Reigning in Charities: Using an Intermediate Penalty to Enforce the Campaigning Prohibition.

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REIGNING IN CHARITIES: USING AN INTERMEDIATE PENALTY TO ENFORCE THE CAMPAIGNING PROHIBITION

Samuel D. Brunson*

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Don’t you push me, push me, push me
Don’t you push me down.1

INTRODUCTION

On February 22, 2010, Americans United for Separation of Church and State wrote a letter to the Internal Revenue Service (IRS), alleging that Liberty University had endorsed Scott Garrett in his run for the Virginia House of Delegates and had attacked his opponent, Shannon Valentine.2 The problem? As an educational institution, Liberty University is a public charity and, as such, is exempt from the federal income tax under § 501(c)(3). As one of the conditions of the tax exemption for public charities, § 501(c)(3) prohibits tax-exempt public charities from engaging in any campaigning for or against any candidate for office.3 The penalty for a public charity that engages in any campaigning is the loss of its tax exemption.4

How did Liberty University allegedly violate the prohibition on campaigning? According to Americans United, the school used its student newspaper, the Liberty Champion, to support Garrett and to oppose the incumbent Valentine.5 The paper, Americans United alleged, was not independent, but was under the control of the university, and was therefore speaking for the university.6 Because Liberty University had violated the

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6. Letter from Barry W. Lynn, supra note 2, at 2. In 1972, the IRS ruled that universities will not be treated as endorsing or opposing a candidate for office as the result of editorial statements in student newspapers, even if the university makes professors available as advisors, provided the editorials are voted on by the newspaper’s editorial board and provided that neither the administration of the university nor the advisors to the newspaper exercise “control or direction” over the newspaper’s editorial policies. Rev. Rul. 72-513, 1972-2 C.B. 246. Thus, in order for Liberty University to lose its exemption as a result of a student newspaper’s editorial content, the IRS would have to find that the university administration, not the students
prohibition on campaigning through the student newspaper, Americans United requested that the IRS investigate the matter and, presumably, revoke Liberty University’s tax-exempt status.7

Even if the IRS determines that Liberty University violated the campaigning prohibition, it is unlikely to revoke the school’s tax exemption.8 The IRS’s reluctance to revoke public charities’ tax exemption may in part result from the fact that their enforcement toolbox is weighted heavily toward “hard shoves” and that it lacks an explicit mandate to gently nudge public charities away from campaigning.9

The current enforcement regime has proven to be ineffective at preventing public charities from endorsing candidates for office, at least in part because the prohibition is not enforced. This Article will propose that the current enforcement regime be altered and that the IRS be granted explicit authority to impose an intermediate penalty on public charities that participate in campaigning. Although the IRS will still have the option of revoking a public charity’s tax exemption if it violates the prohibition, having an intermediate penalty at its fingertips would make enforcing the prohibition more palatable to the IRS, especially where the IRS determines that the violation does not warrant a punishment as drastic as loss of an entity’s tax exemption.

The intermediate penalty proposed by the Article would disallow a portion of donors’ charitable deduction, with the percentage of the disallowance determined roughly by the seriousness of the public charity’s violation. By providing such an intermediate penalty in the IRS’s arsenal, the IRS faces fewer disincentives in enforcing the prohibition. And as the IRS imposes

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7. Letter from Barry W. Lynn, supra note 2, at 3. Americans United could not sue for revocation of Liberty University’s tax-exempt status because § 501(c)(3) does not create a private right of action against public charities that violate the prohibition on campaigning, and therefore taxpayers have no standing to sue for alleged violations of § 501(c)(3) by public charities. Amato v. UPMC, 371 F. Supp. 2d 752, 756 (W.D. Pa. 2005) (“First of all, the plaintiffs have no private right of action under § 501(c)(3), as the statute does not authorize private third party claims.”).

8. In spite of anecdotal evidence that some public charities are flouting the ban, the IRS only rarely revokes public charities’ tax-exempt status. See Lloyd Hitoshi Mayer, Grasping Smoke: Enforcing the Ban on Political Activity by Charities, 6 FIRST Amend. L. Rev. 1, 12–13 (2007).

9. See Dan M. Kahan, Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem, 67 U. CHI. L. Rev. 607, 608 (2000). Professor Dan Kahan introduced the idea of “hard shoves” and “gentle nudges.” See id. Professor Kahan argues that the impulse to create stiffer punishments for undesirable behaviors is counterproductive in changing people’s behavior. When the punishment is too severe, those charged with enforcing the law will balk. Where the punishment is less severe, the law is more likely to be enforced, and the new norm is more likely to stick. Id. at 608.
penalties on public charities that campaign, public charities will become less likely to participate in the prohibited behavior.

I. EXEMPTING PUBLIC CHARITIES FROM TAX

The federal income tax touches virtually every aspect of American life. Congress has chosen, though, to exempt certain entities from the reach of the tax law. The Internal Revenue Code provides that certain types of entities are "exempt from taxation." The most prominent of these tax-exempt organizations are what we call "public charities." However, although the tax law exempts public charities from taxation, it also imposes certain restrictions on the activities in which they can engage, and significant (though underemployed) penalties if they violate the restrictions.

A. Public Charities and Their Advantageous Tax Treatment

Public charities are entities "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . ., or for the prevention of cruelty to children or animals." An organization that qualifies as a public charity is generally not required to pay any income tax. The traditional explanation for why public charities have been removed from the tax rolls is that "they relieve the government from the burden of performing certain services or providing certain goods to the public." In order to encourage private entities to provide these public goods, Congress provided public charities with a tax exemption.

10. See, e.g., Oliver A. Houck, On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws, 69 BROOK. L. REV. 1, 1 (2003) ("If there is a single document that defines these values in American life it is the Internal Revenue Code, whose rewards and penalties rate nearly every activity in which Americans engage.").


12. Id. § 501(c)(3).

13. See id. § 501(a). Public charities were first removed from the tax rolls in 1894, and have been exempt from the federal income tax ever since. See Houck, supra note 10, at 1 n.1 ("[T]he Revenue Act of 1894's] provisions on charities became the prototype for the 1913 Revenue Act . . . and has remained verbatim in the Code from that date."). Public charities are not the only tax-exempt entities, however. Various other entities, including labor unions, chambers of commerce, and certain clubs, fraternal orders, and nonprofit credit unions are also exempt from federal taxation. I.R.C. § 501(c)(5), (6), (10), (14).


Their tax exemption is not the only tax advantage public charities enjoy; in addition to being exempt from tax themselves, donations to public charities can be deducted by donors. The deduction for donations to public charities is only slightly newer than the exemption for public charities, having been enacted in 1917. Effectively, this deduction functions as a second subsidy to public charities, allowing donors to make larger contributions to the public charities than they otherwise could or would have made.

By virtue of its tax exemption, a public charity can keep every dollar it earns. In addition, because donors can deduct charitable donations, they are able to donate a larger after-tax amount than they would be able to donate if there were no deduction available. Because the tax law exempts public charities from tax and allows donors to deduct their donations, it effectively multiplies the amount of money available to public charities in relation to the amount that would be available to organizations that are not exempt from tax.

B. Conditions of the Tax Exemption: The Campaigning Prohibition

The beneficial tax treatment available to public charities is not costless to the charities, however. The tax law imposes certain restrictions on the way a qualifying public charity can act. For example, no substantial part of a public charity’s activities can involve attempting to influence legislation. In addition, the Code provides a blanket proscription on public charities’ intervening in political campaigns on behalf of or in opposition to any candidate. If a public charity engages in a substantial amount of lobbying or supports or opposes a candidate for office, it no longer qualifies for a tax exemption, and its tax exemption should thus be revoked.

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18. By way of comparison, taxable corporations with income in excess of $10 million are subject to a marginal tax rate of 35%, and can keep only 65 cents of every dollar they spend. See I.R.C. § 11(b)(1)(d).
19. An individual in the highest tax bracket is currently subject to a marginal rate of 35%. Id. § 1(i)(2). Assuming that she earns $100 and wants to donate that $100, the amount she can afford to donate depends on the tax treatment of her donation. If she cannot deduct the donation, she must pay $35 in taxes, and only has $65 left to donate. But if the donation is deductible, she can afford to donate the full $100.
20. See id. § 501(c)(3). In addition to the political restrictions, the net earnings of a public charity cannot inure to the benefit of any shareholder or other individual. See id.
21. An organization that does not meet both an organizational and an operational test prescribed by the Treasury regulations is not exempt from tax. Treas. Reg. § 1.501(c)(3)-1(a)(1) (as amended in 2008). An organization fails the operational test if it "participates or intervenes . . . in any political campaign on
In practice, the IRS often does not revoke public charities’ exemptions for violating the prohibition. In fact, in many cases, it appears that the IRS does not impose any penalty at all on public charities that violate the prohibition. The consequences of losing the tax exemption appear to be different for nonchurch public charities than they are for churches. If the IRS were to revoke a nonchurch public charity’s tax exemption, the result would likely be catastrophic for that charity.

Immediately upon losing its exemption, the nonchurch public charity would be required to pay taxes on its income, and donors would no longer be able to deduct their donations. If such a public charity ceases to qualify under § 501(c)(3) because it supported or opposed a candidate for public office, the Code prevents it from transforming itself into a social welfare organization, exempt under § 501(c)(4). Moreover, under Treasury regulations, the entity cannot in the future qualify for exemption under any provision of the Code other than § 501(c)(3). To regain its tax-exempt status, the disqualified organization must reapply for a tax exemption. It cannot reapply, however, until the year after the exemption was withdrawn. As a result of its political


22. See infra notes 129-42 and accompanying text.
23. See infra notes 129-42 and accompanying text.
24. Commentators have largely gravitated toward the question of whether the prohibition on political campaign intervention is null and void in relation to churches. Edward McGlynn Gaffney, Jr., On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics, 40 DePaul L. Rev. 1, 3 (1990) (“I conclude that the restraints imposed . . . on political activities of religious organization violate the free exercise and free speech rights of these exempt organizations.”); Meghan J. Ryan, Can the IRS Silence Religious Organizations?, 40 Ind. L. Rev. 73, 83 (2007) (“Limiting an organization’s political activities presents distinct First Amendment concerns when applied to religious organizations because the Free Exercise Clause imposes additional constitutional protections when religious organizations are involved.”); Allan J. Samansky, Tax Consequences When Churches Participate in Political Campaigns, 5 Geo. J. L. & Pub. Pol’y 145, 155 (2007) (“Religion is different from other charitable causes, and valid reasons exist for special treatment of political activity by churches.”); 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’y 41, 75-76 (2007) (“Moreover, the subsidy argument is unconvincing and violates the First Amendment when applied to churches because the Free Exercise Clause imposes additional constitutional protections when religious organizations are involved.”); see also Keith S. Blair, Praying for a Tax Break: Churches, Political Speech, and the Loss of Section 501(c)(3) Tax Exempt Status, 86 Denw. U. L. Rev. 405, 420-21 (2009).
26. Treas. Reg. § 1.504-1 (1990) (“Further, an organization denied treatment as an organization described in section 501(c)(4) under this section may not be treated as an organization described in section 501(c) other than as an organization described in section 501(c)(3).”).
28. Id.
campaign intervention, then, the nonchurch public charity becomes fully taxable for at least some period of time.

In contrast, the burden to churches of losing their exempt status appears more symbolic than substantive: there is little economic burden to churches of losing their tax-exempt status. Admittedly, a church that campaigns for or against an individual will lose its exemption, just like any other public charity. But the court in Branch Ministries v. Rossotti described a church’s loss of exempt status as being “more symbolic than substantial.” The IRS agreed that loss of exempt status would not cause donations to become taxable income to the church, and donors would continue to be able to deduct donations to the extent the church did not intervene in future political campaigns. Unlike other organizations seeking an exemption from tax under § 501(c)(3), churches are not required to apply for an exemption; their exemption comes automatically. The church itself would lose nothing, and donors would only lose “the advance assurance of deductibility in the event [the] donor[s] should be audited.” 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.

