

PLAINTIFFS' EXHIBIT 183

AMERICAN HORSE SLAUGHTER
PREVENTION ACT

HON. CONSTANCE A. MORELLA

OF MARYLAND

IN THE HOUSE OF REPRESENTATIVES

Thursday, February 14, 2002

Mrs. MORELLA. Mr. Speaker, today I join my colleagues, Mr. GILMAN, Mr. CHRIS SMITH, Mr. JONES, Mr. PALLONE, and Mr. LANTOS to introduce the American Horse Slaughter Prevention Act. This bill will prevent the cruel and senseless slaughter of American horses simply to satisfy the culinary desires of consumers in Canada, Europe, Japan, and elsewhere. According to the U.S. Department of Agriculture, 55,776 horses were slaughtered in the United States last year for their meat, which was then sent overseas for human consumption. Thousands more were shipped live across the borders to Canada and Mexico for slaughter there.

The American public is largely unaware that our horses are slaughtered for human consumption, and the three foreign-owned slaughterhouses operating on U.S. soil would like to keep it that way. As Canadian slaughterhouse operator Claude Bouvry said, "People in the horse-meat industry don't like talking about slaughtering horses for food because of the horse's almost mythical place in Western culture."

Horses have played an important role in American history, and continue to do so through their use in agriculture, transportation, law enforcement, military service and as companion animals. American culture is peppered with famous equines, including Paul Revere's Brown Beauty, General Robert E. Lee's Traveler, and General George Armstrong Custer's horse, Comanche—the sole surviving member of Custer's 7th Cavalry at Little Big Horn. Other cultural icons of the equine persuasion include the Pony Express, the Lone Ranger's faithful mount Silver, Roy Rogers' Trigger, famed Triple Crown winners Citation and Secretariat, Flicka of My Friend Flicka and Mr. Ed, to name a few.

Pet horses, workhorses, thoroughbreds, Premarin® foals (who are a byproduct of the female hormone replacement drug industry), old and unwanted horses, horses purchased under false pretences and federally protected wild horses go to slaughter. Most arrive at the slaughterhouse via livestock auctions where, often unknown to the seller, they are bought by middlemen working for the slaughter plants.

These so-called middlemen better known as "killer buyers" travel from one auction to the next collecting young, old, sick and healthy animals until their trucks are full. Some are shipped for more than 24 hours at a time without food, water or rest. Increasingly, stolen horses are included on the killer-buyers' trucks. As the article *Horse Theft: A Victim's Story* so aptly puts it "Rustling horses is quick, profitable and dirty work. Most horse thieves swiftly unload their stolen animals at auction, where most of the creatures end up at slaughter."

While the transport of horses to slaughter is itself horrific, callous handling at the slaughterhouse often results in additional suffering. Improper use of stunning equipment, designed to render the animal unconscious, means that horses sometimes endure repeated blows to the head, and remain conscious through the

last stages of slaughter, including throat slitting.

There are human health reasons to be concerned about horse slaughter, too. Because they are not raised for food or fiber, the flesh of many horses going to slaughter is likely to be contaminated with medications and other substances unfit for human consumption.

Americans do not eat horses. We do not raise them for food. The vast majority of Americans, when told that our horses are being slaughtered for dinner in Europe, are horrified. In fact, a recent survey indicated that the American public would overwhelmingly support a ban on the slaughter of horses for human consumption.

The American Horse Slaughter Prevention Act is a strong bill, which will end the slaughter of our horses for human consumption for good, rather than simply sending the practice over the border. This bill has the support of the American public, the animal protection community, horse owners and prominent members of the horse industry. Mr. Speaker, as we enter the Year of the Horse I urge my colleagues to join me in supporting this important and long-overdue legislation.

A TRIBUTE TO SANTA CLARA
BRONCOS WOMEN'S SOCCER
TEAM, 2001 NATIONAL CHAMPIONS

HON. MICHAEL M. HONDA

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, February 14, 2002

Mr. HONDA. Mr. Speaker, I rise today to honor the 2001–2002 Santa Clara University women's soccer team. The SCU Broncos, headed by coach Jerry Smith, took home the first-ever national title in women's sports for Santa Clara University.

Santa Clara University's athletic program, under the leadership of Athletic Director Cheryl Levick, has a rich history of dedicated and talented athletes, who work hard on and off the field, and always maintain a strong commitment to teamwork. Santa Clara University has a strong reputation in the athletic and academic fields, has proven successful in recruiting student athletes, and has provided these athletes with an excellent education and a great athletic experience. Santa Clara's student-athlete graduation rate is the highest in their league.

Though the SCU women's soccer team has been a dominant force in women's collegiate athletics, the 2001 season has proven to be their best. In 2001, with a season record of 23 wins and only 2 losses, they went on to defeat North Carolina for the national title in a 1–0 victory on December 9, 2001, in Dallas, Texas.

Santa Clara University, through its educational and athletic programs, fosters the development of scholar-athletes into outstanding leaders. The leadership skills that these scholar-athletes develop through the mentorship of Head Coach Jerry Smith, Assistant Coach Rich Manning, Assistant Coach Eric Yamamoto, and Assistant Coach Sean Purcell was strongly evident during the championship game and throughout the season. Players Danielle Slanton and Aly Wagner both took the initiative to provide their team with the

calm and confidence that only a peer can provide. Aly Wagner has earned the distinction of being named 2001 Female Collegiate Athlete of the Year by the Bay Area Sports Hall of Fame.

It is with great pleasure that I honor all of the members of the Santa Clara University Women's Soccer team: Erin Sharpe, Taline Tahmassian, Zepeda Zepesa, Alyssa Sobolik, Kerry Cathcart, Jaclyn Campi, Aly Wagner, Anna Kraus, Lana Bowen, Leslie Osborne, Jessica Ballweg, Emma Borst, Devyn Hawkins, Bree Horvath, Katie Sheppard, Allie Teague, Danielle Slanton, Chardonnay Poole, Kristi Candau, Holly Azevedo, Erin Pearson, and Ynez Carrasco. The teamwork and dedication of these athletes has made the Santa Clara University community, and the entire State of California, proud. I would also like to acknowledge the Santa Clara University Bronco's Athletic Staff, Lisa Eskey, Carrie Rubertino, Jonathan Clough and Cheryl Levick.

Mr. Speaker, it is my honor to commend and congratulate the Santa Clara University Women's Soccer Team, 2001 National Champions. Go Broncos!

BIPARTISAN CAMPAIGN REFORM
ACT OF 2001

SPEECH OF

HON. MARTIN T. MEEHAN

OF MASSACHUSETTS

IN THE HOUSE OF REPRESENTATIVES

Wednesday, February 13, 2002

The House in Committee of the Whole House on the State of the Union had under consideration the bill (H.R. 2356) to amend the Federal Election Campaign Act of 1971 to provide bipartisan campaign reform:

Mr. MEEHAN. Mr. Chairman, last night, the House passed H.R. 2356 as amended, the Bipartisan Campaign Reform Act of 2002.

I would like to speak today to provide guidance to the Federal Election Commission regarding its future interpretation of one of the provisions of H.R. 2356.

H.R. 2356 sets forth a definition of "electioneering communications" in Title II. Certain exceptions to this definition are set out in Section 201(3)(B) of the bill, and include (i) news distributed by broadcast stations that are not owned or controlled by a candidate, (ii) independent expenditures, (iii) candidate debates and forums and (iv) "any other communication exempted under such regulations as the Commission may promulgate . . . to ensure appropriate implementation of this paragraph."

Specifically, I wish to address some questions that have been raised about the purpose of the fourth exception.

The definition of "electioneering communication" is a bright line test covering all broadcast, satellite and cable communications that refer to a clearly identified federal candidate and that are made within the immediate pre-election period of 60 days before a general election or 30 days before a primary. But it is possible that there could be some communications that will fall within this definition even though they are plainly and unquestionably not related to the election.

Section 201(3)(B)(iv) was added to the bill to provide the Commission with some limited discretion in administering the statute so that

it can issue regulations to exempt such communications from the definition of "electioneering communications" because they are wholly unrelated to an election.

For instance, if a church that regularly broadcasts its religious services does so in the pre-election period and mentions in passing and as part of its service the name of an elected official who is also a candidate, and the Commission can reasonably conclude that the routine and incidental mention of the official does not promote his candidacy, the Commission could promulgate a rule to exempt that type of communication from the definition of "electioneering communications." There could be other examples where the Commission could conclude that the broadcast communication in the immediate pre-election period does not in any way promote or support any candidate, or oppose his opponent.

Charities exempt from taxation under Section 501(c)(3) of the Internal Revenue Code are prohibited by existing tax law from supporting or opposing candidates for elective office. Notwithstanding this prohibition, some such charities have run ads in the guise of so-called "issue advocacy" that clearly have had the effect of promoting or opposing federal candidates. Because of these cases, we do not intend that Section 201(3)(B)(iv) be used by the FEC to create any per se exemption from the definition of "electioneering communications" for speech by Section 501(c)(3) charities. Nor do we intend that Section 201(3)(B)(iv) apply only to communications by section 501(c)(3) charities.

But we do urge the FEC to take cognizance of the standards that have been developed by the IRS in administering the law governing Section 501(c)(3) charities, and to determine the standards, if any, that can be applied to exempt specific categories of speech where it is clear that such communications are made in a manner that is neutral in nature, wholly unrelated to an election and cannot be used to promote or attack any federal candidate.

We urge the Commission to exercise this rulemaking power consistent with the time frame specified in the bill for the promulgation of new regulations to implement the provisions of H.R. 2356. We also expect the Commission to use its Advisory Opinion process to address these situations both before and after the issuance of regulations.

TRIBUTE TO KANSAS CITIZENS' RESPONSE TO OUR RECENT ICE STORM

HON. DENNIS MOORE

OF KANSAS

IN THE HOUSE OF REPRESENTATIVES

Thursday, February 14, 2002

Mr. MOORE. Mr. Speaker, we rise today to pay tribute to the thousands of Kansas City-area residents who over the past two weeks rose to the challenge posed by the worst ice storm to hit the Kansas City metropolitan area in decades.

The storm, which struck our area with unprecedented fury on January 29th and 30th, cut electric power to over 450,000 area residents and caused more than \$50 million in damage in Missouri and approximately \$47 million plus worth of damage in Kansas. Seven deaths were attributed to the storm.

As the Kansas City Star described it, the storm "blasted through [and] left most of the metropolitan area a dangerous tangle of downed trees, felled power lines and snarled traffic . . . During an intense 12 hours, from 7 p.m. Wednesday to 7 a.m. Thursday, [for example,] Johnson County emergency dispatchers took 420 calls, mostly from people reporting tree limbs pulling down overhead lines. The Kansas City Fire Department dispatchers took 1,100 emergency calls in a 12-hour period; ordinarily they receive 1,400 in a month."

Mr. Speaker, our constituents dealt heroically with this unexpected calamity and we want to take special note of the outstanding contributions made by those whose job it was to respond to this crisis: police, firefighters, 911 operators, KCI airport employees, and members of the Missouri and Kansas National Guard, to note just some of them.

Medical teams dealt with cases of carbon monoxide poisoning, exposure, and injuries due to falling tree limbs and falls on ice. Homeless shelters opened their doors to neighbors left without heat and electricity and church groups, the Salvation Army, the Red Cross and municipal emergency services worked overtime and went the extra mile to help those in need during this time of crisis. Countless community volunteers including AmeriCorps, the Boy Scouts, and United Way gave their time to assist in the recovery process. Whether you were in Rosedale or Brookside, Independence or Overland Park, the "Kansas City Spirit" was prevalent with neighbors helping neighbors to cope with the devastation.

Most notably, hundreds of repair crews from area utilities—including Kansas City Power and Light, Missouri Public Service, the Kansas City, Kansas, Board of Public Utilities, Independence Power and Light, Westar Energy, and SBC—worked around the clock, along with 400 out-of-state repair crews and 350 out-of-state tree trimming crews, to replace lines, repair blown fuses and clear ice-laden trees that had cut off power lines and created fire and injury hazards. In fact, it is estimated that of the 450,000 trees that line Kansas City's streets, 10 percent of them will be gone when the cleanup is complete and over 10 percent of the city's privately owned trees also will have perished. To these utility workers, the people of the Kansas City area owe a special debt of gratitude.

We also applaud the leadership of our Governors Bill Graves of Kansas and Bob Holden of Missouri along with the countless local elected officials who worked in tandem with state and federal emergency management officials in compiling the damage assessments so that our Governors could request the Federal Emergency Disaster Declaration. The President and Federal Emergency Management Agency (FEMA) acted quickly to start the process of bringing federal relief to our community so that now the full recovery can occur.

Mr. Speaker, we have proven once again Kansas City truly is the heartland of America—when our friends and neighbors are in trouble, our community comes together to address the crisis and to get the necessary job done—quickly, efficiently and effectively. We have never been prouder to represent the Kansas City metropolitan area.

THE OTHER HALF OF THE JOB: FINANCING OUR FOREIGN POLICY

TOM LANTOS

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, February 14, 2002

Mr. LANTOS. Mr. Speaker, in a recent hearing with Secretary of State Colin Powell, I raised concerns about how we are financing the War on Terrorism. While there is no doubt that there is a need for increased defense spending, I worry that necessary resources are not being made available to finance our diplomatic and development programs overseas. As this war proceeds, it will be our responsibility to establish stable democracies to fill the vacuum left by fallen regimes. It is therefore necessary to properly fund related assistance programs.

Dr. Michael McFaul wrote an article entitled "The Other Half of the Job" in the February fifth edition of the Washington Post that deals with this very issue. He contends that if we intend to urge governments to promote liberty and freedom, it is our responsibility to provide assistance to those nations to establish stable democracies, and thereby create friendly allied states. He cites the examples of Germany and Japan. Just sixty years ago they were the greatest security threat to this nation, and today, after sustained support, they are among our strongest allies.

Dr. McFaul is an expert in the area of international relations and deserves recognition for his work in promoting world peace. He is a professor of political science at Stanford University and a senior associate at the Carnegie Endowment for International Peace. His outstanding scholarship has raised awareness and given light to this, among other important issues. His insights are valuable and worthy of consideration.

Mr. Speaker, I urge my colleagues to read Dr. McFaul's thought provoking article and I request that it be included in the RECORD.

[From the Washington Post, Tuesday, Feb. 5, 2002]

THE OTHER HALF OF THE JOB

(By Michael McFaul)

The United States is at war. President Bush therefore has correctly asked for Congress to approve additional resources to fight this war. The new sums requested—\$48 billion for next year alone—are appropriately large. Bush and his administration have astutely defined this new campaign as a battle for civilization itself, and have wisely cautioned that the battle lines will be multifaceted and untraditional.

So why are the new supplemental funds earmarked to fight this new war largely conventional and single-faceted—i.e., money for the armed forces? Without question, the Department of Defense needs and deserves new resources to conduct the next phase of the war on terrorism. The Department of Defense may even need \$48 billion for next year.

What is disturbing about President Bush's new budget, though, is how little creative attention or new resources have been devoted to the other means for winning the war on terrorism. The Bush budget is building greater American capacity to destroy bad states, but it adds hardly any new capacity to construct new good states.

We should have learned the importance of following state destruction with state construction, since the 20th century offers up

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Coffees, and Charlie Trie and John Huang and Johnny Chung. And then, of course, the Presidential pardons coming under suspicion at the conclusion of the Clinton administration. We faced questions in this body as we considered bills regulating tobacco and telecommunications and the Patients' Bill of Rights, while at the same time we raised soft money from the industries and interest groups that had a huge stake in those bills. The public watched with increasing skepticism as we appeared to act—or fail to act—on legislation based on the demands of wealthy soft money donors. With the enormous influx of soft money being raised by both parties, with every vote we cast the public wondered, and had reason to wonder, was it the money?

Of course of late we have seen yet another scandal take shape—the Enron debacle. As the Enron story unfolded, I think many of us were reminded why the Supreme Court, in its famous 1976 *Buckley* versus *Valeo* decision, said that the appearance of corruption, not just corruption itself, justifies congressional action to place some limits on our campaign finance system.

In the *Buckley* case, the Supreme Court understood that public mistrust of government is destructive to democracy. From a constitutional point of view, it hardly matters whether that mistrust is based on actual misconduct or simply its appearance.

In the case of Enron's collapse, the need to address public mistrust has been paramount for Congress and the administration as they have investigated the company's alleged wrongdoing. When a corporation such as Enron leaves devastated employees and fleeced shareholders in its wake, the public depends on us—on Congress and the administration—to determine what went wrong and defend the public interest. But the potential for a conflict of interest in a case such as this is clear: Many of the elected officials who were asked to sit in judgment of Enron, including Members of Congress, the Attorney General, and the President of the United States, have been accepting, and even asking for, campaign contributions from Enron for years. And the political parties have pocketed more than \$3.5 million in unregulated, unlimited soft money from Enron since 1991.

Congress has moved forward with the investigations into Enron's conduct, despite the potential conflict of interest the political contributions might pose. The reality is that this is all too familiar territory for Congress. Every day Members of Congress accept huge campaign contributions with one hand and vote on issues affecting their contributors with the other. And, every day the public naturally questions whether their Representatives are giving special treatment to the wealthy interests that fund their campaigns and bankroll their political parties.

The Enron scandal, and all the soft money scandals that have come before,

illustrate the permanent conflict of interest—the permanent conflict of interest—that unlimited soft money contributions to the parties have created for elected officials in the Capitol and at the White House. Both parties have gladly accepted Enron's soft money contributions over the years, and now those contributions are compromising our ability to address the Enron collapse, and countless other issues that come before the Congress. More than that—more than that—they compromise the public's confidence in our ability, and our will, to do anything about it.

While eliminating soft money will not cure the campaign finance system of every ill, it will, in fact, end a system of unlimited donations that has blatantly put political access and influence up for sale. Enron is just one in a long line of corporations, unions, and wealthy individuals that has exploited the soft money loophole to buy influence with Congress and the executive branch at the very highest levels. So banning soft money will help to untangle the web of money and influence that has made Congress and the White House so vulnerable to the appearance of corruption for far too long.

In the coming days we will face the final test of this long legislative battle and take our final steps toward enacting these hard-fought reforms into law. Passing campaign finance reform is within our grasp, and so, finally, is a renewed integrity for our democratic process.

Of course, while the soft money ban is central to the bill, and is the most important feature of the bill, this bill contains reforms on a variety of other issues.

I say to the Presiding Officer, of course, you were one of the principal authors of very important provisions relating to so-called phony issue ads that make the bill even stronger.

A number of amendments were added on the Senate floor last year that improved and strengthened the bill. Almost all of them are in the bill now before us that we hope, by the end of the week, will be sent to the President.

Mr. President, I ask unanimous consent that a section-by-section analysis of the bill be printed in the *RECORD* immediately following my statement.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. FEINGOLD. Thank you, Mr. President.

Mr. President, the debate is finally here. Our bipartisan coalition is strong and resolute. And the moment for reform has arrived.

After 6½ years of work on this bill, and more than a decade of scandals that have threatened the integrity of our legislative process, I do believe this body is ready to get the job done for the American people. I believe the American people have waited long enough.

Mr. President, I yield the floor.

EXHIBIT No. 1

THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002—SECTION BY SECTION ANALYSIS TITLE I: REDUCTION OF SPECIAL INTEREST INFLUENCE

Sec. 101(a). Soft Money of Political Parties. Creates new Section 323 of the Federal Election Campaign Act (FECA) to prohibit soft money in federal elections.

Sec. 323(a). National Committees. Prohibits national party committees and entities controlled by the parties from raising, spending, or transferring money that is not subject to the limitations, prohibitions, and reporting requirements of the FECA (i.e., soft money).

Sec. 323(b). State, District and Local Committees. Subject to the Levin amendment, requires any money spent on "Federal election activities" by state or local parties, and entities controlled or acting on behalf of those parties or an association of state or local candidates to be subject to the limitations, prohibitions, and reporting requirements of the FECA (i.e., hard money.) This will close the state party loophole. "Federal election activities" are defined in Section 101(b) of the bill.

Under the Levin amendment, the section permits state or local parties to spend soft money on voter registration and get out the vote activity that does not mention a federal candidate as long as no single soft money donor gives more than \$10,000 per year to any state or local party organization for such purposes, the money is not spent on broadcast advertising other than ads that solely mention state or local candidates, the money is not raised by federal candidates, national parties, or party committees acting jointly. The spending of this money will require an allocation of hard money to soft money. The state or local party organization must raise the hard and soft money for this allocation on its own, and money to be spent under this provision may not be transferred between party organizations.

Sec. 323(c). Fundraising Costs. Requires national, state, and local parties to use hard money to raise money that will be used on Federal election activities, as defined by the bill.

Sec. 323(d). Tax-Exempt Organizations. Prohibits national, state, and local parties or entities controlled by such parties from making contributions to or soliciting donations for 501(c) organizations which spend money in connection with federal elections or 527 organizations (other than entities that are political committees under the FECA, state/district/local party committees, or state or local candidates' campaign committees). This provision will prevent the parties from collecting soft money and laundering it through other organizations engaged in federal electioneering.

Sec. 323(e). Federal Candidates. Prohibits federal candidates or individuals holding federal office and any entities established, financed, controlled, or acting on behalf of such candidates or officeholders from raising or spending soft money in connection with federal elections. The restrictions of this section do not apply to federal officeholders who are running for state office and spending non-Federal money on their own elections, so long as they do not mention other federal candidates who are on the ballot in the same election and are not their opponents for state office. The restrictions also do not prevent a federal candidate or officeholder from attending, speaking at, or appearing as a featured guest at a fundraising event for a state or local political party.

Candidates are permitted to solicit up to \$20,000 from an individual per year specifically for voter registration and get out of

the vote activities carried out by 501(c) organizations. The provision also clarifies that candidates may solicit unlimited funds for 501(c) organizations where the solicitation does not specify the use of the money, and the organization's principal purpose is not voter registration or get out the vote activities.

Sec. 323(f). State Candidates. Prohibits candidates for state or local office from spending soft money on public communications that promote or attack a clearly identified candidate for Federal office. Exempts communications which refer to a federal candidate who is also a candidate for state or local office.

Taken together, these soft money provisions are designed to shut down the soft money loophole as comprehensively as possible. By including entities established, maintained, controlled, or acting on behalf of federal and state officeholders and candidates, they also prohibit so-called "leadership PACs" or "candidate PACs" from raising or spending soft money in connection with Federal elections and are designed to prevent the evasion of the law by federal or state candidates or officeholders using 501(c)(4) or 527 organizations.

Sec. 101(b). Definitions. Provides definitions for certain terms used in the soft money ban.

Federal election activity means voter registration activities within 120 days before a federal election, get out the vote activity and generic campaign activity in connection with an election in which federal candidates are on the ballot (even if state candidates are also on the ballot), and public communications that refer to a clearly identified federal candidate and support or oppose a candidate for that office (regardless of whether those communications expressly advocate the election or defeat of a candidate.) These are the activities that state parties must pay for with hard money (except as specifically provided under the bill).

Generic campaign activity means campaign activities like general party advertising that promote a political party but not a candidate.

Public communication means a communication to the general public by means of broadcast, cable, satellite, newspaper, magazine, outdoor advertising, mass mailing, telephone bank, or any other general public political advertising.

Mass mailing is a mailing of more than 500 identical or substantially similar pieces within any 30 day period.

Telephone bank means more than 500 calls of an identical or substantially similar nature within a 30 day period.

Sec. 102. Increased contribution limits for state committees of political parties. Increases the amount that individuals can give to state parties from \$5,000 to \$10,000. See Section 307 for additional increases in contribution limits.

Sec. 103. Reporting requirements. Requires national political party committees, including congressional campaign committees to report all receipts and disbursements and state party committees to report all receipts and disbursements and state party committees to report all receipts and disbursements for Federal election activities and receipts and disbursements for activities permitted by the Levin amendment (i.e., spending of capped soft money donations on certain forms of voter registration and get-out-the-vote). Requires itemized reporting of receipts or disbursements of over \$200. Eliminates the building fund exception to the FECA's definition of contribution. Accounts to raise money for office buildings were one of the original soft money accounts before the loopholes exploded in the 1996 election

with the use of soft money for political advertising.

TITLE II: NON-CANDIDATE CAMPAIGN EXPENDITURES

SUBTITLE A—ELECTIONEERING COMMUNICATIONS

Section 201-203 have come to be known as the "Snowe-Jeffords amendment."

Sec. 201. Disclosure of Electioneering Communications. Requires anyone who spends over \$10,000 in a calendar year on electioneering communications to file a disclosure statement within 24 hours after reaching that amount of spending and again within 24 hours of each additional \$10,000 of spending. Electioneering communications are defined as broadcast, cable or satellite communications that mention the name or show the likeness of a clearly identified candidate for Federal office within 60 days of a general election or 30 days of a primary election, convention, or caucus, and which is targeted to the candidate's state/district. Electioneering communications do not include news broadcasts, communications that constitute independent expenditures because they contain express advocacy, or candidate debates and advertisements for candidate debates. The FEC may promulgate additional exceptions for advertisements that do not attack, oppose, promote or support a clearly identified Federal candidate.

The disclosure statement must identify the person or entity making the disbursement, the principal place of business of that person if it is not an individual, the amount of each disbursement of over \$200 and the identify of the person receiving the disbursement, and the election to which the communication pertains and the candidate or candidates who are identified. If the disbursement is made from a segregated account to which only individuals can contribute, the disclosure statement must also reveal the names and addresses of the contributors of \$1,000 or more to that account. If the disbursement is not made from such a segregated account then all donors of \$1,000 to the organization making the expenditure must be disclosed. Money in the segregated account can be used for purposes other than electioneering communications, and the spending on other activities need not be disclosed, but all contributors to the account must be informed that their money might be used for electioneering communications.

Sec. 202. Coordinated Communications As Contributions. Makes clear that electioneering communications that are coordinated with candidates or with political parties are deemed to be contributions to the candidate supported by the communication. Because contributions to candidates are limited in the case of individuals, or prohibited in the case of groups (other than through a PAC), this provision essentially prohibits electioneering communications from being coordinated with candidates or parties.

Sec. 203. Prohibition of Corporate and Labor Disbursements for Electioneering Communications. Bars the use of corporate and union treasury money for electioneering communications. Corporations and unions are prohibited from spending their treasury money on electioneering communications, and groups and individuals may not use corporate or union treasury money for such ads (corporations and unions could finance such advertisements through their political action committees). The provision includes a number of special operating rules designed to prevent evasion of this prohibition through pass-throughs, laundering, or contribution swaps. 501(c)(4) and 527 organizations, which are technically corporations, are permitted to make electioneering communications as long as they use individual

money contributed by U.S. citizens, U.S. nationals, or permanent legal residents and make the disclosures required by Section 201 (but see Section 204). If they derive income from business activities or accept contributions from corporations or unions, they must pay for electioneering communications from a separate account to which only individuals can contribute.

Sec. 204. Rules Relating to Certain Targeted Electioneering Communications. Withdraws Section 203's exemption for 501(c)(4) or 527 organizations that run electioneering communications targeted to the electorate of the candidate mentioned in the communications. The net effect of this provision is to apply the Snowe-Jeffords prohibition on running sham issue ads paid for with corporate or union treasury funds to non profit advocacy groups (501(c)(4)'s) and political organizations (527's). Should this provision be struck down as unconstitutional, the prohibition on the use of union or for-profit corporation treasury money for electioneering communications would remain intact, as would the disclosure requirements.

SUBTITLE B—INDEPENDENT AND COORDINATED EXPENDITURES

Sec. 211. Definition of Independent Expenditure. Clarifies the statutory definition of independent expenditure to mean an expenditure expressly advocating the election or defeat of a clearly defined candidate that is not made in coordination with a candidate.

Sec. 212. Reporting Requirements for Certain Independent Expenditures. Requires any person, including a political committee, who makes independent expenditures totaling \$10,000 or more until the 20th day before the election to file a report with the FEC within 48 hours. An additional report must be filed within 48 hours of any additional independent expenditures of \$10,000 or more. In the last 20 days before the election, a report must be filed within 24 hours of each independent expenditure totaling more than \$1,000.

Sec. 213. Independent Versus Coordinated Expenditures by Party. Requires political parties to choose in each election between making the limited expenditures permitted to be coordinated with a candidate under 2 U.S.C. §441a(d) and making unlimited independent expenditures. Parties would make that choice with their first expenditure with respect to a particular election after their nominee has been chosen. If a party makes an independent expenditure, it may not make a coordinated expenditure with respect to that election. If it makes a coordinated expenditure, it may not make an independent expenditure. For purposes of this section, all national and state party committees are considered to be one entity so a national party cannot make an independent expenditure if a state party has made a coordinated expenditure with respect to a particular candidate.

Sec. 214. Coordination with Candidates or Political Parties. Provides that an expenditure made by a person, other than a candidate, in coordination with a political party will be treated as a contribution to the party. In addition, the FEC's current regulations on coordinated communications paid for by persons other than candidates are repealed nine months after enactment. The provision instructs the FEC to promulgate new regulations on coordination between candidates or parties and outside groups, addressing a number of different situations where coordination might be found. It provides that the new regulations shall not require formal collaboration or agreement to establish coordination.

TITLE III: MISCELLANEOUS

Sec. 301. Use of Contributed Amounts for Certain Purposes. Codifies FEC regulations

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University of Pittsburgh Law Review
Spring, 1990

***577 SINKING THE THINK TANKS UPSTREAM: THE USE AND MISUSE OF TAX EXEMPTION
LAW TO ADDRESS THE USE AND MISUSE OF TAX-EXEMPT ORGANIZATIONS BY POLITICIANS**

[FNal]

Laura Brown Chisolm [FNaa]

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A generic politician decides today he is running for President and sets up a tax-exempt organization, and the issue is stopping the arms race. So they set up a tax-exempt organization and they start putting out position papers on behalf of this person. The person charters a jet aircraft to move all around America speaking. They prospect in fundraising by sending direct mail all across America to find out who are the 850,000 hard core good givers on this issue and develop that list. Then, even though everybody knew that this person was running for President but had not formally announced it, 10 months later after all of that was paid for through a tax-exempt organization under the aegis of education, there is a news conference that this person is now a candidate for President. [FN1]

I. INTRODUCTION

The massive Omnibus Budget Reconciliation Act which Congress passed barely in time to make it home for Christmas in 1987 [FN2] contained, as budget reconciliation measures often do, a number of revisions to the Internal Revenue Code. Among them was a series of provisions on the subject of lobbying and political activities by tax-exempt organizations; [FN3] among those provisions was a subsection that applies special rules to certain politician-affiliated organizations. [FN4] The new law was a response to mounting criticism of a phenomenon that had *578 emerged largely during the election cycles of the 1980s--the establishment of "think tanks" by individuals suspected of having presidential aspirations.

Critics of the phenomenon observed that these organizations provided a vehicle by which presidential hopefuls could enhance their public visibility, develop policy positions and support staff, and generally get a running head start in the race to nomination and election, all with the help of tax-exempt status and all free of the constraints of campaign finance regulation.

With a few notable exceptions, the think tanks did not violate either tax-exemption law or federal campaign finance regulation. But their perceived affront to the spirit of both disturbed their critics--charitable organizations are not supposed to get too close to politics, and people are not supposed to be able to run for president without adhering to the constraints of campaign finance regulation. The critics were largely correct in their descriptions of what these organizations were up to. The think tanks were, indeed, almost certainly intertwined with the political aspirations of their founders. The rhythm of their activity and sometimes their very birth and death were, indeed, phased to the election cycle.

In their first incarnation, the new rules seemed designed to effectively prohibit the existence of the think tanks. As the amendments proceeded to enactment, last minute changes to their language and legislative interpretations of their scope seem to have tempered the impact of the new law, but to have left the reach and meaning of the new law uncertain. At the very least, the new provisions convey a vague message of disapproval; at the very most, they will be discouraging enough to make the think tanks disappear.

Whatever they should be taken to mean, the addition of the think tank provisions to the law of tax-exempt organizations is ill-conceived. The new law was formulated in response to a general sense of uneasiness at how close to the edges of forbidden territory these organizations operated. But the alleged harm to the spirit of campaign finance regulation and tax-exemption law is only one factor in a proper analysis of how to deal with the think tanks. Focusing so single-mindedly on the think tanks' perceived threat to the integrity of the borders between legitimate and forbidden tax-exempt organization territory [FN5] necessarily *579 overlooks the qualities that make these organizations eligible for tax-exempt status to begin with. What is left out of this narrow view is a sense of how the think tanks relate to the underlying principles that ought to drive the formulation of tax-exemption law. Furthermore, the narrow focus obscures the broader context within which the

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organizations operate. In a political system that purports to respond to the will of the people, promotion of public speech on issues of public importance is a value of the highest order. A regulatory scheme that deters such speech ought to be imposed only after meticulous attention to the costs as well as the benefits of the regulation. Measured against an equation that takes into account all of the relevant factors, the new rules offer only marginal progress in the service of lesser goals, at considerable cost to far more important values.

II. THE THINK TANK PHENOMENON

In April, 1985, newspapers reported that Gary Hart was about to form the Center for a New Democracy, an "issues-oriented think tank." [FN6] The organization's articles of incorporation described its purpose to be "[f]ostering an understanding in the American public of major political issues facing this nation and conducting academic research and engaging in other research-related activities for the purpose of developing effective responses to those issues." [FN7] Hart was not the first politician to found and lead a charitable or educational tax-exempt organization. In 1983, Senator Robert Dole established the Dole Foundation for Employment of Persons with Disabilities, [FN8] formed to "promote the economic independence of persons with disabilities." [FN9] Jesse Jackson's Operation PUSH and its affiliated organizations were formed in the early 1970s. [FN10] Although the label might not have fit in 1982, when he *580 first formed the Freedom Council, [FN11] it was fair to call Pat Robertson a politician by 1986, when he reincorporated that organization, "dedicated to reinforcing traditional principles and values upon which this nation was founded" and proposing to "encourage, train and equip Americans to exercise their civic responsibility to actively participate in government, to formulate and influence national policy and to prevent erosion of civil and religious liberties." [FN12] In 1981, Jack Kemp organized the Fund for an American Renaissance, an organization "dedicated to fostering economic growth and opportunity, promoting a strong national defense and resolute foreign policy and defending traditional American values and institutions." [FN13] Closer in timing to Hart was Bruce Babbitt, Governor of Arizona, who in 1985 founded American Horizons "to conduct research and publish reports on major national policy issues including but not limited to federal taxing and spending, international relations, arms control, trade, environmental issues and education." [FN14]

One thing these organizations had in common was that all were formed as tax-exempt organizations under [section 501\(c\)\(3\) of the Internal Revenue Code](#). [FN15] As such, they were exempt from the corporate *581 income tax and eligible to receive deductible contributions from their supporters. [FN16] And as [section 501\(c\)\(3\)](#) organizations, they were prohibited by the Internal Revenue Code from participating or intervening in any political campaign on behalf of any candidate for public office. [FN17] One thing the founders of these organizations had in common was that they all would become contestants in the 1988 presidential race.

The Dole Foundation operates in a relatively traditional charitable mode. Its major activity has been the funding of projects and programs designed to deliver direct services to handicapped individuals. [FN18] The Operation PUSH group of affiliated organizations [FN19] has engaged over the years in a variety of programs, mixing direct service activities aimed at promoting minority business development and improving the motivation, achievement, and opportunities of minority students [FN20] and policy work which involved fact-finding trips and publication of position papers on foreign affairs issues. [FN21]

But several of the politician-affiliated organizations conducted no traditionally charitable direct services. Their claims for exempt status under [section 501\(c\)\(3\)](#) were based on their pursuit of "educational" purposes. [FN22] They operated as "think tanks," sponsoring conferences, *582 generating studies, and disseminating position statements on a variety of policy issues. For example, the Center for a New Democracy held a number of seminars in various locations around the country at which panelists addressed economic and other social policy issues. [FN23] American Horizons conducted at least one major policy symposium, co-sponsored by Yale University, which presented research on welfare and family policy. [FN24] The Fund for an American Renaissance conducted a study on the role and effectiveness of career Foreign Service officers in carrying out Presidential foreign policies, [FN25] sponsored conferences on the Strategic Defense Initiative and the problems of poverty, [FN26] and issued a series of policy position papers. [FN27] The Freedom Council focused less on specific issues than on encouraging citizen participation in the political process. [FN28]

The politician-founders of the think tanks were generally very visible in the organizations' programs. The seminars of the Center for a New Democracy invariably featured Gary Hart as speaker or moderator. [FN29] The organization and its programs were routinely referred to in the press as Hart's attempt to "beef up" his image as the candidate of new ideas. [FN30] The American Horizons family policy symposium featured the organization's founder and chairman, Bruce Babbitt, as co-chair and panel moderator. [FN31] The group also distributed copies of Babbitt's speeches and op-ed pieces to the public. [FN32] Jack Kemp's organization *583 conducted a substantial portion of its educational activity through distribution

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of Kemp's speeches [\[FN33\]](#) and featured Kemp prominently in its programs. [\[FN34\]](#) Robertson played a key role in the Freedom Council's precinct delegate mobilization efforts in Michigan, appearing, for example, at a Freedom Council rally held in Detroit and transmitted by satellite to eighteen additional sites around the state. [\[FN35\]](#) Each of the monographs on policy issues published by The Fund for an American Renaissance began with a foreword by Jack Kemp. [\[FN36\]](#)

The think tanks were typically funded by past political supporters of the founders, by corporations, and by large individual contributions. [\[FN37\]](#) They were often staffed by individuals who had been associated with prior political campaigns of the founder or who moved to the campaign staff once the founder became an official candidate. [\[FN38\]](#)

***584** It is no wonder, then, that questions began to arise about the true nature of these organizations. The press, watchdog organizations, members of Congress, other candidates, and even one of the think tank founders himself [\[FN39\]](#) began to suggest that the think tanks, or at least some of them, represented thinly-veiled attempts to circumvent two separate bodies of federal regulation. First, the think tanks were seen to represent a gross abuse of the Internal Revenue Code's [section 501\(c\)\(3\)](#) tax-exempt status for charitable and educational organizations. [Internal Revenue Code section 501\(c\)\(3\)](#) premises tax-exempt status on service of public rather than private interests, and explicitly provides that tax-exempt status under that provision is available only to an organization "which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." [\[FN40\]](#) The criticism reflected a sense that politician-led think tanks are not like other organizations which enjoy the preferred status of [section 501\(c\)\(3\)](#) exemption, and ought not to be treated like those other organizations. Second, the think tanks were criticized as attempts to escape the controls of the Federal Election Campaign Act, [\[FN41\]](#) which closely regulates the raising and spending of money in presidential campaigns. There is much to be said in defense of both of these contentions. A substantial argument can be mustered in support of the position that the think tanks violate the spirit, if not the letter, of both the [section 501\(c\)\(3\)](#) campaign intervention prohibition and the Federal Election Campaign Act.

III. THE SPIRIT OF THE LAW

A. The [Section 501\(c\)\(3\)](#) Campaign Intervention Prohibition

The [section 501\(c\)\(3\)](#) proscription on campaign intervention communicates rather unmistakably a policy of keeping charity and partisan politics unentangled. While the circumstances of the original legislative expression of that policy provide no evidence that the policy was based on a carefully considered judgment that there are important reasons to keep charity and politics separate, [\[FN42\]](#) the notion that politics and charity ought not to be mixed has remained a consistent theme since the enactment of the campaign intervention prohibition.

Perhaps the prime illustration of this theme is the addition of [section 527](#) to the Internal Revenue Code in 1974. [\[FN43\]](#) [Section 527](#) extends limited tax-exempt status to "political organizations," which include political parties, campaign committees, and political action committees. [\[FN44\]](#) The legislative history of [section 527](#) indicates that Congress believed in 1975 both that political organizations and their election-related activity ought to be accorded special tax treatment, [\[FN45\]](#) and that partisan political activities ought, for the most part, to be carried out by [section 527](#) organizations. [\[FN46\]](#)

The notion that Congress would prefer that election-related activity be confined to [section 527](#) organizations is further reflected in the different tax treatment given to similar activity, depending on whether it is undertaken by a [section 527](#) organization or by an organization which is exempt under [section 501\(c\)](#). [\[FN47\]](#) A [section 527](#) organization is not taxed on amounts it spends on [section 527](#) "exempt functions," that ***587** is, activities designed to influence "the selection, nomination, election or appointment of any individual" to public office. [\[FN48\]](#) Any amount a [section 501\(c\)](#) organization spends to influence an election, however, is taxable to the organization. [\[FN49\]](#) On the other hand, the expense of sponsoring a nonpartisan educational workshop which is not intended to influence the nomination or election of any individual would be taxable to a [section 527](#) organization, [\[FN50\]](#) but not to a [section 501\(c\)](#) organization.

Treasury regulations give broad definition to the class of activities which have "the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to . . . office" and which, therefore, escape taxation when carried on by a [section 527](#) organization. To qualify as election-related, and therefore non-taxable, expenditures for a [section 527](#) organization, the activities need not involve a declared candidate or bear a close temporal relationship to an election. [\[FN51\]](#) One inference that might be drawn from the fact that the array of "election-related" activities is so broadly defined in the [section 527](#) context is that Congress, recognizing "the need to encourage political activities which are the heart of the democratic process," [\[FN52\]](#) wanted to avoid unduly limiting the range of activities that

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would receive tax-favored treatment under section 527. Another possible inference is that Congress (and the I.R.S.) intended to define broadly the range of activities which properly "belong" to section 527 organizations and which ought to be avoided by [section 501\(c\)](#) organizations, particularly those which claim their exempt status under [section 501\(c\)\(3\)](#). If the latter inference is correct, it becomes difficult to escape the conclusion that the think tanks did indeed challenge the *588 spirit of the [section 501\(c\)\(3\)](#) prohibition on election campaign participation, since they operated mostly within the zone of overlap between [section 501\(c\)](#) and [section 527](#), engaging in activities whose tax treatment depends largely upon characterization of the intent which motivates them and the classification of the organization which undertakes them.

B. The Spirit of the Federal Election Campaign Act

The think tanks appear to have posed an even greater threat to the spirit of the Federal Election Campaign Act (F.E.C.A.). [\[FN53\]](#) Virtually every aspect of the financing of presidential campaigns is closely regulated by the F.E.C.A. and the Presidential Campaign Fund Act. [\[FN54\]](#) The reported activity of the think tanks indeed seems counter to three strong themes that run through campaign finance regulation: the desirability of keeping corporate and union money and large individual contributions out of the election process, the importance of letting the electorate know whose money is behind a candidate, and a resistance to allowing individuals to avoid the impact of the regulatory scheme by simply moving the evils "upstream" [\[FN55\]](#) to an earlier point in the political process.

That the inclination to block the flow of corporate and union funds into federal elections has long been a driving force behind campaign finance regulation is apparent throughout the history of Congressional efforts to regulate the conduct and funding of election campaigns. The first of a series of acts prohibiting political contributions by corporations was passed in 1907. [\[FN56\]](#) The law was strengthened and amended several times [\[FN57\]](#) before its comprehensive revision in the Federal Corrupt *589 Practices Act of 1925. [\[FN58\]](#) Debate in support of the Act stressed the concern about the potential dangers of corporate and union contributions. [\[FN59\]](#)

Campaign finance regulation was again overhauled in 1971, with the enactment of the Federal Election Campaign Act [\[FN60\]](#) and the Revenue Act of 1971. [\[FN61\]](#) The legislative history of these enactments and the amendments that followed [\[FN62\]](#) yields ample evidence that the reform efforts were driven substantially by a desire to diminish the susceptibility of elected officials to undue pressure by economic interests which have the enhanced leverage of aggregated wealth. [\[FN63\]](#)

*590 One objection to the think tanks was that they were virtually unrestricted with respect to the sources of their financial support. Under the F.E.C.A., a political committee may not accept any contribution from a corporation, [\[FN64\]](#) labor union, [\[FN65\]](#) or foreign national, [\[FN66\]](#) and the amount of support the committee may accept from any single source is limited. [\[FN67\]](#) In contrast, the amount a donor may contribute to a [section 501\(c\)\(3\)](#) think tank is limited only by the donor's means and generosity. Trade unions, foreign nationals, and corporations are all legitimate sources of support for a [section 501\(c\)\(3\)](#) organization.

In large measure, the think tanks were supported by contributions whose magnitude or sources would be clearly prohibited to a political committee. [\[FN68\]](#) American Horizons received \$70,000 from one donor. [\[FN69\]](#) The Center for a New Democracy raised much of its operating funds in donations of \$25,000 or more and from corporate contributions. [\[FN70\]](#) During its most active period, the Freedom Council received up to a quarter million dollars a month from the Christian Broadcasting Network. [\[FN71\]](#) A number of corporations have contributed between \$25,000 and *591 \$100,000 to the Dole Foundation. [\[FN72\]](#) The Fund for an American Renaissance and the PUSH Foundation have also received corporate support. [\[FN73\]](#) As critics of the politician-affiliated think tanks were quick to point out, none of these contributions could legally be made to a political committee.

Another of Congress' goals in enacting the elaborate campaign finance regulation scheme of the F.E.C.A. was to provide "complete control over and disclosure of campaign contributions and expenditures in campaigns for Federal elective office." [\[FN74\]](#) The purpose of requiring detailed disclosure is to give voters the information about a candidate's views and alignments that is revealed by the list of sources from which the candidate draws her major support. [\[FN75\]](#) Disclosure is also intended to facilitate enforcement of the Act's other provisions, [\[FN76\]](#) and, through exposure, "'to prevent the corrupt use of money to affect elections.'" [\[FN77\]](#)

Detractors pointed out that the think tanks were able to dodge the disclosure prescribed by the F.E.C.A. Under the F.E.C.A., a political committee must register with the Federal Election Commission, [\[FN78\]](#) keep detailed accounts of its contributions and its expenditures, [\[FN79\]](#) and file regular, detailed reports of the amounts and sources of its receipts, as well as the

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amounts, recipients, and beneficiaries of its disbursements. [FN80] The think tanks avoided all of these requirements.

That the F.E.C.A.'s constraints on the magnitude and sources of election campaign support should not be easily dodged by cleverness of timing is another constant theme in the evolution and administration of federal campaign finance regulation. The Federal Election Commission has made clear its intention that prospective candidates not be able to raise seed money for a campaign through contributions that would be illegal once the campaign is officially underway. In order to accommodate the practical realities of the early phases of a tentative campaign, F.E.C. regulations exclude from the definitions of the terms "contribution" *592 and "expenditure" certain expenses associated with exploring the feasibility of a campaign. This allows "individuals to conduct certain activities while deciding whether to become a candidate for federal office, without making their activities immediately public." [FN81] But these "testing the waters" provisions are only temporary. Once an individual moves beyond activities "designed to evaluate a potential candidacy," he becomes a candidate, and receipts and disbursements which occurred while testing the waters must be reported as contributions and expenditures. [FN82] Furthermore, if and when the "tester" does become a "candidate," expenditures made for testing the waters are eventually counted against overall and state-by-state spending limits to which presidential candidates who accept federal funding are held. [FN83] And not all of the campaign finance regulations are suspended, even temporarily, while an individual tests the waters. In 1985, the F.E.C. amended the testing the waters regulations to forbid the use of funds that come from prohibited sources or are in excess of the contribution limits for testing the waters. [FN84]

It seems clear, then, that the spirit of the F.E.C.A. calls for control of campaign-related contributions and expenditures no matter where in the process they may occur and no matter how the activity is characterized publicly. The think tanks take in money from sources and in amounts that would be forbidden once a campaign is underway. If contributions to politician-related think tanks are thinly disguised seed money for early campaign efforts then, once again, the think tanks seem out of harmony with a major motif of the campaign finance regulation scheme.

*593 IV. THE LETTER OF THE LAW

If the think tanks were so inconsistent with the spirit of tax-exemption and campaign finance law, how were they able to exist and operate as they did? Some suggested that the I.R.S. was inattentive or insufficiently equipped to effectively enforce the [section 501\(c\)\(3\)](#) strictures on political activity. [FN85] The resources of the Internal Revenue Service's Division of Employee Plans and Exempt Organizations are notoriously slim. [FN86] Policing exempt organizations is something of a sideline for the I.R.S.; "[t]he Service doesn't like it because it doesn't raise revenue." [FN87] In any case, enforcement is based largely upon annual information returns filed by exempt organizations themselves. [FN88] Given the relatively brief existence of the think tanks, by the time the I.R.S. had the information in hand, it was often too late to respond effectively. If the organization had not already ceased operating, all the I.R.S. could do in response to violations was to revoke the organization's exempt status. Deductions taken for donations to the organization before revocation cannot be retroactively disallowed.

But the major reason the think tanks were able to operate as they did had nothing to do with a shortage of enforcement capability. They were not violating the law with impunity. The fact is, they were not violating the law. With a few notable exceptions, the actions of the *594 think tanks did not conflict with the letter of either [section 501\(c\)\(3\)](#) or the Federal Election Campaign Act.

A. Testing the Think Tanks Against [Section 501\(c\)\(3\)](#)

1. The Public Purpose Requirement

A basic qualification criterion for the [section 501\(c\)\(3\)](#) tax exemption is that the organization pursue purposes of broad public benefit, rather than selfish interest. This notion is reflected both in the statute's admonition that an organization qualifies for exemption only if "no part of [its] net earnings . . . inures to the benefit of any private shareholder or individual" [FN89] and in Treasury regulations specifying that "an organization is not organized or operated exclusively for [exempt] purposes . . . unless it serves a public rather than a private interest." [FN90]

Politicians have received financial benefits from the think tanks they founded. The organizations typically paid expenses and sometimes paid honoraria for appearances at forums and conferences they sponsored. [FN91] In addition, some think tanks paid for politicians' travel expenses for factfinding trips. [FN92] But so long as amounts paid are reasonable and expenditures are made in pursuit of the organization's legitimate exempt ends, they do not constitute private inurement even if made to an

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individual who is in a position to control the organization. [FN93] Given the added fact that the individual politicians did not exert *595 formal control over "their" organizations, [FN94] no private inurement violation can be seriously argued.

Nor did the think tanks violate the more general [section 501\(c\)\(3\)](#) requirement that an organization serve a public rather than a private interest. [FN95] The benefit a politician derives from the activities of "his" think tank and his association with it are increased exposure, identification in the minds of the public with certain kinds of ideas, and, perhaps, increased chances of ultimate success as a candidate. This kind of benefit is too indirect, too attenuated, and too speculative to be legitimately characterized as the kind of private benefit that suffices, as the *596 law has been interpreted, to disqualify an organization for exempt status. [FN96] If the organization's activities were to make the kind of direct, *597 immediate contribution to the politician's career that would justify removal of exempt status for conferring substantial private benefit, they would at the same time most likely cross the line into prohibited election campaign activity. [FN97]

*598 2. The Campaign Intervention Prohibition

Some violations of the [section 501\(c\)\(3\)](#) campaign activity prohibition are easy to establish. Where an organization provides financial or in-kind assistance, [FN98] or makes statements which support or oppose a particular candidate for elective office in the context of a clear campaign, [FN99] the prohibition is violated. But the activities of the think tanks rarely fit the model of these easy cases, and the criteria which have been developed for making determinations in the harder cases are not particularly helpful in this different context.

It is almost certain that the [section 501\(c\)\(3\)](#) campaign intervention prohibition would be violated if an organization were to provide the same kind of exclusive forum to a declared candidate during an active campaign that the think tanks regularly provided to "their" politicians before the official campaign season. Only the most neutral and detached distribution of opportunity for candidate exposure may legitimately be undertaken by a [section 501\(c\)\(3\)](#) organization. [FN100] Certainly, *599 the think tanks' spotlighting of "their" politicians could not have met this criterion of detached neutrality. But the think tank principals were not declared candidates, and the think tank activities were not conducted in the context of an official campaign.

None of the politicians connected with a think tank was an announced candidate for the presidency while affiliated with the organization. In fact, as the politician drew close to an official bid, there was invariably a careful disassociation. In some instances the politician withdrew entirely from the organization or moved into an honorary position. [FN101] However, a [section 501\(c\)\(3\)](#) organization need not act on behalf of an announced candidate or one who has qualified as a candidate under the provisions of the Federal Election Campaign Act [FN102] in order to violate the campaign intervention bar of the tax exemption provision. The [section 501\(c\)\(3\)](#) election participation prohibition is not tied to any formal criterion for establishing "candidacy." The regulations specify that, for purposes of [section 501\(c\)\(3\)](#), a "candidate" is any "individual who offers himself, or is proposed by others, as a contestant *600 for [national, state, or local] elective public office." [FN103] This definition is clearly broad enough to reach beyond officially declared candidates, although just how far it does extend has not been tested. [FN104]

Even allowing for a very broad reading of the term "candidate," the involvement of the politicians in the programs and materials of the think tanks should not necessarily be taken as prohibited campaign intervention. Engaging in discussion of public issues is a perfectly appropriate activity for a [section 501\(c\)\(3\)](#) organization. From the earliest days of the [section 501\(c\)\(3\)](#) exemption, addressing social issues has *601 been an accepted function of charitable and educational organizations, [FN105] and there is no requirement that an organization remain neutral in the positions it takes on such issues. Issue development and discussion may disqualify an organization if it crosses the line into legislative advocacy [FN106] or if the organization fails to present its position in a relatively rational and well-balanced fashion. [FN107] In general, however, *602 exploration and explication of policy issues is safely "charitable" or "educational" in the eyes of the I.R.S., whether an organization seeks to educate the public on established policy [FN108] or seeks to influence policy. [FN109] Furthermore, involving public figures--even elected or aspiring public officials--in the debate does not necessarily change the character of the activity. Principled resolution of the dispute over the proper treatment of the think tanks must turn on whether these organizations truly engage in issue exploration or whether they simply develop and disseminate positions which are so identified with and favorable to a particular office seeker as to be thinly disguised campaign participation.

