Exempt Organization Advocacy: Matching the Rules to the Rationales

Chisolm B. Laura

Case Western Reserve University

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Tax Law Commons

Recommended Citation
Available at: http://www.repository.law.indiana.edu/ilj/vol63/iss2/1
Exempt Organization Advocacy: Matching the Rules to the Rationales

LAURA B. CHISOLM*

INTRODUCTION

For years at a time, the debate about whether organizations which are tax-exempt under section 501(c)(3) of the Internal Revenue Code should be

* Assistant Professor of Law, Case Western Reserve University.

This work was supported in part by the Mandel Center for Non-Profit Organizations, Case Western Reserve University. The author gratefully acknowledges the helpful comments and criticisms of Peter Junger, William Marshall, Ronald Coffey, and Melvyn Durchslag, and the able research assistance of Loretta Garrison, Victoria Johnson, Evelyn Dzurilla, and Katherine Wambgsans.


Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

Id.

Section 170 of the Internal Revenue Code allows corporate and individual taxpayers to take an income tax deduction for any “charitable contribution,” which it defines to include:

a contribution or gift to or for the use of . . . [a] corporation, trust, or community chest, fund, or foundation . . . organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals . . .

Id. § 170(c)(2)(B).
allowed to participate in the formulation of public policy neither quiets completely nor rises above a murmur. Periodically, however, the volume increases. Recently, the discussion has again taken on a renewed vigor. In November 1986, the Treasury issued proposed regulations to implement changes made in the restrictions on section 501(c)(3) lobbying by the Tax Reform Act of 1976. The regulations, which had been awaited for ten years, drew an immediate, intense, and almost entirely negative reaction from leaders of exempt organizations, legal practitioners, and members of Congress. In response, the Internal Revenue Service (IRS) announced that although it would reconsider some aspects of the proposal, it expected to


6. See, e.g., Sheppard, Sweet Charity and the Lobbying Taint, 34 Tax Notes 848 (1987); Simpson & Guray, Lobbying by Public Charities Under the IRS Proposed Regulations: We Know Lobbying When We See It, 12 Tax Mgmt. Est. Gifts & Tr. J. 39 (1987); Teuber, Mertz Says IRS Needs More Weapons to Police Tax-Exempt Organizations, 34 Tax Notes 1038, 1040 (1987) (quoting Walter Slocombe, partner with Caplin and Drysdale, who suggests regulations be withdrawn because "they are clearly not what Congress intended" and because organizations concerned with public policy will "simply be put out of business").


retain the basic sense of the regulations as proposed.\(^9\)

Newspaper accounts of blatant misuse of the section 501(c)(3) exemption added fuel to the fire. They revealed that the National Endowment for the Preservation of Liberty (NEPL), a section 501(c)(3) exempt organization, had allegedly used profits from arms sales to Iran,\(^10\) as well as most of the contributions it had received,\(^11\) to lobby for Contra aid and to campaign against members of Congress who opposed such aid.\(^12\) The unfolding NEPL story attracted the attention of Congress.\(^13\) By the time the organization's president and public relations expert had pleaded guilty to charges of conspiracy to defraud the federal government by funneling supposedly deductible contributions to the Contras,\(^14\) and the IRS had revoked the organization's exempt status,\(^15\) the Chairman of the House Ways and Means Committee Subcommittee on Oversight had informed the nonprofit organization community that exempt organization lobbying and campaign activity would be a "first priority" of the Subcommittee.\(^16\) The Subcommittee held hearings\(^17\)

appointed an advisory group of experts in the area of exempt organizations to assist in the reformulation of the regulations. Non-Profit Organization Tax Letter (Org. Mgmt., Inc.) at 1 (June 30, 1987). In addition, the IRS heard from interested parties at hearings held on May 11 and 12, 1987. Broaddus, Revision Begins: IRS Opens the Door to Criticism of Its Proposed Regulations on Lobbying by Charities, FOUND. News, May-June 1987, at 62.

9. Broaddus, supra note 8, at 62. See also IRS, Possible Alternatives Regarding Proposed Regulations on Lobbying by Public Charities that Elect Under Section 501(h), in Commissioner’s Exempt Organizations Advisory Group Discussion and Background Material at Tab A (1987).

10. Iran-Contra Aid Scandal Develops Tax Twist; Pickle Meets with Gibbs to Discuss Activities of Tax-Exempt Organizations, 33 TAX NOTES 1093 (1986) [hereinafter Iran-Contra Scandal].

11. See NEPL Tax Return Shows It Used $2.34 Million to Lobby for Aid to Contras, 34 TAX NOTES 76 (1987) (NEPL’s 1985 tax return showed that NEPL collected $3.3 million in contributions and used $2.34 million to lobby for the Contras and to pay its top officers).


15. Id. (citing IRS Information Release IR 87-60 (Apr. 30, 1987)).
16. Congressman J.J. Pickle Remarks to the Washington Non-Profit Tax Conference, March 6, 1987, Non-Profit Organization Tax Letter (Org. Mgmt., Inc.) Special Insert 1987-2 (Mar. 27, 1987). The issue had been on the Subcommittee's agenda for two years, but consideration had been postponed in favor of other topics. Id. Congressman Pickle was one of the targets of NEPL's negative advertising campaign. See Iran-Contra Scandal, supra note 10.

and generated a list of recommendations as a "conceptual starting point for legislation" to address the perceived problems.\textsuperscript{18} In July, Subcommittee Chairman J.J. Pickle and Ranking Minority Member Richard T. Schulze introduced a bill which would incorporate some of the recommendations into the Internal Revenue Code. The Pickle-Schulze proposal was incorporated into the Omnibus Budget Reconciliation Bill of 1987, which was passed just before Congress adjourned at the end of 1987.\textsuperscript{19}

Although charitable organizations have a long tradition of advocating social change, over the last three decades they have expanded both the amount of their advocacy activity and their repertoire of advocacy strategies. Increasing numbers of nonprofit organizations have come to believe that the traditional beneficiaries of "charitable" activity are only incompletely served by activities that simply respond to individual problems which are overlooked, or even created by, the laws and public systems devised to address the needs of society's least fortunate. These organizations have turned their efforts to raising public awareness, demanding accountability from governmental agencies, and pressing for changes in the law, all in an attempt to serve the collective interests of those whose needs are ill-served by the status quo. Legal services organizations which were established to provide direct representation for the indigent have undertaken law reform efforts in the courts\textsuperscript{20} and in the legislative arena\textsuperscript{21} in order to challenge the broader, systemic problems that face their clients. Other groups have been created for the express purpose of bringing about social change. Some claim to speak for the general population on issues of broad public concern, such as consumer rights, environmental quality, and nuclear arms control.\textsuperscript{22}


\textsuperscript{21} See 31 \textit{CONG. Q. WEEKLY REP.} 1754 (1973).

\textsuperscript{22} See, e.g., 1979 \textit{CONG. Q. ALMANAC} app. D., at 5, 17 (1979) (describing the lobbying efforts of Common Cause and Public Citizen); \textit{COUNCIL FOR PUBLIC INTEREST LAW, BALANCING}
define their missions as the protection of particularly vulnerable subpopulations.23 These advocates have demanded recognition of, and respect for, the rights of individual clients within public social service systems.24 They have fought to obtain and maintain the allocation of public resources to programs serving the poor, the old, the young, and the ill,25 and they have monitored the performance of government in its role as provider of social services and promoter of general well-being.26

Although this activism may not fit comfortably within the narrowest and most traditional sense of “charitable” enterprise, many believe that the roles of advocate and improver of social systems,27 empowerer of citizens,28 and critic and monitor of government policies and programs29 are among the most crucial functions of the nonprofit sector. In sum, “the voluntary sector [provides] countervailing definitions of reality and morality—ideologies, perspectives and world views that frequently challenge the prevailing assumptions about what exists and what is good and what should be done in society; [and] is most likely to say that the emperor has no clothes.”30

Federal tax law restricts the ways in which and the extent to which organizations that qualify for exemption and donor deductibility under section 501(c)(3) (section 501(c)(3) organizations) may participate in political and governmental reform. As these organizations have shifted their focus
from clients to systems, the restraints on system reform activity, long present in the Tax Code and its elaborations, have increased in number, complexity, and importance. An organization that elects to serve its beneficiaries by pursuing system reform rather than, or in addition to, supplying direct client services will find that its activities are subject to different constraints, depending upon the strategy selected. For example, the Tax Code imposes no direct limits on advocacy directed toward administrative agencies, but significantly and elaborately restrains legislative involvement. Pursuit of system change through issue-oriented litigation is subject to detailed prescriptions regarding issue and case selection, organization control, and sources of funding. Tax law limitations on direct involvement in political election campaign activity virtually foreclose this choice of strategy for section 501(c)(3) organizations, although they may engage in some peripheral, arguably election-related, activity. In all cases, the organization is subject to the requirement that section 501(c)(3) organizations be “operated exclusively” for “charitable,” “educational,” “religious,” or other specified purposes. Although the “operated exclusively” requirement is, in theory, uniformly applicable to all section 501(c)(3) organizations, in practice it takes on a different meaning when applied to organizations which focus on system reform rather than direct client service.

As the charitable sector has grown increasingly vocal and articulate about the state of the emperor’s wardrobe, its activist role has become the object of mounting scrutiny. While the precise question has varied, depending upon the context in which it has been raised, the issue that has emerged is one of basic definition: does the fact that an organization directs its energies toward system change, rather than direct service delivery, disqualify it for tax-exempt status or render it ineligible to receive contributions which are deductible to the donor? The question, in one variant or another, has been posed repeatedly since the beginning of the century. Many times the answer has been, “yes, it does indeed.” And when the answer has been “no,” it has frequently been couched in terms of particular circumstances which justify deviation from a general assumption that, for purposes of tax classification, “charity” does not seriously address itself to social change.

Although developments in the last twenty years have probably expanded the degree to which organizations may safely devote their resources to the pursuit of system change, the adjustments, for the most part, have been

31. See infra notes 127, 138, 140; text accompanying note 127.
32. See infra notes 101-72 and accompanying text.
33. See infra notes 53-72 and accompanying text.
34. See infra note 373.
35. See infra notes 39-43 and accompanying text.
36. See infra notes 44-52 and accompanying text.
piecemeal, superficial, and ad hoc. Unfortunately, even now it is not clear just how much of what kind of activity, addressed to which social issues, will so color the character of an organization that it no longer qualifies for exemption and donor deductibility under section 501(c)(3) of the Internal Revenue Code.

All indications are that neither Congress nor the Internal Revenue Service will turn away from the issue of exempt organization political activity without some further attempt to amend the controls. The desire to revise is understandable; few would argue that the law’s present approach to exempt organization involvement in the formulation of public policy is satisfactory. The fact that Congress and the IRS are being urged both to tighten up and to lighten up is not simply a manifestation of the opposing perspectives of those whose attention is drawn by apparent abuses and those whose activities are constrained. The perception that the law is both too lax and too restrictive reflects basic shortcomings of the restrictions. The law is fundamentally flawed in its conception and its application. The limitations have often come from hard cases of the sort that tend to make bad law. The constraints appear to be drawn from a mix of historical accident, assorted political pressures, and conclusions (perhaps unfounded, perhaps not) about traditional notions of “charity” and Congressional motivation. Only occasionally do they represent thoughtful responses to legitimate policy concerns. In short, these constraints have never been addressed as elements of a unified response to a set of coherent underlying principles.

The underlying principles can and should be identified; the law can and should be designed to reflect them. The tax law limitations on the various kinds of reform activities and uncertainty about the boundaries of those limitations have an important shaping effect on the composition, structure, and function of the nonprofit sector. To ensure that the shaping is deliberate, thoughtful, and reflective of valid social policy considerations it is essential, first, to articulate the goals of regulation and, second, to understand the effects, both intended and unintended, of regulation. Only upon such a carefully constructed foundation can we hope to build a legal framework which is efficient, effective, and equitable.

38. In his seminal article criticizing the limitations on lobbying by exempt organizations, Professor Clark observed that “the restriction on political activities illustrates all the difficulties of attempting to fashion one rule to cover an infinite variety of dissimilar situations.” Clark, The Limitation on Political Activities: A Discordant Note in the Law of Charities, 46 Va. L. Rev. 439, 466 (1960). Nearly three decades later, the criticism remains apt. The numerous modifications and instances of interpretation in the intervening years have only exacerbated the problems which arise from failing to carefully tailor the rules to fit the reasons for the rules.
I. The Present Limitations on System-Focused Advocacy by Section 501(c)(3) Organizations

A. The "Organized and Operated Exclusively" Requirement

Any advocacy strategy an organization might choose is subject, as are all its activities, to the limits implicit in the section 501(c)(3) requirement that it must be "organized and operated exclusively" for "religious," "charitable," or "educational" purposes. If the written instrument by which an organization is created limits the organization's purposes to one or more of the exempt purposes described in section 501(c)(3) and does not expressly authorize activities which are prohibited by section 501(c)(3), the organization will be found to be "organized exclusively" for exempt purposes.

The operational test is of much greater consequence. Although the Internal Revenue Code's requirement that the organization's purposes be "exclusively" charitable, educational, or religious is not literally applied, the presence of a single significant non-exempt purpose will disqualify the organization under the operational test even if it is clearly subsidiary to the primary pursuit of undeniably charitable or educational goals. The standard formulation of the operational test focuses not upon the nature of the activities undertaken, but rather upon whether those activities are designed

39. I.R.C. § 501(c)(3) (West Supp. 1987). Section 501(c)(3) also provides for exemption for organizations whose purpose is "scientific," "literary," or "testing for public safety." Id. In addition, organizations formed for "the prevention of cruelty to children or animals" and some organizations which "foster national or international amateur sports competition" are eligible for the section 501(c)(3) exemption. Id.

40. The necessary provisions must be included in the organization's creating document; provisions in the by-laws cannot remedy a defect in the underlying instrument. By-laws which authorize legislative activity when the creating document is silent on the issue have been held to violate the "organized exclusively" requirement.

An organization must meet the organizational test independently of any consideration of its activities. Thus, if the organization's stated purposes are broader than those allowed by section 501(c)(3), the organizational test is failed, even if the actual operations of the organization have been entirely within section 501(c)(3)'s purposes. Treas. Reg. § 1.501(c)(3)-1(b) (1959); Exempt Organizations Handbook, 4 Int. Rev. Man.-Admin. (CCH) §§ 330-338.

The Exempt Organizations Handbook states that "[a]rticles of organization that fail to meet the organizational test are ordinarily amendable. . . . Therefore, in most cases, the status of an organization depends ultimately on the operational test." Id. § 324.

41. An organization is regarded as "'operated exclusively' for one or more exempt purposes only if it engages primarily in activities which accomplish" its exempt purposes. Treas. Reg. § 1.501(c)(3)-1(c)(1) (1959). See also World Family Corp. v. Commissioner, 81 T.C. 958 (1983).

42. Better Business Bureau of Washington, D.C. v. United States, 326 U.S. 279, 283 (1945) ("[T]he presence of a single [non-exempt] . . . purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] purposes.").
to further the organization's exempt goals. This approach has been followed in the context of system-change advocacy, but not evenly and not easily.

The IRS has recognized that non-traditional advocacy activities do not necessarily undermine an organization's claim to charitable or educational status. For example, the IRS justified the exemption of an organization which mediated international environmental disputes with the statement that "[t]he law of charity provides no basis for weighing or evaluating the objective merits of specific activities carried on in furtherance of a charitable purpose, if those activities are reasonably related to the accomplishment of the charitable purpose, and are not illegal or contrary to public policy." However, groups which have proposed to pursue their charitable ends by means of somewhat unorthodox advocacy strategies have sometimes found the IRS reluctant to apply the general principle to their specific circumstances. For example, the IRS insisted that the Center on Corporate Responsibility, an organization which proposed to engage in proxy contests in order to promote corporate social responsibility with respect to the impact of corporate policies on problems of employment discrimination, pollution, and conservation of natural resources, was not entitled to exemption under section 501(c)(3). Rather, the Service maintained, proxy contests are "business processes" with "no community benefit," regardless of their ultimate objective. Although not necessary to its holding in favor of the Center, the District Court for the District of Columbia took pains to address the issue in a long footnote, where it asserted that the Center's purpose of encouraging corporate management to "assume some of its duties as a member of the community," clearly carries a public benefit, and remarked that proxy contests, as a "direct and effective instrument . . . by which the charitable purposes are accomplished for the public good," are charitable activities and thus meet the operational test.

Even after the court's statement in Center on Corporate Responsibility, the IRS denied the section 501(c)(3) charitable classification to an organization which proposed to orchestrate a nationwide boycott of Nestlé products to protest the way that company was marketing infant formula in the Third

43. Goldsboro Art League, Inc. v. Commissioner, 75 T.C. 337 (1980); Pulpit Resource v. Commissioner, 70 T.C. 594 (1978) (commercial activities). See also Rev. Rul. 69-572, 1969-2 C.B. 119 ("The performance of a particular activity that is not inherently charitable may nonetheless further a charitable purpose. The overall result in any given case is dependent on why and how that activity is actually being conducted.").


46. Id. at 874 n.21 (citing Priv. Ltr. Rul. 52-0899187 (May 16, 1973)).

47. Id. at 874-75 n.21.
Only after the group filed suit to challenge the denial did the Service change its position and grant the exemption. Thus, despite indications that the IRS has brought its approach to evaluating advocacy activities into line with its approach to evaluating social and commercial activities, it is not at all clear that strategies which are novel or threatening to the status quo can pass the operational test without a fight.

**B. Using Litigation as a Strategy for Reform**

Indeed, despite its apparent focus on an organization's ultimate purposes, the operational test has long been a mechanism by which exempt status has been denied to groups seeking to change public systems and policies based upon the means selected for mounting the challenge, even where the means involved were not nearly so novel as proxy fights or commercial boycotts. For example, choosing litigation as the means by which to pursue a charitable cause has sometimes brought into question an organization's claim that it is being operated exclusively for charitable purposes.

Charitable organizations are not newcomers to the courtroom. Providing free individual legal representation to indigent or otherwise disadvantaged clients fits comfortably within even a narrow definition of "charity." Indeed, this variety of advocacy has long been accepted as quite compatible with section 501(c)(3) exempt status.

In addition, litigating to defend the human and civil rights of racial, social, and political minorities has tradi-

---


50. Id.

51. See Gen. Couns. Mem. 37,858 (Feb. 16, 1979) (noting that rent strikes, economic boycotts, picketing, and mass demonstrations are not necessarily impermissible means of pursuing charitable or educational purposes, but that the "inherent nature of the activities should be carefully analyzed for legality, for compatibility with public policy, and for reasonable relationship to the accomplishment of the organization's purpose"); supra note 43 and accompanying text.

52. See Ginsburg, Marks & Wertheim, Federal Oversight of Private Philanthropy, in 5 Commission on Private Philanthropy and Public Needs, Research Papers 2575, 2587 (1977) (noting that ambiguity of the operational test "accords to the Service a breadth of interpretive discretion that is relatively untrammeled").

The declaratory judgment provisions of section 7428 of the Internal Revenue Code, added in 1976, may have a moderating influence. Hopkins suggests that it will be the courts' refusal to permit denials, rather than the IRS's inclination to grant exempt status to such groups, that will sustain the principle that choosing advocacy as the means to achieve otherwise exempt ends does not cause an organization to fail the operational test. B. Hopkins, supra note 49, at 292.

53. See infra note 240 and accompanying text.

tionally posed no obstacle to eligibility for exempt status. However, the use of litigation to pursue a cause or to establish a principle that does not implicate the rights or interests of a particular poor or otherwise disadvantaged client has been questioned, even where the cause or principle, if pursued by other means, concededly falls within the scope of the section 501(c)(3) exemption.

The issue of whether law reform litigation is an appropriate section 501(c)(3) activity came into focus in the 1960’s. Inspired, perhaps, by the success of broad-focused reform litigation undertaken by the American Civil Liberties Union, the National Association for the Advancement of Colored People, and traditional legal aid groups, organizations concerned with issues closer to the edges of the broad outlines of section 501(c)(3) recognized that a carefully planned litigation program could be an effective, and perhaps essential, strategy for achieving their goals. The IRS responded by granting exempt status to some of these organizations and denying it to others, then declared a moratorium on exemption rulings for public interest law firms other than those providing legal representation to “specifically identified groups, such as poor or underprivileged people that are traditionally recognized as objects of charity.”

The moratorium, and the swift and loud reaction it evoked from the public and the Congress, led to the unusually prompt promulgation of guidelines intended to distinguish litigation activity that will defeat exempt status from that which will not. These guidelines define the limits on the use of litigation by section 501(c)(3) organizations.


The ACLU and the NAACP offer longstanding and highly visible examples of this variety of legal advocacy, having engaged in litigation of this sort since the early part of the century. See Houck, supra note 54, at 1440-41.


58. Critical reaction to the moratorium was heard from the press, the legal community, academics and government administrators. See Adams, Responsible Militancy—The Anatomy of a Public Interest Law Firm, 29 Rec. N.Y.C. B.A. 631 (1974); Houck, supra note 54, at 1445.

The Senate Subcommittee on Employment, Manpower, and Poverty scheduled oversight hearings to take place just five weeks after the issuance of the IRS press release. Days before the hearings were scheduled to begin, the IRS announced it would resume issuing exemption rulings for public interest law firms and released guidelines by which eligibility for exemption would be evaluated. Houck, supra note 54, at 1445-46.
The guidelines, set out in Revenue Procedure 71-39, do not define "charitable" litigation in terms of the substantive issues addressed. They reflect a decision that the only sound way to evaluate whether proposed litigation activity (beyond traditional kinds of charitable legal representation) involves sufficient public benefit to justify exemption is to focus on whether the organization's methods of operating set it apart from the ordinary practice of law. Where an organization's litigation activity is purportedly on behalf of a diffuse public interest, it must be undertaken in ways which mark it as being different from litigation which could be pursued without the publicly supported benefits of exempt status.

One of the guidelines sets the theme. In order to be charitable, it is necessary that "the engagement of the organization in litigation can reasonably be said to be in representation of a broad public interest rather than a private interest," and that "the litigation is designed to present a position on behalf of the public at large on matters of public interest." The guidelines indicate that involvement in cases which implicate substantial private financial interests that would "warrant representation from private legal sources" will defeat qualification for exempt status. Conversely, involvement in "class actions in the public interest, suits for injunction against action by government or private interest broadly affecting the public, similar representation before administrative boards and agencies, [and] test suits where the private interest is small" would be compatible with section 501(c)(3) exempt status. Other more specific guidelines address control of the organization and its agenda.


I think we were somewhat diverted initially by looking at causes, but we did conclude that we could not pick and choose between causes and say litigation on behalf of this cause is good but litigation on behalf of that cause is bad. . . . Nevertheless there are many instances where the private interest is not such that there can be represented through the normal commercial sources a public voice.

This is what we are talking about—the representation of a public voice that has no substantial private interest.

Id. See also Houck, supra note 54, at 1448-51.
62. Id.
63. Revenue Procedure 71-39 requires that the policies and programs of the litigating organization be determined by a board or committee that is both beyond the control of the organization's staff and is "representative of the public interest." Rev. Proc. 71-39 § 3.05, 1971-2 C.B. 575, 576. While Revenue Procedure 71-39 does not explain what it takes to constitute a group that is "representative of the public interest," later application of the guidelines to an organization seeking exemption found a board consisting of "prominent attorneys, law professors, and leaders of public interest organizations" to satisfy this requirement. Rev. Rul.
The remaining guideline, that ""[t]he organization . . . not accept fees for its services except in accordance with procedures approved by the Internal Revenue Service,"" was not given content until 1975, when the IRS ruled that a public interest law firm may not solicit or accept attorney's fees from its clients. According to the Service, acceptance of even reduced fees, tailored to the circumstances of clients who are willing and able to pay something for representation although they are unable to pay usual market rates, prevents the organization from being sufficiently distinguishable from traditional, private sources of representation and thus defeats the organization's claim that it is operating exclusively for charitable purposes. An organization may accept attorney's fees, but only if they are paid by an opposing party as a result of a court or agency award, or if they are approved as part of a settlement agreement. Further, the organization must take care that the possibility or probability of a fee award does not influence its case selection. Finally, the organization is barred from accepting even court-awarded fees in excess of half of the operating costs of the organization's legal functions over the five years leading up to and including the year in which the fees are awarded.

75-74, 1975-1 C.B. 152.

The guidelines further require that the organization not be "operated, through sharing of office space or otherwise . . . so as to create identification or confusion with a particular private law firm," Rev. Proc. 71-39 § 3.06, that there be "no arrangement to provide, directly or indirectly, a deduction for the cost of litigation which is for the private benefit of the donor," id. § 3.07, and that the organization provide the IRS with an annual description of cases litigated and the rationale for their selection, id. § 3.04. The guidelines also require that the organization's activity not entail "a program of disruption of the judicial system, illegal activity, or violation of applicable canons of ethics," id. § 3.03, and that the organization comply with the provisions of section 501(c)(3) that limit lobbying and election campaign activity, id. § 3.08. These last two guidelines simply restate conditions that apply in any case. All exempt organizations, quite independently of Revenue Procedure 71-39, are held to the principle that activities "may not be illegal or violate established public policy." Bob Jones Univ. v. United States, 461 U.S. 574, 587 (1983). The lobbying and campaign activity restrictions, of course, would apply without being reiterated here. See infra notes 101-72 and accompanying text.

66. Rev. Rul. 75-75, 1975-1 C.B. 154. A different rule applies to traditional legal aid organizations which provide direct representation for indigent individuals. In that context, the IRS has ruled that charging fees based on clients' ability to pay does not "negate or significantly detract from the substantial economic relief provided to the poor and distressed by the organization" and, consequently, does not undermine the organization's claim that it is operated exclusively for charitable purposes. Rev. Rul. 78-428, 1978-2 C.B. 177.
67. Rev. Proc. 75-13 § 3.02, 1975-1 C.B. 662; Rev. Rul. 75-76, 1975-1 C.B. 154, 155. Fee awards must be paid to the firm rather than to individual staff attorneys and must be applied to the organization's normal operating expenses. Rev. Proc. 75-13 §§ 3.04-3.05, 1975-1 C.B. 662.
It might be argued that guidelines which require drawing a distinction between financial interests that are sufficient to "warrant representation from private legal sources" and those that are not, and which require evaluation of whether an organization's policy-setting body is "representative of the public interest," confer an unacceptable measure of administrative latitude. Certainly, the birth of the guidelines was attended by no little controversy, and their recent application has been criticized. For the most part, however, a reasonable reading in light of the stated objective—that is, to reserve the exemption for representation of broad public interests that cannot command representation in the traditional marketplace for legal services—reveals that the limitations on the use of litigation to influence systems and policies are fairly straightforward and not terribly restrictive. While the practicalities of funding may impose limits, nothing in the tax law prevents an exempt organization from committing virtually unlimited amounts of organizational resources and efforts to this strategy.

70. See supra note 58 and accompanying text.

71. The criticisms tend to center not on complaints of overly restrictive application, but rather on the failure of the IRS to apply the guidelines restrictively enough. Recent commentary describes the growing phenomenon of exempt "public interest law firms" whose positions on environmental, consumer, and other public interest issues track those of the substantial private interests which provide both funds and policy direction for the exempt organizations. For an especially thorough and well-crafted description and critique of this phenomenon, see Houck, supra note 54. See also O'Connor & Epstein, Rebalancing the Scales of Justice: Assessment of Public Interest Law, 7 Harv. J.L. & Pub. Pol'y 483 (1984); Singer, Liberal Public Interest Law Firms Face Budgetary, Ideological Challenges, 11 Nat'l J. 2052 (1979); Weiss, Pacific Legal Foundation: The Right Sees Wrongs, Found. News, May-June 1978, at 34.

72. An exempt organization that wishes to use litigation as one strategy in the context of other kinds of activities is also relatively free to do so and, in fact, may be even less constrained than the public interest law firm whose primary activity is litigation. In a 1980 ruling on the eligibility for exempt status of an environmental organization that engaged in litigation as a party plaintiff, the IRS appeared to reverse the position it had taken in Center on Corporate Responsibility, Inc. v. Schultz, 368 F. Supp. 863 (D.D.C. 1973), that litigation is an inherently non-charitable activity unless it is conducted within the guidelines of Revenue Procedure 71-39. Rev. Rul. 80-278, 1980-2 C.B. 175. In the General Counsel Memorandum that provided the basis for Revenue Ruling 80-278, the IRS noted that when the organization's purpose is a recognized charitable one, "the means or activities employed . . . do not have to be per se charitable, so long as they are in furtherance of the exempt purpose and one reasonably related to the accomplishment of such purpose." Gen. Couns. Mem. 37,661 (Aug. 30, 1978). The ruling's statement that "the correct analytical approach in a case . . . in which an issue arises as to the propriety of a particular activity is: first, is the organization's purpose charitable; second, are the organization's activities neither illegal, contrary to public policy, nor in conflict with express statutory restrictions or limitations; and third, are the activities of the organization in furtherance of its exempt purpose and reasonably related to the accomplishment of such purpose," id., seems to suggest that the guidelines of Revenue Procedure 71-39 are irrelevant in this context.

Professor Houck proposes that Revenue Ruling 80-278 suggests a categorical exemption for environmental organizations from the constraints of Revenue Procedure 71-39 and the later Revenue Rulings and Revenue Procedures that amplified its limitations on attorney fees. Houck, supra note 54, at 1454 n.164. Indeed, it seems that the ruling might be read even more broadly—that is, to substitute its broader principles for the specific constraints of Revenue Procedure
C. Changing Systems by Raising Public Awareness

Getting one's message to the public is often a crucial component of advocacy efforts intended to change systems and policies. Treasury regulations provide that "education" embraces not only formal instruction of the individual, but general dissemination of information as well,\(^7\) and that advocacy with the intent of molding public opinion toward acceptance of social change can be "charitable."\(^7\) Nonetheless, there can be little dispute that the Internal Revenue Code, as amplified and interpreted, imposes significant, if not always clear, limits on a section 501(c)(3) organization's pursuit of its goals through the means of public education.

The limitations arise from a longstanding pattern of IRS and judicial attention to whether an organization which addresses its message to the public is advocating a position, and, some have suggested, whether it is advocating the wrong position.\(^5\) The earliest Treasury view was that advocacy was not education for purposes of tax exemption and deductibility of contributions; simple promotion of a position, extreme or not, provided the basis for denial of "educational" status.\(^6\)

71-39, Revenue Procedure 75-13, and Revenue Rulings 75-75, 75-76, and 76-5 for any organization that defines its purposes in terms of recognized charitable ends. Under this reading, only public interest law firms which do not identify their purposes in such terms, but rather, in terms of providing otherwise unavailable representation on issues determined as they arise to implicate the public interest, would be held to the guidelines.

It is not entirely clear, however, that the ruling totally removes the guidelines' constraints, even from an environmental organization that engages in litigation as a small part of its total activities. The General Counsel Memorandum notes that "[o]bviously, . . . if evidence arises that a suit was brought for harassment, the suit involved sufficient private interests to warrant private representation, or the suit was for the private interests of the plaintiffs, the Service could properly conclude that such litigation was not a charitable activity." Gen. Couns. Mem. 37,661 (Aug. 30, 1978). While the first and last factors would reasonably support a conclusion that the activity is not in furtherance of a charitable purpose, the middle element seems inexplicable except as an indirect reiteration of the basic premise of Revenue Procedure 71-39.


The controversiality of an organization's issue or position appears to have played a role in at least some early determinations of eligibility for exempt status, although there is disagreement as to how important a role. See, e.g., Lehrfeld, supra note 75, at 60; cf. Thompson, supra, at 498 n.29 ("no evidence suggests that the Service actively discriminated against organizations that advocated extreme viewpoints, or in favor of organizations that advocated mainstream viewpoints").