Moreover, a nonchurch public charity is likely to see its donor base shrink more than a church would upon the loss of the deductibility of donations. Taxpayers choose between taking their itemized deductions (which include the charitable deduction) and taking the standard deduction. In 2006, only 35.4% of taxpayers itemized their deductions. However, “[l]ower-income taxpayers, those taxpayers least likely to itemize, are also the taxpayers who favor religious organizations in making their charitable contributions.”

30. Id. at 142–43.
31. Compare I.R.C. § 508(c) with id. § 508(a).
32. Branch Ministries, 211 F.3d at 142–43.
33. Itemized deductions are all deductions other than the deductions permissible in determining adjusted gross income and those permitted by § 151. I.R.C. § 63(d). The charitable deduction is authorized by § 170, and is not used to determine adjusted gross income. See id. § 62(a) for the definition of gross income.
34. See id. § 63(e)(1).
Because nonitemizers do not get a deduction for their charitable contributions, whether a church is tax-exempt or not is unlikely to significantly affect whether or how much donors give. On the other hand, high-income taxpayers are more likely to make gifts to "colleges and universities, hospitals, and arts and cultural organizations." Because high-income taxpayers are more likely to itemize, the loss of tax-exempt status by nonchurch entities is more likely to affect itemizers' determination of whether and how much to donate. When their favored public charity loses its tax-exempt status, however, wealthy donors will not be able to deduct amounts donated to the organization. In that case, they should be more likely than nonitemizers to take the lost tax deduction into account in determining whether and how much to give.

By virtue of their nature, public charities inhabit a unique place in the tax law. They do not pay taxes, and donors to the public charities can deduct the amount of their donations for tax purposes. In exchange for this advantageous tax treatment, though, public charities are prohibited from campaigning. If the IRS finds that a public charity has violated the campaigning prohibition, the IRS is obligated to revoke its exemption, which, in many cases, would cripple or destroy the public charity. But the IRS often fails to revoke the tax exemption, which means, in many cases, public charities can get these unique tax benefits without paying the price for the benefits.


The impact of the charitable contribution deduction should be of particular concern to religious congregations, both because many espouse a moral belief in equality of all and because this system favors the charitable activities favored by the wealthy. The wealthy favor cultural institutions and institutions of higher learning instead of religious and social welfare organizations. Id. The Center on Philanthropy estimates that in 2005, 42% of households with incomes of less than $100,000 donated to religious causes, providing 59.4% of the funds raised by religious organizations. See CTR. ON PHILANTHROPY, Ind. Univ., PATTERNS OF HOUSEHOLD CHARITABLE GIVING BY INCOME GROUP, 2005, at 1, 5 (2007), http://www.philanthropy.iupui.edu/research/giving%20focused%20on%20meeting%20needs%20of%20the%20poor%20july%202007.pdf. Seventy-five percent of households with incomes of between $200,000 and $1 million donated to religious organizations, providing 20.8% of the funds raised by religious organizations, and 70.9% of households with incomes of $1 million or more provided 8.6% of the funds raised by religious organizations. Id. at 5. Only 11.2% of households earning less than $100,000 gave to education, accounting for 5.9% of the funds raised by educational charities, as opposed to 82.2% of households earning between $200,000 and $1 million and 82.9% of households earning more than $1 million, which provided 63.5% and 28.2%, respectively, of the funds raised by education. Id. at 9. Likewise, 6.2% of households earning less than $100,000 donated to the arts, accounting for 4.4% of the funds raised by the arts, as opposed to 71.8% of households earning between $200,000 and $1 million and 77.4% of households earning more than $1 million, which provided 59.3% and 34.4%, respectively, of the funds raised by the arts. Id. at 10.
II. THE PROVENANCE OF THE CAMPAIGNING PROHIBITION

The history of the prohibition on campaigning does little to clarify why Congress felt it necessary to prevent public charities from campaigning. And the little glimmers of explanation that can be discerned from its history do nothing to explain why a public charity should lose its tax exemption as a result of its campaigning activities, no matter how negligible. As a result of the sparseness of historical explanation, the IRS cannot look to the events of 1954 to explain why it should revoke a public charity’s tax exemption if it endorses or opposes a candidate for public office.\textsuperscript{38}

Almost from the beginning of the modern tax law, the degree to which a charitable organization remained exempt from taxation while trying to influence legislation and public policy was up for debate. As early as 1919, the Treasury tried to draw a line between “educational” endeavors, which it considered charitable, and “propaganda,” which was not.\textsuperscript{39} Likewise, the courts, while recognizing that charitable organizations could participate in political activity, found that certain political activity disqualified an organization from being charitable.\textsuperscript{40}

Finally, in 1934, the issue of public charities’ political participation came to a head in the wake of a fight between the incoming President Franklin D. Roosevelt, who needed to cut back on the generous veterans’ benefits passed by Congress, and veterans’ groups, which wanted to retain the benefits.\textsuperscript{41} The National Economy League, a probusiness lobbying organization, argued strongly against the veterans’ benefits.\textsuperscript{42} Senator David A. Reed of Pennsylvania, a member of the Senate Committee on Finance, wanted to remove the tax exemption of the National Economy League and other charitable organizations that were lobbying to further the “personal interests” of their donors.\textsuperscript{43} Ultimately, Congress amended the Code to provide that a charitable organization would lose its tax exemption if it engaged in “substantial” activities in “carrying propaganda or otherwise attempting to

\begin{footnotesize}
\begin{enumerate}
\item For purposes of this Article, a sketch of the history of political prohibitions will be sufficient. For an extensive exploration of the history of the prohibition, see Patrick L. O’Daniel, \textit{More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches}, 42 B.C. L. Rev. 733 (2001).
\item Houck, \textit{supra} note 10, at 9–12.
\item \textit{Id.} at 13–15.
\item \textit{See} Houck, \textit{supra} note 10, at 20.
\item Smith, \textit{supra} note 24, at 68.
\end{enumerate}
\end{footnotesize}
influence legislation. " This prohibition against public charities’ engaging in substantial political activities remains in the Code today. 45

In 1954, Congress placed an additional limit on public charities’ participation in electoral politics. On July 2, 1954, Senator Lyndon Johnson proposed that § 501(c)(3) be amended to proscribe a public charity’s acting on behalf of or against any individual candidate for public office. 46 The Senate did not hold any hearings on the provision, nor was there any debate. 47 No committee report exists explaining the proscription and no legislative history beyond a brief statement in which Senator Johnson stated that the amendment was intended to “‘extend’ the limitation of 501(c)(3).” 48 There is, in fact, no record of the voice vote on the Senator’s proposed amendment. 49 Although there is no legislative history of the provision, it appears that “Johnson saw a cabal of national conservative forces, led by tax-exempt educational entities fueled by corporate donations, arrayed against him and wanted to put a stop to the meddling of these foreign interlopers . . . .” 50 Although it is difficult to identify any specific tax policy underlying the prohibition of certain political actions by public charities, once the prohibition had found its way into the Code, “Congress had spoken, [and] the question of whether such prohibitions were wise was foreclosed . . . .” 51

The legislative history of the campaign prohibition thus appears to be a general unease with public charities being too involved in politics combined with particular animosity between powerful politicians and outspoken organizations that claimed tax exemptions as public charities. 52 The history

44. Houck, supra note 10, at 22.
45. See I.R.C. § 501(c)(3).
46. See O’Daniel, supra note 38, at 740.
47. Samansky, supra note 24, at 156–57.
48. James, supra note 41, at 381.
49. Gaffney, supra note 24, at 24 (“Within a few seconds or—if one is a slow reader—a few minutes, one can master all there is to know about the legislative history of this second significant conditional restraint on the political freedom of exempt organizations.”).
50. O’Daniel, supra note 38, at 768; see also James, supra note 41, at 382 (“In the absence of any legislative history explaining Senator Johnson’s reasons for proposing the amendment, commentators have opined that Senator Johnson was motivated by his fear that nonprofit organizations were working on behalf of a campaign opponent to unseat him.”).
51. Houck, supra note 10, at 29.
52. See Laura Brown Chisolm, Politics and Charity: A Proposal for Peaceful Coexistence, 58 GEO. WASH. L. REV. 308, 337 n.130 (1990) (“The best direct evidence, however, strongly suggests that the major motivation for the section 501(c)(3) treatment of campaign intervention has been overreaction to isolated incidents and periodic personal affront to individual legislators rather than response to either careful empirical data or sound theoretical underpinnings.”); see also Elias Clark, The Limitation on Political Activities: A Discordant Note in the Law of Charities, 46 VA. L. REV. 439, 446 (1960) (“It is not clear from
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does not explain, however, why such discomfort and animosity should lead to a blanket prohibition or why the consequences of that prohibition should be the loss of a public charity’s exemption from tax.

III. THE NORMATIVE DEBATE: CONTEMPORARY EXPLANATIONS FOR THE CAMPAIGNING PROHIBITION

In the absence of a clear historical justification, the prohibition on campaigning by public charities has been subject to “considerable attention from both critics and supporters.” Supporters argue that the ban is necessary, both to protect democracy and to protect public charities themselves, and that it must be vigorously enforced. Critics, on the other hand, argue that the ban is both unnecessary and an unconscionable burden on public charities’ rights and should be repealed.

Ultimately, the supporters and the opponents of the prohibition are at an impasse. Both the supporters and the opponents of the ban make arguments that they believe are compelling in justifying their support or opposition. But, as this Section will show, the opponents of the ban respond that the supporters’ arguments are flawed, and the supporters of the ban react similarly to the arguments put forward by the opponents. Even after the debate, there is not a clear justification for maintaining or repealing the prohibition. Moreover, the long-standing controversy neither provides a normative justification for revoking a public charity’s tax exemption for violating the prohibition, nor provides a clear mandate to the IRS for imposing the prescribed penalty.

A. Arguments in Favor of the Prohibition

Since the passage of the campaigning prohibition, supporters of the prohibition have justified its necessity using four broad categories of arguments. First, government should not pay for or subsidize political activity. Second, allowing private charities to participate in political activity

the early history of the restriction on political activities whether it evolved as a result of carefully considered policy, or of the Treasury’s understandable desire to place outer limits around any exemption, or on the assumption that established property law required it.”).


54. See infra Part III.A.

55. See infra Part III.B.

is inconsistent with pursuing the broad public interest that public charities are designed to promote.\textsuperscript{57} Third, partisan politics is, by definition, not charitable.\textsuperscript{58} Fourth, if the prohibition were lifted, political donors would take advantage of the double subsidy and funnel all of their political donations through public charities.\textsuperscript{59} However, with critics responding to each of the arguments, none stands out as an unimpeachable justification for the prohibition.

\subsection*{1. Subsidizing Political Speech}

Courts and commentators have argued that it was necessary to statutorily limit public charities' ability to engage in political controversies because it is inappropriate for the government to subsidize political speech. In fact, Judge Learned Hand, in \textit{Slee v. Commissioner},\textsuperscript{60} stated that “[p]olitical agitation” by public charities “must be conducted without public subvention; the Treasury [against participation by public charities in electoral politics] is that the government must not subsidize political activities.”\textsuperscript{57} Chisolm, supra note 52, at 337 (“First is the principle of nonsubvention: government should not pay for political activity, even through the indirect mechanism of tax benefits.”); Donald B. Tobin, \textit{Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy}, 95 Geo. L.J. 1313, 1336 (2007) (“[T]here is nothing in the common law to suggest that a charitable organization should receive a financial subsidy from the government and be allowed to invest that subsidy in attempting to elect the charity’s preferred candidate.”).

