRS and Treasury and generally afford the public notice and the opportunity for comment.[68] In contrast, although revenue rulings require written approval by the IRS chief counsel and review by the Office of the IRS Commission and by Treasury's Office of Tax Policy, they do not involve public comment or formal signature by the IRS Commissioner and Assistant Secretary for Tax Policy.[69] Revenue rulings name the staff lawyer in the Office of Chief Counsel who is the principal author and list that person's phone number in case further information is desired.[70]

The appropriate level of judicial deference given to such revenue rulings is less certain than that given to regulations.[71] A number of scholars, including myself, have argued that revenue rulings are entitled only to deference under *Skidmore v. Swift & Co.*,[72] which is a far lesser degree of deference than *Chevron* deference.[73] Under

68. *See generally* IRM 32.1 (Chief Counsel Regulation Handbook); *id.* 32.2 (Chief Counsel Publication Handbook); Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1728 (2007); Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239, 250–52 [hereinafter Hickman, *No Man's Land*].

69. *See* Irving Salem, Ellen P. Aprill & Linda Galler, *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717, 736 (2004); *see also* Hickman, *No Man's Land*, *supra* note 68, at 243–46 (discussing revenue rulings); Hickman, *supra* note 59, at 502–09 (same).

70. Salem et al., *supra* note 69, at 736.

71. Similar questions arise in connection with notices published in the Internal Revenue Bulletin:

> A notice is a public pronouncement that may contain guidance that involves substantive interpretations of the Internal Revenue Code or other provisions of the law. For example, notices can be used to relate what regulations will say in situations where the regulations may not be published in the immediate future.

Understanding IRS Guidance – A Brief Primer, IRS, http://www.irs.gov/uac/Understanding-IRS-Guidance-A-Brief-Primer (last visited Mar. 13, 2014); *see* Hickman, *No Man's Land*, *supra* note 68, at 249–52 (discussing the uncertain origins of notices); Hickman, *supra* note 59, at 468–70 (noting that the IRS "relies heavily on informal guidance documents," including notices). To simplify discussion, I am going to assume that guidance issued by the IRS regarding political campaign intervention will take the form of regulations with notice and comment or revenue rulings.

72. *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944).

73. *See* Salem et al., *supra* note 69, at 744–46; *see also* Ellen P. Aprill, *The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081, 2109 (2005) (discussing the Tax Court's traditional position on deference to revenue rulings and the implications of several cases for that position); Leandra Lederman, *The Fight over "Fighting Regs" and Judicial Deference in Tax Litigation*, 92 B.U. L.

Skidmore deference, agency guidance receives deference as a court sees fit, based on the document's "power to persuade," which in turn depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[74]

Whether revenue rulings receive *Skidmore* or *Chevron* deference depends in good measure on how *United States v. Mead Corp.*[75] applies to revenue rulings. In *Mead*, the Supreme Court announced that agency guidance merits *Chevron* deference only if "Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority."[76] Applying this test, the Court decided that a U.S. Customs Service letter ruling was entitled to *Skidmore*, not *Chevron*, deference.[77] Unfortunately, the Court failed to specify the meaning of "force of law" and "promulgated in the exercise of that authority." It stated that *Chevron* deference would apply "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[78] According to the Court, "Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."[79] The case did not fully explain the meaning of "a variety of ways."

In reaction to the Court's lack of clarity, Justice Scalia issued a strongly worded dissent. He criticized the Court for replacing the clarity of *Chevron* with "th'ol' 'totality of the circumstances test.'"[80] He warned, "We will be sorting out the consequences of the *Mead* doctrine, which has today replaced the *Chevron* doctrine, for years to

REV. 643, 663–71 (2012) (noting that "[c]ommentators generally support the application of *Skidmore* to Revenue Rulings" but that the amount of "deference courts accord Revenue Rulings is not entirely clear").

74. *Skidmore*, 323 U.S. at 140.

75. United States v. Mead Corp., 533 U.S. 218 (2001).

76. *Id.* at 226–27.

77. *Id.* at 234–35.

78. *Id.* at 226–27.

79. *Id.* at 227.

80. *Id.* at 245 (Scalia, J., dissenting).

come. . . . The Court's new doctrine is neither sound in principle nor sustainable in practice."[81]

Mead has worried commentators as well. As Professor Ronald Levin has observed, what the Court meant by the "critical phrase," *force of law*, "is not easy to pin down. . . . The Court's commitment to that ['force of law'] test seems less than unequivocal, and the Court also seems unsure about how to apply it."[82] Writing four years after *Mead*, Professor Lisa Schultz Bressman concluded that Justice Scalia "actually understated the effect of *Mead*," when, in his dissent, he "predicted that judicial review of agency action would devolve into chaos."[83] To try to make sense of the case, Professor Sunstein has analyzed *Mead* as *Chevron* Step Zero because it addresses "whether the *Chevron* framework applies at all."[84]

Nonetheless, in a recent article, attorney Patrick Smith, who often writes about the intersection of tax and administrative law,[85] concluded, "When the *Mead* test is applied to revenue rulings, it is clear that they are ineligible for *Chevron* deference. Revenue rulings are not issued using notice and comment procedures, and the IRS does not claim that revenue rulings have the force of law."[86] Others, however, have taken the position that revenue rulings, like regulations, could or should be afforded *Chevron* deference. At one time, the Department of Justice argued that such documents merited *Chevron* deference, but it has since abandoned this position.[87] Specially concurring in a 2008 Ninth Circuit case, Judge O'Scannlain, relying on the statement in *Mead* that delegation of authority could be shown in any of a number of ways,[88] wrote, "I hope . . . that the formality of a particular agency action, standing alone, does not

81. *Id.* at 239, 241 (citation omitted).

82. Ronald M. Levin, Mead *and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771, 774, 776 (2002).

83. Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1443–44 (2005).

84. Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006).

85. *See generally, e.g.*, Patrick J. Smith, Chevron *Step Zero After* City of Arlington, 1140 TAX NOTES 743 (2013); Patrick J. Smith, *District Court Misapplies APA in* Florida Bankers Association, 142 TAX NOTES 75 (2014); Patrick J. Smith, *May Regulations That Violate the APA Be Remanded to the IRS?*, 141 TAX NOTES 84 (2013).

86. Patrick J. Smith, Quality Stores *and the Status of Revenue Rulings*, 140 TAX NOTES 1089, 1093 (2013).

87. *See* Marie Sapire, *ABA Section of Taxation Meeting: DOJ Won't Push* Chevron *Deference for Revenue Rulings*, 131 TAX NOTES 674 (2011).

