

PURSUING A SINGLE MISSION (OR SOMETHING CLOSER TO IT) FOR THE IRS

Kristin E. Hickman*

Abstract

It is often said that taxes are the lifeblood of government. As the nation's tax collector, the IRS serves a critical function without which the federal government would cease to function. Yet the IRS is an agency in crisis—mired in scandal, chronically underfunded, overreliant on automation, and failing to provide taxpayers with the support they need to comply with the tax laws and pay their taxes. This Essay argues that a major contributor to the IRS's woes is Congress's penchant in recent decades for utilizing the IRS to administer social welfare and regulatory programs that are only tangentially related to the IRS's traditional revenue raising mission. This Essay examines the consequences of that choice and calls for reforming the IRS's organizational structure to segregate the revenue collection function from the biggest and most politically fraught social welfare and regulatory programs that currently fall within the IRS's jurisdiction. To that end, this Essay suggests giving serious consideration either to spinning off several non-revenue raising programs from IRS oversight or to splitting up the IRS altogether and distributing its many functions among other new or existing agencies.

* Harlan Albert Rogers Professor of Law, University of Minnesota Law School. I am thankful for comments and suggestions from participants at the *Reforming the IRS* symposium held at the University of Minnesota Law School on March 27, 2015, for which this Essay was written, as well as from participants in the Squaretable presentation series, also at the University of Minnesota Law School, and at the Third Annual Tax Symposium at the University of Washington School of Law. Thanks also go to Stuart Benjamin, Amy Monahan, and Steve Shay for helpful conversations and to Nick Bednar for research assistance.

© 2016 Hickman. This is an open-access publication distributed under the terms of the Creative Commons Attribution License, <https://creativecommons.org/licenses/by/4.0/>, which permits the user to copy, distribute, and transmit the work provided that the original authors and source are credited.

I. INTRODUCTION.....	171
II. THE MODERN, MULTI-MISSION IRS	174
III. THE PROBLEMS AND PITFALLS OF THE MULTI-MISSION IRS.....	179
IV. RETURNING TO A SINGLE MISSION (OR CLOSE TO IT).....	186
A. Learning from Other Agency Experiences	186
1. <i>The Interstate Commerce Commission</i>	187
2. <i>The Immigration and Naturalization Service</i>	189
B. Contemplating the IRS's Future	192
V. CONCLUSION	193

The code of the organization may be supposed governed most strongly by its primary functions. But an organization has in general many functions, auxiliary indeed to its primary ones but important to its welfare. Alternatively, it may be thought desirable to add some secondary functions to the organization because their accomplishment appears to be complementary to the primary ones. But if the code appropriate to the primary functions is inappropriate to the auxiliary or secondary functions, the organization may function badly.¹

I. INTRODUCTION

The Internal Revenue Service (IRS) serves an incredibly important function as an agency of the federal government—that of collecting taxes and enforcing the tax laws. The IRS has been described as “the federal government’s accounts receivable department.”² Without the tax revenues the IRS collects, the federal government would quickly cease to function.

Yet the IRS is struggling. In her 2013 Annual Report to Congress, National Taxpayer Advocate Nina Olson described an IRS in crisis—mired in scandal, chronically underfunded, overreliant on automation, and “entrenched in unproductive methods that do not promote voluntary compliance.”³ In her 2014 Annual Report, Olson again emphasized the IRS’s difficulties, this time highlighting the “declining quality” of taxpayer services provided by the IRS as “the most serious problem” faced by taxpayers, and expressing concerns about the potential impact on taxpayer compliance.⁴

The IRS’s revenue collection function is no easy task, and the IRS takes that mission seriously and generally handles it well. In its fiscal year 2014, the IRS collected more than \$3 trillion in taxes.⁵ In collecting that revenue, the IRS processed more than 240 million tax returns and supplemental documents—and even that large number does not include all of the forms and returns the IRS handles, like W-2s and 1099s.⁶

IRS revenue raising efforts depend heavily on voluntary compliance by taxpayers.⁷ Again, historically, the IRS has fared pretty well in this regard. More than 98% of the taxes that the IRS actually collects are paid voluntarily and on time.⁸ Of course, taxes collected are not synonymous with taxes owed. In 2012, using data from earlier years, the IRS estimated a pre-enforcement (i.e., voluntary) compliance rate of

¹ KENNETH J. ARROW, *THE LIMITS OF ORGANIZATION* 57 (1974).

² NAT’L TAXPAYER ADVOC., 2013 ANN. REP. TO CONG. vol. 1, at xiii–xx (2013), <http://www.taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/Volume-1.pdf> [<http://perma.cc/6733-QX98>].

³ *Id.*

⁴ NAT’L TAXPAYER ADVOC., 2014 ANN. REP. TO CONG. vol. 1, at 3–25 (2014), <http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/2014-Annual-Report/Volume-One.pdf> [<https://perma.cc/A53M-A3GC>] [hereinafter NTA 2014 ANN. REP.].

⁵ INTERNAL REVENUE SERV., INTERNAL REVENUE SERV. DATA BOOK, 2014, at 3 (2015), <http://www.irs.gov/pub/irs-soi/14databk.pdf> [<http://perma.cc/U7N6-VDUX>].

⁶ *Id.* at 4–5.

⁷ See, e.g., George O’Hanlon, *The Role of the Internal Revenue Agent Then and Now*, FED. BAR ASS’N. SEC. ON TAX’N REP., Winter 1993, at 1 (describing voluntary compliance as “the cornerstone of the tax system”). But see Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1 (2004) (suggesting that the description of the U.S. tax system as “voluntary” is not entirely accurate).

⁸ NINA OLSON, NAT’L TAXPAYER ADVOC., FISCAL YEAR 2016 OBJECTIVES REP. TO CONG. vol. 1, at 2 (2015), http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/2016-JRC/Volume_1.pdf [<http://perma.cc/TS7Y-PPSP>].

83.1%, yielding a gross tax gap of \$450 billion.⁹ IRS enforcement efforts increased that compliance rate only slightly, to 85.5%.¹⁰ Nevertheless, these statistics demonstrate that, whether motivated by a citizen's desire to contribute or by fear of the tax man, most people in the United States file their tax returns and pay their taxes. Not every country is so fortunate; the specter of Greece—with a shadow economy representing approximately 27% of GDP and collections of assessed taxes running less than 12%¹¹—looms in the background as an example to avoid.

The Internal Revenue Code is increasingly complicated. To help taxpayers in their efforts to prepare their tax returns and comply with the tax laws, the IRS in Fiscal Year 2014 answered more than 100 million phone calls and assisted more than 5 million taxpayers at more than 300 taxpayer assistance centers across the country.¹² And, concerned about even a roughly 15% tax gap, the IRS in the past has tried various strategies to increase voluntary compliance, including improving its computer systems, hiring a higher quality and more diverse workforce, and providing better training for its agents.¹³ Yet, as Olson and others have documented, budget cuts have reduced IRS employee training and diminished taxpayer service,¹⁴ as well as curtailing funds and the number of IRS employees available for enforcement efforts.¹⁵

To Olson's litany of the IRS's woes, I would add the following: the IRS is stretched too thinly across multiple missions that are in tension with one another. As I have documented in prior work, as the administrator of an increasingly-complex Internal Revenue Code, the IRS has moved far beyond its original and primary mission as the nation's tax collector to become a multi-mission or omnibus agency, serving a variety of congressional programs and goals that are arguably in tension with one another.¹⁶ To that observation, I will add that many if not most of the political controversies that have battered the IRS's reputation in recent years have concerned social welfare or regulatory

⁹ *IRS Releases New Tax Gap Estimates; Compliance Rates Remain Statistically Unchanged from Previous Study*, IR-2012-4, INTERNAL REVENUE SERV. (Jan. 6, 2012), <http://www.irs.gov/uac/IRS-Releases-New-Tax-Gap-Estimates;-Compliance-Rates-Remain-Statistically-Unchanged-From-Previous-Study> [<http://perma.cc/XZN4-VSXQ>].

¹⁰ *Id.*

¹¹ INT'L MONETARY FUND, IMF COUNTRY REP. NO. 13/155, GREECE: SELECTED ISSUES 18–27 (2013) (documenting Greece's abysmal rate of tax compliance).

¹² See NTA 2014 ANN. REP., *supra* note 4, at xvii.

¹³ O'Hanlon, *supra* note 7.

¹⁴ NAT'L TAXPAYER ADVOC., 2013 ANN. REP. TO CONG. EXECUTIVE SUMMARY: PREFACE AND HIGHLIGHTS, at 23–24 (2013), <http://www.taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/2013-Annual-Report-to-Congress-Executive-Summary.pdf> [<http://perma.cc/WDW2-PBS9>]; U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-534R, INTERNAL REVENUE SERVICE: ABSORBING BUDGET CUTS HAS RESULTED IN SIGNIFICANT STAFFING DECLINES AND UNEVEN PERFORMANCE 8–9 (2014), <http://www.gao.gov/assets/670/662681.pdf> [<http://perma.cc/H9ER-49RE>] [hereinafter GAO IRS BUDGET CUTS REP.] (showing budget cuts both generally and as allocated among enforcement functions, taxpayer services, and operations support and business system modernization).

¹⁵ GAO IRS BUDGET CUTS REP., *supra* note 14, at 8–9, (documenting that budget cuts have fallen mostly on IRS enforcement functions and that the number of IRS full-time employees has declined as well, both generally and with respect to enforcement functions). While many government agencies have reduced their workforces through outsourcing, the IRS is not among them. See, e.g., Letter from Nina Olson, National Taxpayer Advocate, to Cong., at 4–5 (May 13, 2014), http://www.taxpayeradvocate.irs.gov/userfiles/file/NTA_PDC_letter.pdf [<http://perma.cc/7EA4-5GEQ>] (documenting past failed efforts to privatize certain collection functions).

¹⁶ Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717 (2014).

programs and functions with only a tangential relationship to taxation, rather than traditional revenue raising.¹⁷

Congress may be willing to trade some reduction in the IRS's revenue raising efforts to accomplish other goals efficiently. Congress also may be willing to trade some reduction in the efficacy of social welfare or regulatory programs for the convenience of utilizing the IRS's existing administrative structure. My argument in this Essay, however, is that Congress's repeated utilization of the IRS to serve functions beyond its traditional revenue raising mission has reached a tipping point that threatens to undermine substantially the viability of the IRS's primary mission as the nation's tax collector.

Tax scholars and policy makers sometimes talk about simplifying the tax code, both in general¹⁸ and as a key element of solving the IRS's problems.¹⁹ But, as a general matter, Congress is not likely to stop using the tax code to achieve policy goals other than revenue raising—and, indeed, often has very good reasons for doing so. Nor is Congress likely to fully restore the IRS's budget anytime soon (let alone provide appropriations beyond said restoration). Beyond those obvious but unlikely solutions to the IRS's woes, existing reform proposals often seem like so much tinkering around the edges, akin to rearranging the deck chairs on the Titanic.

