

DEAR IRS, IT IS TIME TO ENFORCE THE CAMPAIGNING PROHIBITION. EVEN AGAINST CHURCHES

SAMUEL D. BRUNSON*

In 1954, Congress prohibited tax-exempt public charities, including churches, from endorsing or opposing candidates for office. To the extent a tax-exempt public charity violated this prohibition, it would no longer qualify as tax-exempt, and the IRS was to revoke its exemption.

While simple in theory, in practice, the IRS rarely penalizes churches that violate the campaigning prohibition and virtually never revokes a church's tax exemption. And, because no taxpayer has standing to challenge the IRS's inaction, the IRS has no external imperative to revoke the exemptions of churches that do campaign on behalf of or against candidates for office.

This Article makes the normative case that, notwithstanding the IRS's administrative discretion and the inability of taxpayers to challenge its nonenforcement in court, the time has come for the IRS to begin enforcing the campaigning prohibition. Failing to do so harms the rule of law, the taxpaying public, and churches themselves. Moreover, the moment is correct for enforcement, as the difficulty and cost of finding violations has fallen dramatically over the last several years. People are more aware than ever that churches are violating the prohibition, and, in the aftermath of the Supreme Court's Citizens United decision, the campaigning prohibition may represent the final regulatory barrier between charities and politicking.

* Associate Professor of Law, Loyola University Chicago School of Law. I would like to thank John M. Breen, Philip T. Hackney, David Herzig, Jeffrey L. Kwall, Benjamin Leff, Lloyd Hitoshi Mayer, Alexander Tsesis, and Spencer Weber Waller for their thoughtful comments on the article. I would also like to thank the participants in the faculty presentation at Loyola University Chicago. I would like to thank Jamie Brunson for her support.

Even if enforcing the campaigning prohibition is the right thing to do, it would potentially be unpopular and could provoke a backlash against the IRS. After making the normative case for enforcement, this Article provides a strategy for enforcement that will allow the IRS to explain what it is doing and why to the general taxpaying public, and will further permit the IRS to avoid the appearance of partisanship. Ultimately, enforcement will allow the IRS to responsibly administer the tax law, permit the question of the prohibition's constitutionality to get in front of the judiciary, and demonstrate dedication to the rule of law.

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INTRODUCTION

About a month before the 2016 presidential election, some church-goers will participate—actively or passively—in a protest against the tax law. In addition to religious messages, some pastors will explicitly endorse one of the presidential candidates, in violation of the tax law’s campaigning prohibition, but, they will argue, in accordance with their First Amendment rights to free speech and exercise. Since 2008, the Alliance Defending Freedom (ADF)¹ has endorsed “Pulpit Freedom Sunday,” encouraging pastors to flout the Internal Revenue Code’s (IRC or Code) campaigning prohibition.² And, while only thirty-three pastors participated in the first Pulpit Freedom Sunday, more than 1,500 pastors participated in advance of the 2012 presidential election.³

The ADF’s ultimate goal in organizing Pulpit Freedom Sunday is to challenge the constitutionality of the campaigning prohibition in court.⁴ To get to court, though, it needs the Internal Revenue Service (IRS) to enforce the prohibition and penalize a church for making such an endorsement.⁵ The ADF does not want to rely on the IRS’s ability to discover violative sermons to move forward. Instead, to aid the IRS in its enforcement, the ADF encourages pastors to send copies of their Pulpit Freedom Sunday sermons directly to the IRS.⁶

1. The ADF is an advocacy and legal organization that works to defend people’s “right . . . to freely live out their faith.” *About Us*, ALLIANCE DEFENDING FREEDOM, <http://www.alliancedefendingfreedom.org/about> [<http://perma.cc/649N-KRUC>].

2. I.R.C. § 501(c)(3) (2012).

3. David Skeel, *Politicking from the Pulpit and the Tax Man*, WALL STREET J. (Nov. 22, 2012), <http://www.wsj.com/articles/SB10001424127887323713104578133181817762710> [<http://perma.cc/R949-653E>].

4. The ADF claims that it hopes, as a result of Pulpit Freedom Sunday, “to eventually go to court to have the Johnson Amendment struck down as unconstitutional.” *Pulpit Freedom Sunday vs. IRS*, ALLIANCE DEFENDING FREEDOM (Oct. 2, 2014), <http://www.adfmedia.org/News/PRDetail/9333> [<http://perma.cc/5HJZ-L754>]. Its stated desire may be pretextual, however: if it really wanted to challenge the constitutionality of the prohibition, it has other means. It could, for example, recruit a church to file an application for exemption with the IRS that revealed that the church qualified for exemption, except that it intended to endorse candidates for office. To get to court, though, the church would still need the IRS to reject the application. If the IRS did, the church could challenge the constitutionality of the prohibition in court.

5. See *infra* notes 91–104 and accompanying text.

6. Samuel D. Brunson, *Reigning in Charities: Using an Intermediate Penalty to Enforce the Campaigning Prohibition*, 8 PITT. TAX REV. 125, 150–51 (2011)

But, even after eight years of pastors blatantly violating the campaigning prohibition, the IRS has done nothing to penalize these churches.⁷ Because the campaigning prohibition is a qualification requirement for exemption,⁸ such blatant violations by these pastors should result in a loss of their churches' tax exemption. Yet in spite of the widespread publicity and easy discovery (in the form of mailed sermons) of violation, the IRS has not disqualified a single Pulpit Freedom Sunday participant for violating the campaigning prohibition.⁹

There are many possible reasons why the IRS has not enforced the campaigning prohibition against the Pulpit Freedom Sunday churches. While this Article will briefly lay out some of them,¹⁰ *why* is not the focus of the Article. Instead, this Article will argue that, as a normative matter, the IRS *should* disqualify churches that violate the campaigning prohibition.¹¹ Specifically, the IRS should disqualify every

("[B]ecause the pastors intended their sermons as a challenge to the prohibition, they sent copies of their sermons to the IRS.").

7. See Josh Hicks, *Political Pastors Openly Defying IRS Rules on Candidate Endorsements*, WASH. POST (Nov. 4, 2014), <http://www.washingtonpost.com/blogs/federal-eye/wp/2014/11/04/political-pastors-defying-irs-rules-on-candidate-endorsements> [<http://perma.cc/RDE9-QE58>].

8. I.R.C. § 501(c)(3) (2012) (prohibiting would-be public charities from "participat[ing] in, or interven[ing] in, (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office").

9. In fact, it appears that the IRS has only ever disqualified one church as a result of violating the campaigning prohibition, and that happened in 1992. *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000). It also disqualified Christian Echoes as a result of Christian Echoes' significant campaigning activities, which were motivated by sincere religious conviction. *Christian Echoes Nat'l Ministry v. United States*, 470 F.2d 849, 853, 857 (10th Cir. 1972). Still, Christian Echoes had received its exemption as a religious and educational organization, not as a church. *Id.* at 852.

10. See *infra* Section IV.A.

11. The IRS has settled a lawsuit with the Freedom From Religion Foundation agreeing to "eventually take action" against churches that violate the campaigning prohibition. Rachael Bade, *Rogue Pastors Endorse Candidates, but IRS Looks Away*, POLITICO (Nov. 3, 2014, 5:04 AM), <http://www.politico.com/story/2014/11/2014-elections-pastors-endorsing-candidates-irs-112434.html> [<http://perma.cc/FTV5-T3LA>]. Even if the IRS follows through, though, it is not clear what would constitute taking action. In addition, agreement or not, it will face the same types of opposition in the future as it has in the past as it attempts to enforce the campaigning prohibition. This Article will argue that the IRS should make a real effort to enforce the campaigning prohibition out of an interest in protecting the tax law and benefiting churches themselves, not a half-hearted effort motivated merely by meeting its obligation. In addition to the normative arguments for engaging in real enforcement, this Article will describe a series of strategies that the IRS can use to shield itself from accusations of bias and more

church that participates in Pulpit Freedom Sunday and sends a copy of a sermon that endorses or opposes a candidate for public office to the IRS.

Churches are stuck in limbo until the IRS enforces the campaigning prohibition against churches, knowing both that the IRS does not enforce the prohibition, but that it could.¹² Without a judicial determination of its constitutionality, moreover, churches may be circumscribing their speech more than they need to or may be violating a permissible law.¹³

effectively enforce the campaigning prohibition.

12. Churches generally should be aware of the campaigning prohibition. National media report on it extensively. *See, e.g., id.* (“A record number of rogue Christian pastors are endorsing candidates from the pulpit this election cycle, using Sunday sermons to defiantly flout tax rules.”); Jim Dwyer, *Priest’s Dip into Politics Raises Outcry*, N.Y. TIMES (Sept. 18, 2012), http://www.nytimes.com/2012/09/19/nyregion/romney-endorsement-in-church-bulletin-raises-outcry.html?_r=1 [<http://perma.cc/29KZ-H4SP>] (“Tax-exempt organizations like churches are ‘absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office,’ according to I.R.S. guidelines.”); *No Word from I.R.S. on Protest by Pastors*, N.Y. TIMES (Apr. 25, 2009), <http://www.nytimes.com/2009/04/26/us/politics/26churches.html> [<http://perma.cc/3KU7-TY4B>] (“Churches that violate the [no-campaigning] rule can lose their tax-exempt status.”); Paul Vitello, *Pastors’ Web Electioneering Attracts U.S. Reviews of Tax Exemptions*, N.Y. TIMES (Sept. 2, 2008), http://www.nytimes.com/2008/09/03/nyregion/03irs.html?page_wanted=all [<http://perma.cc/8CP6-L9C4>] (“The I.R.S., which can revoke the tax exemptions of churches that express support or opposition to candidates for public office, has declined to say whether it is reviewing Mr. Manning’s case.”). In addition, the IRS provides clear guidance for churches. On its website, the IRS informs public charities that they “are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office.” *The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations*, IRS, <http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/The-Restriction-of-Political-Campaign-Intervention-by-Section-501%28c%29%283%29-Tax-Exempt-Organizations> [<http://perma.cc/F53M-2Q7H>]. The IRS also provides a publication directed specifically at churches that explains the prohibition and warns churches that “[v]iolation of this prohibition may result in denial or revocation of tax-exempt status and the imposition of certain excise tax.” I.R.S., *TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS 7* (2013), <http://www.irs.gov/pub/irs-pdf/p1828.pdf> [<http://perma.cc/GN5M-JZQA>].

13. For example, under its current policies, the Mormon church does not “[e]ndorse, promote or oppose political parties, candidates or platforms.” The Church of Jesus Christ of Latter-day Saints, *Political Neutrality*, MORMON NEWSROOM, <http://www.mormonnewsroom.org/official-statement/political-neutrality> [<http://perma.cc/3Z5V-MDRT>]. If this policy is founded on complying with the campaigning prohibition, and the campaigning prohibition is unconstitutional, then the Mormon church is acting in a manner more circumscribed than it needs to. At the opposite extreme, if the prohibition is constitutionally permissible, pastors such as Rev. Mark Cowart, who endorsed Bob Beauprez for Colorado governor in 2014, are violating a permissible

Unless and until the prohibition's constitutionality as applied to churches can get in front of the courts, they cannot know the permissible limits on their actions.¹⁴ And the only way the constitutionality of the campaigning prohibition can get in front of the courts is if the IRS chooses to revoke a church's tax exemption, which will provide the church with standing to challenge the prohibition in court.¹⁵

Determining the constitutionality of the campaigning prohibition is more than just an academic exercise: the prohibition affects the real-world activities of churches, even as they do not know its constitutional status.¹⁶ On a regular basis, churches must weigh what they wish to say against the consequences of saying it. While many churches have no desire to endorse or oppose specific candidates for office,¹⁷ some view endorsing or opposing certain candidates as part of their moral duty.¹⁸ The campaigning prohibition imposes a cost—that is, the risk of losing their tax exemption—on churches in deciding whether to follow their moral duty. Because a church cannot know whether that cost is constitutionally permissible,

law. Bade, *supra* note 11.

14. It is worth noting that, while the campaigning prohibition also applies to non-church public charities, such charities generally do not challenge its constitutionality. Churches make the specific argument that the prohibition violates their free exercise rights under the First Amendment. See Roger Colinvaux, *The Political Speech of Charities in the Face of Citizens United: A Defense of Prohibition*, 62 CASE W. RES. L. REV. 685, 699 (2012) (“There has been considerable scholarship addressing whether the Rule should be relaxed for [churches], and whether the Rule could withstand a constitutional challenge under the First Amendment’s Free Exercise Clause.”).

15. See *infra* notes 91–104 and accompanying text.

16. See Tamara Audi, *Preaching Politics, Pastors Defy Ban*, WALL STREET J. (Oct. 5, 2014, 9:25 PM), <http://www.wsj.com/articles/preaching-politics-pastors-defy-ban-1412558726> [<http://perma.cc/AM2P-FFMY>] (“But some church leaders have complained the regulation is unclear and say ‘vague and unequal enforcement’ has led to pastors pulling back on social commentary that could be construed as political, said Kerri Kupec, a spokeswoman for the Alliance Defending Freedom.”).

17. Church endorsement of candidates for office can be off-putting to congregants; according to a Pew study, fully two-thirds of Americans oppose churches endorsing candidates for office. *Americans Wary of Church Involvement in Partisan Politics*, PEW RES. CTR. (Oct. 1, 2008), <http://www.pewforum.org/2008/10/01/americans-wary-of-church-involvement-in-partisan-politics/> [<http://perma.cc/SV2L-AYEN>].

18. For example, Rev. Cowart argued that he was endorsing one candidate because that candidate “is against more gun control, does not support abortion and he does protect the man-woman marriage—that’s the one I’m voting for I’m endorsing biblical principles.” Bade, *supra* note 11. (alteration in original).

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however, it cannot accurately weigh the costs against the benefits. Until the IRS enforces the prohibition, and the courts definitively rule on the constitutionality of the campaigning prohibition, churches that feel a calling to act in the political sphere must act without knowing whether the campaigning prohibition is constitutional or not.

Although people colloquially say that it is against the law for a church or other tax-exempt organization to endorse or oppose candidates for office, it is important to point out such a colloquialism misstates the impediments tax-exempt organizations face in endorsing candidates. A church's support of a candidate does not violate any law; it merely violates the criteria laid out for an organization to qualify as tax-exempt. As long as a church is indifferent to its exempt status, it can freely and without impediment endorse or oppose candidates for office.¹⁹

This Article will proceed as follows. Part I will discuss the tax exemption available to public charities under I.R.C. section 501(c)(3). It will lay out both the economic benefits that accrue to these exempt public charities, and the certain limitations placed on them, including the campaigning prohibition. Finally, it will discuss the penalties the government may impose on public charities for violating the campaigning prohibition.

Part II will explore administrative discretion. Administrative discretion recognizes that administrative agencies are often in the best position to determine whether and how to enforce the law and grants those agencies broad (though not limitless) discretion in choosing not to enforce certain laws. Part II will also look at a second level of insulation that the IRS enjoys against being forced to act: taxpayers lack standing to challenge its nonenforcement decisions.

After acknowledging the IRS's ability and right to choose not to enforce the campaigning prohibition, Part III will lay out a normative and a pragmatic case for the IRS's choosing to enforce the prohibition anyway. It will look at the effects on the rule of law of failing to enforce the prohibition, but will also look at enforcement's effects on the public's perception of

19. See Michael Hatfield, *Ignore the Rumors—Campaigning from the Pulpit Is Okay: Thinking Past the Symbolism of Section 501(c)(3)*, 20 NOTRE DAME J. L. ETHICS & PUB. POL'Y 125, 128–29 (2006).

churches and on the IRS itself.

Part IV will discuss the effects on churches of losing their tax exemption. In its publicity materials, the ADF alleges that such a loss will not impact churches,²⁰ and the IRS has expressed agreement with that idea.²¹ Both the ADF and the IRS are wrong. Although the financial impact to churches of losing their exemptions may be minimal, the loss of exemption will nonetheless be significant. As Part IV will point out, loss of exemption will probably have little economic impact: the immediate economic effects on churches and on their donors are likely to be marginal. Still, noneconomic effects of losing a tax exemption, including the administrative burden of requalifying and the reputational harms associated with the loss of exemption are likely to exceed what churches expect.

Finally, Part V will provide the IRS with a blueprint of how it can reasonably provide churches with standing to put the question of the prohibition's constitutionality in front of the courts. If we expect the IRS to enforce the campaigning prohibition, it must have a strategic plan for *how* to enforce it. Although the IRS will benefit from enforcing the prohibition, the majority of the benefits accrue to others while the IRS bears the majority of the costs.²² If the IRS acts strategically and engages the public in a thoughtful way, it can reduce its costs of revoking church exemptions and allow the courts to rule on the prohibition's constitutionality. Ultimately, the IRS serves as the gateway to judicial review, and only the IRS's actions can allow the judiciary to rule on whether the tax law can constitutionally prevent churches from campaigning.

20. See, e.g., *Pulpit Freedom Sunday Frequently Asked Questions*, ALLIANCE DEFENDING FREEDOM, 3, http://www.adfmedia.org/files/ChurchFAQ_PulpitFreedom.pdf [<http://perma.cc/7FDR-J6KB>] [hereinafter *Pulpit Freedom Sunday FAQ*] ("Alliance Defending Freedom believes that a church may only lose its tax exempt status for a very short time period, and even if a church's tax exempt 501(c)(3) letter is revoked, a church may once again be automatically considered tax exempt under the tax code if it agrees to abide by section 501(c)(3).").

21. *Branch Ministries v. Rissotti*, 211 F.3d 137, 142–43 (D.C. Cir. 2000) ("As the IRS confirmed at oral argument, if the Church does not intervene in future political campaigns, it may hold itself out as a 501(c)(3) organization and receive all the benefits of that status. All that will have been lost, in that event, is the advance assurance of deductibility in the event a donor should be audited.").

