

POLITICAL ADVOCACY MEETS THE INTERNAL REVENUE CODE:  
"THERE'S GOT TO BE A BETTER WAY"

by Laura Brown Chisolm

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Taxpayer A launches a series of television advertisements in which two characters earnestly discuss aspects of health care reform. At the end of the spots, they turn to each other and, with brows knitted, pronounce, "There's got to be a better way . . . ." A message comes on the screen urging viewers to let Congress know that they support the position expressed in the ad.

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The CEO of Taxpayer B, addressing attendees at an official B function, urges them to support a particular senatorial candidate. The hat is passed for campaign contributions.

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Taxpayer C conducts polls on savings patterns, funds research, holds conferences and produces educational programs presenting the view that low savings rates among the American people are bad for individuals and for the economy, which lacks sufficient new capital. Copies of the research reports are sent to all members of Congress.

Taxpayer C places newspaper advertisements urging individuals to increase their savings. Some of the advertisements suggest in a general way that tax incentives to encourage saving would be a good idea.

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Taxpayer C formulates a proposal for legislation to create state tax incentives for saving and begins to work with two state legislators to get the proposal introduced and passed. Videotapes of the educational programs produced eight months earlier are run on several of the state's television stations.

Taxpayer C establishes C-PAC, a political action committee, to support congressional candidates who are friendly to Taxpayer C's point of view. Taxpayer C conducts a drive to solicit contributions to C-PAC. C-PAC makes campaign contributions to several congressional candidates.

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What are the consequences for Taxpayers A, B, and C insofar as the Internal Revenue Code is concerned? The answers depend on who they are.

If Taxpayer A is, for example, a medical supply company, the cost of the television spots will not be deductible as a business expense. If Taxpayer A is a trade association of insurance companies, the association will be obliged to notify its members that a portion of their dues cannot be deducted as a business expense or, alternatively, pay an excise tax itself. If Taxpayer A is a section 501(c)(3) public charity mental health advocacy organization, the cost of the ads may be paid for with contributions to the organization for which donors have taken a charitable contribution deduction. On the other hand, the spots may cause the organization to lose its exempt status. If Taxpayer A is a private foundation, it will pay a heavy excise tax penalty on the amount spent on the television campaign.

If Taxpayer B is a business corporation, labor union, trade association, or section 501(c)(4) social welfare organization, it is probably in trouble under the Federal Election Campaign Act. Insofar as the Internal Revenue Code is concerned, the expenses connected with the appearance will be paid with after tax dollars. If Taxpayer B is a section 501(c)(3) public charity or private foundation, it should lose its exemption. If Taxpayer B is a church, it probably will not. If Taxpayer B is a veterans' organization, it may pay for the event with dollars that have been deducted as charitable contributions by the individuals who support the organization.

If Taxpayer C is a business, some of the expenses for the research and education programs may be deductible as goodwill advertising, but not if they are used in connection with the legislative work eight months later. The newspaper advertisements are most likely not deductible as a business expense, nor are the costs of generating the legislative proposal or working with the state legislature to get it passed or the costs of establishing and supporting C-PAC. If Taxpayer C is a section 501(c)(3) public charity, all of the activities, except those in support of the PAC, may be paid for with deductible dollars. Only the activities in connection with the legislative proposal will count as "lobbying," to be measured against either clear or highly unpredictable limits which, if exceeded, will lead to either the imposition of an excise tax or to revocation of the organization's exemption. If the lobbying does not result in revocation, the PAC connection most certainly will. If Taxpayer C is a section 501(c)(4) social welfare organization, it may carry on all of

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the activities, and will use after-tax dollars to do so. If Taxpayer C is a section 501(c)(19) veterans' organization, it may pay for all the activities with untaxed funds.

These hypotheticals only begin to uncover the complicated array of consequences that result when political advocacy activities meet the Internal Revenue Code. Despite all the intricate variation, it may be that the framework makes perfect sense. The only way to tell is to evaluate the provisions, and their relationships to one another, against a backdrop of tax policy and social policy objectives that are germane to the undertaking of constructing a system of tax rules that necessarily have an impact on political participation. This paper attempts to identify what those tax policy and social policy objectives are and to evaluate the existing tax rules in their light. Doing so leads to the conclusion that "there's got to be a better way . . . ."

### THE EXISTING FRAMEWORK

#### Businesses

As the examples show, the existing scheme of tax provisions that relate to political advocacy<sup>1</sup> is complex and variegated. An array of rules, drawn from the Internal Revenue Code, Treasury Regulations, and administrative and judicial

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<sup>1</sup> The term "political advocacy" is used in this paper to encompass both legislative advocacy (direct and grass roots lobbying) and election campaign-related advocacy.

interpretation result in consequences that vary widely, depending on the identity of the taxpayer. Business entities currently operate under a regime of nondeductibility for essentially all political advocacy activity. This represents a change from the state of the law between 1963 and the end of 1993, and, for the most part, a return to the pre-1962 regime. Before 1962, business deductions for political expenditures were denied as a matter of IRS policy.<sup>2</sup> The policy prevailed against a constitutional challenge in the 1958 case of *Cammarano v. U.S.*,<sup>3</sup> and was formalized in regulations promulgated in 1960.<sup>4</sup> In 1962, Congress added section 162(e) to the Code, thereby allowing the deduction of expenses attributable to direct lobbying on matters of direct interest to the taxpayer. The amendment maintained the non-deductibility of grassroots lobbying and of participation or intervention in any political campaign.<sup>5</sup> Amending section 162 in 1993, Congress

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<sup>2</sup> The first denial of a business expense deduction for lobbying is found in a 1915 Treasury Decision. T.D. 2137, 17 Treas. Dec., Int. Rev., 48, 57-58. For a description of the evolution of the tax treatment of business lobbying expenses, see Jasper L. Cummings, *Lobbying and Political Expenditures*, TAX MGMT. (BNA) No. 613, at II.A.1 (Apr. 4, 1994) [hereinafter Cummings, *Lobbying and Political Expenditures*].

<sup>3</sup> 358 U.S. 498 (1958).

<sup>4</sup> The regulations articulated the nondeductibility of expenditures for direct lobbying, that is, attempts to influence legislation through communication with legislators or other government officials or employees who may participate in the formulation of legislation, and grass roots lobbying, that is, "any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums." In addition, the regulations specified that part of dues paid to a membership organization that engaged in "substantial" lobbying would be nondeductible. T.D. 6435, 1960-1 C.B. 79; Treas. Reg. §1.162-15(c)(1).

<sup>5</sup> Pub. L. No. 87-834, 76 Stat. 960, §3(e)(2) enacting IRC § 162(e).

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retained the deduction for direct lobbying only at the local level, reversed the rule of deductibility for direct lobbying at the federal and state levels, and added language specifying that expenses for attempting to influence executive branch actions through contact with certain high-level executive branch officials cannot be deducted as a business expense.<sup>6</sup> As rewritten, section 162 continues to deny deduction for grass roots lobbying at all levels of government and for election campaign-related expenditures. Dues to trade associations and unions are, with narrow exception, nondeductible to the extent the organization spends for lobbying,<sup>7</sup> and deductions for contributions to a charitable organization are disallowed if the organization lobbies "on matters of direct financial interest to the donor's trade or business" and "if a principal purpose of the contribution was to avoid federal income tax by securing a deduction" that the taxpayer could not have taken had the activity been carried on by the taxpayer directly.<sup>8</sup> Tax law does not erect any barriers to political campaign contributions or expenditures; however, if the business is a corporation, the Federal Election Campaign Act (FECA) does.<sup>9</sup>

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<sup>6</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, §13222, 107 Stat. 477, 477-78 (1993).

<sup>7</sup> Treas. Reg. § 1.162-20(c)(3).

<sup>8</sup> Donald Alexander notes that this anti-avoidance rule seems to have a very limited scope. Donald Alexander, *The New Rules Limiting Deductibility of Lobbying Expenses*, 60 TAX NOTES 1509, 1512 (Sept. 13, 1993).

<sup>9</sup> 2 U.S.C. §41b (1988).

Expenditures (allowable under the FECA) to establish, administer, and solicit contributions to a political action committee are not deductible.<sup>10</sup>

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<sup>10</sup> Tech. Adv. Mem. 82-02-019 (Sept. 30, 1981); Tech. Adv. Mem. 82-02-021 (Sept. 30, 1981).

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Basically, then, expenditures made by businesses for the purpose of influencing the shape of public policy or for the purpose of influencing the election of those who will be making policy must be made with after-tax dollars.

Regulations proposed in May, 1994 limit this general principle by providing a relatively narrow definition of direct lobbying, specifying that only preparation and dissemination of communications that reflect a view on specific legislation (either legislation that has already been introduced or a specific legislative proposal offered or opposed by the taxpayer) constitute "influencing legislation."<sup>11</sup> In addition, a business expense deduction is allowed for goodwill advertising, described in the Treasury Regulations as including the presentation of "views on economic, financial, social, or other subjects of a general nature," so long as the presentation does not involve lobbying or campaign purposes and so long as the

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<sup>11</sup> Prop. Treas. Reg. §1.162-29, 59 Fed. Reg. 24992-01 (May 13, 1994). If an activity has both lobbying and non-lobbying purposes, the taxpayer must make a reasonable allocation of the costs. The proposed rule also establishes an algorithm for distinguishing preparatory activity engaged in for the purpose of supporting the lobbying communication from "mere monitoring" of legislative matters, which remains deductible. *Id.*

expenditures "are related to the patronage the taxpayer might reasonably expect in the future."<sup>12</sup>

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<sup>12</sup> Treas. Reg. §1.162-20(a)(2).

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There is not much authority to help confidently locate the line between deductible goodwill advertising and nondeductible grass roots lobbying. Both judicial and I.R.S. pronouncements, however, have tended to take a narrow view of goodwill advertising and a broad view of grass roots lobbying. Advertising that, as judged by its possible impact on its audience rather than by the intent of the advertiser,<sup>13</sup> "through words, pictures, etc., is an attempt to develop a 'grassroots' point of view,"<sup>14</sup> or is "designed to create a climate of public opinion,"<sup>15</sup> even without reference to specific legislation, is grass roots lobbying. Commentators have criticized this approach as being both too stingy and too vague.<sup>16</sup> The May,

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<sup>13</sup> *Consumers Power Company v. United States*, 299 F. Supp. 1180 (E.D. Mich. 1969), *aff'd* 427 F.2d 78 (6th Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

<sup>14</sup> Rev. Rul. 78-112, 1978-1 C.B. 42.

<sup>15</sup> *Southwestern Electric Power Co. v. United States*, 312 F.2d 437, 442 (Ct. Cl. 1963); *see also* Priv. Ltr. Rul. 81-15-024 (Dec. 31, 1980).

1994 proposed regulations explicitly note that the existing approach to grass roots lobbying is undisturbed by the amendments.

*Charitable Organizations*

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<sup>16</sup> See Cummings, *Lobbying and Political Expenditures*, *supra* note 2, at II.3.a n.148 (observing that "[n]either the district court nor the Court of Appeals [in *Consumers Power*] seemed able to articulate a test as opposed to the 'know it when you see it' approach"); Andrew M. Danas, *Grassroots Lobbying and Goodwill Advertising: Are the Regulations Implementing Section 162(e)(2)(B) Unconstitutionally Vague?*, 62 TAXES 722 (1984) (proposing that the standards for making the distinction are so vague as to be unconstitutional).

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Organizations exempt under section 501(c)(3) operate under a different framework. To the extent they can engage in political advocacy, they may do so with untaxed dollars, that is, dollars on which neither the organization (which is exempt from income tax) nor the donor to the organization (who may deduct the gift from her individual income tax as a charitable contribution) necessarily pays tax.<sup>17</sup> The real impact of the tax code on political advocacy activities of charitable organizations has almost nothing to do with tax cost and everything to do with outright constraint. The nature and degree of the constraints depends on several variables. Is the (c)(3) organization a private foundation, or a public charity? If a public charity, is it a church? What is the focus of the advocacy? Does it relate to candidates or issues? If issues, are those issues the subject of pending or potential legislation? To whom is the advocacy addressed?

### *Public Charities*

Tax law imposes explicit and quite narrow limits on the political activities of section 501(c)(3) public charities.<sup>18</sup> Specific provisions limit lobbying and election

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<sup>17</sup> The section 501(c)(3) organization will not necessarily be spending untaxed dollars. The donor may be a non-itemizer, in which case she will not have taken a deduction, or the money spent may have been generated by the organization's taxable unrelated business activities.

<sup>18</sup> "Public charity" is used here to refer to all nonprivate foundation section 501(c)(3) organizations. Nonprivate foundation status turns on either the nature of the organization or the source of its funding. A section 501(c)(3) organization is not a private foundation if it is a school, church, hospital, certain kind of medical care and research organization, governmental unit, or certain kind of foundation that supports a tax-exempt college or university. I.R.C. § 509(a)(1)-(2). Alternatively, an organization may escape private foundation classification if it qualifies as either a

campaign-related activities. Limits implicit in the section 501(c)(3) requirement that the organization be "operated exclusively" for charitable purposes may also have an impact on the consequences of a charity's advocacy activities.

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"broadly publicly-supported organization" or a "public charity." 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. I.R.C. §§ 170(b)(1)(A)(vi); 509(a)(2).

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Since 1934, qualification for section 501(c)(3) status has required that "no substantial part of [the organization's] activities [be] carrying on propaganda, or otherwise attempting, to influence legislation."<sup>19</sup> In 1976, an alternative was made available to many section 501(c)(3) organizations<sup>20</sup> by the addition of sections

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<sup>19</sup> I.R.C. § 501(c)(3).

<sup>20</sup> Section 501(h)(4) specifies which organizations are eligible to elect: those qualifying 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) by virtue of the public support test; and section 509(a)(3) supporting 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 Code.

501(h) and 4911 to the Code.<sup>21</sup> In large measure, the constraints on legislative advocacy are defined by the 1976 amendments, which allow organizations that elect the new standard to measure the limits according to a specific formula rather than the vague and shifting "no substantial part" test, and by the Supreme Court's 1983 opinion in *Regan v. Taxation With Representation*,<sup>22</sup> which seems to clear the way for a section 501(c)(3) organization to establish a separate, less limited, lobbying affiliate.

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<sup>21</sup> Tax Reform Act of 1976, Pub. L. No. 94-455, § 1207(a), (b), 90 Stat. 1520, 1720-26 (1976) (adding sections 501(h) and 4911 to the Internal Revenue Code).

<sup>22</sup> 461 U.S. 540 (1983), *rev'g* 676 F.2d 715 (D.C. Cir. 1982).

The 1976 amendments to the lobbying restrictions followed longstanding criticism of the "no substantial part" test.<sup>23</sup> The criticism pointed to fundamental flaws in the premises upon which the "no substantial part" test rested and to decades of imprecise and inconsistent interpretation by the I.R.S. and the courts. Cases interpreting the limitation give conflicting signals as to whether the tax law permitted legislative activity clearly related to an organization's public-serving, exempt purposes.<sup>24</sup> In addition, the cases disagreed with respect to how much

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<sup>23</sup> SEE, E.G., H.R. REP. NO. 1210, 94th Cong., 2d Sess. (1976); Mortimer M. Caplin & Richard E. Timbie, *Legislative Activities of Public Charities*, 39 LAW & CONTEMP. PROBS. 183 (1975); Elias Clark, *The Limitation of Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 439 (1960); Theodore L. Garrett, *Federal Tax Limitations on Political Activities of Public Interest and Educational Organizations*, 59 GEO. L.J. 561 (1971); William Lehrfeld, *The Taxation of Ideology*, 19 CATH. U.L. REV. 50 (1969); James H. Nix, *Limitations on the Lobbying of Section 501(c)(3) Organizations: A Choice for the Public Charities*, 81 W. VA. L. REV. 407 (1979); Thomas Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 N.Y.U. INST. FED. TAX. 1415 (1973). The revision apparently had its beginnings in a 1968 proposal generated by the American Bar Association Section of 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).

<sup>24</sup> See, e.g. *International Reform Fed'n v. District Unemployment Comp. Bd.*, 131 F.2d 337, 337 (D.C. Cir.), *cert. denied*, 317 U.S. 693 (1942); *Girard Trust v. Commissioner*, 122 F.2d 108,108 (3d Cir. 1941); *Lord's Day Alliance v. United States*, 65 F. Supp. 62, 62 (E.D. Pa. 1946); *Davis v. Commissioner*, 22 T.C. 1091, 1091 (1954); *Old Colony Trust v. Welch*, 25 F. Supp. 45, 45 (D. Mass. 1938) (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 v. United States*, 180 F. Supp. 379, 383 (Ct. Cl. 1960) (disqualifying the League on the basis of its

activity was "substantial,"<sup>25</sup> and differed as to whether the legislative effort ought to be measured in isolation (the "quantitative" approach)<sup>26</sup> or whether it should be assessed in the context of its importance relative to the organization's total activities (the "objectives and circumstances" approach).<sup>27</sup> By the mid-70's, the

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legislative involvement in what the court conceded to be "questions of public interest").

<sup>25</sup> See, e.g., *Christian Echoes National Ministry v. United States*, 470 U.S. 849, 849 (10th Cir. 1972) (organization addressing only one piece of pending legislation engaged in "substantial" lobbying); *Seasongood v. Commissioner*, 227 F.2d 907, 912 (6th Cir. 1955) (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").

<sup>26</sup> 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.

<sup>27</sup> 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."); *Krohn v. United States*, 246 F. Supp. 341, 341 (D. Colo. 1965); *League of Women Voters*, 180 F. Supp. at 383; *Kuper*, 332 F.2d at 163.

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 I.R.S. successfully maintained that the organization's numerous attempts to influence public 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 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 the "[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

courts had established no clear principles for determining whether an organization's activities were substantial attempts to influence legislation, and the I.R.S. tended to follow the views of the most restrictive courts.

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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.

In 1974, the Court of Claims joined the I.R.S. and the Tenth Circuit Court of Appeals in the view that the substantiality limitation applied 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." *Haswell v. United States*, 500 F.2d 1133, 1142 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975).

The addition of sections 501(h) and 4911 in 1976 has been applauded for providing a liberalized, quantified safe harbor within which organizations can safely address themselves to public issues and for defining critical terms that, before the amendments, had been open to shifting and extremely limiting interpretation.<sup>28</sup> For organizations that elect its coverage, the central feature of section 501(h) is its expression of the substantiality limitation on lobbying activities as a percentage of expenditures test. Section 501(h) specifies that an electing organization's lobbying will not be "substantial" so long as the organization does not normally exceed amounts established by a formula set out in the statute.<sup>29</sup>

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. Violations initially result in imposition of a 25% excise tax on excess lobbying expenditures. Only when the four-year average of the organization's lobbying expenditures

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<sup>28</sup> See, e.g., GARY MELTON, *CHILD ADVOCACY* 154 (1983); PAUL TREUSCH & NORMAN SUGARMAN, *TAX EXEMPT CHARITABLE ORGANIZATIONS* 195 (2d ed. 1983); Nix, *supra* note 23, at 414, 420; Barbara J. Washburn, *New Tax Act Defines "Substantial" Lobbying--But Charities Must Elect To Be Covered*, 55 *TAXES* 291, 299 (1977); Comment, *Tax Susidies for Political Participation*, 31 *TAX LAW.* 461 (1978).

<sup>29</sup> 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(c)(7). In no case may the "nontaxable lobbying amount" exceed \$1,000,000, *id.* § 4911(c)(2). An organization may, without penalty, spend for grass roots lobbying up to 25% of the total amount allowed for lobbying, *id.* § 4911(c)(4).

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exceed its limits is the organization subject to revocation of its section 501(c)(3) status.<sup>30</sup>

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<sup>30</sup> I.R.C. § 501(h)(1).

Perhaps the most important feature of Code sections 501(h) and 4911 and, particularly, the Treasury Regulations promulgated in 1990 to implement them, is their definition of key terms and concepts that have been (and arguably still are) subject to intrusive and inconsistent interpretation and application under the "no substantial part" standard of section 501(c)(3). The regulations draw clear lines where even the relative clarity of the 1976 law (as compared to the very muddy "no substantial part" standard) left questions.<sup>51</sup> Uncertainty about when issue advocacy becomes grass roots lobbying, and questions about how much of the work preparatory to arriving at a position might be charged to lobbying expenditures if and when an organization ultimately asserted that position in the context of legislative action are resolved in the regulations. "Direct lobbying" is an attempt to influence legislation through contact with legislators or their staffs, or communication with other government employees that has the primary purpose of influencing legislation. Contact with the general public with respect to initiatives and referenda is also direct lobbying. Under the regulations, an organization's expression of opinion on matters of public policy is not lobbying unless it reflects a view on the merits of specific legislation. "Specific legislation" can be a particular measure not yet introduced, but does not include general approaches for solving problems that have not yet been solidified into specific legislative proposals. The

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<sup>51</sup> See Laura B. Chisolm, *Exempt Organization Advocacy, Matching the rules to the Rationales*, 63 IND. L.J. 201, 230-234 (1987) [hereinafter Chisolm, *Exempt Organization Advocacy*].

1990 regulations provide a clear and very narrow definition of grass roots lobbying, thereby setting a line between grass roots lobbying and non-lobbying educational or advocacy activities that leaves far more room for "safe" policy advocacy than did the pre-1976 law, or even the 1976 amendments before they were defined and clarified by the 1990 regulations. Even more significantly, the regulations specify that a communication with the public, even on a specific legislative proposal, is grass roots lobbying only if it includes a "call to action."<sup>32</sup>

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<sup>32</sup> The term "call to action" is not actually used in the regulations, but has become the standard shorthand for describing the rule. There is no call to action unless the communication does any of the following: (1) directly tells its audience to contact their legislators; (2) provides a legislator's address or telephone number; (3) provides a postcard, tear sheet, petition, or some other prepared message to be sent to legislators; or (4) identifies legislator(s) as opposed to the organization's view or as undecided, or identifies legislator(s) as the recipients' representatives or as members of a committee that will consider the legislation. There is an exception to the call to action threshold rule for paid mass media advertisements within two weeks of a vote on highly visible legislation. In that case, expression of a position on the specific legislation without a call to action, or expression of a position on the general subject (though not the specific legislation) with a call to

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communicate with legislators will count as grass roots lobbying. Treas. Reg. §56.4911-2(b)(2)(iii).

The regulations also take a generous stance toward which expenses of researching and developing a position that is ultimately used in the organization's own or someone else's lobbying effort will count as lobbying expenditures. The regulations provide a six-month "look-back" period; the cost of generating materials in preparation for lobbying longer than six months before their use in lobbying will not count as lobbying expenses. Even within the six month period, only expenses for "advocacy communications" - that is, communications that reflect a position on specific legislation - and that were prepared for the primary purpose of lobbying will count against the organization's limits. Furthermore, substantial nonlobbying distribution of the materials before or contemporaneously with their use in lobbying is deemed to negate primary lobbying purpose. Thus, with only a little care, an organization can carry on significant public policy advocacy work without fear that it will inadvertently exceed the limits.

For both electing and nonelecting organizations, a substantial body of issue-related, and even legislation-related, advocacy falls outside the limitations. The lobbying constraints do not apply to examinations of broad social, economic, and similar problems, to nonpartisan analysis, study, or research, to technical advice provided to a governmental body or committee at the written invitation of that body, or to communications with respect to matters directly affecting the organization ("self-defense" lobbying).<sup>35</sup> In addition, electing organizations'

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<sup>35</sup> These exceptions are found in I.R.C. § 4911 (d) and Treas. Reg. § 53.4911-2(c) for electing organizations. They are applicable to non-electing organizations by

communications with bona fide members are considered to be non-lobbying (if there is no call to action) or direct lobbying (if there is a call to action).<sup>34</sup>

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virtue of various interpretations of the § 501(c)(3) lobbying restrictions prior to the 1976 changes. See Chisolm, *Exempt Organization Advocacy*, *supra* note 31, at 230-32.

<sup>34</sup> I.R.C. §§ 4911(d)(2)(D); 4911(d)(3).

In spite of the fact that some organizations may not elect under section 501(h) and that many organizations eligible to elect have not,<sup>35</sup> and in spite of the fact that Congress explicitly wrote into section 501(h) that the 1976 amendments were to have no effect on the general "no substantial part" test for non-electing charities,<sup>36</sup> it seems almost inevitable that the carefully crafted and highly workable standards of the 1990 regulations will, over time, become the measuring rod against which the activities of public charities that engage in issue advocacy will be evaluated. With detailed standards in place for electing organizations, it becomes harder to imagine Service or court decisions resting on an unmodified, know-it-when-we-see-it approach,<sup>37</sup> even if the organization at issue has not elected to come under section 501(h). Furthermore, it is likely that organizations with policy advocacy as a primary or secondary, as opposed to incidental, focus will choose to place themselves under the more predictable 501(h) framework.<sup>38</sup>

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<sup>35</sup> As of October 31, 1986, fewer than one percent of all public charities had made the 501(h) election. Thomas R. Asher & Elisabeth L Fountain, *Lobbying by Public Charities--Living With (or Without) the New IRS Regulations* 3 EXEMPT ORG. TAX REV. 1011, 1011, n.7 (1990).

<sup>36</sup> I.R.C. §501(h)(7).

<sup>37</sup> The Exempt Organizations Handbook, for example, explains the "no substantial part" test:

[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.

*Exempt Organizations Handbook*, 4 Int. Rev. Man.-Admin. (CCH) § 394.

<sup>38</sup> Since the promulgation of the final Regulations in 1990, commentators are, for

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the most part, uniformly in favor of 501(c)(3) organizations making the election under section 501(h). *See, e.g.*, Thomas A. Troyer & Amy R. Segal, *Lobbying and Political Activities of Charities*, in NEW YORK UNIVERSITY, TWENTY-FIRST CONFERENCE ON TAX PLANNING FOR 501(C)(3) ORGANIZATIONS § 11 (1993); Thomas Asher, *Lobbying by Public Charities: The 1990 IRS Regulations*, in NEW YORK UNIVERSITY, TWENTIETH CONFERENCE ON TAX PLANNING FOR 501(C)(3) ORGANIZATIONS § 3 (1992); Thomas A. Troyer et. al., *Final Lobbying Regulations Provide Workable Guidance*, 74 J. TAX'N 124 (1991); Asher & Fountain, *supra* note 35, at 1011.

