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Why the IRS Should Want to Develop Rules regarding Charities and Politics

Ellen P. Aprill

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ARTICLES

WHY THE IRS SHOULD WANT TO DEVELOP RULES REGARDING CHARITIES AND POLITICS

Ellen P. Aprill[†]

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INTRODUCTION

At All Saints Episcopal Church in California, two days before the 2004 presidential election, its former pastor imagined a debate between Jesus and the presidential candidates. The pastor began by assuring his listeners, “I don’t intend to tell you how to vote.”¹ He

[†] John E. Anderson Professor of Tax Law, Loyola Law School, Los Angeles. I thank Lloyd Mayer for comments on an earlier draft and Erin Massey for excellent research assistance. I also thank the Case Western Reserve Law Review for giving me this opportunity to write in memory of Laura Chisolm, from whose thinking, whether in publications or at meetings, I always learned so much.

¹ George F. Regas, Rector Emeritus, All Saints Church, If Jesus Debated Senator Kerry and President Bush 1 (October 31, 2004) (transcript available at [http://www.allsaints-pas.org/pdf/\(10-31-04\)%20If%20Jesus%20Debated.pdf](http://www.allsaints-pas.org/pdf/(10-31-04)%20If%20Jesus%20Debated.pdf)). The sermon criticized Senator Kerry by name as well, but not to the extent that it took President Bush to task. *See id.* at 1–5

went on, in the voice of Jesus, to criticize the Iraq war into which “President Bush ha[d] led us,” and wondered whether President Bush really meant “to end a decade-old ban on developing nuclear battlefield weapons,”² as well as to ask why so little was mentioned about the poor.³ Finally, he asserted in his own voice, that the number of abortions had risen under George W. Bush because women having abortions could not afford to have a child.⁴ The pastor concluded, “When you go into the voting booth on Tuesday, take with you all that you know about Jesus, the peacemaker. Take all that Jesus means to you. Then vote your deepest values.”⁵

A few months earlier, on July 11, 2004, Julian Bond spoke at the 2004 NAACP Convention. His lengthy speech reviewed the civil rights records of presidents of both parties, but especially criticized the Republican Party, its tax policy, civil rights policy, the war in Iraq, and other foreign and domestic policy issues.⁶ Bond continued:

The election this fall is a contest between two widely disparate views of who we are and what we believe. One view wants to march us backward through history—surrendering control of government to special interests, weakening democracy, giving religion veto power over science, curtailing civil liberties, despoiling the environment The other view promises expanded democracy and giving the people, not plutocrats, control over their government.⁷

The speech included statistics about African American voter registration drives and voting records.⁸ It also urged the audience to vote in the upcoming election.⁹

(referencing President Bush twenty times and Senator Kerry only twelve times).

² *Id.* at 2.

³ *Id.* at 3.

⁴ *Id.* at 4–5.

⁵ *Id.* at 6.

⁶ See Julian Bond, Chairman of the NAACP Bd. of Dirs., 2004 NAACP Convention Speech 11–13, 18–23 (July 11, 2004) (transcript available at <http://moritzlaw.osu.edu/electionlaw/docs/church/naacp-speech.pdf>) (criticizing Republicans’ track record with school desegregation, referring to the war in Iraq as “a war without reason or necessity,” stating that Republicans “preach racial neutrality and practice racial division,” and blaming the deficit at that time “squarely on the tax giveaways to the rich”).

⁷ *Id.* at 23.

⁸ See *id.* at 24–27 (discussing the NAACP and NAACP National Voter Fund registration statistics and stating “if whites and non-whites vote in the same percentages as they did in 2000, Bush will be re-defeated by 3 million votes”).

⁹ See *id.* at 27 (“Our response must be determination—to flood the polls and cast our votes in such large numbers that there will be no doubt. That’s letting the good guys win.”).

As a result of these communications, the Internal Revenue Service (“IRS” or “Service”) investigated both of these organizations,¹⁰ which are tax-exempt under section 501(c)(3), because such entities cannot, without risking the loss of their exemption, “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”¹¹ That is, they are subject to a campaign intervention prohibition. Such organizations, commonly referred to as charities, cannot endorse or oppose a candidate for public office or contribute to a candidate’s campaign. The IRS has long interpreted this campaign intervention prohibition broadly. An applicable regulation, for example, refers to violating the prohibition “directly or indirectly.”¹²

Revenue Ruling 2007–41, the most recent and comprehensive official IRS pronouncement on the subject, explains that “[w]hether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case.”¹³ Applying the facts-and-circumstances test, the IRS determined that All Saints Episcopal Church had

¹⁰ See sources cited *infra* note 14 (discussing the results of the investigations).

¹¹ I.R.C. § 501(c)(3) (2006). All references are to the Internal Revenue Code of 1986, as amended, unless otherwise specified.

¹² See Treas. Reg. § 1.501(c)(3)–1(c)(3)(iii) (as amended in 2008) (“[a]n organization is an action organization” not eligible for section 501(c)(3) status if it violates the campaign intervention prohibition “directly or indirectly”).

¹³ Rev. Rul. 2007–41, 2007–25 I.R.B. 1421. Issuance of the Revenue Ruling followed the issuance of an I.R.S. fact sheet. This fact sheet included similar but not identical examples of what constitutes prohibited activity, but which did not represent official guidance or advice of the National IRS office and thus was not a document on which taxpayers could rely as authority. See I.R.S. News Release FS–2006–17 (Feb. 2006), available at <http://www.irs.gov/newsroom/article/0,,id=154712,00.html> (providing examples to highlight circumstances that would constitute “campaign intervention”); Fred Stokeld, *IRS Publishes Guidance on Charities and Politics as Election Year Looms*, TAX NOTES TODAY, June 8, 2007, available at LEXIS, 2007 TNT 111–4 (comments of exempt organization specialists comparing fact sheet to revenue ruling); see also Treas. Reg. § 601.601(d)(1) (as amended in 1987) (stating that “[t]he Internal Revenue Bulletin is the authoritative instrument of the Commissioner”); Kristin E. Hickman, *IRB Guidance: The No Man’s Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239, 243, 249, (discussing revenue rulings and notices, and their degrees of relative authority); *Tax Code, Regulations and Official Guidance*, IRS, <http://www.irs.gov/taxpros/article/0,,id=98137,00.html> (last updated Sept. 29, 2010) (operating as an online search mechanism for the Internal Revenue Bulletin); *Understanding IRS Guidance—A Brief Primer*, IRS, <http://www.irs.gov/irs/article/0,,id=101102,00.html> (last updated May 20, 2011) (stating that “[a] revenue ruling is an official interpretation by the IRS of the Internal Revenue Code, related statutes, tax treaties and regulations” and “the conclusion of the IRS on how the law is applied to a specific set of facts,” while “[a] notice is a public pronouncement that may contain guidance that involves substantive interpretations of the Internal Revenue Code or other provisions of the law”).

violated the campaign intervention prohibition, but that the NAACP had not.¹⁴

How the IRS interprets, communicates, and enforces the campaign intervention prohibition, particularly indirect intervention, has been, and continues to be, a matter of controversy. Representatives from the charitable community, both before and after the publication of Revenue Ruling 2007–41, have sought greater clarity regarding the criteria for campaign intervention. Several commentators have suggested that current rules may be unconstitutionally vague and that, to avoid this problem, violation of the campaign intervention prohibition be limited to activities involving express advocacy.¹⁵ The Supreme Court’s decision in *Citizens United v. Federal Election Commission*,¹⁶ which excoriated the Federal Election Commission as a “censor” that, by embracing “the open-ended rough-and-tumble of factors,” had chilled political speech of “primary importance” to the “integrity of the electoral process,” has given renewed urgency to this plea.¹⁷

These different attitudes of the charitable community and the IRS reflect the difference between rules and standards. Louis Kaplow explains in an influential article, *Rules Versus Standards: An Economic Analysis*, that the choice between rules and standards involves “the extent to which a given aspect of a legal command should be resolved in advance or left to an enforcement authority to

¹⁴ The IRS, however, did no more than send the church a letter of warning. See Fred Stokeld, *IRS Ends Probe of California Church; Church Wants Answers*, TAX NOTES TODAY, Sept. 25, 2007, available at LEXIS, 2007 TNT 186–2 (describing the letter of warning from the IRS); Fred Stokeld, *IRS Probe of NAACP Ends; Civil Rights Group Keeps Exemption*, TAX NOTES TODAY, Sept. 1, 2006, available at LEXIS, 2006 TNT 170–1 (stating “the IRS concluded that the NAACP did not engage in political campaign intervention”). The factors that may have led to these differing results include the timing of each talk, the broad ranging content of the NAACP speech itself, which took a broad historical view of civil rights issues, and the organization’s history of addressing such issues. See sources cited *infra* note 56 (listing factors the IRS looks at in distinguishing issue advocacy from campaign intervention); see also *Inconsistent Enforcement: IRS Findings in NAACP and All Saints Church Cases*, OMB WATCH (Feb. 14 2008), <http://www.ombwatch.org/node/3608> (making a comparison of the two speeches).

¹⁵ See, e.g., Kay Guinane, *Wanted: A Bright-Line Test Defining Prohibited Intervention in Elections by 501(c)(3) Organizations*, 6 FIRST AMEND. L. REV. 142, 170 (2007) (advocating “[d]evelopment of bright-line rules that clearly define permissible activity”); Elizabeth J. Kingsley, *Bright Lines? Safe Harbors?*, TAX’N OF EXEMPTS, Jul.–Aug. 2008, at 38, 43 (discussing “discontent with the vagueness” and that “the conversation around a possible bright-line standard is starting to crystallize”); James Bopp, Jr. & Zachary S. Kester, *Holding the Service’s Feet to the Fire: Applying Citizens United and the First Amendment to the IRC § 501(c)(3) Political Prohibition*, ENGAGE, Dec. 2010, at 75, 77, http://www.fed-soc.org/doclib/20101223_BoppKesterEngage11.3.pdf (“The only solution to the vagueness problem is a clear, bright-line, speech-protective test such as the express advocacy test.”).

¹⁶ 130 S. Ct. 876 (2010).

¹⁷ *Id.* at 895–96 (quotations and citation omitted).

consider.¹⁸ By asking the IRS for clarity and bright-line rules to define the prohibition, the charitable community emphasizes a key *ex ante* consideration—the impact of guidance on appropriate charitable behavior. By offering a multifactor approach dependent on the particular situation, the IRS stresses an equally important *ex post* consideration—the impact of guidance on enforcement.

Both considerations, of course, have a place in any calculus. Kaplow's article, however, sets out a framework to help those that must give content to legal commands and guidance to decide whether to frame such content as rules or standards. This Article argues that, under Kaplow's analysis, the IRS's own concern for encouraging compliance should lead it to develop more rules in this area. That is, this Article emphasizes why the IRS itself should want to promulgate rules.

Part I sets forth Kaplow's analytical framework regarding levels of enforcement and how the affected community will choose to learn about the legal command, whether it is a rule or standard. Part II describes the legal commands at issue. Part III considers aspects of Kaplow's analysis related to enforcement. It examines the available sanctions, the numbers of parties subject to enforcement actions, and the kinds of sanctions in fact imposed. Part IV discusses the nature of the affected community and how members of that community will seek legal advice. Part V addresses a question Kaplow mentions frequently, but only in passing: what are the underlying norms a statutory command reflects? This Part discusses both the legislative purpose in enacting the prohibition and attitudes toward its constitutionality. Part VI considers arguments against rules, both generally and as applied to tax law. Part VII applies the Kaplow analysis to all these considerations and concludes that the IRS should invest the time to develop a set of rules.

I. KAPLOW ON RULES AND STANDARDS

According to Kaplow, in implementing a legal command, a legal authority must begin by choosing, at least to some extent, between a rule and a standard.¹⁹ That is, legal authorities must decide whether to issue a specific command *ex ante* or to wait and give the command detailed content only *ex post* in an enforcement action. That decision, however, is only the first of three stages that take place

¹⁸ Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 562 (1992). I will rely primarily on Kaplow's analysis in this piece, but at various places will also consider other contributions to the vast academic literature on rules versus standards.

¹⁹ *Id.* at 568.

chronologically. In stage two, individuals must decide to act. In stage three, some kind of enforcement action determines the application of the governing law.²⁰

Kaplow's article focused on situations in which legislatures promulgate legal commands and courts enforce them.²¹ His analysis, however, applies in particularly interesting ways to an administrative agency such as the IRS,²² which has a duty to ensure that the tax laws are obeyed, but must also consider how best to deploy its limited resources. The IRS is, of course, constrained both by the provisions that Congress enacts in the Internal Revenue Code and decisions that courts issue. But it also has the capacity to interpret congressional commands through various forms of administrative guidance (some of which are promulgated jointly with the Treasury Department) and to enforce them in audits and other enforcement actions.