22. That is, because there will be little revenue gained from revoking a church's exemption, the IRS will gain little financial benefit. It will, however, bear the financial costs of auditing and litigating against a disqualified church, as well as the reputational harm of being painted as anti-church. See *infra*, notes 161–64 and accompanying text.

I. THE BENEFITS AND BURDENS OF TAX-EXEMPT STATUS

Exemption from taxation under section 501(c)(3) provides organizations with a number of benefits. These benefits range from the public's perception of legitimacy to the reduced cost of donations to donors to the fact that the organization keeps all of the money it raises.²³

Most organizations that wish to become exempt under section 501(c)(3) must file an application with the IRS.²⁴ Among other things, the application must include various financial statements, a statement of proposed activities, and organizational documents.²⁵ Churches, their integrated auxiliaries, and associations of churches are exempt from the application requirement; these church-related entities automatically qualify for exemption.²⁶

Section 501(c)(3) exempts two types of organizations from taxation: public charities and private foundations.²⁷ These public charities and private foundations receive two significant tax benefits. First, they are generally exempt from federal income taxation.²⁸ Second, donors to these exempt organizations can deduct their donations as long as they itemize their deductions.²⁹

23. Alope Chakravarty, *Feeding Humanity, Starving Terror: The Utility of Aid in a Comprehensive Antiterrorism Financing Strategy*, 32 W. NEW ENG. L. REV. 295, 323 (2010) (“[Section 501(c)(3)] status attracts donors because it affords a double tax benefit; that is, the donors to the organization can deduct the amount of their donation and the corporation need not pay taxes on any income. More importantly, however, the § 501(c)(3) label is the closest thing to a barometer of legitimacy that exists in the realm of charitable giving in the United States.”).

24. I.R.C. § 508(a) (2012). To qualify as exempt under section 501(c)(3), an entity must file IRS Form 1023. Treas. Reg. § 601.201(n)(7) (as amended in 2002).

25. § 601.201(n)(7)(i)(c)–(e).

26. I.R.C. § 508(c)(1). The Senate did not explain *why* it felt that church-related entities did not need to apply for exemption; it hinted, though, that permitting churches to qualify without applying was consistent with the “efficient administration” of the tax law. S. REP. NO. 91-552, at 54 (1969).

27. Robert Paine, *The Tax Treatment of International Philanthropy and Public Policy*, 19 AKRON TAX J. 1, 3 n.10 (2004).

28. I.R.C. § 501(a), (c)(3) (2012). Public charities do pay income taxes, however, at their ordinary rates on their unrelated business taxable income. § 511(a) (2012). Unrelated business taxable income includes income from for-profit business activities, § 512(a) (West Supp. 2015), and a portion of the income derived from debt-financed property, § 514(a) (2012).

29. § 170(a) (Westlaw through P.L. 114-49). Charitable deductions are only available to taxpayers who itemize, and taxpayers only itemize if the sum of certain classes of deductions exceed the standard deduction. See Lilian V. Faulhaber, *The Hidden Limits of the Charitable Deduction: An Introduction to*

The tax exemption means, in essence, that public charities and private foundations have more money with which to pursue their mission. Currently, non-exempt corporations pay federal income taxes at a top rate of 35%.³⁰ Effectively, then, a for-profit corporation can spend no more than \$65 of every \$100 of pre-tax income it earns.³¹ A tax-exempt organization, by contrast, can spend the full \$100 that it receives.

Similarly, the deductibility of charitable donations functions as a government subsidy to the charity.³² A taxpayer in the 39.6% tax bracket who itemizes can donate \$100 to a public charity, and then deduct that donation. Because deductions reduce a taxpayer's tax bill by her marginal tax rate,³³ the \$100 donation only costs the donor \$61.40 after taxes. Yet the charity has \$100 it can use. Where did the extra \$39.60 come from? Effectively, it came from the federal government. Even though the federal government did not transfer any money to the charity, it allowed its revenue to be reduced by \$39.60.

The charitable deduction therefore lowers the cost to donors of donating. The conventional wisdom historically held that charitable donations were price-elastic.³⁴ If charitable giving were price-elastic, then the lower the cost, the more donors would give.³⁵ As demonstrated above, the charitable

Hypersalience, 92 B.U. L. REV. 1307, 1321 (2012).

30. § 11(b)(1)(D) (2012).

31. The amount of after-tax income a corporation can spend ultimately depends not only on its federal income tax rate, but also on state income taxes. States differ radically in the rates at which they tax corporate income. In 2014, the top marginal rates ranged from zero to 12 percent. See *Tax Facts: State Corporate Income Tax Rates 2002–2008, 2010–2014*, TAX POL'Y CTR., <http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=244> [http://perma.cc/FG57-5MHC].

32. Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505, 517 (2010) (“[T]he charitable deduction . . . [is] justifiable as tax expenditures to subsidize charity generally.”).

33. This is because the deduction reduces a taxpayer's taxable income. I.R.C. § 63(a) (2012) (“[T]axable income’ means gross income minus the deductions allowed by this chapter . . .”). If a taxpayer has \$1,000 of taxable income and pays taxes at a rate of 39.6%, she will owe \$396 in taxes. If, however, she can deduct \$100, she will have a tax liability of \$356.40. The deduction has reduced her tax liability by \$39.60, which is the amount of the deduction times her marginal tax rate.

34. See, e.g., CHARLES T. CLOTFELTER, FEDERAL TAX POLICY AND CHARITABLE GIVING 41 (1985) (“In general, then, the deductibility of contributions has an income effect and a substitution effect. If giving is a normal good, both effects will tend to encourage contributions.”).

35. *Id.*

deduction reduces the after-tax cost to donors of making charitable contributions, which, in turn, should cause donors to give more than they otherwise would have given.³⁶

The bulk of economic evidence indicates that the charitable deduction does increase the amount a donor will donate to a charity.³⁷ Thus, the tax exemption and the deductibility of donations provide public charities with a double benefit.

But qualifying as a tax-exempt organization comes with limitations on what the organization can do. Running afoul of these limitations does not break the law, as it were, but it subjects the organization to penalties, including the loss of its tax exemption.³⁸ Broadly speaking, the exemption and ability to receive deductible donations are limited to types of organizations explicitly listed in the Code, including religious, charitable, scientific, and educational institutions.³⁹ Although the Code says that such organizations must be “organized and operated *exclusively* for” their qualifying purposes,⁴⁰ the Treasury regulations temper the exclusivity requirement. An organization will qualify as being operated exclusively for its

36. More recent studies indicate, however, that charitable giving is less price-elastic than conventionally believed. *See, e.g.*, William C. Randolph, *Dynamic Income, Progressive Taxes, and the Timing of Charitable Contributions*, 103 J. POL. ECON. 709, 735 (1995) (“[G]iving is substantially less price elastic and more income elastic in terms of permanent changes in prices and income. Giving also appears to be more price elastic and less income elastic than in past studies in terms of transitory changes in prices and income.”); Richard Steinberg, *Taxes and Giving: New Findings*, 1 VOLUNTAS: INT’L J. OF VOLUNTARY AND NONPROFIT ORGS. 61, 76 (1990) (“Early analyses from panels of tax data indicate that giving is price inelastic, although further analysis is necessary to determine whether this conclusion is robust to plausible variations in statistical technique.”). Ultimately, because of the lower price-elasticity of charitable contributions, providing deductions to charitable donors may not be an efficient means of increasing charitable donations. Kevin Stanton Barrett et al., *Further Evidence on the Dynamic Impact of Taxes on Charitable Giving*, 50 NAT. TAX J. 321, 332 (1997) (“Our results challenge the view that tax deductions for charitable giving are treasury efficient (e.g., that they stimulate an increase in donations that exceeds foregone tax revenues) or that they are efficient in Roberts’ (1987) sense (that they accomplish a given expenditure level on some good at lowest social cost).”).

37. *See, e.g.*, John A. List, *The Market for Charitable Giving*, 25 J. ECON. PERSP. 157, 170–72 (2011) (reviewing various economic and empirical studies to conclude that “there is a fair amount of evidence, although not universal agreement, that charitable giving is at least unitary price elastic if not price elastic, especially amongst the high-income classes.”).

38. Brunson, *supra* note 6, at 130.

39. I.R.C. § 501(c)(3) (2012).

40. *Id.* (emphasis added).

charitable purpose if it “engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3).”⁴¹ In addition to being organized and operated exclusively for a qualifying purpose, most organizations must file an application with the IRS.⁴²

Once the IRS has granted an organization its exemption, the organization must continue to engage primarily in activities that will accomplish its exempt purpose.⁴³ Most exempt organizations must also file an informational return every year of their operation.⁴⁴ As with the application requirement, churches are excluded from this filing requirement.⁴⁵

As it operates, no part of the earnings of an exempt organization can inure to the benefit of shareholders or other individuals.⁴⁶ No substantial part of a public charity’s or private foundation’s activities can include lobbying,⁴⁷ and public charities and private foundations are absolutely forbidden from campaigning for or against any candidate for office.⁴⁸

Violating any of these operating requirements can result in a public charity facing penalties, including loss of its exemption. The following Part will specifically discuss the penalties prescribed for a public charity’s violation of the campaigning prohibition.

II. PENALTIES FOR VIOLATING THE CAMPAIGNING PROHIBITION

A public charity or a private foundation that violates the campaigning prohibition is subject to two codified punitive

41. Treas. Reg. § 1.501(c)(3)-1(c)(1) (as amended in 2014).

42. I.R.C. § 508(a) (2012); Treas. Reg. § 1.501(a)-1(a)(3) (as amended in 2014).

43. Treas. Reg. § 1.501(c)(3)-1(a)(1).

44. *Id.* § 1.6033-2(a)(1) (as amended in 2015).

45. I.R.C. § 6033(a)(3)(A)(i) (2012). In 1969, Congress contemplated ending churches’ exemption from the filing requirement; that galvanized churches into action, and they lobbied extensively to maintain their exemption. *See* Samuel D. Brunson, *The Present, Past, and Future of LDS Financial Transparency*, 48 DIALOGUE 1, 5–7 (2015). Ultimately, while the House of Representatives passed a bill that would have required churches to file an annual return, the churches convinced the Senate to preserve their exemption. *Id.*

46. I.R.C. § 501(c)(3) (2012).

47. Though it is unclear how much lobbying constitutes a “substantial part” of an organization’s purposes, courts have put the percentage in the five- to twenty-percent range. Brunson, *supra* note 6, at 144.

48. *Id.*

measures as well as informal enforcement mechanisms that the IRS has used on limited occasions.⁴⁹ The formal statutory sanctions available to the IRS are the ability to impose an excise tax on the organization and on its management⁵⁰ and the ability to revoke a tax-exempt entity's exemption.⁵¹ Informally, the IRS can use its investigative powers to convince churches to agree to comply with the campaigning prohibition.⁵² This Part will first discuss the excise tax imposed on tax-exempt entities and their officers where the entity violates the campaigning prohibition. It will then discuss the mandatory revocation of tax exemption that Congress prescribed for tax-exempt public charities that violate the campaigning prohibition. After discussing the IRS's statutory enforcement regimes, it will end with informal sanctions that the IRS may use to encourage compliance with the campaigning prohibition.

A. *Formal Sanctions*

The excise tax aims to discourage both tax-exempt entities *and* their managers from campaigning for or against candidates for office.⁵³ It does so by taxing both the entity and any manager who knowingly agreed to the political expenditure.⁵⁴ Initially, the entity must pay 10% of the amount of the political expenditures and the managers 2.5%.⁵⁵ If the entity fails to correct the expenditure within the requisite taxable period, the entity's excise tax jumps to 100% of the political expenditure, while the managers' jumps to 50%.⁵⁶ To correct the expenditure, a tax-exempt entity must recover its

49. *Supra* note 8 and accompanying text.

50. I.R.C. § 4955(a) (2012).

51. Brunson, *supra* note 6, at 130 ("If a public charity . . . supports or opposes a candidate for office, it no longer qualifies for a tax exemption, and its tax exemption should thus be revoked.").

52. *See infra* Section II.C.

53. § 4955(a). Though the IRS does not generally publicize the imposition of this excise tax, it has been imposed on occasion. *See* I.R.S., PROJECT 302: POLITICAL ACTIVITIES COMPLIANCE INITIATIVE, FINAL REPORT 18 & n.6 (2006) [*hereinafter* PACI REPORT], http://www.irs.gov/file_source/pub/irs-tege/final_paci_report.pdf [<http://perma.cc/C2N5-3BC6>] (reporting the results of an IRS investigation of public charities, including churches and non-church entities, that allegedly violated the campaigning prohibition).

54. § 4955(a).

55. *Id.*

56. *Id.* § 4955(b).

expenditure to the extent possible, as well as implement safeguards to prevent such a political expenditure from happening again.⁵⁷

While the excise tax may have real teeth under certain circumstances, it does not always. A “political expenditure,” which determines the amount of the excise tax, is the amount paid by the public charity or private foundation as part of its participation in the proscribed campaign.⁵⁸ If the public charity paid, for example, to produce and run a national television advertisement, the political expenditure (and, as a result, the excise tax) could be substantial. If, on the other hand, the pastor of a church endorsed a candidate for office in the middle of a sermon, the political expenditure, if any, would be inconsequential.⁵⁹ The risk of owing an excise tax of ten percent, or even of 100 percent, of an inconsequential expenditure would do nothing to discourage the church from endorsing the candidate.

The excise tax, though, is not the only arrow the IRS has in its enforcement quiver. “Any charitable organization . . . ceases to qualify for tax-exempt status under section 501(c)(3), or to receive tax-deductible charitable contributions, if it participates or intervenes in any political campaign for or against a candidate for public office.”⁶⁰ Accordingly, a tax-exempt organization that ceases to qualify for tax-exempt status must have its tax exemption revoked.⁶¹

57. Treas. Reg. § 53.4955-1(e) (1995).

58. I.R.C. § 4955(d)(1).

59. Professor Benjamin Leff has proposed that the IRS not focus on the marginal cost of violating the campaigning prohibition, but instead allocate a portion of the organization’s broader costs to the violation. Benjamin M. Leff, “*Sit Down and Count the Cost: A Framework for Constitutionally Enforcing the 501(c)(3) Campaign Intervention Ban*,” 28 VA. TAX REV. 673, 716 (2009). For example, if a pastor were to endorse a candidate for office in her sermon, rather than looking at the costs associated with that sermon, the IRS could look at the total number of hours associated with creating and delivering that sermon, and compare that to the total number of hours the pastor worked, and add that amount to any third-party costs incurred in the course of violating the campaigning prohibition. *Id.* at 719. Such an allocative method would certainly provide the excise tax with more teeth. At the same time, though, if the IRS were to formally provide such guidance, its guidance would be in explicit contravention of the statutory scheme enacted by Congress. *See infra* Section II.B.

60. H.R. REP. NO. 100-495, at 1019 (1987) (Conf. Rep.), *as reprinted in* 1987-3 C.B. 193, 300.

61. *See, e.g.*, Treas. Reg. § 53.4955-1(a) (1995) (“The excise taxes imposed by section 4955 do not affect the substantive standards for tax exemption under section 501(c)(3), under which an organization is described in section 501(c)(3)

As a formal matter, the IRS revokes a tax-exempt organization's exemption by issuing it a private letter ruling.⁶² In the private letter ruling, the IRS explains why the organization's exemption is being revoked and explains that, if the organization disagrees with the IRS's conclusions, it can file an appeal.⁶³ The IRS also informs the organization that donors can no longer deduct their contributions and that the organization will need to file a tax return (rather than the informational return required from non-church tax-exempt organizations).⁶⁴ The consequences to an organization of losing its tax exemption are not limited to the federal government either. When a tax-exempt organization loses its exemption, the IRS must notify appropriate state officials of the loss of exemption.⁶⁵ The loss of a federal tax exemption may also trigger the loss of an organization's state exemption, which could subject the organization to, among other things, state property, sales, and income taxes.⁶⁶

Ultimately, the excise tax and the loss of exemption function differently to achieve the same ends. The excise tax imposes a sliding burden on a tax-exempt organization for violating the campaigning prohibition, but bolsters the effectiveness of that burden by also imposing an excise tax on the organization's managers.⁶⁷ As a result, the managers risk personal liability if they allow the exempt organization to endorse or oppose a candidate for office.⁶⁸

In spite of the potential personal expense, the excise tax is easy to avoid. Because it is calculated as a percentage of the tax-exempt organization's expenditure in endorsing a

only if it does not participate or intervene in any political campaign on behalf of any candidate for public office.”)

62. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 2007-24-033 (Jun. 15, 2007).

63. *Id.*

64. *Id.*

65. I.R.C. § 6104(c)(1)(A) (2012).

66. For example, a tax-exempt corporation in Texas loses its franchise tax exemption if it loses its federal exemption. TEX. TAX CODE ANN. § 171.063(g) (West 2015). In Connecticut, exemption from both the sales and use tax and the corporation business tax depend on a corporation's maintaining its federal exemption. CONN. GEN. STAT. §§ 12-412(8), 12-214(a)(2)(B) (Supp. 2015). A tax-exempt entity in Georgia that loses its federal exemption also loses its state exemption. GA. CODE ANN. § 48-7-25(b)(2)(A)(i) (2013). And Massachusetts bases its corporate tax exemption on an entity's having a federal exemption. MASS. GEN. LAWS ch. 63, § 38Y(b) (2015).