At least some of those same organizations may choose to avail themselves of another option for structuring their advocacy activities that was made available (or, if it was already available, at least made reasonably comfortable) by the Supreme Court's 1983 decision in *Regan v. Taxation With Representation of Washington*.<sup>39</sup> A section 501(c)(3) organization that finds the limits on legislative advocacy to be too constraining might consider establishing a sister organization under section 501(c)(4). Section 501(c)(4) social welfare organizations must be "primarily engaged in promoting in some way the common good and general welfare of the people of the community," but need not limit their legislative advocacy efforts to "insubstantial" amounts.<sup>40</sup> *Taxation With Representation* appears to clear the way for close affiliation between a section 501(c)(3) organization and a lobbying section 501(c)(4) affiliate. Rejecting a constitutional challenge to the section 501(c)(3) lobbying restrictions, the Court concluded that the constraints represent a (constitutional) policy of nonsubsidy rather than an unconstitutional penalty on the exercise of free speech because an organization 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.<sup>41</sup> The Court appeared

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<sup>39</sup> 461 U.S. 540.

<sup>40</sup> Treas. Reg. § 1.501(c)(4)-1(a)(2).

<sup>41</sup> 461 U.S. at 544.

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.<sup>42</sup>

With respect to election-related advocacy, there has been no parallel revision or rethinking of the framework. Internal Revenue Code section 501(c)(3) disqualifies from classification as charitable under that section any organization

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<sup>42</sup> 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 I.R.S. 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 an unconstitutional penalty upon the section 501(c)(3) organization. *Id.* at 552-54.

that "participate[s] in, or intervene[s] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."<sup>43</sup> The election campaign intervention prohibition is expressed in absolute terms: any campaign-related activity calls down its sanctions.<sup>44</sup>

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<sup>43</sup> I.R.C. § 501(c)(3). The proscription is reiterated in the regulations that disqualify "action organizations" from the charitable exemption, Treas. Reg. § 1.501(c)(3) - 1(c)(3)(iii), and in the Code provisions that establish the deductibility of charitable contributions in the individual income tax, I.R.C. § 170(c)(2)(D), gift tax, *id.* § 2522(a)(2), and estate tax, *id.* §§ 2055(a)(2), 2106(a)(2)(A)(ii) contexts.

<sup>44</sup> De minimis infractions may be ignored. Gen. Couns. Mem. 33,682 (Nov. 9, 1967) (indicating that "situations might arise in which an organization . . . engaged in political activity but on such a small scale that it would not be feasible from an administrative standpoint to either withhold or revoke the group's 501(c)(3) status because of it"); *see also* Gen. Couns. Mem. 39,441 (Sept. 27, 1985) (stating that the de minimis exception would not apply to an organization that annually rates a large number of candidates); *St. Louis Union Trust Co. v. U.S.*, 374 F.2d 427, 431-32 (8th Cir. 1967) (stating that a "a slight and comparatively unimportant deviation from the narrow furrow of tax approved activity is not fatal").

Violation of the bar turns, first, on whether the organization takes a position and, second, whether the position relates to a candidate for election. For purposes of section 501(c)(3), a candidate is "an individual who offers himself, or is proposed by others, as a contestant for elective public office" at the local, state, or federal level.<sup>45</sup> No precise criterion exists by which to measure when candidacy begins; the I.R.S. practice has been to factor the status of the individuals upon whom the organization comments as one among several facts and circumstances that determine whether the organization has engaged in prohibited campaign intervention. Support or opposition may be express or implied. Certainly, direct statements of endorsement of or opposition to a candidate<sup>46</sup> (even the repetition of

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<sup>45</sup> Treas. Reg. § 1.501(c)(3) - 1(c)(3)(iii).

<sup>46</sup> *See, e.g.*, Gen. Couns. Mem. 39,441 (Nov. 7, 1985). Language specifying that

the statements of others<sup>47</sup>) violate the prohibition, as do participation in fundraising and distribution of campaign literature on behalf of a candidate,<sup>48</sup> but less direct comment may also be prohibited campaign intervention.

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opposition to a candidate is campaign intervention was added to section 501(c)(3) by the Omnibus Budget Reconciliation Act of 1987, § 10,7111, Pub. L. No. 100-203, 1987 U.S.C.C.A.N. (101 Stat.) 1330-1464. That language simply repeated the approach already reflected in regulations, Treas. Reg. § 1.501(c)(3) - 1(c)(3)(iii) (as amended in 1976), and judicial interpretation, *see* *Christian Echoes Nat'l Ministry v. United States*, 470 F.2d 849, 856 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

<sup>47</sup> *See, e.g.*, Gen. Couns. Mem. 34,071 (Mar. 11, 1969) (indicating that compilation and publication of statements made by others "could be said to constitute political intervention").

<sup>48</sup> *See* Gen. Couns. Mem. 39,414 (Sept. 25, 1984) (concluding that members, acting for organization, actively involved in fundraising and door-to-door canvassing, violate prohibition).

Charitable organizations may engage in activities that "focus on giving voters and candidates access to each other on an impartial basis, i.e., access to and by all the candidates and not merely those favored by the organization's leaders."<sup>49</sup> The line between neutral voter education and disqualifying election intervention has been set, in the main, by I.R.S. interpretations of the applicability of the election intervention prohibition to the sponsorship of candidate forums, and the publication and dissemination of voting records and candidate position surveys. It is defined largely in terms of timing, geographical targeting, and explicit or implicit endorsement or disapproval of candidates. Compiling the positions of declared candidates for office may be neutral voter education, if the organization lists all candidates and neither states nor implies any endorsement or rejection. On the other hand, non-neutral publication and dissemination of the positions of officials who face reelection, even if they are not yet declared candidates, may be prohibited campaign intervention. Materials that survey all candidates in a given contest on a wide range of issues, take no position as to which answers are correct and which are not, and express neither approval nor disapproval of any individual do not constitute campaign intervention.<sup>50</sup> The I.R.S. has applied similar principles to the conduct of candidate forums.<sup>51</sup>

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<sup>49</sup> *Association of the Bar v. Commissioner*, 89 T.C. 599, 616 (1987) (Chabot, J., dissenting), *rev'd*, 858 F.2d 876 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1768 (1989).

<sup>50</sup> Rev. Rul. 78-248, 1978-1 C.B. 154, 154-55. Revenue Ruling 78-248 replaced Revenue Ruling 78-160, published only months earlier, which held that an

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organization's publication, without comment of candidate responses to questions on issues related to the organization's exempt purposes would be campaign intervention because it could affect voter acceptance or rejection of candidates. Rev. Rul. 78-160, 1978-1 C.B. 153, 153-54. The breadth of Revenue Ruling 78-160 drew substantial criticism; it was withdrawn and replaced by Revenue Ruling 78-248 with its less restrictive stance.

<sup>51</sup> Rev. Rul. 86-95, 1986-2 C.B. 73 (stating that sponsoring candidate forums to which all legally qualified candidates are invited, at which candidate response is sought to a wide range of questions prepared and presented by a nonpartisan, independent panel, and at which the sponsoring section 501(c)(3) organization explicitly disclaims endorsement of any candidate, is neutral voter education rather than campaign intervention, although biased questioning would make an otherwise similar event campaign intervention).

Implicit rating of candidates may be found, however, in biased wording of questions or limitation of subject matter to issues on which the response favored by the organization is apparent, even if unspoken.<sup>52</sup> Implicit endorsement or opposition of this sort may well be judged to be intervention in a political election campaign, unless the publication is clearly distanced from the campaign context in time and space. For example, a publication that surveys all members of Congress, and not just those facing reelection campaigns, identifies them as elected officials, rather than as candidates for reelection, is not distributed during an active campaign period, and is not geographically targeted to areas where it might be expected to influence contested seats, is "educational" rather than campaign intervention and will not threaten the sponsoring organization's section 501(c)(3) status,<sup>53</sup> even though responses are "graded."<sup>54</sup> But implicit endorsement timed to coincide with a campaign or selectively distributed to the state or district of a particularly high- or low-rated individual crosses the line into forbidden advocacy.<sup>55</sup> Explicit endorsement, even on nonpartisan lines, in a nonpartisan election, or based on purportedly objective criteria, clearly violates the proscription.<sup>56</sup> The

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<sup>52</sup> Rev. Rul. 78-248, 1978-1 C.B. 154.

<sup>53</sup> *Id.*

<sup>54</sup> Rev. Rul. 80-282, 1980-2 C.B. 178.

<sup>55</sup> Rev. Rul. 78-248, 1978-1 C.B. 154.

<sup>56</sup> *See Association of the Bar v. Commissioner*, 858 F.2d 876 (2d Cir. 1988), *cert.*

other variety of election-related activity that a section 501(c)(3) organization may carry on without violating the prohibition is neutral voter registration.<sup>57</sup> The consequence of violating the prohibition is loss of the section 501(c)(3) charitable exemption; since the passage of the Omnibus Budget Reconciliation Act of 1987,<sup>58</sup> the Code also provides for the imposition of substantial excise tax penalties on errant organizations and their managers.<sup>59</sup> The 1987 Act also authorizes the I.R.S.

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*denied*, 109 S. Ct. 1768 (1989); Rev. Rul. 76-456, 1976-2 C.B. 151; Rev. Rul. 67-71, 1967-1 C.B. 125; Gen. Couns. Mem. 39,441 (Nov. 7, 1985).

<sup>57</sup> Section 4945(f), added to the Code in 1969 to limit private foundation support of voter registration drives, I.R.C. § 4945(f), offers the only guidance as to what makes a voter registration drive neutral. Section 4945(f)(2) provides that a private foundation will not be penalized for making grants to section 501(c)(3) organizations whose voter registration activities "are nonpartisan, are not confined to one specific election period, and are carried on in 5 or more states." The grantee organization must also have a wide base of support, § 4945(f)(4), and expend substantially all of its income in the active pursuit of its exempt purpose, § 4945(f)(3). That provision has no direct bearing on eligibility for section 501(c)(3) exempt status for organizations that are not private foundations, but at the very least, it describes a safe harbor for voter registration activities by public charities, *see* Priv. Ltr. Rul. 88-22-080 (Mar. 9, 1988); Priv. Ltr. Rul. 88-22-056 (Mar. 4, 1988); Priv. Ltr. Rul. 84-42-074 (July 18, 1984); Priv. Ltr. Rul. 84-34-072 (no date given); Priv. Ltr. Rul. 84-33-070 (May 16, 1984). A public charity probably may engage in voter registration activities that do not satisfy all the elements of the section 4945(f) list without violating the election participation bar, *see e.g.*, H.R. CONF. REP. NO. 495, 100th Cong., 1st Sess. 1021 (1987) (noting explicitly that "special rules in section 4945(f) applicable to voter registration activities of private foundations continue to apply only to private foundations"). If so, the general approach to geographic targeting found in the neutral voter education context would presumably apply.

<sup>58</sup> Pub. L. No. 100-203, 1987 U.S.C.C.A.N. (101 Stat.) 1330.

<sup>59</sup> Section 4955 imposes a 10% initial excise tax on each political expenditure by a section 501(c)(3) organization. I.R.C. § 4955(a)(1). In addition, an initial excise tax equal to 2-1/2% of the organization's political expenditures is imposed upon any organization manager who willfully and without reasonable cause agrees to the

to move swiftly to impose penalties and to revoke the exempt status of organizations that are determined to be in "flagrant violation" of the proscription on political expenditures.<sup>60</sup>

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expenditure, § 4955(a)(2). If the expenditure is not promptly corrected, an additional tax equal to 100% of the political expenditure is imposed upon the organization, § 4955(b)(1), and an additional tax equal to 50% of the expenditure is imposed upon any manager who refuses to agree to the correction, § 4955(b)(2).

<sup>60</sup> I.R.C. § 6852. Section 7409 authorizes the I.R.S. to seek an injunction from a federal district court prohibiting any further political expenditures by an organization that "has flagrantly participated in, or intervened in . . . any political campaign" and that has not ceased the expenditures upon being notified that the Service intends to seek an injunction.

Nor may a section 501(c)(3) organization engage in election-related activity, even indirectly and without subsidy, through a controlled section 501(c)(4) social welfare organization or through a (c)(3)-(c)(4)-PAC affiliation. Section 501(c)(4) organizations are subject to restrictions on election intervention, although those restrictions are far less constraining than the absolute prohibition of section 501(c)(3). The I.R.S. has suggested that strict fiscal separation between a section 501(c)(3) organization and its section 501(c)(4) affiliate which, in turn, is connected to a section 527 PAC will not jeopardize the section 501(c)(3) organization's exemption, but at the same time cautions that the arrangement "should not be an attempt to accomplish indirectly what the IRC 501(c)(3) organization could not do directly. Facts and circumstances prevail here also."<sup>61</sup> It is generally agreed that any such arrangement is likely to be risky for the section 501(c)(3) organization.<sup>62</sup>

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<sup>61</sup> 1992 EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM 439.

<sup>62</sup> See, Milton Cerny, *Campaigns, Candidates and Charities: Guideposts for All Charitable Institutions*, NEW YORK UNIVERSITY NINETEENTH CONFERENCE ON TAX PLANNING FOR 501(C)(3) ORGANIZATIONS 5-40 - 5-45 (1991).

If a (c)(3)-(c)(4)-PAC affiliation is risky, a (c)(3)-PAC affiliation without the (c)(4) buffer is clearly out of the question.<sup>63</sup> The I.R.S. position is that a section 501(c)(3) organization may establish a section 527 organization or fund, but only to carry on those activities that are included in the section 527 definition of political activities, but excluded from the section 501(c)(3) definition of election-related activity, for example, legislative activity in connection with a judicial nomination. Intervention in any political campaign by a 501(c)(3)-affiliated PAC will lead to revocation of the controlling organization's exempt status just as if the charitable organization had undertaken the disqualifying activities directly.<sup>64</sup>

Thus, a section 501(c)(3) organization has no effective alternative avenue for election-related political expression. Establishment of a section 501(c)(4) arm

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<sup>63</sup> See 1992 EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM 439. In contrast, the Internal Revenue Code both permits and encourages politically active organizations that are exempt under classifications other than section 501(c)(3) to channel campaign intervention through a separate "political organization," governed by section 527 of the Code.

<sup>64</sup> Gen. Couns. Mem. 39,694 (Jan. 22, 1988); *see also* Internal Revenue Service Manual 7(10)76.2(2)(g) (Mar. 24, 1988). The position was officially adopted in Notice 88-76, 1988-2 C.B. 392, and Notice 88-114, 1988-2 C.B. 449.

offers only a very limited outlet, if that, and the unlimited opportunity for campaign intervention with nonsubsidized dollars that would be provided by affiliation with a section 527 PAC is foreclosed.

*Private Foundations*

Private foundations, while technically subject to the "no substantial part" limitation of section 501(c)(3), are in reality effectively barred from engaging in any direct or grass roots lobbying or election campaign intervention by a system of steep (up to 100%) excise taxes imposed on any such activities by section 4945, added to the Code in 1969.<sup>65</sup> The line between taxable lobbying activities and permitted educational activities is set, in the main, by regulations promulgated shortly after the 1969 legislation and modified in 1990 to align the private foundation regime, where appropriate, with the scheme for public charities under section 501(h), section 4911, and the associated regulations.

Thus, private foundations may freely engage in nonprofit analysis, research, and study; discussion of topics of broad social issues; attempts to influence administrative or executive actions (so long as those actions do not relate to

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<sup>65</sup> The foundation is subject to an initial penalty tax of 10% of the amount of the expenditure; a 2-1/2% penalty tax may be imposed on any foundation manager who agrees to the expenditure knowing that it is a taxable expenditure unless the manager's action is not willful and is due to reasonable cause. Treas. Reg. § 53.4945(a). The exercise of ordinary business care and prudence, or reliance on reasoned, written opinion of counsel establishes "reasonable cause." Second-tier taxes of 100% and 50% of the expenditure amount may be levied on the foundation and participating foundation managers, respectively, if the expenditure is not corrected. Treas. Reg. § 53.4945-1(b).

specific legislation); self-defense lobbying; technical assistance at the written invitation of a legislative body or committee; or communication with the public that lacks either a position on specific legislation or an explicit "call to action." As with public charities that elect to be covered under section 501(h), subsequent grass roots lobbying use of nonpartisan analysis results in the characterization of preparation expenses incurred in the six months prior to such use as grass roots lobbying expenditures. Unlike electing public charities, private foundations do not have the benefit of special treatment of legislation-related communication with members. The most significant difference between the private foundation and public charity regimes, however, is that the penalty tax applies from the first dollar of private foundation taxable expenditures.

### *Noncharitable Exempt Organizations*

#### *Section 501(c)(4) Social Welfare Organizations*

The issue-related advocacy activities, including direct and grass roots lobbying, of section 501(c)(4) social welfare organizations are paid for with after-tax dollars, as contributions to such organizations are not deductible to the donor, but are constrained only by the inherent limits of the statutory definition of the class. Thus, so long as their efforts are not primarily in pursuit of ends other than social welfare,<sup>66</sup> (c)(4) organizations are explicitly authorized to lobby without limit.

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<sup>66</sup> Section 501(c)(4) organizations must be "primarily engaged in promoting in some way the common good and general welfare of the community." Treas. Reg. § 1.501(c)(4)-1(a)(2).

Section 501(c)(4)'s liberality with respect to legislative activity is not echoed in its approach to election-related activity. Unlike section 501(c)(3), section 501(c)(4) does not contain an explicit prohibition on campaign intervention. Support or opposition to candidates for office, however, is not considered to promote social welfare;<sup>67</sup> thus, if such activity is an organization's primary purpose, the organization will not qualify for the (c)(4) exemption.<sup>68</sup> Short of that, however, (c)(4) organizations may intervene in election campaigns. Under section 527, expenditures on campaign-related activities are subject to taxation at the highest corporate rate.<sup>69</sup> Rather than make such expenditures directly, a (c)(4) may

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<sup>67</sup> Treas. Reg. §1.501(c)(4)-1(e)(2)(i).

<sup>68</sup> This holds true even if the support or opposition is based on nonpartisan assessment of candidate qualifications. *Association of the Bar of New York City v. Commissioner*, 858 F.2d 876 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1768.

<sup>69</sup> I.R.C. § 527(f)(1). Actually, the tax is assessed on either the expenditure or on the organization's net investment income, whichever is less.

establish a connected section 527 PAC through which to carry out election-related activities.<sup>70</sup>

*Section 501(c)(19) Veterans' Organizations*

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<sup>70</sup> See S. REP. NO. 1357, 93d Cong., 2d Sess. 30 (1974).

Contributors to veterans' organizations are able to deduct their contributions under section 170.<sup>71</sup> Nothing in the statute explicitly limits direct or grass roots legislative activity or campaign intervention of these organizations. Treasury Regulations under section 170 that deny the charitable deduction for contributions to organizations that lobby substantially or intervene in election campaigns<sup>72</sup> make no distinction as to (c)(19) organizations, but the I.R.S. does not apply the rules to these organizations.<sup>73</sup> A veterans' organization may establish an affiliated PAC

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<sup>71</sup> I.R.C. § 170(c)(3).

<sup>72</sup> Treas. Reg. § 1.170A-1(h)(5).

<sup>73</sup> Plaintiffs in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), challenged this uneven application of the deductibility provisions. The Court rejected the equal protection challenge on the grounds that it is "not irrational for Congress to decide that, even though it will not subsidize substantial lobbying by charities generally, it will subsidize lobbying by veterans' organizations. . . . Our country has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages." *Id.* at 548.

without adversely affecting its exempt status or its eligibility to receive deductible contributions.<sup>74</sup>

*Economic Interest-Based Exempt Organizations*

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<sup>74</sup> Priv. Ltr. Rul. 79-04-064 (Oct. 25, 1978).

Neither section 501(c)(5), which provides for exemption from tax for labor unions, nor section 501(c)(6), which provides for exemption for trade associations and similar organizations<sup>75</sup> places any limits on lobbying activities. Between 1963 and 1993, dues to such organizations were deductible as business expenses under section 162, except that dues to an organization that engaged in "substantial" grass roots lobbying or election-related activity were nondeductible to the extent they were allocable to these activities.<sup>76</sup> The 1993 amendment of section 162 removes the "substantiality" threshold and disallows a business deduction for dues to the extent they are used for activities that would be nondeductible for the

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<sup>75</sup> For example, business leagues, chambers of commerce, boards of trade.

<sup>76</sup> Treas. Reg. § 1.162-20(c)(3). Details of provisions implementing the pass-through or proxy tax choice are found in IRC section 6033(e). IRS notice 93-55, October 20, 1993, provides transition rules for dues paid in 1993 and spent on lobbying after January 1, 1994. The intricacies of the provisions, both before and after the 1993 changes, are ably presented and explained in Jasper Cummings' *Tax Management Portfolio* article. See Cummings, *Lobbying and Political Expenditures*, *supra* note 2, at II.C.6.

duespayer.<sup>77</sup> Organizations are now required either to disclose to their members the proportion of dues that is nondeductible or, alternatively, to pay a proxy tax of 35% of the expenditure amount, unless the organization can show that at least 90% of its members do not deduct dues.<sup>78</sup>

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<sup>77</sup> I.R.C. § 162(e)(3).

<sup>78</sup> I.R.C. § 6033(e)(3).

Nothing in the Internal Revenue Code limits the ability of these organizations to intervene in election campaigns, although they may be subject to tax on amounts spent for that activity under section 527.<sup>79</sup> Federal Election Campaign Act prohibitions on contributions or independent expenditures in connection with federal elections apply to unions and to other exempt organizations if they are incorporated.<sup>80</sup> However, these organizations may establish a connected PAC and make expenditures in connection with administering and soliciting contributions to it. Any such expenditures are included in the amount that is subject to the nondeductibility or proxy tax calculations.

Thus, an inventory of Internal Revenue Code provisions that relate to political advocacy - that is lobbying or election-related activities - yields a collection of different results, depending on the nature of the activity and depending on who the taxpayer is. Would it make more sense to trade the mix of rules for a unitary approach to the tax treatment of political advocacy, no matter who the advocate? That is, would it be better to have a rule that says that lobbying, direct or grass roots, and election campaign participation are always deductible, or never deductible? Of course, income tax rules are not based on the nature of an activity, irrespective of the identity of the taxpayer engaging in the activity. But we can reformulate the question - why not have parallel rules for each kind of taxpayer

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<sup>79</sup> A § 501(c) organization that makes election-related expenditures is taxed at corporate rates on either the amount of the political expenditures or the amount of its investment income, whichever is less. I.R.C. § 527(f)(1).

with respect to the tax treatment of political activity? That is, however and wherever rules about lobbying or political campaign intervention might appear, those rules would consistently provide for deduction or consistently provide for nondeductibility. Would such evenhandedness (if that is what such a scheme would be) be superior to the current framework or to other ways the rules in this area might be arranged?

NEUTRALITY

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<sup>80</sup> 2 U.S.C. § 441b.

The standard starting place for evaluating tax-related rules relating to political advocacy is "neutrality."<sup>81</sup> The provenance of the idea that the tax treatment of lobbying activities ought to be "neutral" is Learned Hand's 1930 opinion in *Slee v. Commissioner*,<sup>82</sup> as explained by Justice Harlan in *Cammarano v. United States*<sup>83</sup> in 1958.

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<sup>81</sup> See, e.g., Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities*, 71 TEX. L. REV. 1269 (1993); Chisolm, *Exempt Organization Advocacy*, *supra* note 31, at 201; R.T. Boehm, *Taxes and Politics*, 22 TAX L. REV. 369 (1967).

<sup>82</sup> 42 F.2d 184 (2d Cir. 1930).

<sup>83</sup> 358 U.S. 498 (1958).

The taxpayer in *Slee* challenged the disallowance of his charitable deduction for gifts to the American Birth Control League. In addition to operating a birth control clinic,<sup>84</sup> the League engaged in educational and advocacy efforts among the public and legislators in favor of changing existing law to relax restraints on birth control. Upholding the Internal Revenue Service's denial of the charitable deduction for gifts to the League because its advocacy activities disqualified the League as a charitable or educational organization, Hand set down the oft-quoted pronouncement that "[p]olitical agitation as such is outside the statute, however innocent the aim . . . . Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them."<sup>85</sup> Although nothing in the tax law compelled such a conclusion, and the idea that political advocacy was out of bounds was inconsistent with common law concepts of charitable and educational purpose as manifested in the law of every state except Massachusetts,<sup>86</sup> Hand's characterization in *Slee* provided the starting point for discussion in many of the cases over the next twenty years or so that concerned the tax status of charitable organizations that engaged in legislative or public policy advocacy activities,<sup>87</sup> and

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<sup>84</sup> The clinic provided contraception advice to married women "if in the judgment of the physician their health demand[ed] but not otherwise." *Slee*, 42 F.2d at 184.

<sup>85</sup> *Id.* at 185.

<sup>86</sup> See Clark, *supra* note 23, at 448 n.44; Tommy F. Thompson, *The Availability of the Federal Educational Tax Exemption for Propaganda Organizations*, 18 U.C. DAVIS L. REV. 487, 513 n.56 (1985).

<sup>87</sup> See, e.g., *International Reform Fed'n v. Commissioner*, 131 F.2d 337 (D.C. Cir. 1942); *Weyl v. Commissioner*, 48 F.2d 811; *Davis v. Commissioner*, 22 T.C. 1091

52 Chisolm

is often identified as the foundation for the 1934 amendment to the Internal Revenue Code which added the explicit limitation on "substantial" lobbying to section 501(c)(3).<sup>88</sup>

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(1954). This is not to say that Hand was the first to have this idea. 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. See Chisolm, *Exempt Organization Advocacy*, *supra* note 31, at 201, n.76.

<sup>88</sup> See, e.g., George Baker, *Lobbying by Public Charities: Summary of Proposed Regulations*, 33 TAX NOTES 1145 (1986).

