

1-1-2003

On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws

Oliver A. Houck

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*, 69 Brook. L. Rev. 1 (2003).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol69/iss1/13>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

ARTICLES

On The Limits of Charity:

LOBBYING, LITIGATION, AND ELECTORAL POLITICS BY CHARITABLE ORGANIZATIONS UNDER THE INTERNAL REVENUE CODE AND RELATED LAWS*

*Oliver A. Houck**

I. INTRODUCTION

This is an article about what is good, and the limits of what it is good to do. If there is a single document that defines these values in American life it is the Internal Revenue Code, whose rewards and penalties rate nearly every activity in which Americans engage. High on the ratings is a category of groups organized and operated for “religious, charitable, scientific, testing for public safety, literary or educational purposes,” collectively known as public charities.¹ Charities are

^{*} © 2003 Oliver A. Houck. All Rights Reserved.

^{*} Professor of Law, Tulane University. The research assistance of William Hancock, Tulane '03, David Nicolardi '05, Olivia Orza '04, and Tara Pierre, '03 is acknowledged with gratitude, as are the comments and criticisms of Professors John Eason, Cynthia Samuels, and Keith Werhan of the Tulane law faculty and John Pomeranz of the Alliance for Justice, Washington, DC.

¹ I.R.C. § 501(c)(3) (2000). *See also* 26 C.F.R. § 1.501(c)(3)-1(d)(1) (2003) (listing charitable purposes eligible under this section). The first legislation in the United States recognizing charitable status was the Revenue Act of 1894, imposing an income tax but exempting “corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes.” Act of Aug. 27,

blessed not only with exempt income but also with itemized deductions for their contributors.² Few get more favorable treatment under the Code.³

It is a large and consequential world. As of 1998, more than one million charitable organizations qualified under § 501(c)(3) of the Code,⁴ and another 140,000 social welfare groups qualified under § 501(c)(4).⁵ They attended to the needs of the blind, the aging, racial minorities, the natural environment, the urban poor, as well as issues such as tobacco smoking, gun control (both sides), women in banking, children in sports . . . a list thousands of causes long.⁶ These “independent sector” organizations employed nearly eleven million people and accounted for 6.1 percent of the national income, \$665 billion a year and rising.⁷ The value of their time,

1894, ch. 349, § 32, 28 Stat. 556 (1894). The Act did not take effect because it was declared unconstitutional on other grounds – the graduated income tax. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895). However, its provisions on charities became the prototype for the 1913 Revenue Act, Pub. L. No. 63-16, ch. 16, 38 Stat. 172 (1913) (codified at I.R.C. § 501) and has remained verbatim in the Code from that date. A classic text on public charities and related tax exempt organizations is BRUCE R. HOPKINS, *THE LAW OF TAX EXEMPT ORGANIZATIONS* (7th ed. 1998); see also JAMES J. FISHMAN & STEPHEN SCHWARTZ, *NON-PROFIT ORGANIZATIONS* (2d ed. 2000).

² I.R.C. § 170(c)(2)(D) (2000). The 1917 Revenue Act introduced parallel provisions allowing contributions to charitable organizations to be deducted from the donor's gross income. See Act of Oct. 3, 1917, Pub. L. No. 65-50, ch. 63, § 1201(2), 43 Stat. 314 (1917) (gift); Revenue Act of 1924, Pub. L. No. 68-176, ch. 234, § 303(a)(3), 43 Stat. 306 (1924) (estate).

³ For fiscal years 2002-06, the Joint Committee on Taxation estimates that charitable deductions will cost the Treasury a total of \$243 billion. Estimates of Federal Tax Expenditures for Fiscal Years 2002-06, prepared by the Staff of the Joint Committee on Taxation for the Ways and Means Committee and the Committee on Finance, U.S. Government Printing Office, (January 17, 2002), Table 1, at 20-28 (combining \$27.0 billion to health institutions, \$37.1 billion to educational organizations and \$178.9 to other charities). These costs, of course, exclude the charitable income exception. By comparison, veterans and military personnel benefits are estimated at \$25.9 billion, tax credits for education at \$96.9 billion, tax credits for minors at \$142.3 billion, the exclusion of capital gains at death, \$216.6 billion, and the home mortgage deduction, \$365.5 billion. *Id.*

⁴ See National Center for Charitable Statistics, at http://nccs.urban.org/n_entities2.pdf (last visited Oct. 24, 2003). In 1998, 734,000 charities were registered with the IRS under § 501(c)(3). This figure only partially includes some 344,000 religious organizations, which are not required to register. *Id.*

⁵ *Id.* Section 501(c)(4) exempts the income of a broad category of social welfare organizations. I.R.C. § 501(c)(4). Contributions to these organizations are not, however, made deductible to the donor. See § 170(c)(2)(D) (providing deductibility only to 501(c)(3) organizations).

⁶ For a fuller sample listing, see *infra* note 263.

⁷ See National Center for Charitable Statistics, at http://nccs.urban.org/n_entities2.pdf (last visited Oct. 24, 2003). Charitable revenues rose from \$211.9 billion in 1982 to \$664.8 billion in 1997. See Estimates of Federal Tax Expenditures for Fiscal Years 2002-2006, *supra* note 3.

paid and volunteer, was another \$226 billion.⁸ It is hard to imagine the work of this country – and particularly that work not directed to private gain – without the support, education, leadership, and compassion contributed by public charities. These are without question the good guys. The question is how active they may be in accomplishing their charitable ends before running afoul of the law. It has never been an easy question to answer, and the answers remain in motion.

Consider the case of the hypothetical Save The Birds. It tends to injured wildlife. It can only wipe off so many oil-slicked sea gulls, however, before it begins thinking about curbing oil spills. At what point does its lawsuit against the Exxon Valdez, its support for the Oil Pollution Control Act of 1990,⁹ or its favor for Senator George Mitchell become a non-charitable activity threatening its deductions, exemptions, and the future of the organization itself? Must Save The Birds – and the American Lung Association, the National Urban League, and Mothers Against Drunk Driving – do only the little stuff, the mop-up, and leave the remedy to others? That is the question posed by this study. It has been around for more than one hundred years.

The answers arrived at by the Internal Revenue Code lie in their history. There was no grand plan. Congress and the Internal Revenue Service dealt with the political activities of charities at widely-spaced moments in time, each treating a separate part of the elephant – early Code rulings (1920s), lobbying (1934), electoral politics (1954), and litigation (1970). It was then up to the courts to interpret what had been done and to provide reasons where reasons were thin, or lacking altogether. In the 1970s, Congress retook the stage with new Code provisions and companion rules under the federal election campaign laws, followed by new rounds of regulation and litigation. These histories, and their rationales and outcomes, form the base of this Article.

The Article turns its final attention to where we have come with charitable restrictions, and where we could still usefully go. For one, time has softened their blow. On the other hand, we have developed an anomaly: a hierarchy of charitable values that most highly favors the least effective action and

⁸ See National Center for Charitable Statistics, at http://nccs.urban.org/n_entities2.pdf (last visited Oct. 24, 2003).

⁹ Pub. L. No. 101-380, 104 Stat. 486 (1990) (codified as amended at 33 USC §§ 2701-2761 (2000)).

most highly penalizes activity that, in other areas of law, we reward with the highest protections. We need to separate the history of these restrictions from that which persuades us today. There are valid reasons for restricting the involvements of charities in politics, but we fail to recognize them and to limit the restrictions to those ends. For such purposes, this study may be useful.

II. THE DEBATE BEGINS

"The past is never dead. It's not even past."

William Faulkner¹⁰

From an early date, courts, legislatures, and administrative agencies have wrestled with the notion of charity. Perhaps the most commonly-stated rationale for charitable organizations and their favorable treatment under the law has been that they provide public services supplementing those of government and beyond the ability of government to provide.¹¹ Well and good, and easily applied to an organization that sheltered homeless animals. The problem came when this same organization began to advocate in favor of animal rights. The question became whether the measure of a charity was its ends (animal welfare), its means (advocacy), or both.

English and then American courts began asking this question more than a century ago and arrived at opposite conclusions, first under the law of trusts and then under newly-evolving income tax laws. Left to their own devices, the American courts trended toward a policy that permitted a wide range of political activity for charitable organizations. They were not, however, left to their own devices for long.

¹⁰ WILLIAM FAULKNER, *REQUIEM FOR A NUN*, Act I, Scene III (1951).

¹¹ See *HOPKINS*, *supra* note 1, at 11-18; see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 591-92 (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."). See also LESTER M. SALAMON, *AMERICA'S NON PROFIT SECTOR: A PRIMER* (2d ed. 1999) at 11-13 (identifying several reasons supporting favorable treatment of nonprofits, including "market failure" and "government failure").

A. *The Law of Trusts*

The question of whether political activities are charitable first arose – before the dawn of income taxation and exemptions – in the law of trusts. At issue was whether the courts would validate trust funds operated to carry out a donor's social agenda.¹² High on any one agenda might appear such controversies as temperance,¹³ vivisection,¹⁴ women's suffrage,¹⁵ and the abolition of slavery.¹⁶ One of the most controversial, apparently, concerned the belief that there could be no absolute ownership of real property and that land titles were a form of robbery.¹⁷ The common denominator of all of these trusts was that, through a mix of public education, lobbying, and even outright electioneering, they intended to change the status quo. Their reception at the bar was mixed, and the rationales offered for limiting their political activity even more so.

Early English cases approved trusts with the purpose of law reform. Funds to oppose vivisection,¹⁸ to support prohibition,¹⁹ and even vegetarianism,²⁰ were upheld, literally without discussion of their political character. By the early twentieth century, however, the English rule and its applications had evolved to the point where political activity – legislative or electoral, exclusive or ancillary – was fatal.²¹ The original reason given was a tidy syllogism: if government is beneficial (a given), then efforts to change it simply could not be. As one commentator argued it, the law “could not stultify itself by holding that it was for the public benefit that the law

¹² Trusts were intended to avoid the early English mortmain statutes and the rule against perpetuities. See AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 348.2 (4th ed. 1989).

¹³ *Inland Revenue Comm'rs v. Temperance Council*, 42 T.L.R. 618 (K.B. 1926).

¹⁴ *In re Foveaux*, 2 Ch. 501 (1895).

¹⁵ *Jackson v. Phillips*, 96 Mass. 539 (1867).

¹⁶ *Id.*

¹⁷ *George v. Braddock*, 18 A. 881 (N.J. 1889).

¹⁸ *In re Foveaux*, 2 Ch. 501 (1895).

¹⁹ *Farewell v. Farewell*, 22 O.R. 573 (1892).

²⁰ *In re Slatter*, 21 T.L.R. 295 (1905).

²¹ See *Nat'l Anti-Vivisection Soc'y v. Inland Revenue Comm'rs*, [1948] A.C. 31 (H.L. 1947); *Bowman v. Secular Soc'y, Ltd.* [1917] A.C. 40[6]; *Inland Revenue Comm'rs v. Temperance Council*, 42 T.L.R. 618 (1926) (legislative activity disqualifying even though it was fully non-partisan); *In re Jones*, 45 T.L.R. 259 (Ch. 1929) (any political motive sufficient to defeat a trust despite other laudable objectives).

be changed";²² testators, like courts, would have to operate on the principle that "the law is right as it stands."²³ Gilbert and Sullivan could not have written it better. While this rationale might be news to English legislators whose very reason to exist was to improve the nation's laws, trusts such as one intended to aid the London Anti-Vivisection Society were, accordingly, ruled invalid.²⁴

Subsequent English trust cases offered a more practical rationale, bottomed on the courts' professed inability to distinguish good political agendas from bad. Although it might be perfectly *legal* to promote changes in law, the court had no means of judging whether a proposed change in the law would or would not be for the public benefit, and so a trust to secure religious freedom (for non-Christians) through education, legislation, and electoral politics failed to qualify.²⁵ Unexplained, of course, is how the courts had any better means of judging whether an educational campaign that did *not* challenge existing law was for the public benefit. The answer may lie in the litigation over a trust to propagate "the sacred writings of the late Joanna Southcoate,"²⁶ an authoress who labored "under the delusion that she was with child by the Holy Ghost."²⁷ The trust, while acknowledged to be "very foolish,"²⁸ prevailed, leading to the hornbook conclusion that a trust may be "both absurd and valid."²⁹ In this and like cases,

²² AMHERST D. TYSSEN, *THE LAW OF CHARITABLE BEQUESTS, WITH AN ACCOUNT OF THE MORTMAIN AND CHARITABLE USES ACT*, at 177 (1st ed. 1888), *quoted in Nat'l Anti-Vivisection Soc'y*, [1948] A.C. 31 (H.L. 1947). As an American commentator has observed, "It seems difficult indeed to justify such view as to the perfection of the law." SCOTT & FRATCHER, *supra* note 12, at § 374.4.

²³ *Nat'l Anti-Vivisection Soc'y*, [1948] A.C. 31 (H.L. 1947).

²⁴ *See id.*

²⁵ Acknowledging that a campaign for religious freedom, even for non-Christians, was within "the decencies of controversy," one court noted:

A trust for the attainment of political objects has always been held invalid, not because it is illegal to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.

Bowman, 31 A.C. at 421, 422.

As a description of the law of the time, the statement is simply flawed. *See* cases discussed *supra* notes 18-20. *See also* Note, *Charitable Trusts for Political Purposes*, 37 VA. L. REV. 988 (1951).

²⁶ *Thornton v. Howe*, 54 Eng. Rep. 1042 (H.L. 1862).

²⁷ *Id.* *See also* Louis Bartlett, Note, *Charitable Trusts to Effect Changes in the Law*, 16 CAL. L. REV. 478, 482-23 (1927-28).

²⁸ *Thornton*, 54 Eng. Rep. at 1043-44.

²⁹ CARL ZOLLMANN, *AMERICAN LAW OF CHARITIES* 149 (1924).

the question as to whether such an activity was for the public benefit was simply avoided. An absurd, and therefore non-beneficial, trust was perfectly fine; the problem was not the purpose, but rather the political activity itself.

The English rule was followed in America more than a century ago in *Jackson v. Philips*,³⁰ in which the Massachusetts Supreme Court ruled on one trust to promote the abolition of slavery, and another to support women's suffrage. Focusing on the political nature of these agendas, the court explained:

[T]rusts whose expressed purpose is to bring about changes in the laws or the political institutions of the country are not charitable in such a sense as to be entitled to peculiar favor, protection and perpetuation from the ministers of those laws which they are designed to *modify or subvert*.³¹

The Massachusetts court saw its duty as upholding the law and not "the overthrowing or changing of them."³² From this starting point, it went on to uphold the trust for abolition (its political demise, in 1867, was by then imminent), but to invalidate the trust for women's suffrage (which still faced a long political road ahead). Massachusetts stuck to its guns a half century later in *Bowditch v. Attorney General*,³³ approving a trust to promote temperance (a *fait accompli*), but again rejecting a trust for women's suffrage.

Whatever personal biases may have affected the dogged insistence of these (male) justices that women's suffrage was not a charitable cause, their opinions also reflect the English view: It is not charitable to change the status quo. They apply the language of illegal acts, of revolution itself – "subvert," "overthrow" – to advocacy for legislative and political change. They add, as well, a corollary that would grow tall in American law and beyond the law of trusts: The more hard-fought and controversial the objective, the less likely it would be favorably viewed.

Most American courts, however, indeed all beyond the state of Massachusetts, rejected this conclusion. A trust would not be invalidated simply because it sought to achieve its objects by, *inter alia*, political means.³⁴ A leading explanation

³⁰ 96 Mass. 539 (1867).

³¹ *Id.* at 555 (emphasis added).

³² *Id.* at 571.

³³ 134 N.E. 796 (Mass. 1922).

³⁴ See SCOTT & FRATCHER, *supra* note 12, § 374.

for this position comes from *Taylor v. Hoag*,³⁵ where the Pennsylvania Supreme Court stated:

To hold that an endeavor to procure, by proper means, a change in a law is, in effect, to attempt to violate that law would discourage improvement in legislation and tend to compel us to continue indefinitely to live under laws designed for an entirely different state of society. Such view is opposed to every principle of our government based on the theory that it is a government "of the people, by the people, and for the people," and fails to recognize the right of those who make the laws to change them at their pleasure, when circumstances may seem to require.³⁶

This reasoning has since been cited and followed as the trend of modern authority in the United States.

In sum, to the English courts and their followers in Massachusetts, there was something unseemly about political activity of any sort. To the American majority, however, legislative activity and the political push and pull that attended it, distortions and agendas included, were all part of the Big Democratic Bazaar. Against this backdrop, itself in evolution, the Internal Revenue Code was born and began taking on a shape of its own.³⁷

B. *Early Tax Rulings*

Early federal tax rulings on the treatment of advocacy were indirect, and mixed. The political activity prohibition first appeared in federal tax law as a restriction on the activities of business corporations, without reference to charities at all. The tax code of 1913 permitted the deduction of "ordinary and necessary" business expenses.³⁸ In 1915, the Bureau of Revenue (Bureau) promulgated regulations defining these expenses to exclude "sums of money expended for lobbying purposes and contributions for campaign expenses."³⁹ While the Bureau provided no rationale for this exclusion, the Supreme Court

³⁵ 116 A. 826 (Pa. 1922).

³⁶ *Id.* at 828. Even this statement drew a dissent, however, that preferred to follow the *Jackson* rationale. *Id.* at 826 (Schaffer, J., dissenting).

³⁷ This American majority, while approving legislative activities, appeared to draw the line at outright support for political parties, see *Buell v. Gardner*, 144 N.Y.S. 945 (Sup. Ct. 1914), or for the "advancement, by political intrigue or otherwise, of the fortunes of a political party," *Int'l Reform Fed'n v. Dist. Unemployment Comp. Bd.*, 131 F.2d 337, 340 (D.C. Cir. 1942).

³⁸ Revenue Act of 1913, Pub. L. No. 63-16, ch. 16, § 2(b), 38 Stat. 167 (1913).

³⁹ T.D. 2137, 17 Treas. Dec. Int. Rev. 48, 57-58 (1915).

upheld it,⁴⁰ observing that “[c]ontracts to spread such insidious influences through legislative halls have long been condemned.”⁴¹ The first restrictions, therefore, targeted not political activity per se, but rather the undue influence of business in politics.

In 1917, Congress amended the Code to allow individuals to deduct contributions to charitable organizations from their gross income, provided that these organizations “exclusively” served⁴² “religious, educational, scientific or charitable” ends.⁴³ Two years later, the Department of the Treasury (the Treasury) adopted a regulation defining the term “educational” for these purposes. Without explanation, it declared that “associations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute.”⁴⁴ Whether this regulation was based on English charitable trust law or was simply a case of parallel evolution does not seem to be known. No Bureau rulings subsequent allude to trust law for their reasoning or support.⁴⁵ One commentator speculates that the limitation merely extended the limits placed on business corporations a few years earlier.⁴⁶ If so, one wonders whether “insidious influences” by charities on legislation had, likewise, “long been condemned”; one also might wonder how a limit so justified could survive once Congress amended the Code to favor business deductions for lobbying expenses.⁴⁷ Whatever the answers, reliance cannot be placed on trust law or the business exclusion to explain the Treasury’s position.

Little more illuminating were the Treasury’s first interpretative rulings. In an odd parallel to the early development of the English rule on trusts, the very first rulings recognized that activity towards political ends was in fact charitable. Sequential opinions of the Solicitor in 1918 approved an organization “operated solely in order to educate

⁴⁰ *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326 (1941).

⁴¹ *Id.* at 338.

⁴² War Revenue Act of 1917, Pub. L. No. 65-50, ch. 63, § 1201(2), 40 Stat. 330 (1917).

⁴³ *Id.*

⁴⁴ T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919).

⁴⁵ As well they might not, given the weight of American trust law to the contrary. See *supra* text accompanying notes 34-35.

⁴⁶ William J. Lehrfeld, *The Taxation of Ideology*, 19 CATH. U. L. REV. 50, 53 (1969).

⁴⁷ See *infra* note 391.

the public sentiment of a State in favor of prohibition on the sale of intoxicating liquors"⁴⁸ and another "to educate public sentiment in favor of the doctrine of prohibition."⁴⁹ The latter opinion went so far as to declare that "[t]he work of the club is propagandist, but none the less educational."⁵⁰

Two years later, however, in a ruling on an organization formed "to encourage the study of labor conditions in the United States with a view to promoting desirable labor legislation," the Solicitor reversed field.⁵¹ The ruling, numbered S. 1362, reflected a division of opinion within the Treasury. Despite the rulings noted above, the agency's Administrative Unit had been denying exemptions to the "National Dry Federation and other abstinence societies" as "distributors of partisan propaganda."⁵² This time, the Solicitor found the Administrative Unit's position correct, by looking at the dictionary:

The prime purpose of education is to benefit the individual. Century Dictionary, page 1845. On the other hand, the primary purpose of propaganda is much more narrow. Propaganda is that which propagates the tenets or principles of a particular doctrine by zealous dissemination. Century Dictionary, page 4774. It is a matter of common knowledge that propaganda in the popular sense is disseminated not primarily to benefit the individual at whom it is directed, but to accomplish the purpose or purposes of the person instigating it.⁵³

In its 1917 legislation allowing charitable deductions, the Solicitor reasoned, Congress had this distinction in mind, intending neither to assist "the aims of one class against another," nor "one doctrine as opposed to another," nor "the profit of one class versus the detriment perhaps of another."⁵⁴ Rather, Congress wished to advance "the interest of all, over the objections of none."⁵⁵ A lofty goal, to be certain, and one that left no room for advocating anything controversial.⁵⁶

⁴⁸ S. 1362, II-2 C.B. 152, 153 (1920) (citing S. 200 (May 16, 1918)).

⁴⁹ *Id.* (citing S. 455 (Aug. 28, 1918)).

⁵⁰ *Id.*

⁵¹ *Id.* at 152-54. In so doing, S. 200 and S. 455 were specifically overruled. *Id.*

⁵² *Id.*

⁵³ S. 1362, II-2 C.B. 152 (1920).

⁵⁴ *Id.*

⁵⁵ *Id.* ("A magazine is published, discussion is stimulated, memoranda are prepared and distributed, and, in short, all of the ordinary means are utilized to place before the public matter which will press labor's interests.") *Id.*

⁵⁶ Treasury regulations contemporaneous with S. 1362 explicitly added, as a disqualifying factor, that the subject matter was of a "controversial nature." O.D. 704,3

Several aspects of this seminal ruling are worth noting. First and most obviously, it dealt with the issue of labor rights which, along with women's suffrage, were the hottest and most establishment-resisted domestic issues of their day. Second, although the activities of the organization in the ruling were expressly limited to public education,⁵⁷ the Treasury was prohibiting activities that could if successful, simply *lead* to legislation. Third, although the ruling arose in the context of defining an "educational" organization, its prohibition would logically extend to charitable organizations qualified as scientific and religious as well. And finally, the relied-upon congressional intent had to have been defined by informal, if not supernatural, means; no congressional intent appears in the 1917 amendment or its legislative history.

The most apparent difficulty in the opinion however, was the opacity of its distinction between education and propaganda – a distinction that would prove to be uncomfortably subjective. The decade that followed saw a string of rulings applying this distinction in which "educational" meant activities that appeared to the Treasury as socially acceptable, while "propaganda" meant those that were unpopular, and against the status quo. On the approved side were an organization to secure legislation for the welfare of the American Indian (since "all that concerns his property and person is in a peculiar sense subject to legislative control," political activities were the only means of protecting him and hence were educational),⁵⁸ another to promote legislation regulating the taking of fish and game (without explanation),⁵⁹ and the activities of the National Rifle Association, already a powerful legislative force (but "educational" nonetheless, as the nation's defense rested upon arms training for this "obligation of citizenship").⁶⁰ During the same decade, the Treasury denied charitable status to, among others, several temperance organizations,⁶¹ including the Civic Fund of the City Club of New York, whose "advocacy of or opposition to candidates and

C.B. 240 (1920).

⁵⁷ For a detailed discussion of these rulings, see Lehrfeld, *supra* note 46, at 56-63.

⁵⁸ Gen. Couns. Mem. 3830, VII-1 C.B. 114 (1928).

⁵⁹ I.T. 2546, IX-2 C.B. 122 (1930).

⁶⁰ Gen. Couns. Mem. 443, VII-1 C.B. 114 (1926).

⁶¹ See Appeal of Herbert E. Fales, 9 B.T.A. 828, 832 (1927) (involving the Scientific Temperance Federation and the Massachusetts Anti-Saloon League).

proposed municipal measures carries [the Fund] beyond the exclusively educational purposes,⁶² and the League for Industrial Democracy, whose campaign for the public ownership of property, in the eyes of the Board of Tax Appeals, advocated a "new social order" including "drastic political and economic changes which are directly at odds with existing economic theories and practices upon which society is founded"⁶³

Two sides of the same coin are at work in these opinions: mainstream and change. If an organization's agenda was in the mainstream of public opinion, it could include a healthy element of political action. If, however, its agenda proposed ideas not (yet) widely accepted, it would not be recognized as charitable, even though no political action was involved.⁶⁴

Further exploration of the early Treasury rulings serves little purpose. No distinctions are drawn between legislative or electoral activity, nor do additional reasons for prohibitions on either type of activity appear. Several of their more extreme applications have since been modified by Service rulings and regulations. They are, in this sense, history. They are also, however, the earliest record on the origins of the political prohibitions and their rationales. Suffice it to say, the rationales were not overwhelming. It would be up to the courts to give these restrictions legitimacy, or a decent burial.

C. *Early Court Rulings*

The judicial reactions, too, were mixed. Controversy arose in 1929 over contributions to the American Birth Control League, formed to disseminate health information through clinics, a magazine and scientific journals on birth and birth control . . . and to advocate the repeal of anti-birth control laws. The Board of Tax Appeals denied the deduction on the basis of S. 1362,⁶⁵ and the case came to the Second Circuit Court of Appeals as *Slee v. Commissioner*.⁶⁶ Writing for the court, Judge

⁶² Joseph M. Price v. Commissioner, 12 B.T.A. 1186, 1189 (1928).

⁶³ Bertha Poole Weyl v. Commissioner, 18 B.T.A. 1092, 1094 (1930), *rev'd*, 48 F.2d 811 (2d Cir. 1931).

⁶⁴ See *supra* text accompanying note 11. See also Vanderbilt v. Commissioner, 34 B.T.A. 1033 (1936), *aff'd*, 93 F.2d 360 (1st Cir. 1937).

⁶⁵ See *Slee v. Commissioner*, 15 B.T.A. 710 (1929).

⁶⁶ 42 F.2d 184 (2d Cir. 1930).

Learned Hand began his opinion by recognizing the social value and benefit of the League's work ("[t]hat the League is organized for charitable purposes seems to us clear"), and that the legislative agenda was related, if incidental, to this larger purpose.⁶⁷ Nevertheless, in language that has become a cornerstone for later cases approving political activities restrictions, Judge Hand wrote:

Political agitation as such is outside the statute, however innocent the aim, though it adds nothing to dub it "propaganda," a polemical word used to decry the publicity of the other side. Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them.⁶⁸

Having so concluded, however, the opinion proceeded in the next sentence to sanction some types of political activity: "Nevertheless, there are many charitable, literary and scientific ventures that as an incident to their success require changes in the law."⁶⁹ They included, by way of illustration: a charity seeking laws "allowing it to receive 'larger gifts'"; a "society to prevent cruelty to children, and animals," seeking legislative power "to coerce parents and owners"; a state university "trying to get appropriations," or "leave to teach evolutionary biology"; and last, a society of book lovers seeking "to relax the taboos on works of dubious propriety."⁷⁰ All such activities were "mediate" to the exempt purposes, "ancillary to the end in chief," and hence not disqualifying.⁷¹ By contrast, it would be "a perversion of the statute" to exempt persons who seek "the more general acceptance of beliefs which they think beneficial to the community at large," including those concerning prohibition, the League of Nations, the size of the Navy, "or any other of the many causes in which ardent persons engage."⁷²

⁶⁷ *Id.* at 184, 185.