In Kaplow's analysis, legal authorities weighing the costs of promulgation and the costs of enforcement should not make a decision at stage one without carefully considering stages two and three. Cost of promulgation is important. "Rules are more costly to promulgate than standards because rules involve advance determinations of the law's content . . ."²³ Nonetheless, "[i]f there will be many enforcement actions, the added cost from having resolved the issue on a wholesale basis at the promulgation stage will be outweighed by the benefit of having avoided additional costs repeatedly incurred in giving content to a standard on a retail basis."²⁴ Moreover, a rule may be preferable when the legal command governs "millions of individuals and billions of transactions,"²⁵ such as in the federal income tax, even if enforcement actions are rare. In contrast, if the relevant facts vary widely, "[d]esigning a rule that accounts for every relevant contingency would be wasteful, as most would never arise."²⁶ Standards are better suited for situations in which a particular set of facts will occur only rarely.

Legal authorities also need to bear in mind, however, the impact of their choice on the behavior of those whom their command affects; in other words, they must consider stage two. "Being imperfectly

²⁰ *Id.* at 562.

²¹ *See, e.g., id.* at 583 (noting that a standard could reflect the "legislature's decision to delegate the question to the courts").

²² In any case involving promulgation of regulations, the Treasury Department will be involved as well as the IRS. *See* Hickman, *supra* note 13, at 240 n.4 (citing authorities that describe the promulgation of regulations).

²³ Kaplow, *supra* note 18, at 562.

²⁴ *Id.* at 563 (footnote omitted).

²⁵ *Id.* at 564 (referring specifically to tax as an example).

²⁶ *Id.* at 563.

informed of the law's commands," affected parties may "act based on their best guess of the law," or they may seek to acquire legal information.²⁷ They may acquire such legal knowledge by seeking professional legal advice, through study of government resources, through information disseminated by trade groups, other third-party resources, or by other means. On the basis of this legal information, they may decide to avoid conduct that they learn is illegal or subject to sanctions to which they do not wish to become subject.²⁸ Legal knowledge may also lead them to engage in conduct that they had mistakenly thought was forbidden or subject to sanctions they thought severe but are in fact quite minor.²⁹

Affected parties, however, must decide how much to invest in learning about the content of a legal command. The value of obtaining information about the law depends on the value that parties place on conduct from which they are deterred, and the value they place on conduct that they feel free to undertake after investigation.³⁰ Importantly, to Kaplow, the decision by an affected party about how much to invest in learning about the content of a legal command is likely to differ depending on whether the content is a rule or a standard. "Because a standard requires a prediction of how an enforcement authority will decide questions that are already answered in the case of a rule, advice about a standard is more costly."³¹ As a result, affected parties may well choose not to become as well informed regarding standards. Thus, a rule could improve compliance. "[S]ubstantial compliance with imperfect rules" may yield better results than "poor compliance with more nearly perfect standards."³² Frequency is again important. "[T]he number of individuals who incur the cost of legal advice may greatly exceed the number who are subject to complete enforcement proceedings."³³ Thus, Kaplow suggests that, while standards have an important role to play in ensuring accurate enforcement actions, rules offer two possible sources of benefits: (1) individuals may need to spend less time learning their content; and (2) they "may become better

²⁷ *Id.* at 562.

²⁸ *See id.* at 571 ("[I]nformed individuals might be deterred from conduct they would have taken if they had remained uninformed.").

²⁹ *See id.* ("[I]nformed individuals might choose to undertake acts they would have been deterred from committing if they had remained uninformed.").

³⁰ *See id.* ("The value of advice, then, is simply the value of each possibility weighted by the likelihood of its occurrence.").

³¹ *Id.* at 569 (footnote omitted).

³² *Id.* at 608 n.138.

³³ *Id.* at 574 (footnote omitted).

informed about rules than standards and thus better conform their behavior to the law.”³⁴

Kaplow’s framework helps to clarify the different preferences of the IRS and the charitable community in addressing the campaign intervention prohibition. It directs us to ask a number of questions about enforcement, such as, the available sanctions, the number of parties subject to enforcement actions, and the kinds of sanctions in fact imposed. But it also charges us to consider the number and nature of parties subject to the legal command, whether they are likely to seek legal advice, and the nature of legal advice they are likely to consult. Underlying all of Kaplow’s analysis is a concern that a legal command conform to its underlying norms. He also gives significant attention to issues of complexity. All of these factors bear upon whether a rule or a standard is most likely to achieve the highest possible level of compliance.

II. THE LEGAL COMMANDS AT ISSUE

First, it is important to note that Congress issued the legal commands regarding the political campaign prohibition. Section 501(c)(3) of the Internal Revenue Code provides that an organization cannot be tax-exempt if it “participate[s] in, or intervene[s] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”³⁵ The provision was first introduced as part of the 1954 Internal Revenue Code.³⁶ Congress amended the provision in 1987 to prohibit opposing as well as supporting any candidate.³⁷

³⁴ *Id.* at 577.

³⁵ I.R.C. § 501(c)(3) (2006).

³⁶ See Roger Colinvaux, *The Political Speech of Charities in the Face of Citizens United: A Defense of Prohibition*, 62 CASE W. RES. L. REV. 685, 686 (2012) (stating the “political activities prohibition” was introduced in the Internal Revenue Code in 1954). I note that the staff of Senator Grassley, former ranking minority member of the Senate Finance Committee, recently recommended that the campaign intervention prohibition be eliminated or circumscribed. See Memorandum from Theresa Pattara & Sean Barnett on Review of Media-Based Ministries to Senator Grassley 54 (Jan. 6, 2011) [hereinafter *Senate Staff Memorandum*], available at <http://finance.senate.gov/newsroom/ranking/release/?id=5fa343ed-87eb-49b0-82b9-28a9502910f7> (stating that “[t]he electioneering prohibition on Section 501(c)(3) organizations should be repealed or circumscribed”). Grassley, however, did not endorse any of the recommendations in the staff report. Instead, he referred the issues to a commission to be headed by the Evangelical Council of Financial Accountability. See Letter from Charles E. Grassley, U.S. Senator, to Dan Busby, President, Evangelical Council for Financial Accountability (Jan. 5, 2011), <http://finance.senate.gov/newsroom/ranking/release/?id=5fa343ed-87eb-49b0-82b9-28a9502910f7> (requesting the Evangelical Council of Financial Accountability consider and provide input on the issues addressed in the staff report).

I will address a number of issues raised by the staff report later in this piece. Generally, however, I observe that this staff recommendation flies in the face of the long history of the

In general and subject to various limits, contributions to section 501(c)(3) organizations are tax-deductible for purposes of the federal income tax. Section 170(c)(2)(D), a provision dating to 1969 that codified a Treasury regulation,³⁸ provides specifications regarding the tax-deductibility of charitable contributions.³⁹ A contribution or gift must, among other requirements, be to or for the use of an entity “which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”⁴⁰

In 1987, Congress gave the IRS some additional tools to enforce the campaign intervention prohibition. It provided that any organization losing its exempt status under section 501(c)(3) because of substantial lobbying or violating the campaign intervention prohibition cannot at any time thereafter be treated as a section 501(c)(4) organization.⁴¹ Congress also enacted section 4955, an excise tax on violations of the prohibition.⁴² Under this provision, a two-tier excise tax applies to amounts paid or incurred for campaign intervention.⁴³ The initial section 4955 excise tax on the organization is 10 percent of each forbidden campaign intervention expenditure, with a separate tax of 2.5 percent on a knowing organization manager (up to \$5,000) in certain circumstances.⁴⁴ If the organization does not

prohibition. See Colinvaux, *supra* note 36, at 690–97 (discussing the historical background of the prohibition). It also fails to consider that we as a nation have a policy of requiring all contributions for political campaigns to come from after-tax income, other policy reasons that favor the prohibition, or the abuses that could follow repeal of the prohibition. See Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations after Citizens United*, 10 ELECTION L.J. 363 (2011) (arguing for changes in the laws regarding political activities); Gregg D. Polsky, *A Tax Lawyer’s Perspective on Section 527 Organizations*, 28 CARDOZO L. REV. 1773, 1775 (2007) (discussing tax and electioneering issues related to 501(c)(3) organizations); Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1363 (2007) (concluding that the section 501(c)(3) prohibition ensures “taxpayer subsidies are not used for political campaigns” and “protects democracy by keeping all groups on a level playing field”).

³⁷ Revenue Act of 1987, Pub. L. No. 100–203, § 10711(a)(2), 101 Stat. 1330, 1330–464 (1987).

³⁸ See Colinvaux, *supra* note 36, at 697.

³⁹ I.R.C. § 170(c)(2)(d) (2006).

⁴⁰ *Id.* The gift and estate taxes also provide for a charitable contribution deduction, although the wording is not identical to section 170(c)(2)(d). See I.R.C. § 2055(a)(2) (providing a charitable contribution deduction in the context of estate taxes, but not for contributions to organizations disqualified for tax exemption under section 501(c)(3) for political activities); I.R.C. § 2522(a)(2) (providing a charitable contribution deduction, in the context of gift taxes, but not for contributions to organizations disqualified for tax exemption under section 501(c)(3) for political activities).

⁴¹ I.R.C. § 504(a).

⁴² I.R.C. § 4955.

⁴³ *Id.* at (a)–(b).

⁴⁴ *Id.* at (a), (c).

recover part or all of the expenditures to the extent possible and establish safeguards to prevent future campaign intervention,⁴⁵ the IRS levies a second tier of taxes of 100 percent on the organization and 50 percent (up to \$10,000) on the knowing manager.⁴⁶ If the correction is accomplished and the expenditure was not “willful and flagrant,” the IRS can waive the first-tier tax.⁴⁷

According to the legislative history of the provision, the section 4955 excise tax was enacted to be imposed, in most cases, in addition to, and not in lieu of, revocation.⁴⁸ If the political campaign intervention involves little out of pocket expense, the excise tax has little bite. When a violation of the campaign intervention prohibition is flagrant, however, the IRS can make an immediate termination assessment of tax due.⁴⁹ The IRS can also file an action in federal district court to halt or enjoin future campaign intervention if certain procedural requirements are met.⁵⁰

Regulations, the most authoritative form of administrative guidance,⁵¹ provide some additional interpretation regarding the congressional commands, but do not set out any bright-line rules. The regulations under section 501(c)(3) explain that an organization cannot be exempt under that provision if it is an “action” organization, which includes an organization that violates the campaign intervention prohibition.⁵² The regulations explain, most unhelpfully, that activities violating the campaign intervention prohibition “include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to . . . a candidate.”⁵³

⁴⁵ *Id.* at (f)(3).

⁴⁶ *Id.* at (b), (c).

⁴⁷ I.R.C. § 4962(a)(1), (c); Treas. Reg. § 53.4955-1(d)(1) (as amended in 2009).

⁴⁸ The House Report provided:

The adoption of an excise tax sanction does not modify the present-law rule that an organization does not qualify for tax-exempt status as a charitable organization, and is not eligible to receive tax-deductible contributions, unless the organization does not participate in, or intervene in, any political campaign on behalf of or in opposition to any candidate for public office.

H.R. REP. NO. 100-391, pt. 2, at 1624 (1987) (internal citations omitted). The regulations under section 4955 also make this point: “The excise taxes imposed by section 4955 do not affect the substantive standards for tax exemption under section 501(c)(3) under which an organization is described in section 501(c)(3) only if it does not participate or intervene in any political campaign on behalf of any candidate for public office.” Treas. Reg. § 53.4955-1(a).

⁴⁹ I.R.C. § 6852(a).

⁵⁰ I.R.C. § 7409. There is no evidence that the IRS has ever asserted the authority to halt or enjoin future campaign intervention.

⁵¹ Hickman, *supra* note 13, at 240 n.4.

⁵² Treas. Reg. §§ 1.501(c)(3)-1(c)(3)(i)-(iii) (as amended in 2008).

⁵³ *Id.* at (c)(3)(iii).

Revenue rulings involving this issue provide additional guidance, but always with the caveat that the determination of whether a violation of the prohibition has occurred is a question of facts and circumstances. Thus, Revenue Ruling 2007–41 lists several categories that raise the potential for campaign intervention, and factors to be considered for a number of such categories.⁵⁴ It also offers twenty-one examples of situations that would involve campaign intervention.⁵⁵ In the case of candidate appearances, for example, factors include whether the organization provided other candidates with an equal opportunity to participate, whether the organization indicated any support or opposition to the candidate, and whether any political fundraising occurred.⁵⁶

The meaning of some of these factors is itself uncertain. What, for example, indicates support or opposition during a candidate appearance? What weight do we assign to each factor? In addition, whenever “open-ended rough-and-tumble of factors,”⁵⁷ using the Supreme Court’s language in *Citizens United*, are applied to a particular factual situation, the result will be uncertain if different factors point in different directions. An exempt organization can have no confidence that its conclusion would be the same as that of the IRS.