Indeed, in *Cammarano*,<sup>89</sup> the U.S. Supreme Court drew a connection between *Slee* and the 1934 legislation. Ruling on the reach and constitutionality of a Treasury Regulation denying deduction as a section 162(a) ordinary and necessary business expense for "sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising,"<sup>90</sup> the Court characterized the 1934 amendment as explicit Congressional expression of the "sharply defined national policy" reflected in Judge Hand's words, and quoted the same phrases that are quoted above.<sup>91</sup> The Court went on to equate "nonsubvention" with neutrality; denial of deduction for the expenses of lobbying "appears to us to express a determination by Congress that since purchased publicity can influence the fate of

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<sup>89</sup> 358 U.S. 498 (1958). In *Cammarano*, the activity at issue was with respect to initiatives the passage of which, the Court acknowledged, "would have seriously affected, or indeed wholly destroyed, the taxpayers' businesses." *Id.* at 500. *Cammarano* raised the question of whether the regulation applied to grass roots advocacy with respect to initiative measures and challenged the constitutionality of the provision. A regulation denying a business expense deduction to corporations for lobbying costs had been on the books since 1918. Art. 143 Treas. Regs. 33 (Revised 1918); a parallel regulation denying a business expense deduction to individuals was added in 1938. Art. 23(o)-1 Treas. Reg. 101. In 1941, the Supreme Court upheld the regulation against an assertion that it was beyond the Treasury's authority under the terms of the statute. *Textile Mills Securities Corp. v. Commissioner*, 314 U.S. 326 (1941). Taking notice of a "general policy" of "[condemning] contracts to spread such insidious influences through legislative halls," the Court found "no reason why, in the absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction." *Id.* at 338-39.

<sup>90</sup> Treas. Reg. 111, §§ 29.23(o)-1; 29.23(q)1.

<sup>91</sup> *Cammarano*, 358 U.S. at 512.

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legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned."<sup>92</sup>

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<sup>92</sup> *Id.* at 513.

It is not at all clear that Congress has been driven by concerns about neutrality as it has, over the years, formulated the various tax provisions that bear on political activity. While many, including the Court in *Cammarano*, attribute the 1934 addition of restrictions on lobbying to the threshold of qualification for the charitable exemption to Congress's adoption of the *Slee* neutrality principle, the sparse legislative history indicates that Congress was probably responding to concerns about the promotion of private, selfish interests in the guise of charity.<sup>93</sup> Certainly, the 1954 addition of the express prohibition on campaign intervention by section 501(c)(3) organizations had nothing to do with neutrality. The provision was inserted as a floor amendment offered by Senator Lyndon Johnson and passed with virtually no discussion.<sup>94</sup> The standard story is that the amendment was prompted by Johnson's belief that his opponent in the 1954 Senate campaign had been indirectly supported by a tax-exempt Texas foundation.<sup>95</sup> Debates in

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<sup>93</sup> Explaining the amendment, Senator Reed said:

There is no reason in the world why a contribution made to the National Economy League should be deductible as if it were a charitable contribution if it is a selfish one made to advance the personal interests of the giver of the money. That is what the committee were trying to reach . . . . [b]ut this amendment goes much further than the committee intended to go.

78 CONG. REC. 5,861 (1934).

See also Chisolm, *Exempt Organization Advocacy*, *supra* note 31, at 222 n.109.

<sup>94</sup> 100 CONG. REC. 9,604 (1954).

<sup>95</sup> BRUCE HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 327 (6th Ed. 1992). It has been suggested that the offending organization may have been H.L. Hunt's Lifeline Foundation, *Lobbying and Political Activities of Tax-Exempt Organizations: Hearings Before the Subcomm. on Oversight of the Comm. on Ways and Means*,

connection with the 1962 passage of section 162(e), making direct lobbying a deductible business expense, do reflect some attention to the idea of "neutrality."<sup>96</sup>

Deliberations on the way to passage of the 1969 private foundation provisions signal that those changes were driven less by concerns about political involvement per se and more by concerns about the power of foundations to pursue narrow private agendas with tax-favored money.<sup>97</sup> Certainly, the 1976 liberalization of restrictions on lobbying by charitable organizations could not have been driven by a principle of nonsubvention. While the 1993 amendment of section 162 to remove the business deduction for most lobbying is arguably consistent with nonsubvention, evidence suggests that it was motivated by a desire to raise

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100th Cong., 1st Sess. 124, 144 (1987) (statement of William J. Lehrfeld). Research conducted on behalf of the United States Catholic Conference at the Johnson Library in Austin, Texas suggests that exempt organization which had at least indirectly expressed support in its literature for Dudley Dougherty, Johnson's opponent in the democratic primary. Contemporaneous documents in support of this theory include a memorandum to Johnson from his chief aide, Gerald W. Siegel, written less than three weeks before Johnson introduced his amendment and noting that the Committee's actions appeared not to violate any provision of the then-existing federal tax exemption law. *Id.* at 423, 437, 446-53 (statement of United States Catholic Conference). A more generous view of the motivation for the amendment is that Johnson's motive was to head off a far more restrictive proposal by Senator Patrick McCarran, which would have denied tax-exempt status to any "subversive" organization, and thus "pacify Senator McCarran and his like without exposing tax-exempts to IRS-conducted witch hunts of potentially divesting dimensions". *Id.* at 148-49 n.1 (statement of Leonard L. Silverstein).

<sup>96</sup> See Jasper L. Cummings Jr., *Tax Policy, Social Policy, and Politics: Amending Section 162(e)*, 9 EXEMPT ORG. TAX REV. 137 (1994) [hereinafter Cummings, *Tax Policy*].

<sup>97</sup> See Laura B. Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence* 58 GEO. WASH. L. REV. 308, 342-43 (1990).

revenue to offset hoped-for public financing of Congressional campaigns, and perhaps by a desire on the part of legislators to insulate themselves from some of the ever-increasing din of business lobbying.<sup>98</sup>

Thus, pursuit of "neutrality" has motivated Congress in formulating these rules only sporadically and inconsistently (and perhaps, even then, more as an afterthought than as a driving principle). Nevertheless, courts and commentators have often looked to a baseline of "neutrality" when applying or evaluating the rules, and it does seem reasonable to gauge existing or proposed tax rules against a measuring rod of neutrality, at least as one step in the process, and if only to provide a backdrop for critique against wider-ranging policy concerns.

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<sup>98</sup> See Cummings, *Tax Policy*, *supra* note 96, at 141.

First, what do we mean by "neutrality"? As used in judicial opinions, legislative history, and commentary, the term carries a variety of meanings and is often used without making clear which of those meanings is intended<sup>99</sup> or even recognition that the meanings can be disentangled from one another.

Disagreements about the neutrality-enhancing or -reducing tendencies of particular rules have often turned on this axis,<sup>100</sup> sometimes without appearing to notice that the reason for arriving at different conclusions was that the calculations were being carried out according to entirely different formulae. Several commentators, however, have ably sorted out the neutrality construct, such that it

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<sup>99</sup> See *id.* at 145 (noting that there is no way to tell what Hand really meant by the phrases he wrote in *Slee*, the fountainhead of the idea that neutrality is a pivotal policy behind rules relating to deductibility of political activity).

<sup>100</sup> Compare, for example, Cooper's assessment that "the result reached by Congress [in the 1962 addition of section 162(e)] was probably sound, since as a matter of abstract tax equilibrium it can well be argued that the denial of a deduction defeats rather than protects tax equilibrium," George Cooper, *The Tax Treatment of Business Grassroots Lobbying: Defining and Attaining Public Policy Objectives*, 68 COLUM. L. REV. 801, 811 (1968), with Boehm's conclusion that "[p]ermittting deductibility for [business] lobbying expenses in 1962 was a legislative mistake because its necessary effect is to help those wealthy interests which already have the financial resources to pay the basic expense, while opponents may often have no tax advantage." Boehm, *supra* note 81, at 436.

In the context of the debate on adding section 162(e) to the Code in 1962, the same difference in viewpoint is reflected in the dialogue between Senator Douglas (arguing that the amendment would move away from neutrality because "the key corporations, which have a direct business and financial interest [would have] a tax deduction. . . , whereas the people who are trying to defend the general interest have to pay all their expenses from their own pockets"), 108 CONG. REC. 17,403 (1962), and Senator Curtis ("I do not think we can compare a business entity with non-business or nonprofit organizations which are interested in causes. The purpose of a deduction under the income tax law, is to enable a taxpayer to determine his net income, so that the Government may apply and collect the tax."),

is possible at least to understand the relevant questions, if not to arrive at certain answers.<sup>101</sup>

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108 CONG. REC. 17,407 (1962).

<sup>101</sup> *E.g.*, Galston, *supra* note 81, at 1282-1314; Cummings, *Tax Policy*, *supra* note 81, at 142-45.

"Neutrality," as it appeared in *Slee* and as it has continued to appear in discussions about tax rules with respect to political activity can mean either of two things. One way to understand "neutrality" in this context is that neutrality requires that every taxpayer's political activity be subject to similar tax treatment. Some commentators have attached the term "equilibrium" to this version of the neutrality discussion.<sup>102</sup> Neutrality in the equilibrium sense could arguably be satisfied by deductibility or nondeductibility, or any combination of the two, so long as the rules are the same for all taxpayers. The equilibrium arguments, however, are most often attached to the concept of "nonsubvention," that is, the idea that neutrality requires "complete separation between public revenues and private [political] activities."<sup>103</sup> At some level, the nonsubvention principle may reflect the belief that people ought not to be forced to support involuntarily, through tax dollars that are "spent" on exemption and deductibility, political positions and candidates they find distasteful. This objection goes beyond bare evenhandedness; even completely uniform deductibility would not fully alleviate the negative impact of being forced to "contribute" to a disfavored cause or candidate, whose success will have a binding and continuing effect on supporters and detractors alike.<sup>104</sup> This view of neutrality was central to the government's

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<sup>102</sup> *E.g.*, Cooper, *supra* note 100, at 810; Boehm, *supra* note 81, at 436-37.

<sup>103</sup> Galston, *supra* note 81, at 1286. *See also* Cummings, *Tax Policy*, *supra* note 96, at 144-45.

<sup>104</sup> *See* Thompson, *supra* note 86, at 537; Note, *Charitable Lobbying Restraints and Tax Exempt Organizations: Old Problems, New Directions?*, 1984 UTAH L. REV.

argument in *Cammarano*<sup>105</sup> and to the Court's opinion in that case,<sup>106</sup> may have been behind the 1993 amendment of Section 162,<sup>107</sup> and has provided the rationale for some commentators' critiques of the rules.<sup>108</sup> A universal rule of consistent nondeductibility would seem to satisfy this version of neutrality.

A second way to understand "neutrality" rejects the idea that "equilibrium," in the sense of universal, undifferentiated rules for deductibility of political advocacy costs for all taxpayers, is neutral. This view rests instead on differentiating between expenses that are incurred to generate income and those that are not. The former require deductibility in order to reach an accurate measure of net income; deductions for the latter are subsidies, or tax expenditures.<sup>109</sup> It has been argued

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337, 352.

<sup>105</sup> See Cooper, *supra* note 100, at 810 (quoting the government's brief, which notes that, whether carried out by business, citizens, organizations, or labor organizations, money spent "to influence legislation cannot be charged to the Government by taking these expenses as a deduction . . . Thus, tax equilibrium exists.").

<sup>106</sup> See Cummings, *Tax Policy*, *supra* note 96, at 144-45.

<sup>107</sup> *Id.* at 141-43, citing the Treasury's explanation of the proposal and noting that this explanation does not appear in the legislative record.

<sup>108</sup> See, e.g., Boehm, *supra* note 81, at 436-37.

<sup>109</sup> Paul McDaniel and James Repetti have recently discussed the tax expenditure construct as: "a taxpayer is deemed to pay tax based on economic income and is then given a Treasury check in an amount equal to the subsidies run through the tax system for which he or she qualifies. Obviously, in the real world two checks are not exchanged. Instead, the taxpayer nets the two . . . ." Paul R. McDaniel and James R. Repetti, *Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange*, 1 FLA. TAX REV. 607, 621 (1993). See also Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditures Concept: Current Developments and Emerging*

that the only way for government to "stand aside" and for "everyone in the community [to] stand on the same footing . . . so far as the Treasury of the United States is concerned" is to provide for deductibility where necessary to reach an accurate measurement of net income, but not otherwise.

The next step of this version of the neutrality argument is that neutrality demands that businesses be able to deduct business-related advocacy expenses, and that political advocacy by or through charitable organizations, like any other personal preference advocacy, not be deductible. As a practical matter, the last half of the formulation translates into a prohibition on political activity for charitable organizations, since they are funded by contributions that are deductible to the donor. Alternatively, it would be possible to formulate rules that effectively tax the organization's advocacy expenditures, either at the organizational level or at the level of the individual donor.

This construct relies not only on the difference, in terms of net income measurement, between business-related and personal preference advocacy, but also on a conviction that, at least until otherwise justified, one kind of expenditure to generate income ought to be treated like any other. "Why should two business with the same economic incomes after deducting amounts spent to improve their businesses (one for maintenance, the other for direct lobbying) pay different amounts of taxes?"<sup>110</sup> This part of the analysis reflects horizontal equity concerns, that is, the idea that to be fair, a tax system must treat equals alike.<sup>111</sup>

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<sup>110</sup> Cummings, *Tax Policy*, *supra* note 96, at 142. See also Cooper, *supra* note 100, at 811; Boehm, *supra* note 81, at 388 ("Since the gross income of any business must first be reduced by deduction for ordinary and necessary expenses so as to arrive at taxable net income, from a *a priori* reflection it would seem that deduction should be allowed for political expenditures directly related to earning the business income."). Cummings notes that efficiency, as well as logic and fairness, suggests this approach, because decisions about which kinds of expenditures to make in pursuit of profits will be skewed by the disallowance of deductions for some kinds of expenditures. Businesses will be inclined to overspend on deductible costs and under-expend on nondeductible ones. "This result, when compounded, will tend to diminish the overall output of goods and

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services in the economy". Cummings, *Tax Policy*, *supra* note 96, at 142.

<sup>111</sup> See McDaniel & Repetti, *supra* note 109, at 1.

This version of neutrality, however, is far from cut and dried.<sup>112</sup> To reach the conclusion that neutrality requires that business-related advocacy be deductible and charitable advocacy be nondeductible, one must be convinced, first, that advocacy costs must be subtracted to reach an accurate measure of net income in the context of business and, second, that the 501(c) exemption and the 170 charitable contribution deduction are tax expenditures, or subsidies. Those characterizations are widely, but not universally, subscribed to.<sup>113</sup>

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<sup>112</sup> See generally Galston, *supra* note 81, at 1287-92.

<sup>113</sup> See, e.g., *id.*; John G. Simon, *The Tax Treatment of Nonprofit Organizations: A Review of Federal and State Policies*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 67, 73-77 (Walter Powell ed., 1987) [hereinafter Simon, *Tax Treatment*].

Others have argued, though, that the charitable exemption is a necessary component of an accurate measurement and consistent definition of income.<sup>114</sup> 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.<sup>115</sup> Likewise, some have characterized the deduction for charitable contributions as necessary for the accurate measurement of income. Because money contributed to charity is deflected for the benefit of others, the donor should not be taxed on it, since he has neither consumed nor

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<sup>114</sup> Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, (1976). See also Boris I. Bittker, *Charitable Contributions: Tax Deductions or Matching Grants*, 28 TAX L. REV. 37 (1972); Boris I. Bittker & Kenneth M. Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51 (1972).

<sup>115</sup> Bittker & Rahdert, *supra* note 114, at 307-16.

added to his accumulated wealth as a result of the expenditure,<sup>116</sup> and only income in the sense of consumption or savings is properly taxable.<sup>117</sup>

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<sup>116</sup> John McNulty, *Public Policy and Private Charity: A Tax Policy Perspective*, 3 VA. TAX L. REV. 229, 241 (1984).

<sup>117</sup> See William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972); HENRY C. SIMONS, PERSONAL INCOME TAXATION (1938).

The prevalent view is that the exemption of charitable organizations and the deductibility of contributions to them represent two levels of indirect government "subsidy;" that is, the revenues foregone as a result of the exemption and deduction are, in some sense, the equivalent of a government outlay.<sup>118</sup> 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.<sup>119</sup> The 1995 tax expenditure budget shows a tax expenditure cost of \$19,330,000,000 for deductibility of charitable contributions.<sup>120</sup> It has been suggested that the absence of any figure representing the tax expenditure cost of the section 501(c)(3) exemption provision might be taken either as reflecting uncertainty about whether it is accurate to characterize the exemption as a "subsidy" or as a reflection of the difficulty of computing the tax liability of a nonprofit organization.<sup>121</sup>

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<sup>118</sup> See, e.g., STANLEY S. SURREY, *PATHWAYS TO TAX REFORM; THE CONCEPT OF TAX EXPENDITURES*, 223 (1973); Harold M. Hochman & James D. Rodgers, *The Optimal Tax Treatment of Charitable Contributions*, 30 NAT'L TAX J. 1, 2 (1977).

<sup>119</sup> See U.S. Office of Management and Budget, *Special Analysis: Tax Expenditures, Special Analyses, Budget of the United States Government* (1984); Hopkins, *supra* note 95, at 49; Thompson, *supra* note 86, at 493 n.140.

<sup>120</sup> *Tax Expenditures from the President's Fiscal 1995 Budget*, 62 TAX NOTES 1055, 1075 (1994).

<sup>121</sup> Henry Hansmann, *Why Are Nonprofit Organizations Exempted from Corporate Income Taxation?* in *NONPROFIT FIRMS IN A THREE SECTOR ECONOMY* 115, 120 n.8 (Michelle J. White ed., 1981).

The courts, too, have accepted the tax expenditure characterization. *Regan v. Taxation With Representation of Washington*<sup>122</sup> 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.<sup>123</sup>

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<sup>122</sup> 461 U.S. 540 (1983).

<sup>123</sup> *Id.* at 544.

The other predicate of this version of the neutrality calculation - that is, that advocacy in pursuit of business interests ought, by definition, to be deducted to reach net taxable income - is not so clear either. The definition of income is not a law of nature; decisions about what items go into the calculation and what items come out before the final tally is rung up require economic and social judgments. Paul McDaniel and James Repetti have pointed out that treating like taxpayers alike is virtually automatic - the hard part is selecting and defining a tax base upon which to base the comparison of taxpayers.<sup>124</sup> Thus, if we decide (or assume, thereby implicitly deciding) that spending for advocacy in pursuit of business purposes is indistinguishable from spending for maintenance of the business premises (to use Cummings' example), then it follows that we are treating equals unequally if we allow deduction of the latter, but not the former, to arrive at net taxable income. On the other hand, if we decide that spending on advocacy in pursuit of business purposes is different in ways relevant to accurate measurement of net income from spending for, for example, maintenance, then we are treating equals unequally if we make both kinds of expenses deductible.<sup>125</sup>

The characteristics that define an expenditure as appropriately deductible on the way to an accurate measurement of net income are not immutable. There may

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<sup>124</sup> McDaniel & Repetti, *supra* note 109, at 605.

<sup>125</sup> This is different from deciding that the two kinds of spending are equivalent insofar as getting to an accurate bottom line is concerned, but then proceeding to deny deduction for one of them for policy reasons other than the desire to measure income accurately.

be reasons to consider political advocacy to be like the pin-stripe suit that is not deductible as a business expense, even if the taxpayer never wears it anywhere but to work, while maintenance of the premises and toner for the copy machine are like certain other varieties of work uniforms that are deductible.<sup>126</sup>

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<sup>126</sup> See Surrey, *supra* note 118, at 725 n.29.

One way to characterize this definitional decision is to say that the determination of deductibility involves a decision that the expenditure is not an "ordinary and necessary business expense." Galston, *supra* note 81, at 1289 n.55.

Michael McIntyre has likened the process of distinguishing tax expenditure items from deductions necessary to reach an accurate measurement of income to the process of distinguishing a weed - "a plant that has no proper place in a flower garden" - from a non-weed. "[P]art of what makes a weed a weed is an aesthetic judgment that it is out of place where it is. The same is true of a tax expenditure. Since their meanings depend in part on value judgments, their definitions necessarily have soft, fuzzy edges - not the crispness of an itemized list."<sup>127</sup>

Finally, even using the likelihood (or at least reasonable expectation) of generating taxable income as the principle of demarcation between advocacy that ought or ought not be deductible<sup>128</sup> does not neatly coincide with the distinction between "business" and "personal preference" advocacy. Alan Viard has made the point that some individual "personal preference" lobbying can be expected to generate taxable benefits. Lobbying for policies that increase wages or lower out-of-pocket medical expenses, for example, would be reflected in increases in taxable income. Policies that advance civil liberties or increase rates on municipal bonds, on the other hand, would not.<sup>129</sup>

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<sup>127</sup> Michael J. McIntyre, *A Solution to the Problem of Defining a Tax Expenditure*, 14 U.C. DAVIS L. REV. 79, 84-85 (1980) [hereinafter McIntyre, *Solution*].

<sup>128</sup> See Cooper, *supra* note 100, at 811-12.

<sup>129</sup> Alan D. Viard, *Further Complexities of the Tax Treatment of Lobbying Expenses*, 9 EXEMPT ORG. TAX REV. 149 (1994). In making this point, Viard adds a level of precision to the customary characterization of personal preference lobbying. Compare, for example, George Cooper's explanation that "[i]n the case of the non-business individual, however, expenditures are not considered in terms of profit. The individual is normally seeking some personal benefit - less

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housework for his wife, . . . an improved community - which will not result in taxable income to him. The value of these intangible personal benefits . . ., cannot be measured, but the important point is that the individual gets full value in the terms sought for his expenditure without any reduction for taxes due". Cooper, *supra* note 100, at 812.

Assuming that we put the questions of categorization to one side and accept the more or less standard characterizations, neither all-or-nothing framework would satisfy the call for neutrality in the accurate measure of income sense. Either universal deductibility or universal nondeductibility is uneven, so long as deductibility for some is necessary to reach an accurate measurement of taxable income and deductibility for others is a "subsidy."

*Testing the Existing Rules Against a Standard of Neutrality*

The present system of rules is far from uniform. Does the mix approach "neutrality," in either sense? The rules relating to campaign intervention show the closest fit, if evaluated in terms of the equilibrium version of neutrality. Congress has rather consistently avoided

indirect support of election-related advocacy through tax provisions.<sup>130</sup>

Nondeductibility of campaign-related expenses is, and has been, reflected throughout the tax law with far more consistency than the supposed policy of nonsupport for lobbying. Individual taxpayers may not deduct contributions to

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<sup>130</sup> See SUBCOMM. ON OVERSIGHT OF THE HOUSE COMM. ON WAYS AND MEANS, 100TH CONG., 1ST SESS., REPORT AND RECOMMENDATIONS ON LOBBYING AND POLITICAL ACTIVITIES BY TAX-EXEMPT ORGANIZATIONS 37 (Comm. Print 1987) ("Present law reflects a long-standing congressional judgment that the Federal benefits of tax deductible contributions and exempt status generally should be denied in matters of political activities.").

political parties, campaign committees, or political action committees.<sup>131</sup> In all of its incarnations, whether allowing a business deduction for direct lobbying or not, section 162(e) has always disallowed deduction of the costs of intervention in or contribution to any election campaign<sup>132</sup> or for the proportion of labor union or trade association dues attributable to campaign intervention.<sup>133</sup> Other sections of the Internal Revenue Code deny deduction as bad debts,<sup>134</sup> advertising, or entertainment expenses<sup>135</sup> what are, in reality, political contributions. Thus, the

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<sup>131</sup> Section 170 does not list political organizations among those to which deductible contributions may be made. A short-lived tax credit for political contributions by individual taxpayers has been repealed. Explicit denial of deductibility of political contributions from individual income tax first appeared in the Treasury Regulations in 1939. Reg. No. 103, § 9.23(o)-1 (1939); see Boehm, *supra* note 81, at 413 n.135.

<sup>132</sup> I.R.C. § 162(e) (1962). The nondeductibility of political expenditures from the corporate income tax first entered the Treasury Regulations in 1918, Reg. No. 33, Art. 143 (1918), although the policy was already being applied by ruling before that. T.D. 2137, 17 Treas. Dec. Int. Rev. 48, 57-58 (1916); see Boehm, *supra* note 81, at 403 n.118. Boehm presents an engaging description of the origins of the nondeductibility policy, which was rooted in suspicion of the impact of corporate wealth on political campaigns, as reflected in the spate of state and federal regulation of corporate campaign contributions enacted early in this century.

<sup>133</sup> Treas. Reg. § 1.162-20(c) (as amended in 1969). Between 1962 and 1994, this disallowance applied only if the association or union engaged in "substantial" political campaign activities.

<sup>134</sup> I.R.C. § 271 (1982).

<sup>135</sup> *Id.* § 276; See Boehm, *supra* note 81, at 388-98 (providing a description of the origins of these provisions). The fact that organizations formed for the purpose of election-related advocacy are themselves exempt from taxation to the extent that they take in and expend money specifically for candidate support or opposition, § 527(e), is not inconsistent with a policy of nonsubvention. Rather, it reflects a recognition that the organization is but a conduit for the support - that collecting and dispensing funds to support campaigns is not really like a trade or business.

framework of tax rules that bear on election-related advocacy appears to satisfy the equilibrium variant of neutrality, with minor variation. The variation is that, although soft money expenditures, that is, expenditures to establish, administer, and solicit for a connected PAC are made with after-tax dollars for almost all types of entity that may provide such support, some exempt organizations that may make such expenditures do not pay tax on dollars spent on such support. The IRS has held that section 527's scheme for essentially overriding the organization's usual exemption from the corporate income tax with respect to funds expended for political purposes does not, under the present regulations, apply to the organization's soft money expenditures in support of its separate segregated fund.<sup>156</sup> Traced back to the individual taxpayer, these expenditures may or may not

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See S. REP. NO. 1357, 93d Cong., 2d Sess. 26 (1974) (stating that "in general, the committee's bill provides that political organizations are to be treated as tax-exempt organizations, since political activity (including the financing of political activity) as such is not a trade or business which is appropriately subject to tax"). See generally Kaplan, *Taxation and Political Campaigns: Interface Resolved*, 1975 TAXES 340.

