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GRASPING SMOKE: ENFORCING THE BAN ON POLITICAL ACTIVITY BY CHARITIES

LLOYD HITOSHI MAYER

INTRODUCTION

I am very grateful to the First Amendment Law Review and the University of North Carolina School of Law for hosting this important symposium on speech by tax-exempt organizations, particularly speech with respect to public policy issues. Whether we realize it or not, most of us rely on such speech. For example, we look to Consumer Reports for product data, to the American Heart Association for health information, and to the American Red Cross for disaster prevention tips. More relevant to this symposium, we also increasingly look to tax-exempt organizations to give us information about the great public policy debates of the day and rely on their opinions regarding issues of public concern.

But such speech is not unlimited. Charities, which are the majority of tax-exempt organizations,1 face two major restrictions on

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1. See Paul Arnsberger, Charities and Other Tax-Exempt Organizations, 2003, SOI BULLETIN: FALL 2006, at 231-32 & n.2, 234, 236 (2006) (reporting that of the approximately 370,000 annual returns (IRS Form 990 or 990-EZ) filed by tax-exempt organizations for 2003, charities other than private foundations filed approximately 263,000 or 70 percent; these figures do not include churches, church-
their speech about public policy issues. First, they can only engage in a limited amount of lobbying—that is, seeking to influence legislation. Second, they are absolutely prohibited from engaging in political activity, generally defined as supporting or opposing a candidate for elected public office. It is on the enforcement of this second limitation that I want to focus. Such enforcement is particularly difficult because, for the reasons detailed in this Article, violations of this prohibition seem to be as elusive as smoke, being both difficult to detect and difficult to separate from permissible charitable activities.

Despite valiant attempts by many scholars, the exact reasons behind Congress’ enactment of the prohibition remain obscure. From its related organizations, or charities with annual gross receipts of less than $25,000, as such entities are not required to file annual returns with the IRS); Melissa Ludlum & Mark Stanton, Private Foundations, Tax Year 2003, SOI BULLETIN: FALL 2006, at 192, (2006) (reporting that private foundations filed approximately 76,000 annual returns (IRS Form 990-PF)); INTERNAL REVENUE SERVICE, DATA BOOK, 2006, at 56 (reporting that of the 1.7 million tax-exempt organizations that have successfully applied to the IRS for recognition of their tax-exempt status as of 2006, 1.1 million are charities, including private foundations; these figures do not include churches, church-related organizations, or charities with annual gross receipts of less than $5,000 that have chosen not to file for recognition of tax-exempt status, as they are not required to make such a filing); National Center for Charitable Statistics, Number of Nonprofit Organizations in the United States, 1996-2006, available at http://nccsdataweb.urban.org/PubApps/profile1.php?state=US (last visited Oct. 26, 2007) (National Center for Charitable Statistics data showing that of the approximately 1.4 million nonprofit organizations existing in 2004, there were approximately 935,000 organizations described in Internal Revenue Code section 501(c)(3), including religious congregations). For purposes of this article, a “charity” is an organization that is described in sections 170(c)(2) (relating to deductibility of charitable contributions) and 501(c)(3) (relating to tax exemption) of the Internal Revenue Code (26 U.S.C.).

2. See I.R.C. §§ 170(c)(2)(D) (cross-referencing the I.R.C. § 501(c)(3) limitation on attempting to influence legislation), 501(c)(3) (limiting attempts to influence legislation to “no substantial part” of a charity’s activities), (h) (providing an alternate, elective limit on lobbying by charities) (West 2002).

3. See I.R.C. §§ 170(c)(2)(D) (prohibiting charities from “participat[ing] in, or interven[ing] in ... , any political campaign on behalf of (or in opposition to) any candidate for public office” (alteration added)), 501(c)(3) (containing the same prohibition) (West 2002); Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (elaborating on this prohibition).

birth to today, some commentators have challenged its validity on both constitutional and public policy grounds while others have strenuously defended it. And its exact parameters remain frustratingly unclear. But to stop certain charities from opposing his re-election); Ann M. Murphy, *Campaign Signs and the Collection Plate*, 1 PITT. TAX REV. 35, 54, 62 (2003) (arguing that the prohibition arose from a long standing suspicion of political activities by charities that was strengthened by the McCarthy paranoia of the time, not primarily because of Senator Johnson’s desire to stop his political opponents); Patrick L. O’Daniel, *More Honored in the Breach*, 42 B.C. L. REV. 733, 768 (2001) (making the same argument as Houck, supra); see also Judith E. Kindell & John Francis Reilly, *Election Year Issues*, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FY2002, at 335, 448-51 (2001) (summarizing four theories for why Congress enacted the prohibition, three arguing that the prohibition was a reaction by Senator Johnson to his political opponents and one positing that the prohibition was a successful attempt to preempt a much more restrictive limitation on the activities of charities, and ultimately concluding “[p]erhaps all four are true; nothing is certain” (alteration added)).


6. See, e.g., Murphy, supra note 4, at 73-83 (arguing that relaxing the prohibition with respect to churches is unnecessary, would be unwise, and probably would be unconstitutional); Donald B. Tobin, *Political Campaigning by Churches and Charities*, 95 GEO. L.J. 1313 (2007) (arguing against relaxing the prohibition and for strengthening enforcement of it).

7. See, e.g., *EO Committee of ABA Tax Section Offers Commentary on Politicking*, 11 EXEMPT ORG. TAX REV. 854, 856 (1995) [hereinafter ABA Comments] (stating that the IRS appears to have been using a “smell test” to determine what constitutes prohibited political activity, without any unifying principle); Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax
in the midst of all this uncertainty, the prohibition has survived for more than fifty years in essentially the same form, and recent attempts to alter it have consistently fallen short. 8

Survival is not, however, the same as vitality. By most accounts, IRS enforcement of the prohibition has been spotty at best. 9 Critics have

and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations, 31 WM. MITCHELL L. REV. 55, 64-71 & n.39 (2004) (summarizing the existing guidance regarding what exactly constitutes prohibited political activity and concluding that the definition remains frustratingly ambiguous); OMB WATCH, THE IRS POLITICAL ACTIVITIES ENFORCEMENT PROGRAM FOR CHARITIES AND RELIGIOUS ORGANIZATIONS 12-13 (2006) [hereinafter OMB WATCH REPORT] (arguing that the IRS continues to use what is essentially a “smell test” when more bright line rules are needed).


9. See, e.g., Lloyd Hitoshi Mayer, The Much Maligned 527 and Institutional Choice, 87 B.U. L. REV. 625 (2007) [Part III.C.1] (describing generally the problems with IRS enforcement respecting the political activities of tax-exempt organizations); O’Daniel, supra note 4, at 739 (arguing from anecdotal information that non-compliance is “arguably widespread”); Tobin, supra note 6, at 1356-57 (noting “significant compliance problems” leading to “sporadic and potentially uneven enforcement”); see also infra Part I (summarizing available evidence of
also asserted that partisan bias taints the IRS' limited enforcement efforts, although the IRS has strongly denied these allegations and government investigations of such complaints have not found such bias. And the IRS' recent attempts at implementing a systematic audit program have resulted in only a handful of significant sanctions.

noncompliance). But see OMB Watch Report, supra note 7, at 8-10 (arguing that the available evidence does not indicate widespread noncompliance).


11. See, e.g., Letter from IRS Commissioner Mark Everson to Sen. Max Baucus (Nov. 12, 2004), in 2004 Tax Notes Today 232-15 (2004) (responding to an inquiry relating to the 2004 audit of the NAACP and providing assurance that the IRS had operated in a non-partisan manner); Press Release, Internal Revenue Service, Tax-Exempt Organizations and Political Activities (Oct. 2004), available at http://www.irs.gov/newsroom/article/0,,id=130652,00.html (quoting IRS Commissioner Mark W. Everson as stating “[a]ny suggestion that the IRS has tilted its audit activities for political purposes is repugnant and groundless” (alteration added)).

12. Memorandum from Pamela J. Gardiner, Deputy Inspector General for Audit, at 1-2, 3 (Feb. 17, 2005) (stating the Treasury Inspector General for Tax Administration’s review did not identify any indications that the IRS been subject to political influence in processing information about alleged prohibited political activity by tax-exempt organizations); JCT Report, supra note 10, at 6 (stating that the Joint Committee staff had found no credible evidence of political motivations in IRS audit selection or conduct); see also United States v. Judicial Watch, 371 F.3d 824 (D.C. Cir. 2004) (refusing to block enforcement of an IRS summons in part because target of summons had failed to produce evidence that IRS audit was politically motivated); Branch Ministries v. Rossotti, 211 F.3d 137, 144-45 (D.C. Cir. 2000) (rejecting selective prosecution claim made by a church that had engaged in prohibited political activity).