The only part of [the League's] activities which can be thought to touch upon legislation is in directing persons how best to prepare proposals for changes in the law, and in distributing leaflets to legislators and others recommending such changes, chiefly by bringing before them such information as is supposed to 'enlighten' their minds.

Id. at 185.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Slee*, 42 F.2d. at 185.

⁷² *Id.*

Judge Hand's opinion has been as much admired for its eloquence as criticized for its content.⁷³ It appears to stand on two legs, both of which are required for the opinion to remain upright. The first simply asserts that Congress chose not to "subvene" something called "political agitation." This explanation goes no further, because Congress of course made no expression on what it chose to subvene, other than that it be exclusively charitable. The opinion cites no congressional language, mentions no Treasury rulings, and cites no case law. The explanation does infer, however, a congressional policy of neutrality: to exempt (although ardent persons on all sides would be eligible for exemptions) would be to take sides.

The second leg, defining political agitation, is also necessary, because political agitation is what Congress allegedly chose not to subvene. Here the waters become even more murky. One is hard-pressed to find a common denominator of those listed activities Judge Hand excludes from the prohibition: agitation for a university's appropriations, for example, and lobbying by the Society for the Prevention of Cruelty to Animals for an ordinance on mistreating the family dog. What does emerge as exempt in Judge Hand's mind, however, are those political activities of a relatively smaller nature and motivated by a group's immediate self interest — more gifts (money), more appropriations (money), greater latitude in teaching (one's own curriculum), fewer mistreated dogs to care for (admittedly a stretch), and more (interesting) books to read "of dubious propriety." As such, the opinion gets the traditional notion of charity exactly backwards: One might agitate all one wishes for personal gain and qualify as charitable; what is prohibited are activities intended for a greater public good.

Federal opinions immediately following *Slee* limited its reach, and qualified as charitable the work of other, equally ideological and equally aggressive organizations. Within the next ten years, a federal district court approved an anti-vivisection society with a legislative agenda that the Board of

⁷³ See, e.g., Elias Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 439, 447 (1960) ("In retrospect it may be suggested that this deference [to *Slee*] is due more to the decision's primacy in the field, as well as the eloquence and illustrious name of its author, than to the cogency of its argument"); BORIS I. BITTKER & LAWRENCE LOKKEN, *TAX EXEMPT & NON PROFIT ORGANIZATIONS* § 100.5.1 (2d ed. 1989) ("an urbane but debatable opinion"); Lehrfeld, *supra* note 46, at 60 ("suspect"). This author has found no commentator purporting to understand, or support, the *Slee* opinion.

Tax Appeals considered "substantial."⁷⁴ The Second Circuit, father of *Slee*, reversed the Board of Tax Appeals to exempt organizations promoting a doctrine similar to socialism and achievable only through legislation.⁷⁵ The Third Circuit found a religious organization with a frank and forceful legislative program supporting prohibition to be qualified.⁷⁶ The Fourth Circuit approved the World League Against Alcoholism, although its member organizations advanced this controversial issue through legislation and "indulged in political activity,"⁷⁷ and the District of Columbia Circuit approved a charity that had "boasted" of having "at one time or another written 36 bills on moral subjects for submission to various state legislatures, and 18 that have been passed by the Congress."⁷⁸

These cases, allowed to grow and solidify, might well have overruled *Slee* entirely and produced a very different rule from the one we live with today. As it happened, however, they were overtaken by the politics of the New Deal, which resulted, unpredictably, in legislation amending the exempt organization provisions of the Internal Revenue Code.

⁷⁴ Old Colony Trust Co. v. Welch, 25 F. Supp. 45, 46 (D. Mass. 1938).

⁷⁵ Weyl v. Commissioner, 48 F.2d 811, 812 (2d Cir. 1931); Leybscher v. Commissioner, 54 F.2d 998, 999 (2d Cir. 1932).

⁷⁶ Girard Trust Co. v. Commissioner, 122 F.2d 108 (3d Cir. 1941). The case involved the legislative agenda of the Board of Temperance, Prohibitions and Public Morals of the Methodist Episcopal Church, of which the majority opinion held:

The advocacy of such regulation before party committees and legislative bodies is a part of the achievement of the desired result in a democracy. The safeguards against its undue extension lie in counter-pressures by groups who think differently and the constitutional protection, applied by courts, to check that which interferes with freedom of religion for any.

Id. at 110.

⁷⁷ Cochran v. Commissioner, 78 F.2d 176, 178 (4th Cir. 1935).

⁷⁸ Int'l Reform Fed'n v. District Unemployment Corp. Bd., 131 F.2d 337 (D.C. Cir. 1942). The majority found that the legislative activities did not "accomplish a metamorphosis in appellant's character whereby it . . . changed from a charitable educational to a political organization." *Id.* at 340. It continued:

Here we have no actual difference between the education of the individuals – admittedly proper – and the education of the legislator, where both are directed to a common end, and that end, not the advancement, by political intrigue or otherwise, of the fortunes of a political party, but merely the accomplishment of a notional social improvement.

Id.

The dissent argued, in vain, that the activities in question, although lawful, were not charitable in the sense for which charities are recognized: "the performance of duties which, otherwise, the government would itself perform . . ." *Id.* at 346.

On the other hand, the movement was not all one way. See *Vanderbilt v. Commissioner*, 93 F.2d 360, 363 (1st Cir. 1937) (bequest to organization with legislative agency promoting woman's rights held not deductible).

III. THE LEGISLATIVE PROHIBITION AND SENATOR DAVID AIKEN REED

“There is no history, only biography.”

Ralph Waldo Emerson⁷⁹

In 1934 Congress first amended the Code to prohibit political activity by charities. To the Internal Revenue Service, the amendments may have served, if selectively, to confirm its previous rulings. To some commentators, the amendments codified Judge Hand's opinion in *Slee*.⁸⁰ Although the amendment was raised and discussed on the Senate floor, no mention was made by proponents of the pre-existing Service policy, or of *Slee*.⁸¹ Indeed, if the amendment was intended simply to reflect an existing prohibition, it is not easy to understand why anyone would have thought it necessary to put it into the Code. Apparently, however, at least one senator believed them to be quite necessary, and his reasons largely constitute the record for their adoption.

The story begins with veteran's benefits and the Great Depression. At the turn of 1933, America was deep into its worst economic depression in history, and torn between those who saw the solution through government intervention and others who saw it in government restraint. The issue was pressing and, in language the Bureau of Revenue would understand, controversial. With President Herbert Hoover in his twilight and the policies of President-elect Franklin D. Roosevelt not yet formed, the very course of government seemed at stake. Of the voices raised to set this course, none was more strident on the side of government restraint than a tax-exempt charity named the National Economy League (the League).⁸² In January 1933, the League boasted a membership

⁷⁹ JOURNALS OF RALPH WALDO EMERSON, 1838-1841 (Edward Waldo Emerson & Waldo Emerson Forbes eds., Houghton Mifflin 1911).

⁸⁰ See Laura B. Chisholm, *Exempt Organizations Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 232 n.141 (1987-88); Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities*, 71 TEX. L. REV. 1269, 1285 n.46 (1993); Kevin M. Yamamoto, *Taxing Income from Mailing List and Affinity Card Arrangements: A Proposal*, 38 SAN DIEGO L. REV. 221, 230 n.40 (2001).

⁸¹ See 78 CONG. REC. 5, 861 (1934).

⁸² See *infra* text accompanying notes 97-98. See also MARK HUGH LEFF, *THE LIMITS OF SYMBOLIC REFORM: THE NEW DEAL AND TAXATION, 1933-1939*, at 162 (1984). Such leagues were in vogue. The similarly-named National Economic League, another powerhouse of fiscal conservatism, possessed an almost equally illustrious leadership,

of two hundred thousand, representation in every state, and leadership that included leading giants of finance and such luminaries as Rear Admiral Richard E. Byrd, General John J. Pershing, Alfred E. Smith, and former President Calvin Coolidge.⁸³ High on the League's target list were government benefits to Spanish-American and Great War veterans, benefits that, in its view, would bankrupt the government.⁸⁴

The Spanish-American War was a relatively small and bloodless affair, but World War I was another matter. In 1918, more than one million servicemen came home and returned to civilian life.⁸⁵ Low-income Americans in the main, these men were among the first and hardest hit at the onset of the Great Depression ten years later.⁸⁶ By 1932, twelve million formerly employed Americans were out of work, twenty-five percent of the workforce.⁸⁷ The hit song of that year began:

Once in khaki suits
 Ah gee, we looked swell,
 Full of that Yankee Doodle-dee-dum!
 Half a million boots went sloggin' through hell,
 And I was the kid with the drum!
 Say, don't ya remember?
 I'm your pal.
 Buddy, can you spare a dime?⁸⁸

The war veterans held government bonus certificates, payable years into the future. Feeling that their past service and current stress entitled them to immediate payment, they and their families came to Washington in old cars, on freight trains, hitchhiking, on foot – a grassroots, disorganized force that grew to more than twenty thousand, intent on making its

including former Attorneys General and a former Vice President of the United States. For a description of its similar agenda, which also featured "efficiency and economy in government," see THURMAN. W. ARNOLD, *THE FOLKLORE OF CAPITALISM* 105-07 (Yale Press 1937).

⁸³ *Anti-Bonus Group in Economy League*, N.Y. TIMES, Jan. 28, 1933, at 7.

⁸⁴ *Urges Veto on Bill for Veterans' Pay*, N.Y. TIMES, Feb. 27, 1933, at 2.

⁸⁵ About 1.3 million servicemen had seen combat; in all, the Army reached 4 million by the end of the war. See SAMUEL ELIOT MORRISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE*, 866 (Oxford Univ. Press 1965).

⁸⁶ See HOWARD ZINN, *A PEOPLES' HISTORY OF THE UNITED STATES: 1942-PRESENT* 381-82 (Harper Perennial 1995).

⁸⁷ See MORRISON, *supra* note 85, at 944.

⁸⁸ Jay Gorney & E.Y. Harburg, *Brother, Can You Spare a Dime?* (Harms Inc. 1932) (from the Broadway musical *AMERICANA*, which opened on October 5, 1932 and was popularly recorded on October 25, 1932 by Bing Crosby with Lennie Hayton and his orchestra).

case. They marched, they stayed for weeks and then months, they lived along the Potomac in makeshift camps, they received media attention and public sympathy, they called themselves the "Bonus Expeditionary Forces," and they went down in history as the Bonus Army.⁸⁹

To President Hoover, their demands were budget-breaking, extortionist, and a threat to public order.⁹⁰ To his Army Chief of Staff, General Douglas MacArthur, they were Communists. Hoover ordered the real Army to evict them. General MacArthur led the charge in person. With four companies of infantry supported by cavalry, a machine gun squadron and six tanks, the Army marched into the camps firing tear gas and setting the shanties on fire. It catalyzed a riot, and by the time it had ended there were two veterans dead, many more injured, and thousands gassed. General MacArthur won the battle, but he lost the war. Public opinion turned sharply in favor of the veterans, who were not only ignored by their government but, now, gassed and killed as well.⁹¹

The result was another overreaction, this time by the Congress. It soon passed a supremely generous benefits package for veterans of both the Spanish-American and First World Wars.⁹² The package covered not only those who had fought abroad or served on the home front, but all who had served in whatever capacity for the previous thirty years.⁹³ It amounted to twenty million dollars a year, about one-seventh of the cost of running the government;⁹⁴ overall, veteran's benefits totaled more than one billion dollars, nearly half the federal budget.⁹⁵

Incoming President Roosevelt would have to mitigate the impact of these payments on monies needed to finance the

⁸⁹ See ZINN, *supra* note 86, at 381-82; see also Federal Bureau of Investigation, Freedom of Information and Privacy Act: The Bonus March (May-July 1932), at <http://foia.fbi.gov/bonmarch.htm> (last visited Aug. 12, 2003).

⁹⁰ See ZINN, *supra* note 86, at 382.

⁹¹ See PBS, AMERICAN EXPERIENCE, *The Bonus March (May-July, 1932)*, at <http://www.pbs.org/wgbh/amex/macarthur/peopleevents/pandeAMEX89.html> (last visited Aug. 12, 2003).

⁹² *Senate Votes 51 to 39*, N.Y. TIMES, June 15, 1933, at 1.

⁹³ *Id.*

⁹⁴ *Editorial: How to Save \$400,000,000*, N.Y. TIMES, Jan. 11, 1933, at 18.

⁹⁵ J. Garry Clifford, *Grenville Clark: World Peace Through World Law*, at http://www.harvardsquarelibrary.org/unitarians/clark_grenville.html (last visited Aug. 12, 2003).

New Deal. One way was to cut them back.⁹⁶ Corporate America and its allies led the charge. In February 1933, the National Economy League called on President Hoover to veto the entire government appropriations bill because veteran's benefits, although reduced, were still too high.⁹⁷ At the same time the League was drumming up the grassroots, obtaining a resolution from "the members and friends of the Women's National Republican Club" that endorsed its agenda and its "campaign of education" throughout the country.⁹⁸

On the other side of this controversy stood, as could be expected, the veteran's organizations themselves.⁹⁹ With them stood an otherwise unlikely champion of veteran's benefits, the conservative Republican Senator from Pennsylvania, David Aiken Reed.¹⁰⁰ Senator Reed was to the manor born, son of a wealthy industrialist, Princeton-educated, top of his class at the University of Pittsburgh Law School, and a successful defense attorney representing, among others, the United States Steel Corporation.¹⁰¹ Reed was a natural, one would have expected, for the National Economy League . . . but for one additional fact. He had also served as a Major in the Field Artillery for three years of the Great War, and had since been appointed to the American Battle Monuments Commission.¹⁰² He was a veteran. Reed was also pugnacious in combat on Capitol Hill, outspoken in his beliefs and not afraid of taking on even the President of the United States.¹⁰³ He could also be vindictive.¹⁰⁴ He was not the person with whom one would choose to pick a fight.

The veteran's benefits issue came to a head in June of 1934. The Roosevelt administration announced a compromise with the House of Representatives that included some additional benefits, but not all.¹⁰⁵ The Senate's more generous

⁹⁶ LEFF, *supra* note 82, at 97-119.

⁹⁷ *Urges Veto on Bill for Veterans' Pay*, N.Y. TIMES, Feb. 27, 1933, at 2.

⁹⁸ *Finds Government Still Too Wasteful*, N.Y. TIMES, Jan. 14, 1933, at 1.

⁹⁹ *Senate Votes 51 to 39*, *supra* note 92.

¹⁰⁰ Princeton University, Rare Books and Special Collections, *Description of David Aiken Reed Scrapbooks: Biographical Sketch*, at http://libweb.princeton.edu/libraries/firestone/rbsc/finding_aids/reed.html (last visited Aug. 12, 2003).

¹⁰¹ *Id.*

¹⁰² OFFICIAL CONGRESSIONAL DIRECTORY, 73d Congress, 97 (1934)

¹⁰³ See *infra* notes 106-11 and accompanying text.

¹⁰⁴ See *Reed to Ask Party to Drop Bolters: Will Ask Senate Caucus to Cut Ties with Four Republicans Who Backed Roosevelt*, N.Y. TIMES, Feb. 25, 1933, at 6 (Reed threatens to remove those who vote with the President from the party caucus.).

¹⁰⁵ *Compromise Near on Veterans' Cuts*, N.Y. TIMES, June 8, 1933, at 3.

plan was rejected by the administration, to which Senator Reed responded by promising veterans that the compromise would have to be "modified" to provide a "new deal" for them.¹⁰⁶ On June 14, the Senate passed its own bill restoring more benefits, but the margin was close and the bill appeared unlikely to survive a presidential veto.¹⁰⁷ The lobbying on this measure was reported as fierce, with the administration using "every conceivable argument"¹⁰⁸ to deal with the "pro-veteran uprising."¹⁰⁹ The debate took a personal turn when Reed described his opponents as "under the White House lash," an accusation that drew angry attack, and an "avalanche" of counter-attacks by no fewer than eight senators, Democrat and Republican, including Senator Reed himself.¹¹⁰ The debate also included an "attack on the National Economy League," whose lobbying activities against the benefits in question were apparently sorely felt.¹¹¹

The administration ultimately prevailed.¹¹² The National Economy League went on to other battles with the President,¹¹³ and Senator Reed, over tax legislation.¹¹⁴ The League was not the only pro-business lobby at work in the capitol; other corporate-sponsored organizations with names like "The Liberty League" rose up against tax reform and other legislation that affected the interests of their backers.¹¹⁵ But the scars of the veteran's benefits war remained. It had been a relatively long war, as legislation goes; it had made headlines and provoked considerable anger. The National Economy League won, and boasted about it.¹¹⁶ Senator Reed lost.

¹⁰⁶ *Reed Pleadings Aid to Veterans*, N.Y. TIMES, June 8, 1933, at 3.

¹⁰⁷ *Senate Votes 51 to 39*, *supra* note 92.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Veto Already Written*, N.Y. TIMES, June 15, 1933, at 8.

¹¹² *Thomas and Curran Debate on Budget*, N.Y. TIMES, Dec. 31, 1934, at 2.

Henry H. Curran, of the National Economy League, declared, "In 1932, they told me that the National Economy League could never win its fight for the elimination of pensions to veterans who never got sick or wounded in the war. Now in 1934, people tell me that our nation's budget cannot be balanced. I say that this budget can be balanced." *Id.*

¹¹³ *Id.*

¹¹⁴ *Republicans Balk at Tax Bill Report*, N.Y. TIMES, April 27, 1934, at 1.

¹¹⁵ LEFF, *supra* note 82, at 162-63.

¹¹⁶ See *Thomas and Curran Debate on Budget*, *supra* note 112 (statement of Henry Curran).

On April 2, 1934, as the veteran's benefits issue reached full boil, the Senate Committee on Finance reported legislation to the Senate amending the charitable contribution provisions of the Code.¹¹⁷ As proposed, the amendment was sweeping. For an organization to qualify as charitable, no "substantial part" of its activities could involve "participation in partisan politics or in carrying on propaganda, or otherwise attempting to influence legislation."¹¹⁸ When this language reached the Senate floor, however, Senator Reed, a committee member and the amendment's chief spokesman, explained with evident discomfort that, as worded, the prohibition would apply to the Society for the Prevention of Cruelty to Children, to the Society for the Prevention of Cruelty to Animals, "or any of the worthy institutions that we do not in the slightest mean to affect."¹¹⁹ However, Reed continued:

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; but we found great difficulty in phrasing the amendment. I do not reproach the draftsmen. I think we gave them an impossible task; but this amendment goes much further than the committee intended to go.¹²⁰

The National Economy League and its "personal interests" were the problem. But the solution cured too much, and Senator Reed knew it. As he pointed out in a colloquy with a colleague over "tuberculosis societies" and "children's welfare societies" that have substantial legislative agendas, those groups that argued for public health or child labor laws were certainly "not acting from selfish motives," but would nevertheless fall within the sweep of the new prohibition.¹²¹

¹¹⁷ The amendment was offered by Senator Harrison, the Finance Committee Chair, but its explanation and defense was carried by Senator Reed. See 78 CONG. REC. 5861, 5959 (1934). That Senator Reed was the moving force became apparent in the presentation of the final compromise. See *infra* note 123.

¹¹⁸ 78 CONG. REC. 5861 (1934).

¹¹⁹ *Id.*

¹²⁰ *Id.* In the view of Senator Harrison, this sauce-for-the-goose-sauce-for-the-gander approach was appropriate. *Id.* As far as he was concerned, the prohibition would extend even to "some war organizations," a heresy to which the Congress has yet to subscribe, allowing veterans groups to lobby with impunity, muting testimony to the lasting effects of the Bonus Army war. See I.R.C. § 501(C)(19) (2003). For an unsuccessful challenge to the constitutionality of this unequal treatment, see *Taxation With Representation v. Regan*, 676 F.2d 715 (D.C. Cir. 1982).

¹²¹ 78 CONG. REC. 5861 (1934).

With the question so raised and unresolved, the Senate deferred the amendment.

When the Senate later returned to the amendment, the Finance Committee Chairman explained that there were "certain organizations which are receiving contributions in order to influence legislation and carry on propaganda. The committee thought there ought to be an amendment which would stop that, so that is why we have put this amendment in the bill."¹²² Reed reiterated that the committee was not proud of the language of the amendment, but urged its adoption to allow "better phraseology" to be offered in conference with the House.¹²³ To Senator Robert LaFollette, however, Reed was attempting the impossible. In Senator LaFollette's view, the "mistakes of administration" and "decisions which may seem like favoritism" would never abate until all organizations of this type were disqualified.¹²⁴ In other words, once the National Economy League was up for challenge, so were all of the others.¹²⁵

As it turned out, Senator LaFollette's blanket approach prevailed. The conference committee was either unable or unwilling to distinguish between the National Economy League and the Society for Prevention of Cruelty to Animals, and, instead, retained the language prohibiting "substantial" activities in "carrying on propaganda or otherwise attempting to influence legislation."¹²⁶ At the same time, however, the

¹²² 78 CONG. REC. 5959 (1934) (statement of Sen. Harrison).

¹²³ *Id.* (statement of Sen. Reed).

¹²⁴ *Id.* (statement of Sen. LaFollette). Certainly one such "mistake," or decision that may have seemed like "favoritism," would have been the Roosevelt administration's failure to challenge the exempt status of the National Economy League under existing IRS policy; a similar reluctance to challenge the exemption of a politically-active charity would lead, years later, to a more explicit sanction on participation in elections. See *infra* text accompanying notes 400-19.

¹²⁵ Senator Reed's concerns over corporate lobbying re-surfaced the following year when the Metropolitan Edison Company blanketed members of Congress with several thousand letters opposing federal utility legislation. *Anyone's Name Put on Lobbyist Wires, Utility Man Says*, N.Y. TIMES, July 24, 1935, at A1. The letters, it turned out, were fraudulent, written by a utility company lobbyist who affixed the names of company employees, most of whom had no knowledge of the letters or their content. *Id.* For congressional reaction, see LEFF, *supra* note 82, at 162-63. Incidents such as these served to reinforce the position of Senator LaFollette the previous year: If restricting corporate lobbying through charitable organizations meant restricting all charities, then so be it.

¹²⁶ 100 CONG. REC. 9599, 9604 (1954). Senator Reed's only comment was that he had "discussed the matter within the Chairman of the Committee, the Minority ranking member of the Committee, and several other members of the Committee, and I understand that the amendment is acceptable to them." *Id.* The Conference Report is no more enlightening. H.R. REP. NO. 83-2543, at 46 (1954).

committee reported a “substantial concession” on part of the prohibition that was “too broad”; it had succeeded in getting the conferees to drop the prohibition on “participation in partisan politics.” Three months after the lobbying prohibition was enacted, the IRS revoked the exempt status of the National Economy League.¹²⁷

As of 1934, then, the lobbying restriction was made explicit and ostensibly freed from its “controversiality” underpinnings. Its expressed concern was with the economic self-interest of contributors who controlled these organizations, but unable to draw a line to limit them, it limited, instead, the lobbying activity itself. By retaining the restriction on “propaganda” and by prohibiting only “substantial” lobbying, however, the Congress left the Service extremely wide discretion on whom it wished to challenge, and why – discretion that would remain influenced by the controversial nature of the position advocated as viewed by the Service and the administration in power. At the same time, and for the first time, Congress explicitly focused on participation in electoral campaigns and decided that prohibition of politics in this form would simply be “too broad.” The first time, then, that the Congress looked at electoral activities by charities, it blinked.

IV. THE ELECTORAL POLITICS PROHIBITION AND SENATOR LYNDON B. JOHNSON

In 1954 Congress again amended § 501(c)(3), this time to add the language it had rejected twenty years earlier. The reasons it did so again lie in the history of the amendment and its sponsor, this time an even more influential figure in the Senate of his day, Lyndon B. Johnson of Texas.

By contrast to the 1934 amendment, the legislative history here is minimal. No committee proposal was made; no Treasury proposal was made; no committee hearings were held. There was no discussion of the amendment on the floor of either chamber. On July 2, 1954, without explanation, Senator Johnson simply offered an amendment to prohibit political campaign activity by charities, as part of general revisions to the Internal Revenue Code.¹²⁸ The amendment was prepared in

¹²⁷ *Lobbying and Political Activities of Tax-Exempt Orgs.: Hearings Before the Subcomm. on Oversight of the Comm. on Ways and Means*, 100th Cong., 1st Sess. 124, 139 (1987) (statement of William J. Lehrfeld) [hereinafter *Lehrfeld Statement*].

¹²⁸ See *infra* text accompanying notes 162-65.

such haste, and its consideration so brief, that it failed also to amend the provisions of § 170 relating to charitable deductions, leaving an anomaly in the law that thenceforth allowed deductions to *non-exempt* organizations and that was only corrected years later.¹²⁹

Commentators have explained that Senator Johnson was motivated by the activities of charities allied to his opponent in a recent campaign.¹³⁰ At least two commentators identify those charities as creations of the wealthy Texas conservative H.L. Hunt.¹³¹ More recent evidence confirms that the Senator was reacting to material circulated during the 1954 Democratic primary campaign by a nonprofit organization called the Committee for Constitutional Government.¹³²

To Senator Johnson, the 1954 primary – which he ultimately won in a landslide – was an anxious matter.¹³³ He had won his first term by the razor thin margin of eighty-seven votes, a margin some maintained did not exist at all.¹³⁴ He was a Democrat in the Republican Senate, with an extremely popular Republican in the White House. No sooner had his principal rival for reelection, Texas' Governor Allan Shivers, chosen not to run, then into the lists came a young, millionaire rancher-oilman with a conservative agenda: Dudley T. Dougherty.¹³⁵

¹²⁹ See *Lehrfeld Statement*, *supra* note 127, at 144; Letter from Thomas A. Troyer, former member of IRS Commissioner's Advisory Group on Exempt Organizations and former member of the Treasury Department's Advisory Committee on Private Philanthropy and Public Needs, to Oliver Houck (July 20, 1988) (on file with author).

¹³⁰ HOPKINS, *supra* note 1, at 504.

¹³¹ See *Lehrfeld Statement*, *supra* note 127, at 144 ("Senator Lyndon Johnson was facing a difficult re-election campaign, strongly opposed by H.L. Hunt and his Lifeline Foundation."); NON-PROFIT ORGANIZATION TAX LETTER, Vol. 22, Mar. 23, 1984, at 2 ("Senator Johnson was irritated at the H.L. Hunt Foundation activity against him when he ran for the Senate in Texas[.]").

¹³² *Lehrfeld Statement*, *supra* note 127, at 144. For a more recent account, see Patrick L. O'Daniel, *More Honored in the Breach: A Historical Perspective on the Permeable IRS Prohibition on Campaigning by Churches*, 42 B.C. L. REV. 733 (2001) (Johnson suspected Hunt was clandestinely supporting his opponent through the Committee for Constitutional Government).

¹³³ See ALFRED STEINBERG, *SAM JOHNSON'S BOY: A CLOSE-UP OF THE PRESIDENT FROM TEXAS* 383 (1968); MERLE MILLER, *LYNDON: AN ORAL BIOGRAPHY* 240-42 (1980); ROWLAND EVANS & ROBERT NOVAK, *LYNDON B. JOHNSON: THE EXERCISE OF POWER* 72-73 (1966).

¹³⁴ EVANS & NOVAK, *supra* note 133, at 73. Suspicions about the legitimacy of this vote, and victory, continued long afterwards. See *id.*; see also STEINBERG, *supra* note 133; MILLER, *supra* note 133.