<sup>156</sup> Priv. Ltr. Rul. 85-16-001 (Oct. 22, 1984). This Private Letter Ruling dealt with the taxability under section 527(f) of the soft money expenditures of a section 501(c)(6) trade association, but the rationale upon which it rests must logically apply to all section 501(c) organizations that are permitted to engage in political activities and establish separate segregated funds. Treas. Reg. § 1.527-6(b)(2) (1980), entitled "Indirect expenses," is reserved. The I.R.S. ruling that a trade association's soft money expenditures are not, at present, taxable rests entirely on the absence of regulatory guidance with respect to how these expenditures should be treated. Priv. Ltr. Rul. 85-16-001 (Oct. 22, 1984). The absence of this regulation is apparently the result of a collision between the Service's inclination to keep the regulations parallel in the political organization and section 501(c) contexts with a bit of after-the-fact legislative history indicating that soft money expenditures by exempt organizations were not to be taxable. See Chisolm,

be deductible. Soft money expenditures by a trade association or labor union in support of a connected PAC are included, as of 1994, in the portion of dues that is not deductible to the duespayer or on which, in the alternative, the organization must pay a proxy tax.<sup>137</sup> Donors to a section 501(c)(4) organization may not deduct their contributions from their individual income tax. Veterans' organizations, however, may provide soft money support for an affiliated PAC with dollars that are

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*Politics and Charity, supra* note 98, at 353, n.204.

<sup>137</sup> This provision does not apply, however, to organizations that can show that 90% of their members would not take a business deduction for dues in any case. See H.R. REP. NO. 103-213, 103d Cong., 1st Sess., 127, n.20 (1993). This exemption will apply to many unions. See Cummings, *Tax Policy, supra* note 96, at 140.

both exempt from tax at the organizational level and deductible to the original donors.<sup>138</sup>

By meeting (or nearly meeting) the equilibrium definition of neutrality, the framework almost necessarily has to fail to meet the accurate measurement of income neutrality formulation. It does seem possible, however, that even if advocacy directed to the legislature is properly seen as being sufficiently connected to the fortunes of one's business to bring it legitimately within the universe of

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<sup>138</sup> Veterans' organizations may be operated "[t]o promote the social welfare of the community as defined in § 1.501(c)(4)-1(a)(2)." Treas. Reg. § 1.501(c)(19)-1(c)(1) (1976). That provision's statement that "[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office" would seem to preclude the establishment or support of a separate segregated fund by a veterans' organization. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (1959). However, the provision is interpreted, as it is in the case of section 501(c)(4) social welfare organizations, to allow participation in political campaigns, so long as that activity is not "primary." Priv. Ltr. Rul. 79-04-064 (Oct. 25, 1978). Donald Alexander has noted that veterans' organizations may be subject to the reporting requirements of section 6033, but that "the report itself is meaningless since no deduction is claimed under section 162." Alexander, *supra* note 8, at 1513.

"ordinary and necessary" business expenses and, therefore, properly deductible to reach an accurate measurement of net income, election-related advocacy is another significant degree or two removed from business-enhancing outcomes, so is properly excluded from the scope of ordinary and necessary business expenses. If so, both varieties of neutrality are roughly satisfied by the general nondeductibility of election-related expenses.

The framework of rules with respect to lobbying, on the other hand, meets neither conception of neutrality. The 1993 amendment of section 162 arguably moved the entire framework closer to the equilibrium view of neutrality than it had been since section 162(e) was added to the Code in 1962; generally speaking, lobbying expenses are now nondeductible. Nevertheless, the present scheme does not make all lobbying expenditures taxable. Businesses may still take a deduction for direct lobbying at the local level. Both direct and grassroots lobbying carried on at any level of government by a public charity, within limits set by sections 501(c)(3) or 501(h) and 4911, is not taxable at the organizational level and may be funded by contributions that are deductible to the individual taxpayer. Veterans' organizations may spend deductible contributions to lobby. Thus, around a core of general taxability of moneys spent to influence legislation there swirls an array of

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exceptions that make it impossible to say that the current framework consistently embodies a principle of equilibrium or nonsubvention.<sup>139</sup>

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<sup>139</sup> See Cummings, *Tax Policy*, *supra* note 96, at 143 (noting that the liberalization of rules relating to charitable lobbying since 1976 had largely adjusted for lack of equilibrium under the 1962 treatment of business-related lobbying expenses, and characterizing the 1993 amendment of section 162 as "overkill").

While the current framework demonstrates an imperfect fit with the equilibrium variety of neutrality, it appears to be completely backwards with respect to accurate measurement of income neutrality concepts. Under that view of neutrality, business expenses should be deductible; non-business expenses should not. In the existing scheme, the deduction is withheld from lobbying expenses that are incurred as (arguably) ordinary and necessary expenditures in pursuit of taxable income, while deductions that are tantamount to subsidies help to pay for lobbying efforts that have no such potential or aim.<sup>140</sup>

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<sup>140</sup> See Cooper, *supra* note 100, at 817-18; Cummings, *Tax Policy*, *supra* note 96, at 137.

So far, we have considered neutrality only in terms of the impact of tax rules on the cost to the taxpayer of a dollar spent on advocacy. There is, however, another very important dimension of the framework of tax rules relating to political advocacy. Tax rules do not simply affect the net cost of political participation. For some kinds of taxpayers, they impose significant constraints on participating at all. For section 501(c)(3) organizations, the tax rules are not fundamentally about deductibility - they are about limitations on the choice of strategy by which to pursue charitable purposes. Private foundations may undertake policy study and analysis, but are effectively barred from carrying their policy concerns into public decisionmaking arenas. Public charities may carry their policy concerns into public decisionmaking arenas, but only within circumscribed limits, and may not link their policy concerns to the election of those who will make the policy decisions. Business enterprises, on the other hand, will pay a full dollar for each dollar spent on lobbying, but tax law imposes no limit on how many dollars that will be. Likewise, while campaign finance law restricts direct election-related expenditures,<sup>141</sup> and tax law provides that permitted expenditures are not deductible, nothing in the tax law limits clear and unabashed identification of a business interest with a properly organized political arm. Thus, the tax rules relating to political advocacy for charitable organizations are of a fundamentally

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<sup>141</sup> 2 U.S.C. §441b (1988) ("Contributions or expenditures by national banks, corporations, or labor unions").

different character than those that apply to business organizations or, for that matter, most other categories of exempt organizations.<sup>142</sup>

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<sup>142</sup> This aspect arises only if we consider the impact of the rules at the organizational level. Traced back to the individual taxpayer, the constraints on advocacy by section 501(c)(3) organizations boil down to nothing more than cost, just like business lobbying. That is, the individual is free to spend her money on engaging in advocacy directly, rather than giving it to a charitable organization to use for advocacy. By doing so, she will lose the benefit of the charitable deduction, thereby having to pay for her advocacy with after-tax dollars, but will be subject to no substantive constraints on the activity. Musgrave's premise that "tax burdens are borne by people, not by things or legal entities. All tax burdens must therefore be traced to people, and the system must be judged in terms of its effects upon individuals," MICHAEL J. MCINTYRE, *READINGS IN FEDERAL TAXATION* 25 (2d ed. 1983) [hereinafter McIntyre, *Federal Taxation*], offered in the context of establishing the guiding principles of horizontal equity, however, are not entirely apposite in this context. It is appropriate here to consider what happens at the organizational level. There is an important functional difference between the individual acting alone and the individual acting through an organization, such that reducing the

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equation to focus solely at the level of the individual taxpayer would lose sight of a highly significant piece of the picture that ought to be taken into account in establishing and evaluating policy in this area. *See infra* notes 296-304 and accompanying text.

The 1976 addition of sections 501(h) and 4911 to the Code, the 1990 regulations to implement those provisions, and the principle established by *Regan v. Taxation With Representation*<sup>145</sup> combine to make those constraints significantly less disabling than they used to be. To a large degree, the rules as they stand today do remove the substantive constraints that go beyond nondeductibility. Sections 501(h) and 4911 only limit, rather than proscribe, legislative activity.<sup>144</sup> The 1990 regulations define lobbying quite narrowly, leaving an electing organization free to carry on an unlimited amount of activity that would very likely have been considered lobbying under the old test. The ability to spin off a section 501(c)(4) affiliate according to the terms that *Taxation With Representation* appears to have set allows a charitable organization to direct activity (funded with nondeductible contributions) that it may not undertake itself. But the current rules continue to block the expenditure of taxable as well as deductible dollars. A section 501(c)(3) organization may not spend beyond the limits or support its affiliated (c)(4) even with after-tax dollars, for example, unrelated business income.<sup>145</sup> There is even less flexibility with respect to campaign-related advocacy.

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<sup>143</sup> 461 U.S. 540 (1983).

<sup>144</sup> For that matter, so does the "no substantial part" test of section 501(c)(3). However, the malleability of that test acts as a more serious constraint. *See supra* notes 19-29 and accompanying text.

<sup>145</sup> In many cases, the structure of related organizations could be set up so that the (c)(4), rather than the (c)(3), earns the unrelated income, thereby effectively circumventing this constraint. There may be reasons, however, why the structure

The prohibition applies to the organization, not just to the organization's

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that optimizes the affiliated organizations' capacity to engage in advocacy activities is less than optimal from other standpoints. For instance, if the unrelated business is closely intertwined with related income producing activity, it may not make sense from a management perspective, or even a tax perspective, to move it to the affiliated (c)(4).

The new rules about nondeductibility of trade association dues spent for lobbying have a somewhat parallel feature. Lobbying expenses are deemed to come first from dues, so that even if an organization covers its lobbying expenses with taxable income (e.g., unrelated business income) either the organization or its members will still pay tax on amounts spent for lobbying. The suit filed by the American Society of Association Executives argued that this feature of the new law imposes an unconstitutional condition in that it effectively penalizes political speech by imposing double taxation under these circumstances. See Marlis Carson, *District Court Asked to Block New Lobbying Deduction Law*, 62 TAX NOTES 658, 658-59 (1994). The D.C. District Court dismissed the suit in April, 1994 on jurisdictional grounds, holding that the case does not fit within court-created exceptions to the Anti-Injunction Act, 26 U.S.C. § 7421(a), because plaintiffs established neither that they were certain to prevail on the merits, nor that they have no alternative legal remedies.

deductible dollars, and to direct or indirect activity. Even meticulous fiscal separation is not enough to distance a section 501(c)(3) organization sufficiently from campaign intervention carried on at its direction. Thus, even after the developments of the last fifteen years, the constraints are not entirely gone, and they remain particularly for smaller, less sophisticated organizations with less knowledge of the leeway the rules provide, less access to advice that could impart that knowledge, and fewer resources to invest in restructuring.

In addition, it is possible that even an organization that elects the section 501(h) option could be vulnerable to revocation of exemption under the "action organization" regulations. Historically, the basis for restricting the political involvement of charitable organizations has been found not only in the explicit constraints on lobbying, but also in the basic requirement that to qualify for the section 501(c)(3) exemption, an organization must be "organized and operated exclusively for religious, charitable, . . . or educational purposes."<sup>146</sup> Treasury Regulations elaborating on the meaning of that requirement specify that an organization does not meet the standard if it is an "action organization."<sup>147</sup> "Action organization" is given several definitions, the last of which 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

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<sup>146</sup> I.R.C. § 501(c)(3).

<sup>147</sup> Treas. Reg. § 1.501(c)(3)-1(c)(3).

those objectives.<sup>148</sup> While this regulation seems 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 I.R.S. 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.<sup>149</sup>

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<sup>148</sup> Treas. Reg. § 1.501(c)(3)-1(c)(3)(iv).

<sup>149</sup> See Chisolm, *Exempt Organization Advocacy*, *supra* note 31, at 235. Perhaps the most dramatic example of the application of this provision was the Service'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 I.R.S. concluded that the organization's stated goal of attaining international peace could be achieved ultimately only through legislation. See Caplin & Timbie, *supra* note 23, at 187.

It is essential to consider this aspect of the framework if we hope to make a complete and fair assessment of the neutrality of the scheme taken as a whole. It is this aspect that puts charitable organizations at a continued disadvantage, despite the apparent skew in their favor when the neutrality of the framework is evaluated in terms of its impact on the cost of engaging in various kinds of advocacy activities. What is at stake for a business is money; what is at stake for a charitable organization is quite possibly its very existence.<sup>150</sup> There could be no parallel scheme with respect to business; it would be clearly unconstitutional to impose direct restrictions that had the same impact as the section 501(c)(3) limits on advocacy. Constitutionally, there is more room for decisions about taxation (at least, deductibility).<sup>151</sup> But because deductibility is inextricably interwoven with the enabling and defining construct for charitable organizations, the tax law framework plays a very different role in the case of section 501(c)(3) organizations than it does in the case of taxable entities.

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<sup>150</sup> Under sections 501(h) and 4911, what is at stake is, first, money, and only ultimately, exempt status and, with it, possibly organizational existence.

<sup>151</sup> *Cammarano v. United States*, 358 U.S. 498 (1959); *Regan v. Taxation with Representation*, 461 U.S. 540 (1983).

This difference in function of the tax rules for different kinds of entities helps to predict the real world impact of their operation. Some charitable organizations will structure themselves and their activities to take maximum advantage of the room to maneuver that *Taxation With Representation* and section 501(h) have provided. Less sophisticated organizations will more likely find the process too complex to bother with, or simply continue to overestimate the risk that advocacy would pose to their entire operation, and will leave it largely off their menu of strategies. The bottom line for business, on the other hand, is the bottom line - will the expenditure likely yield a worthwhile financial return? While there may be some instances at the margin where lobbying that looked profitable if carried out with untaxed dollars looks unprofitable if after-tax dollars are spent, the more common scenario is likely to be that even when the price is raised by nondeductibility, much business-related lobbying will continue to be worth the expense. One has only to think of the frequency of Harry and Louise's slickly-produced, angst-ridden, and nondeductible appeals to television audiences to appreciate this point.<sup>152</sup> The 1993 repeal of the business deduction for direct

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<sup>152</sup> As of July 3, 1994, the Health Insurance Association of America had spent \$16 million on the Harry and Louise ads. George Gordon, "Harry and Louise" Ads Throw Powerful Wrinkle Into Debate, MINN. STAR TRIBUNE, July 3, 1994, at A1. See also JEFFREY M. BERRY, THE INTEREST GROUP SOCIETY 152-53 (1984). Berry describes the intensive grass roots campaign in opposition to a proposal to institute tax withholding on dividend and interest income that was mounted by the banking industry in the early 1980s. Banking trade associations and banks "prompted letters with ads in newspapers, posters in bank windows and lobbies, and inserts in monthly bank statements. The outpouring of mail was so great that Congress turned around and repealed the withholding law, which they had passed only a

lobbying is predicted to raise \$653 million over five years, indicating that no one expects the change to lead businesses to shut down their direct lobbying efforts.<sup>153</sup>

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year before." *But see* Cummings, *Tax Policy*, *supra* note 96, at 139 (observing that business grassroots lobbying campaigns have been "fairly rare," at least in comparison to direct lobbying).

<sup>153</sup> See Cummings, *Tax Policy*, *supra* note 96, at 137-38. Cummings notes that the change might, however, have some impact on the amount of lobbying undertaken, or on the way that effort is organized. *Id.* He points out, for example, that the new rules may encourage more lobbying to be carried out through trade associations; if the association pays the 35% proxy tax (and raises dues to cover the cost of the tax), instead of opting to notify its members what part of their dues is nondeductible, the association can avoid the expense of the notification, and the members, whose dues are fully deductible and who are liable for taxes at higher rates than 35%, "can get more than one dollar of lobbying for one dollar of dues." *Id.* at 139. In addition, removal of the difference in treatment of direct versus grassroots lobbying expenses may lead businesses to put more of what they do spend on lobbying into grassroots efforts. *Id.* at 140.

Once we have moved to considering constraining, as well as cost-affecting tax provisions, patterns of difference in application and enforcement take on particular significance. Even rules that are perfectly neutral as written, if imperfectly enforced, are not neutral at all. When the rules are cast in terms of limits on participation, and the stakes are high enough to exert a serious pull on behavior, the fact that some to whom the rules nominally apply are held to them, while others to whom the rules nominally apply are not, undermines neutrality. Under the present regime, veterans' organizations, although on paper apparently subject to rules that tie deductibility of contributions to their refraining from political advocacy, are not held to those rules. Instead, they are permitted to lobby without limit and to provide indirect support to an affiliated PAC not only without substantive limits, but with deductible dollars at that. In addition, despite the recent woes of Jimmy Swaggart and Jerry Falwell<sup>154</sup>, it is fair to say that religious

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<sup>154</sup> After Jimmy Swaggart endorsed Pat Robertson for President in 1988 during a regularly televised Wednesday evening worship service and later in his ministry's publication, *The Evangelist*, Jimmy Swaggart Ministries ("JSM") became the first "church" targeted for investigation by the I.R.S. for prohibited political activities. In a settlement agreement, the I.R.S. did not revoke JSM's exempt status, but did require that JSM publicly acknowledge that the endorsement of Robertson violated the prohibition against political campaign intervention by tax-exempt churches. See Jimmy Swaggart Ministries, *Full Text of Swaggart Ministries Settlement is Available*, 92 TAX NOTES TODAY 31-31 (Feb. 11, 1992); Paul Streckfus, *Swaggart Settlement Draws Comments*, 92 TAX NOTES TODAY 25-10 (Feb. 3, 1992); *Shun Politics, Tax-Exempt Groups Told*, L.A. TIMES, Jan. 12, 1992, at B5.

In a 1993 settlement with the I.R.S., Jerry Falwell's Old Time Gospel Hour lost its exempt status for 1986-87 and was required to pay a penalty for improper political activity. As was the case with Jimmy Swaggart Ministries, the settlement

organizations are less likely to be held to the terms of the section 501(c)(3) constraints than are other sorts of organizations. Churches cannot elect to measure their lobbying by the standards of section 501(h). Nonetheless, they are able to maintain a significant presence in the legislative process.<sup>155</sup> The IRS is understandably reluctant to challenge church involvement in politics. With the notable exception of the *Christian Echoes* case,<sup>156</sup> 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. An inventory of early cases<sup>157</sup> reveals that strong positions taken on one side of an issue were more easily tolerated when they were rooted in religious belief.<sup>158</sup> The IRS once noted the virtual unthinkability of applying the supposedly absolute proscription on election campaign involvement against religiously-affiliated organizations that published articles and made statements opposing the

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was conditioned on Falwell's public acknowledgement of the violation. See Jerry Falwell, *Statement of Jerry Falwell Regarding Closing Agreement: Public Statement*, reprinted in 7 EXEMPT ORG. TAX REV. 876 (1993); Old Time Gospel Hour, *Falwell Responds to IRS Appeal for Money*, 7 EXEMPT ORG. TAX REV. 722 (1993); Robert Hersey, *Falwell's Gospel Hour Fined for Political Activity*, N.Y. TIMES, Apr. 7, 1993, at A16.

<sup>155</sup> See, e.g., Note, *Church Lobbying: The Legitimacy of the Controls*, 16 HOUS. L. REV. 480, 501-03 (1979).

<sup>156</sup> *Christian Echoes Nat'l Ministry v. United States*, 470 F.2d 849 (10th Cir. 1972).

<sup>157</sup> See Chisolm, *Exempt Organization Advocacy*, *supra* note 31, at 215-16.

<sup>158</sup> See, e.g., *Girard Trust v. Commissioner*, 122 F.2d 108 (3d Cir. 1941).

election of a Roman Catholic as President.<sup>159</sup> In recent years, the heightened activity of the "religious right"<sup>160</sup> has incurred the attention, and sometimes a response, from the Service. Even the most brazen political involvement, however, has drawn penalties short of the revocation of exempt status that is nominally mandated.<sup>161</sup> The IRS has failed to enforce the restriction against the Catholic Church despite fairly open and extensive political activity.<sup>162</sup> *Abortion Rights*

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<sup>159</sup> Gen. Couns. Mem. 34,071 (Mar. 11, 1969).

<sup>160</sup> See, e.g., Sidney Blumenthal, *Letter From Washington: Christian Soldiers*, NEW YORKER, July 18, 1994, at 31; Larry Witham, 'Christian Duties' Expand to Politics; Activism Now a 'Part of Citizenship', WASH. TIMES, Feb. 8, 1993, at A1; Peter Applebome, *Religious Right Intensifies Campaign for Bush*, N.Y. TIMES, Oct. 31, 1992, at A1; Kenneth J. Cooper, *Democrats Charge GOP is Aided By Tax-Exempt Christian Coalition*, WASH. POST, Oct. 23, 1992, at A18; Carlos V. Lozano & Ralph Frammolino, *Christian Right Tries to Take Over State GOP*, L.A. TIMES MIRROR, Oct. 18, 1992, at A1.

<sup>161</sup> See *supra* note 154.

<sup>162</sup> See, e.g., Peter Steinfels, *Bishops Mobilize Against Abortion in Health Plans*, N.Y. TIMES, July 13, 1994, at A1 ("The nation's Roman Catholic bishops have warned the leaders of Congress that they are mobilizing millions of members of their church against any health care plan that requires all health insurers to cover abortion as part of a standard package of benefits"); *Diocese's Tie to Campaign is Questioned*, CHI. TRIB., June 17, 1994, at 10 (citing report that parochial school officials, acting at request of Diocese official, "sent pupils home with a memo urging parents to volunteer at the polls" for a particular candidate); Robin Toner, *Political Memo; Clinton's Support of Abortion Rights Has Catholic Leaders on a Tightrope*, N.Y. TIMES, Feb. 3, 1993, at A14 ("The United States Catholic Conference said five million postcards were distributed to parishes for mailing last month urging Congress to vote against the proposed Freedom of Choice Act, which would prohibit states from enacting a variety of restrictions on abortion"); Larry B. Stammer, *Mahony Urges Activism on Abortion Issue*, L.A. TIMES MIRROR, Nov. 20, 1992, A3 ("Cardinal John J. O'Connor of New York . . . has barred politicians who support abortion rights from speaking in Catholic churches and colleges in the Archdiocese of New York"); Don Lattin, *Bishops Fight Right-to-Die Initiative*, SAN FRAN. CHRON., Oct. 1, 1992, at A1 ("California's Roman Catholic bishops have

*Mobilization, Inc. v. Regan* tells the story of overt support of anti-abortion candidates by the Catholic Church, with no response from the IRS.<sup>163</sup> After ten years of litigation on procedural issues, the case was dismissed for lack of standing.<sup>164</sup> It is clear that religious organizations, including churches, have a major presence in both the legislative and electoral contexts which, as a practical matter, is virtually impossible to constrain. For example, several African American groups have recently joined in an effort to "press black ministers to talk up health care from the pulpit [and to get] black congregations to begin letter-writing, telephone and telegram campaigns to lawmakers" in support of health care reform. Organizers are "trying to use the power of the pulpit," in part to counter the extensive grass roots campaign of health care reform opponents. As one organizer explains it, "Harry and Louise don't live in the 'hood."<sup>165</sup> Even President Clinton took his crime bill proposal to church. Speaking from the pulpit of the Full Gospel African Methodist Episcopal Zion Church, he told parishioners, "Our ministry is to

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launched an unprecedented campaign to kill the 'Death With Dignity' initiative, raising hundreds of thousands of dollars by passing the collection plate in parishes across the state.").

<sup>163</sup> 603 F. Supp. 970 (S.D.N.Y. 1985).

<sup>164</sup> In re: United States Catholic Conference and National Conference of Catholic Bishops, 885 F.2d 1020 (2d Cir. 1989); *Abortion Rights Mobilization, Inc., v. United States Catholic Conference*, cert. denied, 110 S.Ct. 1946 (1990). For a detailed account of the decade of complicated procedural maneuvering over this case, see BRUCE HOPKINS *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 813-15 (6th ed. 1992).

<sup>165</sup> Ronald Smothers, *Call From the Pulpits to Awaken Interest*, N.Y. TIMES, Aug. 24, 1994, at A10.

do the word of God here on earth, and that starts with giving our families a place in which at least they can be safe and secure," and asked them "to pray for us, pray for members of Congress . . . Ask us not to turn away from our ministry."<sup>166</sup> Many would argue that religious involvement in public affairs is a good thing.<sup>167</sup> Whether a good thing or not, it appears to be unavoidable.

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<sup>166</sup> *Clinton Asks for Crime Bill Prayers*, PLAIN DEALER 6A (Aug. 15, 1994). See also, Richard L. Berke, *Mainline Religions Form Lobby for "Alternate" View*, N.Y. TIMES, July 14, 1994, at A1.

<sup>167</sup> See, e.g., Benson Tesdahl, EXEMPT ORG. TAX REV. (1991); Deirdre D. Halloran, *Reaction to the Tesdahl Proposal for Political Intervention by Religious Organizations*, 5 EXEMPT ORG. TAX R. 217 (1992). See also, remarks of Senator Boren during debate on a proposal to limit the soft money expenditures of tax-exempt organizations that are permitted to make such expenditures. Apparently misunderstanding the current state of the law and questioning whether the proposal would include churches, Mr. Boren expressed his opinion that if the provision would prohibit a minister "from taking the pulpit on Sunday and [urging] the members of his congregation and his church to either support or oppose a

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certain officeholder because his record demonstrates they either do or do not share the values of that particular congregation or religious group," it would be "opposed . . . to American values of allowing organizations to express themselves" and "clearly unconstitutional." *Senate Rejects Amendment to Limit Tax-Exempts' Politicking*, 90 TAX NOTES TODAY (Aug. 8, 1990).

Finally, it seems fair to say that, at least from time to time, the particular ideology reflected in an organization's advocacy has something to do with either calling forth or holding back the machinery of enforcement. 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.<sup>168</sup> There have been other instances of less than neutral enforcement of the political activities restrictions. During the 1960's, the White House directed the I.R.S. to investigate far-right hate groups that were tax-exempt.<sup>169</sup> Efforts to politicize the I.R.S. 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."<sup>170</sup> The Service's failure to hold the League of Women Voters to the articulated standards of impartiality when the League excluded Lenora Fulani from its presidential debate may be a recent example of this phenomenon.<sup>171</sup> And as Ms. Fulani and the

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<sup>168</sup> Lehrfeld, *supra* note 23, at 67, 72-73.