67. I.R.C. § 4955(a) (2012).

68. *Id.* § 4955(a)(2).

candidate, to the extent that the tax-exempt organization endorses a candidate without spending a substantive amount of money, the excise tax has little sting. On the other hand, although the loss of exemption does not impact individual managers personally, it potentially has a devastating effect on the organization. Without a tax exemption, the organization's federal and state tax bills will increase, as all of its income suddenly becomes subject to taxation. Moreover, the cost of donating to the organization—at least for taxpayers who itemize—will increase, as the government no longer bears any of the cost of the donation.⁶⁹

B. The Excise Tax Does Not Substitute for Revocation

Though the excise tax and revocation use different routes to accomplish the same result, the excise tax does not substitute for revocation.⁷⁰ Instead, Congress intended to impose the excise tax *in addition to* a tax-exempt organization's loss of its exemption.⁷¹

In 1987, Congress was concerned that some tax-exempt organizations would view loss of exemption as insufficiently deterrent to prevent them from endorsing a candidate for office.⁷² A tax-exempt organization that merely wanted to funnel deductible contributions to candidates for office could immediately cease operations after distributing the money and before being audited, thus avoiding the bite of revocation.⁷³

To combat this potential abuse, Congress decided, “the sanction of revocation of tax-exempt status should be supplemented by an excise tax.”⁷⁴ In explaining the change, Congress explicitly says that the excise tax applies to organizations that have “ceased to qualify as tax-exempt” and to certain managers of organizations “whose exempt status has

69. See *supra* notes 34–36 and accompanying text.

70. Treas. Reg. § 53.4955-1(a) (1995).

71. H.R. REP. NO. 100-495, at 1020 (1987) (Conf. Rep.), as reprinted in 1987-3 C.B. 193, 300. (“The adoption of the excise tax sanction does not modify the present-law rule that an organization is not tax-exempt under section 501(c)(3), or eligible to receive tax-deductible charitable contributions, if the organization engages in any political campaign activities.”).

72. H.R. REP. NO. 100-391, pt. 2, at 1631 (1987), as reprinted in 1987 U.S.C.C.A.N. 2313-1211 to -1212.

73. *Id.*

74. *Id.*

been revoked.”⁷⁵ In spite of the clear intent of Congress and the clear statutory scheme, the IRS, on at least a handful of occasions, imposed the excise tax without revoking an organization’s exemption.⁷⁶ The IRS’s decision to impose the excise tax as a standalone penalty is unsupported by either Congress’s intent or the language of the Code.

The IRS’s substitution of the excise tax for revocation stands in stark contrast to another excise tax faced by tax-exempt organizations that violate requirements for their tax exemption. The Code imposes a different excise tax on the managers of a tax-exempt organization that engages in an excess-benefit transaction.⁷⁷ In an excess-benefit transaction, a tax-exempt organization pays more to certain insiders than the services or goods they provide to the tax-exempt organization are worth.⁷⁸

An excess-benefit transaction violates section 501(c)(3)’s prohibition on private inurement, and, as a result, a tax-exempt entity that engages in such a transaction no longer qualifies as tax-exempt.⁷⁹ Like the excise tax on campaigning, the excise tax on excess-benefit transactions appears additive to, not substitutive for, revocation.⁸⁰ Unlike the excise tax for campaigning, the Treasury regulations governing the excise tax on excess benefit transactions allow the IRS to impose the excise tax without revoking the entity’s exemption. Under regulations, the determination of whether to impose the excise tax in place of, rather than in addition to, revocation depends on a facts-and-circumstances test.⁸¹

The regulations provide no similar test for the campaigning excise tax. The Treasury is clearly capable of writing regulations that soften the mandatory revocation of a tax-exempt entity’s exemption, yet it has not done so with respect to the campaigning prohibition.⁸² This fact, in concert with Congress’s clear statement that the excise tax was to be

75. *Id.* at 1632.

76. *See, e.g.*, PACI REPORT, *supra* note 53, at 18 n.6.

77. I.R.C. § 4958(a) (2012).

78. *Id.* § 4958(c)(1).

79. Treas. Reg. § 1.501(c)(3)-1(c)(2) (as amended in 2014) (“An organization is not operated exclusively for one or more exempt purposes if its net earnings inure in whole or in part to the benefit of private shareholders or individuals.”).

80. I.R.C. § 4958(a) (imposing excise tax without mentioning revocation of tax exemption).

81. Treas. Reg. § 1.501(c)(3)-1(f)(2)(ii) (as amended in 2014).

82. *See generally* Treas. Reg. § 53.4955-1 (2014).

imposed in addition to, not in place of, revocation, demonstrates that the existence of the excise tax does nothing to eliminate revocation as a mandatory penalty for violating the campaigning prohibition.⁸³ In fact, together they give added weight to the assertion that, under current law, a tax-exempt organization that violates the campaigning prohibition *must* lose its tax exemption.

C. *Informal Sanctions*

Not only has the IRS misapplied the clear penalty scheme laid out by the Code, but when it took initiative to try to enforce the campaigning prohibition, it ended up using extra-statutory means to do so. In 2004, for the first time, the IRS's Exempt Organizations Division initiated its Political Activity Compliance Initiative (PACI), which was the IRS's first attempt to expeditiously investigate alleged violations of the campaigning prohibition.⁸⁴ The PACI started with 132 cases, but the IRS closed twenty-two of those after it determined that those cases did not merit further investigation.⁸⁵ Of the 110 tax-exempt entities that the IRS did investigate, forty-seven were churches and the remaining sixty-three were non-church exempt entities.⁸⁶ By 2006, the IRS had closed forty of the cases dealing with churches.⁸⁷ Of those, the IRS issued no-change written advisories to thirty-four.⁸⁸

For purposes of the PACI, "no-change written advisories" were issued where the church had, in fact, violated the campaigning prohibition, but the violation was anomalous (or the church relied on the opinion of counsel), it corrected its violation to the extent possible, and it took steps to prevent future violations.⁸⁹ Though the IRS developed this informal policing strategy with no statutory or regulatory basis, it demonstrates that, in 2004, the IRS gave serious thought to investigating violations of the campaigning prohibition by churches. Subsequent to the 2004 PACI, though, the IRS appears to have effectively dropped even this limited approach

83. See *supra* notes 70–76 and accompanying text.

84. PACI REPORT, *supra* note 53, at 2.

85. *Id.* at 7.

86. *Id.* at 9.

87. *Id.* at 18.

88. *Id.* at 21.

89. *Id.* at 18.

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to enforcement, leaving churches free to flout the campaigning prohibition with impunity.⁹⁰

III. ADMINISTRATIVE DISCRETION AND (NOT) ENFORCING THE CAMPAIGNING PROHIBITION

Although the Code clearly states that a church does not qualify as tax exempt if it campaigns on behalf of or against a candidate for office,⁹¹ the campaigning prohibition is not self-enforcing. Rather, to enforce the campaigning prohibition, the IRS must take active steps to revoke the church's tax exemption.⁹² This Part will discuss the reasons that enforcing the prohibition requires IRS initiative, first by explaining why taxpayers and watchdog groups do not have standing to challenge the IRS's nonenforcement. Next, it will discuss the special Establishment Clause standing rules, and why those rules are unavailing. Finally, it will discuss the judicially created doctrine of administrative discretion.

The revocation of a church's tax exemption is solely within the purview of the IRS.⁹³ Even if another taxpayer witnesses the church violate the campaigning prohibition, the only thing a third-party taxpayer can do is bring the violation of the campaigning prohibition to the IRS's attention.⁹⁴ Even if the IRS refuses to act, the taxpayer has no judicial recourse.⁹⁵ An individual can only access the federal judiciary if she has standing to do so.⁹⁶

Standing generally requires that a litigant have suffered an "injury in fact" that can be traced to the defendant's actions and that can be redressed by the courts.⁹⁷ Taxpayers generally have no standing to challenge the IRS's decision not to enforce the tax law against another person where, as here, the IRS's actions have not directly harmed them.⁹⁸ In other words,

90. See, e.g., *Freedom From Religion Found. v. Koskinen*, 298 F.R.D. 385, 386 (W.D. Wis. 2014) (finding that the IRS has a policy of non-enforcement of the campaigning prohibition against churches).

91. I.R.C. § 501(c)(3) (2012).

92. Treas. Reg. § 601.201(n)(6)(i) (as amended in 2002).

93. Samuel D. Brunson, *Watching the Watchers: Preventing I.R.S. Abuse of the Tax System*, 14 FLA. TAX REV. 223, 235 (2013).

94. *Id.*

95. U.S. CONST. art. III, § 2 (standing requires a case or controversy).

96. *Id.*

97. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

98. *Id.*

taxpayers have no standing to sue the IRS for failure to revoke the church's tax exemption.⁹⁹

Congress has, on occasion, provided for less stringent standing requirements. In 1934, in response to the risk of unknowing patent infringement, Congress passed the Declaratory Judgments Act. The Act weakened the standing requirement slightly by allowing "potential infringers to 'clear the air' by seeking declaratory relief in federal court instead of waiting for the patent owner to file an infringement suit."¹⁰⁰ The Declaratory Judgments Act allows courts, in some circumstances, to "declare the rights and other legal relations of any interested party seeking such declaration."¹⁰¹

The Act does not apply, however, to federal taxes.¹⁰² The Declaratory Judgments Act is mirrored by the Anti-Injunction Act, which prevents taxpayers from filing suits "for the purpose of restraining the assessment or collection of any tax."¹⁰³ Together, the Declaratory Judgments Act and the Anti-Injunction Act effectively prevent courts from engaging in any "pre-enforcement review of tax cases."¹⁰⁴ Thus, a church cannot challenge the campaigning prohibition until the IRS enforces the prohibition against it.

The Supreme Court has, however, carved out an exception to the general rule of individualized injury-in-fact. In *Flast v. Cohen*, it held that an individual sometimes has standing to challenge legislation solely as a result of her status as a taxpayer.¹⁰⁵ This type of standing-without-individualized-harm occurs when a taxpayer can (a) establish a link between her status as a taxpayer and the challenged legislation and (b) demonstrate a "nexus between that status and the precise

99. *Cf. Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 36 (1976) (holding the indigent taxpayers lacked standing to challenge the IRS's grant of exemption to hospitals that did not provide free care).

100. Amelia Smith Rinehart, *Patent Cases and Public Controversies*, 89 NOTRE DAME L. REV. 361, 367 (2013).

101. 28 U.S.C. § 2201(a) (2012).

102. *Id.* (stating that courts can generally provide declaratory relief to litigants "except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986").

103. I.R.C. § 7421(a) (2012).

104. Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1167 (2008).

105. 392 U.S. 83, 102 (1968).

nature of the constitutional infringement alleged.”¹⁰⁶ This type of standing eventually came to be known as “Establishment Clause standing,” and allowed taxpayers standing to “challenge government support of religion as a violation of the Establishment Clause, even where they suffered no unique personal injury.”¹⁰⁷

Establishment Clause standing is not a solution, however, for taxpayers who wish to challenge the IRS’s nonenforcement of the campaigning prohibition. Though the Supreme Court has not overturned *Flast*, it has subjected *Flast* to a “highly literal interpretation” that significantly limits its applicability.¹⁰⁸ Under the Court’s highly literal interpretation, an individual can only demonstrate Establishment Clause standing where “moneys have been extracted from a citizen and handed to a religious institution in violation of the citizen’s conscience.”¹⁰⁹ That is, to invoke Establishment Clause standing, a potential litigant who has not suffered individualized harm must show both taxing *and* spending.¹¹⁰ The IRS’s neglect in enforcing the campaigning prohibition does not implicate both, and therefore, taxpayers would need to show individualized injury. Because they have no individualized injury, they cannot access the judiciary through the alternative Establishment Clause standing route, either.¹¹¹

Moreover, even if a taxpayer had standing to sue, she could not force the IRS to enforce the campaigning prohibition. In 1985, the Supreme Court held, in *Heckler v. Chaney*, that administrative agencies have a type of prosecutorial discretion.¹¹² This administrative discretion generally gives

106. *Id.*

107. Linda Sugin, *The Great and Mighty Tax Law: How the Roberts Court Has Reduced Constitutional Scrutiny of Taxes and Tax Expenditures*, 78 BROOK. L. REV. 777, 798 (2013).

108. *Id.* at 800.

109. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448 (2011).

110. *See* Sugin, *supra* note 107, at 800.

111. *See Ariz. Christian Sch. Tuition Org.*, 131 S. Ct. at 1447 (stating that a government’s decision to decline imposing a tax renders any injury speculative, and thus cannot provide proper standing).

112. 470 U.S. 821, 837–38 (1985) (“The FDA’s decision not to take the enforcement actions requested by respondents is therefore not subject to judicial review under the APA.”). *But see* *Freedom From Religion Found., Inc. v. Shulman*, 961 F. Supp. 2d 947, 954 (W.D. Wis. 2013) (“The IRS’s second and third arguments fail because they depend on the false premise that the Foundation is challenging the IRS’s policy pursuant to the APA. In fact, the Foundation is challenging that policy pursuant to the Fifth Amendment’s equal-protection

agencies leeway to decline to enforce statutes and shields their inaction from judicial review.¹¹³

The Supreme Court grounded the right of the Executive Branch to refuse to enforce laws in three main considerations. First, the decision not to enforce requires agencies to balance a number of factors, including whether a violation has occurred and whether the agency's resources are best spent addressing the violation in question.¹¹⁴ The agency has better access to the various priorities that need ordering than does the court.¹¹⁵ Second, the Supreme Court noted that, in refusing to act, agencies do not exercise coercive power over liberty or property.¹¹⁶ Finally, the Supreme Court recognized that an agency's refusal to act was similar to the decision not to "indict—a decision which has long been regarded as the special province of the Executive Branch."¹¹⁷

Though agencies, including the IRS, enjoy a large amount of discretion with respect to inaction, they do not enjoy unfettered discretion. With the right facts, litigants can overcome the presumption of immunity from judicial review that agency inaction carries.¹¹⁸ The responsibility for making agency inaction reviewable by the courts lies first with Congress.¹¹⁹ Congress can explicitly require an agency to enforce the law.¹²⁰

Heckler also leaves open the possibility that an agency's inaction may be subject to judicial review if it has adopted a policy of nonenforcement so extreme that the policy amounts "to an abdication of its statutory responsibilities."¹²¹ The

component and the Establishment Clause.”).

113. Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 653 (1985).

114. *Heckler*, 470 U.S. at 831; see also Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1564 (2014) (stating that administrative discretion is grounded in the fact that “execution of the law requires applying the law to facts, making policy judgments about enforcement, and even at times determining the facts relevant for enforcement”).

115. See *Heckler*, 470 U.S. at 831–32.

116. *Id.* at 832. In the tax context, this assertion may not be entirely true; to the extent the IRS refuses to collect taxes that would otherwise be due, other taxpayers must make up the lost revenue.

117. *Id.*

118. *Id.* at 832–33.

119. *Id.* at 833.

120. *Id.* at 834–35.

121. *Id.* at 833 n.4.

opinion does not ultimately address the contours of agency abdication, however. The Supreme Court has not yet revisited the question of agency abdication.¹²²

Although litigants periodically raise abdication questions, courts have not had the opportunity to explore the specifics of agency abdication. Rather, they find that, even if abdication of agency responsibilities permits judicial review, litigants have failed to demonstrate agency abdication.¹²³ Ultimately, though, potential litigants should not take comfort in the existence of this abdication exception to administrative discretion. It is “admittedly vague and not easily subject to judicial administration,” and, as a result, “will usually amount to a judicially underenforced constraint.”¹²⁴ Instead, judges will principally use it as a backstop available “in extreme cases.”¹²⁵

The IRS’s failure to revoke the tax exemptions of churches that violate the campaigning prohibition appears to fall squarely within the protected area of *Heckler v. Chaney*. The Code states that an exempt church is one “which does not participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office.”¹²⁶ The Code expressly anticipates that tax exempt organizations will lose their exemption as a result of campaigning.¹²⁷ It does not, however, explicitly require the IRS to enforce the campaigning prohibition, nor does it contain any other language indicating “an intent to circumscribe [IRS] enforcement discretion.”¹²⁸ Even though the Code makes clear

122. *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 166 (2d Cir. 2004) (“The Court had no occasion in deciding *Chaney*, however, nor has it had occasion since, to apply this hypothetical ‘abdication’ principle to the presumption of non-reviewability.”).

123. *See, e.g., id.* at 170–71; *Balt. Gas & Elec. Co. v. F.E.R.C.*, 252 F.3d 456, 461 (D.C. Cir. 2001) (“Similarly, we cannot say that settlement is an ‘extreme’ policy that amounts to ‘an abdication of [FERC’s] statutory responsibilities.’”); *N.Y. State Dep’t of Law v. FCC*, 984 F.2d 1209, 1220 (D.C. Cir. 1993); *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997) (“We reject out-of-hand the State’s contention that the federal defendants’ alleged systemic failure to control immigration is so extreme as to constitute a reviewable abdication of duty.”).

124. Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now”: When Agencies Defer Decisions*, 103 GEO. L.J. 157, 162 (2014).

125. *Id.*

126. I.R.C. § 501(c)(3) (2012).

127. § 504(a) (2012) (stating that an organization that loses its exemption under section 501(c)(3) for violating the campaigning prohibition cannot become exempt under section 501(c)(4)).

128. *Heckler v. Chaney*, 470 U.S. 821, 834 (1985).

that if a church campaigns for or against a candidate for office, it no longer qualifies as tax-exempt, Congress has not expressly required the IRS to revoke the exemption of an organization that violates the rule.¹²⁹ As such, under the Supreme Court's interpretation of agency discretion, the courts have no jurisdiction to require the IRS to enforce the campaigning prohibition by revoking churches' tax exemptions.¹³⁰

The only explicit mention of the IRS revoking a public charity's (including a church's) exemption comes in the Treasury regulations.¹³¹ Congress delegated the authority to write regulations to the Treasury,¹³² meaning that regulatory mandates are insufficient to overcome the presumption of agency discretion. Even if Congress were to adopt the language of the regulation into the Code, the IRS would maintain its discretion not to revoke a church's tax exemption.¹³³ The regulation lays out the process by which the IRS revokes an entity's tax exemption, but does not require the IRS to do so.¹³⁴

Even if an agency's abdication of its responsibility is sufficient to grant judicial oversight to agency inaction, it is unlikely that the IRS's failure to revoke offending churches' exemptions would qualify as an abdication. The IRS's general failure to enforce the campaigning prohibition does not derive from any policy, formal or informal, that "expressly abdicat[es] any relevant statutory responsibility."¹³⁵ Nor could a court infer that the IRS has an implicit policy abdicating its responsibility for enforcing the campaigning prohibition.¹³⁶ In fact, the IRS has, at times, investigated allegations of churches campaigning.¹³⁷ Even though the IRS ultimately decided not to

129. See § 501(c)(3) (lacking language explicitly directing IRS to enforce campaigning prohibition).

130. *Heckler*, 470 U.S. at 834.