An earlier revenue ruling on voter guides further illustrated the difficulty. Revenue Ruling 78–248 cautioned that campaign intervention “depends upon all of the facts and circumstances.”⁵⁸ It

⁵⁴ Rev. Rul. 2007–41, 2007–25 I.R.B. 1421. The categories are: 1) voter education, voter registration and get out the vote drives; 2) individual activity by organization leaders; 3) candidate appearances; 4) candidate appearance where speaking or participating as a non-candidate; 5) issue advocacy vs. political campaign intervention; 6) business activity; and 7) web sites. *Id.* at 1422–26.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1423. In distinguishing issue advocacy from political campaign intervention, the revenue ruling lists seven factors: (1) whether the statement at issue “identifies one or more candidates for a given public office”; (2) whether it “expresses approval or disapproval for one or more candidates’ positions and/or actions”; (3) “[w]hether the statement is delivered close in time to the election”; (4) whether it “makes reference to voting or an election”; (5) whether “the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office”; (6) “[w]hether the communication is part of an ongoing series of communications by the organization on the same issues that are made independent” of any election; and (7) “[w]hether the timing of the communication and identification of the candidates are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office.” *Id.* at 1424. The ruling does note that a “communication is particularly at risk of political campaign intervention when it makes [a] reference to candidates or voting in a specific upcoming election.” *Id.* It then backs away from even this statement by cautioning, “[n]evertheless, the communication must still be considered in context before arriving at any conclusions.” *Id.*

⁵⁷ *Citizens United v. FEC*, 130 S. Ct. 876, 896 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007)).

⁵⁸ Rev. Rul. 78–248, 1978–1 C.B. 154.

then distinguished certain voter guides that would be permissible voter education activities for a section 501(c)(3) organization from some that would constitute impermissible campaign intervention.⁵⁹ In one permissible situation, the organization annually prepared and made generally available to the public a compilation of the voting records of all members of Congress on major issues involving a wide range of subjects.⁶⁰ The voter guide, however, did not include an editorial opinion, and nothing in its structure or content implied approval or disapproval of any member or the member's voting record.⁶¹ In one of the impermissible situations, an organization primarily concerned with land conservation matters published a voter guide widely distributed during an election campaign that was a factual compilation of incumbent voting records on selected land-conservation issues.⁶² Because the guide emphasized only one area, however, the ruling concluded that its purpose was not non-partisan voter education but forbidden political intervention.⁶³

The ruling left organizations seeking guidance with a number of questions. What is "a wide variety of issues"? How many issues are enough? Can an organization, for example, emphasize a few issues, listed without editorial comment, if they are those that reflect particular political leanings, such as those on the left or the right? We do not know.

As the Congressional Research Service has observed, neither tax law nor the regulations offer much insight as to what activities are banned for 501(c)(3) organizations prohibited from intervening in political campaigns.⁶⁴ The same is true in the case of revenue rulings. In short, the legal commands from Congress and precedential guidance, which is that included in the IRS cumulative bulletin, provide standards and not rules.

III. ENFORCEMENT OF THE CAMPAIGN INTERVENTION PROHIBITION

A key factor in Kaplow's analysis is the level of enforcement of a legal command.⁶⁵ The defining characteristic of a standard is that it is imbued with specific content only through *ex post* enforcement

⁵⁹ *See id.* (discussing four different situations).

⁶⁰ *Id.* (situation one).

⁶¹ *Id.*

⁶² *Id.* (situation four).

⁶³ *Id.*

⁶⁴ ERIKA LUNDER, CONG. RESEARCH SERV., RL 33377, TAX EXEMPT ORGANIZATIONS: POLITICAL ACTIVITY RESTRICTIONS AND DISCLOSURE REQUIREMENTS CRS-8 (2007), available at, LEXIS, 2007 TNT 36-25.

⁶⁵ Kaplow, *supra* note 18, at 562. Chronologically, enforcement occurs at stage three, but because of its importance in Kaplow's calculus, I discuss it first.

actions. Thus, a low level of enforcement actions would suggest that legal authority should promulgate a standard and rely on enforcement actions to give content to the legal command, instead of developing a rule with all the added costs of promulgating a rule. In the case of the campaign intervention prohibition, however, IRS enforcement has, as others have noted, “been spotty at best.”⁶⁶

Judicial decisions are one means of explaining the content of the legal rule *ex post*. Only a very small number of court decisions have involved the campaign intervention prohibition. The best-known case is the 2000 decision in *Branch Ministries v. Rossotti*.⁶⁷ There, a church had purchased full-page ads in two national newspapers stating that voting for then-Presidential candidate Bill Clinton was sinful and then asked for tax-deductible donations.⁶⁸ The IRS revoked the church’s exemption, an action that the appellate court upheld.⁶⁹ The case involved undisputed express intervention. Thus, its reasoning provided little guidance for the more difficult situation of indirect intervention. Similarly, in the case of the Christian Echoes Ministry, whose revocation of exemption the Tenth Circuit upheld in 1972, the political intervention was clear.⁷⁰ Christian Echoes had attacked various candidates it considered too liberal and endorsed conservative candidates, such as Barry Goldwater.⁷¹

Association of the Bar of the City of New York v. Commissioner,⁷² however, offered guidance on a more subtle form of possible political intervention: voter guides.⁷³ The IRS denied the New York City Bar’s bid for section 501(c)(3) status because it rated judicial candidates for both appointive and elective judgeships at all levels of government as “approved,” “not approved,” or “approved as highly qualified” on the basis of professional ability, experience, character, temperament and possession of any special qualifications. The Second Circuit held that such activity, which the bar association conceded was intended to ensure that unqualified candidates were not elected to office, violated the political intervention prohibition, citing the Treasury regulation

⁶⁶ Lloyd Hitoshi Mayer, *Grasping Smoke: Enforcing the Ban on Political Activity by Charities*, 6 FIRST AMEND. L. REV. 1, 4 (2007); see also Tobin, *supra* note 36, at 1356 (noting “sporadic and potentially uneven enforcement”). I note that this Article in many places updates Mayer’s work, and I thank him for his efforts.

⁶⁷ 211 F.3d 137, 139 (D.C. Cir. 2000).

⁶⁸ *Id.* at 140.

⁶⁹ *Id.* at 145.

⁷⁰ *Christian Echoes Nat’l Ministry, Inc. v. United States*, 470 F.2d 849, 856 (10th Cir. 1972).

⁷¹ *Id.*

⁷² 858 F.2d 876 (2d Cir. 1988)

⁷³ *Id.* at 877.

forbidding intervening “directly or indirectly.”⁷⁴ Conducting the evaluations on a nonpartisan basis did not change the conclusion.

In a recent case, *Catholic Answers, Inc. v. United States*,⁷⁵ Catholic Answers sought to limit the political intervention ban to express advocacy.⁷⁶ Catholic Answers, a tax-exempt religious corporation challenged political activity excise taxes imposed against it under section 4955 for posting e-letters from its founder and president criticizing John Kerry, the then presumptive Democratic Party presidential nominee.⁷⁷ The organization was assessed and paid both first- and second-tier taxes.⁷⁸ Then, Catholic Answers timely corrected the political intervention and requested a refund of the taxes paid, which the IRS granted because the campaign intervention “was not willful and flagrant.”⁷⁹ Catholic Answers nonetheless filed suit challenging the regulations addressing political intervention under sections 4955 and 501(c)(3) on the grounds that they are unconstitutional for lacking specificity, for being overbroad, and for encompassing speech not limited to express advocacy or direct contributions.⁸⁰ The court, however, dismissed the complaint as moot for two reasons: (1) the IRS abatement had rendered the refund claim moot; and (2) because Catholic Answers had formed a new 501(c)(4) organization to engage in political intervention, there were no issues capable of repetition yet evading review.⁸¹ Thus, the case did not provide any additional explication of the reach of the campaign intervention prohibition.

Enforcement activity of the campaign intervention prohibition also takes place short of judicial decisions. The IRS may revoke exempt status or impose the campaign intervention excise tax in administrative proceedings. Several constraints limit the usefulness of such activity in giving content to the campaign intervention prohibition. First, the IRS audits only a small number of exempt organizations. The 2010 Annual Report from the IRS Exempt

⁷⁴ *Id.* at 881 (citing Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 2008)). See Rev. Rul. 78-248, 1978-1 C.B. 154 and Rev. Rul. 80-282, 1980-2 C.B. 178 for revenue rulings that address voter guides.

⁷⁵ 09-CV-670-IEG (AJB), 2009 WL 3320498 (S.D. Cal. Oct. 14, 2009), *aff'd*, 09-56926, 2011 WL 2452177 (9th Cir. June 21, 2011), *cert. denied*, 80 U.S.L.W. 3440 (U.S. Jan. 23, 2012) (No. 11-511); see also Irma E. Gonzales, *Court Dismisses Nonprofit Group's Challenge to Political Expenditures Tax*, Tax Notes Today, Oct. 16, 2009, available at Lexis, 2009 TNT 198-13 (discussing and analyzing the *Catholic Answers* decision in detail).

⁷⁶ *Catholic Answers*, 2009 WL 3320498, at *2.

⁷⁷ *Id.* at *1.

⁷⁸ *Id.*

⁷⁹ *Id.* at *2.

⁸⁰ *Id.*

⁸¹ *Id.* at *7-8.

Organizations Division (“EO”) reported 10,187 returns examined in fiscal year 2009 through traditional examinations and 6,773 through less resource-intensive compliance checks.⁸² The reported numbers for fiscal year 2010 were 11,449 and 3,893, respectively.⁸³

With 776,300 returns processed for Calendar Year 2009,⁸⁴ the percentage of examinations would be approximately 1.47 percent for 2010 if the same number for returns were processed as in 2009. This percentage, however, is somewhat misleading. The *2010 IRS Data Book* reveals that of the 11,449 returns examined in fiscal year 2010, only 3,596 were annual information returns Forms 990 and 990-EZ, one of which most tax-exempt organizations are required to provide the IRS annually.⁸⁵ Thus, using this data, the percentage of filed returns examined drops to approximately 0.463 percent. Moreover, for purposes of these statistics, “‘examined’ means ‘closed,’” and an exempt organization audit may cover one, two or three years of returns, all of which are closed in a single year.⁸⁶ Thus, the number of organizations examined may be even lower.⁸⁷ These numbers are far lower than audits of both personal returns and for-profit entities.⁸⁸ Moreover, while in recent years, redacted revocations of exempt status have been publicly available, administrative enforcement actions are confidential and the details of particular cases become public and thus provide guidance to other entities only if the organization chooses to make them so.⁸⁹

⁸² IRS EXEMPT ORGS., TAX EXEMPT AND GOVERNMENT ENTITIES 2 (2010), available at http://www.irs.gov/pub/irs-tege/fy2011_eo_workplan.pdf [hereinafter *2010 Report*]. “Compliance checks inquire about an item on a return or solicit information about an organization’s operations” *Id.* The Form 990 itself leads to confusion in this area. The glossary in the Instructions to the Form 990 define “political campaign activities” as “All activities that support or oppose candidates for elective federal, state, or local public office.” Department of the Treasury, Internal Revenue Service, Instructions for Form 990 Return of Organization Exempt from Income Tax (2011), available at <http://www.irs.gov/pub/irs-pdf/i990.pdf>. While definitions in a glossary must be short, of course, this definition fails to convey the breadth of political campaign activities as used by the IRS.

⁸³ *Id.*

⁸⁴ I.R.S. DATA BOOK, 2010, Pub. 55B, at 33 (2011) (noting in Table 13 stating data regarding the returns of tax-exempt organizations, employee plans, and government entities), available at <http://www.irs.gov/pub/irs-soi/10datbk.pdf>. The 2010 EO Report does not give this data.

⁸⁵ *Id.* The vast majority of other returns examined were employment tax returns.

⁸⁶ Paul Streckfus, *EO Tax Journal 2010–172*, EO TAX JOURNAL (Nov. 19, 2010), <http://eotaxjournal.com/eotj/?m=201011>.

⁸⁷ Paul Streckfus, editor of the *EO Tax Journal*, estimated the rate at 0.2 percent. *Id.*

⁸⁸ See *infra* text accompanying note 138 (describing the audit rates of tax payers other than tax exempt organizations).

⁸⁹ See, e.g., *CBN Press Release on Agreement With IRS*, TAX NOTES TODAY, March 16 1998, available at LEXIS, 98 TNT 55–78 (announcing that the IRS had revoked the tax-exempt status of Pat Robertson’s Christian Broadcasting Network and three of its former affiliates because of campaign intervention); *Falwell Responds to IRS Appeal for Money*, TAX NOTES TODAY, Feb. 17, 1993, available at LEXIS, 93 TNT 81–46 (announcing that the IRS had

Some additional data on an aggregate basis are available, however. For example, from 2003 through 2005, on average fewer than twenty organizations per year paid the excise for political expenditures under section 4955, disqualifying lobbying expenditures under section 4912, or premiums paid on personal benefit contracts, with an average paid for all three of these taxes of less than \$5,500 per year.⁹⁰ For calendar year 2010, the number of charities, private foundations, and split interest trusts that paid tax on political expenditures was thirty-one and the total amount paid was \$40,413, for an average of \$1,304 per organization.⁹¹ For 2009, the number of charities, private foundations, and split interest trusts that paid tax on these expenditures was forty-eight, and the total amount paid \$1,371,176, for an average of \$28,566.⁹² For calendar year 2008, the number of charities, private foundations, and split interest trusts paying such taxes totaled thirty with total payments of \$84,665, or an average of \$2,822.⁹³ Thus, imposition of the section 4955 excise tax occurs only rarely and in small amounts.