Most of the refinement of the distinction between issue discussion and candidate support is found in I.R.S. responses to organizations that rate candidates or elected officials on their positions with respect to issues in which the organizations have some interest. Compilation of the positions of candidates, as candidates, violates the [section 501\(c\)\(3\)](#) campaign intervention

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prohibition unless the views of all candidates are presented, and unless there is no explicit or implied endorsement or disapproval of any of the candidates. [\[FN110\]](#) When candidate status is less clear, however, the Service looks to the time and place of distribution of the ratings to determine whether any explicit or implicit endorsement or disapproval in the organization's materials is meant for the rated individuals as candidates, or simply as elected officials. [\[FN111\]](#) The *603 I.R.S. guidelines on timing and geographic targeting were designed to address a very different kind of activity and are not easily adapted to the task of evaluating the activity of the think tanks. Application of their criteria, however, suggests that, for the most part, the think tank activity ought not be considered to be participation or intervention in a political campaign on behalf of a candidate for public office. Typically and, in fact, virtually by definition, the think tanks were most active and their politician-founders were most heavily involved in their activities during the off years of the election cycle. [\[FN112\]](#) Furthermore, almost none of the think tank activity could be classified as election campaign participation on the basis of geographic targeting. [\[FN113\]](#)

***604 B. Testing the Think Tanks Against the F.E.C.A.**

Nor did the think tanks violate the Federal Election Campaign Act, despite the complaints of their critics. Their detractors urged that these politician-affiliated organizations should not be available as a vehicle for the development of policy positions and potential campaign staff, nor should they be allowed to create opportunities for exposure and promotion of their founders without being subject to the F.E.C.A.'s limits and controls. Looking beyond form to substance, the critics urged, politician-affiliated think tanks are political committees promoting the election of a candidate, and should not be able to operate free of the limits on sources and amounts of contributions to the organization, the limits on contributions from the organization to the "candidate," and the reporting and disclosure obligations to which political committees are subject. Furthermore, the individual on whose behalf the think tank operates should not be able to engage in the kind of activities characteristically sponsored by these organizations without having them count against the overall and state-by-state expenditure limits that the F.E.C.A. imposes on presidential candidates who accept *605 federal campaign funding. [\[FN114\]](#) To allow the think tanks to carry on unchallenged, the critics argued, was to allow form to trump substance. [\[FN115\]](#)

Notwithstanding the protests of the critics, however, form is a critical part of substance in the interpretation and application of the F.E.C.A.'s controls on campaign finance. The reason the think tank "loophole" has been available is that applicability of the F.E.C.A.'s controls hinges on several key terms and concepts, and the organization and operation of the think tanks as they have existed did not bring them within these pivotal definitions.

The founders of the think tanks were not "candidates" for F.E.C.A. purposes and were, therefore, not subject to F.E.C.A. controls on "candidates." The think tanks were not "political committees" as that term has been described in the context of the F.E.C.A., and thus were not subject to the contribution limits and disclosure requirements imposed on "political committees." Both "candidate" and "political committee" status are triggered by the receipt of "contributions" or the making of "expenditures." [\[FN116\]](#) To constitute a "contribution" or "expenditure," the money [\[FN117\]](#) must be donated or spent "for the purpose of influencing any election for Federal office." [\[FN118\]](#) Thus, the phrase "purpose of influencing any election for Federal office" sets the threshold for the operation of much of the campaign finance regulation scheme.

The activities in which the think tanks engaged were not the kind of activities, and were not carried on under the kind of circumstances, that would cause them to be classified as having the "purpose of influencing any election for federal office" as the Federal Election Campaign Act has been interpreted. The Federal Election Commission and the courts have consistently differentiated issue discussion from election *606 influence, even while acknowledging the difficulty of untangling the two, and have consistently assigned to the former category situations and circumstances which closely resemble those presented by the think tanks, even while occasionally acknowledging that the classification might appear "somewhat disingenuous." [\[FN119\]](#)

Activity which has characteristics of both issue discussion and election influence has been held not to be "for the purpose of influencing an election for Federal office" unless it is very clearly connected to an election campaign effort. A necessary, but not sufficient, condition for establishing the clear connection appears to be the involvement of one or more individuals who are actively engaged in an election campaign, or have at least officially indicated that they are "testing the waters." [\[FN120\]](#) Incumbency, despite the reelection pressures it carries, is not equivalent to candidacy in this context [\[FN121\]](#) nor is "[frequent mention] in the press as a potential presidential candidate." [\[FN122\]](#) A second condition is that content or context must undeniably link the discussion to a specific campaign effort. Even where participants are announced candidates for an imminent election, establishment of the necessary campaign connection almost always requires express advocacy of the election or defeat of a particular candidate or the solicitation or acceptance of campaign contributions. [\[FN123\]](#)

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*607 The Federal Election Commission and the courts have characterized as issue discussion, rather than campaign activity, situations that strongly resemble the behavior for which the think tanks have been criticized--sometimes where the classification required a good deal more disingenuity than the think tanks demand. For example, the F.E.C. has held that sponsorship of an event at which incumbent members of Congress were to participate in a public forum for discussion of problems of the steel industry would not constitute a "contribution" absent express advocacy supporting or opposing any federal candidate or solicitation of campaign contributions. [\[FN124\]](#) Similarly, the F.E.C. has *608 determined that, absent solicitation of contributions or express advocacy of the election or defeat of any candidate, neither the publication and distribution of a candidate's views on a public policy issue [\[FN125\]](#) nor the republication and sale of articles written previously by a candidate [\[FN126\]](#) implicate "contributions" or "expenditures." Regulations implementing the Act and F.E.C. Advisory Opinions applying them explicitly recognize that payment for speechmaking, authorship of an article, or appearance by an office holder, or even by an active candidate for federal office, may be for a purpose other than influencing an election and provide that such payment is an "honorarium" rather than a "contribution." [\[FN127\]](#)

The fact that a politician is the sponsor of an educational organization does not make the organization a "political committee" or its activities campaign support under the F.E.C.A. [\[FN128\]](#) Nor do a politician's *609 significant ties with an issue-oriented group which sponsors his appearance at its events, [\[FN129\]](#) or the fact that members of the organization's staff have been, or later become, key employees of the politician's campaign staff, or that the organization or event is financially supported by past campaign contributors establish the purpose on the part of the group to influence a federal election which would push the organization's activity across the line that differentiates issue discussion from election campaign support. [\[FN130\]](#) Only express advocacy of a particular election result does that. Even where the timing and circumstances of a politician's appearance or an organization's statements coincide with the politician's unmistakable candidacy, and even where the tie-in between the individual candidate and the issue discussed is strong, the apparent connection does not turn issue discussion into a campaign *610 contribution or expenditure. Only express advocacy of a particular election result does that. [\[FN131\]](#)

Thus, although the think tanks may have strained the spirit of the Federal Election Campaign Act and made their critics uneasy, they did not exceed the limits of the F.E.C.A. as established in other contexts. Their activities tended to be far more removed in time from any election than some that have been held to be non-election related. The politicians who were involved in their founding and featured in their activities were much further from "candidate" status than some whose involvement has been determined to be non-election related in other contexts. The relationship between politician and organization was no tighter than some that have been deemed non-election related. And the nature of the think tanks' enterprise and activities fell well within F.E.C. and judicial interpretations of non-election related purpose and undertakings. [\[FN132\]](#)

V. ALIGNING THE LETTER OF THE LAW WITH ITS SPIRIT

A. Section 4955(d)(2)

For the most part, then, the politician-affiliated think tanks violated neither the [section 501\(c\)\(3\)](#) limitations nor campaign finance regulations. Their technical compliance with the letter of the law, however, was seen by their critics as a serious affront to the spirit of both exemption and campaign finance law. The fact that they could do what they did without violating existing law simply demonstrated a need to *611 adjust the letter of the law to bring it into harmony with the spirit. If the think tanks' activity was within the bounds of exemption and campaign laws, it was because those bounds were ill-drawn. An appropriate response, it was argued, would be to redraw the lines of permissible activity so that the think tanks' mode of operations would clearly fall beyond them.

The lines were redrawn by provisions that began as the Tax-Exempt Organizations' Lobbying and Political Accountability Act of 1987 [\[FN133\]](#) and became law as part of the Omnibus Budget Reconciliation Act of 1987. [\[FN134\]](#) Section 4955 of the Act provides for the imposition of a penalty, in the form of a heavy excise tax, on [section 501\(c\)\(3\)](#) organizations that intervene in political campaigns. [\[FN135\]](#) Section 4955(d)(2) of the Act singles out organizations "formed primarily for purposes of *612 promoting the candidacy (or prospective candidacy) of an individual for public office" and applies to them an expanded definition of "political expenditure." For these organizations, political expenditures under the Act are defined to include:

- (A) Amounts paid or incurred to such individual for speeches or other services.
- (B) Travel expenses of such individual.
- (C) Expenses of conducting polls, surveys, or other studies, or preparing papers or other materials, for use by such individual.

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(D) Expenses of advertising, publicity, and fundraising for such individual.

(E) Any other expense which has the primary effect of promoting public recognition, or otherwise primarily accruing to the benefit, of such individual.

This list could reasonably be taken to describe virtually everything the think tanks did, at least as characterized by their detractors. [\[FN136\]](#)

On its face, section 4955 might be read to effectively bar the think tanks. Whether it would have that effect depends on what constitutes "forming" an organization, what constitutes "effective control," how the I.R.S. is to determine whether an organization is being used "primarily" to promote a candidacy, and how "prospective candidacy" is to be identified. Certainly, these words offer ample room for broad interpretation. However, the Conference Report that accompanied the amended bill explains some of these elements in terms which may lessen the impact of the provision significantly. [\[FN137\]](#)

The Conference Committee Report explains that "effective control" of an organization is present only where an individual has a continuing ***613** and substantial involvement in the organization's management or day-to-day operations; "mere affiliation" of an individual with an organization or association of an individual with the issues or positions with which the organization is involved is not equivalent to "effective control," nor is the fact that the individual knows the organization's officers, directors, or employees. [\[FN138\]](#) Whether an organization is formed or availed of "primarily" for the purpose of promoting a candidacy or prospective candidacy is "to be made on the basis of all relevant facts and circumstances." [\[FN139\]](#) The Report seems to suggest that the apparently open-ended fifth category of taxable political expenditure, that is, "any other expense which has the primary effect of promoting public recognition, or otherwise primarily accruing to the benefit" of the founding or controlling individual, is limited only to expenditures for activities that would constitute political campaign activities that are inconsistent with exempt status under [section 501\(c\)\(3\)](#). [\[FN140\]](#)

B. Effect of the New Law

The law as passed is more modest than the law as originally proposed by the Oversight Subcommittee. [\[FN141\]](#) The law as explained by the Conference Report appears to be tempered even further. Understanding the impact of the law depends as much on an assessment of ***614** whether and how the Conference Report shapes its meaning as it does on an evaluation of the language of the provision itself.

It is sometimes taken as nearly axiomatic that committee reports are a reliable source of explication, and that Conference Reports are especially useful, "because they are closest in content to the bill's final version and closest in time to its actual passage and because they represent the will of both houses." [\[FN142\]](#) But although the courts frequently turn to them, [\[FN143\]](#) both proponents and critics of the practice of reaching into the documents of legislative history to find a statute's meaning have noted the pitfalls of assigning any weight to committee reports. [\[FN144\]](#)

In the case of the Accountability Act, the Conference Report was generated close in time to the passage of the bill, and its discussion does, in the main, relate to terms changed in the last version of the bill. On the other hand, there is no recorded floor discussion to indicate that non-committee members ever considered, much less adopted, the committee's ***615** view of the provision's reach. [\[FN145\]](#) The Conference Committee report here seems particularly susceptible to Judge Wald's observation that "conference committee reports are frequently cryptic; they fail to explain why one house acceded to the other, or they give improvised explanations of the legislation that are uncorroborated by any other record of the process." [\[FN146\]](#)

Virtually all of the debate about the utility of legislative history as a tool of interpretation considers its value in judicial construction of statutes. The premises may be somewhat different when the report is considered as a message not so much to the courts as to the agency charged with administration of the statute, as the Conference Committee interpretation of the think tank provisions probably ought to be. [\[FN147\]](#) Seen as a message of restraint from the Conference Committee to the I.R.S., perhaps the report does, in fact, effectively limit the impact of the statute. Of course, what is a message to the I.R.S. is also a message to the organizations and politicians who might be affected by the law. And although they can certainly see and appreciate the Conference Committee effort to scale back the law, one might question how confidently they can rely on the report's moderating effect. [\[FN148\]](#)

***616** If the Conference Committee efforts to modify the statute through the committee report are discounted, and the provision taken at its face value, section 4955(d)(2) exhibits a disturbing imprecision in its essential terms, which seem to

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have been chosen to describe the think tanks as they have been structured and operated in the last two election cycles. It is evident that as originally drafted they were meant to reach groups such as the Freedom Council, American Horizons, Center for a New Democracy, and Fund for an American Renaissance. They may have been intended to reach the PUSH organizations, but they were probably not directed at the Dole Foundation. [\[FN149\]](#) As amended by the Conference Committee, it is less clear that the terms are meant to reach any organization that operates as any of these organizations did, except insofar as it might violate the preexisting law. It is by no means *617 entirely clear, however, that the provision does not reach further than the old law.

Even as amended by the Conference Committee, section 4955(d)(2) has no clearly identifiable end points. What determines when an individual becomes a "prospective candidate"? How are we to tell when an organization's activities have the "primary effect of promoting public recognition" of that "prospective candidate"? There is simply no principled way to draw a confident line on the basis of section 4955's terms. "It's . . . presidential politics, and everybody knows it is" [\[FN150\]](#) may be an accurate observation, but as a legal standard, it is simply unworkable. [\[FN151\]](#)

If, on the other hand, the provision is taken to carry the gloss provided by the Conference Report, a strong argument can be made that section 4955(d)(2) makes no change in the law at all--that it will reach no activity that is not already prohibited by [section 501\(c\)\(3\)](#) or subject to the excise tax penalty under section 4955(d)(1), which parallels the more general [section 501\(c\)\(3\)](#) campaign participation prohibition. Production of studies and reports for the exclusive use of an individual who "effectively controls" an organization would certainly violate the private inurement and private benefit restrictions, whether or not the activity took place in a political context. [\[FN152\]](#) By definition, the *618 Conference Report's examples of taxable activities under section 4955(d)(2)(E) are already violations of the [section 501\(c\)\(3\)](#) campaign intervention prohibition. [\[FN153\]](#) With the Conference Report explanation attached, perhaps the special think tank provisions do nothing more than reiterate the existing rules.

But perhaps they do more. Even with the Conference Report explanation incorporated, section 4955(d)(2) may expand the law with respect to political intervention by [section 501\(c\)\(3\)](#) organizations. The Conference Report does not settle the question of who is a "prospective candidate." The report's explanation of "effective control" is cast in terms of involvement that is "substantial"--a quantifier that has proved to be troublesome indeed in the related context of the [section 501\(c\)\(3\)](#) lobbying restrictions. [\[FN154\]](#) Furthermore, "effective control" is not a criterion for applicability of the provision where the organization has been "formed primarily for purposes of promoting" candidacy or prospective candidacy. And despite the narrowness suggested by the report's examples, its statement that the determination of whether an organization is formed or availed of primarily for purposes of promoting a candidacy "is to be made on the basis of all relevant facts and circumstances" bespeaks a broader inquiry.

Even with the Conference Report appended, section 4955(d)(2)'s malleable terms invest the I.R.S. with substantial discretion in application of the provision. The Conference Committee's directive in favor of *619 avoiding overzealousness may well temper the Service's response, at least while the legislature's message is fresh. But the passage of time and the I.R.S. regulatory perspective might be expected to push toward eventual disregard of the suggested limits on discretion. The danger of overdeterrence of political speech is real, "for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a potential 'evil' to be taxed, muzzled, or sterilized." [\[FN155\]](#)

Furthermore, the Conference Committee's message is ambiguous, even beyond its uncertain terms. The fact that the Conference Committee chose to explain the provision rather than delete it suggests that the provision is not entirely meaningless. We can guess at the political forces that may have led to this result, but the give and take is nowhere on the record--only the outcome. Even if we put little stock in the rule of statutory construction that no provision is without meaning, [\[FN156\]](#) we must accept that the Conference Committee's choice reflects a policy judgment. True, that policy may be nothing more than acquiescence to the House Oversight Subcommittee's desire to send a cautionary signal to politicians and organizations. The fact that the provision survives, albeit amended and explained, broadcasts this warning at least as clearly as the message of restraint in application which is communicated to the I.R.S. by the Conference Committee's amendment and explanation.

VI. ASSESSING THE CHANGE

The limits of section 4955(d)(2) will probably never be established with any certainty. In practice, there will not likely be much, if any, occasion to examine the provision closely and critically. Its impact will almost certainly be more a consequence of its mere existence than of its active application. It may never be subjected to judicial review, because organizations (or

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those who would form them), sensing its message and *620 unable to guess its limits with any confidence, may well shape their behavior to steer far wider than they need to of activities which might call forth its sanctions. [FN157]

Whether its effect is to expand the law by its terms, by the uncertainty of its terms, by the fact of its existence, or not at all, the enactment of section 4955(d)(2) is a move in the wrong direction. The story of its enactment adds one more chapter to what has become a consistent saga of ill-considered and piecemeal development of this area of the law. Exempt organization law in general, and particularly the law concerning what are, broadly speaking, the political activities of exempt organizations, has been driven by anecdotal accounts of perceived abuses of [section 501\(c\)\(3\)](#) tax-exempt status. Rule after rule has been passed with little or no discussion, and with little or no serious consideration by anyone but the individuals who are outraged by the anecdotes or who sense themselves to have been victimized by the purported abuses. [FN158] What has emerged is a series of wide-sweeping responses *621 driven by small problems [FN159] and uninformed by careful consideration of the broader perspective. [FN160]

*622 One of the dangers in responding to a perceived offense to the spirit of a law is that the focus often tends to be too narrow. Concentrating on the reputed abuse tends to overlook the positive aspects of the questioned activity. Focusing on the loophole tends to lose sight of the fabric.

Before we rush to close the "loophole," we ought to consider carefully where these politician-sponsored think tanks fit in the larger fabric of tax exemption, political speech, and campaign finance regulation. What do we stand to gain by regulating more tightly in an attempt to serve the "spirit" of the [section 501\(c\)\(3\)](#) campaign participation bar and the Federal Election Campaign Act? What do we stand to lose in the process?

Altering the law in a way that attaches special importance to the fact that a recognized political figure has some significant connection with an exempt organization that engages in policy research and discussion carries the cost of discarding a useful means to a valuable end, in the hope of safeguarding the electoral process and the integrity of the tax-exemption scheme. The cost is borne, but the hope is not realized.

A. Meager Contribution to Campaign Finance Integrity

Discouraging the politician-related think tanks, either by rule or by suggestion, does not begin to solve the campaign finance problems at which section 4955(d)(2) is directed. So many other avenues exist by which the "evils . . . may be moved upstream" and the F.E.C.A.'s restrictions on the amount and sources of campaign support circumvented that focusing on political think tanks is almost laughable.

One of these avenues is the candidate-organized political action committee (COPAC), ostensibly formed not to promote the candidacy of the organizer, but rather to provide support for candidates in other races. The support may take the form of sponsoring appearances by the COPAC's founder on behalf of candidates running for office, thus raising the possibility that the COPAC "can serve as an all-purpose expense account" for the potential presidential contender [FN161] and provide *623 an effective means for one who aspires to high office to get early exposure to the public and to promote the perception that he is a leader. In the last three election cycles, several individuals who became presidential candidates used COPACs to sponsor multiple trips to early primary or caucus states. In fact, helping "their founders travel, speak, hobnob, and tout themselves as presidential timber" [FN162] has been the principal pursuit of many of the COPACs. Like the activity of the think tanks, the activities of the COPACs largely avoid the controls of the F.E.C.A. [FN163] To the extent that the COPACs serve as preliminary campaign vehicles for would-be presidential contestants, then, they merely "move upstream" the evils of potential corruption sought to be avoided by the lower limit on contributions to a particular candidate.

The F.E.C.A. allows state and local party committees to make unlimited expenditures for party-building activities, voter registration and get-out-the-vote efforts, and materials such as campaign buttons, bumper stickers, and slate cards which support the party's entire slate of local, state, and federal candidates. [FN164] These so-called "soft money" funds may not be used for direct support of federal candidates, but invariably work to their benefit. [FN165] Funds which are contributed directly *624 to state and local organizations for non-federal and party-building purposes or to national party non-federal accounts are not subject to the F.E.C.A.'s limits and disclosure requirements; they are subject only to the applicable state campaign finance rules, which vary widely from state to state, and some of which place no limits on contribution amounts or sources. [FN166]

There are numerous ways for corporations to deliver money "upstream" to would-be candidates. While federal office holders

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and candidates are subject to tight restrictions on accepting favors from corporations, [\[FN167\]](#) state officials may not be, and private citizens who have been or will be candidates are certainly not. Early corporate support may be directed to a potential candidate in a number of ways. Providing transportation and related travel expenses has been identified by one group of campaign finance experts as the chief avenue for using corporate treasury funds to support political activity. "Flying the member or candidate on the corporate jet can be a good, quiet opportunity for some personal lobbying by a company representative." [\[FN168\]](#)

***625** Of course, the primary mode of corporate and union support for candidates is the corporate-sponsored political action committee. [\[FN169\]](#) The prohibition on corporate and union contributions and expenditures [\[FN170\]](#) prevents the direction of funds from the corporate treasury to the corporate PAC as well as directly to candidates. Candidates, however, are likely to perceive the power of corporation leaders to mobilize and allocate individual contributions to the corporate PAC to be just as valuable as the power to make contributions from the corporate or union treasury. [\[FN171\]](#)

***626** Although federal campaign finance law forbids direct corporate support of political activity, corporate funds may be used to set up and administer a connected PAC and to solicit contributions to the PAC. [\[FN172\]](#) Direct reimbursement from the corporate treasury to individuals who contribute to the corporate PAC are equivalent to contributions by the corporation itself, and therefore prohibited, [\[FN173\]](#) but the Federal Election Commission has allowed corporations to implement schemes that fall just short of that sort of direct reimbursement. For example, the F.E.C. has held that a corporation may match an employee's PAC donations with a contribution from the corporation's treasury to the charity of the employee's choice; [\[FN174\]](#) the corporate expense of such a program is a solicitation cost, not a contribution, and is therefore permitted under the F.E.C.A. [\[FN175\]](#)

***627** If section 4955(d)(2) is driven by concern about the purchase of political access and good will, there is no principled reason to distinguish between politician-affiliated organizations that deliver traditional "charitable" services, such as the Dole Foundation, and politician-affiliated think tanks. Realistically, the potential for inappropriate influence is little different in the two situations. Both direct contributions and excess honoraria which are channeled to the charitable organization [\[FN176\]](#) provide opportunities for corporations and individuals to make an impression on a politician, and the charity's donor list often includes the names of the politician's political backers. For example, the list of major donors to the Dole Foundation overlaps noticeably with the list of Dole's political supporters and with the list of those who have reason to be pleased with his work in the Senate. [\[FN177\]](#) Furthermore, identification of a politician with a traditional charitable organization is valuable political capital. "Senators and Representatives themselves acknowledge that excess honorariums dispensed to charities generate considerable favorable publicity and help to enhance their image. That, in turn, assists ***628** them when they go out to raise the kind of money that is most important to them personally: campaign contributions." [\[FN178\]](#)

So long as these other avenues of corporate support and large individual contributions remain open, abolishing the think tanks will hardly eliminate the possibility that the undue influence of corporate and large individual wealth may distort the conduct and outcomes of elections. Of course, the fact that addressing one part of the problem will not solve the whole problem does not mean that it is necessarily ill-advised to address at least that part. In the case of the think tanks, however, there are independent reasons why it is a mistake to address this part of the problem in the way that section 4955(d)(2) attempts to. The modest gain toward the immediate goals of campaign finance regulation is outweighed by damage to the broader values underlying tax-exemption law and campaign finance regulation.

B. Inconsistency With the Underlying Values of Tax Exemption

Section 4955(d)(2) exerts a generally counterproductive effect on the shape of tax-exemption law. Granted, section 4955(d)(2) may serve the spirit of the [section 501\(c\)\(3\)](#) campaign intervention prohibition. Nonetheless, it is counterproductive because it reinforces a pervasive, vague, and unjustified suspicion of [section 501\(c\)\(3\)](#) as a vehicle for discourse on public issues. It allows a nebulous and generalized disapproval of mixing politics with charity to loom so large that it blocks the broader view.

It is true that many of the think tanks, and maybe all of them, crowd the limits of the [section 501\(c\)\(3\)](#) prohibition on campaign involvement by exempt charitable and educational organizations. However, stepping back to consider not just the spirit of the election activity proscription, but the spirit of the [section 501\(c\)\(3\)](#) exemption provision as a whole, it is not so clear that the think tanks are out of harmony with that spirit. Taking the broader view, the think tanks are quite consistent with the postulates of tax exemption law.

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Again, it is easier to see the differences between the think tanks and more traditional charitable organizations, such as the Dole Foundation, than it is to appreciate their important similarities. Handicapped *629 individuals are traditional beneficiaries of charitable activity, and providing aid to them is a traditionally "charitable" endeavor. Public policy-oriented educational activity, on the other hand, has always been the subject of some suspicion as a [section 501\(c\)\(3\)](#) activity, even when not tied to a particular politician. Furthermore, it is more difficult to differentiate the public policy analysis of a [section 501\(c\)\(3\)](#) organization from election-related activity than it is to distinguish traditional charitable works from campaign intervention. The demarcation between policy advocacy and candidacy is not a clear one; the connection between traditional charity and a politician's candidacy is less apparent.

But it is vital to acknowledge the common threads that connect the think tanks and traditional charitable organizations. Just as it would be foolish to overlook the value of the Dole Foundation's charitable endeavors simply because of the organization's identification with a politician, so is it a mistake to dismiss the important contribution of the think tanks, [\[FN179\]](#) so long as they operate within the limits of the preexisting [section 501\(c\)\(3\)](#) rules. [\[FN180\]](#) The importance of exploration and debate *630 of issues of public importance and the notion that the nonprofit sector has a legitimate role in that process are values long-reflected in the law of tax exemption, and nearly equal in stature to visions of a charity which serves the distressed and disadvantaged. In other contexts, the tax law is designed to promote the participation of exempt charitable and educational organizations in exploration and discussion of policy issues. [\[FN181\]](#) Congress, the I.R.S., and the courts have all recognized the capacity of these organizations for bringing an important dimension to the discussion of public issues. Commentators, too, have applauded the unique contribution these organizations can make to the design and selection of social policy on issues of extreme public importance. Some have gone so far as to suggest that "public issues development" [\[FN182\]](#) and "[h]elping to change institutions as much as to preserve them; to develop social policy as well as to maintain it" [\[FN183\]](#) are not only acceptable, but are among the most important functions of the nonprofit sector. Extending the [section 501\(c\)\(3\)](#) exemption to organizations that investigate public issues and disseminate their views contributes to the "assurance of maximum public access to all viewpoints on an issue through the free debate of ideas." [\[FN184\]](#)

*631 C. Dissonance With Basic Principles of Campaign Finance Regulation

Similarly, restricting the politician-affiliated think tanks, either explicitly or by suggestion, is destructive to the broad first amendment values which underlie campaign finance regulation. The Supreme Court has repeatedly held that the Constitution imposes strict constraints on Congress' power to regulate election campaign finance, because political speech "is at the heart of the First Amendment's protection." [\[FN185\]](#) The Court has consistently held to the principle "that preventing corruption or the appearance of corruption are the only legitimate and compelling interests thus far identified for restricting campaign finances." [\[FN186\]](#)

*632 The distinction between issue discussion and candidate support that has emerged as a clear pattern in the interpretation and application of the F.E.C.A. and the establishment of express advocacy of a particular election result as the standard by which to draw the distinction [\[FN187\]](#) are rooted in the dictates of the constitution. The Court has staunchly maintained that express advocacy on behalf of a particular candidate is both the only activity that implicates the anti-corruption rationale and the only regulatory formulation that is precise enough and narrow enough to avoid constitutional infirmity. [\[FN188\]](#) The circumstances *633 under which the courts have found the "express advocacy" standard to be met have been very closely limited, as they should be. [\[FN189\]](#) Otherwise, "every position on any issue, major or minor, taken by anyone would be a campaign issue The dampening effect on first amendment rights and the potential for arbitrary administrative action that would result from such a situation would be intolerable." [\[FN190\]](#)

*634 It would be intolerable because the free speech clause of the first amendment, if it stands for nothing else, stands for the proposition that discussion of public affairs, indispensable to democratic self-government, must be jealously protected and ardently promoted. [\[FN191\]](#) Even after the Supreme Court's recent doctrinal shift, [\[FN192\]](#) it would be impossible to amend campaign finance laws to encompass the think tanks without violating the limits imposed by the first amendment. To extend the meaning of having the "purpose of influencing any election for Federal office" [\[FN193\]](#) to incorporate showcasing a "prospective candidate" or, alternatively, to define "candidate" so broadly as to include anyone with apparent or imagined presidential aspirations would surely run afoul of the narrow limits the Constitution imposes on campaign finance regulation. [\[FN194\]](#)

It is true that the Constitution does not demand that even speech at the heart of the first amendment be given the extra advantage of a tax-exempt platform. [\[FN195\]](#) The Supreme Court has clearly differentiated *635 between direct regulation and a simple decision not to provide a tax exemption "subsidy" for political speech. [\[FN196\]](#) As a practical matter, Congress

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has wide latitude in determining the bounds of the universe of tax- exempt organizations. [\[FN197\]](#)

***636** However, even if the constitutional principles of the F.E.C.A. cases do not dictate how the think tanks must be treated for purposes of tax exemption, they do reflect fundamentally important values which certainly may-- and certainly should--be taken into account when fashioning policy. The fact that the effects of section 4955(d)(2) could not have been accomplished through amendment of the F.E.C.A. reveals something about why they are unwise no matter how they are accomplished.

D. Damage to Broader Values--The Promotion of Reasoned Political Discourse

"Those who won our independence believed that . . . the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government." [\[FN198\]](#) This value is at the center of the first amendment; it drives campaign finance regulation and it is woven into tax-exemption law. Section 4955(d)(2), however it is read, is at odds with this principle. So long as the think tanks are in compliance with the letter of [section 501\(c\)\(3\)](#), they serve the important functions of promoting a robust and free marketplace of political ideas and enhancing the quality of political discourse.

Therein lies the real reason, despite the initial appeal of the argument that the politician-affiliated think tanks operate too close to the limits of the [section 501\(c\)\(3\)](#) campaign participation prohibition and the F.E.C.A. controls on campaign finance, why it does not make sense to adjust those limits to place these think tanks clearly beyond them or to send even a watered-down message of disapproval. Eliminating or further restricting the operations of these organizations will very likely diminish the quality of the debate. Qualification for [section 501\(c\)\(3\)](#) exempt status is predicated on the organization's development and dissemination of information of "subjects . . . useful to the individual and beneficial to the community." [\[FN199\]](#) The organization's materials must focus on issues, not individuals, and must present a reasonably well-supported discussion. [\[FN200\]](#) While blocking the "big money" avenue that the think tanks may provide would have an equalizing effect that some ***637** commentators find to be supportive of first amendment values [\[FN201\]](#) and that a majority of the Supreme Court has recently signalled that it might be inclined to embrace, [\[FN202\]](#) depriving the electorate of the content these organizations bring to the debate, on balance, constricts rather than liberates the discourse. [\[FN203\]](#) By giving serious attention to issues in ***638** the pre-campaign period, these organizations serve a positive function which is strong enough to override the marginal threat they pose to the "spirit" of tax exemption or campaign finance law. [\[FN204\]](#)

***639** In fact, the issue discussion that the think tanks can bring into the election process is all the more valuable because of the effect that the body of campaign finance regulation has had on the shape and style of presidential election campaigns. The contribution and expenditure limits have increased candidates' reliance on professional fundraisers. [\[FN205\]](#) The limits have the effect of advantaging better-known politicians, who can attract early support from a larger number of people, [\[FN206\]](#) and incumbents, who have the platform of public office to enhance their visibility before they launch an official campaign which is subject to the contribution and expenditure limits. [\[FN207\]](#) Relatively low spending limits, particularly in early primary states, has caused candidates to substitute high impact exposure, that is, "sound bites" and television spots which emphasize candidate image, for grass roots contact with the electorate. [\[FN208\]](#)

***640** Attempting to perfect the workings of the electoral system through ever stricter controls is futile. [\[FN209\]](#) Moreover, some attempts to limit political discourse in the name of purifying campaign finance practices are simply ill-advised. The move to discourage politician-affiliated think tanks is one of these. While not unconstitutional, it is contrary to the central value of promoting reasoned debate on issues of public consequence--a value which is reflected in tax exemption law and campaign finance regulation, and which is the very essence of the first amendment. The new law delivers little in return. It does not materially protect the integrity of [section 501\(c\)\(3\)](#). It does not significantly serve the important interest of checking corruption of the electoral process--"the best checks on corruption are a well- informed and issue-oriented electorate and a political system that routinely produces challengers ready to take advantage of lapses by incumbents." [\[FN210\]](#) Ultimately, it increases the pressure that is pushing all substance from the process by which we choose our president.

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[\[FNaa\]](#) Associate Professor of Law, Case Western Reserve University. B.A., 1977; J.D., 1981, Case Western Reserve University. The author gratefully acknowledges the helpful comments and criticisms of Mac Chisolm, Jon Entin, Lori Garrison, Bill Leatherberry, and Bill Marshall and the able research assistance of Ronald Assaf, Rita Bryce, Davida Dodson, and Megan Lum.

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[FN1]. Lobbying and Political Activities of Tax-Exempt Organizations: Hearings Before the Subcomm. on Oversight of the Comm. on Ways and Means, 100th Cong., 1st Sess. 124, 126 (1987) [hereinafter Oversight Hearings] (remarks of Rep. Byron Dorgan).

[FN2]. Pub. L. No. 100-203, 101 Stat. 1330, was enacted on December 22, 1987. 133 CONG. REC. 11,991, 18,689 (1987).

[FN3]. Omnibus Budget Reconciliation Act, Title X, Subtitle G--Lobbying and Political Activities of Tax-Exempt Organizations.

[FN4]. Id. § 10712 (codified at I.R.C. § 4955(d)(2) (1989)).

[FN5]. Professor Simon refers to provisions that circumscribe the ability of tax-exempt organizations to participate in the governmental (or for-profit business) arena as "border patrol" rules, and suggests that these rules are driven, at least in part, by "the concept of order in institutional arrangements The nonprofit entities that stray from their territory are thus guilty of disorderly conduct, of minding someone else's business." Simon, *The Tax Treatment of Nonprofit Organizations: A Review of Federal and State Policies*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 67, 94 (W. Powell ed. 1987).

[FN6]. Rothberg, Hart Forming Issues-Oriented Think Tank (The Associated Press Political Service, Apr. 19, 1985).

[FN7]. CENTER FOR A NEW DEMOCRACY, *ARTICLES OF INCORPORATION*, quoted in CENTER FOR RESPONSIVE POLITICS, *PUBLIC POLICY AND FOUNDATIONS: THE ROLE OF POLITICIANS IN PUBLIC CHARITIES* 89 (1987) [hereinafter *PUBLIC POLICY AND FOUNDATIONS*].

[FN8]. See 129 CONG. REC. 4623 (1983).

[FN9]. Oversight Hearings, *supra* note 1, at 257 (statement of Jackie A. Strange, President and Chief Executive Officer, The Dole Foundation for the employment of Persons With Disabilities).

[FN10]. See *PUBLIC POLICY AND FOUNDATIONS*, *supra* note 7, at 112-17.

[FN11]. See Gerth, *Tax Data of Pat Robertson Groups Are Questioned*, N.Y. Times, Dec. 10, 1986, at B11, col. 1.

[FN12]. FREEDOM COUNCIL, *MISSION OF THE FREEDOM COUNCIL* (1986), quoted in *PUBLIC POLICY AND FOUNDATIONS*, *supra* note 7, at 99.

[FN13]. *PUBLIC POLICY AND FOUNDATIONS*, *supra* note 7, at 102.

[FN14]. *AMERICAN HORIZONS, ARTICLES OF INCORPORATION*, quoted in *PUBLIC POLICY AND FOUNDATIONS*, *supra* note 7, at 83.

[FN15]. I.R.C. § 501(c)(3) (1989). Section 501(c)(3) extends tax- exempt status to:

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

The Freedom Council was originally formed as a § 501(c)(4) social welfare organization. A § 501(c)(4) organization is exempt, but contributions to it are not deductible to the donor, and it is subject to fewer restrictions on political activity than is a § 501(c)(3) organization. In January, 1986, the organization changed its name to the National Freedom Institute. At the same time, a new Freedom Council was formed by the officers of the old § 501(c)(4) Freedom Council. The new organization applied for tax exemption under § 501(c)(3) in April, 1986 and received the § 501(c)(3) classification in May. Gerth, *Tax Data of Robertson Groups Are Questioned*, N.Y. Times, Dec. 10, 1986, at B11, col. 1.

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[FN16]. [I.R.C. § 170\(c\)\(2\)\(1\) \(1989\)](#) essentially tracks the language of [§ 501\(c\)\(3\)](#) to specify which contributions qualify as charitable deductions from federal income tax. [I.R.C. §§ 2055\(a\)\(2\)](#) and [2106\(a\)\(2\)\(A\)\(ii\) \(1989\)](#) specify that contributions to these organizations are deductible for estate tax purposes, and [I.R.C. § 2522\(a\)\(ii\) \(1989\)](#) does the same for gift tax purposes.

[FN17]. [I.R.C. § 501\(c\)\(3\) \(1989\)](#).

[FN18]. See, e.g., Foster, Enabling the Disabled to Work, *Christian Science Monitor*, Feb. 6, 1989, at 12, col. 1.

[FN19]. Operation PUSH, PUSH for Excellence, the PUSH Foundation, and the PUSH International Trade Bureau are related organizations, all founded by Jesse Jackson. See PUBLIC POLICY AND FOUNDATIONS, *supra* note 7, at 112-16.

[FN20]. These activities have been undertaken by PUSH for Excellence, a [§ 501\(c\)\(3\)](#) organization. See Babcock, Jackson's Record as a Manager; Groups Marked by Difficulties, but Campaign Survives, *Wash. Post*, Apr. 10, 1988, at A1, col. 2; Ford Agrees to Increase Business with Blacks, *N.Y. Times*, Dec. 21, 1988, at A17, col. 1.

[FN21]. These activities were conducted by the International Affairs Division of Operation PUSH. PUBLIC POLICY AND FOUNDATIONS, *supra* note 7, at 24.

[FN22]. Treas. Reg. § 1.501(c)(3)-1 (as amended in 1976) defines "educational" activity to include "instruction of the public on subjects useful to the individual and beneficial to the community" in addition to formal instruction of individuals. Recognized educational methods include research and study of policy issues, see, e.g., [Rev. Rul. 70-79, 1970-1 C.B. 127](#); [Rev. Rul. 64-195, 1964-2 C.B. 138](#); publication and dissemination of information, see, e.g., [Rev. Rul. 72-228, 1972-1 C.B. 148](#); [Rev. Rul. 68-14, 1968-1 C.B. 243](#); [Rev. Rul. 68-15, 1968-1 C.B. 244](#); conduct of workshops and conferences, see, e.g., [Rev. Rul. 72-560, 1972-2 C.B. 248](#); and presentation of public lectures, discussions, and debates, Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii) Example (2) (as amended in 1976); see, e.g., [Rev. Rul. 86-95, 1986-2 C.B. 73](#); [Rev. Rul. 68-70, 1968-1 C.B. 248](#); [Rev. Rul. 66-256, 1966-2 C.B. 210](#).

[FN23]. CENTER FOR A NEW DEMOCRACY, ANNUAL REPORT 1985-86, at 4-6, reprinted in Oversight Hearings, *supra* note 1, at 268, 271-73.

[FN24]. PUBLIC POLICY AND FOUNDATIONS, *supra* note 7, at 83.

[FN25]. See Kemp and Foggy Bottom, *N.Y. Times*, Aug. 1, 1986, at A12, col. 1.

[FN26]. See Republican Presidential Hopefuls Organizing Early for the Big Event, *NAT'L J.*, May 24, 1986, at 1250, 1251.

[FN27]. See PUBLIC POLICY AND FOUNDATIONS, *supra* note 7, at 104 (topics were various aspects of foreign policy, Medicare, economic issues, and the Strategic Defense Initiative).

[FN28]. See Robertson Expects to Decide by September (The Associated Press Political Service, June 2, 1986) (Freedom Council was established to "encourage people with 'traditional moral values' to enter politics").

[FN29]. See, e.g., CENTER FOR A NEW DEMOCRACY, ANNUAL REPORT 1985-86, at 6, reprinted in Oversight Hearings, *supra* note 1, at 268, 273; Jorden, Hart Says Nation Could Learn Economic Lessons from Texas (The Associated Press Political Service, Jan. 27, 1986).

[FN30]. See Fly, What's In For Presidential Hopefuls: Think Tanks, *BUS. WK.*, May 12, 1986, at 60; Here's the Beef, *ECONOMIST*, Jan. 11, 1986, at 19 (Hart's attempt to portray himself as the "new ideas" candidate had fallen short in the 1984 campaign when Walter Mondale challenged the claim with the question, "Where's the beef?").

[FN31]. PUBLIC POLICY AND FOUNDATIONS, *supra* note 7, at 83.

[FN32]. Riley, Tax-Exempt Foundations: What Is Legal?, *NAT'L L.J.*, Feb. 23, 1987, at 1 (The information packet included "a series of newspaper columns about Governor Babbitt and by--who else--Governor Babbitt on issues ranging from Medicare to Nicaragua and Mexico. Altogether the packet mentions Governor Babbitt's name 34 times.").

[FN33]. See Shogan, White House Hopefuls Try New Fund-Raising Ideas, *L.A. Times*, May 12, 1986, at Part 1, page 1, col.

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[FN34]. See Republican Presidential Hopefuls Organizing Early for the Big Event, Nat'l J., May 24, 1986, at 1250, 1251.

[FN35]. See id.

[FN36]. PUBLIC POLICY AND FOUNDATIONS, *supra* note 7, at 23.

[FN37]. See, e.g., Fly, *supra* note 30, at 60, 61; Shogan, *supra* note 33, at 12; Jackson, Politicians Turn to Special Groups to Raise Funds While Avoiding Presidential Campaigning Laws, Wall St. J., Mar. 7, 1986, at 46, col. 1; Bonfatti, Kemp Denies Improper Use of Tax-Exempt Fund (The Associated Press Political Service, June 20, 1986) (Donors to Fund for an American Renaissance included two individuals who contributed over \$50,000 each, the Oklahoma City Bar Association, Hilton Hotels, Dow Chemical Corp., Reader's Digest, and Getty Oil.); Edsall, '88 Candidates' New Tricks Stretch Federal Election Law; Tax-Free Foundations Proliferate, Wash. Post, Oct. 20, 1985, at A1, col. 1 (Center for a New Democracy contributions included donations of \$25,000 or more from ten individuals and donations of \$5,000 or more from United Technologies, Bank of America, Singapore Airlines, and American Express.); Jackson, Kemp is Now Pursuing the Small Contributor After Years of Courting Millionaire Set for Funds, Wall St. J., June 12, 1987, at 50, col. 1 (Fund for an American Renaissance accepted contributions of \$15,000 each from Dow Chemical Co. and PepsiCo, Inc. and individual gifts up to \$50,000.). See also PUBLIC POLICY AND FOUNDATIONS, *supra* note 7, at 40 (describing high proportion of contributors of Center for a New Democracy, Fund for an American Renaissance, and American Horizons who had been past political supporters of the respective affiliated politician).

[FN38]. See, e.g., Turner, Tax-Exempt Fund Has Helped Kemp Explore '88 Bid, Buffalo News, June 15, 1986, at A1, col. 1 (board of Fund for an American Renaissance consisted of Kemp and three political advisors; Fund's first executive director had done campaign work for Kemp); Taylor, Kemp Takes Presidential Step; Exploratory Panel is Set Up With Reagan Veterans, Wash. Post, Dec. 2, 1986, at A3, col. 2 (One of the directors, Charles Black, subsequently moved to Kemp's exploratory committee.); Rothberg, Draft Robertson Ads Feature Roy Rogers and Dale Evans (The Associated Press Political Service, Aug. 20, 1986) (Dick Minard, national director of Freedom Council, resigned in June, 1986, and subsequently served as political consultant to Robertson draft committee. Before joining the Freedom Council, Minard had been regional political director for the Republican National Committee.). See Edsall, *supra* note 37.

[FN39]. See, e.g., Oversight Hearings, *supra* note 1, at 124, 126 (remarks of Rep. Byron Dorgan); id. at 89 (statement of J. Roger Mentz, Assistant Secretary (Tax Policy), Dep't of the Treasury); T. DURBIN, CRS REPORT, LEGAL ANALYSIS OF SPECIALIZED MULTICANDIDATE PACS AND TAX-EXEMPT PRIVATE FOUNDATIONS OF POTENTIAL FEDERAL OFFICE CANDIDATES 1-2 (1986); Alexander, FEC Update: It's Not Over 'Til It Begins, CAMPAIGNS & ELECTIONS, Jul.-Aug. 1986, at 62, 64-65; Brownstein & Glen, Money in the Shadows, Nat'l J., Mar. 15, 1986, at 632, 636-37; Jackson, *supra* note 37; Bonfatti, *supra* note 37; Lauter, Presidential Politics--A Search for Loopholes, L.A. Times, June 16, 1987, Part I, at 20, col. 3; Edsall, *supra* note 37; Keane v. Baker, No. Civ.-86-588E (W.D.N.Y. Mar. 6, 1987) (Plaintiff, Jack Kemp's opponent in congressional election, sought declaratory judgment and injunctive relief requiring I.R.S. to enforce § 501(c)(3) campaign intervention prohibition against Fund for an American Renaissance, on grounds that organization had undertaken political activity on behalf of Kemp. Suit was dismissed for lack of standing.). In 1986, Gary Hart introduced a bill "[t]o prohibit any Member of Congress from being closely associated with any charitable organization which does not publicly disclose certain information [and] to establish an advisory panel to recommend solutions concerning unregulated campaign expenditures by such organizations." S. 2145, 99th Cong., 2d Sess. (1986).

[FN40]. I.R.C. § 501(c)(3) (1989). The prohibition is repeated in the regulations, which provide that "[a]n organization is not operated exclusively for one or more exempt purposes if it is an 'action' organization [which] participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office." Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended in 1976). The prohibition is expressed in absolute terms, see INTERNAL REVENUE SERVICE EXEMPT ORGANIZATIONS HANDBOOK (I.R.M. 7751) § 370(2) [hereinafter EXEMPT ORGANIZATIONS HANDBOOK]. However, de minimis infractions may be ignored. Gen. Couns. Mem. 33,682 (Nov. 9, 1967) ("situations might arise in which an organization . . . engaged in political activity but on such a small scale that it would not be feasible from an administrative standpoint to either withhold or revoke the group's 501(c)(3) status because of it"). See also Gen. Couns. Mem. 39,441 (Nov. 7, 1985); St. Louis Union Trust Co. v. United States, 374 F.2d 427, 431-32 (8th Cir. 1967) ("[A] slight and comparatively unimportant deviation from the narrow furrow of tax approved activity is not fatal.").

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[FN41]. [2 U.S.C. §§ 431-455 \(1988\)](#). See infra notes 53-84 and accompanying text.

[FN42]. The prohibition was added to [I.R.C. § 501\(c\)\(3\)](#) in 1954. It originated in a floor amendment proposed by then Senator Lyndon Johnson and was passed without debate. 100 CONG. REC. 9,604 (1954). The most generous view is that Johnson's motive was to head off a far more restrictive proposal by Senator Patrick McCarran, which would have denied tax-exempt status to any "subversive" organization, and thus "pacify Senator McCarran and his like without exposing tax-exempts to IRS-conducted witch hunts of potentially devastating dimensions." Oversight Hearings, supra note 1, at 148-49 n.1 (statement of Leonard L. Silverstein). The most often recited version is that the amendment was prompted by Johnson's belief that his opponent in the 1954 Senate race had been helped by a tax-exempt foundation, B. HOPKINS, THE LAW OF TAX EXEMPT ORGANIZATIONS 281 (5th ed. 1988), possibly H.L. Hunt's Lifeline Foundation, Oversight Hearings, supra note 1, at 144 (statement of William J. Lehrfeld). Research conducted on behalf of the United States Catholic Conference at the Johnson Library in Austin, Texas suggests that Johnson was irritated by the actions of the Committee for Constitutional Government, a tax-exempt organization which had at least indirectly expressed support in its literature for Dudley Dougherty, Johnson's opponent in the Democratic primary. Contemporaneous documents in support of this theory include a memorandum to Johnson from his chief aide, Gerald W. Siegel, written less than three weeks before Johnson introduced his amendment and noting that the Committee's actions appeared not to violate any provision of the then-existing federal tax exemption law. Oversight Hearings, supra note 1, at 423, 437, 446-53 (statement of United States Catholic Conference).

[FN43]. [I.R.C. § 527 \(1989\)](#), enacted as [Pub. L. No. 93-625, § 10\(a\), 93d Cong., 2d Sess. \(1974\)](#). The enactment of [§ 527](#) clarified and formalized a longstanding approach to the tax treatment of political parties and other political organizations. The practice of the Internal Revenue Service had been to ignore political organizations, even though they were nowhere mentioned in the tax exemption provisions of the Code. See generally Kaplan, Taxation and Political Campaigns: Interface Resolved, 53 TAXES 340 (1975); Streng, The Federal Tax Treatment of Political Contributions and Political Organizations, 29 TAX LAW. 139 (1975). The 1974 amendment was enacted in response to a change in that policy, embodied in an August, 1973 announcement by the I.R.S. that political parties and committees were taxable organizations. See S. REP. NO. 1357, 93d Cong., 2d Sess. 26 (1974).

[FN44]. A political organization is a party, committee, association, fund or other organization . . . organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures . . . for the function of influencing . . . the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of Presidential . . . electors.

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

[FN45]. S. REP. NO. 1357, 93d Cong., 2d Sess. 26 (1974).

[FN46]. According to the Senate Finance Committee Report:

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

Id. at 30.

[FN47]. [Section 501\(c\)\(3\)](#) organizations may not engage in such activity. Other [§ 501\(c\)](#) categories, such as [§ 501\(c\)\(4\)](#) social welfare organizations, [§ 501\(c\)\(5\)](#) labor organizations, [§ 501\(c\)\(6\)](#) trade associations, and [§ 501\(c\)\(19\)](#) veterans' organizations may engage in election-related activity, so long as that activity is not "primary." S. REP. NO. 1357, 93d Cong., 2d Sess. 25, 29 (1974); [Rev. Rul. 81-95, 1981-1 C.B. 332](#).

[FN48]. [I.R.C. § 527 \(1989\)](#).

[FN49]. [I.R.C. § 527\(f\)\(1\) \(1989\)](#). Actually, a [§ 501\(c\)](#) organization that makes political expenditures will be taxed on either the amount of the political expenditures or the amount of its investment income, whichever is less. [I.R.C. § 527\(f\)\(1\) \(1989\)](#).

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[FN50]. [Treas. Reg. § 1.527-2\(a\)\(3\)\(i\)](#) (as amended in 1985).

[FN51]. [Treas. Reg. § 1.527-2\(c\)\(1\)](#) (as amended in 1985) ("The individual does not have to be an announced candidate for the office. Furthermore, the fact that an individual never becomes a candidate is not crucial in determining whether an organization is engaging in an exempt function. An activity engaged in between elections which is directly related to, and supports, the process of selection, nomination, or election of an individual in the next applicable political campaign is an exempt function activity.").

Supporting an individual's pre-candidacy exploratory activity qualifies as a non-taxable expenditure for a [§ 527](#) organization, [Treas. Reg. § 1.527-2\(c\)\(5\)\(i\)](#) Example 1, as does the sponsorship of conferences and seminars "intended to influence persons who attend to support individuals to public office whose political philosophy is in harmony with the political philosophy of [the organization]." [Treas. Reg. § 1.527-2\(c\)\(5\)\(viii\)](#) Example 8.

[FN52]. S. REP. NO. 1357, 93d Cong., 2d Sess. 26 (1974).

[FN53]. [2 U.S.C. §§ 431-455 \(1988\)](#).

[FN54]. [2 U.S.C.A. §§ 9001-9042 \(1988\)](#).

[FN55]. The image of "mov[ing] the evils [federal campaign finance regulation] seeks to remedy upstream" is drawn from S. REP. NO. 689, 93d Cong., 2d Sess. 2, 6 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 5587, 5592, where the metaphor was used in the context of explaining the desirability of public funding for presidential primary, as well as general election, campaigns.

[FN56]. Act of January 26, 1907, ch. 420, 34 Stat. 864.

[FN57]. Act of June 25, 1910, ch. 392, 36 Stat. 822; Act of Aug. 19, 1911, ch. 33, 37 Stat. 25; Act of Oct. 16, 1918, ch. 187, 40 Stat. 1013. For an extensive discussion of the history of the F.E.C.A.'s precursors, see [United States v. UAW, 352 U.S. 567, 570-75 \(1957\)](#). See also Nahra, [Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities](#), 56 FORDHAM L. REV. 53, 60-67 (1987).

[FN58]. Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1070.

[FN59]. One Senator remarked:

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

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

[FN60]. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at [2 U.S.C. § 431-54 \(1988\)](#)).

[FN61]. Revenue Act of 1971, Pub. L. No. 92-178, §§ 701-703 & 801-802, 85 Stat. 497, 560-74.

[FN62]. Federal Election Campaign Act Amendments of [1974, Pub. L. No. 93-443](#), 88 Stat. 1263. Federal Election Campaign Act Amendments of [1976, Pub. L. No. 94-283](#), 90 Stat. 475; Federal Election Campaign Act Amendments of [1979, Pub. L. No. 96-187](#), 93 Stat. 1339.

[FN63]. See, e.g., S. REP. NO. 689, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 5587, 5591 ("only way in which Congress can eliminate reliance on large private contributions and still ensure the adequate presentation to electorate of opposing viewpoints of competing candidates is through comprehensive public financing"); Federal Election Reform: Hearings Before the Subcomm. on Elections of the Comm. on House Administration, 93d Cong., 1st Sess. 229 (1973) (statement of Morris K. Udall, Rep., Ariz.) ("The most obviously desirable reform of the existing law is the enactment of strict limits on individual campaign contributions. Ambassadorships should not be up for sale. No one, regardless of his motives, should have the kind of clout that a \$1 million contribution buys."); id. at 309 (statement of Donald

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J. Mitchell, Rep., N.Y.) ("If the so-called funny- money, the money from questionable sources, the money with strings attached, the unreported money, were eliminated, we could be well on the way to restoring confidence in our public officials and the system."); 120 Cong. Rec. 10,348 (1974) (statement of Sen. Clark):

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

Many people across this country, feel disillusioned, frustrated, and angry. They are upset about the energy situation and the high profits of the oil companies, but they become even angrier when they learn that oil companies financed a significant part of the President's re-election campaign.