131. See Treas. Reg. § 601.201(n)(6)(i) (as amended in 2002) ("An exemption ruling or determination letter may be revoked or modified by a ruling or determination letter . . .").

132. I.R.C. § 7805(a) (2012) ([T]he Secretary [of the Treasury Department] shall prescribe all needful rules and regulations for the enforcement of this title . . .").

133. *Heckler*, 470 U.S. at 834.

134. Treas. Reg. § 601.201(n)(6)(a) (as amended in 2002) (providing that exemption may be revoked "by a ruling or determination letter addressed to the organization, or by a revenue ruling or other statement published in the Internal Revenue Bulletin").

135. *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 166 (2d. Cir. 2004).

136. See, e.g., *id.* at 167.

137. See Brunson, *supra* note 6, at 151 (discussing the IRS's 2004 PACI).

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revoke the tax exemption of any churches,¹³⁸ it is hard to convincingly argue that it has entirely abdicated its statutory responsibility. Taxpayers are left with no way to challenge the IRS's nonenforcement of the campaigning prohibition in court. As a result, the IRS acts as the sole gatekeeper to judicial review of the campaigning prohibition, a topic discussed in greater detail below.

IV. THE IRS IS THE GATEKEEPER TO JUDICIAL REVIEW

In theory, the IRS should have little difficulty enforcing the campaigning prohibition against churches. When it comes to the IRS's attention that a church has endorsed or opposed a candidate for office,¹³⁹ the IRS can simply draft a private letter ruling that revokes the church's tax exemption.¹⁴⁰

In spite of the technical ease with which the IRS could revoke the tax exemptions of churches that violate the campaigning prohibition, there exist a number of impediments, both legal and practical, to the IRS's doing so. The principal legal impediment is the process the IRS must follow in attempting to revoke a church's tax exemption. In general, the IRS faces little difficulty in initiating and pursuing audits of taxpayers.¹⁴¹ It has statutory authority to audit any

138. *Id.*

139. I mean "comes to the I.R.S.'s attention" quite literally. Certainly the IRS can search out churches that endorse candidates, but, in many cases, such IRS effort proves unnecessary. Watchdog groups can and do report church political endorsements to the IRS. See, e.g., *FFRF Sues IRS to Enforce Church Electioneering Ban*, FREEDOM FROM RELIGION FOUND. (Nov. 14, 2012), <http://ffrf.org/news/news-releases/item/16091-ffrf-sues-irs-to-enforce-church-electioneering-ban> [<http://perma.cc/8HVS-ECWZ>] ("FFRF has sent letters of complaint to the IRS involving 27 other [church electioneering] violations so far this year."); Stephanie Strom, *Watchdog Group Accuses Churches of Political Action*, N.Y. TIMES (Oct. 26, 2006), <http://www.nytimes.com/2006/10/26/washington/26church.html> [<http://perma.cc/2SAE-2EYF>] (explaining that Citizens for Responsibility and Ethics in Washington filed complaint asking the IRS to investigate role of two churches in Kansas election).

140. See, e.g., I.R.S. Priv. Ltr. Rul. 2007-24-033 (June 15, 2007) (revoking exempt organization's tax exemption for, inter alia, buying full-page newspaper advertisement opposing candidate, sending 8,000 mailings opposing candidate, and sending emails opposing candidate); I.R.S. Tech. Adv. Mem. 91-17-001 (Sep. 5, 1990) (revoking tax-exempt organization's exemption because its voter education activities in fact supported particular candidates for office).

141. *United States v. Powell*, 379 U.S. 48, 57 (1964) ("[T]he Commissioner need not meet any standard of probable cause to obtain enforcement of his summons . . .").

taxpayer,¹⁴² as well as the authority to summon people and records—and take their testimony under oath—in the course of its examination.¹⁴³ The IRS does not have *carte blanche* in its audits, of course: it cannot make unnecessary or overly frequent examinations¹⁴⁴ and cannot infringe a taxpayer's constitutional rights.¹⁴⁵ But as long as the IRS stays within these boundaries, it can audit taxpayers because it is suspicious that they have violated the tax law, or even just for assurance that they have not.¹⁴⁶

A. Church Audits

The IRS faces additional impediments in revoking a church's exemption, though.¹⁴⁷ In enacting the special procedures governing the IRS's audit of churches, Congress was “motivated by two competing considerations.”¹⁴⁸ First, it was concerned that IRS church audits implicated the separation of church and state and, moreover, the churches lacked experience in interacting with the IRS.¹⁴⁹ At the same time, Congress did not want to entirely prevent the IRS from auditing churches because taxpayers had increasingly been using the church form to evade taxes.¹⁵⁰

To ensure that the IRS did not speciously intrude on churches' constitutionally mandated autonomy, Congress enacted specific and burdensome procedures governing all aspects of church audits. For the IRS to open a church tax inquiry, it must first have an “appropriate high-level Treasury official” sign off on the inquiry.¹⁵¹ Only Regional Commissioners and higher Treasury officials qualify as sufficiently high-level to initiate a church tax inquiry.¹⁵² The IRS must then send a very specific notice to the church,

142. I.R.C. § 7601(a) (2012).

143. *Id.* § 7602(a) (2012).

144. *Id.* § 7605(b) (2012).

145. *Raheja v. Comm'r*, 725 F.2d 64, 66–67 (7th Cir. 1984).

146. *Powell*, 379 U.S. at 57.

147. § 7611(a) (2012).

148. STAFF OF THE JOINT COMM. ON TAX'N, 98TH CONG., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984 at 1139 (Comm. Print 1984).

149. *Id.* at 1139–40.

150. *Id.* at 1140.

151. § 7611(a)(2).

152. Treas. Reg. § 301.7611-1, Q&A 1 (as amended in 2002).

explaining its concerns, the administrative and constitutional provisions applicable to the inquiry, and the provisions of the Code that authorize the inquiry.¹⁵³

Even after the IRS has met these predicate requirements, it faces burdensome restrictions on the actual examination of the church. For example, it can only examine church records to the extent necessary to determine the liability for and amount of taxes a church may owe and to determine whether the church is, in fact, a church.¹⁵⁴ The IRS must provide a church with notice of an examination and a list of records it intends to examine at least fifteen days in advance of the examination.¹⁵⁵ And once it has begun an inquiry or examination, the IRS must complete it within two years.¹⁵⁶

Even if the IRS gets permission to audit a church, and determines over the course of the audit that the church had engaged in prohibited campaigning, it cannot revoke the church's tax exemption the same way it would revoke a non-church public charity's exemption.¹⁵⁷ Instead, the appropriate IRS regional counsel must determine, in writing, that the IRS complied with the church inquiry procedures and approve, in writing, the revocation.¹⁵⁸ And if the IRS undertakes an inquiry that does not end in revocation or significant changes in the church's operational practices, it cannot open a new inquiry during the next five years unless the appropriate Assistant Commissioner approves the new inquiry.¹⁵⁹

Still, this arduous procedure alone cannot fully explain the notable absence of church exemptions that have been revoked as a result of proscribed campaigning. In 2014 alone, more than 1,600 churches participated in the ADF's Pulpit Freedom Sunday, explicitly endorsing or opposing a candidate for office in their sermons.¹⁶⁰ But in the more than sixty-year existence of the campaigning prohibition, the IRS has virtually never revoked a church's exemption.¹⁶¹

153. I.R.C. § 7611(a)(3)(B).

154. *Id.* § 7611(b)(1).

155. *Id.* § 7611(b)(2)–(3).

156. *Id.* § 7611(c)(1).

157. *See id.* § 7611(d)(1).

158. *Id.*

159. Treas. Reg. § 301.7611-1, Q&A 16 (as amended in 2002).

160. Bade, *supra* note 11.

161. Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145, 159 (2006) ("In the fifty-four years following the passage of the prohibition, only

The IRS has not explained why it has declined, on such a consistent basis, to enforce the campaigning prohibition. In an earlier article, I proposed that its failure to revoke churches' tax exemptions results from a combination of a number of factors, including the extreme nature of the penalty, with potentially catastrophic consequences to a church.¹⁶² Moreover, this extreme, catastrophic penalty would likely raise very little additional revenue for the government.¹⁶³ At the same time, the IRS could expect significant public displeasure, as the public has blamed the IRS for acting in an unreasonable, draconian manner,¹⁶⁴ even though it was following the law as enacted by Congress. And, it is not just the public. Even members of Congress—despite having passed every provision of the Code—have attempted to shift the blame for unpopular tax provisions to the IRS. For example, “[m]embers of Congress often disingenuously refer to the ‘IRS Code,’ instead of the Internal Revenue Code, implying that the IRS is the originator of the Code.”¹⁶⁵

Looking at the question of enforcing the campaigning prohibition from this perspective, the IRS's drastic underenforcement makes logical sense. If it enforced the campaigning prohibition, the IRS would risk widespread and severe blowback with little tangible benefit to show for it.¹⁶⁶ As such, the IRS has every incentive to exercise its administrative discretion and not address church political campaigning.¹⁶⁷

two churches have ever lost their tax-exempt status and only two others have been required to pay excise taxes.”)

162. Brunson, *supra* note 6, at 152 (“[T]he penalty for campaigning is draconian, even where the infraction is minor or unintentional.”).

163. *Id.* at 153.

164. *Id.*

165. Robert J. Peroni, *Tax Reform Interrupted: The Chaotic State of Tax Policy in 2003*, 35 MCGEORGE L. REV. 277, 315 (2004).

166. Brunson, *supra* note 6, at 153–54.

167. Put another way, at some point in enforcing the campaigning prohibition, the utility to the IRS begins to decrease, in part because it “has considerations other than just maximizing revenue, including political and media pressure and proportionality.” Andrew Blair-Stanek, *Tax in the Cathedral: Property Rules, Liability Rules, and Tax*, 99 VA. L. REV. 1169, 1210 (2013).

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DEAR IRS, IT IS TIME TO ENFORCE

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B. The Impact of Churches on American Politics

The United States political system appears to have survived the last sixty years¹⁶⁸ relatively unscathed, in spite of the lack of definitive judicial review of the constitutionality of the campaigning prohibition. It is fair to ask whether there is any justification for the IRS to begin enforcing the campaigning prohibition if the political system can absorb church campaigning without ill effects. The answer is clearly yes. In the first instance, the question assumes, problematically, that the political system has absorbed church campaigning unscathed.

Even if the political system has remained unaffected by church participation in politics, moreover, I argue that there are at least three compelling reasons for the enforcement of the campaigning prohibition against churches. First, the IRS should enforce the law as written. Second, Congress should be required to stand behind the law it has written. Third, enforcement would allow churches to place the constitutionality of the prohibition in front of the courts.¹⁶⁹

We cannot know, of course, what the political system would look like if the IRS had enforced the campaigning prohibition against churches over the last six decades. Presumably, though, it would be different from what we experience today.¹⁷⁰ Clergy have the resources and opportunity to influence parishioners.¹⁷¹ Parishioners, at the same time, tend to be “receptive to the political cues [clergy] transmit.”¹⁷² In fact, clergy and churches have played “integral roles in

168. Congress added the campaigning prohibition to the Internal Revenue Code in 1954. Brunson, *supra* note 6, at 135.

169. These three reasons apply irrespective of whether there have been any substantive changes in the legal or social landscape surrounding the prohibition. There have, however, been significant changes in both—changes that provide an additional compelling reason for the IRS not only to begin enforcing the campaigning prohibition, but to begin enforcing it immediately. See *infra* Section IV.C.

170. Even if the campaigning prohibition was largely effective, albeit unenforced, and the vast majority of churches did not endorse or oppose candidates for office, at the very least, church endorsements would have had a marginal effect on the political system.

171. Corwin E. Smidt, *Theological and Political Orientation of Clergy Within American Politics: An Analytical and Historical Overview*, in PULPIT AND POLITICS: CLERGY IN AMERICAN POLITICS AT THE ADVENT OF THE MILLENNIUM 3, 6 (Corwin E. Smidt ed., 2004).

172. *Id.* at 7.

American politics since the colonial period.”¹⁷³ If churches have played such an important role in American politics over such a long period, there is no reason to believe that their influence has substantively diminished in the last sixty years.¹⁷⁴

At the same time, though, Congress decided in 1954 to limit churches’ (and other public charities’) ability to influence partisan elections by banning them from campaigning.¹⁷⁵ Had the IRS consistently enforced the campaigning prohibition, churches would have engaged in less campaigning.¹⁷⁶ It is precisely this type of influence that the campaigning prohibition was intended to prevent.¹⁷⁷ Though we cannot see the world we would have had if churches refrained from endorsing candidates, we know that it would be different than the world that Congress envisioned when it enacted the campaigning prohibition. As a result, the IRS’s lack of enforcement has had a real-world effect on our current political system, one contrary to the vision of the law as enacted.

173. Laura R. Olson & Sue E. S. Crawford, *Clergy in Politics: Political Choices and Consequences*, in *CHRISTIAN CLERGY IN AMERICAN POLITICS* 3, 3 (Sue E. S. Crawford & Laura R. Olson eds., 2001).

174. Churches may have seen some diminution in influence over recent years; between 2007 and 2014, the number of adults in the United States who do not affiliate with a particular religion has increased from 16.1 percent to 22.8 percent. PEW RESEARCH CTR., *AMERICA’S CHANGING RELIGIOUS LANDSCAPE* 3 (2015), <http://www.pewforum.org/files/2015/05/RLS-05-08-full-report.pdf> [<http://perma.cc/NXV5-DA28>]. But even with the drastic increase in religiously-unaffiliated Americans, more than 76 percent of Americans claim a religious affiliation. *Id.* at 4. While churches’ influence may have declined, then, they still reach the vast majority of Americans.

175. See Brunson, *supra* note 6, at 135.

176. One purpose behind revoking a public charity’s tax-exempt status if it violates the campaigning prohibition is that such a draconian penalty will deter charities from campaigning. Blair-Stanek, *supra* note 167, at 1200. Though Professor Blair-Stanek argues that status loss is a less effective form of deterrence, its ineffectiveness derives from the IRS’s hesitance to impose the status loss. *Id.* If the IRS had consistently enforced it, notwithstanding its draconian nature, fewer churches would have endorsed or opposed candidates, thus risking the loss of their exemption, over the last sixty years.

177. The actual legislative intent behind the campaigning prohibition is inscrutable. The prohibition was introduced by Senator Lyndon Johnson on the floor of the Senate, and was enacted without any hearings or debate. Allan J. Samansky, *Tax Consequences when Churches Participate in Political Campaigns*, 5 *GEO. J.L. & PUB. POL’Y* 145, 156–57 (2007).

C. A Normative Case for Revoking Church Exemptions

Even if the IRS's nonenforcement has not affected the course of the U.S. political system, there are at least three reasons that the IRS should begin enforcing the prohibition and should begin its enforcement as soon as practicable. First, the IRS is charged with enforcing the tax law as written.¹⁷⁸ Though the IRS has administrative discretion,¹⁷⁹ such discretion is neither legally nor pragmatically boundless. Although the IRS has broad administrative discretion, it cannot have a policy of abdicating its statutory obligation.¹⁸⁰

178. See Archie Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360, 1362 (1980) ("It is thus . . . the duty of the IRS as part of the executive branch to ensure that those laws are 'faithfully executed.'").

179. See *supra* notes 112–144 and accompanying text.

180. *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985). It is worth noting that one district court has challenged the idea that the IRS has administrative discretion in this regard. That court held that the administrative discretion granted to the IRS is limited to claims brought pursuant to the Administrative Procedure Act. *Freedom From Religion Found., Inc. v. Shulman*, 961 F. Supp. 2d 947, 954 (W.D. Wis. 2013). If that court's understanding of the scope of administrative discretion is correct, it is possible that courts could review the IRS's decision not to enforce the campaigning prohibition against churches. *Id.* It is not clear, however, that the court was correct in its understanding of the source and scope of administrative discretion. The court assumes that administrative discretion derives solely from the Administrative Procedure Act (APA), but does not cite to any precedent or otherwise justify that assumption. In fact, its full analysis takes three sentences:

The IRS's second and third arguments [regarding sovereign immunity and administrative discretion] fail because they depend on the false premise that the Foundation is challenging the IRS's policy pursuant to the APA. In fact, the Foundation is challenging that policy pursuant to the Fifth Amendment's equal-protection component and the Establishment Clause. Thus, the limitations on claims brought pursuant to the APA—including the requirement that the claim involve a final agency action, see 5 U.S.C. § 704, and the requirement that the claim not involve a matter committed to agency discretion by law, 5 U.S.C. § 701(a)(2)—do not apply.

Id. Although the court does not explain how it arrived at the conclusion that administrative discretion is based solely on the APA, the nonenforcement that gave rise to the Supreme Court's recognition of administrative discretion was brought pursuant to the APA. *Heckler*, 470 U.S. at 823. The Supreme Court found that the APA did provide a narrow bar to the judicial review of agency inaction. *Id.* at 837. It also said that the respondents did not raise a colorable constitutional claim, so "we do not address the issue that would be raised in such a case." *Id.* No subsequent decisions have addressed the question of whether administrative discretion exists when claims of nonenforcement arise pursuant to the Constitution. As a result, while the IRS's general failure to enforce the campaigning prohibition against churches *may* be judicially reviewable, such a

Even if the IRS's decision not to enforce the campaigning prohibition against churches does not represent an abdication of its responsibilities—thereby making it judicially unreviewable—for pragmatic and policy purposes the IRS should enforce it. As a normative matter, without some countervailing consideration such as resource allocation or ambiguity in the law, the law should be enforced. And here, the law is clear: churches cannot campaign for or against candidates for office *and* be exempt from taxation.¹⁸¹ Moreover, the campaigning prohibition is not an obscure part of the tax law—national media report on the prohibition on a relatively regular basis.¹⁸² As a result, when taxpayers hear or read about a church's endorsement of a candidate, and then see the church face no repercussions for its violation of the tax law, the news solidifies the public's perception that the IRS selectively enforces the tax law.¹⁸³ Such selective enforcement provides at best the image of an IRS willing to show favoritism, rather than enforce the tax law objectively.