13. Internal Revenue Service, Political Activities Compliance Initiative Executive Summary 3 (2006) (hereinafter IRS 2004 PACI Summary) (stating that while it found prohibited campaign activity in fifty-eight of eighty-two completed examinations, it only proposed revocation of tax-exempt status in three cases and the imposition of an excise tax penalty in one additional case).
This Article attempts to separate fact from fiction with respect to compliance with the prohibition and, by doing so, to recommend several steps that the IRS could take to reduce noncompliance. Part I reviews the limited evidence regarding noncompliance and concludes that while intentional and large-scale violations of the prohibition draw the most public attention, they appear to represent only a very small portion of the violations. One example of such a large scale, but apparently rare, violation was the purchase by Branch Ministries (also known as the Church at Pierce Creek) a few days before the 1992 presidential election of full-page advertisements in both *USA Today* and *The Washington Times* warning Christians that then-Governor Clinton’s policy positions violated biblical precepts.\(^\text{14}\) It is instead minor, probably inadvertent, violations that appear to be relatively common and widespread.

Part II argues that widespread but inadvertent and relatively minor violations of the prohibition are worth the time and effort required to discourage and prevent them for several reasons. First, such violations may create a “broken windows” problem: existing literature on noncompliance with tax laws indicates violations that remain undetected and uncorrected encourage greater noncompliance both in terms of the number of violators and the scale of each violation. The second reason for pursuing such violations is that, regardless of whether they represent significant expenditures, they create a partisan taint on both the violating charities and the charitable sector as a whole, undermining the ability of charities to serve as credible independent voices speaking in the public interest. It can also be argued that partisan activity by charities has a greater effect than indicated by the amount of funds spent because of this “halo effect”—if a charity says it, the message is given greater weight than if a clearly partisan or self-interested actor were to communicate the same message. Finally, even if the strength of these arguments is uncertain, it is better in the face of that uncertainty to spend a relatively modest amount of resources to curb minor violations now than to risk the significant possibility that these arguments are correct. Failing to enforce the prohibition today risks having the noncompliance grow in the future beyond the IRS’ limited ability to check it, causing significant damage to the charitable sector as a whole, and exerting undue influence

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14. *See Branch Ministries*, 211 F.3d at 140.
over elections because of the use of charitable platforms to engage in partisan activity.

Part III concludes by recommending several ways that the IRS could modify its enforcement strategies to address the apparently widespread but inadvertent noncompliance. One way is to reduce the IRS’ reliance on third-party complaints\(^\text{15}\) by reviewing readily accessible public information that may reveal violations, including state campaign finance filings, websites, and media reports. Another way is to clarify what is, and what is not, prohibited by creating safe harbors that give specific guidelines regarding what a charity is permitted to do with respect to the most common types of election-related activity, such as voter guides, while retaining the overall facts and circumstances approach as an anti-abuse rule to prevent activities that meet the letter of the new safe-harbor rules but clearly violate the spirit of the prohibition. A third and final way is to continue to use the flexibility of the current penalty regime to limit significant sanctions to intentional or repeat violators while using a “warning ticket” approach for first-time, apparently unintentional, violators.

I. EVIDENCE OF NONCOMPLIANCE

Noncompliance is, by its very nature, difficult to measure. For example, while it undisputed that there is significant noncompliance with the federal income tax laws, the IRS candidly admits that it is difficult to measure the exact extent of that noncompliance.\(^\text{16}\) Noncompliance also

\(^{15}\) See note 77 infra and accompanying text.

\(^{16}\) U.S. GOV’T ACCOUNTABILITY OFFICE, TAX COMPLIANCE: MULTIPLE APPROACHES ARE NEEDED TO REDUCE THE TAX GAP 5 (2007) [hereinafter GAO REPORT] (noting that the “IRS has concerns with the certainty of the tax gap estimate ... in part because some areas of the estimate rely on old data, IRS has no estimates for other areas of the tax gap, and it is inherently difficult to measure some types of noncompliance”). The IRS estimate of the tax gap for 2001 is $345 billion before enforcement efforts and $290 billion after such efforts. Press Release, Internal Revenue Service, IRS Updates Tax Gap Estimates (Feb. 14, 2006), available at http://www.irs.gov/newsroom/article/0,,id=154496,00.html [hereinafter IRS Tax Gap Press Release]. The “tax gap” is generally defined as the estimated difference between the amount of taxes owed and the amount actually collected. GAO REPORT, supra, at 4.
may arise from a variety of sources, ranging from intentional disregard of the law to inadvertent violations arising from ignorance of the law.\footnote{17}

It is particularly difficult to determine the level of noncompliance with the prohibition on political activity by charities because many violations leave few traces.\footnote{18} For example, if a pastor endorses a candidate from the pulpit, the only record of that endorsement exists in the memories of the church members and, possibly, in an audio or video recording of the service. Despite these measurement issues, there is some evidence regarding the level of noncompliance both from IRS and non-IRS sources. A review of this limited evidence indicates that large-scale, intentional violations of the prohibition are rare. The evidence also indicates, however, that minor, probably unintentional, violations are relatively widespread and, for the most part, unchallenged by the IRS.

\textbf{A. The IRS Record}

Until recently, the confidential nature of IRS audits allowed only scant information regarding violations to become public. Such information was available only when the IRS either revoked the tax-exempt status of the offending charity or issued an internal ruling about a violation that it released to the public in redacted form (i.e., after deleting all information that could identify the charity at issue).\footnote{19} Even in these

\begin{enumerate}
\item \textit{See} Graeme S. Cooper, \textit{Analyzing Corporate Tax Evasion}, 50 Tax L. Rev. 33, 35-36 (1994) (identifying six sources for noncompliance: deliberate nonreporting (tax evasion); unintentional nonreporting (taxpayer error); nonreporting of illegal income (the underground economy); underpayment of tax properly reported (administrative failure); reliance on a lawful tax shelter (tax avoidance); and unclarity of the law regarding the amount of tax owed (ambiguity)); \textit{see also IRS Tax Gap Press Release, supra note} 16 (dividing noncompliance into nonfiling, underpayment of tax, and underreporting of tax, each of which could be the result of intentional or inadvertent disregard of the law).
\item A similar problem exists with underreporting of cash transactions. \textit{See GAO REPORT, supra note} 16, at 5 (noting the inherent difficulty for the IRS of observing and measuring such noncompliance).
\item I.R.C. § 6103 (West 2002 & Supp. 2006) generally prohibits the government from disclosing information about specific taxpayers. The most significant exception to this rule is the public disclosure of annual returns and exemption applications filed by tax-exempt organizations. \textit{See} I.R.C. § 6104 (West 2002 & Supp. 2006).
\end{enumerate}
instances, complete information about the apparent violation became available only if the charity fought the IRS in court. But in the wake of public scrutiny of its enforcement efforts relating to the 2004 election, the IRS issued a report that sheds more light on the violations that the IRS detected and pursued in recent years.

The February 2006 IRS report detailed the results of eighty-two completed examinations of charities that the IRS began because information it had received supported a reasonable belief that the charities may have violated the political activity prohibition. In approximately one-fifth of the cases, the IRS found no violation after further investigation. In only 5 percent of the cases did the IRS impose penalties, proposing revocation of tax-exempt status in three cases and an excise tax penalty in a fourth case.

The most interesting result, however, is that in almost 70 percent of the cases the IRS found a violation but chose not to impose a penalty. The IRS' stated reasons for choosing not to impose any sanction in these cases were that (1) the act of political campaign intervention was either of a one-time, nonrecurring nature or was taken in good faith, (2) the charity corrected the violation to the degree possible and took steps to prevent future violations, and (3) assessment of a financial penalty under § 4955 was "unavailable." Lois Lerner,
Director of the IRS Exempt Organizations Division, later elaborated on these reasons. Speaking at an American Bar Association conference in Fall 2006, she explained that in those cases the IRS found that the charities "either didn't understand the rules, didn't think what they had done was political campaign intervention, or said, 'Oh, my gosh. We realize we've done this and we don't want to do it again.'"  

The IRS report also included some interesting additional information. The internal staff committee that determined whether the IRS should open an examination also categorized apparent violations into three types: Type A; Type B; and Type C. The three types divided the cases by both their apparent complexity and the apparent seriousness of the violations, with Type A cases being the simplest, Type B cases being more complex, and Type C cases involving egregious and/or repetitious violations. Examples of Type C cases include ongoing political contributions that are depleting a charity’s assets, continual widespread advertising for or support of named candidates, and clear and continuing support or opposition of a candidate. Of the cases the IRS classified in this manner, there were slightly more Type A cases (54 to 46 percent) and no Type C cases. This information confirms what the low incidence of penalties also suggests—that most cases involved relatively minor and probably inadvertent violations.

4955, or the amount of expenditures was so low that the penalty “fell below internal tolerance levels.” See id. at 18 n.6.


27. Id.

28. Id. at 3.

29. Id. at 8. The IRS did not categorize cases that it had selected for examination before the launch of its Political Activities Compliance Initiative, although it included the results of those examinations in its 2004 PACI report. See id. at 4, 8.