At the heart of that public distrust is a fundamental suspicion of the political process that provides for the election of public officials heavily dependent on private contributions. "You don't get something for nothing," as the saying goes

[FN64]. [2 U.S.C. § 441b \(1988\)](#).

[FN65]. *Id.*

[FN66]. [2 U.S.C. § 441e\(a\) \(1988\)](#).

[FN67]. No person may contribute more than \$5,000 per year to a particular political committee. [2 U.S.C. § 441a\(a\)\(1\)\(c\) \(1988\)](#). The limit on individual contributions to an "authorized" political committee is \$1,000 per year. [2 U.S.C. § 441a\(a\)\(1\)\(A\) \(1988\)](#). An "authorized committee" is a political committee that has been authorized in writing by a candidate to receive contributions or make expenditures on his behalf. [2 U.S.C. § 431\(6\) \(1988\)](#); [11 C.F.R. §§ 100.5\(f\)\(1\), 102.13 \(1989\)](#).

The political committee, like any other "person" under the Act, may contribute no more than \$1,000 per election to a particular candidate. [2 U.S.C. § 441a\(a\)\(1\)\(A\) \(1988\)](#). [Section 431\(11\)](#) defines "person" to include "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons [except the Federal Government]." A multicandidate political committee may make contributions up to \$5,000 per election. [2 U.S.C. § 441a\(a\)\(2\)\(A\) \(1988\)](#). A multicandidate committee is one which has received contributions for Federal Elections from more than 50 people, has made contributions to five or more Federal candidates, and has been registered as a political committee for more than six months. [11 C.F.R. § 100.5\(e\)\(3\) \(1989\)](#).

[FN68]. See *supra* note 67.

[FN69]. *Riley*, *supra* note 32.

[FN70]. *Id.*

[FN71]. Edsall, IRS Audits Freedom Council: Group Closely Tied to Evangelist's Presidential Bid, *Wash. Post*, Oct. 18, 1986, at A10, col. 1; Freedom Council Folds, *Wash. Post*, Sept. 30, 1986, at A5, col. 1.

[FN72]. PUBLIC POLICY AND FOUNDATIONS, *supra* note 7, at 55.

[FN73]. *Id.* at 103 & 115.

[FN74]. S. REP. NO. 689, 93d Cong., 2d Sess. 1 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 5587, 5587-88.

[FN75]. H.R. REP. NO. 564, 92d Cong., 1st Sess. 4 (1971); S. REP. NO. 689, 93d Cong., 2d Sess. 2 (1974).

[FN76]. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

[FN77]. *Id.* at 67 (quoting *Burroughs v. United States*, 290 U.S. 534, 548 (1934)).

[FN78]. [2 U.S.C. § 433 \(1988\)](#).

[FN79]. [2 U.S.C. § 432\(c\) \(1988\)](#).

[FN80]. [2 U.S.C. § 434 \(1988\)](#).

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[FN81]. [Payments Received for Testing the Waters Activities; Transmittal to Congress \(Final Rule\)](#), 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985). A potential candidate who is "testing the waters" may receive contributions or make expenditures in excess of \$5,000 for that purpose without triggering "candidate" status. Legitimate "testing the waters" activities include conducting polls, telephone calls, and travel to determine whether an individual should become a candidate. [11 C.F.R. §§ 100.7\(b\)\(1\)\(i\), 100.8\(b\)\(1\)\(i\) \(1989\)](#).

[FN82]. *Id.*

[FN83]. [2 U.S.C. § 441a\(b\) \(1988\)](#).

[FN84]. Prior to the 1985 amendments, the contribution amount and source limitations of the F.E.C.A. applied only after an individual became a candidate. Fed. Election Comm'n Adv. Op. No. 1982-19, Fed. Election Camp. Fin. Guide (CCH) ¶ 5669; Fed. Election Comm'n Adv. Op. No. 1983-9, Fed. Election Camp. Fin. Guide (CCH) ¶ 5714. The limitations were suspended during the testing the waters phase; once candidacy was triggered, however, receipts and disbursements for testing the waters became "contributions" and "expenditures" subject to the Act's limits. As a result, any excess contributions or contributions from illegal sources had to be repaid immediately.

[FN85]. See, e.g., Oversight Hearings, *supra* note 1, at 289, 291 (testimony of John R. Wallace, Counsel, North Carolina Democratic Party); *id.* at 335 (statement of Robert O. Bothwell, Executive Director, National Committee for Responsive Philanthropy); *id.* at 5 (statement of Rep. Richard Schulze); *id.* at 152 (statement of Leonard L. Silverstein).

[FN86]. See *id.* at 234 (testimony of former Commissioner Cohen) ("The I.R.S. won't call very many in this area, simply because we are dealing with an under staffed, under manned, under funded organization, with this huge workload."). But see *id.* at 104-13 (testimony of Lawrence B. Gibbs, Commissioner of Internal Revenue) (asserting that resources and processes of I.R.S. are adequate for effective enforcement).

[FN87]. Riley, *supra* note 32 (quoting former I.R.S. Commissioner Sheldon Cohen). See also Oversight Hearings, *supra* note 1, at 234 (testimony of former Commissioner Cohen) ("The major function of the I.R.S. is to bring in revenue and an exempt function is specifically designed not to bring in revenue. Therefore, no matter how you enforce it, you are not going to get enough money out of it to spit at, to put it crudely.").

[FN88]. [I.R.C. § 6033 \(1988\)](#) requires exempt organizations (with certain specified exceptions) to file an annual information return. The Form 990 annual information return includes detailed information about the organization's financial support, assets and liabilities, activities and expenditures, and directors, managers and highly compensated employees and independent contractors. Some thought that the Form 990 asked for too little information to allow an effective assessment of the political activities of exempt organizations. See, e.g., Oversight Hearings, *supra* note 1, at 5 (statement of Rep. Richard Schulze).

Form 990 is open to public inspection, although the portion of the form which identifies substantial contributors is not. See Internal Revenue Service, Instructions for Form 990, at 3.

[FN89]. [I.R.C. § 501\(c\)\(3\) \(1989\)](#). The prohibition on private inurement forbids distribution, direct or disguised, of the organization's net earnings. Private inurement questions arise where an organization's activities result in financial benefit to an insider. Typically, the private inurement prohibition comes into play when control of an organization is vested very narrowly--often in the hands of the organization's founder and members of his family. See, e.g., [Birmingham Business College v. Commissioner](#), 276 F.2d 476 (5th Cir. 1960); [Best Lock Corp. v. Commissioner](#), 31 T.C. 1217 (1959); [Labrenz Found. v. Commissioner](#), 33 T.C.M. (CCH) 1374 (1974). The benefit may be direct, as when the organization pays excessive salary or rent to an insider, see, e.g., [Kenner v. Commissioner](#), 33 T.C.M. (CCH) 1239 (1974); [Texas Trade School v. Commissioner](#), 30 T.C. 642 (1958), *aff'd*, 272 F.2d 168 (5th Cir. 1959); or makes loans on terms clearly advantageous to the insider and unfavorable to the organization, see, e.g., [Founding Church of Scientology v. United States](#), 412 F.2d 1197 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1009 (1970). Or it may be indirect, as when the organization establishes facilities which are used to "materially enhance" the insider's profession and income. See, e.g., [Cranley v. Commissioner](#), 20 T.C.M. (CCH) 20 (1961); [Harding Hosp., Inc. v. United States](#), 505 F.2d 1068 (6th Cir. 1974); [Rev. Rul. 66-277, 1966-1 C.B. 151](#).

[FN90]. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 1976).

[FN91]. See Shogan, *supra* note 33, at 1; Fly, *supra* note 30, at 60, 62.

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[FN92]. See, e.g., Perry, A Congressman Abroad: Kemp Visits Leaders In Europe to Bolster His Presidential Prospects, Wall St. J., Feb. 18, 1986.

[FN93]. The I.R.S. has explained that prohibited inurement occurs "where the financial benefit represents a transfer of the organization's financial resources to an individual solely by virtue of the individual's relationship with the organization, and without regard to accomplishing exempt purposes." [Gen. Couns. Mem. 38,459 \(Jul. 31, 1980\)](#). See also e.g., [World Family Corp. v. Commissioner](#), 81 T.C. 958, 969 (1983) ("The law places no duty on individual operating charitable organizations to donate their services; they are entitled to reasonable compensation for their efforts.").

[FN94]. The organizations were typically subject to the formal direction of a board of directors. See, e.g., CENTER FOR A NEW DEMOCRACY, ANNUAL REPORT 1985-86, at 1, reprinted in Oversight Hearings, supra note 1, at 268.

[FN95]. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 1976). Violations of the prohibition on private inurement are sometimes cited as evidence that an organization is pursuing private rather than public interests and is, therefore, not "operated exclusively" for exempt purposes. The requirement, however, is broader. See, e.g., [Retired Teachers' Legal Defense Fund v. Commissioner](#), 78 T.C. 280, 287 (1982) ("Yet, while incorporating some of the same elements, the [prohibition on private inurement] specified in the statute deals with devolvement of net earnings to certain interested individuals. Although an organization may not benefit those individuals financially, it still may emphasize a private purpose which . . . is contrary to being organized and operated exclusively for an exempt purpose."). It mirrors the common law principle that "charitable" activity must benefit a broad, indefinite class. See, e.g., [Sound Health Ass'n v. Commissioner](#), 71 T.C. 158, 181-82 nn.8-10 (1978). See G. BOGERT, TRUSTS § 54 (6th ed. 1987).

One form of disqualifying private benefit is found where the benefit of an organization's activity flows to too narrow and definite a class. See, e.g., [Retired Teachers' Legal Defense Fund, Inc. v. Commissioner](#), 78 T.C. 280, 290 (1982) (primary function was to serve members' property interests); [Ginsberg v. Commissioner](#), 46 T.C. 47, 55 (1966) (operations of dredging company largely benefited adjoining property owners; public benefit was incidental); [Baltimore Regional Joint Bd. Health & Welfare Fund v. Commissioner](#), 69 T.C. 554, 558 (1978) (benefit of organization's activities limited to too narrow a class, i.e. union members). Cf. [Sound Health Ass'n v. Commissioner](#), 71 T.C. 158, 185 (1978) ("class of persons eligible for membership . . . is practically unlimited," therefore, organization not operated for private interests, even though services are largely limited to members). This objection has sometimes been raised in the context of organizations which base their claim to exempt "educational" status on their collection, generation, and dissemination of information. Exempt status has been denied where the limited nature of the organization's audience suggests that the organization's activities provide private rather than public benefits. See, e.g., [Rev. Rul. 69-632, 1969-2 C.B. 120](#); [Rev. Rul. 70-641, 1970-2 C.B. 119](#). Cf. [Rev. Rul. 71-506, 1971-2 C.B. 233](#); [National Ass'n for the Legal Support of Alternative Schools v. Commissioner](#), 71 T.C. 118, 122-23 (1978). This variety of private benefit is not implicated in the think tank situation.

[FN96]. In general, it is impossible to separate a founder's motivation and personal commitment to the ideas developed and disseminated by an organization with which he is affiliated from the public benefit which is provided by the exploration and exposition of ideas. In the law of tax exemption, as in the common law of charitable trusts, "[t]he dilemma posed by the fact that an advocacy organization might also serve the selfish purposes of its organizers or contributors is solved by focusing upon the substantial resulting benefit to society from the free debate of ideas, regardless of who finances that debate." Thompson, The Availability of Federal Educational Tax Exemption for Propaganda Organizations, 18 U.C. DAVIS L. REV. 487, 512-14 (1985). See also G. BOGERT & G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 366 (2d ed. 1964). Exempt status has sometimes been denied to organizations which were formed and operated purely to expose and promote the ideas of their founder. Generally, however, this sort of disqualification for pursuing private rather than public interests has been reserved for situations where the founder's ideas were either quite bizarre or had the character of a personal vendetta. See, e.g., [Gondia Corp. v. Commissioner](#), 44 T.C.M. (CCH) 590, 591 (1982) (Organization's proposed purposes were "to bring together all the possible human usage, speech, deqsterite, image music, movement and balance nutrition" and "to dimensionale project the 96 letter alphabet adeim, and maintain the course necesare to record, store assain, interpret instrumentale, portray and categorize using the format; storage librare, introduction and corporate scale negotiation settlements, based on the tolerance of the human universe." The I.R.S. denied the organization's application for § 501(c)(3) exempt status on the ground that the organization's real purpose was to promote commercially the inventions of the founder.); [Save the Free Enter. Sys., Inc. v. Commissioner](#), 42 T.C.M. (CCH) 515, 518 (1981) (Organization served a private rather than a public interest because the sole function of its publications was "to advance [founder's] personal attack on various agencies and institutions Most of the information in the administrative record repeatedly refers to [founder's] purported persecution by these groups and his legal action against them."); [Gen. Couns. Mem. 36,323 \(June 26, 1975\)](#); [Gen. Couns.](#)

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[Mem. 33,771 \(Mar. 15, 1968\)](#); [Rev. Rul. 68-263, 1968-1 C.B. 256](#).

Where close identification of an individual with less idiosyncratic ideas disseminated by the organization has been held to confer substantial private benefit, there has been an independent reason for denial of exempt status. In one case, it was clear that the I.R.S. was disturbed by the fact that the organization's issue explorations were intended to lead to legislative proposals. [Rev. Rul. 74-117, 1974-1 C.B. 128](#) (organization formed to develop policy and budget proposals for governor-elect). In another, the court's real concern appears to have been the commercial character of the organization's publishing activities, although the disapproval was expressed in terms of objection to the organization's promotion of the founder's private interest by providing an outlet for the exposition of his theories on "the end of time." [Christian Manner Int'l v. Commissioner, 71 T.C. 661, 669 \(1979\)](#).

Where organizations have been disqualified for exempt status because of the benefits their activities provided to individual careers, the benefits have been far more direct and immediate than the sort of image and visibility enhancement which the think tanks provide for the politicians who are associated with them. For example, a co-op art gallery which exhibited and sold its members' work was denied exemption on the grounds that it was primarily "a vehicle for enhancing their careers," and thus served private interests, [Rev. Rul. 71-395, 1971-2 C.B. 228, 228](#). See also [Rev. Rul. 76-152, 1976-1 C.B. 152](#) (major activity of art gallery served private interests of artists whose works were exhibited and sold, even though artists had no control over what was displayed); [Rev. Rul. 61-170, 1961-2 C.B. 112](#) (nurses' association served substantial private purposes by operating employment registry for members); [Cranley v. Commissioner, 20 T.C.M. \(CCH\) 20, 25 \(1961\)](#) (doctor's "practice and income the therefrom were materially enhanced" by establishment of laboratory by "research foundation"). However, the less direct benefits to reputation and recognition which result from a gallery's display of an artist's works do not constitute the kind of private benefit that disqualifies an organization for exempt status. [Rev. Rul. 66-178, 1966-1 C.B. 138](#). See also [Rev. Rul. 77-367, 1977-2 C.B. 193](#) (no substantial private benefit involved in naming historic village after corporate donor); [Rev. Rul. 66-358, 1966-2 C.B. 218](#) (donor corporation's use of park's scenic view as brand symbol not disqualifying private benefit).

[FN97]. A recent Tax Court opinion raises the private benefit issue from another angle. In [American Campaign Acad. v. Commissioner, 92 T.C. 1053 \(1989\)](#), the court considered whether the operation of a school to train individuals to function in key campaign positions could qualify as a [§ 501\(c\)\(3\)](#) educational activity and upheld the I.R.S.'s conclusion that the school operated for the substantial nonexempt purpose of benefiting private interests of the Republican entities and candidates who hire the program's graduates.

This new view of private benefit analysis should not alter the conclusion in the case of the think tanks. First, the nature of their educational activity is distinguishable from that of the campaign academy. The latter involved training in the skills necessary to pursue partisan electoral success; the former involves education of the public on substantive issues.

More important, however, is that the Tax Court's analysis is indefensible, although its result may be sound. In holding that "Republicans" are too definite a class of secondary beneficiaries to support exemption, the court baldly stated, but failed to explain why, training people to work for Republican organizations and campaigns provides a more definite secondary benefit to private interests than does training people for work in the banking industry. [92 T.C. at 1077](#) (purporting to distinguish [Rev. Rul. 68-504, 1968-2 C.B. 211](#)). See also [Rev. Rul. 72-101, 1972-1 C.B. 144](#) and [Rev. Rul. 67-72, 1967-1 C.B. 125](#) (each granting [§ 501\(c\)\(3\)](#) status to a program to train individuals working or desiring to work in a particular industry, and funded by industry employers).

The court makes repeated references to the partisan focus of the campaign academy, but except to say that "Republicans" comprise a finite, albeit large, class, does not explicate the significance of the observation. In fact, the partisan focus of the academy provides a legitimate ground for denial, although it is a ground the court overlooks. At common law, trusts to promote the fortunes of a particular political party are not charitable. See, e.g., [Restatement \(Second\) of Trusts § 374\(k\) \(1959\)](#). Because consistency with common law notions of charity is a threshold for qualification as a [§ 501\(c\)\(3\)](#) organization, see [Bob Jones Univ. v. Simon, 416 U.S. 725 \(1983\)](#), the I.R.S. and Tax Court denial of exempt status to the American Campaign Academy is justified, although the court's explanation of the result is highly problematic.

Properly analyzed, the American Campaign Academy result does not threaten the think tanks. They are organized and operated to engage in discussion and public education on issues of public importance. That their activity may ultimately contribute to the political success of an individual who hopes eventually to be the flag-bearer for a political party does not convert their activity into the promotion of the party's fortunes. Common law concepts of charity do encompass situations where the objectives of a group or a gift are described in terms of furthering an otherwise charitable cause rather than promoting the success of a particular political party, even though a particular party may be identified with the cause or another with its opposition. See *In re Cahan's Estate, 122 N.Y.S.2d 716 (Surrogate's Ct. 1953)*; A. SCOTT, *THE LAW OF TRUSTS* § 374.6 (4th ed. 1989); [Restatement \(Second\) of Trusts § 374 \(1959\)](#); Note, *Charitable Trusts for Political Purposes*, 37 Va. L. Rev. 988, 993 (1951). In fact, even where a particular political party has been identified as the vehicle

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through which broader charitable or educational objects are to be pursued, it has been held that a gift or trust dedicated to pursuit of those objects may be charitable. See, e.g., *In re Scowcroft* [1898] 2 Ch. 638.

[FN98]. See [Rev. Rule 81-95, 1981-1 C.B. 332; Gen. Couns. Mem. 39,414 \(Feb. 29, 1984\)](#) (members, acting for organization, actively participating in fundraising and door-to-door canvassing, violate prohibition).

[FN99]. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended 1976). The rule has been that any endorsement or opposition of a candidate violates the proscription, even if it is neutral in the sense of being nonpartisan and based on objective criteria. See, e.g., [Rev. Rul. 67-71, 1967-1 C.B. 125](#) (organization's evaluation and support of school board candidates in nonpartisan election is prohibited campaign intervention, "even though its process of selection may have been completely objective and unbiased and was intended primarily to educate and inform the public about the candidates"); [Gen. Couns. Mem. 36,557 \(Jan. 19, 1976\)](#) (organization violated prohibition when it publicized names of candidates who had or had not signed organization's code of campaign ethics); [Association of the Bar v. Commissioner, 858 F.2d 876, 881 \(2d Cir. 1988\)](#). See also [Gen. Couns. Mem. 34,071 \(Mar. 11, 1969\)](#) (compilation and publication of statements made by others "could be said to constitute political intervention").

[FN100]. [Section 501\(c\)\(3\)](#) organizations may engage in non partisan voter registration activities, offer a neutral forum within which candidates may express their positions, see, e.g., [Rev. Rul. 86-95, 1986-2 C.B. 73 and Rev. Rul. 74-574, 1974-2 C.B. 161](#) (radio station offering air time to candidates on a neutral basis), or engage in neutral collection and dissemination of information on the positions of elected officials or candidates, see, e.g., [Rev. Rul. 78-248, 1978-1 C.B. 154; Rev. Rul. 80-282, 1980-2 C.B. 178; Gen. Couns. Mem. 39,441 \(Sept. 27, 1985\)](#), without running afoul of the campaign participation bar. Dissenting in [Association of the Bar v. Commissioner, 89 T.C. 599, 616 \(1987\)](#), Judge Chabot characterized these permissible "voter education" activities as those which "focus on giving voters and candidates access to each other on an impartial basis, that is, access to and by all the candidates and not merely those favored by the organization's leaders." Judge Chabot's position prevailed when the case went to the Second Circuit. [Association of the Bar v. Commissioner, 858 F.2d 876 \(2d Cir. 1988\)](#).

[A] forum held for the purpose of educating and informing the voters, which provides fair and impartial treatment of candidates, and which does not promote or advance one candidate over another, would not constitute participation or intervention in any political campaign on behalf of or in opposition to any candidate for public office.

[Rev. Rul. 86-95, 1986-2 C.B. 73, 74](#) (sponsoring candidate forums to which all legally qualified candidates are invited, at which candidate response is sought to a wide range of questions prepared and presented by nonpartisan, independent panel, and at which sponsoring [§ 501\(c\)\(3\)](#) organization explicitly disclaims endorsement of any candidate, is neutral voter education rather than campaign intervention). On the other hand, "a forum for candidates could be operated in a manner that would show bias or preference for or against a particular candidate" and would, therefore, violate the prohibition. *Id.*

[FN101]. For example, Jack Kemp resigned from the chairmanship of the Fund for America's Future to become honorary chairman in June, 1986, then withdrew completely from the organization in December, 1986. Putman, *Kemp Removes Himself as Chairman of Fund Amid Political Charges* (The Associated Press Political Service, June 19, 1986); Fuerbringer, *Kemp Steps Down at Foundation to Avert Dispute on Election Role*, N.Y. Times, June 20, 1986, at A18, col. 1; PUBLIC POLICY AND FOUNDATIONS, *supra* note 7, at 103. Gary Hart resigned from the board of the Center for a New Democracy in April, 1987, *id.* at 90, and Bruce Babbitt resigned as chairman of American Horizons in March, 1987, *id.* at 83. Another typical move was for the organization to close its doors as its founder moved toward candidacy. Kemp's Fund for an American Renaissance discontinued its operations by February, 1987. Riley, *supra* note 32, at 1, 8, 10. American Horizons closed down shortly after Babbitt's resignation from the organization's board. PUBLIC POLICY AND FOUNDATIONS, *supra* note 7, at 37. The Paul Douglas Foundation, founded by Senator Paul Simon, disbanded before it began operations. *Id.* at 12. In at least one case, an organization closed with the apparent encouragement of the I.R.S.; the Freedom Council's suspension of operations in October, 1986, coincided, at least in time, with the initiation of an I.R.S. audit of the group. Edsall, *IRS Audits Freedom Council: Group Closely Tied to Evangelist's Presidential Bid*, Wash. Post, Oct. 18, 1986, at A10, col. 1.

[FN102]. See *infra* notes 116-17 and accompanying text.

[FN103]. Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended 1976). Some politicians established exploratory campaign committees to "test the waters," see *supra* notes 81-84 and accompanying text, while their think tanks were still operating. Kemp set up an exploratory committee in early December, 1986. Taylor, *Kemp Takes Presidential Step; Exploratory Panel is Set Up With Reagan Veterans*, Wash. Post, Dec. 2, 1986, at A3, col. 2. Robertson's explorations began officially in July,

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1986, during the height of the Freedom Council's operations in Michigan. Rothberg, *Michigan Opening Complicated Presidential Process* (The Associated Press Political Service, July 26, 1986); Edsall, *Robertson Sets Up in Michigan*, Wash. Post, July 18, 1986, at A5, col. 2. It might be argued that establishment of an exploratory committee is an indication that an individual is "offering himself" as a candidate. However, under federal election campaign law, the activities of an exploratory committee, by definition, may be undertaken only on behalf of someone who does not yet "offer himself" as a contestant for office. Since the concept of "exploratory committee" is entirely a creature of federal election campaign law, it seems inappropriate to attach significance to the existence of such a committee in any terms other than those of the law which creates and defines it.

On the other hand, the existence of a draft committee might legitimately raise an inference that an individual is being "proposed by others as a contestant for . . . elective public office." Two "draft Robertson" committees had registered with the F.E.C. by July, 1986. See *id.* A draft committee is formed by people other than the potential candidate, with the object of convincing him to run for office and encouraging his political supporters to rally. Taken literally, the prohibition on activity in support of an individual who is "proposed by others as a contestant for . . . elective public office," Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (as amended 1976), is violated by any nonneutral presentation of an individual who is supported by a draft committee. Despite the apparent violation of the literal terms of the regulation, it seems both unfair and inconsistent with the current interpretation of the prohibition to limit an organization's relationship with an individual simply because some third party has established a draft committee on his "behalf." Indeed, it seems unwarranted to circumscribe the relationship between the organization and its founder on the basis of any conclusion that he is being "proposed by others" as a candidate for office, unless the organization is, itself, somehow involved in the "proposing."

[FN104]. In a background document prepared in anticipation of the Oversight Subcommittee Hearings in March, the Staff of the Joint Committee on Taxation noted:

Clear standards do not exist for determining precisely at what point an individual becomes a candidate for purposes of the rule. On the one hand, once an individual declares his candidacy for a particular office, his status as a candidate is clear. On the other hand, the fact that an individual is a prominent political figure does not automatically make him a candidate, even if there is speculation regarding his possible future candidacy for particular offices.

JOINT COMMITTEE ON TAXATION, 100TH CONG., 1ST SESS., LOBBYING AND POLITICAL ACTIVITIES OF TAX-EXEMPT ORGANIZATIONS 14 (Joint Comm. Print 1987).

[FN105]. See, e.g., [Old Colony Trust Co. v. Welch](#), 25 F. Supp. 45 (D.C. Mass. 1938) (antivivisection); [Weyl v. Commissioner](#), 48 F.2d 811 (2d Cir. 1931) (promoting study of political, economic and social problems); [Cochran v. Commissioner](#), 78 F.2d 176 (4th Cir. 1935) (work against alcoholism).

[FN106]. [Section 501\(c\)\(3\)](#) extends exempt status only to organizations "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation." [I.R.C. § 501\(c\)\(3\) \(1989\)](#). While the shortcomings of the lobbying limitations could conceivably create problems for any issue-oriented organization, see, e.g., Chisolm, [Exempt Organization Advocacy: Matching the Rules to the Rationales](#), 63 IND. L.J. 201 (1987-88), they have not played a significant part in the criticisms of political aspirants' think tanks.

[FN107]. The earliest Treasury regulations defining "education" for purposes of exemption excluded dissemination of "controversial or partisan propaganda." Treas. Reg. Art. 517 (Revenue Act of 1918) (1919), in T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919). But since 1959, Treasury regulations have specified that "[t]he fact that an organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under [section 501\(c\)\(3\)](#)" and have explicitly provided that "an organization may be educational even though it advocates a particular position or viewpoint." Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)(b) (1989).

Treasury regulations state that the term "educational" applies to an organization which advocates a particular viewpoint only "so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion." Treas. Reg. §§ 1.501(c)(3)-1(d) (1989). See also EXEMPT ORGANIZATIONS HANDBOOK, *supra* note 40, § 354.9 ¶ (18) ("Organizations doing research or educating the public on controversial public issues must stick to the reasoned approach and avoid unsupported opinion".)

The District of Columbia Circuit has held that the full and fair exposition standard is unconstitutionally vague. [Big Mama Rag, Inc. v. United States](#), 631 F.2d 1030, 1039 (D.C. Cir. 1980). The same court, however, implicitly approved the Service's use of the "methodology test" to cure the vagueness problem. [National Alliance v. United States](#), 710 F.2d 868, 875-76 (D.C. Cir. 1983). Following the signal of the National Alliance dictum, the I.R.S. has adopted the "methodology test" as official

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policy. [Rev. Proc. 86-43, 1986-2 C.B. 729](#). Under the test, the determination as to whether an organization's materials are educational turns on whether "a significant portion" of the materials present "viewpoints unsupported by a relevant factual basis" whether supposedly factual material is "distorted;" whether the materials use "particularly inflammatory and disparaging terms" and express "conclusions based more on strong emotional feelings than objective factual evaluations;" and whether the materials are "aimed at developing an understanding on the part of the addressees." [National Alliance, 710 F.2d at 874](#).

Some of the think tank organizations have interpreted this limit on the definition of "educational" to suggest that their presentations ought to incorporate a partisan balance, sometimes expressed in terms such as, "we are not calling for a Republican anything," or "[a]s long as you don't say this is Republican or Democratic policy, you're O.K." PUBLIC POLICY AND FOUNDATIONS, *supra* note 7, at 20-21 (giving several examples of this view and quoting, respectively, Don Eberly of the Fund for an American Renaissance and a spokesperson for the American Opportunity Foundation, an organization much like the think tanks which are the subject of this Article, although its Congressman-founder Newt Gingrich has expressed no presidential aspirations).

[FN108]. See, e.g., [Rev. Rul. 75-285, 1975-2 C.B. 203](#); [Rev. Rul. 68- 70, 1968-1 C.B. 248](#) (educating employees and employers, respectively, about racial discrimination in employment); [Rev. Rul. 67-391, 1967-2 C.B. 190](#) (disseminating information on community land use plan).

[FN109]. See, e.g., [Rev. Rul. 72-560, 1972-2 C.B. 248](#) (advocating environmental preservation); [Rev. Rul. 72-228, 1972-1 C.B. 148](#) (seeking equal rights for women). The I.R.S. has granted exempt status to organizations which focus on a single issue, see, e.g., [Rev. Rul. 78-305, 1978-2 C.B. 172](#); [Rev. Rul. 72-560, 1972-2 C.B. 248](#); [Rev. Rul. 68-15, 1968-1 C.B. 244](#); [Rev. Rul. 67-250, 1967-2 C.B. 182](#); as well as those with a broader agenda, see, e.g., [Rev. Rul. 66-256, 1966-2 C.B. 210](#). The courts have also recognized that investigation and discussion of issues of public policy are appropriate undertakings for a tax-exempt organization. See, e.g., [National Ass'n for the Legal Support of Alternative Schools v. Commissioner, 71 T.C. 118 \(1978\)](#). Cf. [League of Women Voters v. United States, 180 F. Supp. 379, 383 \(Ct. Cl. 1960\)](#) (finding that "the hours spent by some 128,000 women in more than 700 local Leagues, deliberating and discussing what position, if any, should be taken on questions of public interest, are spent in preparation for the influencing of legislation" and are, therefore, not the "pure and purposeless research and self-education" that qualifies for [§ 501\(c\)\(3\)](#) exempt status), cert. denied, [364 U.S. 822 \(1960\)](#).

[FN110]. [Rev. Rule. 78-248, 1978-1 C.B. 154](#). Implied endorsement or disapproval may be found in biased wording of questions or emphasis on a particular issue, where agreement or disagreement with the organization's preferred position is apparent, even if unspoken.

[FN111]. [Rev. Rul. 80-282, 1980-2 C.B. 178](#). Selective distribution to the state or district of a particularly high- or low-rated individual will likely be seen as an indication that the materials are intended to reflect on the individual as a potential candidate. *Id.* Even more than geographic range of distribution, the I.R.S. looks to the timing of an organization's presentations as an indication of campaign-relatedness. Where the organization's non-neutral materials are distributed during a campaign or in an election year, the I.R.S. has indicated that the materials are likely to be seen as intervention intended to influence voter acceptance or rejection of a candidate, and, therefore, violate the [§ 501\(c\)\(3\)](#) prohibition on campaign participation. [Rev. Rul. 78-248, 1978-1 C.B. 154](#); [Rev. Rul. 80-282, 1980-2 C.B. 178](#); [Gen. Couns. Mem. 39,441 \(Sept. 27, 1985\)](#).

[FN112]. The particular timing variables of [Revenue Rulings 78-248](#) and [80-282](#) do not easily extrapolate to the context of a presidential campaign, because the rhythm of the congressional and presidential election cycles is different. It is probably a correct observation that people start running immediately after one presidential election for the next. See, e.g., Alexander, *supra* note 39, at 62 ("[T]he traditional metaphor of a 'campaign season' may now be obsolete. In this era of seemingly permanent campaigning, a more appropriate reference may be to the presidential campaign epoch."). Nonetheless, the equally accurate observation that issues and candidates are inextricably intertwined, [Buckley v. Valeo, 424 U.S. 1, 42 n.50 \(1975\)](#) (*per curiam*), suggests that it would be as ill-advised to treat the presidential campaign period as perpetual as it would be to treat the two-year Congressional incumbency as a two-year reelection campaign period, although in many important ways it probably is just that. The Presidential Primary Matching Payment Account Act identifies the beginning of the calendar year preceding the presidential election year as the point at which the matching payments provisions of the Act take effect. That is, it is at that point in time that contributions to an individual who qualifies as a candidate for party presidential nomination will qualify for matching federal funds. [26 U.S.C. § 9034 \(1982\)](#). For purposes of interpreting and applying the [§ 501\(c\)\(3\)](#) campaign intervention prohibition, defining the "official" campaign season to coincide with these public funding provisions

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seems both reasonable and efficient. Even then, the "express advocacy" standard of the F.E.C.A. ought to be used to determine whether an organization's statements are campaign intervention for purposes of [§ 501\(c\)\(3\)](#). See Chisolm, *supra* note 106, at 292-94.

[\[FN113\]](#). An exception might be the concentrated activity of Pat Robertson's Freedom Council in the months leading up to Michigan's 1986 Republican convention precinct delegate election. See, e.g., Robertson Claims He is Winning in Michigan (The Associated Press Political Service, Aug. 6, 1986); Johnson, Robertson Takes His Campaign to Lansing (The Associated Press Political Service, Jul. 30, 1986). Because that election had special significance as a first step in the 1988 presidential campaign, the intensive work there of the Freedom Council could arguably constitute the kind of geographic targeting that indicates campaign participation. The Michigan Republican party changed in 1983 from a presidential primary to a multi-stage delegate selection process. Delegates chosen in the 1986 precinct delegate elections and others they help to choose select delegates to the state party convention. The state convention, in turn, chooses the state's 77-member delegation to the 1988 Republican convention. See, e.g., Skidmore, Robertson Eyes Michigan Before Deciding on Presidential Bid (The Associated Press Political Service, May 16, 1986). The precinct delegate contest is seen as one of the nation's earliest indicators of the strength of potential candidates, see, e.g., Vega, GOP Estimates 9,600 Precinct Delegate Candidates Filed (The Associated Press Political Service, May 28, 1986), exactly the result which the Michigan Republican party sought when it switched to this system. The response of potential candidates certainly seems to fulfill the Michigan Republicans' hopes. In addition to Robertson, both Bush and Kemp were very active in Michigan during the spring of 1986, although neither used a think tank as the vehicle for that activity. See, e.g., Rothberg, Michigan Opening Complicated Presidential Process (The Associated Press Political Service, Jul. 26, 1986).

Even if the Freedom Council was not engaging in campaign activity on behalf of Robertson, its apparent intervention in state and local election campaigns would violate the [§ 501\(c\)\(3\)](#) prohibition, which is not limited to federal contests. See Rizzo, Robertson Forces Pledge Low Profile During Campaign (The Associated Press Political Service, Aug. 21, 1986) (describing Freedom Council activity with respect to state supreme court, state board of education, attorney general and secretary of state elections); Newspaper: Bush Leads in Number of Michigan Precinct Delegate Supporters (The Associated Press Political Service, Jul. 11, 1986) ("Robertson said in a letter made public Thursday that his Freedom Council's success in recruiting precinct delegate candidates has given 'believers the tools they needed' to gain control of the Michigan Supreme Court and the State Board of Education. Delegates 'have within their grasp the power to select nominees for numerous major offices in the state,' the letter said.").

[\[FN114\]](#). [2 U.S.C. § 441a\(b\) \(1988\)](#).

[\[FN115\]](#). See, e.g., sources cited *supra* notes 30-39.

[\[FN116\]](#). An individual becomes a "candidate" under the F.E.C.A. when he (or another person with his consent) receives "contributions" or makes "expenditures" in excess of \$5,000. [2 U.S.C. § 431\(2\) \(1988\)](#). An organization is a "political committee" if it receives "contributions" or makes "expenditures" in a year's time which, in the aggregate, exceed \$1,000. [2 U.S.C. § 431\(4\)\(A\) \(1988\)](#).

[\[FN117\]](#). Or non-cash equivalent. F.E.C.A. defines "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value" or "the payment by any person of compensation for the personal service of another person which are rendered to a political committee without charge," [2 U.S.C. § 431\(8\) \(1988\)](#), and "expenditure" to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value" or "a written contract, promise, or agreement to make an expenditure," [2 U.S.C. § 431\(9\) \(1988\)](#). Each definition lists a number of exceptions from the general rule.

[\[FN118\]](#). [2 U.S.C. § 431\(8\)-\(9\) \(1988\)](#).

[\[FN119\]](#). [Orloski v. F.E.C., 795 F.2d 156, 167 \(D.C. Cir. 1986\)](#).

[\[FN120\]](#). See *supra* notes 81-84 and accompanying text; Fed. Election Comm'n Adv. Op. No. 1986-6, Fed. Election Camp. Fin. Guide (CCH) ¶ 5849; cf. Fed. Election Comm'n Adv. Op. No. 1985-40, Fed. Election Camp. Fin. Guide (CCH) ¶ 5842.

[\[FN121\]](#). Fed. Election Comm'n Adv. Op. No. 1980-89, Fed. Election Camp. Fin. Guide (CCH) ¶ 5537.

[\[FN122\]](#). Fed. Election Comm'n Adv. Op. No. 1986-6, Fed. Election Camp. Fin. Guide (CCH) ¶ 5849.

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[FN123]. See Fed. Election Comm'n Adv. Op. No. 1981-37, Fed. Election Camp. Fin. Guide (CCH) ¶ 5623; Fed. Election Comm'n Adv. Op. No. 1980-22, Fed. Election Camp. Fin. Guide (CCH) ¶ 5479; [F.E.C. v. Central Long Island Tax Reform Immediately Comm.](#), 616 F.2d 45, 52 (2d Cir. 1980).

Only rarely has the F.E.C. found the essential election-relatedness in the absence of such express advocacy or solicitations. The rare exceptions involved situations in which the fact that the participants were candidates for office was to be a point of emphasis, or was, in fact, the basis for their selection as participants. Fed. Election Comm'n Adv. Op. No. 1986-37, Fed. Election Camp. Fin. Guide (CCH) ¶ 5875 (event to be characterized as a "candidate debate"; Commission also notes no assurance that candidates won't engage in express advocacy of their own election; not clear whether this observation is essential to the outcome). See also Fed. Election Comm'n Adv. Op. No. 1979-70, Fed. Election Camp. Fin. Guide (CCH) ¶ 5448 (corporation's publication and distribution to the general public of the views of candidates, solicited in their role as candidates, would constitute a prohibited "contribution," despite absence of express advocacy of any particular election result or contribution solicitation).

Furthermore, the occasions when the F.E.C. has determined that an organization's statements that are generally favorable, but short of absolutely clear express advocacy or solicitation, may constitute expenditures or contributions have been in the context of avowedly election-focused, openly partisan organizations. See, e.g., Fed. Election Comm'n Adv. Op. No. 1984-13, Fed. Election Camp. Fin. Guide (CCH) ¶ 5759; Fed. Election Comm'n Adv. Op. No. 1988-22, Fed. Election Camp. Fin. Guide (CCH) ¶ 5932. In these circumstances the F.E.C. has been unable to find that the event had a "major purpose . . . other than the nomination or election of a candidate;" the context of the discourse was so clearly election-focused that the event could not fairly be classified as non-campaign related issue discussion. Fed. Election Comm'n Adv. Op. No. 1980-22, Fed. Election Camp. Fin. Guide (CCH) ¶ 5479. Concurring in Advisory Opinion 1988-22, Commissioner Josephiak noted that the Commission should be extremely cautious in labeling as a contribution or expenditure any activity which does not involve express advocacy. That conclusion should be reached only when the facts present a combination of activity which comes very close to express advocacy and a sponsoring organization which has avowedly candidate- or election-related purposes. Only if the message cannot be interpreted as non-election-related and only if the organization's other purposes cannot explain it should the F.E.C. find that the statement or activity has the "purpose of influencing a Federal election." Even in the context of an imminent election and even when clear candidates are involved:

The question of whether activity is a contribution or expenditure under the Act should almost never turn on subjective notions about the nature and purposes of the one engaging in it; an assertion of the Commission's jurisdiction should almost always rely upon an objective review of the nature and purposes that are reasonably evident from the activity itself.

Fed. Election Comm'n Adv. Op. No. 1988-22, Fed. Election Camp. Fin. Guide (CCH) ¶ 5932 (Josephiak, concurring)

[FN124]. Fed. Election Comm'n Adv. Op. No. 1980-22, Fed. Election Camp. Fin. Guide (CCH) ¶ 5479. See also Fed. Election Comm'n Adv. Op. No. 1977-42, Fed. Election Camp. Fin. Guide (CCH) ¶ 5313 (hosting radio talk show on public issues).

Much of the think tank activity has involved similar issue discussion. The symposium which Gary Hart chaired on the revitalization of the Texas economy in the wake of a declining oil and gas industry has obvious parallels with the town meetings to discuss the problems of the steel industry. Absent solicitation of campaign contributions or express advocacy of Hart's nomination or election, there is no basis for classifying the Center for a New Democracy's support of the program as a "contribution" or "expenditure" to influence an election. The Center's other policy discussion forums and conferences also fit the model of non-campaign related activity, despite Hart's central role in the presentations. Other think tank projects, for example, American Horizons' symposium on welfare and family policy and the Fund for an American Renaissance's series of conferences and lectures, fit this mold as well.

[FN125]. Fed. Election Comm'n Adv. Op. No. 1980-25, Fed. Election Camp. Fin. Guide (CCH) ¶ 5481 (state initiative issue).

[FN126]. Fed. Election Comm'n Adv. Op. No. 1978-72, Fed. Election Camp. Fin. Guide (CCH) ¶ 5361.

[FN127]. [11 C.F.R. § 110.12 \(1989\)](#). An elected or appointed officer of the federal government may accept up to \$2,000 as an honorarium in consideration for a speech, appearance, or article. Id.

The F.E.C. has not been particularly clear about the basis for determining whether a payment in such circumstances is an "honorarium" and when it is a "contribution." The distinction appears to turn on the intent of the payor, and "all circumstances incident to the making and receipt of a gift of money, or other thing of value, are relevant on the question of whether the gift is intended as a political contribution or as an honorarium." Fed. Election Comm'n Adv. Op. No. 1978-32, Fed. Election Camp. Fin. Guide (CCH) ¶ 5334. Certainly, "an oral or written representation contemporaneously with [the

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payment] indicating a purpose to influence [the recipient's] nomination or election to Federal office" would tend to classify the payment as a "contribution" for purposes of the F.E.C.A. *Id.* See also Fed. Election Comm'n Adv. Op. No. 1975-119, Fed. Election Camp. Fin. Guide (CCH) ¶ 5193. In a recent Advisory Opinion, the Commission held that a corporation's payment to an incumbent federal officeholder who was up for reelection to appear at a fundraising event for the corporation's political action committee would be an honorarium rather than a prohibited contribution. Fed. Election Comm'n Adv. Op. No. 1988-27, Fed. Election Camp. Fin. Guide (CCH) ¶ 5934. As evidence that the individual would be appearing in his capacity of officeholder, rather than candidate, the Commission noted that the speaker was selected because of his familiarity with the corporation's legislative interests, payment was to be directed to the speaker, rather than his campaign committee, there was to be no solicitation of campaign contributions in connection with the appearance, and any contribution which the corporation's PAC might make to the speaker would not be in consideration for his appearance at the fundraiser. *Id.*

[FN128]. Fed. Election Comm'n Adv. Op. No. 1977-27, Fed. Election Camp. Fin. Guide (CCH) ¶ 5289. The same is true of a politician's connection with other varieties of charitable organizations. See, e.g., Fed. Election Comm'n Adv. Op. No. 1980-89, Fed. Election Camp. Fin. Guide (CCH) ¶ 5537 (arts committee receptions held by incumbent member of Congress seeking reelection are not for the purpose of influencing election); Fed. Election Comm'n Adv. Op. No. 1978- 15, Fed. Election Camp. Fin. Guide (CCH) ¶ 5304.

[FN129]. Fed. Election Comm'n Adv. Op. No. 1978-56, Fed. Election Camp. Fin. Guide (CCH) ¶ 5373. This Advisory Opinion dealt with what may have been the prototype pre-presidential think tank. Philip Crane was the national chairman of the American Conservative Union prior to announcing his candidacy for the 1980 presidential nomination. The A.C.U. sponsored seminars, symposia, and other policy discussion forums. It produced publications which included material written by Crane. Before announcing as a candidate, Crane was paid for expenses incurred in connection with his work for A.C.U. After announcing, he received no further reimbursement. The organization did not specifically identify or promote Crane as a presidential candidate. The F.E.C. held that absent express advocacy of his election or solicitation for campaign contributions, Crane's continuation as chairman and continued involvement in the activities of the organization would not implicate "contributions" or "expenditures," even after Crane became an officially declared candidate.

[FN130]. Orloski v. F.E.C., 795 F.2d 156 (D.C. Cir. 1986). Orloski involved an allegation that corporate donations of food and supplies to a senior citizens' picnic constituted illegal campaign contributions. The picnic was held just before a congressional election by a "Senior Citizens Advisory Committee" which had been established several years before by an incumbent candidate whose unfavorable record on senior citizen issues put him in a position of needing to woo elderly voters. Campaign posters ringed the park, although they were not posted within the picnic area. Contributions for the event came from past political supporters. Information on social security, as well as a "senior citizens' report" bearing the candidate's name were distributed at the picnic, which was planned and attended by members of the politician's staff who were later on the campaign staff payroll. There was, however, no express advocacy at the event of the election of the Congressman or the defeat of his opponent, nor solicitation of campaign contributions. Under these circumstances, the D.C. Circuit refused to overturn the F.E.C.'s determination that the event was "nonpolitical," the picnic's purpose was other than to influence a federal election, and the corporate donations were not "contributions." *Id.* at 167.

[FN131]. Fed. Election Comm'n Adv. Op. No. 1977-54, Fed. Election Camp. Fin. Guide (CCH) ¶ 5301. See also FEC v. American Fed'n of State, County, and Mun. Employees, 471 F. Supp. 315 (D.D.C. 1979); United States v. National Comm. for Impeachment, 469 F.2d 1135 (2d Cir. 1972); Fed. Election Comm'n Adv. Op. No. 1988-27, Fed. Election Camp. Fin. Guide (CCH) ¶ 5934.

[FN132]. Again, the exception might be the Freedom Council. Despite Robertson's assertions at the time that "I'm still a non-candidate," statements by former key Freedom Council staff indicate that the organization's work was "a cover of some kind for Pat Robertson's campaign." Robertson Expects to Decide by September (The Associated Press Political Service, June 2, 1986); Babcock, Robertson Accused of Using Tax-Exempt Group for Politics: Ex-Officials Say Presidential Bid Was Aided, Wash. Post, Apr. 6, 1988, at A17, col. 1. If the organization was soliciting funds for Robertson's campaign or expressly advocating his election, then the organization was a "political committee" and Robertson a "candidate" for purposes of the F.E.C.A., like it or not, and both are subject to the sanctions prescribed by that law. See *supra* notes 123-30 and accompanying text. On the other hand, if express campaign-related activities were only in support of candidates for state offices, neither the Freedom Council nor Robertson would have had disclosure or reporting obligations under the F.E.C.A., although campaign intervention on behalf of state candidates would have the same § 501(c)(3) implications as campaign intervention on behalf of federal candidates. See *supra* notes 98-99, 113 and accompanying text.

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[FN133]. The Report and Recommendations which grew out of the March Oversight Subcommittee hearings adopted the view of the critics that "[t]he increasing use of tax-exempt organizations to benefit a political candidate . . . runs counter to Federal tax concerns and allows for the circumvention of . . . the Federal Election Campaign Act," and proposed specific measures to deal with the think tanks. SUBCOMM. ON OVERSIGHT OF THE COMM. ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, 100TH CONG., 1ST SESS., REPORT AND RECOMMENDATIONS ON LOBBYING AND POLITICAL ACTIVITIES BY TAX-EXEMPT ORGANIZATIONS 45 (Comm. Print 1987). The recommendations were embodied in H.R. 2942, The Tax Exempt Organizations' Lobbying and Political Accountability Act of 1987, which was introduced in July, 1987 by Rep. J.J. Pickle and Rep. Richard T. Schulze, chairman and ranking minority member, respectively, of the subcommittee. 133 CONG. REC. 6362, 6375 (1987).

The bill was approved by the Ways and Means Committee as an amendment to H.R. 3545, the Omnibus Budget Reconciliation Act of 1987. Comm. on Ways and Means Press Release #16-A, The Honorable Dan Rostenkowski (D., Ill.), Chairman Committee on Ways and Means, U.S. House of Representatives Announces Committee Action Related to the Reconciliation Requirements of the Fiscal Year 1988 Budget Resolution (Jul. 23, 1987). The Budget Reconciliation Act, with the Accountability Act attached, was passed by the House on October 29, 1987. 133 CONG. REC. 9,446 (1987). Because the Senate version of the Budget Reconciliation Act contained no similar provisions, it was left to the Conference Committee to determine whether the Accountability Act provisions would be retained as part of the Budget Reconciliation Act. H.R. 3545 emerged from conference with minor modification and was passed at the eleventh hour by the House and Senate with the Accountability Act still largely intact. 133 CONG. REC. 11,991 & 18,689 (1987).

[FN134]. Omnibus Budget Reconciliation Act of [1987, Pub. L. No. 100-203, § 1072, 101 Stat. 1330](#).

[FN135]. [Section 4955](#) imposes a 10% initial excise tax on each political expenditure by a [§ 501\(c\)\(3\)](#) organization. [I.R.C. § 4955\(a\)\(1\) \(1989\)](#). In addition, an initial excise tax equal to 2-1/2% of the organization's political expenditures is imposed upon any organization manager who willfully and without reasonable cause agrees to an expenditure. [I.R.C. § 4955\(a\)\(2\) \(1989\)](#). If the expenditure is not promptly corrected, an additional tax equal to 100% of the political expenditure is imposed upon the organization, [I.R.C. § 4955\(b\)\(1\) \(1989\)](#), and an additional tax equal to 50% of the expenditure is imposed upon any manager who refuses to agree to the correction, [I.R.C. § 4955\(b\)\(2\) \(1989\)](#).

Making "political expenditures" both triggers tax liability and disqualifies an organization for [§ 501\(c\)\(3\)](#) exempt status.

[FN136]. [I.R.C. § 4995\(d\)\(2\) \(1989\)](#).

Technically, the expanded definition seems to apply only within [§ 4955](#), the excise tax provision. By unavoidable implication, however, the expanded definition must apply equally to the basic qualification issue.

[FN137]. The narrowing approach taken in the Conference Report confirms the impression created by Committee revisions to the bill's language that the Committee intended to diminish the reach of the provision as originally proposed. While the list of taxable activities for the specially-designated organizations remains unchanged, Conference Committee revisions to the language of [§ 4955](#) appear designed to restrict the applicability of the provision to a narrower group of organizations than the original version intended to reach. The original version of the Act applied to [§ 501\(c\)\(3\)](#) organizations which are "formed or availed of substantially for purposes of promoting the candidacy (or potential candidacy) of an individual for public office." The enacted version is limited to organizations "formed primarily" or "effectively controlled and availed of primarily" to promote a candidacy. Thus, as passed, [§ 4955\(d\)\(2\)](#) is triggered by "primary" rather than "substantial" involvement in the specified activity and applies only when a candidate or prospective candidate has formed or effectively controls the organization. In addition, the Conference Committee changed the original references to "potential candidate" to "prospective candidate." One might speculate that this change was meant to narrow the range of circumstances in which the excise tax provision would apply, but it would be no more than speculation.

[FN138]. H.R. CONF. REP. NO. 495, 100th Cong., 1st Sess. 1021 (1987).

[FN139]. Id. The report specifies that providing studies and materials only to one individual or paying for speeches and travel expenses only for one individual would be factors indicating a primary purpose of promoting the individual's candidacy. On the other hand, if the organization's studies and materials are more broadly distributed, "the fact that a candidate or prospective candidate utilizes . . . materials . . . prepared by the organization (for example, in speeches by the individual) is not to be considered as a factor indicating that the organization has a purpose of promoting the candidacy or prospective candidacy of such individual." Id. at 1021-22.

[FN140]. Although the Conference Committee made no change to the language of this particular provision, the Report

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reflects a narrow reading of the provision. In clear contrast to the House Report which accompanied the bill as it emerged from the House Budget Committee, the Conference Report quite plainly indicates that voter registration and voter education activities that are consistent with [§ 501\(c\)\(3\)](#) should not be considered taxable under this section. *Id.* at 1021. The House Report would have imposed the same requirements on voter registration activities which apply to private foundations. H. REP. NO. 391, 100th Cong., 1st Sess. 1627 (1987). Section 4945(f)(2) provides that the only voter registration activities that a private foundation may fund without incurring an excise tax penalty are those which are carried on by a [§ 501\(c\)\(3\)](#) organization, "are nonpartisan, are not confined to one specific election period, and are carried on in 5 or more states." The grantee organization must also have a wide base of support, [I.R.C. § 4945\(f\)\(4\) \(1989\)](#), and expend substantially all of its income in the active pursuit of its exempt purpose, [I.R.C. § 4945\(f\)\(3\) \(1989\)](#).

[\[FN141\]](#). See *supra* note 137.