¹³⁵ EVANS & NOVAK, *supra* note 133, at 72; STEINBERG, *supra* note 133, at 383.

In the early 1950s, American conservatives felt their agenda as strongly as today. The Great Depression may have passed but international Communism loomed abroad and, in the view of many, at home as well. The Cold War dominated American politics, fueled by the investigations and accusations of Senator Joseph McCarthy who, by 1954, if not widely followed, was still widely feared.¹³⁶ Organizations formed in opposition to the New Deal now sounded the alarm over appeasement of Communism and international treachery. One such organization was the Committee for Constitutional Government (the Committee),¹³⁷ described by a political advisor to Johnson as “the wealthiest and most powerful of the extreme right-wing groups in the United States.”¹³⁸

In 1954 the Committee launched a campaign to distribute material supporting the Bricker Amendment, a proposal to limit the treaty-making authority of the President.¹³⁹ Were that all it distributed, § 501(c)(3) of the Internal Revenue Code might not to this day mention participation in an electoral campaign. In addition, however, the Committee’s solicitation attached several articles from its magazine, *Spotlight for the Nation*, one of which, authored by “Noted Economist, Radio Commentator and Author” Willis Ballinger, was entitled *The Texas Story*.¹⁴⁰ *The Texas Story* began by identifying the three groups that threaten traditional America – Communists, Socialists and Internationalists – supported by “numerous dupes who suffer from delusions induced by propaganda about ‘economic justice,’ ‘abundance for all,’ ‘world peace,’ or the ‘brotherhood of man.’”¹⁴¹

Fortunately, *The Texas Story* continued, a young aspirant had arisen in Texas like “a sort of political Moses,” with the courage to challenge for a seat in the United States Senate an incumbent who, in the view of “Nationalist-minded Texans,” was “a slavish partisan of Franklin Roosevelt,” a supporter of NATO (“the military phantom which, under the

¹³⁶ EVANS & NOVAK, *supra* note 133, at 72.

¹³⁷ Letter from Sumner Gerard to J.R. Parten, Chairman of the Board, Federal Reserve Bank of Dallas (May 1954) (on file with author).

¹³⁸ Memorandum from George E. Reedy, Jr., Aide to Sen. Lyndon B. Johnson, to Lyndon B. Johnson, Senator, U.S. Congress (May 27, 1954) (on file with author).

¹³⁹ Letter from Sumner Gerard, *supra* note 137.

¹⁴⁰ Willis Ballinger, *The Texas Story*, HUMAN EVENTS (Washington D.C.), reprinted in SPOTLIGHT ON THE NATION NO. D-269 (Committee for Constitutional Gov’t Inc., New York, NY) (on file with author).

¹⁴¹ *Id.* at 1.

pretense that it protects us and our allies against the Kremlin, has cost us untold millions"), a supporter of the United Nations, and an opponent of the Bricker Amendment.¹⁴² Indeed, a vote for the incumbent, "many Texans felt," was a vote for Socialism in Washington and in favor of "covering up Communist infiltrators."¹⁴³ The incumbent was of course Senator Johnson. The young Moses was Dudley Dougherty.

The campaign itself became somewhat bizarre. Dougherty, who toured the state speaking from the back of a shiny red fire truck, "managed to combine religion, McCarthyism, and anti-federalism into the single slogan: 'Clean the Godless Commies out of the State Department.'"¹⁴⁴ He mounted a twenty-nine hour telethon during which he called Eleanor Roosevelt an "old witch,"¹⁴⁵ and gradually self-destructed to the extent that Johnson chose not to run a campaign in Texas at all.¹⁴⁶ At the outset, however, any opponent was a genuine threat to the Senator, and the tactics Dougherty used were particularly irritating. Among Dougherty's backers was the multi-millionaire H.L. Hunt, and the language Hunt's followers used was "vicious."¹⁴⁷ Johnson "obviously wanted to lash back in some fashion" and his aide George Reedy "had to restrain him (by persuasion, of course,) from making statements on more than one occasion."¹⁴⁸

The Committee for Constitutional Government came to Johnson's attention in May of that election year. The Committee had sent its fundraising solicitation to the Chairman of the Federal Reserve Bank of Dallas, J.R. Parten,¹⁴⁹

¹⁴² *Id.* at 1-2. A notice "to the public," appended to the article, concluded: Dudley T. Dougherty, with courage, forthrightly states his platform. Which of his planks do you agree with and/or oppose? It would no doubt, interest him to have your frank opinion regardless of whether you support his position or are critical of the stand he takes; regardless also of whether you are a fellow citizen of Texas or resident elsewhere in the country. His address is: Hon. Dudley T. Dougherty, Beeville, Texas.

Id. at 2.

¹⁴³ *Id.* at 2.

¹⁴⁴ STEINBERG, *supra* note 133, at 383.

¹⁴⁵ MILLER, *supra* note 133, at 161-62.

¹⁴⁶ STEINBERG, *supra* note 133, at 383-84.

¹⁴⁷ Deirdre Dessingue Halloran & Kevin M. Kearney, *Federal Tax Code Restrictions on Church Political Activity*, 38 CATH. LAW. 105, 107 (1998) (citing Letter from George E. Reedy, Jr. to Deirdre Dessingue (Oct. 11, 1985)).

¹⁴⁸ *Id.*

¹⁴⁹ Letter from J.R. Parten, Chairman, Federal Reserve Bank of Dallas, to Honorable Lyndon B. Johnson, Senator, U.S. Congress (May 28, 1954) (on file with author).

on the not-unreasonable assumption that he might support the Bricker Amendment campaign. Parten, as it happened, was a Johnson supporter and wrote at once to the Senator, questioning whether it was "legal and legitimate" to expend corporate funds for political purposes.¹⁵⁰ Johnson assigned the letter to his aide, George Reedy,¹⁵¹ and replied to Parten that he was having the question "explored by experts."¹⁵²

To Reedy, the Committee was better left alone. In a memo dated May 27, 1954, he informed Johnson that it was "highly unusual" for the Committee to take a stand on a candidate for public office, as it had done here.¹⁵³ Reedy noted further that the Committee – managed by an individual who had been convicted of contempt of Congress a few years earlier and for trafficking with Germany during the First World War¹⁵⁴ – was quite vulnerable to exposure, if it became a problem. The Senator was unmoved.

On June 15, 1954, Johnson received an opinion on the legality of the Committee's actions from his counsel, Gerald Seigel.¹⁵⁵ In circulating an article favorable to Dougherty throughout Texas, and in urging people to write to Dougherty, the Committee had, Seigel concluded, violated Texas election laws.¹⁵⁶ Under federal law, however, while the Committee, "has clearly engaged in an indirect, if not direct, effort to influence a senatorial election by aiding the candidacy of Dougherty and attempting to defeat your candidacy," the applicable prohibition concerned only legislation and was therefore, by inference, inapplicable.¹⁵⁷

Johnson pursued his grievance. As he explained to a friend, here was a candidate for the Senate from Texas

¹⁵⁰ *Id.*

¹⁵¹ Memorandum to George E. Reedy, Jr., Aide, Sen. Lyndon B. Johnson (June 1, 1954) (on file with author).

¹⁵² Letter from Lyndon B. Johnson, Senator, U.S. Congress, to J.R. Parten, Chairman of the Board, Federal Reserve Bank of Dallas (June 3, 1954) (on file with author).

¹⁵³ Memorandum from George E. Reedy, Jr., *supra* note 138, at 1. The memo continues: "As a rule, the Committee confines itself to generalities and only makes attacks upon such people as the Roosevelts, Frankfurter and other obvious targets for right-wing sniping." *Id.* at 2.

¹⁵⁴ *Id.*

¹⁵⁵ Memorandum from Gerald W. Siegel, Counsel, Senator Lyndon B. Johnson, to Lyndon B. Johnson, Senator, U.S. Congress (June 15, 1954) (on file with author).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 2.

"without a single plank" devoted to Texas problems and "whose major backer is an organization controlled by New Yorkers."¹⁵⁸ On June 18, the question of the tax status of the Committee for Constitutional Government was transmitted through a member of the House of Representatives to the United States Treasury.¹⁵⁹ On June 28, the Commissioner acknowledged its receipt, announced the documents to be "no less amusing and shocking to me than they are to you," and promised "appropriate steps" to see "what, if anything, can be done" about these groups under the exemption provisions of the Code.¹⁶⁰ On July 1, Congressman John McCormack transmitted the Commissioner's reply to Johnson.¹⁶¹ It cannot have provided much satisfaction.

On the very next day, July 2, Johnson introduced the amendment.¹⁶² At this point, the documentary evidence disappears.¹⁶³ As a Washington, D.C. tax newsletter notes, both Johnson and the Chief of Staff of the Joint Committee on Internal Revenue Taxation, Lawrence Woodworth, "had a good record on the Hill of leaving little evidence as to what they did."¹⁶⁴ One prominent tax lawyer who worked with Woodworth at the Joint Committee has written, however, that according to Woodworth, Johnson came to him and told him that "some foundations' in Texas were giving him trouble in his reelection

¹⁵⁸ Letter from Lyndon B. Johnson, *supra* note 152.

¹⁵⁹ Letter from T. Coleman Andrews, Commissioner, U.S. Treasury, to John W. McCormack, Congressman, U.S. Congress (June 28, 1954) (on file with author). Also questioned was the tax status of the Constitution and Free Enterprise Foundation, Inc., referenced as an IRS qualified charity in the Committee's letter of solicitation. *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Letter from John W. McCormack, Congressman, U.S. Congress, to Lyndon B. Johnson, Senator, U.S. Congress (July 1, 1954) (on file with author).

¹⁶² See 100 CONG. REC. 9604 (1934); *Lehrfeld Statement*, *supra* note 127, at 144; NON-PROFIT ORGANIZATION TAX LETTER, *supra* note 131, at 2.

¹⁶³ NON-PROFIT ORGANIZATION TAX LETTER, *supra* note 131, at 2 ("The prohibition against election activity by a §501(c)(3) organization has no written legislative history or explanation for why it was inserted in the Code."). In 1985, at the beginning of research for this study, the author spoke with four Washington, D.C. tax attorneys, each of whom had practiced with either the Joint Committee on Taxation or the Internal Revenue Service and who were acquainted with the Committee's Chief of Staff at the time, Lawrence Woodworth. Each stated that Woodworth introduced the amendment in haste, at Senator Johnson's urging, in response to the election activity of unnamed foundations against him. These attorneys expressed their preference that they not be quoted to this effect in this Article.

¹⁶⁴ *Id.*

campaign, and directing Larry to draft an amendment which would stop them.”¹⁶⁵ Which he did.

These events, then, and this reaction, are the reasons why the prohibition on participation by charities in electoral campaigns, a prohibition not even qualified by the word “substantial,” found its way into § 501(c)(3) of the Code. From this point forward, the treatment of the legislative and campaign prohibitions of § 501(c)(3) would take on a new dimension. Congress had spoken, the question of whether such prohibitions were wise was foreclosed, and it would be for courts to decide whether they were constitutional.

V. LITIGATION RESTRICTIONS AND THE NIXON ADMINISTRATION

In 1970, a third assault was launched on the political activity of charities, this time against public interest litigation. It came not from the Congress but from the Nixon administration, and it had been building for some time.

Charitable litigation arose early in the 1900s, when American cities began establishing legal aid programs for immigrants, and then more broadly for the urban poor.¹⁶⁶ In those same years, the American Civil Liberties Union was created to protect pacifists and peace protesters; by 1974 it had become an organization with nearly three hundred thousand members, fifty-two staff lawyers, and hundreds of volunteers litigating civil rights and individual liberties across the board. In 1939, the National Association for the Advancement of Colored People founded the Legal Defense and Education Fund to challenge public school segregation, and then voting restrictions, housing discrimination, and the death penalty. In the 1960s, the federal Office of Economic Opportunity began funding independent legal services, and in 1974 Congress created the independent Legal Services Corporation.¹⁶⁷ Such legislation does not pass without considerable popular support. On the other hand, there were those, including the President of

¹⁶⁵ Letter from Thomas A. Troyer, *supra* note 129, at 2.

¹⁶⁶ The description of the ACLU, the NAACP, and legal services programs that follows is taken from Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 207-31 (1976) (providing detailed references for the early history of the ACLU and NAACP) and from COUNCIL FOR PUBLIC INTEREST LAW, *BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA* 21-57 (1976).

¹⁶⁷ The Legal Services Corporation Act, Pub. L. No. 93-55, 88 Stat. 378 (1974) (codified as amended at 42 U.S.C. § 2996 (2000)).

the American Bar Association, who viewed the "greatest threat" to America, apart from Communism, to be the "propaganda campaign" in support of "a federal subsidy to finance a nation-wide plan for legal aid and low-cost legal service."¹⁶⁸

It was not these activities, however, that brought down the house. Rather, it was a fresh wave of litigation by dozens of newly-formed organizations claiming to defend not the interests of identifiable immigrants, pacifists, or black Americans, but rather those of a diffuse majority concerned with consumer safety and, above all, environmental protection. The literature of the time, *Silent Spring*¹⁶⁹ and *Unsafe at Any Speed*,¹⁷⁰ cried out for protection of the public in general. New doctrines on standing and administrative review facilitated challenges to industry and government conduct that had theretofore been verboten.¹⁷¹ New and old foundations were catching the wave, funding existing charities in litigation projects and establishing new ones whose primary activity would be litigation.¹⁷²

¹⁶⁸ Robert G. Storey, *The Legal Profession Versus Regimentation: A Program to Counter Socialization*, 37 A.B.A. J. 100, 101 (1951). Two decades later, however, a subsequent ABA President would write:

While activity on behalf of the indigent is laudable and must continue, it is now apparent that this concern is only one part of the total obligation of the legal profession to ensure that each and every segment of society is adequately represented There are both individuals and groups who, for practical purposes, are barred from the courts and from legal process generally because they lack sufficient commitment and resources to support litigation on the same scale as their adversaries. Environmental and consumer concerns are two immediate and obvious examples.

Chesterfield Smith, *President's Page*, 60 A.B.A. J. 641 (1974).

¹⁶⁹ RACHEL CARSON, *SILENT SPRING* (1962). Originally published in the New Yorker magazine, this book is generally credited with bringing the problems of pesticide pollution to the attention of the American public, and with it a concern for environmental protection.

¹⁷⁰ RALPH NADER, *UNSAFE AT ANY SPEED* (1965). This book and its attendant publicity became moving forces for consumer protection.

¹⁷¹ See *Sierra v. Morton*, 405 U.S. 727 (1972) (allowing citizen standing for aesthetic interests); *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (opening FCC proceedings to public intervention); *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (opening FPC decisions to a judicial review, the court dismissed the FPC's argument that citizens groups lacked standing because of insufficient economic interest in the controversy, and went on to state that "the right of the public must receive active and affirmative protection at the hands of the Commission").

¹⁷² The law reform programs of the ACLU and the NAACP/LDF and the newer programs of the Environmental Defense Fund and the Center for the Law and Social Policy were created and originally supported through foundation grants. See Rabin, *supra* note 166.

Worse, unlike the ACLU and the NAACP, this new brand of public interest litigation seemed perversely targeted at American business and industry, the heartland of the Republican Party. The Environmental Defense Fund was born over lawsuits to control the manufacture and sale of pesticides.¹⁷³ The Natural Resources Defense Counsel rose from cases contesting the water discharges of Con Edison at Storm King Mountain.¹⁷⁴ The Calvert Cliffs' Coordinating Committee took on a nuclear power plant in Maryland,¹⁷⁵ the Center for Law and Social Policy took on the Alaska Pipeline,¹⁷⁶ and *Unsafe at Any Speed* took on General Motors.¹⁷⁷ No business interests appeared safe, and the reaction of otherwise responsible leaders approached paranoia. In a report to the U.S. Chamber of Commerce entitled *Attack On American Free Enterprise System*, Lewis F. Powell Jr., a few months before his appointment to the Supreme Court, would write, "No thoughtful person can question that the American economic system is under broad attack."¹⁷⁸ Leaders of the attack included Ralph Nader,¹⁷⁹ Yale Professor Charles Reich (for his book, *The Greening of America*),¹⁸⁰ unnamed "Communists" and "New Leftists,"¹⁸¹ and "active exploiters of the judicial system" ranging from "liberal' to the far left."¹⁸² The success of these judicial actions, Powell emphasized, "often at business'

¹⁷³ MARION LANE ROGERS, ACORN DAYS: THE ENVIRONMENTAL DEFENSE FUND AND HOW IT GREW 23-25 (1990) (describing founding of EDF, now called Environmental Defense, and early pesticide litigation).

¹⁷⁴ See JOHN CRONIN & ROBERT F. KENNEDY, JR., THE RIVERKEEPERS: TWO ACTIVISTS FIGHT TO RECLAIM OUR ENVIRONMENT AS A BASIC HUMAN RIGHT 39 (1997).

¹⁷⁵ Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971).

¹⁷⁶ See Wilderness Soc'y v. Hickel, 325 F. Supp. 422 (D.D.C. 1970), *aff'd*, 479 F.2d 842 (D.C. Cir. 1972). The Center for Law and Social Policy represented the Wilderness Society and other plaintiffs. Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974).

¹⁷⁷ See NADER, *supra* note 170.

¹⁷⁸ Confidential Memorandum, Attack on American Free Enterprise System, from Lewis F. Powell, Jr. to Mr. Eugene B. Sydnor, Jr., Chairman, Education Committee, U.S. Chamber of Commerce (Aug. 23, 1971). The memorandum was obtained by syndicated columnist Jack Anderson, who began publishing excerpts in his columns. The Chamber of Commerce then published the memo in full, as *The Powell Memorandum*, WASHINGTON REP., Supp. No. 2900 (U.S. Chamber of Commerce 1971). As for the scope of the "Attack," the memo explained: "The American political system of democracy under the rule of law is also under attack, often by the same individuals and organizations who seek to undermine the enterprise system." *Id.* at 2 n.1.

¹⁷⁹ *The Powell Memorandum*, *supra* note 178, at 3.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 2.

¹⁸² *Id.* at 7.

expense, has not been inconsequential."¹⁸³ In a word, American business was stung.

Putting the matter in its most charitable light, the volume of the new litigation groups and the range of their interests confused the Internal Revenue Service. As the then-Commissioner explained, they included "organizations opposed to specific industrial undertakings that may affect the environment," and others that proposed "to litigate any matter which affects the environment"; they included organizations that would litigate "on behalf of consumers generally," and others that would "litigate on any matter they conceive to be in the public interest."¹⁸⁴ The Service granted exemptions to some groups, stalled on others, and then granted one that required further clearance by the Service before the group went to court.¹⁸⁵ Then it made its move.

On October 9, 1970, the Service issued a press release announcing that it had "temporarily suspended" its rulings on "public interest law firms" (the Service's own quotation marks) and other organizations that litigate "for what they determine to be the public good," such as "preservation of the environment, protection of consumer interests, and the like[.]"¹⁸⁶ It would not decide on their exemptions until the completion of a study, "now under way[.]"¹⁸⁷ Pending its decision, which the Service hoped to make within sixty days, it would make no judgment about the deductibility of contributions to these organizations.¹⁸⁸ Six days later, it issued another press release expressing its "hope" that "major commitments for long-range funding for such organizations would not be undertaken during

¹⁸³ *Id.*

¹⁸⁴ See *Tax Exemptions for Charitable Organizations Affecting Poverty Programs: Hearings Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. 15-16 (1970) (statement and testimony of Randolph W. Thrower, Commissioner, Internal Revenue Service, Department of the Treasury) [hereinafter *Poverty Programs Senate Hearings*].

¹⁸⁵ The extent of the IRS's confusion is reflected in a ruling issued to one applicant for litigation in the environmental field which recognized the law firm as charitable, but then required it to submit any proposal for litigation to the Treasury Department for prior approval. *Id.* at 90-93 (statement of Mortimer M. Caplin, former Commissioner of the Internal Revenue Service, concerning the application of the Natural Resources Defense Council).

¹⁸⁶ *Id.* at 5 (reprinting IRS News Release IR-1069 (IRS), Oct. 9, 1970).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 6.

the present study.”¹⁸⁹ Public interest litigation, and its funders, were on hold.

Putting the matter in a less charitable light, the Service’s action was extraordinary and highly suspicious. The Service did not normally make decisions like this by surprise, nor by press release; its standard practice was to convene the interested parties, identify the problems, and work towards a proposed ruling or regulation.¹⁹⁰ This action looked more like the kind of thing a bureaucracy did when somebody was demanding action, now. Critics wanted to know who that was. “Maybe I did not make myself clear,” stated Senator Walter Mondale at a subsequent hearing held in response to the press release.¹⁹¹ “What sources came to you and urged that the law firms protecting the public interest be denied tax exemption? . . . What sources, for example, set such a regulation in motion? How is that done? Who does it?”¹⁹²

Congress, the press, and a range of public charities were quick to draw their own conclusions. *The New York Times*:

The Internal Revenue Service has previously harassed the Sierra Club on grounds that the club’s public service advertisements on environmental issues constitute lobbying. Now the IRS is extending its intimidation and harassment to a much wider range of organizations. It is time for IRS officials to relax their tender

¹⁸⁹ *Poverty Programs Senate Hearings*, *supra* note 184, at 7 (reprinting IRS News Release IR-1072 (IRS), Oct. 15, 1970).

¹⁹⁰ *See id.* at 136 (Testimony of Mitchell Rogovin, counsel to the Center for Law & Social Policy). The Service’s process – in essence, rulemaking by press release – came under heavy fire at the subsequent hearings:

Mr. Chairman, the Revenue Service has in the past conducted studies. The practice had been to quietly bring in the affected industry groups If industry were involved, rather than charitable organizations, one might assume that the industry representatives would have been quietly called in Washington, and all the information necessary for Revenue to rule – one way or the other – would have then been obtained. A good example of such industry type study took place a few years back when the tax treatment of treble damage payments was under study by IRS. But that type approach did not take place in this instance.

Id.

See also id. at 48. (reprinting Letter from Sam. J. Ervin, Jr., Senator, U.S. Congress, to the Hon. Randolph W. Thrower, Commissioner, Internal Revenue Service (Oct. 29, 1970) (expressing “concern[] about the procedures which the IRS . . . followed in this matter” and declaring it “highly improper to use a press release to change tax status of many existing organizations and to suspend the issuance of exemptions to new organizations of the same kind”).

¹⁹¹ *Id.* at 77 (questioning Commissioner Thrower during his testimony at the Senate Hearings, Nov. 16, 1970).

¹⁹² *Id.*

solicitude for the big polluters and come to the rescue of the ordinary citizens who pay their salaries.¹⁹³

The Washington Post:

Although not all the facts are yet out – if all of them ever will be – a number of urgent questions need to be asked about the IRS decision. Who is behind it? This decision is a major move, one that will prevent qualified lawyers acting on recognized laws going into established courts. It is no secret that major corporations, already buffeted by tight money, a bear market and strikes, feel harassed by court cases in anti-pollution and consumer areas. [T]he thought occurs – though these things are hard to prove – that business interests may have sent an SOS to the Nixon administration, saying, in effect, get the kids off our backs.¹⁹⁴

The Minneapolis Star:

A complex and inconsistent Internal Revenue Service (IRS) ruling designed to protect business will, it appears, throw a body block against some efforts to work within the local system to attack polluters and protect consumers.¹⁹⁵

The Capitol Times (Madison, Wisconsin):

These [the IRS] arguments are one indication of how far the Nixon administration is willing to go to protect the sanctity of big interests against the public.¹⁹⁶

Unlike the lobbying and electioneering restrictions discussed earlier, we will never know the full story behind the Service's proposal and the process it chose to follow. But it smelled strongly of strike-back politics. The Nixon administration knew how to deploy the IRS against its critics.¹⁹⁷ Indeed, it knew how to deploy wiretaps and burglaries.¹⁹⁸ The

¹⁹³ *Poverty Programs Senate Hearings*, *supra* note 184, at 405 (reprinting *IRS to the Rescue*, N.Y. TIMES, Oct. 15, 1970). In fairness to the IRS, the Sierra Club had been engaged in heavy lobbying. On the other hand, so had been a number of non-governmental organizations on all sides of public issues. The suspicion was and is, that the Sierra Club was targeted for being (1) opposed to government policy and (2) effective.

¹⁹⁴ *Id.* at 409 (reprinting *The Law, the IRS, and the Environment*, WASH. POST, Oct. 14, 1970, at A18).

¹⁹⁵ *Id.* at 406 (reprinting Austin C. Weirwein, *IRS Versus Public Interest Law*, MINNEAPOLIS STAR).

¹⁹⁶ *Id.* at 415 (reprinting Editorial, *IRS and the Public Interest*, MADISON (WIS.) CAPITAL TIMES, Nov. 12, 1970).

¹⁹⁷ See CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* 270-71 (1974).

¹⁹⁸ See *United States v. Barker*, 514 F.2d 208 (D.C. Cir. 1975) (affirming conviction of White House-directed burglars of the Democratic Party Headquarters and the offices of a private doctor to obtain medical records of opponent to administration

deep involvement in that same period of time of White House Counsel John Dean in the Service's disqualification of a 501(c)(3) charity called the Center for Corporate Responsibility – whose offending purpose was apparently the promotion of corporate awareness for the needs of minorities and environmental protection – led to court review and reversal.¹⁹⁹ In reaction to the success of the Legal Services Corporation in representing indigent clients, the Republican Party spent years trying to neuter the Corporation and reduce the impact of its litigation.²⁰⁰ In short, there was good reason to suspect business and politics as usual.

Commissioner Randolph Thrower, on the other hand, vigorously denied outside influence on the Service's action.²⁰¹ Either to prove the Service's independence or because he had no other intellectually tenable option, he reversed field dramatically in the weeks following. Within five days, a committee of the Senate notified Thrower that it intended to schedule hearings on the press release in early November.²⁰² Thrower asked for a delay.²⁰³ The Senate refused.²⁰⁴ Meanwhile, Democratic senators wrote the Service in support of full recognition for public interest litigation.²⁰⁵ So did Republican

policy on Vietnam War); *United States v. McCord*, 509 F.2d 334 (D.C. Cir. 1974) (affirming conviction of White House operative for wiretapping and burglary).

¹⁹⁹ *Ctr. on Corp. Responsibility, Inc. v. Schultz*, 368 F. Supp. 863 (D.D.C. 1973).

²⁰⁰ See Michael S. Serrill & David S. Jackson, *An Organization at War with Itself: Legal Services Rifles Its Files and Ruffles Some Feathers*, *TIME*, Oct. 3, 1983, at 83; see also *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (holding that a provision in an appropriations bill restricting arguments lawyers could make on behalf of indigent welfare clients violated the First Amendment).

²⁰¹ *Poverty Programs Senate Hearings*, *supra* note 184, at 424 (Thrower "repudiate[d] published speculation that the 'prime movers' had been Commerce Secretary Maurice H. Stans and Attorney General John N. Mitchell. Purportedly, they had wanted to cripple the fight against corporate polluters by denying exemptions to groups that fight them.") (reprinting Morton Minz, *For Public Interest Law Firms: IRS Denies Pressure on Exemptions*, *WASH. POST*, Oct. 25, 1970).

²⁰² *Id.* at 36-37 (letter from Committee on Labor and Public Welfare to Commissioner Thrower, dated Oct. 14, 1970).

²⁰³ *Id.* at 40, 43-44 (letters from Commissioner Thrower to Gaylord Nelson, Chairman, Senate Subcommittee on Employment, Manpower and Poverty, Oct. 23, 1970 and Oct. 29, 1970).

²⁰⁴ *Id.* at 40-41 (letter from Gaylord Nelson to Commissioner Thrower, Oct. 29, 1970).