In addition to the pragmatic desire that taxpayers see the tax law being enforced, the invocation of administrative discretion stands in dissonance with the rule of law. Allowing an agency the discretion to allocate its scarce enforcement resources risks transforming agency knowledge into a vehicle for biased administration of the tax law.¹⁸⁴ Professor Lawrence Zelenak notes that for those who “take[] the rule of law seriously, it is troubling to contemplate that the Treasury and the IRS are almost unconstrained in their ability to make de facto revisions to the Internal Revenue Code enacted by Congress, as long as those revisions are in a taxpayer-favorable direction.”¹⁸⁵

conclusion is far from certain.

181. I.R.C. § 501(c)(3) (2012) (mandating that entities exempt under section 501(c)(3) cannot “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office”).

182. *See supra* note 12.

183. *See, e.g.*, NINA J. CRIMM & LAURENCE H. WINER, *POLITICS, TAXES, AND THE PULPIT: PROVOCATIVE FIRST AMENDMENT CONFLICTS* 140 (2011) (“Commentators repeatedly have expressed worries that the IRS engages in selective and abusive enforcement of the gag rule.”).

184. Richard A. Epstein, *The Perilous Position of the Rule of Law and the Administrative State*, 36 HARV. J.L. & PUB. POL'Y 5, 15 (2013) (“Agency expertise instead became a cover for agency delay or agency bias.”).

185. Lawrence Zelenak, *Custom and the Rule of Law in the Administration of*

Even if its discretion with respect to enforcement cannot be reviewed judicially, exercising that discretion creates a real societal cost. It reduces the legal accountability of the IRS and weakens the public's perception that the tax law is administered subject to the rule of law.¹⁸⁶ Selective enforcement of the tax law—even if legally permitted and justified—hurts the IRS's reputation.¹⁸⁷ As the IRS exposes itself to accusations of bias,¹⁸⁸ those accusations can make the IRS's tax collection and enforcement endeavors more difficult, as it has to deal with an outraged public and skeptical lawmakers.¹⁸⁹

The harms attendant to the IRS's failure to enforce the campaigning prohibition do not just hobble the IRS's enforcement activities: they could, potentially, have a negative impact on church revenue as well. In 2006, Mark W. Everson, then the Commissioner of the IRS, asserted, "the scourges of technical manipulation and outright abuse that developed some years ago in the profit-making sector of the economy are now spreading to parts of the tax-exempt sector."¹⁹⁰ If the

the Income Tax, 62 DUKE L.J. 829, 851 (2012). Professor Zelenak goes on to assert that it is especially troubling if the IRS's ability to make taxpayer-favorable changes to the tax law has "bred a disrespect for the rule of law on the part of the Treasury and the IRS" in such a way that they believe they can disregard any portion of the Code where it conflicts with their vision of "good tax policy." *Id.* That is, although the IRS is using its discretion to benefit—rather than persecute—particular groups of taxpayers, its selective disregard of tax provisions nonetheless does systemic harm.

186. Though there is disagreement on what, exactly, constitutes the rule of law, in its broadest sense, it means that those in power cannot arbitrarily wield that power. See Peter M. Shane, *The Rule of Law and the Inevitability of Discretion*, 36 HARV. J.L. & PUB. POL'Y 21, 21 (2013).

187. See, e.g., Francis R. Hill, *Auditing the NAACP: Misadventures in Tax Administration*, TAX NOTES TODAY 147–21 (2005) ("At its core, the NAACP controversy arises from a combustible combination of a weak case on the merits with a muscular administrative response which together fuel concern about improper political influence on the Service in the closing days of a national election marked by intense concerns about the integrity of the voting process.").

188. In 2004, for example, "the IRS was accused of selective enforcement with regard to the political campaign ban." Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1356 (2007).

189. See, e.g., TANINA ROSTAIN & MILTON C. REGAN, JR., CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY 19 (2014) ("Although Congress regularly excoriated the IRS for its inadequacies, since the mid-1990s it had denied the agency the resources needed to improve performance.").

190. Mark W. Everson, I.R.S. Comm'r, *Remarks at the City Club of Cleveland, Ohio* (Feb. 24, 2006), <http://www.irs.gov/uac/Remarks-of-IRS-Commissioner-Mark-W.-Everson-at-the-City-Club-of-Cleveland,-Ohio> [<http://perma.cc/3DPQ->

public became cognizant of these abuses, he continued, it would lose faith in public charities and would “stop giving and those in need will suffer.”¹⁹¹

If the IRS enforces the campaigning prohibition against churches, selecting the churches it will audit in an unbiased manner,¹⁹² it can demonstrate its willingness to enforce the tax law. At the same time, it can undercut accusations of selective enforcement, accusations that could be used to further cut its funding or discourage the public from respecting and complying with its administrative actions. Enforcement could further help churches avoid losing the public’s faith by encouraging them to follow the (well-known) law as written.

A second reason why the IRS should begin enforcing the campaigning prohibition as soon as practicable is that, by enforcing the campaigning prohibition, the IRS would force Congress to stand behind the law it has written. As a result of the IRS’s current nonenforcement, Congress can choose to claim credit for the prohibition, to condemn it, or both, depending solely on political expediency. The prohibition is in place, but Congress has no incentive to investigate whether, as a policy matter, the campaigning prohibition still makes sense.¹⁹³ Academics have ceaselessly debated the wisdom and constitutionality of the campaigning prohibition;¹⁹⁴ activists

D6JC]. Most recently, those abuses include shady accounting practices by putative cancer charities, intended to enrich the charities’ officers at the expense of both donors and cancer victims. See Rebecca R. Ruiz, *4 Cancer Charities Are Accused of Fraud*, N.Y. TIMES, May 20, 2015, at B1.

191. Everson, *supra* note 190; cf. Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1409–10 (2005) (noting that though the causal connection is not clear, “[t]he results of the tax study suggest that exposure to reports of an unjust legal outcome in a particular situation might lead to lower perceived fairness of the law more generally, which in turn can lead to noncompliance with the law in the future”).

192. I discuss an easy way to find churches violating the campaigning prohibition at low cost and without political bias *infra* notes 289–294 and accompanying text.

193. Cf. Martin A. Sullivan, *Economic Analysis: The Revenue Costs of Nontraditional REITs*, 144 TAX NOTES 1103, 1107 (2014) (“Because REITs are not getting the same scrutiny as the emotionally charged issue of corporate inversions, Congress is unlikely to intervene except as part of tax reform—which means nothing will happen anytime soon.”).

194. Since 2001 alone, there have been dozens of law review articles addressing the campaigning prohibition as it relates to churches. See, e.g., Nicholas P. Cafardi, *Saving the Preachers: The Tax Code’s Prohibition on Church Electioneering*, 50 DUQ. L. REV. 503 (2012); Brunson, *supra* note 6; Leff, *supra* note 59; Johnny Rex Buckles, *Does the Constitutional Norm of Separation of Church and State Justify the Denial of Tax Exemption to Churches that Engage in*

have argued and litigated for and against it;¹⁹⁵ Congress has even held hearings on the issue.¹⁹⁶

But Congress has not acted. Presumably, by reenacting the campaigning prohibition in the Tax Reform Act of 1986,¹⁹⁷ Congress signaled that it still considered the prohibition good policy. Still, as a practical matter, the fact that the IRS has consistently followed a policy of nonenforcement weakens the presumption of congressional intent. It is equally possible that members of Congress, aware that the IRS had virtually no history of enforcing (and no incentive to enforce) the campaigning prohibition, decided not to expend the political capital it would require to reevaluate the benefits and costs of the prohibition.

Partisan Political Speech?, 84 IND. L.J. 447 (2009); Keith S. Blair, *Praying for a Tax Break: Churches, Political Speech, and the Loss of Section 501(c)(3) Tax Exempt Status*, 86 DENV. U.L. REV. 405 (2009); Johnny Rex Buckles, *Is the Ban on Participation in Political Campaigns by Charities Essential to Their Vitality and Democracy? A Reply to Professor Tobin*, 42 U. RICH. L. REV. 1057 (2008); Tobin, *supra* note 188; Samansky, *supra* note 177; Vaughn E. James, *The African-American Church, Political Activity, and Tax Exemption*, 37 SETON HALL L. REV. 371 (2007); Mark Totten, *The Politics of Faith: Rethinking the Prohibition on Political Campaign Intervention*, 18 STAN. L. & POL'Y REV. 298 (2007); Jennifer M. Smith, *Morse Code, Da Vinci Code, Tax Code and . . . Churches: An Historical and Constitutional Analysis of Why Section 501(c)(3) Does Not Apply to Churches*, 23 J.L. & POL. 41 (2007); Hatfield, *supra* note 19; Douglas H. Cook, *The Politically Active Church*, 35 LOY. U. CHI. L.J. 457 (2004); Vaughn E. James, *Reaping Where They Have Not Sowed: Have American Churches Failed to Satisfy the Requirements for the Religious Tax Exemption?*, 43 CATH. LAW. 29 (2004); Ann M. Murphy, *Campaign Signs and the Collection Plate—Never the Twain Shall Meet?*, 1 PITT. TAX REV. 35 (2003); Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; To What End?*, 42 B.C. L. REV. 903 (2001); Steffen N. Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875 (2001).

195. For example, the Freedom From Religion Foundation sued the IRS to force it to enforce the campaigning prohibition against churches, *Freedom From Religion Found., Inc. v. Shulman*, 961 F. Supp. 2d 947, 954 (W.D. Wis. 2013), and ultimately settled the suit upon the IRS's agreement to start looking into church political campaigning. Press Release, *FFRF, IRS Settle Suit over Church Politicking*, FREEDOM FROM RELIGION FOUND. (July 17, 2014), <http://ffrf.org/news/news-releases/item/20968-ffrf-irs-settle-suit-over-church-politicking> [<http://perma.cc/XY6M-ERNX>]. Its efforts are countered by the ADF, which encourages religions to flout what it asserts is an unconstitutional condition the campaigning prohibition places on churches. Erik Eckholm, *Legal Alliance Gains Host of Court Victories for Conservative Christian Movement*, N.Y. TIMES, May 12, 2014, at A10.

196. See generally *Review of Internal Revenue Code Section 501(c)(3) Requirements for Religious Organizations: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 107th Cong. (2002).

197. Pub. L. No. 99-514, § 2(a), 100 Stat. 2085, 2095 (1986).

If retaining the prohibition in 1986 did in fact signal Congress's judgment that the campaigning prohibition is good policy, the IRS's enforcement of the prohibition would align its actions with Congress's desires. This could lead to less friction between the two, as well as to better-functioning administration of the tax law.¹⁹⁸ If the IRS's nonenforcement just enables Congress to ignore the prohibition, though, and Congress does not stand behind its campaigning prohibition, the IRS's enforcement could spur Congress to revisit the wisdom of the campaigning prohibition. It could then make the changes necessary to ensure that the rules governing tax-exempt organizations better meet its current legislative goals.¹⁹⁹ In the end, whether or not Congress alters the prohibition, even its careful reconsideration of the prohibition has value.²⁰⁰ If Congress actively reviewed the prohibition and ultimately decided to keep it (or was politically unable to revise it), its retention would signal to churches that Congress did, in fact, intend the prohibition to apply to them.²⁰¹ Congress's

198. Congress and the IRS have an interdependent, if dysfunctional, relationship: Congress needs the IRS to administer its tax laws and collect the revenue government needs to function, while the IRS needs Congress to fund it and authorize its activities. See Parnell, *supra* note 178, at 1360. As a result, aligning the goals of the IRS with those of Congress will be beneficial to both the IRS and Congress.

199. One viable approach to tax administration is for the IRS to enforce the Code as written, even if taxpayers are using the literal language of the Code to evade taxes. The IRS's faithful enforcement would "invite Congress to make its intent clear by amending the statute." ROSTAIN & REGAN, *supra* note 189, at 31; cf. Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165 (2002) ("[W]hen enactable preferences are unclear, often the best choice is instead a preference-eliciting default rule that is more likely to provoke a legislative reaction that resolves the statutory indeterminacy and thus creates an ultimate statutory result that reflects enactable political preferences more accurately than any judicial estimate possibly could.").

200. Elhauge, *supra* note 199, at 2175 ("[W]hat matters is really not the probability of legislative override itself, but of serious legislative reconsideration.").

201. The signal would not be perfectly clear, of course. In truth, Congress rarely overrides Supreme Court decisions. Between 1967 and 1990, Congress overrode just 121 Supreme Court statutory decisions. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 338 (1991). The rare override may occur because of a failure of the political system, specifically, when the winning side cannot effectively lobby Congress (because, for example, those who benefit are diffuse), or the Supreme Court is attuned to current, rather than past, congressional preferences. *Id.* at 377-78. Still, IRS enforcement of the campaigning prohibition, combined with a Supreme Court decision on its constitutionality, represents the most likely manner of forcing the current Congress to revisit the question of church campaigning. And,

keeping the prohibition after careful reconsideration would also tell churches that, like other tax-exempt organizations, they need to abide by the campaigning prohibition if they want to keep their tax exemption.²⁰²

The third reason the IRS should begin enforcing the campaigning prohibition is that IRS enforcement of the prohibition would allow churches to put the question of its constitutionality in front of the courts. In spite of the vast literature regarding the constitutionality of the campaigning prohibition as applied to churches,²⁰³ scholars still argue over whether it passes constitutional muster.²⁰⁴ Although the constitutionality of the prohibition as applied to religious organizations has been upheld by two federal appeals courts,²⁰⁵ the Supreme Court has never considered the question. Because of the Supreme Court's failure thus far to rule, and the uncertainty inherent in its Establishment Clause jurisprudence, the prohibition's constitutionality remains uncertain. Churches do not know whether they are bound by the campaigning prohibition, or whether it represents an unconstitutional limit on their free speech and their free exercise of religion.

The uncertainty engendered by this open constitutional question causes real harm to churches, even in the face of the IRS's history of nonenforcement. While churches are aware that the IRS has virtually never revoked a church's tax exemption for supporting or opposing a candidate for office,²⁰⁶

though rare, Congress does override Supreme Court statutory decisions.

202. As part of its 2004 PACI, the IRS ultimately revoked the exemptions of five of the fifty-nine non-church tax-exempt entities it examined; four of the revocations were for violating the campaigning prohibition. PACI REPORT, *supra* note 53, at 5. Although it also examined forty-six churches, it did not revoke a single church's exemption.

203. *See supra* note 194.

204. *See, e.g.*, Brunson, *supra* note 6, at 145–47 (describing arguments for and against the constitutionality of the campaigning prohibition).

205. *Christian Echoes Nat'l Ministry v. United States*, 470 F.2d 849, 856–57 (10th Cir. 1972) (“We hold that the limitations imposed by Congress in Section 501(c)(3) are constitutionally valid.”); *Branch Ministries v. Rossotti*, 211 F.3d 137, 145 (D.C. Cir. 2000) (“For the foregoing reasons, we find that the revocation of the Church's tax-exempt status neither violated the Constitution nor exceeded the IRS's statutory authority.”).

206. Revocation is not impossible, of course. Four days before the 1992 presidential election, the Church at Pierce Creek placed full-page ads in *USA Today* and the *Washington Times* encouraging readers to vote against Clinton. *Branch Ministries*, 211 F.3d at 140. At the end of the ad, the Church solicited “[t]ax-deductible donations for this advertisement.” *Id.*

the prohibition remains a condition for their exemption.²⁰⁷ Moreover, as long as the tax law includes the prohibition, the IRS could choose to enforce it in the future, or even enforce it retroactively.²⁰⁸ As a result, the constitutional uncertainty will likely prevent risk-averse churches from expressly endorsing candidates. The existence of the prohibition, whatever its constitutional status, could even cause these risk-averse churches to restrict their activities more than is necessary to ensure that they do not accidentally violate the prohibition.²⁰⁹ At the same time, aggressive churches will continue to flout the prohibition, secure in the knowledge that they are unlikely to face any repercussions from the IRS.²¹⁰

Though all tax-exempt churches should face the same requirements to maintain their exemption, the IRS's nonenforcement of a prohibition, which is enshrined in the tax law, allows churches to essentially elect whether they will meet the requirements for exemption or not. The ability of similarly situated churches to choose whether to be bound by the campaigning prohibition is unfair, and it violates the basic tax policy principle of horizontal equity.²¹¹ But without the IRS actually revoking a church's tax exemption for violating the campaigning prohibition, nobody will have standing to put the question in front of the courts.²¹²

207. I.R.C. § 501(c)(3) (2012).

208. If the IRS has decided that it does not want to enforce the prohibition, either because it does not want to expend the resources, it does not want any public backlash, or because it believes that the provision is unconstitutional, it would behoove the IRS to formally announce that policy. That formal announcement would provide churches with some degree of protection from retroactive enforcement; at the same time, it may demonstrate sufficient abdication of its statutory responsibilities, sufficient to allow judicial intervention. Treas. Reg. § 601.201(n)(6)(i) (as amended in 2002) ("The revocation or modification may be retroactive if the organization omitted or misstated a material fact, operated in a manner materially different from that originally represented, or engaged in a prohibited transaction . . .").