The earliest Treasury regulations defining "education" for purposes of exemption excluded dissemination of "controversial or partisan propaganda." Treas. Reg. Art. 517 (Revenue Act of 1918) (1919), in T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1920). Although it is unclear just how the Treasury applied that provision, see Thompson, supra, at 498, Lehrfeld notes that
While merely taking sides on an issue is no longer grounds for denial of exemption, IRS disapproval of the substance or tone of an organization's public education efforts continues to provide a basis for adverse rulings. Treasury Regulations, and cases interpreting them, continue to suggest limits on advocacy of a position, even absent legislative involvement. In 1959, the Treasury specified by regulation that "[advocating] social or civic changes or [presenting] opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views" does not prevent an otherwise "charitable" organization from qualifying for exemption under section 501(c)(3), so long as it is not an "action organization." At the same time, the Treasury defined "educational" to include promotion of a particular position or viewpoint so long as the advocating organization presents, not "unsupported opinion," but "a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion."77

most of the early cases dealing with the question do not indicate whether the litigation followed adverse private rulings by the IRS or whether the organizations and individuals ignored the ruling process. Lehrfeld, supra note 75, at 56.

Early judicial responses to advocacy at least gave lip service to, and may have pivoted on, the notion that organizations advocating change ought not to be given exempt status or be designated eligible for deductible contributions. See, e.g., Lebuscher v. Commissioner, 54 F.2d 998 (2d Cir. 1932), modifying 21 B.T.A. 1022 (1930); Cochran v. Commissioner, 30 B.T.A. 1115 (1934), rev'd, 78 F.2d 176 (4th Cir. 1935); Weyl v. Commissioner, 18 B.T.A. 1092 (1930), rev'd, 48 F.2d 811 (2d Cir. 1931); Slee v. Commissioner, 15 B.T.A. 710 (1929), aff'd, 42 F.2d 184 (2d Cir. 1930); Fales v. Commissioner, 9 B.T.A. 828 (1927). Thompson, supra, at 498-501, suggests that the real focus of the courts in these early cases was the legislative activity of the organizations. With a few exceptions, the cases seem to support this contention at least as convincingly as they support the proposition that advocacy per se or controversy was the basis for denial of exemption or deductibility. See, e.g., Cochran v. Commissioner, 78 F.2d 176 (4th Cir. 1935), rev'd 30 B.T.A. 1115 (1934); Slee v. Commissioner, 42 F.2d 184 (2d Cir. 1930); Watson v. Commissioner, 27 B.T.A. 463 (1932); Lebuscher v. Commissioner, 21 B.T.A. 1022 (1930), modified by 54 F.2d 998 (2d Cir. 1932); Slee v. Commissioner, 15 B.T.A. 710 (1929), aff'd, 42 F.2d 184 (2d Cir. 1930); Fales v. Commissioner, 9 B.T.A. 828 (1927).

Even after 1934, when Congress incorporated into the Code an explicit limitation on legislative activity, courts continued to note whether a challenged organization was taking sides on an issue and whether its issue, or its position on the issue, could be classed as "controversial." Some courts held that advocacy alone should not defeat exemption. See, e.g., Seasongood v. Commissioner, 227 F.2d 907 (6th Cir. 1955); Girard Trust v. Commissioner, 122 F.2d 108 (3d Cir. 1941); Old Colony Trust v. Welch, 25 F. Supp. 45 (D. Mass. 1938). Others maintained that advocacy was inconsistent with exemption, see, e.g., Estate of Blaine, 22 T.C. 1195 (1954), or that the controversy of the organization's position was an appropriate focus of inquiry in making the determination, see, e.g., Dulles v. Johnson, 273 F.2d 362 (2d Cir. 1959), cert. denied, 364 U.S. 834 (1960) (deduction allowed because organization's position was not controversial); Marshall v. Commissioner, 147 F.2d 75 (2d Cir. 1945) (too controversial, although no legislative activity). During this period, the Treasury took the position that advocacy per se was not a bar to exemption, so long as the organization's purpose and activities were noncontroversial and its presentation was fact-based, objective, and non-inflammatory. For a discussion of the regulations and IRS policy that formed the basis of this position, see Thompson, supra, at 504-07.

The "full and fair exposition" standard was not challenged until 1980, when Big Mama Rag, Inc., a nonprofit feminist organization denied section 501(c)(3) status on the grounds that its publication did not meet the standard, successfully asserted that the regulation is so subjective and imprecise as to violate the first amendment. The United States Court of Appeals for the District of Columbia Circuit agreed with Big Mama Rag, Inc. that the regulation defining "educational" was void for vagueness, first, because it failed to delineate clearly enough which organizations are subject to the full and fair exposition requirement, and second, because the standard itself was incapable of principled application. The court's rejection of the full and fair exposition standard would seem to remove whatever constraints there might have been on the pursuit of a charitable or educational purpose through publication and distribution of an organization's viewpoint, even when the issues or the viewpoints presented are "controversial." However, as a practical matter, the decision most likely has little effect. First, the IRS is not required to change its practice despite the adverse ruling. More importantly, the full and fair exposition test seems to have been revived in substance, if not in form.


The regulation may have remained unchallenged for so long because the IRS found few occasions to apply the full and fair exposition standard and because on those few occasions when the IRS did apply the test, it usually determined that the standard was met. Big Mama Rag, 631 F.2d at 1036-37; Thompson, supra note 76, at 510 n.48.

80. Big Mama Rag, 631 F.2d at 1036. The regulation imposed the test only on organizations which "advocate a particular position." Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii)(b) (1959). The court concluded that the IRS policy of applying the full and fair exposition test only to organizations which addressed controversial issues had the effect of basing the grant or denial of exempt status on the purely subjective response of Service officials to the content of an organization's views. Big Mama Rag, 631 F.2d at 1036-37.

81. Big Mama Rag, 631 F.2d at 1038. The court noted that it is impossible to determine objectively whether expression of opinion is adequately supported by fact, or whether the message has crossed the line that separates "appeal to the mind" (which the government maintained was "educational"), and "non-educational" "appeal to the emotion." Id. at 1038-39.

82. Id. at 1040.

83. Commentary published immediately after the decision, in fact, assumed that the decision would have this effect, and criticized the result precisely because it seemed to leave the IRS with no way to draw a necessary dividing line between "educational" and "non-educational" promotion of a cause. See Winslow & Ash, supra note 79; Note, supra note 75; Recent Decisions, supra note 79.

84. The IRS will often relitigate issues, hoping for a split in the circuits or outright reversals. B. BITTKER, FEDERAL INCOME, ESTATE AND GIFT TAX 27 (3d ed. 1964).
Although the government chose not to challenge the circuit court's holding in \textit{Big Mama Rag}, it did attempt to resuscitate the full and fair exposition test in \textit{National Alliance v. United States}, a case which was underway by the time \textit{Big Mama Rag} was decided. In \textit{National Alliance}, the government argued that the objectionable vagueness of the test is cured by the explanatory gloss provided by the Service's "methodology test," which purportedly focuses on the manner of presentation, rather than on the content of an organization's viewpoint. Evaluation of whether an organization's materials are "educational" under this test is based upon an assessment of whether "a significant portion" of the materials presents "viewpoints unsupported by a relevant factual basis;" whether supposedly factual material is "distorted;" whether the materials use "particularly inflammatory and disparaging terms" and express "conclusions based more on strong emotional feelings than objective factual evaluations;" and whether the materials are "aimed at developing an understanding on the part of the addressees."

\textit{National Alliance} involved a challenge by a white supremacist hate group which had been denied exempt status. The same court which two years earlier had voided the "full and fair exposition" standard explicitly declined to reach the question of whether the methodology test provides clear enough guidelines to overcome the court's earlier objections to the vagueness of the "full and fair exposition" standard. Noting that it need not decide whether the methodology test is valid in order to decide the case, the court nevertheless took the opportunity to offer its view that the \textit{National Alliance} materials would not satisfy the criteria of the methodology test.

85. Professor Thompson explains that the government's decision not to seek Supreme Court review was probably based on factual weaknesses of the \textit{Big Mama Rag} case, combined with some uneasiness within the IRS about the regulation's susceptibility to uneven enforcement. Thompson, supra note 76, at 489 n.4 (citing \textit{Action on Decision}, Big Mama Rag, Inc. (Nov. 19, 1980)).

It seems likely that the decision may have been influenced by the fact that the Service was in the process of defending its approach to distinguishing "educational" from "non-educational" advocacy organizations in a case which offered both stronger facts and a somewhat modified IRS position, which the Service believed could salvage the full and fair exposition standard.

87. \textit{Id.} at 870.
88. \textit{Id.} at 874.
89. The court rested its denial of exempt status on the conclusion that the organization could not fit within "any definition of 'educational' conceivably intended by Congress." \textit{Id.} at 873. It is interesting to note that the court's rationale for this conclusion focuses heavily on the same sort of factors which make up the methodology test, that is, distortion, unsupported opinion, and emotional rather than reasoned presentation in the organization's publications. The case has been criticized for establishing a new, "within any reasonable interpretation of the term," test which is even more vague than the "full and fair exposition" or "methodology" test. Note, \textit{National Alliance: A Retreat from Protection of the Right to Freedom of Speech}, 29 St. Louis U.L.J. 229, 240 (1984).
90. \textit{National Alliance}, 710 F.2d at 876.
91. \textit{Id.} at 875.
even more significantly, the court made an express point of commenting favorably on the test itself, noting that "[t]he test reduces the vagueness found by the Big Mama decision, and provides 'a carefully charted middle course' which allows the IRS to draw a reasonable line between those advocacy organizations that are worthy of exemption and those that are not."92

Relying on the court's implicit approval, the IRS has adopted the methodology test as its official policy.93 The IRS contends that the "methodology test leads to the minimum of official inquiry into[,] and hence potential censorship of, the content of expression, because it focuses on the method of presentation rather than the ideas presented."94 Nevertheless, there can be little serious argument that inquiries into whether opinions are adequately supported, whether facts are distorted, whether terms are "particularly inflammatory," and whether conclusions are "based more on strong emotional feelings than objective factual evaluations" can really be content-neutral.95

Some have applauded the full and fair exposition test and the methodology test as reasonable and necessary devices which allow the IRS to make appropriate judgments with respect to groups not worthy of support through tax "subsidy."96 It is clear, however, that the tests have not been reserved solely for extremist hate groups like National Alliance. They can be, and have been, applied as well to groups such as Big Mama Rag, Inc. and the gay rights group of Revenue Ruling 78-305,97 whose non-mainstream viewpoints apparently caused the IRS some discomfort, although the groups were ultimately granted exemption.98 Considering, in addition, the uncertain line

92. Id. at 876.
94. 710 F.2d. at 875. See also Rev. Proc. 86-43, 1986-46 I.R.B. 15, 15 ("It has been, and it remains, the policy of the Service to maintain a position of disinterested neutrality with respect to the beliefs advocated by an organization.").
95. The district court considering the National Alliance case expressed this very concern, stating:
"Relevant factual basis," "inflammatory and disparaging terms," and "aimed at developing an understanding," for example, allow IRS officials at least as much latitude in passing judgment "on the content and quality of an applicant's views and goals" as the terms singled out for attention in Big Mama Rag.
81-1 U.S. Tax Cas. (CCH) ¶ 9464, at 87,345.

Professor Thompson criticizes the test because of its serious potential for uneven, content-based application as well as its capacity to diminish public access to a variety of viewpoints on public issues. Thompson, supra note 76, at 521-22. Cf. Recent Case, National Alliance v. United States, 53 U. Cirt. L. Rev. 277, 295 (1984) (approving of the "rescue" of the full and fair exposition standard).

96. See, e.g., Winslow & Ash, supra note 79, at 24. It has been convincingly proposed that when the IRS originally formulated the full and fair exposition test, it was simply fashioning a policy which it expected to use only rarely, but which would be available when necessary to bar exemption in extreme cases. Thompson, supra note 76, at 509 n.47.
98. Thompson, supra note 76, at 524-28. In concluding that the gay rights organization,
between dissemination of opinion and legislative activity or election campaign intervention, it appears that organizations hoping to bring about social change by raising public awareness of their causes continue to be vulnerable to loss of exemption based upon a subjective IRS evaluation of the controversiality and validity of the position taken, as well as the style in which the viewpoint is expressed.

D. Reform Through Legislative Advocacy

The tax law imposes explicit and quite narrow limits on the freedom of section 501(c)(3) organizations to use advocacy before the legislature as a strategy by which to accomplish their exempt purposes. In large measure, these constraints are defined by 1976 amendments to the Internal Revenue Code which allow many section 501(c)(3) organizations to measure the although controversial, nonetheless qualified for exemption, the IRS noted that the methods used to educate the public about homosexuality and foster tolerance and understanding adhered to the educational guidelines of Treasury Regulation section 1.501(c)(3)-1(d)(3); specifically, all the materials disseminated by the organization were independently compiled and contained full documentation of the facts upon which the organization based its conclusions. B. Hopewell, supra note 49, at 176-77. See also Comment, supra note 75, at 852.

99. See infra notes 142-43, 375 and accompanying text.

100. It has been postulated that if an organization's advocacy is directed to a recognized "charitable" purpose, it will not be subject to scrutiny for controversiality and validity in the same way that other "educational" material is. That is, since the goal is "charitable," there need be no evaluation of the process by which it is pursued to determine whether it satisfies the "factual support" and "reasoned rather than emotional presentation" criteria applicable to "educational" advocacy. See, e.g., Big Mama Rag, Inc. v. United States, 494 F. Supp. 473, 478 n.5 (D.D.C. 1979) (drawing a distinction between organizations which are "educational" but not otherwise "charitable," and thus subject to the "full and fair exposition" standard, and those which fall "wholly within one of the other charitable categories" (emphasis in original)), rev'd, 631 F.2d 1030 (D.C. Cir. 1980). See also Winslow & Ash, supra note 79, at 21. This analysis is based on the fact that the reference to the "full and fair exposition" test appears only in the regulations which apply to "educational" organizations, Treas. Reg. § 1.501(c)(3)-1(d)(3)(i) (1959), and not in the regulations which describe the bounds of permissible advocacy for "charitable" organizations, Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959). While the distinction is logically satisfying, given the arrangement of the regulations, the IRS does not apply it in practice. See Comment, supra note 75, at 865. For example, the IRS used the "full and fair exposition" test to evaluate the publications of Big Mama Rag, Inc., although that organization probably could have qualified as a "charitable" organization, promoting social welfare and equality. See Thompson, supra note 76, at 489 n.4 (suggesting that this is one reason why the IRS did not appeal).

Thus, it seems that any controversiality-based limits which are imposed on "educational" organizations' advocacy through public information probably apply equally to work on recognized "charitable" issues. An additional reason for assuming that whatever lines may be drawn with respect to controversial advocacy by "educational" organizations apply to "charitable" organizations as well is that the terms of the "full and fair exposition" standard are implicated in the assessment of whether the organization's advocacy activities are attempts to influence legislation. See infra note 143 and accompanying text.


102. Section 501(h)(4) specifies which organizations are eligible to elect: those qualifying
limits according to a specific formula, rather than by section 501(c)(3)'s general admonition that "no substantial part" of an organization's activities may be carrying on "propaganda" or otherwise "attempting to influence legislation," and by a 1983 Supreme Court opinion which seems to clear the way for a section 501(c)(3) organization to establish a separate, less limited, lobbying affiliate.

The 1976 amendments to the lobbying restrictions were the culmination of a long process of proposal and counterproposal rooted in longstanding under section 501(c)(3) by virtue of section 170(b)(1)(A)(ii)-(iv) (educational institutions, hospitals and medical research facilities, organizations supporting government schools), or section 170(b)(1)(A)(vi) (organizations publicly supported by charitable contributions); those qualifying under section 509(a)(2) by virtue of the public support test; and section 509(a)(3) (support organizations of public charities). Churches and church-affiliated organizations are explicitly disqualified by section 501(h)(5) from making the election and remain subject to the general section 501(c)(3) substantiality provision. Private foundations, by their omission from the section 501(h)(4) list, may not elect, and are governed instead by the provisions of section 4945 of the Internal Revenue Code.

An eligible charity may elect to be covered by section 501(h) at any time before the end of its taxable year, and the election remains effective for subsequent taxable years unless and until revoked. Revocation of the election must be made before the beginning of the tax year to which it is to apply. Thus, an organization may not choose to return to the old substantiality test for a tax year which has already begun. I.R.C. § 501(h)(6). This provision prevents a charity which finds itself close to or surpassing the section 501(h) lobbying limitations from revoking its section 501(h) election during the year in question in order to avoid the penalties.

Parallel provisions condition deductibility of gifts for purposes of income tax, gift tax, and estate tax on a similar restraint by the recipient organization. Most of the challenges to the limitation have arisen in one or another of the deduction contexts. See, e.g., Christian Echoes National Ministry v. United States, 470 F.2d 849 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973); St. Louis Union Trust Co. v. United States, 374 F.2d 427 (8th Cir. 1967); Krohn v. United States, 246 F. Supp. 341 (D. Colo. 1965); Hammerstein v. Kelley, 235 F. Supp. 60 (E.D. Mo. 1964), aff'd, 349 F.2d 928 (8th Cir. 1965).

A few decisions have rested on other statutes which conditioned some benefit on complying with similar restrictions on legislative involvement. See, e.g., International Reform Fed'n v. District Unemployment Comp. Bd., 131 F.2d 337 (D.C. Cir.), cert. denied, 317 U.S. 693 (1942) (church federation exempt from contributing to unemployment compensation fund because its legislative activities were incidental to its religious and educational purposes); Lord's Day Alliance v. United States, 65 F. Supp. 62 (E.D. Pa. 1946) (church organization advocating observance and preservation of the Christian Sabbath exempt from paying Social Security tax).


106. See infra notes 152-66 and accompanying text.

107. The revision apparently had its beginnings in a 1968 proposal generated by the American Bar Association Section on Taxation Committee on Exempt Organizations, which included in its membership several individuals whose writings had criticized the existing law. A.B.A. Section of Taxation, Report of the Committee on Exempt Organizations, 21 Tax Law. 967 (1968). Although the generally unsatisfactory state of the law was acknowledged during deliberations which led to the 1969 tax law amendments, the law as passed in 1969 altered the regulation of legislative activity only with respect to private foundations, leaving the rules for other section...
criticism of the section 501(c)(3) "no substantial part" requirement. The criticism was well-founded, resting as it did on decades of imprecise and inconsistent interpretation by the IRS and the courts of an Internal Revenue Code provision that left a great deal of room for interpretation. Cases

501(c)(3) organizations untouched.

The effort to clarify and liberalize the restrictions moved forward in 1971 when Senator Edmund Muskie introduced Senate Bill No. 1408, 92d Cong., 1st Sess. (1971), which reflected the ABA model draft approach of allowing a charitable organization to carry on legislative activities with respect to matters "directly affecting any purpose for which it is organized and operated." Over a period of five years, detailed proposals disappeared and reappeared as sponsors imagined "ways in which public charities would ostensibly misuse their new lobbying authority." B. Hopkins, supra note 49, at 269-70. For detailed descriptions of the proposals leading up to the 1976 amendments, see id.; Note, Lobbying by Section 501(c)(3) Organizations Under the Tax Reform Act of 1976: A Proposal for Change, 30 Tax Law. 214, 229-32 (1976); Public Charities Lobbying, 1976 Cong. Q. ALMANAC 486.


109. Some of the confusion was introduced even before the reference to legislative activity was added to the Code in 1934. Revenue Act of 1934, Ch. 277 §§ 23(o)(2), 101(6), 48 Stat. 680, 690, 700. For decades before that, courts had quite regularly premised disallowance of deductions for gifts to organizations with legislative programs on the non-charitable or non-educational nature of "political agitation." See supra note 76 and accompanying text.

It has been suggested that the early judicial references to legislative activity were nothing more than gratuitous rationalizations for the real basis of disapproval, which was that the questioned organizations were engaged in "offending the prevailing dogmas." Lehrfeld, supra note 75, at 59. Cf. Thompson, supra note 76, at 498-99 (characterizing the same line of cases as demonstrating that the courts was over the coupling of advocacy with legislative activity). Nonetheless, if the courts were simply upholding the "rule of overdog," Lehrfeld, supra note 75, at 52, they were, at least, expressing the rule in terms of an objection to the means used to pursue the challenged organization's causes.

The most noted early statement of the restriction on legislative activity was Learned Hand's oft-quoted pronouncement in Slee v. Commissioner that "[p]olitical agitation as such is outside the statute, however innocent the aim." 42 F.2d 184, 185 (2d Cir. 1930). Nothing in the tax law compelled such a position, and the conclusion was inconsistent with common law notions of charitable and educational purpose as manifested in the law of every state except Massachusetts. See Clark, supra note 38, at 448 n.44; Thompson, supra note 76, at 513 n.56. Nevertheless, Hand's characterization in Slee provided the starting point for discussion in virtually every subsequent legislative activity case, see, e.g., International Reform Fed'n, 131 F.2d at 337; Weyl, 48 F.2d at 811; Davis v. Commissioner, 22 T.C. 1091 (1954), and is generally credited with leading to the amendment of the Tax Code which denies exemption to organizations that engage in "substantial" legislative activity. See, e.g., Haswell v. United States, 500 F.2d 1133, 1140 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975); Clark, supra note 38, at 446-47.

Congress added the explicit limitation on legislative advocacy to the Code in 1934, intending, it has been variously argued, (1) to signal its agreement with Hand's rule, see, e.g., Baker, Lobbying by Public Charities: Summary of Proposed Regulations, 34 Tax Notes 1145, 1145 (1986); (2) to liberalize the rule by allowing an "insubstantial" amount of legislative activity, see, e.g., Seasongood, 227 F.2d at 910; Clark, supra note 38, at 449; Fogel, To the IRS Tis Better to Give Than to Lobby, 61 A.B.A. J. 960, 961 (1975); Note, supra note 107, at 216
interpreting the limitation gave conflicting signals as to whether the tax law permitted legislative activity clearly related to an organization's public-serving, exempt purposes.110 In addition, the cases disagreed with respect to how much activity was "substantial,"111 and differed as to whether the legislative effort ought to be measured in isolation (the "quantitative" approach)112 or whether it should be assessed in the context of its importance relative to the organization's total activities (the "objectives and circumstances" approach).113

(1976); or (3) to prohibit only selfishly-motivated legislative involvement, see, e.g., League of Women Voters v. United States, 180 F. Supp. 379, 383 (Ct. Cl. 1960) (Jones, J., dissenting), cert. denied, 364 U.S. 822 (1960); Clark, supra note 38, at 447 n.40.

110. See, e.g., St. Louis Union Trust Co., 374 F.2d at 427 (bar association's legislative activities serve public, not private, interests); Hammerstein, 349 F.2d at 928 (deduction disallowed because medical society's legislative activities designed to serve interests of the profession rather than the public and not clearly related to exempt purposes); Dulles, 273 F.2d at 362 (bar association's unselfishly-motivated legislative activity in pursuit of exempt purposes does not defeat deductibility). See also International Reform Fed'n, 131 F.2d at 337; Girard Trust, 122 F.2d at 108; Lord's Day Alliance, 65 F. Supp. at 62; Davis, 22 T.C. at 1091; Old Colony Trust, 25 F. Supp. at 43 (all holding that legislative activity clearly related to an organization's exempt goals does not disqualify it for exemption or deductibility). Cf. Kuper v. Commissioner, 332 F.2d 562, 563 (3d Cir. 1964), cert. denied, 379 U.S. 920 (1964) (stating that "it is immaterial that the legislation advocated from time to time was intended to promote sound government and was for the benefit of all citizens rather than in the interests of a limited or selfish group"); League of Women Voters, 180 F. Supp. at 383 (disqualifying the League on the basis of its legislative involvement in what the court conceded to be "questions of public interest").

111. See, e.g., Christian Echoes Nat'l Ministry, 470 F.2d at 849 (organization addressing only one piece of pending legislation engaged in "substantial" lobbying); Seasongood, 227 F.2d at 912 (5% of organization's activities not "substantial"); Lord's Day Alliance, 65 F. Supp. at 65 (legislative activities were "minor," because they "occurred only when the Legislature was in session, four or five months biennially").

112. See, e.g., Seasongood, 227 F.2d at 912 (since direct contact with legislators consumed less than 5% of the organization's budget, legislative activity was not "substantial"). Lord's Day Alliance, 65 F. Supp. at 62.

113. See, e.g., Davis, 22 T.C. at 1099 ("The question is . . . to be determined upon the record of purely charitable activities and activities influencing legislation and a comparison of the two.").

In Krohn, 246 F. Supp. at 341, the court expressly rejected Seasongood's 5% threshold, noting that its "apparent certainty . . . obscures the basic difficulties of balancing activities in the context of organizational objectives and circumstances." In League of Women Voters, 180 F. Supp. at 383, and Kuper, 332 F.2d at 163 (concerning the national organization and a local chapter thereof, respectively), although the League did little or no actual grass roots or direct lobbying, its contributors were denied deduction of their donations on the grounds that the League engaged in substantial attempts to influence legislation, which the Third Circuit Court of Appeals and Court of Claims held to include the time the League spent in studying, discussing, and formulating positions on public issues.

In 1972, the Tenth Circuit Court of Appeals considered the tax-exempt status of the Christian Echoes National Ministry, a nonprofit religious organization headed by Dr. Billy James Hargis. Christian Echoes National Ministry, 470 F.2d at 849. The organization's extensive publications, broadcasts, and other activities vigorously reflected its view that the "battle against Communism, socialism and political liberalism" was an essential part of its theology and its mission. Id. at 852. Although Christian Echoes had addressed itself to only one piece of pending legislation, the IRS successfully maintained that the organization's numerous attempts to influence public
By the mid-1970's, the courts had established no clear principles for determining whether an organization's activities were substantial attempts to influence legislation. The IRS tended to follow the views of the most restrictive courts. Its position is well represented in its 1966 letter revoking the exempt status of the Sierra Club. In it, the IRS clearly rejected the notion that any quantitative approach to substantiality is appropriate, discarded the idea that unselfishly-motivated legislative activity should not be subject to the limitation, and dismissed the contention that only direct lobbying should be taken into account. In addition to taking a rather expansive view of the activities which might be counted as lobbying, the Service characterized the test in terms so flexible as to set no reliable boundaries, opinion on issues of public policy constituted disqualifying "substantial" attempts to influence legislation. Id. at 856. To arrive at this conclusion, the court explicitly rejected Seasongood's percentage test and adopted the Krohn position that the "political activities of an organization must be balanced in the context of the objectives and circumstances of the organization to determine whether a substantial part of its activities was to influence or attempt to influence legislation." Id. at 855. Once the court had taken the position that "[t]he fact that specific legislation was not mentioned does not mean that [the organization's] attempts to influence public opinion were not attempts to influence legislation," id., it had no difficulty in concluding that "[t]he activities of Christian Echoes in influencing or attempting to influence legislation were not incidental, but were substantial and continuous," and therefore disqualified the organization under the substantiality test, id. at 856.

The Court of Claims considered the substantiality test in 1974. Haswell, 500 F.2d at 1133. At issue was the deductibility of contributions to the National Association of Railroad Passengers (NARP) on the theory that the organization fit the description of section 170(c)(2). That section does not specify that only gifts to section 501(c)(3) organizations are deductible, but tracks the language of section 501(c)(3) to describe organizations to which donations are deductible. NARP had sought and received section 501(c)(4) exempt status, id. at 1137 n.4; Haswell argued here that the organization nevertheless was described by section 170(c)(2), id. at 1136. Noting that "[n]either the legislative histories of sections 170(c)(2) and 501(c)(3), nor the cases that have arisen thereunder, provide specific guidance as to the content of the phrases 'organized and operated exclusively,' 'no substantial part,' and 'to influence legislation' as used in those sections," the court joined the IRS and the Tenth Circuit Court of Appeals in the view that the substantiality limitation applies to unselfishly motivated as well as private interest legislative involvement and in rejecting any percentage test as the measure of substantiality in favor of "[balancing political efforts] in the context of the objectives and circumstances of the organization." Id. at 1142. While rejecting the percentage test approach to determining "substantiality," the court observed that NARP's allocation of approximately 20% of its expenditures to legislative activities was "an indication of the relative importance of legislative activities in NARP's total effort." Id. at 1146. To reach its conclusion that NARP's legislative activities were "substantial," and thus disqualifying under this objectives and circumstances approach, the court noted that "the legislative program was a primary objective... and is on an equal footing with [NARP's] educational and litigative efforts." Id. at 1147.

114. In 1959, the Treasury promulgated regulations which bear on how an organization's involvement in political issues may affect its exempt status. These regulations specify that no "action organization" is operated exclusively for exempt purposes, and tie "action organization" status to substantial involvement in legislative activity. Treas. Reg. § 1.501(c)(3)-1(c)(3) (1959). They avoid assigning any quantitative content to the term "substantial" and quite clearly classify not only direct contact with legislators, but also efforts to convince the public to contact legislators, as "attempting to influence legislation." Id.

stating that, in the end, "the determination of whether attempting to influence legislation is a substantial part of an organization's activities is one of fact in each case, to be ascertained from all of the evidence."116

As the substantiality test stood before the 1976 amendments, then, it invited charges that, although important consequences attached to whether an organization engaged in "substantial" attempts to influence legislation, it was impossible to predict with any confidence which activities might be characterized as "attempting to influence legislation" or at what point those activities could be said to have crossed some line to become "substantial." Virtually any attention to issues of public policy was susceptible to being characterized as "legislative activity," and the threshold of tolerance was very low indeed.

It is no wonder then that the addition of sections 501(h) and 4911 to the Internal Revenue Code by the Tax Reform Act of 1976 was seen as an important step in the direction of curing the faults of the pre-1976 substantiality test. The amendments were applauded for providing a liberalized,

116. Id. For detailed discussion of the Sierra Club revocation, see Borod, Lobbying for the Public Interest: Federal Tax Policy and Administration, 42 N.Y.U. L. Rev. 1087 (1967); Caplin, Limitations on Exempt Organizations: Political and Commercial Activities, in N.Y.U. Proc. of the Eighth Biennial Conf. on Charitable Found. 265 (H. Sellin ed. 1967); Note, Political Activity and Tax Exempt Organizations, Before and After the Tax Reform Act of 1969, 38 Geo. Wash. L. Rev. 1114, 1121-25 (1970); Recent Cases, Income Taxes, 80 Harv. L. Rev. 1793 (1967). A less detailed, but even more extreme, illustration of the breadth of discretion the IRS exercised during this period can be found in the Service's dealings with the Fellowship of Reconciliation in 1963. See infra note 149.

In 1967, the IRS reiterated its position that neither the community benefit of the legislation addressed, nor the relationship of an organization's substantial legislative activity to its recognized charitable purpose will prevent the organization from being classified as an "action organization." Rev. Rul. 67-293, 1967-2 C.B. 185. And testifying before the House Appropriations Committee in 1967, the Commissioner again indicated that the IRS would not apply a percentage standard, but would measure substantiality of an organization's legislative activity by considering money spent, staff and volunteer time spent, and the organization's "real activity." Caplin & Timbie, supra note 108, at 192-93 (citing Hearings on Treasury Dept. and Related Agencies Appropriations for 1968 Before the Subcomm. of the House Comm. on Appropriations, 90th Cong., 1st Sess. 536 (1967)).

The IRS's view of its task is further reflected in the Exempt Organizations Handbook, which sets policy for IRS personnel. The Handbook, too, indicates that the limits of "insubstantial" legislative activity are set by some shifting sense of how important the activities seem to the organization's program:

[T]here is no simple rule as to what amount of activities is substantial. . . . Most cases have tended to avoid any attempt at percentage measurement of activities. . . . The central problem is more often one of characterizing the various attempts to influence legislation. Once this determination is made, substantiality is frequently self-evident.