²⁰⁵ See *id.* at 378 (letter from Sen. George McGovern, Oct. 8, 1970, expressing concern that the IRS "may be preparing a ruling which would prevent any organization engaging in environmental litigation from being classified as a charitable organization"); *id.* at 47 (letter from Sen. Sam Ervin Jr., Oct. 29, 1970); *id.* at 36-37 (letter from Sen. Gaylord Nelson, Walter F. Mondale, Ralph W. Yarborough, Claiborne Pell, Harrison A. Williams, Jr., Edward M. Kennedy, and Thomas F. Eagleton, Oct. 14,

Gerald Ford.²⁰⁶ Nineteen former federal cabinet members and agency heads signed a joint letter to the same effect²⁰⁷ and several former IRS Commissioners submitted documents.²⁰⁸ The press took up the cry. The pressure was on, and Thrower was scheduled to appear on November 16 before the Senate with thirty-four witnesses lined up in opposition, including representatives from the Communications Workers of America, the American Hebrew Congregations, and the United Methodist Church.²⁰⁹ It was not going to be a pretty sight.²¹⁰

On November 12, four days before the hearings were to begin, the Service capitulated.²¹¹ Before media attention that appeared to Thrower to be a "new high . . . in microphones,"²¹² he announced a new set of guidelines that defined and recognized public interest litigation as a charitable activity under § 501(c)(3) of the Code.²¹³ The Service had begun by considering, and then rejecting, a test based on the charitable purposes sought to be achieved, be they environmental protection, civil rights, or whatever rights; all purposes, including very private ones, could be couched as public ones.²¹⁴ Instead, the centerpiece requirement of the new guidelines was that the litigation be designed to represent a "public interest rather than a private interest."²¹⁵ As Thrower would stress several times and in several ways at the subsequent hearing, the question was whether such a charity is "a satellite or a captive of a group that is not itself recognized as a charity" or is

1970).

²⁰⁶ *Poverty Programs Senate Hearings*, *supra* note 184, at 449-50 (letter from Sen. Gerald Ford, Oct. 26, 1970).

²⁰⁷ *Id.* at 493 (letter from John W. Douglas, Louis F. Oberdorfer, et al., Nov. 4, 1970).

²⁰⁸ *Id.* at 90 (statement of Mortimer M. Caplin, Nov. 16, 1970); *id.* at 330 (statement of Sheldon S. Cohen, Nov. 16, 1970).

²⁰⁹ *Id.* at 398, 265, 380 (respectively).

²¹⁰ For a flavor of the testimony awaiting Commissioner Thrower:

If one may resort to Biblical imagery, the public-interest law firms represent a small but courageous David going forth to do battle against a huge, powerful armored Goliath. The Internal Revenue Service is like a referee who rushes in to check the weapons. While Goliath hefts his sword and spear and battle-axe unhindered, the referee threatens to disqualify David for putting too-large pebbles in his sling!

Id. at 263 (statement of the National Council of Churches of Christ).

²¹¹ *Poverty Programs Senate Hearings*, *supra* note 184, at 14-35 (Commissioner Thrower's press conference, Nov. 12, 1970).

²¹² *Id.* at 14.

²¹³ *Id.* at 16-35.

²¹⁴ *Id.* at 60-66.

²¹⁵ *Id.* at 66.

controlled by a for-profit corporation;²¹⁶ whether it is “acting on behalf of a substantial financial interest” that would give the Service concern.²¹⁷ Absent those private interests, litigation on behalf of public interests was, per se, charitable.

The Service’s decision in 1970, under pressure as it was and in the crucible of highly public and expert scrutiny, has stood the test of time. To be sure, business and other financial interests have since found ways to stretch these guidelines in subsequent years, creating public interest law firms that were patently their satellites and that brought cases obviously intended to improve their private commercial interests,²¹⁸ but finding loopholes in the Code are the grits and grease of the practice and do not seriously challenge the principle. Faced with deciding on the charitable nature of litigation, the Service rejected an “ends” test as untenable. It rejected as well either prohibiting or limiting the litigation to some “insubstantial” percentage of the group’s activity. Instead, it addressed its primary concern: separating the charity from business influence and control. This approach would be repeated a few decades later with federal political campaign laws.

VI. AFTERMATH AND RECONCILIATION

As seen above, the Congress rose to deal with the political activities of charities under the Internal Revenue Code at three widely-spaced intervals: first lobbying, next electoral campaigning, and then litigation. The moving parties were two frustrated and angry United States senators and one frustrated and angry administration. The lobbying and electoral restrictions won out; in a later era more sensitive to turbulent public interests, the litigation restriction did not.

The restrictions on lobbying and campaigning would be challenged in the courts, in the literature, and ultimately in subsequent sessions of the Congress.²¹⁹ While on the merits the

²¹⁶ *Poverty Programs Senate Hearings*, *supra* note 184, at 19.

²¹⁷ *Id.* at 30.

²¹⁸ See Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415 (1984) (describing activities of business-sponsored public interest law firms).

²¹⁹ The judicial and congressional responses are described in this Section, *infra*. Academics and commentators have provided a rolling drumfire of criticism of the restrictions on constitutional and policy grounds. See Clark, *supra* note 73, at 439-65; David B. Weaver, *Taxes and Lobbying – The Issue Resolved*, 31 GEO. WASH. L. REV. 938 (1963); Note, *The Revenue Code and a Charity’s Politics*, 73 YALE L.J. 661 (1964); Note, *The Sierra Club, Political Activity, and Tax Exempt Charitable Status*, 55 GEO. L.J. 1128 (1966-67); Ronald S. Borod, *Lobbying for the Public Interest – Federal Tax Policy*

court challenges would lose, and would indeed solidify the restrictions, they provided an alternative that significantly softened their impact. Congress, too, would take steps to ameliorate, or at least clarify, its rules, and through both the Code and electoral campaign laws, to level the playing field.

A. *The Courts Approve*

Judicial approval of the § 501(c)(3) restrictions was not foreordained. On their face, they are significant restraints on speech. They apply to thousands of otherwise qualified exempt organizations in America representing a wide spectrum of expertise and commitment to public issues, each with a message, the essence of De Tocqueville's America.²²⁰ They

and Administration, 42 N.Y.U. L. REV. 1087 (1967); Myron Walker & Tim Rothermel, Note, *Political Activity and Tax Exempt Organizations Before and After the Tax Reform Act of 1969*, 38 GEO. WASH. L. REV. 1114 (1970); Theodore L. Garrett, *Federal Tax Limitations on Political Activities of Public Interest and Educational Organizations*, 59 GEO. L.J. 561 (1971); Thomas Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 INST. ON FED. TAX'N 1415 (1973); James H. Fogel, *To the I.R.S., 'Tis Better to Give Than to Lobby*, 61 A.B.A. J. 960 (1975); Mortimer M. Caplin & Richard E. Timbie, *Legislative Activities of Public Charities*, 39 LAW & CONTEMP. PROBS. 183 (1975); Note, *Lobbying by Section 501(c)(3) Organizations Under the Tax Reform Act of 1976: A Proposal for Change*, 30 TAX LAW. 214 (1976); Robert S. Hyslop & Walter Ebell, *Public Interest Lobbying and the Tax Reform Act of 1976*, 7 ENVTL. L. 283 (1977); 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); Nell Hoffman, Note, *The Tax Code's Differential Treatment of Lobbying Under Section 501(c)(3): A Proposed First Amendment Analysis*, 66 VA. L. REV. 1513 (1980); Note, *Whose Voice Shall be Heard? Lobbying Limitations on Section 501(c)(3) Charitable Organizations Held Constitutional in Regan v. Taxation With Representation*, 28 ST. LOUIS U. L.J. 1017 (1984); Gregory E. Robinson, Note, *Charitable Lobbying Restraints and Tax Exempt Organizations: Old Problems, New Directions?*, 1984 UTAH L. REV. 337; Tommy F. Thompson, *The Availability of the Federal Educational Tax Exemption for Propaganda Organizations*, 18 U.C. DAVIS L. REV. 487 (1985); Commentators Say Regulations on Lobbying by Tax-Exempt Organizations Are Too Restrictive, 34 TAX NOTES 19 (1987); Richard L. Haight, *Lobbying for the Public Good: Limitations on Legislative Activities by Section 501(c)(3) Organizations*, 23 GONZ. L. REV. 77 (1987-88); Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201 (1987-88); Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308 (1990); Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities*, 71 TEX. L. REV. 1269 (1993); Brent Coverdale, Comments, *A New Look at Campaign Finance Reform: Regulation of Non-Profit Organizations Through the Tax Code*, 46 U. KANS. L. REV. 155 (1997); Daniel L. Simmons, *An Essay on Federal Income Taxation and Campaign Finance Reform*, 54 FLA. L. REV. 1 (2002).

²²⁰ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 517 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835) ("Nothing, in my view, more deserves attention than the intellectual and moral associations of America If men are to remain civilized or to become civilized, the art of association must develop and improve among them at the same speed as equality of conditions spreads.").

inhibit communication to the general public on these issues, and flatly prevent comment on political campaigns. They carry draconian penalties: loss of exempt income and deductible contributions constitute, for most nonprofits, the loss of life. Prospects such as these radiate a broad chill. Only the most secure organizations, or the most reckless, will dare to speak at or even near the margin.

The restrictions also implicate freedom of religion, particularly as they impact churches with an agenda of changing government policy. Religious institutions are the largest and wealthiest charities in America.²²¹ The Catholic Church dominates this universe,²²² but the evangelical Protestants, while small in number, are loud in voice.²²³ To religious activists, the inability to lobby or to participate in election campaigns is the inability to complete their duty on earth.²²⁴

1. Freedom of Speech

The free speech challenge rises from a line of cases invalidating the conditioning of tax, unemployment, and other benefits on the relinquishment of a protected interest. The seminal opinion, *Speiser v. Randall*,²²⁵ involved a state property tax exemption for which a veteran simply had to affirm that he or she did not advocate the overthrow of the U.S. government by force, violence, or unlawful means – an activity arguably more threatening to the national interest than advocacy for the humane treatment of animals or child welfare laws. By an eight-to-one margin, the Supreme Court found that “speech can be effectively limited by the exercise of the taxing power.”²²⁶ Justice Harlan, writing for the majority, continued:

²²¹ In 2002, of \$241 billion in total charitable giving, \$84.3 billion, or 35 percent, went to religious institutions. See American Association of Fund-Raising Counsel, *Giving USA 2003* (2003), at <http://www.aaafc.org/bytypeof.html> (last visited Oct. 25, 2003). The next closest was the category of education with \$31.6 billion, or 13.1 percent. *Id.*

²²² See Adherents.com, *Largest Denominational Families in U.S., 2001*, available at http://www.adherents.com/rel_USA.html (last visited Aug. 10, 2003). In 2001, the Catholic Church claimed 50.9 million members, more than one-quarter of the population of the United States; the next closest denomination was Baptist with 33.8 million members. *Id.* No other denomination was in double digits. *Id.*

²²³ *Id.*

²²⁴ See *infra* text accompanying notes 289-94.

²²⁵ 357 U.S. 513 (1958).

²²⁶ *Id.* at 518 (citing *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1957) (invalidating a tax on newspapers above a certain subscription level as an unwarranted

To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty' its denial may not infringe speech.²²⁷

Speiser grew stronger over time, and expanded to invalidate a range of restrictions, some based on the content of the speech,²²⁸ but others based on reasons that had nothing to do with content or point of view.²²⁹ In the words of two

infringement on freed speech).

²²⁷ *Id.* Relying on cases forbidding restraints on free speech through conditions on mailing privileges, labor mediation privileges and employment rights, the court went on to hold that "when the constitutional right to speak is sought to be deterred by a state's general taxing program, due process demands that the speech be unencumbered" until the State offers "sufficient proof to justify its inhibition." *Id.* at 528-29. The one dissenting Justice found sufficient justification for the exemption denial: The state has "an understandable desire to insure that those who benefit by tax exemption do not bite the hand that gives it." *Id.* at 543 (Clark, J., dissenting).

²²⁸ An illustrative case is *Perry v. Sindermann*, 408 U.S. 593 (1972), involving a Texas state college that refused to renew the employment contract of a professor, allegedly due to his public criticism of the administration. The Court began its discussion of the law by observing:

For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

Id. at 597.

²²⁹ See *Sherbert v. Verner*, 374 U.S. 398 (1962) (denying unemployment benefits); *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (denying welfare benefits); *Graham v. Richardson*, 403 U.S. 365 (1971) (denying welfare to resident aliens). There were also a great number of such cases denying public employment. See *United Pub. Workers v. Mitchell*, 330 U.S. 75, 100 (1947); *Wieman v. Updegraff*, 344 U.S. 183, 192; *Shelton v. Tucker*, 364 U.S. 479, 484-86 (1960); *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1960); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 894 (1961); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 288 (1961); *Baggett v. Bullitt*, 377 U.S. 360 (1963); *Elfbbrandt v. Russell*, 377 U.S. 360 (1965); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06 (1967); *Whitehill v. Elkins*, 389 U.S. 54 (1967); *United States v. Robel*, 389 U.S. 258 (1967); *Pickering v. Bd. of Ed.*, 391 U.S. 563, 568 (1968). Each of these cases rebut, in explicit language, the contention that, since the benefits at stake were not "rights" but only "privileges," strict scrutiny under the First Amendment was not required. Thus the Court in *Sherbert* stated:

Nor may the South Carolina Court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right" but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

374 U.S. at 404

And the Court in *Graham* stated, "But this Court now has rejected the

subsequent courts, “a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program”;²³⁰ and the “constitutional challenge cannot be answered by the argument that public assistance benefits are a ‘privilege’ and not a ‘right.’”²³¹ Because they conditioned a benefit – very significant monies – on the relinquishment of the right to lobby and participate in electoral campaigns, the § 501(c)(3) prohibitions seemed ripe for the application of *Speiser* and its progeny. Because of the way in which the issue first arose, however, and perhaps because the consequences of applying *Speiser* to tax-exempt charities appeared to be so open-ended, the first amendment challenges to the 501(c)(3) prohibitions rejected *Speiser* and turned the tide.

The first federal income tax case to reach the Supreme Court on the *Speiser* issue involved deductions for the lobbying expenses of commercial businesses. In *Cammarano v. United States*,²³² wholesale beer distributors had mounted a campaign against state laws placing retail liquor sales under state ownership and control. The Service denied the deductions, and the case reached the Court soon after *Speiser* had been decided. *Speiser* may just as well not have happened. The free speech issue was not raised below, and was only treated in the final paragraph of the opinion as a “suggestion” that denying the deduction presented a “substantial constitutional issue.”²³³ Apparently not: “Petitioners [were] not being denied a tax deduction because they engage in constitutionally protected activities,” but were “simply being required to pay for those activities entirely out of their own pockets,” as everyone else did.²³⁴ As even the Court’s most liberal member, Justice

concept that constitutional rights turn upon whether a governmental benefit is characterized as a ‘right’ or as a ‘privilege.’” 403 U.S. at 374.

²³⁰ Thomas v. Review Bd. of the Indian Employment Sec. Div., 450 U.S. 707, 716 (1981).

²³¹ See *Shapiro*, 394 U.S. at 627 n.6.

²³² 358 U.S. 498 (1958).

²³³ *Id.* at 512-13.

²³⁴ *Id.* at 513. This statement was at least questionable when made. If it was saying that the prohibition did not “deny,” and only required affected parties to “pay,” then the government could require mere payment for the exercise of virtually any First Amendment right – newspaper and poll taxes come to mind. If instead, the meat of the sentence is that everyone else also foregoes deductions for lobbying, in 1963 Congress amended the business deduction provisions of the Code to permit deductions for lobbying by commercial enterprises as “ordinary and necessary” business expenses. In the concluding sentence of its opinion in *Cammarano*, the Court re-emphasizes its reliance on a congressional policy that places “everyone in the community on the same

Douglas, put the matter in his concurrence, "[tax] deductions are a matter of grace, not of right."²³⁵ *Speiser* thus dismissed, the Court went on to uphold the denial of the business deductions, which had no explicit basis in the Code, by analogizing them to the prohibitions against lobbying by charitable organizations found in 501(c)(3).²³⁶ The restrictions on charities evidenced a "sharply defined policy" against deductions for lobbying expenses by whatever organizations.²³⁷ Citing *Slee*, the Treasury "stood aside" from this political agitation.²³⁸

In retrospect, *Cammarano* was the worst possible context in which the constitutionality of the prohibitions on charitable lobbying could have arisen. The issue came up as a matter of corporate lobbying, long suspect for reasons that, while not stated in the opinion, were widely known.²³⁹ It came at a time when corporate rights to free speech were only faintly recognized,²⁴⁰ and it came in the context of a scheme that only disallowed the deductions and not the entire status of the organization itself. Worst, perhaps, the issue came unbriefed or argued below, considered only as an afterthought in the Court's opinion. Legal precedent has a way, however, of forgetting context. *Cammarano* set the mold.

The first case to pit the 501(c)(3) prohibitions against the First Amendment was *Christian Echoes National Ministry Inc. v. United States*,²⁴¹ decided in 1972. The circumstances were certainly provocative. Over a seven-year period the Ministry had, under the leadership of conservative televangelist Dr. Billy James Hargis, urged its readers and listeners to support and oppose a series of laws involving

footing." Four years later, that same footing disappeared.

²³⁵ *Id.* at 515. Justice Douglas had written a stirring concurrence in *Speiser*, striking down the California restriction. *Id.* at 532 (Douglas, J., concurring).

²³⁶ *Cammarano*, 358 U.S. at 512.

²³⁷ *Id.* at 512. This "sharply defined" policy began to blur a few years following the decision, when Congress reversed the Treasury ruling in *Cammarano* to allow deductions for corporate lobbying expenses. See Act of Oct. 16, 1962, Pub. L. No. 87-834, 3(a), 76 Stat. 960, 973 (1962). As a practical matter, this decision tilted the playing field between public charities and private industry. See R.T. Boehm, *Taxes and Politics*, 22 TAX L. REV. 369, 431-32 (1967).

²³⁸ *Id.*

²³⁹ See *supra* note 127 and accompanying text.

²⁴⁰ See *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (invalidating restriction of corporate expenditures in local campaign), *rehearing den'd*, 438 U.S. 907 (1978).

²⁴¹ 470 F.2d 849 (10th Cir. 1972).

foreign policy, federal employment, aid to education, and immigration.²⁴² It urged involvement in politics “at the precinct” level, attacked Presidents John Kennedy and Lyndon Johnson in their election campaigns, and supported Senator Strom Thurman.²⁴³ Its annual convention endorsed Barry Goldwater for President.²⁴⁴ It would be hard to imagine activities more in the face of 501(c)(3)’s prohibitions.

After rejecting a challenge based on the Free Exercise Clause,²⁴⁵ the Court made short work of freedom of speech. Without reference to *Speiser*, it reasoned from the time-honored prologue that “tax exemption is a privilege, a matter of grace rather than right,” and found the restrictions constitutional.²⁴⁶ The Ministry had a choice as to whether it wanted to receive the exemption or go into politics, just as employees had under the Hatch Act, which prohibited federal employees from election activities. In apparent recognition that the Hatch Act carried with it an explicit and persuasive congressional rationale, however – the threat of a governmental reelection machine – the Court was at last required to articulate a reason for the prohibitions. In full, it explained:

The Congressional purposes evidenced by the 1934 and 1954 amendments are clearly constitutionally justified in keeping with the separation and neutrality principles particularly applicable in this case and, more succinctly, the principle that government shall not subsidize, directly or indirectly, those organizations whose substantial activities are directed toward the accomplishment of legislative goals or the election or debate of particular candidates.²⁴⁷

If the study of law teaches any caution, it is that the adverb “clearly” invites scrutiny. The Court supplied no citation for its declaration of congressional purposes; given the legislative history of the 1934 and 1954 amendments, it would have been hard-pressed to do so. Nor did the Court cite judicial precedent, which, as seen, was equally scarce. It did offer “separation and neutrality” as reasons “particularly applicable”

²⁴² *Id.* at 855-56.

²⁴³ *Id.*

²⁴⁴ *Id.* at 856.

²⁴⁵ *Id.* at 856-67. See *infra* text accompanying notes 299-304.

²⁴⁶ *Christian Echoes Nat’l Ministry*, 470 F.2d at 857. Of course, the benefits at issue in *Speiser* and its progeny were also privileges, and not rights. *Speiser v. Randall*, 357 U.S. 513 (1958).

²⁴⁷ *Christian Echoes Nat’l Ministry*, 470 F.2d at 857-58.

in this case, but the "more succinct" principle it provides is simply a restatement of the prohibition itself: government will not subsidize political activity. If the Court meant that a subsidy could be denied because it was only a "matter of grace," then at some point it would have to deal with the language of *Speiser*: denial of a tax benefit becomes no less a penalty by its label. Ten years later, the Supreme Court was forced to face the issue, in *Regan v. Taxation With Representation*.²⁴⁸

Taxation With Representation, a charity with the quixotic mission of promoting the "public interest" in federal tax policy, was denied recognition under § 501(c)(3) because its activities would include substantial lobbying. *Taxation With Representation* claimed violations of both its rights to free speech and to equal protection under the law.²⁴⁹ The Court began, as one might by this time have guessed, with the observation that the deductions in question were "a form of subsidy" administered through the tax system; they had "much the same effect" as a cash grant.²⁵⁰ Congress had allowed a limited subsidy in permitting exempt organizations to lobby; in § 501(c)(3), it had simply precluded them from receiving tax deductible contributions. This so, the case was seen to fit *Cammarano*, which upheld the denial of lobbying expenses as business deductions because no further denial was involved.²⁵¹

Uncomfortable, perhaps, with the flat assertion that "only a matter of grace" legitimized any and all tax penalties, the *Taxation With Representation* Court, like the *Christian Echoes* Court earlier, was forced to look for reasons behind the 501(c)(3) prohibitions themselves. It began by rejecting the lens of strict scrutiny normally required for many speech restrictions, reasoning in a somewhat circular fashion that the

²⁴⁸ 461 U.S. 540 (1983).

²⁴⁹ *Id.* at 545-46. The U.S. Court of Appeals for the District of Columbia Circuit had granted the equal protection claim, on the grounds that Congress had, without substantial basis, allowed exempt veterans organizations to lobby without restriction; the Supreme Court overturned, finding it "not irrational" for Congress to favor veterans, who merited special favor for their contributions to the national defense. *Id.* at 547 n.8, 551-52.

²⁵⁰ *Id.* at 544. The Court added, by footnote, that "in stating that exemptions and deductions, on one hand, are like subsidies, we of course do not mean to assert that they are in all respects identical." *Id.* at 544 n.5 (citing *Walz v. Commissioner*, 397 U.S. 664 (1970)). *Walz* had found property tax exemptions to churches not to be subsidies, prohibited by the Establishment Clause of the First Amendment. The line is, apparently, a fine one.

²⁵¹ *Id.* at 546. The reliance on *Cammarano* was something of a *trompe d'oeil*. It was *Cammarano* that relied on the (c)(4) restriction on charities to reach its conclusion.

restrictions applied only to subsidies, which were only a matter of grace.²⁵² Strict or not, however, the Court could not avoid *all* scrutiny and so, at last, it had to determine whether the prohibition was “within Congress’ broad power in this area.”²⁵³ It was:

It appears that Congress was concerned that exempt organizations might use tax-deductible contributions to lobby to promote the private interests of their members. *See* 78 CONG. REC. 5861 (1934) (remarks of Senator Reed); *id.* at 5959 (remarks of Senator LaFollette). It is not irrational for Congress to decide that tax exempt charities such as TWR should not further benefit at the expense of taxpayers at large by obtaining a further subsidy for lobbying.²⁵⁴

To the extent, then, that *Taxation With Representation* offers a rationale for the legislative prohibition, it is a new arrival on the scene: insulation of Congress from the self-interest of donors to charitable organizations. The Congress itself was hardly clear in providing this reason.²⁵⁵ Further, had it been, first amendment analysis would still call for the prohibition to be the least onerous means to keep these private interests away from Congress.²⁵⁶ Required disclosure of major donors and their interests, for example, come to mind. Limitations on major donors and on corporate contributions to these charities also come to mind. Both alternatives would find a home in federal election laws some years later.

The most important part of *Taxation With Representation* for 501(c)(3) charities, however, was not in its upholding of the lobbying restriction but, rather, in its approval of closely coordinated lobbying by a companion 501(c)(4) social welfare organization.²⁵⁷ According to the Court, the reason that

²⁵² *Id.* at 548. The Court noted in this regard the absence of any attempt to suppress “dangerous ideas.” *Id.* The court ignored, or perhaps was not aware, that the prohibitions arose in large part to eliminate public support for anti-social and unpopular ideas. *See supra* text accompanying notes 58-64. The Court’s conclusion also clashes with its later findings in the federal elections cases that the fact that a limit on political speech is content-neutral does not make it any less limiting. *See infra* text accompanying notes 462-64.

²⁵³ *Taxation With Representation*, 461 U.S. at 550.

²⁵⁴ *Id.*

²⁵⁵ *See supra* text accompanying notes 120-29. Indeed, Congress gave up on an attempt to restrict the limitation to self-interested donors. *Id.*

²⁵⁶ *See* *Shelton v. Tucker*, 364 U.S. 479 (1960) (invalidating affidavits for school teachers). *See generally* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 848 (3d ed. 1986) (describing least restrictive alternative test).

²⁵⁷ 461 U.S. at 544.

the 501(c)(3) restriction passed constitutional muster was that the prohibition reached no farther than the disallowance of the deductions for lobbying.²⁵⁸ A charity could promote its legislative agenda through a separately incorporated alter ego, also tax exempt, with no more administrative burden than to keep records "adequate to show that tax deductible contributions are not used for lobbying."²⁵⁹ In so stating, the Court was rewriting the law. IRS policy at the time had been far more restrictive on the permissible relationship between (c)(3) and (c)(4) organizations, requiring, *inter alia*, that the boards of directors of the two organizations be fully distinct and that the (c)(3) organization not "control" the (c)(4).²⁶⁰ As the concurring opinion of the Court noted, however, "[I]t hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him."²⁶¹ After *Taxation With Representation*, all that was required, in effect, for (c)(3) organizations to lobby was separate accounting.²⁶² A large door had opened.²⁶³

²⁵⁸ See *id.* at 551, 553 (Blackmun, J., concurring).

²⁵⁹ See *id.* at 551.

²⁶⁰ See Thomas A. Troyer & Albert G. Lauber, Jr., *Supreme Court's TWR Decision Provides Guidance in 501(c)(3) Lobbying*, 59 J. TAX'N 66, 68 (1983).

Before the TWR decision, the nature of the relationships that could properly subsist between a public charity and a Section 501(c)(4) affiliate was unclear. Neither the Code nor the Regulations provided any guidance, and the permissible contours of the "dual structure" were effectively determined by IRS enforcement policy. At various times in the past, the Service had challenged (or suggested it might challenge) a charity's exempt status if the charity controlled the positions taken by a lobbying affiliate; if the charity shared facilities, policy priorities, and overall strategy with the affiliate . . . or if the two groups had substantially identical directors and personnel.

Id.

For example, the Service had forced the NAACP to sever its connections with the activist NAACP Legal Defense and Education Fund in 1957. *Id.* at 68 n.10. The Service also had ruled against the Center on Corporate Responsibility, which shared personnel and office space with a lobbying affiliate. See *Center on Corporate Responsibility, Inc. v. Shultz*, 368 F. Supp. 863 (D.D.C. 1973). See also Gen. Couns. Mem. 33,912 (Aug. 15, 1968) (501(c)(3) subsidiary will defeat charitable exemption if it is "an arm, agent, or integral part of the parent").

²⁶¹ 461 U.S. at 553 (Blackmun, J., concurring).