My objective with this Essay is not to offer a detailed blueprint for IRS reform. Instead, as a potential solution to at least some of the IRS's present difficulties, this Essay takes seriously a suggestion that, when advanced by certain politicians or pundits,²⁰ strikes many tax experts as hopelessly naïve and unworkable if not simply crazy: abolish the IRS—perhaps not precisely as the politicians or pundits intend, but closely enough, either by spinning off certain programs from direct IRS oversight or, though less likely, by splitting up the IRS and distributing its many functions among other new or existing agencies. The key notion behind this sort of fundamental restructuring is to segregate the revenue collection function from the biggest and most politically fraught social welfare and regulatory programs that currently fall within the IRS's jurisdiction. The most obvious candidates for separate administration are exempt organization status determinations and monitoring, health care and pension matters that fall within the scope

¹⁷ See discussion *infra* Part III.

¹⁸ Tax simplification has been a topic of academic discussion for decades. For just a few examples of that vast literature, see generally Joseph M. Dodge, *Some Income Tax Simplification Proposals*, 41 FLA. ST. U. L. REV. 71 (2013) (outlining goals and proposals for simplification); Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 WIS. L. REV. 1267 (analyzing different goals and definitions of tax simplicity). For an example of policymaker proposals for tax simplification, see *PERAB Tax Reform Tax Force Releases Final Report*, 2010 TAX NOTES TODAY 167-50 (Aug. 30, 2010) (identifying tax simplification as a goal and documenting proposals of President's Economic Recovery Advisory Board to simplify the tax system).

¹⁹ See, e.g., Jonathan Barry Forman & Roberta F. Mann, *Making the Internal Revenue Service Work*, 17 FLA. TAX REV. 725, 772–79, 782–88 (2015) (identifying tax system complexity as one of the IRS's problems and proposing simplification as the first of several solutions); *Koskinen Speaks In Favor of Tax Simplification, IRS Transparency*, 2013 TAX NOTES TODAY 241-83 (Dec. 16, 2013) (documenting IRS Commissioner's support for tax simplification).

²⁰ See, e.g., Jerry Moran, Editorial, *Overhaul Tax Code, Abolish IRS*, USA TODAY (Apr. 14, 2016) <http://www.usatoday.com/story/opinion/2016/04/14/sen-moran-overhaul-tax-code-abolish-irs/83050708/> [<https://perma.cc/D7FY-FBRQ>] (“Instead of spending millions in an attempt to fix the IRS, we should abolish the agency through comprehensive tax reform.”); *The Simple Flat Tax Plan*, TEDCRUZ.ORG www.tedcruz.org/tax_plan/ [<https://perma.cc/M9UA-YC72>] (describing presidential candidate Ted Cruz's tax reform proposal as including “abolish[ing] the IRS”).

of ERISA and the Affordable Care Act, and eligibility for social welfare payments such as the Earned Income Tax Credit and the Child Tax Credit. Obviously, the devil is in the details, which I cannot offer here. Nevertheless, although lacking that precise blueprint, this Essay offers preliminary thoughts as to why proposals to break up the IRS ought to be given serious consideration.

II. THE MODERN, MULTI-MISSION IRS

The Internal Revenue Code has always reflected goals beyond revenue raising, and IRS administration of the tax laws has necessarily followed suit. Historical evidence suggests that Congress enacted the corporate income tax not only to raise revenue but also to provide a mechanism by which the government could regulate corporate activity and constrain corporate political power.²¹ The progressive structure of the individual income tax is frequently justified at least partly as a remedy for societal inequality.²² Combating inequality is also a justification for maintaining the estate tax.²³ The government has subsidized home ownership through mortgage interest deductions and charitable organizations through exemption from the corporate income tax since 1913, although both the details and our thinking about these provisions have changed substantially over the decades. Whereas both items were once considered definitional, policymakers now acknowledge them as tax expenditures, and tax expenditures as government spending.²⁴

Nevertheless, the legislative trend for several decades now has been to fold a variety of other governmental programs into the tax system, and thus to put the IRS in charge of administering them. The growth of tax expenditures is one part of this trend. Although the precise definition of what constitutes a tax expenditure is elusive, generally speaking, tax expenditures represent government spending that just happens to be structured in the form of exclusions, exemptions, or deductions that reduce taxable income or as credits that reduce the amount of taxes owed and that, in some instances, are refundable.²⁵ Regardless of how one chooses to define what is or is not a tax expenditure, there is no question that Congress has expanded their use. Not long after Stanley Surrey coined the tax expenditures term in the 1960s,²⁶ the federal tax expenditure budget listed sixty items totaling somewhere between \$60 billion and \$65

²¹ STEVEN A. BANK, *FROM SWORD TO SHIELD: THE TRANSFORMATION OF THE CORPORATE INCOME TAX, 1861 TO PRESENT* 43–44 (2010); Reuven S. Avi-Yonah, *Corporations, Society, and the State: A Defense of the Corporate Tax*, 90 VA. L. REV. 1193, 1217–20 (2004); Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L.J. 53 (1990).

²² HENRY C. SIMONS, *PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM IN FISCAL POLICY* 15–19 (1938); Meredith R. Conway, *Money, It's a Crime. Share It Fairly, but Don't Take a Slice of My Pie!: The Legislative Case for the Progressive Income Tax*, 39 J. LEGIS. 119, 130–32 (2013).

²³ See generally Paul L. Caron & James R. Repetti, *Occupy the Tax Code: Using the Estate Tax to Reduce Inequality and Spur Economic Growth*, 40 PEPP. L. REV. 1255 (2013) (invoking societal inequality as a rationale for retaining the estate tax); Jeffrey A. Cooper, *Ghosts of 1932: The Lost History of Estate and Gift Taxation*, 9 FLA. TAX REV. 875, 882 (2010) (recognizing societal inequality as one justification for adopting the estate tax).

²⁴ See Hickman, *supra* note 16, at 1727–28, 1733–35 (summarizing home mortgage interest deduction and charitable exemption history).

²⁵ See STAFF OF J. COMM. ON TAX'N, 113TH CONG., *ESTIMATES OF FED. TAX EXPENDITURES FOR FISCAL YEARS 2014–2018* 2–3 (2014), <http://www.jct.gov/publications.html?func=startdown&id=4663> [<http://perma.cc/3K7L-8MR9>] (describing tax expenditures and analogizing them to direct spending programs).

²⁶ See STANLEY S. SURREY, *PATHWAYS TO TAX REFORM* vii (1973).

billion.²⁷ By comparison, a compendium of tax expenditures prepared by the Congressional Research Service in 2012 lists two hundred and fifty such items totaling well over \$1 trillion,²⁸ and even that extensive list does not purport to be comprehensive.²⁹ Former Joint Committee on Taxation Chief of Staff Edward Kleinbard has called tax expenditures “the dominant instruments for implementing new discretionary spending policies.”³⁰ Former Assistant Secretary of the Treasury for Tax Policy Pamela Olson has elaborated further that

The continual enactment of targeted tax provisions leaves the IRS with responsibility for the administration of policies aimed at the environment, conservation, green energy, manufacturing, innovation, education, saving, retirement, health care, child care, welfare, corporate governance, export promotion, charitable giving, governance of tax exempt organizations, and economic development, to name a few.³¹

Administering government spending through the tax code is really the tip of the iceberg of IRS involvement in programs and goals that are only tangentially associated with revenue raising.³² For example, Congress increasingly utilizes refundable tax credits rather than direct subsidies to alleviate poverty and support working families.³³ Amounts expended by the government on the earned income tax credit (EITC) and the child tax credit each surpassed those for Temporary Assistance for Needy Families and its predecessor, Aid to Families with Dependent Children, years ago.³⁴ In other words, the IRS is now one of the government’s principal welfare agencies, on par with the Department of Health and Human Services (HHS) and the Social Security Administration. Some academics tout tax credits and IRS administration thereof as a particularly efficient means of accomplishing congressional social welfare goals.³⁵ Other

²⁷ *Id.* at 7–11.

²⁸ S. COMM. ON THE BUDGET, 112TH CONG., TAX EXPENDITURES: COMPENDIUM OF BACKGROUND MATERIAL ON INDIVIDUAL PROVISIONS 1, 11 (Comm. Print. 2012) (Cong. Research Serv.) [hereinafter 2012 CRS COMPENDIUM].

²⁹ The CRS Compendium draws its data from tax expenditure estimates compiled by the Joint Committee on Taxation (JCT). *Id.* at 1. The JCT, in turn, acknowledges that it does not include de minimis items that fall below \$50 million or items for which quantification is unavailable. STAFF OF J. COMM. ON TAX’N, 112TH CONG., ESTIMATES OF FED. TAX EXPENDITURES FOR FISCAL YEARS 2011–2015 27–30 (2012), <http://www.jct.gov/publications.html?func=startdown&id=4386> [<http://perma.cc/SPC7-MPX4>].

³⁰ Edward D. Kleinbard, *Woodworth Memorial Lecture: The Congress Within the Congress: How Tax Expenditures Distort Our Budget and Our Political Processes*, 36 OHIO N.U. L. REV. 1, 3 (2010).

³¹ Pamela F. Olson, *Woodworth Memorial Lecture: And Then Cnut Told Reagan . . . Lessons from the Tax Reform Act of 1986*, 38 OHIO N.U. L. REV. 1, 12–13 (2011) (citations omitted).

³² See Susannah Camic Tahk, *Everything Is Tax: Evaluating the Structural Transformation of U.S. Policymaking*, 50 HARV. J. ON LEGIS. 67, 67 (2013) (“For the past twenty-five years, Congress has been relying increasingly on the tax code to accomplish goals beyond raising revenue.”).

³³ See Francine J. Lipman, *Access to Tax InJustice*, 40 PEPP. L. REV. 1173, 1180–84 (2013) (describing the history of the EITC as a mechanism for alleviating poverty); Michelle Lyon Drumb, *Those Who Know, Those Who Don’t, and Those Who Know Better: Balancing Complexity, Sophistication, and Accuracy on Tax Returns*, 11 PITT. TAX REV. 113, 120–23 (2013) (discussing the history of refundable credits with examples); see also *EITC & Other Refundable Credits*, INTERNAL REVENUE SERV., <http://www.eitc.irs.gov> [<http://perma.cc/UK5U-94Q6>] (highlighting and facilitating claims to the EITC and other refundable tax credits).