[\[FN142\]](#). Schanck, An Essay on the Role of Legislative Histories in Statutory Interpretation, 80 LAW LIBR. J. 391, 410 (1988). See also R. DWORKIN, A MATTER OF PRINCIPLE 320-21 (1985); Wald, [Some Observations on the Use of Legislative History in the 1981 Supreme Court Term](#), 68 IOWA L. REV. 195, 201 (1983); Mikva, [A Reply to Judge Starr's Observations](#), 1987 DUKE L.J. 380, 385 ("I always find that the committee report is the most useful device; it is what I use to try to solve some of those ambiguities. Most of the time--not always, and not for every committee--the committee report represents the synthesis of the last meaningful discussion and debate on the issue.").

[\[FN143\]](#). See Canno & Brann, The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis, 22 JURIMETRICS J. 294, 304 (1982) (in the period between 1938 and 1979, the Supreme Court cited committee reports 3,547 times). The Canno and Brann study revealed that the Supreme Court relies far less often on Conference Committee reports than on House or Senate committee reports--only 178 of the citations were to Conference reports. This may be because most bills receive their fullest explanation in the committee report; unless significant changes are made by the Conference Committee, there is little reason to discuss fully the provisions of the bill. See Schanck, *supra* note 142, at 410 ("[S]ince the report by the house of origin will usually have the fullest statement of purpose, it is often most useful from a practical standpoint."). Justice Scalia's view of this practice is set out in [Green v. Bock Laundry Mach. Co.](#), 109 S. Ct. 1981, 1995 (1989) (Scalia, J., concurring) (decrying encouragement of "a legal culture in which, when counsel arguing before us assert that 'Congress has said' something, they now frequently mean, by 'Congress,' a committee report; and in which it was not beyond the pale for a recent brief to say the following: 'Unfortunately, the legislative debates are not helpful. Thus, we turn to the other guidepost in this difficult area, statutory language.'" (citation omitted); see also Biskupic, *Scalia Takes a Narrow View in Seeking Congress' Will*, 48 CONG. Q. WEEKLY REP. 913 (1990).

[\[FN144\]](#). See, e.g., Starr, [Observations About the Use of Legislative History](#), 1987 DUKE L.J. 371, 376-77 (the content of committee reports is often staged by technocrats and lobbyists and rarely read or considered by those who ultimately vote on the measure); Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POL'Y 43, 45 (1988) (committee reports are unreliable because they are likely generated by staff rather than elected legislators and are "only tangentially related to the actual legislative process").

[\[FN145\]](#). Senator Hatch suggests that extensive floor debate about the substance of the committee report, showing that it has been considered by most of the legislature, contributes to the credibility of the report as an interpretive tool. Hatch, *supra* note 144, at 48.

[\[FN146\]](#). Wald, *supra* note 142, at 201.

[\[FN147\]](#). Even with its present inclination to put the responsibility for statutory interpretation in the hands of agencies, rather than the courts, the Supreme Court seems to recognize that Congress may communicate its instructions to the agency through the documents of legislative history in addition to the words of the statute itself. [Chevron U.S.A. v. Natural Resources Defense Council, Inc.](#), 467 U.S. 837, 842-43 (Court's interpretive function is limited to deciding "whether Congress has directly spoken to the precise question at issue"). See also [Young v. Community Nutrition Inst.](#), 476 U.S. 974, 980 (1986). See Farina, [Statutory Interpretation and the Balance of Power in the Administrative State](#), 89 COLUM. L. REV. 452, 460 (1989) (citing [Chevron](#), 467 U.S. at 843 n.9, 851-53, but noting increasing debate on this point in post-*Chevron* cases). See [INS v. Cardoza-Fonseca](#), 480 U.S. 421, 433 n.12 (1987) (despite fact that plain language of the statute appears to settle the question, Court considered legislative history to determine "whether there is a clearly expressed legislative intention contrary to that language"). Even Justice Scalia might concede that where the statutory language is somewhat unclear, turning to legislative history to determine "whether Congress has directly spoken to the precise question at issue," [Chevron](#), 467 U.S. at

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842, would constitute appropriate illumination rather than "[replacing the statutory language] with an unenacted legislative intent," [INS v. Cardoza-Fonseca](#), 480 U.S. at 452 (Scalia, J., concurring).

[FN148]. Organizations and their legal advisors have repeatedly expressed uneasiness with having to guess at the limits of the other restrictions on various forms of "political" activity; the uncertainty results not only from looseness of the statutory language itself, but from inability to predict how the I.R.S. will read that language. For example, numerous organizations took issue with the I.R.S. interpretation, as expressed in Treasury Regulations proposed in 1986, of the 1976 amendments to the lobbying restrictions. Many expressed the view that the proposed regulations were entirely inconsistent with the apparent Congressional intent to liberalize the lobbying restrictions with the 1976 amendments. See, e.g., [Commentators Say Regulations on Lobbying by Tax-Exempt Organizations Are Too Restrictive](#), 34 TAX NOTES 19 (1987); Teuber, Mentz Says IRS Needs More Weapons to Police Tax-Exempt Organizations, 34 TAX NOTES 1038, 1040 (1987) (quoting Walter Slocombe, partner with Caplin & Drysdale, who suggested regulations be withdrawn because "they are clearly not what Congress intended"); [Sen. Simon Says Lobbying Rules Run Contrary to Congressional Intent](#), 34 TAX NOTES 861 (1987). The subsequent revision of the proposed regulations has been better received. See, e.g., Cummings, Revised Proposed Regulations On Lobbying By Electing Public Charities and By Private Foundations, 67 TAXES 193 (1989); Troyer & Slocombe, New Prop. Regs. on Lobbying Ease Many Restrictions, 70 J. TAX'N 146 (1989).

[FN149]. See, e.g., Oversight Hearings, *supra* note 1, at 124 & 126 (remarks of Rep. Dorgan); *id.* at 222-28 (statement of Former I.R.S. Commissioner Sheldon Cohen). Cohen describes and distinguishes among the politician-affiliated "Good Works Foundation" and "Good Feeling Foundation," on the one hand, and the politician-affiliated "Electioneering Foundation" and "Helpful Foundation," on the other. The first two, which operate in the sphere of traditional charitable and civic activity, Cohen asserts, ought to be left unregulated, despite the good will and political advantage they may generate. The "Electioneering Foundation" Cohen characterizes as "one which probably could be addressed under [preexisting] law." Cohen describes the "Helpful Foundation" as "troublesome," because it is furthering private political interests in a way not reachable under preexisting law. Cohen's description of the "Helpful Foundation" sounds very much like a generic description of the 1988 election cycle think tanks:

The Helpful Foundation was created by supporters of Congressman Jones, to promote a public policy agenda that is consistent with his views. The directors of the foundation are friends and supporters of Jones; the foundation has hired a number of former Jones campaign aides (who are expected to work in the next Jones campaign); Jones solicits money for the foundation in mailings which promote and support his policy views; and Jones appears at events sponsored by the foundation around the country, with expenses paid by the foundation. The Helpful Foundation does not, however, attempt explicitly to influence the outcome of particular elections.

Id. at 227-28.

[FN150]. Edsall, '88 Candidates' New Tricks Stretch Federal Election Law: Tax-Free Foundations Proliferate, *Wash. Post*, Oct. 20, 1985, at A18, col. 1 (quoting David Spear, spokesperson for Sen. Howard Baker, commenting on Kemp's Fund for an American Renaissance).

[FN151]. [Big Mama Rag, Inc. v. United States](#), 631 F.2d 1030, 1036 (D.C. Cir. 1980), suggests that as a legal standard, it might even be unconstitutionally vague. In *Big Mama Rag*, the United States Court of Appeals for the District of Columbia Circuit held that the Treasury Regulation defining "educational" for purposes of [§ 501\(c\)\(3\)](#) was void for vagueness not only because its "full and fair exposition" requirement was incapable of principled application, *id.* at 1038, but also because it failed to delineate clearly enough which organizations are subject to the requirement, *id.* at 1036. The regulation imposed the test only on organizations which "advocate a particular position." *Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)(b)* (as amended in 1976). The court concluded that the I.R.S. policy of applying the test only to organizations that addressed controversial issues had the effect of basing the grant or denial of exempt status on the purely subjective response of Service officials to the content of an organization's views. [631 F.2d at 1036-37. Section 4955\(d\)\(2\)](#) would seem vulnerable to the same charge. However, the D.C. Circuit's *Big Mama Rag* opinion stands as a lone monument to the idea that tax-exemption categories and criteria must be predictable and clear. Furthermore, the decision's impact was largely reversed by the same court's subsequent comments on the "full and fair exposition" test in [National Alliance v. United States](#), 710 F.2d 868 (D.C. Cir. 1983). See *supra* note 107. Dictum that the vagueness problems of the full and fair methodology test are reduced by the application of the Service's "methodology test" completely ignored, and therefore seemingly dismissed, the additional problem of vague classification.

[FN152]. See *supra* notes 89-97 and accompanying text.

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[FN153]. See supra note 140 and accompanying text.

[FN154]. See, e.g., [Seasongood v. Commissioner](#), 227 F.2d 907 (6th Cir. 1955) (holding that lobbying expenditures of five percent of organization's budget were not "substantial"); [Christian Echoes Nat'l Ministry v. United States](#), 470 F.2d 849, 855 (10th Cir. 1972) ("The political activities of an organization must be balanced in the context of the objectives and circumstances of the organization to determine whether a substantial part of its activities was to influence or attempt to influence legislation. A percentage test to determine whether the activities were substantial obscures the complexity of balancing the organization's activities in relation to its objectives and circumstances".) (citation omitted), cert. denied, 414 U.S. 864 (1973); [Haswell v. United States](#), 500 F.2d 1133, 1145-46 (Ct. Cl. 1974) (rejecting Seasongood percentage approach, but noting that lobbying expenditures constituted twenty percent of organization's budget), cert. denied, 419 U.S. 1107 (1975); [League of Women Voters v. United States](#), 180 F. Supp. 379 (Ct. Cl.) (holding that despite very low expenditures for lobbying, time spent by volunteers in studying issues prior to taking a position constituted "substantial" lobbying), cert. denied, 364 U.S. 822 (1960).

Recognition of how troublesome a concept "substantiality" is was probably behind the change in the language of the statute itself from "substantial" to "primary." The use of the word "substantial" in this context was identified as one potential problem with the bill in a Congressional Research Service analysis. R. BURDETTE, AN ANALYSIS OF H.R. 2942, 100TH CONGRESS, 1ST SESSION (1987), A BILL TO INCREASE DISCLOSURE OF INFORMATION BY TAX-EXEMPT ORGANIZATIONS AND TO IMPOSE FURTHER RESTRICTIONS ON THEIR POLITICAL ACTIVITIES 8 (Congressional Research Service Reports 87-869A (1988)).

[FN155]. [FEC v. Central Long Island Tax Reform Immediately Comm.](#), 616 F.2d 45, 55 (2d Cir. 1980) (Kaufman, J., concurring) (citing [United States v. National Comm. for Impeachment](#), 469 F.2d 1135, 1142 (2d Cir. 1972)). Judge Kaufman's specific reference is to the Federal Election Commission, although his comments are framed more generally in terms of government agencies charged with the responsibility for scrutinizing the content of political expression. Certainly, the pattern of the I.R.S. response to the advocacy activity of exempt organizations over the years bears out Kaufman's observation. One example is the Service's first round of proposed regulations to implement the 1976 lobbying provisions. See supra note 148.

[FN156]. "Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government." Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 538 (1947).

[FN157]. A similar objection has long been made about the [§ 501\(c\)\(3\)](#) limitation on lobbying, particularly before its terms were made somewhat clearer by measures enacted in 1976, which arguably provide a quantifiable measure for "substantial" legislative activity.

[FN158]. For example, the 1934 provision to limit the legislative activities of charitable organizations was intended as a response to the activities of one particular organization. Explaining the amendment, its sponsor said:

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

78 CONG. REC. 5,861 (1934) (statement of Sen. Reed). Senator Reed went on to express his confidence that the inadequacies of the bill's language would be corrected in committee. The law was enacted as proposed.

Certainly, the original insertion of the campaign intervention prohibition into [§ 501\(c\)\(3\)](#) in 1954 is another example of this phenomenon. See supra note 42 and accompanying text. The 1969 revision of the rules on political activity by private foundations was driven at least in part by protestations about the use of private foundations to further the campaign efforts of particular contestants for public office. New York Congressman John J. Rooney complained bitterly about his opponent's use of a private foundation as a campaign organization, characterizing himself as "the first known Member of Congress to be forced to campaign for reelection against the awesome financial resources of a tax-exempt foundation," and warned his colleagues, "next election this could happen to each of you--or to any other office-holder in the country." Hearings on Tax Reform Before the House Comm. on Ways and Means, 91st Cong., 1st Sess. pt. I at 213-14 (1969).

Professor Fleishman's comment, made in the context of discussing campaign finance regulation measures, is apt here: "[I]ndignation and outrage, while frequently necessary to energize legislative action, are rarely the most favorable auspices for constructive, carefully considered lasting change. And that is even more the case when the legislative subject matter is one in which every member of Congress has a direct personal interest" Fleishman, The 1974 Federal Election Campaign Act Amendments: The Shortcomings of Good Intentions, 1975 DUKE L.J. 851, 852.

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Professor Sorauf has expressed a contrary conclusion about the value of legislative response to the appearance of impropriety in the context of campaign finance regulation:

If the appearance of corruption--or of excessive influence--reduces confidence in political institutions, it ultimately sacrifices a necessary condition for a politically active and law-abiding citizenry and, thus, a necessary condition for the health of the institutions themselves To emphasize appearances is, of course, to concede a major role to illusion and emotion The creation of "devils" is a useful mode of social explanation for many adults, and exorcism of these devils is an important way of reestablishing the credibility and legitimacy of political institutions.

Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, in 3 CONSTITUTIONAL COMMENTARY 97, 120-21 (1986).

[FN159]. In 1986, only 25 organizations of the 414,789 for which the I.R.S. processed tax returns lost tax-exempt status because of lobbying or political activities. GENERAL ACCOUNTING OFFICE, INFORMATION ON LOBBYING AND POLITICAL ACTIVITIES OF TAX-EXEMPT ORGANIZATIONS 22 (1987). See also Oversight Hearings, *supra* note 1, at 64 (testimony of Bruce Hopkins) ("while there have been instances of abuse, I am troubled by the thought that these abuses may lead to the thinking that this is a widespread problem.").

[FN160]. Even where there has been background work and deliberation within some subset of the legislature, the information which has fed the deliberations has not necessarily been systematic and detached. For example, questioning of witnesses during the Oversight Subcommittee Hearings revealed that committee members had mistaken ideas about the thrust and limits of existing law and repeatedly brushed off systematic presentation of data in favor of retelling the anecdotes of perceived abuses. See, e.g., Oversight Hearings, *supra* note 1, at 64-70 (interchange between Bruce Hopkins and Chairman Pickle and other subcommittee members) and *id.* at 111 (interchange between Lawrence Gibbs, Jr., Commissioner of Internal Revenue, and Representative Byron Dorgan).

Nor is this the first time that provisions dealing with the political activities of exempt organizations have been attached to the vehicle of a much larger, substantially unrelated legislative package. For example, [I.R.C. § 527](#), defining the tax treatment of political organizations and specifying the tax treatment of political expenditures of certain other classes of exempt organizations, was appended by the Senate Finance Committee to a bill to amend the Tariff Schedule of the United States to permit the importation of upholstery regulators, upholsterer's regulating needles, and upholsterer's pins free of duty. H.R. 421, 93d Cong., 2d Sess. (1974). See S. REP. NO. 1357, 93d Cong., 2d Sess. 25-26 (1974); H.R. REP. NO. 1642, 93d Cong. 2d Sess. (1974). Under these circumstances, the exempt organization provisions tend to be submerged, and discussion of them is sometimes seen as a distraction from the business at hand. See, e.g., remarks of Rep. Steiger, referring to H.R. 421 as "the 'Christmas Tree' bill for the year" because of all the extraneous "ornaments" hanging on it, 120 CONG. REC. 41,815 (1974), and remarks of Rep. Towell, impatient to return to the main subject of the legislation after discussion on the tax exemption provisions which fills just over two pages in the Congressional Record ("Mr. Speaker, I do not want to needle the gentleman, but some people have been coming up to the desk, and I am sure this is a very important discussion we are having, and I am sure some people are wondering if we are going to talk about needles."). 120 CONG. REC. 41,819 (1974).

See also Handler, Budget Reconciliation and the Tax Law: Legislative History or Legislative Hysteria?, 37 TAX NOTES 1259 (1987) (generally criticizing the use of the federal budget reconciliation process to enact tax legislation); Feder & Scharfstein, Leveraged Investment in Real Property Through Partnerships By Tax Exempt Organizations After the Revenue Act of 1987--a Lesson in How The Legislative Process Should Not Work, 42 TAX L. REV. 55 (1988) (case study and criticism of amendment of this particular provision via budget reconciliation process, concluding that the absence of reasoned deliberation and careful consideration with input from experts and those affected by provision resulted in a seriously flawed provision).

[FN161]. Note, Candidate-Organized Political Action Committees: The Subversion of Federal Campaign Regulation, 4 YALE L. & POL'Y REV. 515, 518-19 (1986). This note provides an excellent description of the COPAC phenomenon and its potential for undercutting the principles of the F.E.C.A. See also Morgan, PACs Stretching Limits of Campaign Law, Wash. Post, Feb. 5, 1988, at A1, col. 3 (describing the activities of Dole's COPAC, Campaign America, and those of other 1988 presidential hopefuls); Republican Presidential Hopefuls Organizing Early for the Big Event, Nat'l J., May 24, 1986, at 1250, 1251 (commenting on the miniscule percentage of COPAC receipts channeled to candidates, as compared to general overhead and fundraising); Pincus, How Vice President Bush's PAC Paid the Way in Michigan, Wash. Post Nat'l Weekly Edition, Feb. 15-21, 1988, at 18.

[FN162]. Note, *supra* note 161, at 521.

[FN163]. While their receipts and expenditures are subject to disclosure under the F.E.C.A., the exposure and promotion

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bought with this kind of expenditure do not trigger official candidacy or count against the overall or state-by-state presidential campaign expenditure limits. See *id.* at 522-25; Fed. Election Comm'n Adv. Op. No. 1986-6, Fed. Election Camp. Fin. Guide (CCH) ¶ 5849.

COPACs also raise questions about circumvention of the F.E.C.A.'s contribution limits. Because a COPAC is a multicandidate PAC, it is subject to a \$5,000 contribution cap, [2 U.S.C. § 441\(a\)\(1\)\(A\)\(1986\)](#), rather than the \$1,000 limit that is placed on contributions to a single candidate or single-candidate committee, [2 U.S.C. § 441\(a\)\(1\)\(C\)\(1986\)](#). See Jackson, *Politicians Turn to Special Groups to Raise Funds While Avoiding Presidential Campaigning Laws*, Wall Street J., Mar. 7, 1986, at 46, col. 1 (describing 1986 activity of George Bush's COPAC, Fund for America's Future); Shogan, *supra* note 33, pt. 1, at 5.

[FN164]. [2 U.S.C. § 431\(9\)\(B\)\(viii\) & \(ix\) \(1988\)](#). These provisions were added to the F.E.C.A. in [1980, Pub. L. No. 96-187, § 101, 93 Stat. 1339, 1343-44 \(1980\)](#), and were intended to enhance the role of state and local party organizations in the federal election process.

[FN165]. Leatherberry, *Rethinking Regulation of Independent Expenditures By PACS*, 35 CASE W. RES. U.L. REV. 13, 40 (1984); E. DREW, *POLITICS AND MONEY* 101-02 (1983); Note, *Soft Money: The Outlook for Reform*, 3 J.L. & POL. 769, 770 (1986). For a description and criticism of the "soft money" phenomenon, see generally CENTER FOR RESPONSIVE POLITICS, *MONEY AND POLITICS: SOFT MONEY--A LOOPHOLE FOR THE 80s* (1985). See also Edsall, "Soft Money" will Finance Voter Signup: Multimillion-Dollar Outlays By Parties Won't Hit Ceilings Imposed by Election Law, Wash. Post, Aug. 12, 1984, at A4, col. 1; Brownstein, *Closing Loopholes Means Ending Worthy Programs*, L.A. Times, Jul. 30, 1989, Part V, at 3, col. 1.

[FN166]. See, e.g., Chicoine & Lindley, *Joint Campaigning by State and Federal Candidates: A Practical Legal Guide*, 72 ILL. B.J. 354 (1984).

National party committees may not supply funds to local and state party committees for party-building activities. [11 C.F.R. § 100.7\(15\)-\(16\) \(1989\)](#). However, no statute or regulation prevents national parties from providing funds to their state and local affiliates to support state and local campaigns or general overhead expenses, thereby freeing up the local funds for party-building activities which can benefit federal candidates.

Almost immediately after the 1979 amendments were enacted, the Republican Party demonstrated an awesome facility for attracting large individual and corporate contributions and funneling them through the "soft money" rules to states where they were permitted. Edsall, *FEC Looks at "Soft Money": Campaign "Loophole" Studied Reluctantly*, Wash. Post, Jan. 30, 1986, at A12, col. 1; Leatherberry, *supra* note 165, at 40 ("[t]he Reagan campaign's exploitation of soft money enlarged the loophole until it was 'big enough to drive a President through'") (quoting E. DREW, *POLITICS AND MONEY* 99 (1983)). By 1984, the Democratic Party was able to demonstrate comparable skill in attracting union and corporate funds to soft money accounts. Edsall, *Firms, Lobbies Provide Much of Democrats' Funds*, Wash. Post, Aug. 12, 1986, at A1, col. 2.

[FN167]. For example, [11 C.F.R. § 114.9\(e\) \(1989\)](#) requires a candidate to reimburse a corporation in advance for use of corporate aircraft in connection with an election.

[FN168]. Schwartz, Straus & Darr, [Corporate Political Activity: Providing Transportation and Related Travel Expenses to Members of Congress](#), 41 BUS. LAW. 15, 16 (1985). For example, while Jimmy Carter was governor of Georgia, he took several free trips on Coca-Cola Company and Lockheed Aircraft corporate executive jets. Horrock, *Carter, as Governor, Got Free Rides On Planes of Lockheed and Coca-Cola*, N.Y. Times, Apr. 1, 1976, at 20(L); *Fate of a Front Runner: Jimmy Carter Gets It From All Sides*, U.S. NEWS & WORLD REPORT, Apr. 12, 1976, at 22; *A New Kind of Heat on Ford and Carter*, U.S. NEWS & WORLD REPORT, Oct. 11, 1976, at 25. The trips were perfectly legal under Georgia law; they were undertaken in connection with state business and involved travel to places the corporate aircraft were going in any case. Nonetheless, they illustrate the sort of opportunities that exist for a corporation to promote an individual's visibility in the pre-candidacy period and to develop or solidify its relationship with someone who may be destined for high places. Certainly, the Carter Coca-Cola connection remained important while Carter was in the White House. See, e.g., *Deputy Defense Secretary Named*, Facts on File World News Digest, Dec. 31, 1976, at 978, F3 (Charles Duncan, Coca-Cola president from 1971 to 1974, named to post); *Business' Most Powerful Lobby in Washington*, BUS. WK., Dec. 20, 1976, at 60 (describing involvement of J. Paul Austin, "Carter confidant and chairman of Coca-Cola Co." and others in the Roundtable, a group of major corporation executives which played an important advisory role and had special access to Administration policymakers).

[FN169]. This is not likely to be "upstream" support, but is a significant factor once more formal campaigning gets

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underway. See, e.g., Latus, Assessing Ideological PACs: From Outrage to Understanding, in *MONEY AND POLITICS IN THE UNITED STATES* 142, 143 (M. Malbin ed. 1984) (Between 1974 and 1982, the number of business, labor and trade association PACs increased more than fourfold, from 608 to 2475.). A Senate Republican proposal to eliminate PACs, pending as this Article goes to press, is given little hope of success. Even its author concedes that the proposal is constitutionally suspect. See Alston, Bipartisan Pact Unlikely As Senate Debate Nears, 48 CONG. Q. WEEKLY REP. 1239, 1239-40 (1990).

[FN170]. 2 U.S.C. § 441b (1988).

[FN171]. See D. ADAMANY, *CAMPAIGN FINANCE IN AMERICA* 216 (1972) (laws restricting corporation and union contributions have a "limited usefulness," because they are "so easily thwarted"); Leatherberry, *supra* note 165, at 37; Still Wooing Labor, N.Y. Times, Aug. 1, 1986, at A12, col. 1 (describing contacts of Jesse Jackson, Bruce Babbitt and Gary Hart with Lane Kirtland, president of the A.F.L.-C.I.O.); Berke, Election Unit Studies Funds and Business, N.Y. Times, Dec. 7, 1988, at A1, col. 1.

Individual contributions from corporation and union executives are also a significant avenue for influence. See, e.g., H. ALEXANDER, *FINANCING THE 1964 ELECTION* 94-95 (1966) (large contributions were made by nearly one-third of the directors of the ten largest defense contractors); Hoch, Campaign Finance Reform--Now More Than Ever, 61 FLA. B.J. 19, 22 (1987). In this article, Hoch cites The Public Data Access Analysis of the 1983-84 Election Cycle:

Although direct corporate contributions are prohibited in federal campaigns, persons associated with corporations are permitted to make "individual" contributions to federal candidates. The Public Data Access Analysis of the 1983-84 Election Cycle, a comprehensive analysis of special interest spending in federal elections, revealed that for 700 leading companies, such contributions totalled more than \$24 million. (citations omitted).

Other modes of corporate support include the corporation's ability to sponsor a candidate appearance before the corporation's shareholders and executives (the same individuals who make up a corporate PAC's "solicitable class"), see Fed. Elec Comm'n Adv. Op. No. 1986-37, Fed. Election Camp. Fin. Guide (CCH) ¶ 5875, and invited guests and press, see Fed. Election Comm'n Adv. Op. No. 1984- 13, Fed. Election Camp. Fin. Guide (CCH) ¶ 5759. So long as the audience is appropriately limited, contributions may be solicited without violating the F.E.C.A. 11 C.F.R. § 114.3(c)(2) (1989). A corporation may provide legal and accounting services to assist a candidate with F.E.C.A. compliance, see Fed. Election Comm'n Adv. Op. No. 1979-77, Fed. Election Camp. Fin. Guide (CCH) ¶ 5454 and Fed. Election Comm'n Adv. Op. No. 1980-137, Fed. Election Camp. Fin. Guide (CCH) ¶ 5585, and may allow a candidate to use corporate facilities and then reimburse the corporation.

This can be a very good deal for the candidate even if you are reasonably comprehensive in computing the reimbursed costs Another plus of this approach is that the candidate does not have to pay the money first You should bill the candidate promptly and continue your efforts to collect just as you would from any other corporate 'customer.' However, this kind of time delay in payment could be very helpful in the context of an election.

Materials on Corporate Political Activities (Business Laws, Inc.) 145-46.

[FN172]. 2 U.S.C. § 441b(b)(2)(C) (1988).

[FN173]. Fed. Election Comm'n Adv. Op. No. 1986-41, Fed. Election Camp. Fin. Guide (CCH) ¶ 5878 (this arrangement would constitute the making of a contribution in the name of another, and therefore, would violate § 441f of the F.E.C.A.).

[FN174]. Fed. Election Comm'n Adv. Op. No. 1989-9, Fed. Election Camp. Fin. Guide (CCH) ¶ 5960; Fed. Election Comm'n Adv. Op. No. 1989-7, Fed. Election Camp. Fin. Guide (CCH) ¶ 5958; Fed. Election Comm'n Adv. Op. No. 1988-48, Fed. Election Camp. Fin. Guide (CCH) ¶ 5949; Fed. Election Comm'n Adv. Op. No. 1986- 44, Fed. Election Camp. Fin. Guide (CCH) ¶ 5879; see also Fed. Election Comm'n Adv. Op. No. 1987-18, Fed. Election Camp. Fin. Guide (CCH) ¶ 5897 (similar matching scheme, but contributions were in-kind donations of the corporation's products to a limited number of designated charities).

[FN175]. Not until 1989 did any Federal Election Commissioner demur to this characterization and conclusion. In Fed. Election Comm'n Adv. Op. No. 1989- 7, Fed. Election Camp. Fin. Guide (CCH) ¶ 5958, and Fed. Election Comm'n Adv. Op. No. 1989-9, Fed. Election Camp. Fin. Guide (CCH) ¶ 5960, Chairman Danny L. McDonald dissented, taking the position that, despite the absence of any direct monetary benefit to the employee, such an arrangement does constitute indirect compensation and that the arrangement is a means of exchanging treasury monies for voluntary contributions, and therefore violates 11 C.F.R. § 114.5(b) (1989).

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[FN176]. Elected and appointed federal officials may now keep up to \$2,000 per appearance, and they may direct fees that exceed the limit to charitable organizations. Ethics Reform Act of [1989, Pub. L. No. 101-194](#), 1990 U.S. Code Cong. & Admin. News (103 Stat.) 1716, prohibits receipt of honoraria by House members beginning in January, 1991, and more gradually for Senators, but permits payment of honoraria of up to \$2,000 per appearance to a charitable organization on behalf of the member. See generally Hook, *New Law Leaves Loopholes for Benefits to Members*, 47 Cong. Q. Weekly Rep. 3420 (1989). "Directing honoraria to such organizations apparently would be barred by the new ethics law only if the member or his family reap direct financial benefit from the organization or if the organization is not approved by the Internal Revenue Service as a tax-exempt organization." *Id.* at 3423.

[FN177]. Harry Phillips, Sr., a contributor to Dole's presidential campaign, was the head of Browning-Ferris Industries in 1987 when that corporation made a \$15,000 contribution to the Dole Foundation. Fritz, *Funds for Charity; Speech Fees: Handy Tool for Congress*, L.A. Times, Jan. 16, 1989, pt. 1, at 1, col. 1. The Koch Foundation, charitable instrument of Koch Industries, has made several \$10,000 contributions to the Dole Foundation. David H. Koch, executive vice president of Koch Industries, made a \$1,000 contribution to Dole's campaign. It has been suggested that Koch Industries stood to benefit from Dole-backed tax relief provisions contained in technical corrections to the 1986 tax reform act. Morgan, *PACs Stretching Limits of Campaign Law*, Wash. Post, Feb. 5, 1988, at A1, col. 1. R.J. Reynolds, U.S. Tobacco Co., and Phillip Morris are all reported to have contributed to the Dole Foundation after Dole's work on the Senate Finance Committee helped to win approval for a program to sell the government's surplus tobacco to cigarette manufacturers at a deep discount. *Id.* See also Burnham, *Lessons on How to Build Power on Power*, N.Y. Times, Dec. 24, 1984, at 8, col. 1. Cf. Nancy Reagan's Drive Got Gifts from Saudis, *Chronicle of Philanthropy*, Mar. 20, 1990, at 7, col. 1 (Saudi sources contributed \$2 million to the Nancy Reagan Drug Abuse Fund while Saudi Arabia was lobbying, ultimately successfully, for the U.S. sale of AWAC planes to that country. In 1989, King Fahd contributed \$1 million to the Barbara Bush Foundation for Family Literacy.).

[FN178]. Fritz, *supra* note 177. In the hearings which led up to the 1969 revision of the laws with respect to the political activity of private foundations, Representative John Rooney complained that a private foundation controlled by his opponent had gained unfair advantage by making charitable grants to organizations in his district. Hearings on Tax Reform Before the House Comm. on Ways and Means, 91st Cong., 1st Sess. pt. I, at 213-14 (1969).

[FN179]. Furthermore, being too quick to ascribe the think tank's discussion of issues to the political aspirations of the individual overemphasizes the value of the organization to the individual and overlooks the value of the individual to the organization. The association of a well-known political figure with an organization can significantly enhance the organization's ability to draw attention to its discourse and engage the public in its discussion. Individuals who are, have been, or expect to be in high public office may be especially qualified to add a valuable dimension to the discourse on issues of public policy. They may have information and insight beyond that of people who have been less involved in public life. See, e.g., Riley, *Tax- Exempt Foundations: What Is Legal?*, NAT'L L.J., Feb. 23, 1987, at 1, col. 1 ("The other side of the coin,' Ms. Keyes [former executive director of Center for a New Democracy] maintains, 'is that there's such a desperate need for good policy work. Gary Hart's voice is heard louder than that of others, and we feel that's very good for the work we're doing.'"); Republican Presidential Hopefuls Organizing Early for the Big Event, Nat'l J., May 24, 1986, at 1250, 1251 ("This foundation is a logical continuation of what he [Kemp] has been up to all these Ears,' said [Donald Eberly, Executive Director of the Fund for an American Renaissance]. 'He can't separate Jack Kemp the ideas man from Jack Kemp the something else. He can't be precluded from chairing the foundation and doing other things.'"). In fact, it is not hard to imagine that an individual might be driven to seek high office because he sees no better way to achieve policy aims to which he has become committed through his work with a charitable or educational organization. For example, Jesse Jackson's work with Operation PUSH long predates his active involvement in politics. See, e.g., Babcock, *supra* note 20. The fact that an individual hopes ultimately to deal with these policy issues from the Oval Office does not diminish his value as an entrepreneur of ideas.

[FN180]. A close connection between a tax-exempt charitable or educational organization and a legislator may indeed raise questions about opportunities to purchase access or influence by making contributions to the favored organization. See *supra* notes 175-77 and accompanying text; see also Oversight Hearings, *supra* note 1, at 286-93 (statement of John R. Wallace, counsel, North Carolina Democratic party, commenting on interrelationships and activities of several [§ 501\(c\)\(3\)](#) and [501\(c\)\(4\)](#) organizations affiliated with Senator Jesse Helms); PUBLIC POLICY AND FOUNDATIONS, *supra* note 7, at 84-85 (describing [§ 501\(c\)\(3\)](#) and [501\(c\)\(4\)](#) organizations founded by Rep. Newton Gingrich). For purposes of [§ 501\(c\)\(3\)](#), promoting employment opportunity for handicapped individuals is charitable, whether or not a U.S. Senator's name and persona are attached to the organization which delivers the services. Similarly, for purposes of [§ 501\(c\)\(3\)](#), serious study and debate of public policy issues is educational, whether or not a U.S. Senator's name and persona are attached to the

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organization which undertakes the research and dissemination. From the standpoint of congressional ethics rules, however, there may well be good reasons to constrain or require disclosure of such relationships. But these are not tax exemption issues, nor are they campaign finance issues. Properly identified as congressional ethics issues, they can be addressed in terms that serve the underlying goals of congressional ethics rules. Gary Hart's proposed approach, see *supra* note 39, would have modified House and Senate rules to prohibit members of Congress from "be[ing] closely associated with any [section 501(c)(3) organization that] does not publicly disclose on an annual basis a list of contributors and a statement of total contributions received and expenditures made." S. 2415, 99th Cong., 2d Sess. (1986).

[FN181]. See *supra* notes 105-09 and accompanying text.

[FN182]. Eisenberg, *The Voluntary Sector: Problems and Challenges*, in 2 COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, RESEARCH PAPERS 853, 862 (1977).

[FN183]. Cohen, *Some Aspects of Evolving Social Policy in Relation to Private Philanthropy*, in 2 COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, RESEARCH PAPERS 667 (1977).

[FN184]. Thompson, *supra* note 96, at 522 n.79. Thompson points out that the idea that debate of public issues is an appropriate "charitable" undertaking is well-rooted in the American common law of charitable trusts, offering a quote from *George v. Braddock*, 45 N.J. Eq. 757, 18 A. 881 (1889), as "the best expression of the reason" for the rule: "[t]he most potent of all forces tending to improvement and evolution are those of examination and discussion." *Id.* at 514 n.56. Thus, dealing with the think tanks under the law as it stood before the enactment of the Accountability Act is ultimately a better way to "[reestablish] the credibility and legitimacy of political institutions" than "exorcising the devils." See Sorauf, *supra* note 158, at 120-21.

[FN185]. *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978).

[FN186]. Until very recently, the Supreme Court has insisted that the "hallmark of corruption is the financial quid pro quo: dollars for political favors," *FECC v. National Conservative Political Action Comm.*, 470 U.S. 480, 490 (1985), and has rejected most of the proffered reasons for regulation as inadequate to justify intrusion on this speech about matters of public concern. Responding in *Buckley v. Valeo*, 424 U.S. 1 (1976), to the first major challenge to campaign finance regulation, the Court struck down several provisions of the Federal Election Campaign Act of 1971, as amended in 1974, and the Presidential Election Campaign Fund Act, establishing from the outset a principle to which it has held in a series of F.E.C.A. challenges which have followed. The Court found the congressional interests in equalizing campaign influence, *id.* at 48-49, and in "reducing the allegedly skyrocketing costs of political campaigns," *id.* at 52, insufficient justification for the significant constraints the Act imposed on the exercise of fundamental first amendment rights. In *Buckley*, the Court accepted the Congressional desire to enhance voter information and the necessity of disclosure to the achievement of the more important anti-corruption goals as sufficient rationales for the limited burden imposed on protected speech by the carefully-drawn disclosure requirements of the Act. The more substantial intrusion implicated in the expenditure and contribution limits of the Act, however, require a more substantial justification. The prevention of real and apparent corruption provides adequate justification in the context of contribution limits, because "[t]o the extent that large contributions are given to secure political quid pro quo's from current and potential officeholders, the integrity of our system of representative democracy is undermined." *Id.* at 26. The Court held in *Buckley* that independent expenditures do not raise the same threat of corruption and therefore, limitations on independent expenditures are unconstitutional. *Id.* at 46-47. In its most recent statement on campaign finance regulation, handed down as this Article went to press, the Court made a rather dramatic departure from this principle, although dictum in *F.E.C. v. Massachusetts Citizens For Life*, 479 U.S. 238, 258 (1986), foreshadowed the shift. In *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391 (1990) a challenge by a nonprofit corporation to a state law prohibiting direct independent expenditures by corporations, the Court recognized "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 1397. In a strong dissent, Justice Scalia accurately characterizes the majority opinion as departing, without adequate rationale, from the well-established doctrinal line of the prior campaign finance regulation cases, and dubs the majority's approach "the New Corruption." *Id.* at 1411 (Scalia, J., dissenting); see also *id.* at 1420-21 (Kennedy, J., dissenting) ("The majority styles this novel interest [in 'combating the 'corrosive and distorting effects of immense aggregations of wealth'] as simply a different kind of corruption; but has no support for its assertion.").

[FN187]. See *supra* notes 120-31 and accompanying text.

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[FN188]. Perhaps the best-known statement of the issue-candidate distinction is found in [First Nat'l Bank v. Bellotti, 435 U.S. 765 \(1978\)](#), where the Court struck down a Massachusetts law prohibiting corporate contributions to referendum campaigns. The Court's disapproval rested on the conclusion that the danger of corruption--that is, the trading of contributions for political quid pro quo's--is simply not present in the context of issue campaigns as it is in the context of candidate elections. [Id. at 790.](#)

In the context of assessing the F.E.C.A.'s limits on independent expenditures in *Buckley*, the Court noted the considerable difficulty of separating issue discussion from candidate support ("the distinction between discussion of issues and candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest"), and devised the "express advocacy of the election or defeat of a clearly identified candidate" standard as the mechanism for drawing the clear line between the two which the Constitution demands. [Buckley, 424 U.S. at 42-44.](#) "This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." [Id. at 80.](#) The court's formulation was subsequently incorporated into the statutory definition of "independent expenditure." [2 U.S.C. § 431\(17\) \(1988\).](#)

Even as it drew the clear line, the Court acknowledged that the consequence of imposing the narrow construction would be invalidation of the provision because, so construed, the restriction would reach only some of the objectionable spending:

The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines the limitation's effectiveness by facilitating circumvention by those seeking to exert improper influence upon a candidate or officeholder. It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefitted the candidate's campaign.

[Buckley, 424 U.S. at 44.](#) This aspect of the Court's analysis assumed, *arguendo*, that independent expenditures raise the same sort of quid pro quo concerns as campaign contributions. The Court then concluded that independent expenditures do not raise the corruption concerns that contributions do and that there was, therefore, no compelling governmental interest to justify the expenditure limitations. The Court again considered the express advocacy standard for defining "expenditures" in the context of the F.E.C.A.'s disclosure provisions, and concluded that only as thus narrowed, the disclosure requirements were closely enough related to the goals of disclosure to withstand constitutional challenge. [Id. at 79-80.](#) Thus, in insisting upon the narrow, "express advocacy" standard, the Court clearly recognized that some campaign spending behavior which might well be objectionable must nevertheless remain untouchable.

The Court's recent decision in *Michigan Chamber of Commerce* may bring the continued vitality of this distinction into question. The logical implication of "the New Corruption," see *supra* note 185, is that there is little reason to distinguish between issue discussion and candidate support, at least in the case of for-profit corporations and nonprofit corporations and unincorporated associations which are financially supported by for-profit corporations. While it seems inconceivable that the Court would take this step considering the strength of contrary doctrine established by the line of political speech cases that preceded *Michigan Chamber of Commerce*, the case both sets the stage for such a step and demonstrates that the evolution of first amendment jurisprudence in this area is, at best, highly unpredictable.

[FN189]. Direct instructions to vote for or against a named candidate, of course, meet the standard, [Buckley, 424 U.S. at 42.](#) as may marginally less direct urgings, [F.E.C. v. Massachusetts Citizens for Life, 479 U.S. 238, 249 \(1986\)](#) (express advocacy standard met when anti-abortion group published under the headline "Everything You Need to Know to Vote Pro-Life" the pictures of candidates who had provided the "correct" answers to survey questions).

At least one lower court has held that "limited reference to external events," taken together with words less explicit than those listed in footnote 108 of *Buckley*, can constitute "express advocacy," but only where "its message is unmistakable and unambiguous, suggestive of only one plausible meaning . . . speech cannot be 'express advocacy' . . . when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action." [F.E.C. v. Furgatch, 807 F.2d 857, 864 \(9th Cir. 1987\)](#) (newspaper advertisement in opposition to President Carter's policies and urging, "Don't let him do it" run during the week preceding the 1980 presidential election, was "express advocacy."). However, comment on an issue or position with which a particular candidate is identified, implicitly or explicitly, is generally not "express advocacy" of a particular election result. See also [F.E.C. v. National Org. for Women, 713 F. Supp. 428, 435 \(D.D.C. 1989\)](#) ("[D]iscussions of public issues that by their nature invoke the names of certain politicians [but] do not provide explicit directions to vote against these politicians" are not "express advocacy").

[FN190]. [United States v. National Comm. for Impeachment, 469 F.2d 1135, 1142 \(2d Cir. 1972\).](#) The case dealt with the activities of an organization which, among other things, criticized President Nixon's stand on the Vietnam War, which the government argued was "a principal campaign issue." *Id.*

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Dissenting in *Michigan Chamber of Commerce*, Justice Kennedy finds a parallel, equally intolerable, dampening effect on first amendment rights in the majority's approach to the issues raised in that case:

There can be no doubt that if a State were to enact a statute empowering an administrative board to determine which corporations could place candidate advertisements in newspapers and which could not, with authority to enforce the guidelines the Court adopts today to distinguish between the *Massachusetts Citizens for Life* and the *Michigan Chamber of Commerce*, the statute would be held unconstitutional. The First Amendment does not permit courts to exercise speech suppression authority denied to legislatures.

[110 S. Ct. 1391, 1419 \(1990\).](#)

[FN191]. See, e.g., [Mills v. Alabama](#), 384 U.S. 214, 218 (1966) ("a major purpose of [the First] Amendment was to protect the free discussion of public affairs"); [New York Times Co. v. Sullivan](#), 376 U.S. 254, 270 (1964) ("debate on public issues should be uninhibited, robust, and wideopen"); [Boos v. Barry](#), 452 U.S. 312 (1988); [Dun & Bradstreet, Inc. v. Greenmoss Builders](#), 472 U.S. 749 (1985); [Connick v. Myers](#), 461 U.S. 138 (1983); [NAACP v. Claiborne Hardware](#), 458 U.S. 886 (1982); A. MEIKELJOHN, *POLITICAL FREEDOM* 26 (1965) (first amendment's most important purpose is facilitation of the discussion of public issues in order to permit the citizenry to perform its electoral function intelligently); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971).

[FN192]. See *supra* notes 186, 188-89.

[FN193]. [2 U.S.C. §§ 431\(8\)-\(9\) \(1988\)](#); see *supra* notes 116-18 and accompanying text.

[FN194]. Furthermore, the unavoidable imprecision of such an extension (for example, what makes someone a "prospective candidate" and what kind of connection between an organization and a politician qualifies the organization's undertakings as election-related?) would require invalidation or construction so narrow as to take the law back to where it started. These are not concepts that can be expressed "in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest"; they are not the sort of uncertainty that can be found only by "those intent on finding fault at any cost." [United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers](#), 413 U.S. 548, 578 (1973). On the contrary, they would be fundamentally at odds with the most basic dictates of the first amendment. On the other hand, taken to its logical extension, the *Michigan Chamber of Commerce* case might permit heretofore (since *Bellotti*, at any rate) unthinkable restriction of issue-related political speech by for-profit corporations and nonprofit corporations and unincorporated associations that are financially supported by for-profit corporations. See *supra* notes 186 and 188.

[FN195]. [Regan v. Taxation With Representation of Wash.](#), 461 U.S. 540, 546 (1983); [Cammarano v. United States](#), 358 U.S. 498 (1959). But see Chisolm, [Politics and Charity: A Proposal For Peaceful Coexistence](#), 58 GEO. WASH. L. REV. 308 (1990) (arguing that the [§ 501\(c\)\(3\)](#) prohibition on campaign intervention may be constitutionally suspect and is at least poorly designed, although some limitations on [§ 501\(c\)\(3\)](#) election-related activity are supportable as a matter of both constitutional principle and reasonable policy).

[FN196]. This difference is clearly illustrated by the different conclusions reached by the Supreme Court in *Taxation With Representation* and in [F.E.C. v. Massachusetts Citizens For Life, Inc.](#), 479 U.S. 238 (1986), both of which involved organizations which were formed to promote political ideas. In *Taxation With Representation*, the Court held that a [§ 501\(c\)\(3\)](#) organization's ability to carry on lobbying activities, unrestricted but without the advantage of deductible contributions, by setting up a structurally and fiscally separate affiliate [§ 501\(c\)\(4\)](#) organization saved the [§ 501\(c\)\(3\)](#) lobbying constraints from unconstitutionality. [461 U.S. at 548-50](#). In *Massachusetts Citizens For Life*, the Court held that F.E.C.A. [§ 441b](#), which prohibits corporations from making campaign contributions or expenditures, but which allows the establishment of a structurally and fiscally separate PAC, imposes a burden that, while not insurmountable, is sufficient to "make engaging in protected speech a severely demanding task." [479 U.S. at 256](#). The Court found inadequate justification for the imposition of this obstacle to protected speech by ideological organizations, and held the provision invalid as applied to such groups. Distinguishing *Taxation With Representation*, the Court explained:

If the corporation [in *Taxation With Representation*] chose not to set such up a lobbying arm, it would not be eligible for tax-deductible contributions. Such a result, however, would infringe no protected activity, for there is no right to have speech subsidized by the government. By contrast, the activity that may be discouraged in this case, independent spending, is core political speech under the first amendment.

[479 U.S. at 256 n.9](#) (citations omitted).

In *Michigan Chamber of Commerce*, the Court found this burden to be justified in the case of a nonprofit corporation whose

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source of income is primarily business corporations. 100 S. Ct. 1391, 1398-1400 (1990).

[FN197]. There are other reasons why the think tank issue was addressed through the tax law rather than by any attempt to amend the F.E.C.A., despite the fact that the problem posed by the think tanks was perceived to be as much one of campaign finance regulation as of tax exemption law. The criticism of the think tanks arose in the context of a larger discussion of the political activities of tax-exempt charitable organizations. The I.R.S. had issued, after a ten year delay, a set of proposed regulations on lobbying activities of charitable organizations which had focused the attention of the tax-exempt community and some members of Congress on the issue of politically active nonprofits. The visibility of tax-exempt groups in the struggle over the Bork nomination to the Supreme Court and newspaper accounts of the use of a [§ 501\(c\)\(3\)](#) organization to funnel money to the Contras and to campaign against Congressional candidates who opposed Contra aid provided the context for a perception that the think tanks were just one more manifestation of a larger [§ 501\(c\)\(3\)](#) problem. See, e.g., [Congressional Taxwriters Seek Withdrawal of Proposed Regs on Lobbying by Tax-Exempt Groups](#), 34 TAX NOTES 929 (1987); [Iran-Contra Scandal Develops Tax Twist: Pickle Meets With Gibbs to Discuss Activities of Tax-Exempt Organizations](#), 33 TAX NOTES 1093 (1986); Taylor, *Of Bork and Tactics*, N.Y. Times, Oct. 21, 1987, at A23, col. 1. The fact that one of the targets of the negative campaigning was the Chairman of the Oversight Subcommittee of the House Ways and Means Committee, which has jurisdiction over exempt organization matters, perhaps increased the likelihood that the whole question of politically active charitable organizations would, in fact, be taken up. See, e.g., [Iran-Contra Aid Scandal Develops Tax Twist: Pickle Meets with Gibbs to Discuss Activities of Tax-Exempt Organizations](#), 33 TAX NOTES 1093 (1986). In addition, tinkering with the tax law is most certainly an easier undertaking in recent years than tinkering with campaign finance law.

[FN198]. [Whitney v. California](#), 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[FN199]. Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)(b) (1987). See supra note 22 and accompanying text.

[FN200]. See supra notes 107-13 and accompanying text.

[FN201]. Judge Wright, for example, has long argued for the acceptance of the equalization rationale as a justification for campaign finance regulation. He believes that limiting spending for political speech can be fully consistent with first amendment values because it serves the purpose of allowing self-governing people "to filter out the decibels so that they may penetrate to the merits of the arguments . . . consider the positions . . . [a]nd . . . choose the course which seems wisest." Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 101, 101-19 (1976). See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 13-27, at 1132-36 (2d ed. 1988) ("If the net effect of the legislation is to enhance freedom of speech, the exacting review reserved for abridgments of free speech is inapposite"); Cox, [The Supreme Court, 1979 Term--Foreword: Freedom of Expression in the Burger Court](#), 94 HARV. L. REV. 1, 69-70 (1980).

[FN202]. See supra notes 186, 188-89, discussing [Austin v. Michigan Chamber of Commerce](#), 110 S. Ct. 1391 (1990). The majority opinion expressly denies that it is accepting the equalization rationale rejected in *Bellotti*, *Buckley*, and other campaign finance cases, [id. at 1397-98](#), but it is hard to argue with the dissents' contention that the majority's approach is a significant step in that direction, [id. at 1408](#) (Scalia, J., dissenting); [id. at 1421](#) (Kennedy, J., dissenting).

[FN203]. Thus, enactment of [§ 4955\(d\)\(2\)](#) seems counterproductive even from the perspective of those who generally favor campaign finance regulation and take issue with the libertarian approach the Supreme Court has taken until very recently. Certainly, it appears ill-advised from the perspective of those who find the Court's traditionally restrictive posture toward campaign finance regulation efforts to be "not merely plausible but probably correct." BeVier, [Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform](#), 73 CALIF. L. REV. 1045, 1046 (1985) [hereinafter BeVier, *Money and Politics*]. See also Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N.C.L. REV. 389 (1973); Powe, *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243; Nahra, supra note 57, at 59 (1987); Rosenthal, *Campaign Financing and the Constitution*, 9 HARV. J. ON LEGIS. 359, 360 (1972) ("gravity of [first amendment barriers to regulation and danger of incumbents' designing regulations to solidify their own positions] argues for great reticence in tempering with the election process"); BeVier, *Hands Off the Political Process*, 10 HARV. J.L. & PUB. POL'Y 11, 11 (1987) ("The First Amendment seems to tell legislators who are thinking about yet other worlds to conquer to keep their hands off the political process."). The Accountability Act's enhancement of I.R.S. capability to enforce the preexisting restrictions on political activity, on the other hand, does represent an improvement in the law. The Act gives the I.R.S. authority to bring an action against any [§ 501\(c\)\(3\)](#) organization which "has flagrantly participated in . . . any political campaign" to enjoin the organization from

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making any further political expenditures. [I.R.C. § 7409 \(1989\)](#). Furthermore, where the I.R.S. determines that an organization has made expenditures "which constitute a flagrant violation of the prohibition against making political expenditures," it can make an immediate determination of tax owed on account of the activities, which tax is "immediately due and payable." [I.R.C. § 6852 \(1989\)](#).

The Act requires all [§ 501\(c\)](#) organizations to make their exemption application documents and Forms 990 available for public inspection during regular business hours at the principal business office of the organization. [I.R.C. § 6104\(2\) \(1989\)](#). In addition, the Act specifies that the annual information return should request information about transactions and relationships between a [§ 501\(c\)\(3\)](#) organization and other exempt, but non-charitable, organizations, such as [§ 501\(c\)\(4\)](#) and [527](#) organizations. [I.R.C. § 6033\(b\)\(9\) \(1989\)](#). These provisions answer some of the concern about the think tanks' ability to avoid disclosure under the F.E.C.A. See *supra* notes 74-80 and accompanying text. The non-disclosure problem is largely self-limiting, in any case. Politicians are sensitive to appearances. When a politician or an organization is operating close to the limits of tax exemption or campaign finance law, it does not go unnoticed by the press or by his opponent. See, e.g., *supra* note 39. Most of the think tanks voluntarily disclosed specific information about their contributors, and that information appeared in the newspapers. See, e.g., *supra* notes 37, 68-73 and accompanying text. Reluctance to disclose was also duly noted by the press. See, e.g., Turner, Tax-Exempt Fund Has Helped Kemp Explore '88 Bid, Buffalo News, June 15, 1986, at A1.

[\[FN204\]](#). In this respect, the think tank "loophole" differs from the COPAC and soft money "loopholes." See *supra* notes 161-66 and accompanying text. Those avenues for avoiding F.E.C.A. limits on sources and amounts of contributions do not enlarge and enlighten the debate. It would be ironic to restrict the think tanks while declining to address these other, more significant threats to campaign integrity, which do not offer the same positive effect in return.