\textsuperscript{57} See, e.g., Buckles, supra note 56, at 1085 (“Another argument in favor of prohibiting political campaign intervention by charities is that such prohibition is necessary to prevent charities from furthering a private interest.”); Chisolm, supra note 52, at 337 (“Second is the apprehension that allowing political involvement invites misuse of the section 501(c)(3) form in pursuit of private interests, rather than for the broad public benefit that the charitable classification is designed to promote.”); Tobin, supra note 56, at 1336 (“[I]ntervention in political campaigns by a 501(c)(3) organization impacts their core mission and therefore undercuts the logic of providing special status to them in the first place.”).

\textsuperscript{58} See, e.g., Buckles, supra note 56, at 1090 (“Another argument in support of forbidding electioneering by charitable entities is that political activities are simply not ‘charitable’ activities under common legal conceptions of charity.”); Chisolm, supra note 52, at 337 (“Finally, the argument is made that political involvement is, by definition, inconsistent with ‘charity’-partisan political activity simply is not charitable as we have long understood the term or as we understand it now, and charitable organizations have no business straying into the partisan political arena.”); Tobin, supra note 56, at 1338 (“I argue that political intervention is not consistent with our current and common definition of charitable.”). Professor Brian Galle offers an additional justification for the prohibition: that the prohibition may be intended to prevent managers of public charities from being distracted by noncharitable activities. Brian Galle, \textit{The LDS Church, Proposition 8, and the Federal Law of Charities}, 103 NW. U. L. Rev. Colloquy 370, 378 n.38 (2009), http://www.law.northwestern.edu/lawreview/colloquy2009/10/LRCollo2009n10Galle.pdf.

\textsuperscript{59} See Tobin, supra note 56, at 1339 (“If the prohibition were lifted and such a subsidy were granted, 501(c)(3) charities would then enjoy a preferred position over all other campaign organizations, including a candidate’s campaign organization.”).

\textsuperscript{60} 42 F.2d 184 (2d Cir. 1930).
Department stands aside from them." Underlying this sense that the Treasury (and, by implication, the government) should stand aside from political agitation is the idea that indirectly subsidizing political speech through a tax exemption forces taxpayers to support candidates they do not want to support. Moreover, the government "has not taken on the responsibility of funding candidate campaigns and certainly has not decided to provide a subsidy to [public charities] to do so."

In response, commentators point out that basing the prohibition on the grounds that taxpayers are being forced to support distasteful candidates is unconvincing at best. Taxpayers are routinely required to pay for government expenditures that they may find objectionable. Moreover, the connection between donations that would not have been made but for their deductibility and a public charity’s support of a candidate is too attenuated to justify the outright ban on campaigning.

Furthermore, objecting to the taxpayer subsidy of a public charity’s political speech presupposes that its tax exemption represents a governmental subsidy. Some characterize the exemption differently. Professor Buckles argues that public charities exist to benefit the community and, as such, act as "qualified co-sovereigns." Under this conception of the tax exemption, public charities have been exempted from tax because it would be improper for the government to tax a co-sovereign. Donations should be deductible because the donors are “constituent parts” of the community and, in essence, are donating to the community; the deductibility of donations merely recognizes that the income belonged to the community, not the donor. Under this co-sovereign theory, the government is not subsidizing charitable speech because the government was not entitled to tax the income in the first instance. It follows that if there is no subsidy, no tax dollars went to support a candidate.

61. Id. at 185.
63. Tobin, supra note 56, at 1336.
64. See, e.g., Autenrieth v. Cullen, 418 F.2d 586, 588 (9th Cir. 1969) ("The fact that some persons may object, on religious grounds, to some of the things that the government does is not a basis upon which they can claim a constitutional right not to pay a part of the tax.").
65. Chisolm, supra note 52, at 340. Moreover, as I argue below at Part III(A)(4), it is not clear that allowing public charities to support candidates will result in any significant amount of donations intended to be funneled to candidates.
66. Buckles, supra note 56, at 1083.
67. Id.
68. Id.
69. Id. at 1084.
Even accepting the co-sovereign theory of public charity, though, the government may have an interest in limiting public charities' participation in politics. Professor Leff argues that the government has an interest in “treating all taxpayers alike when they seek to use their funds to influence the outcome of an election.” Although the co-sovereign theory posits that there is no subsidy to public charities because they are not a type of entity that can be taxed, nonetheless, allowing them to campaign would treat certain donors differently than others, in a way the government may want to avoid.

2. Private Interest

The prohibition is also justified on the basis that public charities are to act in the public’s interest, rather than in private interest. As such, a public charity’s actions are supposed to lead to public, rather than private, benefit. Presumably, absent the ban on campaigning, a public charity could act in the private interest either of candidates, who would seek the public charity’s support, or of supporters of the candidate, who would seek the candidate’s election through the public charity.

In general, however, the benefits received by candidates and their supporters do not appear to be the kind of private benefits proscribed by the tax law. The Treasury regulations prohibit public charities from being organized or operated “for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organizations, or persons controlled, directly or indirectly, by such private interests.” While the candidates and their supporters would, in theory, benefit from public charities’ support, there are often private beneficiaries of public charities’ actions. The poor and homeless benefit from nonprofit soup kitchens and homeless shelters. Students and professors benefit from tax-exempt universities. College athletes and sports fans benefit from the NCAA. Parishioners benefit from the spiritual and temporal activities performed by their churches. But the ancillary benefits enjoyed by certain private individuals do not transform their public functions into private benefit.

Concededly, if a significant portion of a public charity’s activities were dedicated to electing a candidate for office, the public charity would appear to

70. Leff, supra note 53, at 676.
71. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 2008) (“An organization is not organized or operated exclusively for... [an exempt purpose] unless it serves a public rather than a private interest.”).
72. Buckles, supra note 56, at 1086.
be acting in that candidate’s private interest rather than the public interest. But endorsing candidates does not necessarily represent a solely private interest. For example, because democracy has become so complex, it is difficult for individual citizens to master all of the issues relevant and important in making political decisions. To have a good democracy, then, it is necessary for citizens to find experts and trustworthy surrogates. Although public charities may have their own biases, they can also be one more voice to which citizens could turn in evaluating candidates.

3. Politics Are Not Charitable

Additionally, some commentators argue that political activity is inimical to the meaning of “charitable.” The argument can be framed by asserting that under the common law, charitable organizations could perform certain functions (e.g., care for the poor, provide comfort, help the community), and that participating in political campaigns does not fit within one of those charitable categories. The argument may also be framed with a more nuanced view of the purposes of public charities (e.g., to provide services that the government would otherwise be required to provide). Absent support from public charities, this argument goes, government would be under no obligation to support a candidate. Ultimately, this argument arrives in the same place: because intervening in political campaigns is not a charitable activity, organizations that campaign should not be permitted a tax exemption.

There is a second, paternalistic thread to using the argument that campaigning is not charitable as a justification for prohibiting public charities from campaigning. Under this thread, the problem with public charities’ participation in campaigning is not just that such campaigning is not a charitable endeavor. Public charities that participate in campaigning are affirmatively hurting themselves. For example, the argument goes, a church

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75. Id. at 53–54.
76. See, e.g., Tobin, supra note 56, at 1338.
77. Id. (“Using a charity’s resources to promote a particular candidate, however, does not fit within this definition [of the meaning of charitable] and calls the charitable mission of the charity into jeopardy.”).
78. Ann M. Murphy, Campaign Signs and the Collection Plate—Never the Twain Shall Meet?, 1 PITT. TAX REV. 35, 80 (2003) (“The grant of tax exemption is tied to the public service offered to the entity, service that the government need no longer provide.”).
79. Id. (“Charitable work involves areas such as feeding and clothing the poor, providing low-cost medical care, and providing shelter. Attempting to elect a certain official is by no means a charitable activity.”).
that supports a candidate risks alienating parishioners whose political leanings differ from the endorsement.\textsuperscript{80} Moreover, endorsing a candidate may turn away potential donors, making it more difficult for public charities to raise the funds they need to fulfill their charitable mission.\textsuperscript{81}

In response, some scholars argue that, although campaigning may not be a charitable end, there is no reason why it cannot be a legitimate means to accomplish the public charity’s charitable purpose. Professor Buckles posits a public charity organized with the clearly charitable purpose of relieving poverty.

The charity furthers this purpose primarily by offering food and shelter to the homeless. In an election year, the charity endorses a presidential candidate who promises to support proposed legislation granting additional federal funds for homeless shelters and for the vocational training of the unemployed homeless. In this hypothetical, the charity has intervened in a political campaign in an attempt to further its charitable mission.\textsuperscript{82}

Although, strictly speaking, the charity’s support of the presidential candidate is not a charitable activity, neither is its purchase of food for the homeless. But purchasing the food is a step toward providing food to the homeless; similarly, endorsing a candidate who will help the homeless can be viewed as a step toward the charity’s performing its charitable purpose. Looking merely at the endorsement, rather than the purpose underlying the endorsement, reflects an unnecessarily restrictive view of both the transaction and of the public charity’s charitable activity.\textsuperscript{83} Just because a public charity engages in certain activities that are not themselves charitable in nature, it does not mean that those activities should cause the public charity to cease being considered a charitable entity.\textsuperscript{84} This is particularly true when, as illustrated in the forgoing

\textsuperscript{80} Id. at 81 (“The intervention in politics could turn believers away from the church or house of worship.”).

\textsuperscript{81} Tobin, supra note 56, at 1338 (“[C]harities that support political candidates may find it harder to obtain funds and donations from outside sources.”).

\textsuperscript{82} Buckles, supra note 56, at 1090–91.

\textsuperscript{83} See, e.g., Carroll, supra note 4, at 252 (“Indeed, Section 501(c)(3)’s campaign prohibition, together with its limitation on lobbying, constitutes an aberration even in the federal tax law, which otherwise recognizes that the key to whether a group is ‘exclusively’ charitable under the Internal Revenue Code lies in its purposes, not the means by which it accomplishes those purposes.”); Chisolm, supra note 52, at 360 (“But the common law roots of the charitable tax exemption appear to reflect a distinction between means and purposes.”).

\textsuperscript{84} See Buckles, supra note 56, at 1090 (“The common law does not plainly render an institution ‘non-charitable’ simply because it seeks to further its admittedly charitable purposes in part through political means.”).
example, the activity that is not inherently charitable is closely connected to, and in furtherance of, the public charity’s core charitable purpose.

Moreover, there is no reason that the tax law needs to protect public charities from themselves. It is conceivable that a public charity’s endorsement of a candidate would turn certain supporters and donors away from that charity because they disagreed with the endorsement. But nonpolitical decisions that a public charity makes could also turn donors away. A donor may not like the location or mix of services the public charity provides. She may object to the administrative overhead. She may have personal issues with the board members. But the tax law does not attempt to protect public charities from doing anything that would alienate donors. Instead, public charities can generally act as they will, within the legal scope of their charitable mandate. Presumably, they take into account the effect of their actions on potential donors. There is no reason to assume that, if they were allowed to campaign for or against candidates, they would not continue to evaluate the value of campaigning against the cost in terms of donor support.

4. Funneling

The fourth justification for the campaigning prohibition I call the “funneling” concern. According to supporters of the campaigning prohibition, if public charities were permitted to support or oppose candidates, rational political donors would stop donating directly to candidates and, instead, would make their political donations to public charities, with the understanding that some or all of the donation would then be used by the public charity to support or oppose the donor’s candidate of choice.85 Political donors would prefer to donate to a public charity that could then act for or against candidates, the argument goes, because of the multiplier effect of public charities.86

85. See, e.g., Tobin, supra note 56, at 1340 (“The supporter has a choice of donating $500,000 to a political organization that supports Candidate A or B, or $500,000 to Church A or B [that will support Candidate A or B], whereupon, depending on Supporter’s tax situation, Supporter will receive a $500,000 tax deduction. Contributors in that situation will most surely contribute to the Church instead of the political organization.”); Richard J. Wood, Pious Politics: Political Speech Funded Through I.R.C. § 501(c)(3) Organizations Examined Under Tax Fairness Principles, 39 ARIZ. ST. L.J. 209, 217 (2007) (“Both Greta and Oliver are purchasing political speech. Both have identical levels of income. Yet under the Act, Greta would enjoy a tax advantage of the multiplier effect based on nothing other than a disparity in tax treatment of the organization through which she speaks.”).