30. While this article was in the editing process, the IRS reported similar results for its 2006 political activities audit program. See IRS 2006 PACI REPORT, supra note 22. The only significant change was that the IRS implemented part of the first recommendation made by this article. See infra note 93 and accompanying text (describing the results of the IRS’ review of state campaign finance reports for possible contributions by charities to candidates).
Anecdotal information about IRS enforcement in this area reveals a similar pattern of mostly minor and probably inadvertent violations, although there have been a few high-profile revocation cases. The most recent such high-profile case involved Branch Ministries (also known as The Church of Pierce Creek), which purchased full page ads in national newspapers stating that voting for Bill Clinton was a sin. The ads even included a solicitation for tax-deductible contributions to pay for more, similar ads. Not surprisingly, the IRS investigated and ultimately sought revocation of the church’s tax-exempt status, a position the government successfully sustained in court.

The limited evidence involving violations that pre-date the recent IRS effort indicates, however, that the IRS has resolved most cases of political activity by charities in a much less dramatic fashion. Besides the Branch Ministries case, since the codification of the prohibition in 1954, there have been only a handful of other court decisions involving a purported charity’s qualification for tax-exempt status because of prohibited political activity. While it is possible that some charities

32. Id.
33. Id. at 140, 144.
34. See Ass’n of the Bar of the City of New York v. Comm’r, 858 F.2d 876 (2d Cir. 1988) (upholding the IRS’ denial of tax-exempt status under I.R.C. § 501(c)(3) based on prohibited political activity), cert. denied, 490 U.S. 1030 (1989); United States v. Dykema, 666 F.2d 1096 (7th Cir. 1981) (ordering the enforcement of an IRS summons issued to determine, in part, whether a church engaged in prohibited political activity), cert. denied, 456 U.S. 983 (1982); Christian Echoes National Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972) (upholding the IRS revocation of tax-exempt status because of prohibited political activity), cert. denied, 414 U.S. 684 (1973). There have also been five other reported instances where a charity lost its tax-exempt status as a result of political activity. See Branch Ministries v. Rossotti, 40 F.Supp.2d 15, 22 (D.D.C. 1999) (discussing the revocation of The Way International’s tax-exempt status; The Way apparently challenged the revocation in court, but entered into a settlement with the government before the court rendered a decision), aff’d, 211 F.3d (D.C. Cir. 2000); Celia Roady, Political Activities of Tax Exempt Organizations, 22 EXEMPT ORG. TAX REV. 401 at n. 44 (1998) (noting that Jimmy Swaggart Ministries lost its tax-exempt status as a result of political activity); Press Release, Catholics for Free Choice, Operation Rescue West Loses Tax-Exempt Status, in 2006 TAX NOTES TODAY 278-38 (2006) (reporting that the IRS had revoked the tax-exempt status of Youth Ministries, Inc., which did business as Operation Rescue West (ORW), apparently based on a complaint filed by Catholics for Free Choice about a 2004 ORW ad seeking tax-
have lost their tax-exempt status because of prohibited political activity but did not contest that revocation in court, such cases are unlikely to be very common based on the fact that over the past two-and-one-half years the IRS revoked the tax-exempt status of only approximately sixty charities for any reason.\footnote{See Recent Revocations of 501(c)(3) Determinations, http://www.irs.gov/charities/charitable/article/0,,id=141466,00.html (last visited Nov. 9, 2007) (listing revocations from 2005 through 2007). Other grounds for revocation include private inurement, private benefit, excessive lobbying, and having a more than insubstantial nonexempt purpose. Treas. Reg. § 1.501(c)(3)-1(c), (d)(1) (as amended in 1990).}

The imposition of the excise tax penalty on prohibited political expenditures by charities over the past three years also has been a relatively rare event and has involved only small amounts.\footnote{IRS excise tax statistics for 2003 through 2005 report that on average less than twenty organizations per year paid the excise taxes for political expenditures (section 4955), disqualifying lobbying expenditures (§ 4912) or premiums paid on personal benefit contracts, and that the average amount paid for all three of these taxes was less than $5,500 per year. See SOI Tax Stats—Charities & Other Tax-Exempt Organizations Statistics, www.irs.gov/taxstats/charitablestats/article/0,,id=97176,00.html.}

A review of IRS rulings over the past ten or so years similarly reveals only a handful of cases where the IRS judged imposition of the excise tax penalty to be appropriate, and most of those rulings do not even mention revocation as a possible sanction.\footnote{See I.R.S. Tech. Adv. Mem. 2004-46-033 (Nov. 12, 2004) (concluding that a charity’s administration of a payroll deduction plan that allowed employees to contribute to an industry PAC violated the prohibition and that the IRS should impose the I.R.C. § 4955 excise tax; no mention of revocation); I.R.S. Tech. Adv. Mem. 2004-37-040 (Sept. 10, 2004) (concluding that several statements urging}
This evidence taken together indicates either that most violations are relatively minor and inadvertent or that the IRS has not been catching the most serious violators. The next section addresses the extent to which the IRS may have been missing violations, whether minor or serious.

B. Other Evidence

While the IRS record indicates relatively few instances of noncompliance, there is other evidence, beyond the purely anecdotal, indicating that noncompliance is more widespread.38 One piece of evidence is a newspaper article reporting on apparently widespread contributions by churches to candidates and political parties in a

38. For anecdotal information, see, e.g., OMB Watch Report, supra note 7, at 24-32 (listing ten cases of alleged political activity that had been brought to the IRS’ attention), 34 (listing, among other sources, newspaper articles reporting on these cases). OMB Watch believes that violations are not in fact widespread, and so the IRS should stop asserting that they are. Id. at 10. For the reasons detailed in this section, I believe there is evidence that suggests that violations are in fact widespread.
particular state. The other piece of evidence consists of responses to survey questions posed by the Pew Research Center regarding endorsements by pastors and churches. But both pieces of evidence also indicate that such violations are relatively minor and may be primarily inadvertent.

On February 26, 2006, The Baltimore Sun reported on contributions by over 100 churches to Maryland state and local candidates and political party organizations. Maryland, like twenty-seven other states and the District of Columbia, permits corporations to make contributions to candidates for state and local office and to political parties. Such contributions must, however, be disclosed in publicly available reports. Using only those reports, the reporter uncovered 115 churches that had made campaign contributions to approximately forty candidates since 2000. When he contacted some of the churches involved, the explanations generally were that the pastor or church had been unaware that the funds were going to fund campaign activity or had been unaware of the tax law prohibition. For example, one of the pastors whom the reporter contacted stated he did not know that purchasing a ticket to a political banquet counted as a political contribution.

The Pew survey provides a national perspective. From November 9th through 12th of 2006, the Pew Research Center conducted a detailed survey of voters focusing on the effect of religion on voting patterns. Of Americans who reported attending religious services at

40. CORPORATE POLITICAL ACTIVITIES 2006 (published by the Practicing Law Institute), at 464-65 (2006); see also MD. CODE ANN., ELEC. LAW § 13-226(b), (e) (2007) (subjecting contributions by a single “person” to certain limits and considering certain affiliated corporations to be a single contributor); MD. CODE ANN., art. 1, § 15 (2007) (defining “person” to include a corporation).
42. Fritze, supra note 39.
43. Id.
44. Id. (when questioned about the contribution, the pastor replied “It appeared to be some kind of fundraiser [but] we haven’t made . . . contributions to any campaign” (alteration added)).
45. Greg Smith, Scott Keeter, & John Green, Pew Forum on Religion & Public Life, Religious Groups React to the 2006 Election: Most are Happy with the
least monthly, the survey found that "[j]ust 7% . . . said they had been urged to vote for particular candidates or parties" by clergy or other religious groups. The survey report noted that "[t]his was comparable to elections in 2000 and 1996." While the survey report characterized this percentage as representing "very few respondents," it still indicates that a large number of churches and other houses of worship may be violating the prohibition on political activity. According to the Yearbook of American and Canadian Churches, there were over 325,000 religious congregations in the United States in 2004. If the 7-percent figure is accurate, and assuming that most of such encouragement came from clergy speaking in church and that the respondents attended different congregations, that figure would translate into over 20,000 churches urging attendees to vote for a particular candidate or party. This is almost certainly an exaggerated figure. Many respondents could be remembering comments made by clergy outside of their congregational leadership roles or by religious organizations that are not tax-exempt charities. The survey also tested the respondents' recollections, which creates the significant risk of incorrect answers. But the survey still indicates that there may be thousands of churches violating the political activity prohibition, or two orders of magnitude more than the IRS detected in 2004. The violations could easily have been only one-time statements, however, possibly made without any knowledge on the part of the speaker that the church was violating the law.


46. Id. (alteration added).
47. Id. (alteration added).
48. Id.

49. YEARBOOK OF AMERICAN AND CANADIAN CHURCHES 2006, at 385 (2006) (based on the number of churches reporting within each reported religious body for 2004). The number of religious congregations may actually be significantly higher that this figure, as the YEARBOOK relies on voluntary reporting. Id. at 9. A for-profit company that maintains a database of churches claims there are at least 375,000 churches in the United States. See American Church Lists, available at http://www.americanchurchlists.com (last visited Oct. 26, 2007).