<sup>169</sup> David Ginsberg, Lee R. Marks & Ronald P. Wertheim, *Federal Oversight of Private Philanthropy*, in 5 COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, RESEARCH PAPERS 2575, 2615-16 (1977).

<sup>170</sup> *Id.*

<sup>171</sup> Despite the fact that Fulani clearly met the criteria the League had established

*Abortion Rights Mobilization* plaintiffs will attest, if the Service decides not to enforce the rules, there is virtually nothing anyone can do to force the issue. After a decade or so of litigation on procedural matters, the *Abortion Rights Mobilization* case was dismissed on the grounds that the plaintiffs lacked standing to challenge the Service's nonenforcement of the campaign participation prohibition against the Catholic Church.<sup>172</sup> Likewise, the Second Circuit ruled that Ms. Fulani did not have standing to challenge the Service's failure to revoke the League's exemption.<sup>173</sup>

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for eligibility to take part in the debate, the League denied her the opportunity to participate. See *Fulani v. Bentsen*, No. (3-6205, 1994 U.S. App. Lexis 24246, at \*4-\*5 (2d Cir. Sept. 6, 1994); *Fulani v. Brady*, 809 F. Supp. 1112, 1113-16 (S.D.N.Y. 1993).

<sup>172</sup> *Abortion Rights Mobilization*, 110 S.Ct at 1946.

<sup>173</sup> *Fulani v. Bentsen*, 1994 U.S. App. Lexis 24246, at \*19-\*21.

Even the Southern District of New York, which held that Ms. Fulani did meet the requirements of standing to challenge the Service on its failure to enforce the electioneering prohibition against the League, and that the Service had, in fact, violated her first amendment rights by failing to do so, in the end, sent her away without redress, holding that it had no jurisdiction to grant the relief requested.<sup>174</sup>

Thus, the current framework is not "neutral." If we want it to be neutral, we would, first, have to decide whether it is the "equilibrium" or "accurate measurement of income" variant of neutrality we are aiming for, because we are unlikely to be able to satisfy both with the same set of rules. Second, if we are aiming for neutrality in the sense of accurate measurement of income, we must make some careful (and acknowledgedly value-laden) judgments about what

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<sup>174</sup> *Fulani v. Brady*, 809 F. Supp. at 1127-28. The court characterized the relief requested as equivalent to a writ of mandamus and noted that, although it had jurisdiction to declare the Service's actions wrongful, only the Tax Court has jurisdiction to order the Service to revoke the League's exemption. The court suggested that Ms. Fulani could have brought suit in the Tax Court pursuant to I.R.C. section 7428 in order to get the relief she sought. That provision, however, would not have been available to Ms. Fulani, because it provides access to the Tax Court only for a taxpayer who wishes to challenge the Service's denial of exemption to the taxpayer itself.

should be included and what should be subtracted to reach "net income." Third, we must take into account the differential impact of rules that affect the cost of engaging in a particular activity, as compared to rules that impose substantive limitations on ability to engage in those activities. Finally, we would have to formulate rules that are capable of evenhanded enforcement, and be prepared to enforce them evenhandedly. Whether any set of rules can meet these criteria fully is doubtful; some adjustment to the current framework, however, would certainly bring it closer.

POLICY PRINCIPLES IN ADDITION TO, OR INSTEAD OF, NEUTRALITY

No matter what the conclusion as to whether the tax rules relating to political participation are, are not, or may be neutral as a matter of technical tax policy, a proper foundation cannot be constructed on neutrality alone. Neutrality by itself is not enough to justify a particular set of rules, nor is lack of neutrality by itself enough to justify discarding a particular set of rules. Technical neutrality may be a virtue. Clearly, it is not the only virtue, nor is it the most important of the principles that ought to drive the rules relating to the tax treatment of political participation.<sup>175</sup>

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<sup>175</sup> Miriam Galston has noted that in the context of tax rules relating to lobbying,

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the "neutrality" policy justification has been a screen for more basic objectives. Galston, *supra* note 81, at 1274. See also Cummings, *Tax Policy*, *supra* note 96, at 148 ("Congress surely has the prerogative to determine that "good" social policy should prevail over good tax policy.").

Tax laws can be, and often are, vehicles for the pursuit of social policy goals, quite apart from any notion of technical perfection of the tax system itself.

Incentives are provided and disincentives imposed by tax rules that set rates and provide or decline to provide for, exemptions, deductions, and credits. Should political advocacy, in the form of either direct or grass roots lobbying or campaign intervention, be actively encouraged? Actively discouraged?

To arrive at a collection of particular rules that constitute a coherent whole, it is essential to consult other policy principles that relate to taxation in general and to tax exemption in particular, to the regulation of participation in the political process, and to more fundamental notions about the structure and operation of political decisionmaking institutions.

*PRINCIPLE 1: Avoiding Interference with Political Expression*

It has been argued, sometimes by legislators themselves, that reasoned, democratic decisionmaking depends on extensive and broadbased input from individuals and groups who have information, expertise, experience, and interests relevant to problems and solutions under consideration.<sup>176</sup> Certainly, a central

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<sup>176</sup> See, e.g., H.R. REP. NO. 1447, 87th Cong., 2d Sess. (1962), 1962-3 C.B. 402, 421 ("it is desirable that taxpayers who have information bearing on the impact of present laws, or proposed legislation, on their trades or businesses not be discouraged in making this information available to the Members of Congress or legislators at other levels of government"); S. REP. NO. 1881, 87th Cong., 2d Sess. 22 (1962), 1962-3 C.B. 728; 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

(perhaps the central) tenet of the first amendment is that discussion of public affairs must be jealously protected and ardently promoted.<sup>177</sup> While the first amendment by no means requires affirmative support of political expression,<sup>178</sup> its underlying values ought to be borne in mind in formulating rules that can be expected to have an impact on political participation. The counterposition - that political activity is an undertaking the exercise of which ought to be discouraged - tends to be tied not to disapproval of political expression per se, but rather to concerns about distortion of political debate and power by those with control of accumulated wealth, who are in a position to outshout those with fewer material resources.<sup>179</sup> Thus, one guiding principle for the formulation of tax rules would

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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 23, at 198 ("Legislators dealing with social problems should have advantage of information and expertise of organizations that have practical experience with the problems.").

<sup>177</sup> See, e.g., *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("a major purpose of [the First] Amendment was to protect the free discussion of public affairs"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("debate on public issues should be uninhibited, robust, and wide-open"); ALEXANDER MEIKELJOHN, *POLITICAL FREEDOM* 26 (1965) (first amendment's most important purpose is facilitation of the discussion of public issues in order to permit the citizenry to perform its electoral function intelligently); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971).

<sup>178</sup> *Cammarano v. United States*, 358 U.S. 498 (1959); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

<sup>179</sup> See, e.g., Cooper, *supra* note 100, at 813-16, noting that, particularly in the context of grass roots lobbying, "a disparity in financial resources begins to operate

seem to be that the rules should go out of their way to avoid impeding political expression unless strong countervailing concerns command otherwise.

PRINCIPLE 2:        *Avoiding Distortion of Political Process by Powerful and Unaccountable Big Money*

There is a tension between the desire for an unimpeded marketplace of ideas and the worry that as in any marketplace, some will have the resources to dominate. Congress has exhibited a general suspicion of allowing institutions that may have substantial resources, but that need not account to the public in any meaningful way, to interject themselves into public affairs. The limits imposed in 1969 on political activity by private foundations are but one manifestation of a chronic congressional uneasiness with the concentration of unaccountable social and political power in the hands of wealthy donors.<sup>180</sup> In fact, preliminary Treasury Department documents leading up to consideration of the 1969 private foundation provisions did not identify political activity per se as a focus for reform, but did

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to the immense disadvantage of nonbusiness individuals," *id.* at 814, and quoting a reference in the government's brief in *Cammarano* to "[a] continued Congressional concern with the use of large sums of money to finance 'the engineering of consent'--to 'make' public opinion on matters of legislation--particularly where large economic interests are all on one side of the controversy." *Id.* at 815.

<sup>180</sup> See, e.g., John G. Simon, *Foundations and Public Controversy: An Affirmative View*, in *THE FUTURE OF FOUNDATIONS* 58, 71 (Fritz F.Heimann, ed., 1973); Jeffrey Hart, *Foundations and Social Activism: A Critical View in THE FUTURE OF FOUNDATIONS* 43, 46 (Fritz F.Heimann, ed., 1973).

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focus on "continuing control of foundations by donors and their families,"<sup>181</sup> with its concomitant enhancement of personal power at public expense.

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<sup>181</sup> James S. Sligar, *Constitutionality of the Tax on Lobbying by Private Foundations Under Section 4945(d)(1) of the Internal Revenue Code*, 1983 TAXES 306, 315.

The same concern about the potentially distorting influence that big money can exert is reflected in the Federal Election Campaign Act<sup>182</sup> and related laws.<sup>183</sup> The first of a series of acts prohibiting political contributions by corporations was passed in 1907.<sup>184</sup> The law was strengthened and amended several times<sup>185</sup> before its comprehensive revision in the Federal Corrupt Practices Act of 1925.<sup>186</sup> Debate in support of the Act stressed concern about the potential dangers of corporate and union contributions.<sup>187</sup> Campaign finance regulation was again overhauled in

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<sup>182</sup> 2 U.S.C. §§ 431-455 (1988).

<sup>183</sup> *E.g.*, the Presidential Campaign Fund Act, 2 U.S.C.A. §§ 9001-9042 (1988).

<sup>184</sup> Act of January 26, 1907, ch. 420, 34 Stat. 864.

<sup>185</sup> Act of June 25, 1910, ch. 392, 36 Stat. 822; Act of Aug. 19, 1911, ch. 33, 37 Stat. 25; Act of Oct. 16, 1918, ch. 187, 40 Stat. 1013. For an extensive discussion of the history of the F.E.C.A.'s precursors, see *United States v. UAW*, 352 U.S. 567, 570-75 (1957). See also Kirk J. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 *FORDHAM L. REV.* 53, 60-67 (1987).

<sup>186</sup> Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1070.

<sup>187</sup> One Senator remarked:

One of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest.

65 *CONG. REC.* 9507-08 (remarks of Sen. Robinson), *quoted* in *United States v. UAW*, 352 U.S. 567, 570 (1957).

1971, with the enactment of the Federal Election Campaign Act<sup>188</sup> and the Revenue Act of 1971.<sup>189</sup> The legislative history of these enactments and the amendments that followed<sup>190</sup> yields ample evidence that the reform efforts were driven substantially by a desire to diminish the susceptibility of elected officials to undue pressure by economic interests which have the enhanced leverage of aggregated wealth.<sup>191</sup>

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<sup>188</sup> Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. § 431-54 (1988)).

<sup>189</sup> Revenue Act of 1971, Pub. L. No. 92-178, §§ 701-703 & 801-802, 85 Stat. 497, 570-74.

<sup>190</sup> Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475; Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339.

<sup>191</sup> See, e.g., S. REP. NO. 689, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 5587, 5591 ("only way in which Congress can eliminate reliance on large private contributions and still ensure the adequate presentation to electorate of opposing viewpoints of competing candidates is through comprehensive public financing"); *Federal Election Reform: Hearings Before the Subcomm. on Elections of the Comm. on House Administration*, 93d Cong., 1st Sess. 229 (1973) (statement of Morris K. Udall, Rep., Ariz.) ("The most obviously desirable reform of the existing law is the enactment of strict limits on individual campaign contributions. Ambassadorships should not be up for sale. No one, regardless of his motives, should have the kind of clout that a \$1 million contribution buys."); *id.* at 309 (statement of Donald J. Mitchell, Rep., N.Y.) ("If the so-called funny-money, the money from questionable sources, the money with strings attached, the unreported money, were eliminated, we could be well on the way to restoring confidence in our public officials and the system."); 120 CONG. REC. 10,348 (1974) (statement of Sen. Clark):

The impact of the private dollar on the legislative process has been pervasive, and there probably is not a single member of the U.S. Congress who has not felt it or wished that it might be changed.

Many people across this country, feel disillusioned, frustrated, and angry. They are upset about the energy situation and the high

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profits of the oil companies, but they become even angrier when they learn that oil companies financed a significant part of the President's re-election campaign.

All of this suggests another principle that ought to be part of the base for rules that may play some role in shaping political participation. Those rules should be drawn in a way that avoids enhancing the capacity of powerful and wealthy interests for dominating political processes, thus raising the danger that the outcomes generated by those processes will be distorted.

PRINCIPLE 3: *Reserving the Charitable Exemption and Deduction for "Worthy"*

Activities

The use of tax rules to encourage particular activities might be said to underlie the existence and shape of the section 501(c)(3) tax exemption and related rules. Congress' reason for enacting the exemption and deduction provisions is not clear, and may reflect merely a longstanding tradition of non-taxation of charitable and religious organizations, rather than a carefully considered policy choice.<sup>192</sup> Nevertheless, popular, political, and academic views of exemption and deduction see them as mechanisms by which to provide indirect

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<sup>192</sup> See Stephen Diamond, *Of Budgets and Benevolence: Philanthropic Tax Exemptions in Nineteenth Century America*, 1991 NYU PROGRAM ON PHILANTHROPY AND THE LAW CONFERENCE: RATIONALES FOR FEDERAL INCOME TAX EXEMPTION 4 ("Death, taxes, and exemptions run endlessly in both our past and our future. . . . No one decided, on a clean slate, that exemptions were appropriate. They already existed."); James J. McGovern, *The Exemption Provisions of Subchapter F*, 29 TAX LAW. 523, 526 (1976). It has been postulated that the enactment of the deduction provision was 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. Kenneth Liles & Cynthia Blum, *Development of the Federal Tax Treatment of Charities*, 39 LAW & CONTEMP. PROBS. 6, 24-25 (1975).

support for activities in pursuit of purposes that merit public support<sup>193</sup> or, at the very least, as ways to avoid inhibition

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<sup>193</sup> See Robert Atkinson, *Theories of the Federal Income Tax Exemption for charities: Thesis, Antithesis, and Synthesis*, 1991 NYU PROGRAM ON PHILANTHROPY AND THE LAW CONFERENCE: RATIONALES FOR FEDERAL INCOME TAX EXEMPTION [hereinafter Atkinson, *Theories*] (discussing various theories' approaches to identifying the organizing principles for determining the range of activities that merit support); Chauncey Belknap, *The Federal Income Tax Exemption of Charitable Organizations: Its History and Underlying Policy*, in 4 COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, RESEARCH PAPERS 2025, 2038 (1977); *Bob Jones University v. United States*, 461 U.S. 574, 591 (1983) ("Charitable exemptions are justified on the basis that the exempt entity confers a public benefit - a benefit which the society or the 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.").

of those activities.<sup>194</sup>

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<sup>194</sup> See Hopkins, *supra* note \_\_\_, at 16.

Congress is not merely "giving" eligible non-profit organizations any "benefits"; the exemption (or charitable deduction) is not a "loophole," a "preference," or a "subsidy" - it certainly is not an "indirect appropriation." Rather, the various Internal Revenue Code provisions comprising the tax exemption system exist basically as a reflection of the affirmative policy of American government to not inhibit by taxation the beneficial activities of qualified exempt organizations acting in community and other public interests.

*Id.*

One formulation of the organizing principle for determining what purposes and activities are worthy of such support is that charitable organizations, for the most part, earn that support by providing "collective goods"<sup>195</sup> and engaging in redistribution of resources to promote equitable division of society's wealth and opportunity.<sup>196</sup> The for-profit marketplace, working normally, cannot be expected to supply collective goods in socially optimal quantities and will not respond to the equity concerns that lie behind redistribution.<sup>197</sup> Although government is the primary supplier of collective goods as well as the primary corrector of the distributional inequities that society chooses not to tolerate,<sup>198</sup> the incentives of exemption and deductibility are provided to the private voluntary sector when it

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<sup>195</sup> See Burton A. Weisbrod, *Private Goods, Collective Goods: The Role of the Nonprofit Sector*, in *THE ECONOMICS OF NON-PROPRIETARY ORGANIZATIONS* 139, 147-49 (Kenneth W. Clarkson and Donald L. Martin, eds., 1980) [hereinafter Weisbrod, *Private Goods*]. Collective goods are those that "cannot be provided to some individuals without simultaneously bestowing the external benefits on individuals who do not pay, thus posing the free-rider problem or imposing external costs on innocent third parties." BURTON A. WEISBROD, JOEL F. HANDLER & NEIL K. KOMESAR, *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 18 (1978).

<sup>196</sup> Weisbrod, Handler, & Komesar *supra*, note 195, at 9.

<sup>197</sup> See *Id.* at 13-14 ("The problem in the externality, or collective-good cases is that [demands for the output level consumers as a whole are willing and able to pay for] may go unregistered, untransmitted to prospective producers, as will be the case if consumers attempt to hide their true willingness to pay in the hope of benefiting from other people's actions. . . . It follows that the private market can be expected to behave inefficiently in those cases in which there are external effects that the individual participants in the economy either do not recognize or do not take into account in their production and consumption decisions.").

<sup>198</sup> *Id.* at 18 ("[I]nsofar as equity goals conflict with allocative efficiency, the private market will opt for efficiency, and people will turn to government as an instrumentality for fostering equity in its many dimensions.").

engages in market-corrective and redistributive activities that can be provided better by the nonprofit sector than by government directly, or when the nonprofit sector is a valuable supplier in addition to government.<sup>199</sup> Examples of qualification for the section 501(c)(3) exemption on the basis of providing collective goods - engaging in activities that benefit the community at large - abound. Efforts to "preserve and protect the environment" have qualified as charitable because the benefit of the activities accrues to the public at large.<sup>200</sup> 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,"<sup>201</sup> has been that those organizations "provide a service which is of benefit to the community as a whole."<sup>202</sup> The redistributive aspect of section 501(c)(3) is reflected in other grounds for qualification. As used in I.R.C. section 501(c)(3), "charitable" includes

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<sup>199</sup> See *id.* at 30-41; Burton Weisbrod, *Toward a Theory of the Voluntary Nonprofit Sector in a Three-Sector Economy*, in *THE ECONOMICS OF NONPROFIT INSTITUTIONS* 21 (Susan Rose-Ackerman ed., 1986), *reprinted from* *THE VOLUNTARY NONPROFIT SECTOR* 51 (Burton A. Weisbrod ed., 1975) [hereinafter *Weisbrod, Toward a Theory*] (discussing circumstances that give rise to "government failure:"); Simon, *The Tax Treatment of Nonprofit Organizations*, *supra* note 113, at 76-77 (discussing various reasons to prefer nongovernmental provision of collective goods and redistributive activities in certain situations).

<sup>200</sup> Rev. Rul. 80-279, 1980-2 C.B. 176; Rev. Rul. 80-278, 1980-2 C.B. 175.

<sup>201</sup> Rev. Proc. 71-39, 1971-2 C.B. 575 (also released as T.I.R.-1348, dated Feb. 19, 1975).

<sup>202</sup> Rev. Rul. 75-74, 1975-1 C.B. 152.

"[r]elief of the poor and distressed or underprivileged;"<sup>203</sup> interpretations of section 501(c)(3) have determined that ministering to the special, even non-financial, needs of the terminally ill,<sup>204</sup> the handicapped,<sup>205</sup> and the elderly,<sup>206</sup> is charitable.

In addition, Rob Atkinson has catalogued a number of "metabenefits" that have been identified by various commentators and which "derive not from either what product is produced or to whom it is distributed, but rather from how it is produced." These include efficiency, innovation, pluralism, and diversity.<sup>207</sup>

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<sup>203</sup> Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959).

<sup>204</sup> Rev. Rul. 79-17, 1979-1 C.B. 193.

<sup>205</sup> Rev. Rul. 79-19, 1979-1 C.B. 195.

<sup>206</sup> Rev. Rul. 77-246, 1977-2 C.B. 190; Rev. Rul. 72-124, 1972-1 C.B. 145.

<sup>207</sup> Atkinson, *supra* note 193, at 11-12. See, e.g., John G. Simon, *Charity and Dynasty Under the Federal Tax System*, 5 PROB. LAW 1 (1978); MARION R. FREMONT-

Atkinson himself has proposed that altruistic supply of any good or service is a metabenefit of the sort that merits the support of exemption and deduction.<sup>208</sup>

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SMITH, FOUNDATIONS AND GOVERNMENT 49-53 (1965) ("Foundations in a Pluralistic Society"). Lawrence M. Stone, *Federal Tax Support of Charities and Other Exempt Organizations: The Need for a National Policy*, 1968 U.S. CAL. TAX INST. 27, 45. Belknap, *supra* note 193, at 2035-36. Albert M. Sacks, *The Role of Philanthropy: An Institutional View*, 46 VA. L. REV. 516, 524 (1960).

<sup>208</sup> Robert Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501 (1990) [hereinafter Atkinson, *Altruism*].

Another (though overlapping) conception of the basis for section 501(c)(3) is that charitable exemption and deductibility are intended to support activities that lead to broad public benefit rather than private advantage. This purpose is reflected in the threshold section 501(c)(3) requirement that a charitable organization "[serve] a public rather than a private interest,"<sup>209</sup> which mirrors the common law principle that charitable activity must benefit a broad, indefinite class, and in the section 501(c)(3) injunction against private inurement.<sup>210</sup>

If political advocacy is inconsistent with the rationales for exemption, then the principle of reserving the charitable exemption and deduction for "worthy"

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<sup>209</sup> Treas. Reg. § 1.501(c)(3)-1(d)(ii) (as amended in 1976).

<sup>210</sup> Section 501(c)(3) provides that an organization qualifies for exemption only if "no part of [its] net earnings. . . inures to the benefit of any private shareholder or individual. The private inurement prohibition forbids distribution, direct or disguised, of the organization's net earnings. Private inurement occurs when financial benefit to an organization insider is not a legitimate quid pro quo for fair value received by the organization, but rather "represents a transfer of the organization's financial resources to an individual solely by virtue of the individual's relationship with the organization, and without regard to accomplishing exempt purposes." Gen. Couns. Mem. 38,459 (July 31, 1980).

activities would logically require that forgoing political activities should be a condition of qualification for the charitable exemption. Some have suggested that political activism, whether with respect to issues or with respect to candidates, is inconsistent with "charity," or that charitable organizations' involvement in such activities raises the uncomfortable possibility that the support intended for public purposes may in fact go to private, personal political agendas.

The argument that issue-based political advocacy is inconsistent with "charity" cannot rest on charitable trust principles, since neither traditional nor contemporary perceptions of the appropriate functions of charitable organizations demand such restraints.<sup>211</sup> In contrast, it is reasonably accurate to say that electoral politics is not within the range of activities considered "charitable" at common law. Both English and American courts have held that attempts to establish trusts to promote the fortunes of particular political parties are not charitable.<sup>212</sup> On the other hand, common law concepts of charity do not exclude

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<sup>211</sup> Simon, *Foundations and Public Controversy*, *supra* note 180, at 68. See Austin 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 23, at 53-54 (describing history of political reform activity by charitable trusts, as approved by various states); Thompson, *supra* note \_\_\_, at 513 n.56 (comparing American approach with English common law, which is less accepting of activism by charitable organizations).

<sup>212</sup> See *In re Grossman's Estate*, 190 Misc. 521, 73 N.Y.S.2d 335 (Sur. Ct. 1947); *Liapis Estate*, 88 Pa. D. & C. 303 (Orphans' Ct. 1954); *Boorse Trust*, 64 Pa. D. & C. 447 (Orphans' Ct. 1948); *In re Hopkinson*, [1949] 1 All E.R. 346 (Ch.); *Bonar Law Memorial Trust v. Inland Revenue Comm'rs*, 49 T.L.R. 220 (K.B. 1933).

situations in which the objectives of a group or a gift are described in terms of furthering an otherwise charitable cause, even though a particular party may be identified with the cause or another with its opposition.<sup>215</sup>

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<sup>215</sup> See *In re Cahan's Estate*, 122 N.Y.S.2d 716 (Sur. Ct. 1953); AUSTIN W. SCOTT & WILLIAM F. FRATCHER, *THE LAW OF TRUSTS*, § 374.6, at 224 (4th ed. 1989); RESTATEMENT (SECOND) OF TRUSTS § 374(k) (1959); Note, *Charitable Trusts for Political Purposes*, 37 VA. L. REV. 988, 993 (1951). In fact, it has been held that a gift or trust dedicated to pursuit of charitable or educational objects is charitable, even when a political party is the organization designated to undertake the activity. See e.g., *In re Scowcroft* [1899] 2 Ch. 638, 641-42 (holding that a gift to the Conservative Party for the purpose of promoting religious and mental improvement was a charitable gift).

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, either because charitable trust law reflects a bad policy choice, or because what makes sense when setting the boundaries of "charity" for other purposes does not fit the distinct purposes and rationales for defining "charity" in the context of tax law. It does not appear that Congress originally based its imposition of lobbying restrictions on either of these conclusions. Rather, the provisions seem to have been driven by concerns about distortion of "charity" for private, self-serving ends. Congress has regularly expressed misgivings about allowing funders and managers of charitable organizations to capture the benefits of the exemption and deductibility for promotion of a self-serving, private agenda.<sup>214</sup> In fact, a desire to foreclose tax benefits for selfish legislative advocacy motivated the 1934 provision to limit lobbying, although the sponsor of the amendment admitted that the language of the provision went far beyond that purpose. But despite the limits that have long been imposed on legislative advocacy, the importance of exploration and debate of issues of public importance and the notion that the nonprofit sector has a legitimate role in that process are values long-reflected in the law of tax exemption. Congress, the I.R.S., and the courts have all recognized the capacity of charitable

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<sup>214</sup> This concern is a sibling, though not a twin, of the policy of avoiding distortion of political processes by powerful and unaccountable wealth. See *supra* notes 180-81 and accompanying text.

organizations for bringing an important dimension to the discussion of public issues.