86. Wood, supra note 85, at 246 (“Section 501(c)(3) organizations have the capacity to multiply the dollars contributed to them far beyond the ability of traditional political organizations. That...has proved to be irresistible to some politicians and could lead to the diversion of funds away from political organizations toward 501(c)(3) religious organizations.”).
Political donors would arguably donate to a public charity in place of political organizations because, in addition to the public charity’s not having to pay taxes on the donations, the donors would be able to deduct the amount they donated. “As a result, on an after-tax basis, those who donate to charities are no worse off financially than they would have been had they donated smaller, nondeductible sums” directly to a candidate. This multiplier effect could make it more attractive to support or oppose candidates through public charities rather than directly because the donor could donate more after-tax dollars through a public charity than she could donate directly to a political campaign.

In addition to concerns about tax fairness and policy, some commentators have raised concerns about public charities themselves. Absent the prohibition, these commentators argue, rational donors have a strong incentive to shift their political donations from political organizations to public charities. In doing so, donors would pressure the public charities to adopt the donors’ political views. In addition, donors could pressure public charities to change their priorities, focusing less on their charitable missions and more on the donors’ political agendas. The prohibition, these commentators argue, protects public charities’ agendas from being subsumed by their donors’ political agendas.

The campaigning prohibition is not the only impediment to public charities’ becoming funnels for campaign contributions, however. Even if the prohibition on campaigning by public charities were completely removed from

87. Buckles, supra note 56, at 1079. For example, a potential donor in the 35% tax bracket who earns $1,000 that she wants to donate to a candidate can only afford to donate $650 to a political organization after taxes. Because she can deduct contributions to public charities, though, in effect, there would be no tax cost if she made the $1,000 donation to the public charity instead. Therefore, she can donate the full $1,000 after-tax amount that she intended to donate.

88. Professor Donald Tobin explains the potential problems like this:

A hypothetical supporter of candidate A or B is now faced with the question of how to contribute her money in support of her chosen candidate. The supporter has a choice of donating $500,000 to a political organization that supports Candidate A or B, or $500,000 to Church A or B, whereupon, depending on Supporter’s tax situation, Supporter will receive a $500,000 tax deduction. Contributors in that situation will most surely contribute to the Church instead of the political organization. A person in the 35% tax bracket will save $185,000 in taxes by donating to the Church instead of to the candidate or political organization.

Tobin, supra note 56, at 1340–41. Provided that the IRS and courts enforce the “no substantial part” test robustly, however, I find this concern that public charities will become conduits for political donations unconvincing. See infra notes 91–95 and accompanying text.

89. Tobin, supra note 56, at 1341 (“A donor who itemizes deductions on her tax return will likely make her political contributions to the Church instead of to the candidate’s campaign or other independent organization.”).

90. Id. at 1322–26, 1337 (discussing capture of 501(c)(3)’s).
§ 501(c)(3), the "no substantial part" requirement would significantly limit the amount of support public charities could provide to candidates for office.

As has been previously discussed, to maintain their tax-exempt status, "no substantial part" of a public charity's activities can include "carrying on propaganda, or otherwise attempting, to influence legislation."91 A public charity that allocates between "16 and 20 percent" of its annual expenditures to influencing legislation has been held in violation of the "no substantial part" rule.92 On the other hand, where less than 5% of a public charity's activities were devoted to influencing politics, the Sixth Circuit held that its political activities were insubstantial.93 It would appear that the "line between what is substantial and what is insubstantial lies between five and 15% of an organization's total activities, as measured by time, effort, expenditure and other relevant factors."94

To the extent that the "no substantial part" rule is enforced robustly, it should reduce concerns about the multiplier effect of supporting political candidates through public charities. Because political advocacy is not a qualifying charitable purpose, as made clear by the "no substantial part" rule, even without the campaigning ban a public charity could not act as a conduit, using every dollar it receives to campaign on behalf of a political candidate. Because of the constraints on its funneling money, donating to a political campaign through a public charity will generally be less beneficial than it would appear on first glance: in general, a public charity could use less than 15% of a donor's (deductible) contribution to campaign for a candidate, while a political organization could use 100% of a donor's (nondeductible) contribution.95

91. I.R.C. § 501(c)(3).
92. See Haswell v. United States, 500 F.2d 1133, 1146 (Ct. Cl. 1974).
93. Seasongood v. Comm'r, 227 F.2d 907, 912 (6th Cir. 1955). Money is not the sole criterion by which a public charity can use a substantial part of its activities in propaganda or influencing legislation. The percentage of time and effort an organization's employees and directors engage in political activities may also indicate substantiality. See Kuper v. Comm'r, 332 F.2d 562, 562 (3d Cir. 1964); I.R.S. Gen. Couns. Mem. 38,437 (July 8, 1980). The IRS has held, moreover, that "[a]n organization which, as its primary objective, advocates the adoption of a doctrine or theory which can become effective only by the enactment of legislation" can never qualify as a tax-exempt public charity. Rev. Rul. 62-71, 1962-1 C.B. 85.
95. This is not to suggest that public charities cannot act as efficient conduits and multipliers of charitable donations. It is possible that CharityCo intends to spend money on its charitable purpose and has no current intention of spending any money to try to influence legislation or support or oppose any individual candidate. In that case, assuming CharityCo is comfortable that 10% of its expenditures is permitted under the "no substantial part" test, it has unused political capacity. That is, it can spend an
B. Arguments in Favor of Permitting Increased Political Activity

Critics of the prohibition have argued that the campaigning prohibition should be eliminated or significantly curtailed. These commentators raise a number of arguments that can largely be described in three main categories. First, they argue that there are constitutional problems with the current prohibition. Second, public charities' historic role has included "shaping major social movements with enormous political implications." Third, to protect themselves and their charitable interests from the vagaries of the political world, public charities need to have some input into their "governmental partners." Ultimately, though, supporters of the prohibition have been able to respond to each of these arguments, and none has been sufficiently persuasive to get the law changed.

1. The Prohibition Violates the Constitution and Federal Statute

Some commentators argue that the prohibition against campaigning by public charities is unconstitutional. Such arguments include that the prohibition is unconstitutionally vague and that it is unconstitutionally overbroad. More specifically, commentators note that the prohibition has been challenged as infringing on the right to free speech and petition under the First Amendment and violating Fifth Amendment guarantee of equal protection of the laws.

In general, though, courts have upheld Congress’s ability to condition tax-exempt status on public charities’ political speech. In Regan v. Taxation With Representation of Washington, the Supreme Court held that there was no amount equal to about 11% of the amount of charitable purpose expenditures it intends to make on political expenditures and still feel comfortable that it qualifies for its tax exemption under § 501(c)(3). Moreover, 10% of a large public charity’s expenditures, while relatively small compared with the size of the organization, could still constitute a significant amount of money. See, e.g., Galle, supra note 58, at 375–76 ("The implication is that a sufficiently large entity could spend billions of dollars without violating the prohibition against 'substantial' lobbying efforts.").

96. Carroll, supra note 4, at 256 ("Without clarification of the restriction, churches and other charitable organizations would continue to lack adequate notice to comply with even a more narrowly applicable limitation on their electoral activities.").

97. Chisolm, supra note 52, at 362 ("Because the broad proscription is entirely unnecessary to accomplish the goals of the charitable exemption and deductibility, it is constitutionally suspect.").


constitutional problem with the IRS's denial of tax-exempt status to an organization that intended to do a substantial amount of lobbying.\textsuperscript{100} Taxation With Representation argued that the lobbying limitation violated the First Amendment because it imposed an "unconstitutional condition" on the receipt of deductible contributions.\textsuperscript{101} The Supreme Court responded that, while the government cannot deny a benefit to a person because she exercises her constitutional rights, neither is the government required to provide an exemption to taxpayers; in this case, the government merely refused to subsidize Taxation With Representation's political activities.\textsuperscript{102}

Professor Chisolm argued that the Supreme Court's decision in \textit{Taxation With Representation} did not answer the constitutional question presented by the prohibition on campaigning, because public charities have other options for lobbying that they do not have for campaigning.\textsuperscript{103} Rather, the campaigning prohibition was subject to a less-clear unconstitutional conditions analysis.\textsuperscript{104} Since Professor Chisolm's article, however, the District of Columbia Circuit ruled in \textit{Branch Ministries v. Rossotti} that the prohibition on campaigning did not constitute and unconstitutional burden by forcing Branch Ministries to choose between its exemption and protected speech.\textsuperscript{105}

Some commentators argue that, even if the prohibition on campaigning is not unconstitutional as applied in general to public charities, that it is unconstitutional as applied to churches. The Free Exercise Clause of the Constitution provides churches with even more protection than the First Amendment provides to nonchurch public charities.\textsuperscript{106}

\textsuperscript{100} Id. at 545.
\textsuperscript{101} Id.
\textsuperscript{102} Id. However, although the Supreme Court uses the language of subsidy to describe the tax exemption, that may not be an entirely accurate characterization of tax exemption. See \textit{supra} notes 66–69 and accompanying text.
\textsuperscript{103} Chisolm, \textit{supra} note 52, at 332 ("Thus, Taxation With Representation [sic] does not settle the question of whether the section 501(c)(3) prohibition on campaign participation is an unconstitutional condition. The difficult question that the Court, rightly or wrongly, was able to avoid in Taxation With Representation [sic] cannot be dodged in the case of the campaign intervention prohibition.").
\textsuperscript{104} See id. at 333.
\textsuperscript{105} Branch Ministries v. Rossotti, 211 F.3d 137, 144 (D.C. Cir. 2000).
\textsuperscript{106} Ryan, \textit{supra} note 24, at 83 ("This blending of political and religious speech and actions exacerbates the free speech and free exercise concerns implicated when applying § 501(c)(3) and the IRS's corresponding regulations to religious organizations."). If churches were to be treated differently than nonchurch public charities for § 501(c)(3) purposes, it could raise the specter of the Establishment Clause. Arguably, treating a church differently (and better) than a nonchurch public charity could be seen as an establishment of religion. See \textit{Galle}, \textit{supra} note 58, at 376 n.32 ("It is, however, also possible that a scheme permitting only churches to lobby with little limit would violate the Establishment Clause."). Others disagree, arguing that historically, the tax law has treated churches differently in some contexts without
Even if the prohibition on political campaigning by churches does not violate their free speech or exercise rights, though, some commentators argue that, as applied to religious institutions, it violates the Religious Freedom Restoration Act of 1993 (RFRA). Congress enacted RFRA in response to the Supreme Court’s decision in Employment Division v. Smith, in which the Court “abandoned the compelling-interest test as applied to free-exercise claims, holding that it did not apply to generally applicable, facially neutral laws.” RFRA reinstated the more-stringent compelling-interest standard in evaluating free-exercise claims. Under RFRA, the federal government would be required to make a “case-by-case determination of the extent to which politically-oriented speech is part of religious practice or activity.” It is likely that at least some church political speech would be protected under RFRA.

The Branch Ministries court found, however, that the prohibition on campaigning did not unconstitutionally burden the petitioner church’s right to free exercise of religion. It also held that the law as applied to Branch Ministries did not violate RFRA. Still, it is possible that, in some circumstances, the prohibition could violate the First Amendment or RFRA. And even if the prohibition does not technically violate the Constitution, it may still be “contrary to free speech values” and other values that underlie the Constitution.

violating the Establishment Clause. Smith, supra note 24, at 82 (“However, if churches are treated differently than other tax-exempt organizations, will the Establishment Clause be violated? The answer is probably not. Historically, churches have been treated differently, perhaps because of their significant contributions to America and the world. Since this country’s founding, churches have been accorded a special place in society.”).