88. *See supra* note 79 and accompanying text.

determine the level of deference it receives."[89] In the case, Judge O'Scannlain would have granted *Chevron* deference to a revenue procedure.[90] Since then, the Ninth Circuit has not resolved the question of whether revenue rulings receive *Skidmore* or *Chevron* deference.[91] Recently, Professor Kristin Hickman has argued that, because the IRS applied penalty provisions for failure to follow guidance documents such as revenue rulings, these rulings carry the force of law and would be entitled to *Chevron* deference, because a taxpayer's failure to follow them can result in penalties. However, she also believes that revenue rulings, to be valid, must be promulgated with notice-and-comment rulemaking as required by the Administrative Procedure Act[92] (APA) for legislative rules.[93]

Which of these views regarding the level of deference due to revenue rulings interpreting statutory language[94] ultimately prevails will have significant consequences for IRS administration of the tax law, not only in the case of any statute that defines political intervention, but also more generally. From an instrumental rather than a normative viewpoint, if revenue rulings issued without notice and comment merit *Chevron* deference, the IRS may have little incentive to go to the trouble of promulgating regulations with notice and comment.

The Supreme Court could have resolved the question regarding the level of deference to revenue rulings interpreting a statute when it

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89. Tualatin Valley Builders Supply, Inc. v. United States, 522 F.3d 937, 946 (9th Cir. 2008) (O'Scannlain, J., specially concurring).

90. *Id.* The IRS explains,

> A revenue procedure is an official statement of a procedure that affects the rights or duties of taxpayers or other members of the public under the Internal Revenue Code, related statutes, tax treaties and regulations and that should be a matter of public knowledge. It is also published in the Internal Revenue Bulletin. While a revenue ruling generally states an IRS position, a revenue procedure provides return filing or other instructions concerning an IRS position.

Understanding IRS Guidance – A Brief Primer, *supra* note 71. The Internal Revenue Manual 32.2.2.3.2 includes a similar definition. *See* IRM 32.2.2.3.2 (Aug. 11, 2004) ("A revenue procedure is an official statement of a procedure by the Service that affects the rights or duties of taxpayers or other members of the public under the Internal Revenue Code, related statutes, tax treaties, and regulations, or information that, although not necessarily affecting the rights and duties of the public, should be a matter of public knowledge.").

91. *See* Taproot Admin. Servs., Inc. v. Comm'r, 679 F.3d 1109, 1115 n.14 (9th Cir. 2012).

92. Administrative Procedure Act § 4, 5 U.S.C. § 553 (2012).

93. *See* Hickman, *supra* note 59, at 542.

94. As discussed below, yet a third kind of deference may be appropriate when revenue rulings interpret regulations. *See infra* notes 129–30 and accompanying text.

decided *United States v. Quality Stores, Inc.*,[95] in 2014. That is, the Court in *Quality Stores* could have clarified, whether, under *Mead*, such revenue rulings receive *Skidmore* or *Chevron* deference. However, it did not do so.

The substantive issue in *Quality Stores* was whether tax under the Federal Insurance Contribution Act[96] (FICA), which encompasses Social Security and Medicare, is due on severance pay that qualifies as supplemental unemployment compensation benefit (SUB) payments. The Sixth Circuit held that it is not.[97] The Federal Circuit, however, took the opposite position in *CSX Corp. v. United States*.[98]

FICA does not expressly address SUB payments,[99] and no regulations address the issue.[100] A number of revenue rulings, however, perform this function—most recently, Revenue Ruling 90-72.[101] According to Revenue Ruling 90-72, SUB payments are exempt from the definition of wages under FICA only if they are made to involuntarily separated employees pursuant to a plan that is designed to supplement the receipt of state employment compensation.[102] The ruling also concludes that payments in a lump sum cannot be linked to state employment compensation and thus are not excluded from FICA.[103]

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95. United States v. Quality Stores, Inc., No. 12-1408, 2014 WL 1168968 (U.S. Mar. 25, 2014).

96. Federal Insurance Contribution Act, I.R.C. §§ 3101–3128 (2012).

97. United States v. Quality Stores, Inc., 693 F.3d 605, 607–08 (2012), *rev'd*, No. 12-1408, 2014 WL 1168968 (U.S. Mar. 25, 2014).

98. CSX Corp. v. United States, 518 F.3d 1328, 1352 (Fed. Cir. 2008). The Government's petition for certiorari in *Quality Stores* also cites *Otte v. United States*, 419 U.S. 43 (1974), *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), *University of Pittsburgh v. United* States, 507 F.3d 165 (3d Cir. 2007), and *Abrahamsen v. United States*, 228 F.3d 1360 (Fed. Cir. 2000), as inconsistent with the Sixth Circuit's reasoning. *See* Petition for Writ of Certiorari at 20–25, *Quality Stores*, 2014 WL 1168968 (No. 12-1408).

99. *See Quality Stores*, 693 F.3d at 611.

100. *Id.*

101. Other revenue rulings addressing the issue include Rev. Rul. 77-347, 1977-2 C.B. 363 (indicating that SUB benefits from trust fund established by employer are not wages for FICA or the Federal Unemployment Tax Act (FUTA), I.R.C. §§ 3301–3311 (2012)); Rev. Rul. 60-330, 1960-2 C.B. 46 (indicating that SUB payments made directly to former employees are not wages for Federal employment tax purposes); Rev. Rul. 58-128, 1958-1 C.B. 93 (concluding that Rev. Rul. 56-249, 1956-1 C.B. 488 applies also to similar payments, even if not union negotiated but unilaterally established by an employer); and Rev. Rul. 56-249, 1956-1 C.B. 488 (indicating that employer payments supplement SUB payments, not wages for FICA or FUTA). The 1990 revenue ruling discussed in the text reversed the 1977 revenue ruling.

102. Rev. Rul. 90-72, 1990-2 C.B. 211.

103. *See Quality Stores*, 693 F.3d at 619.

The Sixth Circuit rejected reliance on the IRS revenue rulings "in favor of the expressed will of the legislature."[104] It looked to legislative history, which spoke of authority to issue regulations decoupling the meaning of "wages" for purposes of income tax withholding and FICA. Given the absence of such regulations, the court relied on the definition of wages in § 3402 of the I.R.C., which defines the term for purposes of income tax withholding. Section 3402(a) defines SUB payments and excludes them from the definition of wages.[105] The Sixth Circuit cited *Rowan v. United States*,[106] which concluded that Congress intended wages to have the same meaning for purposes of income tax withholding and FICA.[107] Thus, the Sixth Circuit found that the IRS revenue rulings conflicted with congressional intent.[108] Furthermore, according to the Sixth Circuit, revenue rulings do not merit *Chevron* deference because, in issuing revenue rulings, "the IRS does not invoke its authority to make rules with the force of law."[109]

The Federal Circuit in *CSX Corp.*, however, held that SUB payments are subject to FICA. It did not read § 3402, the provision excluding SUB payments from the definition of wages for income tax withholding, as requiring that SUB treatments be excluded from wages for purposes of FICA.[110] That is, it rejected the taxpayer's argument that the term "wages" in § 3402(o) governs the meaning of wages for purposes of FICA.[111] Without specifying the level of deference or the importance of consistency, the Federal Circuit found that CSX's payments would not satisfy "the IRS's administrative exclusion of SUB benefits from wages under Rev. Rul. 90-72 and its predecessors, as the IRS has construed and applied those rulings."[112]

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104. *Id.*

105. *See id.* at 611–13.