Further, the Handbook adopts the League of Women Voters and Kuper view of what constitutes "legislative activity," instructing IRS personnel that while "it is sometimes difficult to determine what supporting activities should be included with the proscribed attempts to influence legislation . . . attempting to influence legislation does not necessarily begin at the moment the organization first addresses itself to the public or to the legislature." Id.
quantified “safe harbor” within which organizations could safely address themselves to public issues and for defining critical terms that, before the Act, had been open to shifting and extremely limiting interpretation.\footnote{117}

For organizations which elect its coverage,\footnote{118} the central feature of section 501(h) is its expression of the substantiality limitation on lobbying activities in terms of a percentage of expenditures test. Section 501(h) specifies that an electing organization’s “carrying on propaganda, or otherwise attempting, to influence legislation” will not be “substantial” so long as the organization does not normally exceed amounts established by a formula set out in the statute.\footnote{119}

The second major impact of the 1976 amendments is the replacement of the all-or-none loss of exempt status with a scaled system of penalties for those organizations that choose to be covered by section 501(h) and then violate its limits. Violations initially result in imposition of an excise tax on excess lobbying expenditures. Only when the four-year average of the organization's lobbying expenditures exceed its limits is the organization subject to revocation of its section 501(c)(3) status.\footnote{120}


\footnote{118. See supra note 102.}

\footnote{119. The basic formula allows electing charities to make, without penalty, annual expenditures for influencing legislation equal to 20% of the first $500,000 of the organization’s “exempt purpose expenditures,” plus 15% of the second $500,000, plus 10% of the third $500,000, plus 5% of any additional expenditures. I.R.C. § 4911(e)(2) (West Supp. 1987). “Exempt purpose expenditures” include amounts paid or incurred by an exempt organization to carry out the charitable, educational, or other purposes described in section 170(c)(2) and upon which its exempt status is based. Id. § 4911(e)(1)(A). Exempt purpose expenditures include administrative and lobbying expenses, id. § 4911(e)(1)(B), but do not include expenses for fundraising by a separate unit or organization; id. § 4911(e)(1)(C). In no case may the “nontaxable lobbying amount” exceed $1,000,000. Id. § 4911(e)(2). Because the lobbying amount is determined according to a sliding scale, larger organizations are allowed to spend a smaller amount, proportional to their total expenditures, than are smaller organizations. An organization may, without penalty, spend for grass roots lobbying up to 25% of the amount allowed for lobbying under section 4911(c)(2). Id. § 4911(c)(4). It is interesting to note that the percentage Congress chose for the lobbying ceiling amount is virtually the same percentage that the Court of Claims, denying deductibility in Haswell, found to be an indication that legislative activity was of too much “relative importance . . . in NARP’s total effort.” Haswell, 500 F.2d at 1146.}

\footnote{120. Violation of the proscription on “substantial” legislative activity so as to justify revocation of exempt status is defined, for electing organizations, as “normally” making lobbying expenditures that exceed 150% of the “lobbying nontaxable amount,” I.R.C. § 501(b)(1)(A) (West Supp. 1987), or “normally” making grass roots expenditures that exceed 150% of the “grass roots nontaxable amount,” id. § 501(b)(1)(B). The nontaxable lobbying amount is derived from the basic formula of section 501(h)—that is, 20% of the organization’s first $500,000 of exempt purpose expenditures, plus a sliding scale of decreasing percentages of additional exempt purpose expenditures. The grass roots nontaxable amount is equal to 25% of the lobbying
Finally, sections 501(h) and 4911 supply definitions for key terms in the new substantiality formula. "Lobbying expenditures" are amounts spent to "influence legislation."121 "[I]nfluencing legislation" includes "any attempt to influence any legislation" either "through an attempt to affect the opinions of the general public or any segment thereof"122 or "through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation,"123 subject to certain exceptions.124 Besides defining what is lobbying, the 1976 provisions specify a number of activities which, by legislative grace, are not. Activities which are explicitly excluded from the term "influencing legislation" are "providing of technical advice . . . to a governmental body or to a committee . . . in response to a written request,"125 "appearances

nontaxable amount.

The revocation sanction is made still less threatening by the meaning that has been given to the word "normally," as used in this provision. The legislative history of the provision indicates that "normal" expenditures will be measured by taking a four-year average. H.R. Rep. No. 1210, 94th Cong., 2d Sess. at 9 n.2 (1976); S. Rep. No. 938, pt. 2, 94th Cong., 2d Sess. at 81 n.3 (1976). See also Exempt Organizations Handbook, 4 Int. Rev. Man.-Admin. (CCH) § 395. Thus, an unusually high level of grass roots or lobbying expenditures in one year, if balanced by lower levels in the preceding three years, will not lead to revocation of the organization's tax exempt status. It will, however, subject the organization to the other type of sanction provided for in the section 501(h) scheme—that is, the imposition of an excise tax on the excess expenditure.

Section 4911 provides for a first-level sanction on a charitable organization which exceeds its nontaxable lobbying or grass roots amount in any taxable year. The sanction takes the form of an excise tax equal to 25% of the overexpenditure. I.R.C. § 4911(a) (West Supp. 1987). If an organization exceeds both the lobbying and grass roots limitations, the tax is imposed on the greater of the two excesses. Id. § 4911(b).

Provisions added to the Code by the Omnibus Budget Reconciliation Act of 1987 impose an excise tax penalty on any non-electing organization which loses its section 501(c)(3) status as a result of "substantial" lobbying activity, and an additional penalty on organization managers who agree to the making of "substantial" lobbying expenditures. Pub. L. No. 100-203, § 10714 (1987).

121. I.R.C. § 4911(c)(1) (West Supp. 1987). For one expert's assessment of what costs should be included in calculating the expenditures, see 4 S. WEITHOORN, supra note 4, at 34-61, 34-62. In Weithorn's judgment, an organization must allocate portions of staff salaries, overhead, and travel expenses to "lobbying expenditures." Id. The recent proposed regulations, see supra note 2, support this interpretation.


123. Id. § 4911(d)(1)(B). Section 4911 defines additional terms. The term "grass roots expenditures" is defined to include only the first half of the lobbying expenditures definition, that is, expenditures to influence legislation by affecting the opinions of the general public or some segment thereof. Id. § 4911(e)(3).

"Legislation," according to the scheme of the 1976 Act, "includes action with respect to Acts, bills, resolutions, or similar items by Congress, any State legislature, any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure." Id. § 4911(e)(2). "Action," in the context of the definition of legislation, is "limited to the introduction, amendment, enactment, defeat, or repeal" of legislation. Id. § 4911(e)(3).

124. Id. § 4911(d)(2).

125. Id. § 4911(d)(2)(B).
before, or communications to, any legislative body with respect to a possible
decision by such body which might affect the existence of the organization,
its powers and duties, tax-exempt status, or the deduction of contribu-
tions,"126 and communications with non-legislative government officials, so
long as the communication does not urge the influencing of legislation.127
Also exempted from the definition of "influencing legislation" are an or-
organization's communications with bona fide members,128 unless such com-

126. Id. § 4911(d)(2)(C).
127. Id. § 4911(d)(2)(E).
128. Id. § 4911(d)(2)(D). The Senate Report on the Tax Reform Act specifies that if less
than 15% of the distribution of an organization's publication is to nonmembers, then the
portion of the publication's cost which is allocable to:
material directly encouraging the members to engage in direct lobbying is to be
treated as an expenditure for direct lobbying. . . . [T]he fact that some copies
of the publication are distributed to libraries and other bona fide subscribers will
not cause any portion of those expenditures to be treated as expenditures for
gross roots lobbying. On the other hand, if more than 15 percent of the copies
are distributed to nonmembers (including libraries), the portion of the cost of the
publication allocable to the lobbying material is to be allocated between activities
relating to members and the activities relating to nonmembers (grass roots lob-
bying) in proportion to the distribution of the publication.
The specification of the 15% standard is one of the few items on which the Senate Report
varied from the House Ways and Means Committee Report on the bill, which supported the
same general approach, but which used the term "insubstantial" in place of the numerical test.
See Hyslop & Ebell, supra note 4, at 288; Washburn, supra note 117, at 294. Washburn points
out that since the legislative provisions were added to the 1976 Tax Reform Act by the Senate,
the Senate Report prevails in areas of disagreement. Id. at 294 n.16.
Thus, if an electing organization publishes an eight-page newsletter, one page of which is a
"legislative alert" urging readers to contact members of the legislature on matters before it,
one-eighth of the cost of preparing and mailing the publication must be charged to direct
lobbying, so long as at least 86% of circulation is directed to bona fide members of the
organization. However, if, for example, 20% of circulation is to nonmembers, the organization
must divide the cost of the "legislative alert" page—that is, one-eighth of the publication cost—
allocating 80% of that amount to direct lobbying and 20% to grass roots lobbying expenditures.
Washburn suggests that the potential complexity of record-keeping and accounting required by
this two-tiered allocation system might be incentive enough for an organization with a large
nonmember circulation of its publication to avoid the section 501(h) election altogether. Wash-
burn, supra note 117, at 298.
Because the allocation requirement turns on the proportion of distribution to "bona fide
members," the definition of that term takes on a special importance. The House Report defines
"bona fide member" to be a person who has "more than a nominal connection with the
organization." In addition to having "affirmatively expressed a desire to be a member," a
"bona fide member" must also pay more than nominal dues, contribute more than a nominal
amount of time to the organization, or be one of a limited number of "honorary" or "life"
These standards prevent an organization from unilaterally bestowing "membership" upon
all who are on its mailing list in order to avoid having to allocate publication costs to the
lower grass roots lobbying ceiling. The House Report requirements are designed to ensure that
an organization's membership standards "do not serve as a subterfuge for grass roots lobbying
activities." Id. It is not absolutely necessary that the organization's membership qualifications
coincide with those specified; the report states that an organization may be able to persuade
the IRS that its nonconforming membership requirements are supported by "a good reason.”
Id.
munications urge the member to contact legislators\textsuperscript{129} or to urge others to contact legislators,\textsuperscript{130} and “making available the results of nonpartisan analysis, study, or research.”\textsuperscript{131}

The statute does not define “nonpartisan analysis, study, or research.” Several commentators suggested that, pending IRS elaboration of the 1976 amendments through regulations, guidance could be found in the regulations amplifying parallel provisions of section 4945. Section 4945 imposes an excise tax on any amount spent for lobbying by private foundations.\textsuperscript{132} The section 4945 regulations explain that “nonpartisan analysis, study, or research” means “independent and objective exposition of a particular subject matter, including any activity which is ‘educational’ within the meaning of Treasury regulation, section 1.501(c)(3)-1(d)(3).”\textsuperscript{133} A study is nonpartisan despite its advocacy of “a particular position or viewpoint,” so long as it presents “a sufficiently full and fair exposition of the pertinent facts” to permit its readers to “form an independent opinion or conclusion.” A study does not fall within the exception if it is a “mere presentation of unsupported opinion.”\textsuperscript{134} An organization may disseminate the results of its nonpartisan research by any reasonable means, but it may not limit or direct its distribution “toward persons who are interested solely in one side of a particular issue,”\textsuperscript{135} nor time its presentation so as to implicitly favor one side of an issue and still remain within the bounds of the exception.\textsuperscript{136} The recently proposed regulations, the fate of which is, at this point, quite uncertain,\textsuperscript{137} indicate that the IRS does indeed intend to give “nonpartisan analysis, study, or research” the same meaning regardless of context.\textsuperscript{138}

\textsuperscript{129} I.R.C. § 4911(d)(3)(A) (West Supp. 1987). If it does so, it is “influencing legislation” under section 4911(d) and a “lobbying expenditure” under section 4911(c)(1).

\textsuperscript{130} If it does so, it is a “grass roots expenditure” under section 4911(c)(2). \textit{Id.} § 4911(d)(3)(B).

\textsuperscript{131} \textit{Id.} § 4911(d)(2)(A).

\textsuperscript{132} See, e.g., A S. Wethorn, \textsf{supra} note 4, at 34-57 to 34-59; Nix, \textsf{supra} note 108, at 422 n.58; Shrekgast, \textit{Political Lobbying of Exempt Organizations,} 37 N.Y.U. INST. ON FED. TAX'N pt. 2, 26-1, 26-15 (1979); Washburn, \textsf{supra} note 117, at 295.

The suggestion is a logical one. Not only do the two sections contain much identical language, but the legislative history of the 1976 Act indicates that Congress was conscious of the similarity. House Report No. 1210 notes that three of the categories of activities excluded from the concept of “influencing legislation” in section 4911 are also excluded under the private foundation provisions of section 4945. H.R. REP. No. 1210, 94th Cong., 2d Sess. 10 (1976).

\textsuperscript{133} See \textsf{supra} note 78 and accompanying text.


\textsuperscript{137} See \textsf{supra} notes 2-9 and accompanying text.

\textsuperscript{138} See Prop. Treas. Reg. § 56.4911-3(b), 51 Fed. Reg. 40,223 (1986) (“For guidance in determining whether an amount is paid or incurred for, or in connection with, making available the results of nonpartisan analysis, study, or research see § 53.4945-2(d)(1).”).

The private foundation regulations offer guidance as to the meaning of the other section 4911 exceptions as well. The section 4911 exception for “providing technical advice or assistance
The 1976 provisions were applauded for the relative certainty and new flexibility they offered to electing organizations. Close analysis of the provisions reveals, however, that although the 1976 Tax Reform Act did indeed make some changes in the lobbying restrictions for public charities, the new provisions are not much different from the old and, ultimately, fail to cure the problems of indefiniteness and inconsistency that were the focus of criticism in the pre-1976 scheme.

The communications to bona fide members exception aside, most of the activities designated "non-legislative" by the 1976 Act were actually excluded from the measure of lobbying activities under the old section 501(c)(3) provisions, either by reference to definitions contained in the more severe lobbying restrictions imposed on private foundations in 1969, or by virtue...

... in response to a written request by a governmental body [or committee]." I.R.C. § 4911(d)(2)(B) (West Supp. 1987), also tracks an identical section 4945(e) provision. To fit within this exception, according to the section 4945 regulations, the request must come from and the response be addressed to the entire body or committee, rather than an individual member thereof. Treas. Reg. § 53.4945-2(d)(2)(i) (1972). The material presented need not be balanced, as it must to qualify for the nonpartisan study exception. The organization's opinions or recommendations may be presented if specifically requested by the governmental body or if they "are directly related to the materials so requested." Treas. Reg. § 53.4945-2(d)(2)(ii) (1972); Treas. Reg. § 53.4945-2(d)(2)(iii) Examples (1)-(3) (1972).

The "self-defense" lobbying exception of section 4911(d)(2)(c) tracks the private foundation provision of section 4945(e), which is amplified by Treasury Regulation section 53.4945-2(d)(3). This exception does not extend to attempts to influence legislative decisions which "merely affect the scope of the [organization's] future activities." Treas. Reg. § 53.4945-2(d)(3)(ii) Examples (3) & (4) (1972). Thus, while an organization may, under this exception, lobby freely to revise the tax law which governs deductibility of contributions made to it, it may not urge continued funding of a government program under which it has a contract, and the exception would certainly not extend to lobbying on issues that are substantively related to the organization's charitable purpose, but which have no direct impact on the legal status of the organization. The proposed section 4911 regulations cross-reference the private foundation provisions addressing technical assistance and self-defense lobbying. Prop. Treas. Reg. § 56.4911-3(c), (d), 51 Fed. Reg. 40,223 (1986).

Section 4911's final exception to the definition of "influencing legislation" has no parallel in the private foundation provisions of section 4945(e). Section 4911(d)(2)(E) permits an organization to communicate with any non-legislative government official or employee, so long as the contact is not for the principal purpose of influencing legislation. Since it has no explicit counterpart in the private foundation portion of the Code, this exception stands without elaboration. It has been suggested that this exception is designed to clarify the distinction between the respective effects on exempt status of administrative and legislative advocacy and to ensure that engaging in the former will not raise an inference of lobbying. 4 S. WEITTHORN, supra note 4, at 34-59. Although not explicit, a similar exception for private foundations may well be implied by the descriptions of "legislation" and "propaganda influencing legislation" found in Treasury Regulation section 53.4945-2(a)(1), (2). See infra note 140 and accompanying text.

139. See, e.g., Nix, supra note 108, at 424; Washburn, supra note 117, at 299.
140. To the extent that the 1976 provisions are given content by the section 4945 regulations, they are deprived of much of their impact as an instrument of change because, although Congress stated its intent that the new rules apply only to organizations that may and do elect to be covered by section 501(h), many of the "new" provisions were already applicable to all section 501(c)(3) organizations. The Joint Committee Explanation which accompanied the 1969
of IRS interpretations of the section 501(c)(3) lobbying restrictions them-

Tax Reform Act indicates that Congress thought that the specific provisions of section 4945 would clarify, but not modify (except by removing the “substantiality” threshold insofar as private foundations were concerned), the section 501(g)(3) lobbying restrictions. Staff of the Joint Comm. on Int. Rev. Tax., 91st Cong., 2d Sess., General Explanation of the Tax Reform Act of 1969 47, 49 (Comm. Print 1970). See Caplin & Timbie, supra note 108, at 188 (noting in 1975 that the section 4945 regulations “are the best available measure of [the] Treasury’s current position on the meaning of legislative activity for section 501(c)(3) purposes”).

The IRS had also acknowledged the relationship of section 4945 and its regulations to the concept of activities which constitute attempts to influence legislation for purposes of section 501(c)(3). “The legislative history surrounding the enactment of Code § 4945(d) and (e) indicates that Congress viewed § 4945(e) as a clarification of the phrase ‘attempt to influence legislation’ in all contexts in which that phrase is used with respect to exempt organizations.” Gen. Couns. Mem. 36,127 (June 6, 1974). See also Haswell, 500 F.2d at 1141 (applying section 4945 and its regulations to determine whether NARP was an “action organization” under section 501(c)(3), noting that section 4945 and its amplifying regulations “provide additional and more precise definitions of activities that are included within the § 501(c)(3) lobbying restrictions”).

Section 4911 specifies two categories of exempt activities which have no direct parallel in the section 4945 or section 501(c)(3) regulations. The exemption for contact with non-legislative government officials for purposes other than to influence legislation is one of these and might thus be thought to apply only to section 501(h) electing organizations. It seems clear, however, that the exception, although not listed with the others in the section 4945 regulations, is solidly incorporated into other portions of those regulations. The private foundation regulations define “attempts to influence legislation” to “include communications with a member or employee of a legislative body or with an official of the executive department of a government . . . with respect to legislation being considered by, or to be submitted imminently to, a legislative body.” Treas. Reg. § 53.4945-2(a)(1) (1972). The clear implication of this formulation is that communication with an executive official on a subject other than a current legislative proposal is not an “attempt to influence legislation” for purposes of section 4945 or (through the applicability of the section 4945 regulations) of section 501(g)(3). At most, it appears that under the section 4945 regulations, an organization might have to count as legislative activity that proportion of a multi-purpose contact with an executive official that dealt with pending or imminent legislation, while an organization which had elected section 501(h) coverage would not, so long as the “principal purpose” of the communication was not to influence legislation. I.R.C. § 4911(d)(2)(E) (West Supp. 1987).

The communication with members exception of section 4911 has no counterpart in section 4945, either explicitly or by implication. Thus, it appears to be the only one of the “new” exception categories that truly creates a distinction between a charity which elects under section 501(h) and one which remains subject to the “old” section 501(c)(3) substantiality test. Most of the categories that are exempted under section 4911 are equally exempted under the general section 501(g)(3) provision, and should not enter into an assessment of the substantiality of lobbying by organizations subject to the old, qualitative test any more than they do for those which have made the section 501(h) election. Furthermore, the definitions which fill out the term “influencing legislation” in the various sections, though not identical in their language, seem indistinguishable in their meaning. What sections 501(h) and 4911 say it means for an electing organization to “influence legislation” is essentially the same as what the section 501(c)(3) regulations and, by implication, the section 4945 regulations say it means for a non-electing organization to “influence legislation.”

While the 1976 provisions were the first to incorporate the term “grass roots” into the Code, the lobbying restriction has long included the kind of activity now given that label. Section 4911(a)(3) of the Internal Revenue Code defines “grass roots” lobbying to be “any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof.” Treasury Regulation section 1.501(c)(3)-1(e)(3)(ii)(b)(b) states that “influencing legislation” includes urging the public to contact legislators; section 53.4945-2(a)(1) includes in its definition “efforts to affect the opinion of the general public.” Thus, the
To be sure, an electing organization has the certainty of knowing

All three sections, of course, restrict direct communication with legislators about legislation. I.R.C. § 4911(d)(1)(B) (West Supp. 1987); Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii)(a) (1959); Treas. Reg. § 53.4945-2(a)(1) (1972). All three offer equivalent definitions as to what constitutes legislative action. Section 4911 defines "legislation" to include "action with respect to Acts, bills, resolutions, or similar items by the Congress, any State legislature, any local council, or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure." I.R.C. § 4911(e)(2) (West Supp. 1987). The section 501(c)(3) regulations use virtually identical language. The only difference, that is, deletion of the words "with respect to Acts, bills, resolutions, or similar items," has no effect on substance. Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (1959). The section 4945 regulations, which, according to legislative history, apply to section 501(c)(3), see supra, and which probably bear on section 4911 as well, see supra note 132 and accompanying text, repeat the same language and then elaborate somewhat: "[s]uch term does not include actions by executive, judicial, or administrative bodies. For purposes of the preceding sentence, school boards, housing authorities, sewer and water districts, zoning boards and other similar federal, state, or local special purpose bodies, whether elective or appointive, shall be considered administrative bodies." Treas. Reg. § 53.4945-2(a)(2) (1972).

The "action" which electing charities are not supposed to influence, by either direct or "grass roots" contacts, is defined by section 4911(e)(3) to be "limited to the introduction, amendment, enactment, defeat, or repeal of Acts, bills, resolutions, or similar items." This statement differs from that given in the section 4945 regulations only slightly. In that section, the word "action" "includes the introduction, enactment, defeat, or repeal of legislation." Id. Thus, the "new" provision of section 4911 inserts "amendment," replaces "legislation" with a list of components, and "limits" rather than "includes." These appear to be clarifications rather than significant changes. The section 4945 regulations, in turn, seem designed to clarify rather than to alter the substance of the section 501(c)(3) definition—that is, "proposing, supporting, or opposing legislation." Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (1959).

141. Well before the enactment of the 1976 amendments, the IRS had explicitly held that nonpartisan research does not constitute an attempt to influence legislation. Rev. Rul. 64-195, 1964-2 C.B. 138. See also 4 S. WERTHORN, supra note 4, at 34-36 (quoting testimony of Edwin S. Cohen, then Assistant Secretary of the Treasury, before the House Ways and Means Committee, May 3, 1972). There is direct reference to the nonpartisan analysis, research or study exception in the section 501(c)(3) regulations, although since none of the section 501(c)(3) regulations addresses the issue of substantiality, the discussion arises in another context. The phrase appears in a section which describes "action organizations." Treas. Reg. § 1.501(c)(3)-1(c)(3)(iv) (1959). For a discussion of the interrelationship between the "substantiality" and "action organization" provisions, see infra notes 143-51 and accompanying text. Invited testimony was also excluded from attempts to influence legislation. Rev. Rul. 70-449, 1970-2 C.B. 111, 112 (for purposes of section 501(c)(3), "attempts to influence legislation . . . imply an affirmative act and require something more than a mere passive response to a Committee invitation").

While the House Report on the 1976 amendments demonstrates that Congress was aware that nonpartisan research and invited testimony were excluded from consideration under the section 501(c)(3) substantiality test, H.R. Rep. No. 1210, 94th Cong., 2d Sess. 10 n.5 (1976), the report makes no reference to an already existing exclusion of self-defense lobbying. The IRS, however, had taken the position in 1970 that such an exclusion in fact applied. The IRS based this conclusion on: 1) the notion that the 1969 section 4945 amendments were intended to restate, but not revise, the existing definition of attempting to influence legislation, and 2) the idea that since the 1934 addition of the lobbying restrictions was simply a codification of Slee, which at least implied that charitable organizations could engage in self-defense lobbying, the exception is inherent in the basic statutory provision. Gen. Couns. Mem. 34,289 (May 8, 1970).

The Exempt Organizations Handbook, revised in 1982, continues to describe the restrictions
that the extent of its legislative activity will be measured in terms of dollars expended. Much of the certainty fades, however, unless it is possible to predict with some confidence exactly which expenses will be ascribed to legislative activity. Largely because their pivotal terms share definitions with those of the old section 501(c)(3) substantiality test, the 1976 provisions, despite their apparent detail, do not afford that confidence. For example, all charitable organizations, whether or not they elect to come under section 501(h), are free to undertake "nonpartisan analysis, study, and research." Yet the line between "nonpartisan analysis" and "attempting to influence legislation" is far from clear.

A second source of uncertainty is the difficulty of confidently predicting which supporting activities will be considered to be part of an organization's

---

142. See supra notes 131-38 and accompanying text.

143. The section 4945 regulations define "nonpartisan analysis, study, or research" to include any activity which is "educational," that is, any communication that offers a "full and fair exposition" of the pertinent facts. Treas. Reg. § 53.4945-2(d)(1)(ii) (1972). Several illustrative examples provided by the regulations suggest that presenting a conclusion which supports one side of an issue, even an issue that is the subject of pending legislation, may or may not be "nonpartisan analysis."

Although the regulation at least supports the proposition that communications that are not "the mere presentation of unsupported opinion" would be "nonpartisan analysis," the distinction really appears to turn not on whether the conclusion is supported, but whether it is accompanied by some threshold quantum of information that is counter to the position taken. The examples, however, provide no real guidance as to what the threshold is, stating in rather conclusory terms that the situations described either do or do not present a sufficiently "full and fair exposition." In the last analysis, then, the decision as to whether the costs of a particular communication would be included or excluded, for purposes of the section 501(h) calculation, turns on the indeterminate concept of "full and fair exposition," which presumably defies reliable definition in this context just as surely as it does in the context of defining "educational." See Treas. Reg. § 53.4945-2(d)(1)(v) Examples (2), (4) & (5) (1972); Exempt Organizations Handbook, 4 Int. Rev. Man.-Admin. (CCH) § 395. Furthermore, the questions raised and left unanswered in that context by Big Mama Rag, 631 F.2d at 1030, and National Alliance, 710 F.2d at 830, see supra notes 79-100 and accompanying text, would seem to carry over into this context as well.
attempts to influence legislation. The IRS continues to take the position that "[a]ttempting to influence legislation does not necessarily begin at the moment the organization first addresses itself to the public or the legislature" and that study and research will be considered legislative activity if they serve "merely as a preparatory stage for the advocacy of legislation." Thus, although the 1976 provisions assure an electing organization that it is the cost, rather than some vague notion of time and effort spent, that will be assessed to determine the substantiality of its legislative activities, they fall short of allowing the organization to be confident that the IRS will not include in the tally expenditures beyond those which the organization itself would classify as having been incurred in connection with "attempts to influence legislation."

Finally, the addition of sections 501(h) and 4911 does not appear to preclude denial of exempt status on the ground that an organization is an "action organization" and, therefore, not "operated exclusively" for exempt purposes. Historically, the basis for restricting the political involvement of charitable organizations has been found not only in the substantiality provision, but also in the basic requirement that exempt organizations be "organized and operated exclusively for religious, charitable, . . . or educational purposes." The "action organization" provision is found in the regulations which delineate when an organization is not "operated exclusively for charitable purposes." The term is given several definitions, the last of which


145. *See supra* notes 39-43 and accompanying text.

The legislative history of the Act announces that sections 501(h) and 4911 are not intended to have any effect on "whether an expenditure might cause the organization to lose its charitable status because the expenditure violates the requirement that the organization be . . . operated 'exclusively' for charitable . . . purposes." H.R. REP. No. 1210, 94th Cong., 2d Sess. 10 n.6 (1976); STAFF OF THE JOINT COMMISSION ON INT. REV. TAX., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976 411 n.7, reprinted in 1976-3 C.B. Vol. 2, 1, 423. It has been suggested that the significance of this statement is to establish that an amount of lobbying activity that is acceptable under section 501(h) could still be unacceptable under the "operated exclusively" requirement if the lobbying concerns non-charitable subject matter. *See* Shrekgast, *supra* note 132, at 26-32. Thus, the extent to which an organization might be vulnerable under the "operated exclusively" requirement could potentially impose significant constraints on its advocacy activities quite separate from those which inhere in the "no substantial part" requirement.


147. One of the definitions states that "'[a]n organization is an 'action' organization if a substantial part of its activities is attempting to influence legislation by propaganda or otherwise.'" Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (1959) (emphasis added). If the section 501(h) and section 4911 approach truly has no effect on the "operated exclusively" requirement, it would appear that an organization which elects to be covered by section 501(h) is subject to both the new and the old "substantiality" tests, and could be penalized for activity that is well within the section 4911 limits but is found to exceed the indeterminate, "facts and circumstances" substantiality threshold. Of course, this result is logically insupportable; a much more reasonable interpretation is that, for an electing organization, the measure of "substantial" legislative involvement will always follow the section 4911 formula. The proposed regulations, *see supra*
focuses on whether the accomplishment of the organization's primary objectives is likely to require legislative action and whether the organization "advocates" for the attainment of those objectives. While this regulation appears to focus on both means and ends, it is not clear exactly what kind of activity will constitute "advocacy" that may trigger the action organization characterization. The uncertainty is introduced by several IRS pronouncements which suggest that the threshold of "advocacy" in this context does not necessarily require that the organization address itself to specific, pending legislative proposals. This last definition of "action organization" has long

---

149. The Revenue Ruling cited by the Exempt Organizations Handbook as an example of an "action organization" under this last definition disqualified an organization because it was "primarily engaged in teaching and advocating the adoption of a particular doctrine or theory . . . which could be attained only by legislative action." Exempt Organizations Handbook, 4 Int. Rev. Man.-Admin. § 392(2) (1982) (citing Rev. Rul. 62-71, 1962-1 C.B. 85). There is no indication in the Ruling that the organization was addressing actual pending or imminent legislative proposals.

Other IRS statements also suggest, although not consistently, that general "advocacy" objectives that would ultimately require legislation for their attainment may be an independent basis for denial of exempt status. In General Counsel Memorandum 37,247 (Sept. 8, 1977), the IRS took the position that an organization's ultimate goal of freeing the individual from governmental and social control could be achieved only illegally or by legislation. Advocacy of illegal action would preclude "charitable" classification; advocacy of legislation would disqualify the group as an action organization under the final definition. Some concern was expressed that the organization might be engaging in legislative activity; it is not clear that the general political focus of the organization would have been enough to cause the IRS to disqualify it.

Perhaps the most dramatic example of the application of this provision was the IRS's revocation of the exempt status of the Fellowship of Reconciliation in 1963. Although the 40-year-old organization was involved in no legislative activity, the IRS concluded that the organization's stated goal of attaining international peace could be achieved ultimately only through legislation. See 4 S. Warren, supra note 4, at 34-13; Caplin & Timbie, supra note 108, at 187; Comment, The Revenue Code and a Charity's Politics, 73 Yale L.J. 661 (1964).