²⁶² The D.C. Circuit recently returned to this line of reasoning in a free exercise of religion claim. See *infra* text accompanying notes 299-304.

²⁶³ In practice, many 501(c)(3) organizations that wish to lobby have created (c)(4) affiliates, and 501(c)(4)'s that wish to fund the educational aspects of their social welfare organizations through deductible contributions have established educational charities under 501(c)(3). Some organizations are separate only on paper; other organizations may have separate facilities and a few different board members, but work together so closely that they refer to each other as sister organizations. See websites for the following organizations: National Rifle Association, at <http://www.nra->

The Court reaffirmed the rationale of *Taxation With Representation* in *FCC v. League of Women Voters*²⁶⁴ and *Rust v. Sullivan*.²⁶⁵ In *League of Women Voters*, government grants to non-commercial radio stations were conditioned by a prohibition against editorializing. Radio stations only used government money to fund about one-quarter of their expenditures, but under the prohibition radio stations could spend no money – regardless of whether it came from the government – on editorializing.²⁶⁶ The majority found the prohibition went too far. Had the prohibition applied only to the government monies, however, it would have been constitutional.²⁶⁷ The *Rust* Court took this reasoning to a new level. Citing *Cammarano* and *Taxation With Representation* as precedent, the majority went so far as to approve a ban on information about abortion by federally-funded medical clinics, on the basis that the doctors could provide this information in their spare time.²⁶⁸ Applying *Rust* to the issue at hand, if a content-based restriction is permissible because there is an alternative so slight as the possibility of a doctor providing free

foundation.org/foundation/ (last visited Oct. 28, 2003); American Association for Retired People, at <http://www.aarp.org/press/disclosure.html> (last visited Oct. 28, 2003); American Obesity Association, at <http://www.obesity.org/subs/about.shtml> (last visited Oct. 28, 2003); U.S. Sportsmen's Alliance, at <http://www.ussportsmen.org/interactive/features/Read1.cfm?ID=32> (last visited Oct. 28, 2003); National Center for Tobacco Free Kids, at <http://www.tobaccofreekids.org/organization/donate.shtml> (last visited Oct. 28, 2003); We The People Foundation, at <http://www.givemeliberty.org/aboutus.htm> (last visited Oct. 28, 2003); Taxpayers for Common Sense, at <http://www.taxpayer.net/about/index.htm> (last visited Oct. 28, 2003); Coalition to Stop Gun Violence, at http://www.gunfree.org/content/edfund_intro.html (last visited Oct. 28, 2003); Texas Campaign for the Environment, at http://www.texasenvironment.org/about_tce.htm (last visited Oct. 28, 2003); Citizens Committee for the Right to Keep and Bear Arms, Partnership for Caring, at http://www.partnershipforcaring.org/About-Us/fund_set.html (last visited Oct. 28, 2003); Women's World Banking, at http://www.swwb.org/English/5000/how_can_you_contribute_to_wwb.htm (last visited Oct. 28, 2003); Stephanie Roper Foundation, at <http://www.stephanieroper.org/foundation.htm> (last visited Oct. 28, 2003); American Association of University Women, at http://www.aauw.org/about/aauw_corporate_overview.pdf (last Oct. 28, 2003); Handmade in America, at <http://www.handmadeinamerica.org/about/board.htm> (last visited Oct. 28, 2003); and the San Francisco Bicycle Coalition, at http://www.sfbike.org/about_sfbic/ (last visited Oct. 28, 2003).

²⁶⁴ 468 U.S. 364 (1984).

²⁶⁵ 500 U.S. 173 (1991).

²⁶⁶ 468 U.S. at 400.

²⁶⁷ See *id.* The decision in *League of Woman Voters* calls in question whether the real basis of *Taxation With Representation* is the availability of an alternative, or simply the fact that the prohibition does not go beyond the subsidy. In the wake of *Rust*, the latter may prove to be the only tenable ground; the alternative suggested in *Rust* was illusory. See 500 U.S. at 211 n.3, 217 (Blackmun, J., dissenting).

²⁶⁸ *Rust*, 500 U.S. at 193.

information to poor clients outside of an official setting, then challenges to content-neutral restrictions are history.²⁶⁹ From a free speech standpoint, the 501(c)(3) prohibitions are constitutional.²⁷⁰

2. Freedom of Religion

Organized religion has a long history in American politics, supporting for some a special claim for privileges and for others a special need for restraint. For their part, the courts have declared that the current political restraints do not impair freedom of religion, and their reasoning has sounded strongly in favor of a need for restraint. The pole stars of this issue are the First Amendment's guarantee of free exercise of religion and its prohibition against the establishment of religion.²⁷¹ It is not always easy to steer a course between them.

a. Free Exercise

The early New England colonies were for all intents and purposes theocracies, and in the succeeding centuries churches played important roles in, among other highly-charged political issues, the anti-slavery and civil rights movements.²⁷² Churches

²⁶⁹ *But see* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 549 (2001) (discussing Congress prohibiting Legal Services grantees from raising certain arguments in the defense of their clients, a restriction held to violate the First Amendment). A vigorous dissent by four Justices pointed out that the case was indistinguishable from *Rust. Id.* at 553-55.

²⁷⁰ In addition to *Speiser* and its progeny, two other lines of cases have also presented free speech challenges to § 501(c)(3). The first concerns its application to "educational" organizations, stricken for vagueness in *Big Mama Rag Inc. v. United States*, 631 F.2d 1030, 1039 (D.C. Cir. 1980), which was upheld as applied in *Nat'l Alliance v. United States*, 710 F.2d 868 (D.C. Cir. 1983). Both cases cited *Speiser* for the proposition that "discriminatory denial of tax exemptions for engaging in particular speech can impermissibly infringe constitutionally protected rights." 710 F.2d at 875; 631 F.2d at 1034. The second line concerns denial of exempt status for segregated private schools. *See, e.g.,* Bob Jones Univ. v. United States, 461 U.S. 574 (1983); *Green v. Connally*, 330 F. Supp. 1150 (D.C. Cir. 1971), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971). Each of these latter opinions found the "compelling state interest" in eliminating segregation to override *Speiser*-based claims of the denial of a benefit for the exercise of constitutionally-protected rights. 461 U.S. at 604; 330 F. Supp. at 1167. Not treated separately in this Article, but at times raised in litigation over Code restrictions as applied to charities, is freedom of association. This claim, when addressed, has been subsumed in the free speech and free exercise claims.

²⁷¹ The First Amendment states, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

²⁷² *See* CHURCH AND STATE IN AMERICAN HISTORY (John F. Wilson & Donald L. Drakeman eds., 2d ed. 1986); ANSON PHELPS STOKES & LEO PHEFFER, CHURCH AND

of particular faiths engaged openly in the presidential campaigns of Thomas Jefferson (one preacher warning that, if Jefferson were elected, his listeners would be forced to hide their Bibles in wells);²⁷³ William Howard Taft (called an "infidel" because he was a Unitarian);²⁷⁴ Al Smith (a Roman Catholic, about whose candidacy an evangelist preacher told his congregation, "If you vote for Al Smith, you're voting against Christ and you'll all be damned");²⁷⁵ and John F. Kennedy (about whom another evangelist warned that "Roman Catholicism's bloody hand," could "spell the death of a free church in a free state and our hopes of continuance of full religious liberty in America").²⁷⁶

The Catholic Church, for its part, took the lead role in the anti-abortion movement, opposing vice presidential candidate Geraldine Ferraro and declaring that particular pro-choice candidates risked ex-communication;²⁷⁷ with regard to the Code's restrictions on political activity, one Catholic newspaper headlined its editorial, "To the IRS – 'NUTS!!'"²⁷⁸ Evangelicals took to the field again against Bill Clinton with full-page advertisements in USA Today and the Washington Times headlined, "Christians Beware," asserting that Clinton's policies on abortion and homosexuality contravened the Bible.²⁷⁹ As if begging the question, the ads concluded with the solicitation: "Tax-deductible donations for this advertisement gladly accepted."²⁸⁰

The Service, notwithstanding the petitions of pro-choice laymen and clergy, was not about to touch the Catholic Church with the proverbial ten-foot pole.²⁸¹ Nor would it touch the black

STATE IN THE UNITED STATES (1964); RELIGION AND SOCIAL CONFLICT (Robert Lee & Martin E. Marty eds., 1964).

²⁷³ EDMUND FULLER & DAVID E. GREEN, GOD IN THE WHITE HOUSE: THE FAITHS OF AMERICAN PRESIDENTS 28 (1968).

²⁷⁴ ALBERT J. MENENDEZ, RELIGION AT THE POLLS 33 (1977).

²⁷⁵ *Id.* at 21.

²⁷⁶ MENENDEZ, *supra* note 274, at 69.

²⁷⁷ See Robert D. McFadden, *Archbishop Calls Ferraro Mistaken on Abortion Rule*, N.Y. TIMES, Sept. 10, 1984, at A1.

²⁷⁸ The journal, identified as the official publication of the San Antonio, Texas archdiocese of the Catholic Church, is identified in *Abortion Rights Mobilization v. Regan*. Plaintiffs Amended Complaint at 8, 544 F. Supp. 471 (S.D.N.Y. 1981) (No. 80 Civ. 5590 (RLC), Jan. 30, 1981) (on file with author).

²⁷⁹ See *Branch Ministries v. Rossotti*, 211 F.3d 137, 140 (D.C. Cir. 2000).

²⁸⁰ *Id.* at 140.

²⁸¹ See *Abortion Rights Mobilization*, 544 F. Supp. 471. The complaint, filed by individuals and other religious faiths opposed to the Church's abortion policies, challenged IRS inaction in the face of Church involvement in electoral campaigns. See

Baptist congregations that formed the financial base and the get-out-the-vote machine for presidential candidate Jesse Jackson.²⁸² What finally bestirred the Service, and the Congress, to action was the explosion of the religious right into electoral politics in the early 1980s.²⁸³ By 1984, evangelist activists claimed that they had taken over more than half of the Republican Party in Minnesota, adding, "we intend to use the Republican Party as a vehicle."²⁸⁴ Evangelical churches played strongly in the presidential campaigns of Ronald Reagan²⁸⁵ and George Bush the elder,²⁸⁶ and ran their own candidate, Pat Robertson, as well.²⁸⁷ In that same time frame, the cartoonist Gary Trudeau featured his lead character, Doonesbury, in front of a television commercial that began . . . and ended:

Hi. This is God. Normally, as the Supreme Being, I try to transcend partisan politics. But this year is different. This year, for the first time in your history, you have a chance to vote for the only party that's actually doing My Work . . . Paid for by the Reagan-God Re-Election Committee.²⁸⁸

Prompted by news accounts and by congressional hearings in 1987,²⁸⁹ the Service began moving against the most egregious examples of electioneering by religious institutions,²⁹⁰

also Plaintiffs Amended Complaint at 8, *Abortion Rights Mobilization*, 544 F. Supp. 471. After much delay, the complaint was dismissed, for lack of standing.

²⁸² See Richard N. Ostling, *Jesse Takes Up The Collection*, TIME, Feb. 6, 1984, at 57 ("At every church he visits, members of the congregation are asked to come forward with gifts of as much as \$1,000 and as little as \$20."); *Black Churches Raise 1 Million for Jackson*, JET, July 23, 1984, at 22; Jeannye Thorton, *Blacks Turn to Church in Political Drive*, U.S. NEWS AND WORLD REPORT, Feb. 6, 1984, at 45 (NAACP used church space and resources for voter education and registration).

²⁸³ See ROBERT ZWIER, *BORN-AGAIN POLITICS: THE NEW CHRISTIAN RIGHT IN AMERICA* (1982); Richard N. Ostling, *Power, Glory and Politics: Right Wing Preachers Dominate the Dial*, TIME, Feb. 17, 1986, at 62; Jim Buie, *Praise the Lord and Pass the Ammunition*, CHURCH AND STATE, October 1984.

²⁸⁴ Sidney Blumenthal, *The Righteous Empire*, THE NEW REPUBLIC, Oct. 22, 1984, at 18, 23 (quoting Gary Jarmin of *Christian Voice*).

²⁸⁵ See *id.*; see also Walter Shapiro et al., *Politics and the Pulpit: Reagan and Mondale fought the first battle of the fall campaign last week on a surprise issue - religion*, NEWSWEEK, Sept. 17, 1984, at 24.

²⁸⁶ See William Scott Malone, *Bush and the Bakker Connection: On His Way to the White House, the Vice-President Wooed the Preacher*, WASH. POST, Dec. 18, 1988, at C1.

²⁸⁷ Charles R. Babcock, *Robertson Blending Charity and Politics; Tax Exempt Television Ministry Was Foundation for Campaign*, WASH. POST, Nov. 2, 1987, at A1.

²⁸⁸ Gary Trudeau, *Doonesbury* (undated) (on file with author).

²⁸⁹ See *infra* text accompanying notes 420-26.

²⁹⁰ See Letter from Robert I. Braver, Internal Revenue Service, to the Hon. J.J. Pickle, Chairman, Subcommittee on Oversight, Committee on Ways and Means,

moves that continued into the 1990s.²⁹¹ Whether due to the deterrent effect of these enforcement actions or to a subsequent change of philosophy in a new administration, these actions have since abated. Beginning many years before, however, churches protested the restrictions on, *inter alia*, the free expression of their beliefs. The issue came to a head in *Christian Echoes*,²⁹² whose treatment of the free speech challenge has been discussed above.

The Christian Echoes National Ministry's other challenge was that the Service, by restricting the activities of the church, violated the free exercise of religion and the "excessive entanglement" prong of the Establishment Clause.²⁹³ The free exercise claim was not superficial. The Ministry, like many evangelical churches, held political action to conform government to biblical teachings as central to its practice.²⁹⁴ Its mission was to change the world. Further, probing the activities of the Ministry to determine which sermon, which newsletter, which fund-raiser, and which meeting was political would involve the Service in exactly the type of day-to-day, case-by-case oversight that was entanglement, pure.²⁹⁵

Dismissing both challenges, the Tenth Circuit found that the Ministry's argument was "tantamount to the proposition that the First Amendment right of free exercise of religion . . . in effect, protects those exercising the right to do so unfettered."²⁹⁶ Fetters were, indeed, possible "in keeping with an overwhelming and compelling governmental interest," as in the case of the Hatch Act prohibiting federal employees from electioneering.²⁹⁷ What was the compelling interest in this case? "That of guarantying that the wall separating church and state

U.S. House of Representatives (Mar. 8, 1989) (on file with author) (stating that "the Service's continuing to devote significant examination resources to media evangelist causes," and attaching a docket of pending investigations).

²⁹¹ See Andrew Mollison, *Churches' Tax Exemptions Jeopardized by Politicking*, TIMES-PICAYUNE (New Orleans), July 20, 1996, at A18; Ruth Muds, *FEC Sues Christian Coalition*, TIMES-PICAYUNE (New Orleans), July 31, 1996, at A2; Peter H. Stone, *One Step Over the Line?*, NATIONAL JOURNAL, July 29, 1996, at 1449 (identifying "about 30" IRS investigations of political participation by charities).

²⁹² *Christian Echoes Nat'l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972). See *infra* text accompanying notes 319-37.

²⁹³ *Christian Echoes Nat'l Ministry*, 470 F.2d at 856.

²⁹⁴ *Id.* at 851-53.

²⁹⁵ *Id.* at 856 (citing to the conclusion of the district court below).

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 857.

remain high and firm.²⁹⁸ In the mind of this court, then, preventing undue religious influence in politics, similar to preventing undue government influence through its employees, was a trumping state rationale.

Twenty-five years later, the District of Columbia Circuit had the opportunity to modify or reject the reasoning of *Christian Echoes* concerning the need to restrain religion in politics. It did neither.²⁹⁹ In *Branch Ministries v. Rossotti*, the Service had revoked the 501(c)(3) exemption of the Church at Pine Creek for high-profile, public advertising against candidate Bill Clinton during the 1992 presidential campaign.³⁰⁰ As in *Christian Echoes*, the Church's primary claim was that the revocation violated the right to free exercise of its religion.³⁰¹ The D.C. Circuit would not go there. It found, instead, that even if such a right were implicated here, the requirements of 501(c)(3) imposed no substantial burden on the Church.³⁰² Citing both *Taxation With Representation* and *Cammarano*, the court noted that the Church could opt to forego deductibility and politic all it wanted, or it could set up a companion 501(c)(4) and through it conduct both its lobbying and electoral campaigns.³⁰³ This concluded, the court needed not decide whether the 501(c)(3) restrictions served a compelling government interest.³⁰⁴

b. Establishment

Left undecided by *Christian Echoes* and *Branch Ministries* was the effect of the First Amendment's prohibition against the establishment of religion. Assuming that the Code's political activity limits do not impair free exercise, the question remains whether these restrictions are not in fact *compelled* by the separation of church and state. More specifically, would the granting of significant tax benefits to religious organizations for the purpose of engaging in politics act to establish religion in a manner prohibited by the First Amendment?

²⁹⁸ *Christian Echoes Nat'l Ministry*, 470 F.2d at 857.

²⁹⁹ *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000).

³⁰⁰ See *supra* text accompanying note 285.

³⁰¹ *Branch Ministries*, 211 F.3d at 139.

³⁰² *Id.* at 142.

³⁰³ *Id.* at 142-44.

³⁰⁴ *Id.* at 144.

The framers of the Constitution took establishment seriously.³⁰⁵ Reacting to the history of religion and government in Europe and the colonies,³⁰⁶ Thomas Jefferson and James Madison, primary architects of the Constitution and the Bill of Rights, were both adamant on the need to separate church and state. Jefferson “contemplate[d] with sovereign reverence [the] act of the whole American people” in ratifying the First Amendment and “thus building a wall of separation between church and State.”³⁰⁷ Madison wrote that “the duty towards the Creator” must be “wholly exempt from” the cognizance “of Civil Society.”³⁰⁸ Alexander Hamilton was not far behind.³⁰⁹ The French scholar and observer of the early American scene Alexis De Tocqueville was struck by how firmly that principle was embedded in the new United States, even within the clergy. “[A]ll thought that the main reason” for religious harmony in America “was the complete separation of church and state,” he wrote, adding “throughout my stay in America I met nobody, lay or cleric, who did not agree about that.”³¹⁰ He continued:

I have shown in the first part of this book how the American clergy stands aloof from public business. Religion in America is a world apart in which the clergyman is supreme, but one which he is careful never to leave; within the limits he guides men’s minds, while outside them he leaves men to themselves[.]³¹¹

The principle of separation held nearly inviolate well into the twentieth century. A number of federal courts, up to

³⁰⁵ For a concise summary of the background to the First Amendment’s religion clauses, see *Everson v. Board of Education*, 330 U.S. 1, 8-14 (1946).

³⁰⁶ *Id.* at 9-10.

³⁰⁷ Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, Committee of the Danbury, Connecticut Baptist Ass’n (Jan. 1, 1802) in *THE COMPLETE JEFFERSON* 518-19 (Saul K. Padover ed., 1943).

³⁰⁸ James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in 2 *WRITINGS OF JAMES MADISON* 184 (G. Hunt ed., 1901) (1784).

³⁰⁹ ALEXANDER HAMILTON ET AL., *THE FEDERALIST PAPERS* No. 69, at 422 (Clinton Rossiter ed., 1961) (contrasting the U.S. President with the King of England: “The one has no particle of spiritual jurisdiction; the other is the Supreme head and governor of the national church!”).

³¹⁰ DE TOCQUEVILLE, *supra* note 220, at 295. Describing the separation of power as a tradeoff, he further observed:

The American clergy were the first to perceive this truth and to act in conformity with it. They saw that they would have to give up religious influence if they wanted to acquire political power, and they preferred to lose the support of the authority rather than to share its vicissitudes.

Id. at 288-89.

³¹¹ *Id.* at 448.

and including the Supreme Court, had signaled danger in the influence of religion on politics. Thus, in *McGowan v. Maryland*,³¹² the Court opined that the state could not "openly or secretly" participate in the affairs of religious organizations, and "vice versa."³¹³ In *Engel v. Vitale*,³¹⁴ the Court's reasons began to surface:

[The Establishment Clause's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.³¹⁵

The Court elaborated on this thesis in *Lemon v. Kurtzman*,³¹⁶ holding in the context of support for religious schools that "entanglement of yet a different character [was] presented by the divisive political potential of these state programs."³¹⁷ It would be "unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith."³¹⁸ With particular reference to the issue at hand in this study, the Court continued:

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but *political division along religious lines was one of the principle evils against which the First Amendment was intended to protect The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.*³¹⁹

Only seven years after *Lemon*, however, the Court invalidated a Tennessee state constitutional provision prohibiting clergy from serving in the state legislature. Dismissing the argument that the inclusion of clergy would embroil the government in religious conflict, the majority in

³¹² 366 U.S. 420 (1961).

³¹³ *Id.* at 443.

³¹⁴ 370 U.S. 421 (1962).

³¹⁵ *Id.* at 431.

³¹⁶ 403 U.S. 602 (1971).

³¹⁷ *Id.* at 622.

³¹⁸ *Id.*

³¹⁹ *Id.* at 622-23 (emphasis added).

*McDaniel v. Paty*³²⁰ concluded that “the American experience provides no” basis for this “fear.”³²¹ Justice Brennan, who had authored the opinion in *Walz v. Tax Commission* approving state property tax exemptions for the Catholic Church,³²² concurred, stating that “the antidote” provided by the constitution against “zealots who would inject sectarianism into the political process” is to subject them to “the marketplace of ideas,”³²³ the Great Religious-Political Bazaar.

Having lowered the wall of separation in *McDaniel*, the Court raised it again in *Larkin v. Grendel's Den*,³²⁴ where the state of Massachusetts had granted both churches and schools the opportunity to veto liquor licenses within five hundred feet of their premises. The majority began its analysis with the principle of separation, through which “[r]eligion and government, each insulated from each other, could then coexist.”³²⁵ Citing its own precedents, the separation was soon to work in both directions, with “churches excluded from the affairs of government,”³²⁶ thereby “rescu[ing] the temporal institutions from religious interference.”³²⁷ Under the statute at hand, the church power was “standardless, calling for no reasons, findings or reasoned conclusion,”³²⁸ which created the “danger of political fragmentation . . . on religious lines.”³²⁹ The mere appearance of such authority provided “significant symbolic benefit”³³⁰ to religious institutions in the mind of the public, for whom these institutions would be political decision makers. All of which, the Court concluded, had the primary effect of advancing religion,³³¹ violating the Establishment Clause.

Of course, the word “establishment” is not self-defining. Beginning in the 1940s, a series of closely-divided cases has permitted an ever-widening range of state support for religious

³²⁰ 435 U.S. 618 (1978).

³²¹ *Id.* at 629.

³²² *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

³²³ *McDaniel*, 435 U.S. at 642 (Brennan, J., concurring).

³²⁴ 459 U.S. 116 (1982).

³²⁵ *Id.* at 122.

³²⁶ *Id.* at 126 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

³²⁷ *Id.* (citing *Watson v. Jones*, 80 U.S. (13 Wall) 679, 730 (1872)).

³²⁸ *Id.* at 125.

³²⁹ *Larkin v. Grendel's Den*, 459 U.S. 116, 127 (1982) (citing *Lemon*, 403 U.S. at 623).

³³⁰ *Id.* at 125.

³³¹ *Id.* at 126.

activities, including property tax exemptions,³³² school busing,³³³ after school meetings,³³⁴ and most recently, school vouchers.³³⁵ The seminal decision, *Everson v. Board of Education*,³³⁶ upheld public funding for transportation to public and parochial schools. The majority opinion reads as if written by two different, and differing, individuals. It opens with a paean to the Establishment Clause, its history, reasons, and continuing vitality.³³⁷ It closes with the statement that, "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We would not approve the slightest breach."³³⁸ This said, however, somewhere beyond the rhetoric, the Court found that no establishment occurred.³³⁹ Justice Jackson, dissenting, pointed out the anomaly with an analogy to Lord Byron's Julia who, "whispering 'I will ne'er consent' — consented."³⁴⁰ Justice Rutledge, also dissenting, prophesied that following this breach of the wall would come a second, third, and fourth, and thus "the most solid freedom steadily gives way before continuing corrosive decision."³⁴¹

Justice Rutledge proved prescient, and the establishment principle has remained under siege. Originally guided by a "three-pronged test" requiring "a secular purpose," a "primary effect" that neither "advances nor inhibits religion," and the avoidance of "excessive government entanglement,"³⁴² more recent majority opinions boil the inquiry down to a question of "neutrality" of benefits among secular and non-secular institutions.³⁴³ To a majority of the current Court, so

³³² See *Walz v. Tax Comm'n*, 397 U.S. 554, 678-79 (1970). See also *Mueller v. Allen*, 463 U.S. 388 (1953) (permitting state tax deductions for religious school expenses).

³³³ See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

³³⁴ *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990). See also *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002); *Caniceros v. Bd. of Tr.*, 106 F.3d 878 (9th Cir. 1997).

³³⁵ See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

³³⁶ 330 U.S. 1 (1947).

³³⁷ *Id.* at 8-14.

³³⁸ *Id.* at 18.

³³⁹ *Id.* at 17-18.

³⁴⁰ *Id.* at 19.

³⁴¹ *Everson*, 330 U.S. at 29.

³⁴² See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). See generally NOWAK ET AL., *supra* note 256, at 1047-48 (discussing three-part test).

³⁴³ See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); see also William P. Marshall, *What is the Matter with Equality?: An Assessment of Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 196-200 (2000); Douglas Laycock, *The Underlying Unity of Separation of Neutrality*, 46 EMORY

long as the state support is provided neutrally and not for a facially religious purpose – even if religious institutions receive the lion's share of the benefits³⁴⁴ – it has a good chance of dodging the “establishment” bullet.³⁴⁵

At first blush, any attempt to separately limit churches from political activity would seem to run afoul of the neutrality principle and be unconstitutional. The cases applying this principle to date, however, have involved state support for educational and other apolitical activities.³⁴⁶ There is a major difference in empowerment between allowing religious groups to meet after-hours at a public school, and subsidizing a church slate of political candidates. The subsidy is large, and the activity goes to the heart of democratic government. To some, including members of the Supreme Court, if the involvement of religious organizations in politics is threatening, then the antidote is more of it – the more the better, and may the better view win.³⁴⁷ Religion and politics are inseparable, indeed they

L.J. 43 (1997). For a thoughtful development of this thesis, see Keith Werhan, *Navigating the New Neutrality: School Vouchers, the Pledge, and the Limits of a Purposive Establishment Clause*, 41 BRANDEIS L.J. 603 (2003) (criticizing the Court's reluctance to look beyond “facial” or “purposive” neutrality).

³⁴⁴ In *Zelman*, for example, the facially neutral Cleveland school voucher program was, in the words of Professor Werhan, a “strikingly disproportionate financial benefit to the city's religious schools.” See Werhan *supra* note 343, at 621. “Forty-six of the fifty-six participating schools were religious in nature, and ninety-six percent of the children receiving the vouchers used them to enroll in religious schools.” *Id.*

³⁴⁵ With the Court so narrowly divided on these issues, however, every vote counts, and Justice O'Connor, who concurred with the majority in *Zelman*, refused to join the same Justices in *Mitchell v. Helms*, 530 U.S. 793 (2000), opining that “a government-aid program [does not pass] constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid.” *Id.* at 839. In short, federal subsidies to religious charities may not pass the establishment bar simply because they subsidize religious and non-religious groups alike.

³⁴⁶ See *Mueller v. Allen*, 463 U.S. 388 (1983) (tax deduction for school expenses); *Walz v. Tax Comm'n*, 397 U.S. 694 (1970) (church property tax exceptions). For the inconsistency of results in aid-to-education cases under the *Lemon* test, see KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 534 (1999), cited in Werhan, *supra* note 343, at 610-11. See also 26 C.F.R. § 1.501(c)(3)-(1)(d)(2) (2003) (the “advancement of religion”); RESTATEMENT OF TRUSTS §371 cmt. a (1959) (describing such advancement as including the construction of church buildings and the dissemination of religious creeds). The question here is whether subsidies for political activities are qualitatively different.