106. Rowan v. United States, 452 U.S. 247 (1981).

107. *See Quality Stores*, 693 F.3d at 613 (stating *Rowan*'s holding in this manner and citing *Rowan*, 452 U.S. at 255–57).

108. *See id.* at 616–20.

109. *See id.* at 619 (quoting Aeroquip-Vickers, Inc. v. Comm'r, 347 F.3d 173, 181 (6th Cir. 2003)) (quotation marks omitted). "In appropriate circumstances we may give substantial judicial deference to longstanding and reasonable interpretations of IRS regulations and revenue rulings, but in this case we conclude . . . that the IRS has not taken congressional intent fully into account." *Id.* at 620 (citation omitted).

110. CSX Corp. v. United States, 518 F.3d 1328, 1340 (Fed. Cir. 2008).

111. *Id.* at 1345.

112. *Id.*

If the Supreme Court had agreed with the Federal Circuit that congressional intent as expressed in the statute is unclear regarding FICA and SUB payments, the level of deference the Court assigns revenue rulings interpreting a statute could have played an important role in the *Quality Stores* decision. If revenue rulings are entitled only to *Skidmore* deference, courts would be relatively free to provide their own interpretations of the statute, particularly in light of inconsistency in the SUB revenue rulings.[113] If instead the Court had accepted the arguments of those who argued for *Chevron* deference, the position of Revenue Ruling 90-72 would govern, because agencies are free to change positions without loss of *Chevron* deference.[114]

On the other hand, if the Supreme Court had adopted the position of the Sixth Circuit that the IRS revenue rulings are inconsistent with congressional intent, it would not have needed to reach the question of what level of deference to give revenue rulings interpreting a statute. Clear congressional intent ends the deference inquiry; congressional intent will trump administrative guidance that receives *Chevron* deference, much less guidance that receives only *Skidmore* deference. In fact, the Solicitor General during the oral argument disavowed reliance on the revenue rulings and chose to rely on the statutory text.[115]

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113. The taxpayer's brief in *Quality Stores* argued that revenue rulings regarding SUB payments do not merit *Chevron* deference and that they lack the power to persuade under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), because of their inconsistency and lack of sound reasoning. Brief for Respondents at 49–59, *Quality Stores*, 2014 WL 1168968 (No. 12-1408), 2013 WL 6492303, at *49–59. An *amicus* brief from the American Benefits Council, authored by Patrick Smith, made similar arguments, Brief of *Amicus Curiae* the American Benefits Council in Support of Respondents at 11–17, *Quality Stores*, 2014 WL 1168968 (No. 12-1408), as did the *amicus* brief of American Payroll Association, Brief of American Payroll Ass'n as *Amicus Curiae* in Support of Respondents, *Quality Stores*, 2014 WL 1168968 (No. 12-1408). Professor Kristin Hickman submitted an amicus brief in the case, arguing, as she has in her scholarship, that revenue rulings are entitled to *Chevron* deference, but only if promulgated with notice and comment. *See* Brief of Professor Kristin E. Hickman as *Amicus Curiae* in Support of Neither Party at 28–33, *Quality Stores*, 2014 WL 1168968 (No. 12-1408), 2013 WL 6114794, at *28–33.

114. Justice Scalia explained in his *Mead* dissent, "As *Chevron* itself held, the Environmental Protection Agency can interpret 'stationary source' to mean a single smokestack, can later replace that interpretation with the 'bubble concept' embracing an entire plant, and if that proves undesirable can return again to the original interpretation." United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting); *see* Aprill, *supra* note 73, at 2113–18.

115. Eric J. Feigin, Assistant to the Solicitor General, stated during oral argument that "we acknowledge that the revenue rulings are not consistent with the statutory text." Transcript of Oral Argument at 26, *Quality Stores*, 2014 WL 1168968 (No. 12-1408), 2014 WL 262860, at *26.

The Court, however, decided the case in favor of the government, based on its interpretation of the statutory text.[116] It rejected "the Court of Appeals' interpretation of § 3402(o) as standing for some broad definition principle."[117] The Supreme Court relied instead on "FICA's broad definition of wages."[118] It noted that IRS revenue rulings, including Revenue Ruling 90-72, exempting certain severance payments from both FICA and income-tax withholding were "not at issue here."[119] Thus, despite the arguments of the taxpayer and some amici in *Quality Stores*,[120] the Supreme Court did not provide guidance as to the level of deference that courts should afford revenue rulings.

Under current law, in which revenue rulings interpreting statutes are most likely to receive *Skidmore* deference, the BLP legislative proposal would give the greatest force to the rules themselves. Interpretations of the statute by the IRS and Treasury, whether in regulations or revenue rulings, may be vulnerable to challenge as inconsistent with the statute. However, as discussed below in connection with the BLP regulatory proposal, revenue rulings interpreting regulations rather than the statute itself may claim a stronger form of deference than revenue rulings interpreting a statute.

III. IMPLICATIONS OF THE BRIGHT LINES PROJECT'S REGULATORY PROPOSAL

Should the BLP's proposal be promulgated as stand-alone regulations under the current I.R.C., rather than as regulations promulgated pursuant to a specific grant of regulatory authority in a new statute, different issues would arise as to their validity.[121] Such

116. *Quality Stores*, 2014 WL 1168968, at *10.

117. *Id.* at *8.

118. *Id.* at *10.

119. *Id.* The opinion continued, "Because the severance payments here were not linked to state unemployment benefits, the Court does not reach the question of whether the IRS' current exemption is consistent with the broad definition of wages under FICA." *Id.*

120. *See supra* note 113.