³⁴ NAT’L TAXPAYER ADVOC., INTERNAL REVENUE SERV., 2009 ANN. REP. TO CONG. vol. 2, at 78 (2009), http://www.irs.gov/pub/tas/09_tas_arc_vol_2.pdf [<http://perma.cc/T737-QYP6>].

³⁵ See, e.g., David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955 (2004); Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867 (2005).

scholars have documented administrative challenges posed by this arrangement, given the complexity of the statutory requirements as well as the IRS's lack of affinity for or expertise regarding anti-poverty policies and objectives.³⁶ It is no secret among tax experts that tax returns claiming such benefits are among the most likely to be audited, largely due to IRS studies documenting high error rates (or high rates of fraud, depending on one's perspective) in claiming such benefits.³⁷ In past years, the IRS has been criticized extensively for allegedly over-auditing the tax returns of benefits claimants.³⁸

The newest big refundable tax credit is the subsidy for health insurance premiums adopted as part of the Patient Protection and Affordable Care Act (ACA).³⁹ Enacted in 2010,⁴⁰ the ACA is a complicated and lengthy piece of legislation that endeavors to expand health insurance coverage and control health care costs through various mandates, regulations, and subsidies administered by a combination of federal and state agencies.⁴¹ The ACA contains several excise taxes that the IRS must collect.⁴² Individual income tax returns serve as the mechanism by which taxpayers also report their compliance with the ACA's requirement that they purchase health insurance, and the IRS correspondingly relies upon those returns to determine and assess "shared responsibility payments" (i.e., the penalties for failing to acquire health insurance).⁴³ But the legislation's core aims are health care access and cost control, and the IRS's role in ACA implementation extends far beyond revenue collection. Working with the Department of Health and Human Services (HHS) and the Department of Labor (Labor), IRS personnel have drafted regulations that, among other things, accommodate religious organizations that object to mandatory contraceptive coverage;⁴⁴ elaborate the extent to which group health plans are precluded from denying coverage to individuals with preexisting health conditions;⁴⁵ and identify ways in which health insurance providers

³⁶ See Drumbl, *supra* note 33, at 132-39 (2013) (describing at length the mismatch between the IRS's usual approach to tax enforcement and the needs and challenges of credit recipients).

³⁷ See, e.g., Stephen D. Holt, *Keeping It In Context: Earned Income Tax Credit Compliance and Treatment of the Working Poor*, 6 CONN. PUB. INT. L.J. 183, 185-96 (2007) (documenting EITC error and audit rates, and IRS and public perceptions regarding error versus fraud in that area).

³⁸ See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-98, ADOPTION TAX CREDIT: IRS CAN REDUCE AUDITS AND REFUND DELAYS 10 (2011), <http://www.gao.gov/assets/590/586423.html> [<https://perma.cc/J6HY-2TRE>] (noting that the IRS had audited 68% of returns claiming the adoption tax credit but found no fraud and only disallowed all or part of the credit for 17% of the returns audited); David Cay Johnston, *I.R.S. Audits of Working Poor Increase*, N.Y. TIMES (Feb. 28, 2002) <http://www.nytimes.com/2002/03/01/business/irs-audits-of-working-poor-increase.html> [<https://perma.cc/K6PL-X3CY>] (criticizing IRS for increasing audits of taxpayers claiming the EITC).

³⁹ I.R.C. § 36B (2012); *King v. Burwell*, 135 S. Ct. 2480 (2015).

⁴⁰ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21, 25, 26, 29 and 42 U.S.C.).

⁴¹ See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012) (noting the ACA's goals and size).

⁴² Examples include excise taxes on indoor tanning services (I.R.C. § 5000B) and medical devices (I.R.C. § 4191). See also *Affordable Care Act Tax Provisions*, INTERNAL REVENUE SERV., <http://www.irs.gov/Affordable-Care-Act/Affordable-Care-Act-Tax-Provisions> [<http://perma.cc/3EWP-UF8M>] (listing and describing ACA tax provisions, including but not limited to several excise taxes).

⁴³ I.R.C. § 5000A (2012).

⁴⁴ See, e.g., T.D. 9578, *Group Health Plans and Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act*, 77 Fed. Reg. 8725 (Feb. 15, 2012).

⁴⁵ See, e.g., T.D. 9491, *Patient Protection and Affordable Care Act: Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections*, 75 Fed. Reg. 37,188 (June 28, 2010), 2010-32 I.R.B. 186, 188-89.

may or may not offer incentives for participating in wellness programs.⁴⁶ Most recently, in *King v. Burwell*, the IRS had to defend its determination that taxpayers retained eligibility for the premium tax credit when they purchased health insurance on “exchanges” established by the federal government rather than state governments.⁴⁷ Although the IRS won the case, the Supreme Court noted that the IRS “has no expertise in crafting health insurance policy” and, consequently, declined to give its interpretation the usual deference extended to agency interpretations of statutes they administer.⁴⁸

Beyond the ACA, the IRS plays a leading role in administering pension benefits as well as health care under the Employee Retirement Income Security Act of 1974 (ERISA).⁴⁹ Congress enacted ERISA to protect participants in certain employee pension and welfare plans, including health coverage plans, by imposing various participation, vesting, funding, reporting, and disclosure requirements on the employers and unions that sponsor them.⁵⁰ The role of the IRS in administering the pension aspects of ERISA largely corresponds to provisions in the Internal Revenue Code that exclude qualifying pension contributions and earnings from taxable income⁵¹—acknowledged tax expenditure items.⁵² By contrast, IRS responsibilities for administering ERISA health coverage requirements (as opposed to ACA health coverage requirements) relate most closely to a financial penalty, styled as an excise tax, imposed by the Internal Revenue Code on nonconforming group health plans.⁵³ In administering ERISA, the IRS has worked in recent years, again with HHS and Labor, to adopt regulations concerning the length of hospital stays for new mothers and their newborn infants⁵⁴ and ensuring that the mental health and substance abuse disorder benefits provided by group health plans enjoy

⁴⁶ See, e.g., Notice of Proposed Rulemaking, Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 77 Fed. Reg. 70,620 (Nov. 26, 2012).

⁴⁷ See *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015).

⁴⁸ *Id.* at 2489.

⁴⁹ Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 26 and 29 U.S.C.).

⁵⁰ See STEVEN J. SACHER, JAMES I. SINGER & TERESE M. CONNERTON, *EMPLOYEE BENEFITS LAW* 22–35 (2d ed. 2000); Anne Tucker, *Retirement Revolution: Unmitigated Risks in the Defined Contribution Society*, 51 HOUS. L. REV. 153, 163–66 (2013). Although historical accounts of ERISA focus primarily on pension reform, Congress drafted ERISA to cover a broader array of employee welfare plans, including employer-sponsored health insurance plans. See SACHER ET AL., *supra*, at 28.

⁵¹ See, e.g., I.R.C. §§ 401–407, 410–418E, 457 (2012). Many of these provisions have parallel provisions in ERISA, and Treasury claims interpretive jurisdiction over both. See COLLEEN E. MEDILL, *INTRODUCTION TO EMPLOYEE BENEFITS LAW* 95–96 (3d ed. 2011); see also T.D. 9419, Mortality Tables for Determining Present Value, 73 Fed. Reg. 44,632 (July 31, 2008), 2008-40 I.R.B. 790, 791 n.1 (asserting jurisdiction to adopt mortality tables for determining present value and making other computations for purposes of applying pension funding requirements under I.R.C. §§ 412 and 430 as well as ERISA § 302); T.D. 9484, Diversification Requirements for Certain Defined Contribution Plans, 75 Fed. Reg. 27,927 (May 19, 2010); 2010-24 I.R.B. 748, 748–49 (adopting regulations concerning diversification requirements for defined contribution plans holding publicly traded employer securities under both I.R.C. § 401(a)(35) and parallel provision 29 U.S.C. § 204(j)).

⁵² 2012 CRS COMPENDIUM, *supra* note 28, at 963.

⁵³ Specifically, for any group health plan that fails to meet the requirements of I.R.C. ch. 100, I.R.C. § 4980D imposes an excise tax upon a sponsoring employer of \$100 per day, per individual affected. I.R.C. § 4980D (2012). Chapter 100, in turn, imposes an array of portability, access, and renewability requirements, as well as benefit requirements for mothers and newborns and for mental health, among other things. I.R.C. §§ 9801–9802, 9811–9812 (2012) (imposing group health plan requirements); see also MEDILL, *supra* note 51, at 354–55 (discussing the “excise tax penalty” adopted to enforce group health plan requirements).

⁵⁴ T.D. 9427, Final Rules for Group Health Plans and Health Insurance Issuers Under the Newborns’ and Mothers’ Health Protection Act, 73 Fed. Reg. 62410 (Oct. 20, 2008).

parity with those plans' medical and surgical benefits⁵⁵—also subjects that fall outside the IRS's primary expertise. One need not be anti-IRS to question whether IRS personnel are desirable arbiters of such matters.

The IRS also plays a key role in regulating the activities of the exempt organization sector.⁵⁶ Current IRS administration efforts in this one area now involve an entire IRS division (out of only four) monitoring more than 1.6 million tax exempt organizations⁵⁷ across a few dozen separate statutory classifications that encompass universities with billion-dollar endowments and tiny religious schools teaching a few dozen students; large hospitals and small, free health clinics; labor unions; chambers of commerce; churches, big and small; the Metropolitan Opera and tiny, rural theater companies; the local Elks Lodge; and your Aunt Sadie's garden club.⁵⁸ Defining which organizations are eligible for exempt status and, separately, which may receive tax deductible contributions is complicated.⁵⁹ Evaluating applications for exempt status and monitoring existing organizations for continued compliance with eligibility requirements are even more difficult and often require the IRS to venture outside its primary expertise. Tax administrators in this sector routinely make decisions implicating issues as varied as free speech, politics, and religion;⁶⁰ election law and campaign finance;⁶¹ and, again, health policy and hospital governance.⁶² For example, public charities are not allowed to participate in election campaigns, but the IRS's efforts to curb political speech by church

⁵⁵ T.D. 9479, Interim Final Rules Under the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, 75 Fed. Reg. 5410 (Feb. 2, 2010).

⁵⁶ *But see* Lloyd Hitoshi Mayer & Brendan M. Wilson, *Regulating Charities In The Twenty-First Century: An Institutional Choice Analysis*, 85 CHI.-KENT L. REV. 479, 498 (2010) ("Despite the IRS's recent attempts to regulate charity governance, it is generally recognized that Congress, in granting tax exemption to charitable organizations, did not intend for the IRS to become a national regulator of the charitable sector.").