Between 2005 and 2007, the IRS revoked the tax-exempt status of sixty charities.⁹⁴ From January 1, 2010 through April 4, 2011 alone, the IRS revoked the charitable status of 212 organizations.⁹⁵ The results of the Political Activity Campaign Initiative discussed below, however, indicate that only a few of these revocations related to campaign intervention.⁹⁶ More frequently, revocations or denials of initial applications for recognition of exempt status occur for failure to file required forms or as a result of private inurement, that is, self-dealing by organization insiders.⁹⁷ A recent denial of exemption did

revoked the tax-exempt status of Jerry Falwell's Old Time Gospel Hour for 1986 and 1987 for campaign intervention).

⁹⁰ Mayer, *supra* note 66, at 12 n.36.

⁹¹ SOI TAX STATISTICS, EXCISE TAXES REPORTED BY CHARITIES, PRIVATE FOUNDATIONS AND SPLIT INTEREST TRUSTS ON FORM 4720, Calendar Year 2010, available at <http://www.irs.gov/pub/irs-soi/10pf00et.xls>. The IRS now aggregates the categories listed by Mayer with such items as tax on prohibited tax shelters and taxable distribution of sponsoring organizations.

⁹² SOI TAX STATISTICS, EXCISE TAXES REPORTED BY CHARITIES, PRIVATE FOUNDATIONS AND SPLIT INTEREST TRUSTS ON FORM 4720, Calendar Year 2009, available at <http://www.irs.gov/pub/irs-soi/09pf00et.xls>.

⁹³ SOI TAX STATISTICS, EXCISE TAXES REPORTED BY CHARITIES, PRIVATE FOUNDATIONS AND SPLIT INTEREST TRUSTS ON FORM 4720, Calendar Year 2008, available at <http://www.irs.gov/pub/irs-soi/08pf00et.xls>.

⁹⁴ Mayer, *supra* note 66, at 12.

⁹⁵ IRS RECENT REVOCATIONS OF 501(C)(3) DETERMINATIONS, available at <http://www.irs.gov/charities/charitable/article/0,,id=141466,00.html>.

⁹⁶ See *infra* note 104–34 and accompanying text (discussing an IRS initiative that reviewed the campaign intervention prohibition).

⁹⁷ For the period examined, revocations of exemptions for credit counseling organizations

cite the campaign intervention prohibition as one reason for the action, where the organization donated office space and telephone lines to an affiliated section 527 organization without charging for their use and allowed candidates to speak at the organization's events.⁹⁸ In 2006, the IRS revoked the exemption as a section 501(c)(3) organization of an entity that placed a newspaper advertisement opposing a candidate's bid for office, made two "massive mailings" to the general public, and had a truck with signs opposing the candidate's ticket driven across the country for four months.⁹⁹

That is not to say that redacted guidance lacks relevance to the enforcement of the campaign intervention prohibition. The IRS publishes redacted Technical Advice Memoranda (TAM), which constitute answers by the Office of Chief Counsel to questions that arise in the field, usually during examinations.¹⁰⁰ A 2009 TAM found prohibited campaign intervention where a charity failed to distinguish web pages that contained candidate-related material from its other web pages when the website was operated jointly by the charity and its affiliated social welfare organization.¹⁰¹ A 2004 TAM concluded that a charity's administration of a payroll deduction plan that allowed contributions to an industry political action campaign violated the campaign intervention prohibition and justified imposition of the section 4955 excise tax.¹⁰² In 1996, a TAM concluded that a loan to a political organization violated the campaign intervention prohibition because a contribution to a political organization is defined to include a loan and that the loan transaction justified imposition of the section 4955 excise tax.¹⁰³

By far the best evidence of IRS enforcement policy in this area as well as of the public's understanding of, and compliance with, the prohibition is the IRS Political Activity Campaign Initiatives

were particularly numerous. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 2010-17-077 (Jan. 8, 2010), I.R.S. Priv. Ltr. Rul. 2009-50-051 (Sept. 14, 2009), I.R.S. Priv. Ltr. Rul. 2009-15-059 (Jan. 6, 2009). Congress in 2006 enacted new standards applicable to exemption by credit counseling organizations. Pension Protection Act of 2006, Pub. L. No. 109-280 § 1220(a), 120 Stat. 780, 1086 (codified as amended at 26 U.S.C. § 501(q)).

⁹⁸ I.R.S. Priv. Ltr. Rul. 2010-20-021 (Feb. 25, 2010).

⁹⁹ I.R.S. Priv. Ltr. Rul. 2007-24-033 (April 16, 2006).

¹⁰⁰ *Understanding IRS Guidance: A Brief Primer*, I.R.S., <http://www.irs.gov/irs/article/0,,id=101102,00.html> (last updated May 20, 2011). TAMs are the basis for revenue rulings.

¹⁰¹ I.R.S. Tech. Adv. Mem. 2009-08-050 (Feb. 20, 2009).

¹⁰² I.R.S. Tech. Adv. Mem. 2004-46-033.

¹⁰³ I.R.S. Tech. Adv. Mem. 98-12-001 (Aug. 21, 1996). For description of the few other TAMs since 1991 involving the campaign intervention prohibition, see Mayer, *supra* note 66, at 12-13 n.37.

(“PACI”) for 2004, 2006, and 2008. The initiative’s objective was precisely “to establish the IRS enforcement presence.”¹⁰⁴ Using referrals, the IRS examined, on an expedited and focused basis, possible campaign intervention in each of those election cycles.¹⁰⁵ In so doing, it distinguished between single-issue cases and more complicated ones involving multiple issues.¹⁰⁶ In the 2004 and 2006 election cycles, violations were evenly split between churches and other types of section 501(c)(3) organizations,¹⁰⁷ and the IRS undertook to follow the procedural requirements for church audits.¹⁰⁸ In 2004, the IRS received 166 referrals, selected 110 organizations for examination, and found violations in nearly 75 percent of the organizations examined.¹⁰⁹ The most common violations identified were distribution of printed documents supporting candidates, statements endorsing candidates during normal services, well-known individuals endorsing a candidate at an official function, candidates speaking at official functions, distribution of improper voter guides or candidate ratings, posting of signs on the organization’s property, endorsing candidates on the organization’s website or through links on its website, verbal endorsements by an organization’s official, political contributions to a candidate, and non-candidate endorsement of a candidate at an official function of the organization.

The statutory prohibition by its terms is absolute such that even a *de minimis* amount of political campaign intervention could result in loss of exemption. The lack of statutorily authorized intermediate sanctions complicates enforcement.¹¹⁰ The statute’s only option is

¹⁰⁴ Political Activities Compliance Initiative Final Report, IRS, 1 (Feb. 24, 2006) http://www.irs.gov/pub/irs-tege/final_paci_report.pdf [hereinafter *2004 PACI Report*].

¹⁰⁵ For criticism of IRS reliance on referrals, see Mayer, *supra* note 66, at 25–27.

¹⁰⁶ *2004 PACI Report*, *supra* note 104, at 6.

¹⁰⁷ See I.R.C. § 7611 (2006) (imposing “reasonable belief” and notice requirements that must be satisfied before the IRS may begin a church tax inquiry). The IRS regulations implementing this code section were subsequently held invalid. *United States v. Living Word Christian Ctr.*, No. 08–mc–37 ADM/JJK, 2009 WL 250049, at *1 (D. Minn. Jan. 30, 2009). The IRS has proposed but not finalized new regulations. See Prop. Treas. Reg. § 301.7611–1, 74 Fed. Reg. 39003 (Aug. 5, 2009) (providing “Amendments to the Regulations Regarding Q&A Relating to Church Tax Inquiries and Examinations”); *2010–2011 Priority Guidance Plan*, I.R.S., 10 (Dec. 7, 2010), http://www.irs.gov/pub/irs-utl/2010-2011_pgp.pdf (including final 7611 regulations as a priority).

¹⁰⁸ *2004 PACI Report*, *supra* note 104, at 9.

¹⁰⁹ *2006 Political Activities Compliance Initiative*, I.R.S., 1 (May 30, 2007), http://www.irs.gov/pub/irs-tege/2006paci_report_5-30-07.pdf [hereinafter *2006 PACI Report*]. *Id.* at 4; see also Fred Stokeld, *Referrals of Possible Campaign Intervention by Charities Not Always Promptly Processed Timely*, *Says TIGTA*, TAX NOTES TODAY (July 1, 2008), available at, LEXIS, 2008 TNT 127–5 (reporting that sixty-three out of 100 referrals in the 2006 PACI were not completed in a timely manner).

¹¹⁰ *Senate Staff Memorandum*, *supra* note 36, at 55, notes this problem but does not suggest amending the statute to include sanctions short of revocation.

revocation for even the smallest violation, but the IRS is understandably hesitant to invoke such a severe sanction for minor violations. In the 2004 PACI, the IRS revoked exemption in five cases and proposed revocation in two more, although one revocation related to issues other than campaign intervention.¹¹¹ In 66 percent of 2004 PACI cases, however, the IRS engaged in self-help regarding available sanctions by issuing written advisories,¹¹² as it did in connection with All Saints Episcopal Church.¹¹³ The reason for these advisories, it explained, was that:

[t]he act of intervention was of a one-time, nonrecurring nature, or was taken in good faith reliance on advice of counsel, or was otherwise shown to be an anomaly; [t]he organization corrected the intervention, including recovery of expenditures, to the extent possible, and established that it had taken steps to prevent any future political intervention within the meaning of section 501(c)(3); and [t]he assessment of the section 4955 tax was unavailable.¹¹⁴

The report on the 2004 PACI was careful to specify that “the term ‘no-change written advisory’ has a broader meaning in the context of PACI than it is usually understood to mean.”¹¹⁵ The term was not being limited to issues or activities that were insubstantial, but “if conducted to a greater extent, could affect the organization’s exempt status,” since technically under the law, any amount of campaign intervention, no matter how small, results in loss of exemption.¹¹⁶ The report specifically noted confusion with the meaning of the statutory prohibition and that, “in cases concerning churches, the phrase had been interpreted to mean that the prohibition on political intervention . . . was limited to expressly endorsing or opposing candidates.”¹¹⁷

The IRS repeated the program in 2006; referrals increased to 237, but the IRS selected 100 for examination, with results similar to that for 2004.¹¹⁸ Unlike the 2004 efforts, however, it identified six cases in

¹¹¹ 2006 PACI Report, *supra* note 109, at 5.

¹¹² *Id.*

¹¹³ See *supra* note 14 and accompanying text (discussing the All Saints Episcopal Church’s violation and sanctions imposed by the IRS).

¹¹⁴ 2004 PACI Report, *supra* note 104, at 18.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 21–22.

¹¹⁸ 2006 PACI Report, *supra* note 109, at 1, 4. A report of the Treasury Inspector General for Tax Administration (“TIGTA”) regarding the 2004 PACI urged IRS examiners to make clearer statements in closing letters about whether a prohibited political activity violation occurred. Memorandum from Michael R. Phillips, Deputy Inspector Gen. for Audit to Comm’r, Tax Exempt and Gov’t Div., at 2 (May 12, 2009), *available at*

which an organization's facilities were used for political campaign intervention.¹¹⁹ It also undertook a follow-up process for its 2004 examinations and found no repeat campaign intervention.¹²⁰ In addition, unlike the 2004 efforts, the IRS conducted independent research on various state campaign finance report databases and found 269 apparent cases of direct contributions to candidates.¹²¹ It found the same types of violations that it did in the previous election cycle, but did not revoke or propose revocation in any case.¹²² Rather, it issued written advisories in 65 percent of closed cases.¹²³

The IRS continued the initiative in 2008, with an announced emphasis on internet activity.¹²⁴ The 2010 Annual Report from the director of exempt organizations provides the only information on the 2008 PACI.¹²⁵ According to the 2010 Annual Report, the IRS investigated 133 allegations of political activity for the 2008 election cycle, more than in 2004 and 2006.¹²⁶ The 2010 Annual Report detailed few other results. While the report described the same categories of violations, no data on political contributions were noted. The 2008 PACI involved forty-seven allegations of a church official endorsing a candidate during normal services, as compared to nineteen in 2004 and fourteen in 2006.¹²⁷ Thus, the earlier PACIs and attempts at education, including publishing a revenue ruling and a guide for churches and religious organizations, discussed below,¹²⁸ did not result in any clear evidence of increased compliance.

<http://www.treasury.gov/tigta/auditreports/2009reports/200910080fr.pdf>. In its examination of the 2006 PACI, TIGTA said the IRS had improved but nonetheless recommended that organizations be notified more promptly regarding the examination. Fred Stokeld, *Referrals of Possible Campaign Intervention by Charities Not Always Promptly Processed Timely, Says TIGTA*, TAX NOTES TODAY, July 1, 2008, available at LEXIS, 2008 TNT 127-5.

¹¹⁹ 2006 PACI Report, *supra* note 109, at 4.

¹²⁰ *Id.* at 5.

¹²¹ *Id.* at 6.

¹²² *Id.* at 5.

¹²³ *Id.*

¹²⁴ See I.R.S. News Release IR-2008-61 (Apr. 17, 2008), available at <http://www.irs.gov/newsroom/article/0,,id=181570,00.html> (announcing the 2008 PACI program); Memorandum from Marsha A. Ramirez, Dir., Exempt Orgs. Examinations to All Exempt Orgs. Revenue Agents (July 28, 2008), available at <http://www.irs.gov/pub/irs-tege/internetfielddirective072808.pdf> (providing guidance for revenue agents on dealing with tax exempt organizations websites).