121. For purposes of this Article, I am assuming any such regulations would be promulgated with notice and comment, and thus would not raise the particular issues that ensue when the IRS issues temporary regulations without notice and comment. *See* Ellen P. Aprill, *The Impact of Agency Procedures and Judicial Review on Tax Reform*, 65 NAT'L TAX J. 917, 925–27 (2012) (reviewing the "serious" validity questions that interim final regulations provoke); Hickman, *supra* note 59, at 471–72 (noting the "significant potential difficulties for the stability of the federal income tax system" caused by the interpretation of temporary regulations).

regulations would be promulgated under the general authority of § 7805(a), which specifies that "the Secretary shall prescribe all needful rules and regulations" for the enforcement of the Internal Revenue Code ("general authority regulations").[122]

Until recently, it was uncertain whether such general-authority Treasury regulations would be entitled to the same deference from courts as specific-authority regulations. A long tradition, particularly in the Tax Court, was to afford less deference to Treasury regulations than that afforded by *Chevron* deference.[123] This tradition relied on *National Muffler Dealers Ass'n v. United States*,[124] in which the Supreme Court stated, in connection with a general-authority regulation:

> A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.[125]

In other cases, the Supreme Court suggested that courts owe less deference to a general-authority regulation than to a specific-authority regulation.[126] Before 2011, the Court was inconsistent in its application of *National Muffler* and *Chevron* in reviewing tax regulations.[127]

The Supreme Court, however, resolved this uncertainty when it decided *Mayo Foundation for Medical Education & Research v. United States*[128] in 2011. In addressing a regulation promulgated with

122. I.R.C. § 7805(a) (2012).

123. *See* Ellen P. Aprill, *Muffled* Chevron*: Judicial Review of Tax Regulations*, 3 FLA. TAX REV. 51, 67–73 (1996); Lederman, *supra* note 73, at 646; Salem et al., s*upra* note 69, at 721–22. The vast majority of tax cases are litigated in Tax Court, which does not require taxpayers to pay disputed amounts before bringing suit. Leandra Lederman, *(Un)Appealing Deference to the Tax Court*, 63 DUKE L.J. 1835, 1836–37 (2014); *see* Gerald Kafka, *Choice of Forum in Federal Civil Tax Litigation (Part I)*, PRACTICAL TAX LAW., Winter 2011, at 55, 60.

124. Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472 (1979).

125. *Id.* at 477.

126. *See* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 713 (2011) (describing the inconsistency).

127. *Id.* at 712.

128. Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704 (2011).

notice and comment under the general authority of § 7805, the Court declared: "We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations."[129] The Court in *Mayo* also noted that "we are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly '[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.'"[130]

That general-authority regulations receive judicial deference to the same extent as specific-authority regulations, however, does not resolve all the administrative law issues raised by the BLP regulatory proposal. Recall, as discussed above, that *Chevron* deference requires ambiguity in expressed congressional intent. Congressional intent clearly appears ambiguous under the language of §§ 501(c)(3), 4955, 4945, 6033(e), and 162(e)(1)(B), in which the statutory language explicitly refers to political intervention but fails to define the term in any detail.[131] Indeed, given the failure of Congress to provide any definition of the term, it is hard to imagine a court holding that regulations defining the term and promulgated under the general authority of § 7805(a) could be inconsistent with congressional intent. That is, counterintuitively, regulations defining political campaign intervention under these provisions pursuant to the general authority of § 7805(a) may be less vulnerable to attack than those promulgated under the detailed grant of regulatory authority under the BLP legislative proposal.

Chevron deference also requires fidelity to congressional intent. When it comes to defining political campaign intervention for the purpose of permitting some amount of such activity by other § 501(c) entities, congressional intent is less clear. That is, intent may be lacking rather than ambiguous. As noted earlier, under the language of § 501(c)(4) of the I.R.C., organizations must be operated

129. *Id.* at 713.

130. *Id.* (quoting Dickinson v. Zurko, 527 U.S. 150, 154 (1999)).

131. The provisions do not all use the same language, however. Section 501(c)(3) requires that an organization exempt under this section "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." I.R.C. § 501(c)(3) (2012). Section 4955, which imposes an excise tax on the political expenditures of such organization, *id.* § 4955, uses the same language, as does § 162(e)(1)(B), which denies any business deduction for political expenditures. *Id.* § 162(e)(1)(B). Section 6033(e) cross-references to § 162(e)(1). *Id.* § 6033(e). Section 4945 imposes an excise tax on private foundations that "influence the outcome of any specific public election." *Id.* § 4945.

"exclusively for the promotion of social welfare."[132] It is a regulation promulgated in 1959, not a statute, that allows such an organization to be "*primarily* engaged in promoting in some way the common good and general welfare of the people of the community."[133] The regulations also specify that "promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office."[134]

Recently, the IRS and Treasury issued proposed regulations for § 501(c)(4) organizations that would broaden the scope of what the proposed regulations now call "candidate-related political activity" to include, for example, nonpartisan voter registration and candidate forums.[135] The proposed regulations, however, do not specify the level of required social welfare activity.[136] The proposed regulations have generated enormous controversy.[137] The IRS received more than 140,000 comments on them.[138] The BLP reaction, for example, in a fifty-six-page comment, welcomed "the IRS's much-needed

132. *See supra* note 5 and accompanying text.

133. Treas. Reg. § 1.501(c)(4)–1(a)(2)(i) (as amended in 1990) (emphasis added).

134. *Id.* § 1.501(c)(4)–1(a)(2)(ii).

135. *See* Prop. Treas. Reg. § 1.501(c)(4)–1(a)(2), 78 Fed. Reg. 71,535, 71,541–42 (Nov. 29, 2013). The proposed regulations would also define candidate-related political activity to include any public communication "within 30 days of a primary election or 60 days of a general election that refers to one or more clearly identified candidates in that election or, in the case of a general election, refers to one or more political parties represented in that election." *Id.* at 71,541.

136. The NPRM asks for comments on this question. *Id.* at 71,537–38.

137. *See, e.g.*, Diana Aviv & Gary D. Bass, *IRS Plan on Nonprofit Political Work Undermines Democracy*, CHRON. PHILANTHROPY (Dec. 3, 2013), http://philanthropy.com/article/IRS-Plan-on-Nonprofit/143351; Bob Bauer, *The IRS Proposed Rules on (c)(4) Political Activity*, MORE SOFT MONEY HARD LAW BLOG (Dec. 2, 2013), http://www.moresoftmoneyhardlaw.com/2013/12/the-irs-proposed-rules-on-c4-political-activity; Ctr. for Competitive Politics, *No Good Speech Unpunished: New Model Regulations Would Muzzle Charities' Speech*, CAMPAIGN FREEDOM (Dec. 6, 2013), http://www.campaignfreedom.org/2013/12/06/no-good-speech-unpunished-new-model-regulations-would-muzzle-charities-speech; Stephanie Drahan, *New IRS Proposal for Tax Exempt Groups "Important First Step Against Abuse" Says League*, LEAGUE WOMEN VOTERS (Dec. 3, 2013), http://www.lwv.org/press-releases/new-irs-proposal-tax-exempt-groups-important-first-step-against-abuse-says-league; Matea Gold, *New IRS Rules Add Both Clarity and Confusion About the Role of Advocacy Groups in Politics*, WASH. POST (Nov. 29, 2013, 6:11 PM), http://www.washingtonpost.com/politics/new-irs-rules-add-both-clarity-and-confusion-about-the-role-of-advocacy-groups-in-politics/2013/11/28/19e76286-5784-11e3-835d-e7173847c7cc_story.html.