In the section which deals with private foundations, the Exempt Organizations Handbook notes that "activities which appear by themselves to be educational in nature may, in fact, be part of a broader purpose to influence specific legislative action" and cites Robert's Dairy Company v. Commissioner, 195 F.2d 948, 950 (8th Cir. 1952), cert. denied, 344 U.S. 865 (1952), which held that since the organization's ultimate object was the revision of the tax laws, it was attempting to influence legislation. But see Gen. Couns. Mem. 37,741 (Nov. 9, 1978) (section 501(c)(3) status was granted because the organization's primary objectives were not dependent on adoption or rejection of legislation and because the organization did not contact legislators or its members to urge action on pending legislation; it is unclear whether the first factor would have defeated exemption absent the second, but it seems unlikely, in this case, given the generally approving tone of the memorandum); Rev. Rul. 70-79, 1970-1 C.B. 127 (section 501(c)(3) status granted because "although some of the plans and policies formulated by the organization can be carried out only through legislative enactments, the organization does not direct its efforts or expend funds in making any legislative recommendations, preparing prospective legislation, or contacting legislators"); Rev. Rul. 68-656, 1968-2 C.B. 216
been criticized for the virtually unlimited discretion it gives the IRS to focus on an organization’s ultimate goals instead of the nature of its activities.\textsuperscript{150} Nothing suggests that the complaint is any less apt today. In fact, it has been suggested that insofar as a liberalized and clarified substantiality test diminishes the Service’s ability to deny exemption on the basis of clear legislative activity, it might be encouraged to rely on the separate application of the action organization regulations.\textsuperscript{151}

A section 501(c)(3) organization which finds the limits on legislative advocacy to be too constraining might consider establishing a sister organization under section 501(c)(4).\textsuperscript{152} Section 501(c)(4) extends exempt status, but not eligibility to receive deductible contributions, to “social welfare” organizations.\textsuperscript{153} Section 501(c)(4) organizations must be “primarily engaged in promoting in some way the common good and general welfare of the people of the community,”\textsuperscript{154} but need not limit their legislative advocacy efforts to “insubstantial” amounts.\textsuperscript{155} In addressing questions about the constitutionality of the section 501(c)(3) lobbying restrictions which had been raised by commentators for years,\textsuperscript{156} the Supreme Court’s 1983 opinion in \textit{Regan} (organization could not qualify for section 501(c)(3) status because achievement of the organization’s cause would require change in law and because the organization drafts and circulates petitions to have legislation introduced; there is no indication as to whether the first factor alone would have been sufficient to disqualify the organization).

150. Shortly after the regulations were adopted, Professor Clark observed that they are “sufficiently broad to permit either a relaxed or a strict administration depending upon whichever way the Treasury wishes to throw the switch.” Clark, \textit{supra} note 38, at 452.

151. Comment, \textit{supra} note 117, at 477-78. See also Garrett, \textit{supra} note 108, at 577 (suggesting that organizations that engage in no lobbying, but do take firm positions on controversial issues, are at risk of disqualification under the action organization regulations). In fact, the recently proposed section 4911 regulations, \textit{see supra} notes 2-9 and accompanying text, indicate that the IRS intends to reserve this option. Prop. Treas. Reg. § 1.501(h)-1, 51 Fed. Reg. 40,213 (1987) (“An organization that elects the expenditure test may nevertheless be determined to be an action organization under § 1.501(c)(3)-1(c)(3)(iii) [election campaign participation] or (iv) [primary objective may be attained only by legislation and organization advocates, as distinguished from engaging in nonpartisan analysis, study, or research].”).


153. \textit{Id}.


155. \textit{Id}.

v. Taxation With Representation of Washington\textsuperscript{157} seems to clear the way for close affiliation between a section 501(c)(3) organization and a lobbying section 501(c)(4) entity.

Taxation With Representation of Washington (TWR) was the product of the merger of a section 501(c)(3) organization, which sought to promote the public interest in federal taxation issues through litigation and publication of a journal, and a section 501(c)(4) organization, which pursued the same goal through legislative advocacy.\textsuperscript{158} When TWR was denied section 501(c)(3) status, it challenged the section 501(c)(3) lobbying restrictions on two grounds: first, that the restrictions imposed an unconstitutional condition on the organization's exercise of its first amendment rights, and second, that they violated the equal protection guarantees of the fifth amendment by subsidizing lobbying activities of veterans' groups—which may receive deductible contributions, but which are not subject to limits on legislative activities—while failing to subsidize similar lobbying by charitable organizations.\textsuperscript{159}

On its way to holding that the differential treatment of veterans' and charitable organizations does not violate guarantees of equal protection,\textsuperscript{160} the Supreme Court rejected the first amendment argument that the lobbying constraints force a section 501(c)(3) organization to forego constitutionally protected speech in order to receive a government benefit to which it is otherwise entitled (here, the deductibility of contributions).\textsuperscript{161} The Court held that the lobbying restrictions simply implement a Congressional judgment that legislative activity is worthy of exemption but should not be extended the second level of favorable tax treatment represented by deductibility. Since it was already settled that a Congressional decision not to "subsidize" lobbying with a tax deduction for its cost does not, in and of itself, infringe first amendment rights,\textsuperscript{162} the lobbying restrictions are not constitutionally infirm unless they somehow impose a penalty beyond nondeductibility of the funds used for lobbying. The Court concluded that no such penalty is imposed by the lobbying restrictions, because a section 501(c)(3) organization

\textsuperscript{157} 461 U.S. 540 (1983). Although the case involved a challenge to the pre-1976 provision, its principles apply equally to organizations which elect section 501(h) coverage.

\textsuperscript{158} Id. at 543; Taxation With Representation of Washington v. Regan, 676 F.2d 715, 717 n.1 (D.C. Cir. 1982).

\textsuperscript{159} Taxation With Representation, 461 U.S. at 542.

\textsuperscript{160} Id. at 549. The Court overturned the D.C. Circuit on this point, disagreeing with that court's conclusions, first, that it was appropriate to apply a heightened standard of review to the evaluation of the difference in treatment, Taxation With Representation, 676 F.2d at 724, and second, that the differences could not be justified even under a rational basis standard, id. at 739.

\textsuperscript{161} Taxation With Representation, 461 U.S. at 545.

\textsuperscript{162} Id. at 546 (citing Cammarano v. United States, 358 U.S. 498, 513 (1959)). This principle, taken from Cammarano, is the starting place for first amendment analysis of tax deduction issues that implicate protected speech. Even the D.C. Circuit Court of Appeals, in reaching the opposite result in Taxation With Representation, took no issue with this basic first amendment analysis. 676 F.2d at 717.
that wishes to lobby can simply organize itself into a dual structure, isolating the lobbying activities into an affiliated section 501(c)(4) entity which would be tax exempt, but not eligible to receive deductible contributions. In this way, the section 501(c)(3) organization can continue to receive and expend deductible funds for all but its legislative activities. The Court appeared to characterize this affiliation arrangement as nothing more than a procedural formality, designed to keep the finances of the two organizations separate—a simple matter of bookkeeping.

Although exempt organizations were on the losing side in TWR, the effect of the decision may be to ease the constraints on the degree to which they can engage in legislative advocacy. If, in fact, the decision authorizes the close affiliation of a section 501(c)(3) organization with a lobbying section 501(c)(4) entity, it would seem to override IRS pronouncements suggesting that a substantially greater degree of independence between the two organizations is required than simply separate incorporation and funding.

It has been suggested that the TWR decision does, in fact, have a liberalizing effect. Because the opinion ties the constitutionality of the limitations to the unfettered ability of a section 501(c)(3) organization to affiliate with a lobbying section 501(c)(4) group, the IRS cannot constitutionally continue (or reinstate) its prior practice of insisting upon separate directors, staff,

163. Taxation With Representation, 461 U.S. at 544.
164. Id. Concurring in the opinion, Justices Blackmun, Brennan, and Marshall insisted that the constitutionality of the lobbying restrictions in fact depend on this characterization; if the IRS were to limit the section 501(c)(3)-501(c)(4) connection beyond insisting upon a clear fiscal separation, the lobbying constraints would indeed impose a penalty upon the section 501(c)(3) organization, rather than simply declining to subsidize its legislative activity. Id. at 552-54.
165. A striking example was the Service’s response to the Center on Corporate Responsibility’s second-round application for section 501(c)(3) status. In response to the IRS’s position that proxy contests are inherently non-charitable activities, the Center split off the proxy activities into a separate, non-exempt organization and assured the IRS that it had ceased all involvement in the proxy contests, but expected to act as counsel for the non-exempt affiliate in connection with the affiliate’s proxy fight activities. Center on Corporate Responsibility v. Schultz, 368 F. Supp. 863, 867 (D.D.C. 1973). Acknowledging that “the mere fact that an otherwise charitable organization is in some way affiliated with a noncharitable organization is not necessarily fatal to charitable qualification,” id. at 876, the IRS nevertheless contended that, given the “common control and interrelation of the two programs,” Gen. Couns. Mem. 35,341 (May 16, 1963), to grant section 501(c)(3) status to the Center would be equivalent to allowing the organization “to indirectly devote its resources to ends which we previously concluded have not been shown to be charitable,” id. The ostensible basis for the IRS position was the well-established principle that charitable resources must not be expended for the noncharitable activity of a noncharitable affiliate, and the “common control and overlapping personnel” of the two organizations raised doubts about whether the required separation of resources could be effectively monitored. Center on Corporate Responsibility, 368 F. Supp. at 863. The Center successfully challenged the denial, see supra notes 45-48 and accompanying text, but the IRS continued to exhibit concern in other cases over common control, shared staff, and coordinated agenda of affiliated section 501(c)(3) and section 501(c)(4) organizations, even when there was clear assurance of separation of funds and bookkeeping. Troyer & Lauber, Supreme Court’s TWR Decision Provides Guidance in 501(c)(3) Lobbying, 59 J. Tax’n 66, 68 n.9 (1983).
facilities, or agenda—it can require nothing more than separate funds. Thus, a section 501(c)(3) organization should be able to safely pursue a legislative agenda, so long as it does so through the mechanism of a section 501(c)(4) sister organization. However, the dual structure arrangement may be of limited utility. First, funding the efforts of the section 501(c)(4) affiliate may be a significant obstacle to the organization’s ability to pursue its objectives in this form. Contributions to a section 501(c)(4) organization are not deductible to the donor, private foundations are seriously constrained in their ability to provide grant support, and support from the affiliated section 501(c)(3) organization for lobbying would be limited to the amount the section 501(c)(3) organization could itself spend for lobbying activities.

Second, the dual structure arrangement may be a less reliable option than it appears at first (post-TWR) glance, for such an arrangement is beset with the same ambiguity and inconsistency that are woven throughout the constraints on legislative activity. Exactly which activities must be carried out by the section 501(c)(4) affiliate? While it is plain that direct contacts with legislators and clear grass roots lobbying should be undertaken by the section 501(c)(4) affiliate, the difficulty of confidently predicting which preparatory activities might be classified as “attempts to influence legislation” carries over to this context as well. If the section 501(c)(3) organization produces a report that would qualify as “discussion of broad social issues” because, although arguably one-sided, it is dispassionate and unconnected to specific legislation, and its section 501(c)(4) affiliate then uses the report as support for what is plainly legislative activity, it is not at all clear that the report

166. See Troyer & Lauber, supra note 165, at 68-69.
167. “In a practical sense, the income tax exemption is of relatively minor importance since most organizations operate on a balanced budget. However, the tax advantages of 501(c)(3) rather than 501(c)(4) status can amount to a 15 percent subsidy on costs.” Downing & Brady, The Role of Citizen Interest Groups in Environmental Policy Formation, in NONPROFIT FIRMS IN A THREE SECTOR ECONOMY 61, 82 (M. White ed. 1981).
168. Foundations may not direct support specifically to lobbying activity without incurring a heavy excise tax liability and cannot provide general operating support for a section 501(c)(4) organization which lobbies, since grants made to noncharitable organizations must be limited to use for charitable purposes. I.R.C. § 4945(d) (West Supp. 1987).
169. See Washburn, supra note 117, at 297. One possible approach for an organization with income-generating program activities would be to locate those activities within the section 501(c)(4) affiliate and transfer funds in excess of support needed for the section 501(c)(4) organization to the section 501(c)(3) organization, since transfer of funds from the section 501(c)(4) organization to the section 501(c)(3) organization is not limited as are transfers in the other direction. This approach may not be a practical solution, however, as the organization may want or need charitable status to carry on its major program activities. “Charitable status has come to symbolize stability and credibility. The defrocked organization frequently finds itself at a disadvantage in recruiting members and in obtaining the cooperation of other community agencies, including the press, radio, and television.” Clark, supra note 38, at 455. Further, the section 501(c)(3) organization would have to be alert to the possibility that substantial funding from its section 501(c)(4) affiliate might undermine its ability to demonstrate the broad public support necessary to maintain public charity status. See infra notes 358-63 and accompanying text.
would not be characterized at that point as legislative activity, having been "merely preparatory" for the legislative effort. 170

Finally, and perhaps most troubling, there is the danger that the section 501(c)(3) organization might be vulnerable to being characterized as non-charitable because it is within the Treasury's vague definition of "action organization." 171 Its close affiliation and shared agenda with a section 501(c)(4) organization which was created expressly for the purpose of lobbying could be seen as evidence that the section 501(c)(3) organization's primary purpose can be achieved only through legislation. Since it is still not clear what constitutes "advocating" the attainment of the primary objectives for purposes of this definition, 172 the section 501(c)(3) organization's expression of a clear position in its public education endeavors might conceivably suffice. This is particularly true if some of the related activities of the section 501(c)(3) organization are capable of being characterized as legislative activity because of their connection with clear legislative involvement by the section 501(c)(4) affiliate.

Since the evaluation of whether an organization is organized and operated exclusively for charitable or educational purposes is purportedly separate and apart from the question of whether a "substantial part" of its activities constitute attempts to influence legislation, and since the former inquiry purportedly focuses on objectives, it is entirely conceivable that a close section 501(c)(4) affiliation could lead to a denial of section 501(c)(3) status couched in terms of the "operated exclusively" requirement. So long as the denial rests on the indefinite and ambiguous content that has been given to the terms "operated exclusively," "charitable," and "educational," it would appear to turn on a conclusion that the inherent nature of the organization places it outside the long-recognized categories granted favored tax treatment, rather than on a judgment that attempts to influence legislation form a

170. See supra note 144 and accompanying text. Of course, if the report could qualify as "nonpartisan analysis, research, or study," it would not be classified as legislative activity even if its subsequent use by the section 501(c)(4) organization connected it to a specific legislative proposal. Predicting whether a publication is sufficiently dispassionate and presents a sufficiently "full and fair exposition of the pertinent facts" to qualify as "nonpartisan analysis" causes its own difficulties. See supra notes 142-43 and accompanying text. See also Gen. Couns. Mem. 35,734 (Mar. 19, 1974) (IRS approved section 501(c)(3) status for organization which had a section 501(c)(4) lobbying affiliate but cautioned that the section 501(c)(3) organization "would not be free to conduct research and prepare educational materials as a means of giving preferential assistance to ongoing projects of [the section 501(c)(4) organization] which serve non-charitable purposes or otherwise as a means of providing the latter with material for use in any non-501(c)(3) activity"). The author of a student Note has suggested that because there is no assurance that volunteer lobbying activities of individuals who are members of both affiliates would not be attributed to the section 501(c)(3) organization, the charitable organization is vulnerable to a finding that a "substantial part" of its activities constitute lobbying. Note, Charitable Lobbying Restraints and Tax Exempt Organizations: Old Problems, New Directions?, 1984 UTAH L. REV. 337, 355-56. Of course, if the section 501(c)(3) organization makes the section 501(h) election, "substantiality" is a function of money spent, so the volunteer activity would be of no consequence.

171. See supra notes 145-48 and accompanying text.

172. See supra notes 149-50 and accompanying text.
"substantial part" of the organization's activities. Depending on how the denial is justified, the constitutional protection afforded by *Taxation With Representation* may be illusory.

Ultimately, then, although the enactment of the 1976 Tax Reform Act and the holding in *Taxation With Representation* may have somewhat eased the degree to which charitable organizations are constrained in their selection of legislative advocacy as a strategy for accomplishing their exempt purposes, they do not entirely resolve the difficulties posed by the ambiguity and inconsistency of the restrictions as they stood before the two developments. Nor do they alter the fact that, so far as federal tax law is concerned, legislative advocacy remains subject to a very complicated and highly restrictive set of limitations.

**E. Effect of the Limitations**

Taken together, the explicit restrictions on advocacy and the further constraints that are inherent in their uncertain limits seriously curtail the participation of section 501(c)(3) organizations in the formulation of public policy. Although some strategies are subject to more extensive constraints than others under the present tax law, all varieties of system-focused advocacy are disfavored as compared to direct service activities. Not only the readily apparent constraints, but also nervousness about their possible reach, understandable in light of the unresolved issues concerning the scope and application of the constraints, lead organizations to limit their social activism, even where they believe system-focused activity is the most effective means of achieving their exempt ends. No comparable constraints limit an organization's direct service activities in pursuit of identical purposes.\(^{173}\)

Besides steering section 501(c)(3) organizations away from system-focused advocacy in general, the constraints have the additional effect of influencing those organizations which do engage in system-focused advocacy in their choice of strategy and even in their choice of issues. In their extensive study of public interest law firms, Weisbrod, Handler, and Komesar noted that the tax law restrictions on lobbying have caused public interest law activities to be directed overwhelmingly toward litigation, with a secondary emphasis on administrative advocacy, even in cases where legislative advocacy was

---

173. For example, the IRS had no difficulty in granting exempt status to an organization which provided a residence facility and therapeutic program for individuals recently released from mental institutions because "promotion of mental health is ... charitable." Rev. Rul. 72-16, 1972-1 C.B. 144. Yet the Maryland Division of the National Mental Health Association was threatened with loss of its exempt status because of its dealings with the state legislature, also presumably in the interest of promotion of mental health. G. MELTON, supra note 117, at 153.
perceived to be a more direct and effective means of achieving the charitable goal.\textsuperscript{174} Other commentators have echoed this observation.\textsuperscript{175}

Exempt organizations are frustrated by their inability to pursue their legitimate concerns in the most effective way, if the most effective way in a particular instance is through system-focused advocacy, especially legislative action. Furthermore, there are certain areas of philanthropic concern which will necessarily be more affected by the limitations than others, "on the basis of fortuities quite beyond the control of the parties."\textsuperscript{176} Some social welfare areas have been more preempted by government than others, and advocacy in the preempted areas will necessarily be more hampered by the constraints. Thus, a mental health association, operating largely in the public arena because the responsibility for providing mental health services is primarily the province of the state, will find that its work is confounded by the restrictions far more than are the efforts of the heart and cancer associations, although their goals are largely parallel.\textsuperscript{177}

An organization's effectiveness may be compromised by its inability to carry its cause into an arena to which its opposition has full access. For example, the successes of public interest organizations in litigation over the Trans-Alaska pipeline were met with Congressional action declaring the pipeline in compliance with the National Environmental Policy Act of 1969 and exempting the pipeline from further litigation. Specific statutory exemptions effectively eliminated the grounds upon which public interest suits could be brought to force compliance with National Environmental Protection Act procedures and Clean Air Act performance standards by dozens of oil-to-coal plant conversions.\textsuperscript{178} The section 501(c)(3) lobbying limitations barred environmental organizations from resisting legislative action to foreclose their other avenues of challenge.

\textsuperscript{174} B. Weissbrod, J. Handler & N. Komesar, Public Interest Law: An Economic and Institutional Analysis 556-57 (1978) [hereinafter Public Interest Law].

\textsuperscript{175} Tax-exempt groups are permitted to pursue their program objectives through advocacy before courts and administrative agencies; yet such advocacy is prohibited if the same matter is considered by a legislature. . . . There is no justification for this distinction, and the public interest is disserved by excluding tax-exempt groups from the legislative process.

Donee Group, supra note 29, at 82. See also, e.g., Downing & Brady, supra note 167, at 92-93; Note, A Setback for Environmental and Other Public Interest Plaintiffs, 55 Neb. L. Rev. 283, 292 n.58 (1976). But see R. Kramer, Voluntary Agencies in the Welfare State 228-29 (1981) (suggesting that fear of losing tax exemption is not as important a constraint on legislative advocacy as other factors, such as organizational self-image, time and energy required for program management, fundraising demands, and leadership's commitment to advocacy). See also Frank, supra note 57, at 19 (noting that the relative unavailability of legislative activity as a strategy choice interferes with the public interest attorney's ability to fulfill his ethical obligation to represent the client zealously).

\textsuperscript{176} Clark, supra note 38, at 454.

\textsuperscript{177} Id.

Organizations which see reform of public systems to be a major part of their mission are necessarily more hampered by the limitations on legislative involvement than are organizations whose lobbying activity is adjunct to a program of direct service delivery. They are hampered not only because a greater proportion of their resources is devoted to lobbying, but also, and less justifiably, because much more of their activity is likely to implicate the most ambiguous and uncertain aspects of the constraints, such as where background work and "nonpartisan analysis" stop and lobbying begins.\footnote{179} Much of the activity of an organization which hopes to affect systems necessarily involves study and analysis of the existing systems, as well as research into theoretical and actual model systems which suggest directions for change. It is inevitable that any proposals for legislative action which such an organization ultimately generates will draw upon the background studies. If the Internal Revenue Service chooses, as it appears inclined,\footnote{180} to define broadly which support activities are part of the attempt to influence legislation, the organization could find itself seriously penalized for what it reasonably thought to be "safe" activity. In contrast, a direct service organization is likely to get involved in legislative activity, if at all, at a later stage; the direct service agency may endorse and campaign for the passage of a piece of legislation, but is likely to do so based on the background work of the system-focused advocacy organization, and perhaps at its behest. Further, the organization which concentrates on policies and systems, rather than individual clients, is particularly susceptible to characterization as an "action organization" and, through that categorization, failure of the operational test.\footnote{181} While a direct service agency's primary goal might be to provide counseling services to mentally ill clients, another organization with the same charitable purpose—that is, promotion of mental health—might believe that goal can best be accomplished by restructuring the state mental health care delivery system. The former group's lobbying activity, if any, is likely to be perceived as incidental to its primary purpose; the latter group's activities with respect to the same piece of legislation will be seen as part and parcel of the organization's overall aims. Given the potential for disqualification as an "action organization" based on objectives which require legislative action for their accomplishment,\footnote{182} the system-focused organization is, again, especially vulnerable.

The present collection of explicit and implicit constraints on system-focused advocacy by section 501(c)(3) organizations confers overly broad adminis-
trative discretion on the IRS over the affairs and even the survival of exempt organizations. The ambiguity and inconsistency of the existing regulatory scheme gives the Internal Revenue Service nearly unlimited power to "pull the plug" on any organization that is politically active.

There is some indication that the IRS has, in fact, taken advantage of the definitional leeway in the tax provisions to suppress unpopular ideology. The Service's earliest demarcations between "propaganda" and "education" have been characterized as protective of the status quo.\(^\text{183}\) Even now, the controversiality of an organization's cause or position may draw the attention of the IRS.\(^\text{184}\) The effectiveness of an organization's advocacy efforts, theoretically irrelevant to a determination of whether the organization is "operated exclusively" for exempt purposes or whether it has engaged in "substantial" legislative action, appears to increase the likelihood of a negative IRS response to the organization.\(^\text{185}\)

Since controversiality and visibility appear to be important factors in the actual application of the statutory/regulatory scheme of restrictions on advocacy by exempt organizations, organizations which concentrate on policies and systems are in a precarious position. Because their very existence is typically premised on a desire to change the status quo, the positions they take are likely to be controversial.\(^\text{186}\) Because they cannot accomplish their purposes without having their position heard and understood by the public

\(^{183}\) Lehrfeld, supra note 75, at 52.

\(^{184}\) See Levy & Nielsen, supra note 156, at 1032 ("At one point many leaders of the movement were convinced that organizations concerned with social change rather than with more traditional forms of charitable and educational activity were being subjected to harassment by the I.R.S."). A similar theme ran through the hearings on the 1976 amendments to the lobbying restrictions. "Witnesses testifying on behalf of the charitable organizations charged that the law gave District Directors, revenue agents, and other I.R.S. officials broad discretion, which at times was abused in order to challenge the actions and to suppress the views of organizations with which they disagreed." Hearings on H.R. 13720 Before the House Ways and Means Comm., 92d Cong., 2d Sess. 222 (1972) (statement of Stuart Johnson).

This perception is not limited to representatives of exempt organizations. Mortimer Caplin, former Commissioner of the Internal Revenue Service, has stated: "In close cases, I.R.S. officials may be swayed instinctively to be more or less lenient in taxing political activities depending upon their view of the merit of an organization's political activities." Caplin, supra note 116, at 277.

\(^{185}\) See Nix, supra note 108, at 412 n.13. Richard Harwood, a writer for the Washington Post, described the reaction of the IRS to the Sierra Club's advertisement urging the public to contact Congress to oppose construction of dams in the Grand Canyon:

[On the day the advertisement appeared] an excited young assistant bounded into the office of . . . Commissioner Sheldon Cohen . . . [and] dropped on Cohen's desk a fresh copy of the Washington Post . . . . [I]t took Cohen only a couple of minutes to get the message from the ad and before the day was out he had ordered his agents . . . to audit the Sierra Club's books.


\(^{186}\) See supra notes 75-100 and accompanying text (describing how controversiality of an organization's views enters into the determination of whether the organization's efforts are "educational" or "charitable").
at large and by legislators, their effectiveness depends on the very visibility that makes them vulnerable. The selection of exempt organization returns for audit is based largely on receipt of complaints by the IRS.\(^{187}\) It only makes sense that organizations which are most effective in making their positions heard are those which will be least appreciated by those who run the systems they monitor, and will likely be those about whom the IRS is most likely to receive complaints.

From time to time, the breadth of the IRS's power over exempt organizations has been used as a blatant political tool. During the cold war years, forty-two organizations had their exempt status summarily revoked because of their appearance on the Attorney General's list of "subversive" organizations.\(^{188}\) There have been other instances of less than neutral enforcement of the political activities restrictions. During the 1960's, the White House directed the IRS to investigate far-right hate groups that were tax-exempt.\(^{189}\) Efforts to politicize the IRS and to use the exemption provisions as a tool for ideological suppression escalated during the Nixon years. In 1969, Nixon established the Special Services Staff "to gather information on the finances and activities of extremist organizations . . . and to make this information, along with recommendations on what to do with it, available to the appropriate division of the I.R.S."\(^{190}\) By June of 1972, the Special Services Staff had information files on over 2,500 organizations. This action and other attempts by the Nixon administration to politicize the IRS apparently had little direct effect; some have suggested that the IRS is simply too massive and self-contained a bureaucracy to distort for political ends.\(^{191}\)

\(^{187}\) See Ginsburg, Marks & Wertheim, supra note 52, at 2606 (citing Internal Revenue Manual 4(11)(43)). See also Lehrfeld & Webster, Administration by the I.R.S. of Non-Profit Organization Tax Matters, 21 TAX LAW. 591, 599-600 (1968) (describing the order of processing cases; inquiries from the House Ways and Means Committee, Joint Committee on Internal Revenue Taxation, Treasury Department, and White House receive first priority over all other matters).

\(^{188}\) Lehrfeld, supra note 75, at 67, 72-73. Ginsburg, Marks and Wertheim maintain that while this was an abuse of power, the IRS was no more unfair than any other part of the government during that era. Furthermore, they propose, the IRS was taking its cue from Congress, which had recently demonstrated quite an interest in the political activities and perspectives of tax-exempt organizations. "Understandably, there [was] no desire to provoke the sleeping lion once again." Ginsburg, Marks & Wertheim, supra note 52, at 2615 (quoting Clark, supra note 38, at 460).

\(^{189}\) Ginsburg, Marks & Wertheim, supra note 52, at 2615-16. The challenge to Christian Echoes, see supra note 113 and accompanying text, apparently arose this way. Although the revocation was ultimately upheld by the Court of Appeals on the grounds that Christian Echoes had not been prejudiced by the Service's "deviation from normal procedures," the district court initially found that the decision to revoke had been made arbitrarily and without sufficient evidence. Id. (citing Christian Echoes Nat'l Ministry, 470 F.2d at 849; Christian Echoes Nat'l Ministry, Inc. v. United States, 28 A.F.T.R. 2d ¶ 71-5260 (D. Okla. 1971)).

\(^{190}\) Ginsburg, Marks & Wertheim, supra note 52, at 2615-16.

\(^{191}\) See Caplin & Timbie, supra note 108, at 194-95 ("Whether or not these allegations [of uneven application] are well-founded, such discretion and the resulting potential for actual or apparent abuse are undesirable as a matter of sound tax administration.").
Exempt organizations should not have to rely on the unwieldiness of the bureaucracy, nor on the reassurance that the IRS has only infrequently abused its discretion. The discretion is there, and carries with it the potential for abuse. While instances of blatant political manipulation may be few, there are simply too many situations in which the IRS cannot avoid making a judgment and simply too much room for interpretation. Unable to draw clear conclusions as to what activities are permitted, organizations tend to be overly cautious.

Finally, as they are presently structured and administered, the limitations on system-focused advocacy tend to be more restrictive of non-religious than of religious organizations. Churches cannot elect the supposedly relaxed standards of section 501(h). Nonetheless, they are able to maintain a significant presence in the legislative process. The IRS is understandably reluctant to challenge church involvement in politics. With the notable exception of the Christian Echoes case, the pursuit of which was apparently politically motivated, political activity by religious organizations (at least, mainstream religious organizations) has often been looked upon with a relatively tolerant eye. A cataloguing of the early propaganda cases reveals that strong positions taken on one side of an issue were more easily tolerated when they were rooted in religious belief. The IRS has noted the virtual unthinkable by applying the supposedly absolute proscription on election campaign involvement against religiously-affiliated organizations which published articles and made statements opposing the election of a Roman Catholic as President. The pending controversy in Abortion Rights Mobilization involves plaintiffs who are contesting the failure of the IRS to enforce the election participation constraints against the Catholic Church, despite its overt support of anti-abortion candidates. The government is extremely reluctant to see the case pursued. In fact, the government went so far as to petition the United States Supreme Court for a writ of mandamus directing the district court to dismiss the case. The petition was unsuccessful, and the case is still pending. The Supreme Court has recently agreed to consider standing issues which could prevent reaching the merits of the underlying case.

194. Christian Echoes Nat'l Ministry, 470 F.2d at 849. For a discussion of the case, see supra note 113.
195. See supra notes 75-76 and accompanying text.
196. See, e.g., Lord's Day Alliance, 65 F. Supp. at 62; Girard Trust, 122 F.2d at 108.
200. 108 S. Ct. 284 (1987). The basic standing issue, whether the plaintiffs have standing to
F. Arguments in Favor of the Limitations

Not everyone agrees that discouraging exempt organizations from attempting to influence systems and policies is a bad idea. A number of arguments have been offered to support the contention that exempt status and activist stance are inconsistent, and that any organization desiring to assume one of the two should forego the other. The argument cannot rest on charitable trust principles, since neither traditional nor contemporary perceptions of the appropriate functions of charitable organizations demand restraints on system-focused advocacy. The common law of charitable trusts in this country "does not reveal a tradition of reasoned or even intentional opposition to charitable involvement in public policy formulation."

Of course, tax law need not follow the common law of trusts. Certainly, Congress could conclude that tax exemption and deduction should hinge on conditions that do not apply in the charitable trust context. Such a decision might logically be based on the conclusion that charitable trust law reflects a bad policy choice, or on a determination that what is good for charitable trust law does not fit the distinct purposes and rationales of tax law. While it is unlikely that Congress originally based its imposition of restrictions on sue the IRS and the Treasury for failing to revoke the tax-exempt status of the Catholic Church despite the Church's active participation in election campaign activity in violation of section 501(c)(3), is the same as that raised by the government when it sought a writ of mandamus ordering dismissal. See supra note 199 and accompanying text. The government had based an earlier petition for summary dismissal on the same argument and lost. Baker v. Abortion Rights Mobilization, Inc., 788 F.2d 3 (2d Cir.), cert. denied, 107 S. Ct. 184 (1986). See also Abortion Rights Mobilization, Inc. v. Baker, No. 80 Civ. 5590 (RLC) (S.D.N.Y. 1985) (denying certification of an interlocutory appeal of the district court's holding that the plaintiffs do have standing).