⁵⁷ *See At-a-Glance: IRS Divisions and Principal Offices*, INTERNAL REVENUE SERV., <http://www.irs.gov/uac/At-a-Glance:-IRS-Divisions-and-Principal-Offices> [<http://perma.cc/HS29-EQA6>] (listing four primary IRS divisions: Wage and Investment; Large Business and International; Small Business/Self-Employed; and Tax-Exempt and Government Entities); *Tax Exempt & Government Entities Division at a Glance*, INTERNAL REVENUE SERV., <http://www.irs.gov/Government-Entities/Tax-Exempt-&-Government-Entities-Division-At-a-Glance> [<http://perma.cc/WP25-3R6L>] (describing the work of the TE/GE division and noting "this sector is not designed to generate revenue, but rather to ensure that the entities fulfill the policy goals that their tax exemption was designed to achieve").

⁵⁸ I.R.C. § 501(c)(1)–(29), (d)–(f) (2012); *see also* Charles A. Borek, *Decoupling Tax Exemption for Charitable Organizations*, 31 WM. MITCHELL L. REV. 183, 201–07 (2004); James J. Fishman, *The Nonprofit Sector: Myths and Realities*, 9 N.Y. CITY L. REV. 303, 303–05 (2006).

⁵⁹ Only some exempt organizations can receive tax deductible contributions. *Compare* I.R.C. § 501 (listing types of exempt organizations), *with* I.R.C. § 170(c) (listing organizations eligible to receive deductible contributions).

⁶⁰ *See generally* Johnny Rex Buckles, *Does the Constitutional Norm of Separation of Church and State Justify the Denial of Tax Exemption to Churches that Engage in Partisan Political Speech?*, 84 IND. L.J. 447 (2009); Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771 (2001); Steffen N. Johnson, *Of Politics and Pulpits: A First Amendment Analysis of IRS Restrictions on the Political Activities of Religious Organizations*, 42 B.C. L. REV. 875 (2001).

⁶¹ Demonstrating the issues that the IRS faces in this area, in 2011, the *Election Law Journal* published an entire volume on this topic. For just a few of the contributions to that volume, see, for example, Richard Briffault, *Nonprofits and Disclosure in the Wake of Citizens United*, 10 ELECTION L.J. 337 (2011); Lloyd Hitoshi Mayer, *Charities and Lobbying: Institutional Rights in the Wake of Citizens United*, 10 ELECTION L.J. 407 (2011); Donald B. Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing*, 10 ELECTION L.J. 427 (2011).

⁶² *See, e.g.*, Jessica Berg, *Putting the Community Back into the "Community Benefit" Standard*, 44 GA. L. REV. 375, 377 (2010) (discussing IRS-developed "community benefit" criteria that nonprofit hospitals must satisfy to maintain exempt status).

leaders implicate First Amendment issues that the IRS has proven ill-equipped to handle, damaging the IRS's credibility.⁶³ For another prime example of the difficulties the IRS faces in regulating nonprofits, one need look no further than the recent IRS-Tea Party kerfuffle, concerning the IRS's efforts to evaluate the involvement of Internal Revenue Code § 501(c)(4) social welfare organizations in candidate-related political activities. No matter whom or what one blames for that brouhaha, the fact remains that the IRS failed to appreciate the landmine onto which it was stepping, and then handled the aftermath ineptly, resulting in lasting damage to the IRS's public image.⁶⁴ The IRS's subsequent attempt to promulgate regulations to clarify exactly which activities are candidate-related political activities was almost as fraught. The IRS received more than 150,000 comments—many critical—from a broad array of interested parties and members of the public, prompting the IRS to delay the implementation of those regulations.⁶⁵

These and other programs, purposes, and functions that are at best tangentially related to the IRS's revenue raising mission take up a much greater proportion of tax administration efforts and resources than is generally realized. In other work, I documented the extent to which Treasury and IRS focus their regulatory efforts on tax expenditures and other social welfare and regulatory programs as opposed to revenue raising.⁶⁶ According to that study, from 2008 through 2012, Treasury and the IRS spent almost as much time and effort drafting regulations addressing tax expenditures and other social welfare and regulatory matters like the Affordable Care Act, ERISA, and exempt organizations as they did drafting regulations addressing the individual, payroll, and corporate income tax matters that actually raise revenue.⁶⁷ In short, the IRS has transitioned over time from a mission-driven agency that collects taxes to an omnibus agency that does many things.

III. THE PROBLEMS AND PITFALLS OF THE MULTI-MISSION IRS

Tax policy experts have debated for some time whether and under what circumstances Congress ought to assign nontax responsibilities to the IRS. For example, a sizable literature exists considering whether and under what circumstances tax expenditures are adequate substitutes for, or perhaps even more effective than, direct spending programs. Comparing the EITC and food stamp programs as illustrative, David Weissbach and Jacob Nussim argue that the IRS's special expertise in measuring income makes it especially suited to administer means-tested welfare programs.⁶⁸ Also comparing the EITC and food stamps, Larry Zelenak touts the benefits of allowing people to self-declare their eligibility for government benefits, rather than requiring precertification of eligibility.⁶⁹ Ann Alstott counters that, because beneficiaries claim the

⁶³ See, e.g., Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1315–17 (2007) (describing the controversy).

⁶⁴ See, e.g., Lily Kahng, *The IRS Tea Party Controversy and Administrative Discretion*, 99 CORNELL L. REV. ONLINE 41 (2013) (detailing the controversy, describing the IRS's "ineptitude" and "[b]ureaucratic bungling," and concluding that the incident "inflicted needless damage on the IRS").

⁶⁵ E.g., *IRS Update on the Proposed New Regulation on 501(c)(4) Organizations*, INTERNAL REVENUE SERV. (May 22, 2014), <http://www.irs.gov/uac/Newsroom/IRS-Update-on-the-Proposed-New-Regulation-on-501%28c%29%284%29-Organizations> [<http://perma.cc/796F-8FQD>]; *IRS to Rewrite Nonprofit Rules Amid Criticism*, POLITICO (May 23, 2014), <http://www.politico.com/story/2014/05/irs-rewrite-nonprofit-rules-amid-criticism-107015.html> [<http://perma.cc/342C-JJPY>].

⁶⁶ Hickman, *supra* note 16.

⁶⁷ *Id.* at 1746–53.

⁶⁸ Weissbach & Nussim, *supra* note 35, at 1001–02.

⁶⁹ Zelenak, *supra* note 35, at 1915.

EITC by filing an annual tax return, that program is less able than more traditional welfare programs to respond timely to changes in personal circumstances.⁷⁰ Eric Laity complains that tax expenditures shift administrative costs from the government to the private sector—which others might find a feature rather than a bug.⁷¹ Eric Toder suggests that both tax expenditures and direct spending possess potential attributes and difficulties, and he counsels careful case-by-case consideration of programmatic design.⁷² Relatively little scholarly consideration has been paid, however, to whether administering such programs might cause problems for the IRS. And, of course, the IRS's capacity to administer any *one* social welfare or regulatory program effectively (or at least effectively enough) does not automatically equate with a capacity to administer *many* such programs simultaneously.

Having a government agency serve multiple missions is not always problematic. Cabinet-level departments serve multiple missions, with a single leadership that oversees a variety of subordinate offices, bureaus, administrations, and agencies—although those subordinate agencies within agencies are more typically oriented toward a single mission. For example, the Department of the Treasury includes not only the IRS but also the U.S. Mint, the Financial Crimes Enforcement Network, the Bureau of Engraving and Printing, and the Alcohol and Tobacco Tax and Trade Bureau, as well as several policy offices, on its organization chart.⁷³ And the Department of Health and Human Services includes the Centers for Disease Control and Prevention, the Centers for Medicare and Medicaid Services, the Indian Health Service, and the Food and Drug Administration among its many offices and operating divisions.⁷⁴ Just as Cabinet-level departments coordinate and manage the many functions of their subordinate agencies, so too a single agency ought to be able to organize its personnel to administer multiple programs.

Moreover, using an existing agency like the IRS to administer new programs or functions is not unusual in American government. Congress often has very good reasons to assign a new program or function to an existing administrative agency, even when that new program or function is not entirely germane to the agency's original or core mission. The case for utilizing an existing agency for a new program or function often focuses on a combination of efficiency and resource constraints.⁷⁵ Setting up a new agency takes time, so assigning a new program or function to an existing bureaucracy may allow for faster implementation. Such assignments are not entirely random; Congress generally tasks an existing agency with a new program or function based on its perception that the

⁷⁰ Ann Alstott, *The Earned Income Tax Credit and The Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 579–84 (1995).

⁷¹ Eric Laity, *The Corporation As Administrative Agency: Tax Expenditures and Institutional Design*, 48 VA. TAX REV. 411, 425, 442–43 (2008).

⁷² Eric J. Toder, *Tax Cuts or Spending—Does it Make a Difference?*, 53 NAT'L TAX J. 361, 365–370.

⁷³ See *Organizational Structure*, U.S. DEP'T OF THE TREASURY, <http://www.treasury.gov/about/organizational-structure/Pages/default.aspx> [<http://perma.cc/Y9TC-EZ3F>]; *Bureaus*, U.S. DEP'T OF THE TREASURY, <http://www.treasury.gov/about/organizational-structure/bureaus/Pages/default.aspx> [<http://perma.cc/2VKG-ZCPB>].

⁷⁴ *HHS Organizational Chart*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, <http://www.hhs.gov/about/agencies/orgchart/index.html> [<http://perma.cc/T38E-HFXY>].

⁷⁵ Rachel Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 307–08 (2013) (noting these considerations in the context of assigning tangential functions to the Department of Justice).

agency may have some specialized expertise relevant to the task.⁷⁶ When a new program's goals overlap or are at least compatible with an existing agency's core mission or expertise, then the agency's ability to coordinate among those complimentary programs may create synergies that achieve superior outcomes while conserving government resources. Even when programmatic goals are not so closely aligned, for smaller or more experimental programs, creating a new agency may make little sense when an existing agency's expertise is at least close enough for Congress to believe it can handle the additional responsibility appropriately.

Just because Congress can assign multiple missions to an agency does not mean, however, that Congress always should. The more missions an agency has, the greater the strain on the agency. In measuring agency priorities, scholars who study agency design often describe agencies as having primary and secondary missions. They recognize that an agency often, or even typically, will pursue its primary mission, perhaps to the detriment of secondary missions, for a variety of reasons.⁷⁷

Which goals an agency prioritizes can depend on a number of factors including political pressure, measurability, agency culture, and personnel.⁷⁸ For example, political and economic pressure from Congress, lobbyists, and executive oversight typically will push an agency toward its primary mission.⁷⁹ The more an agency's primary and secondary missions conflict—yielding opposing pressures, the more likely the agency will shirk its secondary responsibilities. J.R. DeShazo's and Jody Freeman's study of hydropower relicensing decisions by the Federal Energy Regulatory Commission (FERC) is illustrative.⁸⁰ As its name suggests, FERC's responsibilities and expertise center around energy, yet FERC also has secondary environmental obligations under the National Environmental Policy Act, the Clean Water Act, and the Endangered Species Act. DeShazo and Freeman posit that, at least from 1982 to 1998, FERC resisted pursuit of its environmental responsibilities because Congress and the executive branch prioritized pro-power policies in light of the 1970s energy crisis, even as they continued to support environmental protection.⁸¹

Agencies also tend to favor missions, goals, or functions that are easily measured and monitored—focusing on short-term, tangible results rather than abstract policy ideals.⁸² From a practical standpoint, and in light of political pressures, this preferencing makes sense. Congress and the executive branch reward agencies they regard as successful, and nothing demonstrates success so much as tangible, quantifiable results. Agencies may thus allocate fewer resources to secondary missions that pursue more

⁷⁶ See, e.g., Weisbach & Nussim, *supra* note 35, at 987–90 (discussing the role of expertise in organizational design).