³⁴⁷ See *McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (Brennan, J., concurring); *Walz*, 397 U.S. at 670 (opinion of Chief Justice Burger) (“Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right.”). One difficulty with this argument is that a strong majority of churches and clergy believe church involvement in politics to be improper, see *infra* text accompanying notes 493-94, giving them the choice of acting contrary to their beliefs or abandoning the field to politically active minorities.

complement each other, and to attempt to separate them, to say nothing of discriminating against the former, is to forego the beneficial effects of religion on public life, and, indeed, abandon the field to atheism.³⁴⁸ By the very language of the First Amendment, the wall between church and state operates in one direction, to keep the state out of religion, not to keep religion out of the state.³⁴⁹ Indeed, to some jurists the church reigns supreme even in secular matters.³⁵⁰

To others, however, organized religion plays a dangerous role in American political life, and threatens basic

Further, as strong as the Justices' statements are, they were not made in the context of tax subsidies for religious political activity. *McDaniel* did not involve a public subsidy for clergy in the legislature, and the subsidy in *Walz* was not for lobbying or political campaigns. The fact that we have not experienced a serious polarization of politics in America over religious beliefs may be in part due to our tradition of tolerance, but may also be in no small part due to the 501(c)(3) restrictions.

³⁴⁸ For a sample of the considerable literature running in this direction, see Edward McGlynn Gaffney, Jr., *On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics*, 40 DEPAUL L. REV. 1 (1990) (emphasizing the history and value of religious organizations in politics); Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639 (arguing that churches are no different than other participants in public debate); Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Articles on Political Expression by Churches*, 76 MARQ. L. REV. 217 (1992) (arguing, *inter alia*, for reduced sanctions for political involvement); Symposium, *The Conflicted First Amendment: Tax Exemptions, Religious Groups and Political Activity*, 42 B.C. L. REV. 733 (2001) (presenting seven articles that, in their sum, challenge every aspect of the political activity restrictions from their history to their constitutionality and effect on religious freedom and political discourse; several of these articles are cited individually in this study). See also KENT GREENWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988); Laurence Tribe, AMERICAN CONSTITUTIONAL LAW 1282 (2d ed. 1988); RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (2d ed. 1984) (secular argument leaves the "public square" bereft of religion-based civic virtue).

³⁴⁹ See Gaffney, *supra* note 348, at 9, 51 (quoting the Williamsburg Charter, "a bicentennial document celebrating the meaning of the religion clauses" of the First Amendment, which declared, "the No Establishment Clause separates Church from State but not religion from politics or public life"); Michael W. McConnell, *Why 'Separation' is Not the Key to Church - State Relations*, THE CHRISTIAN CENTURY, Jan. 18, 1989; Stanley Fish, *Mission Impossible: Settling the Just Bonds Between Church and State*, 97 COLUM. L. REV. 2255 (1997).

³⁵⁰ See Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 11-12 (1985).

[R]eligious claims – if true – are prior to and of greater dignity than the claims of the state. If there is a God, His authority necessarily transcends the authority of nations; that, in part, is what we mean by "God." For the state to maintain that its authority is in all matters supreme would be to deny the possibility that a transcendent authority could exist. Religious claims thus differ from secular moral claims both because the state is constitutionally disabled from disputing the truth of the religious claim and because it cannot categorically deny the authority on which such a claim rests.

Id. at 15.

principles of democracy: discourse, reason, and compromise.³⁵¹ The special difficulty of religion is that its arguments are based on the word of God, which do not lend themselves easily to debate, reason, or a search for consensus.³⁵² The discourse threatens to become one God against another, or worse, anti-God,³⁵³ the pernicious results of which were as apparent to the framers as they may be to even a casual reader of the newspaper today.³⁵⁴ A second danger is an electorate prepared – indeed commanded in some churches – to vote by faith,³⁵⁵ and of

³⁵¹ See Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFFAIRS 259 (1989) (arguing that a free and democratic society requires a secular basis for decision making); Steven C. Gey, *When is Religious Speech not Free Speech?*, 2000 U. ILL. L. REV. 379 (maintaining that religious speech in a political context is different from secular speech and argument); Arlen Specter, *Defending the Wall: Maintaining Church/State Separation in America*, 18 HARV. J.L. & PUB. POL'Y 575 (1994-95); see also Mario Cuomo, former New York Governor, Remarks at Panel Discussion on Religion on the Stump: Politics and Faith in America, available at website of The Pew Forum on Religion & Public Life Pew Foundation, <http://pewforum.org/events/index.php?EventID=34> (Oct. 2, 2002).

³⁵² See Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677, 691 (1993) ("Where religious convictions are a basis for a disagreement, it is, other things being equal, less likely the disputants can achieve resolution or even peacefully agree to disagree."). See also Audi, *supra* note 351, at 275-83, 295-96; Gey, *supra* note 351, at 455-56 n.331 (describing an activist religious scholar as "declaring aloud that as a 'traditional theist' what [the scholar] wants is a chance to win out over the 'modernist liberals' . . . it is a victory he seeks, and he is even willing to acknowledge that if he gains it, the losers will *not* be treated fairly but will 'live in a society that is hostile to the continuance of their way of life'" (quoting Fish, *supra* note 349, at 2330-01).

³⁵³ Presidential candidate Patrick Buchanan described members of the electorate concerned with environmental issues as follows: "They turned Easter into Earth Day and worship dirt." *It's Soil We Worship, Pat, Not Dirt*, HIGH COUNTRY NEWS, Sept. 4, 1995, available at http://www.hcn.org/servlets/hcn.PrintableArticle?article_id=1294 (last visited July 18, 2003) (quoting from a campaign speech). In addition, the response of U.S. Senator Arlen Specter to Buchanan's "jihad" was, "Our nation has no place for holy wars." Specter, *supra* note 351, at 589. For the rapid fusion of a secular controversy with a religious one, see the remarks of Rev. Jerry Falwell in support of American military action in Arab countries, calling the prophet Muhammad a "terrorist." Mark O'Keefe, *Anti-Islam Remarks Called Inflammatory*, TIMES-PICAYUNE (New Orleans), Oct. 6, 2002, at A36. See also Cal Thomas, *The Terrorist Threat Among Us*, THE AUGUSTA CHRONICLE, May 23, 2003, at A4 (raising the alarm that "our enemies have invaded the United States through immigration for the express purpose of organizing themselves politically" and pointing out that, "[i]n at least 16 states, Muslim groups, by their own admission, are organizing voter-registration drives and political consciousness-raising events"). For true believers, democracy has its limits.

³⁵⁴ One may take notice of the numerous religious differences underlying political and armed conflicts throughout the world. Indeed, one cannot avoid it.

³⁵⁵ See *Dissenting Politicians Face Catholic Scrutiny*, TIMES-PICAYUNE (New Orleans), Nov. 11, 2003, at A4 ("The nation's Roman Catholic bishops Monday said they are considering whether to recommend sanctions for Catholic politicians who favor policies contrary to church teachings on abortion and other issues [One member of a task force of bishops] said some dioceses already ban from church property elected officials who support abortion rights."); James N. Goodsell, *Cardinal's Abortion*

legislators beholden to (or intimidated by) the power of this command by a dominating church in a state or region.³⁵⁶ A third difficulty, noted by the Court in another context, relates to money and the nature of religious giving, which is more in the order of a tithe than a contribution to promote a particular belief. In their sum, these are large tithes, more than one-third of all charitable contributions.³⁵⁷ As the federal courts have noted with the aggregation of for-profit corporate wealth,³⁵⁸ the sum does not necessarily represent the stockholders.³⁵⁹

Letter Stirs Political Controversy, CHRISTIAN SCI. MONITOR, Sept. 15, 1980 (describing a Catholic cardinal's letter urging Catholics to vote against political candidates favoring Medicaid funding of abortions); Bruce Alpert, *Landrieu, Opponents, Divided on Abortion*, TIMES-PICAYUNE (New Orleans), Oct. 13, 2002, at A1 ("In the final days of the 1996 U.S. Senate race, retired Archbishop Philip Hannan sent shock waves through the state's political world with a public declaration that it would be a sin for Catholics to vote for Mary Landrieu because of her support of abortion rights.").

³⁵⁶ See El Papa Insta a los Politicos Catolicos a Legislar Conforme a la Doctrina de la Iglesia [The Pope Insists That Catholic Politicians Legislate in Conformity with Church Doctrine], EL PAIS (Spain), Jan. 17, 2003, at 1; see also Audi, *supra* note 351; Gey, *supra* note 351, at 456-57 (continuing controversy over religious teaching in Atlanta public schools). There are similar pressures at the local level. See James Gill, *Candidate Targeted for Backing the Law*, TIMES-PICAYUNE (New Orleans), Oct. 23, 2002, at B7 (describing continuing controversy over religious teaching in public schools); Ed Anderson, *"Choose Life" Plates Hit Road in La.*, TIMES-PICAYUNE (New Orleans), Nov. 2, 2002, at A4 (describing controversy over new state license plate reading "Choose Life"). The impact of church involvement in politics is felt in indirect proportion to the level at which it is exercised, and is at its strongest at the local level with school boards, cities, and counties – the foundations, one could argue, of democracy. The impact, nonetheless, can also reach the highest levels of government. See *supra* notes 289-293. For a remarkable insight into the impact of religious involvement in electoral campaigns at the presidential level, see Specter, *supra* note 351, at 575, describing the grip of the Religious Right on the 1992 Republican Presidential Convention and commenting on how the author's "incidental reference to the 'basic American principle of separation of church and state' caused the hall to erupt with boos." If this impact can be so strongly felt by a senior and established United States senator whose reelection was not even at issue, one gets a sense that, for more vulnerable elected officials, the impact is an order of magnitude greater.

³⁵⁷ See *supra* note 221.

³⁵⁸ See *Beaumont v. FEC*, 278 F.3d 261, 272 (4th Cir. 2002) (citations omitted), *rev'd*, 123 S. Ct. 2200 (2003):

[T]he possibility of distortion of political support for corporate causes has been recognized as a form of corruption significant enough to warrant government regulation. Distortion involves the concern that "[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas." Instead, these resources may reflect only "the economically motivated decisions of investors and customers." The fear here is that shareholders or members of certain corporations will have an "economic disincentive for disassociating with [the corporation] if they disagree with its political activity." Accordingly, the potential for distortion is also a compelling governmental interest for limiting political expression.

³⁵⁹ It is not difficult to encounter an active church member who strongly opposes his or her church's political position on a given issue, and even the idea of the church taking a political position at all. See *Review of Internal Revenue Code Section*

These kinds of arguments may well have persuaded the founding fathers. To Jefferson, Madison, and company, separating churches from political activity was probably axiomatic: if one were concerned about the state establishing religion, funding religious organizations to elect the state's legislature would be about the most counter-intuitive step imaginable, a straight shot down the wrong road. Times do change, however, and by luck, tolerance, and the reinforcing influence of the Internal Revenue Code in this century, government has managed to keep religious involvement in politics down to a dull roar.³⁶⁰ Correspondingly, we have tended to disregard the threat.³⁶¹ The current trend in Congress,³⁶² the Court,³⁶³ and President George W. Bush's administration³⁶⁴ is to provide religious institutions an increasing amount of federal support. We are in an establishment mode, not a separation mode.

As the dust settles, we have a line of cases permitting federal subsidies for religious activities on the basis of neutrality. On the other hand, another line keeps churches out of government decision making, for the very danger they pose to the American political system. Where between these two poles federal subsidies to religious institutions for political

501(c)(3) Requirements for Religious Orgs.: Hearing Before the Subcomm. on Oversight of the House Committee on Ways and Means, 107th Cong. 39 (2002) (statement of Reverend C. Welton Gaddy, Ph.D., Executive Director, Interfaith Alliance Foundation) ("When people of faith give money to their congregations as an act of devotion to God, they should not have to worry about a portion of that money going to politicians."). To these arguments could be added the argument made by de Tocqueville, Jefferson, and Madison, namely that it is in the churches' own interest to keep their affairs separate from secular political decisions, lest they bring discredit upon themselves. See DE TOCQUEVILLE, *supra* note 220, at 297.

³⁶⁰ See *supra* text accompanying notes 283-311.

³⁶¹ See *McDaniel v. Paty*, 435 U.S. 618 (1978); but see *Larkin v. Grendel's Den*, 459 U.S. 116 (1982).

³⁶² See Religious Freedom Restoration Act, Pub. L. No. 103-141, § 1, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. § 2000bb - 2000bb4 (2000)); Houses of Worship Political Speech Protection Act, H.R. 2357, 107th Cong. (2002) (permitting church involvement in electoral campaigns; the bill failed in the House of Representatives on Oct. 2, 2002 by a vote of 178-239). See also Steven Patrick, *House Shoots Down Bill Allowing Religious Groups to Fund Political Campaigns*, CONG. Q. WEEKLY, Oct. 5, 2002, at 2591.

³⁶³ See *supra* text accompanying notes 338-50.

³⁶⁴ See Press Release, White House, President Names New Faith-Based and Community Initiatives Director (Feb. 1, 2002); Dana Milbank, *Bush Issues 'Faith-Based Initiative' Orders; Decrees Would Allow Religious Programs to Get Federal Money, Contracts*, WASH. POST, Dec. 13, 2002, at A4; Kate Schuler, *GOP May Spread Faith-Based Legislation Over Several Social Policy Bills*, CONG. Q. WEEKLY, May 10, 2003, at 1105.

activity falls will depend in large part on how seriously one perceives the danger of that activity to be.³⁶⁵ Which, in turn, may depend on one's own religious beliefs³⁶⁶ – the difficulty in a nutshell.

B. *Congress Clarifies*

In the 1970s, while challenges to the 501(c)(3) restrictions mounted in the courts, Congress stepped back into the picture with legislation intended to soften their impact on lobbying but to hold firm on electoral politics. The moving impulses of these interventions were familiar, led by the same wave of social concerns that had justified public interest litigation, followed a decade later by a counter-attack from the Internal Revenue Service, accompanied by a different wave of right-wing political activity, this time in favor of the Contras in the Nicaraguan civil war.

1. Section 501(h)

The early 1970s were America's environmental moment. Environmental literature led the best seller list of *The New York Times*,³⁶⁷ and the massive public response to Earth Day 1970 took the entire country by surprise.³⁶⁸ On New Year's Day, 1970, President Richard Nixon signed the seminal National Environmental Policy Act,³⁶⁹ to be followed by major legislation on air, water, toxic substances, safe drinking water, solid waste, hazardous waste, strip mining, off-shore leasing,

³⁶⁵ While this discussion has focused on whether subsidizing political activity by religious institutions would violate the Establishment Clause, a free expression or free speech challenge to the 501(c)(3) restrictions by these same institutions would turn on the same issue of the perception of the danger and, thus, the strength of the state interest. See *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1980) ("The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify the least restrictive means of achieving some compelling state interest.").

³⁶⁶ As would be natural to expect, the most vigorous criticism of the 501(c)(3) restraints on political activity by religious organizations comes from commentators associated with religious and religion-affiliated institutions. See *supra* notes 354-56.

³⁶⁷ See RACHEL CARSON, *SILENT SPRING* (1962); FRANK GRAHAM, JR., *SINCE SILENT SPRING* (1970).

³⁶⁸ See BARRY COMMONER, *THE CLOSING CIRCLE*, 5-11 (1971) (describing the unexpected outpouring of public participation in Earth Day and Earth Week 1970, and the surprise of the government). See also 117 CONG. REC. 10,313 (1971) (statement of Sen. Muskie introducing FBI report, which alleged communist influence).

³⁶⁹ Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4367 (2000)).

forestry, fisheries, public lands, and endangered species.³⁷⁰ Many Americans could take legitimate credit for these accomplishments, but anyone involved recognized the leadership in nearly all of them of the senior Senator from Maine, Edmund Muskie.³⁷¹ In 1970 and 1971, Muskie was lead-sponsoring and maneuvering through Congress both the Clean Air and Clean Water Acts. He was also introducing a bill to loosen the restrictions on public interest lobbying.

On March 30, 1971, Muskie presented his bill. "I believe," he stated, "that voices of the environmentalists, of the civil rights and poverty groups, of public interest law firms, are just as important – if not more important today – than the already finely orchestrated views of private business pursuing public policy."³⁷² Muskie's bill redefined 501(c)(3) to exclude lobbying by charities on any matter of "direct interest" to them, which included matters "directly affecting any purpose for which [the organization] is organized and operated."³⁷³ Over the

³⁷⁰ See Clean Air Amendments of 1970, Pub. L. No. 91-604, 89 Stat. 1676 (1970) (codified as amended in scattered sections of 42 U.S.C.), *completed revised by the Clean Air Act Amendments of 1977*, Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified in scattered sections of 42 U.S.C.) (current version at 42 U.S.C. §§ 7401-7671q (2000)); Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977) (codified as amended in scattered sections of 33 U.S.C.) (current version at 33 U.S.C. §§ 1251-1387 (2000)); Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (current version at 15 U.S.C. §§ 2601-2692 (2000)); Safe Drinking Water Act of 1974, Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended in scattered sections of 42 U.S.C.) (current version at 42 U.S.C. §§ 300f to 300j-25 (2000)); Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-850, 90 Stat. 2795 (1976) (codified as amended in scattered sections of 42 U.S.C.) (current version at 42 U.S.C. §§ 6901-6992k (2000)) (amending the Solid Waste Disposal Act, which regulated both solid as well as hazardous wastes); Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-97, 91 Stat. 445 (1977) (current version at 30 U.S.C. §§ 1201-1328(e) (2000)); Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (1978) (codified as amended in scattered sections of 43 U.S.C., 16 U.S.C., and 30 U.S.C.) (current version at 43 U.S.C. §§ 1331-1356 (2000)); Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476 (1974) (current version at 16 U.S.C. §§ 1600-1687 (2000)); Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (1976) (current version at 16 U.S.C. §§ 1801-1883 (2000)); National Park System General Authorities Act of 1970, Pub. L. No. 91-383, 84 Stat. 825 (1970) (codified as amended in scattered sections of 16 U.S.C. (2000)); Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended in scattered sections of 16 U.S.C. and 7 U.S.C.) (current version at 16 U.S.C. §§ 1531-1544 (2000)).

³⁷¹ See Robert F. Blomquist, *Nature's Statesman: The Enduring Environmental Law Legacy of Edmund S. Muskie of Maine*, WM. & MARY ENVTL L. & POL'Y REV. 233 (2000) (describing environmental record of Senator Muskie); Robert F. Blomquist, *What is Past is Prologue: Senator Muskie's Environmental Policymaking Roots as Governor of Maine*, 51 ME. L. REV. 87 (1999).

³⁷² 117 CONG. REC. 8517, 8518 (1971).

³⁷³ *Id.*; 119 CONG. REC. 5746 (1973).

next five years, Muskie would hound and bird-dog his proposal into law, the new § 501(h) of the Internal Revenue Code.³⁷⁴

Section 501(h) evolved from the general to the specific. The bill's direct interest test borrowed language from a resolution of the American Bar Association,³⁷⁵ which had also caught the liberal spirit of the time. Opponents in Congress, however, feared that this language would free charities for unlimited lobbying, which caused Muskie to begin to draw lines circumscribing "substantial lobbying," starting with an outer boundary of sixty-five percent of a group's activities.³⁷⁶ His bill picked up support from congressmen of both parties,³⁷⁷ whose primary concerns were the vagueness of the existing "substantial" test, and the harsh and mandatory punishment for violations, in Muskie's words, "the death penalty."³⁷⁸ A wide range of testimony from the nonprofit sector reinforced these concerns.³⁷⁹ Even the Service announced itself bedeviled with the almost impossible task of line drawing between "substantial" and "insubstantial," and the lack of an alternative response between simply overlooking a violation on the one hand, and revoking charitable status outright.³⁸⁰

The Tax Reform Act of 1976 provided greater definition for lobbying: objective, numerical limits qualifying substantial, and graduated penalties depending upon the severity of the offense.³⁸¹ For the great majority of 501(c)(3) charities, small and local organizations with budgets under five hundred thousand dollars per year, a total of twenty percent of their

³⁷⁴ 117 CONG. REC. 8517 (1971). *See also* 118 CONG. REC. 843 (1972); 119 CONG. REC. 5746 (1973); 122 CONG. REC. 13,306 (1976).

³⁷⁵ 117 CONG. REC. 8518 (1971). *See also* 122 CONG. REC. 13,306 (1976); 119 CONG. REC. 5746 (1973); Kim Bouchillon, *Guiding Lobbying Charities Into a Safe Harbor: Final Section 501(h) and 4911 Regulations Set Limits for Tax-Exempt Organizations*, 61 MISS. L.J. 157, 162-63 n.44 (1991).

³⁷⁶ *See* 118 CONG. REC. 843 (1972).

³⁷⁷ 122 CONG. REC. 13,306 (1976). *See also* 122 CONG. REC. 12,254 (1976); 122 CONG. REC. 16,883, 16,886 (1976).

³⁷⁸ 117 CONG. REC. 8517 (1971). *See also* 122 CONG. REC. 12,254, 12,255 (1976); 122 CONG. REC. 13,306 (1976); 1976 U.S.C.A.N. 4029, 4104; Bouchillon, *supra* note 375, at 162.

³⁷⁹ Nonprofit groups testifying before Congress about their difficulty understanding the vague "substantial part" test and the chilling effect of this vague limit and its attendant sanction, included: Lincoln Center for the Performing Arts, a YWCA in Delaware, the National Association of Mental Health, the National Audubon Society, the American National Red Cross, and the League of Women Voters. *See* 119 CONG. REC. 5746 (1973).

³⁸⁰ 119 CONG. REC. 5746 (1973).

³⁸¹ Pub. L. No. 94-455, 90 Stat. 1520 (1976) (codified as amended at 26 U.S.C. § 501(h) (2000)).

budgets could be spent on lobbying.³⁸² A charity could elect to fall under these provisions or to remain subject to the “substantial” test of the earlier Code. Election required no more than filing a form with the Service; compliance meant no more than keeping records of time and expenses – always a nuisance, rarely a bar.³⁸³ Major violations would be taxed.³⁸⁴ Only the egregious excesses would lead to revocation of exempt status, the death penalty.³⁸⁵

Paradoxically, churches and religious charities were not allowed to elect to be governed by 501(h), a restriction enacted at their own request.³⁸⁶ It was a tactical decision. Churches were hoping to succeed in invalidating all such restrictions on their activities and expenditures as unconstitutional, and apparently felt that acquiescence in the 501(h) scheme could compromise their position.³⁸⁷ The congressional record is thus replete with statements by House and Senate members assuring churches that they would not be included in the § 501(h) option.³⁸⁸ In this manner, both Congress and the churches also avoided the tricky question of how such

³⁸² 26 U.S.C. § 501(h)(1)(A) (2000); 26 C.F.R. § 56.4911-1(c)(1)(ii) (2001). Larger organizations might expend 15% of the next \$500,000, and a diminishing percentage beyond. 26 C.F.R. § 56.4911-1(c)(1)(ii). Within these total expenditures, no more than a quarter of the total could be used for grassroots lobbying, defined as communications to the general public. 26 U.S.C. § 501(h)(1)(B) (2000); 26 C.F.R. § 56.4911-1(b)(2), (c)(2) (2001). The remainder might be used for direct lobbying, which included both lobbying of individual members of Congress and communications to members urging them to contact their legislators. See 26 U.S.C. § 501(h)(1)(A) (2000); 26 C.F.R. § 56.4911-02(a) (2001). See also 26 U.S.C. § 501(h)(2)(A) (defining “lobbying expenditures”) (2000).

³⁸³ See ELIZABETH KINGSLEY ET AL., *E-ADVOCACY FOR NONPROFITS: THE LAW OF LOBBYING AND ELECTION RELATED ACTIVITY ON THE NET*, at http://www.allianceforjustice.org/images/collection_images/eadvocacy.pdf (last visited July 20, 2003).

³⁸⁴ Violations of up to 150% of the lobbying limits – i.e. up to 30% of the budget of an organization with a 20% ceiling – would be penalized by tax. 26 U.S.C. § 501(h)(1) (2000); 26 C.F.R. § 56.4911(c)(1)(ii) (2001); 122 CONG. REC. 12,255 (1976).

³⁸⁵ An example of a violation of this extent would be a violation of more than 150%, and then only if averaged over a four year period. 26 U.S.C. § 501(h)(1) (2000); 26 C.F.R. CONG. REC. 12,255 (1976).

³⁸⁶ 122 CONG. REC. 16,886 (1976); *Report and Recommendations on Lobbying and Political Activities by Tax-Exempt Orgs.: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, at 28, 100th Cong. 28 (1987); JOINT COMMITTEE ON TAXATION, 2 GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976: (H.R. 10612, 94TH CONGRESS, PUBLIC LAW 94-455), at 419-20 (1976); Reka Potgieter Hoff, *The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise?*, 11 VA. TAX REV. 71, 146 (1991).

³⁸⁷ Bouchillon, *supra* note 375, at 164 n.56 (citing statement of James E. Woods, Jr., Executive Director of the Baptist Joint Committee on Public Affairs, to the House Committee on Ways and Means in 1976). Hoff, *supra* note 386, at 90-91 n. 97.

³⁸⁸ 122 CONG. REC. 12,254 (1976); 122 CONG. REC. 16,886 (1976); 1976 U.S.C.C.A.N. 4029, 4104 (1976); Hoff, *supra* note 386, at 91.

expenditures would be measured in the context of, say, sermons advocating particular legislation.

In the same years that the Code was moving to liberalize public interest lobbying, the Service conformed its policies to the ruling in *Taxation With Representation*, allowing full control of a 501(c)(4) organization by a 501(c)(3) organization.³⁸⁹ The controlled 501(c)(4) could, in turn, engage in an unlimited amount of lobbying so long as it was related to the social welfare purpose of the organization.³⁹⁰ A few years later, the Congress, in an unheralded amendment, changed the Code to disqualify corporate lobbying deductions as a necessary business expense, leveling this part of the playing field between business and charity.³⁹¹ For the next decade, this is where matters stood until the political activities issues were reopened by the Internal Revenue Service, and then from an unexpected quarter, the National Endowment for the Preservation of Liberty.

2. IRS Regulations

In 1976, Congress liberalized the lobbying rules but, in a concession to its critics, agreed to revisit the question along with the Service after a ten-year trial.³⁹² Over that time, not many 501(c)(3)'s had elected to switch to 501(h), in part because of uncertainty over what the term "influencing legislation" would include, and in particular, whether it would include grassroots lobbying.³⁹³ In 1986, the Service proposed new regulations that proscribed grassroots lobbying broadly, very broadly from the point of view of the affected charities, for

³⁸⁹ See discussion *supra* notes 257-63 and accompanying text. Essentially, full control is now permitted so long as tax exempt funding and functions are kept separate from non-exempt functions. See Ward L. Thomas & Judith E. Kindell, Internal Revenue Service, *Affiliations Among Political Lobbying and Educational Organizations*, available at <http://www.irs.gov/pub/irs-tege/topics00.pdf> (2000). See also Gen. Couns. Mem. 39,776 (Aug. 25, 1988) (501(c)(3) charity may control non-exempt subsidiary investment fund). This said, the Service has not clarified the degree of control permitted through Regulation or other binding pronouncement, which leaves 501(c)(3) advocates somewhat uncertain as to how far they can go before being challenged. Telephone conversation with John Pomeranz, Alliance for Justice (Oct. 28, 2003) (Mr. Pomeranz represents 501(c)(3) charities on federal tax matters).