The standing issue is now being raised by the National Conference of Catholic Bishops (NCBB) and the United States Catholic Conference (USCC). These groups were dismissed as defendants in the early stages of the proceedings, Abortion Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471 (S.D.N.Y. 1982), but were ordered to comply with discovery orders and were held in civil contempt for refusal to do so, Abortion Rights Mobilization, Inc. v. Baker, 110 F.R.D. 337 (S.D.N.Y. 1986). The challenge to the plaintiffs' standing in the underlying action is raised now in the context of an appeal of the contempt order. In re United States Catholic Conference and Nat'l Council of Catholic Bishops, 824 F.2d 156 (2d Cir.) (upholding contempt order), cert. granted, 108 S. Ct. 484 (1987).

For a concise summary of the chronology of the dispute, see Evans, Challenge to IRS Enforcement of Ban on Political Activities by Churches Poses Difficult Questions for High Court, 37 Tax Notes 1194 (1987).

201. See infra notes 203-12 and accompanying text.
202. Simon, Foundations and Public Controversy: An Affirmative View, in The Future of Foundations 58, 68 (F. Heimann ed. 1973). See 4 A. Scott, The Law of Trusts § 374.4 (3d ed. 1967) ("Many reforms can be accomplished only by a change in the law, and there seems to be no good reason why the mere fact that they can be accomplished only through legislation should prevent them from being valid charitable purposes."); Lehrfeld, supra note 75, at 53-54 (describing history of political reform activity by charitable trusts, as approved by various states); Thompson, supra note 76, at 513 n.56 (comparing American approach with English common law, which is less accepting of activism by charitable organizations).
either conclusion, it is probably accurate to conclude that Congress has, by
now, acquiesced in the application in the tax context of restrictions that are
not mirrored in the law of charitable trusts. Nonetheless, it is appropriate
to question now whether there are policy justifications to support the result,
even if the justifications were not articulated as the law was formed.

Some have questioned the wisdom of encouraging charitable organizations
to engage in social activism, either because there is no need for such in-
volve ment or because engaging in system change advocacy distorts and
demeans the charitable mission.\(^{203}\) For each such statement several others
applaud the charitable sector for assuming an activist role.\(^{204}\) And the di-
versity of opinion within the nonprofit sector is seen to argue for, rather
than against, the value of charitable groups bringing their views into the
debate on public issues.\(^{205}\)

Other arguments against political activism by charitable organizations are
specific to the tax context, and rest on perceptions about the nature of
taxation and tax exemption. It is understandable that the Treasury would
favor a somewhat restrictive approach to acknowledging the compatibility
of advocacy activities with charitable principles, because each exemption and
deduction represents a revenue loss.\(^ {206}\) Some commentators have argued that

---

\(^{203}\) One commentator has proposed that foundations should reserve their support for that
portion of the charitable sector which is concerned with “knowledge” (i.e., scientific research)
and “beauty” (i.e., the arts). “The creation of beauty, after all, is a function of status and
luxury. . . . And, after all, things like the Ford Foundation, and the others, are creatures of
of Foundations} 43, 56 (F. Heimann ed. 1973). Hart goes on to say, “It is also true that to
bring about the creation of beauty a great deal of money may have to be wasted. . . . But the
foundations would seem to be in an ideal position to do this.” \textit{Id.}

While Hart’s argument is directed at private foundation involvement, foundation funding is
very important to the system change functions of charitable organizations, and Hart’s preference
for total noninvolvement of foundations in public affairs would also seriously compromise
charitable organization involvement. The same author suggests that nothing would be lost
should the charitable sector avoid social activism completely, because “those who evangelize
for social activism . . . exaggerate the seriousness of our various social difficulties. They falsely
suggest, and may even believe, that the activities they propose and sponsor will ameliorate
those difficulties—though the reverse is more often the case.” \textit{Id.} at 54.

Other commentators have suggested that “the public has the right to ask of charitable
organizations that they meet higher standards of debate than the standards prevailing in the
commercial and campaign marketplaces.” Graetz & Jeffries, \textit{supra} note 156, at 2962. They
also suggest that the higher standard is compromised by advocacy activities because they “[serve]
pecuniary self-interests or [serve] only to inflate the reputations of the principals of the charitable
organizations,” and because they only diminish public confidence in the charitable sector,
particularly when the public may see different charitable organizations taking different positions
on an issue. \textit{Id.} at 2462-63.

\(^{204}\) “They exist to experiment, to innovate, to critique, to aid the powerless, and thus
necessarily to involve themselves in social tension.” \textit{Field Foundation Report, 1968-69, quoted
in Carey, \textit{supra} note 27, at 1109. See also \textit{supra} notes 27-30 and accompanying text.}

\(^{205}\) See Simon, \textit{supra} note 202, at 71 (“Indeed, the very absence of a universal consensus
. . . undermines the argument [that foundation involvement in public affairs is unnecessary].”).

\(^{206}\) See Clark, \textit{supra} note 38.
the tax base should be protected from the erosion that would result from expanded permission to charitable organizations to engage in advocacy activity. Particularly in the case of legislative advocacy, it has been argued, the restrictions limit activity that is likely to be directed toward promoting the expenditure of public funds. As a result, allowing section 501(c)(3) organizations to lobby would run counter to the rationale for extending tax exemption—that is, that government is compensated for its loss of revenue by relief from the financial burden of services provided by the charities which would otherwise have to be met from the public fisc. This tax-base erosion argument is weak. First, any direct revenue loss which results from extending exemption and deductibility to politically active organizations is probably not significant, and would not be, even if the limitations were liberalized. Second, the notion that political activism must necessarily lead to increased government expenditures is simply insupportable. There is just no way to estimate the significance of the revenue consequences of limiting advocacy activities by charities.

The principal tax policy objection to extending exemption and deductibility to politically active charitable organizations is that government should avoid

207. Pepper, Hamilton & Sheetz, Legislative Activities of Charitable Organizations Other Than Private Foundations, in 5 COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, RESEARCH PAPERS 2917, 2937 (1977). The authors protest that "while this sort of activity may help the legislators better realize the needs of the country, it does not provide any of the funds that are vital to satisfy the need to which the charity has drawn attention." Id. at 2923. See also Graetz & Jeffries, supra note 156, at 2963.

208. See Garrett, supra note 108, at 581; Note, supra note 170, at 360.

The restrictions are more likely to influence donors in their choices among organizations, rather than having much effect on the overall level of contributions and, thus, deductions. See Garrett, supra note 108, at 581-82; Note, Political Speech of Charitable Organizations Under the Internal Revenue Code, 41 U. Cm. L. Rev. 352, 374 (1974); Note, supra note 170, at 360.

209. See, e.g., Mavity & Ylvisaker, supra note 156, at 828, stating:

To sum it up, there is no way of giving a totally objective or definitive answer to the questions of private philanthropy's overall worth or efficiency, either when measured by its own aspirations or when compared with government's present or future capacity to do the same things with the same money. Activities sponsored by private philanthropy and government are so randomly scattered over the entire range of "efficiency," and judgments of effectiveness and worth are so varying and subjective, that any conclusion is almost meaningless . . . . Merely citing examples of how many philanthropic endeavors turned out to be "good or bad," or more or less "efficient" than government's actual or hypothetical record in similar endeavors sooner or later becomes an exercise in the interminable.

Especially in its role as critic, competitor, judge, and adversary . . . the value of private philanthropy lies not in its relative efficiency, but simply in the fact that it exists and is available to a public that chronically needs something more than government always and alone can provide.

Id.

Some advocacy is clearly directed toward money-saving objectives. For example, successfully urging a state to establish a program of adoption subsidies for hard-to-place children would reduce expenditures for long-term foster care. That net savings probably would, in fact, "lessen the burdens of government." See also Karel, Foundations and Public Policy: Coming of Age in the 1980's, FOUND. NEWS, Mar.-Apr. 1985, at 58-59.
underwriting participation in political debate.\textsuperscript{210} If the restrictions on advocacy activities are lifted, it is argued, government neutrality would be undermined. Some charitable organization viewpoints would be heard more than others,\textsuperscript{211} and the charitable sector would have an unfair advantage over the for-profit sector.\textsuperscript{212}

Neutrality arguments often cite \textit{Cammarano v. United States}.\textsuperscript{213} In \textit{Cammarano}, the Supreme Court upheld the nondeductibility of business-related lobbying, stating that the regulations barring deduction "simply . . . required [the plaintiffs] to pay for [lobbying] activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do . . . ."\textsuperscript{214} Some counter that neutrality with respect to political activities was overturned by the passage of section 162(e) of the Internal Revenue Code, which allowed deduction of expenditures for lobbying on issues of direct interest to the taxpayer's business.\textsuperscript{215} Proponents of the restrictions on charitable organizations reply that neutrality demands the distinction notwithstanding section 162(e), because business-related lobbying expenses must be deducted to reach an accurate measurement of net income, while a deduction for a contribution to a politically active charitable organization is a subsidy for personal choice advocacy.\textsuperscript{216} The same distinction can be made between business-related and charitable organization litigation.

Even conceding that deductibility of business lobbying and litigation is necessary to arrive at a net income figure, while deductibility of contributions to activist charitable organizations constitutes a subsidy, the present system is not really neutral at all. Businesses can deduct expenditures for lobbying beyond those which are "of direct interest" and therefore necessary to deduct

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{210} Statements of this position typically point to Learned Hand's announcement in \textit{Slee v. Commissioner} that "political agitation as such is outside the statute." 42 F.2d 184, 185 (2d Cir. 1930). \textit{See also supra} note 109.
\item\textsuperscript{211} \textit{See, e.g.,} Note, \textit{supra} note 208, at 370, 372 (describing and rejecting the argument that tax-exempt political activity enhances the voice of organizations favored by the wealthy).
\item\textsuperscript{212} \textit{See, e.g.,} Pepper, Hamilton & Sheetz, \textit{supra} note 207, at 2924 (expressing concern that a large "slush fund" of tax-free dollars would be available for lobbying by charitable organizations should the restrictions be relaxed); \textit{Public Charities Lobbying, supra} note 107, at 486-87 ("many members of Congress "are afraid [the 1976 revisions of section 501(c)(3) lobbying constraints] will unleash a torrent of zealous lobbyists upon Congress"") (quoting Rep. Barber Conable).
\item\textsuperscript{213} 358 U.S. 498 (1959).
\item\textsuperscript{214} \textit{Id.} at 513.
\item\textsuperscript{215} \textit{See, e.g.,} Borod, \textit{supra} note 116, at 1113; Fogel, \textit{supra} note 109, at 964; Garrett, \textit{supra} note 108, at 585; Lehrfeld, \textit{supra} note 75, at 65 n.88.
\item\textsuperscript{216} \textit{See, e.g.,} Haswell, 500 F.2d at 1141; Graetz & Jeffries, \textit{supra} note 156, at 2948. \textit{See also Surrey, Tax Incentives as a Device for Implementing Government Policy, 83 Harv. L. Rev.} 705, 724 (1970) (noting "the importance of distinguishing tax expenditures and tax incentives from those provisions considered a proper and necessary part of the structure of an income tax," i.e., "expenses and costs incurred in the process of producing or earning the gross income received by the taxpayer"). This conclusion requires the rejection of the "net income theory" of the charitable deduction. \textit{See infra} note 226.
\end{itemize}
\end{footnotesize}
to reach an accurate measure of net income. Tax regulations permit businesses to deduct as a business expense trade association dues used for lobbying directed toward legislation which, though not of "direct interest" to the taxpayer, "is of direct interest to the organization, as such, or is of direct interest to one or more members of the organization." Thus, an organization with a broad membership may pursue a broad legislative agenda, and the deduction to its members will exceed that which leads to an accurate measurement of taxable income. The principle of neutrality is also violated by the absence of any restrictions on political activity by section 501(c)(19) veterans' organizations. These organizations may lobby freely with deductible dollars, although such activity is undertaken not to generate income but in pursuit of "personal choice" political agendas.

A related objection to permitting exempt organizations to engage in advocacy activity contends that taxpayers have economic and political liberty interests in not subsidizing the expression of political views with which they disagree. Successful lobbying activity yields law which binds supporters and non-supporters alike. Thus, the argument goes, the general "charitable social contract"—that people are generally willing to "spend" through taxation in support of charitable activity which they would not support directly, because other taxpayers "spend" reciprocally—does not comfortably extend to the advocacy of legal change.

219. The Supreme Court's observations in Taxation With Representation about the possible Congressional rationales for extending different treatment to veterans' organizations than to charitable organizations implicitly acknowledge that, as it now stands, the law with respect to deductibility of lobbying expenditures is not neutral. 461 U.S. at 548. It is not at all clear from the legislative history that Congress intended any such distinction between charitable and veterans' organizations. See Taxation With Representation, 676 F.2d at 732-33 ("[T]here is no indication in the legislative history . . . that Congress intended to grant any tax-exempt organization a lobbying advantage over any others. In fact, the scant legislative history that exists . . . suggests that Congress meant to treat the lobbying of all § 501(c) organizations equally."). Furthermore, Treasury Regulation section 1.170A-1(h)(5), with language that parallels section 501(c)(3), prohibits any deduction for contributions to any organization that lobbies or participates in an election campaign. This rule should apply to contributions to veterans' organizations as well as to charitable organizations, but the IRS does not enforce it with respect to the former. Surrey, supra note 216, at 721. Thus, it seems that this departure from neutrality originates with the Treasury and the courts, rather than with Congress.
220. This argument has been made in connection with a proposal that local Legal Aid organizations which receive Legal Services Corporation funding should be severely restricted in their ability to lobby. Comment, Pulling the Rein on Legal Services Lobbying, 9 Harv. J. L. & Pub. Pol'y 203, 204-05 (1986). The author cites a number of cases which held unconstitutional compulsory individual financial support for expression of views with which the individual disagreed. All of the cases cited involved direct expenditures by the individual (license plate fees, union dues) or by the government (government campaign to defeat a proposed constitutional amendment).
221. See Note, supra note 170, at 362. See also Thompson, supra note 76, at 537.
This objection is also undermined by the imperfections in neutrality of the present system. Taxpayers involuntarily support the deductible advocacy activity of businesses, trade associations, and veterans' organizations which is not undertaken to generate income.\textsuperscript{222} Further, the costs of nondeductible advocacy are reflected in the price of a business's products and services; consumers of those products or services involuntarily support the expression of political viewpoints with which they may not agree. Purchase of the product may be fully voluntary, but it is unlikely that the consumer knows that the price paid includes the cost of such expression. It is even less likely that the consumer is aware of the issues addressed or the position espoused by the producer.

Even if the present system could be accurately characterized as neutral, maintaining that neutrality would be misguided. Neutrality is neither constitutionally required,\textsuperscript{223} nor necessarily supportable as a matter of good policy. Rules which have the effect of either limiting or encouraging advocacy activity should aim to protect the integrity of the processes to which the advocacy is directed. Where technical neutrality contributes to unequal access to governmental institutions and processes, reinforces rather than relieves the chronic voicelessness of some segments of society,\textsuperscript{224} and leads to social policy built upon incomplete information,\textsuperscript{225} it no longer provides an acceptable foundation upon which to rest a system of controls and incentives.

\section*{II. POLICY BASES FOR A CONSISTENT APPROACH TO ADVOCACY BY EXEMPT ORGANIZATIONS}

Clearly, the present tax law is far from neutral with respect to a section 501(c)(3) organization's choice of means by which to pursue its ends. As a rule, strategies which seek to change systems rather than to deliver direct services are disfavored. Furthermore, some system change strategies entail greater costs and stricter controls than others. These results are defensible only if they are consistent with the policies underlying the section 501(c)(3) exemption or if there are other important reasons for restricting the use of system-change strategies. Where there are countervailing concerns which argue against permitting unfettered use of a particular strategy, the limits imposed should be constructed to strike a careful accommodation between the policy arguments for limiting the means and those for promoting the ends.

\begin{flushright}
\textsuperscript{222} See supra notes 217-19 and accompanying text.
\textsuperscript{223} See, e.g., Buckley v. Valeo, 424 U.S. 1, 90-91, 93 n.127 (1976) (subsidy of political speech is not constitutionally prohibited; there is no "establishment clause" component to first amendment's guarantee of free speech).
\textsuperscript{224} See infra notes 312-18 and accompanying text.
\textsuperscript{225} See infra note 311 and accompanying text.
\end{flushright}
There are important justifications for basing the regulation of advocacy activity by exempt organizations on a deliberate and principled analysis of the implicated values. The resolution of the issue has significant fiscal implications for organizations which see system change as a desirable or essential part of their charitable mission. These groups need the sort of reliable statement of rules that can be generated only by a clear approach to the question. More importantly, because the fiscal implications have incentive and disincentive effects that tend to steer organizational behavior, ad hoc responses deserve broader societal interests as well.

Exemption and deductibility operate as an incentive system with the power to promote or retard the pursuit of particular objectives and the undertaking of particular activities by nonprofit organizations.226 When qualification for

226. The proper characterization of exemption and deduction is the subject of some debate. See, e.g., COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, GIVING IN AMERICA 107-11 (1975); B. HOPEKINS, supra note 49, at 48-50; McNulty, Public Policy and Private Charity: A Tax Policy Perspective, 3 VA. TAX L. REV. 229 (1984); Hansmann, Why Are Nonprofit Organizations Exempted from Corporate Income Taxation?, in NONPROFIT FIRMS IN A THREE SECTOR ECONOMY 115 (M. White ed. 1981). Exemption and deductibility are often characterized as two levels of governmental subsidy in the form of "tax expenditures." That is, the tax revenues foregone as a result of the exemption or deduction are, in some sense, the equivalent of a governmental outlay. See, e.g., S. SUPREY, PATHWAYS TO TAX REFORM 223 (1973); Hochman & Rodgers, The Optimal Tax Treatment of Charitable Contributions, 30 NAT'l TAX J. 1, 2 (1977). This view is not universally shared. An opposing view maintains that the exemption and deduction provisions simply contribute to an accurate measure of income. See, e.g., Bittker, Charitable Contributions: Tax Deductions or Matching Grants, 28 TAX L. REV. 37 (1972); Bittker & Kaufman, Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code, 82 YALE L.J. 51 (1972); Bittker & Rahdert, The Exemption of Nonprofit Organizations from Federal Income Taxation, 85 YALE L.J. 299 (1976).

This "income definition" theory proposes that to treat charitable organizations as taxable entities would be conceptually difficult and ill-fitted to legal and accounting principles that have been devised to compute net taxable income and set the tax rates of for-profit corporations. Bittker & Rahdert, supra, at 307-16. Further, the theory posits, money spent by individuals for charitable contributions is not a proper subject of taxation. The deduction appropriately relieves from taxation amounts donated to charitable organizations because those expenditures are in some sense nonvoluntary. Either the donor is compelled by a "moral conviction that charitable functions have a high priority claim on one's resources" or the contribution is, in reality, a necessary business expense. Bittker, supra, at 57-58; McNulty, supra, at 238. Furthermore, because the income so spent is deflected for the benefit of others, the donor should not be taxed on it, since he has neither consumed nor saved for future consumption as a result of the expenditure, id. at 241, and only income in the sense of consumption or savings is properly taxable, see Andrews, Personal Deductions in an Ideal Income Tax, 86 HARV. L. REV. 309 (1972).

Hansmann rejects both the "subsidy" and "net income" characterizations and offers an efficiency model, proposing that the exemption can be explained and justified as a means of compensating nonprofit organizations for the constraints they face in raising capital for expansion to a long-run competitive equilibrium with their for-profit competitors. Hansmann, supra, at 124-28. Congress signaled its acceptance of the tax expenditure concept with the enactment, as part of the Congressional Budget Act of 1974, of a requirement that the budget include a "Special Analysis" of "Tax Expenditures," which includes information about the "cost" of the deduction provisions. See U.S. OFFICE OF MANAGEMENT AND BUDGET, SPECIAL ANALYSIS: TAX EXPENDITURES, SPECIAL ANALYSES, BUDGET OF THE UNITED STATES GOVERNMENT
exemption or deductibility hinges on foregoing a particular kind of activity, the decision to engage in the activity imposes a cost on the organization. Consideration of this cost can be expected to influence the organization's choice of strategy in pursuit of its objectives, and even its choice of objectives. The rules which shape the incentives and disincentives ought to be carefully tailored to maximize desired responses and to minimize undesirable effects. Otherwise, the rules may work at cross-purposes to the underlying values and thus impede, rather than promote, the desired ends.

What are the underlying values and the desired ends? The first inquiry must focus on identifying the range of endeavors that merit the institutionalized incentives of tax exemption and deductibility. Incentives ought to be directed toward encouraging activities which, without encouragement, are likely to be undertaken in insufficient quantity or, perhaps, not at all. What distinguishes the sort of activities that ought to be encouraged? Speaking generally, the normal operation of the private, for-profit sector market tends to result in an undersupply of "public" or "collective" goods—that is, commodities which are desired at least a little by a large number of people and which, if supplied to anyone, will necessarily benefit many others.

---

(1984); B. Hopkns, supra note 49, at 48-49; Thompson, supra note 76, at 493 n.14. No figure for the "cost" of the section 501(c)(3) exemption appears in the tax expenditure budgets. Hansmann suggests that its absence may signal uncertainty as to whether the exemption is really a "subsidy" or implicit acknowledgement of the difficulty of computing the tax liability of a nonprofit organization. Hansmann, supra, at 120 n.8.

The courts, too, have accepted the tax expenditure characterization. Regan v. Taxation With Representation of Washington provides perhaps the most straightforward expression of the position:

Both tax exemption and tax-deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions.


If qualification for exempt status and receipt of deductible contributions are characterized as subsidies to qualifying organizations, it is easy to see the incentive effect of those mechanisms. Furthermore, if exemption and deductibility are, in effect, equivalent to expenditures of public funds, decisions about when they are appropriate should be made with the care and deliberation that should accompany any decision about governmental expenditures. See generally Schroeder, Congressional Oversight of Tax Expenditures, 7 Tax Notes 323 (1978). Even those who view exemption and deductibility as necessary to reach an accurate measure of income recognize the disincentive effect of the taxation which results from failure to qualify. See, e.g., B. Hopkns, supra note 49, at 13-14; Bittker, supra, at 53.

227. Even though deductibility of contributions is directed to individual donors, it is generally agreed that qualification to receive deductible contributions is often far more valuable to an organization than is its own exemption. See, e.g., C. Clotfelter, Federal Tax Policy and Charitable Giving 11 (1985).

228. Under the view that rejects the "tax expenditure" characterization, the focus of this inquiry might more properly be characterized as seeking to identify the range of endeavors which merit careful avoidance of the disincentives of taxation.

229. While "public good" is probably the more frequently used terminology, Weisbrod chose
The market is an inefficient reflector of demand for collective goods because of the distorting effect of high transaction costs—that is, the costs of identifying, informing, and collecting from all who stand to benefit—and because of the "free-rider" problem—that is, the natural reluctance of many to bear a share of the cost when they stand to benefit, whether or not they pay. In addition, the market is incapable of responding to many of society's equity concerns. Even perfectly efficient operation of the private market may lead to results that are dissonant with widely shared social and moral values. The disadvantaged status of some "consumer" classes chronically weakens their bargaining position. Basically, these classes are unable to command the attention of the market. Here, market forces fail not because the normal operation of the market is inefficient, but because it is inequitable. Much of the function of correcting market failure is assumed by the public sector. In large measure, governmental activity involves the provision of collective goods, either directly or by regulating aspects of private production. The second major category of government activity is the redistribution of income and opportunity to adjust for disparities between private market outcomes and widely shared conceptions of basic fairness. Government has a wide array of mechanisms by which it can intervene to alleviate both efficiency-based and equity-based market failures. One choice, putting aside for the moment whether and when it is the best choice, is the system to use the term "collective good" in his seminal exploration of the economic role of the nonprofit sector. Weisbrod, Toward a Theory of the Voluntary Nonprofit Sector in a Three-Sector Economy, in The Economics of Nonprofit Institutions 21 (S. Rose-Ackerman ed. 1985), reprinted from Altruism, Morality, and Economic Theory 171 (E. Phelps ed. 1975) [hereinafter Weisbrod, Theory]. That convention will be followed in this Article because "collective goods" identifies the concept without risking the implication that the supplier must be public (governmental). See also Weisbrod, Private Goods, Collective Goods: The Role of the Nonprofit Sector, in The Economics of Nonproprietary Organizations 139 (K. Clarkson & D. Martin eds. 1980) [hereinafter Weisbrod, Private Goods]. It should also be noted that "goods" in this context may be goods or services. "Undersupply" is used in this context to refer only to allocative inefficiency. "Resources are allocated 'efficiently' when every consumer gets the goods and services he wants, so long as he is willing and able to pay enough to compensate workers and other resource owners for their voluntary supply of those resources required in production of those goods and services." Public Interest Law, supra note 174, at 9.


231. See id. at 5-6, 18-19. "[P]rivate market responses [yield an unacceptable result] when 'low' income is the source of lack of economic demand, but where social consensus supports provision of some commodity or service to some group nonetheless." Id. at 26.

While a broadly shared desire for redistribution of income and opportunity might itself be identified as a "collective good," it will be useful for purposes of this Article to maintain the distinction between efficiency-based and equity-based market failures. 232. See id. at 17.

233. "Direct" provision can involve either government production or government purchase from private producers. National defense is the classic example.

234. Government's provision of the collective good, clean air, is largely undertaken through this mechanism.

235. Food stamps and anti-discrimination regulations are examples.
of laws and regulations governing section 501(c)(3) exemption and deductibility, which funnels the intervention through the private, nonprofit sector.\(^2\) It should come as no surprise that, again speaking generally, the section 501(c)(3) classifications encompass a range of activities which have collective goods or redistributive characteristics.

A. The "Charitable" Exemption

The basic description of the class of endeavors to which the incentives of exempt status and deductibility are extended has changed little since 1894, when nonprofit corporations, companies, and associations organized and operated solely for "charitable, religious, or educational purposes" were exempted from the first imposition of a corporate income tax.\(^2\) The provision for deduction of charitable contributions by individuals originated in 1917 and paralleled the exemption provision.\(^2\) Neither Congress's reason for enacting the exemption and deduction provisions nor its early conception of the boundaries of these provisions is clear. The original exemption provisions may reflect merely the longstanding tradition of non-taxation of charitable and religious organizations, rather than a carefully considered policy choice.\(^2\)

The virtually complete absence of relevant legislative history has led to some debate about the proper scope of the terms "charitable," "educational," and "religious." Much of the discussion has focused on the term

\(^2\) Weisbrod offers an explanation of why the private, nonprofit sector has arisen as an alternative mechanism for the correction of private market failure. Weisbrod, Theory, supra note 229. See also Hansmann, The Role of Nonprofit Enterprise, 89 Yale L.J. 835 (1980).


\(^2\) Ch. 63, § 1201(2), 40 Stat. 300. Deductibility of corporate contributions was initiated by the Revenue Act of 1935. Ch. 829, 49 Stat. 1014. Except for its omission of "testing for public safety," the deductibility list echoes the list of organizations which may be exempt from taxation under section 501(c)(3). However, the two provisions are not cross-referenced. Liles & Blum, supra note 237, at 24-26.

\(^2\) See McGovern, The Exemption Provisions of Subchapter F, 29 Tax Law. 523, 526 (1976). The enactment of the deduction provision appears to have been spurred by a fear that colleges would likely be strapped for funds as a result of the effect of heavy wartime taxes on the revenues of their wealthy supporters and losing students to the military. Liles & Blum, supra note 237, at 25.
“charitable,” quite likely because it is equally feasible that Congress intended the term to encompass either of two well-established meanings. One argument asserts that Congress intended the “charitable” exemption to extend only to organizations “charitable” in what is often referred to as the narrow, “popular” sense of the word—that is, organizations whose purpose is the relief of the poor, distressed, and disadvantaged. An alternative view holds that Congress had in mind the broader, common law definition of charitable purposes, which extends beyond relief of the poor and distressed to encompass the promotion of health; the advancement of education, science, or religion; the erection and maintenance of public buildings, performance of government functions or otherwise lessening the burdens of government; and the promotion of social welfare for the benefit of the community. The argument that Congress did, indeed, intend for “charitable” in the exemption and deduction provisions to stand for the broad common law concept was advanced in 1958 by Herman T. Reiling, who was at the time Assistant Chief Counsel of the IRS. It is not surprising, given the vantage point

240. This argument is founded largely on principles of statutory construction and grammatical logic. First, it is posed, section 501(c)(3)’s reference to “religious, charitable, or educational purposes” (emphasis added) demands that the categories be read as alternatives. Further, only if “charitable” is read in the narrow sense can it logically parallel the other terms on the list; a broader reading of the term would subsume “educational” and “religious” and render their inclusion redundant. See B. Hopkins, supra note 49, at 61-62. Early Treasury interpretations of the term followed this narrow view. From at least as early as 1923, Treasury Regulations and IRS interpretive documents consistently held that organizations “organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor.” See id. at 63 (quoting Treas. Reg. 65, Art. 517 and subsequent regulations promulgated under the Revenue Acts of 1924, 1926, 1928, 1932, 1934, 1936 and the Internal Revenue Code of 1939).

241. See G. Bogert & G. Bogert, Law of Trusts 200 (5th ed. 1973); B. Hopkins, supra note 49, at 71-73; Restatement (Second) of Trusts § 368 (1959). The list “includes everything that is within the letter and spirit of the Statute of Elizabeth, considering such spirit to be broad enough to include whatever will promote, in a legitimate way, the comfort, happiness, and improvement of an indefinite number of persons.” Harrington v. Pier, 105 Wis. 485, 520, 82 N.W. 345, 357 (1900). The Preamble to the Statute of Charitable Uses, 1601, 43 Eliz. 1, ch. 4, defined “charitable” purposes to include: Relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, seaborne and highways, some for education and preferment of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, and others for relief or redemption of prisoners and captives, and for aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.

7 Pickering's English Statutes 43.

242. Reiling, Federal Taxation: What Is a Charitable Organization?, 44 A.B.A. J. 525 (1958). Reiling took the position that given the absence of any indication that Congress intended the narrower meaning, the content of “charitable” as used in the tax law must be that which has been so long accepted in areas of law other than tax. Id. at 526-27. The separate enumeration of “educational” and “religious” purposes, as well as the later addition of “scientific” and
from which he wrote, that Reiling's view was reflected in the definition of "charitable" which was included in Treasury Regulations promulgated in 1959. Some commentators dispute the legitimacy of the broad approach, because of the structure of the statute and its legislative history, or because the breadth of the provision is seen to create problems in administering the exemption. Even those who disapprove, however, agree that the regulation's broad definition, as administratively and judicially amplified and as tacitly accepted by Congress since 1959, must be taken as defining the present scope of the term "charitable" for purposes of exemption and deductibility.

Even in its narrow, "popular" sense, the term "charitable" is amenable to evolution and expansion beyond direct aid to the impoverished. "Distress and disadvantage" need not be financial; ministering to the special, non-financial needs of the terminally ill, the handicapped, and the elderly constitutes "relief of the distressed" justifying classification as a charity, although this was not always so. If it, in fact, follows common law charitable trust principles, the term "charitable" in the tax context should reach "to almost anything that tends to promote the well-doing and well-being of social man," so long as the benefit of the activity flows to a large, indefinite class. Further, the bounds should not be fixed, but rather, "literary" purposes to the list, explained Reiling, simply provides additional description of what the term "charitable" encompasses beyond relief of the poor, to guard against the possibility that taxpayers unfamiliar with the broad legal definition might mistakenly read "charitable" in its popular, narrow sense of relief of the poor and distressed. Id. at 527. In other words, the list, taken as a whole, is meant to reach to the outer bounds of the common law legal definition of "charity."

243. Charitable defined.—The term "charitable" is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be constrained and limited by the separate enumeration in 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the poor and distressed or underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.