⁷⁷ See, e.g., Eric Biber, *Too Many Things To Do: How To Deal With The Dysfunctions Of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 4 (2009) (concluding that “agencies are most likely to underperform on ‘secondary goals’ that both interfere with the completion of what are perceived to be the agency’s primary goals”); J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2221 (2005) (noting that political pressure from Congress and lobbyists both will push an agency toward one primary mission); Barkow, *supra* note 75, at 306–07 (suggesting that the prosecutorial functions of the Department of Justice have won out against the secondary interests of corrections, clemency, and forensic science).

⁷⁸ Barkow, *supra* note 75, at 307–12 (drawing these factors from the agency design literature).

⁷⁹ *Id.* at 309; DeShazo & Freeman, *supra* note 77, at 2221.

⁸⁰ DeShazo & Freeman, *supra* note 77, at 2221–22 (describing the study).

⁸¹ *Id.* at 2230–45.

⁸² Barkow, *supra* note 75, at 310.

abstract goals, such as promoting societal equality, welfare, or environmental sustainability.⁸³

Agency culture additionally plays a prominent role in how an agency approaches its various missions. Internal cultural conflicts are pervasive throughout the administrative state. Political scientist James Q. Wilson generalized about the effects of culture on agencies:

First, tasks that are not part of the culture will not be attended to with the same energy and resources as are devoted to tasks that are part of it. Second, organizations in which two or more cultures struggle for supremacy will experience serious conflict as defenders of one seek to dominate representatives of others. Third, organizations will resist taking on new tasks that seem incompatible with its dominant culture. The stronger and more uniform the culture—that is, the more the culture approximates a sense of mission—the more obvious these consequences.⁸⁴

Wilson offered as an example the former Immigration and Naturalization Service (INS), discussed at greater length in Part IV below, as an agency torn between competing goals: “Keep out illegal immigrants, but let in necessary agricultural workers”; “find and expel illegal aliens, but do not break up families, impose hardships, violate civil rights, or deprive employers of low-paid workers.”⁸⁵ Rachel Barkow’s examination of the Department of Justice’s administration of corrections, clemency, and forensic science matters further illustrates Wilson’s point. Barkow observed that the Department of Justice has a culture that is oriented toward its prosecutorial function, and that culture has resulted in fewer pardons, undermined reform efforts by the Bureau of Prisons, and encouraged botched scientific investigations that favor the prosecution.⁸⁶ In sum, agencies struggle with or even ignore outright secondary goals that conflict with their dominant culture, and too much tension between competing functions can undermine agency efforts across the board.

An agency’s culture is intertwined with its personnel and leadership. Agencies recruit like-minded individuals to preserve their culture and further their primary missions.⁸⁷ For example, the National Aeronautics and Space Administration (NASA) hires engineers who demonstrate a “‘can-do’ attitude based on the diligent and systematic application of hard work and engineering principles,” rejecting subjective orientations that emphasize “I feel” or “I think” in favor of a “complete, fully documented, verifiable set of data.”⁸⁸ Personnel also shape how primary missions are defined and measured. For example, the Forest Service employs biologists, economists, engineers, and foresters, all of whom define the Forest Service’s mission of attaining “sustainable yields” differently.⁸⁹

⁸³ Cf. Chris Bonastia, *Why Did Affirmative Action in Housing Fail During the Nixon Era? Exploring the “Institutional Homes” of Societal Politics*, 47 SOC. PROBS. 523 (2000) (suggesting the Department of Housing and Urban Development ignored its secondary mission of combating racial segregation because measuring progress was difficult).

⁸⁴ JAMES Q. WILSON, BUREAUCRACY 101 (1989).

⁸⁵ *Id.* at 158.

⁸⁶ Barkow, *supra* note 75, at 341–42.

⁸⁷ WILSON, *supra* note 84, at 96–99.

⁸⁸ *Id.* at 104.

⁸⁹ *Id.* at 107.

In summary, when Congress assigns a new program or function to an existing agency, the general understanding is that the new program or function may “take a backseat” to the agency’s primary or core mission.⁹⁰ Agencies tend to focus on the tasks likely to garner the most attention from Congress and gravitate toward goals that are most easily measured and achieved.⁹¹ In such circumstances, an agency is likely to hire new employees whose skills and interests align with such efforts, solidifying an agency culture that emphasizes some programs or functions, even to the detriment of others.⁹² Consequently, the efficacy of the new program or function may suffer somewhat as a consequence of Congress’s decision to assign it to an existing agency. One can imagine such is especially the case when an agency is established originally to accomplish one mission and only subsequently had other, conflicting missions grafted onto its brief. When an agency’s multiple missions are in tension with one another, the agency may be particularly hard pressed to accomplish all of them well. No agency or government program design is perfect, and life and government both often require such tradeoffs. To a great extent, therefore, the question really is whether and when the costs of the tradeoff outweigh the benefits.

The IRS’s administration of nontax programs—even if well-intentioned and dutiful—suffers from many of these same issues. The IRS’s traditional mission as the nation’s tax collector dominates everything it is and does. The IRS’s mission statement emphasizes compliance, helping taxpayers “understand and meet their tax responsibilities,” and ensuring that taxpayers “pay their fair share.”⁹³ The IRS’s website home page is loaded with information about preparing and filing tax returns and paying taxes,⁹⁴ with only a few nods toward other matters within the IRS’s jurisdiction: a “Credits & Deductions” tab linked to lists of prominent tax benefits available through filing an annual tax return;⁹⁵ a “Hot Topics” reference to the Affordable Care Act linked to a page that in turn refers to “important changes” to “how individuals and families file their taxes;”⁹⁶ and a “News” item linked to an acknowledgment of “the 10th Anniversary of EITC Awareness Day,”⁹⁷ for example. The IRS publishes dozens of reports annually documenting the numbers of tax returns filed and audits conducted, and the amounts of taxes received and refunds paid—all of which are readily quantifiable.⁹⁸ Speeches by the IRS Commissioner regarding the agency’s challenges and priorities emphasize answering taxpayer questions, improving tax enforcement, and collecting more revenue: “For every dollar invested [in the IRS budget], there can be returns ranging from 6-to-1 and even up

⁹⁰ Barkow, *supra* note 75, at 307–12; David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 119 (2000) (“That agencies are systematically more loyal to their basic mission seems persuasive, even obvious.”).

⁹¹ Barkow, *supra* note 75, at 308–10.

⁹² *Id.*

⁹³ *The Agency, its Mission and Statutory Authority*, INTERNAL REVENUE SERV., <https://www.irs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority> [<https://perma.cc/XLZ4-2ZW4>].

⁹⁴ See INTERNAL REVENUE SERV., <https://www.irs.gov/> [<https://perma.cc/T8SL-XVHG>].

⁹⁵ *Id.* (linking to <https://www.irs.gov/Credits-&-Deductions> [<https://perma.cc/ZHM4-6YQ3>]).

⁹⁶ *Id.* (linking to <https://www.irs.gov/Affordable-Care-Act> [<https://perma.cc/GUF8-WQ2N>]).

⁹⁷ *Id.* (linking to <https://www.irs.gov/uac/Newsroom/On-the-10th-Anniversary-of-EITC-Awareness-Day-IRS-Alerts-Workers-of-Significant-Tax-Benefit> [<https://perma.cc/3K9N-767N>]).

⁹⁸ See, e.g., <https://www.irs.gov/uac/Tax-Stats-2> [<https://perma.cc/4YVX-ULWF>] (linking to dozens of IRS reports).

to 20-to-1 in some initiatives.”⁹⁹ The IRS does not, by comparison, provide reports documenting its impact or otherwise touting its efforts in achieving other congressional goals like alleviating poverty, protecting the environment, or improving access to health care.

Consider one representative example that illustrates the IRS’s focus: the annual IRS Data Book, most recently issued for 2014. The 2014 IRS Data Book includes table after table documenting tax collections and refunds, tax returns and other forms filed, and audits and other enforcement actions pursued.¹⁰⁰ “Taxpayer assistance” is denominated principally in terms of the various ways in which IRS personnel answer taxpayer questions—e.g., through telephone calls answered, walk-in assistance contacts made, or website visits made¹⁰¹—and also the number of appeals of proposed liability assessments the IRS handled,¹⁰² although the IRS additionally tracks by type the various matters addressed by the Taxpayer Advocate Service.¹⁰³ The Data Book further contains sections concerning tax-exempt organizations and the Affordable Care Act. But rather than discussing how the IRS’s efforts accomplish congressional goals in those sectors, the Data Book denominates filings processed, guidance issued, and taxes collected.¹⁰⁴

Consistent with its primary mission and the emphasis of its leadership, the IRS’s workforce is culturally oriented toward raising revenue, maximizing collections, and protecting the fisc. Most of the IRS bureaucracy is focused on the practical, accounting-oriented functions of processing and evaluating hundreds of millions of taxpayer filings with the end goal of evaluating who has paid and who still owes, taxpayer by taxpayer, entity by entity. The webpage advertising careers that prospective employees might pursue with the IRS lists administrative and clerical positions; accounting, budget, and finance positions; business and tax enforcement positions; research and analysis positions; tax law specialist positions; mail and file, financial, and cash processing clerk positions; and tax examiner positions, among others—but does not list positions suggesting training or aptitude in social work, health policy, environmental policy, or any of the myriad nontax functions Congress has assigned to the agency.¹⁰⁵ Anecdotally, casual conversations with IRS managers reveal a perception that their responsibility vis-a-vis tax expenditures is to hold the line on spending through interpretation and enforcement, not to achieve the congressional goals that inspired the tax expenditures in the first place.