50. Ten cases of alleged political activity collected by OMB Watch mostly involved single speeches or statements, although in at least one instance the complaining party alleged repeated events favoring a particular candidate, partisan
C. Conclusion

This limited evidence is far from conclusive. It suggests, however, that there are significantly more violations occurring than the IRS has detected and pursued. There is no particular reason to believe that Maryland is unique with respect to the involvement of churches in state and local political campaigns, nor that the Pew report data is unreliable. Furthermore, while these sources sought only to identify political involvement by churches as opposed to other kinds of charities, there is also no particular reason to believe that churches are unique in their political involvement. In fact, the violations the IRS did detect and pursue involved slightly more non-church charities than churches (57 percent to 43 percent), and for those cases that the IRS categorized, the churches were involved primarily in the simpler “Type A” cases (72 percent were churches) as opposed to the more complex “Type B” cases (only 15 percent were churches). Another indicator of significant non-church charity involvement is that preliminary checks of state contribution databases found that a number of non-church charities also made political contributions, even though the non-church charities were harder to identify.52

voter registration drives, and the distribution of biased voter guides. OMB WATCH REPORT, supra note 7, at 24-32.

51. IRS 2004 PACI REPORT, supra note 20, at 9-12 (Type A cases were non-complex, usually single-issue cases assigned to revenue agents for processing as a correspondence examination; Type B cases were more complex, multi-issue cases assigned to various field groups.)

52. See infra note 86-87 and accompanying text. There also is a tendency to blame the “Religious Right” for most church violations. But the Pew survey found a significant number of churches endorsing Democratic candidates, although Republican endorsements were more common (4 percent versus 1 percent, with 2 percent being survey respondents who couldn't remember which side was endorsed). Smith, Keeter & Green, supra note 45. The Treasury Department’s Inspector General for Tax Administration (TIGTA) also found support for candidates across the political spectrum: based on forty randomly selected allegations of prohibited activity received by the IRS, in eighteen cases the charity allegedly supported the Republican Party or a Republican candidate, in twelve cases the Democratic Party or a Democratic candidate, and in one case the Green Party or a Green candidate, while no determination could be made in the other nine cases (TIGTA did not provide a partisan breakdown for allegations against churches specifically). Inspector General for Tax Administration, REVIEW OF THE EXEMPT ORGANIZATIONS FUNCTION
At the same time, the limited available evidence indicates that most violations are relatively minor and probably either the result of a misunderstanding of the law or otherwise unintentional. The IRS concluded in the vast majority of the cases it reviewed that no financial or other penalty was appropriate because the violation was unintentional or involved relatively small expenditures.\(^5\) Similarly, the two worst cases reported in *The Baltimore Sun* article involved a single candidate who received—over a five-year period—$16,000 from churches, and a single church that made seven contributions over that same period, none larger than $2,000.\(^4\)

Given these results, it is prudent to pause and to ask whether any improvement in IRS enforcement of the political activity prohibition is needed. If the vast majority of violations are relatively minor and probably inadvertent, is there any need for the IRS to catch more of the violators, only to issue what is essentially a warning ticket? To answer that question requires consideration of the possible long-term effects of these violations.

II. DOES IT MATTER?

Assume that further investigation by the IRS or others confirms the conclusion above that there is relatively widespread noncompliance, but that this noncompliance involves mostly minor and probably inadvertent violations. Why should the IRS devote more of its limited resources to prosecuting these apparently minor and inadvertent violations? Or, more radically, why should it devote any significant resources to finding and sanctioning violations that do not rise to a *Branch Ministries* level?

Answering these questions requires consideration of four issues. Will even minor violations, if left undetected and unsanctioned, lead to ever-increasing violations in terms of either numbers or scale? Will even minor violations potentially cause significant harm to the charities involved or the charitable sector as a whole by undermining credibility

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53. See *supra* notes 23-25 and accompanying text.
54. Fritze, *supra* note 39 at 10A.
with the general public? Or, conversely, will even "minor" violations have a disproportionate electoral effect because of the positive public reputation charities generally enjoy? Finally, even if the answers to these questions are uncertain, are the risks they identify significant enough to justify at least modest steps by the IRS to detect and prevent such violations? This section will address each of these issues.

A. The "Broken Windows" Problem

The existing literature on compliance with the federal tax laws is almost as inconclusive as it is large.\(^5\) Both limited data and methodological difficulties have frustrated attempts to come to definitive conclusions regarding the importance of various economic, cultural and psychological factors in determining whether taxpayers comply with those laws.\(^6\) That said, the various studies have generally identified the factors that affect intentional noncompliance and, to a lesser extent, inadvertent noncompliance. Those factors include, not surprisingly, the perceived risk of detection and level of penalties, but also the individual taxpayer's views on the fairness of the tax system, the effectiveness of


\(^6\) See, e.g., James Alm et al., Why do People Pay Taxes, 48 J. PUB. ECON. 21, 36 (1992) (concluding that individual taxpayers "exhibit a remarkable diversity in behavior" so "some new theory is needed" to deal with all of the factors that apparently affect compliance); Cooper, supra note 17, at 69 (concluding that empirical tests of economic-based compliance models lead to either unsurprising or inconclusive results); Raskolnikov, supra note 55, at 577, 579 (noting that economic models of compliance support the basic intuition that probability of punishment and nominal penalties affect taxpayer behavior but fail to explain the relatively high level of actual compliance, and that empirical research on both economic and non-economic factors that possibly influence compliance "lends some support to all existing models of taxpayer behavior, while giving a decisive advantage to none").
the government in using tax revenues, and the degree of compliance by other taxpayers.\textsuperscript{57} Counter-intuitively, actually being audited appears to increase noncompliance by intentional violators, but it also appears to reinforce compliance among audited taxpayers who are seeking to comply with the law and may increase deterrence among taxpayers generally if there is already a high level of compliance.\textsuperscript{58}

The existence of widespread, minor violations directly implicates both the perceived risk of detection and the degree of compliance by other taxpayers. If a significant minority of charities is engaging in political activity, this fact would appear to have two effects on compliance. First, noncompliant charities are likely to continue and

\textsuperscript{57} See, e.g., Alm, supra note 56, at 36 (citing perceived risk of detection, level of penalties, and value of public goods that tax payments finance as affecting compliance); Eric A. Posner, \textit{Law and Social Norms: The Case of Tax Compliance}, 86 \textit{Va. L. Rev.} 1781, 1784-85 (2000) (noting that beyond the effects of audit and penalty rates, individuals also tend to comply because they believe others do, because they believe tax authorities are fair or have fair procedures, and because they believe the government is using tax revenues effectively); Raskolnikov, supra note 55, at 578-79 (noting that the existing research indicates that beyond audit and penalty rates, other factors that may influence compliance include social norms, perceptions of the fairness of the tax laws and their administration, and perceptions of whether the government spends tax revenues appropriately, although the relative strength of each factor (and, in some cases, whether the factor actually influences compliance at all) is uncertain).

\textsuperscript{58} See, e.g., Marcelo Bergman, \textit{Do Audits Enhance Compliance? An Empirical Assessment of VAT Enforcement}, 59 \textit{Nat'l Tax J.} 817, 829-830 (2006) (concluding that audits tend to either not affect or increase noncompliance by audited noncompliant taxpayers, but at the same time audits appear to make compliant taxpayers who are audited even more compliant and may increase overall deterrence in a generally compliant taxpayer population, based on the impact of audits on subsequent compliance for value added taxpayers in Argentina and Chile); Jeffrey A. Dubin et al., \textit{The Effect of Audit Rates on the Federal Income Tax, 1977-1986}, 43 \textit{Nat'l Tax J.} 395, 406 (1990) [hereinafter \textit{Effect of Audit}] (concluding that increasing audit rates increases tax revenues collected, although also noting that a decrease in audit rates appears to increase the number of taxpayers who file returns, suggesting that an increase in audit rates would increase the number of (illegal) nonfilers); see also Jeffrey A. Dubin, \textit{Criminal Investigation Enforcement Activities and Noncompliance} (2004) [hereinafter \textit{Enforcement Activities}], http://www.irs.gov/pub/irs-soi/04dubin.pdf (last visited Oct. 27, 2007) (concluding that IRS criminal investigations have a measurable positive effect on voluntary compliance, particularly when such investigations result in incarceration and probation (rather than fines)).
possibly expand their levels of noncompliance absent any indication that the IRS is enforcing the ban against them—the perceived risk of detection presumably is low and presumably becomes even lower over time as the IRS continues to be absent. Second, other charities see or hear about the noncompliance, which may reduce their perceived risk of detection and also may create a "culture of noncompliance." 

One example of such a culture is found among the self-employed and small business owners, where noncompliance is so widespread that it both puts compliant taxpayers at a competitive disadvantage and may encourage other types of taxpayers to avail themselves of any opportunities for noncompliance that may exist. In a limited sense, this observation is similar to the famous, although now contested, "broken windows" theory that small signs of neglect and deterioration in a building soon lead both to much larger levels of neglect and to intentional destruction.