244. E.g., B. Hopkins, supra note 49, at 61-62.


246. See, e.g., B. Hopkins, supra note 49, at 64; Thompson, supra note 245, at 13-14.


should evolve with changing ideas about what constitutes community benefit.\textsuperscript{253} And, in fact, as it has been applied in the context of tax law, the term “charitable” is broad in scope and subject to flexible construction that will “recognize the changing economic, social, and technological precepts and values of contemporary society.”\textsuperscript{254}

Within the reaches of the broader sense of “charitable” are several causes which the regulation offers as examples of “promotion of social welfare,” such as lessening neighborhood tensions, eliminating prejudice and discrimination, defending human and civil rights, and combatting community deterioration and juvenile delinquency.\textsuperscript{255} As broad as it is, “promotion of social welfare” apparently does not exhaust the content of the term “charitable.” In addition, section 501(c)(3)’s “charitable” designation has been extended to activities such as environmental preservation efforts and legal representation “on behalf of the public at large on matters of public interest,” the rationale being that these activities benefit the community as a whole.\textsuperscript{256}

\begin{itemize}
\item \textsuperscript{253} See \textit{id.} § 368.

However, the notion that broad social benefit is an essential component of “charitable” “social welfare” has been a determinant of charitable status even in the context of organizations which seem to operate for an enumerated “social welfare” purpose. Rev. Rul. 76-147, 1976-1 C.B. 151 (combating community deterioration in a nonblighted area promotes social welfare because benefit accrues to community at large); \textit{cf.} Rev. Rul. 67-6, 1967-1 C.B. 135 (preserving and maintaining historic area for education of general public is charitable but preserving architecture and traditions of a community for benefit of community residents, while “promotion of social welfare,” is not charitable).

In addition, a few groups have been held to “promote social welfare” and, thus, be charitable, by providing general community benefits that do not fit within one of the regulation’s enumerated categories of “social welfare.” Rev. Rul. 70-79, 1970-1 C.B. 127 (organization to study regional problems of urban areas); Rev. Rul. 66-146, 1966-1 C.B. 136 (organization presenting citizen awards).

\item \textsuperscript{256} Efforts to “preserve and protect the environment” have qualified as charitable because the benefit of the activities accrues to the public at large. \textit{E.g.}, Rev. Rul. 80-279, 1980-2 C.B.
A strong case can be made for the proposition that activity on behalf of the classes and causes that fit within section 501(c)(3)'s "charitable" classification indeed merits the incentives of tax exemption and deductibility. Each justification for designating a class or a cause to be an appropriate focus of "charitable" activity implicates some variety of market failure. Endeavors which are "charitable" because of the broad public benefit they generate, or because they lessen neighborhood tensions or combat community deterioration, implicate collective goods. Endeavors which are "charitable" because they relieve poor, distressed, and disadvantaged classes, or because they promote social welfare by defending human and civil rights or by eliminating discrimination, are fundamentally redistributive. Both of these varieties of section 501(c)(3) "charitability" are exactly the sort of enterprise that is ill-served by the usual operation of the marketplace.

Various explanations from Congress, the courts, the IRS, and commentators for the existence of the charitable exemption and deduction, while not cast in terms of defective market forces, do seem to reflect an appreciation of the collective goods or redistributive characteristics of charitable endeavors and do point, at least implicitly, to these characteristics as justification for the special support that the exemption and deduction provide. The often-repeated notion that the government is compensated for the loss of revenue that results from exemption because the benefits that result from the promotion of the general welfare relieve a financial burden that would otherwise be borne by government seems an inherent acknowledgement of

176; Rev. Rul. 80-278, 1980-2 C.B. 175. Likewise, the rationale for extending section 501(c)(3) exemption to law firms which "present positions on behalf of the public at large on matters of public interest," Rev. Proc. 71-39, 1971-2 C.B. 575 (also released as T.I.R.-1348, dated Feb. 19, 1975), has been that those organizations "provide a service which is of benefit to the community as a whole," Rev. Rul. 75-74, 1975-1 C.B. 152. An organization formed to provide a color guard for public functions and dedications of newly-installed flagpoles qualified for exemption because charitable trust precedent recognized the promotion of patriotism as an appropriate charitable objective. Rev. Rul. 78-84, 1978-1 C.B. (Part 2) 728, 742. The House Report states:

The exemption from taxation of money or property devoted to charitable... purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare.

Id. See also, e.g., Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983) ("Charitable exemptions are justified on the basis that the exempt [charity] confers a public benefit—a benefit which... [a] community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues."); Haswell v. United States, 500 F.2d 1133, 1139-40 (Ct. Cl. 1974) ("The exemption, and the corresponding deduction, recognize the benefits resulting from promotion of the general welfare and are based on the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds."); See also Trinidad v. Sagrada Orden, 263 U.S. 578, 581 (1924); McGlotten v. Connally, 338 F. Supp. 448, 456 (D.D.C. 1972); Reiling, supra note 242, at 595.
Commentators have noted that it would be "illogical and mean" to tax organizations that "subserve the highest public ends," and have posited that the tax treatment of charitable organizations reflects an implicit "recognition that some sectors have greater needs than others, that our society nurtures and perpetuates pockets of poverty and misery, and that the rational organization of voluntary services should compensate for society's wrongs by concentrating disproportionate resources to where the need is disproportionately large." Some actual decisions about qualification for section 501(c)(3) exempt status seem at first blush to be inconsistent with this construct. For example, the IRS and the courts have seriously curtailed any requirement that health care organizations be redistributive—that is, provide free care to the poor—in order to qualify as "charitable." This shift, however, does not necessarily clash with the notion that redistribution and provision of collective goods provide the rationale for exemption. For example, in moving away from the requirement that health care providers must care for indigent patients in order to be eligible for exemption, the Tax Court shifted at least implicitly to a collective goods rationale for the exemption, indicating that charitability should be determined by a "community benefit" approach which focuses on the size of the class served. In support of its conclusion that promotion of health care is per se charitable, the court relied on language from Scott's treatise on trusts which indicates that health-related charitable trusts are not limited to providing medical assistance to the poor, but may also be established for purposes such as medical research or to remove the causes of the spread of disease. Of course, these examples describe collective goods, and might well be distinguished from health care delivery that neither redistributes wealth nor provides collective goods. Indeed, the notion that the provision of health care services without a redistributive or collective goods component is nonetheless "charitable" and thus an appropriate focus of exemption and deduction has engendered much debate.

261. Sound Health, 71 T.C. at 190.
262. Id. at 178; 4 A. Scott, supra note 202, § 372. The court's quotation of Scott included, with emphasis added, Scott's assertion that "[a] trust for the promotion of health...is...charitable although the benefits are not limited to the poor. Thus a trust to establish a hospital for all persons whether rich or poor is charitable." 71 T.C. at 178. While the court offered this quotation to support the conclusion that a health care organization need not provide free services to indigents in order to qualify as "charitable," a fairer reading of the statement seems to be that a hospital need not serve only the poor in order to be "charitable." Thus, the paragraph on which the court relied is not inconsistent with the notion that "charitability" reflects some combination of redistributive activity and collective goods.
263. See, e.g., Utah County v. Intermountain Health Care, Inc., 725 P.2d 1357 (Utah 1986).
B. The "Educational" Exemption

A collective goods justification exists for the exemption of "educational" organizations as well. The tax provisions extend "education" well beyond formal schooling. While the outer boundary of the category is far from clear, it appears that the common characteristic of organizations which have been ruled to be exempt because of their "educational" nature is that they engage in the dissemination of information and ideas. The

Hansmann has observed that extending the exemption to "virtually all nonprofit hospitals, whether or not they provide free care for indigents or engage in other activities which might be thought to involve positive externalities," tends to undermine the argument that the tax exemption is a means of subsidizing the provision of collective goods. It might be argued, however, that although present practice is inconsistent with the underlying rationale, it is the practice, and not the rationale, that requires adjustment. In fact, Hansmann notes that his efficiency model would also argue against continuing the exemption of nonprofit hospitals which provide no research, teaching, or subsidized care for indigents. Hansmann, supra note 226, at 132.

"Educational" organizations have qualified for exemption since the beginning of the tax law and for deductibility as long as that concept has been incorporated in the Code. See supra notes 237-39 and accompanying text. In exempting educational organizations, the tax law follows the pattern of the common law of charitable trusts. The "advancement of education" is a long recognized subcategory of "charitable" activity. The Statute of Charitable Uses included among its enumeration of charitable purposes support for "schools of learning," "free schools," and "scholars in universities." Statute of Charitable Uses, 1601, 43 Eliz. 1, ch. 4.

The law of charitable trusts recognizes the charitability of other sorts of educational institutions, such as museums, zoos, and libraries, see 4 A. Scott, supra note 202, § 370, as well as trusts for the dissemination of knowledge and beliefs through methods other than formal schooling, such as publication and distribution of books and presentation of lectures, id. § 370.4.


For an excellent analysis of the difficulties of defining the scope of "educational" activity and the problems occasioned by IRS attempts to locate the limits in various contexts, see Thompson, supra note 76, at 487.

See, e.g., Rev. Rul. 66-147, 1966-1 C.B. 137 (publication of abstracts of scientific and
seriousness or general acceptability of the subject matter with which they are concerned is not a consideration in determining qualification for exempt status; exemption seems to have less to do with the substance with which the organization is concerned than with the process it undertakes. And, indeed, to the extent that the process relieves the burdens of government (as in the case of private schools) or adds to the quantity and variety of information and ideas available to society at large (as in the case of educational organizations which "[instruct] the public on subjects useful to the individual and beneficial to the community"), it is a kind of collective good, and the incentives of exemption and deductibility are justified. 267

medical articles contributes to the advancement of education and science by providing an effective means for increased dissemination and application of such knowledge).


268. See Rev. Rul. 67-342, 1967-2 C.B. 187 (presenting programs on the need for international social and economic cooperation); Rev. Proc. 86-43 § 3.01, 1986-2 C.B. 729 ("advocacy of particular viewpoints or positions may serve an educational purpose even if the viewpoints or positions being advocated are unpopular or are not generally accepted"). This approach is consistent with charitable trust law. See 4 A. Scott, supra note 202, § 370.4. Scott states:

The mere fact, however, that the beliefs or doctrines to be disseminated are those of a minority group does not preclude the trust from being a valid charitable trust. The difficult task is imposed upon the courts to determine whether a belief or doctrine is of such a character that its dissemination is illegal, or at least that its dissemination cannot be of benefit to the community because of its absurdity, or whether it is merely one which is displeasing to the majority.

Id. But see supra note 76 and accompanying text (describing early cases which held that organizations which disseminated information on "controversial" topics were not "educational").


270. "[I]nformation itself is a commodity that is produced, and it frequently has the characteristics of a collective-type good; once produced, it can be used by persons who did not contribute to its financing." Public Interest Law, supra note 174, at 17 (explaining why government action can alleviate allocative inefficiency when the cause of the market failure is lack of information). See also McKeen, Producing Knowledge in Nonproprietary Organizations, in The Economics of Nonproprietary Organizations 209 (K. Clarkson & D. Martin eds. 1980) (agreeing that information production, collection, and dissemination is a collective good, but questioning the capacity of the nonprofit sector to provide it effectively).

It is more difficult to fit this rationale to organizations which "[instruct] the individual for the purpose of improving or developing his capabilities." Treas. Reg. § 1.501(c)(3)-1(d)(3)(a) (1959). Whereas operation of training centers for the rehabilitation of prisoners, Rev. Rul. 67-150, 1967-1 C.B. 133, and providing a program for the rehabilitation of individuals recently released from mental institutions, Rev. Rul. 72-16, 1972-1 C.B. 143, and alcoholic treatment centers, Rev. Rul. 75-472, 1975-2 C.B. 208, exhibit the kind of redistributitional effect which is frequently implicated in the classifications of tax exemption, instruction of individuals in the skills of sailboat racing, Rev. Rul. 64-275, 1964-2 C.B. 142, and conducting seminars on banking for bank employees, Rev. Rul. 68-504, 1968-2 C.B. 211, would seem neither to redistribute wealth to society's least fortunate nor to generate significant external benefits. These endeavors might better be left to the normal operation of the marketplace.

The only possible justifications for granting the "educational" exemption in these circumstances are that (1) it is too difficult to draw the line between instructional activities which constitute the kind of "formal instruction" that government would otherwise provide and those
Distinctions made in determining exempt status that are otherwise difficult to explain are consistent with this characterization. For example, the line that is drawn in practice between publishing activities that are deemed "too commercial" to be "educational" for purposes of tax exemption and those which qualify seems to reflect a recognition that information which is published and distributed by ordinary commercial practices is more properly characterized as a "private" good than a "collective" one.271 A similar distinction may account for the denial of exemption to professional organizations which collected and disseminated information solely for the use of the group's members,272 even where the members' professional affiliations were in the "charitable" sphere of public health and welfare.273 In contrast, the "educational" classification was granted to a society of heating and air which are purely private goods, or (2) the general public derives some benefit from the enhancement of its individual members' knowledge and skills. The first of these appears to be the implicit rationale in some of the individual instruction cases. For example, attendees of the banking seminars could earn university credit, and a program in securities management which was granted "educational" status was closely affiliated with a school of management. Rev. Rul. 68-16, 1968-1 C.B. 246.

The grant of the educational exemption to the sailboat racing school also seems to implicate this rationale. The school was chartered by the State Board of Regents and was organized to prepare individuals for Olympic and other international competition. Revenue Ruling 64-275 relied upon the notion that physical education is part of "education" and upon the assertion that the sailing program is analogous to a trade school (which is explicitly included in the Treasury Regulation section 1.501(c)(3)-1(d)(3)(ii) definition of "education"). A rationale more consistent with the principles underlying exemption and deductibility is that the development and training of athletes to represent the nation in international competition is a collective good. "[Fostering] national or international amateur sports competition" was added as an independent basis for section 501(c)(3) exemption by the Tax Reform Act of 1976, Pub. L. No. 94-455 § 1313(a), 90 Stat. 1525, 1730. Section 501(j), added by the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248 § 286, 96 Stat. 324, 569-70, to clarify the 1976 amendment, specifies that the new category includes organizations which "support and develop amateur athletes for national or international competition in sports." I.R.C. § 501(j)(2) (West Supp. 1987).

At least one IRS pronouncement seems to implicate the second rationale. See Gen. Couns. Mem. 38,459 (July 31, 1980) (reduced price distribution of scholarly journals to organization's scientist-members "results in the education of a class of individuals whose increased knowledge and capabilities will serve the public interest").

271. Compare Rev. Rul. 77-4, 1977-1 C.B. 141 (publication of ethnic newspaper undertaken in manner indistinguishable from ordinary commercial publishing practices not exempt) with Big Mama Rag, Inc. v. United States, 494 F. Supp. 473, 476-77 (D.D.C. 1979), rev'd on other grounds, 631 F.2d 1030 (D.C. Cir. 1980) (feminist newspaper which is published by volunteer staff, distributed free, and does not make a profit is distinguishable from ordinary commercial publishing practices and, therefore, not ineligible for section 501(c)(3) on that basis). See also Rev. Rul. 79-369, 1979-2 C.B. 226 (exemption granted for recording and sale of musical compositions not generally produced by the commercial recording industry because the process results in presenting new works of unrecognized composers and neglected works of known composers); Rev. Rul. 67-4, 1967-1 C.B. 121 (non-commercial manner of preparing and distributing journal of abstracts from world's medical and scientific publications qualifies organization for exemption).


conditioning engineers which collected, generated, and broadly disseminated (beyond its membership) information although the information itself did not relate to "charitable" topics.274

C. The "Religious" Exemption

Providing the incentives of exemption and deductibility for "religious" organizations275 cannot rest on the justification that it encourages private undertaking of functions government would otherwise be obliged to carry, because government is, of course, constitutionally barred from engaging in or directly supporting religious activity.276 And, despite some opinion that advancement of religion is worthy of the exemption and deductibility in-


275. "Religious" organizations, too, have been exempted from tax as long as there has been a tax, see supra note 237 and accompanying text, and contributions to them have been deductible as long as there has been a charitable deduction, see supra note 238 and accompanying text. Like education, religion is both separately enumerated in section 501(c)(3) and included, by regulation, as a subcomponent of "charitable," Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959), where tax law, reflecting the common law of charitable trusts, recognizes the promotion of religion as charitable.

While the Statute of Charitable Uses, 1601, 43 Eliz. I, ch. 4, deliberately omitted religious purposes except the repair of churches in order to avoid difficulties which might arise in connection with shifts in the official religion, see 4 A. Scott, supra note 202, § 371, the common law soon included the promotion of the established religion, and later, other religions as well in the category of charitable trusts. Id. Under the tax law, the "advancement of religion" component of "charitable" is applied, for the most part, to activities which support the functions of one or more churches or sects. See, e.g., Rev. Rul. 75-282, 1975-2 C.B. 201 (making below market mortgage loans for construction of church buildings); Rev. Rul. 74-575, 1974-2 C.B. 161 (supervising food products to ensure compliance with religious dietary rules); Rev. Rul. 68-26, 1968-1 C.B. 272 (providing materials for parochial school system); Rev. Rul. 68-306, 1968-1 C.B. 257 (publishing church newspaper).

The "religious" designation is applied more broadly, and has qualified not only mainstream sects, but also groups espousing nearly any sincerely held belief. See B. Hopkins, supra note 49, at 184-87. Where tax exemption has been denied to purportedly "religious" organizations, denial has almost always rested on other requirements of section 501(c)(3), such as the prohibition on private inurement or the limitations on political activity, rather than on a conclusion that the organization is not within the bounds of the term "religious." Id. at 189-92. See also Thompson, supra note 245, at 10.

276. Government could provide or finance operas, hospitals, historical societies, and all the rest because they represent social welfare programs within the reach of the police power. In contrast, government may not provide or finance worship because of the Establishment Clause any more than it may single out "atheistic" or "agnostic" centers or groups and create or finance them.

centives because of its contribution to the general well-being of society,\textsuperscript{277} the better-accepted view is that tax exemption for religious organizations is not supported, or supportable, by reference to the desirability of providing incentives. Rather, exemption is the less obnoxious of two troublesome alternatives.

While exemption raises the spectre of subsidy, non-exemption offends the principle that "organized religion is not expected to support the state."\textsuperscript{278} The classic treatment of the issue is found in \textit{Walz v. Tax Commission of New York.}\textsuperscript{279} In \textit{Walz}, the United States Supreme Court concluded that it is appropriate for government to go out of its way to avoid interfering with the private practice of religion,\textsuperscript{280} and that, while "[e]ither course, taxation of churches or exemption, occasions some degree of involvement with religion,"\textsuperscript{281} the involvement between church and state occasioned by the exemption is far less than that which would necessarily accompany taxation.\textsuperscript{282} Exemption "restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other."\textsuperscript{283}

\textbf{D. Advocacy as Charity}

Thus, while the religious exemption must be explained in other terms, the endeavors which qualify for exemption and deduction under the tax law generally do tend to be those which either supply collective goods or which are redistributive in that they serve the needs and interests of society's

\begin{footnotesize}
\begin{footnotes}
\textsuperscript{277} See, e.g., Reiling, \textit{supra} note 242, at 595. Reiling states: Nonetheless, there is a presumption that the exemption of [religious organizations] serves a public interest. It is a presumption which springs from the fact that the advancement of religion is generally recognized as fundamental to our way of life, for we are a people who do not agree with the agnostic views of Robert G. Ingersoll or with the teaching of Karl Marx that religion "is the opium of the people." Instead, we believe in a government that guarantees the right to religion and to religious freedom. These religious objectives are accomplished only by public institutions that are established and maintained otherwise than by government. These institutions, when recognized by law as religious, are of a public character and therefore serve a public interest. \textit{Id.}\n

\textsuperscript{278} Freund, \textit{Public Aid to Parochial Schools}, 82 HARV. L. REV. 1680, 1687 n.16 (1969).

\textsuperscript{279} 397 U.S. 664 (1970). While \textit{Walz} concerned state property tax exemption, the analysis and conclusions apply equally in the federal income tax exemption context.

\textsuperscript{280} \textit{Id.} at 672-74.

\textsuperscript{281} \textit{Id.} at 674.

\textsuperscript{282} \textit{Id.} at 675.

\textsuperscript{283} \textit{Id.} at 676.
\end{footnotes}
\end{footnotesize}
distressed and disadvantaged. In the case of "educational" organizations, the collective good is the process—the dissemination of information and ideas. In the case of "charitable" organizations, on the other hand, the collective good or redistributive aspect that supports the designation is found in the substantive content of the organization's aims. The charitable organization's purpose is to aid a group or a cause that has been recognized to be an appropriate focus of special support. The organization's "charitability" flows from the ends it pursues.

Left free to choose, the charitable organization would likely be guided in its selection of means by considerations such as the pool of skills and expertise available within the organization, the perceived effectiveness of a particular strategy relative to others which might be chosen, and its membership's and management's views of the organization's appropriate role and style. External factors will also influence the choice. One important concern will be the relative direct and indirect costs of various activities. Another is the desirability or necessity of carrying the organization's activity into an arena chosen by others, either to join in collective action with those who share the organization's purposes or to respond to those whose interests are counter to the organization's charitable ends. So long as its activities are in pursuit of the "charitable" ends determined to be deserving of the incentives of exemption and deductibility, the organization's choice of means should not be distorted by special regulatory constraints. Nor should the choice of some particular means carry the extra costs that attend the withholding or retraction of the incentive unless there are reasons for the restriction or control of that means that are at least equal in strength to the policy behind encouraging the pursuit of the organization's charitable ends. That is, without some convincing justification to the contrary, the tax law should be neutral with respect to a charitable organization's choice of strategy, and should not penalize the organization's decisions to supplement or supplant direct service activities with system-focused advocacy.

In fact, there are important reasons, at least in some circumstances, to be not just neutral, but especially solicitous of charitable advocacy activity. In some circumstances, advocacy activities are not simply means to an otherwise charitable end. Rather, they are worthy in their own right of the incentives of exemption and deductibility. This special deference is due where the advocacy activity tends to promote fair participation in the arenas of public decisionmaking—where it operates to correct chronic underrepresentation in the processes of government. Careful characterization of the kinds of interests represented by "charitable" organizations and critical examination of the workings of the policymaking processes toward which system-change advocacy is directed reveal that much advocacy by "charitable" organizations should in fact be the object of special encouragement.

Equal protection analysis, although not directly applicable to the question, offers a starting point. Equal protection jurisprudence is rooted in the idea
that majoritarian outcomes of the political process lose their presumed legitimacy when the public decisionmaking processes from which they flow are fundamentally flawed. The systematic and pervasive disadvantage under which some groups labor in the political arena justifies a close and skeptical evaluation of policy formulations that adversely affect their interests. Of course, these are the "discrete and insular minorities" of Carolene Products' famous footnote 4—groups with respect to which majoritarian prejudice "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."  

While only racial and ancestral group characteristics have qualified unequivocally as "suspect" classifications which demand strict scrutiny, members of other groups operate to some significant degree under the same chronic political disadvantage that underlies our solicitude for the recognized "suspect classes." Children, for example, may be such a group. Although children are not the objects of class prejudice of the type that merits heightened protection under equal protection analysis, as a class they have no direct access to the political process. Some subgroups of children—foster children, very poor children, and children of children—lack even indirect representation through their parents. These same children have the most to lose from decisionmaking that does not factor in their perspectives, because

284. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). The language of the footnote itself indicates that it is their condition of disadvantage in the political arena that justifies the special protection of strict judicial scrutiny of legislation adverse to the interests of "discrete and insular minorities." The notion that equal protection analysis is concerned with the correction of process defects has its distinguished supporters, see, e.g., J. Ely, Democracy and Distrust (1980), and its distinguished critics, see, e.g., Brilmayer, Carolene, Conflicts, and the Fate of the "Inside-Outsider," 134 U. Pa. L. Rev. 1291 (1986); Parker, The Past of Constitutional Theory—And Its Future, 42 Ohio St. L.J. 223 (1981); Powell, Carolene Products Revisited, 82 Colum. L. Rev. 1087 (1982); Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063 (1980). Parker argues that Ely's process-based view of equal protection doctrine is fundamentally flawed because its premise that "our political process works well enough as it is, and . . . is given (only) to rather discrete sorts of malfunction," Parker, supra at 240-41, ignores a more pervasive failing: "the routine political ineffectiveness and quiescence—rooted in social and economic inequality—of masses of ordinary citizens," id. at 249.


286. See, e.g., L. Tribe, American Constitutional Law 1012 (1978). Justice Powell has suggested that in writing footnote 4, Justice Stone intended to limit the universe of "discrete and insular minorities" to those racial, religious, and ethnic groups which are treated unfairly and unequally in the political process. Powell, supra note 284, at 1091.

The Court has sometimes held that classification on the basis of noncitizen status calls for strict scrutiny. See, e.g., In re Griffiths, 413 U.S. 717 (1973); Graham v. Richardson, 403 U.S. 365 (1971). It has not done so consistently, and the alienage cases, taken together, seem to reflect an intermediate standard of review. See J. Nowak, R. Rotunda & J. Young, Constitutional Law 630-44 (3d ed. 1986); L. Tribe, supra, at 1052-56.

287. See J. Ely, supra note 284, at 153 (discussing the centrality of prejudice in the identification of suspect classes); Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713, 740 (1985) (suggesting that the "prejudice" aspect of Carolene in fact argues against a purely process-based reading of footnote 4).
their lives are much more affected by public programs and policies than are those of children who have the buffer of a reasonably well-functioning family. A number of other groups, such as the very poor, the mentally ill, and the mentally retarded, share this characteristic of special vulnerability, because their dependence on public systems coincides with a lack of effective direct access to decisionmaking processes. Furthermore, it is likely that their interests will not routinely be of much importance to those who do have access. Scholars have suggested that the principle of political fairness which underlies footnote 4, and not its specific words, should shape judicial review. For instance, Ackerman proposes that “anonymous and diffuse” groups—even majorities—are subject to systematic disadvantages in the political marketplace that are similar to, and perhaps worse than, those which justify special protection for “discrete and insular” groups. Because of the relative invisibility of the members of “anonymous and diffuse” groups to one another, the barriers to effective organization may be greater than those faced by at least some “discrete and insular” groups. Thus, the interests of groups which are discrete and diffuse (like women and handicapped persons), or anonymous and somewhat insular (like homosexuals), or both


In its treatment of illegitimacy as a classification, the Court has come close to recognizing a need to extend special equal protection review on behalf of children, particularly in circumstances where they are disadvantaged by their parents’ actions, see, e.g., Trimble v. Gordon, 430 U.S. 762 (1977) (invalidating Illinois law excluding illegitimate child from inheritance from father through intestate succession unless legitimated through intermarriage of natural parents and father’s acknowledgment of paternity), but appears to have retreated somewhat from that position, see Lalli v. Lalli, 439 U.S. 259 (1978).

289. Glasser describes these groups in terms of their intrinsic dependency resulting from “natural causes that cannot be remedied,” such as severe physical or mental handicap, or extrinsic dependency, caused by “economic insufficiency.” Glasser, supra note 24, at 126. Welfare recipients, foster children, and many of the elderly and mentally ill fall into the latter category. Id.

290. See infra notes 312-14 and accompanying text.

291. Ackerman, supra note 287, at 723-24.

292. Id. See generally M. Olson, The Logic of Collective Action (1965). This conclusion is consistent with predictions suggested by the economic model of political organization, see infra notes 317-18 and accompanying text, and with empirical observations, see infra note 319 and accompanying text.

293. See also J. Ely, supra note 284, at 164 (although women are neither “insular,” nor a minority, “there remains something that seems right in the claim that women have been operating at an unfair disadvantage in the political process, although it’s tricky pinning down just what gives rise to that intuition”). Ely concludes that political “access was blocked in the past but can’t responsibly be said to be so any longer” and proposes that “old” gender-discriminatory laws be reviewed more stringently than “new” ones. Id. at 169.

294. See also id. at 163-64.
diffuse and anonymous (like poor people) are chronically underrepresented in the processes which set public policy and should be extended the same sort of protection through careful judicial review which is extended to footnote 4's "discrete and insular minorities."  

Taken together, the "discrete and insular minorities" of Carolene Products' footnote 4 and Professor Ackerman's "diffuse" and "anonymous" groups describe a universe that is very nearly coextensive with the universe described by the term "charitable." They encompass the "distressed and disadvantaged" groups that are the appropriate focus of "charity" in its narrow, "popular" sense; the groups served by the anti-discrimination component of "charitable" "promotion of social welfare;" and the "sufficiently large and indefinite" classes, the service of whose collective interests is "charitable" under the broad, common law reach of the term that has been incorporated into the tax law since at least 1959.  

The same concern about chronic underrepresentation of these groups that justifies a willingness to overturn majoritarian outcomes in the equal protection context should inform our approach to advocacy by charitable organizations. For although neither established equal protection doctrine nor the exploratory extensions of its underlying principles dictate special incentives for participation, they may help to identify groups whose participation is chronically compromised. Furthermore, recognizing how heavily our perception of the legitimacy of governmental action depends on an underlying assumption of fair opportunity for participation in the design of that action should lead us to consider other adjustments that might be made to correct the chronic underrepresentation of some interests.

The very nature of the policymaking process, as well as the public policy which results, is distorted when some views are chronically underrepresented. The classic pluralist model of democratic government describes a legislative process wherein the articulated preferences of groups of individuals who share attitudes and claims upon other groups in society compete with the articulated preferences of other interest groups for attention and accommodation. The function of the legislative process is to hear and balance these articulated preferences, arriving at some optimal aggregation which is,

295. Ackerman, supra note 287, at 742.
296. See supra notes 241-56 and accompanying text.
298. D. TRUMAN, supra note 297, at 37 ("[A]n interest group is a shared attitude group that makes certain claims upon other groups in the society. If and when it makes its claims through or upon any of the institutions of government, it becomes a political interest group.").
by definition, the embodiment of the "public interest." The process of adjustment and compromise takes account of both the size of the group sharing any given preference and the intensity with which that preference is held; thus, an intensely felt minority preference can counter a less intense majority interest. Although some have expressed concern that proliferation of identified interest groups may ultimately immobilize, rather than perfect, the democratic process, or that the accommodation reached will represent a division of policy "turf" among coalitions of minority factions, classic pluralist theory holds that the existence of unorganized potential interest groups, overlapping membership among identified interest groups, and widely shared but unorganized interests set stabilizing limits on the interest group struggle. The process and its outcomes are democratic to the extent that all articulated preferences are heard at a meaningful stage in the decision-making process.

A version of the pluralist view of the legislative process has been embraced by law and economics scholars, who have proposed that legislative outcomes result from the operation of a specialized marketplace. Within this marketplace, coalitions of individuals in pursuit of economic gain seek laws that will promote that goal from legislators who seek to ensure their own reelection. Groups seek to "outbid" competing interests for legislation favorable to them, with the currency of exchange being the group's value to the legislator's chances of reelection (through ability to deliver votes, to provide favorable publicity or withhold unfavorable attention, and to make campaign contributions).

The pluralist model has been criticized as being neither descriptively accurate nor normatively sound. First, its critics argue, "[t]he idea that the political process operates as a well-functioning market is highly romantic." Second, and more important, they take issue with the notion that government in its policymaking function is nothing more than a "cash register, ringing up the additions and withdrawals of strength, a mindless balance pointing

299. See Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 33 (1985). See also Weisbrot, Theory, supra note 229, at 35 (describing how legislative outcomes are affected by the vote trading that results from the variation in intensity of individual preferences with respect to different issues).