³⁹⁰ See HOPKINS, *supra* note 1, at 280, 290-92, 799.

³⁹¹ Pub. L. No. 103-66 1322(a), 107 Stat. 312 (1993). See also FISHMAN & SCHWARTZ, *supra* note 1, at 728. For Congress' earlier approval of the deduction, see *supra* note 237.

³⁹² 122 CONG. REC. 12,255 (1976); Bouchillon, *supra* note 375, at 163-64.

³⁹³ Bouchillon, *supra* note 375, at 163.

whom a broader definition meant less action. It proposed, further, to implement the new definition on a retroactive basis.³⁹⁴ The proposal was a shocker and, once again, the roof fell in.

The 1986 Service proposals prompted tens of thousands of comments by nonprofits and the legal community, overwhelmingly opposed.³⁹⁵ Leading the charge were Planned Parenthood and an umbrella group of charities called Independent Sector, which recommended a narrower definition of grassroots lobbying limited to bills actually pending, and efforts that included a "call to action."³⁹⁶ Also taking the lead, as with the public interest litigation regulations a decade before, were leaders of Congress itself. In February 1987, sixteen members of the Senate Finance Committee wrote to IRS Commissioner Lawrence Gibbs expressing their deep concern that the proposal would "introduce ambiguity" into the 501(h) scheme, and "restrict lobbying in ways not intended by the 1976 Act."³⁹⁷ Adding to the din were the chairs of the House Ways and Means Committee and the House Government Operations Committee,³⁹⁸ no small voices on Capitol Hill.

In the end, aided by a change in administration, the Service read the score and changed its mind. In 1988, it released a new proposal for "substantially" revised regulations that defined grassroots lobbying in narrow terms – pending legislation, specific point of view, call to action – an approach it adopted finally in 1990.³⁹⁹ From the point of view of the charities, it was another bullet dodged.

³⁹⁴ 51 Fed. Reg. 40,211, 40,214-22 (November 5, 1986); Lee A. Sheppard, *Sweet Charity and the Lobbying Taint*, 34 TAX NOTES 848 (1987); I.R.S. News Release, *Service Announces Release of Grass-Roots Lobbying Regulations*, IR-88-168 (December 22, 1988); 53 Fed. Reg. 51,826, 51,828-29 (December 23, 1988); Bouchillon, *supra* note 375, at 164.

³⁹⁵ Sheppard, *supra* note 394, at 848; Bouchillon, *supra* note 375, at 164; I.R.S. News Release, *supra* note 394; 53 Fed. Reg. 51,826, 51,828-29 (December 23, 1988).

³⁹⁶ Sheppard, *supra* note 394, at 849-50; Bouchillon, *supra* note 375, at 164; I.R.S. News Release, *supra* note 394.

³⁹⁷ Letter from Senate Finance Committee to Lawrence B. Gibbs, IRS Commissioner, March 2, 1987, *reprinted in* 34 TAX NOTES 929 (1987).

³⁹⁸ 34 TAX NOTES 929 (1987) (noting that a letter similar to the Senate Finance Committee letter, *supra* note 397, was also sent to IRS Commissioner Gibbs by the House Ways and Means Committee); Sheppard, *supra* note 394, at 849-50.

³⁹⁹ 53 Fed. Reg. 51,826, 51,828-29 (December 23, 1988); I.R.S. News Release, *supra* note 394; 55 Fed. Reg. 35,579, 35,580 (August 31, 1990). Bouchillon, *supra* note 375, at 164 & n.54-55.

3. Electoral Politics and the Contras

Meanwhile, the Congress was spurred to action on another front when, for yet a third time, one of its members was gored by a right-wing charity crossing the political line. The year was 1986 and the *causa belli* was United States policy on the Nicaraguan civil war.

The provocation came from the National Endowment for the Preservation of Liberty, one of a network of ultra-conservative tax-exempt organizations that also included the Anti-Terrorism America Committee, the American Conservative Trust, and the Sentinel.⁴⁰⁰ At issue was the U.S. reaction to the Sandinista government in Nicaragua, elected to power in 1979.⁴⁰¹ The Reagan administration moved to arm and fund a revolution in Nicaragua, directed from the White House by Lieutenant Colonel Oliver North.⁴⁰² Disagreeing with at least the administration's tactics, Congress reacted by banning federal funding for the Contras.⁴⁰³ The White House counter-reacted by continuing to raise money from outside sources, including the sale of arms, in secret, to Iran, a country that we had only recently attempted to invade in order to free U.S. hostages.⁴⁰⁴ The White House also reacted by proposing legislation to override the ban and resume Contra funding, and by promoting groups to support its cause.⁴⁰⁵ In short, it was another Great Bazaar, highly politicized, and unfolding in the midst of congressional and senate electoral campaigns.

The position of the National Endowment and its brethren was clear: The Sandinistas were Communists, end of story. With the assistance of North, the Endowment and its cohorts went on the attack, financing, among other things, a

⁴⁰⁰ See Thomas B. Edsall, *Tax, Election Law Questions Arise On Activist's Pro-Contra Efforts: Lawmakers Seeking Investigations of Channell*, WASH. POST, Dec. 18, 1986, at A30; Mark N. Uhlfelder, *Iran-Contra Aid Scandal Develops Tax Twist; Pickle Meets with Gibbs to Discuss Activities of Tax Exempt Organizations*, 33 TAX NOTES 1093 (1988).

⁴⁰¹ *Id.*

⁴⁰² *Private Diplomacy, Exposed*, N.Y. TIMES, Mar. 2, 1987, at A16; *Iran-Contra Hearings; The Colonel Presents His Case: His Beliefs, His Work and His Grievances*, N.Y. TIMES, Jul. 10, 1987, at A6.

⁴⁰³ *Private Diplomacy, Exposed*, *supra* note 402; *Iran-Contra Hearings*, *supra* note 402.

⁴⁰⁴ Joel Brinkley, *The White House Crisis: Getting Supplies To The Contras; U.S. Got Reports On Contra Arms*, N.Y. TIMES, Dec. 17, 1986, at A20.

⁴⁰⁵ See Edsall, *supra* note 400.

television campaign promoting Contra aid.⁴⁰⁶ In a press release during congressional hearings on the issue, the Endowment announced that it would raise \$2.5 million – in its words, the “most expensive, privately funded education and information program on a foreign policy issue ever undertaken” – in support of one hundred million dollars in aid to the Contras.⁴⁰⁷ It did more. It produced and aired television advertisements that supported conservative political candidates who favored the aid package, and then targeted incumbent opponents.⁴⁰⁸

That was a major tactical error. One of the targets was Senator Howard Metzenbaum, known for his independence as well as his liberal views, who quickly raised the issue of these campaigns to the Service.⁴⁰⁹ For whatever reason, the Service took no action against the Endowment.⁴¹⁰ Then the Endowment made its second mistake: it targeted the reelection campaign of Congressman J.J. Pickle, a senior member of the House Ways and Means Committee and chair of its Subcommittee on Oversight, which includes oversight of the Service.⁴¹¹ Congressman Pickle already had his eye on the apparent use of charities in political campaigns.⁴¹² Suddenly, the issue became a priority.

The hearings that followed surfaced the problem.⁴¹³ Senator Gary Hart and other presidential candidates had created charities to promote their images and issues.⁴¹⁴ Churches had suddenly thrown themselves into politics: The evangelist Pat Robertson was electing delegates to the

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*; Uhlfelder, *supra* note 400, at 1093.

⁴⁰⁹ Uhlfelder, *supra* note 400, at 1093.

⁴¹⁰ *Id.* One reason that certainly comes to mind, of course, is that the Endowment was supporting the administration's war in Nicaragua. Indeed, it was acting as the administration's agent.

⁴¹¹ Edsall, *supra* note 400. By no small coincidence, Representative Pickle had been a staff aid to Lyndon Johnson during the congressional campaign that led to the original electoral activity prohibition. See O'Daniel, *supra* note 132, at 749.

⁴¹² Uhlfelder, *supra* note 400, at 1093.

⁴¹³ See H.R. REP. NO. 391(II), reprinted in 1987 U.S.C.A.A.N. 2313-378; H.R. CONF. REP. NO. 495, reprinted in 1987 U.S.C.A.A.N. 2313-1245.

⁴¹⁴ Charles R. Babcock, *Use of Tax-Exempt Groups Integral to Political Strategy*, WASH. POST, Jan. 7, 1997, at A1. The practice continues. See Note, *Use and Abuse of Non-Profit Organizations for Partisan Political Activities* in FISHMAN & SCHWARTZ, *supra* note 1, at 514-16; Robert P. Meier, Comment, *The Darker Side of Nonprofits: When Charities and Social Welfare Groups Become Political Slush Funds*, 147 U. PA. L. REV. 971 (1999).

upcoming Republican convention;⁴¹⁵ white churches in the South were openly supporting David Duke for Governor of Louisiana;⁴¹⁶ black churches were openly supporting Jessie Jackson's bid for the presidency;⁴¹⁷ and the Catholic Church was pronouncing the moral obligations of candidates on the issue of abortion.⁴¹⁸ Throughout it all, the Service was silent.⁴¹⁹

Congressman Pickle chaired congressional hearings in 1987, prompted in his words by "recent events" that had "raised questions" about the engagement of charities in politics, the scope of the law, and the Service's enforcement.⁴²⁰ His subcommittee found an "alarming use" of tax exemption in the electoral process, and "deficient and misleading" disclosure of the charities' activities.⁴²¹ Its recommendations culminated in the Tax Exempt Organizations Lobbying and Political Activities Accountability Act of that same year, broadening the definition of political activity to include use of an organization for the "primary benefit" of a candidate, and requiring more regular and specific reporting.⁴²²

In the same legislation, Congress reaffirmed the absolute nature of the prohibition on electoral politics, without dissent.⁴²³ With language unambiguous in its intent but no more illuminating than that of the court in *Slee*, the House report explained that "the prohibition on political campaign activities and the restrictions on lobbying activities by charities reflect Congressional policies that the US Treasury should be neutral in political affairs."⁴²⁴

⁴¹⁵ Charles R. Babcock, *Robertson Accused of Using Tax-Exempt Group for Politics; Ex-Officials Say Presidential Bid Was Aided*, WASH. POST, Apr. 6, 1988, at A17.

⁴¹⁶ Roberto Suro, *Duke Recasts His Religious Claims*, N.Y. TIMES, Nov. 11, 1991, at A12.

⁴¹⁷ *Jackson to Pass the Plate at Churches Sunday*, N.Y. TIMES, Jan. 28, 1988, at A23.

⁴¹⁸ Goodsell, *supra* note 355; Kenneth A. Briggs, *Debate is Growing on Legalities of Religious Activism*, N.Y. TIMES, Oct. 3, 1980, at A22.

⁴¹⁹ Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining The Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217, 241-45 (1992).

⁴²⁰ *Report and Recommendations on Lobbying and Political Activities by Tax-Exempt Orgs.: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 100th Cong. 3 (1987).

⁴²¹ *Id.* at 38.

⁴²² *Id.* at 39-46; Tax-Exempt Organizations' Lobbying and Political Activities Accountability Act of 1987, H.R. 2942, 100th Cong. (1987).

⁴²³ H.R. 2942.

⁴²⁴ H.R. REP. NO. 100-391, at 1621, 1625 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-1201, 2313-1205.

The net effect of all of these developments – § 501(h), the Service implementing regulations, and the Act of 1987 – was to diminish the sting of the political restrictions, and to level the playing field between corporate and charitable subsidies under the Code. The charitable organization had the option of conducting significant, if not “substantial,” lobbying, including grassroots lobbying, with considerable security and predictability under § 501(h). If it wanted to be more active, it could launch a 501(c)(4) organization down the hall with the same board of directors, personnel, and overhead, and with only the restriction of keeping records to ensure that deductible contributions did not flow to the non-deductible (c)(4). These organizations would, further, no longer be competing for legislative attention with industry lobbyists whose influence taxpayers subsidized as necessary business expenses. With regard to electioneering, the controlled 501(c)(4) organization could not only lobby freely but, pursuant to Service rulings, engage in political campaigns as well through a separate segregated fund or a political action committee,⁴²⁵ so long as that campaigning did not become its principal activity.⁴²⁶

None of this is to say that the remaining prohibitions freed charities completely for the political fight. They remained largely limited to acting through 501(c)(4)’s, to which contributions were not deductible. In the competition for the donor dollar, the deductibility of contributions is key. Only the most committed donors are willing to forego the tax break for the cause. Unless (c)(4)’s are sponsored by for-profit corporations, private foundations, or a few multi-millionaires, the (c)(4) world for genuinely public interests, as opposed to the world of commercial interests masquerading as public interests, will always be limited by funding. The leash on charities was loosened, but it remained securely fastened at the neck.⁴²⁷

⁴²⁵ Enacted in 1974, § 527 of the Internal Revenue Code adds political action committees (PACs) and other campaign committees and political parties to its list of tax exempt organizations. I.R.C. § 527 (2003). PACs are defined as any organization operated primarily to fund an “exempt function,” *id.* § 527(e)(1), which in turn is defined as the “selection, nomination, election or appointment of any individual” to federal, state or local office, including officers of political parties and members of the electoral college, *id.* § 527(e)(2). PACs are established as independent organizations, or as “separate segregated funds” (SSFs) of other organizations; 501(c)(3) charities but not 501(c)(4)’s, are specifically disqualified from maintaining SSFs or PACs, *id.* § 527(f). See also HOPKINS, *supra* note 1, at 373-75.

⁴²⁶ Rev. Rul. 81-95, 1981-1 C.B. 332.

⁴²⁷ At the same time, however, commentators and the Congress, impulsed by

C. *Election Campaign Laws*

For a century, with the overwhelming support of the public, Congress has struggled to curb the corrupting influence of corporate, union and large, unregulated contributions in Federal elections. Time and time again, this Court has agreed that achievement of that goal is critical to avoid erosion of public confidence in representative government to – and I’m using the Court’s words – to a disastrous extent.

But concentrated wealth is nothing if not creative. As this Court has observed, the history of campaign finance reform has been a cycle of legislation followed by the invention and exploitation of loopholes, followed by more legislation to cut off the most egregious evasions and circumventions.

Theodore B. Olson, Solicitor General
of the United States, 2003.⁴²⁸

Federal election laws offer a different set of answers for nonprofit organizations. In contrast to the political restrictions of the Internal Revenue Code, federal election laws have a long history of legislative development with a rather well-understood objective: that elections be fair and be perceived as fairly won.⁴²⁹ Over time, electoral fairness has come to mean limiting the effect of money.

As early as 1867, Congress first banned solicitation of political contributions at the federal Navy Yard.⁴³⁰ For the next forty years, this and similar efforts to control political spending came as ad hoc responses to particular abuses, generally ones publicized from the previous campaign.⁴³¹ Loopholes abounded;

the media, have noted a trend towards using (c)(4) nonprofits, even those allied with (c)(3) charities, for political campaigns, the so-called “stealth PACs,” in an attempt to circumvent the reporting requirements for PACs under federal election laws. See David S. Karp, Note, *Taxing Issues: Reexamining the Regulation of Issue Advocacy by Tax Exempt Organizations Through the Internal Revenue Code*, 77 N.Y.U. L. REV. 1805, 1805-11 (2002). Congress attempted to close this loophole with legislation in 2000 requiring, *inter alia*, the disclosure of donors, Pub. L. No. 106-230, 114 Stat. 477 (2000) (codified as amended in scattered sections of 26 U.S.C. (2000)), and again in the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended in scattered sections of 2 U.S.C.A., 18 U.S.C.A., and 47 U.S.C.A. (West Supp. 2002)). See also *infra* text accompanying notes 480-85.

⁴²⁸ Oral argument of United States Solicitor General Theodore B. Olson, at 50 (Sept. 8, 2003), *McConnell v. FEC*, 251 F. Supp. 2d 919 (D.D.C. 2003).

⁴²⁹ Albert J. Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. ON LEGIS. 359, 360 (1972).

⁴³⁰ Naval Appropriations Act of 1867, Ch. 172, § 3, 14 Stat. 489, 492 (1867).

⁴³¹ See CTR. FOR RESPONSIVE POLITICS [hereinafter CRP], *Important Dates: Federal Campaign Finance Legislation*, in A BRIEF HISTORY OF MONEY IN POLITICS: CAMPAIGN FINANCE – AND CAMPAIGN FINANCE REFORM – IN THE UNITED STATES (1996),

no unifying scheme could be found.⁴³² In 1905, President Theodore Roosevelt, locked in a struggle against large, corporate interests over trusts, taxes, banking, and conservation, called for public financing of congressional and presidential elections as a means of reducing the influence of "big money."⁴³³

Congress would not go that far, but it did pass the Tillman Act,⁴³⁴ which prohibited corporations and banks from contributing to federal candidates. Three years later Congress adopted the first federal campaign disclosure requirements. In 1939, Congress passed the Hatch Act,⁴³⁵ prohibiting federal employees from engaging in election activities. The following year it amended the Act to limit individual contributions to candidates.⁴³⁶ In 1943, Congress turned to the influence of organized labor, and imposed a temporary ban on labor contributions, paralleling the ban on corporate contributions.⁴³⁷ At the close of World War II, it reenacted both prohibitions in the Taft-Hartley Act.⁴³⁸

In the continuing game of regulation and evasion, however, the evaders had developed a new mechanism for avoiding the effect of the election laws.⁴³⁹ To circumvent limits on candidates' committees, they created multiple committees.⁴⁴⁰

at <http://www.opensecrets.org/pubs/history/historyindex.asp> (last visited July 17, 2003). The history that follows is taken largely from this and two other publications: CRP, *How Americans Have Financed Elections in the Past*, in A BRIEF HISTORY OF MONEY IN POLITICS: CAMPAIGN FINANCE – AND CAMPAIGN FINANCE REFORM – IN THE UNITED STATES, *supra*; FEDERAL ELECTION COMMISSION, TWENTY YEAR REPORT, ch. 1 (1995), available at <http://www.fec.gov/pages/20year.htm> (last visited July 17, 2003).

⁴³² For much of this period, the Federal Corrupt Practices Act of 1925 served as the basic federal campaign law. "[N]otoriously devoid of enforcement procedures," the Act led to no prosecutions over its nearly fifty-year existence. CRP, *Reform Attempts at the Federal Level*, in A BRIEF HISTORY OF MONEY IN POLITICS: CAMPAIGN FINANCE – AND CAMPAIGN FINANCE REFORM – IN THE UNITED STATES, *supra* note 431. President Lyndon Johnson described the act as "more loophole than law." *Id.*

⁴³³ James L. Huffman, *Campaign Finance Reform in North Carolina: An Act to Limit Campaign Expenditures and to Strengthen Public Financing to Political Campaigns*, 67 N.C.L. REV. 1349, 1352 n.31 (1989).

⁴³⁴ Tillman Act, ch. 420, 34 Stat. 864 (1907).

⁴³⁵ Hatch Political Activity Act, ch. 410, 53 Stat. 1147 (1939) (codified as amended in scattered sections of 5 U.S.C. and 18 U.S.C.).

⁴³⁶ See Huffman, *supra* note 433, at 1352 n.31.

⁴³⁷ *Constitutionality of Restrictions on Individual Contributions to Candidates in Federal Elections*, 122 U. PA. L. REV. 1609, 1616 (1974).

⁴³⁸ *Id.*

⁴³⁹ Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 141 (2000)).

⁴⁴⁰ Joel L. Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51

In 1944, the first labor political action committee (PAC) was formed, and by 1956, labor PACs were contributing \$2.1 million to federal campaigns.⁴⁴¹ Corporations were quick to catch on and by the 1970s PACs were contributing money freely to federal campaigns through organizations that were technically separate from both a union or a corporation and thus not limited in contributions, and from candidate committees, thus avoiding the expenditure ceilings.⁴⁴²

In 1971, Congress took its first step towards comprehensive election reform. One concern was escalating federal campaign costs that seemed to confirm the impression that politics was reserved for the wealthy. Another was the impression that contributors got what they paid for, a quid pro quo⁴⁴³ that would only increase as politicians became more dependent upon their contributors to meet the costs of media-based campaigns. The Federal Election Campaign Act (FECA)⁴⁴⁴ addressed the problem in several ways. It limited expenditures on campaign communications, restricted a candidate's use of personal funds, and imposed reporting requirements for candidates and their campaigns.⁴⁴⁵ It was almost immediately, however, overtaken by events.

The 1972 elections brought the Watergate scandal and the disclosure of widespread, illegal campaign contributions by such influential corporations as Gulf Oil, 3M, Ashland Oil, and Northrop. Disclosure reports listed various individuals and corporations contributing millions of dollars illegally and in secret to President Nixon's campaign.⁴⁴⁶ Spurred by these and

N.C. L. REV. 389, 391 (1973).

⁴⁴¹ See Hoover Institution, *Campaign Finance: History*, available at <http://www.campaignfinancesite.org/history/financing1.html> (last visited Oct. 26, 2003); Joseph E. Cantor, Congressional Research Service, CRS Report for Congress, *Political Spending by Organized Labor: Background and Current Issues* (1998).

⁴⁴² See *id.* at 391. These were only some of the more lawful ways of avoiding the campaign restrictions. In combination, they were so extensive and their enforcement so weak that no case reached the Supreme Court to challenge their constitutionality. See Rosenthal, *supra* note 429.

⁴⁴³ Rosenthal, *supra* note 429.

⁴⁴⁴ Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 18 U.S.C. §§ 591, 600, and in scattered sections of 2 U.S.C. and 47 U.S.C. (2000)). See also *Buckley v. Valeo*, 424 U.S. 1, 7 (1976) (quoting *Buckley v. Valeo*, 519 F.2d 821, 831 (D.C. Cir. 1975) (characterizing the 1971 and 1974 FECA as "the most comprehensive reform legislation [ever] passed by Congress concerning the election of the President, Vice-President, and members of Congress").

⁴⁴⁵ 86 Stat. 3 (1972).

⁴⁴⁶ Center for Responsive Politics, *A Brief History of Money in Politics, How Americans Have Financed Elections in the Past*, available at <http://www.opensecrets.org/pubs/history/history2.html> (last visited Aug. 10, 2003).

other revelations, Congress amended FECA in 1974 to address campaign costs that continued to soar, and the ever-present specter of the quid pro quo.⁴⁴⁷ Reacting to abuses on the contributions side, it imposed a one thousand dollar ceiling on the amount any individual could give any candidate.⁴⁴⁸ On the expenditure side, Congress extended FECA's limits on communications expenditures to all campaign expenditures. The amendments streamlined campaign disclosure and placed new filing requirements on PACs and individuals.⁴⁴⁹ To administer these requests, Congress also created, after long reluctance, a Federal Election Commission with powers of investigation and enforcement.⁴⁵⁰

These additions unified the federal campaign laws into a single scheme. They were the product of a century of trial and error, of extensive hearings in the Senate and House, and of a widely-felt desire to reduce campaign abuses and the influence of money in politics. The scheme did not last two years, which was the shortest time it would take for First Amendment challenges to reach the Supreme Court.

If FECA was the most comprehensive campaign legislation ever enacted, *Buckley v. Valeo*⁴⁵¹ was certainly one of the most comprehensive assaults on legislation ever to reach the Court. Mounted by candidates of both major parties, the Libertarian Party, the Conservative Party of the State of New York, the New York Civil Liberties Union, and the

⁴⁴⁷ Securities and Exchange Commission, Report on Questionable and Illegal Corporate Payments and Practices Submitted to the Senate Banking, Housing and Urban Affairs Committee, reprinted in 353 Sec. Reg. & L. Rep. 36-41 (1976). See also CRP, *How Americans Have Financed Elections in the Past*, in A BRIEF HISTORY OF MONEY IN POLITICS: CAMPAIGN FINANCE – AND CAMPAIGN FINANCE REFORM – IN THE UNITED STATES, *supra* note 431:

A turning point in campaign finance history took place after the scandalous "Watergate election" of 1972, in which President Nixon's re-election committee received millions of dollars in secret, and often illegal, donations from, among others, Robert Vesco (\$200,000 cash delivered in an attaché case), Howard Hughes (\$100,000 contribution purportedly via a locked safe deposit box belonging to Nixon's long-time friend, Bebe Rebozo), Clement Stone (\$73,000 reported, \$2 million unreported) and, according to a 1974 Senate Select Committee, "at least 13 corporations" and their "foreign subsidiaries" (which made over \$780,000 in "illegal corporate contributions").

⁴⁴⁸ Federal Election Campaign Act of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 47 U.S.C. § 315, and in scattered sections of 2 U.S.C. and 26 U.S.C. (2000)).

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ 424 U.S. 1 (1976).

Conservative Victory Fund, among others,⁴⁵² the suit challenged virtually every major feature of the Act, including the various contribution limits, expenditure limits, reporting requirements, public campaign financing, and the Federal Election Commission itself. The crux of the case was that the Act infringed on political expression. At opinion's end,⁴⁵³ the expenditure limits on campaigns, groups, contributors, and candidates were dead.

In contrast to the approach in *Cammarano* and *Taxation With Representation*, *Buckley* focused first on the speech and then on the nature of the restriction. Money is speech in today's world, hence, restrictions on money restrict speech.⁴⁵⁴ This equation established, the "advocacy of the election or defeat of a candidate" is "no less entitled to protection under the First Amendment than discussion of political policy generally or advocacy for the passage or defeat of legislation."⁴⁵⁵ Congressional findings to the contrary – and one would think that members of Congress would be in a particularly good position to know – the dangers of unrestricted expenditures on electoral campaigns were too attenuated to raise legitimate fears of corruption.⁴⁵⁶

Of the few requirements of FECA that survived *Buckley*, the ones of primary significance, beyond disclosure, were the limits on contributions.⁴⁵⁷ Corporate contributions were the problem. In *California Medical Association v. FEC*⁴⁵⁸ and *FEC v. National Right to Work Committee*,⁴⁵⁹ the Court upheld limits on corporate contributions to PACs and a ban on corporate contributions to federal candidates. Both opinions, echoing

⁴⁵² *Id.* at 7.

⁴⁵³ It takes a while; the opinion runs for 294 pages, and consists of a plurality *per curiam* opinion and separate opinions, each concurring and dissenting in part, by Chief Justice Burger, *id.* at 235, and Justice White, *id.* at 257, Justice Rehnquist, *id.* at 290, and Justice Blackmun, *id.* at 290. Justice Stevens took no part in the decision, *id.* at 5.

⁴⁵⁴ *Id.* at 11, 21, 92-93. They also restricted freedom of association: "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Id.* at 15. (citing *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

⁴⁵⁵ *Id.* at 48.

⁴⁵⁶ *Buckley*, 424 U.S. at 45-58.

⁴⁵⁷ Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, tit. I, § 112, 90 Stat. 475 (1976) (codified as amended in scattered sections of 2 U.S.C. and 26 U.S.C. (2000)) (following *Buckley* and amended by Congress to conform to the opinion).

⁴⁵⁸ 453 U.S. 182 (1981).

⁴⁵⁹ 459 U.S. 197 (1982).

Buckley, turned on the particular dangers corporate money posed to the political process.⁴⁶⁰ Evincing a somewhat unusual deference to congressional findings that these contributions led to a quid pro quo, the court would not “second guess” this judgment.⁴⁶¹

Where the limits did not implicate corporate contributions, the Court was overtly hostile. *FEC v. National Conservative Political Action Committee*⁴⁶² involved a challenge by two of the nation’s largest ideological PACs to the Presidential Election Campaign Fund Act,⁴⁶³ which limited PAC expenditures in support of a candidate who elected to accept public financing.⁴⁶⁴ The Congress had enacted this provision in order to prevent high-powered PACs from circumventing their ceilings; without the provision, the Senate committee report had found, the law would be ineffective to combat favoritism and corruption.⁴⁶⁵ The stipulated record of the case included evidence that the expenditures of these two PACs were largely devoted to the election of President Ronald Reagan, and were directed by political professionals closely associated with the Reagan campaign.⁴⁶⁶ The PACs avoided the “coordinated expenditure” prohibitions simply by avoiding direct contact with campaign officials.⁴⁶⁷

The Court acknowledged that these PAC monies were what Congress “plainly intended to prohibit.”⁴⁶⁸ Moreover, they

⁴⁶⁰ See *id.* at 209-10; *California Med. Ass’n*, 453 U.S. at 198 n.19.