The strength of these conclusions is uncertain, however. While general tax-compliance research suggests that a lower perceived risk of detection increases noncompliance, that theory has been difficult to prove definitively. Similarly, there is some evidence that

59. See Michael C. Durst, Report of the Second Invitational Conference on Income Tax Compliance, 42 TAX LAW. 705, 708 (1988) (concluding that the self-employed and other small-business owners have a high level of noncompliance that is at least tacitly assisted by their customers, thereby contributing to "a widespread 'culture' of noncompliance"); see also GAO REPORT, supra note 16, at 8, 15 (noting that underreporting of business income accounted for $109 billion of the $197 billion individual income tax underreporting total, of which underreporting relating to sole proprietor income and losses constituted, at $68 billion, the largest share of the entire tax gap and reflected a 57 percent misreporting rate among filers reporting such income and losses).

60. Durst, supra note 59 at 716-17.


62. See, e.g., Cooper, supra note 17, at 69 (noting that proving whether an increase to the expected penalty, such as by increasing the perceived risk of detection, increases compliance "has not been easy to substantiate"); Raskolnikov, supra note 55, at 578 (noting that while several studies support the basic predictions of the economic deterrence model—that higher penalties and a higher likelihood of incurring them improve tax compliance—these predictions have not been definitively proved and the effect of these factors on noncompliance appears to be small).
noncompliance increases when there is significant perceived noncompliance by other taxpayers as well as personal acquaintance with tax evaders, but again this theory has been difficult to prove. Even if these theories are definitively proven, there are two hurdles to extending them to the particular context of the prohibition on charities engaging in political activity. First, the behavior of charities and their officials may be significantly different than that of individual taxpayers, who are the subject of almost all of the studies on compliance. Second, it is not clear that increased detection by the IRS will result in a perception of an increased risk of detection by charities. So while unchecked noncompliance, even at a minor level, may lead to greater noncompliance by both the original violators and by other charities, those results are not a given. I will address the issue of how to deal with the uncertainty of this conclusion at the end of this section.

B. The Taint Problem

The second argument for why such violations matter is based on the reasons for the prohibition in the first place. The usual reason cited for the prohibition is that without it the federal government would be providing a government “subsidy” for political activities because charities can receive tax-deductible charitable contributions from their supporters. But there is a second oft-cited reason for the prohibition—the generally held view that charities should serve the public interest and that allowing them to support or oppose particular candidates or parties would taint their fidelity to the public interest.

63. See Cooper, supra note 17, at 65 (citing surveys supporting this theory).
64. See id. at 46, 69-88 (arguing why the incentives for tax evasion by publicly traded companies are different than the incentives for tax evasion by individual taxpayers).
65. See, e.g., Buckles, supra note 5, at 1079 (describing the subsidy argument); Mayer, supra note 9, at 637-644 (describing the subsidy rationale for the prohibition); Gregg D. Polsky, A Tax Lawyer’s Perspective on Section 527 Organizations, 28 CARDOZO L. REV. 1773, 1776-78 (2007) (same); Tobin, supra note 6, at 1317-20 (same).
66. See, e.g., Buckles, supra note 5, at 1091-94 (describing one version of this theory that views the charitable sector as separate from government and so properly excluded from the selection of government actors (i.e., through elections)); Deidre Dessingue, Prohibition in Search of a Rationale, 42 B.C. L. REV. 903, 925-26
The second point was made by Diana Aviv, President of Independent Sector, during this symposium. When asked about the wisdom of the prohibition on political activity by charities, she did not make the subsidy argument. Instead, she noted the special role that charities play in our society and how that role could be compromised if they became agents for electing or defeating particular candidates.

The subsidy argument, even if accepted, does not provide much support for substantial enforcement against minor, albeit possibly widespread, violations because such violations are unlikely to create much of a subsidy problem for the simple reason that they do not involve a significant use of tax-deductible funds. If the taint argument is accepted, however, even minor violations can have the effect of undermining the public interest reputation associated with all of a charity’s activities or even damage that reputation for the charitable sector as a whole. The taint argument therefore indicates that combating even minor violations may be a worthwhile use of the IRS’ enforcement resources.

C. The Halo Problem

The “halo effect” that charities enjoy also has another ramification in this context. Even if the political activity expenditures by a charity are relatively small, they may have a disproportionate electoral effect because of the goodwill charities generally enjoy. For example, a pastor speaking from the pulpit or a human-services charity leader writing in the charity’s newsletter will likely be addressing an audience that is relatively open to his or her electoral message because of the charitable platform from which he or she is speaking, especially as compared to an electoral message from a self-interested candidate, political party, or business interest. Of course, it could also be argued that the audience may already have political values similar to those of the speaker—i.e., the pastor is literally preaching to the choir—but the

(2001) (concluding that church political involvement would threaten the integrity and independence of churches); Tobin, supra note 6, at 1322-24 (explaining various ways that churches may be harmed if they are permitted to engage in political activity).

67. See Buckles, supra note 5, at 1084 (explaining potential weaknesses in the subsidy argument).
benefit of using the charity's voice may still be significant. For example, one significant indication of the possible influence of charities on elections is the extent to which candidates seek to use the positive reputations of charities, particularly churches, to enhance their electoral chances. So while there is very limited evidence of large-scale political advertising campaigns by charities or wholesale funneling of funds to candidates through charities, even the relatively minor but apparently widespread incidences of pastors endorsing candidates on a Sunday shortly before an election or other charity leaders briefly mentioning a candidate favorably in a newsletter may have a decisive effect in some elections.

D. Dealing with Uncertainty

None of these arguments is completely compelling, however, for the simple reason that it is unclear if they are correct and, even if they are, how strong an effect minor, albeit widespread, violations really have on future noncompliance, on the reputation of the charities involved or the charitable sector as a whole, or on actual voting patterns. While the available studies indicate that noncompliance breeds noncompliance, whether that would definitely occur in this specific context and to what degree is unknown. And while the taint argument may make intuitive sense, to what extent charities or the charitable sector as a whole would lose credibility is far from clear. Finally, whether perceived endorsements of or opposition to candidates by charities and their leaders actually change voting patterns is also uncertain.

So, given this uncertainty, why should the IRS devote some of its limited resources to increasing enforcement in this area or even maintaining enforcement at its current level? One answer is that the evidence and studies already cited indicate that the risk of increasing noncompliance has at least a significant possibility of being real, and, if

68. See, e.g., Marcus S. Owens & Natalie E. Fay, Penalizing Instigators of Political Campaign Intervention, 113 TAX NOTES 504, 505 (2006) (describing various attempts by candidates to speak at or appear in churches as part of their campaign strategies).
69. See supra Part I.
70. See supra note 39 and accompanying text.
71. See supra Part II(A).
it is, it will be more difficult and resource-consuming to combat the resulting higher level of noncompliance in the future. Similarly, if minor but widespread violations, left unchecked, will significantly damage both individual charities and the charitable sector's reputation, it is not clear to what extent, if any, the government could remedy the damage once done or what resources would be required to implement a remedy. As for the “halo” effect, it is small comfort to losing candidates to know that in the future the IRS will be more diligent about preventing charities from using their privileged platform to influence elections in violation of the law if the illegal efforts of charities have a significant electoral effect. At the same time, this uncertainty argues against a radical shift of government resources toward enforcing the prohibition, even assuming it would be politically realistic for either the IRS or the Congress to implement such a shift.

III. WHAT CAN BE DONE ABOUT IT?

So assume that there are widespread, if mostly minor and inadvertent, violations of the prohibition—a proposition that the IRS may be able to test by following the first suggestion below—and that such violations are not only illegal but may cause significant harm by encouraging increasing levels of noncompliance, damaging the reputations of both violating charities and the charitable sector as a whole, and significantly influencing elections for the reasons outlined above. Given that the IRS’ current approach does not appear to be detecting or preventing most violations, what could the IRS do differently without a radical redeployment of its enforcement resources, which is not justified given the uncertainty of these risks? The IRS has already launched a dedicated audit program focusing on these violations, increased its public education efforts in this area, and used

72. The IRS has in fact recently implemented one part of this first suggestion by checking state campaign-finance records, which confirmed this proposition in that this check revealed several hundred apparent campaign contributions by charities over a three-year period but totaling less than $350,000. IRS 2006 PACI REPORT, supra note 22, at 6.

73. See IRS 2004 PACI REPORT, supra note 20, at 15-24 (describing the results of the 2004 version of that program and the procedures for the 2006 version).
no less prominent an official than the IRS Commissioner himself to advertise its increased activity. But there is more that it could do without breaking its budget.

First, the IRS should more pro-actively seek information about violators through readily available public sources. This approach, if implemented in a neutral, nonpartisan fashion, has the added benefit of lessening the IRS' reliance on third-party complaints, which exposes the IRS to accusations of partisan bias. Second, it can reduce the inherent uncertainty surrounding what in fact is improper political activity for a charity by adopting an approach used in many other tax contexts. That approach is to create bright lines and safe harbors wherever possible, but also to create a more general anti-abuse rule to prevent activities that adhere to the letter of the more specific rules but violate the spirit of the statutory prohibition. Third and finally, the IRS should continue its practice of issuing “warning tickets” to first-time, apparently inadvertent, offenders while also using the full range of penalties at its disposal for repeat and intentional violators. The IRS has for the most part not done the latter, so no changes to the penalty regime are justified, at least until the effectiveness of the existing regime has been sufficiently tested and found wanting.