301. See McFarland, supra note 28, at 324, 335.

302. See D. Truman, supra note 297, at 513-16.


306. Sunstein, supra note 305, at 18.
and marking the weight and distribution of power among the contending
groups.307 An alternative model proposed by these critics argues that gov-
ernment’s function is not just to tally expressed interest group preferences,
but to reflect critically on them, to provide an effective forum for deliberation
and discussion and thus to arrive at expressions of public policy which
embody a “public interest” that is separate from, and loftier than, a simple
aggregation of competing private interests.308
Under either the classic pluralist theory or the deliberative model, the
legitimacy of the process and of the product it generates depends on wide
and effective access to the decisionmaking machinery.309 If the political
marketplace is not open to all articulated preferences, it can hardly lead to
an accurate aggregation of those preferences.310 If the legislative function is
to reach a well-considered embodiment of some higher notion of the public
interest, the function can only be compromised by the diminution of infor-
mation and perspective available to policymakers which necessarily results
when some groups are consistently denied full access.311
Distribution of effective access is clearly skewed, to the detriment of both
the “distressed and disadvantaged” groups and the “large and indefinite
classes” that have been identified as the appropriate focus of “charity.”
These are the interests that habitually lose in the policy process either because
they lack the power to get their concerns on the public agenda312 or because

Content of Public Interest: Some Comments on Harold D. Lasswell, in NOMOS V: The Public
Interest 80, 84 (C. Friedrich ed. 1962).
308. See A. Maass, supra note 305, at 5, 19; Friedmann, supra note 307, at 84-85; Sunstein,
supra note 305, at 18.
309. Unlike the classic pluralists, the law and economics theorists do not consider participation
in the debate by all interests to be a postulate of a properly functioning system. Rather, the
factors which result in differential levels of political participation among interests are themselves
the result of the operation of economic principles. See Eskridge & Frickey, supra note 297, at
704-05.
310. See T. Lowi, The End of Liberalism 51 (2d ed. 1979) (noting that one of the funda-
mental assumptions upon which the classic pluralist view rests is that virtually all sectors of
society are adequately represented by effective organization of their interests). See also Asher,
supra note 28, at 1069, 1080 (“If we are to trust the political marketplace to mediate between
private claims and define public needs equitably and democratically, the marketplace must be
open to all on fair and equal terms.”).
311. See HOUSE SELECT COMM. ON LOBBYING ACTIVITIES, GENERAL INTERIM REPORT, H.R.
REP. No. 3138, 81st Cong., 2d Sess. 12 (1950) (“where a full hearing is available for all
interested groups, we can rely on competitive watchfulness and public scrutiny as partial
safeguards against misrepresentation of the facts by any one group”); remarks of Sen. Edmund
Muskie, 117 CONG. REC. 8518 (1971) (“If we are to maintain a democratic form of government
in practice, and if the Congress is to reach reasoned judgments on the important issues before
it, we must assure that every segment of society is able to communicate with Congress”); Caplin
& Timbie, supra note 108, at 198 (legislators dealing with social problems should have advantage
of information and expertise of organizations which have practical experience with the problems).
312. A. Dobelstein, Politics, Economics and Public Welfare 166-67 (1980); E.
they are without the resources needed to obtain their desired outcomes once the issues are raised in the public arena. The degree to which a group obtains effective access to governmental decisionmaking processes depends, among other things, on the group’s prestige and the extent to which the decisionmakers belong to or identify with the group.313 Groups that are appropriate beneficiaries of “charitable” activity rarely enjoy much prestige. Further, government officials are unlikely to consider themselves to have much in common with members of these groups, particularly the “distressed and disadvantaged” classes. To the extent that the concerns of these groups make it onto the public agenda, legislators are more likely to identify with, and therefore give access and credence to, the professional service providers who are concerned with the same policy issues as their client populations but who are likely to represent an entirely different, though not necessarily unsympathetic, perspective.314

SCHATTESCHNEIDER, THE SEMI-SOVEREIGN PEOPLE 71 (1960) ("Some issues are organized into politics while others are organized out."); quoted in Bachrach, Interest, Participation, and Democratic Theory, in NOMOS XVI: Participation in Politics 39, 54 n.10 (J. Pennock & J. Chapman eds. 1975); Bachrach, supra, at 45; Parker, supra note 284, at 250 (criticizing Ely's process-oriented conception of politics for "[ignoring] the probability that a condition of weakness might impair a group's capacity even to get its interests on the 'agenda' of the political process" and for being "oblivious to a dimension of power involving 'nondecisions'; that is, inaction").

314. See id. at 336; Cigler & Loomis, supra note 300, at 13-14 (noting also that service-provider interest groups face fewer obstacles to organization than client groups, particularly when clients are poor, mentally ill, or otherwise disadvantaged).

Parallel problems of effective access confront the target populations of “charity” in the second major locus of public policy decisionmaking, that is, administrative agencies. The importance of wide access to bureaucratic policy setting is clearly essential to fair and balanced outcomes. See Sunstein, supra note 305, at 18; DiMento, Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues and a Direction for Future Research, 1977 DUKE L.J. 409, 441 (1977). DiMento states:

If that portion of the public which has previously been unrepresented in agency decision-making can be included in the [administrative] decision-making process, many will agree that the decisions will be closer to the public interest than was the case prior to their inclusion. . . . [C]ontributions from a greater variety of perspectives may improve the quality of analysis.

Id. (footnotes omitted).

Interest group influence in this context, too, is likely to be skewed by disparity in availability of resources and, probably even more than in the legislative context, by the identification of the decisionmakers with the professional, rather than client or consumer, interest groups. See A. DOEBELSTEIN, supra note 312, at 168-69 ("[p]rofessional groups have access to the bureaucracy, largely because the staff of administrative agencies themselves are likely to be members of professional groups and often seek the advice of their colleagues in exchange for political support"); E. LATHAM, THE GROUP BASIS OF POLITICS 37 (1952), quoted in Friedmann, supra note 307, at 84-85; McLachlan, Democratizing the Administrative Process Toward Increased Responsiveness, 13 ARIZ. L. REV. 835, 836 (1972). See, e.g., Scenic Hudson Preservation Conference v. Federal Power Comm’n, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966). See also Kelm, Participating in Contemporary Democratic Theories, in NOMOS XVI: Participation in Politics 1, 16 (J. Pennock & J. Chapman eds. 1975).
The economic theory of the legislative process also predicts that section 501(c)(3)'s "distressed and disadvantaged" groups and "large and indefinite classes" are likely to be at a chronic disadvantage in the political marketplace. First, the "distressed and disadvantaged" groups have, almost by definition, less of the currency needed to "buy" favorable legislation. Second, the formation and successful mobilization of interest groups as "buyers" is affected by the incidence of transaction costs and the extent to which the group must overcome a free-rider problem. Where the perceived costs or benefits of legislation fall to a relatively narrow, well-defined group, that group will tend to organize and participate because the net stake to each member is significant and the transaction costs of organizing are manageable. Where the perceived costs or benefits are widely distributed, however, the net stake of each potentially affected individual is small, and therefore less likely to seem to justify the cost and effort of organization and active participation. Furthermore, as the size of the affected group increases, so does the cost of organization. As a result, economic theory predicts that interest group activity will be skewed in favor of narrow, well-defined groups, rather than large, indefinite classes.

Finally, since legislators "supply" legislation in exchange for increased likelihood of reelection, they are reluctant to pass measures which call forth organized opposition, which is likely to be the case when the costs of the proposed measure would fall on a relatively small, well-defined group. At the same time, they are willing to grant concentrated benefits when the cost is widely dispersed and, therefore, the opposition unlikely to be organized. Economic theory predicts that the operation of the forces of political supply and demand will result in a large number of statutes favorable to the interests of well-organized, powerful interest groups and far fewer "public interest" laws—that is, laws which correct market failure by supplying collective goods or by implementing broadly held notions of distributive justice, such as civil rights laws.

Empirical studies of interest group and legislative behavior indicate that neither pluralist theory, in either its "classic" form or as modified by law and economics scholars, nor the deliberative model provides an accurate description of our political reality. What the studies do confirm is that while the legislative product is driven by a shifting mix of response to organized pressure and independent exercise of legislators' ideology, the pressure is

315. See supra note 304 and accompanying text.
316. See supra note 230 and accompanying text; McFarland, supra note 28, at 327-28.
317. See Eskridge & Frickey, supra note 297, at 704-05 (summarizing the views of Posner and others).
318. Id. at 705-06. "[W]here the legislator cannot ... avoid conflictual demand patterns, either because an issue is politically salient or organized groups are on both sides ... [he] has every incentive to work out some compromise ... that satisfies as many interest groups as possible, or even to delegate the sensitive decisions to agencies." Id.
exerted by groups that disproportionately represent upper-class and upper-middle-class interests.\(^{319}\)

As long as the political demands of some segments of society remain unarticulated, the legitimacy of the policies which emerge from the skewed decision processes is suspect. An additional reason to promote opportunities for involvement in the processes of public policy generation is offered by those who suggest that the importance of political participation is not only in its capacity to affect outcomes, but also in its value as a mechanism for self-realization.\(^{320}\) Developing awareness of one's latent political interests is a creative process that can take place only if opportunities exist to reflect and act upon one's opinions. A political system that forecloses such opportunities for some groups is fundamentally flawed.\(^{321}\)

Finally, one of the claims that individuals have upon others in society is to be recognized and respected as bearers of interests and demands that command consideration in the democratic processes of interest accommodation.\(^{322}\) Failure to share decisionmaking power connotes a basic disrespect for the excluded,\(^{323}\) and seems to postulate a natural right of the political elite "to determine where the shoe pinches as well as how the pinch should be eased."\(^{324}\) This message runs directly counter to one of the most basic premises of our system: while one may not win in the struggle of competing interests, one's arguments will be given conscientious consideration. One's claims and one's right to present them will be respected.\(^{325}\)

The principles that support special solicitude for "charitable" groups in the processes of legislative and administrative policymaking argue equally in favor of incentives for litigation in pursuit of charitable ends. Diffuse majority interests are susceptible to underrepresentation in the courtroom, as well as in the halls of the legislature. Because of the inherent difficulty of effectively mobilizing diffuse interests that implicate no substantial and immediate individual pecuniary stake, issues that pit substantial private interests

---

320. See Bachrach, supra note 312, at 47-49 (proposing that continuing face-to-face involvement in close-to-home policymaking environments—primarily the workplace—would be an appropriate mechanism to facilitate political self-realization among those unaccustomed to participation in the larger political arena); Michelman, The Supreme Court, 1985 Term—Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4, 26 (1986).
322. See A. Maass, supra note 305, at 5-6.
323. Ackerman, supra note 287, at 738; Bachrach, supra note 312, at 43.
against widely distributed but far less intensely held interests tend not to be brought into the courts as often as their overall importance would merit. The diffuse nature of the interest of the general public in issues such as environmental preservation and consumer protection undercuts the ability of the marketplace to provide legal representation commensurate with the real value of such public interests. The IRS itself has acknowledged that, under these circumstances, the availability of representation, in and of itself, is a charitable object.

There are additional reasons for increasing access to the courts for those who pursue the interests of the beneficiaries of "charity" in its narrow sense. Not only do the "distressed and disadvantaged" lack the resources to vindicate their rights, but, by virtue of their particular circumstances, their most basic rights are especially vulnerable. Precisely because these are the "distressed" and "disadvantaged," they are often dependent for their most basic needs on public programs. These programs, reflecting their roots in the Progressive era, have historically conditioned assistance upon forfeiture of a significant degree of personal autonomy. The agencies and individuals who provide services under these programs tend sometimes to overlook the fact that even benevolent governmental intervention is subject to fundamental constitutional limitations. This tendency creates a strong potential for inordinate agency power over client lives and for arbitrary exercise of that power. The only reliable safeguard against abuse is effective access to the institutions and processes designed to protect private right from public power. Furthermore, the courts are the primary forum for challenging the legitimacy of policies generated by unacceptably distorted representative processes. If the very groups that are the most likely victims of these distortions are unable to seek relief from the courts, then the basic premise supporting the legitimacy of majoritarian outcomes is violated.

Finally, those who represent both broad and narrow "charitable" interests are uniquely placed to insist that the final arbiters of society's rules do not overlook basic questions of distributive justice. By definition, they are concerned with collective goods and with the interests of the least powerful.


327. Hearings, supra note 60, at 60-61 (testimony of Commissioner Randolph Thrower); Rev. Rul. 75-74, 1975-1 C.B. 152.


329. See Glasser, supra note 24, at 114-17 (1978).


331. See supra notes 284-96 and accompanying text.
Their presence in the judicial forum helps to guard against the danger that courts will not only weigh these interests too lightly, but will fail altogether to recognize that fundamental value judgments are implicated in the issues they are deciding.

III. RESTRUCTURING THE LAW TO REFLECT THE UNDERLYING RATIONALES

There are good reasons, then, not only to tolerate, but to encourage, advocacy which tends to correct either general market failures or the particular failures of the "political marketplace." In general, system-focused advocacy efforts of charitable organizations have this effect, and the arguments in favor of limiting them are not strong enough to override the reasons for encouraging them. However, even if the arguments against charitable advocacy are insufficiently persuasive that the incentives of exemption and deductibility should be withheld from advocacy organizations, the incentives cannot be justified except in cases where the underlying policies favoring the incentives will, in fact, be furthered.

All advocacy by all varieties of nonprofit organizations is not alike. Under which circumstances are the justifications for the incentives present? Which situations do not implicate market failure or do not compensate for that failure in ways that justify the incentive?

Exemption and deductibility for organizations pursuing "charitable" purposes are justified by the organization's substantive focus. Almost by definition, the "charitable" organization exists to provide public goods or to

332. Tribe argues that the courts do, in fact, demonstrate this propensity. He contends, for example, that basing decisions on a cost-benefit calculus simply obscures the fact that basic value judgments are implicated in defining what counts as a "cost" or a "benefit." Further, the value perspective the courts have tended to adopt is one that discounts, or even ignores, basic distributive justice issues. Tribe, Constitutional Calculus: Equal Justice or Economic Efficiency?, 98 Harv. L. Rev. 592, 597-98 (1985).

333. Section 501(c)(3) imposes substantial constraints on participation in election campaigns. These limitations are beyond the scope of this article because elections are not really a part of the policy formulation process; rather, they are the process by which the major policymaking bodies are constituted. It is true that the chronic underrepresentation of some sectors of society in this process can be expected to result in a skewing of the policies which emerge from the resulting policymaking bodies. However, the fair participation issues raised by election campaigns differ from those that arise in the context of legislative, administrative, or litigative advocacy. The primary value which underlies regulation of elections and participation in campaigns is the principle of ensuring the individual a full and fair opportunity to participate. The value of associating to participate is, for these purposes, a subordinate one. There is less reason, therefore, for society to "expend" to encourage aggregation of voices (even chronically underrepresented voices) in this context. Conversely, there is good reason to "expend" to facilitate full and effective individual opportunity to participate. Incentives in this context, then, should be directed toward activities which are aimed at engaging the individual in the election process, such as neutral voter education activities and voter registration drives.

334. See supra notes 203-25 and accompanying text.
redistribute wealth. The articulation of the organization's purpose identifies the disadvantaged group or the broad public concern whose interests it seeks to promote. In principle, the process by which those interests are pursued is irrelevant; the collective good or redistributive aspect of the endeavor arises from the nature of the group or cause by which the organization defines its mission.\textsuperscript{335} In fact, the process of providing representation in the arenas of public decisionmaking for interests which suffer chronic underrepresentation can be, in and of itself, a collective good or redistributional activity which merits incentive.\textsuperscript{336} The justification is absent, however, where an organization describes its mission in terms of a recognized charitable purpose, but actually provides a private good—that is, representation that the private market is perfectly capable of supplying. When an organization simply amplifies voices already well-represented in policymaking arenas, the special justification for providing incentives for advocacy is lacking. When the organization's position merely restates individual interests which are of sufficient magnitude to ensure their representation without special incentive, there is no market failure, and providing a special incentive for such advocacy is more likely to contribute to, rather than correct, imbalance of representation.

The distinction cannot be drawn on the basis of the position taken. Two "charitable" organizations may well reach different conclusions about the desirability of certain public policies. For example, one organization might oppose the proliferation of nuclear power plants on health and environmental protection grounds. The policies favored by this organization might also be preferred by coal producers, who stand to derive a private benefit from the limitation of alternative energy sources. Another "charitable" organization might take the position that the expansion of nuclear energy generation facilities would serve environmental protection and consumer interests. This organization's policy preferences might be consistent with those of the power companies which stand to gain from the promotion of nuclear power facilities. Each organization believes its viewpoint to represent the "public interest." It is impossible to identify which vision is correct, and there are clear reasons to avoid basing decisions about the grant or denial of the section 501(c)(3) incentives upon an administrative assessment of which vision is correct.\textsuperscript{337} But if the incentives are to be tailored to reflect their underlying justifications, some way must be identified to distinguish between those organizations which merit the incentives and those which do not. Clearly, that basis must be something more than the organization's own claim that its efforts are in the service of "environmental preservation" or "consumer protection."

\textsuperscript{335} See supra notes 237-63 and accompanying text.
\textsuperscript{336} See supra notes 284-333 and accompanying text.
\textsuperscript{337} See supra notes 183-91 and accompanying text.
Representation of the private interest on either side of the issue does not implicate market failure and does not merit special incentive, even if the representatives are organized into nonprofit firms and their goals given the label of "environmental preservation" or "consumer protection." But representation of a widely shared, hard-to-organize sentiment does fit the rationales for the incentive, no matter which side of the issue is espoused. Representation of a diffuse interest is no less a collective good because there exists an opposing diffuse interest or because it is aligned with private interests. The mechanism for deciding which organizations qualify for the exemption and deductibility incentives must be designed, therefore, to draw the line, not between the "pro" and the "anti," but rather, between the representation of viewpoints which are "collective" and those which are "private."

There is another situation in which the incentives are not warranted. Even where the inefficiencies or inequities of the marketplace do lead to chronic underrepresentation, no cure is supplied, and, therefore, no incentive should be provided, where an organization which purports to give voice to the slighted viewpoint cannot fairly claim to speak for those whose interests have been overlooked.

The criticism has been advanced that many organizations which claim to represent underrepresented interests in fact do not. Very often, there exists no mechanism by which the organization is formally accountable to those in whose interests it claims to be acting. As a practical matter, even a membership organization which is technically accountable to its members is unlikely to involve them actively in selecting positions on issues or in choosing strategies by which to pursue them. The staff of "public interest" organ-

338. The discussion describes representation of diffuse interests. The same principle applies to representation of "distressed and disadvantaged" interests, which has redistributive rather than collective good characteristics and which responds to equity-based rather than efficiency-based market failure. For example, the fact that developers who stand to gain support a housing subsidy program does not make the advocacy efforts of an organization formed to promote the interests of the poor any less "charitable." Nor does the fact that the program would serve the interests of the poor necessarily make the developers' advocacy "charitable." See K. SCHLOZMAN & J. TIERNEY, supra note 319, at 26-35 (defining public interest group as "one seeking a benefit, the achievement of which will not benefit selectively either the membership or the activists of the organization" and noting that there may be both public and private interests on each side of a question).

339. Further, many membership organizations do not vest even technical, ultimate control in members. Even an organization with members may vest total voting power, including the power to elect directors, in its board of directors. See, e.g., ALI-ABA MODEL NON-PROFIT CORPORATION ACT §§ 15, 18 (1964). Hayes describes a 1977 study which assessed the opportunities to influence organizational policy provided by public interest lobbies to their members. Hayes, Interest Groups: Pluralism or Mass Society, in INTEREST GROUP POLICIES 110 (A. Cigler & B. Loomis eds. 1983). "[F]ew of these groups communicated with their memberships in any ongoing way beyond the publication of newsletters or occasional legislative alerts. Fifty-seven percent provided no means whatever for members to influence group decision making. . . . Not surprisingly, the professional staff dominated the decision-making process for most (69 percent) of these groups." Id. at 113-14.
izations tends to be white, middle class, more highly educated and more politically liberal than the public at large.\textsuperscript{340} Even in what might be called "middle class causes," such as environmental and consumer issues,\textsuperscript{341} an organization's members are likely to hold views that do not accurately reflect general public opinion, and the organization's staff and board are likely to subscribe to positions more extreme than those held by many of the members.\textsuperscript{342} If organizations dealing in middle class causes fail to mirror the characteristics and policy preferences of their "constituencies," one might expect to find even more acute disparities between the supposedly represented group and the leaders of organizations which focus on the distressed and disadvantaged, or on victims of discrimination.

Despite these criticisms, charitable organizations may indeed be able to help diminish the imbalance of representation suffered by "charitable" target groups and causes. Effective action often requires the skills and resources of relatively well-educated, well-heeled individuals, who can take an entrepreneurial role in organizing, funding, and directing an organized response to the problems of chronic underrepresentation.\textsuperscript{343} Social movements have often begun with advocacy by:

people close to the sociological norm of the country (the white middle class), many of whom had the communications skills and political talents to influence other members of the middle class to lobby political elites. . . . At certain times in American history, middle-class social movements have appeared suddenly and have had an immediate impact on public


\textsuperscript{341} See PUBLIC INTEREST LAW, supra note 174, at 555.

\textsuperscript{342} See Downing & Brady, supra note 167, at 67, 91-93. Downing and Brady propose that as a public interest group successfully moves public policy toward its preferred position, membership will drop, because members with less extreme preferred positions will be satisfied and will perceive marginally less to be gained by continued participation. It seems possible, however, that success might invigorate rather than satiate; given evidence of the organization's effectiveness, a member might rethink his stance. Downing and Brady acknowledge that members of multiple-issue groups are likely to stay interested longer, since new issues "ripen" as others approach resolution. Id.

\textsuperscript{343} See Hayes, supra note 339, at 123. Schlozman and Tierney point out that individuals with high levels of education, income, and employment are much more likely to engage in all forms of political activity, including membership in organizations. K. SCHLOZMAN & J. TIERNEY, supra note 319, at 60-61. "Individuals vary in terms of the political resources—time, money, skills, contacts and so on—that make it easier for some individuals to be joiners and more difficult for others." Id. at 65. The material demands of group membership and participation ("from paying dues to paying a babysitter") "might pose a particular barrier to lower status citizens." Id. at 62-63.
AD

policy, partly because existing social institutions provided a means of communicating the ideas of the new movement.344

The impact has not been limited to "middle-class causes;" largely middle-class organizations have provided an avenue for reform on behalf of the "discrete and insular" target groups of charitable purpose as well.345

Although some organizations have made efforts to involve members of the "distressed and disadvantaged" groups whose interests they seek to further,346 the limited nature of these efforts has been criticized.347 And while it may be possible and desirable to involve members of some underrepresented classes (for example, the poor and racial minorities) in the direction of the organizations which purport to represent their interests, the members of other chronically underrepresented groups are inherently powerless to identify and pursue their own interests, even to the extent of joining in decisionmaking with respect to the organizations which claim to represent them. For example:

[Children need advocates because, in most circumstances, children cannot speak for and defend their own interests. Whether policy is made in the legislature or the courthouse, the interests of children need and deserve representation. And yet, because children cannot speak for their own interests, how can the advocate know for certain what those interests are? ]348

Generally, it is the groups whose status or condition makes them the least capable of direct participation in policymaking processes on their own behalf that have the greatest need for advocates, but also have the least power to control those who purport to speak for them. These groups would appear to present the greatest risk of divergence between actual "constituent" interests and the organization's perception of constituent needs. The dilemma is real, and perhaps incapable of resolution. Experience demonstrates, how-

344. McFarland, supra note 28, at 341. See also D. Truman, supra note 297, at 517 ("Research evidence indicates that individuals who hold a broad [unorganized] interest . . . may or may not see a given set of events as bearing upon that interest . . . . The quality and character of [communication] . . . are of fundamental importance in assuring the influence of unorganized interests.").

345. See, e.g., Cigler & Loomis, supra note 300, at 23. To some extent, this is a necessary consequence of the fact that some advocacy strategies require the skills of lawyers and other professionals. But see Cahn & Cahn, Power to the People or the Profession—The Public Interest In Public Interest Law, 79 Yale L.J. 1005, 1042-45 (1970) (expressing concern that focus on "middle class" public interest issues, such as consumerism and environmentalism, will divert the attention of public interest lawyers from the causes of society's least fortunate. "For the law has traditionally provided the only avenue of redress for the disenfranchised. . . . [T]he only profession specially protected in an advocacy role cannot justify its dereliction by regrouping under the righteous banner of essentially majoritarian concerns.").


348. R. Mookin, supra note 288, at 12.
ever, that even groups which do not mirror the characteristics of their "constituents" can be capable of valuing and promoting the interests of those who are not like them. Given the alternative, which is either no voice at all or "representation" by others whose interests are at odds with those of the underrepresented group, perhaps the best we can do is to structure the incentives for advocacy activity to avoid enhancement of already well-represented viewpoints and to promote accountability of ostensibly representative organizations, to their "constituent" groups if possible, and, if not, at least to someone or something other than narrow, otherwise well-represented interests.

The existing section 501(c)(3) prohibition on private inurement and the requirement that to be "operated exclusively" for exempt purposes an organization must serve "a public rather than a private interest" provide some protection against the most blatant distortions of charitable form for

349. Schlozman and Tierney found (based on their own survey and journalistic accounts) that "[t]hose who work for public interest groups seem to labor for love not money: they work long hours in surroundings that are not plush and do so at lower pay than they could command in the private sector. Moreover, they seem, almost universally, to care deeply about the causes to which they devote their efforts." K. SCHLOZMAN & J. TIERNEY, supra note 319, at 33-34.

Mnookin notes that, despite the inherently compromised accountability of public interest advocacy groups to the children for whom they purport to advocate, examination of several major test cases addressing children's issues reveals no evidence that the interests of individual children were sacrificed to the "cause." R. MNookIN, supra note 288, at 515. See also Caplin & Timbie, supra note 108, at 198-99 (describing legislative advocacy activities of the National Association for Mental Health on behalf of the mentally ill).

In some situations, interested advocates who are somewhat removed from their "constituency" may be best able to represent their interests. For instance, "[t]he burden on a retarded person's family is not a primary concern of [independent advocates] committed to the right of the retarded to lead normal lives. Thus, legal activists may push for more home-based care than [advocacy organizations led by parents of retarded children]." Rose-Ackerman, Mental Retardation and Society: The Ethics and Politics of Normalization, 93 ETHICS 81, 91 (1982).

350. See, e.g., K. SCHLOZMAN & J. TIERNEY, supra note 319, at 21-22 (teachers' viewpoint with respect to bilingual education is not necessarily consistent with children's interests, because although teachers are "informed outside observers," their jobs may be implicated in the outcome and their own values with respect to the relative worth of cultural pluralism and material success may be different); Knitzer, Advocacy and the Children's Crisis, 41 AM. J. OF ORTHOPSYCHIATRY 799 (1971) (describing "representation" of children's interests by established institutional service providers, thus ensuring resistance to any reversal of existing priorities); Rose-Ackerman, supra note 349, at 92-93 (noting that relatively unskilled ward staff of institutions for retarded have opposed deinstitutionalization movement because of fear of losing their jobs, and groups of professionals who work with mentally retarded have supported deinstitutionalization accompanied by increase in services provided by their professions); supra notes 314, 319 and accompanying text.

351. Section 501(c)(3) extends exempt status only to otherwise qualifying organizations "no part of the net earnings of which inures to the benefit of any private shareholder or individual." Treas. Reg. § 1.501(c)(3)-1(c)(2) (1959). An organization cannot be exempt if it is organized or operated for the benefit of designated individuals, the organization's creator or his family, shareholders, persons controlled by the creator, or anyone having a personal and private interest in the activities of the organization. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (1959).

private gain, and provide some safeguard against the use of exempt organization political advocacy to further private interests that are not otherwise underrepresented. These provisions are designed to inhibit distribution of the organization's assets to insiders, directly or indirectly. They would prevent, for instance, the use of the section 501(c)(3) form to provide free legal representation for the direct, clearly identifiable private interests of those who control the organization. To the extent that the "public rather than private interest" component of the operational test requires that the benefits of the organization's works accrue to a broad public, rather than a narrowly defined class, it bars the use of a section 501(c)(3) organization to pursue the self-serving agenda of, for instance, the members of a particular profession. These provisions, however, do not necessarily preclude the use of a section 501(c)(3) organization to pursue public policy positions which are perfectly capable of being heard without special incentive, if the organization's positions deal generally with "charitable" subject matter, nor do they offer any assurance that the views espoused are those of anyone but the organization's leadership.

Current tax law offers a model for a mechanism to locate the line between section 501(c)(3) organizations which should be permitted to engage freely in system-change advocacy activities and those which should not. Section 509(a) of the Internal Revenue Code describes criteria that a section 501(c)(3) organization must meet in order to avoid being classified as a private foundation. Private foundations are essentially barred from engaging in legislative activity. Treasury Regulation section 1.509(a) excludes from the definition of private foundation organizations "which either have broad public support or actively function in a supporting relationship to such organization." In a rough way, this distinction is consistent with the idea that the advantages of section 501(c)(3) status ought not to be extended to advocacy, even on "charitable" subjects, on behalf of narrowly held views. In particular, the

353. Distribution or disguised distribution in this context can take the form of excess salary or benefits, loan arrangements, or proceeds of self-dealing transactions. See, e.g., Founding Church of Scientology v. United States, 412 F.2d 1197, 1199-1201 (Ct. Cl. 1969).

354. Coincidental private benefits, even to those who control the organization, will not violate the prohibition against private inurement. See B. Hopkins, supra note 49, at 247.

355. See Sound Health Ass'n v. Commissioner, 71 T.C. 158, 190 (1978) ("When possible membership is so broad, benefit to the membership is benefit to the community." (emphasis in original)).


357. While section 4945 of the Internal Revenue Code does not expressly prohibit private foundations from engaging in legislative activity, its imposition of an excise tax on lobbying expenditures has that effect. A tax equal to 10% of the expenditure is assessed initially; if, however, the expenditure is not recovered promptly, the tax assessed is equal to 100% of the expenditure. In addition, section 4945 imposes a tax on foundation managers who are responsible for the expenditure. I.R.C. § 4945 (West Supp. 1987).

public support formulas of Internal Revenue Code sections 170(b)(1)(A)(vi)359 and 509(a)(2)360 are indicators of whether an organization is responsive to a broad or a narrow constituency. Generally speaking, an organization can satisfy either of the formulas only if it receives at least one-third of its support in the form of relatively small amounts (donations, dues and/or fees) from a relatively broad "public."361 In the "public charity" formula, large contributions are included in full in the denominator of the support fraction, but are included in the numerator only to the extent that the contribution of any one donor (or group of donors standing in certain specified relationships to one another) does not exceed two percent of the organization's total support, averaged over a four-year period.362 The "broadly-publicly-supported" formula screens for concentrated influence by excluding from the public support numerator any amount received from "disqualified persons," including individuals whose aggregate contributions have exceeded a $5,000 or two percent of total contributions threshold.363 Because the receipt of relatively large amounts from any one source works against satisfaction of the public support formulas, the fact that an organization meets either of the support tests should provide at least some assurance that the organization is not controlled by narrow private interests.

Tying eligibility to pursue system-focused advocacy activities with exempt and deductible dollars to the public support formulas is one way to avoid providing special incentives for the repetition and amplification of viewpoints that are not chronically disadvantaged in the political marketplace. In addition, the fact that its support is drawn from a "diffuse" base gives some credence to an organization's claim to give voice to "diffuse" interests. A broad base of financial support provides a direct indicator that the organ-
EXEMPT ORGANIZATION ADVOCACY

organization's perception of the public interest is shared by at least some minimal "public." The formulas are a less useful measure of true representation in the case of organizations which purport to represent the interests of the "distressed and disadvantaged." The ability of an organization to draw broad-based financial support does not necessarily correlate with its capacity to reflect the needs and desires of the distressed and disadvantaged target group. Insisting upon broad-based support as a condition of eligibility to engage in unlimited system-focused advocacy would, however, offer some rough indication that the organization is responding to a widely shared perception of social inequity. In other words, the market forces that reside within the broad support requirement can help to identify which organizations are alleviating equity-based market failures.