111. Samanksy, supra note 24, at 177.
112. See id.
114. Id.
115. See generally Lloyd Hitoshi Mayer, Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise, 89 B.C. L. REV. 1137 (2009) (arguing that a First Amendment challenge to the prohibition as applied to churches would probably fail, but that RFRA would likely require a narrow exception to the prohibition).
116. Chisolm, supra note 52, at 315.
2. Public Charities Have Historically Participated in Political Discourse

Commentators who oppose the campaigning restriction also point to the historic role of public charities in forming public policy. Historically, religious and other charitable institutions have been at the forefront of fighting for abolition, suffrage, and civil rights. Refusing to allow public charities to participate in the political sphere "ignore[s] their significant historical contributions to our country, contributions that illustrate their vital place in democratic government." And public charities' contributions to democracy are not all in the past. Because they are organized to serve the public interest rather than a narrow self-interest, public charities may be able to provide legislators, and the voting public in general, with information that could act as a counterweight to the information provided by private lobbyists and interest groups. Among other things, public charities are "particularly situated to notice and say that the emperor is naked." In fact, to the extent that public charities partner with the government in providing certain services to the public, it makes sense to "permit the charitable sector to participate in the process of choosing its governmental 'partners.'"

Proponents of the ban on campaigning do not necessarily deny public charities' history of political activity or the important role they can continue to play. The prohibition on campaigning does not, they argue, prevent public charities from "discussing important issues of the day." Public charities are not prohibited from engaging in the political debates of the day, including debates over how the government should be run; rather, they are prohibited from saying who should run it. Within these more-limited constraints, public charities are free to continue to influence public policy.

118. Buckles, supra note 56, at 1096.
119. See Clark, supra note 52, at 458–59.
121. Buckles, supra note 56, at 1096.
122. Tobin, supra note 56, at 1334.
123. Id.
3. Public Charities Must Be Able to Fully Protect Their Self-Interest

Although they are intended to serve the public, some commentators point out that public charities need the ability to protect their own self-interest.\textsuperscript{124} Public charities are subject to governmental laws and regulations and, without a representative voice in the political world, they risk getting captured by government in much the same way that some proponents of the prohibition worry that, should they be permitted to support individual candidates, they risk being captured by large donors. Banning public charities from the political world would prevent them from “defend[ing] their operations, and indeed their very existence, against hostile acts by government agents.”\textsuperscript{125} Both because of the good that public charities can do in the public arena and because of the potential harms they would face if they were not permitted to act politically, expanding the prohibition to cover all of a public charity’s potential political actions is neither a viable nor a good solution.

Supporters of the ban on campaigning reply, again, that even with the prohibition, public charities can protect themselves in the public sphere.\textsuperscript{126} Moreover, they argue that intervention in political campaigns by a public charity is actually harmful to the charity.\textsuperscript{127} There is limited value in a public charity’s being able to protect its interests in the political realm if the cost of such protection harms or destroys the public charity.

C. Summary

In spite of the lack of a discernable normative justification underlying the original enactment of the campaigning prohibition, there are clearly strong arguments for preventing public charities from campaigning. However, just as clearly there are strong countervailing arguments that the prohibition should not exist. Moreover, all of the arguments on both sides are flawed and rebuttable. Ultimately, the debate fails to result in a justification that absolutely compels the IRS to enforce the prohibition, irrespective of the penalty’s severity.

\textsuperscript{124} Buckles, supra note 56, at 1097 (“[O]ne may argue that charities should be permitted to defend their operations, and indeed their very existence, against hostile acts by government agents.”).

\textsuperscript{125} Id.

\textsuperscript{126} See supra notes 122–23 and accompanying text.

\textsuperscript{127} Tobin, supra note 56, at 1338 (“Moreover, charities that support political candidates may find it harder to obtain funds and donations from outside sources.”).
IV. ENFORCEMENT PROBLEMS

The last half-century has demonstrated that the existence of the campaigning prohibition has not been fatal to public charities’ pursuit of their charitable purposes. But although public charities have been able to function in a world where they operate subject to the prohibition, anecdotal evidence suggests that many have been acting as if there was no such prohibition. And the IRS has been hesitant in its attempts to identify and penalize public charities that violate the prohibition. So although public charities appear to be coexisting with the prohibition successfully, this coexistence exists, at least in part, because in many cases, public charities are able to operate as if there were no prohibition. But the disregard by some public charities of the prohibition impacts other public charities negatively.

A. Public Charities Often Disregard the Prohibition

In spite of the prohibition, public charities endorse or oppose candidates on a relatively regular basis. The 2008 election saw widespread questions about whether then-presidential-candidate Barack Obama’s church should have its exemption revoked because of a sermon by Rev. Jeremiah Wright in which Rev. Wright appeared to oppose Senator Hillary Clinton’s bid for the presidency. On the other side of the political spectrum, the Alliance Defense Fund sponsored “Pulpit Freedom Sunday.” On September 28, 2008, thirty-three pastors used their sermons to endorse a candidate for office, in express contravention of the prohibition. The churches did not try to surreptitiously violate the campaigning prohibition: Pulpit Freedom Sunday received prominent nationwide news...
Moreover, because the pastors intended their sermons as a challenge to the prohibition, they sent copies of their sermons to the IRS.\(^{132}\)

In the face of this blatant disregard for the campaigning prohibition, as of April 2009, the IRS had not notified any of the churches that it had opened an investigation. Nor had the IRS made any other move to sanction any of the churches.\(^{133}\) And, in fact, it appears that the IRS rarely revokes a public charity’s tax-exempt status for violating the prohibition. In 2004, the IRS launched the Political Activities Compliance Initiative (PACI), in which it reviewed 110 cases of alleged impermissible campaigning by public charities.\(^{134}\) About 57% of the organizations examined were nonchurch public charities, while the other 43% were churches.\(^{135}\) As of the date of the report, the IRS had closed 82 of the 110 cases.\(^{136}\) In 18 of the 82 closed examinations, the IRS determined that the public charity had not violated the campaign prohibition.\(^{137}\) In another 53, the IRS determined that they had violated the prohibition, but it did not revoke the public charity’s tax-exempt status or impose an excise tax.\(^{138}\) Instead, the IRS “issu[ed] a closing letter that stated the circumstances leading to the examination, the examination findings, and the reasons for resolving the examination without change to the organization’s exempt status.”\(^{139}\) In three cases, the IRS imposed an excise tax,\(^{140}\) and in only four cases—none of which involved a church—did the IRS revoke a public charity’s tax-exempt status.\(^{141}\) In only one court case has a church lost its tax-exempt status as a result of campaigning for or against a candidate.\(^{142}\)

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132. Goodstein, supra note 131.


135. Id. at 9.

136. Id. at 18.

137. Id. at 18–19.

138. Id.

139. Id. at 19.

140. Id.

141. Louis Sahagun, Church Votes to Fight Federal Probe; Pasadena’s All Saints Episcopal Parish Board Challenges a Request to Turn over Documents in a Case over a 2004 Antiwar Sermon, L.A. TIMES, Sept. 22, 2006, at B1.

142. Blair, supra note 130, at 428.
B. The IRS Does Not Enforce the Prohibition

The IRS, the agency charged with enforcing the prohibition, has largely ignored its responsibility to do so. There may be legitimate reasons why the IRS is hesitant to enforce the campaigning prohibition. Although the prohibition has been a part of the tax law for over fifty years, there is still broad disagreement about whether public charities should be permitted to campaign.\textsuperscript{143} Notwithstanding this disagreement, the penalty for campaigning is draconian, even where the infraction is minor or unintentional. In theory, a public charity must lose its tax exemption for a single instance of supporting a candidate.

In exploring the enforcement of legal norms, Professor Kahan argues that "[t]he decisive factor in determining whether a norm will inhibit enforcement ... is how much more severely the law condemns the behavior than does the typical decisionmaker."\textsuperscript{144} He argues that where the law condemns a behavior much more severely than does society broadly, those charged with enforcing the law are reluctant to do so, whereas if the law condemns the behavior only a little more than society at large, those charged with enforcing the law are more likely to do so.\textsuperscript{145}

Professor Kahan grounds his theory of gentle nudges in a model that bears an uncanny resemblance to the current state of the prohibition:

Imagine a society whose members are divided about how to regard some form of behavior that reflects a contested social norm. Many regard the behavior as perfectly appropriate or as at most a trifling wrong. Others vehemently denounce it and demand that it be severely sanctioned, both to deter individuals from engaging in it and to change the social norm that gives rise to it. A significant group of citizens falls somewhere in between. Against the will of those who condone the behavior, those intent on denouncing it prevail in obtaining legislation that prohibits the behavior or, assuming it is already subject to modest regulation, substantially raises the penalty for it.

What will happen next? That depends, I will argue, on exactly how severely the new law condemns the behavior relative to the sensibilities of the decisionmakers who are called upon to enforce it. If the law condemns too severely—if it tries to break the grip of the contested norm (and the will of its supporters) with a "hard shove"—it will likely prove a dead letter and could even backfire. If it condemns more mildly—if it "gently nudges" citizens toward the desired behavior and attitudes—it might well initiate a

\textsuperscript{143} See supra Part III.
\textsuperscript{144} Kahan, supra note 9, at 608.
\textsuperscript{145} Id.
process that culminates in the near eradication of the contested norm and the associated types of behavior.\textsuperscript{146}

Like Professor Kahan's model, there are two outspoken groups, the supporters and the critics of the prohibition, while most people presumably fall somewhere between the extreme poles that the two groups represent. With such polarized opinions, though, it becomes especially valuable to provide the IRS, which is charged with enforcing the prohibition, the tools necessary to gently nudge public charities. In that way, it will be more likely to enforce the prohibition.

Even with the explicit authority to nudge, rather than shove, public charities, the IRS starts at a disadvantage. When the IRS initiates investigations of public charities, it is often met with cries of bias, or complaints that it is trying to bully the Administration's opponents.\textsuperscript{147} Moreover, analyzing a public charity's actions and statements in order to determine whether the public charity has engaged in proscribed behaviors is administratively burdensome, potentially requiring significant investments of time and financial resources by the IRS. And the upside to the IRS is minimal: presumably, revoking a public charity's tax-exempt status, while preventing bad behavior, will not result in significant additional revenue for the government. If the public charity is a church, it will regain its tax exemption immediately upon ending its support of a candidate. Other public charities would presumably cease to operate and, to the extent they intended to continue, would form a new entity and apply for public charity status for that entity.

The IRS's hesitance to penalize violators limits the effectiveness of the current penalty regime in another way. Although the penalty is severe as applied to any individual public charity, \textit{ex ante}, any given charity faces a very low expected penalty. A public charity’s expected penalty for violating the campaigning prohibition is the nominal penalty (i.e., loss of exemption) discounted by the probability of the penalty's being imposed.\textsuperscript{148} Although this Article has used examples of highly publicized noncompliance by public charities, noncompliance of which the IRS has been aware, it appears that there is a sizeable amount of noncompliance of which the IRS is

\textsuperscript{146} Id. at 609.

\textsuperscript{147} Such complaints are not entirely without merit: the Nixon administration used information provided by the IRS in order to "harass and intimidate political opponents." Joseph J. Darby, \textit{Confidentiality and the Law of Taxation}, 46 AM. J. COMP. L. 577, 579 (1998).

unaware. And even if it were willing to revoke the tax exemption of every public charity that violated the campaigning prohibition, the IRS cannot penalize violations of which it is unaware. To the extent public charities believe they will not be caught, even the most stringent penalty has a low expected cost. If enforced, the expected penalty may be enough to prevent public charities from blatant disregard, but may be insufficient to encourage public charities to actively avoid small and inadvertent violations that are unlikely to be found.