The Federal Election Commission has indicated that it does not intend to tighten its regulation of COPACs or soft money. See Edsall, FEC Looks at "Soft Money": Campaign "Loophole" Studied Reluctantly, Wash. Post, Jan. 30, 1986, at A12, col. 1 ("The F.E.C., however, signalled little or no interest in expanding its regulatory mandate to cover soft money . . . and one F.E.C. source said a majority of the commission members appears to oppose issuing new regulations"). The F.E.C.'s reluctance to assume expanded regulatory duties may be at least partially explained by the difficulty the agency was experiencing at about the same time in carrying out the responsibilities already assigned to it on a budget diminished by the effect of the Gramm-Rudman-Hollings Budget Deficit Reduction Act. See FEC Testifies on FY 1988 Budget, 13 FEDERAL ELECTION COMMISSION RECORD 1 (May, 1987). The F.E.C.'s reluctance to tighten the controls on COPACs is reflected in Fed. Election Comm'n Adv. Op. No. 1986-6, Fed. Election Camp. Fin. Guide (CCH) ¶ 5849.

At this writing, however, Congress is displaying some inclination to eliminate the COPAC and soft money loopholes, and to decrease the influence of PACs. Bills introduced by Senators David Boren, S. 137, 101st Cong., 1st Sess. (1989), and Mitch McConnell, S. 2595, 101st Cong., 2d Sess. (1990), do make some attempt to address the COPAC and soft money issues. Despite "tedious, cordial, careful" negotiations between party leaders, Alston, Negotiators Tread Carefully To Find Common Ground, 48 CONG. Q. WEEKLY REP. 1627, 1627 (1990), the Democratic and Republican proposals differ substantially, see Alston, The Maze of Spending Limits: An Election Field Guide, 48 CONG. Q. WEEKLY REP. 1621 (1990); Alston, Senators Fortify Their Bases For War--Or Negotiation, 48 CONG. Q. WEEKLY REP. 1321 (1990). It remains to be seen whether the current crop of reform proposals will go the way of numerous previous proposals which have quietly (or not so quietly) died. See, e.g., Hook, Stalemate Senate Shelves Campaign Measure, 46 CONG. Q. WEEKLY REP. 485 (1988). The Boren bill has been reported out of the Senate Rules and Administration Committee, 136 CONG. REC. S2929 (1990) but, as of June 8, 1990, the George Mason University Billcast service, available on LEXIS, projects strong odds against the enactment of any of the pending proposals. See also Alston, Lenders Select Negotiators for Off-the-Floor Talks, 48 CONG. Q. WEEKLY REP. 1529, 1529 (1990) ("None of us have any illusions about the difficulty of this process," Mitchell said. "Democrats and Republicans have tended to see this issue from vastly different perspectives, and even within our own parties, there are sharply divergent views."); Alston, Bipartisan Pact Unlikely As Senate Debate Nears, 48 CONG. Q. WEEKLY REP. 1239 (1990).

[\[FN205\]](#). See BeVier, Money and Politics, *supra* note 203, at 1080; Alexander, The Regulation and Funding of Presidential Elections, 1 J.L. & POL. 43, 48-49 (1983); Edsall, Fund-Raising as Preoccupation; Early Advantage Becomes More Critical, Wash. Post, Apr. 15, 1987, at A1, col. 1; Levy, Cash for Primaries: More, Please, Legal Times, Mar. 14, 1988, at 14, col. 1.

[\[FN206\]](#). "The role once filled by large contributors [is] now filled by well-connected individuals who [can] persuade a large number of persons to contribute the \$1,000 maximum" Alexander, *supra* note 205, at 48.

[\[FN207\]](#). See BeVier, Money and Politics, *supra* note 203, at 1080; Nagra, *supra* note 57, at 107-08; Romano, [Metapolitics](#)

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[and Corporate Law Reform, 36 STAN. L. REV. 923, 990-91 \(1984\)](#); Cohen, PACs and Perks, Nat'l J., June 11, 1988, at 1582; Cohen, Incumbent Money, Nat'l J., Nov. 15, 1986, at 2812 (most PAC money goes to incumbents). This disparity is exacerbated by the elimination of the think tanks, because incumbents continue to have the platform of their offices.

[FN208]. See H. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 22 (3d ed. 1984):

The predisposition of the voters, the issues of the moment, the advantages of incumbency, and the support of various groups are always related to the final vote totals and are often more important than cash. Independent decisions by the news media--particularly TV--about what aspects of a campaign to cover can provide more exposure than advertising purchased by the candidates. Most campaigns now spend substantial money to put the candidate at events where free television coverage is certain. Campaign schedules are now drawn up with a view to obtaining media coverage, in time to make the morning or evening newspaper, or to get on the evening newscasts.

See also Oreskes, America's Politics Loses Way As Its Vision Changes World, N.Y. Times, Mar. 18, 1990, at 1, col. 1 ("Winning elections has become . . . a big business with professional associations and magazines, where volunteers have been replaced by computer assisted polling, the pamphlet by the television spot."); Shyles, Defining the Issues of a Presidential Election From Televised Political Spot Advertisements, 27 J. BROADCASTING 333, 337-43 (1983) (empirical research leads to conclusion that "[t]elevised political commercials can be a serious vehicle for disseminating issues," but author notes that the most prevalent "issue" addressed was "national wellbeing," that is, messages "focused on the vision of the American Dream, the hope of all Americans for the continued growth of the nation . . . and values and commitment of citizens to strive for the continued success of America," and posits that prevalence of this "issue" may be explained by the fact that "candidates presumably run a lower risk of precipitating defections by mentioning aspirations of the American dream than by defending more controversial and substantive issue positions"); Shafer, Reform and Alienation: The Decline of Intermediation in the Politics of Presidential Selection, 1 J.L. & POL. 93, 113-15 (1983). Shafer suggests that the shift to major media is a shift away from the "more proximate campaign devices which might attach citizens to 'their presidential candidate' . . . and convert these citizens into a constituency which could make demands and seek accountability after the election." Shafer proposes measures to increase the role of political parties as an antidote to this phenomenon. Avoiding overdeterrence of other vehicles for issue discussion, such as the think tanks, would have a similar effect.

[FN209]. See H. ALEXANDER, FINANCING THE 1984 ELECTION 411 (1986) ("Critics notwithstanding, the great variety of political funding vehicles that have emerged demonstrate the inventiveness of political actors in exploiting and circumventing the laws and the intractability of election campaign finance more than they demonstrate the deficiencies of the laws themselves.").

[FN210]. S. Rose-Ackerman, Corruption: A Study in Political Economy 57 (1978). See also [Buckley v. Valeo, 424 U.S. 1, 14-15 \(1976\)](#) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential . . .").

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PLAINTIFFS' EXHIBIT 186

LEXSEE 66 TAX NOTES 237

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Tax Notes

JANUARY 9, 1995

LENGTH: 14821 words

DEPARTMENT: Special Report (SPR)

CITE: 66 Tax Notes 237

HEADLINE: 66 Tax Notes 237 - NEWT GINGRICH AND OLIVER TWIST: CHARITABLE CONTRIBUTIONS AND CAMPAIGN FINANCE

AUTHOR: Hill, Frances R.
University of Miami School of Law

SUMMARY:

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Frances R. Hill is an associate professor at the University of Miami School of Law, and coauthor of *Federal and State Taxation of Exempt Organizations*, published by Warren Gorham & Lamont.

In this article, Professor Hill examines new House Speaker Newt Gingrich's fund-raising activities, especially those involving the various *section 501(c)(3)* organizations that fund his lectures on 'Renewing American Civilization,' which are beamed by satellite to approximately 130 locations around the country. She places the debate over these activities in the larger context of campaign finance reform and reform of *section 501(c)(3)*.

This article originally appeared in *The Exempt Organization Tax*

TEXT:

09 JAN 95

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Introduction

Portrayed by his Democratic adversaries as Scrooge, Newt Gingrich, newly elected speaker of the House of Representatives, has been emulating Oliver Twist. Like that celebrated orphan, Gingrich is asking for 'more' from contributors to the various *section 501(c)(3)* organizations that fund his lectures on 'Renewing American Civilization,' which are beamed by satellite to some 130 locations around the country. Former Congressman Ben Jones, whom Gingrich defeated in this fall's election, filed a complaint with the House Committee on Standards of Official Conduct,

more commonly called the 'House Ethics Committee,' charging that the course was a partisan effort to recruit and train Republican activists. /1/ Gingrich responded by challenging the Ethics Committee's jurisdiction, asserting that the only issue, if there was one, was a tax matter properly under the jurisdiction of the Internal Revenue Service. /2/ Rep. David Bonior, D-Mich., the new House Minority Whip, has called for appointment of an independent counsel to investigate Gingrich and his course. /3/

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Some observers may see in Gingrich's characterization of the issue as a tax matter an early portent of the self-destruction that at least some of Gingrich's political rivals long for. In fact, this strategy is more insightfully regarded as a clever invocation of the authority of an agency feared by ordinary taxpaying voters but one that probably cannot, given the state of the law of exempt organizations, impose any sanctions on Gingrich. /4/ Although there seem to be significant questions about who funded the Gingrich lectures and what organizations played what roles in the fund-raising effort, the real scandal here may be that Congress has never found the political courage to enact a meaningful package of campaign finance reforms that includes administrable standards for determining whether *section 501(c)(3)* organizations are participating impermissibly in electoral politics. Campaign finance reform without reform of *section 501(c)(3)* will only exacerbate the very problems that the Gingrich lectures have placed on the public agenda.

The issue is not new, and Gingrich is not unique. /5/ While he may be more flamboyant in his fund-raising and while he may be bolder in his assertions that his activities are educational and not political, Gingrich is virtually indistinguishable from his colleagues of both parties in his enthusiasm for developing a close relationship with a *section 501(c)(3)* organization. /6/ These politician-charity links vary in motive, consequences, and political implications. No doubt, some officeholders are doing what many private citizens do — putting their talents at the service of a cause for the sole purpose of helping others. Some, however, seem to be helping mainly themselves and their quests for re-election in the endless campaigns that characterize American politics. Indeed, the modest efforts already made to reform campaign fund-raising may have made the political use of *section 501(c)(3)* organizations more tempting — and the problems of determining the proper role of *section 501(c)(3)* organizations more difficult.

Section 501(c)(3) organizations offer three enticements to politicians. First, contributions to *section 501(c)(3)* organizations are deductible to the contributors under *section 170*, while contributions to a *section 527* political organization are not deductible. Being able to offer contributors, especially large contributors, a tax deduction may ease the unremitting burden of fund-raising faced by all politicians. Second, contributors to *section 501(c)(3)* organizations are not subject to disclosure under either tax law or federal campaign finance law. Third, corporations may contribute directly to *section 501(c)(3)* corporations (and claim a deduction for this contribution) but federal election law prohibits direct corporate contributions to political candidates.

While the benefits of raising political capital through charitable contributions are obvious, the means of doing so are less obvious if one relies on the plain meaning of the statute. *Section 501(c)(3)* provides exemption only for an otherwise qualifying organization 'which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.' While this prohibition is absolute, /7/ it is far from clear what activity it prohibits short of direct endorsement of a particular candidate by an official speaking on behalf of the organization. In all other cases, the law offers little guidance and perhaps even less restraint. /8/

Inclusion of education among the exempt purposes of a qualifying *section 501(c)(3)* organization provides the foundation for the political use of charitable contributions. The line between politics and education is difficult to draw, at best, and existing judicial precedents only increase the difficulty. /9/ This article first examines the politics-education distinction. It then discusses other requirements for exemption as a *section 501(c)(3)* organization, including providing a public benefit to a charitable class, not providing a private benefit, and earnings not inuring to the benefit of an insider. It then looks at the use of complex structures including *section 501(c)(3)* organizations. The article concludes with an analysis of the currently available sanctions against political intervention or participation

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by a *section 501(c)(3)* organization and suggestions for reform. Paradoxically, these issues will become matters of greater concern if campaign finance reform restricts the formation of capital for politics, leaving the unreformed law of *section*

501(c)(3) as one of a more limited number of options for unrestricted political fund-raising.

Education and Politics

The invocation of a professorship past is apparently an effort to bolster Gingrich's position that the lectures in question were 'educational' within the meaning of *section 501(c)(3)*. From this premise, Gingrich apparently concludes that an activity that is educational cannot violate the political prohibition. He also seems to think that his academic past provides insulation against his political present. These assertions contain a germ of correct legal analysis (the lectures may in fact be educational within the meaning of *section 501(c)(3)*) but make a factual assertion that is either irrelevant or unnecessary or both (that Gingrich was formerly a professor) and advance an incorrect legal argument (that educational activities can never violate the *section 501(c)(3)* political prohibition) to reach the conclusion that his activities raise no tax issue. /10/

Section 501(c)(3) provides no definition of educational activity, but the applicable regulations define 'exempt educational activity' as '(a) the instruction or training of the individual for the purpose of improving or developing his capabilities, or (b) the instruction of the public on subjects useful to the individual and beneficial to the community.' /11/ Given the breadth of this definition, the conceptual problem is trying to determine what activity it might exclude rather than what activities it includes. There is no requirement that such instruction take the form of 'courses' of a type offered for credit at an accredited school or college. /12/ The regulations treat 'public discussion groups, forums, panel, lectures, or other similar programs' as educational without reference to academic credit. /13/ Indeed, athletic activity is educational within the meaning of *section 501(c)(3)*, even though most colleges and universities or private secondary schools do not give academic credit for either intramural or competitive inter-school athletics. /14/

Presentation of controversial views and even advocacy of controversial positions are not necessarily inconsistent with characterization as educational activity. /15/ This, however, is where the issue becomes difficult and where the Service and at least one court have taken different approaches. The regulations resolve the issue by the so-called full and fair exposition test under which a *section 501(c)(3)* organization may advocate controversial positions 'so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion.' /16/ A presentation is not educational under the regulations if it constitutes 'the mere presentation of unsupported opinion.' /17/

In *Big Mama Rag*, the District of Columbia Circuit Court of Appeals held that the full and fair exposition test was void because it was unconstitutionally vague. /18/ The Service in the *National Alliance* case attempted to cure the unconstitutional vagueness by setting forth a 'methodology test' it used to determine whether the organization's activities were educational. /19/ The court did not rule on whether the methodology test cured the vagueness it had found in the regulation in *Big Mama Rag* because it held that *National Alliance's* activities could not be considered educational under any standard. /20/

The Service used the methodology test it presented in *National Alliance* as the basis of *Rev. Proc. 86-43*, /21/ which set forth the criteria it would use to determine whether particular activities are educational within the meaning of *section 501(c)(3)*. The Service emphasized

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its focus on methodology rather than on content, stating:

Although the Service renders no judgment as to the viewpoint or position of the organization, the Service will look to the method used by the organization to develop and present its views. The method used by the organization will not be considered educational if it fails to provide a factual foundation for the viewpoint or position being advocated, or if it fails to provide a development from the relevant facts that would materially aid a listener or reader in a learning process. /22/

Rev. Proc. 86-43 then sets forth four factors, any one of which 'is indicative that the method used by the organization to

advocate its viewpoints or positions is not educational.' /23/ The four factors are: (1) presentation of views or positions that are 'unsupported by facts' constitutes 'a significant portion of the organization's communications'; (2) reliance on 'distorted' facts; (3) presentations that 'make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations'; and (4) reliance on an approach not aimed at developing understanding on the part of the audience 'because it does not consider their background or training in the subject matter.' /24/

Although the presence of any one of the enumerated factors may be sufficient to find that an organization's activities are not educational, *Rev. Proc. 86-43* also provides that an organization's activities may, in 'exceptional circumstances,' be educational even if one or more of the enumerated factors are present. /25/ *Rev. Proc. 86-43* concludes that '[t]he Service will look to all the facts and circumstances to determine whether an organization may be considered educational despite the presence of one or more of such factors.' /26/ Advocacy in itself does not bear on whether an activity is educational. /27/

The constitutionality of the methodology test was challenged in the Nationalist Movement case. /28/ The Nationalist Movement was organized to promote the interest of white Americans through education, litigation, and lobbying for legislation of particular interest to the majority. /29/ The Service determined that the Nationalist Movement did not qualify for exempt status as an organization described in section 501(c)(3), and the organization brought a declaratory judgment action in the Tax Court. /30/ The major issue was whether the organization's newsletter, which was the organization's primary activity, was educational and whether the Service had based its adverse determination on an impermissible consideration of the substantive content of the newsletter.

The Nationalist Movement challenged the methodology test on the grounds that it permitted the Service excessive administrative discretion. The Tax Court rejected arguments based on the First Amendment and the Due Process Clause and held that the methodology test of *Rev. Proc. 86-43*

...is not unconstitutionally vague or overbroad on its face, not is it unconstitutional as applied. Its provisions are sufficiently understandable, specific, and objective both to preclude chilling of expression protected under the First Amendment and to minimize arbitrary or discriminatory application by the IRS. /31/

The Fifth Circuit affirmed the Tax Court with respect to the Service's denial of exemption for the Nationalist Movement, but held that it did not have to consider the constitutionality of the methodology test. /32/

If the Gingrich course is tested under the methodology test, it may or may not be found to be educational. Nevertheless, such a showing would not resolve the issue of whether the course constituted impermissible participation or intervention in a political campaign. Two different types of tests apply to the two determinations involved. The Service applies a methodology test to determine whether an activity is educational but applies a purposes test to determine whether an activity (whether educational or not) constitutes a prohibited political activity. The Service has taken the position that '[a]ctivities that meet the methodology test of *Revenue Procedure 86-43* may nevertheless constitute participation or intervention in a political campaign.' /33/

This distinction has been applied by both the Service and the courts in the context of various types of political activities to determine whether they are prohibited political activities. For example, an organization that urged its members to become active in either of the two major political parties by seeking election as precinct committee members did not qualify for exemption under *section 501(c)(3)* both because it was urging its members to seek public office and because its longer-

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term strategy was to elect persons who shared its views to public office. /34/ In terms that may offer some guidance with respect to Gingrich's efforts to train activities, the Service reasoned that:

The first step in the Foundation's long-term strategy was to encourage members to be elected as precinct committeemen. These individuals could then exert influence within the party

apparatus, beginning with the county central committee. Precinct committeemen could sway the precinct caucus, a step in the selection of delegates to the party's presidential nominating convention... Intervention at this early stage in the elective process in order to influence political parties to nominate such candidates is, we believe, sufficient to constitute intervention in a political campaign. /35/

Voter registration projects that favor a particular candidate or slate of candidates constitute prohibited political participation. /36/ Similarly, voter guides will also be treated as prohibited participation or intervention if they seek to influence voters' choices rather than simply to inform voters about the range of choices. /37/ Candidate forums will constitute prohibited participation or intervention if they are not neutral in both format and content. /38/ The major difficulty with candidate forums centers on whether any candidate can be excluded and, if so, what criteria of selection and exclusion are consistent with the required neutrality. Presidential candidate Dr. Leonora Fulani raised this issue in a series of cases but the question of selection criteria remains unresolved. /39/

Candidate rating systems are likely to be treated as prohibited political activities even though they may also be educational. The rating system applied to candidates for elective judgeships by the New York City Bar is a case in point. /40/ The Tax Court held that the rating system did not constitute prohibited political participation or intervention because the candidates were rated using objective criteria against an absolute standard of fitness and were not compared directly among each other so that more than one candidate for any office could receive the highest rating. /41/ The court also noted that the Bar Association did not attempt to publicize its ratings. /42/ In a vigorous dissent, Judge Chabot warned that '[w]e should not twist the language of the statute merely because petitioner is prestigious or because this activity, when done with care and highmindedness, may justly be viewed as an example of the legal profession acting honorably to uphold and heighten the standards of the judiciary.' /43/ The dissent also rejected any distinction between active and passive publication based on how broadly a candidate rating system was disseminated.

The Second Circuit reversed the Tax Court and held that the candidate rating system constituted prohibited participation or intervention. /44/ The court held that exempt status is a government subsidy and permitting the preparation and dissemination of a candidate rating system that necessarily reflected the organization's own values was inconsistent with government neutrality in elections. /45/

A more difficult issue involves issue advocacy during a campaign. *Section 501(c)(3)* prohibits only that participation or intervention that occurs 'on behalf of (or in opposition to) any candidate for public office.' If an organization advocates certain positions at issue during a campaign, it is extremely difficult to determine whether such advocacy is purely educational or whether it constitutes an indirect mode of endorsing one or more candidates. The Service has rejected the position that only an activity that constitutes 'express advocacy' for purposes of federal election law constitutes impermissible participation or intervention and has taken the position that a communication may be intended to influence voters even if it does not refer to a candidate by name. /46/ The Service has indicated that it will deal with questions of advocacy during a campaign by looking for labels or coded language that serve as proxies for direct references to one or more identifiable candidates. /47/

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While the Service approach might prove useful in some situations, it may not provide a means of distinguishing prohibited political participation or intervention from permissible advocacy in the Gingrich case. Gingrich is an ideologue whose worldview links politics to every other aspect of life. /48/ In his emerging lexicon, 'American civilization' appears to be a coded reference to those aspects of the American past he finds of contemporary value. /49/ Such selective, instrumental use of the past to condemn the present and shape the future is the essence of ideological politics. /50/ Because most contemporary politicians do not approach politics with Gingrich's expansive effort to craft a general ideology of every aspect of contemporary life, current law may be based on an assumption of a non-political category that no longer exists. In the Gingrich gestalt, any distinction between politics and history or literature or social science may be meaningless because the purpose of everything is political transformation. In sum, Gingrich may be expanding the concept of politics while shrinking the role of government.

If *section 501(c)(3)* does not contemplate ideological politics, it may also not contemplate the permanent campaigns

and ongoing candidacies that characterize contemporary politics. *Section 501(c)(3)* prohibits only that political participation or intervention that occurs 'in any political campaign on behalf of (or in opposition to) any candidate for public office.' The regulations define a 'candidate' as one who 'offers himself, or is proposed by others.' /51/ Under this standard, the IRS has treated a person as a candidate when he announced the formation of an exploratory committee that referred to the person's 'prospective candidacy.' /52/ Formation of a draft committee by others may make a person a candidate as of the time that the draft committee was formed. /53/

An incumbent is not automatically presumed to be a candidate engaged in a campaign for re-election solely by virtue of his or her incumbency. The Service has taken the position that 'the mere fact that an individual is a prominent political figure does not make him a candidate, even if there is speculation regarding his possible future candidacy for particular offices.' /54/ This restrictive concept of candidacy enlarges the opportunities of incumbents to use *section 501(c)(3)* educational organizations for prohibited political purposes and creates ambiguities in the determination of what constitutes a campaign.

The Service has offered no guidance as to what constitutes a campaign for purposes of *section 501(c)(3)*. One approach is to define a campaign in terms of the date of an election, creating an arbitrary presumption that, for example, the six-month period prior to an election constituted the campaign period. While this approach offers an administrable brightline rule, it invites abuse. It is difficult to imagine what enterprising politician would not form a charity to finance his or her activities in the officially designated noncampaign period. Another approach is to define a campaign in terms of the purpose of activities taken by actual or prospective candidates. This is the approach taken under *section 527*, with the result that expenditures may be treated as exempt political expenditures without regard to the proximity of an election. /55/ A restrictive definition of a campaign for purposes of *section 501(c)(3)* and an inclusive definition of a campaign for purposes of *section 527* suits politicians' interests admirably.

One thing that is clear in the Gingrich case is that a congressional campaign is a campaign for public office. /56/ The Service has taken the position that 'the term 'public office' requires that there be some statutory or constitutional basis for construing the office as 'public.'" /57/ In contrast to its restrictive definition of a candidate, the IRS has interpreted public office relatively broadly to include certain positions in political party organizations. /58/

It will be difficult to determine whether Gingrich's course is prohibited political activity for purposes of *section 501(c)(3)*. While Congress has taken no action to clarify the political prohibition, a significant question is whether the Service should be expected to solve the problem through precedential guidance or whether Congress might exercise some leadership in this area.

Gingrich's Course

To date, most commentary on Gingrich's lectures has focused on the arguably political character of the

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course. /59/ However, other requirements for exemption as a *section 501(c)(3)* organization may also be implicated by the emerging facts of the Gingrich matter. The pertinent issues are whether the beneficiaries of the course constitute a charitable class or whether the course provides a private benefit, whether the course constitutes inurement to Gingrich or others, and whether the organizations through which Gingrich's course was funded are conduits or shams because contributions were targeted exclusively for the course. All of these issues are aspects of a larger unresolved question regarding the proper relation between candidates (or officeholders) and *section 501(c)(3)* organizations, the so-called 'candidate organization' dilemma that remains virtually unaddressed.

An organization will not qualify for exemption under *section 501(c)(3)* 'unless it serves a public rather than a private interest.' /60/ A *section 501(c)(3)* organization must establish that 'it is not organized or operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests.' /61/ Under this requirement, the Service has ruled that the organization must serve the public at large, or at least a segment of it that constitutes a charitable class, and may benefit private individuals only incidentally. /62/

The Tax Court relied on the private benefit prohibition in *American Campaign Academy*, /63/ a case with certain similarities to the current Gingrich matter. The organization in question trained professional campaign workers, all of

whom worked for the Republican Party or Republican candidates, even though the organization itself denied any formal affiliation with the Republican Party. The Tax Court found that the students enrolled in the course were its primary beneficiaries and did not treat such benefits as impermissible private benefits. Instead, the court held that the organization did not qualify as a *section 501(c)(3)* organization because the Republican Party received an impermissible private benefit in the form of a cadre of trained political operatives. While these benefits to the Republican Party were 'secondary benefits,' the court held that '[s]econdary benefits which advance a substantial purpose cannot be construed as incidental to the organization's educational purpose.' /64/

Based on American Campaign Academy, the Gingrich course could be regarded as educational and of primary benefit to its students, but still constitute a private benefit either to Gingrich or to the Republican Party or, more problematically, to the conservative movement. Gingrich is educating a cadre of conservative activists for the broad cultural-political struggle to save American civilization from the depredations of liberals and Democrats. One possible distinction between Gingrich's course and the course offered by the American Campaign Academy is that the American Campaign Academy trained professional staff members, although it did not guarantee them employment upon completion of the course. Gingrich's course, however, is offered for college credit at some campus viewing sites but it is not designed to train campaign professionals. The question is then how the training of Republican or conservative activists could constitute even an indirect private benefit to any private interest, whether Gingrich himself, the Republican Party, /65/ or a conservative movement. In the case of a presumed benefit to a conservative movement, the unanswered but necessary question is whether such a potentially inchoate interest could be treated as a private interest that derives an impermissible benefit from the course.

The United Cancer Council case, which is currently before the Tax Court, raises the possibility that Gingrich himself derives an impermissible private benefit in the form of financial support for the dissemination of his ideas. /66/ A private benefit analysis is not defeated by Gingrich's having foregone any salary for giving his lectures. The intangible benefit of disseminating his ideas, especially with the presumption of scholarly legitimacy and academic respectability that at least some might accord the course because of its particular packaging could constitute a private benefit. /67/ In addition, payment for such expenses as travel or the production of course materials and videos might also constitute a private benefit to Gingrich. /68/

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The same questions arise if the issue is inurement rather than private benefit, but under current law, the inurement prohibition is absolute. /69/ *Section 501(c)(3)* describes a qualifying organization as one 'no part of the net earnings of which inures to the benefit of any private shareholder or individual.' /70/ The regulations define a 'private shareholder or individual' to include 'persons having a personal and private interest in the activities of the organization.' /71/ This definition does not depend on the individual's holding any formal position with the organization. The statute refers to any individual without limitation. The Service has applied the inurement prohibition in the case of 'persons who, because of their particular relationship with an organization, have an opportunity to control or influence its activities.' /72/ The United Cancer Council case involves the Service's assertion that a fund-raising organization was an insider with respect to an exempt organization for which it raised funds because the contract permitted the fund-raiser to retain a disproportionate share of the funds raised in the name of the charity. /73/ Insiders are not limited to natural persons but could encompass the Republican Party or GOPAC as well as Gingrich himself. The Service has made it clear, however, that inurement may arise through a wide range of transactions involving value shifts to insiders. /74/

All of the foregoing issues — charitable class, private benefit, inurement — are related to the question of whether the organizations that raised money for Gingrich's lectures are themselves mere conduits to transfer money from contributors to Gingrich while the organizations themselves play no independent role. A conduit analysis treats the organization's only role as offering a charitable contribution deduction to contributors who want their contributions used only for a purpose they designate — a quid pro quo. /75/ The contributors are, in effect, earmarking their contributions and the organization simply accommodates the transaction. The organization is a sham with no independent purpose. Under this analysis, the contribution is treated as having been made to the ultimate beneficiary (Gingrich or the Republican Party or the conservative movement) and the *section 501(c)(3)* organization that accepted the contribution is disregarded.

The facts of the Gingrich case relating to which organizations solicited and/or received contributions remain unclear. /76/ This case may raise issues of whether a recipient organization is a conduit if it accepts moneys solicited by an organization with which it has no connections. In this case, some press accounts suggest that the solicitations were

made by GOPAC, Gingrich's *section 527(f)(3)* political organization, but were paid either to one of two colleges, or to a foundation controlled by one of the colleges, or to the Progress and Freedom Foundation, which is run by political associates of Gingrich or perhaps by each of these at some point in the process of offering the Gingrich lectures.

Political Finance and Complex Structures

The unanswered questions relating to the organizations involved and Gingrich's involvement in or with them points to another of the significant issues involved in political charities, the use of a *section 501(c)(3)* organization as part of a larger structure of *section 527* political organizations and other types of *section 501(c)* organizations to move funds indirectly from the *section 501(c)(3)* organization to political uses. These structures depend on the basic principle of federal income taxation that the separate identity of a corporate entity will be respected unless it is a sham or a conduit or has no independent business purpose. /77/

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In these cases, education is the claimed purpose of the *section 501(c)(3)* component of the complex structure. The effort is to treat as many campaign-linked expenses as possible as educational and not political so that they may be funded with deductible charitable contributions.

There are at least two types of structures that include *section 501(c)(3)* organizations. One involves the creation of a *section 501(c)(3)* organization for the express purpose of accepting contributions that qualify for deduction under *section 170*. These organizations may be analyzed as conduits and their activities may be recharacterized as political rather than educational. This type of organization may be found in structures dominated by a political figure. In other cases they may be subsidiaries of trade associations that also have an affiliated PAC or they may be affiliated with *section 501(c)(4)* social welfare organizations. The second type of structure involves a *section 501(c)(3)* organization with an independent exempt purpose that seeks to participate indirectly in electoral politics, or feels that a relationship with a prominent political figure would enhance its stature and its ability to pursue its own exempt agenda. These *section 501(c)(3)* organization may themselves confer legitimacy on the political figure and obscure the political nature of the undertaking. At the same time, such organizations may serve as conduits between the contributors and the political figure. The Gingrich case may involve both types of *section 501(c)(3)* organizations, each of which served as a conduit that provided a charitable deduction to the contributors and, to varying degrees, obscured the political nature of the lecture series.

The Service has issued no precedential guidance in this area. However, with respect to the larger issue of complex structures organized at least in part to permit the use of deductible charitable contributions for prohibited political campaign activities, the Service has indicated that it approaches the issue by tracing value flows among the organizations. /78/ With respect to one common structure, a *section 501(c)(3)* organization with a related *section 501(c)(4)* organization with an affiliated PAC (a *section 527(f)(3)* separate segregated fund), the Service has taken the position that 'the political campaign activities of the affiliated *IRC 501(c)(4)* organization, or of the PAC it establishes, should not be an attempt to accomplish indirectly what the *IRC 501(c)(3)* organization could not do directly.' /79/ The Service has pointed to the following facts and circumstances that may trigger special scrutiny:

Situations of particular concern when an *IRC 501(c)(3)* organization has a related *IRC 501(c)(4)* organization include those in which the two organizations share staff, facilities, or other expenses or in which the two organizations conduct joint activities requiring an allocation of income and expenses. Any allocation of income or expenses between the two organization must be carefully reviewed to ensure that the allocation method is appropriate and that the resources of the *IRC 501(c)(3)* organization are not being used to subsidize the political campaign activity of the *IRC 501(c)(4)* organization or its PAC. The determination of whether the allocation method used is appropriate is based upon the facts and circumstances. An arm's length standard must be utilized. /80/

The Service is concerned not simply with direct transfers of cash but also with transfers of goods or services, including such intangible assets as a *section 501(c)(3)* organization's name and the goodwill associated with it. /81/ The Service has taken the position that

Any attempt at joint fundraising should be carefully scrutinized from the aspect of whether the IRC 501(c)(3) organization is allowing its name or goodwill to be used to further an activity forbidden to it. For example, if a well-known IRC 501(c)(3) organization 'jointly' sponsors a fundraising event with a lesser-known PAC, there is a strong suspicion that the IRC 501(c)(3) organization's drawing power is being used to aid the political intervention activities of the PAC. /82

In the Gingrich case, the colleges that sponsored Gingrich may be considered to have contributed their reputations as academic institutions to Gingrich, thereby bolstering his assertion that his lectures are educational rather than political undertakings. /83/ The same inquiry may be made with respect to those colleges that offered academic credit for the course.

These issues are made especially difficult by the presence of an officeholder in the structure. The officeholder or candidate organizes the *section 527* political organization but does not (at least in the best-advised structures) hold any formal position in the *section 501(c)(3)* organization. The *section 501(c)(3)* organization is typically run by an executive director who formerly served on the officeholder's staff or in his campaign organization. For example, the Progress and Freedom Foundation is run by Jeffrey Eisenach, a former Gingrich staffer and former employee of Gingrich's *section 527* organization, GOPAC. The officeholder or candidate may simply appear at organization events or endorse the organization's positions on issues. Fund-raising solicitations may or may not refer to the politician, but will prominently invoke his or her views. The *section 501(c)(3)* organization commonly solicits contributions from the *section 527*

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organization's contributors. /84/ It is unclear whether or under what circumstances such joint fund-raising efforts might cause the *section 501(c)(3)* component of a complex structure to be disregarded. /85/

The questions posed by the presence of an officeholder or candidate or potential candidate find no answers in the current law of exempt organizations or of campaign finance. One question is whether the presence of a political figure in itself taints the *section 501(c)(3)* organization? If so, is the taint one of prohibited political participation or intervention or is it one of lobbying, of making charitable contributions to gain legislative access and consideration? If there is no per se taint, are there types of relationships between a *section 501(c)(3)* organization and a political figure that support characterization of the *section 501(c)(3)* organization as a conduit or sham or that bear on the question of whether its activities are educational or political? Current law provides no answers and little guidance in understanding the issues involved in complex structures that include political charities.

Uncertain Sanctions

While Gingrich's status as a charitable beneficiary is more problematic than was Oliver Twist's, current law protects Gingrich from any personal accountability for his successful (another difference between Gingrich and Twist) request for 'more.' Gingrich himself will suffer no tax-based sanctions. The *section 501(c)(3)* organizations may risk loss of exempt status and both the organizations and their managers may be subject to excise taxes under *section 4955*, but, in reality, neither of these sanctions is meaningful, and neither could under current law impose any cost upon Gingrich. /86/ Under current law, a politician who benefits from a political charity faces little or no personal risk — he is rolling someone else's dice.

Section 501(c)(3) provides that an organization that 'participates or intervenes in a political campaign on behalf of (or in opposition to) any candidate for public office' does not qualify for exemption under *section 501(c)(3)*. While this initially sounds like a draconian alternative, especially in light of the prohibition in *section 504* on such an organization's then seeking exemption under *section 501(c)(4)*, it in fact has little practical value.

A *section 501(c)(3)* organization that loses its exempt status is required to dissolve and to transfer its assets to another *section 501(c)(3)* organization. /87/ If a political charity loses its exempt status, which is a protracted administrative process, those involved in the imperiled organization can simply establish a new organization, generally with a slightly altered board of directors, and, when the former organization's exemption is revoked, transfer any remaining assets to its successor. In this process, the organization itself can determine which *section 501(c)(3)* organization will receive its assets. In tax terms, there is no liquidation-reincorporation doctrine that applies to *section 501(c)(3)* organization whose exempt status has been revoked.

Section 504 prohibits an organization that has lost its exempt status due to excessive lobbying or prohibited political activity from seeking exemption as a *section 501(c)(4)* organization that is not subject to the same limitations on lobbying or political participation. /88/ *Section 504(b)* restricts transfers to avoid *section 504(a)* where the transferee is controlled by those persons who controlled the transferor organization. /89/ The paradox is that *section 504* does not prohibit transfers to other *section 501(c)(3)* organizations, whether or not controlled by those persons who controlled the transferor organization. /90/

Under current law, the only meaningful sanction associated with revocation of exemption is embarrassment. /91/ Presumably, the colleges involved in the Gingrich lectures would find revocation of their exempt status embarrassing. /92/ Whether organizations formed for the purpose of serving as conduits would suffer similar embarrassment is open to significant question. Indeed, some political charities dissolve of their own accord at the end of an election cycle, having achieved their purpose and used all of the contributed funds.

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These limitations and paradoxes of revocation of exemption led Congress to add three new sanctions /93/ after extensive hearings on the political activities of *section 501(c)(3)* organizations. /94/ These hearings produced strong evidence that *section 501(c)(3)* organizations were playing a greater role in political campaigns than had previously been thought. The subcommittee concluded that '[t]he increasing use of tax-exempt organizations to benefit a political candidate for public office runs counter to Federal tax concerns and allows for the circumvention of the contribution and spending restrictions contained in the Federal Election Campaign Act.' /95/ The subcommittee distinguished candidate organizations from other *section 501(c)(3)* organizations and warned that '[t]he alarming use of tax-exempt organizations to further the political ambitions of a particular candidate demonstrates the need for clarification of current law and additional restrictions on this type of activity.' /96/ The full Ways and Means Committee followed its Oversight Subcommittee in expressing concern over the political role of certain *section 501(c)(3)* organizations and called for enactment of additional sanctions on those *section 501(c)(3)* organizations that engaged in prohibited political activity. /97/ These new sanctions are the *section 4955* on political expenditures, the authority under *section 6852* to assess tax immediately in the case of flagrant political expenditures, and the authority under *section 7409* to seek to enjoin flagrant political participation or intervention. In effect, Congress recognized that revocation was ineffective. /98/

Under *section 4955*, any *section 501(c)(3)* organization and its managers are subject to an excise tax if the organization makes a 'political expenditure' for prohibited political activity. /99/ *Section 4955(d)* provides two types of political expenditures. Under *section 4955(d)(1)*, expenditures that violate *section 501(c)(3)* are political expenditures subject to the *section 4955* excise taxes. /100/ In addition, *section 4955(d)(2)* lists political expenditures characteristic of candidate organizations. /101/

Section 4955 imposes an excise tax equal to 10 percent of the amount of the political expenditure on the organization /102/ and an excise tax equal to 2.5 percent of the amount of the expenditure is imposed on any organization manager /103/ who willfully /104/ agreed /105/ to the making of the expenditure knowing /106/ that it was a political expenditure. /107/ If the organization does not correct /108/ the political expenditure, it becomes subject to an additional excise tax equal to 100 percent of the political expenditure /109/ and any organization manager who refuses to agree to the correction becomes subject to an additional excise tax equal to 50 percent of the political expenditure. /110/

More than one manager may be subject to tax, but their total liability is capped at \$5,000 for any one political expenditure for the first-level excise tax and at \$10,000 for the second-level excise tax. /111/ Managers subject to the tax are jointly and severally liable. /112/

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There is no similar cap on the organization's liability, but such liability may be a mere formalism in the case of an organization created and operated solely to promote a particular candidate in a particular election because *section 4955* provides no mechanism for piercing the corporate veil and reaching the assets of the managers to pay the organization's excise tax. In this sense, the excise tax on the organization is as meaningless as revocation of exemption.

The 1987 hearings provided evidence that the major problem was candidate organizations, not the desire of other *section 501(c)(3)* organizations to broaden their activities to encompass electoral politics. /113/ Consequently, *section 4955* contains special definitions of political expenditures that capture the reality (or at least part of it) of candidate organizations. A candidate organization for purposes of *section 4955* is 'an organization which is formed primarily for purposes of promoting the candidacy (or prospective candidacy) of an individual for public office (or which is effectively controlled by a candidate or prospective candidate) and which is availed of primarily for such purposes.' /114/ The proposed regulations appear to narrow the concept of effective control by providing that

For purposes of *section 4955(d)(2)*, an organization is effectively controlled by a candidate or prospective candidate only if the individual has a continuing, substantial involvement in the day-to-day operations or management of the organization. An organization is not effectively controlled by a candidate or a prospective candidate merely because it is affiliated with the candidate, or merely because the candidate knows the directors, officers, or employees of the organization. The effectively controlled test is not met merely because the organization carries on its research, study, or other educational activities with respect to subject matter or issues in which the individual is interested or with which the individual is associated. /115/

No guidance has been issued with respect to indicia that an organization has been 'availed of' for prohibited political purposes and the legislative history is silent on this point.

It is far from clear that any such candidate organization could ever exist in practice. *Section 4955(d)(2)* applies only if an organization is both 'formed primarily' and 'availed of primarily' for promoting an individual's candidacy for public office. Thus, the organization would have to violate both the organizational and operational requirements for exemption under *section 501(c)(3)*. Consequently, an organization organized for an educational purpose but operated for a political purpose would fall outside the definition of a candidate organization. Because the Service would almost certainly deny *section 501(c)(3)* status to an organization that stated that its primary purpose is to promote a candidacy, there seems to be no organization to which *section 4955(d)(2)* could apply, either because it could not be granted recognition of exemption or because *section 4955* does not apply to an organization that satisfies the organizational test but not the operational test.

Despite this fundamental conceptual problem, *section 4955(d)(2)* provides valuable insights into the operation of candidate organizations. It defines political expenditures to include the following types of expenditures made on behalf of a candidate or political candidate: (1) payments for speeches or other services; (2) travel expenses; (3) 'expenses of conducting polls, surveys, or other studies, or preparing papers or other materials, for use by such individual'; (4) expenses of advertising, publicity, and fund-raising; and (5) '[a]ny other expense which has the primary effect of promoting public recognition, or otherwise primarily accruing to the benefit of such individual.' This is a useful checklist of the main types of expenditures made by *section 501(c)(3)* organizations that might constitute political expenditures. However, *section 4955* imposes no special sanctions on *section 4955(d)(2)* candidate organizations. While these items seem to set forth a comprehensive schema for limiting the political activities of candidate organizations, it is important to remember that they apply only to those organizations that in fact fall within the narrow confines of *section 4955(d)(2)*, assuming that this oddly drafted provision applies to any organization at all.

However *section 4955* is construed, the likely result is that none of its sanctions will apply to Gingrich and his fellow office-holding Oliver Twists. The Subcommittee on Oversight had suggested as an 'additional or alternative option' in drafting *section 4955* in 1987 a proposal to '[i]mpose excise tax penalties directly on the candidate where the candidate encouraged the prohibited expenditure and knowingly accepted it.' /116/ No action was taken on this proposal. Consequently, a politician will be subject to the *section 4955* sanctions only if he or she falls within the definition of a manager. /117/

If an organization makes political expenditures that constitute a 'flagrant violation of the prohibition against making political expenditures,' *section 6852*

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permits the Service to make an immediate assessment of all taxes due, including any tax under *section 4955* on the organization or its managers, but only if the organization's exemption has been revoked. /118/ Because this is not treated as a jeopardy assessment, normal collection procedures remain in effect. /119/

Finally, the Service has authority to seek to enjoin further political expenditures if an organization has 'flagrantly' participated or intervened in a political campaign. /120/ Before seeking an injunction, the Service must provide the organization written notice of its intention to do so if the organization does not immediately cease making political expenditures and must give the organization 10 days to respond. /121/ If the organization does not respond with a promise to make no further political expenditures, injunctive relief may be sought only if the commissioner has 'personally determined' that 'injunctive relief is appropriate to prevent future political expenditures.' /122/ The commissioner 'may also recommend that the court action include any other action that is appropriate in ensuring that the assets of the *section 501(c)(3)* organization are preserved for *section 501(c)(3)* purposes.' /123/ While *section 7409* may be useful in extreme and highly visible cases, it seems unlikely that the Service could move quickly enough to prevent a candidate from deriving an important advantage from a candidate organization making prohibited political expenditures.

Conclusion

All of the penalties and remedies set forth in the code may well leave Gingrich and other candidates untouched. It is scarcely surprising that Gingrich has insisted that questions about his lectures are purely tax matters. To the extent that he and other candidates are tested only under tax law, they can avail themselves of its ambiguities to treat themselves as their political supporters' favorite charities. The problem is that Gingrich (and all the others) are now competing with the growing numbers of Oliver Twists in America for a shrinking amount of charitable contributions. To the extent that campaign finance reform deprives the political class of other sources of revenue or imposes on them greater disclosure requirements and increased accountability in the use of campaign funds political charities will become ever-more enticing and the strange results permissible under current law will become the norm for more political entrepreneurs like Gingrich. Campaign finance without careful consideration of the tax issues raised by the Gingrich matter will only exacerbate the problems and puzzles of the current *section 501(c)(3)* prohibition on political campaign activity and the sanctions currently in place to enforce it.

Any attempt to address the problems raised by the Gingrich matter will arise the concern and perhaps even opposition of nonpolitical *section 501(c)(3)* organizations. Current controversies over the meaning of education as an exempt purpose, private benefit, inurement, and quid pro quo and conduit problems are taking place in organizations that have shown little or no interest in the kind of political activity that *section 501(c)(3)* prohibits. Perhaps the real meaning of the Gingrich matter is that it is time for a searching reexamination of *section 501(c)(3)*, and not simply of *section 501(c)(3)* organization's possible use a fund-raising mechanisms for politicians.

FOOTNOTES:

/1/Catherine E. Manegold, 'Ethics Panel Opens Inquiry Into Activities of Gingrich,' The New York Times, Nov. 13, 1994. David Remnick, 'Lost in Space,' The New Yorker, Dec. 5, 1994, at 86 quotes a letter written to the Tobacco Institute by Jeffrey Eisenach, formerly a staff member for the Gingrich political action committee (PAC) GOPAC and currently the executive director of the Progress and Freedom Foundation, a *section 501(c)(3)* organization that funds Gingrich's course, as saying of the goals of the course: 'The goal of this project is simple: To train, by April 1996, two hundred thousand plus citizens into a model for replacing the welfare state and reforming our government.' It should be noted that 1996 is a presidential election year and that, of course, all seats in the House of Representatives, will also be on the ballots of America.

/2/Serge F. Kovaleski and Charles R. Babcock, 'Ethics Complaint Places Gingrich in Odd Position,' The Washington Post, Dec. 1, 1994, quotes Gingrich's spokesman Tony Blankley as saying with respect to Gingrich's November 29, 1994, letter to the Ethics Committee: 'The gist of what he said to the committee was that he didn't think that there was any problem and if there was it involved a 501(c)(3) [charitable organization], not him.'

/3/Bonior's December 8, 1994, press release is available at 94 TNT 240-18. Bonior appears to be acting without significant support from his fellow Democrats. It is far from clear whether politicians from either party in Congress wish to have the issue of political finance through charitable contributions thoroughly investigated since the inclusion of a *section 501(c)(3)* organization in a political fund-raising apparatus is one of the few truly bipartisan activities among

contemporary politicians.

/4/This article does not discuss any possible violations of House rules that may provide a basis for an Ethics Committee investigation, nor does it discuss any potential violations of the Federal Election Campaign Act of 1971, 2 *USC section 431* et seq. and the possibility of sanction by the Federal Election Committee (the FEC). Similarly, the article does not discuss the current FEC suit against GOPAC alleging past violations of federal election law. See 'Gingrich Political Group Seeks Suit Dismissal,' *The Washington Post*, Dec. 3, 1994.

/5/The Subcommittee on Oversight of the House Committee on Ways and Means held hearings in 1987 on the political activities of *section 501(c)(3)* organizations. See *infra* at notes 94-97. See also Hill, 'Charitable Contributions and Political Campaign Funding,' 2 *J. Tax'n. Exempt Orgs.* 39 (Summer 1989).

/6/See, e.g., 'When Charity Begins in the House and Senate,' *The Chronicle of Philanthropy*, Oct. 18, 1994.

/7/IRM VII(3)(10)(1) states: 'This is an absolute prohibition. There is no requirement that political campaigning be substantial.' The effect of *section 4955* on the absoluteness of the prohibition is far from clear. *Section 501(c)(3)* and *section 4955* together present the paradox of an intermediate sanction for an absolute prohibition. The same paradox arises with respect to proposed intermediate sanctions with respect to inurement.

/8/See October 5, 1994, letter to Leslie B. Samuels, Assistant Secretary of the Treasury for Tax Policy, from the American Bar Association, Section of Taxation, Committee on Exempt Organizations, calling on Treasury and the Service to issue precedential guidance in this area, among others. 94 *TNT* 207-14.

/9/See *infra* notes 18-20.

/10/Whether Gingrich's lectures on 'Renewing American Civilization' are educational within the meaning of *section 501(c)(3)* is a matter for the Service to determine based on all the relevant facts and circumstances. This article does not attempt to make such a determination.

/11/*Treas. reg. section 1.501(c)(3)-1(d)(3)(i)*.

/12/Apparently, at least some of the schools that offered Gingrich's course by satellite did offer academic credit for those who took it.

/13/*Treas. reg. section 1.501(c)(3)-1(c)(3)(ii)* Example 2.

/14/While one may be tempted to disciplinary arrogance when contemplating a school's athletic department, any other rule would be meaningless since a school would simply design a series of courses, perhaps constituting a major in which a degree could be granted. One could easily imagine survey courses in Blocking I and Tackling I and a seminar in The Single Wing Offense in Historical Perspective. Not precluding such possibilities is at the heart of an intellectual community and not requiring such expedients is consistent with the federal income tax principle of not exalting form over substance.

/15/*Treas. reg. section 1.501(c)(3)-1(d)(3)(i)*.

/16/*Treas. reg. section 1.501(c)(3)-1(d)(3)(i)*.

/17/*Id.*

/18/*Big Mama Rag, Inc. v. Commissioner*, 631 F. 2d 1030 (DC Cir. 1988), rev'g 494 F. Supp. 473 (DDC 1979).

/19/*National Alliance v. United States*, 710 F. 2d 868 (DC Cir. 1980), rev'g 81-1 USTC para. 9464 (DDC 1981). Even though National Alliance was an avowedly white supremacist organization, the IRS did not argue that its views violated the public policy requirement of *Bob Jones University v. Commissioner*, 461 U.S. 574 (1983). See also *Rev. Rul. 71-447*, 1971-2 C.B. 230. While the IRS has never explained why it did not raise the public policy requirement, it might have reasoned that the public policy requirement raises questions of content that would have detracted from the force of the methodology test.

/20/*National Alliance*, 710 F. 2d at 875-76.

/21/*Rev. Proc. 86-43*, 1986-2 C.B. 729.

/22/*Id.* at sec. 3.02.

/23/Id. at sec. 3.03.

/24/Id.

/25/Id. at sec. 3.04.

/26/Id.

/27/Id. at sec. 3.02 states that '[t]he Service recognizes that the advocacy of particular viewpoints or positions may serve an educational purpose even if the viewpoints or positions being advocated are unpopular or are not generally accepted.'

/28/*Nationalist Movement v. Commissioner*, 102 T.C. No. 22 (1994), aff'd 37 F. 3d 216 (5th Cir. 1994).

/29/The IRS had originally raised a public policy objection to exempt status for the Nationalist Movement but did not pursue this argument at trial.

/30/Section 7428 provides that an organization may bring a declaratory judgment action if its application for recognition of exemption is denied or its exemption is revoked.

/31/*The Nationalist Movement*, 102 T.C. at 68-69.

/32/*The Nationalist Movement*, 37 F. 3d at 219.

/33/Kindell & Reilly, 'Election Year Issues,' in Internal Revenue Service, 1992 Exempt Organizations Continuing Professional Education Technical Instruction Program (1992 CPE Text) at 415. The Service's CPE materials may not be cited as authority. However, this article provides the most comprehensive statement to date of the Service's views on the political activities of section 501(c)(3) organizations.

/34/GCM 39811 (Feb. 9, 1990).

/35/Id.

/36/TAM 9117001 (Sept. 5, 1990). See also Kindell & Reilly, 1992 CPE Text at 427.

/37/*Rev. Rul. 78-248*, 1978-1 C.B. 154, revoked *Rev. Rul. 78-160*, 1978-1 C.B. 153, which had held that publication of responses to a survey of candidates' views on issues of particular concern to the organization constituted prohibited participation or intervention even without any accompanying editorial endorsements or comments because '[n]otwithstanding the educational nature of the questionnaire activity, the organization's solicitation and publication of candidate's views on topics of concern to the organization can reasonably be expected to influence voters to accept or reject candidates.' This position was modified somewhat in *Rev. Rul. 78-248* so that a widely distributed voter guide focusing on one issue was treated as prohibited political participation but a voter guide that covered a broader range of issues was not.

/38/*Rev. Rul. 86-95*, 1986-2 C.B. 73. See also Kindell & Reilly, 1992 CPE Text at 424.

/39/*Fulani v. League of Women Voters*, 684 F. Supp. 1185 (SDNY 1988), aff'd 882 F. 2d 621 (2d Cir. 1989); *Fulani v. Brady*, 729 F. Supp. 158 (DDC 1990), aff'd 935 F. 2d 1324 (DC Cir. 1991), cert. denied 112 S. Ct. 912 (1992); *Fulani v. Brady*, 809 F. Supp. 1112 (SDNY 1993), reh'g denied 93-2 USTC section 50,413 (1993), aff'd 35 F.3d 49 (2d Cir. 1994); *Fulani v. Bentsen*, 862 F.Supp. 1140 (S.D. N.Y. 1994). For a discussion of these cases, see Hill and Kirschten, *Federal and State Taxation of Exempt Organizations* (Warren Gorham & Lamont 1994) at para. 2.03[4][d][iv].

/40/*The Association of the Bar of the City of New York v. Commissioner*, 858 F. 2d 876 (2d Cir. 1988), rev'g 89 T.C. 599 (1987), cert. denied 490 U.S. 1030 (1989).

/41/*The Association of the Bar of the City of New York v. Commissioner*, 89 T.C. 599, 603-04 and 610-11(1987).

/42/Id. at 603 and 611.

/43/Id. at 618.

/44/*The Association of the Bar of the City of New York v. Commissioner*, 858 F. 2d 876 (2d Cir. 1988).

/45/Id. at 879.

/46/TAM 8936002 (May 24, 1989).

/47/Id.

/48/Catherine E. Manegold, 'Gingrich, Now a Giant, Aims at Great Society,' The New York Times, Nov. 12, 1994, quotes Gingrich as saying that 'the question is whether or not our civilization will survive.'