138. *See Guidance for Tax-Exempt Social Welfare Activities on Candidate-Related Political Activities (Reg. 134417-13)*, REGULATIONS.GOV, http://www.regulations.gov/#!docketBrowser;rpp=25;so=DESC;sb=postedDate;po=0;dct=PS;D=IRS-2013-0038;refD=IRS-2013-0038-0001 (last visited Mar. 13, 2014).

attention" to the issues, but concluded that the initial proposal required "very significant improvements in order to achieve its objectives, provide fair treatment of all 501(c) organizations, and avoid interference with legitimate, nonpartisan activities of nonprofit organizations."[139] It urged Treasury "to substantially rework the proposal and provide the public another opportunity to comment."[140]

The proposed regulations have prompted additional congressional scrutiny[141] and have come under criticism from both the right and the left.[142] Many have predicted that they will be substantially changed; others have urged their withdrawal.[143] Nonetheless, Lisa Zarlenga, Treasury Tax Legislative Counsel, has announced that the IRS will hold a hearing on the proposed regulations in the spring of 2014.[144]

Some have argued, both during and prior to the recent controversy regarding the eligibility of Tea Party groups for § 501(c)(4) status, that the IRS ignored congressional intent in permitting any campaign intervention by such groups.[145] Thus, whether or not the proposed regulations defining candidate-related activity are finalized, it is possible that a court would find that § 501(c)(4) does not permit political intervention. Under *Chevron*, congressional silence, however, is ambiguous and, as a result, the 1959

139. Comment from Gregory L. Colvin, Chair, Drafting Comm., Bright Lines Project, Lisa Gilbert, Director, Congress Watch and Bright Lines Project, to Amy F. Giulano, Office of the Assoc. Chief Counsel (Tax Exempt and Gov't Entities), RE: Proposed Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities 1 (Feb. 27, 2014), *available at* http://www.citizen.org/documents/Bright%20Lines%20Project%20Comment%20FINAL%20with%20exhibit.pdf.

140. *Id.*

141. *See* Fred Stokeld, *At Hearing, Proposed Rules on Social Welfare Groups Described as Harmful to Free Speech*, TAX NOTES TODAY, Feb. 28, 2014, *available at* LEXIS, 2014 TNT 40-5.

142. *See* Lauren French, *IRS Hit from All Political Stripes on Nonprofit Rules*, POLITICO PRO (Mar. 3, 2014, 5:05 AM), http://www.politico.com/story/2014/03/irs-hit-from-all-political-stripes-on-nonprofit-rules-104146.html; Matea Gold, *IRS Plan To Curb Politically Active Groups Is Threatened by Opposition from Both Sides*, WASH. POST. POL. (Feb. 12, 2014), http://www.washingtonpost.com/politics/irs-plan-to-curb-politically-active-groups-threatened-by-opposition-from-both-sides/2014/02/12/99dcfd2a-932a-11e3-b46a-5a3d0d2130da_story.html.

143. *See* French, *supra* note 142; Gold, *supra* note 142.

144. *See* Fred Stokeld, William Hoffman & David van den Berg, *IRS Hearing Likely in the Spring on Proposed Social Welfare Group Guidance*, TAX NOTES TODAY, Mar. 3, 2014, *available at* LEXIS, 2014 TNT 41-16.

145. Alan B. Morrison, *Focusing on the Wrong IRS 501(c)(4) Scandal*, HUFFINGTON POST (May 29, 2013, 5:02 PM), http://www.huffingtonpost.com/alan-b-morrison/irs-501c4-scandal_b_3353468.html; *Van Hollen et al. v. IRS*, PUB. CITIZEN, http://www.citizen.org/litigation/forms/cases/getlinkforcase.cfm?cID=838 (last visited Mar. 13, 2014).

regulations or any new § 501(c)(4) final regulations specifying the permissible levels of political campaign intervention could well be entitled to *Chevron* deference. Whether § 501(c)(4) organizations may engage in some or no political intervention, however, such groups need to know what activities do and do not amount to political intervention, and regulations defining political campaign intervention themselves would almost surely be afforded *Chevron* deference.

In the case of other § 501(c) organizations, such as § 501(c)(5) labor organizations and § 501(c)(6) trade associations, regulations defining political campaign intervention would not clarify either statutory or other regulatory language.[146] As in the case of § 501(c)(4) organizations, nothing in the I.R.C. refers to permission for or limits on political intervention.[147] In the case of these organizations, however, the IRS has recognized their ability to engage in some amount of political intervention, but it has done so in guidance entitled to less deference than general-authority regulations promulgated with notice and comment. General Counsel Memorandum (GCM) 34233 extended to § 501(c)(5) and § 501(c)(6) organizations the ability to engage in some political campaign intervention.[148] It stated that "if the primary purpose or activity of an organization is to engage is [*sic*] political action, then we believe it is not organized primarily as a business league and cannot qualify for exemption under section 501(c)(6)."[149] The GCM also noted that "if the primary purpose and activities of an organization otherwise qualify it under section 501(c)(6), then participation in political activities will not disqualify it from exemption."[150]

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146. The recently proposed § 501(c)(4) regulations ask for comments about extending the proposed regulations to § 501(c)(5) and § 501(c)(6) organizations. *See* Prop. Treas. Reg. § 1.501(c)(4)–1(a)(2), 78 Fed. Reg. 71,535, 71,537 (Nov. 29, 2013).

147. The next several paragraphs are drawn from Aprill, *supra* note 8, at 381.

148. *See* I.R.S. Gen. Couns. Mem. 34,233 (Dec. 3, 1969).

> Formerly prepared by the Interpretative Division, GCMs originally were the way the Office of Chief Counsel communicated legal advice [in the context of private letter rulings and revenue rulings] to the IRS assistant commissioner (technical), which eventually merged into the [O]ffice of [C]hief [C]ounsel. After that point, GCMs became the formal legal opinion of the chief counsel responding to inquiries from a National Office function outside of chief counsel or explaining the legal basis for the position taken in a TAM, letter ruling, or revenue ruling. . . . GCMs are rarely written anymore except to repeal old GCMs.

Marion Marshall, Sheryl Stratton & Christopher Bergin, *The Changing Landscape of IRS Guidance: A Downward Slope*, 90 TAX NOTES 673, 679 (2001).

149. I.R.S. Gen. Couns. Mem. 34,233.

150. *Id*. *See generally* JOHN FRANCIS REILLY & BARBARA A. BRAIG ALLEN, POLITICAL CAMPAIGN AND LOBBYING ACTIVITIES OF IRC 501(C)(4), (C)(5), AND (C)(6) ORGANIZATIONS

Private letter rulings, which are written statements on issues addressed to taxpayers who have requested the rulings, and which are not authority on which other taxpayers can rely,[151] address § 501(c)(8) fraternal beneficiary societies and § 501(c)(19) veterans' organizations.[152] Two private letter rulings acknowledge that a § 501(c)(8) organization can, without endangering its exemption, establish a separate segregated fund as a political action committee and transfer a portion of dues to it promptly and directly so that the transferred amounts will not be considered political campaign intervention subject to tax under § 527(f) by the § 501(c)(8) organization itself.[153] By discussing the possibility of the § 501(c)(8) organization being subject to tax under § 527(f), the private letter rulings assume that the organization could engage in political campaign intervention directly. Neither ruling discusses how much political campaign intervention would be permissible for a § 501(c)(8) organization.