Still, some have questioned the wisdom of encouraging charitable organizations to engage in political activism, suggesting that political advocacy ought not be included in the "charity" of tax exemption law because there is no need for it or because engaging in political advocacy distorts and demeans the charitable mission.<sup>215</sup> The more frequently expressed view, however, is to applaud

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<sup>215</sup> 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 status and luxury." Hart, *supra* note 180, at 56. 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." *Id.* 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." *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." Michael J. Graetz and John C. Jeffries, Jr., *Limitations on Lobbying by Charitable Organizations* in 5 COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, RESEARCH PAPERS, 2945, 2962 (1977). 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. *Id.* at 2462-63.

the charitable sector for assuming an activist role.<sup>216</sup> And the diversity 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.<sup>217</sup> Some

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<sup>216</sup> "They exist to experiment, to innovate, to critique, to aid the powerless, and thus necessarily to involve themselves in social tension." FIELD FOUNDATION REPORT, 1968-69, *quoted in* Sara C. Carey, *Philanthropy and the Powerless*, in 2 COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, RESEARCH PAPERS, 1109, (1977). *See also*, Chisolm, *Exempt Organization Advocacy*, *supra* note 31, at 205.

<sup>217</sup> *See* Simon, *Foundations and Public Controversy*, *supra* note 180, at 71 ("Indeed, the very absence of a universal consensus . . . undermines the argument [that foundation involvement in public affairs is unnecessary].").

have gone so far as to suggest that "public issues development"<sup>218</sup> and "[h]elping to change institutions as much as to preserve them; to develop social policy as well as to maintain it"<sup>219</sup> are not only acceptable, but are among the most important functions of the nonprofit sector.<sup>220</sup>

Charitable organizations exist to provide collective goods or to engage in redistribution. Legislative advocacy is simply a strategy for the accomplishment of

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<sup>218</sup> Pablo Eisenberg, *The Voluntary Sector: Problems and Challenges*, in 2 COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, RESEARCH PAPERS 853, 862 (1977).

<sup>219</sup> Wilbur J. Cohen, *Some Aspects of Evolving Social Policy in Relation to Private Philanthropy*, in 2 COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, RESEARCH PAPERS 657, 667 (1977).

<sup>220</sup> Thompson, *supra* note 86, at 522 n.79 (1985). Thompson points out that the idea that debate of public issues is an appropriate "charitable" undertaking is well-rooted in the American common law of charitable trusts, offering a quote from *George v. Braddock*, 45 N.J. Eq. 757, 18 A. 881 (1889), as "the best expression of the reason" for the rule: "[t]he most potent of all forces tending to improvement and evolution are those of examination and discussion." *Id.* at 514 n.56.

those purposes. In fact, advocacy on behalf of widespread community interests (such as environmental issues or consumer protection) is itself a collective good; advocacy on behalf of the disadvantaged is redistributive. Thus, there is no reason why legislative advocacy cannot fit within the principle of reserving tax exemption and deductibility for activities worthy of "charity," so long as that advocacy does not promote a narrow private agenda.

Election-related advocacy is another story. Hardly anyone bothers even to articulate arguments in favor of the campaign intervention prohibition of section 501(c)(3); its wisdom is taken as more or less axiomatic. While the circumstances of the original legislative expression of that policy provide no evidence that the rule was based on a carefully considered judgment that there are important reasons to keep charity and politics separate,<sup>221</sup> the notion that politics and charity ought not

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<sup>221</sup> See *supra* notes 95 and accompanying text.

The first attempt to condition eligibility for exemption on forbearance from partisan political activity was made in 1934. The limitations recommended by the Senate Finance Committee, S. REP. NO. 558, 73rd Cong., 2d Sess. 26 (1934), and added to the Revenue Act of 1934 on the Senate floor, 78 Cong. Rec. 5959 (1934),

to be mixed has remained a consistent theme since the enactment of the campaign intervention prohibition, and the section 501(c)(3) proscription on campaign intervention communicates rather unmistakably a policy of keeping charity and partisan politics unentangled.

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extended to "partisan politics" as well as to legislative advocacy. Explaining the bill on the House floor after the Conference Committee had removed the "partisan politics" language, H.R. REP. NO. 1385, 73d Cong., 2d Sess. 3-4 (1934), Congressman Samuel B. Hill described the deletion as "a substantial concession" on the part of the Senate in response to the belief of the House conferees that the language "was too broad," 78 Cong. Rec. 7831 (1934).

Perhaps the prime illustration of this theme is the addition of section 527 to the Internal Revenue Code in 1974.<sup>222</sup> Section 527 extends limited tax-exempt status to "political organizations," which include political parties, campaign committees and political action committees.<sup>223</sup> The legislative history of section 527 indicates that Congress believed in 1975 both that political organizations and their election-related activity ought to be accorded special tax treatment,<sup>224</sup> and

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<sup>222</sup> I.R.C. § 527 (1989), enacted as Pub. L. No. 93-625, § 10(a), 93d Cong., 2d Sess. (1974). The enactment of § 527 clarified and formalized a longstanding approach to the tax treatment of political parties and other political organizations. The practice of the Internal Revenue Service had been to ignore political organizations, even though they were nowhere mentioned in the tax exemption provisions of the Code. See generally Kaplan, *Taxation and Political Campaigns: Interface Resolved*, 53 TAXES 340 (1975); William P. Streng, *The Federal Tax Treatment of Political Contributions and Political Organizations*, 29 TAX LAW. 139 (1975). The 1974 amendment was enacted in response to a change in that policy, embodied in an August, 1973 announcement by the I.R.S. that political parties and committees were taxable organizations. See S. REP. No. 1357, 93d Cong., 2d Sess. 26 (1974).

<sup>223</sup> A political organization is a party, committee, association, fund or other organization . . . organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures . . . for the function of influencing . . . the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of Presidential . . . electors.

I.R.C. § 527(e) (1989). A § 527 organization is not taxed on the money it collects and spends on election-related activities, but does pay tax on other income, such as investment income. I.R.C. § 527(b). Contributions to a § 527 organization are not deductible to the donor.

<sup>224</sup> S. Rep. No. 357, 93d Cong., 2d Sess. 26 (1974).

that partisan political activities ought, for the most part, to be carried out by section 527 organizations.<sup>225</sup>

It is fair to say, then, that, unlike advocacy directed at issues, election-related activity generally does not belong within tax exemption notions of "charity."

*PRINCIPLE 4: Promoting Deliberative and Public-Regarding Policymaking*

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<sup>225</sup> According to the Senate Finance Committee Report:

The Committee expects that, generally, a section 501(c) organization that is permitted to engage in political activities would establish a separate organization that would operate primarily as a political organization, and directly receive and disburse all funds related to nomination, etc. activities. In this way, the campaign-type activities would be taken entirely out of the 501(c) organization, to the benefit of both the organization and administration of the tax laws.

*Id.* at 30.

A great deal has been written in the last decade or so on the desirability of adjusting both our mindset and the institutions that generate and interpret policy in our constitutional system to promote the pursuit of public policy that embodies a public interest that is separate from, and loftier than, a simple aggregation of competing private interests. This call for a better politics, associated primarily with the theory of "civic republicanism,"<sup>226</sup> has at its center the conviction that binding decisions about public policy should be arrived at through a process of reasoned deliberation and a commitment to advancing the public weal.<sup>227</sup> The civic

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<sup>226</sup> Some key designers and advocates of modern civic republicanism theory are Cass Sunstein, Frank Michelman, and Michael Perry. Modern civic republicanism claims roots in classic republicanism and connection to the Framers' concept of well-designed government, *see, e.g.*, Cass R. Sunstein, *The Republican Civic Tradition: Beyond the Republican Revival*, 97 YALE L.J. 1539, 1558-59 (1988) [hereinafter Sunstein, *Beyond*]; Cass R. Sunstein, *Well-Being and the State*, 107 HARV. L. REV. 1303, 1303 (1994) [hereinafter Sunstein, *Well-Being*], but situates itself in a contemporary sensibility by rejecting the elitist, militaristic, and misogynist premises of the earlier versions, *see, e.g.*, Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 n.8, 56-57, 72-73 [hereinafter Sunstein, *Interest Groups*]; Frank R. Michelman, *The Republican Civic Tradition: Law's Republic*, 97 YALE L.J. 1493, 1525-26 (1988) [hereinafter Michelman, *Law's Republic*]. *Cf.* Stephen G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 821 (1993) ("The images invoked by civic republicanism proposals owe as much to Frank Capra's simple tales of public spirit and political goodness as they do to anything written by Madison or any of the other Framers friendly to civic republican ideals"); *id.* at 822 n.55 ("The classic model of the community did not include women or the poor . . . . There was no objective reason for limiting membership in this way. It simply seemed obvious to classical republicans of that era, just as it now seems obvious to the modern eye that the classical republicans were blind to their own short-sightedness, elitism, and misogyny.").

<sup>227</sup> "Republican theories . . . rely on the deliberative functions of politics and on practical reason, and embrace the notion of the common good as a coherent one."

republican idea is that through deliberation, in which political actors consider solid data<sup>228</sup> and subject "prevailing . . . desires and practices to scrutiny and review"<sup>229</sup> in light of "what will best serve the community in general,"<sup>230</sup> the "political outcomes [thereby arrived at will be] supported by reference to a consensus (or at least broad agreement) among political equals."<sup>231</sup> This view of political decisionmaking suggests a guiding principle that would serve well as at least one basis for designing and evaluating rules, including tax rules, that affect the structure and processes of political decisionmaking. That is, the rules should promote, or at the

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Sunstein, *Republican Civic Tradition*, *supra* note 226, at 1554-55.

<sup>228</sup> See Galston, *supra* note 81, at 1339; Sunstein, *Well-Being*, *supra* note 226.

<sup>229</sup> Sunstein, *Republican Civic Tradition*, *supra* note 226, at 1549.

<sup>230</sup> *Id.* at 1550.

<sup>231</sup> *Id.* "Under republican approaches to politics, laws must be supported by argument and reason; they cannot simply be fought for or be the product of self-interested 'deals.' Political actors must justify their choices by appealing to a broader public good." *Id.* at 1544.

very least, not impede, thoughtful and informed consideration of how resulting policy will affect the community at large.

Civic republicanism's deliberative ideal, reliance on rational information and critical reflection, and public-regarding ethic are presented by its adherents as a superior alternative to the classic pluralist view of the political process.<sup>252</sup> The classic pluralist model of democratic government<sup>253</sup> describes a legislative process wherein the articulated preferences of groups of individuals who share attitudes and claims upon other groups in society<sup>254</sup> compete with the articulated preferences of other interest groups for attention and accommodation. The

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<sup>252</sup> See, e.g., Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 551 ("Where liberalism finds the primary purpose of government to be promotion of the diverse goods of its individual citizens, republicanism finds its primary purpose to be definition of community values and creation of the public and private virtue necessary for societal achievement of those values"); Sunstein, *Interest Groups*, *supra* note 226, at 32-33; Sunstein, *Republican Civic Tradition*, *supra* note 226, at 1542-43, 1546-47; Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512, 1533-36; Galston, *supra* note 81, at 1337-38.

<sup>253</sup> See generally DAVID O. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* (2d ed. 1971). For an excellent survey of the literature describing various models of the legislative process and examining empirical studies of the legislative process for fit with the theoretical models, see Daniel A. Farber and Philip B. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987). See also William N. Eskridge and Philip B. Frickey, *Legislation, Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987).

<sup>254</sup> Truman, *supra* note 233, 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.").

function of the legislative process is to hear and balance these articulated preferences, arriving at some optimal aggregation which is, 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.<sup>235</sup> Although some have expressed concern that proliferation of identified interest groups may ultimately immobilize, rather than perfect, the democratic process,<sup>236</sup> or that the accommodation reached will represent a division of policy "turf" among coalitions of minority factions,<sup>237</sup> 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.<sup>238</sup> The process and its outcomes are democratic to

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<sup>235</sup> See Sunstein, *Interest Groups*, *supra* note 226, at 33. See also Weisbrod, *Toward*, *supra* note 199, 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).

<sup>236</sup> Allan J. Cigler and Burdett A. Loomis, *Introduction: The Changing Nature of Interest Group Politics*, in *INTEREST GROUP POLITICS* 1, 23-24 (Allan J. Cigler and Burdett A. Loomis eds., 2d ed. 1986).

<sup>237</sup> See Andrew S. McFarland, *Groups Without Government: The Politics of Mediation*, in *INTEREST GROUPS POLITICS* 289, 300-01 (Allan J. Cigler and Burdett A. Loomis eds., 2d ed. 1986).

<sup>238</sup> See Truman, *supra* note 233, at 513-16.

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the extent that all articulated preferences are heard at a meaningful stage in the decisionmaking process.<sup>239</sup>

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<sup>239</sup> See Robert A. Dahl, DILEMMAS OF PLURALIST DEMOCRACY 6 (1982) [hereinafter Dahl, DILEMMAS].

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).<sup>240</sup>

Pluralism is currently rather unpopular as an aspirational model, although there are some who continue to prefer it to the alternatives.<sup>241</sup> Indeed, it is hard to argue against the central tenets of civic republicanism, at least in their simplest

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<sup>240</sup> See, e.g., Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983) William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875 (1975); Bruce L. Benson and Eric M. Engen, *The Market for Laws: An Economic Analysis of Legislation*, 54 SOUTHERN ECON. J. 732 (1988).

<sup>241</sup> See, e.g., Robert A. Dahl, *The Ills of the System*, DISSENT 447, 449-50 [hereinafter Dahl, *Ills*].

expression. A legislative process that involves thoughtful and careful analysis of the best information that can be brought to bear on a problem, that is driven by a balanced concern for the well-being of all, and that is insulated from distortion by crass self-interest on the part of legislators or constituents, is undeniably a more appealing picture than one of pigs at the trough, each pushing and shoving to get the others out of the way and maximize his own share.

A number of commentators have observed, however, that as much as we might aspire to the noble view of politics embodied in the civic republican ideal, the reality of our political institutions and processes demands that we acknowledge the force of classic (even crass) pluralism and structure real world responses accordingly. "Self-interested behavior may not be the whole truth of politics, but it is too large a component of politics for anyone, republican or not, safely to ignore."<sup>242</sup>

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<sup>242</sup> Richard A. Epstein, *The Republican Civic Tradition: Modern Republicanism - Or*

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*the Flight From Substance*, 97 YALE L.J. 1633, 1639 (1988). See also Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1333-35 (1994); Dahl, *Ills*, *supra* note 241, at 450-51; Jonathan R. Macey, *The Missing Element in the Republican Revival*, 97 YALE L.J. 1673, 1673-75 (1988); Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 YALE L.J. 1651, 1655-56 (1988); Seidenfeld, *supra* note 232, at 1544-45; James M. Buchanan and Gordon Tullock, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 27-28 (1965). In fact, the civic republican scholars acknowledge the "evidence that the pluralist understanding captures a significant component of the legislative process and that, at the descriptive level, it is far superior to its competitors." Sunstein, *Interest Groups*, *supra* note 226, at 48.

In addition, even if it is possible to draw a boundary around rational, objective information, it is not so clear that only rational, objective information has something important to contribute to the process of generating policy.<sup>243</sup> First, a simple nose-count of how many constituents, and whom among them, stand behind any particular position provides important information about what the polity values. More importantly, the line between reason and non-reason is not found - it is set. An illustration of this point is Cass Sunstein's proposal, in pursuit of the deliberative ideal, of a (tentative) catalogue of rational, objective information that ought to be included in an annual "quality of life report," to be produced by governments to measure their performance in promoting good lives for their citizens.<sup>244</sup> Sunstein acknowledges that "any conception of what matters is a product of judgments that may be controversial," and notes that "the very definitions of poverty and unemployment," for example, involve social judgments.<sup>245</sup> Yet he goes on in the next paragraph to profess faith in the

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<sup>243</sup> See, e.g., *Big Mama Rag v. United States*, 631 F.2d 1030 (D.C. Cir. 1980), holding the "full and fair exposition" test of the regulations defining "educational" for purposes of section 501(c)(3) to be unconstitutionally vague. In so doing, the court noted that "facts and figures . . . can easily be distorted and therefore of questionable value," *id.* at 1037 n.14, commented on "the futility of attempting to draw lines between fact and unsupported opinion," *id.* at 1038, and declared that appeals to the mind and appeals to the emotions can be equally "educational," and are often inseparable, *id.*

<sup>244</sup> Cass R. Sunstein, *Well-Being*, *supra* note 226, at 1303.

<sup>245</sup> *Id.* at 1325.

"accurate information," the "actual evidence," that would appear in the quality of life report:

"There is of course a risk of error and bias, especially in view of the fact that the fortunes of an incumbent administration may depend on what emerges. Government manipulation of official statistics is hardly foreign to American experience. At the same time, many government agencies have established a reputation for objectivity, and there is no reason to believe that (for example) the statistics relating to literacy, infant mortality, and poverty levels reflect substantial bias."<sup>246</sup>

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<sup>246</sup> *Id.*

Compare Gary Peller's reflections on how "a whole hierarchy of what counts and what doesn't that might present itself as neutral knowledge but is really just an ideology of power" present statistics and analysis as the legitimate "test of truth that would count out most of what you know most deeply, even if you can't prove it."<sup>247</sup> Peller's position is that

"[t]he construction of a realm of knowledge separate from superstition and the identification of a faculty of reason separate from passion . . . have always served political roles in differentiating groups as worthy or unworthy and in justifying particular social hierarchies . . . . And a continuing thread of that construction of the world has been the notion that there is a radical distinction between truth, the representation of the way the world really is, and myth, an interpretation of the world that cannot be proven and thus is merely sentimental or poetic. It is this sense, of some grand distinction between truth and myth, that is supposed to distinguish the rational from the emotive, the legal from the political, the scientific from the

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<sup>247</sup> Gary Peller, *Reason and the Mob: The Politics of Representation*, 2 TIKKUN 28, 28 (1987).

aesthetic, the civilized from the primitive, the objective from the subjective, the neutral from the interested, and fact from opinion."<sup>248</sup>

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<sup>248</sup> *Id.* at 28-29.

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Peller would presumably find the stories of families who are not impoverished by official standards but who cannot count on being able to provide regularly for their children to be "information" that is important, even vital, to factor into the making of policy. It is not so clear how such stories would fit into Sunstein's "good information about existing problems and trends."<sup>249</sup>

*PRINCIPLE 5: Promoting Meaningful Participation in Political Decisionmaking*

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<sup>249</sup> Sunstein, *Well-Being*, *supra* note 226, at 1327.

If the pluralist view is to a significant extent descriptively accurate, even if aspirationally disappointing, it would seem that another important guiding principle in structuring rules of political participation would be a preference for ensuring a fair opportunity for a full range of interests to have a place in the discussion<sup>250</sup> and, further, to insist that the opportunity for participation is not just formal, but meaningful, that is, that it offers some real hope of effectiveness. Meaningful participation, in this sense, requires capacity to get one's interests on the agenda of the political process and is sensitive "to the dimension of the process 'located' in between access and decision: the competition among - and the capacity of - groups to exploit their access and influence the decision."<sup>251</sup>

At the same time, there is a distinct danger that the more participation is promoted, the less insulated are the policymakers from the pressures of self-

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<sup>250</sup> See THEODORE LOWI, *THE END OF LIBERALISM* 51 (2d ed. 1979) (noting that one of the fundamental 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 Thomas R. Asher, *Public Needs, Public Policy, and Philanthropy: An Analysis of the Basic Issues and Their Treatment by the Commission on Private Philanthropy and Public Needs*, in 2 COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, RESEARCH PAPERS 1069, 1080 (1977) ("[I]f 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.").

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 233, at 704-05.

<sup>251</sup> Richard D. Parker, *The Past of Constitutional Theory - And Its Future*, 42 OHIO STATE L.J. 223, 250 (1981).

interest.<sup>252</sup> That is, pursuing the principle of promoting widespread participation threatens to undermine the principle of promoting reasoned, other-regarding deliberation. The two are potentially at odds, particularly if we are able to conceive of participation as nothing more than speaking up for one's narrow self-interest, in competition with the narrow self-interests of others.<sup>253</sup>

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<sup>252</sup> See Galston, *supra* note 81, at 1339 (proposing that one of two threshold conditions for deliberative decisionmaking is that "legislators should be insulated sufficiently from political pressures to enable them to act in accordance with a view of the public interest arrived at through deliberation when such a view and their constituents' perceived interests collide"); Sunstein, *Interest Groups*, *supra* note 226, at 34.

<sup>253</sup> See Seidenfeld, *supra* note 232, at 1540-41, identifying a "fundamental tension in civic republicanism. The theory relies on the citizenry to define community values, but distrusts the citizenry's willingness to pursue the public good. Civic republicanism demands that the law simultaneously conform with a popular consensus and yet not represent a mere polling of people's private preferences. In operative terms, one cannot subject decisionmakers to more direct political pressure without threatening the civic republican ideal that decisionmakers act deliberatively;" H. Jefferson Powell, *Reviving Republicanism*, 97 YALE L.J. 1703,



Civic republican theory deals with this tension by recasting the role of the participants and redefining the objectives of participation (as compared with the picture drawn by classic pluralism). The object of the deliberative process is to arrive at consensus about the public good and to generate just laws;<sup>254</sup> participation and inclusion contributes to attainment of the object by increasing the number and range of possibilities for persuasion - for transformation of each participant's "pre-political self-understandings and social perspectives."<sup>255</sup> Frank Michelman, for example, suggests "that the pursuit of political freedom through law depends on 'our' constant reach for inclusion of the . . . hitherto excluded;" the inclusion "helps to create interpretive possibilities that were unthought of before, persuade others, and transform social life."<sup>256</sup> Through the deliberative process "[w]e recongize, reflect, define, enlighten, and transform one another as we ourselves are reciprocally recognized, reflected, defined, enlightened, and transformed."<sup>257</sup> Cass Sunstein explains that "disagreement [is] a creative and

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<sup>254</sup> See, e.g., Paul Brest, *Further Beyond the Republican Revival Republicanism*, 97 YALE L.J. 1623, 1624 (1988).

<sup>255</sup> Frank Michelman, *Law's Republic*, *supra* note 226, at 1527 (1988) [hereinafter Michelman, *Law's Republic*]; Hannah Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY 327, 347 (1981)(quoted in Brest, *supra* note 254, at 1624 n.7.).

<sup>256</sup> Michelman, *Law's Republic*, *supra* note 226, at 1529-30.

<sup>257</sup> Frank Michelman, *The Supreme Court 1985 Term: Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 33 (1986) [hereinafter Michelman, *Supreme Court*].

productive force, highly congenial to and even an indispensable part of the basic republican faith in political dialogue,<sup>258</sup> and that the republican belief in the possibility of arriving at consensus on the public good "affirms . . . that some perspectives are better than others, and that that claim can be vindicated through discussion with those initially skeptical," but only by providing "public-regarding justifications offered after multiple points of view have been consulted and (to the extent possible) genuinely understood."<sup>259</sup>

Others, unconvinced that particularistic perspectives can or should be relinquished, nevertheless do not cast aside all hope for a nobler politics. It is quite possible to imagine debate and negotiation among competing interests in which the preferences the negotiators bring to the table are not just driven by singleminded desire to maximize personal gain, but are shaped by concern for other members of the community and a belief that "one's own interest [is] intimately intertwined with that of the community."<sup>260</sup> Both the civic republican pursuit of transformative dialogue and this optimistic pluralist view suggest a corollary to the guiding principle of fair opportunity to be meaningfully included in

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<sup>258</sup> Sunstein, *Beyond*, *supra* note 226, at 1575.

<sup>259</sup> *Id.* at 1574-75.

<sup>260</sup> See Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 716-18 (1985). See also Seidenfeld, *supra* note 232, at 1531 (reconciling the civic republican goal of public-regarding, deliberative policymaking with interest group participation in the process by noting that "[t]here is no inconsistency as long as the political role of interest groups is to debate the common good from their unique perspectives, and not intransigently to pursue their private concerns.").

political debate - that is, that the rules ought to encourage especially the interjection of less self-interested and more public-spirited perspectives into the mix of positions at the table.

Other writers, unwilling to accept the notion that consensus is desirable or possible, put forth instead a vision of a broadly inclusive politics that respects difference and shares power<sup>261</sup> and that strives particularly to include heretofore marginalized perspectives.<sup>262</sup> In some ways, this vision of participation is not so different from the civic republicans' idea of transformative dialogue,<sup>263</sup> but parts

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<sup>261</sup> See, e.g., IRIS M. YOUNG, *JUSTICE AND THE POLITICS OF JUSTICE* 10-11 (1990) [hereinafter Young, *Justice*], arguing for "principles and practices that instead of [conceiving the ideal of liberation as the elimination of group difference from political and institutional life] identify liberation with social equality that affirms group difference and fosters the inclusion and participation of all groups in public life;" Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups* 1990 U. ILL. L. REV. 95, 122 [hereinafter Karst, *Boundaries*] ("One meaning of a group's subordination is that the members' voices often go unheard . . . . The most effective forms of 'more speech' will come from the presence of increased numbers of blacks, or gays, or women in the opinion-making sectors of our society, and from politicians who can count the votes from these groups among their constituents.")

<sup>262</sup> See, e.g., Young, *Justice*, *supra* note 261, at 3 ("where social group differences exist and some groups are privileged while others are oppressed, social justice requires explicitly acknowledging and attending to those group differences in order to undermine oppression"); JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 251 (1976).

<sup>263</sup> See, e.g., Wendy Brown-Scott, *The Communitarian State: Lawlessness or Law Reform for African-Americans*, 107 HARV. L. REV. 1209, 1215 (1994) (describing the importance of including the stories of "the outgroup:" "They are stories that complete, unearth, and transform both the speaker and the listener."). Richard

company with the fundamental conviction of civic republicanism that the object of the conversation is to persuade, and that the desired outcome is to arrive at agreed-upon, universal norms.<sup>264</sup> For these commentators, the point of inclusive deliberation is not to identify and embrace the common ground. Rather, the idea is to expand the norm, to enlarge and diversify the collective view of what matters. This we can accomplish by hearing (and speaking) what matters (and why) to each participant, appreciating that what matters to some will not be the same as what matters to others, either at the beginning or at the end of the dialogue. "The politics of difference seeks to sever the association of equality with sameness, and focuses on equality as participation and inclusion. Where group differences continue to exist and some groups have greater power and privilege, promoting

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Delgado's observations about the value of including new voices in legal scholarship are equally apt in the context of deliberative structures: "It can sharpen our concern, enrich our experience, and provide access to stories beyond the stock tale. Heeding new voices can stir our imaginations, and let us begin to see life through the eyes of the outsider." Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 109 (1990).