/49/Id. Manegold quotes Gingrich as saying: 'It is impossible to take the Great Society structure of bureaucracy, the redistributionist model of how wealth is acquired and the counterculture values that now permeate how we deal with the poor, and have any hope of fixing things. They are a disaster. They have ruined the poor. They create a culture of poverty and a culture of violence. And they have to be replaced thoroughly from the ground up. We have to say to the counterculture: 'Nice try. You failed. You're wrong.' And we have to simply, calmly, methodically reassert American civilization.'

/50/Gingrich's spokesman, Tony Blankley, is quoted as saying of Gingrich's course: 'It's ideological, of course. But that doesn't in any way deal with partisanship.' Catherine E. Manegold, 'Ethics Panel Opens Inquiry Into Activities of Gingrich,' The New York Times, Nov. 13, 1994. While this analysis may be more insightful than it was perhaps intended to be, its implication that only 'partisan' activity violates the *section 501(c)(3)* prohibition is misleading.

/51/Treas. reg. *section 1.501(c)(3)-1(c)(3)(iii)*.

/52/TAM 9130008 (Apr. 16, 1991).

/53/Kindell & Reilly, 1992 CPE Text at 408, state that 'some action must be taken to make one a candidate, but the action need not be taken by the candidate or require his consent.'

/54/Kindell & Reilly, 1992 CPE Text at 408.

/55/See Federal and State Taxation of Exempt Organizations at para. 8.14 for a discussion of *section 527* organizations.

/56/*Section 501(c)(3)* and *Treas. reg. section 1.501(c)(3)-1(c)(3)(iii)* refer to 'public office.'

/57/Kindell & Reilly, 1992 CPE Text at 408.

/58/GCM 39811 (Feb. 9, 1990).

/59/Notable exceptions are Lee A. Sheppard, 'Charitable Money Laundering,' Tax Notes, Sept. 20, 1993, p. 1541 (discussing the Gingrich organizations as fiscal agents) and Lee A. Sheppard, 'Is Gingrich's Think Tank Too Partisan for Exemption?' Tax Notes, Dec. 5, 1994, p. 1173 (discussing private benefit and inurement issues).

/60/Treas. reg. *section 1.501(c)(3)-1(d)(1)(ii)*.

/61/Id.

/62/Rev. Rul. 68-422, 1968-2 C.B. 207. See Federal and State Taxation of Exempt Organizations at para. 2.03[2] for a discussion of the public benefit requirement.

/63/*American Campaign Academy v. Commissioner*, 92 T.C. 1053 (1989).

/64/Id. at 1078.

/65/The House Ethics Committee has been quoted as requesting further information from Gingrich on grounds that 'the course has not been entirely educational, but rather has been to promote Republican Party activism and a Republican agenda.' Gingrich had sought the Ethics Committee's approval before offering his lectures and represented that the course would be nonpartisan. Catherine E. Manegold, 'Ethics Panel Opens Inquiry Into Activities of Gingrich,' The New York Times, Nov. 13, 1994.

/66/*United Cancer Council v. Commissioner*, T.C. Dkt. No. 2008-91X.

/67/The same is true of inurement. See *Retired Teachers Legal Defense Fund v. Commissioner*, 78 T.C. 280 (1982).

/68/These videos and printed materials are available through an 800-number. Gingrich reportedly urged a group of business leaders he was addressing to call and place their orders. Catherine E. Manegold, 'Ethics Panel Opens Inquiry Into Activities of Gingrich,' The New York Times, Nov. 13, 1994. There is no information on whether the colleges or the Progress and Freedom Foundation or GOPAC or some other person or entity receives the proceeds of the sales. There is

no evidence to date that Gingrich shares directly in the sale proceeds.

/69/For a discussion of the inurement prohibition and possible enactment of intermediate sanctions in this area, see Federal and State Taxation of Exempt Organizations at para. 2.03[3].

/70/*Treas. reg. section 1.501(c)(3)-1(c)(2)* restates the statutory prohibition by providing that '[a]n organization is not operated exclusively for one or more exempt purposes if its net earnings inure in whole or in part to the benefit of private shareholders or individuals.'

/71/*Treas. reg. section 1.501(a)-1(c)*.

/72/GCM 39862 (November 22, 1991).

/73/*United Cancer Council v. Commissioner*, T.C. Dkt. No. 2008-91X, is pending before the Tax Court. The briefs in this case explore the distinction between the private benefit and inurement prohibitions and vigorously debate the extension of the concept of an insider to an unrelated contractor.

/74/The Service stated in the Hospital Audit Guidelines, Ann. 92-83, 1992-2 *IRB* 59 (June 1, 1992) that '[i]nurement and private benefit may occur in many different forms including, for example, excessive compensation; payment of excessive rent; receipt of less than fair market value in sales or exchanges of property; inadequately secured loans; or other questionable loans, etc.'

/75/See Lee A. Sheppard, 'Charitable Money Laundering,' Tax Notes, Sept. 20, 1993, p.1541. A quid pro quo analysis does not depend on the receipt of anything of value other than the right to have made the designation as to use. In this sense, a quid pro quo analysis implicates earmarking. See *Rev. Rul. 63-252, 1963-2 C.B. 101*; *Rev. Rul. 66-79, 1966-1 C.B. 48*; *Rev. Rul. 75-65, 1975-1 C.B. 79*. Both of these issues arise in the context of corporate sponsorship. Because corporate sponsorship arose initially as an unrelated business income tax (UBIT) issue, it has been discussed primarily in a sales framework, specifically, the sale of advertising. Prop. *Treas. reg. sections 1.513-4 and 1.512(a)-1(e)*. However, viewed more broadly, corporate sponsorship raises issues of earmarking and quid pro quo exchanges that would render the entity receiving the purported contribution a sham or conduit.

/76/See Stephen Engelberg and Katherine Q. Seelye, 'Gingrich: Man in Spotlight and Organization in Shadow,' *The New York Times*, Dec. 18, 1994 (calling the organizations collectively 'Newt, Inc.').

/77/*Moline Properties, 319 U.S. 436 (1943)*. In GCM 39326 (January 17, 1985) and GCM 39598 (January 23, 1987) the Service treated an exempt purpose as a business purpose. See Federal and State Taxation of Exempt Organizations at chapter 9 for a discussion of complex structures and respect for exempt entities' separate identities.

/78/Kindell & Reilly, 1992 CPE Text at 440.

/79/GCM 33912 (Aug. 15, 1968).

/80/Kindell & Reilly, 1992 CPE Text at 440.

/81/*Id.*

/82/*Id.*

/83/Gingrich offers the sponsoring colleges enhanced visibility, perhaps increasing their ability to recruit tuition-paying students, much the way a successful athletic program facilitates recruitment of students who are not athletes.

/84/One of the unresolved factual issues in the Gingrich matter is what role, if any, GOPAC played in funding Gingrich's lectures. Gingrich is quoted as telling CNN that, 'Now, GOPAC provided some initial ideas on who might be interested in financing the course.' But, Gingrich insisted, 'That's all they did.' Catherine S. Manegold, 'Ethics Panel Opens Inquiry Into Activities of Gingrich,' *The New York Times*, Nov. 13, 1994.

/85/The Service looks to control of daily operations, not to mere control of an organization's agenda or direction. See LTR 8805059 (Nov. 13, 1987).

/86/In addition, and somewhat paradoxically, if Gingrich's *section 527(f)(3)* organization, GOPAC, were involved in the lectures, it could be subject to tax if the expenditure did not qualify as a political expenditure within the meaning of *section 527*. But, GOPAC could argue, probably successfully, that funding the lectures was an exempt indirect political expense. The same expenditure may be a qualifying political expenditure for purposes of *section 527* but not be treated

as prohibited participation or intervention for purposes of *section 501(c)(3)* or as a political expenditure subject to the *section 4955* excise tax.

/87/A *section 501(c)(3)* organization must include a dissolution clause to this effect in its articles of incorporation. See *Treas. reg. section 1.501(c)(3)-(1)(b)(4)*.

/88/*Section 504(a)*.

/89/*Treas. reg. section 1.504-2(b)*. Control is defined for this purpose by reference to the principles of the lobbying regulations applicable to affiliated groups under *Treas. reg. section 56.4911-7(a)* and the mandatory distribution rules of *Treas. reg. section 56.4942(a)-3(a)(3)*.

/90/*Treas. reg. section 1.504-2(b)(5)*.

/91/The practical consequence of embarrassment is difficulty in fund-raising.

/92/The state college is not subject to revocation because it is a *section 115* agency or instrumentality of the state government. The Georgia university system has barred all officeholders from lecturing, whether or not they are compensated, at state colleges and universities. The New York Times, Nov. 13, 1994.

/93/The Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, *sections 10711-13*, 101 Stat. 1330, 464-70 (1987).

/94/Subcommittee on Oversight, House Ways and Means Committee, Hearings on Lobbying and Political Activities of Tax-Exempt Organizations (1987) (1987 Hearings).

/95/Subcommittee on Oversight of the Committee on Ways and Means, Report and Recommendations on Lobbying and Political Activities by Tax-Exempt Organizations 45 (1987) (1987 Report).

/96/*Id.*

/97/Ways and Means Committee of the House of Representatives, Report on H.R. 3545 (1987). In this report, the Ways and Means Committee took the position that electoral participation or intervention 'may violate' the private benefit and inurement prohibitions.

/98/The preamble to proposed regulations relating to these provisions (*59 FR 64359* (December 14, 1994)) states: 'Congress enacted *sections 4955*, 6852, and 7409 because it determined that revocation of exemption was not a sufficient sanction to enforce effectively the prohibition on political intervention by *section 501(c)(3)* organizations. For example, if an organization engaged in significant, uncorrected political intervention, revocation could be ineffective as a penalty or deterrent, particularly if the organization used all its assets for political intervention and then ceased operations. On the other hand, if an organization made a small, unintentional political expenditure and subsequently adopted procedures to assure no similar future expenditures (particularly if the responsible managers left the organization), then revocation was also ineffective because it was considered a disproportionate penalty and, therefore, not used.'

/99/Political expenditures are defined in *section 4955(d)*.

/100/Prop. *Treas. reg. section 53.4955-1(c)(1)*.

/101/Prop. *Treas. reg. section 53.4955-1(c)(2)*. It is not clear whether candidate organizations are subject to the general definition of a political expenditure under *section 4955(d)(1)*. If they are not, the restrictive definition of a candidate organization may provide an unintended safe harbor for candidate organizations, contrary to the clear legislative intent.

/102/*Section 4955(a)(1)*.

/103/*Section 4955(f)(2)* and prop. *Treas. reg. section 53.4955-1(b)(2)*.

/104/Prop. *Treas. reg. section 53.4955-1(b)(5)*.

/105/Prop. *Treas. reg. section 53.4955-1(b)(3)*.

/106/Prop. *Treas. reg. section 53.4955-1(b)(4)* requires actual knowledge, not the mere reason to know.

/107/*Section 4955(a)(2)*. Under prop. *Treas. reg. section 53.4955-1(b)(7)*, acting on the basis of a reasoned written legal opinion provides a defense. The Service bears the burden of proof with respect to whether a manager knowingly

agreed to making a political expenditure. *Section 7454(b)*.

/108/*Section 4955(f)(3)* defines 'correct' and 'correction' as 'recovering part or all of the expenditure to the extent recovery is possible, establishment of safeguards to prevent future political expenditures, and where full recovery is not possible, such additional corrective action as is prescribed by the Secretary by regulations.' Prop. Treas. reg. section 53.4955-1(e)(1) provides that an organization is not required to take legal action to recover the expenditure 'if the action would in all probability not result in the satisfaction of execution on a judgment.'

/109/*Section 4955(b)(1)*.

/110/*Section 4955(b)(2)*.

/111/*Section 4955(c)(2)*. The statute is silent on what constitutes a separate political expenditure. If, for example, an organization conducts a poll and also prepares a study that are treated as prohibited political activity, will the poll and study be treated as one political expenditure or as two? The answer matters in terms of the amount of liability faced by organization managers.

/112/*Section 4955(c)(1)*.

/113/Most *section 501(c)(3)* organization are far more concerned about limitations on their ability to lobby than about the existing political prohibition.

/114/*Section 4955(d)(2)*.

/115/Prop. Treas. reg. section 53.4944-1(c)(2)(i).

/116/Subcommittee on Oversight, 1987 Report at 50.

/117/*Section 4955(f)(2)* and prop. Treas. reg. section 53.4955-1(b)(2) do not define managers in formal terms but they do require a showing of daily managerial involvement of a kind that most politicians should be able to avoid without sacrificing control of the organization.

/118/*Section 6852(a)(1)* and prop. Treas. reg. section 301.6852-1(b).

/119/Prop. Treas. reg. section 301.6852-1(c).

/120/*Section 7409(a)(2)*. Prop. Treas. reg. section 301.7409-1(c) defines 'flagrant' as any action that violates *section 501(c)(3)* 'if the participation or intervention is flagrant.'

/121/*Section 7409(a)(2)(A)*. Prop. Treas. reg. section 301.7409-1(a) provides that notice must take the form of a letter from the Assistant Commissioner (Employee Plans & Exempt Organizations).

/122/*Section 7409(a)(2)(B)(ii)*. Prop. Treas. reg. section 301.7409-1(b) provides that the commissioner's authority cannot be delegated.

/123/Prop. Treas. reg. section 301.7409-1(b).

END OF FOOTNOTES

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PLAINTIFFS' EXHIBIT 187

C

University of Pennsylvania Law Review
January, 1999

Article

***613 INFORMATIONAL REGULATION AND INFORMATIONAL STANDING: AKINS AND BEYOND**

Cass R. Sunstein [\[FNd1\]](#)

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As Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before [\[FN1\]](#)

If today's decision is correct, it is within the power of Congress to authorize any interested person to manage (through the courts) the Executive's enforcement of any law that includes a requirement for the filing and public availability of a piece of paper. [\[FN2\]](#)

Introduction

It is often said that the American economy has been shifting from one based on industrial development to one based on the creation and dissemination of information. [\[FN3\]](#) Whether or not this is so, there can be little doubt that a number of statutes in the last forty years were designed to ensure disclosure of information, and that mandatory disclosure is an increasingly pervasive and important regulatory tool. Indeed, informational regulation, or regulation through disclosure, has become one of the most striking developments in the last generation of American law. [\[FN4\]](#)

***614** Informational regulation takes several different forms. Sometimes the government attempts to improve the behavior of private industry by requiring companies to disclose information about, for example, toxic releases, the contents of food and drink, and workplace injuries. Prominent examples include the Emergency Planning and Community Right-to-Know Act [\[FN5\]](#) and regulations governing the disclosure of the nutritional content of food. [\[FN6\]](#) Here the goal is to fortify either market mechanisms or political checks on private behavior. [\[FN7\]](#) Sometimes the government attempts to control its own agents through compulsory production and disclosure of information; consider the National Environmental Policy Act of 1969 ("NEPA"), [\[FN8\]](#) the Freedom of Information Act ("FOIA"), [\[FN9\]](#) and the Federal Election Campaign Act ("FECA"). [\[FN10\]](#) Here the goal is to allow more in the way of public monitoring of governmental decisions, with particular issues (insufficient environmental concern, unlawful behavior during campaigns, official corruption) receiving special attention.

Legal struggles between those seeking information on the one hand, and government or others required by law to disclose information on the other, ***615** promise to provide many of the most important public law cases in the next several decades. The outcome of these struggles will have significant consequences. Victories for those who seek to withhold information are important not only because they dispose of the case at hand, but also because they give similarly situated people, in both government and the private sector, a clear signal about whether they must disclose information outside of the context of litigated cases. This signal will inevitably affect behavior well before cases arise.

For many years it has been unclear whether, and under what circumstances, a citizen will have standing in federal court to seek access to information held by the government. FOIA gives standing to all persons to obtain a wide range of information; [\[FN11\]](#) there is no requirement that the information involve a particular citizen, or even be shown to be relevant to her professional or personal concerns. Mere curiosity appears to be enough. Anyone is entitled to obtain any information that FOIA makes public. [\[FN12\]](#) Is FOIA therefore unconstitutional? NEPA requires the government to compile and disclose environmentally relevant information before it proceeds with projects having a major impact on the environment. [\[FN13\]](#) But who, exactly, may sue to require preparation of an environmental impact statement ("EIS")? Is curiosity enough here as well? FECA imposes a wide range of reporting and disclosure requirements on all "political committees." [\[FN14\]](#) Does this mean

that any American can bring suit against the Federal Election Commission ("FEC") to require it to enforce the law?

*616 The Supreme Court has now started to sort out this area of the law. *Federal Election Commission v. Akins* [FN15] is by far the most important pronouncement on the general issue of standing to obtain information. More than that, it reorients the general law of standing in several significant ways. In particular, the Court appears to have held that any citizen has standing to sue under FECA; that Congress is permitted to grant standing to all or many citizens, even if they are seeking to redress a "generalized grievance"; that the key question, in cases involving information or anything else, is what the relevant source of law actually says; and that Article II is no barrier to suits brought by citizens whose interests are not substantially different from those of the citizenry as a whole. [FN16] The most important step here is the suggestion that Congress can overcome the barrier to "generalized grievances," for this barrier is likely to be crucial to plaintiffs seeking information.

At the same time, the Court's opinion marks a significant new development in the law of "redressability," a development that is in considerable tension with previous cases. And the Court's opinion raises or leaves open a host of new questions about the circumstances in which citizens may bring suits to obtain information. It is no wonder that Justice Scalia wrote a passionate dissent, suggesting that the Court's opinion violates not only Article III but Article II as well. [FN17]

Remarkably, the emerging law governing standing to obtain information has yet to receive academic attention. The basic purpose of this Article is to begin to fill this gap, above all by exploring the intersection between the law of standing and the wide range of statutes mandating public disclosure. In the process it will be necessary to offer an understanding of the extent to which disclosure of information has become a central part of the American regulatory state--as central, in its way, as command-and-control regulation and economic incentives. As we shall see, it is impossible to understand the standing questions without understanding the regulatory questions as well. As we shall also see, an understanding of the emerging law of standing to receive information has a set of implications for the law of standing in general.

The Supreme Court's decision in *Akins* is the vehicle for much of the analysis, because the *Akins* Court covers a strikingly wide range of standing issues, in a way that is full of implications for the future. My most general claim is that at least in information cases, the question of standing is for *617 congressional rather than judicial resolution. It follows that whether someone has informational standing depends on what Congress has said. If Congress creates a legal right to information and gives people the authority to vindicate that right in court, the standing question is essentially resolved. Insofar as it recognizes this point, *Akins* appears to vindicate the passage from Justice Kennedy's important concurring opinion in *Lujan v. Defenders of Wildlife*, quoted above, [FN18] and in the process suggests that Justice Scalia's prophecy, also quoted above, [FN19] will eventually be proved correct.

This Article comes in four parts. Part I discusses the use of information as a regulatory tool, partly as a background for the question of standing, and partly as a brief, freestanding treatment of an important development in regulatory law. The basic point here is that informational strategies are displacing (and have significant advantages over) command-and-control approaches. In some contexts, however, they risk futility and excessive cost, partly because of the difficulty that people face in dealing with low-probability events.

Part II deals with *Akins* itself and outlines the several clarifications of, and departures from, current law. The argument here is that the Court has revised the "injury in fact" test so as to focus attention on what kind of harm Congress sought to prevent; in the process the Court has made clear, for the first time, that Congress can grant standing to someone who suffers a quite generalized injury. Part III evaluates the *Akins* Court's approach to informational standing, with particular emphasis on the relationships among standing, injury in fact, congressional instructions, and Article III. I argue that the Court's decision suggests the right approach for informational standing, but that the decision leaves open a number of questions, both practical and conceptual.

Part IV discusses the future, with reference to a number of actual and hypothetical cases. I attempt to show how an understanding of informational regulation sheds light on the question of informational standing. The most important claim is that if Congress creates an interest in receiving information, and gives people a right to vindicate that interest in court, then it has acted consistently with Article III. This claim bears in turn on the general law of standing and the whole notion of "injury in fact," especially, but not only, in the context of information. It suggests that whether there is an *618 "injury" cannot be decided in the abstract, or solely by reference to the "facts"; it turns instead on positive law.

I. Information as a Regulatory Tool

(Cite as: 147 U. Pa. L. Rev. 613)

In this Part I deal with the rise of informational regulation. At least a general understanding of this development is a prerequisite for an understanding of informational standing. In addition, it is worthwhile to have a sense of this important development in the fabric of the modern regulatory state, a development that promises to become all the more central in the coming decade, when there will likely be a great deal of experimentation in this direction. [\[FN20\]](#)

A. An Overview

Informational regulation is far from new to American law. At common law, sellers of goods and services face certain obligations of disclosure; thus a failure to convey relevant information may violate the common law of contract or tort. [\[FN21\]](#) The New Deal, of course, witnessed a dramatic shift from regulation through common law courts to regulation via administrative agencies, [\[FN22\]](#) and disclosure of information became a pervasive regulatory strategy, most obviously through the work of the Securities and Exchange Commission. [\[FN23\]](#) But the great modern surge of informational regulation-- ***619** growing out of laws involving health, safety, and the environment--is a post-1960s phenomenon. Mandatory disclosure was a central part of the rights revolution of the 1960s and 1970s, and it has become especially prominent in the 1980s and 1990s, largely as an alternative to command-and-control regulation. [\[FN24\]](#)

Many statutes and regulations now require the disclosure or even the production of information. Some of these are designed to assist consumers in making informed choices; such statutes are meant to be market-enhancing. By contrast, others are designed to trigger political, rather than market, safeguards; such statutes are meant to enhance democratic processes. Of course there is an overlap between the two categories. A statute that requires companies to place "eco-labels" on their products may produce little in the way of consumer response, but shareholders and participants in the democratic process may attempt to punish those whose labels reveal environmentally destructive behavior. Companies will know this in advance, with likely behavioral consequences. The risk of sanctions from shareholders and state legislatures may well produce environmental improvement even without regulation. [\[FN25\]](#)

Heavily publicized health risks from tobacco represent the most prominent forerunners of more recent measures that attempt to fortify the operations of markets by informing consumers. Thus, mandatory messages about the dangers of cigarette smoking, first set out in 1965 and modified in 1969 and 1984, are, of course, designed to ensure that smokers are aware of the associated risks. [\[FN26\]](#) The Food and Drug Administration ("FDA") has long maintained a policy of requiring risk labels for pharmaceutical products. [\[FN27\]](#) The Environmental Protection Agency ("EPA") has done the same for pesticides and asbestos. [\[FN28\]](#) Congress itself requires warnings on products that ***620** contain saccharin. [\[FN29\]](#) There are numerous other illustrations, but several post-1980 initiatives are especially striking and deserve brief description by way of illustration and for purposes of understanding the standing question.

In 1983, the Occupational Safety and Health Administration ("OSHA") issued a Hazard Communication Standard ("HCS"), applicable to the manufacturing sector. [\[FN30\]](#) In 1986, the HCS was made generally applicable. [\[FN31\]](#) Under the HCS, chemical producers and importers must evaluate the hazards of the chemicals they produce or import; develop technical hazard information for material safety data sheets, and labels for hazardous substances; and, most importantly, transmit this information to users of the relevant substances. All employers must adopt a hazard communication program--one that includes individual training--and inform workers of the relevant risks. [\[FN32\]](#)

The FDA has also adopted informational strategies. In its most ambitious set of proposals, the FDA required a form of disclosure that affected nearly all food and drink purchased in the United States. The FDA (1) compelled nutritional labeling on nearly all processed foods, including information relating to cholesterol, saturated fat, calories from fat, and fiber; (2) required compliance with government-specified serving sizes; (3) compelled companies to conform to government definitions of standardized terms, including, "reduced," "fresh," "free," and "low"; and (4) allowed health claims only if the claims (a) are supported by scientific evidence and (b) communicate clear and complete information about such matters as fat and heart disease, fat and cancer, sodium and high blood pressure, and calcium and osteoporosis. [\[FN33\]](#)

***621** A great deal of recent attention has been given to informational regulation in the particular context of the communications industry. As an alternative to direct regulation, which raises especially severe First Amendment problems, the government might attempt to increase information instead. Thus, the mandatory "V-chip" is intended to permit parents to block programming that they want to exclude from their homes. [\[FN34\]](#) The V-chip is supposed to work hand-in-hand with a ratings system. [\[FN35\]](#) Similarly, a provision of the 1996 Telecommunications Act (1) requires television manufacturers to include technology capable of reading a program rating mechanism; (2) requires the Federal Communications Commission ("FCC") to create a ratings methodology if the industry does not produce an acceptable ratings plan within a year; and (3)

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requires that broadcasters include a rating in their signals if the relevant program is rated. [\[FN36\]](#) Spurred by this statute, most of the networks generated a system for television ratings that is now in place. [\[FN37\]](#) A new set of proposals under current discussion would require broadcasters to make public a set of reports about their public interest activities, including providing free time for political candidates and educational programming. [\[FN38\]](#)

As I have noted, some disclosure statutes are designed to trigger political, rather than market, mechanisms; here consumers are not directly involved. The most famous of these statutes is NEPA. Enacted in 1972, NEPA's principal goal was to require the government to compile and disclose environmentally related information before going forward with any projects having a major effect on the environment. [\[FN39\]](#) NEPA does not require the government to give environmental effects any particular weight, nor is there judicial review of the substance of agency decisions. [\[FN40\]](#) The purpose *622 of disclosure is principally to trigger political safeguards coming from the government's own judgments or from external pressure. [\[FN41\]](#) Hence, any governmental indifference to adverse environmental effects is perfectly acceptable under NEPA. The idea behind the statute is that if the public is concerned, then the government will have to give some weight to environmental effects.

In 1986, Congress enacted an ambitious statute, the Emergency Planning and Community Right-to-Know Act ("EPCRA"). [\[FN42\]](#) Under this statute, firms and individuals must report to state and local governments the quantities of potentially hazardous chemicals that have been stored or released into the environment. Users of such chemicals must report to their local fire departments the location, types, and quantities of stored chemicals. They must also give information about potential adverse health effects. On the basis of the relevant results, the EPA publishes pollution data about the release of over 300 chemicals from over 20,000 facilities. [\[FN43\]](#) This has been an exceptional success story, one that has well exceeded the expectations at the time of the statute's enactment. [\[FN44\]](#) A detailed report by the General Accounting Office suggests that EPCRA has had important beneficial effects, spurring innovative, cost-effective programs from the EPA and from state and local governments. [\[FN45\]](#)

Many other statutes involving health, safety, and the environment fall into this general category. The Animal Welfare Act is designed partly to ensure publicity about the treatment of animals; thus covered laboratories are required to file reports with the government about their conduct, [\[FN46\]](#) with the apparent thought that the reports will deter noncompliance and also allow continual monitoring. In addition to its various command-and-control provisions, the Clean Air Act requires companies to create and disclose "risk management plans" involving accidental releases of chemicals, which *623 must include a worst case scenario. [\[FN47\]](#) The Safe Drinking Water Act was amended in 1996 to require annual "consumer confidence reports" to be developed and disseminated by community water suppliers. [\[FN48\]](#) Statutes governing mortgages, crime, discrimination, sexual violence, and medical care also seem partly committed to the idea that "sunlight is . . . the best of disinfectants"; [\[FN49\]](#) thus, they require covered institutions to compile reports about their conduct and compliance with applicable law. [\[FN50\]](#) As noted, FECA requires political committees to disclose a great deal of information about their activities. In the same category is a proposed code for television broadcasters, designed partly to ensure publicity about the public service activities of various stations. Its goal is to ensure more in the way of such activities indirectly, and simply by virtue of the fact that there will be a public accounting. [\[FN51\]](#)

For an overview, consider the following table:

*624 Table 1. Examples of Informational Regulation

	Trigger Market Reactions	Trigger Political Reactions
Duties	• Tobacco warnings legislation •	• EPCRA (annual
Imposed on	Nutrition regulation • Warnings for	reports) • Proposed
Private	television programming • Hazardous	broadcasters code •
Sector	materials warning regulation •	Animal Welfare Act •
	Telecommunications Act of 1996 (ratings	Clean Air Act's

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system)	"risk management plans" • Age Discrimination Act
Duties	• Warnings about the use of drugs •
Imposed on	EPCRA (Toxic Release Inventory) • NEPA
Government	• Safe Drinking Water Act • FECA

B. Rationale

Why has information disclosure become such a central regulatory tool? There are several answers. For various reasons, a market failure may come in the form of an inadequate supply of information. [\[FN52\]](#) Because information is generally a public good [\[FN53\]](#)--something that if provided to one is also provided to all or many--workers and consumers may attempt to free ride on the efforts of others, resulting in too little information being provided. For this reason, compulsory disclosure of information can provide the simplest response to the relevant market failure.

***625** It is increasingly recognized that information is often a far less expensive and more efficient strategy than command-and-control, which consists of rigid mandates about regulatory ends (a certain percentage reduction in sulfur dioxide, for example), regulatory means (a technological mandate for cars, for example), or both. [\[FN54\]](#) A chief advantage of informational regulation is its comparative flexibility. If consumers are informed of the salt or sugar content of foods, they can proceed as they wish, trading off various product characteristics however they see fit. If workers are given information about the risks posed by their workplace, then they can trade safety against other possible variables (such as salary, investments for children or retirement, and leisure). [\[FN55\]](#) From the standpoint of efficiency, information remedies can be better than either command-and-control regulation or reliance on unregulated markets alone.

From the democratic point of view, informational regulation also has substantial advantages. A well-functioning system of deliberative democracy requires a certain degree of information, so that citizens can engage in their monitoring and deliberative tasks. Subject as they are to parochial pressures, segments of the government may have insufficient incentives to disclose information on their own; consider FOIA or FECA, where the self-interest of the government or private groups may press in the direction of too little disclosure. A good way to enable citizens to oversee government action and also to assess the need for less, more, or different regulation, is to inform them of both private and public activity. The very fact that the public will be in a position to engage in general monitoring may well spur desirable outcomes.

EPCRA is the most obvious example here. Sharp, cost-effective, and largely unanticipated reductions in toxic releases have come about without anything in the way of direct regulation. [\[FN56\]](#) This approach appears to be emerging as the wave of the future. [\[FN57\]](#) In the area of broadcasting, it is possible to hope that disclosure of public interest programming, and the mere need to compile the information each year, will increase educational and public affairs programming without involving government mandates at all. [\[FN58\]](#) ***626** A primary virtue of informational regulation is that it triggers political safeguards and allows citizens a continuing oversight role--one that is, in the best cases, largely self-enforcing.

C. Policies and Prospects

None of this is to say that informational regulation is always desirable. Under imaginable assumptions such regulation will be inferior to command-and-control regulation and to reliance on markets unaccompanied by disclosure requirements. There are two problems with informational strategies. First, providing information may be expensive, sometimes costing more than it is worth. Second, the provision of information is sometimes ineffectual, or even counterproductive.

Consider, for example, the fact that the government estimated the cost of the FDA disclosure rules as "\$1.7 billion over twenty years." [\[FN59\]](#) The president of the National Food Processors Association claimed that the first- year costs alone would exceed \$2 billion. [\[FN60\]](#) In either case, the cost is significant, and an important question is what improvements--in terms of reduced mortality or morbidity--are produced in return. OSHA's hazard communication policy is estimated to save

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200 lives per year--a large number-- but at an annual cost of \$360 million. [\[FN61\]](#) The expenditure per life saved is therefore \$1.8 million. This is far better than a large number of regulations, and is probably an amount well worth spending; but it is more than many agencies spend for life-saving regulations. [\[FN62\]](#) The OSHA rule does not stand out as a means of saving lives especially cheaply. [\[FN63\]](#) (Of course there *627 are likely to be large morbidity and other gains that are not captured in the "lives saved" number.)

Even when informational strategies are not prohibitively expensive, they may be ineffectual and thus have low benefits; they may even be counterproductive. This is so for various reasons, and here a great deal more work remains to be done. People have a limited ability to process information. [\[FN64\]](#) They have a notoriously difficult time thinking about low-probability events. Sometimes people discount such events to zero; sometimes they treat them as much more dangerous than they actually are. If people are told, for example, that a certain substance causes cancer, then they may think that it is far more dangerous than it is in fact. [\[FN65\]](#) But some carcinogenic substances pose little risk of cancer. There is also a pervasive risk of "alarmist bias," as frightening information is more salient and potent than comforting information, regardless of what is true. [\[FN66\]](#)

For example, California's Proposition 65, an initiative designed to promote citizen awareness of risk levels, requires warnings for exposure to carcinogens. [\[FN67\]](#) At first glance, the requirement seems entirely unexceptionable, indeed an important advance. But it has in some ways been counterproductive. Consumers appear to think that twelve of every 100 users of a product with the required warning will die from cancer, an estimate that exceeds reality by a factor of 1000 or more. [\[FN68\]](#) With respect to information, less may be more. If information is not provided in a clear and usable form, it may actually make people less knowledgeable than they were before, producing overreactions, or underreactions, based on an ability to understand what the information actually means. People also face a pervasive risk of "information overload," causing consumers to treat a large amount of information as *628 equivalent to no information at all. [\[FN69\]](#) Certainly this is true when disclosure campaigns are filled with details that cannot be processed easily.

With respect to industry responses, companies may respond to certain disclosure requirements by refusing to provide information at all (if this is an available option). The result will be the removal from the market of information that is useful overall. If industry responds to a requirement of evidentiary support for scientific claims with mere "puffing," then consumers may have less information than they did to begin with. If advertisers must conduct extensive tests before they are permitted to make claims, then they will be given a strong incentive to avoid making claims at all. [\[FN70\]](#)

There is a further problem: optimistic bias. [\[FN71\]](#) People often believe themselves to be immune from risks that they acknowledge are significant and real with respect to others. About 90% of people believe that they are above-average drivers, less likely than others to be involved in automobile accidents. [\[FN72\]](#) In one study, 97% of those surveyed ranked themselves as average or above average in their ability to avoid both bicycle and power mower accidents. [\[FN73\]](#) If most people think that the information does not apply to them, disclosure requirements may have little effect.

Disclosure strategies may also have disproportionately little effect on people who are undereducated, elderly, or poor. If this is so, the disadvantaged may continue to face the risks that informational disclosure strategies are aimed to counteract (at least if market forces fail to induce general changes from producers). [\[FN74\]](#) And when risks are placed on outsiders who are *629 not in a contractual relationship with the wrongdoer, [\[FN75\]](#) information may do little good, because the outsiders are not in a position to extract a higher price in return for the relevant risk, and may in fact be unable to do anything about it. [\[FN76\]](#)

These points should be taken as cautionary notes, and not as suggestions that informational regulation is ill advised. Whether informational regulation is preferable to complete reliance on markets, or instead to regulation through command-and-control or through economic incentives, depends on the details. Certainly there is reason, in both theory and practice, to think that informational regulation is the best approach in many contexts. [\[FN77\]](#) The most promising setting involves a market failure in the provision of information and reason to believe that information can be provided in such a way as to be understandable to the people who receive it.

D. Why Suits? Why Citizen Suits?

As we will see, Congress sometimes explicitly authorizes citizen suits to ensure disclosure of information. Where Congress is not explicit, inferences must be drawn about legislative instructions; the Administrative Procedure Act ("APA") or some other source of law may or may not be read to allow apparent outsiders to bring suit to require disclosure. This possibility

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leaves an obvious question. Why does Congress give standing to citizens or others to allow them to use courts to require government, or regulated parties, to disclose information? [\[FN78\]](#)

The simplest answer is connected to the reason for statutes requiring information disclosure in the first instance. Both agencies and private companies often have powerful incentives to withhold information, and suits can serve both as an ex ante deterrent and as an ex post corrective to an unlawful failure to disclose. In the face of disclosure requirements, government failure may mimic market failure, and a right to bring suit might provide ***630** some help. The incentive not to disclose takes multiple forms. People may not want to disclose because of the sheer economic burden of doing so in the first instance. It can be quite costly to compile and disseminate the relevant reports. Consider the large expense involved in producing an EIS, [\[FN79\]](#) as well as other paperwork requirements that may impose substantial burdens. [\[FN80\]](#)

In addition, both private and public agencies may have an incentive not to disclose because of the qualitatively diverse problems, and costs, that may follow disclosure. The market may well punish bad news via decreased sales or (perhaps in consequence) decreased stock prices; the punishment may be mild, optimal, or excessive and alarmist, [\[FN81\]](#) and it can be hard to predict in advance. A cereal company that discloses the nutritional content of its foods may find itself with much fewer purchasers; a company that discloses workplace risks may have to increase wages or cut back production. An agency and affected developers may resist compiling an EIS because once the statement is made public, the project itself will be in jeopardy. The perception of jeopardy may impose costly delays and eventually development may be blocked entirely--a far from uncommon result of the EIS process. [\[FN82\]](#) So too, a political organization that discloses its financial backers may find itself far less influential.

These incentives not to disclose may be especially hard to counteract in light of the fact that information is often a public good. [\[FN83\]](#) As noted above, the benefits of disclosure are often obtained by many people, whereas the costs of ensuring disclosure are borne (at least in the short run) by one or a few. In these circumstances, it is possible that with market ordering, or even a law on the books, few or none will bother to take the necessary steps-- economic, political, or otherwise--to counteract the unlawful withholding of information. Thus, the economic and political markets may underproduce disclosure, even in the face of a law that mandates it.

***631** Congress may offer a broad grant of standing--perhaps even to citizens generally--so as to counteract the relevant incentives. The hope is that some plaintiff, whether altruistic or self-interested, will take steps to ensure the availability of information. FOIA is the most obvious example. The grant of the power to obtain information, and to litigate, to "any person" [\[FN84\]](#) operates to inform agencies that there will be ready judicial review of any denial of a FOIA request, a factor that should make agencies less likely to engage in unlawful denials. In any case, such denials can and often will be corrected if they are unlawful. Or Congress may decide that citizens generally can bring suit against the FEC to ensure compliance with federal campaign laws, believing that this mechanism will deter violations of a law central to the electoral process. A general grant of standing may help to remedy the problems created by the relevant incentives and the public-good character of information, for there may be someone, out of a large group of potential beneficiaries, who is willing to bear the costs of a lawsuit. As we shall see, Akins itself is a prime example. [\[FN85\]](#)

None of this is to say that a grant of informational standing is a good idea. Lawsuits can be expensive; they also can be diversionary and even frivolous. With respect to information, a grant of standing to all citizens may divert an agency from its preferred course of action and can make sensible priority-setting extremely difficult. It even may involve a kind of private conscription of public resources [\[FN86\]](#) in a way that undermines a fully democratic effort, by the agency involved, to allocate its limited resources to the most serious problems. If all citizens can bring suit against the FEC to require it to regulate all groups that any citizen would like to see treated as "political committees," then the FEC may have to spend all of its time defending itself in court. If any agency definition of "animals" can prompt a federal action by some citizen asking the government to expand its definition, [\[FN87\]](#) the government may have fewer resources to enforce the Animal Welfare Act. Alternatively, the mere risk of a citizen suit may lead the agency to an outcome that it believes is undesirable, and that perhaps is, in ***632** fact, undesirable. From the agency's point of view, if the suit can be avoided by choosing a certain route, why not choose that route, even if the suit might be unsuccessful and even if the problem at hand does not deserve agency attention?

These points are sufficient to show that it cannot be decided, in the abstract, whether a grant of informational standing is or is not desirable. The answer depends on a range of empirical issues--the likely performance, without lawsuits, of the agency and the private sector; the cost of any lawsuits; the effects of lawsuits on the agency's capacity for priority- setting; and the effects of lawsuits on the agency's substantive regulation. It would be highly desirable to obtain a great deal more information on

these points.

E. Standing Puzzles and Problems

Before *Akins*, the law governing standing to obtain information was in considerable disarray, probably in even more disarray than the law of standing generally. The most serious question was how the "injury in fact" requirement [FN88] should operate in cases involving a deprivation of access to information. The Supreme Court has held that a public interest group, consisting of citizens, suffered an injury in fact when the group was deprived of information that was required to be disclosed under the statute governing federal advisory committees. [FN89] The Court has also held that deprivation of information concerning available housing constituted a sufficiently "specific injury" to establish injury in fact. [FN90] Lower courts have uniformly upheld the general grant of standing under FOIA, but without providing a clear rationale for doing so. [FN91]

Outside of the FOIA context, the leading case is *Lujan v. Defenders of Wildlife*, [FN92] which invalidated a congressional grant of citizen standing and suggested that citizens could not bring suit unless a "concrete" and "particularized" *633 interest was at stake. [FN93] This idea seemed to suggest that a widely generalized injury, of the sort often invoked by information-seeking plaintiffs, would not be a sufficient basis for standing. Thus, the injury in fact requirement, after *Lujan*, appeared to merge with the ban on standing for those invoking generalized grievances, and to have created serious adverse consequences for those seeking informational standing. [FN94] At the same time, lower courts generally agreed that withholding information to which a plaintiff had a legal right was sufficient to create a legal injury for purposes of Article III. [FN95] But a complex set of rulings from the D.C. Circuit suggested that a plaintiff whose injury was widely shared would be held to not have standing under the "zone of interests" test. [FN96]

It seemed clear that the Court's recent standing cases were on a kind of collision course with a number of statutes, including FOIA and FECA, which gave standing to citizens generally. It was against this background that the Court decided *Akins*.

II. What the Court Said

The American Israel Public Affairs Committee ("AIPAC") may or may not be a "political committee" within the meaning of FECA. If AIPAC is a political committee, then it is subject to a range of legal restrictions, involving, for example, statutory limits on the amount that it can contribute to a candidate for political office. [FN97] More importantly for the particular purposes of informational standing, FECA imposes a number of record-keeping and disclosure requirements on all political committees. [FN98] These requirements are designed to expose a range of political activities to public view. As a result, such committees must register with the FEC; keep names and addresses of contributors; record the purpose and amount of disbursements; and file annual reports to the FEC which include lists of donors giving more than \$200 per year, contributions, expenditures, and disbursements. [FN99] A series of complex provisions define "political committee." The statute also *634 provides that "any person who believes a violation of this Act . . . has occurred, may file a complaint with the Commission." [FN100] It adds that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition" [FN101] to seek review of the dismissal of the complaint.

In 1997, a number of voters attempted to persuade the FEC to treat AIPAC as a political committee. [FN102] Their evident motivation was political disagreement with AIPAC. They also believed that AIPAC was involved in campaign activities and that the FEC had behaved unlawfully in failing to engage in regulation and in failing to require disclosure of AIPAC's relevant activities. [FN103] After extended deliberation, the FEC concluded that it did not consider AIPAC to be such a committee, because "the Act's definition of 'political committee' includes only those organizations that have as a 'major purpose' the nomination or election of candidates." [FN104] AIPAC was an "issue-oriented lobbying organization, not a campaign-related organization." [FN105] Disagreeing with the FEC's judgment, the voter- plaintiffs then filed suit to seek review of the complaint, claiming that they were "aggrieved" and therefore statutorily authorized to bring suit. The FEC responded by asserting, among other things, that the voters lacked standing in their capacity as citizens and that the suit should therefore be dismissed.

In *Akins*, the Supreme Court held that the voters had standing because of their interest in obtaining the relevant information about AIPAC. [FN106] The analysis came in four parts. First, the Court said that there was no problem with "prudential standing." [FN107] Congress itself had granted standing to "[a]ny party aggrieved," [FN108] and any prudential limits had been overcome by statute and were therefore inapplicable. [FN109]

*635 Second, the plaintiffs suffered injury in fact, and hence the statutory grant of standing to citizens was constitutional.

(Cite as: 147 U. Pa. L. Rev. 613)

[FN110] The injury "consists of their inability to obtain information--lists of AIPAC donors . . . and campaign-related contributions and expenditures--that, on respondents' view of the law, the statute requires that AIPAC make public." [FN111] The Court added that there was "no reason to doubt their claim that the information would help them . . . to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election." [FN112] This injury was sufficiently "concrete and particular" for purposes of Article III.

The Court faced a possible obstacle to this conclusion in *United States v. Richardson*. [FN113] There, a plaintiff bringing suit principally as a taxpayer sought information involving the expenditures of the Central Intelligence Agency ("CIA"), which, in his view, had to be made public under the Accounts Clause of the Constitution. The Court denied standing. [FN114] As the *Akins* Court explained, this was because there was no "logical nexus" between the plaintiff's taxpayer status and the claimed failure of Congress to require a more detailed report of CIA expenditures. [FN115] In *Akins*, by contrast, "there is a statute which, as we have previously pointed out[,] . . . does seek to protect individuals . . . from the kind of harm they say they have suffered." [FN116] Under FECA, the "logical nexus' inquiry" in *Richardson* was thus entirely irrelevant. [FN117] In a crucial passage, the Court added that *Akins* was a case involving not taxpayer standing, but voter standing. If *Richardson* had involved voter standing, the question would have arisen whether the Constitution's "general directives" allowed for enforcement through lawsuits brought by private persons. The answer to that question "(like the answer to whether there was taxpayer standing in *Richardson*) would have rested in significant part upon the Court's view of the Accounts Clause." [FN118]

At this point, the Court turned to the third standing question: whether standing was lacking because the injury was a "generalized grievance," *636 shared by all or most citizens. The Court acknowledged that previous decisions suggested "that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance." [FN119] Indeed, in some cases, including *Richardson* itself, the Court suggested that Article III might be an obstacle to a suit by plaintiffs whose injuries were widely shared. [FN120] But the Court concluded that with an express congressional grant of standing, the generalized character of the grievance here was no obstacle, because the limitation was prudential in character. In its key step, the Court distinguished between injuries that are widely shared and injuries that are "abstract and indefinite." An abstract injury--such as an injury "to the interest in seeing that the law is obeyed" [FN121]--would not allow for standing. By contrast, a concrete but widely shared injury would suffice for purposes of Article III. "Thus the fact that a political forum may be more readily available where an injury is widely shared (while counseling against, say, interpreting a statute as conferring standing) does not, by itself, automatically disqualify an interest for Article III purposes." [FN122] This point seemed to the Court "obvious" for cases involving the same common law injury, as in a mass tort or an "interference with voting rights." [FN123] "We conclude that similarly, the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in federal courts." [FN124]

The fourth and final standing issue involved redressability. Would the plaintiffs' injury be remedied by a decree in their favor? The FEC urged that even if it agreed with the plaintiffs on the law, it may have exercised its statutory discretion so as not to require AIPAC to produce the information. Thus the plaintiffs' injury might not be redressed by a decree in their favor. The Court answered with an analogy: "Agencies often have discretion about whether or not to take a particular action. Yet those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground." [FN125] The Court explained that it is typical to remand a case after a judicial judgment, *637 even though the agency may end up doing the same thing after the remand. This familiar practice was sufficient to justify a conclusion that the plaintiffs had met the redressability requirements.

Justice Scalia's dissenting opinion was rooted in a concern that the legal provision in FECA "is an extraordinary one, conferring upon a private person the ability to bring an Executive agency into court to compel its enforcement of the law against a third party." [FN126] His principal argument invoked *Richardson*, which, in Justice Scalia's view, held that in order to have standing, each plaintiff's harm must be "particularized," in the sense that it affects him "in a personal and individual way." [FN127] In a mass tort, each person suffers "a particularized and differentiated harm"; but in this case, as in *Richardson*, the harm caused to the plaintiff is "precisely the same as the harm caused to everyone else." [FN128] The requirement of a particularized harm is also based on a sound understanding of Article II, which gives the Executive, not the courts, the responsibility to "take Care that the Laws be faithfully executed." [FN129]

Justice Scalia complained that the logic of the Court's opinion is that "it is within the power of Congress to authorize any

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interested person to manage (through the courts) the Executive's enforcement of any law that includes a requirement for the filing and public availability of a piece of paper." [\[FN130\]](#) The result of allowing suits in cases like these is to produce "a shift of political responsibility to a branch designed not to protect the public at large but to protect individual rights." [\[FN131\]](#) This result would violate both Article III and Article II. [\[FN132\]](#)

III. Evaluating Akins: Informational Standing As a Question of Statutory Law

I now turn to an evaluation of the Court's principal conclusions. The unifying theme is that with respect to information, and perhaps more generally, the Court has rooted the standing question firmly in Congress's instructions. Whether a plaintiff has standing depends on what the relevant ***638** statute says. For both the "injury in fact" and generalized grievance issues, the foundation for the Court's conclusion is that Congress created a legally cognizable injury and gave citizens the right to redress that injury in court.

The Court was correct to stress this point, and as we shall see, the emphasis on congressional instructions carries with it a number of important implications. Justice Scalia's dissenting opinion is also correct insofar as it contends that the Court suggests that Congress may create an interest in information and allow people to vindicate that interest in court. But Justice Scalia is wrong to suggest that this outcome would violate the Constitution.

A. Injuries, in Fact and in Law

Begin with the idea of "injury in fact." The Court held that there was such an injury in Akins because the plaintiffs were denied information to which they had a legal right. [\[FN133\]](#) Because the statute created a right to information of which they were deprived, the plaintiffs suffered an injury that was sufficient for Article III purposes. Was the Court correct in reaching this conclusion?

1. Preliminaries: Of Fact and Law

To answer this question, it is necessary to step back a bit. There now appears to be a consensus that the "injury in fact" idea has extremely serious problems. [\[FN134\]](#) The first problem is that the idea is not a product of the text or history of the Constitution; it is a recent innovation by the Court itself. [\[FN135\]](#) To be sure, the text of the Constitution does require a "case" or "controversy," and this provision does limit the kinds of claims that can be heard in court. [\[FN136\]](#) Without some kind of cause of action--with a purely ideological ***639** objection or complaint--there is no "case" or "controversy" within the meaning of Article III. It follows that courts cannot hear objections unaccompanied by some kind of legal right to initiate suit. But both before and after ratification, legislatures--including the very first Congress--gave citizens and taxpayers causes of action in certain circumstances, and these causes of action were not thought to violate Article III. [\[FN137\]](#) The injury in fact test has its roots not in the founding period, but in New Deal era cases, and did not take Article III form until about 1970. [\[FN138\]](#) As a matter of text and history, the best reading of the Constitution is that no one can sue without some kind of cause of action. An injury in fact, however, is neither a necessary nor a sufficient condition for standing.

There are problems with the injury in fact test even if we put text and history to one side. The test was originally designed to simplify the standing inquiry by separating the issue of standing and the merits, [\[FN139\]](#) but it has actually produced extremely complex and unwieldy threshold issues of fact, ill suited to judicial resolution--involving, for example, the question of how, exactly, fuel economy standards alter the mix of available automobiles for consumers. [\[FN140\]](#) But a more important problem with the injury in fact idea is conceptual: the test is not even coherent. [\[FN141\]](#) The basic difficulty is that many people suffer injuries "in fact" every day, but these injuries do not become ***640** legally cognizable, and are not even visible to the legal system, unless and until some source of law creates a relevant legal interest and a right to bring suit. The legal system does not "see" an injury unless some law has made it qualify as such. If this point seems obscure, it is only because of widespread agreement, within the legal culture, about which injuries are "injuries in fact" and which are not. But the agreement comes from understandings of law, not understandings of fact.

Thus, for example, if a citizen sought information from the government in 1956 and even claimed that his request involved "the right to information," his complaint would have seemed purely ideological, and he would not have had standing. It is only after the passage of FOIA that there is a legal claim and hence an injury (in fact?) that is the basis for a federal cause of action. If a woman sued for sexual harassment in 1958, her injury would seem purely ideological and would not support a federal action; things are altogether different in 1999. Can it possibly be suggested that the "facts" have changed? If someone was turned down for a job in 1954 because of his skin color and complained about the rejection in court, there would have

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been no possible basis for a lawsuit. Things changed in 1964. [\[FN142\]](#) The reason is not that the facts are different; it is the law that has changed. The line between injuries in fact and "other" injuries is usually clear, and it cannot possibly be one involving just "facts"; it necessarily involves the requirements of law.

To say this is to say that under Article III, an injury in fact is not an intelligible basis for standing. Something involving a violation of the law is required. But--it might be asked--is not an injury in fact a necessary or minimal condition for standing, as the Court has suggested in many cases since 1980? [\[FN143\]](#) The most important problem with this question is that it is hard to know what the question means. For the question to be a sensible one, we would have to be able to think that there is a way, entirely independent of law, of figuring out whether a litigant has been "injured" at all. Some cases may seem quite easy on this count. If I sue to prevent the government from taking my land, surely I have been injured "in fact." If I am an Illinois citizen and sue to prevent racial discrimination in North Carolina, a state that I never visit, surely my interest is purely ideological. These *641 cases seem to suggest that common sense, or ordinary perceptions, can tell us whether someone has really, or "in fact," been injured, quite apart from the law.

But this conclusion is much too quick. "Injuries" are not some kind of Platonic form, so that we can distinguish, without the aid of some understanding of law, between those that exist "in fact" and those that do not exist "in fact." What is perceived, socially or legally, as an "actual" injury is a product of social or legal categories giving names and recognition to some things that people, prominently people within the legal culture, consider to be (actual, cognizable) harms. Takings cases, and cases involving Illinois citizens suing about discrimination in North Carolina, seem easy, and they are, but this is only because the relevant legal understandings are so deeply internalized that they appear to be mere "common sense." That these cases are easy is a tribute to the agreed-upon nature of the relevant legal understandings; it is not a product of any simple or law-free understanding of the "facts." The only way to distinguish between cognizable and noncognizable injuries is to see what the law says, or is; there is no prepolitical or prelegal way of making that distinction. [\[FN144\]](#)

2. The Akins Reformulation

Thus far these objections seem to run counter to the whole thrust of modern standing doctrine. But the Court has shown unambiguous signs of acknowledging this point. [\[FN145\]](#) The Akins Court was alert to these problems and indeed seems to have taken the injury in fact test in a new, and far more productive, direction.

Note first that the Court seems to meld the injury in fact inquiry with the inquiry into what the law is: "The 'injury in fact' that respondents have suffered consists of their inability to obtain information . . . that, on respondents' *642 view of the law, the statute requires that AIPAC make public." [\[FN146\]](#) This formulation unambiguously mixes the injury in fact inquiry with an inquiry into the content of the law. The Court does not refer merely to an inability to obtain information; it refers to an inability to obtain information that must, under the relevant law, be made public. Here is a suggestion that without FECA, it is not clear that there would be a legally cognizable "injury."