¹²⁵ 2010 Report, *supra* note 82, at 20 available at http://www.irs.gov/pub/irs-tege/fy2011_eo_workplan.pdf (noting the types and amounts of 2008 allegations).

¹²⁶ *Id.* at 20.

¹²⁷ *Id.*; see *infra* notes 191-194 and accompanying text for discussion of an initiative by one church group that may have produced or at least influenced these figures.

¹²⁸ See *infra* notes 154-159 (discussing IRS initiatives to educate nonprofit organizations about the campaign intervention prohibition).

The 2010 Annual Report stated that the IRS revoked the tax-exempt status of seven noncompliant organizations over the three years of the PACI.¹²⁹ When the report was released, Director of Exempt Organizations Lois Lerner explained that investigations substantiated allegations against more than half of the organizations, with most receiving only a warning.¹³⁰ According to Lerner, the three most common complaints were “church officials making a statement for or against a candidate during normal services; exempt organizations distributing printed documents supporting candidates; and organizations endorsing candidates on their websites or through links to their websites. Close behind were organizations making political contributions to candidates.”¹³¹

The 2010 Annual Report did not include complaints for the 2010 election year because the IRS’s exempt organizations division was still going through the classification process. Moreover, it stated that the IRS has moved from “project to process,” meaning that it will be “winding down . . . separate, formal projects, and assimilating them into [its] general casework.”¹³² The IRS has not indicated publicly any intention to conduct a PACI for 2010.¹³³ That is, we can expect no further PACI efforts. A high profile enforcement undertaken by PACI has fizzled away.

Even with the PACI’s sustained audit, enforcement levels of the campaign intervention prohibition have been low, relying primarily on referrals, rather than any systematic audit or examination by the IRS. Under stage one of Kaplow’s calculus, a low level of enforcement activity usually favors the development of standards because “the added cost from having resolved the issue on a wholesale basis at the promulgation stage will [not] be outweighed by the benefit of having avoided additional costs repeatedly incurred in

¹²⁹ 2010 Report, *supra* note 82, at 20.

¹³⁰ *Id.*

¹³¹ Diane Freda, *Political Activity Revocations Reported; IRS Work Plan Outlines 501(c)(4) Focus*, BNA MONEY & POLITICS REPORT (Dec. 16, 2010), http://news.bna.com/mpdm/MPDMMWB/split_display.adp?fedfid=18838983&vname=mpebulalli ssues&fn=18838983&jd=a0c5r5r3a1&split=0. It is not clear to what extent these violations involved direct or indirect intervention. For example, we do not know what kind of statements church officials made, that is, whether they were express advocacy or statements at the margin between intervention and issue advocacy. Nonetheless, the 2010 Annual Report belies the argument made by the *Senate Staff Memorandum*, *supra* note 36, at 3, that enforcement of the prohibition is not feasible. Statements made in church services may be difficult to detect, but voter guides, candidate contributions, and statements on web pages are not.

¹³² 2010 Report, *supra* note 82, at 16.

¹³³ ERIKA K. LUNDER, CONG. RESEARCH SERV., RL 33377, TAX EXEMPT ORGANIZATIONS: POLITICAL ACTIVITY RESTRICTIONS AND DISCLOSURE REQUIREMENTS 11 (2010), available at LEXIS, 2010 TNT 190–34.

giving content to a standard on a retail basis.”¹³⁴ Kaplow observes that, if the relevant facts vary widely, “[d]esigning a rule that accounts for every relevant contingency would be wasteful, as most would never arise.”¹³⁵ In other words, situations in which a particular set of facts will occur only rarely suggest reliance on standards, not rules. While the IRS routinely cautions that violations of the campaign intervention prohibition depend on facts and circumstances, the results of the PACI suggest that violations fall into clear and relatively few categories.

Kaplow, as noted earlier, cautions that when a legal command affects millions, a rule may be preferable even when enforcement activity is low.¹³⁶ He uses tax, which is well-known for its enormous number of rules, as an example of such a category.¹³⁷ The audit rate is low for all taxpayers, not just section 501(c)(3) organizations.¹³⁸ The intervention prohibition applicable to section 501(c)(3) organizations affects hundreds of thousands of organizations,¹³⁹ and this fact argues for rules rather than standards, despite the low level of enforcement. Moreover, in the case of section 501(c)(3), the number of organizations subject to the prohibition is closely related to the nature of those subject to the legal command, a consideration which figures prominently in Kaplow’s stage two, to which we now turn.

IV. THE AFFECTED COMMUNITY

Equally important to the Kaplow calculus is the nature of the community affected by the legal command because the nature of the community shapes how members of the community will learn about it. “Being imperfectly informed of the law’s commands,” Kaplow posits, affected parties may “act based on their best guess of the law,”

¹³⁴ Kaplow, *supra* note 18, at 563.

¹³⁵ *Id.*

¹³⁶ See *supra* notes 19–26 and accompanying text (discussing stage one in Kaplow’s analysis).

¹³⁷ Kaplow, *supra* note 18, at 564.

¹³⁸ The IRS audited 1.1 percent of all personal returns in fiscal year 2010, the highest rate in a decade. Nicole Duarte, *Tax Practitioners Expect More Audit Growth in 2011*, TAX NOTES TODAY, Dec. 17, 2010, available at LEXIS, 2010 TNT 242–5. Audits for small businesses (those with less than \$10 million in assets) increased to 0.94 percent from 0.85 percent in 2009. *Id.* Those for midsize corporate taxpayers (those with between \$10 million and \$50 million in assets) increased to 10.95 percent from 10.10 percent in 2009. *Id.* Audits for the largest corporations declined in 2010, from 25.70 percent in 2009 to 23.44 percent in 2010. *IRS Releases Fiscal 2010 Enforcement Statistics*, TAX NOTES TODAY, Dec. 16, 2010, available at LEXIS, 2010 TNT 241–17. In 2005, the ten year high, audit rates for the largest corporations was 44.10 percent. *Id.*

¹³⁹ See *infra* note 143 and accompanying text (discussing the number of organizations affected).

or they may seek to acquire legal information.¹⁴⁰ Those affected by the legal command may acquire information by seeking professional legal advice, through study of government resources, through information disseminated by trade groups, through other third-party resources, or by other means. They will do so, however, only if the perceived value of acquiring legal advice exceeds the perceived cost,¹⁴¹ and the costs of acquiring legal advice about a standard are greater than those of acquiring such advice about a rule.¹⁴² Two considerations are relevant: (1) whether members of the affected community have the resources to acquire legal advice about the application of a standard; and (2) how they perceive the likelihood and burden of possible sanctions.

The community of organizations exempt under section 501(c)(3) is diverse and numerous. According to the National Center for Charitable Statistics (“NCCS”), the number of all section 501(c)(3) organizations, both public charities and private foundations, was 1,574,674 as of August 2011.¹⁴³ Most of the NCCS information is based on organizations that file the Form 990, the annual information return required for most organizations exempt under section 501(c), although it includes numbers for non-reporting organizations. The number also includes an estimated 278,772 churches, based on the website of American Church Lists in 2004, only about half of which have filed a 1023 application for exemption form with the IRS.¹⁴⁴ This large number of entities subject to the campaign intervention prohibition suggests that the IRS should develop rules, at least for common situations, rather than rely entirely on standards.

In 2009, the NCCS approximated as 691,008 the number of section 501(c)(3) organizations not reporting or not required to file

¹⁴⁰ Kaplow, *supra* note 18, at 562.

¹⁴¹ *Id.* at 571. The value of advice includes both the benefit of undertaking permitted acts that affected parties would have avoided without information and avoiding those not permitted that they would have undertaken without the information, in each case weighted by the likelihood of occurrence. *Id.*

¹⁴² *Id.* at 569.

¹⁴³ *Quick Facts About Nonprofits*, NAT’L CENTER FOR CHARITABLE STAT., <http://nccs.urban.org/statistics/quickfacts.cfm> (last visited Nov. 12, 2011) [hereinafter *NCCS Quick Stats*]. The 1,574,674 section 501(c) organizations include 959,698 public charities, 100,337 private foundations, and 514,639 miscellaneous. *Id.*

¹⁴⁴ *See Number of Nonprofit Organizations in the United States, 1999 – 2009*, NAT’L CENTER FOR CHARITABLE STAT., <http://nccsdataweb.urban.org/PubApps/profile1.php> (last visited Nov. 12, 2011) [hereinafter *NCCS Numbers*] (noting that about half of the estimated number of congregations are registered with the IRS based on the American Church List website). Churches are not required to file Form 1023, the application for exemption, or Form 990, the Annual Information Return, required of other section 501(c)(3) organizations. *See* I.R.C. §§ 508(c)(1)(A), 6033(a)(3)(A)(i) (2006).

Form 990 because they normally have less than \$25,000 in gross receipts.¹⁴⁵ That is, 43 percent of all organizations exempt under section 501(c)(3) and more than 68 percent of public charities were churches or normally had annual gross receipts of less than \$25,000.¹⁴⁶ Another recent report stated that 41 percent of returns filed by section 501(c)(3) organizations were filed by organizations with assets of less than \$100,000.¹⁴⁷

Other data further emphasize the large percentage of tax-exempt organizations that are very small. The Pension Protection Act of 2006 mandated that organizations with gross receipts less than \$25,000 file (other than churches) a very short new Form 990, known as the 990-N or e-Postcard.¹⁴⁸ The deadline to file this form was May 17, 2010, although the IRS later extended the deadline to October 15, 2010.¹⁴⁹ This requirement reaches beyond section 501(c)(3) organizations subject to the campaign intervention prohibition. A 2010 NCCS report gave as the total number of registered 501(c) organizations as 1,617,447, and the number of organizations required to file the e-Postcard as 714,379.¹⁵⁰ That is, of all organizations registered under section 501(c), those with gross receipts normally under \$25,000 are more than 45 percent.¹⁵¹ If the ratio of organizations exempt under section 501(c)(3) to organizations exempt under provisions of section 501(c) in 2010 is the same as that for 2009, more than 70 percent, or

¹⁴⁵ NCCS Numbers, *supra* note 144.

¹⁴⁶ *Id.*

¹⁴⁷ Paul Arnsberger & Mike Graham, *Charities, Social Clubs, and Other Tax-Exempt Organizations, 2007*, STAT. OF INCOME BULL., Fall 2010, at 169, 169–70, available at <http://www.irs.gov/pub/irs-soi/07eocharteobull.pdf>.

¹⁴⁸ Pension Protection Act of 2006, Pub. L. No. 109–280, § 1223(a), 120 Stat. 780, 1090 (2006) (codified as 26 U.S.C. § 6033(i) (2006)). The IRS has increased the limits for filing this short form for any tax year beginning after December 31, 2009 to any organization that normally has gross receipts of \$50,000 or less. *IRS Issues Guidance Relieving Some Small Organizations of Information Reporting*, TAX NOTES TODAY, Jan. 14, 2011, available at LEXIS, 2011 TNT 10–6.

¹⁴⁹ *IRS Releases FAQ on One-Time Filing Relief Program for Small Charities*, TAX NOTES TODAY, Aug. 30, 2010, available at LEXIS, 2010 TNT 167–47.

¹⁵⁰ Amy Blackwood & Katie L. Roeger, *Gone Tomorrow: A Look at Organizations That May Have Their Tax-Exempt Status Revoked*, NAT'L CENTER FOR CHARITABLE STAT, 1 (July 8, 2010), <http://www.urban.org/uploadedpdf/412135-tax-exempt-status.pdf>. In the 2010 Annual Report, the IRS director of the exempt organizations division reported that 335,952 Form 990-Ns had been filed by October 15, 2010. *2010 Report*, *supra* note 82, at 9.

¹⁵¹ The largest percentage (26 percent) of Form 990-N filers are in the human services subsector. Katie L. Roeger, *Small Nonprofit Organizations: A Profile of Form 990-N Filers*, URBAN INSTITUTE, 1–2 (Aug. 2010), <http://www.urban.org/uploadedpdf/412197-nonprofit-form990-profile.pdf>. This includes homeless shelters, soup kitchens, senior centers, meals on wheels. *Id.* The next largest group (22 percent) is in the public and societal benefit subsectors, such as civil rights groups, neighborhood block associations. *Id.* In contrast, health organizations and human service organizations tend to be larger. *Id.* at 3.

more than 500,000, of these very small organizations will be currently exempt under section 501(c)(3).

Thus, a large percentage of organizations exempt under section 501(c)(3)—and thus subject to the campaign intervention prohibition—are very small. Small organizations, which by definition have few funds, are unlikely to devote scarce resources to engage professionals to help them interpret the current standards that the IRS uses to interpret and apply the prohibition.¹⁵² Kaplow reminds us that advice about a standard is more difficult and expensive than advice about a rule “[b]ecause a standard requires a prediction of how an enforcement authority will decide questions that are already answered in the case of a rule”¹⁵³ Thus, even larger 501(c)(3) entities, which just miss the 990-N limit, and still have limited resources, may choose to become less informed regarding standards than they would a rule. Furthermore, these types of organizations are likely to look to sources other than professional advisors.