⁴⁶¹ See *Nat’l Right to Work Comm.*, 459 U.S. at 210.

⁴⁶² 470 U.S. 480 (1985). For the 1979-1980 election cycle, NCPAC reported spending \$3.3 million and FCM another \$2.06 million in independent expenditures on federal campaigns, ranking them second and third in the political committee spending of that year. See Gregory O’Brien, *Federal Campaign Finance Laws and the First Amendment: Federal Election Commission v. National Conservative Political Action Committee*, 9 BRIDGEPORT L. REV. 409, 428 n.115 (1986).

⁴⁶³ Pub. L. No. 89-809, 80 Stat 1587 (1967) (codified as amended at 26 U.S.C. §§ 9001-9013 (2000)).

⁴⁶⁴ 26 U.S.C. § 9012 (2000) (providing criminal penalties for candidates who elect to accept public financing and accept illegal contributions).

⁴⁶⁵ S. REP. NO. 93-689, at 19 (1974).

⁴⁶⁶ See O’Brien, *supra* note 462, at 429, 468 n.116.

⁴⁶⁷ *Id.* at 429 n.117. As one campaign official explained the game, “I wouldn’t have to talk to Bill Casey [Ronald Reagan’s 1980 campaign director]. I’d have a friend of mine talk to Bill Casey. I wouldn’t have any problem getting that done.” See *id.* (quoting Lyn Nofzinger). As the former Executive Director of one of the plaintiff PACs was quoted as stating, also in the record of the case, “[a]ll independent PACs . . . dance around the law in a way that never breaks the letter but breaks the spirit of the law – but we don’t agree with the law, anyway.” *Id.* (quoting Paul Dietrich).

⁴⁶⁸ *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985).

were demonstrably larger – and thus their potential for corruption greater – than the individual expenditures in *Buckley*. Once again, however, the judgment of Congress was simply wrong: the “absence of prearrangement and coordination” removed the danger and the justification for the statute.⁴⁶⁹

The focus on corporate contributions reached its apex in a trio of cases dealing with FECA prohibitions on campaign activities by nonprofit organizations. During the 1970s, the Massachusetts Citizens for Life conducted a campaign on abortion laws that included a “Special Election Edition,” published and distributed just prior to the 1987 primary elections. Headlined “Everything You Need to Know to Vote Pro-Life,” it rated candidates in accordance with abortion issues.⁴⁷⁰ At issue in *FEC v. Massachusetts Citizens for Life* was whether Massachusetts Citizens had violated the spending limits imposed on all corporations,⁴⁷¹ and if so, whether these limits could survive their First Amendment impact.

The FECA violation was easy to find: The Special Election Edition expressly advocated the election of its favored candidates. However, the Edition was political speech; for the Court’s majority, this aspect again controlled. Congress had no compelling reason to limit the political expenditures of nonprofits such as Massachusetts Citizens, the Court ruled.⁴⁷² Nonprofits were not the problem. The “corrosive influence of concentrated corporate wealth” was the problem, aggravated by the “special advantages” which go with the corporate form of organization.⁴⁷³ Where an organization, such as Massachusetts Citizens, (1) was formed for promoting political ideas, (2) had no shareholders or others who could privately profit from its earnings, and (3) was not established by a corporate or labor union and did not receive funding as a conduit for them, the First Amendment freed it from FECA.⁴⁷⁴

The courts clarified and reinforced the “MCFL test” in *Austin v. Michigan Chamber of Commerce*⁴⁷⁵ and *Beaumont v.*

⁴⁶⁹ *Id.* at 519 (Marshall, J., dissenting) (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)).

⁴⁷⁰ *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 243 (1986).

⁴⁷¹ *Id.* at 241.

⁴⁷² *Id.* at 267 (Rehnquist, J., concurring in part and dissenting in part).

⁴⁷³ *Id.* at 257.

⁴⁷⁴ *Id.* at 239.

⁴⁷⁵ 494 U.S. 652 (1990).

FEC.⁴⁷⁶ Both cases involved nonprofits, one a 501(c)(6) business league and the other a 501(c)(4) social welfare organization promoting a right-to-life agenda. The Michigan Chamber failed the test. Its business members received benefits from the Chamber's agenda, and the Chamber, in turn, depended on business contributions for seventy-five percent of its budget.⁴⁷⁷ In *Beaumont*, on the other hand, the National Committee on the Right to Life had a political, nonprofit agenda, its activities spun off no economic benefits to its members, and its funding was essentially, although not entirely, non-corporate.⁴⁷⁸ The Chamber presented a significant danger of undue corporate influence.⁴⁷⁹ The National Committee did not.

Electoral campaign law remained with the courts until 2002, when Congress passed the Bipartisan Campaign Reform Act of 2002.⁴⁸⁰ A polarizing issue within both the Republican and Democratic parties, the Act's main purpose was to limit the influence of "soft money," unregulated contributions to political parties and, hence, political campaigns.⁴⁸¹ Republicans feared a replay of the massive soft money fundraising at which former President Clinton had been so adept, Democrats feared corporate contributions to Republican coffers that would dwarf theirs over time, and both feared an electorate that, by all public opinion polls, had been made cynical and restless by the influence of money in politics.⁴⁸²

Once again, Congress drew the line between for-profit and not-for-profit corporations. As in predecessor laws, the Act barred corporations and unions from electioneering except

⁴⁷⁶ 278 F.3d 261 (4th Cir. 2002), *rev'd*, 123 S. Ct. 2200 (2003).

⁴⁷⁷ *Austin*, 494 U.S. at 656.

⁴⁷⁸ *Beaumont*, 278 F.3d at 265.

⁴⁷⁹ *Id.* at 271. The *Beaumont* court explained:

Corporations benefit from state laws that grant them special advantages such as limited liability, favorable treatment for asset accumulation, and perpetual life. These state-created advantages allow corporations to attract capital and deploy resources in order to maximize shareholder wealth in ways that other business forms cannot. Corporations could use that wealth to influence federal elections.

Id.

⁴⁸⁰ Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended in scattered sections of 2 U.S.C.A., 18 U.S.C.A., and 47 U.S.C.A. (West Supp. 2002)) [hereinafter BCRA].

⁴⁸¹ See H. REP. NO. 107-331, pt. 1, at 1 (2001).

⁴⁸² See Jonathan Rauch, *OK, Sign the Campaign Finance Bill. But First, Veto It*, NAT'L J., Mar. 23, 2002, at 839. In the end, the Act was a trade-off allowing higher (hard-money) contributions in turn for restricting soft money. *Id.*

through tightly-regulated PACs.⁴⁸³ It broadened the definition of electioneering to include media advertising that even referred to a candidate, in that candidate's state or district, close to election day.⁴⁸⁴ It then made an exception for nonprofit 501(c)(4) organizations, which would be free (under the elections laws) to campaign all they wished, providing that they used only contributions from individuals and not corporations or unions.⁴⁸⁵

The Court has yet to pass on the constitutionality of these new limits, although challenges are now pending.⁴⁸⁶ The

⁴⁸³ See H.R. REP. NO. 107-31, pt.1, at 51; see also BCRA, 116 Stat. at 89, 91 (2002).

⁴⁸⁴ BCRA, 116 Stat. at 89.

⁴⁸⁵ See *id.* at 91-92. The Bipartisan Campaign Reform Act of 2002, however, proceeds to prohibit 501(c)(4)'s from electioneering for targeted candidates during the same 30 to 60 day period prior to elections noted above. See *id.* at 92.

⁴⁸⁶ On May 2, 2003, a three-judge panel composed of two Federal District Judges, Colleen Kollar-Kotelly and Richard J. Leon, and one Judge from the DC Circuit Court of Appeals, Karen L. Henderson, issued an extremely long ruling of over 700 pages on the constitutionality of the BCRA. See *McConnell v. FEC*, 251 F. Supp. 2d 919 (D.D.C. 2003); see also *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003). Judge Kollar-Kotelly, a President Clinton appointee, found the BCRA's provisions constitutional on the grounds that money in politics contributed to corruption or the appearance of corruption and that the six-year, deliberate effort of Congress to reach consensus on the Act deserved deference. 251 F. Supp. 2d at 433-36; see also Neil A. Lewis & Richard A. Oppel, Jr., *Campaign Finance: The Overview*, N.Y. TIMES, May 3, 2003, at A1; Bradley A. Smith, *No Money Where Your Mouth Is*, WALL ST. J., May 8, 2003, at A18; Tony Mauro, *Something for Everyone to Hate*, LEGAL TIMES, May 12, 2003, at 1; Spencer Overton, *Lost in Law*, LEGAL TIMES, May 12, 2003, at 58. Judge Henderson, a President Reagan appointee, ruled that most of the Act's provisions violated the First Amendment. 251 F. Supp. 2d at 266. Judge Leon, an appointee of President George W. Bush, adopted a middle position and his opinion was decisive on many of the Act's provisions. *Id.* at 756. One provision of the BCRA barred corporations and unions from spending money on television or radio ads that mention the name of a candidate who is running for federal office and are aired in that candidate's district 60 days before a general election. Judge Kollar-Kotelly found this provision constitutional. *Id.* at 568-88. Judge Henderson found the provision was expressly unconstitutional, while Judge Leon ruled that this provision was unconstitutional because it was "substantially overbroad." *Id.* at 798-99. However, the BCRA also included a backup, referred to as the "electioneering communications or sham issue ads" provision that was upheld by both Judge Leon and Judge Kollar-Kotelly. As interpreted by Judges Kollar-Kotelly and Leon, this provision prohibits the use of third-party funds for any ad that "promotes or supports or attacks or opposes" candidates, provided the ads "have no plausible meaning other than exhortation to vote for or against a specific candidate" and lack any geographic or temporal limits. *Id.* at 212-13. Another provision of the BCRA, which banned soft money fundraising by national parties, was also partially upheld and partially rejected. Also, Judges Henderson and Leon struck down a provision of the BCRA that prohibited national parties from transferring soft money to 501(c)(4) and 527(e)(3) political organizations. *Id.* at 417-17, 790-91. These conflicting rulings may be, in turn, contrasted to those of the Second Circuit in *Landell v. Vermont Public Interest Group*, 300 F.3d 129 (2d Cir. 2002), *withdrawn*, 2002 WL 31268493 (2d Cir. Oct 3, 2002), giving much greater deference to the legislative purposes of the 1997 Vermont Campaign Finance Reform Act. On May 19, 2003, the ruling in *McConnell* was stayed pending resolution by the Supreme Court; Judges Kollar-Kotelly and Henderson ruled in favor of staying the entire opinion, while Judge Leon, who

lesson for this study, however, is that Congress has tried to limit the effects of money in electoral politics in several ways. The most direct, public financing, remains only a partial option and available only at the level of presidential campaigns. Most scholars, as well as a majority of the current Supreme Court, believe that overall campaign and individual expenditure limits are unconstitutional.⁴⁸⁷ The remaining option is to channel corporate and union contributions towards regulated PACs, and to free up the activity of organizations that are independent of corporate and union influence. Unlike the Internal Revenue Code restrictions on tax-exempt organizations, FECA does not try to limit a group's activities by percentage, or by the type of advocacy used – but rather by the sources of its funding.

VII. REFLECTIONS

The Internal Revenue Code restraints on the political activities of charities have been in evolution, and in dispute, for nearly a century. They represent no grand plan, but rather a design arrived at in pieces by the impulses of the moment. They have been looking for a reason since the time they first appeared, and it was half a century before the Congress even attempted one. Reading their histories, one is struck by the fact that each of the limitations, in a different climate, could have come out quite differently. Congress enacted the lobbying restriction of 1934 almost apologetically for its failure to distinguish what it was attempting to restrict from what it wanted to protect. At that time, Congress rejected the electoral restriction and passed it twenty years later only by stealth. The litigation restriction of 1970 was all but adopted when it ran into a one-of-a-kind Congress at the apogee of a liberal moment

dissented in part, would not have stayed the entire ruling. *McConnell v. FEC*, Civ. No. 02-582, 2003 U.S. Dist. LEXIS 11006 (D.D.C. May 19, 2003). See also Richard Oppel, Jr., *Court Stays Its Ruling on Financing Campaigns*, N.Y. TIMES, May 19, 2003, at A21.

⁴⁸⁷ Whatever the ultimate fate of the BCRA, *Buckley v. Valeo* has forced the Supreme Court to, in effect, re-legislate every proposed campaign limitation using constitutional standards that draw no consensus between the Court and the Congress, nor among jurists or the judges themselves. See 424 U.S. 1 (1976). Perhaps someday the Court will reexamine the assumptions of *Buckley* in light of this experience, as *Buckley* itself implicitly invited. 424 U.S. at 46, 97 n.131, 137 n.175 (“the independent advocacy restricted by the provision does not *presently* appear to pose dangers of real or apparent corruption”) (emphasis added). In the meantime, and for as long as the courts treat political money as speech, election financing in the United States seems doomed to complexity, evasion, and public mistrust.

in American politics. Twenty years earlier, or yesterday for that matter, it could have easily prevailed.⁴⁸⁸ Perhaps the best that can be said is that we have never been of a clear mind about what to do with the political activities of charitable organizations, and we still are not clear today.

A. *The Hierarchy and Its Reasons*

As the dust has settled, we have a hierarchy of activities that are considered charitable under the Code. At the top, unquestioned at any time in history, are educational activities, so long as they are not intended to affect the workings of government. At a slightly lower rank comes litigation, approved for 501(c)(3) charities across the board so long as it advances public and not private ends. Yet lower on the scale comes lobbying, permitted to charities within limits, and to companion 501(c)(4) organizations without limits. At the bottom of the scale we find participation in electoral politics, which is flatly prohibited to charities but allowed to companion (c)(4)'s so long as it is not their primary activity. In diagram and colloquial form, the hierarchy appears:

Education: Go for it.

Litigation: Go for it, so long as public.

Lobbying: Be careful, approved only in a small way (twenty percent) for charities, but without limits through a non-deductible, companion 501(c)(4).

Electioneering: Do not go there, unless through a 501(c)(4), and then only up to fifty percent.

One aspect of this evolved scheme is that, over time, it has become less harsh. Congress significantly loosened the lobbying restriction on charities, as did the Supreme Court in *Taxation With Representation*, by freeing charities to conduct a full lobbying agenda through controlled 501(c)(4)'s. The electoral restriction has similarly been softened by the (c)(4)

⁴⁸⁸ Given the "only-a-subsidy" rationale that underlies the Court's approval of the other restrictions, no reason comes to mind why an administration hostile to public interest litigation could not prohibit charities from engaging in it as well. For constitutional arguments that would be raised against such a prohibition, however, see Poverty Program Senate Hearings, *supra* note 184, at 156-60 (Memorandum of Michael Rogovin for the Senate Subcommittee on Employment, Manpower and Poverty, Nov. 23, 1970) (citing, *inter alia*, NAACP v. Button, 371 U.S. 415 (1963) (public interest litigation a lawful means of vindicating fundamental rights)).

option, limited only by a fifty percent primary activity rule.⁴⁸⁹ These developments, coupled with Congress' long-overdue elimination of the subsidy for business lobbying as ordinary business expenses, have begun to level the playing field between public and private interests in the decision making of the country.

A second aspect of this hierarchy is that, the loosened restrictions notwithstanding, it stands on their head commonly-held notions about the value of free speech and political debate. The Court's FECA opinions place electoral speech at the top of the constitutional pedestal; its 501(c)(3) opinions approve flat prohibitions on political speech. We are left with something that approaches, in effect, a hierarchy of ineffectiveness in civic life. Education that does not touch politics is at the top, followed by litigation, which only touches political decisions already made and which has only indirect and uncertain outcomes. Further down stands lobbying, the first amendment right to "petition the Government for a redress of grievances," which receives only limited approval. Electioneering, free speech in its most politically important role, comes last, and banned.

A third aspect of this hierarchy is that the reasons provided by the courts and Congress do not hold water today, if they ever did. Indeed, one unstated explanation for the Court's defense of the restrictions as "only a subsidy" is that it avoids the embarrassment of strict scrutiny and the search for a reason. The most oft-given rationale for the restrictions, that the Treasury "stands apart" from "political agitation," derives from *Slee*. Of course, the Treasury does no such thing. It is involved in political activity up to its eyeballs, starting with exemptions for PACs. It also frees up veteran's organizations, and only veteran's organizations, for unlimited lobbying. If *Slee* means that the Treasury stands apart from particular points of view, that explanation holds only until one appreciates that across-the-board exemptions and deductions for participants in political activity would do the same, supporting a wide range of political views – the Great Bazaar itself.⁴⁹⁰ Read in context, the

⁴⁸⁹ To be sure and as noted earlier, these measures are limited by the reality that contributions to (c)(4) organizations are not deductible, limiting the scope of their involvement in the legislative and electoral processes and skewing the playing field towards organizations patronized by interests so wealthy that they do not need or seek deductions.

⁴⁹⁰ Moreover, it ignores *Rust v. Sullivan*, 500 U.S. 173 (1991), which upheld

stand-aside language of *Slee* and the 1987 Code amendments emanate a feeling that politics is beneath the dignity of charity – decent people don't do this – the English law of charitable trusts come to America.

A more recently acquired rationale for the political restrictions on charities argues that tax deductions for contributions to 501(c)(3) organizations confers a double benefit,⁴⁹¹ and would give (c)(3)'s an unfair advantage in the political arena. Whether, even with such benefit, charities could offset the power of private money in politics seems highly questionable. The argument also overlooks the same consequences that *Slee* did: benefits to all (c)(3)'s would favor none, and would promote a wide spectrum of political participation.

Moreover, to the extent that charitable organizations are favored by a "double" benefit, the question arises: Why not? American political debate is increasingly divided between private and public interests, which are nearly coextensive with for-profit and not-for-profit interests. This distinction, and conflict, is probably the clearest line of difference in the politics of all three branches of government. That economic interests hold trump cards in this debate is, or should be, beyond cavil. One need look no further than the costs of litigation, lobbying, and political campaigns. The more appropriate inquiry is not whether Treasury would be in fact conferring a "double benefit" upon charities – of course it would be – but rather, whether it should.

B. *Three Different Reasons*

We arrive at the nub of the issue. If public charities have much to contribute to public policy and are outgunned by private interests in the debate, why *doesn't* the Treasury support them? Three distinct but related answers come to mind: public acceptance, the impact of money, and the impact of religion.

very targeted denials of government benefits for no more than particular political views.

⁴⁹¹ Anne Berrill Carroll, *Religion, Politics, and the IRS: Defining the Limits of Tax Law Controls on Political Expression by Churches*, 76 MARQ. L. REV. 217, 253 (1992).

1. Public acceptance

The concept of charity has traveled a great distance since the times of the Bible and the common law of England. In any era, it has been based on a consensus about what was “worthy.” Over time, what is charitable has come to be defined more by what it is *not* (e.g., private gain), than what it *is* (e.g., the recognition of both pro-abortion rights and anti-abortion rights as charitable purposes). The equation of “charitable” with “worthy,” however, remains. If one were to ask a friend, any friend, whether lobbying the legislature and campaigning for candidate X were charitable activities, four out of five answers would likely be quick, and negative.⁴⁹² For most people, it is hard to consider worthy the schmooze, pressure, blandishments, paid vacations, former-congressmen-on-retainer, hype, horse trades, and quid pro quo that go on in lobbying – without even mentioning what they think of electoral campaigns. As noted at the beginning of this study, the attitude that politics is more catfight than charity pervades the restrictions in the British rule on trusts, and much of the still-cited decision in *Slee*. Rightly or wrongly, people are not ready to consider large-scale lobbying and electioneering charitable activity. To declare them so could shake the legitimacy of the 501(c)(3) world.

People are even less ready to see religious charities engage in electoral politics. A recent public opinion survey by the Pew Foundation, asking whether churches should endorse candidates, found seventy percent of all respondents saying no, and only twenty-two percent saying yes.⁴⁹³ Noteworthy is the fact that ninety-five percent of the respondents identified themselves as religious.⁴⁹⁴ This was not an anti-religion vote; rather, it was a religion-should-stay-out-of-politics vote. More

⁴⁹² The author has tested this question with better than four-in-five results. To be sure, such an anecdotal sample is close to worthless. The thesis is, nonetheless, that a more valid poll would produce similar results.

⁴⁹³ The highest negatives were found in the White Mainline Protestant (78%) and White Catholic (73%) communities; the lowest among those identifying themselves as “High Commitment White Evangelical Protestant” (48%). News Release, The Pew Forum on Religion and Public Life, *Americans Struggle with Religion’s Role at Home and Abroad*, March 20, 2002, at 21, available at <http://pewforum.org/publications/reports/poll2002.pdf> (last visited Aug. 24, 2003).

⁴⁹⁴ *Id.* at 49. Eighty-seven percent of the poll respondents identified themselves with a particular religion; another 8% held no single religious preference; and the remaining 4% identified themselves as either agnostic or atheist, or refused to answer.

strikingly, a similar poll of American clergy found seventy-seven percent opposed to church endorsement of political candidates.⁴⁹⁵

Whether protecting the image of charities in general would, in and of itself, support restrictions on speech is another matter. Were the restrictions not justified as conditions on subsidies, these reasons would have a difficult time with First Amendment scrutiny. Indeed, a strong argument can be made that, precisely because of the increased sophistication of lobbying and campaigning, greater support for the participation of public interests in these activities is called for, not less.⁴⁹⁶ In terms of understanding policy, however, and the motives for which we do things as opposed to the reasons offered, the thesis here is that we limit charities in politics because we don't believe in our gut that they belong there. This may not be a constitutionally sufficient reason, but it may well explain the staying power of the restrictions against near constant assault, decades after their enactment.

2. The impact of money

A second reason for restrictions relates to the power of concentrated wealth on public decision making. The ineffectiveness hierarchy described above carries its own controls. Litigation is inherently limited by its after-the-fact nature, and by rules of evidence, opposing counsel and an independent adjudicator; victories in public litigation, moreover, are subject to review and reversal by the Congress. Lobbying is a more powerful and proactive political process, but it is controlled to some extent by partisan politics, public participation and the media scrutiny that usually accompanies legislative decision making. Electoral politics, by contrast, stands out as the most powerful and ruleless process of all, delivering not only the outcome of a particular issue but the

⁴⁹⁵ See *Review of Internal Revenue Code Section 501(c)(3) Requirements for Religious Orgs.: Hearing Before the Subcomm. on Oversight of the House Committee on Ways and Means*, 107th Cong. (2002) (statement of Brenda Girton-Mitchell, Member, Associate General Secretary for Public Policy, and Director, Washington Office, National Council of the Churches of Christ in the USA) (citing a Gallup/Interfaith Alliance Foundation poll).

⁴⁹⁶ This argument, the provision of a necessary service for public interests, was of course the basis for the Service's acceptance of public interest litigation. See *Poverty Programs Senate Hearings*, *supra* note 184, at 82 (Statement of Commissioner Thrower) ("I think that is the basis, the availability of the representation, rather than the evaluation of the case that we have recognized here.").

decision maker as well. It may be the essence of American democracy, but it also presents its greatest risk – the capture of the system by money.

In this light, one may view the halting, unsteady evolution of the Internal Revenue Code's restraints on charities as an instinctual thrashing towards identifying this problem. Senator Reed in 1934 had the influence of wealthy self-interests, and *only* wealthy self-interests, in mind. Senator Johnson in 1954 had the influence of a multi-millionaire-backed challenger in mind. The more effective restraints on charities under the Code are not those that require pious statements of charitable ends, but rather, those that limit private interests in their beneficiaries, management, and activities. These restraints were the upshot of the Service's qualification of public interest litigation in 1970, so long as it was not acting as a conduit for moneyed interests. Some years later they became the upshot of FECA's permission for 501(c)(4)'s to engage in political activity, so long as they were not conduits for corporate interests.

Would the adoption of similar laws under the Internal Revenue Code suffice? Suppose one were to delete the existing restrictions as accidents of history, and start anew. One would certainly require of charities a "charitable purpose," knowing full well that it would screen out only the most inept attempts by private interests to wiggle their way into the tent. One would rule as well against "private inurement," and could usefully add both criteria and disclosure requirements that would help make this principle more of a reality. Taking a page from FECA's book, one could rule out corporate contributions as the price charities would pay for political activity. This prohibition is already in effect through FECA for the electioneering activity of charity-controlled (c)(4)'s. What would be new is its application to lobbying as well, either by prohibition or by limitation to a percentage of total revenue.

Still left to decide would be the question facing Senators Reed and Johnson: what to do about charities as conduits for the super-wealthy. Senator Reed might have acted in a fit of pique, but he was onto something that has endured. Senator Johnson might have acted both in pique and in panic, but he too was onto something that called for restraint. The super-wealthy may of course, and will under *Buckley*, spend their own money freely. The addition of tax deductions for their political agendas, however, serves no obvious public purpose. As the difference between the super-rich and all other

Americans continues to widen, there is a reason for an institutional balance. The Internal Revenue Code's controls evolved in a ham-handed manner, but as modified, they have come to limit the impact of disproportionate concentrations of wealth. It seems worth the risk to subsidize some lobbying by charities, accepting the inevitability of their manipulation for the offset they provide to private interests and the raw power of money. It seems more risky to subsidize the electoral activities of charities, at least until better rules are in place to limit their manipulation by the same private interests. The FECA approach forbidding corporate contributions is a good start. Ceilings on individual contributions might be useful also, as well as a demonstrated, major percentage of general support. With these or similar assurances, we should be ready to revisit the question.

3. The impact of religion

The most sensitive issue remains: the role of religious charities in politics, and more specifically, in lobbying and electoral campaigns. To some, this involvement is necessary to fulfill the mission of their faith and to improve the world. To others, it is a large part of what's wrong with the world. The separationists appear to be in a clear, if more passive, majority. For many Americans, more than ninety percent of whom identify themselves as religious,⁴⁹⁷ the thought of unleashing churches for all-out lobbying and electioneering may be reason enough to oppose *any* relaxation of the 501(c)(3) restrictions. If that means muzzling secular charities such as Save The Birds as well, then so be it.

But it is not necessarily so. Since the time of its enactment, § 501(c)(3) has lumped all charities, secular and non-secular, together, they having arisen out of a tradition of similar good works. Political action may be, however, a good reason to distinguish among them. If the potentially powerful influence of religious organizations on politics is perceived as an establishment threat to a secular democracy, then Save The Birds may be separated from the Christian Echoes National Ministry, and have its leash removed. No such proposal is imminent. This discussion is simply to suggest that it is possible, and that it may make increasing sense over time.

⁴⁹⁷ See *supra* note 494.

C. Conclusion

The Internal Revenue Code restrictions on political activities by charities have traveled an uneven road for more than a century, and we are even now not certain what to do with them. Re-examining the history of the restrictions, one is left with the impression that they were onto a problem but chose the wrong cure. The fact that they were enacted in haste, even in revenge, does not make them wrong; they are, however, and they have always been, overbroad. A better approach to the participation of charities in political life is evolving, providing greater leeway, although it is still neither comprehensive nor particularly coherent. Greater latitude still is desirable, given the imbalance between private and public interests in this country, but the price of that latitude will be having to decide more precisely what we are afraid of – be it the influence of corporate money, organized religion or yet something else – and tailoring the restrictions to those ends.