The private ruling addressing § 501(c)(19) veterans' organizations, however, does consider this issue.[154] In deciding that a § 501(c)(19) veterans' association may establish a political action committee, the ruling, issued shortly after enactment of § 501(c)(19), reasoned that a § 501(c) organization can establish a separate

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(2003), *available at* http://www.irs.gov/pub/irs-tege/eotopicl03.pdf (providing exempt organizations with information about the rules relating to political campaign and lobbying activities).

151. A private letter ruling (PLR)

> is a written statement issued to a taxpayer that interprets and applies tax laws to the taxpayer's specific set of facts. A [PLR] is issued to establish with certainty the federal tax consequences of a particular transaction before the transaction is consummated or before the taxpayer's return is filed. A PLR is issued in response to a written request submitted by a taxpayer and is binding on the IRS if the taxpayer fully and accurately described the proposed transaction in the request and carries out the transaction as described. A PLR may not be relied on as precedent by other taxpayers or IRS personnel. PLRs are generally made public after all information has been removed that could identify the taxpayer to whom it was issued.

Understanding IRS Guidance – A Brief Primer, *supra* note 71. *See generally* IRM 32.3.2 (Oct. 25, 2011) (providing guidance to taxpayers regarding letter rulings). Tax professionals, however, study private letter rulings to glean the attitude of the IRS as well as to study the reasoning and authorities the private letter rulings employ.

152. The recently proposed § 501(c)(4) regulations make no reference to and do not ask for comments defining political campaign intervention in the case of § 501(c)(8) or § 501(c)(19) organizations. *See* Prop. Treas. Reg. § 1.501(c)(4)–1(a)(2), 78 Fed. Reg. 71,535, 71,536–37 (Nov. 29, 2013) (limiting the proposed rulemaking to § 501(c)(4) organizations).

153. *See* I.R.S. Priv. Ltr. Rul. 88-52-037 (Oct. 4, 1988); I.R.S. Priv. Ltr. Rul. 83-42-100 (July 20, 1983).

154. *See* I.R.S. Priv. Ltr. Rul. 79-04-064 (Oct. 25, 1978).

segregated fund under § 527(f)(3) only if political campaign activity is consistent with its exempt purpose. Veterans' organizations, it observes, are tax-exempt either under § 501(c)(4) or under the newly enacted § 501(c)(19). It continues:

> Concerning organizations which are tax exempt under section 501(c)(19), the legislative history connected with the enactment of this section does not indicate congressional intent to either increase or diminish the extent that veterans organizations may be involved in political activities. The Code and Regulations themselves are silent as to the permissibility or extent of political participation or intervention on the part of section 501(c)(19) organizations.[155]

This ruling thus suggests that § 501(c)(19) organizations can engage in political campaign intervention to the same extent, but not more than, § 501(c)(4) organizations.[156]

To date, no court has granted *Chevron* deference to either GCMs or private letter rulings,[157] and there is little likelihood that, given their nature, any court would do so. Nonetheless, as with § 501(c)(4) organizations, these other § 501(c) organizations need to know what activities constitute political intervention, and whether they are ultimately prohibited from engaging or permitted to engage to some extent in such activity. Thus, courts are likely to see congressional silence about the amount of political campaign intervention permitted by noncharitable § 501(c) organizations as an ambiguity that would result in the BLP regulatory approach receiving *Chevron* deference as applied to these entities as well. Although courts are not consistent regarding when they find a statute to be silent about a particular issue,[158] the Court explicitly stated in *Chevron* that "if the statute is *silent* or ambiguous with respect to the specific

155. *Id.*

156. In contrast, Hill and Mancino believe that veterans' organizations "may engage in unlimited lobbying and political activities." *See* FRANCES R. HILL & DOUGLAS M. MANCINO, TAXATION OF EXEMPT ORGANIZATIONS ¶ 19.02[1] (2002).

157. *See* Hickman, *No Man's Land*, *supra* note 68, at 256–57. Neither private letter rulings nor GCMs are published in the Internal Revenue Bulletin. Moreover, as noted above, a private letter ruling "may not be relied on as precedent by other taxpayers or IRS personnel." *Understanding IRS Guidance – A Brief Primer*, *supra* note 71.

158. *See* Aprill, *supra* note 73, at 2091–94 (discussing two contrasting judicial opinions as to whether a statute was silent or ambiguous).

issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[159]

From an administrative law perspective, predicting the status of any revenue rulings published to clarify the BLP regulatory proposal becomes both challenging and intriguing. Earlier, I discussed the dispute as to whether revenue rulings receive *Chevron* or *Skidmore* deference. If, however, revenue rulings clarify Treasury regulations rather than statutory language, such rulings could be subject to *Auer*/*Seminole Rock* deference.

Auer/*Seminole Rock* deference declares that an agency's construction of its own regulations is to receive "controlling weight unless it is plainly erroneous or inconsistent with the regulation."[160] A recent article describes the best justifications for this strong deference as "pragmatic"—that is, they are based on notions regarding "expertise, efficiency, flexibility, and accountability."[161] However, questions have arisen about the doctrine's continuing validity after *Mead* and *Chevron.* Justice Scalia, the author of *Auer*, wrote recently in *Talk America, Inc. v. Michigan Bell Telephone Co.*[162]:

> For while I have in the past uncritically accepted [*Auer* deference], I have become increasingly doubtful of its validity. On the surface, it seems to be a natural corollary—indeed, an *a fortiori* application—of the rule that we will defer to an agency's interpretation of the statute it is charged with implementing. But it is not. . . . [W]hen an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the

159. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (emphasis added).

160. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); *see also* Auer v. Robbins, 519 U.S. 452, 461 (1997) (applying the "deferential" *Seminole Rock* standard and finding it "easily met"); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 518 (1994) (applying *Seminole Rock* and holding that the Secretary of Health and Human Services' interpretation was "faithful to the regulation's plain language" and thus controlled).

161. Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1460 (2011); *see also* Scott H. Angstreich, *Shoring Up* Chevron*: A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 89–99 (2000) (describing the Supreme Court's justifications for broad deference to agency interpretations of statutes and regulations); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 629–31 (1996) (discussing the rationale offered by the Supreme Court for applying *Seminole Rock* deference to agency interpretations of regulations); Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 410–12 (2012) (positing a purposive solution to "the puzzle of how a court is to judge when deference under *Seminole Rock*" is appropriate).

162. Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254 (2011).