The quantitative skills and fiscal orientation of IRS personnel are well suited for the agency’s primary function of collecting government revenue; processing and evaluating hundreds of millions of taxpayer filings and collecting trillions of dollars in

⁹⁹ Statement of IRS Commissioner John Koskinen on the Fiscal Year 2016 Budget (Feb. 2, 2015), <https://www.irs.gov/uac/Newsroom/Statement-of-IRS-Commissioner-John-Koskinen-on-the-Fiscal-Year-2016-Budget> [https://perma.cc/SWR5-SVRE]; see also, e.g., Written Testimony of Commissioner Koskinen Before the House Ways and Means Committee’s Subcommittee on Oversight on the 2015 Tax Filing Season (Apr. 22, 2015), <https://www.irs.gov/uac/Written-Testimony-of-IRS-Commissioner-Koskinen-before-the-House-Ways-and-Means-Committee> [https://perma.cc/AR64-JTXF] (reflecting similar emphases).

¹⁰⁰ INTERNAL REVENUE SERV., INTERNAL REVENUE SERVICE DATA BOOK, 2014, *supra* note 5, at 1–46.

¹⁰¹ *Id.* at 48–49.

¹⁰² *Id.* at 51.

¹⁰³ *Id.* at 50.

¹⁰⁴ *Id.* at 53–58, 71–72.

¹⁰⁵ See *Our Careers*, INTERNAL REVENUE SERV., <https://jobs.irs.gov/careers.html> [https://perma.cc/FVW8-2X5H].

taxes is no small task. Those same employees may be of less utility but cause little real harm in the administration of some tax expenditures, like a research and development credit adopted to encourage corporate investment in such activities,¹⁰⁶ an exclusion of municipal bond interest maintained to subsidize local government activities and investments,¹⁰⁷ or a home mortgage interest deduction intended to promote middle-class home ownership.¹⁰⁸ But the IRS's green-eyeshade culture may make the IRS spectacularly ill equipped for some of the tasks Congress has assigned it. IRS personnel are not automatons or drones, but nor are they social workers, environmental scientists, health policy experts, or First Amendment scholars.¹⁰⁹ They are not trained, and thus may often fail to recognize when their efforts will implicate nontax values, sensitivities, or needs. As Mary Heen has observed with respect to anti-poverty programs in particular, “[a] revenue-raising system, overseen by accountants, tax lawyers, and tax administrators, has serious shortcomings as a mechanism for administering social benefit programs, such as distributing income security funds to low-income workers and development funds to low-income housing programs.”¹¹⁰

It would be lamentable enough if the IRS's focus, culture, and expertise limitations were merely obstacles to accomplishing congressional goals of alleviating poverty, improving access to health care, or encouraging the pursuits of the nonprofit sector. But the disconnect between the IRS's traditional revenue raising function and some of its contemporary social welfare and regulatory responsibilities poses a more fundamental problem for the IRS itself. Some of these social welfare and regulatory programs have drawn the IRS into controversial political waters. Last year's *King v. Burwell* decision saw the IRS dragged into a highly politicized controversy over taxpayer eligibility for Affordable Care Act subsidies,¹¹¹ a subject the Supreme Court recognized as outside the IRS's expertise.¹¹² Even if one is inclined to give the IRS the benefit of the doubt when it comes to its past handling of 501(c)(4) exemption applications, only the most partisan ideologues think the IRS handled that controversy adeptly and escaped undamaged in the eyes of average taxpayers.¹¹³ Other examples already noted include whether in the nonprofit area with the First Amendment rights of churches and 501(c)(4) social welfare organizations,¹¹⁴ under the Affordable Care Act in requiring health

¹⁰⁶ I.R.C. § 41 (2015).

¹⁰⁷ I.R.C. § 103 (2015).

¹⁰⁸ I.R.C. § 163(h) (2015).

¹⁰⁹ Cf. Jane Aiken & Stephen Wizner, *Law as Social Work*, 11 WASH. U. J.L. & POL'Y 63, 64–67 (2003) (comparing mindsets of lawyers versus social workers).

¹¹⁰ Mary L. Heen, *Reinventing Tax Expenditure Reform: Improving Program Oversight Under the Government Performance and Results Act*, 35 WAKE FOREST L. REV. 751, 792–93 (2000).

¹¹¹ 135 S. Ct. 2480, 2486–87 (2015).

¹¹² *Id.* at 2489 (declining to apply the *Chevron* review standard to the IRS's interpretation of the Affordable Care Act because the IRS “has no expertise in crafting health insurance policy”).

¹¹³ See, e.g., Kahng, *supra* note 64, at 41 (2013) (detailing the controversy, describing the IRS's “ineptitude” and “[b]ureaucratic bungling,” and concluding that the incident “inflicted needless damage on the IRS”).

¹¹⁴ See discussion *supra* notes 63–65 and accompanying text (describing these issues).

insurance plans to include contraceptive coverage,¹¹⁵ or through IRS efforts to combat EITC fraud using traditional tax enforcement tools like tax return audits and penalties.¹¹⁶

Moreover, the integration of social welfare programs into the Internal Revenue Code has a substantial impact on the profile of the persons most likely to have to engage in a meaningful way with IRS personnel. Historically, a simple wage earner with two children who did not itemize her deductions would have interacted rather minimally with IRS personnel—filing a relatively uncomplicated annual tax return, perhaps receiving a refund or at least not owing much tax. Now, that same individual grapples with pages and pages of forms and instructions to avail herself of social welfare benefits like the EITC or the child tax credit. She might enjoy the check she receives from the IRS at the outset. But if she makes a mistake, the IRS will not seem so friendly as it seeks to recoup the distributed funds and she additionally faces the prospect of penalties for underpayment of taxes.¹¹⁷

Whether or not one believes that the IRS has done anything wrong in any of these situations, the IRS's frequently flat-footed and tone-deaf reactions—both before and after controversy erupted—have undermined taxpayer perceptions of the agency's competence as well as its fairness. Agencies like the Environmental Protection Agency or the National Labor Relations Board may be expected to pursue partisan priorities. The IRS, by contrast, relies heavily on its reputation for fairness and impartiality, and cannot afford to be perceived otherwise. Unfortunately, as noted, Congress's response has been to cut the IRS's budget, even as politicians from both parties call for adding to the IRS's burden by adopting even more programs for the IRS to administer.¹¹⁸ The IRS just cannot succeed under these conditions.

IV. RETURNING TO A SINGLE MISSION (OR CLOSE TO IT)

The purpose of this Essay is not to offer a precise blueprint for removing programs and functions from the IRS's jurisdiction. Accomplishing such a task would be substantially more complicated and require far more expertise than any one symposium essay or person can offer. Instead, having argued that making the IRS a multi-mission agency has harmed the IRS's ability to perform its critical role as the federal government's tax collector, this Essay merely suggests that tax policymakers and administrators ought to contemplate either spinning off certain programs and functions from the IRS or splitting up the IRS altogether to segregate revenue raising from other government activities.

Of course, the devil is in the details, and trying to segregate the revenue collection function altogether from other congressional goals is a fool's errand. But the IRS is not unique in seeing its responsibilities grow and change over time, and past restructurings of other, nontax agencies may offer significant guidance in this regard.

A. Learning from Other Agency Experiences

The IRS is hardly alone in finding itself overburdened with multiple missions and in need of a substantial overhaul. From the century plus of the modern administrative state, examples abound. The past decade alone has seen at least two such examples.

¹¹⁵ See discussion *supra* notes 44–48 and accompanying text (listing this and other examples of controversial IRS actions implementing the Affordable Care Act).

¹¹⁶ See discussion *supra* note 36–38 and accompanying text (noting criticism of IRS administration of the EITC program).

¹¹⁷ See Drumbl, *supra* note 33, at 140–41 (describing how this happens).

¹¹⁸ See discussion *supra* notes 14–16 and accompanying text.

After the 2008 financial crisis, Congress discerned that consumer finance regulation was spread among several agencies, none of which viewed consumer protection as their primary mission.¹¹⁹ Perceiving a greater need to protect consumers within the financial sphere, in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress created the Consumer Financial Protection Board and reassigned functions from several other agencies to it.¹²⁰ Also, in the wake of the massive Deepwater Horizon oil spill in 2010, government officials realized that the agency responsible for regulating offshore oil development, the Minerals Management Service (MMS), had subordinated its safety and environmental regulatory functions to its other missions of facilitating offshore drilling and production and collecting government royalties therefrom.¹²¹ Consequently, the Secretary of the Interior ordered that the MMS and its responsibilities be divided into three new successor agencies—the Bureau of Ocean Energy Management, the Office of Natural Resources Revenue, and the Bureau of Safety and Environmental Enforcement—segregating the agency’s permitting and revenue-collection tasks from its enforcement functions, and thereby removing the conflict among those missions.¹²²

Just as each agency is at least somewhat unique, the story behind each reorganization of a government agency is a little different. Nevertheless, commonalities exist. The experiences of other agencies in the past may offer useful insights into the IRS’s present problems. The following discussion describes in greater depth two such reorganizations as especially instructive: the spinoff of telephone regulation from the Interstate Commerce Commission (ICC) to the Federal Communication Commission (FCC) in 1934, and the division of the Immigration and Naturalization Service (INS) into three successor agencies in 2003.

1. *The Interstate Commerce Commission*

The ICC was originally established in 1887 to regulate railroads as common carriers.¹²³ Throughout its existence, the ICC’s primary expertise lay in the area of transportation services.¹²⁴ Over time, the ICC’s authority was expanded to encompass other transportation industries, such as trucking and interstate bus lines.¹²⁵ The ICC was

¹¹⁹ Dylan J. Castellino, *A Spotlight on Shadow Banking: The CFPB Finalizes Procedures to Supervise Risky Nonbanks*, 18 N.C. BANKING INST. 333, 334–37 (2014); Michael S. Barr, *The Financial Crisis and the Path of Reform*, 29 YALE J. ON REG. 91, 107–08 (2012).

¹²⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

¹²¹ Rebecca M. Bratspies, *A Regulatory Wake-Up Call: Lessons from BP’s Deepwater Horizon Disaster*, 5 GOLDEN GATE U. ENVTL. L.J. 7, 52–53 (2011); see also HENRY B. HOGUE, CONG. RESEARCH SERV., R41485, REORGANIZATION OF THE MINERALS MANAGEMENT SERVICE IN THE AFTERMATH OF THE DEEPWATER OIL SPILL 1–3 (2010) (hereinafter REORGANIZATION OF THE MINERALS MANAGEMENT SERVICE).

¹²² Bratspies, *supra* note 121, at 64 n.7 (documenting two executive orders reorganizing the MMS); see also REORGANIZATION OF THE MINERALS MANAGEMENT SERVICE, *supra* note 121, at 3 (“The perceived conflicts between the missions of energy development, safety and environmental regulation enforcement, and royalty collection and disbursement for the use of state and federal governments provided the rationale for post-oil-spill administrative and legislative initiatives to reorganize MMS.”).