The IRS, recognizing this problem, has worked to educate section 501(c)(3) organizations and others about the campaign intervention prohibition. After the 2004 and 2006 PACI, the IRS published a fact sheet that contained detailed examples of the types of activities that the IRS investigated during the 2004 election cycle.¹⁵⁴ It followed this fact sheet with Revenue Ruling 2007–41,¹⁵⁵ and also updated its webpage.¹⁵⁶ During the 2008 PACI, taking further steps to raise awareness, the IRS: (1) wrote letters to the national political party committees explaining the prohibition; (2) published a letter in the Federal Election Commission’s monthly newsletter asking candidates to ensure that their contacts with charitable organizations do not jeopardize the entity’s exemption; (3) issued a new release reminding charities and churches of the ban; and (4) made public an internal memorandum describing the 2008 PACI.¹⁵⁷ The IRS has a number of resources on its webpage addressing the prohibition, including a

¹⁵² It may be that not all categories of section 501(c)(3) organizations are equally likely to engage in behavior that calls into issue the campaign intervention prohibition. See Colinvaux, *supra* note 36, at 699–707 (discussing criticism and justifications for the rule).

¹⁵³ Kaplow, *supra* note 18, at 569.

¹⁵⁴ I.R.S. News Release FS–2006–17 (Feb. 2006), available at <http://www.irs.gov/newsroom/article/0,,id=154712,00.html>.

¹⁵⁵ Rev. Rul. 2007–41, 2007–25 I.R.B. 1421.

¹⁵⁶ See *TIGTA Says Further Improvements to Exempt Orgs Outreach Possible*, TAX NOTES TODAY, JULY 1, 2008, available at LEXIS, 2008 TNT 127–30 (discussing the improvements that the IRS made to aid 501(c)(3) organizations’ understanding of the political intervention prohibition).

¹⁵⁷ See *Political Activities Compliance Initiative (2008 Election)*, I.R.S., <http://www.irs.gov/charities/charitable/article/0,,id=181565,00.html> (last updated Aug. 10, 2010) (noting the educational components of the 2008 PACI).

frequently asked questions (“FAQ”) section.¹⁵⁸ It has published the *Tax Guide for Churches and Religious Organizations*, which includes a number of examples involving the prohibition.¹⁵⁹

Despite all these admirable attempts, however, the value of this guidance is limited because the IRS is trying to explain and enforce a standard, namely, that violations of the campaign intervention depend on facts and circumstances. For example, the FAQs include the question of whether an “organization can state its position on public policy issues that candidates for public office are divided on.”¹⁶⁰ It answers:

An organization may take position on public policy issues, including issues that divide candidates in an election for public office as long as the message does not in any way favor or oppose a candidate. Be aware that the message does not need to identify the candidate by name to be prohibited political campaign activity. A message that shows a picture of a candidate, refers to a candidate’s political party affiliations, or contains other distinctive features of a candidate’s platform or biography may result in prohibited political campaign activity.¹⁶¹

That answer gives little guidance. For example, what are distinctive features of a candidate’s platform? Unlike Revenue Ruling 2007–41, the FAQs do not mention the organization’s past and continuing discussion of the public policy issue as a mitigating factor,¹⁶² introducing tension between official and unofficial IRS guidance.

Other tax-exempt organizations also offer guidance to their own and other section 501(c)(3) organizations. To name just two as

¹⁵⁸ See *Political Campaign Intervention by 501(c)(3) Tax-Exempt Organizations Educating Exempt Organizations*, I.R.S., <http://www.irs.gov/charities/charitable/article/0,,id=179750,00.html> (last updated Nov. 19, 2010) (listing the available resources); *Frequently Asked Questions About the Ban on Political Campaign Intervention by 501(c)(3) Organizations*, I.R.S., <http://www.irs.gov/charities/charitable/article/0,,id=179432,00.html> (last updated Sept. 21, 2011) [hereinafter *501(c)(3) FAQs*] (answering frequently asked questions regarding the political campaign intervention ban).

¹⁵⁹ I.R.S., *TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS*, Pub. No. 1828 (2009), available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf>.

¹⁶⁰ *501(c)(3) FAQs*, *supra* note 158 (question 8).

¹⁶¹ *Id.*

¹⁶² Compare Rev. Rul. 2007–41, 2007–25 I.R.B. 1421, 1424 (noting that one factor is “[w]hether the communication is part of an ongoing series of communications by the organization on the same issues that are made independent”), with *501(c)(3) FAQs*, *supra* note 158 (answer to question 8) (noting only that “[a] message that . . . contains other distinctive features of a candidates platform . . . may result in prohibited political campaign activity”).

examples, both the United States Conference of Catholic Bishops,¹⁶³ and the American Library Association maintain guidance regarding the prohibition on their web pages.¹⁶⁴ Guidance about permissible activity is also important. As Kaplow observes, legal knowledge may also cause those subject to a legal command to engage in conduct that they had mistakenly thought was forbidden or subject them to sanctions they thought severe but are in fact quite minor.¹⁶⁵ The Alliance for Justice is one of several organizations that have been active in explaining to charities the kind of activities that the campaign intervention prohibition leaves them free to undertake.¹⁶⁶

Nonetheless, the IRS's position that violation depends on the facts and circumstances limits the guidance any organization can provide. A standard is unlikely to provide the answers small organizations, which generally do not have the luxury of hiring tax professionals, need in reaching a conclusion regarding the application of the law to a particular fact pattern, particularly an unusual one. In addition, the light sanctions that the IRS has imposed for at least the first identified violation, as the PACI results indicate, may further undermine the incentive of affected entities to parse the meaning of a standard, much less pay someone else to do so on their behalf.

In contrast to the implications of the low level of enforcement, the large number of affected entities (a high percentage of which are very small entities) to which the prohibition applies suggests that the IRS and the Treasury should develop rules rather than rely on standards. The nature of the community affected by the campaign intervention prohibition calls for tax authorities to invest the resources to develop a set of rules rather than standards regarding the prohibition.

Kaplow considers the value a party puts on conduct from which it is deterred or permitted as the result of a legal command within his stage two.¹⁶⁷ In the case of the campaign intervention prohibition, the value a charity places on political intervention is closely related to its own norms, and I will discuss issues related to norms, both of the affected charities and the IRS, which I believe bear on the decision between a standard and a rule, below.

¹⁶³ *Political Activity Guidelines*, U.S. CONF. OF CATH. BISHOPS (July 7, 2007), <http://www.usccb.org/about/general-counsel/political-activity-guidelines.cfm#37>.

¹⁶⁴ *Election Year Do's and Don'ts*, AM. LIBR. ASS'N (Mar. 2008), <http://www.ala.org/ala/aboutala/governance/legalguidelines/electiondosanddnts/electionyear.cfm>.

¹⁶⁵ Kaplow, *supra* note 18, at 571.

¹⁶⁶ See *Nonprofit and Foundation Advocacy*, ALLIANCE FOR JUST., <http://www.afj.org/nonprofits-foundations/> (last visited Sept 26, 2011) (listing various publications about non-profit organizations' advocacy about public policy).

¹⁶⁷ Kaplow, *supra* note 18, at 571.

V. APPLICABLE NORMS

Kaplow states that the quality of a legal command “can be understood as reflecting how closely it conforms to underlying norms,”¹⁶⁸ and throughout his article stresses that legal authorities should evaluate whether a rule or a standard is more likely to motivate behavior consistent with the underlying norm. For example, he notes that, if individuals will become better informed under a rule than under a standard, they will behave more in accord with legal norms,¹⁶⁹ even though “it is usually said that standards result in more precise application of underlying norms because they can be applied to the particular facts of a case.”¹⁷⁰ He acknowledges but does not discuss in any detail the impact of different possible legal norms.¹⁷¹

In particular, nowhere does Kaplow discuss explicitly the case in which the decision-maker’s and the affected parties’ beliefs about the underlying norms differ, and the effect of such a scenario on the choice between rules and standards. Yet, because standards give less *ex ante* content to a legal command, those subject to a standard (or their advisors) have more freedom to interpret the command. In so doing, we can expect them to bring their understanding of the underlying norms to bear. If those charged with carrying out the legal command and those subject to it come with different understandings of the underlying norms, the two groups may interpret a standard in very different ways, complicating education and compliance.

As Russell Korobkin explains in his behavioral analysis of rules and standards,¹⁷² in the case of a standard, two competing behavioral biases come into play. On one hand, the general tendency toward risk aversion—i.e., the reluctance to take a position with an uncertain payoff—may cause some affected parties to unknowingly over comply with the law.¹⁷³ On the other hand, the self-serving bias—i.e., the phenomenon that individuals are likely to interpret ambiguous information in ways that resound to their benefit—is also present.¹⁷⁴ The impact of the self-serving bias may mean that unknowing

¹⁶⁸ *Id.* at 579 n.52.

¹⁶⁹ *Id.* at 575.

¹⁷⁰ *Id.* at 622.

¹⁷¹ For example, Kaplow refers to questions about the appropriate norms for a given situation. *See id.* at 582 n.62 (whether considering only safety and time or also energy conservation in designing laws governing driving); *id.* at 594 n.98 (referring to Prof. Frederick Schauer’s distinction between a decision maker consulting a single background justification or all possible justificatory norms).

¹⁷² Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 46 (2000).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

violations of the law “may be more prevalent than previously thought.”¹⁷⁵

A system of factors, as the IRS has provided for many iterations of the campaign intervention prohibition, allows those affected “to weigh each factor as [it] chooses.”¹⁷⁶ The self-serving bias likely leads organizations to emphasize factors that favor their positions. That is, standards give discretion not only to administrators, as many have observed,¹⁷⁷ but also to the affected community. A rule, in contrast, leaves less room for *ex ante* interpretation by those subject to the legal command by recourse to underlying norms. Cass Sunstein puts it succinctly, “By settling cases in advance, rules . . . make it unnecessary and even illegitimate to return to first principles.”¹⁷⁸

Thus, especially when the affected parties’ and administrators’ understanding of underlying norms differ, a rule may promote greater compliance with the legal command. Different understandings of underlying norms are, I believe, very much the case for the campaign intervention prohibition. First, the parties’ interpretations about the purpose can diverge because of the lack of congressional explanation of the provision’s purpose, and second, because the IRS and section 501(c)(3) organizations diverge as to the role of the First Amendment as an underlying norm.

Statements of congressional purpose can guide both administrators and affected parties in understanding the reach and meaning of a legal command.¹⁷⁹ Congress, however, did not provide legislative history about its purpose in adopting the campaign intervention prohibition. Then-Senator Lyndon Johnson inserted the campaign intervention prohibition as a floor amendment to legislation that produced the Internal Revenue Code of 1954;¹⁸⁰ the applicable statutory provisions at the time limited only lobbying activity.

There is no legislative history explaining Congress’s reasoning in first adopting the provision.¹⁸¹ Many who have examined the

¹⁷⁵ *Id.* Korobkin notes that “[t]he self-serving bias is less problematic in a rules regime” and that “the self-serving bias . . . suggests that standards will chill less desirable behavior than otherwise would be expected.” *Id.* at 46–47. *But see* Guinane, *supra* note 15, at 152 (reporting that in one survey, 43 percent of those 501(c)(3) organizations surveyed incorrectly believed they could not host a candidate debate or forum).

¹⁷⁶ Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 1012 (1995).

¹⁷⁷ *See, e.g., id.* at 960–61 (discussing the concept of “untrammelled discretion”); *see also* Ellen P. Aprill, *Tax Shelters, Tax Law, and Morality: Codifying Judicial Doctrines*, 54 S.M.U. L. REV. 9, 22–33 (2001) (reviewing uses of rules to limit administrative discretion).

¹⁷⁸ Sunstein, *supra* note 176, at 975.

¹⁷⁹ *See, e.g.,* Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHL-KENT L. REV. 321, 329 (1990) (discussing the problematic use of legislative history by courts).

¹⁸⁰ 100 CONG. REC. 9604 (1954).

¹⁸¹ Johnson stated:

legislative record have concluded that its motive was simply political animus: Senator Johnson was responding to attacks on him by conservative charities in his recent reelection campaign.¹⁸² As others have documented, however, Johnson's floor amendment came after months of House investigation of the political activities of charitable organizations.¹⁸³ The first of two committees conducting this investigation was charged with determining "whether foundations have been infiltrated by communists";¹⁸⁴ the second with determining whether charitable organizations were "using their resources for un-American and subversive activities."¹⁸⁵ The second committee recommended that charities be forbidden to engage in both lobbying and political campaigns, "leaving it to the courts to apply the maxim of *de minimis non curat lex*."¹⁸⁶ Based on that recommendation, some have asserted that Johnson sought to head off an even more restrictive rule.¹⁸⁷ Even if such is the case, the legislative record at the time of

Mr. President, this amendment seeks to extend the provisions of Section 501 of the House bill, denying tax-exempt status to not only those people who influence legislation but also to those who intervene in any political campaign on behalf of any candidate for any public office. I have discussed the matter with the chairman of the committee, the minority ranking member of the committee, and several other members of the committee, and I understand that the amendment is acceptable to them. I hope the chairman will take it to conference, and that it will be included in the final bill which Congress passes.