> rule's meaning. And though the adoption of a rule is an exercise of the executive rather than the legislative power, a properly adopted rule has fully the effect of law. It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well. . . .
>
> . . . [D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.[163]

Disagreeing with Justice Scalia, the *Talk America* Court relied on the Federal Election Commission's interpretation of the regulations at issue in its amicus brief, citing *Auer*.[164]

Professors Pierce and Hickman have observed that "[t]he Court's continued commitment to *Seminole Rock* and *Auer* is particularly interesting when one considers that *Mead* denies *Chevron* deference to agency interpretations of statutes expressed in the very guidance formats that agencies typically utilize to articulate their interpretations of their own regulations."[165] Moreover, the Court has in recent opinions emphasized situations in which it will not apply *Auer*/*Seminole Rock* deference. It has explained that this doctrine will not apply, for example, if the agency's interpretation is "'plainly erroneous or inconsistent with the regulation,'"[166] if the agency's interpretation "'does not reflect the agency's fair and considered judgment on the matter in question,'"[167] if the agency's position is simply a "'convenient litigating position,'"[168] or a "'*post hoc* rationalizatio[n]'" intended "to defend past agency action against attack."[169]

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163. *Id*. at 2266 (Scalia, J., concurring) (citation omitted).

164. *Id*. at 2260–61. Other Supreme Court cases involving *Auer*/*Seminole Rock* deference include *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156 (2012); *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871 (2011); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); and *Gardebring v. Jenkins*, 485 U.S. 415 (1988).

165. KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., FEDERAL ADMINISTRATIVE LAW: CASES AND MATERIALS (2d ed. forthcoming 2014) (on file with the *Duke Law Journal*).

166. *Christopher*, 132 S. Ct. at 2166 (quoting *Auer*, 519 U.S. at 461).

167. *Id.* (quoting *Auer*, 519 U.S. at 462)

168. *Id.* (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988)).

169. *Id.* at 2166–67 (alteration in original) (quoting *Auer*, 519 U.S. at 462).

Nonetheless, a recent study shows that the Supreme Court is extraordinarily deferential when it reviews agencies' interpretations of their own rules; it upholds the agency approximately 91 percent of the time,[170] while, according to another study, the federal district and circuit courts uphold the agency under *Auer*/*Seminole Rock* approximately 76 percent of the time.[171] In contrast, Professor Steve Johnson has recently reviewed Tax Court cases and has concluded that the Tax Court has embraced *Auer*/*Seminole Rock* deference far less than other federal courts.[172] According to Professor Johnson,

> The Tax Court typically gives at least lip-service to [*Auer*/*Seminole Rock*]. Sometimes it even applies [*Auer*/*Seminole Rock*] deference faithfully, in both cases in which the IRS prevails and cases in which it justifiably should not. But it is hard to escape the conclusion that, in the Tax Court, the [*Auer*/*Seminole Rock*] principle often is honored more in name than in substance.[173]

He believes that the reason for the Tax Court's reluctance is that, as a specialist tribunal, it is less likely to defer to the IRS than generalist federal courts.[174]

I argue that there is a reasonable possibility that revenue rulings interpreting regulations (as opposed to those interpreting a statute) could receive *Auer*/*Seminole Rock* deference in the Tax Court as well as other federal courts. As Professor Johnson and I have both noted,

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170. Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85 (2011).

171. Richard J. Pierce, Jr. & Joshua A. Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 519 (2011).

172. *See* Steve R. Johnson, Auer/Seminole Rock *Deference in the Tax Court*, 11 PITTSBURGH TAX REV. 1, 24–25 (2013).

173. *Id.* at 28. In addition to *Lantz v. Commissioner*, 132 T.C. 131 (2009), *rev'd on other grounds*, 607 F.3d 479 (7th Cir. 2010), Professor Johnson, in his examination of recent Tax Court cases, discusses Judge Cohen's concurrence in *Pierre v. Commissioner*, 133 T.C. 24 (2009), in which she stated that the case did not "adopt the litigating position of the [IRS] as distinct from preexistent and consistent administrative interpretations," Johnson, *supra* note 172, at 23–24, as well as Judge Wherry's refusal in his opinion for the court in *Carpenter Family Investments v. Commissioner*, 136 T.C. 373 (2011), to accord *Seminole Rock* deference to a preamble to a regulation, Johnson, *supra* note 172, at 26–27. *See Carpenter Family Invs.*, 136 T.C. at 379 n.4. In 2013, the Tax Court declined to grant *Auer* deference to the position of the IRS in a brief. *See* Rand v. Comm'r, No. 2633-11, 2013 WL 6063566, at *11 (T.C. Nov. 18, 2013).

174. Johnson, *supra* note 172, at 36–40. He also believes, however that *Auer*/*Seminole Rock* deference is a "dubious rule of law," particularly because of its "pernicious incentive effects" for an agency to write ambiguous regulations. *Id.* at 40, 45–50. He finds the perverse incentive especially deleterious in tax matters, wherein "[v]ague regulations 'clarified' by explanations by the Treasury or the IRS make it difficult for citizens to understand and so to fulfill their obligation to pay taxes they legally owe." *Id.* at 51.

the Tax Court resisted adopting *Chevron*. It did so for largely the same reason—its belief in its own expertise—that Professor Johnson suggests for the Tax Court's unwillingness to apply *Auer*/*Seminole Rock* deference.[175] Eventually, however, the Tax Court did in fact accept the application of *Chevron* deference.[176] It may do the same with *Auer*/*Seminole Rock* deference. In addition, since *Mayo*, both private practitioners and government lawyers have become more sensitive to administrative law issues.[177] In particular, William J. Wilkins, the Chief Counsel of the IRS, has stated that he was interested in seeing whether a case "would prompt a court to consider the potential application[s] of *Auer v. Robbins*" to a tax case.[178] Therefore, government lawyers at some future time could well make the argument that revenue rulings interpreting regulations should receive *Auer*/*Seminole Rock* deference.

As discussed above, the Supreme Court in *Talk America* recently gave *Auer*/*Seminole Rock* deference to positions in briefs, including an amicus brief. Nonetheless, the form of agency interpretations that are entitled to *Auer*/*Seminole Rock* deference is a matter of considerable controversy. As Professor Matthew Stephenson and attorney Miri Pogoriler have explained, cases have afforded *Auer*/*Seminole Rock* deference to an interpretation contained in no more than an internal memorandum and agency practice or in an inter-agency memorandum.[179] Nonetheless, they conclude that strong *Auer*/*Seminole Rock* deference should be reserved for "interpretations issued in orders following formal adjudications, while granting only *Skidmore* respect to interpretive rules and informal order."[180]

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175. *Id*. at 39–40; *see* Aprill, *supra* note 123, at 67–73.

176. Johnson, *supra* note 172, at 39.

177. *See* Patrick J. Smith, *Life After* Mayo*: Silver Linings*, 131 TAX NOTES 1251, 1254 (2011) (describing the "tax community's overreaction to *Mayo*").