¹²³ Interstate Commerce Act, ch. 104, § 11, 24 Stat. 379, 383 (1887) (repealed 1995); see also John J. Esch, *The Interstate Commerce Commission and Congress—Its Influence on Legislation*, 5 GEO. WASH. L. REV. 462, 462–63 (1937) (describing ICC origins).

¹²⁴ S. REP. NO. 73-781, at 2 (1934), reprinted in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 712 (Max D. Paglin ed., 1989) (observing that the primary focus of the Interstate Commerce Act, and thus the ICC, was railroads).

¹²⁵ Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (1935).

eventually abolished and its functions were transferred to the Surface Transportation Board.¹²⁶

In 1910, the Mann-Elkins Act gave the ICC authority to regulate telephone and telegraph services as well.¹²⁷ Obviously, the mechanics of railroads and telephones are very different. So why give the ICC authority over telephones in the first place? The courts had decided that telephone companies were at least strongly akin to common carriers, prompting state governments to regulate their intrastate activities.¹²⁸ But in the late 1800s and early 1900s, the economic significance of interstate communications was negligible.¹²⁹ The ICC, as the regulator of railroads, had significant experience and expertise in issues associated with common carrier regulation, including but not limited to setting rates and enforcing nondiscrimination requirements.¹³⁰

With the Communications Act of 1934, Congress transferred responsibility for telephone service regulation from the ICC to the newly-created Federal Communications Commission.¹³¹ The ICC supported that transfer.¹³² No crisis prompted Congress to move telephone regulation from the ICC to the FCC. According to Jim Speta, “[i]n 1934, there were no burning issues forcing new regulation of telephone companies.”¹³³ But the ICC had not asked Congress to give it jurisdiction over telephones,¹³⁴ and its personnel were focused primarily on regulating railroads and less interested in telephones.¹³⁵ Meanwhile, the telephone industry was growing.¹³⁶ With that growth came new

¹²⁶ ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

¹²⁷ Mann-Elkins Act of 1910, ch. 309, § 7, 36 Stat. 539, 544–45 (1910).

¹²⁸ See, e.g., *Delaware & A. Tel. & Tel. Co. v. Delaware*, 50 F. 677, 678 (3d Cir. 1892) (“It is no longer open to question that telephone and telegraph companies are subject to the rules governing common carriers and others engaged in like public employment.”); *Chesapeake & P. Tel. Co. v. Balt. & Ohio Tel. Co.*, 7 A. 809, 811 (Md. 1887) (“[Telegraphs and telephones] are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public.”); cf. *W. Union Tel. Co. v. Texas*, 105 U.S. 460, 461 (1881) (“A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods.”).

¹²⁹ Kenneth A. Cox & William J. Byrnes, *The Common Carrier Provisions—A Product of Evolutionary Development*, in *A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934*, *supra* note 124, at 25.

¹³⁰ See *id.* at 25–30 (comparing and contrasting congressional and ICC regulation of railroads and telephones).

¹³¹ 47 U.S.C. § 151 (1934).

¹³² *Hearing on H.R. 8301 Before the H. Comm. On Interstate and Foreign Com.*, 73d Cong. 83 (1934) (statement of Frank McManamy, Chairman, Legis. Comm. of the Interstate Com. Comm’n.), reprinted in *A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934*, *supra* note 124, at 429 (describing the jurisdictional transfer as “sound public policy and in the interest of effective and economical regulation”).

¹³³ James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 *FED. COMM. L.J.* 225, 263 (2003).

¹³⁴ Esch, *supra* note 123, at 480 (noting that the Mann-Elkins Act gave the ICC authority over telephones “without even any suggestion from” the agency).

¹³⁵ See H. REP. NO. 73-1850, at 3 (1934) (noting that the ICC “ha[d] never set up any bureau within its organization designed to concentrate on this field”); see also PETER W. HUBER ET AL., *FEDERAL TELECOMMUNICATIONS LAW* § 3.2.2 (2d ed. 1999) (noting that the ICC “was preoccupied with railroad regulation” and “never formulated any national plan for the [telephone] industry”).

¹³⁶ Cox & Byrnes, *supra* note 129, at 30 (“By 1934, interstate communications had risen to a level of importance requiring greater public attention than the ICC, still very busy with regulating railroads, was able to give it.”).

complexities. Key aspects of the industries' structures were different.¹³⁷ Methods that had been successful in regulating railroads proved inadequate in the context of telephones.¹³⁸ Contemporary documents reflect perceptions that the task of regulating telephone service had simply grown too great to leave as a secondary function of the ICC.¹³⁹ According to the *New York Times*, the chief sponsor of the 1934 Communications Act, Senator Clarence Dill, maintained that an ICC focused primarily on railroad issues simply could not “deal adequately with the communications problem.”¹⁴⁰

In summary, Congress initially assigned what it perceived to be a relatively minor secondary function to an existing agency that seemed to have relevant expertise. As the secondary function grew in size and complexity, the limitations of that assignment became apparent. The agency's emphasis on its primary mission meant that the secondary function received less attention, blunting the advantages of the agency's expertise. And the agency's lack of knowledge about other important aspects of the secondary function correspondingly hampered its ability to accomplish congressional goals. Hence, Congress decided to spin off the secondary function to an agency created specifically to serve those goals.

Of course, spinning off communications matters from the ICC to the FCC created its own issues. In particular, assigning the responsibility for regulating an industry to a single government agency with no other agenda is a perfect recipe for regulatory capture—whereby the agency comes to identify so closely to the industry it regulates that it ultimately serves the interests of industry participants as much as or more than the public interest. Both critics and more neutral observers of the FCC's history level precisely that complaint.¹⁴¹

2. *The Immigration and Naturalization Service*

The story of the INS is a little different. In 1933, President Roosevelt issued an executive order establishing the INS as a combination of the Bureau of Immigration and the Bureau of Naturalization, both of which were housed in the Department of Labor.¹⁴²

¹³⁷ Speta, *supra* note 133, at 262–63; *see also* S. REP. NO. 73-781, at 2 (1934) (“No government organization can provide such regulation without a full knowledge of the contractual relations between the parent, subsidiary, and affiliated corporations engaged in the telephone, telegraph, and cable business.”).

¹³⁸ Carl I. Wheat, *The Regulation of Interstate Telephone Rates*, 51 HARV. L. REV. 846, 846–47 (1938).

¹³⁹ *See* S. REP. NO. 73-781, at 2 (1934) (“This vast monopoly which so immediately serves the needs of the people in their daily and social life must be effectively regulated”); H.R. REP. NO. 73-1850, at 3 (1934) (acknowledging the need for greater regulatory attention); *see also* *Committee Urges Wire-Radio Bill*, N.Y. TIMES, Apr. 20, 1934, at 6.

¹⁴⁰ *Committee Urges Wire-Radio Bill*, *supra* note 139, at 6.

¹⁴¹ *See, e.g.*, Thomas W. Hazlett, *Explaining the Telecommunications Act of 1996: Comment on Thomas G. Krattenmaker*, 29 CONN. L. REV. 217, 220–21 (1996) (“Indeed, the [FCC] became a cartel-enforcement agency, one which could reliably be called on by incumbents to formulate rules which would make competitive entry economically impossible.”); John F. Duffy, *The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and the Technology of Regulation*, 71 U. COLO. L. REV. 1071, 1120–21 (2000) (describing the FCC's history as a prototypical example of agency capture). *But see* Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1187–88 (1973) (suggesting that capture theory “grossly exaggerat[es] the germ of truth which it does indeed embody”).

¹⁴² PRESIDENT'S COMM. ON IMMIGR. AND NATURALIZATION, WHOM WE SHALL WELCOME: REP. OF THE PRESIDENT'S COMM. ON IMMIGR. AND NATURALIZATION 128 (1953).

In 1940, Congress moved the INS to the Department of Justice, where it operated for several decades.¹⁴³

As part of the Department of Justice, the INS served two sets of functions that, arguably, were in tension with one another. First, the INS was an “enforcement agency,” charged with preventing immigrants from entering the country illegally, finding and deporting illegal immigrants, and sanctioning employers of undocumented workers.¹⁴⁴ Additionally, however, the INS was a “service agency,” charged with processing millions of applications annually from U.S. companies, citizens, permanent residents, and others applying for “immigration benefits” such as visas for foreign workers, family members, or asylum seekers, or certificates of naturalization.¹⁴⁵

By the 1990s, the INS was an agency in crisis. Chronic budget shortfalls were one problem, although this was due more to financial mismanagement than to congressional budget cuts.¹⁴⁶ Service fees were a significant source of funds for the INS, representing roughly one third of its budget.¹⁴⁷ Every year, the INS overestimated the fees it would collect and failed to collect fees that it was owed.¹⁴⁸ Due to poor internal financial controls, the INS also endured a bribery scandal.¹⁴⁹

The INS’s primary difficulty, however, was its inability to balance effectively its enforcement functions with its more service-oriented benefit functions. Culturally, the INS prioritized its enforcement functions, cultivating an “enforcement mentality” in training its employees, and emphasizing enforcement experience in filling management positions.¹⁵⁰ The agency’s emphasis on its enforcement functions often resulted in apathy, suspicion, and hostility toward applicants for immigration benefits, prompting even agency employees to describe their organization as “cold, rude, [and] insensitive.”¹⁵¹ Yet, the INS’s service functions—resolving millions of individual applications for immigration benefits each year—were, quite literally, the INS’s “bread and butter,” given the agency’s reliance on service fees.¹⁵² Meanwhile, even as the INS regarded its enforcement functions as primary, the INS was criticized for failing to deport convicted felons, and when they did, for failing to stop those same felons from reentering the country.¹⁵³ Yet, even successful border control efforts prompted criticism from

¹⁴³ *Id.*

¹⁴⁴ Daniel W. Sutherland, *The Federal Immigration Bureaucracy: The Achilles Heel of Immigration Reform*, 10 GEO. IMMIGR. L.J. 109, 113 (1996); Bennett J. Lee, Note, *The Immigration and Naturalization Service: In Search of the Necessary Efficiency*, 6 GEO. IMMIGR. L.J. 519, 521–22 (1992).

¹⁴⁵ Sutherland, *supra* note 144, at 113; Lee, *supra* note 144, at 521–22.

¹⁴⁶ ACCT. AND FIN. MGMT. DIV., U.S. GOV’T ACCOUNTABILITY OFF., GAO/AFMD-91-20, FINANCIAL MANAGEMENT: INS LACKS ACCOUNTABILITY AND CONTROLS OVER ITS RESOURCES 2 (1991), <http://www.gao.gov/products/AFMD-91-20> [<http://perma.cc/LBN5-D59F>] (“INS does not have fiscal accountability over its resources.”); Sutherland, *supra* note 144, at 110 (noting substantial increases in congressional appropriations to the INS).