A. Pro-actively Gathering Information about Possible Violations

Available information indicates that the IRS relies entirely or almost entirely on third-party complaints to identify potential violations of the prohibition. This reliance creates two problems. First, the
limited evidence available indicates that this reliance uncovers only a very small percentage of violators. Second, this reliance exposes the IRS to the allegation that there is partisan bias in its selection of audit targets, if for no other reason than that the IRS relies so heavily on complainers, many of whom may be politically motivated. This method of identifying possible violators also seems an odd way to enforce the law. It is analogous to state troopers sitting in rest stops nursing their coffee and donuts until somebody calls 911, instead of actively patrolling the highways. This method is also an approach the IRS tries to avoid in other contexts, primarily by requiring third-party reporting of financial information (such as employers reporting the wages of employees on IRS Form W-2), which commentators agree has been a highly effective means of deterring noncompliance. This consensus is in sharp contrast with the scholarly uncertainty about the effectiveness of other techniques for deterring noncompliance. The prohibited political activity, "several" were received from internal IRS sources, but apparently the vast majority were received from individual taxpayers, other Federal Government agencies, political candidates, and the Congress (alteration added). IRS 2004 PACI REPORT, supra note 20, at 2; TIGTA REPORT, supra note 52, at 12, 14.

78. See supra Part I(B).

79. See, e.g., Fred Stokeld, GOP Lawmakers Contacted IRS About NAACP, Documents Show, 52 EXEMPT. ORG. TAX REV. 252 (2006) (reporting that documents obtained by the NAACP from the IRS showed that several Republican members of Congress, and apparently no Democratic members, had forwarded complaints from constituents alleged prohibited political activity); Terry Mattingly, Activists Spy on Churches for IRS Political Violations, DAILY BREEZE, Oct. 2, 2004, at B3 (reporting on efforts by activists on both sides of the aisle to identify and report church support of opposition candidates).

80. See, e.g., GAO REPORT, supra note 16, at 12-13 (noting the substantial positive effect of withholding or information reporting by third parties on tax compliance); MICHAEL J. GRAETZ, THE DECLINE (AND FALL?) OF THE INCOME TAX 93-98 (1997) (concluding that third-party reporting combined with document matching by the IRS has been so effective in preventing noncompliance that it has created a two-tier system of enforcement, one tier for taxpayers whose income is almost entirely subject to such reporting and another tier for taxpayers whose income is not); see generally Leandra Lederman, Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance, 60 STAN. L. REV. (forthcoming 2007) (exploring how and when information reporting and tax withholding by third parties fosters compliance).

81. See supra note 55.
IRS has also used more creative techniques for obtaining information needed to identify otherwise hard-to-detect noncompliance. While third party reporting is not a viable option in the context of the prohibition on political activity, the IRS can and should do the information age’s equivalent of patrolling to enforce the prohibition: it should identify possible violators by checking readily available sources of public information. Three sources come readily to mind. First, in twenty-eight states and the District of Columbia, corporations are permitted to make campaign contributions. As The Baltimore Sun article indicates, publicly available state campaign finance reports in those states may contain the names of charities that have made such contributions. Second, pre-election Internet searches for “voter guides” and similar materials may reveal charities who are distributing materials that support or oppose candidates—most of which will presumably disappear from the Internet after the election is over. Finally, pre-election searches of newspapers—which can readily be done through electronic databases such as LexisNexis—for candidates’ speaking schedules and similar information may also reveal the improper involvement of charities in campaigns.

The effectiveness of these suggestions is not purely hypothetical. While I have left it to the IRS to refine how such information sources should be used, spot checks of the first and third sources indicate that they may reveal a significant number of violations. First, as already noted, a Baltimore Sun reporter found that over a six-year period 115 churches had made campaign contributions. Searches for “church” in the names of contributors in Washington and Indiana revealed campaign contributions from at least nine churches over a five-year period in Washington and from thirteen churches in Indiana over a seven-year period, counting only contributors whose names clearly indicated that

82. See, e.g., IRS, Press Release, IRS Sets New Audit Priorities (Sept. 2002), http://www.irs.gov/newsroom/article/0,,id=105695,00.html (describing, among other projects, the “Offshore Credit Card Project,” pursuant to which the IRS served summons on major credit card companies and businesses for information about credit cards issued to U.S. customers by banks in alleged tax haven countries).
83. See supra note 40.
84. See supra note 38-43 and accompanying text.
86. See Fritze, supra note 39.
they were in fact a church and not either an individual or business who happened to have "church" in its name. Searching for non-church charities is more difficult because terms such as "hospital" that occur in the names of many such charities also appear in the names of many taxable entities. But looking only for contributors with the word "university," "college," or "school" in their names, and only counting as contributors those entities that appeared in the IRS Publication 78 list of charities, revealed contributions by two such charities in Washington, four in Indiana, and fourteen in Maryland.

While these initial numbers are relatively small, they are based on only a very cursory review of these databases and were far from comprehensive given that some churches do not have the word "church" in their names and only a subset of non-church charities have the words "university," "college," or "school" in theirs. These initial numbers also cover only three relatively small states. Finally, and perhaps most troubling from the perspective of overall noncompliance, these figures cover only contributions to candidate campaigns, which, unlike many other election-related activities, are clearly a violation of the prohibition regardless of the surrounding facts and circumstances.


88. Which misses, for example, church schools that are not separately incorporated and so are not required to apply to the IRS for tax-exempt status.


90. According to the 2000 U.S. Census, each of these states had approximately 5 or 6 million residents, as compared to 281 million residents for the United States as whole. See Resident Population of the 50 States, the District of Columbia, and Puerto Rico: Census 2000, available at http://www.census.gov/population/cen2000/tab02.pdf.

91. I.R.S. Publication 1828: Tax Guide for Churches and Religious Organizations 7 [hereinafter IRS Tax Guide for Churches] (stating that "[c]ontributions to political campaign funds . . . clearly violate the prohibition against political campaign activity" (alteration added)).
In fact, while this article was in the editing process, the IRS released a report on its enforcement of the prohibition relating to the 2006 elections. While for the most part the activities and the level of noncompliance it found were similar to what it found with respect to the 2004 elections, the report also revealed that the IRS has already implemented this recommendation—checking state campaign-finance records for contributions by charities. Focusing on contributions reported in 2003 through 2005, the IRS found 269 apparent cases of direct contributions to candidates, totaling almost $350,000. These results indicate that this is clearly an avenue that IRS should continue to pursue.

Searching election-season newspaper articles is a more involved endeavor because such articles will often report either clearly innocuous activities or those, such as candidate appearances, that will only violate the prohibition if certain facts are present. But an initial inquiry indicates that such articles may be fertile ground for uncovering possible violations. A search of the LexisNexis “News, Most Recent Two Years” database for articles during the five months preceding the 2006 election where “candidate” and “church” appeared in the same sentence revealed over 2,000 such articles. A spot check of these articles supported their relevance, with at least a quarter of them referring to candidate appearances or forums at churches or similar election-related activities. Of course some of the articles are duplicative, some report already-commenced IRS investigations growing out of previous alleged political activity, and some of the reported activities are undoubtedly candidate-neutral and so permitted, but, presumably, further refinement of such searches could better limit the results to situations that raise the greatest likelihood of prohibited political activity.

None of these very preliminary results should be taken as providing an accurate measure of the overall level of violations. They do strongly indicate, however, that relatively simple searches of publicly available information may (and with respect to the campaign-finance databases, almost certainly will) reveal numerous violations that so far

92. IRS 2006 PACI Report, supra note 22.
93. Id. at 6.
95. Looking at every 100th article.
have escaped IRS scrutiny. If this amateur sleuth from his ivory tower computer can find all of these speeders, certainly the trained and well-equipped state troopers can find many more.

The IRS should not, and almost certainly could not, simply direct an employee to hop onto a computer and start conducting random searches. Nor should it take every new story or Internet posting as 100 percent accurate. But it would seem logical for the IRS to use some of the resources dedicated to its political activity compliance program to develop appropriate and relevant protocols for searches and for evaluating the information so found. Another option would be for the IRS to use its recently created Exempt Organizations Data Analysis Unit, designed to mine data from not only IRS databases but also outside databases and the Internet, for this task. The IRS' recent success in checking state campaign finance databases for possible contributions to candidates by charities indicates that it should be able to design and implement other data searches, such as the ones recommended here.

For churches, gathering such information is complicated by the existence of § 7611. That section bars the IRS from even starting an inquiry into whether a church qualifies for tax-exempt status under section 501(c)(3) unless a relatively senior official has reasonable belief that the church may not in fact be tax-exempt and follows certain required notice procedures. This section does not, however, appear to require that such a reasonable belief exist before the IRS seeks publicly available information about either churches generally or a specific church. So while the IRS must tread carefully once it has uncovered

96. The IRS' internal criminal investigation procedures describe under what conditions certain information collecting activities are permitted. INTERNAL REVENUE SERVICE, INTERNAL REVENUE MANUAL §§ 9.4.1.2, 9.4.1.3 (2005). It is unclear to what extent these specific procedures are applied outside of the criminal investigation context, although presumably the general requirement that only information necessary for the enforcement and administration of the tax laws will be sought applies throughout the IRS. See id. § 9.4.1.2 (paragraph 1).