<sup>264</sup> "[T]he ideal that the activities of citizenship express or create a general will that transcends the particular differences of group affiliation, situation, and interest [tends to exclude] groups judged not capable of adopting that general point of view [and] to enforce a homogeneity of citizens. . . . The attempt to realize an ideal of universal citizenship that finds the public embodying generality as opposed to particularity, commonness versus difference, will tend to exclude or to put at a disadvantage some groups, even when they have formally equal citizenship status." Iris M. Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 251, 257 (1989) [hereinafter Young, *Polity*]; See also Brown-Scott, *supra* note 263, at 1219 (concepts of community that define community "as a causal factor in the construction of personal identity, as a substantive value that derives its worth from individuals acting as citizens in search of the common good," or as "the source of values" "raise the specter of exclusion").

the participation and inclusion of currently disadvantaged groups often requires recognizing the specificity of their situation and culture, rather than being blind to difference.<sup>265</sup> Furthermore, in this vision of an inclusive politics, the value of promoting participation rests not just on the importance of having multiple perspectives in the mix of information upon which policy will be built, although that certainly is a piece of it.<sup>266</sup> It depends equally on the notion that having the floor, giving voice to one's own perspectives, is an essential element of a truly democratic system. "[P]articipation [by members of a subordinated group] tells them (and tells others) that their opinions count, that they are full members of the polity. In fact, when members of the group do participate in public deliberations,

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<sup>265</sup> Iris M. Young, *Difference and Policy: Some Reflections in the Context of New Social Movements*, 56 U. CIN. L. REV. 535, 535 (1987) [hereinafter Young, *Difference*]; see also Gey, *supra* note 226, at 838 ("Members of a social group cannot be different and also the same . . . . They might share a willingness to respect their individual differences, but neutral respect is a fundamentally different concept than commonality"). Compare Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1714 (1988) (agreeing with those who take issue with the civic republican contention that social heterogeneity is compatible with the development of a shared understanding of a single common good, but proposing that group-based "social interaction and value formation" belong "principally in settings other than citizenship.").

<sup>266</sup> Richard Delgado, advocating a more inclusive legal scholarship, has observed that "persons who have grown up in the minority community may have information not easily accessible to others and a special stake in disseminating it. . . . For example, they may know about: (1) conditions and problems besetting their community; (2) priorities that community places on programs and needs; and (3) solutions that would likely work." Delgado, *supra* note 263, at 99-100.

one of the most important ideas expressed is entirely unspoken, communicated instead by their very presence in the meeting room."<sup>267</sup>

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<sup>267</sup> Karst, *Boundaries*, *supra* note 261, at 122. See also *id.* at 147, contrasting this view with that of Alexander Meikeljohn that "[w]hat is essential [in the town meeting] is not that everyone shall speak, but that everything worth saying shall be said."; KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 214 (1989) [hereinafter KARST, EQUAL].

Furthermore, it is not just the opportunity to communicate with others, but the self-validating and self-reflecting effects of engaging in the dialogue that make the opportunity to participate so important. 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.<sup>268</sup> "Sometimes the light bulb goes on when

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<sup>268</sup> See Peter Bachrach, *Interest, Participation, and Democratic Theory*, in NOMOS XVI: PARTICIPATION IN POLITICS 39, 47-49 (J. Roland Pennock & John W. Chapman eds. 1975) (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, *Supreme Court*, *supra* note 257, at 26; David Braybrooke, *The Meaning of Participation and of Demands for It: A Preliminary Survey of the Conceptual Issues*, in NOMOS XVI: PARTICIPATION IN POLITICS 82 (J. Roland Pennock & John W. Chapman eds. 1975).

we hear ourselves saying things we have never before articulated."<sup>269</sup> A political system that forecloses such opportunities for some groups is fundamentally flawed. This suggests another corollary to the principle of broad participation: the rules should not disadvantage, and perhaps should actively encourage, inclusion of otherwise marginalized interests.

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<sup>269</sup> Karst, *Boundaries*, *supra* note 261, at 126, n. 212; *see also id.* at 116 ("Although these messages typically are addressed to people on the other side of a cultural boundary, they also serve to raise consciousness within the group . . . . We do not have to give up being who we are in order to claim the respect, the participation, and the responsibilities that come with full inclusion in the community's public life . . . . Our views - and our points of view - are worthy of the larger community's consideration."). Some civic republican writers likewise point to the importance of the individual self-development element of civic participation. *See, e.g.,* Michelman, *Law's Republic*, *supra* note 226, at 1503.

Once again, however, there is tension between the principle of promoting deliberative decisionmaking, as understood and described by civic republicanism theorists, and the desire for an inclusive politics. Insisting that policy should rest on rational, objective information may tend to preclude meaningful participation by marginalized groups, not because they have no relevant input to offer, but because those who are setting the rules of participation cannot see or appreciate the relevance of what they have to offer.<sup>270</sup> Civic republican deliberative decisionmaking presupposes an elite sort of dialogue.<sup>271</sup> Furthermore, someone has to define what counts as a reason. "Someone" will almost certainly be those who already have a comfortable place in the civic dialogue and who may bring to it views shaped by their own expectations and values.<sup>272</sup> Despite all good intentions about an inclusive politics, it is likely that some kinds of input from some kinds of players will not be considered appropriate or useful to the task at hand.

"In fact, the very debating points that should be the most interesting - that is, the arguments that come from [the] distinctive perspectives [of

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<sup>270</sup> See, e.g., Peller, *supra* note 247; Derrick Bell and Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609, 1610 (1988); Clare Dalton, *The Faithful Liberal and the Question of Diversity*, 12 HARV. WOMEN'S L.J. 1 (1989). This point brings to mind once again McIntyre's fable of the garden. See *supra* note 127 and accompanying text. McIntyre makes the point that not only is the distinction between "weed" and "nonweed" not fixed, but that the assignment of a particular plant to one category or the other will necessarily depend heavily on who is the "ultimate arbiter of what constitutes a weed." McIntyre, *Federal Taxation*, *supra* note 142, at 181.

<sup>271</sup> Fitts, *supra* note 242, at 1660-61.

<sup>272</sup> See, e.g., Karst, *Boundaries*, *supra* note 261, at 97.

minority groups] - will be the least persuasive of all. Precisely in these cases their speech is most likely to be discounted as talk outside the bounds of 'normal discourse.' In this context the importance of 'reason-giving in public debate' lies not so much in any appeal to Reason as in the acculturating power of ritual behavior."<sup>273</sup>

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<sup>273</sup> *Id.* at 124; see also Kenneth L. Karst, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989) [hereinafter Karst, *BELONGING*]; Delgado, *supra* note 263, at 100 n.31 ("ideology can make unfamiliar claims seem outlandish or unreasonable").

Indeed, the same players and the same forces will ultimately determine what are acceptable outcomes of the deliberative process. For civic republicans, legitimacy of outcomes is defined essentially in terms of the deliberative process by which they were reached and by a requirement that a reasoned explanation be given for the choices made. Some commentators have observed that these criteria are not, in reality, very demanding.<sup>274</sup> It is easy to produce a satisfactory veneer of public-regarding rationale to support private preference outcomes,<sup>275</sup> either deliberately and disingenuously,<sup>276</sup> or because of psychic protection mechanisms.<sup>277</sup>

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<sup>274</sup> See Gey, *supra* note 226, at 861 n. 204 ("A cynic might suggest that these requirements do not effectively limit anything a civic republican majority might want to do, since the existence of an appropriate dialogue and 'a broader public good' is judged by the victorious participants themselves. If the participants in the process all behave according to republican principles, they will invariably believe that their deliberations are 'well-functioning,' because if they believed otherwise they would have altered the structure of the deliberations . . . . The system's self-justification mechanism is impregnable.").

<sup>275</sup> See, e.g., Powell, *supra* note 253, 1710 ("Republicanism's 'good' is scarcely distinguishable from pluralism's aggregation and balancing of interests, because [it] gives us no criterion for determining the justice of 'deliberative' political decisions other than the requirement that political actors articulate a public rationale for their positions. That is a requirement that the histories of legislation and of minimal rationality review would suggest is formal and empty.")

<sup>276</sup> Even Cass Sunstein has noted that "[s]elf-interested motivations may merely be concealed; the requirement of deliberation can be an invitation to hypocrisy and deceit." Sunstein, *Beyond*, *supra* note 226, at 1545 n.21.

<sup>277</sup> See, e.g., Easterbrook, *supra* note 242, at 330 ("When the conflict between self and virtue is irreconcilable, cognitive dissonance leads people to conclude that civic virtue and personal ends coincide. Once this mental transformation occurs, people are impervious to rational argument. Faction's power thus does not depend on cynicism. Not only the factions themselves but also those who serve

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their interests in legislatures come to believe that their goals are aligned with the public interest."); Dalton, *supra* note 270, at 1 (noting that it is difficult, even for those "who are . . . prepared to make space for [new perspectives] in their hearts and minds" to incorporate the outsiders' views because "[i]t involves recognizing that the entire perceptual and conceptual apparatus one has previously relied on for knowledge about the world may be faulty . . . . And since it is in relation to this interior map that one locates and identifies oneself, it involves being ready to meet some unfamiliar and sometimes unwelcome images of oneself."); Macey, *supra* note 242, at 1673; Karst, EQUAL, *supra* note 267, at 11.

The tension between valuing deliberation and valuing inclusive participation can be resolved if we discard civic republicanism's belief in a universal, unitary view of public interest to be arrived at through this process, and if we discard the notion that all the participants will or should see the world in the same way, even at the end of the process. The principles can be pursued in tandem if we define desirable input into deliberation as whatever the participants, speaking from their distinct experiences and perspectives, think is important for them to say and for others to hear. This is not the same as accepting that what everyone brings to the discussion will necessarily be desire for gain at the expense of others.

"It is possible for persons to maintain their group identity and to be influenced by their perceptions of social events derived from their group-specific experience, and at the same time to be public spirited, in the sense of being open to listening to the claims of others and not being concerned for their own gain alone. It is possible and necessary for people to take a critical distance from their own immediate desires and gut reactions in order to discuss public proposals. Doing so, however, cannot require that citizens abandon their particular affiliations, experiences, and social location . . . . having the voices of particular group perspectives other than one's own explicitly

represented in public discussion best fosters the maintenance of such critical distance without the pretense of impartiality."<sup>278</sup>

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<sup>278</sup> Young, *Polity*, *supra* note 264, at 257-58.

But it does caution against requiring, as a ticket of admission to the discussion, certification by those who are already secure participants that what one has to say is a worthwhile addition to the debate. A large measure of what we might aspire to accomplish in the processes of public deliberation is enlargement of our capacity to recognize and appreciate what is relevant. "What will contribute more to the exploration of our common concerns and the resolution of our common problems than the enrichment of our understanding of what counts as reason?"<sup>279</sup>

PRINCIPLE 6: *Ensuring Clear Rules*

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<sup>279</sup> Karst, *Boundaries*, *supra* note 261, at 149.

Another foundational principle for rules, including tax rules, that affect political participation is that they ought not by their explicit terms or in their application, exclude on the basis of official disapproval of the viewpoint of the speaker.<sup>280</sup> While there is little likelihood that such distinctions will be made on the face of the rules, rules that are not drawn in reasonably clear terms raise a distinct danger of uneven application and subjective interpretation.<sup>281</sup> Particularly in the context of regulation that touches on political speech, it is essential that those who are bound have a reasonably confident grasp of where the edges are as well as reasonable confidence that those who are charged with assessing compliance are bound by the same understanding. Even if the exercise of official discretion is not shaped by personal or political predilections, loose definitions and unclear mandates (particularly when coupled with serious consequences for infractions) encourage overcaution and chill more expression by their vague threat than they ought to by their terms.

Thus, there exists a catalogue of principles that have to do with aspirations for the political process, the essential characteristics of "charity," ideas about the appropriate role of various players, particularly charitable organizations, in the political process, and the role that tax law plays in shaping behavior. These

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<sup>280</sup> This is a basic premise of first amendment doctrine. Even when what is at issue is the distribution of benefits, rather than direct regulation of speech, viewpoint-based distinctions are out of bounds. See *Taxation With Representation*, 461 U.S. at 544; *Bullfrog Films v. Wick*, 847 F.2d 502, 509 (1988).

<sup>281</sup> This has been a criticism of the section 501(c)(3) advocacy constraints over the

principles ought, at the very least, to be on a par with "neutrality" as elements of the policy foundation upon which to rest particular rules for the tax treatment of political advocacy activities. If they pull in a different direction than neutrality, they probably ought to prevail.

#### THE BEGINNING OF A BETTER WAY

The current rules are not well matched to these underpinning principles. Building from the principles up would lead to modification of the constraints on section 501(c)(3) organizations and perhaps to the rules affecting other entities as well. Taken together, the guiding principles suggest removing the constraints on lobbying by section 501(c)(3) organizations - at least, the public charities among them - and removing the obstacles that the current rules create for affiliation with a structurally and financially separate political action arm that engages in election-related activity in accordance with the FECA and section 527.

As a starting point, the presumption against restriction on political speech counsels that limitations ought not to be part of the framework unless other relevant policies exert a sufficiently strong countervailing pull. There is no such countervailing pull here. Legislative activity is not inherently inconsistent with "charity;" in fact, promotion of discussion on issues of public importance is, and always has been, an important facet of section 501(c)(3).<sup>282</sup> Concerns about the possibility of misuse of charitable vehicles for the pursuit of private interests or as an avenue to distort political processes with the influence of wealth can be assuaged in less intrusive ways, and the other identified principles are better served by removing the constraints than by keeping them.

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<sup>282</sup> See *supra* note 215 and accompanying text.

It would be entirely possible to construct rules that both remove the constraints and achieve neutrality in the sense of accurate measurement of net income.<sup>283</sup> To do so, the rules would have to remove the "no substantial part" and section 501(h) limitations, but require that the organization fund its legislative advocacy only with taxable dollars. Thus, the rules would provide that lobbying dollars be taxed either at the organization level or in the hands of donors, much in the way that the rules on deductibility of trade association dues are now arranged.<sup>284</sup> The goal of achieving the equilibrium variety of neutrality (and, for that matter, nonsubvention) would also be furthered by eliminating the substantive constraints on lobbying while requiring that such activities be carried on with taxable dollars, particularly now that business lobbying is largely nondeductible.<sup>285</sup>

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<sup>283</sup> This assumes either that we can resolve the questions about how to measure net income accurately or that we decide to ignore them. *See supra* notes 124-129 and accompanying text.

<sup>284</sup> The dues deduction rules are not a perfect model for this approach. First, where details of the dues deduction provisions are designed to reflect characteristics of the business deduction context, parallel rules would not make sense in the context of charitable organizations. For example, the rules on exemption from the notification of members requirement are based on being able to show that (most) members would not otherwise be deducting the dues under section 162 in any case. Second, imperfections in the dues deduction provisions, *see supra* note 145 and accompanying text, ought not to be imported into the rules for charitable organizations.

A 1993 proposal to the Subcommittee on Select Revenue Measures of the House Ways and Means Committee (characterized by an aide of subcommittee chairman Charles Rangel as "a lot of old hash") would have imposed a 30% tax on the lobbying expenditures of exempt organizations. It would, however, have left the constraints in place. Kristin A. Goss, *House Panel Weighs 2 Proposals Aimed at Curbing Charity Lobbying*, CHRON. OF PHILANTHROPY (Sept. 21, 1993).

<sup>285</sup> Cooper suggested in 1968 that a better way of balancing the tax treatment of

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business and charitable organization lobbying than disallowing the business deduction would be to remove the constraints on charitable organizations. Cooper, *supra* note 100, at 842, 845-46.

Observations about the selective exclusion of charitable organizations from political debate that arose in the context of the discussion of neutrality<sup>286</sup> are equally apt when evaluating the rules in light of the broader guiding principles. In fact, the significance of that exclusion is heightened when the discussion is thus expanded. The principle of promoting deliberation and the principle of promoting wide-based participation in political decisionmaking processes both argue for removing the constraints that function to keep charitable organizations out of the debate. Indeed, they argue for overriding the neutrality that would arguably be served if the constraints were lifted but charitable organizations were required to lobby with nondeductible dollars. Both principles, but particularly the participation principle, suggest lifting the constraints and allowing charitable organizations to lobby even with deductible funds, as a means of affirmative support for charitable advocacy.<sup>287</sup>

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<sup>286</sup> See *supra* notes 141-142 and accompanying text.

<sup>287</sup> All of the arguments for lifting the explicit limits on political advocacy activities also support repeal of the "action organization" regulations, which are an alternative pathway to the same results generated by the "no substantial part" limit on lobbying and the election campaign intervention bar. See *supra* notes 147-49 and accompanying text.

*The Participation Principle*

The threshold requirements for qualification as a section 501(c)(3) charity generally limit eligibility to organizations that serve broad interests and disadvantaged groups.<sup>288</sup> Inherent in the very diffuseness and disadvantage that define charitable purposes are obstacles to organization and expression that operate to keep these viewpoints largely out of the arenas of public policymaking. The disadvantaged and indefinite groups that have been identified as the proper focus of "charity" are interests that habitually lose in the policy process either because they lack the power to get their concerns on the public agenda,<sup>289</sup> or because 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,

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<sup>288</sup> See *supra* notes 18 and 195-210 and accompanying text. These observations apply to organizations that meet the criteria for exemption under the section 501(c)(3) definition of "charitable" and that satisfy one of the public support formulas. See *supra* note \_\_. They do not necessarily apply to organizations that qualify for exemption under section 501(c)(3) as educational, religious, or scientific organizations, unless they also meet the definition of "charity" and satisfy the public support formulas. See Chisolm, *Exempt Organization Advocacy*, *supra* note 31, at 294-99.

<sup>289</sup> A. DOBELSTEIN, *POLITICS, ECONOMICS AND PUBLIC WELFARE* 166-67 (1980); ELMER SCHATTSCHNEIDER, *THE SEMI-SOVEREIGN PEOPLE* 71 (1960) ("Some issues are organized into politics while others are organized out."), Richard D. Parker, *The Past of Constitutional Theory - And Its Future*, 42 OHIO ST. L.J. 223, 250 (1981) (criticizing John Hart 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"); Craig Jenkins, *Nonprofit Organizations and Policy Advocacy in THE NONPROFIT SECTOR: A RESEARCH*

among other things, on the group's prestige and the extent to which the decisionmakers belong to or identify with the group.<sup>290</sup> "Charitable" classes are notoriously short on prestige, and policymakers, seeing through the lens of their own position and experience,<sup>291</sup> are unlikely to consider themselves to have much in common with these groups.

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HANDBOOK 296, 307 (Walter W. Powell, ed., 1987).

<sup>290</sup> Truman, *supra* note 233, at 506-07.

<sup>291</sup> See *supra* notes 277 and accompanying text. [x-ref to inclusive politics stuff in delib and participation sections] 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 charitable client populations but who are likely to represent an entirely different, though not necessarily unsympathetic, perspective. See Cigler & Loomis, *supra* note 236, at 13-14 (noting also that service provider groups face fewer obstacles to organization than client groups, particularly when clients are poor, mentally ill, or otherwise disadvantaged).

Public choice theory predicts that section 501(c)(3)'s disadvantaged groups and large and indefinite classes will likely be underrepresented in the political marketplace. The formation and successful mobilization of interest groups is affected by the incidence of transaction costs and the extent to which the group must overcome free riding.<sup>292</sup> 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, public choice theory predicts that interest group activity will be skewed in favor of narrow, well-defined groups, rather than large, indefinite classes.<sup>293</sup>

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<sup>292</sup> See Chisolm, *Exempt Organization Advocacy*, *supra* note 31, at 255; McFarland, *supra* note 237, at 327-28; Benson & Engen, *supra* note 240.

<sup>293</sup> See Eskridge & Frickey, *supra* note 233, at 704-05 (summarizing the views of Richard Posner and others); Jenkins, *supra* note 289, at 303.

Public choice theory also posits that legislators supply legislation in exchange for increased likelihood of reelection, so 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 proposition unlikely to be organized. The prediction that follows is 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 supply public goods or implement broadly held notions of distributive justice, such as civil rights laws.<sup>294</sup> These predictions are borne out empirically, albeit imperfectly. While legislative output is driven by a shifting mix of response to organized pressure and independent exercise of legislators' ideology, the pressure is exerted by groups that disproportionately represent upper-class, upper-middle-class, and business interests.<sup>295</sup>

A conclusion that certain kinds of interests are underrepresented, even coupled with a recognition of considerable coincidence between groups that tend

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<sup>294</sup> Eskridge & Frickey, *supra* note 233, at 705-06. See also Jenkins, *supra* note 289, at 309, *citing* THEODORE LOWI, *THE POLITICS OF DISORDER* (1972).

<sup>295</sup> See Farber & Frickey, *supra* note 233, at 886-87, 906-08 (describing a number of empirical studies); Al Wilhite, *Union PAC Contributions and Legislative Voting*, 9 *J. of Labor Research* 79, 79 (1988); *Can You Buy a Congressman?*, 313 *THE ECONOMIST*, Nov. 18, 1989, at 25. See especially KAY SCHLOZMAN AND JOHN TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 666-87, 107-19 (1986).

to be underrepresented and groups that define charitable purpose, is not enough to justify special support for charitable organizations' legislative advocacy through favorable tax rules. Aiming rules at the organizational level (that is, letting organizations use deductible contributions for unlimited lobbying rather than, for example, making lobbying expenses deductible for individuals) makes sense only if the organization serves some useful function in facilitating participation and correcting for underrepresentation.

Dennis Chong has noted the vital role of organization in giving meaning and effect to participation. Channeling advocacy through an organization is not only instrumental ("The organization has the freedom and recognition to raise issues that I, as an individual, do not have the courage or time for"),<sup>296</sup> but also adds an important dimension to the self-expression and self-realization functions of participation. People join in the advocacy efforts of organizations "to voice their convictions, affirm their efficacy, share in the excitement of a group effort, and take part in the larger currents of history."<sup>297</sup> Iris Young proposes that a "democratic public . . . should provide mechanisms for the effective representation and recognition of its constituent groups that are oppressed or disadvantaged," including support for "self-organization of group members so that they gain a

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<sup>296</sup> DENNIS CHONG, *COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT* 74 (1991).

<sup>297</sup> *Id.*

sense of collective empowerment and a reflective understanding of the collective experience and interests in the context of society."<sup>298</sup>

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<sup>298</sup> Young, *Polity*, *supra* note 264, at 261. Young would apply this principle to "social groups," defined by affinity, shared sense of history, modes of reasoning, and values, but not to "associations," which she defines as "a collectivity of people who come together voluntarily." While the underrepresented social groups Young is concerned with would likely fall within section 501(c)(3), many section 501(c)(3) groups would not be those for whom Young would provide the formal mechanisms of group-based representation she proposes in her article. *Cf.* Michelman, *Law's Republic*, *supra* note 226, at 1531 (recognizing the contribution of group-based activity to self-realization, but not linking that mode of political dialogue to participation in the arenas of formal political decisionmaking).

In more instrumental terms, organization may be necessary for the successful pursuit of advocacy goals. Chong points out, for example, that "[c]ivil rights, women's rights, peace, and other collective goals . . . are public goods that can be produced only if large numbers of people work to achieve them . . . . No individual could supply the public good for the benefit of the entire group, and, more importantly, no average contributor could significantly affect the likelihood that the public good would be produced; rather, a collective effort [is] necessary to obtain a group objective."<sup>299</sup> Mobilization of interests requires political entrepreneurship and financial patronage;<sup>300</sup> entrepreneurship and patronage, in turn, virtually mandate organization.

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<sup>299</sup> Chong, *supra* note 296, at 4.

<sup>300</sup> See Jenkins, *supra* note 289, at 298-300.

The principle of promoting widespread participation, with particular attention to inclusion of the traditionally excluded, is not served by giving special tax favors to section 501(c)(3) organizations unless they can fairly claim to speak for those excluded interests. Many organizations have no formal mechanism of accountability to those in whose interests they claim to be acting. Even membership organizations that are technically accountable to their members are unlikely to involve members actively in selecting positions on issues or in choosing strategies by which to pursue them.<sup>501</sup> The staff of "public interest" organizations tend to be white, middle class, more highly educated and more politically liberal than the public at large.<sup>502</sup> 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

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<sup>501</sup> Hayes describes a 1977 study which assessed the opportunities to influence organizational policy provided by public interest lobbies to their members. Michael T. Hayes, *Interest Groups: Pluralism or Mass Society*, in INTEREST GROUP POLITICS 110 (Allan J. Cigler and Burdett A. 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. Berry makes a similar observation about lobbying groups in general, noting that they are "almost always oligarchic," with "[a] small cadre of workers invariably seem[ing] to dominate." Berry, *supra* note 152, at 92. "Still, members . . . do have a great deal of indirect influence . . . . Members can 'vote with their feet' by leaving the group if they don't like what the organization is doing . . . . Members join groups because they agree strongly with its goals." *Id.* at 95.

<sup>502</sup> See Hayes, *supra* note 301, at 110; McFarland, *supra* note 237, at 340; Jenkins, *supra* note 289, at 310-11; Chisolm, *Exempt Organization Advocacy*, *supra* note

represented group and the leaders of organizations which focus on the distressed and disadvantaged, or on victims of discrimination. But 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 underrepresentation.<sup>303</sup> And despite the fact that charitable organization advocacy efforts tend to be staff driven, and charitable organization staff not particularly representative of charitable organization clientele, experience shows that charitable organizations can be capable of valuing and effectively promoting the interests of those they purport to represent.<sup>304</sup>

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31, at 279-80.

<sup>303</sup> See Hayes, *supra* note 301, at 123; Schlozman & Tierney, *supra* note 295, at 60-63.