¹⁴⁷ Sutherland, *supra* note 144, at 127; Joel Brinkley, *At Immigration, Disarray and Defeat*, N.Y. TIMES, Sept. 11, 1994, at A1.

¹⁴⁸ Sutherland, *supra* note 144, at 127–28; Brinkley, *supra* note 147, at A1.

¹⁴⁹ Stephen Engelberg, *In Immigration Labyrinth, Corruption Comes Easily*, N.Y. TIMES, Sept. 12, 1994, at A1.

¹⁵⁰ Sutherland, *supra* note 144, at 127–28; Deborah Sontag & Stephen Engelberg, *Insider’s View of the I.N.S.: ‘Cold, Rude and Insensitive’*, N.Y. TIMES, Sept. 15, 1994, at A1.

¹⁵¹ Sontag & Engelberg, *supra* note 150, at A1 (describing INS employee training as “inculcat[ing] an intrinsic suspicion of immigrants” that “often translates into rudeness and even vindictiveness”).

¹⁵² Sutherland, *supra* note 144, at 116.

¹⁵³ Deborah Sontag, *Porous Deportation System Gives Criminals Little to Fear*, N.Y. TIMES, Sept. 13, 1994, at A1.

congressional and executive branch officials, essentially for complicating the service side of the equation.¹⁵⁴

A series of articles by the New York Times summed up the INS's difficulties. "Hobbled by understaffing, underfinancing, conflicting mandates from Congress and widespread mismanagement failures, it is an agency in disarray. It lurches from one immigration emergency to the next, its employees demoralized, its mission unrealized."¹⁵⁵ Subsequently, the bipartisan U.S. Commission on Immigration Reform, created by the Immigration Act of 1990 to evaluate the immigration system,¹⁵⁶ concluded,

While some argue that enforcement and benefits are complimentary functions, . . . placing incompatible services and enforcement functions within one agency creates problems: competition for resources; lack of coordination and cooperation; and personnel practices that both encourage transfer between enforcement and service positions and create confusion regarding mission and responsibilities. Combining responsibility for enforcement and benefits also blurs the distinction between illegal migration and legal admissions. As a matter of public policy, it is important to maintain a bright line between those two forms of entry.¹⁵⁷

The Commission counseled assigning the immigration enforcement and immigration service functions to different agencies.¹⁵⁸ In 2002, Congress did just that. In the Homeland Security Act, Congress disbanded the INS and divided its functions among three new agencies—U.S. Citizenship and Immigration Services (CIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP)—all within the newly-created Department of Homeland Security.¹⁵⁹

Splitting the INS has created its own problems, most obviously with respect to interagency coordination between the newly-created agencies within the Department of Homeland Security,¹⁶⁰ and also between the Department of Homeland Security and the Department of Justice. For example, under the new structure, both CIS and the Executive Office of Immigration Review (EOIR), which is housed in the Department of Justice, adjudicate asylum proceedings.¹⁶¹ EOIR and CIS do not readily share information and

¹⁵⁴ Joel Brinkley, *A Rare Success at the Border Brought Scant Official Praise*, N.Y. TIMES, Sept. 14, 1994, at A1.

¹⁵⁵ Brinkley, *supra* note 147, at A1.

¹⁵⁶ Immigration Act of 1990, Pub. L. No. 101-649, § 141, 104 Stat. 4978 (1990).

¹⁵⁷ U.S. COMM'N ON IMMIGR. REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 147 (1997), <https://www.utexas.edu/lbj/uscir/becoming/full-report.pdf> [<http://perma.cc/MN4U-6HQM>].

¹⁵⁸ *Id.* at 228.

¹⁵⁹ Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (2002); *see also* Deepa Iyer & Jayesh M. Rathod, *9/11 and the Transformation of U.S. Immigration Law and Policy*, 38 HUM. RTS., no. 1, Winter 2011, at 10 (describing the Homeland Security Act's division of the INS).

¹⁶⁰ U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-081, HOMELAND SECURITY: MANAGEMENT CHALLENGES REMAIN IN TRANSFORMING IMMIGRATION PROGRAMS 12 (2004), www.gao.gov/assets/250/244485.pdf [<https://perma.cc/M9KD-X6RR>] (finding that CBP, CIS, and ICE required "a clearer understanding of the roles and responsibilities of each program").

¹⁶¹ *Accord* 8 C.F.R. § 1208.2(b) (2015) ("Immigration judges shall have exclusive jurisdiction over asylum applications filed by an alien who has been served a Form I-221."); 8 C.F.R. § 208.2(a) (2015) ("[Refugee, Asylum and International Operations] shall have initial jurisdiction over an asylum application filed by an alien physically present in the United States . . ."); *see also* Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 814–20 (2015).

have not adopted standard procedures, to the detriment of asylum applicants seeking legal benefits. Along these lines, the failure of EOIR and CIS to collaboratively manage applicants' asylum clocks¹⁶² resulted in a class action lawsuit against the agencies.¹⁶³ And EOIR and CIS are not the only agencies that clash in the immigration context.¹⁶⁴ Nevertheless, these coordination difficulties pale in comparison to the problems associated with the former INS's clashing missions and cultures.

B. Contemplating the IRS's Future

The parallels between these stories and the IRS's current situation should be obvious. For example, making exempt status determinations and monitoring exempt organizations was once a relatively small and straightforward endeavor. Over the decades, as the nonprofit sector has expanded and as Congress has recognized new categories of exempt organizations, the task has grown and become substantially more complicated, giving rise to a host of issues the IRS is ill equipped to handle. Similarly, an initially modest EITC has been expanded several times, and has correspondingly increased in complexity, again placing the IRS in its present, more challenging position as that program's administrator. The IRS is being torn apart by conflicts that, for the most part, are not of its making. The question is how to resolve that problem.

The most straightforward approach to dealing with the IRS's issues would be to spin off the largest and most politically damaging IRS programs and functions to other new or existing agencies. For example, even if Congress wants to continue using tax credits and deductions rather than direct subsidies to accomplish social welfare goals, another agency could determine and monitor eligibility, handle enforcement of eligibility requirements, and then coordinate with and rely on the IRS to administer the mechanics of processing the credits or deductions through tax returns. Social workers with expertise in the issues faced by socioeconomically disadvantaged persons, rather than tax experts, could determine and monitor eligibility for the EITC and like refundable tax credits, and handle claims of ineligibility and fraud as well, removing those responsibilities from the IRS's jurisdiction. Perhaps Congress could spin off exempt organization determinations and monitoring wholesale, and have the responsible agency just provide the IRS with a list of approved entities. If the IRS suspects a problem with a particular entity, it could refer the matter back to the responsible agency.

By comparison, abolishing the IRS outright seems extreme. Certainly, the federal government cannot function without a revenue agency of some sort. Whatever the IRS's problems, abolishing the IRS and discarding an otherwise effective tax

¹⁶² The "asylum clock" measures when an asylum claim starts and stops. An individual with a pending asylum application is permitted to obtain an employment authorization document once the clock reaches 150 days. See JESÚS SAUCEDO & DAVID RODRÍGUEZ, *UP AGAINST THE ASYLUM CLOCK: FIXING THE BROKEN EMPLOYMENT AUTHORIZATION ASYLUM CLOCK* 3 (2010).

¹⁶³ See *A.B.T. v. U.S. Citizenship & Immigration Servs.*, No. C11-2108, 2013 WL 5913323 (W.D. Wash. Nov. 4, 2013); Shah, *supra* note 161, at 816 (2015) ("Exacerbating the problem was the extent to which the DOJ and the DHS were often unable to effectively communicate regarding when one agency was tolling the clock, both because they were not keeping sufficient track of it themselves (due to bureaucratic ineptitude) and because they rarely shared this information with one another (due to inefficiencies and firewalls set up by the division of the asylum process between the two agencies).").

¹⁶⁴ See generally Julia Braker, *Navigating the Relationship Between the DHS and the DOL: The Need for Federal Legislation to Protect Immigrant Workers' Rights*, 46 COLUM. J.L. & SOC. PROBS. 329 (2013); Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089 (2011) (surveying enforcement conflicts between ICE and the Department of Labor); Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015) (discussing ICE and the FBI's pooling of resources).

administration infrastructure developed over more than 100 years, only to start over with a new revenue agency, seems wasteful and counterproductive. Nevertheless, although abolishing the IRS seems drastic as a sound bite, dividing the IRS into two or three new agencies—one of which would focus on revenue raising under a new name—has its merits. Arguably, the “Internal Revenue Service” brand has been substantially compromised in the eyes of at least a plurality of the taxpaying public. At the risk of giving bragging rights to demagogues, dividing the IRS into two or three new agencies might give the revenue collection arm a fresh start. With that fresh start, perhaps Congress might be persuaded to “restore” funding to those new agencies.

Whether cast as spinning off certain programs and functions or dividing the IRS outright, either approach to restructuring the IRS would likely give rise to interagency coordination problems. Jody Freeman and Jim Rossi stress the importance of interagency coordination in an age where “so many domains of social and economic regulation now seen populated by numerous agencies, which—to satisfy their missions—must work together cooperatively or live side by side compatibly.”¹⁶⁵ Nevertheless, potential interagency coordination issues are not without remedy. Whatever combination of agencies emerges from reorganizing the IRS can deliberately pursue both formal interagency agreements and informal interagency consultations, can coordinate policymaking (much as the IRS, the Department of Labor, and the Department of Health and Human Services do presently in the ERISA and Affordable Care Act contexts), and can seek the assistance of the Office of Information and Regulatory Affairs to prevent coordination problems.¹⁶⁶ Where there’s a will, there’s a way to minimize interagency coordination challenges.

V. CONCLUSION

The IRS is in perilous shape at the moment, and its condition is largely Congress’s fault. Congress has burdened the IRS with too many secondary social welfare and regulatory programs, most of which have little to no relation to the IRS’s primary mission: collecting taxes. The IRS has made its own share of errors, but so do we all when given responsibilities for which we are unprepared and ill-suited.

The secondary functions assigned by Congress to the IRS divert too many resources from the IRS’s core mission. The IRS and its personnel lack the expertise to assess the political consequences of many of the administrative decisions the IRS must make on a day-to-day basis. Politically-controversial decisions upset taxpayers, give rise to skepticism regarding the fairness and legitimacy of the tax system, and thus imperil tax compliance.

Finding a way to separate some of the largest and most politically fraught non-revenue raising functions from the IRS, such as exempt status determinations or health policy administration, would allow the IRS to avoid such political turmoil and return its focus to its core expertise. At the very least, the idea is worth considering.

¹⁶⁵ See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1137–38 (2012).

¹⁶⁶ See *id.* at 1138–1178.