98. See supra note 87 and accompanying text (describing the initial results of the IRS' 2006 search of state campaign finance databases).


100. See I.R.C. § 7611(b)(2) (West 2002) (defining a “church tax inquiry” as “any inquiry to a church” (emphasis added)); INTERNAL REVENUE SERVICE,
publicly available information that indicates a particular church may have violated the political activity prohibition, this section does not appear to prevent the uncovering of that information in the first place.

But gathering more information about possible violations is only one way to reduce noncompliance. Another is to provide better guidance regarding what is in fact a violation, therefore enabling charities that want to comply—which appears to be the vast majority of them, including many of the violators—to do so easily. So it is to the issue of how to provide clearer, but still effective, rules that I turn next.

B. Creating Safe Harbors and an Anti-Abuse Rule

Many commentators have urged the Treasury Department and IRS to adopt a bright-line definition of political activity, either tracking the “express advocacy” definition in election law or some similar, easy to understand definition. 101 The creation of such a definition offers at least three apparent benefits. First, it offers the hope of simplifying the maze of precedential and nonprecedential rulings that apply the prohibition in a variety of contexts. In most cases, these rulings leave charities struggling to balance a list of relevant factors with little guidance regarding the weight of each factor or what other factors might ultimately be found by the IRS to be relevant. 102 This hope is

INTERNAL REVENUE MANUAL § 4.76.7.4.1 (2004) (stating that the IRS can obtain the information supporting a reasonable belief from, among other sources, newspaper articles, internet web pages, documents distributed by the church, and information in the possession of third parties).

101. See OMB WATCH REPORT, supra note 7, at 12-13 (arguing for bright-line rules and/or safe harbors); ABA Comments, supra note 7, at 854 (noting that many members of the ABA Section of Taxation would prefer an “express advocacy” standard, but acknowledging that the IRS had explicitly rejected use of such a standard); Dessingue, supra note 66, at 928 (urging the IRS to limit the definition of political activity to “explicit endorsements... and other clear and unambiguous support”); Opinion, Free Speech vs. Tax Code, THE WALL STREET JOURNAL, Dec. 14, 2004, at A14 (suggesting that the IRS adopt the express advocacy standard).

102. See, e.g., Rev. Rul. 2004-6, 2004-1 C.B. 328 (listing eleven factors that are relevant to determining whether an “issue ad” is political activity, but carefully noting that other factors may be relevant); see generally Rev. Rul. 2007-41, 2007-25 I.R.B. 1421 (ruling on whether activities described in twenty-one factual scenarios are political activities); Judith E. Kindell & John Francis Reilly, Election Year Issues, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION
particularly attractive because it is generally agreed that the complexity of the tax laws is one major cause of noncompliance, since taxpayers do not understand, or can easily feign not understanding, complex rules. Complexity makes it more difficult for the IRS to detect noncompliance and to administer the tax laws.¹⁰³

Second, bright-line rules also can limit the discretion of government officials when they are enforcing those rules in a particular case.¹⁰⁴ Limited discretion may be particularly attractive in a context where enforcement actions trigger allegations of improper political influence, whether justified or not.¹⁰⁵ Finally, bright-line rules shift some of the costs of applying a general principle, such as the prohibition of political activity, to the government that must design the rules, rather than forcing the regulated population to spend its resources on determining what that principle means in specific situations.¹⁰⁶ Such a shift would hopefully reduce the “chilling” effect that a lack of bright-line rules can create. This chilling effect arises because taxpayers who are not willing or able to pay the costs required to determine the exact

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¹⁰³. See GAO REPORT, supra note 16, at 9 (citing the complexity of the tax laws as one major factor contributing to noncompliance); GRAETZ, supra note 80, at 68-88 (same); Durst, supra note 59, at 728-731 (same); Steve Johnson, The 1998 Act and the Resources Link Between Tax Compliance and Tax Simplification, 51 U. KAN. L. REV. 1013, 1048-49 (2003) (same).


¹⁰⁵. See supra note 10.

parameters of a vague, general standard may avoid even permitted activities out of a fear that they fall within the prohibition.\textsuperscript{107}

The problem with bright-line rules, however, is that they come with perhaps less apparent trade-offs. First, such rules may lead to sophisticated members of the regulated community finding ways to technically comply with the rules while violating the underlying spirit motivating them. For example, assume that the IRS did adopt an “express advocacy” definition for political activity. The experience in the election law area, which for many years used just such a definition, is that it allowed organizations to make communications that were as (or even more) effective in shaping voters’ positions than express advocacy but fell outside the technical definition of “express advocacy” and so escaped the reach of federal election law.\textsuperscript{108} The classic example of such an ad is the one relating to Bill Yellowtail, then a candidate for Congress, which carefully avoided mentioning “vote,” “election,” or similar express advocacy terms but left little doubt in the hearer’s mind as to whether he was worthy of the hearer’s vote.\textsuperscript{109}

Even if existing charities would be unlikely to engage in such manipulation, there is the very real risk that if it is possible to take

\textsuperscript{107} See OMB Watch Report, supra note 7, at 3, available at http://www.ombwatch.org/pdfs/pacifull.pdf (noting the chilling effect of IRS enforcement of the prohibition); Dessingue, supra note 66, at 929 (making this point with respect to churches); Ehrlich & Posner, supra note 104, at 263 (discussing the chilling effect of vague standards generally).

\textsuperscript{108} See McConnell v. FEC, 540 U.S. 93, 192-193, 196-97 (2003) (noting that the express advocacy “magic words” text is “functionally meaningless,” and that the record demonstrated the widespread use of ads that carefully avoided being express advocacy yet nevertheless clearly influenced elections); Buckley v. Valeo, 424 U.S. 1, 45 (1976) (noting that by limiting the reach of election law to “express advocacy” communications for constitutional reasons, the Court necessarily “facilitat[ed] circumvention” because “[i]t would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate’s campaign.” (alteration added)).

\textsuperscript{109} McConnell at 193 n.78 (“Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail’s response? He only slapped her. But ‘her nose was not broken.’ He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.”).
advantage of a bright-line rule, new politically oriented players would enter the charitable sector to take advantage of the subsidy mentioned earlier (and the confidentiality of donor identities). For example, when Congress enacted laws limiting the ability of candidates to raise large unlimited donations for organizations other than charities, then-Representative Tom DeLay created a new charity to receive such donations in connection with activities to be conducted at the 2004 Republican National Convention. While that effort died under the glare of media scrutiny, certainly many political players would be tempted to take advantage of the charitable form if more bright-line rules permitted them to do so legally.

The government can of course respond to such manipulation with more bright-line rules to counter the modifications. But such new rules could easily lead to a maze of bright-line rules that is so complex it poses an even greater challenge to unsophisticated taxpayers and IRS employees than the general standard did initially. While a complex set of bright-line rules might limit the IRS’ discretion in particular cases, it would still leave the charities with the choice of incurring significant compliance costs, ignoring the rules and pleading ignorance if detected, or avoiding any activities that might fall within the now complex rules.

So how can the Treasury Department and the IRS effectively balance these concerns? Scholars, Congress, and the Treasury Department have often gravitated toward a hybrid approach. That approach involves creating safe harbors that will apply in the vast majority of situations, coupled with an anti-abuse rule that can be invoked when the general standards those rules are meant to implement have been violated though the technical requirements of the rules have

110. See Stephen R. Weissman & Kara D. Ryan, Soft Money in the 2006 Election and the Outlook for 2008: The Changing Nonprofits Landscape 1 (Campaign Finance Institute, 2007) (concluding that increased regulatory pressure on so-called “527 organizations” had resulted in switching election-related advocacy funding and activities to non-charitable organizations tax-exempt under I.R.C. § 501(c)).

111. 2 Groups Try to Block Charity Tied to Delay, N.Y. TIMES, Dec. 5, 2003, at A34.


been met. Thus, in the vast majority of cases, the taxpayers have certainty, the line-drawing burden is placed on the government, and the discretion of government officials in individual enforcement actions is limited. But to prevent the regulated community from taking advantage of the lines so drawn in a manner that would undermine the original principle behind the line drawing, an anti-abuse rule is put in place to bar manipulation of the bright-line rules that runs counter to the original principle they are supposed to invoke.

In the political activity context, this suggests the creation of safe-harbor provisions for the most common types of election-related but permissible activities while at the same time continuing to retain the facts-and-circumstances approach as an anti-abuse rule. The IRS has in fact already started down this road, albeit in nonprecedential materials, with respect to candidate appearances. In its Tax Guide for Churches and Religious Organizations, the IRS provided an example of how a church could avoid violating the prohibition by inviting candidates for the same office to speak to the congregation on successive Sundays.