<sup>304</sup> See McFarland, *supra* note 237, at 341; ROBERT MNOOKIN, IN THE INTEREST OF CHILDREN 12, 515 (1985); Schlozman & Tierney, *supra* note 295, at 33-34.

Still, if charitable organization advocacy efforts are professional and centralized, using tax rules to encourage the activity will not necessarily promote participation in the sense of inclusion and voice that writers such as Young, Karst, and Delgado propound.<sup>505</sup> However, if the liberalization extends to grass roots activity as well as direct lobbying, it may indeed promote participation of the sort and for the reasons these writers value. Advocacy designed to disseminate information widely to people to whom an organization believes it might be of interest and to encourage and facilitate political expression on the part of those people might well promote inclusion and expression of voices otherwise unheard. To the extent that organizational leaders are not of the audience reached, or that the message does not ring true, its recipients will ignore it, or perhaps be motivated to develop and express an alternative.

There are other reasons why liberalization should be equally, and maybe even especially, extended to the rules relating to grass roots lobbying. Taking advocacy positions to the people provides a check on capture of "the public interest" by the elites and professionals who appear to be necessary for organization and effective action. Connecting the information and expertise an organization provides to legislators to evidence of popular interest enhances the effectiveness of the organization's direct legislative efforts.<sup>506</sup> Furthermore,

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<sup>505</sup> See *supra* notes \_\_ and accompanying text.

<sup>506</sup> See Berry, *supra* note 152, at 150-51 ("Lobbyists understand intuitively what political scientists have demonstrated empirically; members of Congress are more

charitable organization advocacy positions are typically motivated by moral concern rather than selective self-interest;<sup>307</sup> encouraging citizens to connect moral position explicitly with political avenues would seem to diminish apathy and promote civic virtue of the sort sought by the civic republican theorists<sup>308</sup> by engaging the populace in the pursuit of the public interest.

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influenced by their constituents than by Washington lobbies"); Jenkins, *supra* note 289, at 308, 314.

<sup>307</sup> See Jenkins, *supra* note 289, at 311; Schlozman & Tierney, *supra* note 295, at 33-34. 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." *Id.*

<sup>308</sup> See *supra* notes 255-59 and accompanying text.

If people contribute through expressions and exchanges they do not perceive as political, they may not have the experience of leaving a personal domain, marked by individualized assessments, for a sphere that is shaped by collective ends. Moreover, because these participants are not galvanized by the need for decision or action, they may not fully consider the perspectives of others.<sup>309</sup>

*The Deliberative Ideal*

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<sup>309</sup> Kathryn Abrams, *Law's Republicanism*, 97 YALE L.J. 1591, 1597 (1988).

At the center of the promotion of deliberative decisionmaking principle is the idea that public policy should be the result of carefully considered, community-regarding contemplation of problems and possible solutions, rather than the prize in a contest among inward-looking, self-serving preferences. Logically, a threshold condition for thoughtful, informed consideration of how policy will affect the community at large is access on the part of the policy makers to as complete an array as possible of information and perspectives. To the extent that some kinds of information and some perspectives are chronically absent from the deliberations, the ideal of deliberative decisionmaking is not well served. If charitable organizations are likely to introduce information and perspectives that are otherwise not in the dialogue, then encouragement of their participation is consistent with the principle of promoting deliberative decisionmaking. Furthermore, if the information and perspectives that charitable organizations bring to the debate tend to be driven by community-regarding rather than self-serving concerns, then that is another reason why expanded inclusion of these organizations could be expected to contribute to approaching the deliberative ideal. There is substantial evidence that the latter condition is met. A number of studies, trying to identify what makes people support advocacy efforts that are by definition particularly vulnerable to free riding,<sup>510</sup> have shown that support for

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<sup>510</sup> See *supra* notes 292-93 and accompanying text.

charitable advocacy is driven by moral vision, public service ideology, and sense of conscience rather than pursuit of personal gain.<sup>511</sup>

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<sup>511</sup> Jenkins, *supra* note 289, at 303 (surveying the studies and describing the phenomenon). These studies counter Mancur Olson's theory that organizations advocating collective goods would have to rely on selective individual incentives to draw contributions.

*Id.*

Some have expressed concerns that removing constraints on charitable organizations' lobbying would simply invite those organizations to become like any other "special interest," squabbling for a bigger share of the public resources pie, urging government to increase its expenditures rather than "lessening the burdens of government" as they ought to, and demeaning themselves in the process.<sup>312</sup> But those arguments do not hold up very well,<sup>313</sup> and we have seen that charitable

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<sup>312</sup> 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 215, at 2963.

<sup>313</sup> See, e.g., Jane H. Mavity & Paul N. Ylvisaker, *Private Philanthropy and Public Affairs*, in 2 COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, RESEARCH PAPERS 795, 828 (1977), 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

advocacy tends to be driven more by moral conviction than by self-serving distributive goals. Furthermore, it is hard to understand why, if the goal is to dampen self-serving distributive politics, that goal should be pursued by selectively excluding those who speak for a share for the disadvantaged or for a broad public, rather than by setting generally applicable rules of engagement that might enable the process across the board.

There is another dimension to the concern about encouraging charitable lobbying. Jeffrey Berry has documented the exponential expansion of lobbying organizations in the twenty years between 1960 and 1980, noting that in the 1970s, citizen groups grew from virtual nonexistence (at least at the national level) into a highly visible political phenomenon.<sup>314</sup> More and more, groups have tended to form around a single issue, giving rise to a perception among politicians,

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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.

Furthermore, any direct revenue loss that results from extending exemption and deductibility to politically active organizations is probably not significant, and would not be, even if the limitations were liberalized. See Theodore L. Garrett, *Federal Tax Limitations on Political Activities of Public Interest and Educational Organizations*, 59 GEO. L.J. 561, 581 (1971); Note, *Charitable Lobbying Restraints and Tax Exempt Organizations: Old Problem, New Directions?*, 1984 Utah L. Rev. 337, 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*, at 581-82; Note, *Political Speech of Charitable Organizations Under the Internal Revenue Code*, 41 U. CHI. L. REV. 352, 374 (1974).

scholars, and the public at large that "the advocacy explosion has paralyzed policymaking."<sup>515</sup> Further, as people have organized around particular causes and around particular group identities (even disadvantaged group identities) and as the poor have become an identifiable minority (instead of "most of us," as it was in the New Deal era), advocacy on behalf of those causes and groups has begun to look like special interest advocacy rather than representation of the interests of the community as a whole.<sup>516</sup>

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<sup>514</sup> Berry, *supra* note 152, at 20-23.

<sup>515</sup> *Id.* at 17. See also Jenkins, *supra* note 289, at 311 (noting that, because charitable advocacy positions are premised on moral concerns, they are less amenable to compromise).

<sup>516</sup> See E.J. DIONNE, *WHY AMERICANS HATE POLITICS* 142 (1991).

The worry, then, is that taking the limits off of charitable organization lobbying and, particularly, grass roots lobbying, would add heat, but little light, to deliberation and design of public policy.<sup>317</sup> To avoid this problem, Miriam Galston has proposed that charitable organizations ought to be given free rein to contribute reasoned information to legislative deliberation, but remain restricted with respect to grass roots lobbying. The former, she observes, promotes the deliberative ideal; the latter constitutes "pressure politics," from which legislators ought to be insulated in the interest of deliberative policymaking.<sup>318</sup>

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<sup>317</sup> Cooper made this point in connection with limits on grass roots lobbying in general. Cooper, *supra* note 100, at 849.

<sup>318</sup> Galston, *supra* note 81, at 1339.

But to resolve the tension between the principles of promoting deliberation and promoting participation in this way is to sacrifice inclusion for the sake of insulation. The insulation would be lopsided, as it is under the current framework, because grass roots efforts of economic interests could be taxed, but not blocked.<sup>319</sup> Limiting charitable organizations to offering reasoned input, supported by verifiable data<sup>320</sup> has the potential to further this skew. More importantly, information about what the polity values should not too quickly be characterized as "pressure" that detracts from deliberation. Value preferences are not always tied to verifiable data, but they are nevertheless a legitimate part of the information that a deliberative legislative process ought to take into account. As Stephen Gey has pointed out, the process leading to some of the most significant and noble legislation of recent times (notably, the Civil Rights Act of 1964) can hardly be characterized as cool-headed, reasoned deliberation and debate.<sup>321</sup>

### *Modifying the Election Campaign Restrictions*

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<sup>319</sup> See *supra* notes 152-53 and accompanying text. See also Cooper, *supra* note 100, at 814-15 ("The inherent advantages of business are more pronounced in the grassroots lobbying area than in any other area where business and personal interests collide . . . . The sums that can be usefully spent on grassroots lobbying are unlimited, and a disparity in financial resources begins to operate to the immense disadvantage of nonbusiness individuals.").

<sup>320</sup> Galston, *supra* note 81, at 1343-44. This approach also raises the difficulties associated with identifying "reason" and "verifiable data." See *supra* notes 243-49 and accompanying text.

<sup>321</sup> Gey, *supra* note 226, at 852. For a blow-by-blow account of the passage of the Civil Rights Act of 1964, see Eskridge & Frickey, *supra* note 233, at 2-36.

Similar reasoning supports the idea that charitable organizations ought to be permitted to link their policy agendas to election campaigns. The expressive and self-realization dimensions of the principle of inclusive participation are no less implicated in the election context than in the legislative context,<sup>322</sup> and the same characteristics that give charitable organizations a unique capacity for facilitating participation of underrepresented groups in policy deliberations equip them to play a similar role in encouraging the linking of the personal to the political in the electoral context.<sup>325</sup> Furthermore, if it is worthwhile to encourage charitable organizations' legislative role, the impact on that role of rules that fence the same organizations entirely out of election campaigns ought to be considered.

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<sup>322</sup> See Karst, *Boundaries*, *supra* note 261, at 122.

<sup>325</sup> See *supra* notes 296-99 and accompanying text.

In tandem with the increase in the number of lobbying organizations has come proliferation of political action committees and vast expansion of PAC contributions to congressional campaigns.<sup>324</sup> There is disagreement as to whether PAC money buys votes or merely buys access to legislators; the reality seems to be that what PAC money buys depends on the nature of the issue and the position of the legislator.<sup>325</sup> Few would argue that PAC money buys nothing - it seems fairly clear that PAC money, at the very least, buys access.<sup>326</sup> PACs operate primarily as adjuncts to the lobbying efforts of their organizers;<sup>327</sup> contributions tend to be directed largely at key committee members,<sup>328</sup> and a large part of the influence

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<sup>324</sup> DAVID B. MAGLEBY & CANDICE J. NELSON, *THE MONEY CHASE: CONGRESS AND CAMPAIGN FINANCE REFORM 72-97* (1990).

<sup>325</sup> Chuck Alston, *As Clean-Air Bill Took Off, So Did PAC Donations*, CONG. Q. WKLY. REP., Mar. 17, 1990, at 811-18; Laura Langbein, *Money and Access: Some Empirical Evidence*, 48 J. OF POL. 1052-61 (1986); Thomas Stratman, *What Do Campaign Contributions Buy?: Deciphering Causal Effects of Money and Votes*, 57 S. ECON. J. 606-20 (1991).

<sup>326</sup> See Magleby & Nelson, *supra* note 325, at 77-79 (studies of the relationship between PAC contributions and congressional voting draw mixed conclusions, but "as nearly everyone agrees, contributions ease access to congressional policymakers"); LARRY J. SABATO, *PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES 133* (1984) (access is the goal of most interest groups); Berry, *supra* note 152, at 162-64, 172 (giving examples of PAC money influence on access and outcomes).

<sup>327</sup> Larry J. Sabato, *PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES 122-40* (1984); Berry, *supra* note 152, at 23.

<sup>328</sup> See, e.g., Aliss J. Rubin, *Generosity of Health PACs Rises As Overhaul Approaches*, CONG. Q. WKLY. REP., Sept. 25, 1993, at 47; Chuck Alston, *As Clean-Air Bill Took Off, So Did PAC Donations*, CONG. Q. WKLY. REP., Mar. 17, 1990, at 811; Thomas Stratmann, *Are Contributors Rational? Untangling Strategies of Political Action Committees*, 100 J. POL. ECON. 647, 651 (1992); *Can You Buy a*

they exert may be hidden. "The more invisible the issue, the more likely that PAC funds can change or produce Congressional votes on it . . . . A corollary of this invisibility rule might be that PAC money has more effect on the early stages of the legislative process, such as agenda setting and votes in subcommittee meetings, than on later and more public floor deliberations."<sup>329</sup>

Completely barred from direct or indirect affiliation with a PAC, charitable organizations arguably lose an important mechanism for increasing the effectiveness of their legislative advocacy. Jeffrey Berry proposes that "[p]olitical action committees further institutionalize inequities between those who have

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*Congressman?*, ECONOMIST, Nov. 18, 1989, at 25; Langbein, *supra* note 326, at 1054.

<sup>329</sup> Sabato, *supra* note 328, at 135. See also Magleby & Nelson, *supra* note 325, at 78-79 ("[D]ecisions about legislation are often made out of the public eye and off the public record. There is simply no way to measure the influence of PAC contributions in such instances - as when a member decides not to offer an amendment that would adversely affect an organization whose PAC made a contribution to his or her campaign."). *Id.* at 79.

greater wealth and highly effective political representation and those who have neither."<sup>330</sup> Barring the representation of interests already compromised in the processes of policymaking would seem to push the inequity even further. As Robert Dole once observed, "there aren't any Poor PACs or Food Stamp PACs or Nutrition PACs or Medicare PACs."<sup>331</sup>

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<sup>330</sup> Berry, *supra* note 152, at 218.

<sup>331</sup> Quoted in Elizabeth Drew, *Politics and Money - I*, NEW YORKER 147, Dec. 6, 1982, at 14. Today, he would be wrong at least about the Medicare PACs.

At the same time, election campaign intervention is different from issue advocacy. Pursuit of partisan political objects is not within traditional common law notions of charity, although the common law roots of the charitable exemption seem to recognize a distinction between political means and political ends.<sup>332</sup> Tax exemption law, which, as a general rule, also assesses charitability on the basis of ends rather than means, departs from that rule when it comes to political activity. The departure is justified.

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<sup>332</sup> See *supra* notes 212-13 and accompanying text.

In the context of legislative advocacy, it has been argued that the difficulty of establishing a clear connection between means and ends is reason enough to apply special rules to lobbying - it is easier to see that an organization's goal of combatting hunger is served by running a soup kitchen than to see that it is served by taking a particular position on food stamp legislation. But if the organization's charitable goals are well explicated, the task of assessing the connection between the advocacy activity and the charitable goal is no harder than assessing the consistency of nonadvocacy activities with the organization's identified charitable ends.<sup>333</sup> The argument is more difficult to answer when election intervention is the means at issue. Although the connection between food stamp legislation and the fight against hunger may be reasonably traceable, support for a candidate perceived to be sympathetic to an organization's charitable agenda is far more tenuously linked. Support for a candidate helps to elect not only her position on food stamps, but also her predilections on a vast array of issues, many as yet unrevealed. Thus, the difficulty of establishing the necessary link between the organization's election-related activity and its charitable ends may help to make the case for differential treatment of campaign intervention as a strategy to achieve charitable goals. But even if working toward the election or defeat of a particular candidate is too loosely linked to charitable goals and must therefore be seen as a means to the noncharitable object of electing a particular person or party, we need

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<sup>333</sup> See Simon, *Foundations*, *supra* note 180, at 69.

not ban all such activity by section 501(c)(3) organizations to maintain the integrity of the charitable exemption.

The heart of the prohibition on campaign intervention by section 501(c)(3) organizations should be maintained. The rationales that might be offered for extending the tax subsidy to this activity are balanced by legitimate reasons for declining to do so. But declining to subsidize campaign-related expression does not require the total ban of the present rule.<sup>334</sup> It can be accomplished by requiring that the section 501(c)(3) organization's campaign-related activity be carried on by a structurally and fiscally separate organization that does not qualify for either level of subsidy. This arrangement would parallel the separation approved in *Regan v. Taxation With Representation*<sup>335</sup> to prevent the expenditure of subsidized while avoiding further penalty, but only if the section 501(c)(3) organization is free to identify with the affiliate organization and fully control its agenda and activities. Aside from formal and fiscal separation, there should be no restriction of the affiliation between the section 501(c)(3) organization and its political action committee. Neither sharing facilities, governing board, and personnel with the political committee (so long as costs are properly allocated and relationships fully disclosed), nor controlling the agenda and activities of the affiliate should result in the imputation of the PAC's activities to the section

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<sup>334</sup> I have argued elsewhere that the current rule is constitutionally suspect, and the the scheme proposed here would both correct the constitutional defect and represent a superior policy. Chisolm, *Politics and Charity*, *supra* note 98.

501(c)(3) organization.<sup>335</sup> This approach would entirely resolve whatever uneasiness we might feel about spending one taxpayer's money to promote another's political preferences or about making government expenditures, even in the most indirect manner, for the conduct of political contests.

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<sup>335</sup> 461 U.S. 540 (1983).

<sup>336</sup> In addition, section 501(c)(3) organizations should be prohibited from using deductible funds to pay for solicitation or administrative costs on behalf of a PAC. There are several ways the tax rules could be arranged to achieve this result. See Chisolm, *Politics and Charity*, *supra* note 98, at 353-58.

To implement this scheme effectively, and to promote the principle that legal rules, particularly those that affect political speech, should be clearly drawn requires that the rules give clear signals about which activities need to be carried out by the political arm. This can be accomplished by defining participation and intervention to encompass only activities that are "contributions" or "expenditures" for purposes of the Federal Election Campaign Act.<sup>337</sup> As construed in *Buckley v. Valeo*,<sup>338</sup> these terms include only direct campaign contributions and expenditures for "communications that in express terms advocate the election or defeat of a clearly identified candidate."<sup>339</sup> Adopting this definition of campaign intervention

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<sup>337</sup> 2 U.S.C. § 431(8)-(9) (1988).

<sup>338</sup> 424 U.S. 1 (1976).

<sup>339</sup> *Id.* at 44.

would draw a clear line in place of what is now a rather uncertain division between election campaign participation, on the one hand, and permitted issue advocacy and activities that promote informed individual participation in the electoral system, on the other.<sup>540</sup>

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<sup>540</sup> The Service's position is that, because the purposes behind the definition of "candidate" are different in the context of the FECA and section 501(c)(3), transplanting the FECA definitions into the (c)(3) context would not be a good idea. 1992 EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM 408. Similarly, the Service believes that adopting the FEC "express advocacy standard in the context of section 501(c)(3) "would do violence to the statute." See also remarks of Marcus Owens in *Mini-Program: Political Activities of Exempt Organizations, PACs and IRC Section 527: An Overview of IRS and Federal Election Commission Rules, Held on May 8, 1993, in Washington, D.C.*, 8 EXEMPT ORG. TAX R. 267, 274 (1993).

Although letting charitable organizations establish affiliated PACs may serve the principle of promoting participation in policymaking processes, this rule change might run counter to the principle of promoting deliberation. Clearly, this proposal works against the insulation of legislators from political pressure - that is, after all, the basis for the argument that it makes participation more meaningful. Still, to the extent that charitable organizations are more likely than others to bring public-regarding views to the table,<sup>341</sup> modifying the rules to enhance the impact of their views arguably promotes the search for public-regarding outcomes. Even if it does not, the answer is not to limit a subset of participants - the subset that is likely to be least heard already. The answer to pressure politics is not in the Tax Code. If anywhere, it is in campaign finance regulation, institutional structures, legislative ethics rules, and lobby registration and disclosure rules. There is no reason why these mechanisms, universally applied, should not be the focus of efforts to turn down the heat and turn on the light.<sup>342</sup>

#### *Avoiding the Promotion of Private Agendas*

A final consideration is that easing the constraints on legislative advocacy and campaign intervention may heighten the possibility that charitable

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<sup>341</sup> See *supra* notes 307 and 311 and accompanying text.

<sup>342</sup> See Berry, *supra* note 152, at 220 ("Worrisome as the spiraling growth of interest group politics may be, it is not desirable to have the government trying generally to inhibit the efforts of various constituencies to find more effective representation in the political system."); Dahl, *Ills*, *supra* note 241, at 448.

Lifting the constraints on political advocacy will also mitigate, though not entirely cure, the problems of uneven application of the rules, which seem

organizations will become the vehicle by which private agendas are pursued or through which amassed wealth is able to distort political processes and outcomes.

Fortunately, there is no need to decide which of the guiding principles should trump others that pull in another direction, because the constraints can be lifted as proposed while still guarding against these two concerns, thereby constructing a framework that is consistent with all of the guiding principles at once.

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intractable to other solutions. *See supra* notes 154-74 and accompanying text.

This can be accomplished by apply the liberalized rules only to section 501(c)(3) organizations that meet one of the public support tests to qualify as a "public charity" or "broadly-publicly supported" nonprivate foundation under section 170(b)(1)(A)(vi) or section 509(a)(2). For section 501(c)(3) organizations that escape private foundation status by demonstrating a wide base of support, the liberalized framework proposed here would be adequate to ensure that the voice of charitable organizations is not used to promote a narrow, self-serving agenda. Such organizations are "subject to the discipline of public support . . . and thus in some measure responsible to, the general public."<sup>343</sup> Either the positions they take, as well as the decision to express them through legislative advocacy or through a politically active affiliate, will be supported by a broad-based constituency, or the constituency will express its disapproval by withdrawing financial support for the affiliate, the charitable organization, or both.

The support base required by the public support formulas is not all that broad, but represents the dividing line Congress has set between organizations to which special controls on self-interested behavior will be applied and those that are not subject to those controls. It might very well be that a different formula would better serve the purpose of screening for private agenda political activities. For example, a modification of the formula for purposes of qualification for liberalized

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<sup>343</sup> *U.S. Treasury Department Supplement to Summary of Tax Reform Proposals of April 22, 1969, May 9, 1969, reprinted in 4 S. WEITHORN, TAX TECHNIQUES FOR FOUNDATIONS AND OTHER EXEMPT ORGANIZATIONS at G5-1, -3, -4 (1980).*

political activity rules might include business corporation support in the denominator but not the numerator of the support fraction, thereby avoiding the danger that charitable organizations might serve as vehicles by which business lobbying could be made deductible. Or perhaps the formulation devised to prevent private foundation funding of narrowly-controlled charitable voter registration efforts is better suited to the purpose of defining which organizations are "subject to the discipline of public support." Section 4945(f) limits "safe" foundation funding for voter registration drives to section 501(c)(3) organizations substantially all of the support (other than gross investment income . . .) of which is received from exempt organizations, the general public, governmental units . . ., or any combination of the foregoing; not more than 25 percent of such support is received from any one exempt organization . . . ; and not more than half of the support of which is received from gross investment income.<sup>344</sup>

Whatever the details might be, the point is that it is surely possible to devise a screen that will accommodate the principles of reserving the charitable exemption and deduction for public benefit and of avoiding the distortion of political processes by powerful and unaccountable wealth without imposing a complete ban, in the case of election-related activity, or general limits, in the case

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<sup>344</sup> I.R.C. § 4945(f)(4).

of lobbying, on all section 501(c)(3) organizations - and in the process, sacrificing all the other guiding principles.

### *Business Interests*

Building from the guiding principles up might also suggest changes in the rules for business and other economic interest-based organizations, such as unions and trade associations. Once "neutrality" is joined,

or even supplanted, by other relevant policy considerations, it makes sense to measure the existing rules for these organizations, as well as changes that might be made, against the guiding principles and separately from consideration of how they compare to the rules for other kinds of taxpayers.

The policy principles that argue for particularly favorable treatment of lobbying by public charities, of course, do not factor into the equation for business interests. The presumption in favor of political speech might argue for restoring the lobbying deduction. Particularly if lobbying is properly seen as an ordinary and necessary business expense, denial of deductibility may be characterized as a disincentive. Congress seems to have believed in 1962 that the deliberative ideal would be well-served by encouraging legislative contact by businesses.<sup>345</sup> If business lobbying impedes deliberation, however, perhaps that 1962 view is out of

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<sup>345</sup> See Cummings, *Tax Policy*, *supra* note 96, at 149.

date.<sup>346</sup> In any case, because the rules about deductibility can be expected to have only marginal impact on levels of political involvement,<sup>347</sup> the principles that favor unimpeded access to political arenas are not seriously compromised by denying the deduction for most political advocacy by business organizations. Furthermore, it may be that attaching the disincentive of nondeductibility to lobbying and election-related activity is sufficiently supportive of the principle in favor of avoiding distortion of political decisionmaking by those in control of concentrated economic resources to justify any moderate pull it exerts against the other principles.

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<sup>346</sup> Cummings suggests that Congress might have been aiming to discourage business lobbying with the 1993 changes, but failed, perhaps deliberately, to articulate that policy basis for the amendments. *Id.* at 141.

<sup>347</sup> See *supra* notes 152-53 and accompanying text.

The principle in favor of clear rules, however, could be promoted with no counter pull on other underlying policy goals. A better demarcation between grass roots lobbying and goodwill advertising, for example, could be drawn to reflect a conscious judgment about how the principle of avoiding interference with political speech and the principle of promoting participation balance with the principle of avoiding distortion of political decisionmaking by concentrated wealth.<sup>348</sup> Adopting the position of the 1990 section 4911 regulations<sup>349</sup> would provide clarity; however, it also might be insufficiently sensitive to the dangers of unbalanced capacity to affect decisionmaking and the decisions that result. Regulations proposed in 1980 to implement both section 162 and section 4945 and later withdrawn<sup>350</sup> provide a model that offers clarity and draws the line more conservatively.

On balance, though, it is fundamental changes to the treatment of political advocacy activities of charitable organizations that could contribute most significantly to bringing the legal framework into alignment with the guiding policy principles that ought to drive the rules that affect political participation. It is the framework of tax rules that apply to charitable organizations that remains, even after the substantial improvements of recent years, least consistent with the principles that should guide it.

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<sup>348</sup> Cooper made a similar proposal in 1968. See Cooper, *supra* note 100, at 850-55.

<sup>349</sup> See *supra* note 32 and accompanying text.

<sup>350</sup> See Cummings, *Lobbying and Political Expenditures*, *supra* note 2, at II.B.2.e(2)(e).