Id. As others have noted, this statement seems to assume that all lobbying by section 501(c)(3) organizations is prohibited, while in fact lobbying at the time was permitted, so long as it was not substantial. See Colinvaux, *supra* note 36, at 690–99 (discussing the history of the prohibition); Judith E. Kindell & John Francis Reilly, *Election Year Issues*, 2002 EO CPE TEXT 335, 336–37, available at <http://www.irs.gov/pub/irs-tege/eotopic02.pdf> (discussing the history of IRC 501(c)(3)).

¹⁸² See e.g., BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 678 (9th ed. 2007) (claiming the amendment was offered over concerns regarding the funding for Johnson's primary election opponent); 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, 23–25 (2003) (discussing the political landscape of Johnson's 1954 election as the motivating factor); Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733, 768 (2001) (arguing Johnson's motivation for the amendment was to stop corporate donations to conservative educational entities arrayed against him).

¹⁸³ See Colinvaux, *supra* note 36, at 694–96 (reviewing committee activity leading up to Johnson's amendment); Ann M. Murphy, *Campaign Signs and the Collection Plate: Never the Twain Shall Meet?*, 1 PITT. TAX REV. 35, 49–57 (2003) (revisiting the congressional committee history prior to the amendment); see also Kindell & Reilly, *supra* note 181, at 448–51 (discussing various scenarios explaining why Johnson offered the amendment).

¹⁸⁴ Murphy, *supra* note 183, at 49 (internal quotations and citations omitted).

¹⁸⁵ H.R. REP. NO. 83–2681, at 1 (1954).

¹⁸⁶ *Id.* at 219.

¹⁸⁷ Kindell & Reilly, *supra* note 181, at 449.

the prohibition's adoption did not offer the purpose of or the reasons for the rule.

Legislative history from 1987 explains that the ban “reflect[s] [a] Congressional policy that the U.S. Treasury should be neutral in political affairs”¹⁸⁸ The fact that a number of other categories of tax-exempt organizations are permitted to engage in political campaign intervention undercuts this rationale. These other categories of tax-exempt organizations, however, are not eligible to receive tax-deductible contributions. Thus, a more persuasive justification for the prohibition is that Congress did not wish to allow tax-deductible contributions to be used for political campaign intervention. Stated succinctly by Judge Learned Hand, political controversies “must be conducted without public subvention; the Treasury stands aside from them.”¹⁸⁹

Even if accepted, that justification offers little guidance. It does not help the IRS determine how to give content to and administer the rule or help others trying to sort out a facts-and-circumstances test in light of the underlying principles the rule is intended to advance. It may, however, suggest that the campaign intervention prohibition should be interpreted broadly.

Whatever the policy reasons for the campaign intervention prohibition, its application is complicated further by the First Amendment protection that many affected parties assert. What matters for an administrator choosing between a rule and a standard under Kaplow's analysis is not whether those making such constitutional arguments are correct,¹⁹⁰ but only that they believe the arguments to be correct and, in practice, base their behavior on them.

A number of church groups believe that any formulation of the prohibition violates their constitutionally guaranteed free exercise of religion. The Alliance Defense Fund (“ADF”) has sponsored three annual “Pulpit Freedom Sundays.”¹⁹¹ Ministers participating preach about how scripture applies to every area of life, including, if they

¹⁸⁸ H.R. REP. NO. 100–391, pt. 2, at 1625 (1987); see Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 843–44 (2001) (discussing Congress's purpose).

¹⁸⁹ *Slee v. Comm'r*, 42 F.2d 184, 185 (2d Cir. 1930); see also *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983) (upholding constitutional limits on lobbying by section 501(c)(3) organizations on the basis that there is no duty to subsidize First Amendment activity). It is generally assumed that the same reasoning applies to the campaign intervention prohibition. See Aprill, *supra* note 188, at 843–44 (discussing rationales for the prohibition on section 501(c)(3) organizations).

¹⁹⁰ That is, I am not making a rights-based argument.

¹⁹¹ *Participants in Annual Pulpit Freedom Sunday Increase for Third Year*, ALLIANCE DEF. FUND (Sept. 27, 2010) [hereinafter *ADF Pulpit Freedom*], <http://www.adfmedia.org/News/PRDetail/4361>.

choose, candidates for election. The ADF has organized Pulpit Freedom Sunday in hopes that the IRS will revoke the exemption of at least some participating churches so that the ADF can challenge the constitutionality of the political campaign intervention prohibition.¹⁹² Although it is unclear how many ministers actually engaged in forbidden political campaign intervention rather than permitted issue advocacy, the ADF reported that approximately one hundred churches from thirty states participated in the 2010 Pulpit Freedom Sunday,¹⁹³ more than in 2009 (eighty-four) and in 2008 (about three dozen).¹⁹⁴ Those that believe that any limitation on the speech of churches violates their constitutional free exercise rights will not care whether the legal command is embodied in a rule or a standard.¹⁹⁵ That is, they question the statutory legal command and not just the IRS's efforts to interpret and enforce the command.

Others take the position that speech regarding political candidates benefits from First Amendment protection because it is core First Amendment speech. Catholic Answers took that position in *Catholic Answers, Inc. v. United States*, challenging the applicable regulations on First Amendment grounds.¹⁹⁶ The IRS's reliance on vague standards, these critics argue, chills section 501(c)(3) organizations from expressing their views, and undermines their freedom of association.¹⁹⁷ That view of the First Amendment calls for reading the legal commands narrowly, as applying to only limited types of speech. Critics look especially to *Federal Election Commission v.*

¹⁹² See Bob Unruh, *See What Has the IRS Stopped in Its Tracks!*, WORLDNETDAILY (Sept. 23, 2010, 9:05 PM), <http://www.wnd.com/index.php?fa=PAGE.view&pageId=207025> (participating pastors, hoping to spark an audit that could be used as a constitutional challenge to the regulations, have sent their sermons that included specific voting suggestions to the IRS).

¹⁹³ *ADF Pulpit Freedom*, *supra* note 191. The ADF initiative may account for the larger number of candidates being endorsed during normal church services in the 2008 PACI summary data. See *2010 Report*, *supra* note 82, at 20 (reporting more than double the allegations of church officials endorsing candidates during services in 2008 than in 2006 or 2004).

¹⁹⁴ Unruh, *supra* note 192.

¹⁹⁵ As Kaplow puts it, when considering the category of individuals that will not become informed under either a rule or under a standard:

Because individuals do not become informed under either formulation of the law, information costs are not incurred. Moreover, uniformed individuals' behavior does not depend on whether a rule or standard prevails, so the benefits and harms of individuals' acts will be the same. Thus in the case, whether a rule or standard is preferable will depend solely on the differences in promulgation and enforcement costs.

Kaplow, *supra* note 18, at 572.

¹⁹⁶ *Catholic Answers, Inc. v. United States*, 09–CV–670–IEG (AJB), 2009 WL 3320498, at *2 (S.D. Cal. Oct. 14, 2009), *aff'd*, 09–56926, 2011 WL 2452177 (9th Cir. June 21, 2011), *cert. denied*, 80 U.S.L.W. 3440 (U.S. Jan. 23, 2012) (No. 11–511).

¹⁹⁷ See, e.g., Guinane, *supra* note 15, at 143 (noting that the “current IRS enforcement regime poses serious First Amendment problems for 501(c)(3) organizations”).

Wisconsin Right to Life, Inc.,¹⁹⁸ where Chief Justice Roberts wrote that First Amendment standards “must give the benefit of any doubt to protecting rather than stifling speech.”¹⁹⁹ A recent article argues that the vagueness of current IRS standards violates both the due process clause and the First Amendment.²⁰⁰

Again, the question is not whether those that endorse these constitutional arguments are right.²⁰¹ From an administrator’s point of view, what matters is whether those subject to a legal command believe the constitutional arguments to be right in such a way as to influence compliance and, in particular, interpretation of a standard.

The IRS itself recognizes that the campaign intervention prohibition carries with it important First Amendment considerations. The report on the 2004 PACI, for example, stated that one of the challenges to enforcement and education was that “[t]he activities that give rise to questions of political campaign intervention also raise legitimate concerns regarding freedom of speech and religious expression.”²⁰² At the same time, it is generally the duty of administrative agencies to execute the legal commands assigned to them without consideration of the constitutionality of the legal commands they enforce. “[A]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.”²⁰³

¹⁹⁸ 551 U.S. 449 (2007)

¹⁹⁹ *Id.* at 469 (citing *New York Times v. Sullivan*, 376 U.S. 254, 269–70 (1964)).

²⁰⁰ See Bopp & Kester, *supra* note 15, at 75 (arguing that the unconstitutionally vague and that the IRS’s enforcement violates procedural due process).

²⁰¹ Of course, if those making the “void for vagueness” and “chilling of protected speech” First Amendment arguments about the current standards are correct, the IRS will have no choice but to write rules to carry out the campaign intervention prohibition.

²⁰² 2004 PACI Report, *supra* note 104, at 1.

²⁰³ *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (quoting *Johnson v. Robison*, 415 U.S. 361, 368 (1974) (internal quotation marks omitted)). The Court went on to observe, “[t]his rule is not mandatory, however . . .” *Id.*; see also Harold J. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 361–62 (1991) (“True, agencies should consider the constitutionality of their programs and procedures insofar as their statutes allow change to meet constitutional objections.”); Note, *The Authority of Administrative Agencies to Consider the Constitutionality of Statutes*, 90 HARV. L. REV. 1682, 1682–83 n.1–3 (1977) (citing many courts’, commentators’, and agencies’ assertions that agencies cannot pass on the constitutionality of statutes that they enforce, but arguing that the “narrow excision on avowedly constitutional grounds may actually further the overall legislative goals by saving the statute from judicial revision or from being struck down altogether”). However, as Bernard Bell has observed:

Some agencies have jurisdiction over issues which clearly implicate constitutional concerns, and thus Congress clearly contemplates that they may have to address constitutional principles. Congress could not be expected to address all such tensions between policy goals and constitutional principles in advance. The Federal Communications Commission is a prime example of such an agency.

Bernard W. Bell, *Interpreting and Enacting Statutes in the Constitution’s Shadows: An*

The issue on which this Article focuses is not adjudicating the constitutionality of a statute, but promulgating administrative directives in a way that best effects compliance. When a large percentage of those running and advising affected organizations believe that the First Amendment constrains the campaign intervention prohibition, promulgating administrative guidance as standards will likely decrease compliance. On one hand, a standard without specific criteria allows affected parties to read it in terms of their own norms, rather than those that the IRS assumes. For example, when the IRS lists a variety of factors, affected organizations have a normative basis for giving the most weight to factors in their favor. On the other hand, organizations' misunderstanding of standards may prevent them from engaging in permitted activity.²⁰⁴

The beliefs of affected parties regarding underlying norms cannot dictate administrative action. If that were the case, affected parties could unduly influence the content of legal commands. Nonetheless, administrators wishing to encourage compliance appropriately take into account the norms of the regulated entities in deciding between rules and standards. Given the First Amendment beliefs of many of the parties affected by the campaign intervention prohibition, standards will not accurately constrain behavior. Moreover, a number of those affected by the legal command believe that underlying First Amendment norms require the specificity of rules rather than the uncertainty of standards. That the IRS itself recognizes the role of the First Amendment also argues in favor of rules rather than standards.

VI. ARGUMENTS AGAINST RULES

Thus far, consideration of the large number of affected parties, the likelihood that many affected parties will not seek legal advice regarding compliance, and the differing norms animating the administrative agency administering the legal command and the affected parties all suggest that the IRS should adopt rules rather than standards to implement the campaign intervention prohibition. Arguments against rules, however, cannot be ignored.

Kaplow addresses the frequent complaint against rules that they are under- or overinclusive. They fail to cover some situations that the legal command should encompass and may catch some that it should

Introduction, 32 U. DAYTON L. REV. 307, 311 n.22 (2007).

²⁰⁴ See Guinane, *supra* note 15, at 152 (reporting that in one survey, 43 percent of those 501(c)(3) organizations surveyed incorrectly believed they could not host a candidate debate or forum).

not. Often, the complaint against rules takes the form of describing rules as too simple. Standards, the argument goes, are more complex in application because they inherently encompass more relevant considerations. Thus, standards achieve a better fit with underlying norms.²⁰⁵ Kaplow urges that considerations of simplicity versus complexity be separated from considerations of *ex ante* versus *ex post* that underlie the rules-standard distinction.²⁰⁶ Too often, he contends, these categories are conflated and a simple rule is compared to a complex standard. At the same time, however, he acknowledges:

When one makes a single pronouncement that will govern many (perhaps millions) of cases, it is worthwhile to undertake greater investigations into the relevance of additional factors and to expend more effort fine-tuning the weight accorded to each. Thus, when rules are to be applicable to frequent behavior with recurring characteristics, there is a systematic tendency for rule systems to be more complex than the content that would actually be given to standards covering the same activity.²⁰⁷

When rules are complex, learning their content imposes a cost on the affected parties in ways that, in at least some cases, standards will not.