209. Brunson, *supra* note 6, at 154–55.

210. *Id.*

211. See, e.g., Richard A. Musgrave, *Horizontal Equity, Once More*, 43 NAT'L TAX J. 113, 113 (1990) ("The call for equity in taxation is generally taken to include a rule of horizontal equity[,] . . . requiring equal treatment of equals, and one of vertical equity[,] . . . [and] calling for an appropriate differentiation among unequals.").

212. See Brunson, *supra* note 93, at 232–35. Of course, the IRS does not *need* to revoke a church's tax exemption for the constitutionality question to become justiciable. If the IRS were, instead, to penalize a church by imposing the excise tax without simultaneously revoking its exemption, the church would have standing to sue to challenge the constitutionality of the limitations on speech and

In addition to nonenforcement's violation of horizontal equity between churches, the ambiguity associated with the campaigning prohibition neuters other benefits the prohibition provides to churches. Many churches do not want to participate in partisan politics.²¹³ The campaigning prohibition gives them a backstop against pressure to participate—even if politicians or parishioners want churches or their clergy to endorse or oppose a candidate for office, the campaigning prohibition provides churches and clergy with an excuse to recuse themselves.²¹⁴ To the extent that everybody knows that the IRS will not enforce the prohibition, though, the power of churches' excuse is diminished. Without the IRS acting, in other words, the unfairness that churches currently face will not end without any offsetting benefits to the churches.

Providing churches with standing to sue, however, imposes a real cost to the IRS, both in terms of money and time.²¹⁵ And the benefits to the IRS of allowing churches to litigate the constitutionality of the campaigning prohibition are less obvious. But such litigation does benefit the IRS. The resolution of the question would provide certainty not just to churches, but to the IRS itself. It has purportedly settled the

free exercise. But, while imposing an excise tax would permit judicial challenge to the overall regime, it does not respond to the other two reasons to begin enforcing the prohibition. If the IRS allows a noncompliant church to keep its exemption—even if it imposes the excise tax—the IRS fails in its duty to enforce the law as written. *See supra* Section II.C. Moreover, it does not force Congress to stand behind the regime that it has enacted and maintained over the course of six decades.

213. *See, e.g.*, Sue E. S. Crawford & Laura R. Olson, *Choices and Consequences in Context*, in CHRISTIAN CLERGY IN AMERICAN POLITICS, *supra* note 173, at 230 (“[M]any religious traditions have long applied strong normative pressure against explicitly partisan talk by clergy . . .”). While approximately 1,500 pastors participated in Pulpit Freedom Sunday in 2012, *see supra* note 3 and accompanying text, that is a small fraction of the estimated 46,510 clergy in the United States in May, 2013. *See* BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT AND WAGES – MAY 2014 at 11 (Mar. 25, 2015), <http://www.bls.gov/news.release/pdf/ocwage.pdf> [<http://perma.cc/R3ZA-B35L>].

214. Crawford & Olson, *supra* note 213, at 230 (“This legal context provides a concrete reason for clergy to steer clear of *party-oriented* politics and focus instead on *issue-oriented* politics.”).

215. The IRS is involved in all litigation arising out of the federal income tax. Attorneys in the IRS Office of Chief Counsel litigate in the Tax Court. Roberta Mann, *Chief Counsel's Subtle Impact on Revenue: Regulations, Litigation, and Administrative Guidance*, 65 NATL TAX J. 889, 893–94 (2012). Even when the Department of Justice actually litigates tax cases, though, the Office of Chief Counsel stays involved and works with the Department of Justice attorneys. *Id.* at 894.

Freedom From Religion Foundation's recent lawsuit by agreeing to enforce the campaigning prohibition against churches.²¹⁶ To some extent, its enforcement strategy will depend on the ultimate constitutionality of the campaigning prohibition as applied to churches. In the meantime, to protect its reputation as unbiased and dedicated to the rule of law,²¹⁷ the IRS needs an apolitical, neutral, and fair way to select test cases. Pulpit Freedom Sunday provides the IRS with just such an apolitical, neutral, and fair method to choose test cases. By revoking the exemptions of Pulpit Freedom Sunday participant churches while simultaneously explaining what it is doing and why, the IRS can open the gate to a judicial determination of the campaigning prohibition's constitutionality. Moreover, in opening the gate this way, it will do the least harm to itself while providing for the certainty churches and the tax system need.

V. EFFECTS ON CHURCHES OF REVOCATION

The churches involved in Pulpit Freedom Sunday rightfully see little risk in their participation. No church has ever lost its exemption for participation in Pulpit Freedom Sunday.²¹⁸ Moreover, although the IRS has allegedly agreed to begin enforcing the campaigning prohibition against churches, it has also delayed the implementation of its enforcement.²¹⁹ It has also not described what its enforcement would look like. Unless and until the IRS credibly signals that it will robustly enforce the campaigning prohibition, churches can reasonably expect the status quo to extend into the foreseeable future. The IRS's past actions have signaled clearly that enforcing the campaigning prohibition, at least against churches, is such a low priority that they can effectively ignore the tax law.

Even if churches believed that the IRS would enforce the

216. See *supra* note 195.

217. See *supra* notes 184–189 and accompanying text.

218. Adelle M. Banks, *Religious, Secular Advocates Seek Clarity on IRS Rules for Endorsements*, HUFFINGTON POST (Feb. 1, 2015, 9:59 AM) (“There’s [sic] been no prosecutions to date” for participating in Pulpit Freedom Sunday.), http://www.huffingtonpost.com/2015/02/01/religious-irs-endorsement-rules_n_6579864.html [<http://perma.cc/UL4R-F7AF>].

219. Kate Tracy, *IRS to Atheists: Okay, We’ll Investigate Pulpit Freedom Sunday Pastors*, CHRISTIANITY TODAY (July 25, 2014, 11:33 AM), <http://www.christianitytoday.com/gleanings/2014/july/irs-to-atheists-okay-well-investigate-pulpit-freedom-sunday.html> [<http://perma.cc/LHK3-CHV2>].

campaigning prohibition, presumably many participant churches would still be willing to risk the loss of their exemption. By participating in Pulpit Freedom Sunday, these churches have already demonstrated that the right to endorse a candidate for office is important to them; moreover, even if they believe that the IRS might revoke their exemptions, they could reasonably believe that their loss of exemption would not affect them in any substantive manner. On its website, the ADF assures churches that they face little risk in participating.²²⁰ It admits that the IRS could impose an excise tax, but that excise tax would “be difficult for the IRS to calculate and would probably not be very great in amount.”²²¹ Further, the ADF assures potential participant churches that “a church may [at worst] lose its tax exempt status for a very short time period, and [that] even if a church’s tax exempt 501(c)(3) letter is revoked, a church may once again be automatically considered tax exempt under the tax code if it agrees to abide by section 501(c)(3).”²²²

This Part will first describe the limited economic harm churches would face as a result of losing their exemptions. It will then explain why, in spite of that minimal harm, the threat of losing their exemptions would motivate churches to comply with the prohibition. Next it will address how a church might have its exemption reinstated. Finally, it will explain how merely tempering the penalty for violating the campaigning prohibition would not solve the constitutional question raised by the prohibition itself.

A. *Financial Impact of the Loss of Exemption*

Irrespective of the financial impact, churches would be loath to lose their tax exemption. Churches see their tax-exempt status as “essential to their ability to accomplish their religious and ethical obligations,”²²³ and they view the risk of losing their exemptions for engaging in what they view as protected speech as “fundamentally repugnant.”²²⁴ In many

220. *Pulpit Freedom Sunday FAQ*, *supra* note 20.

221. *Id.*

222. *Id.*

223. Wyatt McDowell, *How Religious Organizations and Churches Can Be Politically Correct*, 42 BRANDEIS L.J. 71, 77 (2003).

224. Dessingue, *supra* note 194, at 920.

ways, though, a church's loss of exemption would do more symbolic than financial harm. Ultimately, the impact of a loss of the deductibility of donations made by the church's donors would be limited by the fact that many church donors do not itemize and thus are not sensitive to such loss of deductibility.²²⁵

The tax law provides that donors to public charities, including churches, can deduct the amount of their donations in calculating their tax liability.²²⁶ Deductibility means that the federal government effectively subsidizes a donor's contribution by reducing the real cost of that contribution to the donor.²²⁷ But because charitable donations are an itemized donation, only donors who itemize their deductions benefit from the subsidy.²²⁸ Approximately one-third of taxpayers itemize their deductions,²²⁹ and higher-income taxpayers are far more likely than lower-income taxpayers to itemize their deductions.²³⁰ Although it is difficult to determine what percentage of church donors itemize, lower-income taxpayers tend to "favor religious organizations in making their charitable contributions."²³¹ Even though studies have demonstrated that charitable giving is price elastic,²³² non-itemizing donors effectively bear the full cost of their donations. The price of donating will not change for these donors merely because the church loses its exemption, and their donations would likely remain constant.

In addition, churches themselves will see very little change in their tax bills. Churches must already pay taxes at ordinary corporate rates on unrelated business income that they earn.²³³ At the same time, exempt or not, churches would not include donations in their taxable income.²³⁴ Like any other tax-

225. Faulhaber, *supra* note 29, at 1322 ("[T]he vast majority of taxpayers were not able to take the charitable deduction.").

226. I.R.C. § 170(a) (Westlaw through Pub. L. No. 114-49).

227. Faulhaber, *supra* note 29, at 1318.

228. *Id.* at 1321.

229. Brunson, *supra* note 6, at 164.

230. *Id.* at 165.

231. Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 846 (2001).

232. Faulhaber, *supra* note 29, at 1319.

233. I.R.C. § 511(a) (2012).

234. Donations to churches (or other charitable organizations) should be characterized as gifts; as gifts, they are not taxable to the recipient, whether or not the recipient is exempt from taxation. *Id.* § 102(a) (2012).

exempt organization, churches that engage in active businesses already pay taxes on the income they earn from their active businesses.²³⁵ The principal difference a church would face if it lost its exemption would be that it would have to pay taxes on its passive income, if any. If a church had a significant endowment, or otherwise invested significant funds in financial assets, it could see its tax liability increase from its loss of exemption.

Even given the marginal economic costs to churches of losing their tax exemptions, enforcing the campaigning prohibition against churches would likely lead to more compliance by churches. The IRS believes that publicizing its successful tax enforcement constitutes an important means of deterring others from violating the tax law.²³⁶ Even if it wanted to robustly enforce the campaigning prohibition, the IRS lacks the ability to audit every church for compliance.²³⁷ As a result, if the IRS wants to encourage churches that would violate the campaigning prohibition to comply with it instead, the IRS must magnify the impact of the enforcement actions it does undertake. If the IRS's intuition about publicity is correct, successfully revoking some churches' exemptions—and publicizing the fact that they have been revoked—would discourage other churches from violating the campaigning prohibition.

Some empirical evidence indicates that disclosing tax enforcement against certain taxpayers deters other taxpayers from violating the tax law.²³⁸ This empirical evidence does not speak precisely to the situation churches face, but focuses

235. *Id.* § 511(a) (imposing corporate income tax on tax-exempt entities' unrelated business taxable income).

236. Joshua D. Blank & Daniel Z. Levin, *When Is Tax Enforcement Publicized?*, 30 VA. TAX REV. 1, 21–22 (2010).

237. For individuals, the overall audit rate in 2013 was less than one percent. Laura Saunders, *Are You Ready to Be Audited?*, WALL STREET J., Mar. 15, 2014, at B7. And the IRS faces significantly more constraints on auditing churches than it does on auditing individuals. To audit a church, the IRS must comply with restrictive permission, notice, and duration requirements. I.R.C. § 7611(b), (d) (2012).

238. *See, e.g.*, Jeffrey A. Dubin, *Criminal Investigation Enforcement Activities and Taxpayer Noncompliance*, 35 PUB. FIN. REV. 500, 502 (2007) (finding that criminal enforcement has a measurable effect on other taxpayers' voluntary compliance with the tax law); ALAN H. PLUMLEY, *THE DETERMINANTS OF INDIVIDUAL INCOME TAX COMPLIANCE: ESTIMATING THE IMPACTS OF TAX POLICY, ENFORCEMENT, AND IRS RESPONSIVENESS* 36 (1996), www.irs.gov/pub/irs-soi/pub1916b.pdf [<http://perma.cc/CF7H-4X5Q>].

instead on criminal penalties against individuals. Because only one or two churches²³⁹ have lost their exemption as a result of violating the campaigning prohibition, it would be impossible to construct a reliable empirical study precisely on point. But the evidence at least suggests that enforcing the campaigning prohibition against some churches would encourage other churches to comply with the prohibition, even if their risk of audit were minimal.

Seeing other churches lose their tax exemptions may even have more deterrent power than the imposition of a fine. As Professor Joshua Blank points out, taxpayers face certain cognitive biases, including loss aversion and the endowment effect.²⁴⁰ In general, potential losses are more salient to individuals than potential gains.²⁴¹ This strong aversion to losses “leads to the endowment effect, which causes them to develop attachments to items they own and a reluctance to part with them.”²⁴² Together, loss aversion and the endowment effect suggest that the threat of losing its exemption—something a church already has, and already values—would be a particularly salient penalty. As such, evidence that campaigning could lead to a church’s loss of exemption should create more deterrence than its expected likelihood would indicate.

Failure to enforce the campaigning prohibition, on the other hand, would presumably continue to weaken the obligation that churches feel to refrain from endorsing candidates for office.²⁴³ As more churches begin to flout the tax law, their noncompliance can reduce the taxpaying public’s belief in the fair enforcement of the tax law, which, in turn, risks flipping the taxpayers’ norm of voluntary compliance into a norm of noncompliance.²⁴⁴

239. See *supra* note 9 (Branch Ministries lost its exemption for campaigning, as did Christian Echoes, though it is not clear from the case whether Christian Echoes was a church or a religious organization).

240. Joshua D. Blank, *Collateral Compliance*, 162 U. PA. L. REV. 719, 752 (2014).

241. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 284 (2011).

242. Blank, *supra* note 240.

243. The weakening obligation can be illustrated by looking at the explosion in the number of participants in Pulpit Freedom Sunday. Only thirty-three churches participated in the first Pulpit Freedom Sunday in 2008. Brunson, *supra* note 6, at 150. By 2014—a midterm, not a presidential, election year—that number had skyrocketed to more than 1,600 participating churches. Bade, *supra* note 11.

244. Eric Kroh, *U.S. Seen in Danger of Tumbling Over “Compliance Cliff,”* 144

B. Reinstating Its Exemption

The ADF's assertion that churches will only lose their exemption for a short period of time, and that they can automatically become exempt again once they comply with section 501(c)(3), has become conventional wisdom.²⁴⁵ The conventional wisdom appears to have originated in the D.C. Circuit's decision in *Branch Ministries v. Rossotti*.²⁴⁶ In that case, the court found that the IRS's revocation of Branch Ministries' tax exemption did not violate the Constitution or exceed the IRS's authority.²⁴⁷ On its way to this conclusion, the court stated in dicta that the Code's "unique treatment of churches"—that is, the fact that churches are automatically exempt from taxation without needing to file an application²⁴⁸—meant that any harm from revocation was more illusory than real.²⁴⁹ The court based its assumption on the IRS's oral assurance that "if the Church does not intervene in future political campaigns, it may hold itself out as a 501(c)(3) organization and receive all the benefits of that status."²⁵⁰

It is not clear, though, that the court and the IRS were correct. Nothing in the Code or Treasury regulations explains the process that a public charity must follow to become tax-exempt again after losing its exemption as the result of campaigning. However, the regulations and the IRS have laid out procedures for a public charity to regain its exemption where that exemption was lost for other reasons. Those procedures may provide at least some guidance.

Most tax-exempt organizations must file an annual information return with the IRS.²⁵¹ A tax-exempt organization that fails to file its return for three consecutive years has its exemption automatically revoked.²⁵² An organization that

TAX NOTES 909, 909 (2014).

245. Even I have made that assertion in a prior article. *See* Brunson, *supra* note 6, at 132 ("Because the harm of a church's losing its exemption is more symbolic than substantive, the harm to the church of participating in a political campaign is more illusory than the very real harms suffered by a nonchurch public charity.").

246. 211 F.3d 137 (D.C. Cir. 2000).

247. *Id.* at 145.

248. I.R.C. § 508(c)(1) (2012).

249. *Branch Ministries*, 211 F.3d at 142.

250. *Id.*

251. I.R.C. § 6033(a)(1) (2012).

252. *Id.* § 6033(j)(1).

wants its exemption reinstated after its failure to file must apply for the reinstatement, *even if it did not have to formally apply for tax exemption in the first place*.²⁵³ Churches, of course, cannot have their exemptions revoked for failure to file because the tax law exempts them from the annual filing requirement.²⁵⁴ But this provision belies the idea that just because an organization did not originally need to file an application for exemption, it would not need to file an application to have its exemption reinstated.

While neither the Code nor the regulations lay out the reinstatement process after a loss of exemption for violating the campaigning prohibition, they are not silent on public charities' political involvement. The Code allows certain public charities (though not churches) to elect out of the prohibition on spending a substantial part of its activities lobbying.²⁵⁵ Rather than the hazy "no substantial part" standard, these public charities can elect to limit their political expenditures to a "lobbying ceiling amount."²⁵⁶ If an electing public charity's political expenditures exceed this ceiling amount, it loses its exemption.²⁵⁷ To regain its exemption, a disqualified public charity must reapply, and cannot even reapply until the year following its loss of exemption at the earliest.²⁵⁸

To be clear, neither process for reinstating an organization's tax exemption is directly applicable to a public charity that loses its exemption for violating the campaigning prohibition, whether or not that public charity is a church. But they collectively indicate that a church could be required to formally apply to have its exemption reinstated, even though it did not originally need to apply for an exemption. Additionally, they suggest that a church could conceivably face a waiting period before it becomes exempt again.

In fact, it seems likely that churches must follow whatever procedure governs other organizations that wish to have their tax exemptions reinstated.²⁵⁹ In the first place, the law does

253. *Id.* § 6033(j)(2).