In addition, as has been discussed, because of the devastating effect of the penalty for noncompliance, there may be strong political and practical reasons not to enforce the prohibition except in truly egregious cases. To step up the enforcement of the prohibition would, moreover, require the IRS to spend more time and money on enforcement. But the IRS is already doing more work with fewer employees and fewer resources. Improving its enforcement of the campaigning prohibition would require the IRS to shift resources that it currently deploys in other ways. But government’s return on shifting scarce IRS resources toward enforcing the prohibition is unlikely to raise any significant revenue for the government; churches will not become taxable and, presumably, other public charities will cease to operate or otherwise shift their behavior to minimize or eliminate their tax liabilities as quickly as possible.

C. Lack of Compliance by Some Public Charities Harms All Public Charities

This noncompliance by some public charities is bad for charities in general. It can distort public charities’ actions. In some cases, a public charity may become paranoid, worried that any political action may lead to the loss


149. See, e.g., Mayer, supra note 8, at 13–15.
150. See Joshua D. Rosenberg, The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane, 16 VA. TAX REV. 155, 206 (1996) (“Unfortunately, the Service is likely to detect noncompliance only when it has access to tax-relevant information. . . . In addition, the Service’s own attempts to find what others have hidden have often proven more likely to provoke resentment than to provoke honesty.”).
152. See Stephanie Hunter McMahon, To Have and to Hold: What Does Love (of Money) Have to Do with Joint Tax Filing?, 10 NEV. L.J. (forthcoming spring 2011) (“With all of these demands, it should not be surprising that there is not enough money [for the IRS] to do everything that needs to be done.”).
153. See, e.g., Carroll, supra note 4, at 219 n.9 (“As commentators have pointed out, revocation of charitable status is far more likely to result in a dead organization than in a taxable one.”).
of its tax exemption.\textsuperscript{154} Such a paranoid public charity is likely to restrict its behavior more than the tax law requires, and miss the chance to do some things that are permissible and would further its exempt purpose. Other public charities, on the other hand, may simply ignore the prohibition, knowing that it is unlikely to be enforced.\textsuperscript{155} Even where there is no distortion of public charities' behavior as a result of the underenforcement of the prohibition, public charities are likely to be careless, violating the prohibition in small or in accidental ways if they know the prohibition is unlikely to be enforced.\textsuperscript{156}

Professor Lloyd Hitoshi Mayer lays out a number of problems with such noncompliance by public charities. It is possible, for example, that noncompliance among public charities could be contagious. That is, if public charities see other public charities engaged in campaigning, it may create a "culture of noncompliance."\textsuperscript{157} Public charities that are already noncompliant may be encouraged by the lack of enforcement to continue, or even broaden, their noncompliance, while previously compliant public charities may reduce their perception of the risk of violating the prohibition.\textsuperscript{158} It may be, too, that a public charity's support of a candidate will have a disproportionate effect on the electorate, as a result of the goodwill that public charities have.\textsuperscript{159} Even if, however, public charities do not have a disproportionate influence, and even if noncompliance is not contagious, the public perception that charities are flouting the law may damage the reputation of both individual charities and the charitable sector in general.\textsuperscript{160}

In spite of the blatant disregard for the campaigning prohibition evinced by many public charities, the IRS does not enforce the prohibition. Knowing that the prohibition will not be enforced frees other public charities to campaign. And the continual violation of the prohibition harms public charities in general. Nonetheless, as long as the penalty for violating the prohibition is as severe as it currently is, the IRS is unlikely to begin to enforce the prohibition robustly. In order to end the cycle of violation, the IRS needs the tools to gently nudge public charities toward compliance.

\textsuperscript{154} Steffen N. Johnson, \textit{Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations}, 42 B.C.L. Rev. 875, 899 (2001) ("Other churches, by contrast, are always looking over their shoulder, for fear that any political activity will place them in violation of the Code and at risk of losing their tax-exempt status.").

\textsuperscript{155} Id.

\textsuperscript{156} See Mayer, \textit{supra} note 8, at 17.

\textsuperscript{157} Id. at 20.

\textsuperscript{158} Id. at 19–20.

\textsuperscript{159} Id. at 22–23.

\textsuperscript{160} Id. at 24.
V. INTERMEDIATE SANCTIONS FOR PUBLIC CHARITIES THAT ENGAGE IN CAMPAIGNING

Although revocation of a public charity's tax exemption is an extreme penalty, it has not prevented widespread violation of the campaigning prohibition. Providing the IRS with the explicit option, in appropriate circumstances, to gently nudge public charities toward compliance by imposing a properly designed intermediate penalty would lower the IRS's inclination to not enforce the prohibition. As the IRS actually imposed sanctions, the expected penalty would increase. A higher expected penalty, in turn, would likely reduce noncompliance by public charities.

An intermediate penalty should be designed to meet a number of criteria. It needs to be administrable, fair, comprehensible, and effective.\footnote{161. Richard J. Wood, Accuracy-Related Penalties: A Question of Values, 76 IOWA L. REV. 309, 320 (1991).} In order for it to be fair, the intermediate penalty needs to have some proportionate relation to the violation; for example, a one-time inadvertent statement in favor of a candidate should be punished less harshly than a repeated and deliberate endorsement.\footnote{162. Generally, penalties for noncompliance with the tax law “change based on two variables: aggressiveness of a particular avoidance transaction and its absolute size.” Raskolnikov, supra note 148, at 580.} And the IRS should have limited discretion with respect to the size of the penalty, in order to avoid a perception that the IRS is biased in its administration of the penalty.\footnote{163. See, e.g., Eric R. Swibel, Comment, Churches and Campaign Intervention: Why the Tax Man Is Right and How Congress Can Improve His Reputation, 57 EMORY L.J. 1605, 1642 (2008) (“The continuous flow of claims accusing the IRS of politically biased enforcement reflects weaknesses in the Code.”).}

A. Current Intermediate Penalty Regimes Applicable to Public Charities

The rules governing tax-exempt entities already include intermediate penalties in some situations. For example, if certain tax-exempt organizations engage in transactions that unduly benefit directors, employees, or certain other people, called “excess benefit transactions,” the beneficiary owes a tax of 25% of the excess benefit and, in certain situations, the management may
also owe an excise tax of 10%.164 "The intermediate sanction provisions create
an intermediate step between revoking exempt status and no sanction at all."165

The Code also contains an excise tax applicable to public charities that
participate in political campaigns. The excise tax requires a public charity
to pay to the government 10% of the amount it spent campaigning.166 In addition,
there may be a 2½% excise tax on a culpable manager who knowingly causes
the public charity to make a proscribed expenditure.167 If the public charity
fails to correct the political expenditure, it will owe an additional excise tax
equal to 100% of the political expenditure, and a culpable manager may be
required to pay an additional 50% excise tax.168

In addition, if the public charity’s campaigning is a "flagrant violation of
the prohibition against making political expenditures," the IRS can make a
determination of the income and excise taxes payable by the public charity.169
The IRS’s income tax assessment may go back as of the date the public
charity’s tax-exempt status was revoked,170 and the public charity must pay the
income and excise taxes assessed within ten days of the assessment.171 The IRS
may also, under certain circumstances, seek an injunction against a public
charity that is flagrantly violating the campaigning prohibition.172

In its current form, though, this excise tax is not an intermediate penalty.
Under current law, the excise tax is imposed in addition to a public charity’s
loss of its tax exemption. In the preamble to the regulations promulgated under
these three sections, the Treasury Department wrote,

According to the statutory language and the legislative history of section 4955, the
addition of that section to the Internal Revenue Code did not affect the substantive
standards for tax exemption under section 501(c)(3). To be exempt from income tax as
an organization described in section 501(c)(3), an organization may not intervene in any
political campaign on behalf of any candidate for public office. Consistent with this

164. I.R.C. § 4958(a), (c).
165. L. Edward Bryant, Jr., Responsibilities of Directors of Not-for-Profit Corporations Faced with
Sharing Control with Other Nonprofit Organizations in Health Industry Affiliations: A Commentary on
166. I.R.C. § 4955(a)(1).
167. Id. § 4955(a)(2).
168. Id. § 4955(b). In order to correct its political expenditure, a public charity must recover the
expenditure to the extent possible, as well as establish safeguards in order to prevent future political
expenditures. Id. § 4955(f)(3).
169. Id. § 6852(a).
171. Id. § 301.6852-1(c).
172. I.R.C. § 7409(a).
requirement, section 4955 does not permit a de minimis amount of political intervention. 173

The preamble goes on to assert that, in some circumstances, “based on the facts and circumstances such as the nature of the political intervention and the measures that have been taken by the organization to prevent a recurrence,” the IRS may have discretion to impose the excise tax without revoking the public charity’s exemption. 174 The IRS appears to believe that it has this discretion, 175 but, notwithstanding the IRS’s belief, the Treasury Department declined to provide for such discretion in the published regulations. 176

Even if the IRS were given discretion to impose the excise tax in lieu of revoking a public charity’s tax exemption, it would not effectively improve the IRS’s policing of political activity. In the first instance, not all campaigning involves giving money to organizations supporting candidates. Campaigning can also include an endorsement by a pastor speaking to her congregation, a university president’s public support of a candidate, publishing an endorsement in a newsletter that would be printed anyway, posting an endorsement on an organization’s website, or even sending spam emails. 177 None of these involve significant marginal cost to the public charity, and so none would result in a penalty sufficient to discourage public charities from supporting or opposing candidates.

In addition, while making the excise tax available to the IRS as an intermediate sanction would potentially diminish the IRS’s unwillingness to enforce the campaigning prohibition, it would do nothing to help the IRS substantively enforce the prohibition. “The IRS functions best when engaged in its core function—collecting revenue and protecting the fisc. It has no special expertise in the regulation of elections, and it has neither the staff nor

174. Id.
175. See supra notes 139-40 and accompanying text.
176. Preamble, supra note 173. Although the IRS acts as if it has the authority to impose a penalty on public charities that violate the campaigning prohibition in lieu of revoking their exemption, I believe it is better to provide them that authority explicitly, rather than maintain the requirement that the exemption be revoked but tacitly allow the IRS to impose a less-severe sanction.
177. See, e.g., Gregory D. Baird, Comment, Independent Institutions of Higher Education and I.R.C. § 501(c)(3): Guidelines for Conducting Political Campaign Activities on Campus, 49 Baylor L. Rev. 129, 134–35 (“Suppose, for example, that the IRS found that a college president had violated the political campaign activity prohibition by endorsing the Republican candidate for President of the United States during a ten minute interview on the local college radio station. Should the college lose its tax-exempt status?”).
the expertise to engage adequately in this function." There is no reason to believe that just because Congress granted it an additional tool in its arsenal, the IRS would suddenly become better positioned to police public charities' political actions.

B. A New Tool for Enforcement

In order to meet the goals of both discouraging public charities from participating in political campaigns and improving the IRS's ability to enforce the prohibition, I propose that Congress implement a penalty that is designed differently than current penalties, one that can be imposed on tax-exempt organizations. Instead of penalizing the public charity, the tax law should disallow a portion of the deduction taken by donors to the public charity that campaigned on behalf of or against any individual.

This approach solves a number of problems with the current regime. First, it is less draconian. The amount of the penalty is set with respect to the culpability of the bad behavior. And because the penalty disallows a portion of the amount taxpayers can deduct, its enforcement raises revenue, which should encourage the IRS to enforce the penalty.

In addition, it ultimately reduces the pressure on the IRS to police public charities' political speech. Because the deductibility of donations is at issue, donors to the public charity have the incentive to make sure that the public charity does not violate the campaigning prohibition. If the public charity does campaign for or against a candidate for office, all of the donors during the year will lose a portion of their exemption, not just donors who donate after the public charity's exemption is revoked.