While it is beyond the scope of this article to develop these safe harbors, others have already started that work. Professor Ellen Aprill has written a letter to the IRS proposing a revenue procedure that would create four such safe harbors with respect to statements by an organization, whether oral or in writing, including statements that may name a candidate. Similar safe harbors would be useful in other situations where the IRS has most commonly found violations, including distribution of specific types of documents mentioning candidates, such

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114. See Blatt, supra note 104, at 452; Weisbach, supra note 113, at 886; see generally Ehrlich & Posner, supra note 104, at 268 (noting that the problem of underinclusion can be remedied by backing up specific rules with a more general standard). Examples of such structures include the detailed rules for partnerships found in Subchapter K, I.R.C. §§ 701 et seq., which are backed up by a general anti-abuse rule found in Treas. Reg. § 1.701-2 (2005), and the detailed rules for corporate reorganizations, I.R.C. §§ 351-368, which are backed up by rules such as the Treas. Reg. § 1.368-1(b) (as amended in 2007) requirement for “continuity of interest” for certain reorganizations to qualify as tax free.


116. Letter from Ellen Aprill, John E. Anderson Professor of Tax Law, to Eric Solomon, Acting Deputy Assistant Secretary (Tax Policy), et al. (Nov. 29, 2005), http://taxprof.typepad.com/taxprof_blog/2005/12/aprill_proposes.html.
as voter guides and candidate questionnaires. At the same time, the IRS should make clear in precedential guidance the types of activities that are always forbidden, including campaign contributions, and, that while the safe harbors may generally be relied upon, the IRS always retains the power to invoke the general anti-abuse rule.

But even with clearer guidance and better detection, the IRS will still face the issue of what penalties to impose when a violation is discovered. Here the IRS' existing tools appear to be sufficient, at least given the current uncertainty about both the actual levels of noncompliance and the long-term effectiveness of IRS enforcement efforts.

C. The Death Penalty, Warning Tickets, and Everything In Between

Initially, the only statutory penalty for violators was the charitable equivalent of the death penalty—revocation of tax-exempt status. Charities, or at least churches, perhaps feared it more than it deserved—at least one court has noted that for churches it may be an empty threat because their tax-exempt status (appropriately) is resurrected the day after revocation. Nevertheless, revocation was feared by charities and also was used sparingly by the IRS, which had no desire to kill an otherwise legitimate charity because of a single, perhaps inadvertent, misstep.

Recognizing the potential chilling effect of this dramatic penalty and, conversely, the reluctance of the IRS to apply it to most violators,

117. IRS 2004 PACI REPORT, supra note 20, at 15-17.
118. Branch Ministries v. Rossotti, 211 F.3d 137, 142-43 (D.C. Cir. 2000). This "resurrection" is a consequence of the fact that Congress does not require churches, unlike other charities, to apply to the IRS for recognition of their tax-exempt status. I.R.C. § 508(c) (West 2002). Churches are therefore automatically exempt from tax under I.R.C. § 501(c)(3) (West 2002) as long as they otherwise meet the requirements of that section (including refraining from prohibited political activities). The court therefore concluded that once a church ceases a prohibited activity, such as political activity, it automatically has its tax-exempt status restored. Branch Ministries, supra, at 142-43.
Congress created a more nuanced penalty regime in 1987. That regime gives the IRS the ability to impose an excise tax on the amount of political expenditures on both the charity and responsible managers, with a second, higher level of tax imposed if the charity or managers refuse to agree to correction of the expenditures. Congress also gave the IRS the ability to both enjoin further political expenditures and immediately assess both excise tax and income tax owed in the event of a flagrant violation of the political activity prohibition.

To this array of enforcement options, the IRS has also created its own additional tool for addressing violations. As detailed with respect to its 2004 audit program, the IRS will issue a “no-change written advisory”—and not impose any financial or other penalty—when the violation is a one-time act or was made inadvertently, usually because of a good faith but incorrect understanding of the law, as long as the organization corrects the violation to the degree possible and takes steps to avoid future violations. Unlike normal no-change advisories, which are issued when the tax law violations detected are insignificant, the IRS issues these advisories even though it continues to maintain the position that there are no “insignificant” violations in this context. But the effect is the same: good faith, minor violations combined with repentance lead to simple warning tickets even though the IRS now also has the option of imposing a penalty short of revocation.

This current approach is the best one, given what both IRS audits to date and other available data indicate: the vast majority of violations are minor and probably inadvertent. The warnings may in fact serve an important educational function, by both clarifying for the charity involved what activity is prohibited and alerting the charity to the fact that the IRS is enforcing the prohibition. At the same time, however,

121. I.R.C. § 4955 (West 2002).
122. I.R.C. §§ 4955, 6852, 7409 (West 2002).
123. See supra notes 24-25 and accompanying text.
124. IRS 2004 PACI REPORT, supra note 20, at 18.
125. See supra Part I.
126. See Omri Ben-Shahar, Playing Without a Rulebook: Optimal Enforcement When Individuals Learn the Penalty Only by Committing the Crime, 17 INT'L REV. L. & ECON. 409 (1997) (arguing that enforcement actions can educate as well as deter, particularly with respect to the magnitude of the possible penalties and the risk of detection). Of course, learning that the penalties or the risk of detection is less
the IRS should be sure to keep the entire array of possible penalties available for use in those apparently rare cases where it finds either more extensive violations, intentional violations, or an unwillingness on the part of the charity to acknowledge that it violated the law ("I was only going 55 miles per hour officer, really.").

The IRS should also assess the effectiveness of this approach, possibly through follow-up examinations of violators (other than churches, which are protected by § 7611) as well as by monitoring public information about past violators in order to detect new violations, as it has already indicated it plans to do. If such follow-up examinations or reviews indicate that the current approach is not effective in preventing recidivism, then perhaps changes are needed to the penalty regime.

For example, one barrier to imposing a financial penalty under § 4955 is that it requires a determination of the expenditures for the alleged political activity. In the NAACP audit, the IRS initially asked the NAACP to provide the total, undoubtedly multi-million dollar cost of the annual convention, presumably to use for that calculation. The NAACP responded, as protective measure, by paying the amount of tax it claimed it owed under § 4955: 10 percent of the alleged political expenditures or $17.65. And how much is the "expenditure" when a pastor endorses a candidate from the pulpit? A way to avoid this issue would be to impose a minimum flat penalty—e.g., $1,000 or $5,000 per violation—regardless of the level of expenditures.

than you expected may increase noncompliance assuming the noncompliance was intentional, see supra note 58 and accompanying text, but in this situation it appears that most violators wish to comply.

127. See Lerner Comments, supra note 25, at 22 (noting that the IRS has flagged charities that it found violated the prohibition but should not be subject to a penalty for a follow-up check using publicly available information to ensure that they do not repeat their violation).

128. See I.R.C. § 4955(a)(1) (imposing an initial tax on a charity of 10 percent of its political expenditures).


130. Fred Stokeld, NAACP Preparing to take IRS to Court, 2006 Tax Notes Today 63-1 (Apr. 2006).

131. See Johnson, supra note 5, at 896-897 (noting that even when a religious leader invites a candidate to address the congregation during a regular worship service, no additional funds are spent).
Another proposal, made recently by two commentators, would be to impose tax shelter promoter penalties on candidates or party officials who knowingly encourage charities to violate the prohibition

While this proposal would reach only violations where such encouragement occurred, if the IRS found that a significant number of otherwise good faith, minor (or not so minor) violations are the result of such encouragement, then such penalties might be appropriate.

At least for now, however, such changes are premature. First, the IRS should be given the opportunity to use the already existing, relatively flexible penalty regime to address what will be an expanded universe of violations, if it follows my first recommendation. Only if and when that regime is unable to sufficiently deter noncompliance should changes to that regime be considered.

CONCLUSION

The prohibition on charities supporting or opposing candidates for elected public office is now more than fifty years old. Yet despite its longevity, both the extent to which charities comply with it and its exact parameters remain unclear. The first two proposals seek to address these uncertainties, first by testing the theory that minor and probably mostly inadvertent violations are significantly more widespread than current IRS enforcement efforts have determined, and, second, by clarifying the prohibition’s parameters, hopefully without creating opportunities for abuse. But these uncertainties, combined with the uncertainties about the likely effects of widespread but minor violations, if they are proven to exist, argue against either any significant changes to the already flexible penalty regime available to the IRS or a radical increase in resources for enforcing the prohibition.

For these reasons, I believe modifications of that penalty regime and the suggestion by my co-panelist Donald Tobin that a new agency is needed to enforce the prohibition are premature. At the same time, I believe it is important that the IRS continue to inform the public about its

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132. Owens & Fay, supra note 68. Full disclosure: Owens and Fay are attorneys at the law firm for which I am Of Counsel.

133. See Tobin, supra note 6, at 1359-1362 (suggesting the creation of an independent commission)
enforcement activities in this sensitive area (as it did with respect to its audits arising out of 2004 and earlier alleged political activities) and to seek outside review of those activities as appropriate.134 Only with that information will the charitable sector and the public be able to determine whether in fact the IRS' enforcement program is sufficiently comprehensive, effective in promoting compliance, and free from any improper political influence. If the IRS is unable to demonstrate that it is meeting these goals, then more significant changes may be in order.

134. See IRS 2004 PACI REPORT, supra note 20; TIGTA REPORT, supra note 52.