254. *Id.* § 6033(a)(3)(A)(i).

255. *Id.* § 501(c)(3) (2012) (providing that to qualify under section 501(c)(3), an organization must ensure that "no substantial part of [its] activities . . . is . . . attempting[] to influence legislation").

256. *Id.* § 501(h)(1).

257. Treas. Reg. § 1.501(h)-3(b)(1) (2014).

258. *Id.* § 1.501(h)-3(d)(1).

259. The Code is surprisingly silent about how a formerly tax-exempt

not explicitly state that churches can follow a different procedure than other public charities for reinstating their exemption.²⁶⁰ While it does not lay out a specific process for other public charities, either, without a specific provision stating that churches are treated differently, they should follow the same rules as non-church public charities.

In the second place, the constitutionality of providing an easier process for churches to reinstate their exemptions is, at best, questionable. The First Amendment allows permissive accommodation of religion, but the Establishment Clause circumscribes the breadth of that permissive accommodation.²⁶¹ The Establishment Clause, according to the Supreme Court, prohibits the government from enacting policies intended to favor religion.²⁶² That does not mean, of course, that government policies cannot benefit religion, as long as the benefits it provides are merely incidental²⁶³ or are mandated by the Free Exercise Clause of the First Amendment.²⁶⁴

Unfortunately, the Supreme Court's Establishment Clause jurisprudence is largely incoherent.²⁶⁵ As a result, it is unclear

organization regains its exemption. Still, it seems unlikely that any organization that loses its exemption for violating the campaigning prohibition can automatically become tax-exempt again solely by beginning to comply with the prohibition. More likely, it must reapply with the IRS for an exemption.

260. The Code does provide one difference between churches that lose their exemptions for violating the campaigning prohibition and other public charities that lose their exemptions for the same reason: other public charities cannot subsequently be treated as exempt under section 501(c)(4). § 504(a) (2012). Churches, however, are exempt from this limitation and, presumably, could become exempt under section 501(c)(4). *Id.* § 504(c). Though this provision does not necessarily indicate a congressional opinion on whether churches that lost their exemption should be able to instantly regain their exemption, if churches could, the exception in section 504 would be unnecessary. Without any friction between losing its exemption and regaining its exemption, a church would have little need to shift its exemption from section 501(c)(3) to section 501(c)(4).

261. Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 356–57 (2013).

262. *Gillette v. United States*, 401 U.S. 437, 450 (1971).

263. *See, e.g., Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 10 (1989).

264. Gedicks & Van Tassell, *supra* note 261, at 356.

265. Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 628 (2011) (“The [Supreme Court’s Establishment Clause] jurisprudence therefore appears partial and incoherent both to religionists and nonreligionists.”); Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1, 4 (2006) (“One of the few things constitutional scholars of every stripe seem to agree about is the proposition that the Court’s

whether the Court would find that permitting the automatic and instant reinstatement of a church's tax exemption violated the Establishment Clause. It is, however, within the realm of possibility. In *Walz v. Tax Commission of New York*, the Supreme Court held that granting tax exemptions to churches presents no constitutional infirmities.²⁶⁶ The Court noted that the Establishment Clause was not implicated in that case because the state had not "singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups."²⁶⁷

If churches get special fast-track treatment in reinstating their exemptions, though, the benefits of that special treatment are available solely to churches as such. And, while the Supreme Court did not hold in *Walz* that such treatment violated the Establishment Clause, it left the door open for such a conclusion.²⁶⁸ Subsequent to its decision in *Walz*, the Supreme Court has held that a tax exemption available solely to religious publications violated the Establishment Clause.²⁶⁹ In large part, the Supreme Court disallowed the sales tax exemption because it "burden[ed] nonbeneficiaries markedly."²⁷⁰ What was the burden imposed? By reducing the sales tax obligation on these religious publications, the state increased the amount of sales tax others would bear.²⁷¹ The incoherence of Establishment Clause jurisprudence prevents us from knowing whether allowing churches to regain their exemptions immediately and automatically, while imposing some administrative obligations on non-church exempt organizations, is constitutional or not. But there is at least a real possibility that such special treatment presents an

Establishment Clause jurisprudence is an incoherent mess."). Gedicks and Van Tassell assert that there are at least some rays of order within the chaos of the Court's Establishment Clause jurisprudence: they assert that the court has consistently held that permissive accommodations that protect religion at the expense of non-religion violate the Establishment Clause. See Gedicks & Van Tassell, *supra* note 261, at 357.

266. 397 U.S. 664, 667 (1970).

267. *Id.* at 673.

268. *Tex. Monthly*, 489 U.S. at 12.

269. *Id.* at 14.

270. *Id.* at 15.

271. See Gedicks & Van Tassell, *supra* note 261, at 358.

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Establishment Clause problem.

C. Why Not Just Change the Penalty?

No matter the actual financial harm to churches, though, there is no denying the symbolic violence that revoking a church's tax exemption would do. There is nothing inevitable about the Code's current penalty for tax-exempt organizations that violate the campaigning prohibition. Moreover, the current penalty—loss of exemption—potentially creates significant problems, both for the IRS and for churches themselves. For the IRS, the draconian nature of the prescribed penalty almost certainly prevents it from enforcing the campaigning prohibition.²⁷²

Meanwhile, even if the campaigning prohibition were to be enforced against churches, it would likely affect each church differently. Wealthier churches, which can afford legal advice, would find it easy to avoid violating the prohibition. If the wealthy church wanted to endorse a candidate, its legal advisors could provide it with a good idea of where the line between permissible and impermissible fell, and the church could approach that line without crossing it.

A poorer church that felt a similar moral obligation would face a much more difficult conundrum. Lacking the resources to obtain sophisticated legal advice, the church would have to figure out for itself where the permissible limits fell. Without a clear vision of the line separating permissible from impermissible campaign intervention, poorer churches would need to restrict their political actions more than richer churches, or face the very real risk of losing their exemptions for violating the campaigning prohibition.

Congress could easily resolve the scope of this problem by altering the penalty structure applicable to violators. Commentators have suggested alternatives to the current regime. For example, the law could require churches that wish to endorse candidates to create a parallel entity that must pay taxes on its income and cannot accept deductible donations.²⁷³

272. Blair-Stanek, *supra* note 167, at 1200 (“Status-loss is often a draconian remedy, and the IRS hesitates to impose it.”).

273. See Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308, 352 (1990). Professor Benjamin Leff argues that something like this—some method of allowing tax-exempt

Alternatively, it could introduce some sort of intermediate penalty that is less draconian than the loss of exemption. For example, the tax law could allow the IRS to impose a penalty in lieu of disqualification, or it could disallow a portion of the deduction that donors to the church could otherwise enjoy.²⁷⁴

Currently, though, Congress has no reason to change the law. Members of Congress can hide behind the IRS's nonenforcement to play either side of the issue. Some can inflame their constituents with stories of the IRS's violation of churches' Free Exercise rights while others can assure their constituents that the law prevents churches from using untaxed money to get candidates elected.²⁷⁵

But the impediments to congressional improvement of the prohibition are not merely political. If prohibiting churches from campaigning on behalf of or against candidates for office violates the Constitution, then the method Congress uses to prevent it is irrelevant. Even an intermediate penalty would be an unconstitutional restraint on a church's Free Exercise. To arrive at a place where looking at an intermediate penalty makes sense, then, the courts need to resolve the constitutional controversy.

VI. REVOCATION

As a legal matter, the IRS can choose not to enforce the campaigning prohibition; as a normative matter, it should not make that choice. The policy considerations outlined in the Supreme Court's recognition of wide agency discretion apply, if at all, only in the weakest manner here. At the same time, failure to enforce the campaigning prohibition against churches negatively impacts horizontal equity considerations, and may reduce taxpayers' respect for, and compliance with, the tax law.

Of course, the IRS is currently in an awkward position to start enforcing the campaigning prohibition. Although the campaigning prohibition entered the tax law in 1954, the IRS has only revoked two churches' exemptions for violating the

organizations to exercise their speech rights—is necessary to avoid requiring the IRS to pursue a “constitutionally problematic enforcement strategy.” Leff, *supra* note 59, at 728–29.

274. See Brunson, *supra* note 6, at 158–59.

275. See *supra* notes 192–196 and accompanying text.

prohibition.²⁷⁶ It would be absurd to believe that, during the past six decades, only two churches violated the prohibition. In fact, it would be doubly absurd because the thousands of churches that have participated in Pulpit Freedom Sunday have expressly and intentionally violated the prohibition and have, in fact, confessed as much to the IRS.²⁷⁷ Still, nothing has changed between the last Pulpit Freedom Sunday and today that would demand an IRS crackdown.

While nothing has changed with regard to the campaigning prohibition, the political climate facing the IRS has changed. Between 2010 and 2012, some conservative groups alleged that the IRS improperly targeted them, delaying or denying their applications for tax exemption under I.R.C. section 501(c)(4).²⁷⁸ Whether or not the IRS was improperly targeting conservative organizations,²⁷⁹ it clearly reacted poorly.²⁸⁰ As fallout, the IRS has faced hostile congressional hearings²⁸¹ and, to the extent it had any sympathy from taxpayers, it has managed to lose that.²⁸² Already scandal-ridden and unpopular, the timing appears horrible for revoking churches' tax exemptions. Not only is the IRS targeting

276. See Brunson, *supra* note 6, at 135; see also *supra* note 9.

277. Bade, *supra* note 11.

278. See Philip T. Hackney, *What We Talk About When We Talk About Tax Exemption*, 33 VA. TAX REV. 115, 120 (2013); Donald B. Tobin, *The Internal Revenue Service and a Crisis of Confidence: A New Regulatory Approach for a New Era*, 16 FLA. TAX REV. 429, 463 (2014).

279. The TIGTA report found that the IRS did use improper criteria in selecting applications for a more rigorous examination, resulting in added delays for conservative groups. TREASURY INSPECTOR GENERAL FOR TAX ADMIN., DEP'T OF THE TREASURY, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX EXEMPT APPLICATIONS FOR REVIEW (2013), <http://www.treasury.gov/tigta/audit-reports/2013reports/201310053fr.pdf> [<http://perma.cc/7R74-8GY3>]. Others have debated the inappropriateness, pointing out that liberal political groups were also caught up in the more-extensive reviews. See, e.g., Lily Kahng, *The IRS Tea Party Controversy and Administrative Discretion*, 99 CORNELL L. REV. ONLINE 41, 43 (2013) ("It has since come to light that the IRS targeted conservative political groups, liberal political groups, and a variety of other groups for heightened scrutiny, although the TIGTA Report omitted these facts.").

280. See, e.g., Joseph J. Thorndike, *New Analysis: Stop Blaming the IRS for Problems It Didn't Create*, 144 TAX NOTES 115, 115 (2014) ("The agency's performance during the Tea Party scandal has been defensive, dilatory, and less than fully honest.").

281. See, e.g., Josh Hicks, *IRS E-mail Hearings Get Dramatic*, WASH. POST, Jun. 25, 2014, at A17.

282. Thorndike, *supra* note 280, at 115 ("Last month it obliterated any remaining sympathy when it confessed to 'losing' former official Lois Lerner's e-mails.").

conservative political groups, its opponents could proclaim, but it is also targeting churches in the exercise of their First Amendment speech!

As a result, the IRS should not merely implement a large-scale enforcement of the campaigning prohibition. Instead, it needs to coordinate its enforcement approach, explaining to both churches and the American public why it is choosing to begin enforcing a provision of the tax law that it has mostly ignored for the last six decades. In addition, it needs to clearly signal that it is not selecting churches for revocation based on their political or religious ideology, but instead has preemptively tied its hands in terms of criteria for selecting which churches it will investigate. To achieve these goals, this Article will provide a template the IRS can use in its pursuit of churches violating the campaigning prohibition.

A. *Selection Criteria*

To the extent possible, the IRS should avoid further alienating the taxpaying public. It is in nobody's interest to have a tax collector hamstrung by massive unpopularity.²⁸³ The National Taxpayer Advocate found that distrust of the federal government and of the IRS correlated with low tax compliance.²⁸⁴

Moreover, the IRS has a history of allowing itself to be used for political ends. The recent Tea Party scandal, whether or not it reflects true politicking by the IRS, at least projects an *appearance* of political bias. And the Tea Party scandal is not the only time the IRS has faced allegations of political bias. In 2004, when the IRS investigated All Saints Episcopal Church after its pastor allegedly used his sermon to oppose the reelection of George Bush, some commentators accused the IRS

283. In 2013, Gallup found that 42% of Americans thought the IRS was doing a poor job, as opposed to 27% who thought it was doing an excellent or a good job. Jeffrey M. Jones & Lydia Saad, *Americans Sour on IRS, Rate CDC and FBI Most Positively*, GALLUP (May 23, 2013), <http://www.gallup.com/poll/162764/americans-views-irs-sharply-negative-2009.aspx> [<http://perma.cc/9XHJ-V7TV>]. Moreover, Americans' confidence in the IRS has been trending downward over the last several years. *See id.*

284. NAT'L TAXPAYER ADVOCATE SERV., 2012 ANNUAL REPORT TO CONGRESS VOL. 2: TAS RESEARCH AND RELATED STUDIES 5 (2012), <http://www.taxpayeradvocate.irs.gov/2012-Annual-Report/downloads/Volume-2.pdf> [<http://perma.cc/9T XC-C9V9>].

of “politics of intimidation.”²⁸⁵ The Kennedy Administration was accused of using the IRS to attack tax-exempt organizations,²⁸⁶ and Richard Nixon tried to use the IRS to intimidate his enemies.²⁸⁷ In fact, “[t]here is no lack of anecdotal evidence suggesting that Congress and the President both have used their political influence to bend the IRS to their own partisan purposes.”²⁸⁸

Given the IRS’s history and the scrutiny under which it operates, it is essential that it not appear to be acting in a partisan manner when it revokes church tax exemptions. An easy way that the IRS can stand apart from politics is to limit its ability to choose which churches to investigate. Pulpit Freedom Sunday provides the IRS with an easy method for limiting its discretion. Rather than looking through news reports²⁸⁹ and complaints by aggrieved parties, the IRS can look at those churches that expressly intend to violate the campaigning prohibition and send their sermons to the IRS as evidence that they have violated the prohibition.²⁹⁰ Moreover,

285. Vincent J. Schodolski, *Political Sermons Stir Up the IRS: Effort to Enforce Tax-Exempt Rules or Bid to Bully Pulpits?*, CHI. TRIB. (Nov. 20, 2005), http://articles.chicagotribune.com/2005-11-20/news/0511200326_1_tax-exempt-status-los-angeles-tax-attorney-government-entities-division [<http://perma.cc/D7RD-8R3A>].

286. David J. Herzig, *Justice For All: Reimagining the Internal Revenue Service*, 33 VA. TAX REV. 23, 26 (2013).

287. Marilyn Young et al., *The Political Economy of the IRS*, 13 ECON. & POL. 201, 204 (2001).

288. *Id.*

289. The IRS has historically been known to look for potential tax violations in newspapers, among other sources. *See, e.g.*, Mark A. Muntean, Letter to the Editor, *Preserving the Saints: IRS vs. All Saints Church*, 109 TAX NOTES 1691, 1691 (2005) (“Every time I tell a client about this method of IRS investigation, they always seem surprised, which surprises me. The IRS, or rather IRS employees, read the newspaper . . .”); Richard E. Sympson, *Taxation of Contingent Legal Fees on Settlements or Awards*, 3 HOUS. BUS. & TAX L.J. 170, 198–99 (2003) (“The IRS audit guide suggests that the auditors comb through newspaper articles because ‘large punitive damage verdicts generally make headlines.’”).

290. Enforcing the prohibition against self-reporting churches should be constitutionally permissible. In the 1980s, the U.S. government took a passive enforcement approach toward individuals who refused to register with the Selective Service. *See* *Wayte v. United States*, 470 U.S. 598, 601 (1985). Essentially, the government only prosecuted individuals who reported themselves as having violated the law. *Id.* David Alan Wayte, who was prosecuted for his failure to register, objected that such selective prosecution violated his First and Fifth Amendment rights. *Id.* at 604. The Supreme Court held that the government had the prosecutorial discretion to take this passive approach and indict only those who were brought to its attention. *Id.* at 614. If the government

beyond a cursory examination of the sermons to ensure that the sermon did, in fact, endorse or oppose a candidate for office, the IRS should explicitly waive its discretion to decide whether the violation was sufficient to warrant the loss of exemption.²⁹¹ Because Congress wrote the campaigning prohibition as a strict liability rule, the IRS should enforce it as such.²⁹² By limiting its discretion in choosing what churches to investigate, and in making revocation essentially automatic, the IRS can credibly advertise that it was not engaged in a partisan witch hunt, but rather was enforcing the Code neutrally, as written.²⁹³

can constitutionally choose to criminally prosecute only those who bring their violation of the law to the government's attention, there should be no constitutional defect in using the same passive approach in a civil context.

291. It is not always clear whether a church or other tax-exempt public charity has violated the campaigning prohibition. On the margins, there can always be ambiguity. For example, a church's publication and distribution of the voting records of Congress does not violate the campaigning prohibition as long as it does not editorialize. Rev. Rul. 78-248, 1978-1 C.B. 154. But if it publishes the same voting records, along with its position on the underlying issues, it may violate the prohibition. Rev. Rul. 80-282, 1980-41 I.R.B. 7. But Pulpit Freedom Sunday sermons generally do not present this ambiguity, intended, as they are, to violate the prohibition. As a result, simply using these sermons allows the IRS to materially reduce its search costs, and ensures clean cases should the courts become involved.

292. Section 501(c)(3) says simply that an organization does not qualify as exempt if it participates in "any political campaign on behalf of (or in opposition to) any candidate for public office." I.R.C. § 501(c)(3) (2012). Congress did not require that the organization or its representatives have any particular state of mind to fail to qualify as exempt.