1. Calculating the Intermediate Penalty

The campaigning prohibition presents unusual challenges for the design of penalties. The prohibition has very little to do with the government's collection of taxes; instead, the prohibition is intended to regulate a public charity's nontax behavior. Moreover, a public charity's violation may be more culpable even if the violation involves a smaller percentage of the public charity's assets than a violation by a smaller public charity. As such, a penalty

178. Tobin, supra note 56, at 1318.

179. See, e.g., Mayer, supra note 8, at 16 ("This limited evidence . . . suggests, however, that there are significantly more violations occurring than the IRS has detected and pursued.").
determined solely as a percentage of the public charity's expenditures in supporting a candidate is both difficult to design and flawed at its inception. This difficulty may contribute to the fact that no substantive changes have occurred with what amounts to the current regime.

In order to meet the regulatory aims of the campaigning prohibition, the intermediate penalty should be designed differently than other penalties in the Code. Rather than penalizing the public charity as a proportion of its expenditures, the intermediate penalty would disallow a percentage of donors' charitable deductions. In order to effectively deter both high-cost and low-cost campaigning, each donor's deduction would be reduced by the greater of (a) the percentage of the public charity's expenditures that went toward campaigning, or (b) a percentage calculated by the size of the audience toward which the political speech was directed.

In general, the first number will apply when public charities endorse candidates using an expensive medium. Depending on the size of the public charity, purchasing an ad in a newspaper or on television, or mailing pamphlets, may consume a substantial portion of its annual budget. Calculating the percentage of the public charity's expenditures that went toward campaigning is straightforward enough; conceptually, this aspect of the penalty is similar to the excise tax that can already be imposed on public charities.\(^\text{180}\) A public charity would be required to determine the total amount of its expenditures for the year and the total amount it spent campaigning on behalf of and against candidates for office, and divide the second number by the first.\(^\text{181}\)

In some situations, however, a public charity could endorse a candidate at a low cost, relative to its other expenditures. Email, for example, is virtually costless and, if the organization is large enough, even purchasing television advertising that reaches a broad audience may not constitute a significant percentage of its annual expenditures.\(^\text{182}\) In order to discourage these low-

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180. See supra Part V.A.
181. In practice, this calculation may not be as straightforward as adding up a list of checks. There is a value, for example, to a public charity's provision of its mailing list, even where there is no marginal cost to the public charity of providing the list. See, e.g., Galle, supra note 58, at 374–75. Determining the amount of expenditures would be a matter of accounting rather than of bookkeeping. Although such valuation may be difficult, though, it is possible; moreover, because the aim of the intermediate penalty is prophylactic rather than revenue raising, knowing that the calculation will impose an administrative burden may help prevent public charities from providing such difficult-to-value support.
182. For example, the New York Times estimates that the Bill and Melinda Gates Foundation spends more than $3 billion annually on its various charitable pursuits. Andrew Jacobs, H.I.V. Tests Turn Blood into Cash in China, N.Y. TIMES, Dec. 3, 2009, at A6. In 2009, a 30-second ad during the Super Bowl cost up to
marginal-cost endorsements, the intermediate penalty needs to be able to
disallow a significant percentage of donors' deductions even where the public
charity does not spend a significant amount of money.

In order to capture low-marginal-cost endorsements, then, a public charity
would have to determine two numbers. First, it would need to know how many
people had donated money to it during the year. Second, it would have to
determine the number of people to whom the endorsement was directed. In
order to calculate the percentage of donors' deductions that would be
disallowed, it would again divide the second number by the first.

Determining the number of donors during the year is relatively simple.
Public charities already generally keep records of their donors, and the
intermediate penalty would provide additional incentive for them to keep those
records. Provided the public charity has those records, quantifying the
donors should be simple.

Determining the number of people to whom the endorsement was directed
is slightly more complicated, if only because the methodology would vary
depending on the medium used by the charity. A series of examples helps
illustrate how it would work, though. If a pastor endorsed a candidate during
a sermon, the people to whom the endorsement was directed would be those
in the congregation. If a university bought an ad in the New York Times, the
number of people to whom it was directed would be the circulation of the New
York Times. If the public charity sent a blast email, the number of people to
whom it was directed would be the number of emails it sent.

Using the number of donors as the denominator has both theoretical and
practical problems. Theoretically, there is no relationship between the number
of donors a public charity has and the number of people to whom it addresses
its endorsement. It would make more sense, for example, to calculate the
number of people who were at the sermon as a percentage of the church's total
congregation. But while that would work in the church/sermon context, it is
impossible to determine the appropriate denominator for a newspaper ad or an
email blast. The number of donors is a determinable number, and it can stay
consistent across the various media by which a public charity could endorse
a candidate.

$3 million and reached an estimated 100 million people. Stuart Elliott, Super Bowl Sales as Economic
Indicator, N.Y. TIMES, Jan. 13, 2010, at B7. If the penalty were determined solely as a percentage of annual
expenditures, the Bill and Melinda Gates Foundation could encourage 100 million people to vote for a
candidate, and donors would only lose 0.1% of their deduction.

183. See infra notes 200–05 and accompanying text.
It is also possible for the number of people to whom the endorsement is directed to exceed the number of donors, creating a disallowance of more than 100% of donors’ deductions. Because this is mathematically possible, the intermediate penalty would cap the disallowance at 100%.

It is also important that the intermediate penalty only be applied as a result of violative acts of the public charity. It would be unfair to increase the penalty if, for example, a pastor’s endorsement to a small congregation were surreptitiously recorded by a congregant, and placed on the internet or sent to news outlets without the public charity’s knowledge or permission.

Disallowing up to 100% of donors’ charitable deductions should prevent the penalty from crossing the line separating gentle nudges from hard shoves. Professor Kahan explains that penalties must be “sufficiently severe to avoid being construed as tacit endorsements . . . but sufficiently mild to avoid coming across as morally fanatical.”\textsuperscript{84} The loss of a percentage of donors’ deductions is a real penalty—it requires donors to pay more taxes than they had intended to pay. But the ultimate amount of additional taxes they must pay is capped at the amount they previously deducted. Deductions are “a matter of legislative grace,”\textsuperscript{85} and, although losing the deduction stings, it should not come across as draconian.

These tests can be gamed, of course. A public charity could, for example, send out an email endorsing a candidate to a single person, knowing that the recipient would forward the email to a much larger group. Under this intermediate penalty regime, if there was insufficient evidence to characterize the intermediary as an agent of the public charity, the single email would create a negligible deduction disallowance. But the intermediate penalty is not the only penalty in the IRS’s quiver: it would still be able to revoke the public charity’s tax exemption. Structuring an endorsement in a manner intended to avoid the penalty demonstrates awareness of the rule and a deliberate intent to avoid the rule. In that case, it may be more palatable to the IRS to revoke the charity’s exemption. And because the IRS would have such a powerful ultimate penalty, it would curtail the need for new regulations to respond to each new attempt by public charities to circumvent the prohibition.\textsuperscript{86}

\textsuperscript{84} Kahan, supra note 9, at 641.
\textsuperscript{85} Interstate Transit Lines v. Comm’r, 319 U.S. 590, 593 (1943).
\textsuperscript{86} Cf. Samuel D. Brunson, Elective Taxation of Risk-Based Financial Instruments: A Proposal, 8 Hous. Bus. & Tax L.J. 1, 9 (2007) (“The necessity of creating a new taxing regime for each financial instrument suffers from two major problems: it increases the complexity of the Code, and because there is a lag between the introduction of an instrument and its tax classification, it creates inefficiencies.”).
2. Imposing the Intermediate Penalty

Where this penalty varies most radically from other proposed penalties is in its incidence. If the IRS determined that a public charity had engaged in prohibited campaigning during the year that merited the intermediate penalty, the IRS would not fine the public charity itself. Instead, it would require the public charity to send a notice to its donors from the year of the violation, informing them of the percentage of their donation that would not be deductible. Donors would then be required to file an amended return and that percentage of the donor’s charitable deduction would be disallowed. Effectively, the intermediate penalty would increase each donor’s taxable income for the year. In addition, the public charity would be required to inform the IRS of its donors for the year, the amount of their donations, and the percentage of the donations that were disallowed.

At first glance, penalizing donors for the public charity’s noncompliance appears unfair. The donors, after all, did not force the public charity to endorse a candidate; it is reasonable to assume, moreover, that at least some of them donated to the public charity before the prohibited campaigning occurred, and therefore could not have known, when making their deduction, that the public charity would violate the campaigning prohibition. But there is no constitutional requirement that taxpayers know in advance the tax consequences of their actions. Courts have determined that, provided the legislature’s decision is rational, it can change tax laws retroactively, even where taxpayers have no prior notice of the change.

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187. It may be necessary to make explicit the requirement that donors file an amended return. Currently, the Treasury regulations say that “[i]f a taxpayer ascertains that an item should have been included in gross income in a prior taxable year, he should . . . file an amended return and pay any additional tax due.” Treas. Reg. § 1.451-1(a) (as amended in 1999) (emphasis added). The Tax Court has held that the regulations impose a duty to file an amended return. Unvert v. Comm’r, 72 T.C. 807, 818 (1979). However, it is not clear that the Tax Court is correct. See, e.g., P.H. Glatfelter Co. v. Lewis, 746 F. Supp. 511, 519 n.23 (E.D. Pa. 1990) (citing the “presumed fact that the taxpayer is not mandated to amend his return”). Mandating that donors who receive notice from public charities file amended returns would obviate any confusion.

188. Presumably, such notice could be designed in a manner similar to the IRS’s various Forms 1099, on which payors inform payees and the IRS of the amount of payments made to the payee during the year. See Sarah B. Lawsky, Fairly Random: On Compensating Audited Taxpayers, 41 CONN. L. REV. 161, 188 (2008) (“The tax code requires certain payors to submit forms to the IRS stating how much was paid and to whom. For example . . . a bank paying interest must submit a Form 1099-INT to the IRS, with a copy to the depositor.”).

189. See United States v. Carlton, 512 U.S. 26, 30–31 (1994) ("The due process standard to be applied to tax statutes with retroactive effect, therefore, is the same as that generally applicable to retroactive economic legislation . . . . ").
intermediate penalty, there would be no change in the tax law. Donors would be on notice, when they donated to a public charity, that a portion of their donation could be disallowed.

Disallowing a portion of donors' deductions provides a number of advantages over fining the public charity itself. Principal among those advantages is that it strongly discourages public charities from violating the provision. If a public charity feels strongly enough about a candidate, it may be willing to risk a fine and, if it feels the chances of losing its exemption are sufficiently small, may even be willing to risk losing its exemption. But if its actions may increase its donors' tax bills, violating the campaigning prohibition risks alienating its donors.

Disallowing a portion of the charitable deduction also yields roughly the same amount of revenue that the government would have received had the donors donated to the politician rather than through a public charity. As such, it eliminates any funneling problem. The pro rata share of each donor's donations that go to campaigning is disallowed as a deduction, eliminating any double subsidy that would be available by donating through a public charity.

The proposed intermediate sanction would also be progressive. Many commentators take issue with the regressivity of the charitable deduction; the deduction is worth more to higher-income taxpayers than it is to lower-income taxpayers. But the reverse is also true: the denial of a deduction is more costly to a higher-income taxpayer than to a lower-income taxpayer.

What's more, the proposal would not impact a large number of lower-income taxpayers. To be able to deduct a contribution to a public charity, and therefore to be able to have part of the deduction disallowed, a donor would have to elect to itemize her deductions. The Joint Committee on Taxation estimates that, in 2010, only about 36% of taxpayers will itemize their deductions. And the likelihood that any taxpayer itemizes increases almost

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190. I say "roughly" because it is possible that only the highest-income (or lowest-income) donors would have donated directly to the candidate, and thus the additional tax revenues would be greater or less than the amount the government would have actually received.

191. See, e.g., Alice Gresham Bullock, Taxes, Social Policy, and Philanthropy: The Untapped Potential of Middle- and Low-Income Generosity, 6 CORNELL J.L. & PUB. POL’Y 325, 330 (1997) ("The cost of giving to charity becomes cheaper... as the taxpayer’s income rises...").