178. Jeremiah Coder & Shamik Trivedi, *Supreme Court Has Put Regulatory Challenges in Play, Wilkins Says*, 138 TAX NOTES 1212 (2013).

179. *See* Stephenson & Pogoriler, *supra* note 161, at 1484–85 & nn.147–48 (collecting cases).

180. *Id.* at 1496. They suggest that the strong deference of *Auer*/*Seminole Rock* is appropriate only "in orders following formal adjudications, which entail extensive hearing and participation rights as well as significant constraints on the agency's decisionmaking process." *Id.* at 1485–86. They are unwilling to look to the seniority of the official approving an interpretation as a key factor because, they believe, "[a]n interpretive question significant enough to attract the attention of a senior agency official prior to litigation is more likely to be a question that is sufficiently prominent that the agency could and should address it through a legislative rule." *Id.* at 1492. I do not believe this generality holds for tax.

Lantz v. Commissioner,[181] a Tax Court case that involved possible discretionary relief by the IRS to a statute of limitations, also demonstrates the dispute about the reach of *Auer*/*Seminole Rock* deference. The majority of the Tax Court relied on *Bowles v. Seminole Rock & Sand Co*.[182] in concluding that this special relief did not apply. In dissent, Judge Halpern argued that the IRS position was "no more than a litigating position," and one "without merit, or, in the language of *Bowles v. Seminole Rock & Sand Co.*, 'plainly erroneous' and 'inconsistent with the regulation,' which would cause its rejection in any event."[183] But Judge Halpern also suggested that such deference might be available when the IRS position takes the form of published guidance.[184] Such would be the case for revenue rulings interpreting regulations. That is, if Judge Halpern's view eventually prevails in the Tax Court, revenue rulings interpreting regulations could well receive *Auer*/*Seminole Rock* deference.

In sum, the BLP regulatory proposal offers two distinct advantages from the government's point of view. It reduces the possibility that regulations could be deemed inconsistent with congressional intent and allows the possibility that revenue rulings interpreting the political campaign intervention rules would be afforded the strong deference of *Auer*/*Seminole Rock.*

CONCLUSION

We would expect that the surest and strongest way to ensure establishment of rules defining political campaign intervention for purposes of the federal tax law would be to enshrine the rules in the I.R.C. However, because of a number of administrative law doctrines—in particular the difference between the two steps of *Chevron*, the holding of *Mayo* regarding deference to general-authority regulations, and the possible application of *Auer*/*Seminole Rock* deference to revenue rulings interpreting regulations, but not to those interpreting statutes—the BLP regulatory proposal, not the legislative proposal, offers those who have drafted the BLP proposals and the government a greater ability to establish and clarify the

181. Lantz v. Comm'r, 132 T.C. 131 (2009), *rev'd on other grounds*, 607 F.3d 479 (7th Cir. 2010).

182. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

183. *Lantz*, 132 T.C. at 151 (Halpern, J., dissenting) (citation omitted) (quoting *Seminole Rock*, 325 U.S. at 414).

184. *See id.*

definition of political campaign intervention under the federal tax law.

The contrast discussed in this Article, however, involves only two possibilities: first, a relatively detailed statutory regime followed by guidance in the form of revenue rulings, and second, sparse or silent statutory direction followed first by regulations and then by revenue rulings. Neither of these alternatives is desirable. Far preferable, both in the case of political campaign intervention in particular and for tax legislation in general, would be a process involving both Congress and the tax agencies.

Congressional action, of course, represents the promise of representative and responsive government. Having Congress enact statutes ensures the most direct accountability to the electorate and the perceived legitimacy of the rules enacted. One scholar has articulated a particular need for congressional action in the case of tax laws:

> Taxing powers are, as a matter of history and practice, different from other sorts of government authority. When government commands that a citizen surrender money or property, it is essential that the decision reflect a modicum of democratic accountability. Democratically elected—and accountable—members of Congress, rather than bureaucrats, should be required to endorse de facto revenue measures and face the potential wrath of the voters if they deem the taxes too burdensome or the program's benefits too ephemeral.[185]

Of course, congressional delegation is important for major policy decisions in general. Recently, in *Loving v. IRS*,[186] the Court of Appeals for the D.C. Circuit held that Treasury regulations applicable to tax-return preparers were invalid under *Chevron* Step One, which requires that an agency give effect to the clear intent of Congress, as inconsistent with the text, history, structure, and context of the applicable statute. *Loving* relied on *FDA v. Brown & Williamson Tobacco Corp.*,[187] which denied the Food and Drug Administration authority to regulate tobacco products,[188] to assert

185. Ronald J. Krotosynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power To Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 246 (2005).

186. Loving v. IRS, No. 13-5061, 2014 WL 519224 (D.C. Cir. Feb. 11, 2014).

187. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

188. *Id.* at 161.

that courts should not presume congressional intent to "implicitly delegate decisions of major economic or political significance."[189]

In the case of political campaign intervention by tax-exempt organizations, Congress has done more than make an implicit delegation. Congress has assigned responsibility for interpreting and administering § 501(c)(4) and other provisions of § 501(c) to the IRS and Treasury by establishing these categories in the I.R.C. Nonetheless, it is possible that regulation of this activity has itself grown so politically fraught that it will prove difficult for Treasury and the IRS to draft regulations that will garner public acceptance,[190] including not only the proposed regulations, but also the regulations suggested by the BLP, given the thinness of the statutory base on which the regulations must be built.

Thus, if our sharply divided Congress could agree on some approach,[191] some additional congressional direction as to the meaning of political campaign intervention by exempt organizations would be desirable. At the same time, too detailed a set of statutory provisions poses a danger. Such statutes risk ossification. Exhaustive, finely articulated statutory provisions hamper administrative agencies in responding to changing circumstances.[192] Statutes with more general guidance—that is, statutes that do not attempt to address all possibilities, both present and future, followed by careful regulations with notice and comment, and then by revenue rulings that receive appropriate *Auer*/*Seminole Rock* deference offers a better model, if only as an ideal.

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189. *Loving*, 2014 WL 519224, at *8.

190. For example, the House has voted to delay for one year the finalization of the proposed § 501(c)(4) regulations. *See* Stokeld, *supra* note 141.

191. *See generally, e.g.*, Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205 (2013); Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2239491; Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011).

192. *See* Kyle D. Logue & James R. Hines, Jr., *Delegating Tax* 10 (Univ. of Mich. Pub. Law Research Paper No. 391, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2402047 ("Even when the legislative process is working well, it may take longer for Congress to pass a new law than it takes an agency to make a new rule.") These authors disagree with Krotosynski, *supra* note 185, to argue "that Congress should consider making more extensive delegations of authority in the tax area—or, at the very least, that Congress should think more expansively about what types of tax lawmaking power it is prepared to delegate." Logue & Hines, *supra*, at 4.