293. It may be that there is a strong ideological bent to the churches that participate in Pulpit Freedom Sunday. That is, it is clearly possible that the majority will endorse the Republican candidate or that the majority will endorse the Democratic candidate. However, if the IRS explicitly proscribes its selection and penalty discretion, opponents of the IRS will not be able to accuse the IRS of bias in its enforcement, especially if the IRS does not know, in advance of Pulpit Freedom Sunday, the precise churches that intend to participate. The IRS could limit any structural bias, of course. Rather than revoking the elections of all of the violative participants in Pulpit Freedom Sunday, it could simply create a balanced case by revoking the election of one liberal and one conservative church. And, if creating a test case were the sole goal, this would be an easy way to go about it. But selecting two churches on either side of the political spectrum violates other considerations raised in this Article. For one thing, it increases the IRS's enforcement costs. Rather than simply reviewing the sermons it passively received to determine if they contained a political endorsement, the IRS would need to actually search out violators. After identifying churches that had violated the prohibition, the IRS would need to determine whether the churches were politically liberal or conservative, which would require more work and the expenditure of more resources on the IRS's part. Finally, explicitly determining the political bent of churches would require the IRS to explicitly enter the political

B. Public Explanations

The IRS should engage in systemic public relations and pronouncements as it revokes the tax exemptions of any Pulpit Freedom Sunday churches that violate the campaigning prohibition. Absent some sort of concurrent publicity, one can easily imagine members of Congress scapegoating the IRS to win points with their constituencies.²⁹⁴ Although the IRS's revocation of churches' tax exemption is mandated by the Code—a law enacted by Congress—members of Congress have, in the past, been happy to blame the IRS for unpopular tax laws.²⁹⁵ There is no reason to believe that, upon the revocation of church tax exemptions, Congress would suddenly shoulder the blame voluntarily.²⁹⁶

Congress's historic unwillingness to take responsibility for its tax legislation provides an opportunity to the IRS in this case. In spite of its broad unpopularity, the IRS is not the least popular group in Washington, D.C. In July 2014, Gallup found that just fifteen percent of Americans approved of the way Congress was doing its job.²⁹⁷ Congress, then, has an approval rating approximately twelve percentage points *below* that of the IRS. Americans already believe bad things about Congress;

arena, and specifically target churches for their political leanings, the appearance of which could be politically disastrous for the IRS. *See supra* notes 278–282 and accompanying text.

294. And Congress is not the only group willing to scapegoat the IRS to score political points. On its website advertising Pulpit Freedom Sunday, the ADF writes, “The IRS continues to threaten that it will decide what can be said from America’s pulpits. There are two ways to stop this: Congress fixes it, or courts strike it down.” *Pulpit Freedom Sunday*, ALLIANCE DEFENDING FREEDOM, <http://www.alliancedefendingfreedom.org/pulpitfreedom> [http://perma.cc/CL6H-CU2A].

295. *See, e.g.*, Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 IOWA L. REV. 413, 477 n.281 (1999) (“For instance, Senators and Representatives vote to add new incentives, subsidies, anti-abuse rules, exemptions, transitional rules, and obscurities to the law—then thunder against the complexity of the ‘IRS Code,’ as if the IRS, not Congress, enacted those complexities.”); Thorndike, *supra* note 280, at 115 (“[Lawmakers are] using the IRS investigation to avoid blame for a problem that Congress created in the first place.”).

296. Because losses tend to be more salient to taxpayers than gains, policymakers have a strong motivation to minimize blame, even if their blame-minimization strategies also limit the amount of credit they can claim. *See* R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POLY 371, 373 (1986).

297. Andrew Dugan, *Congressional Approval Rating Languishes at Low Level*, GALLUP (July 15, 2014), <http://www.gallup.com/poll/172859/congressional-approval-rating-languishes-low-level.aspx> [http://perma.cc/LE9B-5XND].

it should not be difficult to persuade them that any harm that comes to disqualified churches can be traced back to Congress, not the IRS.

To deflect potential public outrage onto Congress, though, the IRS must clearly and transparently explain the law underlying the Pulpit Freedom Sunday churches' loss of exemption, and it must provide some plausible explanation for why it has begun to enforce a law that, historically, it has not enforced.

Explaining the law should be relatively easy: the IRS must explain, in a simple manner, that the Code places certain conditions on the tax exemption under section 501(c)(3).²⁹⁸ That part of its statement could follow roughly along these lines:

Although Congress allows certain charities, including churches, to be free from the obligation to pay federal income tax, it conditioned this freedom from taxation on a charity's meeting certain conditions. One of those conditions was that charities—again, including churches—not support or oppose candidates for office. When it drafted the tax law, Congress decided that an organization that supports or opposes a candidate for office would not qualify as tax-exempt, even if that organization is a church. It delegated to the IRS both the authority and responsibility to take exemptions away from organizations that failed the test. It did not, however, give the IRS authority to decide whether losing the exemption is the right penalty. As such, the IRS is obligated to enforce the law passed by Congress and revoke the tax exemptions of these churches, each of which endorsed or opposed a candidate for office, and each of which provided notice to the IRS of what it had done.

As a pragmatic matter, it is unclear whether the IRS would be willing to explicitly blame Congress. After all, Congress controls the IRS's budget, and an angry Congress may be a Congress that would reduce the IRS's budget even

298. By "simply," I mean that the IRS needs to explain in a manner that an unsophisticated citizen, who does not follow and, for that matter, is utterly uninterested in tax policy debates, can easily understand. Simplicity may cause a loss of nuance but, in the end, the campaigning prohibition itself is a relatively simple, unnuanced rule.

more drastically than it already has.²⁹⁹ In spite of the potential risks, IRS Commissioner John Koskinen has been publicly critical of the reduction in the IRS budget, and has laid the blame squarely at the feet of Congress.³⁰⁰ Still, blaming Congress for providing insufficient funding may be different than blaming Congress for the IRS's decision to enforce a law, especially where that enforcement may be unpopular.

Even if the IRS does not want to risk offending Congress by describing the provenance of the campaigning prohibition, it should not have to shoulder the public discontent, if any, with enforcing the campaigning prohibition. If the IRS chose not to implicate Congress, others, including academics and journalists, would need to step up. Academics and journalists have both the means and the obligation to educate the American public on its legislative system.³⁰¹ When the IRS starts revoking the tax exemptions of churches that participate

299. According to the Taxpayer Advocate, between 2010 and 2013, Congress cut the IRS's budget by almost eight percent. During the same time period, inflation further eroded the purchasing power of the IRS's reduced funding. NAT'L TAXPAYER ADVOCATE SERV., 2013 ANNUAL REPORT TO CONGRESS: VOL. ONE 20 (2013), <http://www.taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/Volume-1.pdf> [<http://perma.cc/H9X4-BY33>].

300. On August 21, 2014, Commissioner Koskinen told the National Society of Accountants that a proposed \$1 billion cut in IRS funding would be "very serious if not catastrophic" to the [IRS's] efforts to deliver a smooth filing season." William Hoffman, *Koskinen Warns of House IRS Budget's Impact in 2015*, 144 TAX NOTES 919, 919 (2014). He went on to warn Congress that it "cannot continue to reduce our resources and ask us to do more things. We are no longer going to pretend that cutting funding makes no difference." *More Reductions in IRS Services Likely Due to Funding Cuts, Koskinen Predicts*, 35 FED. TAX WKLY, Aug. 28, 2014, at 1, http://www.groom.com/media/news/1460_Dold_Code_Sec_6056_Reporting.pdf [<http://perma.cc/6BXB-8CCF>]. Although Commissioner Koskinen's remarks go in the right direction, they were reported in periodicals aimed toward tax practitioners and policymakers. To affect the public's perception, the IRS will have to lay out its obligations to the congressionally-passed prohibition in media that will reach the average American; those who read tax-specific periodicals are likely to already understand the IRS's obligation to enforce laws enacted by Congress.

301. See, e.g., Am. Political Sci. Task Force on Civic Educ. in the 21st Century, *Expanded Articulation Statement: A Call for Reactions and Contributions*, 31 PS 636, 636 (1998) ("We believe that we who have chosen to teach politics as our profession bear major responsibility for addressing the problem [of political apathy in the United States]."); James Curran et al., *Media System, Public Knowledge and Democracy: A Comparative Study*, 24 EUR. J. COMM. 5, 6 (2009) ("In practice, political accountability requires a variety of institutional arrangements, including . . . a media system that delivers a sufficient supply of meaningful public affairs information to catch the eye of relatively inattentive citizens.").

in Pulpit Freedom Sunday, journalists and academics can explain Congress's role in creating the shape of the prohibition in various media, including newspapers and magazines, blogs, social media, radio, and television. Educating the public on why the IRS is *obligated* to revoke the tax exemptions of churches that support candidates for office would result in a better-educated electorate, and would provide the IRS with the space it needs to enforce the law.

C. *Why Now?*

Although explaining why the IRS believed it needed to enforce the campaigning prohibition would be relatively easy, explaining why it should begin enforcing it now would prove more difficult. Congress enacted the campaigning prohibition in 1954.³⁰² Has anything changed over the last sixty years that could serve as a catalyst for actual large-scale enforcement?

In fact, there have been three significant changes in recent years that the IRS could point to as justification for moving the campaigning prohibition higher on its list of priorities. The first is that Pulpit Freedom Sunday has lowered the search costs to the IRS. One of the factors an agency must weigh in determining whether to enforce a law is the best use of its resources.³⁰³ In the past, finding church violators of the campaigning prohibition and ensuring that the church had, in fact, endorsed or opposed a candidate for office would have required the IRS to expend time and resources that it may have believed did more good used in other ways. Pulpit Freedom Sunday significantly reduces the costs to the IRS of enforcing the campaigning prohibition; rather than searching for violators, the violators come to the IRS *and* they provide the IRS with evidence of the violation. As a result, the resource allocation issue that helps weigh in favor of administrative discretion is gone.

Second, the public is increasingly aware of the IRS's lack of enforcement and is pushing back against it.³⁰⁴ Most recently, that manifested itself in the form of a lawsuit by the Freedom

302. See Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733, 740 (2001).

303. See *supra* note 114 and accompanying text.

304. See, e.g., *supra* note 12 and accompanying text.

From Religion Foundation against the IRS. The Freedom From Religion Foundation complained that the IRS had a policy of not enforcing the campaigning prohibition against churches while fully enforcing it against other public charities.³⁰⁵ Because of the pressure imposed by the lawsuit, the IRS has reportedly agreed to begin investigating church campaigning, although it will not begin to do so until after the congressional investigation of its policies regarding Tea-Party-backed social-welfare groups.³⁰⁶

In addition to the reduced administrative costs and the increased pressure, the campaigning prohibition has more salience since the Supreme Court's decision in *Citizens United*.³⁰⁷ In *Citizens United*, the Supreme Court invalidated federal limitations on the ability of corporations and unions to use their money in support of or opposition to candidates for office, finding such limits unconstitutional.³⁰⁸ As a result, the Code is the only law standing between churches (and, for that matter, other public charities) and express campaigning.³⁰⁹ Though there is debate over whether public charities *should* be prevented from engaging in campaigning,³¹⁰ Congress has not made any change to its policy that public charities may not engage in political campaigning. And, the only two courts to hear cases where churches or other religious organizations lost their exemption have upheld the campaigning prohibition as

305. See *Freedom From Religion Found., Inc. v. Shulman*, 961 F. Supp. 2d 947, 950 (W.D. Wis. 2013). The assertion is not, technically, true: in its 2004 PACI, the IRS found sixty public charities—both church and non-church organizations—that had violated the campaigning prohibition. Brunson, *supra* note 6, at 151. Of those sixty, fifty-three suffered no penalty, three paid an excise tax, and only four tax-exempt organizations (none of which were churches) lost their exemption. *Id.* In general, that is, the IRS underenforces the campaigning prohibition. But its underenforcement against churches differs drastically from its underenforcement against other tax-exempt organizations. *Id.*

306. See Tracy, *supra* note 219.

307. *Citizens United v. FEC*, 558 U.S. 310 (2010).

308. *Id.* at 318–19. It's worth noting that *Citizens United* was exempt from taxes under section 501(c)(4). *Id.* at 404. The decision, then, is not limited in scope to for-profit corporations; presumably, any blanket limitations on public charities would also be deemed unconstitutional.

309. See, e.g., Colinvaux, *supra* note 14, at 687 (“Absent the [campaigning prohibition], charities still would have faced a prohibition on some of their political activities under campaign finance laws, which, until recently, had long provided that corporations, including charitable corporations, could not spend money expressly advocating for or against a candidate for public office.”).

310. See generally Brunson, *supra* note 6, at 136–49 (discussing the normative debate on the contemporary explanations for the campaigning prohibition).

constitutional.³¹¹

The confluence of these three changes—reduced search costs, increased public outrage and pressure, and more salience—provides the IRS with a strong explanation for why it would start enforcing the campaigning prohibition against churches now, in spite of its long history of non-enforcement. Although the campaigning prohibition has not changed, the legal and social context in which it finds itself has, and those changes merit a new focus on enforcement.

CONCLUSION

Without the intervention of the courts, the debate over the constitutionality of the campaigning prohibition, as applied to churches, will remain purely academic: interesting and valuable but ultimately inconclusive. Years of scholarship and activism have neither definitively resolved the question nor found a workaround that allows us to determine the constitutionality of the campaigning prohibition without judicial intervention. Moreover, there is no scholarly silver bullet out there that will appear someday in the future. This does not mean that the scholarship and the debate have no value. They have helped, and will continue to help, crystalize the policies underlying and the consequences of the campaigning prohibition.

Still, in spite of the value of the debate, we must ultimately resolve the question of the prohibition's constitutionality. Even unenforced, the campaigning prohibition looms large in the mind of the public and in constraining (or not) the actions of churches. Even churches that are willing to flout the prohibition remain acutely aware that the prohibition exists and that they are, in fact, violating it.³¹² Congress will continue

311. See *Branch Ministries v. Rossotti*, 211 F.3d 137, 143 (D.C. Cir. 2000) (“That the Church cannot use its tax-free dollars to fund such a PAC unquestionably passes constitutional muster.”); *Christian Echoes Nat’l Ministry v. United States*, 470 F.2d 849, 856–57 (10th Cir. 1972) (“We hold that the [campaigning] limitations imposed by Congress in Section 501(c)(3) are constitutionally valid.”).

312. For example, during 2014’s Pulpit Freedom Sunday, Pastor Matthew Schlesinger of San Diego’s Grace Church preached on the history of church involvement in politics and decried the current limitations on church politicking. SpeakUpChurch, *Matthew Schlesinger’s Pulpit Freedom Sunday Sermon*, YOUTUBE, (Oct. 8, 2014), <https://www.youtube.com/watch?v=ADtVqIabcBg> [https://perma.cc/W73Z-L4M9]. Interestingly enough, though, he appears to

to leave the prohibition alone, for both political and pragmatic reasons. It currently appears content to use the campaigning prohibition as a weapon against the IRS when it wants a scapegoat for its tax policies. But even if Congress sincerely wanted to fix the problem, the constitutionality of penalizing churches for supporting candidates for office will have an outsize effect on what, if anything, Congress can do.

Realistically, the only way this uneasy—and unhealthy—equilibrium can end is to allow churches to have their day in court. And the only way churches can put the question in front of the courts is if the IRS enforces the law and revokes their tax exemptions for violating the campaigning prohibition. The IRS's reticence to do so is understandable given its long history of ignoring such violations; the severity of the penalty; and the cost that litigation would entail, balanced against the limited revenue that such a revocation would likely provide. Still, the IRS has both the duty and the goal of enforcing and ensuring compliance with the tax law.³¹³ Doing so not only helps create a culture of compliance, but it “gives taxpayers confidence in the tax administration system.”³¹⁴

Only the IRS can permit the courts to adjudicate whether the campaigning prohibition is constitutional. The IRS can do so in a way that does not cause itself reputational harm, educating both the public and churches themselves about the prohibition, about its relevance, and about the IRS's duty to enforce the law as Congress enacted it. The IRS can further protect itself from blowback by providing advanced notice to churches that it will begin enforcing the prohibition and by selecting the churches it audits mechanically, in a manner that prevents its decisions from exhibiting any ideological valence.

If the IRS carefully selects the churches and explains its actions, the uncertainty over the campaigning prohibition can

misunderstand the campaigning prohibition as including all political speech, or else he is unwilling to violate the campaigning prohibition. In either event, his sermon, while asserting the right of pastors to participate in the political world, does not endorse or oppose a candidate for office and, as a result, would not cause Grace Church to lose its tax exemption.

313. INTERNAL REVENUE SERV., STRATEGIC PLAN FY2014–2017 at 16 (2014), www.irs.gov/pub/irs-pdf/p3744.pdf [<http://perma.cc/XBN5-F8SK>] (“Our second and equally important goal is to effectively enforce the tax law to ensure compliance with tax responsibilities and combat fraud.”).

314. I.R.S. OVERSIGHT BD., ANNUAL REPORT TO CONGRESS 2011 at 32 (2012), <http://www.treasury.gov/IRSOB/reports/Documents/IRSOB%20Annual%20Report%202011.pdf> [<http://perma.cc/UJ3A-N6N5>].

end. The courts will find the prohibition either constitutional or unconstitutional. If it is unconstitutional, the IRS can (and in fact must) stop enforcing it. If it is constitutional, the IRS can and should expand its enforcement of the prohibition. Ultimately, if Congress dislikes the IRS's revocations of churches' tax exemptions, a court decision will provide it with incentive to change the penalty or change the prohibition. All this, however, rests on the IRS exercising its discretion and affirmatively deciding to enforce the campaigning prohibition as enacted in the Code. Otherwise, the campaigning prohibition will continue to impede risk-averse churches while allowing risk-tolerant churches broad freedom and discretion, to the detriment of both church and the tax law at large.