The point emerges even more straightforwardly from the Akins Court's treatment of *United States v. Richardson*, [\[FN147\]](#) where it is made clear that the injury in fact question would be assessed by reference to positive law, whether statutory or constitutional. If the citizens in *Richardson* had claimed standing qua citizens, the legal issue "would have rested in significant part upon the Court's view of the Accounts Clause." [\[FN148\]](#) Quoting *Richardson*, the Court said that there would thus be an issue "whether 'the Framers . . . ever imagined that general directives [of the Constitution] . . . would be subject to enforcement by an individual citizen.'" [\[FN149\]](#) In other words, Akins was different from *Richardson*: in Akins, Congress had expressly said that the widely diffused interest could be enforced by individual litigants, whereas in *Richardson*, it was not at all clear that the relevant source of law (the Constitution) said that the relevant, widely diffused injury could be enforced by individual litigants. Whether there was injury "in fact" depended on what had been provided "in law."

This is a striking way to understand the inquiry into "injury in fact." It suggests unambiguously that whether a perceived harm is legally cognizable depends not on facts, but on law. If a denial of citizen standing was appropriate in *Richardson*, it was not because there was no injury "in fact," but because there was no injury in law--that is, because no source of law created a right to bring suit. This suggestion is compatible with several promising pronouncements in previous cases. [\[FN150\]](#) In *Lujan* itself, the Court said that part of the injury in fact test involved whether a "legally cognizable" interest was involved. [\[FN151\]](#)

I conclude that the principal question after Akins, for purposes of "injury in fact," is whether Congress or any other source of law gives the litigant *643 a right to bring suit. [\[FN152\]](#) Previous cases suggest that there are limits on Congress's power to

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grant standing to people who have sustained no "injury in fact," [\[FN153\]](#) and these cases have not been overruled by *Akins*. But at least where the plaintiff seeks information, and where Congress has created a legal interest and a right to bring suit, the Constitution does not stand as an obstacle. This is, to say the least, a major development in the law of informational standing. It is also a promising development, because it puts the standing question in the hands of Congress, where it belongs. And even if this statement is controversial in its broadest form--applying outside the context of information [\[FN154\]](#)--it should not be controversial in a case in which Congress expressly gives people a right to receive information and allows them to bring suit to vindicate that right in court.

B. Generalized Grievances

Perhaps the most important aspect of the *Akins* decision is the Court's novel understanding of the old idea that "generalized grievances" are not subject to judicial protection. Before *Akins*, it was fair to say that the ban on generalized grievances was moving from a prudential one to one rooted in Article III. [\[FN155\]](#) Lujan seemed to suggest that to have standing, citizens would have to show that their injuries were "particular" in the sense that they were not widely shared. [\[FN156\]](#) This was the view defended in an influential law review ^{*644} article by then-Judge Scalia, which Lujan appeared to follow. [\[FN157\]](#) The article urged that the distinctive role of the courts is to protect individual rights, and that when numerous people are being injured, their remedy is political rather than judicial. This claim was bottomed, in turn, on the idea that the distinctive role of the courts is to vindicate rights held by individuals, rather than majorities or large groups. [\[FN158\]](#) There were many suggestions, in the lower courts as well as the Supreme Court, that prudential or constitutional considerations counseled against standing for those whose injuries were not individuated. [\[FN159\]](#) These suggestions were especially important in cases involving information, since the interest in receiving information is often widely shared--sometimes, in fact, shared by millions of citizens, as in the typical deprivation of information suit under FECA.

The *Akins* Court makes what reasonably could be considered either an important clarification or a dramatic shift. After *Akins*, the fact that an injury is generalized is not a barrier to standing under Article III. Congress is entirely authorized to grant standing to individuals who share an injury with many other people, even with all citizens. *Akins* reads the references to generalized grievances in connection with the requirement that injuries be concrete rather than abstract. Concreteness, the Court says, is indeed a constitutional requirement. Injuries must not be speculative. But an injury that is both concrete and generalized is constitutionally cognizable. [\[FN160\]](#)

Frequently, this is the case with a denial of information. The person who has been denied information suffers a concrete harm, even though she may be part of an extremely large class of people. As we have seen, this is the point where Justice Scalia departed, with some alarm, from the *Akins* majority, on the theory that any injury must be both concrete and "particularized" in the sense that it must be distinct to the complaining individual. [\[FN161\]](#) Frequently, a plaintiff seeking information would run afoul of this requirement,^{*645} for often those deprived of information are not injured in a way that is (in Justice Scalia's particular sense) particular.

What, then, remains of the supposed ban on generalized grievances? Very little--but not nothing. The Court says that the fact that an injury is widely shared, and hence the political forum is available, will "counsel [[[] against . . . interpreting a statute as conferring standing." [\[FN162\]](#) Hence, the notion is retained as a prudential one, and as we will see, it may turn out to be quite important as such, in information cases and in others. [\[FN163\]](#)

Now, it would be possible to suggest that *Akins* eliminates the "generalized grievance" requirement entirely and focuses solely on injury in fact. The Court's use of the mass tort case--in which numerous people are affected, but each has standing--might be taken as indicative of a move in this direction. In the mass tort case, however, many people are affected, but each in a particular and concrete way. A more serious question is whether the same is true when thousands or millions of people are deprived of information. It is not easy to answer that question in the abstract. Perhaps a deprivation of information (involving, for example, television ratings) affects each individual particularly and concretely. But the Court should probably be taken at its word with its suggestion that a widely generalized injury is not cognizable if Congress has not expressly said that it is.

An especially narrow reading of *Akins* would fasten on the following sentence: "We conclude that similarly, the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts." [\[FN164\]](#) A future court could possibly read *Akins* as crucially about information directly related to voting. Such a court could plausibly say that the *Akins* Court allowed standing for citizens asserting a generalized

grievance only because, and to the extent that, the injury involved "the most basic of political rights."

The first question here is obvious: Was the Court correct to say that Article III poses no barrier to those who have grievances that are both concrete and widely shared? As a matter of text and history, the Court's conclusion is unimpeachable; there is no constitutional barrier to judicial recognition of legally authorized claims asserted by citizens whose interests are widely shared. [FN165] Generalized grievances were recognized in both England *646 and America, where, as we have seen, citizen and taxpayer standing was permitted. [FN166] Even if it were possible to generate from text and history a constitutional requirement of an "injury," such a requirement would not stand as an obstacle to suits by people who suffer along with many others. Such people have injuries, too; they are not mere bystanders, and they are not complaining about violations of law as such. Thus the Court's conclusion that widely generalized injuries are cognizable is right even if we agree that some "injury in fact" test is constitutional in character.

In both judicial and nonjudicial writing, Justice Scalia has defended the ban on generalized grievances not by reference to text and history, but instead by invoking considerations of policy and structure. [FN167] In his view, the ban stems from an understanding of the distinctive role of the judiciary in a democratic society. Courts properly protect individuals, or members of small groups, against governmental illegality. But when injuries are widely shared, the victims can and should use the political process, not the courts, for they have (by hypothesis) sufficient political voice to resort to their democratic remedies. In the context of information, the argument would be that if government is refusing to regulate (for example) AIPAC as a political committee, and thus refusing to require it to disclose relevant information, then a large number of people are harmed. They should have enough political influence to be able to pressure the FEC and Congress to respond. That is the appropriate arena for their claims, not the judiciary.

As a matter of political science, this is not an entirely implausible set of generalizations; a large group certainly has more access to political remedies than a small one, other things being equal. But the generalization is crude. Whether it is right depends on a number of variables, including the information and the organizational capacity of the relevant group members, who may face serious collective action problems. [FN168] Return here to a basic reason for statutes requiring information disclosure and indeed for grants of standing in public law cases: when a large group of people is denied information, *647 many or most of them may not know that they have been harmed; and even if they know, any particular member--say, member A--may not consider it worthwhile to participate in the relevant political activity. This is especially so in light of the fact that nothing is likely to happen unless other members act, in which case little will be added by the participation of member A. With respect to information in particular, the free rider problem is likely to make political remedies insufficient, even or especially when large numbers of people have been deprived of information to which they have a legal right.

Justice Scalia's argument is basically one from democracy: when many people are injured, they should use the democratic process, not the courts. But as a claim from democracy, the argument is weak. The most basic difficulty is that Congress has, by hypothesis, concluded that the agency (or private defendant) is not entirely reliable on its own and that relevant people should have access to the courts in order to ensure that the (democratically enacted) law is enforced. If Congress has made that judgment, then there should be no (democratic) problem with allowing that kind of enforcement of the statutory directive. If Congress has given anyone the right to ensure disclosure of campaign-related information, it is because Congress was concerned that the FEC would not adequately enforce the law, and because Congress believed that a right to challenge FEC decisions in court would increase the likelihood of good outcomes. Perhaps that judgment was unwise; perhaps citizen suits cause more trouble than they are worth. But that would be a policy problem, not a constitutional one. [FN169]

There is also nothing in Article II that argues against allowing standing for people who suffer a widely shared injury. To be sure, it is for the Executive, not the courts, to "take Care" that the laws are faithfully executed. In these cases, however, the plaintiffs' allegation is that the Executive has failed in that task. In order to prevail, the plaintiffs must overcome a substantial burden by showing (to simplify a complex story) that the agency has violated an unambiguous statute [FN170] or has behaved in an arbitrary or capricious manner. [FN171] It does no violence to Article II for a court to hear a plaintiff's *648 complaint to this effect and to rule against the Executive if it is shown that the agency has, in fact, violated the law.

C. Redressability

With respect to redressability, the Court proceeded with an analogy that operated as a kind of *reductio ad absurdum*. With some incredulity, the Court indicated that if this injury was not redressable, then the same would be true of countless complaints in countless administrative law cases, where agencies might also end up rejecting the plaintiffs' complaints after remand. The point is correct; the logic of the government's redressability argument might well have this extraordinary

consequence.

It also seems clear that *Akins* marks a noteworthy clarification of preexisting law. The prior cases [\[FN172\]](#) seemed to suggest that standing should not be permitted if there is any nontrivial reason to think that a discretionary decision, by the agency or a private party, might prevent the plaintiff from obtaining the requested relief. In *Akins*, this idea is rejected; standing exists even in the face of a substantial possibility that the agency would exercise its discretion to the plaintiff's detriment. We might even say that after *Akins*, the redressability requirement is unlikely to matter in the administrative law context, at least where the exercise of agency discretion on remand is what makes the remedy "speculative." [\[FN173\]](#)

But the Court's explanation nonetheless leaves a good deal to be desired. Under the Court's existing redressability cases, it has yet to be explained why, in principle, there is no serious problem in conventional administrative law cases. We know that there is no such problem; we do not know why.

To be more concrete: the Court made clear that Article III requires the plaintiff to show that a decree in his favor will remedy his asserted injury. It must not be "speculative" whether the decree would do so. In *Linda R.S. v. *649 Richard D.*, [\[FN174\]](#) for example, the mother of a child born out of wedlock challenged the local prosecutor's failure to bring proceedings against her child's father for failure to pay child support. The Court denied standing on the ground that even if the prosecutor initiated proceedings, the father might not pay. [\[FN175\]](#) So, too, in *Simon v. Eastern Kentucky Welfare Rights Organization* ("EKWRO"), where indigent individuals, denied emergency services in local hospitals, brought suit against the Internal Revenue Service challenging a new policy that allowed hospitals to claim a charitable deduction after providing fewer emergency services to the indigent. [\[FN176\]](#) The Court denied standing on the ground that it was possible that even if the charitable deduction had been unchanged, services might have been denied. [\[FN177\]](#) Thus, a decree in the plaintiffs' favor would not have prevented or redressed their injuries. In both cases, the Court seemed concerned that a grant of standing would have allowed a kind of advisory opinion.

The problem here is that many conventional administrative law cases seem to have precisely the same difficulty; there is no assurance that a plaintiff will ultimately receive what he wants even if he succeeds on the issue at hand. Thus, for example, if a plaintiff complains that the agency failed to give an adequate explanation for a rule, there is no assurance that on remand, the agency will not come up with exactly the same rule after justifying itself adequately. The plaintiff's victory may not result in an outcome in his favor. The central question, unanswered in *Akins*, is this: Why, then, do the redressability requirements not create problems in ordinary administrative law cases?

The beginning of an answer may seem to lay in a controversial explanation in the Lujan opinion, consisting chiefly of a footnote [\[FN178\]](#) in which the Court suggested that the redressability requirements would be relaxed in **650* some cases involving a "procedural injury," such as where a plaintiff complains of the failure to prepare an EIS. Standing is available if plaintiffs "are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs." [\[FN179\]](#) It is true that the mere preparation of an EIS need not have favorable consequences for any plaintiff; the agency may prepare the statement and go ahead with its plans undaunted. But if a concrete recreational or health interest "lies behind" the complaint, then this fact is not fatal to standing by a NEPA plaintiff. Thus the Court said that a "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." [\[FN180\]](#) This was essentially the logic that the Court followed in *Akins*, without citing the Lujan suggestion. And we can agree that the redressability requirements should not be taken to forbid people from complaining about procedural violations that are connected with injuries to their legally cognizable interests. But the question remains: Why is this so?

The best response has to do with the nature of procedural rights and their distinctive relation to the question of redressability. When Congress creates a procedural right, it does so not because the right will necessarily lead to particular results, but instead because procedural rights create desirable structures, incentives, and increased or decreased probabilities--and also because they increase the legitimacy of any government interference with substantive rights. In Congress's apparent view, those structures, incentives, and probabilities tend to produce outcomes that are better or more fair. This is the underlying logic of the brief analysis in Lujan; NEPA is designed not to require particular results, but to structure processes in a way that will increase the likelihood of good or fair decisions. Once properly characterized--as involving a right to certain procedures rather than certain outcomes--the statutory injury would be redressed. When a court holds that an agency has not complied with NEPA and requires the preparation of an EIS, the court has redressed the plaintiff's NEPA-related injury. That injury does not consist of an environmental injury alone, or even at all; the injury consists of the failure to provide the beneficiaries of NEPA with the procedural protections (and agency incentives) created by that statute. The key point here is that we cannot

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know whether the redressability requirements are met without properly characterizing the relevant injury, and the only basis for a proper characterization is the statute. NEPA gives rise to a *651 new and distinctive set of injuries, and those injuries are precisely redressed through a mandate that agencies prepare (legally required) EISs.

A similar situation arises with the campaign finance law in *Akins*. Perhaps the agency would decide, on remand, to exercise its discretion not to challenge AIPAC, but at least it would be doing so as an exercise of prosecutorial discretion and not on the basis of what would be (by hypothesis) an illegitimate interpretation of FECA. A central point of the APA arrangement for judicial review of administrative action is to ensure that agencies proceed both publicly and on the basis of legitimate reasons. The plaintiffs in *Akins* alleged that the FEC misinterpreted the relevant law, and the relevant injury-- government inaction threatening to their statutory rights in their capacity as citizens, based on that misinterpretation--would be adequately redressed by a decision in their favor. The general conclusion is that characterization of the injury comes from the governing statute. This conclusion cuts across standing doctrine and indeed applies in information cases quite broadly.

The point incidentally explains why Justice Scalia was able to attract only a plurality on the redressability question in *Lujan* itself. There, the plurality concluded that the plaintiffs, challenging federal funding of an international project that threatened certain endangered species, should be denied standing because they could not show that the denial of federal funding would save any endangered species. [FN181] The plurality noted that even if the plaintiffs prevailed, and the Secretary of the Interior determined that the funding was unlawful, the funding agencies might not change their behavior. The Court also noted that American agencies provide only a part of the funding for the relevant foreign projects and hence a denial of federal funds might not save the relevant species. [FN182] If the plurality's reasoning is right, then the redressability reasoning of the *Akins* Court is probably wrong. But the plurality's reasoning is not right. Insofar as the Endangered Species Act forbids the use of federal funds to jeopardize the continued existence of endangered species, its purpose is not necessarily to preserve endangered species (an outcome that depends not only on federal funding or even federal action), but to ensure that the American government does not take actions that contribute to their elimination. The injury that the plaintiffs sought to address was the increased probability of extinction that would be created by the unlawful use of federal funds.

*652 If the injury is understood in these terms, the redressability requirement is met by showing that if the plaintiff prevailed, then the funds would not be used in the unlawful manner. The six justices who joined the majority opinion in *Akins* straightforwardly have rejected the four-person opinion in *Lujan*. These claims about redressability are closely related to the claims about injury in fact offered above. Both injury in fact and redressability are crude ways of getting at the central question: What kind of injury is created by the relevant source of law?

There is an important corollary. When a plaintiff seeking to attack an institution objects to an unlawful expenditure of federal funds--involving, for example, schools that discriminate on the basis of race or sex--standing is available even though a withdrawal of funds may not prevent the discrimination. The injury consists of the increased probability or dimensions of discrimination by virtue of government funding, or of the use of federal funds to subsidize discrimination; that injury would be redressed by the decree the plaintiff seeks. [FN183]

These points help sort out the whole area of procedural injuries. When a concrete interest lies behind a procedural violation, a plaintiff has standing to bring suit, even if the agency, after complying with applicable procedures, might not give the plaintiff the relief he seeks or might proceed on a course that the plaintiff dislikes. For purposes of informational standing, the course for the future is therefore clear. Even if an agency might not proceed against a third party to require disclosure of information, a plaintiff with congressional authorization has standing to object to the procedures that the agency followed in choosing that course. This is not because the redressability requirements are "relaxed" in procedural cases (as the *Lujan* Court would have it), but because the injury, properly characterized in light of the underlying (procedural) law, would be redressed by a decree in the plaintiff's favor (consider NEPA and funding cases above as examples).

These answers also help to recast the whole idea of redressability, certainly, but not only, in cases involving access to information. Whether an injury is redressable depends on how it is characterized, and how it is characterized depends on the nature of the relevant law. In procedural cases, a plaintiff with a concrete interest faces no redressability problem if the governing law also creates a legally cognizable interest in the relevant structures and incentives--so, too, with other standing cases. Consider, as Exhibit *653 A, *Northeastern Contractors*, [FN184] in which white construction contractors challenged an affirmative action program, only to meet with the seemingly plausible objection that they could not show that they would have received the contracts without the affirmative action program. The Court responded that this showing was irrelevant; what was important was that the plaintiffs had suffered an injury to an interest protected by the Equal Protection Clause--that is, the opportunity to compete on an equal basis. [FN185] That injury would have been addressed by a favorable decree.

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Although I cannot discuss the point in detail here, I believe that Northeastern Contractors, together with Akins, will eventually force a rethinking of the whole idea of redressability, requiring the Court to be more explicit about the kinds of "injuries" that it recognizes. [\[FN186\]](#)

The appropriate conclusion is that the Akins Court was correct to allow standing in the face of a redressability challenge, and also that it was correct to invoke the analogy of conventional administrative law cases. But the correctness of the result and of the analogy suggest deeper problems with redressability; the problems have to do with the need to characterize the injury properly. The proper characterization of the injury turns on the content of the relevant law, procedural or substantive.

IV. Injuries and Information in the Future

The discussion thus far suggests that the Akins Court was right on each of the three principal standing issues. [\[FN187\]](#) But larger questions remain. For example, what are its implications for informational injury in the future? And how does it bear on standing questions not involving information injury at all?

*654 A. Injury in Fact: Mostly Easy Cases

After Akins, there are, with respect to information, many easy cases. If Congress granted standing to citizens in general to seek information and information has been withheld, citizens in general can bring suit. Certainly this is clear if the information bears directly on their behavior as voters. It seems equally clear if the information bears directly on the plaintiffs' activities in their individual or organizational capacities. Suppose, for example, that an individual or institution is interested in obtaining information relating to enforcement of the Animal Welfare Act, and that individual or organization has a demonstrable interest in the protection of animals from suffering. In such cases, standing is clearly available.

The situation is slightly less clear when an individual or institution seeking information invokes no interest expressly related to the political process and when that individual or institution cannot show that the information would relate to relevant activities on his or its part. The strongest argument for denying standing would be that the plaintiff has a purely ideological interest, or an interest in law enforcement for its own sake. Suppose, for example, that an ordinary, relatively young citizen is seeking information about compliance with the Age Discrimination Act. Suppose the citizen seeks this information simply because she is curious, or because she generally wants to make sure that the government is enforcing the law. It is possible to argue that Akins does not cover this case. As stated, the plaintiff has no particular interest as a citizen, and she cannot connect the denial of information to any tangible activity independent of the lawsuit. Thus, there is a plausible basis for denying standing even in light of the outcome in Akins.

The argument is plausible, but no more than that; a congressional grant of standing in a case of this kind would probably be constitutional after Akins. (If there is no such grant, then standing should probably be denied on prudential grounds.) [\[FN188\]](#) The first point is analogical and involves FOIA. Under FOIA, anyone can bring suit to obtain any information that FOIA requires to be made public. [\[FN189\]](#) The plaintiff need not show an interest in using the information for anything in particular; simple curiosity is enough. The denial of the information is the injury in fact. No court has held this provision unconstitutional. It is hard to distinguish the countless imaginable FOIA cases from the hypothesized case.

*655 The second point involves Akins itself. The Akins Court could have issued a narrow ruling, saying that when citizens bring suit to obtain information directly involving the political process, there is no constitutional obstacle to a congressional grant of standing. As noted, there is some language in Akins emphasizing that the case itself involved voting, "the most basic of political rights," [\[FN190\]](#) and it would be possible to seize on this language to confine the opinion's reach. A narrow understanding of this kind, however, would not be consistent with the spirit of the decision, for the Court spoke far more generally about Congress's creation of a legal right to information and its grant of a right to bring suit to vindicate that interest. The remark about "the most basic of political rights" was in the nature of an exclamation point, and not in any sense central to the Court's reasoning.

In any case, it would not be sensible, for Article III purposes, to distinguish between citizens seeking information directly bearing on the political process and citizens seeking other kinds of information. If the question is whether the plaintiff has suffered injury in fact, then why would that line be appropriate? At best, such a line would invite strategic behavior and ingenious pleading; almost any information can plausibly be characterized as bearing on voting behavior. In the hypothesized case, for example, the plaintiff could contend, at least as plausibly as the citizens in Akins, that the relevant information would bear on her decision about how to vote, and in what kinds of political activity to engage. Putting the risk of strategic

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behavior to one side, nothing in Article III supports the view that Congress may create citizen standing in cases involving denial of information bearing on the right to vote, but may not do so when voting is not at stake. Article III requires a legal right--if Congress has created a legal right to information, that requirement is satisfied.

I conclude that after *Akins*, the injury in fact test is not a barrier to explicit congressional grants of standing to citizens seeking information to which they have a legal right. The real difficulties lie elsewhere; they have to do with redressability and with congressional instructions.

B. Redressability: Information, Bounties, and the U.S. Treasury

Suppose that the government or some private entity refused to disclose information, or suppose that the government failed to require disclosure of information by some third party, either public or private. Suppose, too, that the nondisclosure is unlawful. If a plaintiff sues to obtain the information, there is injury in fact, and the plaintiff meets the redressability requirements under *Akins*. Now instead suppose that the information has been disclosed *656 after the filing of the complaint but before the judgment, and that the plaintiff seeks declaratory relief or the imposition of monetary penalties. The problem is far from hypothetical. Congress sometimes allows plaintiffs to impose financial burdens on both those who have failed to disclose information [\[FN191\]](#) and polluters (and others) who sometimes disclose information only after a lawsuit has been threatened or instituted. Is there a standing problem?

The easiest case for the plaintiff would involve monetary penalties that would go directly to the plaintiff. If a plaintiff stands to receive compensation for information unlawfully withheld, then the case is akin to many conventional cases in which a plaintiff seeks damages for illegality, and there is no standing question at all. If the plaintiff stands to receive a "penalty" not representing compensation but taking the form of a bounty, then the problem is a little harder, but there should be no problem here either. A potential award of a penalty or a bounty would make the case akin to several old prerogative writs, such as *quo warranto*, *informer's actions*, and *qui tam* actions. [\[FN192\]](#) In *Lujan*, the Court suggested that a grant of a bounty to the citizen-plaintiffs would solve the constitutional difficulty, [\[FN193\]](#) and there is support for this idea in the *qui tam* action, as suggested by early congressional practice and in several Supreme Court decisions. [\[FN194\]](#)

Suppose, however, that a plaintiff stands to gain no monetary relief at all; suppose that the plaintiff is entitled only to a declaratory judgment, with appropriate fines going to the U.S. Treasury. In a case of this kind, the Court recently held that there can be no informational standing. *Steel Co. v. Citizens for a Better Environment* involved a complaint, by a public interest organization, that Steel Company failed to disclose its toxic releases, in *657 plain violation of EPCRA. [\[FN195\]](#) All sides agreed that Steel Company had not done what it was legally obliged to do. Soon after *Citizens for a Better Environment* sent Steel Company a statutory notice of intent to sue, however, the company filed the overdue forms and disclosed the relevant information. The plaintiff claimed that the statute entitled it to various kinds of "appropriate" relief: a declaratory judgment that the company violated EPCRA, civil fines (of \$25,000 per day) that would be paid to the government, an award of costs, and an order requiring the company to provide them with copies of all compliance reports submitted to the EPA. [\[FN196\]](#)

Nonetheless, the Court denied standing. It did not reach the question of whether "being deprived of information that is supposed to be disclosed under EPCRA--or at least being deprived of it when one has a particular plan for its use--is a concrete injury in fact that satisfies Article III." [\[FN197\]](#) (*Akins* answers that question affirmatively, though without the approval of Justice Scalia, who wrote the opinion in *Steel Co.*) Instead the Court simply concluded that the plaintiff could not meet the requirements for redressability. If the plaintiff won, how, exactly, would its injury be remedied? The Court explained that "[n]one of the specific items of relief sought, and none that we can envision as 'appropriate' under the general request, would serve to reimburse respondent for losses caused by the late reporting, or to eliminate any effects of that late reporting upon respondent." [\[FN198\]](#) The result might have been different if the civil penalties could be "viewed as a sort of compensation or redress to" the plaintiff, but the fact that the penalties would go to the Treasury suggested that the plaintiff instead sought "not remediation of its own injury . . . but vindication of the rule of law." [\[FN199\]](#)

Steel Co. is important because it suggests a significant obstacle to informational standing: a plaintiff must show not only that there has been a deprivation of information, but also that the plaintiff stands to gain something from a decree in its favor. To be sure, it is reasonable to doubt the Court's decision, which was, on the constitutional issue, quite cavalier. [\[FN200\]](#) As a matter of first principles, or as a matter of constitutional text and history, why is Congress prohibited from concluding that citizens who have suffered an injury should be allowed to require violators of the law to pay appropriate penalties to the government? The history suggests a far broader *658 understanding of legislative power. [\[FN201\]](#) Nonetheless, *Steel Co.* is

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consistent with the thrust of the Court's recent redressability holdings. It thus suggests that a plaintiff seeking information must show that if the suit is successful, the plaintiff will receive something for its trouble. If the plaintiff would receive the information, there is no problem. There is also probably no problem if the plaintiff would receive compensation or a bounty. If, however, the plaintiff stands to gain nothing else, standing will be denied.

The outcome in *Steel Co.* was presaged by an intriguing court of appeals case raising a similar problem of informational standing in a quite different setting. In *Common Cause v. FEC*, the court of appeals rejected a claim of standing on behalf of the plaintiff, a well-known organization interested in campaign finance issues. [FN202] *Common Cause* alleged that in the 1988 Senate election in Montana, the Montana Republican Party and the National Republican Senatorial Committee had violated federal campaign election law by making excessive contributions and expenditures and by failing to accurately report these contributions. The latter claim suggested an interest in obtaining information. In denying standing, the court said that the mere fact of deprivation of knowledge as to whether there had been a violation of the law could not, by itself, create standing; this, according to the court, would be equivalent "to recognizing a justiciable interest in the enforcement of the law." [FN203] But if *Common Cause* was "asserting an interest in knowing how much money a candidate spent in an election," then it would have standing to protect that "legally cognizable injury in fact." [FN204] (This point is very much in line with the conclusion in *Akins*.)

Here, however, *Common Cause* sought investigation and the imposition of monetary penalties, rather than disclosure itself. Thus, a central problem for standing was that the monetary penalties would not benefit *Common Cause* at all. Concurring, Judge Sentelle stressed this point and its connection to the problem of redressability. In his view, the imposition of monetary penalties would only speculatively produce future compliance with the law--penalties themselves would not redress any injury. [FN205] But Judge Sentelle*659 also acknowledged that the "redressability requirement can be satisfied by requesting that the wrongfully withheld information be disclosed." [FN206]

We may thus draw several conclusions. There is no problem with redressability if the plaintiff seeks to obtain information, compensation for information withheld, or (though this is less clear) a bounty for information withheld. But a problem of redressability will arise if Congress grants citizens standing to seek declaratory judgments, attorney's fees, or penalties to be paid to the Treasury for information withheld. If Congress wants to allow standing in cases like *Steel Co.* and *Common Cause*, then it should amend the relevant statutes to provide a financial benefit not only to the Treasury, but also to the plaintiffs, in the form, perhaps, of fixed or scheduled compensation for information withheld, and also (or instead) a small bounty for the trouble of bringing suit. This would be easy to do. Although the question is not entirely settled, a statute of this kind probably would, [FN207] and certainly should, [FN208] be upheld.

C. Generalized Grievances Within the Zone?

The *Akins* Court dealt with a statute that, in its view, unambiguously granted standing to the plaintiffs. But many informational standing cases involve the APA, and therefore involve ambiguity about the issue of standing. The APA grants standing to any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." [FN209] What does this provision mean in the context of a request for information? Here there is a question of statutory interpretation; and recall that the *Akins* Court suggested that there remains a prudential barrier to "generalized grievance[s]." [FN210] Thus there is a further question about how prudential barriers are to be understood when people seek to obtain information from government or private persons.

The best way to approach this complicated problem is by examining a series of cases in the D.C. Circuit Court of Appeals. The basic suggestion in these cases is that if the governing statute is ambiguous, then standing will be denied in informational cases where the plaintiff is one of a very large group of people. The denial is based on prudential rather than Article III grounds, and hence Congress can, in these cases, grant standing if it *660 chooses. The question is whether, and to what extent, this line of argument makes sense in general or after *Akins* in particular. To answer this question it is necessary to investigate the cases in some detail.

The initial case, and the origin of the doctrinal developments, did not principally involve informational standing. In *Haitian Refugee Center v. Gracey*, the plaintiff organization claimed that it had an interest in counseling and representing Haitians who had been interdicted from entering the United States. [FN211] The court concluded that this interest was not within the zone of rights created by the relevant laws, and therefore, that the plaintiff lacked standing to protect the relevant rights. [FN212] This conclusion applied to the plaintiff's particular claim that it should have been allowed to receive pertinent information from the interdicted Haitians:

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If any person or organization interested in promoting knowledge, enjoyment, and protection of the rights created by a statute or by a constitutional provision has an interest that falls within the zone protected or regulated by the statute or constitutional provision, then the zone-of-interest test is not a test because it excludes nothing. [\[FN213\]](#)

The court insisted in particular that the zone of interests test should be read in the light of the ban on standing based on a "generalized grievance"; [\[FN214\]](#) if a plaintiff claiming to be within the zone was a member of a large class, then standing should be denied. This was of course not a "pure" information case, since it did not involve a statute that required disclosure of information. But it has turned out to be quite important in such cases.

In the first case using this kind of reasoning to deny informational standing, the D.C. Circuit Court of Appeals refused to allow the Hazardous Waste Treatment Council to assert an unambiguous informational injury. [\[FN215\]](#) The Council sought to sue on the ground that regulated third parties were exempted from certain statutory reporting requirements under a hazardous waste statute. [\[FN216\]](#) The Council claimed that the exemption would make it harder for the Council to advance its "educational and promotional activities." [\[FN217\]](#) In denying standing, the court did not deny that there was an injury in fact. Instead it said that the Council's goals did not fall within the relevant ***661** statute's zone of interests, beyond a "general coincidence of goals." [\[FN218\]](#) In so concluding, the court implied that it would read the prudential barrier in light of the additional prudential barrier that operated against generalized grievances. [\[FN219\]](#) Thus the court suggested that the two prudential barriers would have a kind of synergy, preventing members of large classes from claiming information unless there was a clear indication that Congress intended them to be able to do so.

This line of thinking was extended in *Animal Legal Defense Fund v. Espy*. [\[FN220\]](#) In that case, the Animal Legal Defense Fund and the Humane Society of the United States challenged the government's relatively narrow definition of "animal" for purposes of the Animal Welfare Act. [\[FN221\]](#) More specifically, they complained that "the exclusion of birds, rats, and mice from the definition of 'animal' [would] hamper[] their attempts to gather and disseminate information on laboratory conditions for those animals." [\[FN222\]](#) A broader definition would require laboratories to provide more information about their treatment of animals to the government, which would mean that such information would be included in an annual report to Congress. The relevant organizations contended that they would use this report in "public education and rulemaking proceedings." [\[FN223\]](#) In addition, the narrow definition of "animal" would make it harder for the organizations to educate the laboratories about "the humane treatments of birds, rats, and mice." [\[FN224\]](#) The Animal Legal Defense Fund thus urged that it had standing to ensure that the information was disclosed, especially because the information would be central to its activities.

The court concluded that "informational injury, without more, does not fall within the zone of interests of the statute under which suit is brought." [\[FN225\]](#) The key point was that the Animal Legal Defense Fund was not attempting to promote its members' own legal rights, but "simply to educate all those who desire to promote the statute's substantive purposes." ***662** [\[FN226\]](#) To have informational standing under the zone of interests test, an organization must show far more than a "general corporate purpose to promote the interests to which the statute is addressed . . . [I]t must show a congressional intent to benefit the organization or some indication that the organization is 'a peculiarly suitable challenger of administrative neglect.'" [\[FN227\]](#) Here, an unusual provision of the statute itself prohibited any such showing. The Animal Welfare Act creates an oversight committee consisting of private citizens designed to ensure compliance with the Act. [\[FN228\]](#) In the court's view, "on the face of the Act the organizations are not the intended representatives of the public interest in animal welfare." [\[FN229\]](#)

This holding is quite insecure after *Akins*; it should be contrasted with an important case in which organizations were held to have fulfilled the prudential requirements for informational standing. In *Action Alliance of Senior Citizens v. Heckler*, [\[FN230\]](#) the court permitted a senior citizens' group to challenge regulations that restricted the flow of reports from third parties involving compliance with the Age Discrimination Act. The Action Alliance contended that these regulations would interfere with its basic mission. The court agreed, noting that the regulations would make it harder for the plaintiff organization to help elderly people now and to protect their legal interests in the future. [\[FN231\]](#) In the court's view, this injury was well within the statute's zone of interests. The distinction between *Action Alliance of Senior Citizens* and *Espy* is thin. The best argument would stress the existence of a special private institution designed to ensure compliance with the Animal Welfare Act, but it is far from clear that this is a convincing distinction. [\[FN232\]](#)

To what extent must an organization seeking information connect its interest to the substantive purposes of the statute? This question was not ***663** pressed in the cases just discussed, all of which involved a close connection between the plaintiff's interests and the statute's basic concerns. In the leading case, *Competitive Enterprise Institute v. National Highway Traffic*

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Safety Administration, [\[FN233\]](#) two organizations, the Competitive Enterprise Institute and Consumer Alert, brought suit to challenge the National Highway Traffic Safety Administration's ("NHTSA") decisions that lowered the minimum Corporate Average Fuel Economy ("CAFE") standards for passenger cars. Both organizations complained of NHTSA's failure to produce an EIS discussing the adverse safety effects of the CAFE standards. They argued that the absence of such a statement made it harder for them to obtain and disseminate information that was central to their organizational activities. In the abstract, their complaint had a high degree of plausibility insofar as fuel economy standards may have adverse safety effects--a point that, it is reasonable to think, deserves public attention when an agency is deciding how much to require in the way of fuel economy. [\[FN234\]](#)

The court held that an informational injury would be a legitimate basis for federal jurisdiction when the information is "essential to the injured organization's activities" and when "the lack of the information will render those activities infeasible." [\[FN235\]](#) To meet this standard, the organization "must assert a plausible link between the agency's action, the informational injury, and the organization's activities." [\[FN236\]](#) The court, however, held that the plaintiff organizations did not have standing under this test to contest the agency's failure to provide an EIS. This was because there was no showing of "how the lack of that assessment from NHTSA ha [\[FN237\]](#) significantly harmed their ability to educate and inform the public about highway safety." [\[FN237\]](#) The court acknowledged that, under previous cases, [\[FN238\]](#) NEPA had been held to have created a right to information about the environmental effects of government action, and that a denial of that information "constitutes *664 a constitutionally cognizable injury, without further inquiry into causation or redressability." [\[FN239\]](#) In such cases, however, it would be necessary to show that the information sought involved a specifically environmental harm; "there is a critical difference between seeking an EIS for the purpose of disseminating information about potential environmental harm and seeking an EIS as a vehicle for obtaining or disseminating information on a nonenvironmental issue." [\[FN240\]](#) The court emphasized that the plaintiffs, who did not invoke environmental concerns, were not within NEPA's zone of interests, which involved strictly environmental consequences of government action. [\[FN241\]](#)

With respect to the application of prudential requirements to informational actions, the lower court rulings thus reflect considerable complexity. But three propositions seem to underlie the rulings, and we can organize the law in the following way. First: An organization may sue to obtain information when that information is important to protect its members' (noninformational) statutory legal rights, at least if the injury is not widely generalized. This premise is the basic point of Action Alliance of Senior Citizens. Second: When an organization seeks information and when its interests are very widely shared, the courts will deny standing on prudential grounds, apparently even if the information is important to the organization's mission. Third: Under NEPA (designed to safeguard environmental goals) and other statutes designed to protect interests that are not purely informational, an organization can bring suit to require an EIS or otherwise to obtain information essential to its activities if the reason for bringing suit is to protect interests that are specifically environmental or otherwise in line with the statute's substantive goals. This third proposition, however, is subject to qualification from the second. With suitable amendments, these propositions appear to apply to individuals as well.

Akins does not say a great deal either to undermine or to support these conclusions--Akins suggests only (what the lower court cases do not deny) that Congress can grant purely informational standing if it chooses. If the lower court cases remain good law, then most of the doctrinal work in challenging attempts to bring suit for information will be prudential. Courts will ask (1) whether the plaintiff falls within the statute's zone of interests; (2) whether the plaintiff is part of a very large class; and (3) whether the information is relevant to the organization's activities in protecting independent legal interests (for example, the interest in environmental quality or freedom *665 from age discrimination). It is relevant in this regard whether the zone of interests test is generally meant to be strict or lenient; the Court's most recent pronouncement in *National Credit Union Administration v. First National Bank & Trust Co.*, [\[FN242\]](#) suggests great leniency, in line with the basic thrust of other Supreme Court decisions. [\[FN243\]](#)

For those who believe, as Akins itself suggests, that the key standing issue is whether Congress has authorized the suit, the problem in all of these cases is simple to pose: Is this the kind of plaintiff whose interests are safeguarded by the legal provision at issue? If this is the proper question, then perhaps standing should have been allowed in all of the cases above, with the exception of Competitive Enterprise Institute, in which the plaintiffs' complaint lay far outside the domain of statutory concerns. Thus, there is reason to think that some or many of the lower court cases should not survive Akins.

Consider, for example, the Animal Welfare Act. If an ordinary citizen concerned with animal welfare sought to require the regulations at issue in *Espy*, a response might be that the ordinary citizen should not be allowed to sue unless she can show a distinctive personal or professional interest in the protection of animals or in the use of the relevant information; otherwise, the case would seem to involve an interest in law enforcement for its own sake. *Espy* itself, however, was quite different. The

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Animal Legal Defense Fund had a special and particularized interest in the relevant information and in disseminating it, as a way of protecting the legal rights protected by the Animal Welfare Act. Thus, the Animal Legal Defense Fund was well within the statute's zone of interests and had no widely generalized injury.

The best justification for the lower court's conclusion in *Espy* is that Congress implicitly precluded the suit by creating a citizen review board. This would suggest that the outcome was a narrow one, based on the distinctive structure of the Animal Welfare Act. Perhaps one could argue not *666 that there was a prudential barrier to standing, but instead, that Congress implicitly had prohibited the suit. Such an argument is analogous to the reasoning of *Block v. Community Nutrition Institute*, in which the Court denied standing on similar grounds. [FN244] If the creation of the review board did in fact represent a decision not to allow private supervision in the form of suits by people within the zone of interests, a denial of standing would be perfectly appropriate. As a matter of statutory interpretation, however, this argument is fragile. Why should we view the review board and the courtroom as competing rather than complementary? Since the plaintiffs had a distinctive organizational interest in the relevant information, standing should have been granted.

The analysis would be similar with respect to informational standing under NEPA. Note first that in the ordinary NEPA case, the plaintiff seeks not information but a delay in the completion of a project until an EIS is produced; hence, the plaintiff must show, as a matter of interpretation of NEPA, that he has a distinctive stake, usually environmental, in the action. [FN245] For example, a citizen of Wyoming who complains about the failure to compile an EIS about a development in New York must show that the development would in some way affect his aesthetic, recreational, or material interests. This citizen should ordinarily be denied standing because no interest protected by NEPA supports his action. But a question remains. After *Akins*, might the citizen of Wyoming contend, not that he sought an EIS to protect his environmental interests in New York, but that he sought an EIS in order to receive information about important issues bearing on his duties and activities as a voter?

The best answer is that the citizen of Wyoming could not so contend. The mere fact that the relevant EIS would produce information of personal or professional interest is not enough--not, it must be added, as a matter of Article III, but as a reading of congressional instructions and concerns in *667 enacting NEPA. [FN246] It is here that the zone of interests test and the prudential barrier to generalized grievances meet--not as inferences from Article III or even the APA, but as a somewhat crude and indirect way of getting at the key question, which relates to the text and purposes of the statute pursuant to which the plaintiff initiates suit. Thus, the appropriate conclusion is that when a court denies standing to a plaintiff on the ground that its interest is both highly generalized and not within the zone of statutory interests, it is really saying that the underlying statute is best read not to allow suits by plaintiffs of that sort. As we have seen, this is the best defense of the "injury in fact" and "redressability" standards as well. And the best defense of the lower court cases denying standing on this rationale is that when the injury is highly generalized, there should be a presumption against standing on the ground that such injuries are best redressed politically. Congress can overcome that presumption if it chooses to do so.

D. Illustrations

With these basic conclusions, we can assess a series of stylized cases, drawing on the discussion thus far.

1A. A group of workers in a plant in Detroit brings suit against the plant for failing to disclose workplace risks. They seek full information about those risks, as is required (in their view) by the governing law. This is an easy case. Standing should be granted, even in the absence of an explicit statute authorizing standing. The plaintiffs have shown both injury (nondisclosure of information undoubtedly relevant to them) and redressability, and no problem exists under the prudential requirements.

1B. Cereal consumers bring suit against General Cereal for false and incomplete statements involving the nutritional content of food. They seek full disclosure and compensatory damages. Standing should be granted, even in the absence of an explicit statute. The case is slightly harder, but basically the same as case 1A. The strongest argument against standing is that the class of plaintiffs is very large and, hence, that the grievance is generalized, *668 triggering a prudential barrier against standing. But since the plaintiffs are unambiguously within the relevant zone of interests, and since the difference from case 1A is only one of degree, standing is available under *Akins*. The class of plaintiffs is not so extremely large as to trigger any prudential barriers.

1C. Television viewers bring suit against the American Broadcasting Company ("ABC"), complaining that ABC has failed to rate its programs adequately and thus failed to comply with the Telecommunications Act of 1996. As in example 1B, the

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strongest argument against standing is that the grievance is widely generalized and, hence, that standing should be denied on prudential grounds. If the plaintiffs consist of television viewers as such--which is to say the vast majority of Americans--standing should probably be denied for that reason. The case would be different if brought by parents of school age children, a more limited group whose members fall squarely within the zone of interests protected by the Telecommunications Act. The case would also be different if the plaintiff was an organization particularly interested in the content of television programming; in that case, it would closely resemble 1B, and standing should be granted.

2A. A group of citizens in New York and Connecticut complains to OSHA that firms in Illinois have not been required to disclose workplace risks. In the face of OSHA inaction, the citizens in New York and Connecticut bring suit, contending that the information would help them in their capacity as citizens; if they learn about workplace risks, then they will know more about how to vote and about what political activities would be most worthwhile. Standing should be denied. The plaintiffs do not fall within the zone of interests protected by the Occupational Safety and Health Act.

2B. Citizens for Safe Workplaces ("CSW"), a Washington, DC organization, brings suit against OSHA, contending that it has failed to require disclosure of workplace risks in Detroit. CSW has no members in Detroit, but its members include many people interested in promoting workplace safety and workers in various states. CSW seeks disclosure of the information on the ground that CSW could use that information in its various educational and political activities. This is a hard standing case. The best argument against CSW is that CSW does not include Detroit workers and therefore is not within the zone of interests protected by the statute, a conclusion that could be fortified by invoking the prudential barrier to generalized grievances. Because CSW would use the information in activities directly related to workplace safety, however, it stands out from the public at *669 large, and CSW should be permitted to bring suit. This conclusion is consistent with the analysis of NEPA in Competitive Enterprise Institute. [\[FN247\]](#)

3. Citizens for a Nuclear-Free Environment, an environmental organization based in California, attacks the adequacy of an EIS produced in connection with a nuclear power plant to be built in Massachusetts. The organization contends that an adequate statement would be extremely helpful in its political and educational activities. This is also a hard standing case, and it would be reasonable to deny standing on the ground that the interest is highly generalized and that only those in Massachusetts, with environmental interests at stake, should be permitted to bring suit. Probably the better conclusion, however, is that informational standing should be granted on the theory that the plaintiffs are well within the zone of interests protected by NEPA; Competitive Enterprise Institute supports this conclusion. [\[FN248\]](#)

4. Consumers in Los Angeles challenge a Los Angeles water supplier's failure to provide adequate information about its performance in connection with the Safe Water Drinking Amendments of 1996. [\[FN249\]](#) They seek the relevant information, which they contend is relevant to their behavior as consumers of water in the local area. This is an easy standing case; it is akin to case 1A above.

5A. A reporter for The Washington Post brings suit against the Department of Health and Human Services, complaining that his work has been hindered by the government's unlawful failure to require disclosure of certain practices under the Medicaid statute. The plaintiff contends that the relevant information would be extremely valuable in his professional activities. Standing should probably be denied on the ground that reporters are not within the zone of interests protected by the Medicaid statute.

5B. The Gray Panthers, a group dedicated to the welfare of elderly people, brings the same suit as in 5A, contending that it needs the information*670 in order to perform its various public interest activities and in order to promote the well-being of its members. Standing should be granted because the injury is not so highly generalized, and because the group contains members who are unambiguously within the zone of interests protected by the statute.

5C. A daughter of an elderly woman receiving Medicaid brings the same suit as in 5A, contending that she would like to see the relevant information in order to ensure that her mother is being treated in accordance with the law. This is a very hard case. On the one hand, the interests at stake are those of a beneficiary of the Medicaid program, and the child of a beneficiary has a distinct and not merely ideological interest in the problem. On the other hand, the beneficiary of the program is not the plaintiff (compare with 5B) and a large number of people might reasonably claim that they are interested, financially or otherwise, in the legality of the government's behavior under the Medicaid statute. Clearly, Congress could grant standing in this case if it chose to do so, but if there is no express grant, then standing should probably be denied on the ground that the case is somewhat closer to 5A than to 5B.

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E. The Implications of Informational Standing for Noninformational Standing: A Brief Note

How does all this bear on standing in general? Several important points are clear. So long as there is an injury, Congress can grant standing to plaintiffs even if their injuries are very widely shared. Whether there is an injury depends largely on what the law says. In addition, whether the case involves information or something else, there is no redressability problem even if an agency, having lost on the legal question at issue, might have discretion to do what it originally did on some other ground. Thus a majority of the Court has repudiated the plurality opinion in *Lujan* insofar as it concluded that there would be a serious problem with redressability. [\[FN250\]](#)

The most interesting questions involve Congress's authority to create novel legal interests and to give people the power to bring suit to protect those interests in court. Congress might, for example, give everyone an interest in information of a certain sort (as it did in both FOIA and FECA, and might do in other contexts as well); *Akins* plainly says that this is constitutional. If Congress can do that, perhaps it also has a great deal of room to *671 create novel interests that do not involve information. Perhaps Congress could give all citizens a property interest in the continued existence of endangered species (making each of us beneficial owners of a particular sort), or in maintaining certain land in a pristine state, or in clean air in certain regions of the country, or in a certain kind of telecommunications market. After *Akins*, why is Congress forbidden from saying that all Americans have a property interest in clear skies above the Grand Canyon, a property interest that exists regardless of whether the citizens in question actually visit the Grand Canyon? [\[FN251\]](#)

A possible answer--not ruled out by current law--is that such a statute would be unconstitutional because those who do not visit the Grand Canyon lack an "injury in fact." [\[FN252\]](#) The same might be said about the hypothesized cases involving endangered species, land, and telecommunications. But if Congress says that they have an injury in fact, why should courts disagree? Note that "existence value" is often treated as a kind of property interest for purposes of environmental valuation; [\[FN253\]](#) it is now conventional in contingent valuation studies to consider the amount that people are willing to pay in order to maintain a certain state of affairs. This very practice treats the continued existence of that state of affairs as a kind of property interest. Why can't Congress do the same thing? In any case, a property interest often is no more, and no less, than a cause of action. If Congress attempts to create a cause of action in a certain state of affairs and grants that cause of action to all Americans, there appears to be no constitutional barrier, especially after the *Akins* Court's unambiguous holding that the obstacle to generalized grievances is merely prudential.

Justice Kennedy presaged this judgment with his cautionary notes in *Lujan*, quoted as the first epigraph to this Article: "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." [\[FN254\]](#) Justice Kennedy joined the *Lujan* opinion only because in creating citizen standing under the Endangered *672 Species Act, Congress failed to "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." [\[FN255\]](#) FECA is quite different on this count. Congress clearly identified the relevant interest, which was unambiguously related to the grant of standing to citizens. Thus, *Akins* vindicates Justice Kennedy's point and his concern about the breadth of *Lujan* insofar as it shows that Congress may recognize an entirely new (and highly generalized) legal interest, one foreign to the common law, and give all citizens standing to vindicate that interest in court. After *Akins*, whether a deprivation of information counts as an injury (in fact!) depends on whether it is (alleged to be) against the law. And after *Akins*, it does not matter if that injury is shared by most or all citizens--at least to the extent that Congress says this does not matter.

If this is true with information, why is it not true with many other interests? Why, for example, is Congress not permitted to give standing to all drivers to challenge acts that increase the risk of accidents on highways; [\[FN256\]](#) or to give standing to parents of children in schools undergoing desegregation plans to allow them to challenge the grant of tax deductions to segregated schools; [\[FN257\]](#) or to give standing to automobile purchasers and environmental organizations to ensure that the EPA enforces statutory requirements for fuel economy standards? [\[FN258\]](#) The best answer is that Congress is indeed permitted to do these things. [\[FN259\]](#) To the extent that similar cases have come out unfavorably to plaintiffs, it is because the governing statutes, interpreted in the light of relevant prudential requirements, reflect no effort by Congress to do so. *Akins* would not have had standing if Congress had denied him standing. Because of the prudential barrier to generalized grievances, *Akins* would probably not have had standing if FECA had merely incorporated the APA's standing provision. Denials of standing in cases involving novel interests foreign to the existing legal culture are therefore best understood as interpretations of the underlying statute. Congress's challenge for the future--if it genuinely seeks to grant standing--is to think of imaginative *673 ways to create legal interests in the rights it intends to protect. [\[FN260\]](#) With this point, we end where we began: an assertion of the primacy, for purposes of Article III, of legislative instructions.

Conclusion

In this Article, I have attempted to outline the range of statutes that attempt to use information as a regulatory tool; to understand their rationale, their potential value, and their potential pathologies; to see when citizens are, and should be, granted standing to obtain information; and to understand how all these points bear on the general law of standing. We have seen that American government frequently, and increasingly, avoids both market and command-and-control solutions by using information disclosure as a regulatory tool. Sometimes informational strategies attempt to improve the ordinary operations of markets by ensuring that workers and consumers are adequately informed. Initiatives involving tobacco products, the nutritional content of food and drink, and worker safety are primary examples. Sometimes information is required as part of moral suasion and in order to trigger political safeguards. EPCRA and FECA are the chief examples here.

Typically information, once provided to one or a few, is also provided to many or all; and very frequently information is required as a way of protecting against a widely shared injury. In the political context, the injury from nondisclosure may be suffered by a large number of citizens. After *Akins*, this is not an obstacle to standing, and properly so--assuming that Congress has concluded that it ought not be. Nothing in the Constitution forbids Congress from authorizing groups of citizens to bring suit to obtain information that they believe is relevant to their interests. Nor does anything in the Constitution forbid Congress from granting citizens a legal right to information and allowing them to vindicate that right in court. This holding--a crucial part of *Akins*--is a vindication of Justice Kennedy's highly suggestive concurring opinion in *Lujan*, allowing Congress to create injuries quite foreign to the common law.

Things are more complicated with respect to redressability. In *Akins* itself, the injury--a lack of information--would have been redressed by a favorable *674 decree. The information itself need not have been linked to any independent interest. Nor was it important that the FEC might ultimately have exercised its discretion unfavorably to the plaintiffs. This conclusion offers an important lesson about the nature of procedural injuries: procedures are designed to structure decisions and to create incentives, not to command particular outcomes, and an injury to a procedural interest need not be tied to a nonspeculative outcome. It follows that courts should be careful and self-conscious about characterizing the injury of which the plaintiff complains. I suggest that *Akins* may be the first step toward a more explicit confrontation, on the Court's part, with that important question.

What about the prudential limitations? When Congress has not explicitly granted standing to those who seek information, it is important to know what the relevant law says. In many cases involving informational standing, there is no difficult question about whether the plaintiffs fall within the zone of interests protected by the statute. It is possible, however, to imagine cases in which those who seek information are attempting to vindicate interests, economic or ideological, that have little to do with the statute's substantive goals. In such cases, the prudential limits on standing are properly invoked and the plaintiffs should be held to be outside the zone of statutory interests. Furthermore, if the plaintiff is a member of a large group, or is hard to distinguish from other citizens generally, the argument for invoking prudential barriers is strengthened. We have examined a range of possible cases to see how this analysis might work. The simplest point is that if an injury is very widely shared, then there is reason to deny standing if the case is, with respect to the zone of interests test, otherwise in equipoise.