192. Imagine two taxpayers, one of whom is in the 10% tax bracket and the other in the 35% tax bracket. Each taxpayer has $100 of deductions disallowed. For the 10% taxpayer, the disallowance means she will pay an additional $10 in taxes. The 35% taxpayer, on the other hand, will pay an additional $35 in taxes.

193. Bullock, supra note 191, at 330 ("[T]axpayers must be able to itemize in order to take the charitable deduction.").
exponentially as income increases: only 11.1% of taxpayers earning between $20,000 and $30,000 itemize, while 65.3% of taxpayers earning between $75,000 and $100,000 and 91% of taxpayers earning $1 million or more itemize.194 Because many lower-income taxpayers could not have deducted their donation in the first place, the intermediate penalty will not increase their tax burden.

In addition to strongly discouraging public charities from violating the prohibition, the intermediate sanction would encourage donors to help enforce the prohibition, reducing the IRS’s burden and increasing the likelihood that a public charity’s violation of the prohibition will be caught.195 It may be that, even without structuring the penalty to induce donors to enforce the prohibition, the IRS would be more motivated to enforce the prohibition, both because the penalty is less politically unsavory and because imposing the penalty will provide revenue for the government. Even if the revenue raised through enforcement were insufficient to tempt the IRS into active enforcement, however, donors would have an incentive to police the public charities to which they donate.196

194. STAFF OF JOINT COMMITTEE ON TAXATION, 111TH CONG., PRESENT LAW AND BACKGROUND DATA RELATED TO THE INDIVIDUAL INCOME AND SOCIAL INSURANCE TAXES AS IN EFFECT FOR 2010 AND 2011, at 23 (Comm. Print 2010).

195. Cf. Rosenberg, supra note 150, at 206 (“The cause of tax enforcement would be well served by changing the system so we rely on neither the taxpayer nor the Service to report or discover the facts, but instead look to those who, unlike the Service, already have direct access to tax-relevant information and, unlike the taxpayer, have no inherent self-interest in concealing it.”).

196. Admittedly, the fact that the IRS would have to pursue multiple donors, rather than a single tax-exempt entity, would create more work than merely fining or disqualifying the public charity. The additional work would not be overwhelming, however. The IRS Oversight Board says that “one of the most effective ways to increase enforcement is to increase document matching with information reporting. The board said well-administered matching programs ‘have a large deterrent effect’ and produce direct revenue.” Michael Joe, Oversight Board Report Provides Preview of IRS Strategic Plan, 123 TAX NOTES 284, 285 (2009). Already, the IRS’s “domestic information return matching programs make the most efficient use of enforcement resources.” Thomas D. Greenaway, Worldwide Taxation, Worldwide Enforcement, 123 TAX NOTES 561, 561 (2009). The enforcement would allow the IRS to do what it is designed to do: enforce tax provisions and collect revenue. If, however, Congress were to determine that the intermediate penalty still placed too heavy a burden on the IRS, it could expand the whistleblower award to persons who provide actionable information to the IRS about a public charity’s violating the campaigning prohibition. Currently, if a person provides information to the IRS helping it detect underpayment of tax or prosecute persons who violate the Code, that person may be eligible to receive an award of between 15% and 30% of the collected proceeds. I.R.C. § 7623. Because the intermediate penalty could raise substantial revenue for the government, a whistleblower award could be a significant amount of money. If whistleblowers were so incentivized, the IRS would be largely relieved of the duty to look for violations, and instead could focus all of its efforts on enforcing the intermediate penalty.
Under the current regime, donors can afford to leave the enforcement to the IRS. If their preferred charity violates the campaigning prohibition and loses its exemption, donors can still deduct donations they made before the loss and can shift their future giving to other public charities. If their charitable deductions are at risk, however, donors have an incentive to watch the activities of public charities in which they invest and to encourage the public charities to avoid any campaigning.

Moreover, public charities would have an incentive to comply with their donors’ wishes in this regard, and therefore to avoid campaigning. While there is no consensus on the sensitivity of donors to the charitable deduction, economists generally agree that the charitable deduction has increased charitable donations. In order to maintain their donor base, a well-advised public charity would not only want to comply with the prohibition, but to establish procedures whereby it could assure current and future donors that it would continue to comply with the prohibition.

Imposition of the proposed intermediate penalty would increase the IRS’s willingness and ability to enforce the prohibition on campaigning. Moreover, it would align the interests of donors and of public charities in seeing that public charities complied with the prohibition. Finally, it would reduce the enforcement burden on the IRS by drafting donors into ensuring that the public charities to which they donated complied fully with the prohibition, leaving the IRS to focus on enforcing the revenue-raising provisions that it is best suited to enforce.


198. See Aprill, supra note 35, at 857. Toward the high end of estimates of taxpayer sensitivity, some studies suggest that increasing the cost of giving by 10% (e.g., by reducing the charitable deduction) decreases charitable contributions by at least 10%. Evelyn Brody & Joseph J. Cordes, Tax Treatment of Nonprofit Organizations: A Two-Edged Sword, in NONPROFITS AND GOVERNMENT: COLLABORATION AND CONFLICT 141, 146 (Elizabeth T. Boris & C. Eugene Steuerle eds., 1999). On the low end, other studies suggest that increasing the cost of giving by 10% only reduces giving by 5%. Id.

199. An alternative to this proposal that would also ease the burden on the IRS would be to permit private enforcement of the prohibition. Under this model, private parties could “bring qui tam lawsuits for purported tax violations.” Dennis J. Ventry, Jr., Cooperative Tax Regulation, 41 CONN. L. REV. 431, 460 (2008). Whatever the benefits of private enforcement, though, it seems a poor fit for enforcing the prohibition on campaigning. On the one hand, under current law, the so-called whistleblower statute, I.R.C.
3. Ancillary Design Issues

The enactment of the proposed intermediate penalty would impose some additional administrative burden on public charities. As discussed, it would require public charities to implement procedures that would signal to donors that the public charities would continue to comply with the campaigning prohibition at least until the end of the current taxable year. In addition, the intermediate sanctions would likely make fundraising at least marginally more difficult, to the extent that any potential donor was sufficiently sensitive and risk-averse that the donor did not want to risk the deductibility of her donation at all.

The intermediate sanction would also require public charities to collect and store donor information, including the donors' names, addresses, amounts donated, and possibly taxpayer identification numbers. If the IRS were to impose the intermediate sanction, the public charity would be required to contact all of its donors from the year to inform them of the percentage of their donation that was disallowed, as well as transmit that information to the IRS. In order to inform the IRS and its donors, public charities would have to be able to access this information.

As a practical matter, requiring public charities to collect and store this information may not impose a significant burden. It appears that many public charities already maintain donor lists, which they use to raise more money, both by renting or selling the list to other organizations and by requesting additional donations from previous donors. Existing mailing lists would

§ 7623, incentivizes normal taxpayers to turn in violators by rewarding them with a portion of the taxes collected. See Ventry, supra, at 460 ("The promise of lucrative bounties increased incentives for private persons to expose abusive taxpayer behavior, and added risk of detection and prosecution to the compliance calculus."). It would be difficult to design a financial reward of a magnitude that would encourage whistleblowers who had actual knowledge of wrongdoing. On the other hand, if the tax law were to provide for private enforcement of the prohibition, it would have to contain some mechanism to rein in frivolous suits. See, e.g., James J. Fishman, The Development of Nonprofit Corporation Law and an Agenda for Reform, 34 EMORY L.J. 617, 673–74 (1985) ("An expanded use of relator status based on the California approach would expand and strengthen the attorney general's enforcement efforts, yet it would protect the charitable organization from frivolous suits brought by a member of the public.").

200. Taxpayer identification numbers would be useful for the IRS as it attempts to match the information provided by the public charity with the donors' tax returns in order to determine whether donors reduced their deduction by the mandated amount.

201. See supra note 188 and accompanying text.

202. See, e.g., Jon Gertner, The Very, Very Personal Is the Political, N.Y. TIMES, Feb. 15, 2004, § 6, at 43 ("The common practice of nonprofit groups sharing mailing lists with like-minded organizations would almost certainly provide them with useful information about the charities I favor and the civic groups I'm
likely contain most of the information that public charities would need in order to comply with the intermediate penalty.

In addition, the tax law already requires public charities to furnish to the IRS the names and addresses of "substantial contributors." A substantial contributor is defined as any person who donates more than $5,000, provided that donation amounts to 2% or more of the total donations. The intermediate penalty would require public charities to collect the information from all donors, not just substantial donors, but public charities should already have a mechanism for collecting personal information from donors.

Moreover, in order for a donor to substantiate her deduction, in general she needs to get a receipt from the public charity to which she donates. It would be possible for public charities to require donors to provide the required information for the receipt, and to keep a copy of the receipt itself.

It may be that there is a different way for public charities to collect the required information that would be easier or better for the public charity. But requiring public charities to collect this information would not present an unworkable administrative burden; in many instances, it would present a marginal additional burden at most. Whatever additional administrative burden the intermediate penalty imposed on public charities would not prevent them from engaging in their charitable purposes, and the burden to the public charities would be offset by the benefits from increased compliance with the campaigning prohibition.

CONCLUSION

The purpose of this Article is neither to attack nor defend the current prohibition on campaigning by public charities. Congress has chosen to continue to regulate public charities' political participation through the tax law, even though the campaigning prohibition's purpose is shrouded in various and sometimes conflicting justifications, and even though public charities' compliance suffers from lack of enforcement and well-publicized

affiliated with ""); Nora Krug, MARKETING: The More You Give, the More You Get. Just Ask Your Mailman, N.Y. TIMES, Nov. 18, 2002, at F3 ("If you make a donation, you can expect to receive 4 to 12 letters a year from the group you gave to, thanking you and asking for more. More important, your name goes out on a list to be bought and exchanged by other groups, which may send solicitation mail at the same pace, hoping that you will extend your charitable proclivities their way.").

203. I.R.C. § 6033(b)(5). Churches are exempted from this requirement. Id. § 6033(a)(3)(A)(i). Still, there is no reason why they could not be required to collect this information, too.

204. Id. § 507(d)(2)(A).

noncompliance by other public charities. Still, in order to prevent public charities from being too involved in politics, the tax code may be the best regulatory instrument available. The Supreme Court has held that Congress may constitutionally deny a tax deduction, even where the act that led to the denial is constitutionally protected. In light of Citizens United v. Federal Election Commission, it is possible that the government would not be able to directly prohibit a public charity from campaigning. If that is the case, the tax law may be the only tool available to regulate public charities' political activities, which in turn makes finding an appropriate enforcement mechanism even more important.

Whether or not the tax law is the only viable manner by which to regulate public charities' political speech, though, the IRS needs tools that will allow it to enforce the prohibition consistently. And in order to do so, it would help for the IRS to have a politically acceptable enforcement tool, one that does not require shutting down a public charity solely because it engages in campaigning. The intermediate penalty proposed by this Article would give the IRS just such a tool—a penalty that gently nudges public charities toward compliance with a prohibition that remains hotly contested, rather than the hard shove of losing their tax exemptions. Moreover, by virtue of increasing donors' tax liability, the intermediate penalty would strongly encourage public charities to comply with the prohibition while, at the same time, giving donors an incentive to help the IRS enforce the prohibition. The potential revenue gains would give the IRS additional reasons to enforce the prohibition.

The intermediate penalty would admittedly impose additional burdens on public charities. They would have to figure out a way to assure donors and potential donors that they were not going to violate the campaigning prohibition, they would have to keep additional records, and, if they violated the prohibition, would have to file additional returns. But none of these

206. Cammarano v. United States, 358 U.S. 498, 513 (1959) (“Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code.”).

207. 130 S. Ct. 876, 886 (2010) (“The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”).

burdens is excessive and, because the intermediate penalty would increase compliance at a low cost, the additional burdens would be justified.