As presently defined, however, the placement of the line between private foundations and non-private foundations is not well matched to the policies which should drive the system of incentives and constraints. First, non-private foundation status is not based exclusively on the sources of an organization's support. Some types of section 501(c)(3) organizations, namely schools, churches, hospitals, certain medical care and research organizations, governmental units, and certain foundations which support tax-exempt colleges and universities, are categorically deemed non-private foundations. Second, the present support formulas are inadequate to identify advocacy that speaks for otherwise underrepresented interests. An organization can conceivably derive all of its support from fewer than twenty donors and still satisfy the one-third support formula. While there is no way to identify precisely how broad the support base ought to be in order to provide adequate assurance that the organization neither represents a narrow public interest nor fails to represent a broad one, it seems that a better indication that the underlying justifications for the incentive are present would be provided by excluding from the numerator contributions from any one donor (or group of related donors) which exceed one percent of the organization's total support, and by raising the required proportion of public support to one-half of total support.

Once the threshold of broad public support is met, additional standards could be imposed in circumstances which still threaten to exacerbate, rather

364. This would be true even where the organization aligns with well-represented private interests.
366. For example, suppose an organization's total support of $1,800,000 is received as $100,000 contributions from each of 18 individuals. The contributions must be included in full in the denominator of the support fraction ($1,800,000), while each can be included in the numerator only up to an amount equal to 2% of total support ($36,000 per contributor, for a total of $648,000). Despite the small number of contributors, the one-third public support test is met.
367. See supra note 362 and accompanying text.
than alleviate, disparities in access to public policymaking. When an organization's "charitable" focus is somewhat difficult to identify, either because it challenges the limits to which the term "charity" has, so far, been extended, or because its charitable mission is defined, without reference to subject matter, in terms of providing representation for causes and viewpoints which cannot otherwise find representation, the public support formulas provide some assurance, but perhaps not enough, that the organization pursues "public" causes. In these situations, it is appropriate to require the organization to provide further evidence that its cause is indeed public. Given the difficulty and danger of evaluating whether such an organization's output is in the "public interest," it may be appropriate to scrutinize the organization's decisionmaking processes for added assurance that the organization's advocacy is not simply a reiteration of private interest views that are already well represented. Mechanisms modeled on some of the public interest law firm guidelines of Revenue Procedure 71-39 could address legitimate concerns about distortion of the section 501(c)(3) exemption for private benefit without imposing unnecessary and counterproductive restrictions based on means. The most useful of the guidelines in this respect are the requirement of an annual report to the IRS which explains the organization's choice of cases and the basis for the organization's selection of those cases and the requirement of a community-based board.

A better-designed reporting process is essential if the aim is to identify and withhold section 501(c)(3) benefits from purportedly "charitable" organizations which simply promote private interests. Houck points out that the information required by the present Form 990, on which section 501(c)(3) organizations submit their annual informational returns, is entirely inadequate for accurate characterization of "public interest" law firms that are, in actuality, promoting private interests. He suggests that requiring a listing of donors whose contributions equal at least one-half of one percent of the organization's income, rather than the present two percent threshold, would more accurately identify those who have a significant interest in the organization's positions. In addition, Houck proposes that the informational return include an explanation of any direct or indirect involvement of the organization's board members or substantial contributors in cases in which the organization is also involved and an explanation of how the organization's position diverges from those being promoted by those parties. This mechanism is most comfortably applicable to litigation, since litigation involves

---

368. See supra note 256 and accompanying text.
372. Houck, supra note 54, at 1517.
373. Id. at 1519-20.
fairly clear-cut cases and since litigation is perhaps the strategy most susceptible to being used for private gain under the guise of pursuing a "charitable" purpose.\(^{374}\) It could, however, also be well-applied to other non-traditional strategies, for example, proxy contests, which raise the spectre of distortion of the section 501(c)(3) form for private interest. This is particularly true where the claimed basis for the "charitable" description is that the organization proposes to represent an otherwise unrepresented "public interest" in the context of a variety of as yet unidentified issues. Enhanced information gathering, together with the public support formulas, would go a long way toward ensuring that an organization's advocacy neither results in private inurement nor simply amplifies the representation of already represented interests. Once these requirements have been met, it is legitimate to conclude that the organization's advocacy "product" is the sort toward which the incentives of section 501(c)(3) exemption and deductibility ought to be directed.

Nearly all means-specific restrictions beyond these threshold measures are unnecessary and counterproductive.\(^{375}\) Once an organization establishes that its purpose is "charitable" and its support base broad, there is no justification for imposing artificial limits on its use of legislative advocacy to achieve its ends. Removing from the tax law all provisions that limit contacts with legislators and the public with respect to legislative matters would be fully consistent with the policies and values that should shape exempt or-

\(^{374}\) Houck provides a detailed examination of how the section 501(c)(3) public interest law firm form is used by organizations which proudly describe themselves as "advocates for... economic interests" and whose positions in litigation parallel those of the powerful economic interests that are represented on the organization's boards.

\(^{375}\) The question of participation in election campaigns presents an exception to the rule that there should be no means-specific constraints on political activity by section 501(c)(3) organizations. In this context, there is less reason to provide incentives to promote the aggregation of the voices of the chronically underrepresented. First, it is far more difficult to establish a causal connection between the election of particular candidates and achievement of an organization's charitable goals than it is to find such a connection between, for example, legislative advocacy and the organization's purposes. Given the fact that election of particular candidates will likely have at least as much effect on an array of issues unrelated to the organization's focus as it will have on those that relate to the organization's cause, there is some good reason to differentiate between this strategy and others. Furthermore, associational aspects of election participation are of only secondary importance; the primary value in this context is the promotion of full and effective individual participation. As it has evolved, the present system of constraints on election campaign participation seems to reflect an implicit distinction between activities which contribute to the working of the electoral system or promote full and effective individual participation, such as voter registration activities and neutral publication of voting records, and those which are aimed at promoting particular election outcomes as a means of achieving substantive charitable goals. Because the distinction is consistent with the underlying values which should shape the law in this context, it is appropriate to retain it, so long as election campaign participation is defined clearly and narrowly. See infra notes 404-08 and accompanying text. Provisions enacted as part of the Omnibus Budget Reconciliation Act of 1987 appear to move away from the clear and narrow definition proposed here. Pub. L. No. 100-203 § 10712 (1987).
ganization law. The disfavor Congress has historically shown for grassroots lobbying should be eliminated in the context of charitable organization activity. Grassroots activity is especially important to charities in their roles of innovator, educator of the public, and monitor. The policy considerations in favor of encouraging these functions argue equally for lifting the limits on grassroots activity. Furthermore, distinguishing between non-lobbying advocacy and grassroots lobbying for the purpose of applying limits to the latter creates difficult line-drawing problems that tend to inhibit activity which ought to be encouraged.

For years the lobbying limitations have been the object of criticism and proposals for change. It has been suggested that the restrictions be dropped altogether, or that the IRS simply administer them with a more even and tolerant hand. Before the 1976 changes to the Tax Code, some commentators urged the adoption of a quantitative approach to determine the "substantiality" of lobbying activities. When the 1976 amendments took this approach, the calls for reform largely quieted. Some commentators have proposed that a good basis for evaluating the legitimacy of charitable lobbying activities would be the relationship of the legislation to the exempt

376. The recently proposed Treasury Regulations, see supra note 2, move in exactly the opposite direction. They broaden the definition of lobbying by definitely including communications which do not involve pending legislation. Prop. Treas. Reg. § 56.4911-2(c)(1). They broaden the definition of "grass roots" lobbying to include indirect communication with the public. Id.

377. This is evidenced by the lower limit for grassroots than for direct lobbying under the provisions of section 501(h) and the non-deductibility of grassroots lobbying expenditures by businesses under section 162(e).

378. The proposed Treasury Regulations amplify the effect of the disfavor for grassroots lobbying by counting against the grassroots expenditure limits the entire amount of a mixed direct and grassroots expenditure or a mixed advertising and grassroots expenditure unless the organization can substantiate a different allocation. Prop. Treas. Reg. §§ 56.4911-2(c)(iii), 56.4911-2(d).

379. See, e.g., Fogel, supra note 109, at 961. Some commentators have proposed that while direct lobbying should be unlimited, grassroots lobbying should continue to be subject to restrictions. See Note, supra note 107, at 236-38.

380. See Clark, supra note 38, at 461-64; Garrett, supra note 108, at 585; Comment, supra note 149, at 673-74.

381. It has been suggested that the entire function of supervising the charitable sector might be removed from the IRS and assigned to another existing or specially-created agency, so as to separate the governance of philanthropic activities from the tax-policy considerations which guide the IRS. See Nonprofit Org. Tax Letter (Org. Mgmt., Inc.) at 1 (June 4, 1987) (noting former IRS Commissioner Sheldon Cohen's proposal that federal oversight of section 501(c) organizations should be assigned to the Department of Health and Human Services); Donee Group, supra note 29, at 76-78; Mavity & Ylvisaker, supra note 156, at 830; So long as charities are exempt and donations deductible, however, it is unlikely that the IRS involvement can be totally replaced. Furthermore, shifting oversight responsibility from one agency to another responds to a very small part of the criticism.

382. See supra note 117 and accompanying text.
purpose of the organization. This approach would parallel the ability of a business to deduct expenditures for lobbying with respect to legislation of "direct interest" to it. Imposing that parallel, however, would retain many of the problems of definition and administrative discretion that plague the present system. Furthermore, whatever safeguard such a limitation might provide against lobbying which deviates unacceptably from the organization's purpose is already supplied by the basic criteria that the lobbying organization be "charitable" and that it draw its support from a broad base. If an organization engages in a significant amount of any activity, including lobbying, which does not further charitable goals, it will no longer qualify for section 501(c)(3) status. If the organization’s legislative activity is substantially unrelated to the organization's announced purpose, those who support the organization financially will likely begin to redirect their resources. Thus, the market forces that reside within the public support requirement provide an additional, self-executing control on the possibility that the exemption and deductibility incentive will be misapplied.

Some commentators have suggested that the lobbying restrictions be lifted for all section 501(c)(3) organizations, including private foundations. That proposal raises some of the legitimate concerns that lurk behind the present system of restrictions. Allowing unlimited legislative action only to publicly supported charities would avoid the danger of distorting the political process by large infusions of tax-deductible money to further selfish interests. Private foundations should, however, be allowed to donate freely to politically active charitable organizations. The public support requirement would allay fears of foundation control of the lobbying organization; the initial determination that the funded organization qualifies as "charitable" will ensure that the ends pursued with deductible dollars are designed to promote the public interest.

Requiring a charitable organization to relegate its political activity to a separate section 501(c)(4) organization does not provide a satisfactory solution. While it is probably true that Congress has, by now, acquiesced in the IRS-generated and court-approved policy of steering political activity into the section 501(c)(4) form, it does not appear that Congress originally

---

383. Caplin & Timbie, supra note 108, at 185-86 (suggesting that this approach, while not theoretically compelled, would be a workable basis for administering the constraints); Commission on Private Philanthropy and Public Needs, Commentary on Commission Recommendations, in 1 COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, RESEARCH PAPERS 3, 36-37 (1977).


contemplated this function for section 501(c)(4). The precursor of section 501(c)(4) was enacted as part of the Tariff Act of 1913, apparently in response to testimony of the United States Chamber of Commerce. The Chamber of Commerce was seeking to broaden the range of exempt organizations to include "civic and commercial" organizations which could not qualify as charitable, educational, or religious, but whose activities somehow benefited the general public. The notion that the section 501(c)(4) social welfare organization category is an appropriate classification for politically active charitable organizations seems to have originated with the IRS in the 1950's. It was made explicit in regulations adopted in 1959, which assigned the label of "action organization" to any legislatively active organization and stated that "[e]ven though an organization is an 'action organization' it can qualify as a social welfare organization under section 501(c)(4)."

Forcing organizations to split off their legislative, and perhaps other, advocacy activity to a section 501(c)(4) affiliate is inconsistent with the policies which should drive the system of exemption and deduction incentives. It withholds the incentive of deductibility of contributions from system-focused advocacy in circumstances which warrant special encouragement. Furthermore, it extends the limited incentive of exemption for advocacy activity to circumstances where the justifications for the incentive are not present. Section 501(c)(4) status is available to organizations whose purposes do not necessarily implicate the collective goods or redistributive effects that are characteristic of even the broadest reaches of the "charitable" classification. Furthermore, because section 501(c)(4) incorporates no requirement of broad-based support, there is no assurance that political activity carried on by a section 501(c)(4) affiliate of a charitable organization, or any other section 501(c)(4) organization, for that matter, represents anything but the views of the organization's founders, staff, or directors. Thus, since there is no reason to conclude that the section 501(c)(4) organization shares the

386. Tariff Act of 1913, ch. 16 § II(G)(a), 38 Stat. 172.
388. See, e.g., Rev. Rul. 55-269, 1955-1 C.B. 29 (discussing the nondeductibility of contributions to a section 501(c)(4) social welfare organization engaged in the promotion of sound government by means of disseminating literature and occasionally advocating or opposing pending legislation).
391. See supra notes 251-56 and accompanying text.
charitable organization's capacity to cure market failure by providing representation for disadvantaged or diffuse interests, there is no justification for providing even the limited incentive of exemption without deduction for advocacy by section 501(c)(4) organizations which would not meet the standards for section 501(c)(3) status or the public support formula. Conversely, there is every reason to provide the incentives of exemption and deductibility to any organization which does meet these thresholds. Thus, the assignment of politically active charitable organizations to the section 501(c)(4) classification is without merit.

With the exception of special reporting requirements applicable in certain circumstances, other means-specific constraints on section 501(c)(3) advocacy activity should be discarded along with the lobbying restrictions. For example, many of the other public interest law firm guidelines are redundant. They add nothing to the controls that would be provided by the basic section 501(c)(3) "charitable" designation and the prohibition against private inurement, if those provisions are well-administered.

The fee limitations imposed upon public interest law firms are counterproductive. The limitation on an organization's total receipt of court-awarded fees unjustifiably hampers its efforts. The policies which underlie the statutes providing for the award of attorney's fees to public interest plaintiffs are closely related to those which argue for tax incentives for advocacy activity by charitable organizations. Each is motivated by a recognition that carefully structured incentives can enable and encourage private vindication of public interests. Furthermore, the prohibition on accepting fees from clients adds no useful safeguard against use of the section 501(c)(3) form for private benefit and clashes with the policies upon which the exemption/deduction system should rest. So long as an organization qualifies as "charitable" and meets the public support test, it is perfectly appropriate to apply the general rule that "[i]f the activity may be deemed to benefit the community as a whole, the fact that fees are charged for the organization's services will not detract from the exempt nature of the activity."}

392. Weisbrod notes that some section 501(c)(4) organizations rank high on his "collectiveness" index, which is proposed as a measure of the extent to which an organization produces collective rather than private goods. Weisbrod, Private Goods, supra note 229, at 164. It is interesting to note that Weisbrod's examples, namely, the Sierra Club, Common Cause, and Public Citizen, are all advocacy organizations which represent diffuse interests of the sort which this Article proposes are appropriate objects of the exemption and deductibility incentives.

393. See supra notes 368-74 and accompanying text.
394. See supra notes 64-69 and accompanying text.
The presence or absence of client-paid fees does not reliably indicate whether a case implicates the kind of private interest that ought not to be pursued by a section 501(c)(3) organization. That clients are willing and able to contribute to the cost of representation of a diffuse or disadvantaged interest does not necessarily deprive that representation of its collective goods or redistributive character. Nor is the representation of a substantial private interest "charitable" because it is provided without cost to the client. Careful screening for charitable purpose, absence of private inurement, and public support are much better standards for assessing whether a section 501(c)(3) organization's litigation activity merits the exemption/deduction incentive.

The *per se* ban on client fees is unnecessary to ensure that the section 501(c)(3) form is not being misused for private gain. Indeed, in certain circumstances the prohibition may undermine the positive values associated with system-focused litigation by charitable organizations. The fee prohibition seems designed to ensure that charitable organizations will not provide representation in cases where a private financial interest would warrant private representation. Under some circumstances, however, clients who could conceivably find and pay for representation in the private legal service marketplace cannot find there the level of expertise and enthusiasm for their cause that a public interest group can provide. So long as the cause has substantial collective goods or redistribution aspects, a parallel, incidental private financial interest should not preclude pursuit of the cause by the sort of organization that is particularly well suited to provide vigorous representation on issues with important public policy implications. Finally, the requirement that client fees can never, under any circumstances, support the organization eliminates an important mechanism of accountability between the organization and those whose interests it purports to represent. Thus, the concern that a charitable organization may fail to represent the underrepresented interests it claims to speak for is fed by mandated financial independence of lawyer from client.

While the proscription on election campaign activity by exempt organizations is beyond the scope of this Article, it is impossible to address fully

---

398. Ability to pay something for representation is not necessarily indicative of sufficient resources to purchase legal services in the for-profit marketplace. See *Council for Public Interest Law*, supra note 22, at 354.

399. This criterion for establishing the "charitability" of litigation appears as guideline 3.01 of Rev. Proc. 71-39, 1971-1 C.B. 575. See *supra* notes 61-62 and accompanying text.

400. "[T]here are many people who . . . turn to organizations such as . . . [the ACLU], feeling there is an expertise there; an enthusiasm and energy, and a desire to set things right." *Hearings*, supra note 60, at 282, 284 (statement of Lawrence Speiser, Director of American Civil Liberties Union, Washington, D.C.).

401. See *supra* notes 64-69 and accompanying text; Berlin, Roisman & Kessler, *supra* note 56, at 685-86 (noting that reliance on foundation funding rather than client-paid fees threatens to compromise public interest law firm accountability to its clients).

402. See *supra* note 333.
the limits on legislative advocacy and public education without encountering difficulties occasioned by the interplay between those limits and the prohibition on campaign activity. Although the present limits on campaign activity are, for the most part, justified, it would be desirable to minimize the problems of uncertainty and undue enforcement discretion that arise from the indistinct separation between election campaign participation, on the one hand, and grassroots lobbying and general advocacy through public education, on the other. This could be accomplished by applying the election campaign participation restriction only to activities which rise to the level of "contributions" or "independent expenditures" for purposes of the Federal Election Campaign Act. As construed in Buckley v. Valeo, these terms extend only to direct campaign contributions and expenditures for "communications that in express terms advocate the election or defeat of a clearly identified candidate." The rationale put forth for so limiting the term in the context of the Federal Election Campaign Act provides excellent guidance for locating the demarcation between prohibited election campaign participation and permitted advocacy in the tax exemption context. The Buckley Court recognized that:

[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest. . . . Discussions of those issues, as well as more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.

The Buckley definition of "independent expenditure" was designed to eliminate uncertainty that "foster[s] 'arbitrary and discriminatory application' [and] operates[s] to inhibit protected expression by inducing 'citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of

403. See supra note 375.
406. Id. at 44. "This construction would restrict the application of [the term "independent expenditure"] to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject,'" Id. at 44 n.52. Further, the communication would have to be directed for or against a "clearly identified" candidate, which would "require that the candidate's name, photograph or drawing, or other unambiguous reference to his identity appear as part of the communication." Id. at 44 n.51. See also Federal Election Comm'n v. Mass. Citizens for Life, Inc., 107 S. Ct. 616, 621 (1986) (marginally less direct message may be "express advocacy").

Even having narrowly construed the term "expenditure," the Buckley Court struck down the limitations imposed by the FECA on such expenditures. Nonetheless, the Court's approach to defining the term in that context provides a useful model for delineating election campaign activity which ought to be out of bounds for charitable organizations.

407. Buckley, 424 U.S. at 42 n.50 (citation omitted).
the forbidden areas were clearly marked." Uneasiness about the uncertain demarcations between permitted and forbidden political activity in the tax exemption context arises from the same underlying concerns. It is perfectly fitting, therefore, that the resolution of both be accomplished by the same formulation.

Finally, redesigning the system of incentives and constraints to fit solidly upon the underlying rationales logically requires a careful separation of the section 501(c)(3) categories of exempt purpose. The justifications for encouraging advocacy activity are present only in the case of "charitable" organizations. The collective good provided by organizations which are exempt because they are "educational" is the process of dissemination of information and ideas to the public, regardless of the particular content of the information or ideas disseminated. Consequently, when the organization begins to engage in a different process—that is, advocacy which goes beyond the dissemination of ideas—the justification for the incentive is lost. Thus, it would make sense to withhold exemption and deductibility from a purely "educational" organization's lobbying, litigation, or other activity in pursuit of system change. However, no constraints should be placed on the organization's dissemination of information and ideas, even if the information and ideas disseminated argue for social change or are controversial.

If there is a "public good" character to purely "religious" endeavors, it is the value to society at large of the fact that individuals have the freedom


409. See supra notes 284-333 and accompanying text.

410. See supra notes 264-74 and accompanying text.

411. See supra notes 94-100 and accompanying text. Thompson, supra note 76, makes a careful and convincing case that controversy of subject matter and ardency of advocacy, short of legislative involvement, should not disqualify an organization from being classified as "educational." Thompson also believes that once such an organization ventures into substantial legislative activity, it should no longer qualify for exempt status.

Thompson's justification for disparate treatment of legislative and non-legislative propaganda organizations differs from that proposed in this Article. First, Thompson maintains that "allowing exemptions to legislative propaganda groups would benefit those organizations with access, and would therefore magnify rather than ameliorate the disadvantaged position of organizations without access to legislators." Id. at 537-38. Second, successful lobbying "will be imposed on the public by legislative fiat." Id. at 538. Although Thompson does not address the question of lobbying by "charitable" organizations as they are defined here, see supra notes 237-63 and accompanying text, his rationales would seem to argue for limiting the lobbying of those organizations as well. However, the more broadly distributed the opportunity for input and influence in the legislative process, the more legitimate the result. And since it is the interests of the groups represented by "charitable" organizations which currently tend to be ignored in the legislative calculus of interests, and their perspectives that tend to be left out of the information upon which legislators base their conclusions about the "public interest," see supra notes 312-19 and accompanying text, lifting the lobbying restrictions on "charitable" organizations would tend to relieve (albeit incompletely) the major problems of differential access.
and opportunity to pursue spiritual growth and fulfillment. As with "educational" organizations, the collective good aspect of the religious organization's endeavors is tied to function, rather than to the substantive content of its focus. When it moves away from the "special secular function [it performs] in our society by putting the lives of individuals into cosmic perspective and by offering answers to the meaning of life," and into active advocacy in the various arenas of public policymaking, it is no longer supplying that collective good. At this point, then, the justification for providing the exemption and deduction incentives is absent.

A stronger rationale for exemption of religious organizations is the constitutional mandate to avoid entanglement of church and state. Exemption and deductibility are justified, not as incentives, but because they further neutrality and non-interference of government with religion. That principle is two-sided, embodying the value of "insulating each from the other." The notion that "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere," suggests an additional policy against extending the benefits of exemption and deduction for advocacy by purely "religious" organizations. Certainly, providing special encouragement for political advocacy by religious organizations poses a very real threat of promoting "political division along religious lines [which] was one of the principal evils against which the first amendment was intended to protect . . . . The political divisiveness of such conflict is a threat to the normal political process." At the very least, the rules should not favor religious organizations over other exempt categories.

It would be logical to apply the liberalized approach suggested in this Article only to "charitable" organizations, and to continue to restrict the use of deductible dollars for advocacy activity by "educational" and "religious" organizations, where the justifications are absent. Of course, an educational or religious organization which also fits the definition of "charitable," meets one of the public support tests, and is willing to comply with enhanced reporting requirements would be entitled to the benefits of the liberalized "charitable" organization rules.

412. See supra note 277 and accompanying text.
413. Schwarz, supra note 277, at 56.
414. See supra notes 278-83 and accompanying text.
415. See Schwarz, supra note 277, at 56 ("This theory rests on the premise that religious liberty is essential to the survival of our society, and that government must make a special effort to foster religious liberty by leaving religion alone." (footnote omitted)).
416. Walz v. Tax Comm'n of New York, 397 U.S. 664, 676 (1970); Consedine & Whelan, supra note 277, at 95 ("It may seem paradoxical, but tax exemptions of churches have served the highest secular purpose: to keep the government itself secular, neutral, and uninvolved with the internal affairs of churches.").
The separation, though logically compelled in theory, would be difficult to achieve in practice. The separate enumeration of the categories is as old as the idea of tax exempt status itself, but the actual classification of exempt organizations over the years reveals a pattern of overlap and imprecision in assigning the designations of "charitable," "educational," and "religious" to particular organizations. 419 The imprecision has been of little importance, because the consequences of qualifying for each of the three classifications are now virtually identical. In a restructured system which attaches important differences to the categories of qualification for exemption, careful classification would be essential. To arrive at that careful classification would require not only a redrafting of the definitions of the categories 420 and a meticulous evaluation in order to classify new organizations accurately, but also a reevaluation of existing section 501(c)(3) organizations for classification within the revised scheme. The established tradition might be very difficult indeed to overcome.

Differentiating between "charitable" organizations, on the one hand, and "educational" and "religious" organizations, on the other, might pose additional difficulties. Even though the underlying justifications for "subsidizing" advocacy activity are absent in the case of religious organizations 421 and even though there are additional policy reasons for avoiding such a "subsidy," 422 other legitimate concerns which arise from the special nature of the religious context might be sufficient to override the basic premise that the advocacy rules ought to reflect a consistent response to those underlying policies.

The fact that the proposed scheme, unlike the present system, extends to "charitable" organizations a more liberal opportunity to engage in political activities with deductible dollars than it extends to "religious" organizations may call forth an argument that the proposed rules would constitute a preference for non-religiously motivated advocacy which is forbidden by the establishment clause of the first amendment. 423 The establishment clause prohibits governmental action which either prefers or disadvantages religion, unless the act has a secular purpose and a primary secular effect and does

---

420. This process would require substantial revision of the section 1.501(c)(3) regulations to remove the present cross reference between the definitions of "educational" and "charitable." The basic definitions of these two terms would remain largely as they are now, to reflect the breadth and flexibility of the two concepts. The definitions themselves should contain no reference to means; the concepts of "charitable" and "educational" should be consistently expressed in terms of ends. "Religious" should remain without explicit definition, both because no important function would be served by setting down a definition and because attempting to do so would raise serious first amendment problems.
421. See supra notes 412-13 and accompanying text.
422. See supra notes 414-18 and accompanying text.
423. U.S. Const. amend. I.
not excessively entangle government with religion.\textsuperscript{424} Under the proposed scheme, however, the benefit which flows from allowing advocacy activity to be funded by deductible dollars is not conferred or withheld on the basis of whether an organization is religious or whether its advocacy is religiously motivated. Rather, the system is structured to extend the benefit to advocacy activity based on independent factors which are solidly rooted in principled, secular purposes. The liberalized standards are available equally to all organizations, religious and non-religious alike, so long as their advocacy activity fits the justifications for providing the incentive. A religious organization that meets the independent criteria of "charitability," broad-based support, and willingness to disclose, in appropriate circumstances, the basis of its advocacy-related decisionmaking is not precluded from operating under the liberalized standards.

Furthermore, the proposed approach threatens no more administrative entanglement in the affairs of religious organizations than the present system. Religious organizations would remain subject to essentially the same set of constraints to which they are now subject. These constraints actually entail less administrative intrusion than the liberalized standards applicable to charitable organizations under the proposed approach, which would require disclosure of substantial information about an organization's support base.\textsuperscript{425}

In fact, the proposed approach would diminish the threat of administrative entanglement by defining more narrowly and more distinctly the particular activities which are subject to limitations or prohibitions. In addition to the definitions of election campaign participation suggested above,\textsuperscript{426} which would be relevant to all section 501(c)(3) organizations, the reconstructed system should include a similarly limited definition of "legislative activity," which would be of consequence to section 501(c)(3) organizations other than "charitable" organizations meeting one of the public support formulas. Limiting the section 501(c)(3) definition of "legislative activity" to instances of clearly stated support for or opposition to specific, pending legislation and excluding all communications to bona fide members would draw a clear line between lobbying and general discussion of social issues for those organizations which are still subject to different rules with respect to the two types of activity. Further, it would facilitate enforcement of the remaining limitations while diminishing the opportunity for subjective evaluation by those charged with their administration. In the case of religious organizations, this would relieve

\textsuperscript{424} See generally J. Nowak, R. Rotunda & J. Young, supra note 286, at 1033-34.
\textsuperscript{425} See supra notes 372-74 and accompanying text.
\textsuperscript{426} See supra notes 403-08 and accompanying text.

It is interesting to note, in this connection, that it was at their own urging that churches were excluded from eligibility to elect the liberalized lobbying limitations of section 501(h), presumably because they were concerned about the increased information reporting requirements they expected would accompany the new standard. See Note, supra note 193, at 494-95.
potential problems of administrative entanglement and, perhaps, alleviate the present apparent reluctance to hold the organizations accountable for plain violations of the standards.\footnote{427} Both results would further the interrelated policies that should form the basis of the law in this area.

There remains, nonetheless, a concern that the scheme, even though secularly based, might impose a substantial burden on religious practice. Restrictions on the political activity of religious organizations whose doctrine sincerely directs them to political action, by definition, limit their religious activity as well. Some have argued that any limitation on political advocacy by religious organizations necessarily violates the free exercise clause of the first amendment.\footnote{428} This issue was raised and resolved in \textit{Christian Echoes National Ministry, Inc. v. United States}.\footnote{429} Government may attach conditions to the grant of exempt status to religious organizations, even when the conditions touch activity that is unarguably religiously motivated.\footnote{430} Thus, a scheme which ties the ability to engage in system-focused advocacy to qualification as "charitable" and to broad public support is constitutionally permissible, even if that scheme withholds similar benefits from organizations that are purely "religious."

The practical and political difficulties of converting to a system which draws clear lines to separate the "charitable," "educational," and "religious" classifications may present an overwhelming obstacle to restructuring the system as proposed. However, to conclude that this is the case should not lead to an abandonment of the idea of reconstructing the system. The underlying policies would be furthered, albeit less completely, by lifting the constraints as proposed, even without distinguishing among the various classes of section 501(c)(3) organizations. The present system, as applied, tends to particularly disadvantage the organizations and the activities most worthy of encouragement. Although the restrictions nominally apply to all, in practice their effects tend to be felt less by religious organizations and more by charitable ones.\footnote{431} Lifting the restrictions for all would at least reduce the extent to which the scheme of constraints on system-focused advocacy by section 501(c)(3) organizations pulls against the values and policies which should shape it.

CONCLUSION

The rules which limit system-change advocacy run counter to the principles that should shape them. They have been devised in patchwork fashion, often in response to perceived abuses of the section 501(c)(3) form, and with no attempt to relate the pieces to a common theoretical foundation. Consequently, they neither provide appropriate incentives for activities that should be encouraged, nor consistently deny such incentives to activities that either do not implicate the justifying rationales or that do raise countervailing concerns which, on balance, argue against incentives. Finally, they are so uncertain that they leave undue latitude to define the bounds of permitted activity in the hands of those who are charged with enforcement. The explicit prohibitions and the cautious nonparticipation induced by the questions left unanswered conflict with the very strong policy considerations in favor of allowing, and even encouraging, the active participation of the charitable sector in the processes of public policymaking.

The system of controls which the tax law imposes on the advocacy activities of exempt organizations could be redrawn to reflect the underlying rationales, screen out undesired effects, and limit administrative discretion. As the Internal Revenue Service and the Congress again turn their attention to the issue of the section 501(c)(3) limitations on advocacy, it can be hoped that they will be guided not by the anecdotal evidence of abuses, nor by the frustrated outcry of the charitable sector. The time has come to focus firmly upon the underlying principles which should shape the controls on system reform advocacy by section 501(c)(3) organizations and to fashion a set of rules that will serve those principles consistently and well.