As David Weisbach has argued in partial rebuttal of Kaplow, standards can allow the tax law to be simpler than a system of only rules.²⁰⁸ Kaplow, like others, observes that it is difficult to draft rules to cover uncommon situations.²⁰⁹ Weisbach argues that, in the case of tax law, it is particularly important to tax uncommon transactions appropriately because taxpayers will make them common as they “discover how to take advantage of them.”²¹⁰ Thus, infrequent transactions must be addressed in the area of tax. To do so in rules, however, may make the rules too complex, especially given interaction among tax rules.²¹¹ Moreover, rules may often be inaccurate at their borders, and thus complex rules will create additional opportunities for tax avoidance. Standards, in contrast, do not have to anticipate each and every situation, combination, or permutation that might arise in the future. Weisbach thus concludes

²⁰⁵ See Kaplow, *supra* note 18, at 589–90 (addressing this argument).

²⁰⁶ *Id.* at 589.

²⁰⁷ *Id.* at 595.

²⁰⁸ David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860, 862 (1999).

²⁰⁹ See Kaplow, *supra* note 18, at 599 (“It would appear that some legal commands cannot plausibly be formulated as rules.”).

²¹⁰ Weisbach, *supra* note 208, at 869.

²¹¹ *Id.*

that an anti-abuse rule might be appropriate to solve the intersection of rules, standards, and complexity.²¹²

The problematic situations that Weisbach identifies do not seem to apply with great weight to the campaign intervention prohibition. It interacts with few provisions. Any set of rules defining campaign intervention would need to consider the impact of the limitation on section 501(c)(3) organizations' ability to lobby. That is, because lobbying by section 501(c)(3) organizations is permitted to some extent while political intervention is prohibited, it is important to distinguish the two activities. Rules defining campaign intervention will also need to coordinate with a definition of campaign intervention for other organizations exempt under section 501(c) that are permitted to engage in campaign intervention so long as it is not their primary activity, such as 501(c)(4) social welfare organizations, 501(c)(5) labor organizations, and 501(c)(6) trade associations. Finally, any definition of campaign intervention for purposes of section 501(c) must also be coordinated with section 527, which applies to political organizations, namely those organizations with a primary purpose of campaign intervention.²¹³ We need to consider all definitions of political activity for purposes of the Internal Revenue Code. Defining campaign intervention is not, however, the kind of scenario that Weisbach posits, in which a number of provisions can shape a corporate or partnership transaction.

Nonetheless, a greater reliance on rules to give content to the campaign intervention raises important concerns. The need to cover all likely possibilities may produce a complex set of rules. A complex set of rules, like a standard, may discourage those affected by the rules, especially smaller organizations, from seeking legal advice. Any set of rules is likely to be underinclusive to some extent, a state of affairs that is likely to concern the IRS if it views the legislative history of the prohibition as directing broad enforcement. Sophisticated organizations and their advisors might be able to take advantage of rules by staying within the letter of the rules while violating their spirit with impunity. Any set of rules is likely to be overinclusive in other regards, a state of affairs of great concern to those members of the affected community who view the First Amendment and the accompanying need not to chill protected speech as an underlying norm for any regulation of speech.

There is also an argument that the uncertainty engendered by a set of standards rather than rules will lead to greater compliance by the

²¹² *Id.* at 879.

²¹³ I.R.C. § 527(e)(1) (2006).

affected community, a result that IRS might be expected to embrace. Under a standard, such as the set of factors currently in use, the limits of the campaign intervention prohibition are unclear. Risk adverse charities will avoid any activity that might run afoul of the prohibition. Thus, compliance with the prohibition will be achieved, albeit at the cost of some overinclusion. A number of scholars have in fact urged that tax administrators use strategic uncertainty, such as strategically withholding guidance, as a tool for tax compliance.²¹⁴ But as Leigh Osofsky explains, if taxpayers perceive the lack of guidance as ambiguity regarding a tax outcome, “taxpayers with a low chance of success on the merits would be more likely to claim the tax benefits, whereas taxpayers with a high chance of success on the merits would have the opposite inclination.”²¹⁵

Thus, although developing a set of rules raises a number of concerns regarding over- and underinclusiveness, the same concerns arise with a standard. Some organizations would treat the standard as overinclusive and others would see it as underinclusive, depending on their appetite for risk. Aggressive taxpayers may become more aggressive, and conservative taxpayers more conservative, in the latter case, so much so that they fail to undertake permitted activities.²¹⁶

VII. WHAT SHOULD THE IRS DO?

Kaplow’s calculus urges that those deciding whether to undertake the burdensome process of promulgating a rule consider both the level of enforcement and the nature of the affected parties, in particular whether and how they would go about understanding a standard. The presence of many affected organizations unable to hire expert advice regarding the political campaign intervention prohibition argues for a rule. The low level of enforcement of the political campaign intervention argues, at least at first look, for a standard. But, as Kaplow suggests, if many are affected by the legal command, a rule could be worthwhile even when enforcement is low. Moreover, the likelihood that many of the regulated parties see norms underlying the prohibition differently from the IRS suggests that use of standards undermines compliance. All of these considerations lead

²¹⁴ See Leigh Osofsky, *The Case Against Strategic Tax Law Uncertainty*, 64 TAX L. REV. 489, 489–90 n.4 (2011) (providing a list of such scholars).

²¹⁵ *Id.* at 492.

²¹⁶ See Guinane, *supra* note 15, at 152 (reporting that in one survey, 43 percent of those 501(c)(3) organizations surveyed incorrectly believed they could not host a candidate debate or forum); *cf. supra* notes 172–75 and accompanying text (discussing Korobkin’s comparison of weight of risk aversion and self-serving bias.)

to the conclusion that the IRS should promulgate more rules in connection with the campaign intervention prohibition. Considerations regarding the potential complexity and the potential for both under- and overinclusiveness, however, raise the question of whether a thorough rule-based regime or something less than that would be more desirable.

One way “of obtaining the benefits of rules without some of the costs” is to make use of standards with safe harbors.²¹⁷ In 2005, I drafted and sent to the IRS and the Treasury a set of four possible safe harbors.²¹⁸ One of the suggested safe harbors, for example, would have protected remarks by a speaker, whether or not an official of the organization, whose remarks included the statement that the speaker is speaking only for him or herself and not telling the audience how to vote.²¹⁹ Such a safe harbor would have overturned current IRS policy²²⁰ and have provided an easy, perhaps too easy, means for permitting many communications currently forbidden under existing guidance.

The analysis undertaken in this Article, however, leads to the conclusion that promulgating a more robust set of rules is appropriate because it would lead to the greatest possible compliance with the law. Revenue Ruling 2007–41, for example, demonstrates that there is a manageable set of categories in which political campaign intervention is most likely to arise.²²¹ At the same time, the findings of the PACI over several election cycles show that there is a limited number of recurring types of violation. For all these reasons, I endorse an effort to go beyond framing a few safe harbors to urging development of a set of rules. Such rules could include safe harbors at various points, but I recommend a comprehensive effort to develop a fuller set of rules.²²²

²¹⁷ See Weisbach, *supra* note 208, at 876–877 (discussing a “safe-harbor” approach as one that obtains “the benefits of rules without some of the costs”).

²¹⁸ Ellen Aprill, *Loyola Professor Proposes Safe Harbors for Political Campaign Activity by 501(c)(3) Groups*, TAX NOTES TODAY, Dec. 2, 2005, available at LEXIS, 2005 TNT 231–19. Gregory Colvin also, at one time, suggested a safe harbor; see also Lee Mason, *OMB Watch Seeks Bright-Line Definition of Prohibited Political Activity by Charities*, TAX NOTES TODAY, June 4, 2009, available at LEXIS, 2009 TNT 105–20 (discussing and reprinting the suggestions of Gregory Colvin).

²¹⁹ Aprill, *supra* note 218.

²²⁰ See Kindell & Reilly, *supra* note 181, at 364 (noting that a disclaimer that communication is made in speaker’s individual capacity is “insufficient to avoid attribution of the endorsement to the organization,” when endorsement made in organization’s publication or at official function).

²²¹ See Rev. Rul. 2007–41, 2007–25 I.R.B. 1421 (listing several categories that raise the potential for political campaign intervention).

²²² To support its suggestion that the prohibition be repealed or circumscribed, the Senate Staff Memorandum states that the current IRS facts and circumstances test is difficult to

One commentator has called upon the IRS and the Treasury to model a set of rules after the regulations regarding 501(c)(3) organizations' election to adopt an expenditure limit for lobbying activities under sections 501(h) and 4911.²²³ Gregory Colvin has undertaken the first iteration of such an effort.²²⁴ According to Colvin, “[a]lthough the charitable lobbying regulations are lengthy, the interpretive detail and examples aid in sharply drawing the basic definitions and in sharply drawing a few safe harbor exceptions.”²²⁵ Moreover, they have “generated practically zero controversy” and various groups “provide handbooks and seminars to teach charities what they can and can’t do, with or without help from lawyers, to influence legislation.”²²⁶

I would urge some caution in relying on these regulations. For all their supposed success, very few section 501(c)(3) organizations choose to be subject to this elective regime, probably no more than 1 to 2 percent. It is difficult to know why such is the case. It may derive from their length or their complexity. It might also be traced to the fact that the most any organization can spend on lobbying under the elective regime is \$1 million.²²⁷ Nonetheless, this low level of adoption must give us pause in calling the regulations successful (and I speak as one who spent many hours working on these regulations as a staffer in Treasury’s Office of Tax Policy). If the complexity of the applicable set of rules is discouraging the adoption of the lobbying expenditure election, that reaction cautions against adopting a complex set of rules to define campaign intervention.

Previously in this Article, I have discussed First Amendment norms without accepting their validity. Should the IRS devote the considerable energies that developing a set of rules requires, prudence dictates that those writing the rules take heed of First Amendment concerns and the extent to which First Amendment standards developed in other areas of the law, particularly federal election law,

administer, but does not consider the possibility of the IRS and the Treasury developing a set of more specific rules. *Senate Staff Memorandum, supra* note 36, at 55.

²²³ Treas. Reg. § 1.501(h) (1990); Treas. Reg. § 56.4911 (as amended in 2009). *See also* Guinane, *supra* note 15, at 170 (discussing a set of rules regarding the political campaign intervention prohibition modeled after those regulations).

²²⁴ Gregory L. Colvin, *Political Tax Law After Citizens United: A Time for Reform*, 66 EXEPT ORG. TAX REV. 71 (2010).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *See* Treas. Reg. § 56.4911–1(c)(1)(i) (providing a sliding scale that sets lobbying expenditure limits under the elective regime; an organization with a budget of \$17 million or more is subject to the \$1 million ceiling).

may apply to the campaign intervention prohibition.²²⁸ Thus, in drafting a set of rules for the political campaign intervention, the Treasury and the IRS will face a difficult task in deciding how much to import First Amendment considerations developed in other areas of law. This difficult task compounds further the difficulties inherent in developing a coherent, easily applicable set of rules. However, the consequences of reliance on standards in this area, even apart from constitutional concerns, call upon them to do so.²²⁹

CONCLUSION

Critiques of the IRS approach to regulating the campaign activities of section 501(c)(3) organizations, like many other critiques of the IRS, generally take the point of view of the regulated entities to point out the defects in the IRS approach, in particular the difficulties taxpayers can face in complying with standards. In the case of the campaign intervention prohibition, the critique of current IRS standards in this area draws heavily on First Amendment jurisprudence, a more unusual approach for those taking the IRS to task. This Article has approached the problem from another point of view. It attempts to address the issue from the agency's point of view, balancing its responsibility to encourage compliance and accurately identify offenders. To do so, this Article has applied Kaplow's *Rules Versus Standards: An Economic Analysis*, which makes no assumptions about the inherent superiority of a rule or a standard. Application of the considerations identified by Kaplow—the low level of enforcement, the large number of affected parties, and the number of affected parties unlikely to seek legal advice—strongly suggests that rules will better regulate this area than standards, at least when the topic of regulations affects both large and small section 501(c)(3) organizations.²³⁰ Other considerations, such as how affected

²²⁸ See April, *supra* note 36, at 69–81 (discussing the effect of election law jurisprudence on nonprofit organizations); Miriam Galston, *When Statutory Rights Collide: Will Citizens United and Wisconsin Right to Life Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J. CON. L. 867, 871 (2011) (noting that recent Supreme Court jurisprudence has called into question the IRS's regulation of campaign intervention of nonprofit organizations). Adopting a similar view, the Senate Staff Memorandum suggests that “participate” or “intervene” be interpreted consistently with the federal election law. *Senate Staff Memorandum*, *supra* note 36, at 61.

²²⁹ The possibility of legislative change, as recommended by the Senate Staff Memorandum, *supra* note 36, at 54, could give the IRS and the Treasury pause in undertaking such a regulation project. I believe that legislative change is unlikely and that regulatory change such as those discussed here could reduce its likelihood further.

²³⁰ That is, different considerations apply to the question of rules versus standards if the regulation is of areas likely to affect only those section 501(c)(3)'s with access to tax advisors, such as hospitals or private foundations.

parties may interpret standards and constitutional considerations that surround the prohibition, reinforce this conclusion. The IRS should undertake the difficult work of writing a set of rules for the campaign intervention prohibition.