Beyond these doctrinal points, the *Akins* decision deserves a more general celebration. It is the first case in a long while to place the law of standing on a solid foundation--an understanding of the particular statutory and constitutional provisions that are said to give rise to a legally cognizable injury. But there is a more particular point, involving the relationship of information to regulatory law. In the same period in which the American economy increasingly has become based on the production and exchange of information, American government has increasingly attempted to control public and private conduct--not via command-and-control regulation, but by requiring disclosure of information. And in the same period in which informational regulation has become a hallmark of American government, informational standing has increasingly emerged as a central problem in administrative law. There is nothing constitutionally problematic about a congressional judgment that a deprivation of information counts as legally cognizable injury. The question is whether Congress has made that judgment. In the area of informational standing, as in the law of standing generally, *675 the relevant statutory law is the best place to start, rooting the doctrine in democratic rather than judicial judgments about the appropriate nature, and boundaries, of modern regulatory government.

[FNd1]. Karl N. Llewellyn Distinguished Service Professor, University of Chicago Law School and Department of Political Science. I am grateful to Jack Goldsmith and Richard Posner for valuable comments on a previous draft.

[FN1]. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

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[FN2]. [Federal Election Comm'n v. Akins, 118 S. Ct. 1777, 1792 \(1998\)](#) (Scalia, J., dissenting).

[FN3]. See, e.g., David Osborne & Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector* 15-16 (1992) (describing the failure of government bureaucracy to adjust to the new "knowledge-based economy").

[FN4]. See Stephen Breyer, *Regulation and Its Reform* 171-75 (1982) (discussing alternatives to classical regulation that overcome some of the information problems associated with regulation); Wesley A. Magat & W. Kip Viscusi, *Informational Approaches to Regulation* (1992) (discussing, in depth, various informational approaches to regulation); Anthony Ogus, *Regulation: Legal Form and Economic Theory* 121-49 (1994) (identifying "mandatory disclosure" and "control of false or misleading information" as the two broad categories of information regulation, and discussing the justifications for each); Paul R. Kleindorfer & Eric W. Orts, *Informational Regulation of Environmental Risks*, 18 *Risk Analysis* 155 (1998) (examining the informational regulation of environmental risks from an economic perspective); Eric W. Orts, [Reflexive Environmental Law](#), 89 *Nw. U. L. Rev.* 1227, 1258-64, 1313-40 (1995) (advancing "reflexive law" as a means of regulating complex societies by adopting procedures rather than "detailed pronouncements of acceptable behavior," and advocating mandatory environmental audits as a type of reflexive environmental law).

[FN5]. 42 U.S.C. §§ 11,001-50 (1994) (establishing notification and reporting requirements relating to hazardous chemicals).

[FN6]. See Nutrition Labeling and Education Act of 1990, [Pub. L. No. 101- 535](#), 104 Stat. 2353 (codified as amended at [21 U.S.C. § 343 \(1994\)](#)). The most important provisions of this Act are codified at [21 U.S.C. § 343\(r\)](#).

[FN7]. Throughout this Article, a reference to the "goals" or "purposes" of a statute requiring disclosure is designed not to capture the actual political forces that give rise to the law, but instead to put the law in a sympathetic light and to make the best sense of it. Undoubtedly, statutes that require disclosure--like all statutes--owe a great deal to interest group pressures, some of them pernicious. The existence of informational regulation rather than more aggressive controls may reflect the power of self-interested private groups attempting to minimize government's presence in their lives. So, too, the existence of informational regulation may reflect the efforts of self-interested, entrepreneurial groups. Both of these possibilities are connected to the risk that informational regulation will be futile or excessively expensive.

[FN8]. [42 U.S.C. §§ 4321-4370d \(1994\)](#) (establishing the Council on Environmental Quality and related federal environmental departments to carry out research and reporting responsibilities).

[FN9]. [5 U.S.C. § 552 \(1994 & Supp. III 1997\)](#) (requiring agencies to publish public information in the Federal Register and to make nonpublished materials available to persons who request them).

[FN10]. [2 U.S.C. §§ 431-56 \(1994 & Supp. III 1997\)](#) (requiring candidates for federal office to disclose certain types of campaign contributions).

[FN11]. See [5 U.S.C. § 552](#) (requiring agencies to make certain information available to the public).

[FN12]. In [Akins v. Federal Election Comm'n, 101 F.3d 731 \(D.C. Cir. 1996\)](#) (en banc), vacated, [118 S. Ct. 1777 \(1998\)](#), the court gave the closest thing to an explanation of the prevailing view:

Congress can create a legal right (and, typically, a cause of action to protect that right) the interference with which will create an Article III injury. Such a legal right can be given to all persons in the country. In that event, any person whose individual right has been frustrated or interfered with has standing to sue, even though all other persons have the same right, without the claim being regarded as a generalized grievance. That is why anyone denied information under the Freedom of Information Act (FOIA) has standing to sue regardless of his or her reasons for suing.

Id. at 736 (citations omitted).

[FN13]. [42 U.S.C. §§ 4321-4370d](#). Specifically, [42 U.S.C. § 4332](#) provides that "all agencies of the Federal Government shall...include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement...on (i) the environmental impact of the proposed action."

[FN14]. [2 U.S.C. §§ 431-56 \(1994 & Supp. III 1997\)](#).

[FN15]. [118 S. Ct. 1777 \(1998\)](#).

[FN16]. See *infra* Part II (discussing the Court's holding and analysis in *Akins*).

[FN17]. See [Akins, 118 S. Ct. at 1789-92](#) (Scalia, J., dissenting).

[FN18]. [504 U.S. 555, 580 \(1992\)](#) (Kennedy, J., concurring in part and concurring in the judgment); see *supra* text accompanying note 1.

[FN19]. See *supra* text accompanying note 2.

[FN20]. This is a bipartisan view. See Newt Gingrich et al., *Contract with America* 131-35 (1994) (discussing reforms that would, *inter alia*, increase information); Al Gore, *Common Sense Government: Works Better and Costs Less* (1996) (discussing the Clinton Administration's efforts to restructure the federal government to increase flexibility and reduce rigid regulation).

[FN21]. See [McMahon v. Bunn-O-Matic Corp., 150 F.3d 651, 655-56 \(7th Cir. 1998\)](#) (suggesting that there may be circumstances under which manufacturers must warn consumers "about a surprising feature that is potentially dangerous yet hard to observe," but holding that a coffee manufacturer did not have to provide a detailed warning about the severity of burns potentially caused by hot liquid); [Restatement \(Third\) of Torts: Products Liability § 2 \(1998\)](#) ("A product...(c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm...could have been reduced or avoided by the provision of reasonable instructions or warnings...and the omission of the instructions or warnings renders the product not reasonably safe."); William L. Prosser, *Handbook of the Law of Torts* 641-82 (4th ed. 1971) (discussing products liability).

[FN22]. See Cass R. Sunstein, *After the Rights Revolution* 11-46 (1990) (describing the displacement of the common law by regulatory programs).

[FN23]. See Securities Act of 1933, [15 U.S.C. § 77h, j \(1994 & Supp. III 1997\)](#) (establishing disclosure requirements for offerings of securities); Securities Exchange Act of 1934, [15 U.S.C. § 78a-11 \(1994 & Supp. III 1997\)](#) (establishing the Securities and Exchange Commission and providing for regulation of securities transactions and exchanges).

[FN24]. See the discussion of informational strategies in Robert V. Percival et al., *Environmental Regulation: Law, Science, and Policy* 612-27 (2d ed. 1996).

[FN25]. Consider the eco-label required by the European Union. See Council Regulation 880/92 of 23 March 1992 on a Community Eco-Label Award Scheme, 1992 O.J. (L99) 1. See generally Kleindorfer & Orts, *supra* note 4.

[FN26]. See Comprehensive Smoking Education Act of 1984, [Pub. L. No. 98- 474](#), 98 Stat. 2204 (codified as amended at [15 U.S.C. §§ 1331-41 \(1994\)](#)) (requiring multiple warnings about the health risks associated with smoking); Public Health Cigarette Smoking Act of 1969, [Pub. L. No. 91-222](#), 84 Stat. 87 (1970) (codified as amended at [15 U.S.C. §§ 1331-41 \(1994\)](#)) (same); Federal Cigarette Labeling and Advertising Act of 1965, [Pub. L. No. 89-92](#), 79 Stat. 282 (codified as amended at [15 U.S.C. §§ 1331- 1341 \(1994\)](#)) (same).

[FN27]. See [21 C.F.R. § 201.57 \(1998\)](#) (stating labeling requirements for prescription drugs and insulin).

[FN28]. See [7 U.S.C. § 136-136y \(1994 & Supp. III 1997\)](#) (referring to environmental pesticide regulations); [15 U.S.C. §§ 2601-29 \(1994\)](#) (listing EPA regulations that require warning labels for products containing polychlorinated biphenyls ("PCBs"), asbestos, or hexavalent chromium, a water treatment chemical, promulgated under the federal Toxic Substances Control Act (TSCA)); [40 C.F.R. § 156.10 \(1998\)](#) (detailing EPA regulations requiring warning labels on pesticides promulgated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)).

[FN29]. See [21 U.S.C. § 343\(o\) \(1994\)](#) (requiring a warning on products containing saccharin that the sweetener causes cancer in laboratory animals).

[FN30]. See Hazard Communication, [29 C.F.R. § 1910.1200 \(1998\)](#). OSHA promulgated a standard requiring

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all chemical manufacturers and importers to assess the hazards of chemicals which they produce or import, and all employers having workplaces in the manufacturing division,...to provide information to their employees concerning hazardous chemicals by means of hazard communication programs including labels, material safety data sheets, training, and access to written records.

Id.

[FN31]. See [52 Fed. Reg. 31,852 \(1987\)](#) (expanding the scope of the HCS to "cover all employers with employees exposed to hazardous chemicals in their workplaces").

[FN32]. See id. ("Expansion of the scope of the HCS requires non-manufacturing employers to establish hazard communication programs to transmit information on the hazards of chemicals to their employees by means of labels on containers, material safety data sheets, and training programs.").

[FN33]. See [58 Fed. Reg. 2,927 \(1993\)](#).

[FN34]. See James P. Hamilton, Channeling Violence: The Economic Market for Violent Television Programming 289-92 (1998) (discussing the political call for a V-chip).

[FN35]. See id. at 289 (noting that the V-chip can block programs which carry ratings).

[FN36]. 1996 Telecommunications Act, 58 U.S.C. §§ 151-611 (1998); see also Hamilton, *supra* note 34, at 302 (discussing ratings requirements).

[FN37]. See Hamilton, *supra* note 34, at 304-11 (detailing the development of the television ratings system).

[FN38]. See Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters: Charting the Digital Broadcasting Future 45-46 (1998) [hereinafter Final Report] (calling for "enhanced disclosures of ... public interest programming and activities on a quarterly basis" and other recommendations); Cass R. Sunstein, Private Broadcasters and the Public Interest (1999) (unpublished manuscript) (on file with author).

[FN39]. See [Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n](#), 449 F.2d 1109, 1112 (D.C. Cir. 1971) (noting NEPA's procedural goal).

[FN40]. See [Strycker's Bay Neighborhood Council, Inc. v. Karlen](#), 444 U.S. 223, 227 (1980) (stating that "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences").

[FN41]. See id. (noting that NEPA is an "area of discretion of the executive as to the choice of the action").

[FN42]. 42 U.S.C. §§ 11,001-50 (1994); see also *supra* note 5 and accompanying text.

[FN43]. See Hamilton, *supra* note 34, at 302 (stating these figures for EPA pollution data).

[FN44]. See Percival et al., *supra* note 24, at 624, 626 ("Congress anticipated that the availability of information...would enable the public to put substantial pressure on companies to reduce emissions.").

[FN45]. See General Accounting Office, Toxic Chemicals, Report to the Congress (1991) [hereinafter GAO Report].

[FN46]. Animal Welfare Act, [7 U.S.C. §§ 2131-59 \(1994\)](#).

[FN47]. [42 U.S.C. § 7412\(r\) \(1994\)](#).

[FN48]. [42 U.S.C. § 300g-3\(c\)\(4\) \(1994\)](#).

[FN49]. The phrase comes from Louis D. Brandeis, *Other People's Money and How the Bankers Use It* 62 (Torchbook ed. 1967).

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[FN50]. See, e.g., Home Mortgage Disclosure Act of 1975 (HMDA), [12 U.S.C. §§ 2801-10 \(1994\)](#) (requiring banks to maintain records of where they make mortgage loans and to make such records available to the public); Community Reinvestment Act of 1977 (CRA), [12 U.S.C. §§ 2901-07 \(1994\)](#) (subjecting banks to detailed reporting requirements and rating the banks based on the extent to which they serve their community); Crime Awareness and Campus Security Act of 1990 § 204(a), [20 U.S.C. § 1092\(f\)\(1\)-\(6\) \(1994\)](#) (requiring that colleges develop policies to encourage the prompt reporting of crimes to police and college officials); Higher Education Amendments of 1992 § 486(c)(1)-(2), [20 U.S.C. § 1092\(f\)\(1\)\(F\), \(f\)\(7\) \(1994\)](#) (requiring that colleges compile and report statistics on listed crimes including sexual assault, and requiring that colleges promulgate and enforce policies against sexual assault); Federal Water Pollution Control Act, [33 U.S.C. §§ 1319, 1342, 1369 \(1994\)](#) (requiring permit holders to sample their discharges and then submit the results in the form of discharge-monitoring reports ("DMRs") to the proper authority; these DMRs are made available to the public).

[FN51]. See Final Report, *supra* note 38, at 45-46 (discussing proposed disclosures of public interest activities).

[FN52]. See Ogus, *supra* note 4, at 121-23 (1994) (discussing information deficits).

[FN53]. Of course, it is possible to give information more "private good" characteristics, and innovative approaches can be expected in the next decade. Consider, for example, fees for access to information on the Internet or the subscription-based Consumer Reports. Neither of these approaches converts information into a private good, but both reduce the range of people who may, without high cost, have access to it. Thus, it is possible to imagine a range of approaches that would diminish the cost of access for some or many, while increasing it, or holding it constant, for others.

[FN54]. See Breyer, *supra* note 4, at 161-64 (analyzing disclosure as an alternative regulatory regime); Ogus, *supra* note 4, at 121-49 (explaining the less interventionist strategy of information regulation).

[FN55]. See Cass R. Sunstein, *Free Markets and Social Justice* 327-28 (1997) (discussing efficiency and information).

[FN56]. See Percival et al., *supra* note 24, at 612-16 (discussing the efficacy of informational approaches to toxic substance regulation).

[FN57]. See *supra* text accompanying notes 4-10.

[FN58]. See Hamilton, *supra* note 34, at 302 (discussing informal governmental attempts to increase educational programming).

[FN59]. Nancy Ryan & Linda M. Harrington, *FDA Offers New Rules on Food Labels, Claims*, *Chi. Trib.*, Nov. 7, 1991, at 2.

[FN60]. See *id.*

[FN61]. These figures come from John F. Morrall III, *A Review of the Record*, 10 *Regulation* 25, 30 (Nov./Dec. 1986), which was criticized in Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 *Yale L.J.* 1981, 1999-2000 (1998).

[FN62]. See W. Kip Viscusi, *Fatal Tradeoffs: Public and Private Responsibilities for Risk* 264 (1992).

[FN63]. When informational strategies are costly, there are two possible responses from the government. The first is to do nothing. If the savings--in terms of health, life, and informed choice--are relatively low, then costly strategies, even informational ones, make little sense. There will, therefore, be circumstances in which a government remedy for an absence of information is unwarranted.

The second possibility is to impose a regulatory strategy rather than to require disclosure. By a regulatory strategy I mean a mandatory outcome, such as a flat ban on the materials in question, or governmental specification of a particular outcome, as in a mandated maximum level of carcinogens in the workplace. Sometimes the regulatory strategy will be cheaper because the price of disclosing information--changing packaging and so forth--is so high. This is likely to be the right response when most or all people would respond to the information in the same way. In that case, it is unnecessary to provide information, and better simply to dictate an outcome that, by hypothesis, is generally or almost universally preferred. For an especially dangerous substance, one that reasonable people would choose not to encounter, a flat ban is appropriate.

[FN64]. See *Judgment Under Uncertainty: Heuristics and Biases* (Daniel Kahneman et al. eds., 1982); Christine Jolls et al., [A](#)

[Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471, 1533-37 \(1998\)](#) (discussing how simply providing information "is not enough").

[FN65]. See W. Kip Viscusi, Product-Risk Labeling: A Federal Responsibility 11-16 (1993) (analyzing the results of California's Proposition 65); W. Kip Viscusi, Rational Risk Policy 5 (1998) (suggesting that "[i]ndividual risk perceptions are often in error").

[FN66]. See W. Kip Viscusi, Alarmist Decisions with Divergent Risk Information, 107 Econ. J. 1657, 1666-67 (1997) ("[T]he fear of the worst case scenario receives greater weight than does the low risk assessment.").

[FN67]. See Percival et al., *supra* note 24, at 616-21 (describing California's approach to the information problem).

[FN68]. See W. Kip Viscusi, Predicting the Effects of Food Cancer Risk Warnings on Consumers, 43 Food Drug Cosm. L.J. 283, 288 (1988) (finding that "individuals have a difficult time in processing refined distinctions between very miniscule probabilities").

[FN69]. See Jacob Jacoby et al., Corrective Advertising and Affirmative Disclosure Statements: Their Potential for Confusing and Misleading the Consumer, 46 J. Marketing 61, 70 (1982) (describing how the language used in remedial statements designed to correct misleading advertising messages may be more confusing to the consumer than the advertising message itself).

[FN70]. See Richard Craswell, Interpreting Deceptive Advertising, 65 B.U. L. Rev. 658, 719-25 (1985) (noting the various incentives that sellers have to not disclose useful information).

[FN71]. See [Christine Jolls et al., A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471, 1524-27 \(1998\)](#) (describing optimistic bias as "[a] common feature of human behavior" where "[p]eople tend to think that bad events are far less likely to happen to them than to others").

[FN72]. See Shelley E. Taylor, Positive Illusions: Creative Self-Deception and the Healthy Mind 10-11 (1993).

[FN73]. See *id.* at 116.

[FN74]. See George W. Schucker et al., The Impact of the Saccharin Warning Label on Sales of Diet Soft Drinks in Supermarkets, 2 J. Pub. Pol'y & Marketing 46, 54-56 (1983) (finding no change in diet soft drink sales in poor, undereducated areas after the FDA added warning labels).

[FN75]. The notions of "outsiders" and "wrongdoers" are of course pre-Coasian. See Ronald H. Coase, The Firm, the Market, and the Law 95-156 (1988) (discussing the reciprocal and interactive nature of harms). I use the terms to build on common understandings.

[FN76]. See Breyer, *supra* note 4, at 23 (discussing how information is an inadequate response to externalities); Ogas, *supra* note 4, at 310 (same).

[FN77]. See the suggestive discussion in James T. Hamilton, Channeling Violence: The Economic Market for Violent Television Programming 310 (1998), finding that "information provision offers a way to reduce exposure of children to violent programming while allowing adult views to consume what they wish," and Magat & Viscusi, *supra* note 4, at 4-9, discussing the advantages of informational regulation in the hazard warning context, in which the government seeks to reduce accident and health risks.

[FN78]. As noted, there is a separate question about the actual origins of the relevant law; the answer to that question likely will depend on the constellation of relevant interest groups.

[FN79]. Millions of dollars are appropriated each year for federal oversight alone. See William Rodgers, Environmental Law 806 (1994).

[FN80]. Hard data are difficult to find, but the Paperwork Reduction Act of 1980, [44 U.S.C. §§ 3501-20](#) (1994 & Supp. II 1996), was a clear response to perceived expenses.

[FN81]. There is a real possibility of an alarmist reaction, producing excessive punishment; alarmist information is especially salient and hence memorable, and people might read nonalarmist information in an alarming way. See Timur Kuran & Cass R. Sunstein, Availability Cascades and Risk Regulation, 51 Stan. L. Rev. (forthcoming Apr. 1999); Viscusi, *supra* note 66, at 1668 (concluding that people overvalue risk, overreact to highly publicized risks, and "place considerable weight on the risk information provided to them").

[FN82]. See Percival et al., *supra* note 24, at 1060-65 (discussing the adequacy of the EIS approach).

[FN83]. See Breyer, *supra* note 4, at 26 (discussing the public good aspects of information); Ogas, *supra* note 4, at 121-26 (same).

[FN84]. [5 U.S.C. § 552 \(1994 & Supp. III 1997\)](#).

[FN85]. See *infra* Part II (discussing the Court's holding and analysis in *Akins*).

[FN86]. See Michael S. Greve, Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program, in *Environmental Politics: Public Costs, Private Rewards* 105, 108-10 (Michael S. Greve & Fred L. Smith, Jr. eds., 1992) (discussing the increase in private enforcement actions under the Clean Water Act as a result of the ease in bringing such actions, the EPA's desire to settle the suits, and the subsequent transfer of settlement payments from the agency to private environmental groups).

[FN87]. See [Animal Legal Defense Fund, Inc. v. Espy](#), 23 F.3d 496, 496 (D.C. Cir. 1994) ("Animal welfare groups and two individuals brought suit challenging [a] regulation promulgated by [the] Department of Agriculture that failed to include birds, rats and mice as 'animals' within the meaning of [the] Federal Laboratory Animal Welfare Act (FLAWA).").

[FN88]. See, e.g., [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 561 (1992) (establishing that the "irreducible constitutional minimum of standing contains three elements," one of which is that the "plaintiff must have suffered an 'injury in fact'").

[FN89]. See [Public Citizen v. Department of Justice](#), 491 U.S. 440, 449 (1989) (rejecting the department's argument that the plaintiff did not allege sufficient injury so as to confer standing).

[FN90]. See [Havens Realty Corp. v. Coleman](#), 455 U.S. 363, 374 (1982).

[FN91]. See [Reporters Comm. for Freedom of the Press v. Sampson](#), 591 F.2d 944, 945 (D.C. Cir. 1978) (granting standing to plaintiffs seeking access to Richard Nixon's presidential materials through FOIA); [Skolnick v. Parsons](#), 397 F.2d 523, 524-25 (7th Cir. 1968) (holding that the plaintiff had standing to bring an action to compel the President's Commission on Law Enforcement and Administration of Justice to release a specific report).

[FN92]. [504 U.S. at 571-72 \(1992\)](#) (holding that the respondents lacked standing to seek judicial review of Section 7(a)(2) of the Endangered Species Act of 1973).

[FN93]. [Id. at 560](#).

[FN94]. See [Federal Election Comm'n v. Akins](#), 118 S. Ct. 1777, 1791 (1998) (Scalia, J., dissenting) (questioning the majority's suggestion that abstract interests "go hand in hand" with those which are unduly shared).

[FN95]. See *infra* notes 110-12 and accompanying text (discussing the requirements for a legal injury).

[FN96]. See *infra* notes 212-13, 218-19, 225-27 and accompanying text (discussing the zone of interests test).

[FN97]. See [2 U.S.C. §§ 432-34 \(1992\)](#).

[FN98]. See *id.* (codifying registration requirements for political committees).

[FN99]. See *id.*

[FN100]. [Id. § 437g\(a\)\(1\)](#).

[FN101]. Id. § 437g(a)(8)(A).

[FN102]. See [Federal Election Comm'n v. Akins, 118 S. Ct. 1777, 1781-82 \(1998\)](#) (discussing the efforts of a group of voters from which this case arose).

[FN103]. See id. (noting that voters had "views often opposed to those of AIPAC").

[FN104]. Id. at 1782-83.

[FN105]. Id.

[FN106]. See id. at 1784 (holding that plaintiffs suffered a "genuine 'injury in fact'" since they could not obtain information concerning AIPAC donors and contributions).

[FN107]. Id. at 1783.

[FN108]. Id.

[FN109]. In his dissent, Justice Scalia disagreed on this point, suggesting that there was a difference between a "party" who could file a complaint with the FEC and a "party aggrieved" who could bring suit. See id. at 1789-90 (Scalia, J., dissenting) (calling the majority's interpretation of an aggrieved party "too much of a stretch").

[FN110]. See id. at 1784 (stating that a plaintiff suffers an injury in fact when the plaintiff "fails to obtain information which must be publicly disclosed pursuant to a statute").

[FN111]. Id.

[FN112]. Id.

[FN113]. [418 U.S. 166, 179-80 \(1974\)](#) (holding that respondents lacked standing because they had nothing more than "generalized grievances" and had not suffered an actual injury).

[FN114]. See [id. at 171](#).

[FN115]. [Akins, 118 S. Ct. at 1784](#); see also [Richardson, 418 U.S. at 175](#).

[FN116]. [Akins, 118 S. Ct. at 1785](#).

[FN117]. Id.

[FN118]. Id.

[FN119]. Id.

[FN120]. See, e.g., [Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-78 \(1992\)](#) (suggesting that Article III may prevent a citizen with only generalized grievances from bringing suit).

[FN121]. [Akins, 118 S. Ct. at 1786](#).

[FN122]. Id.

[FN123]. Id.

[FN124]. Id.

[FN125]. Id. (citing [Abbott Lab. v. Gardner, 387 U.S. 136, 140 \(1967\)](#)).

(Cite as: 147 U. Pa. L. Rev. 613)

[FN126]. *Id.* at 1788 (Scalia, J., dissenting).

[FN127]. *Id.* at 1791 (Scalia, J., dissenting).

[FN128]. *Id.*

[FN129]. [U.S. Const. art. II, § 3.](#)

[FN130]. [Akins, 118 S. Ct. at 1792](#) (Scalia, J., dissenting).

[FN131]. *Id.* This point amounts to a one-sentence summary of Justice Scalia's influential essay on standing. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *Suffolk U. L. Rev.* 881 (1983).

[FN132]. See [Akins, 118 S. Ct. at 1791-92](#) (Scalia, J., dissenting) (arguing that the statute unconstitutionally transfers executive power under [Article II](#) to Article III courts).

[FN133]. See [id. at 1784](#) ("The injury of which respondents complain-- their failure to obtain relevant information--is injury of a kind the FECA seeks to address....").

[FN134]. See Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 *Yale L.J.* 425, 492 (1974) (suggesting that the standing question is not injury in fact, but cause of action); David P. Currie, *Misunderstanding Standing*, 1981 *Sup. Ct. Rev.* 41, 42 (same); William A. Fletcher, *The Structure of Standing*, 98 *Yale L.J.* 221, 229 (1988) (arguing that standing should not require injury in fact); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1669, 1737-39 (1975) (discussing the problems of injury in fact when the injury is to an ideological interest). Many authorities to this effect are collected in Fletcher, *supra*, at 223 n.18.

[FN135]. Specifically, the test is an outgrowth of [Association of Data Processing Serv. Orgs. v. Camp](#), 397 U.S. 150 (1970). The origins of the test lay in the 1958 treatise by Professor Kenneth Culp Davis. See 3 Kenneth Culp Davis, *Administrative Law Treatise* § 22.02, at 211-13 (1958) (arguing that as a matter of elementary justice, "one who is in fact hurt by illegal action should have a remedy").

[FN136]. See U.S. Const. art. III.

[FN137]. See Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 *Yale L.J.* 816, 817 (1969) (arguing that the English precursor of standing "did not in fact demand injury to a personal interest as a prerequisite"); Louis L. Jaffe, [Standing to Secure Judicial Review: Public Actions](#), 74 *Harv. L. Rev.* 1265, 1265 (1961) (reviewing the common law development of public actions to protect public interests and contrasting the limitations that standing places on these actions); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 *Mich. L. Rev.* 163, 176 (1992) (discussing evidence that "Article III did not impose constraints on Congress' power to grant standing to strangers"); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 *Stan. L. Rev.* 1371, 1395 (1988) (suggesting that in early Supreme Court jurisprudence, the Court did not recognize a cause of action in terms of "standing," but rather in formalistic terms).

A competing view of the history is provided in Bradley S. Clanton, [Standing and the English Prerogative Writs](#), 63 *Brook. L. Rev.* 1001 (1997). I cannot discuss Professor Clanton's valuable treatment here; note, however, that even if he is correct on eighteenth-century law, the early American practice argues against any "injury in fact" requirement.

[FN138]. See Sunstein, *supra* note 137, at 179-81 (providing a historical overview of standing during the New Deal).

[FN139]. See [Camp](#), 397 U.S. at 153 (distinguishing between the legal interest test, which goes to the merits, and the question of standing).

[FN140]. See [Center for Auto Safety v. Thomas](#), 806 F.2d 1071, 1075 (D.C. Cir. 1986) (holding that as a membership organization, the petitioners had standing because they sought to protect the interests of their members in the choice of the most fuel efficient vehicles).

[FN141]. See Fletcher, *supra* note 134, at 221 (stating that "[t]he structure of standing law in the federal courts has long been

criticized as incoherent").

[FN142]. See [42 U.S.C. § 2000e \(1994\)](#) (detailing the provisions of the Equal Employment Opportunities Act).

[FN143]. See, e.g., [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 560 (1992) (requiring injury in fact as an element of standing); [Sierra Club v. Morton](#), 405 U.S. 727, 740-41 n.16 (1972) (citing 1 Alexis de Tocqueville, *Democracy in America* 280 (Phillips Bradley ed., A.A. Knopf 1945) (1835)), for the assertion that "judicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury").

[FN144]. A hard case for this proposition would be created if Congress said that anyone may sue for any acts of unlawful racial discrimination anywhere. Would this not be a case of someone being given standing, or a legal right, when she had no injury in fact? I think that this question, meant to be rhetorical, is too simple; relevant discussion can be found *infra*, at Part IV.E.

[FN145]. See, for example, *Lujan*, where the Court, in introducing the standing requirements, said that "the plaintiff must have suffered an 'injury in fact'--an invasion of a legally protected interest." [504 U.S. at 560](#) (emphasis added). See also [International Primate Protection League v. Administrators of Tulane Educ. Fund](#), 500 U.S. 72 (1991), where the Court said that "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents," and noted that standing "should be seen as a question of substantive law, answerable by reference to the statutory and constitutional provision whose protection is invoked." *Id.* at 77 (quoting *Fletcher*, *supra* note 134, at 229).

[FN146]. [Federal Election Comm'n v. Akins](#), 118 S. Ct. 1777, 1784 (1998).

[FN147]. [418 U.S. 166 \(1974\)](#).

[FN148]. [Akins](#), 118 S. Ct. at 1785.

[FN149]. *Id.* (quoting [Richardson](#), 418 U.S. at 178 n.11) (alteration in original).

[FN150]. See, e.g., [Air Courier Conference v. American Postal Workers Union](#), 498 U.S. 517, 523 (1991) (stating that in order to sue under the APA, one must establish that she has suffered a legal wrong as the result of an agency's action).

[FN151]. See [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 578 (1992) (affirming the principle that only "legally cognizable injuries" satisfy the requirements of Article III).

[FN152]. See [United States House of Representatives v. United States Dep't of Commerce](#), 11 F. Supp. 2d 76, 85 (D.D.C. 1998); [Judicial Watch, Inc. v. Federal Election Comm'n](#), 10 F. Supp. 2d 39, 41 (D.D.C. 1998).

[FN153]. See [Lujan](#), 504 U.S. at 576-77 (rejecting the proposition that courts act as pseudo-legislatures by accepting cases without a person suffering "distinctive concrete harm"); [Sierra Club v. Morton](#), 405 U.S. 727, 740 (1972) ("The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process.").

[FN154]. I do not suggest that *Akins* overrules *Lujan* insofar as the latter case requires an injury in fact. All that is clear is that after *Akins*, a deprivation of information consists of an injury in fact if Congress has said so. The tension between *Akins* and *Lujan* stems from the *Akins* Court's recognition that whether there is an injury depends on what Congress has said, and its clear indication that Congress has the power to create new interests and new injuries. It remains to be seen whether and how *Akins* alters *Lujan*'s apparent belief that "injury" is a kind of Platonic form, existing above and apart from the law. For a quite extreme example of the Platonic form view of standing law, see [Animal Legal Defense Fund, Inc. v. Glickman](#), 154 F.3d 426, 445-50 (D.C. Cir. 1998) (Sentelle, J., dissenting).

[FN155]. See [Lujan](#), 504 U.S. at 573-74 (stating that making a generalized grievance claim against the government "does not state an Article III case or controversy").

[FN156]. See *id.* at 574-75 (quoting with approval [Doremus v. Board of Educ.](#), 342 U.S. 429, 433-34 (1952), which stated that "to invoke the judicial power...it is not sufficient that [the citizen] has merely a general interest common to all members

of the public").

[FN157]. See Scalia, *supra* note 131, at 881-82 (1983) ("I suggest that courts need to accord greater weight than they have in recent times to the traditional requirement that the plaintiff's alleged injury be a particularized one, which sets him apart from the citizenry at large.").

[FN158]. See *id.* at 894-97 (arguing that "the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority").

[FN159]. See, e.g., [United States v. Richardson](#), 418 U.S. 166, 179-80 (1974) (stating that a citizen who is not satisfied with a congressional ruling can resort to the electoral process as a remedy, and that there is a "basic principle that to invoke judicial power the claimant must have a 'personal stake in the outcome,' or a 'particular, concrete injury,' or 'a direct injury'" (citations omitted)).

[FN160]. See [Federal Election Comm'n v. Akins](#), 118 S. Ct. 1777, 1786 (1998) ("[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.'").

[FN161]. See [id.](#) at 1791 (Scalia, J., dissenting) (stressing the importance of a "particularized" injury).

[FN162]. [Id.](#) at 1786.

[FN163]. See *infra* notes 209-41 and accompanying text.

[FN164]. [Akins](#), 118 S. Ct. at 1786.

[FN165]. See Berger, *supra* note 137, at 816, 840 ("[T]he notion that the constitution demands injury to a personal interest as a prerequisite to attacks on allegedly unconstitutional action is historically unfounded."); Louis L. Jaffe, [Standing to Secure Judicial Review: Public Actions](#), 74 Harv. L. Rev. 1265, 1307-14 (1961) (explaining that the Constitution does not bar a shared interest suit). See generally Winter, *supra* note 137, at 1418-25 (explaining the ontological development of the term "standing").

[FN166]. See Sunstein, *supra* note 137, at 171 ("In both England and America, actions by strangers, or by citizens in general, were fully permissible and indeed familiar."); Winter, *supra* note 137, at 1441-57 (describing constitutional standing).

[FN167]. See [Akins](#), 118 S. Ct. at 1791-92 (Scalia, J., dissenting) (arguing that such suits undermine the powers of the Chief Executive); Scalia, *supra* note 131, 894-97 (arguing that courts should not be political instruments).

[FN168]. See generally Russell Hardin, *Collective Action* 6-9 (1982) (analyzing collective action problems); Mancur Olson, *The Logic of Collective Action* 1-2 (2d ed. 1971) (explaining that without a coercive force, groups may not take steps to advance their common or group interests).

[FN169]. There is a difference here between standing in constitutional cases and standing in administrative law cases. Perhaps courts should be cautious in allowing citizens to invoke the Constitution to challenge the outcomes of the democratic process. Even if this is so, however, there is far less reason for courts to be cautious in allowing people to invoke statutes to challenge the outcomes of the administrative process.

[FN170]. See [Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.](#), 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear,...the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

[FN171]. See [5 U.S.C. § 706\(2\)\(A\)](#) (1994) (mandating that the reviewing court "hold unlawful and set aside agency action...found to be...arbitrary [or] capricious").

[FN172]. See [Allen v. Wright](#), 468 U.S. 737 (1984), [Eastern Kentucky Welfare Rights Organization v. Simon](#), 426 U.S. 26 (1976), and [Linda R.S. v. Richard D.](#), 410 U.S. 614 (1973), discussed *infra*, at notes 174-77 and accompanying text.

[FN173]. See [Animal Legal Defense Fund, Inc. v. Glickman](#), 154 F.3d 426, 445-49 (D.C. Cir. 1998) (Sentelle, J., dissenting). *Akins* does not disturb previous law insofar as it is focused on the exercise of discretion by a private party. See [Allen v.](#)

[Wright, 468 U.S. 737 \(1984\)](#) (exercise of discretion by private schools); [Eastern Ky. Welfare Rights Org. v. Simon, 426 U.S. 26 \(1976\)](#) (exercise of discretion by nonprofit hospitals); [Linda R.S. v. Richard D., 410 U.S. 614 \(1973\)](#) (exercise of discretion by parent). But it is not clear, on the Court's view, why this should make a substantial difference. I suggest below that the different results really turn on the statutory interpretation--that is, on an understanding of Congress's instructions under the relevant statute.

[FN174]. [410 U.S. 614 \(1973\)](#).

[FN175]. See [id. at 619](#) (holding that the mother lacked standing since she had not shown that the prosecution of the father would vindicate her interest).

[FN176]. [426 U.S. 26 \(1976\)](#).

[FN177]. See [id. at 42-43](#) ("It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioner's 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications."). See also [Allen, 468 U.S. 737](#), where the Court denied standing to parents of black children attending public schools undergoing desegregation. The plaintiffs attempted to challenge the grant of tax deductions to segregated public schools. The Court held that the denial of the tax deduction would not necessarily affect the plaintiffs. See [id. at 758](#) ("[I]t is entirely speculative...whether withdrawal of a tax exemption from any particular school would lead the school to change its policies."). After *Akins*, both *EKWRO* and *Allen* might be seen as cases in which Congress did not create standing; as a matter of construction of the Internal Revenue Code, third parties usually lack standing to litigate the tax liability of others.

[FN178]. [Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 \(1992\)](#).

[FN179]. [Id. at 572](#).

[FN180]. [Id.](#)

[FN181]. See [id. at 571](#) (stating that "[r]espondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated").

[FN182]. See [id.](#) (noting that the agency provided less than 10% of the funding).

[FN183]. The point suggests that *EKWRO* and *Allen* were incorrectly decided if they are taken as pure redressability cases. But if they are taken as cases about congressional instructions, then they were probably correct, because Congress is generally not understood to allow one taxpayer to litigate the tax liability of another.

[FN184]. [Northeastern Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656 \(1993\)](#).

[FN185]. See [id. at 666](#) ("The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier [to compete for benefits], not the ultimate inability to obtain the benefit.").

[FN186]. See Cass R. Sunstein, [Standing Injuries, 1993 Sup. Ct. Rev. 37](#), for a general discussion on how injuries should be characterized for purposes of standing.

[FN187]. The Court was also right on the smaller issue, involving interpretation of the statute. Justice Scalia's disagreement was plainly motivated by his belief that the statute should be construed so as to avoid constitutional doubts. See [Federal Election Comm'n v. Akins, 118 S. Ct. 1777, 1789-90 \(1998\)](#) (Scalia, J., dissenting) (urging the Court to adopt a "narrower reading of the phrase 'party aggrieved'" in order to avoid constitutional doubt).

[FN188]. See the discussion of generalized interests within the zone, *infra* Part IV.C.

[FN189]. See [5 U.S.C. § 552 \(1994\)](#) (stating that agency rules, opinions, orders, records, and proceedings are public information).

[FN190]. [Akins, 118 S. Ct. at 1786](#).

[FN191]. See EPCRA, [42 U.S.C. § 11045\(c\) \(1994\)](#) (imposing civil and administrative penalties for failing to meet the reporting requirements of EPCRA).

[FN192]. See Sunstein, *supra* note 137, at 168-79 (describing the history of standing in the English and American systems).

[FN193]. See [Lujan v. Defenders of Wildlife, 504 U.S. 555, 572-73 \(1992\)](#) (distinguishing Lujan from the simple case where standing exists because Congress has provided "a cash bounty for the victorious plaintiff").

[FN194]. See, e.g., Act of May 19, 1796, ch. 30, § 18, 1 Stat. 469, 474 (awarding private citizens bounties for informing the U.S. government of violations of the Act); Act of Mar. 22, 1794, ch. 11, § 4, 1 Stat. 347, 349 (offering a bounty to persons who prosecute violations of the Act); Act of Feb. 20, 1792, ch. 7, § 25, 1 Stat. 232, 235 (granting one half of the penalties collected to the person "informing and prosecuting" the violation); Act of March 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (providing one half of all penalties collected for violation of the Act to the person who discovers the violation); [United States ex rel. Marcus v. Hess, 317 U.S. 537, 541 n.4 \(1943\)](#) (supporting the Court's assertion that "[q]ui tam suits have been frequently permitted by legislative action"); [Marvin v. Trout, 199 U.S. 212, 225 \(1905\)](#) (asserting the standing of the plaintiffs to sue in qui tam actions).

[FN195]. [118 S. Ct. 1003 \(1998\)](#).

[FN196]. See [id.](#) at 1018.

[FN197]. *Id.*

[FN198]. *Id.*

[FN199]. *Id.*

[FN200]. See *id.* at 1027-30 (Stevens, J., concurring) (noting the Court's substantial departure from its previous treatment of cases without redressability).

[FN201]. See Sunstein, *supra* note 137, at 173-74 (discussing the suggestion of a historical survey that "the public action--an action brought by a private person primarily to vindicate the public enforcement of public obligations--has long been a feature of our English and American law" (citation and internal quotations omitted)).

[FN202]. [108 F.3d 413 \(D.C. Cir. 1997\)](#).

[FN203]. *Id.* at 418.

[FN204]. *Id.*

[FN205]. See *id.* at 419 (Sentelle, J., concurring) ("If the injury alleged were the cognizable deprivation of information upheld in *Akins*, administrative discipline of the alleged wrongdoers would not remedy that injury.")

[FN206]. *Id.* at 420 (Sentelle, J., concurring).

[FN207]. See *supra* note 194 (providing statutory and case support for such a bounty system).

[FN208]. See Sunstein, *supra* note 137, at 173-79, 232 (discussing the historical support for, and the substantial merits of, a bounty system).

[FN209]. [5 U.S.C. § 702 \(1994\)](#).

[FN210]. [Federal Election Comm'n v. Akins, 118 S. Ct. 1777, 1785 \(1998\)](#).

[FN211]. [809 F.2d 794 \(D.C. Cir. 1987\)](#).

[FN212]. See [id.](#) at 813-16 (examining the zone of interests that is created by the relevant laws).

[FN213]. [Id.](#) at 813.

[FN214]. [Id.](#) (citing [Schlesinger v. Reservists Comm. to Stop the War](#), 418 U.S. 208 (1974), and [United States v. Richardson](#), 418 U.S. 166 (1974)).

[FN215]. See [Hazardous Waste Treatment Council v. EPA](#), 861 F.2d 277, 287 (D.C. Cir. 1988) (holding that a plaintiff cannot attain standing for a generalized grievance simply by forming an organization that has as its goal furtherance of the interest at the heart of the grievance).

[FN216]. See [id.](#) (summarizing the plaintiff's argument).

[FN217]. [Id.](#) at 286-87.

[FN218]. [Id.](#) at 287.

[FN219]. See [id.](#) (arguing that if any organization could secure standing by showing a general coincidence of goals with a statute, anyone could secure standing to challenge any action taken by the agency implementing that statute).

[FN220]. [23 F.3d 496 \(D.C. Cir. 1994\)](#); cf. [Animal Legal Defense Fund, Inc. v. Glickman](#), 154 F.3d 426 (D.C. Cir. 1998) (finding standing for someone claiming an aesthetic interest in observing animals).

[FN221]. See [Espy](#), [23 F.3d at 498](#) (describing the plaintiffs' grievance).

[FN222]. [Id.](#) at 501.

[FN223]. [Id.](#)

[FN224]. [Id.](#)

[FN225]. [Id.](#) at 502.

[FN226]. [Id.](#)

[FN227]. [Id.](#) (quoting [Hazardous Waste Treatment Council v. EPA](#), 861 F.2d 277, 283 (D.C. Cir. 1988)).

[FN228]. See [7 U.S.C. § 2143 \(1994\)](#) (discussing the "standards and certification process for humane handling, care, treatment, and transportation of animals").

[FN229]. [Espy](#), [23 F.3d at 503](#).

[FN230]. [789 F.2d 931 \(D.C. Cir. 1986\)](#), vacated on other grounds, [494 U.S. 1001 \(1990\)](#).

[FN231]. See [id.](#) at 937-38 (identifying added expense and difficulty as the likely results of the restrictions on information).

[FN232]. See *infra* text following note 244 (arguing that Congress's creation of a citizen review board in conjunction with the Animal Welfare Act does not adequately explain the preclusion of suit by the Animal Legal Defense Fund); see also [Animal Legal Defense Fund, Inc. v. Glickman](#), 154 F.3d 426, 445 (D.C. Cir. 1998) (noting that the Animal Welfare Act did not establish private citizen committees to oversee animal exhibitions, but "anticipated the continued monitoring of concerned animal lovers to ensure that the purposes of the Act were honored").

[FN233]. [901 F.2d 107 \(D.C. Cir. 1990\)](#).

[FN234]. See John D. Graham, Saving Gasoline and Lives, in *Risk Versus Risk: Tradeoffs in Protecting Health and the Environment* 87, 98-102 (John D. Graham & Jonathan Baert Wiener eds., 1995) (discussing the important role of the Insurance Institute for Highway Safety in bringing the safety risks associated with stricter CAFE standards into the public policy debate).

[FN235]. [Competitive Enter. Inst.](#), 901 F.2d at 122.

[FN236]. *Id.*

[FN237]. *Id.* at 123.

[FN238]. See [National Wildlife Fed'n v. Hodel](#), 839 F.2d 694, 712 (D.C. Cir. 1988) (finding that the "elimination of the opportunity to see and use an EIS prepared under federal law does constitute a constitutionally sufficient injury on which to ground standing"), *rev'd* on other grounds *sub nom.* [National Wildlife Fed'n v. Lujan](#), 928 F.2d 453 (D.C. Cir. 1991); [Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n.](#), 481 F.2d 1079, 1091 (D.C. Cir. 1973) (finding that NEPA requires EISs for technology development programs).

[FN239]. [Competitive Enter. Inst.](#), 901 F.2d at 123.

[FN240]. *Id.*

[FN241]. See *id.* (stressing that standing under NEPA has only been granted when the plaintiffs' interests relate to environmental interests protected by NEPA).

[FN242]. [118 S. Ct. 927, 938 \(1998\)](#) (finding that the "interest [of competing financial institutions] in limiting the markets that [federal] credit unions can serve" is within the statute's zone of interests); see also [Animal Legal Defense Fund, Inc. v. Glickman](#), 154 F.3d 426, 444 (D.C. Cir. 1998) (stating that "the zone of interests test is generous and relatively undemanding").

[FN243]. See [Clarke v. Securities Indus. Ass'n](#), 479 U.S. 388, 396 (1987) (finding that the trade association has standing because its interests are "arguably within the zone of interests to be protected"); [Association of Data Processing Serv. Orgs., Inc. v. Camp](#), 397 U.S. 150, 154 (1970) (noting that "the trend is toward enlargement of the class of people who may protest administrative action"). But see [Air Courier Conf. v. American Postal Workers Union](#), 498 U.S. 517, 517-18 (1991) (arguing that the union's interests were outside the zone of interests because the monopoly statute's purpose was to give an economic advantage to the Postal Service and not to protect postal jobs, and, therefore, holding that postal workers have no standing to challenge the Service's decision to allow competition in international remailing services despite its statutory monopoly).

[FN244]. [467 U.S. 340, 348 \(1984\)](#) (holding that consumers may not obtain judicial review of milk market orders under the Agricultural Marketing Agreement Act because the Act does not contemplate such suits).

[FN245]. See [Sierra Club v. Morton](#), 405 U.S. 727 (1972) (holding that the petitioner lacked standing because it failed to show "individualized harm to itself or its members"). According to this view, the holding in *Sierra Club* is largely an interpretation of NEPA. There is no injury in fact because NEPA created no legal interest! If this formulation seems odd, consider its similarity to the analysis in *Akins*. *Akins* had an injury in fact because he had a legal interest. Extending this analysis, *Sierra Club* is very similar to [United States v. Richardson](#), 418 U.S. 166 (1974), in which the Court held that the taxpayer did not have standing because he failed to show an injury or immediate danger of legally cognizable injury. In both cases, standing was denied because the relevant provision of law did not create individual rights.

[FN246]. If Congress allowed anyone to bring suit to require compliance with NEPA--not because of any specifically environmental interests but because of a general interest in the information at stake--there would probably be no Article III issue. The strongest opposing argument would be that it is necessary to have a distinctly environmental interest in the backdrop, as in a case in which people located near a proposed causeway challenge the failure to prepare an EIS. As NEPA now stands, an environmental interest is indeed a requirement, and this view is best justified as a reading of NEPA itself, perhaps informed by prudential considerations.

[FN247]. See [901 F.2d 107, 122-24](#) (noting that, even under the more liberal standing requirements used in NEPA-related cases, a "right to specific information under NEPA has so far been recognized for standing purposes only when the information sought relates to environmental interests that NEPA was intended to protect").

[FN248]. See *id.* at 122 (stating that standing is granted to those who have suffered "[an] injury to an interest within the zone of interest protected by [NEPA]").

(Cite as: 147 U. Pa. L. Rev. 613)

[FN249]. [42 U.S.C. § 300j-21 \(1994 & Supp. II 1996\)](#) (outlining additional requirements to Title XIV of the Public Health Service Act, regulating drinking water).

[FN250]. See [Lujan v. Defenders of Wildlife, 504 U.S. 555, 568-71 \(1992\)](#) (noting that the plaintiffs, in challenging a "generalized level of government action," failed to present a case for the redressability of their specific injuries in fact).

[FN251]. People are often willing to pay a good deal for the "existence" of certain environmental amenities, and that existence value often plays a role in contingent valuation studies. See David W. Pearce & R. Kerry Turner, *Economics of Natural Resources and the Environment* 137-40 (1990).

[FN252]. Cf. [Lujan, 504 U.S. at 560](#) ("[T]he plaintiff must have suffered an 'injury in fact'...which is (a) concrete and particularized and (b) 'actual or imminent'" (citations omitted)); [Sierra Club v. Morton, 405 U.S. 727, 735 \(1972\)](#) (holding that the Sierra Club had failed to demonstrate how any of its members would be affected by the challenged development).

[FN253]. See supra note 251; see also [Ohio v. United States Dep't of the Interior, 880 F.2d 432, 464 \(D.C. Cir. 1989\)](#) (upholding contingent valuation that allows use of "existence value" and "option value").

[FN254]. [Lujan, 504 U.S. at 580.](#)

[FN255]. *Id.*

[FN256]. See [International Bd. of Teamsters v. Peña, 17 F.3d 1478, 1483- 87 \(D.C. Cir. 1994\)](#) (holding that the union had standing to challenge the Memorandum of Understanding between the United States and Mexico regarding recognition of foreign commercial drivers' licenses).

[FN257]. See [Allen v. Wright, 468 U.S. 737, 753 \(1984\)](#) (holding that parents seeking relief for the IRS's failure to fulfill its obligation to deny tax exempt status on racially segregated schools failed to demonstrate a judicially cognizable injury).

[FN258]. See supra note 140 and accompanying text.

[FN259]. See [Animal Legal Defense Fund, Inc. v. Glickman, 154 F.3d 426, 445 \(D.C. Cir. 1998\)](#) (recognizing an aesthetic interest in observing animals).

[FN260]. Examples are briefly given above involving endangered species and visibility. More particularly, Congress might say, for example, that Americans have a shared property interest in the continued existence of endangered species, an interest that is violated whenever the federal government acts unlawfully under the Endangered Species Act, [16 U.S.C. §§ 1531-34 \(1994\)](#), and an interest that can be protected by citizen suits. A statute of this kind might be strengthened by reference to the role of "existence value" in ordinary cases of environmental valuation. I do not suggest that Congress should do this as a matter of policy; the answer to that question depends on context.

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PLAINTIFFS' EXHIBIT 188



University of Pennsylvania Law Review
April, 1999

Comment

*971 THE DARKER SIDE OF NONPROFITS: WHEN CHARITIES AND SOCIAL WELFARE GROUPS BECOME POLITICAL SLUSH FUNDS

Robert Paul Meier [\[FNd1\]](#)

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Introduction: Clinton's Biltmore Bonanza

The 1996 general election was only two weeks away. [\[FN1\]](#) Many of Florida's Democratic faithful had gathered at the Biltmore Hotel in Coral Gables for a prominent fundraiser. [\[FN2\]](#) This was their mission: to provide Democratic candidate President Bill Clinton with a final surge of cash to send him coasting to a second term in the White House. The price of admission that night was \$1,500. [\[FN3\]](#) And at least one person, Warren Meddoff, intended to help contribute much, much more.

After briefly speaking at the fundraiser, Clinton was making his way through the "crush" of attendees when Meddoff handed him a business *972 card. [\[FN4\]](#) Clinton "took two [more] steps" and stopped in his tracks. [\[FN5\]](#) Glancing at the card, he had read a simple message handwritten by Meddoff: "I have an associate that [sic] is interested in donating \$5 million to your campaign." [\[FN6\]](#) The amount offered was equivalent to 3,300 additional guests rushing into the fundraiser. President Clinton immediately found Meddoff, a stranger until this point, and informed him that a staff member would be in contact. [\[FN7\]](#)

Four days later, with just ten days left until the general election, White House Deputy Chief of Staff Harold Ickes called Meddoff from Air Force One to discuss the proposed contribution. [\[FN8\]](#) By now, the offer became even more incredible and completely unprecedented in American politics. [\[FN9\]](#) Meddoff informed Ickes that a business associate, [\[FN10\]](#) Bill Morgan, was expecting a "very large sum of money" from a business deal and was willing to donate \$5 million initially and another \$50 million over the course of the next ten months. [\[FN11\]](#) The catch was that Meddoff's associate wanted the contributions to President Clinton to be tax deductible. [\[FN12\]](#) Ickes reportedly replied that there were "tax-favorable" ways of assisting Clinton's reelection campaign. [\[FN13\]](#)

Later in the week, Ickes called again from Air Force One and informed Meddoff that the Clinton campaign had an "immediate need for \$1.5 million within the next 24 hours." [\[FN14\]](#) Meddoff was unsure if Morgan could obtain*973 the funds that quickly. [\[FN15\]](#) Still, Meddoff requested that Ickes forward a list of where the money should be sent. [\[FN16\]](#) Within hours, Ickes, from the President's plane, dictated to a White House staff member a list of four organizations to receive the \$1.5 million. [\[FN17\]](#) The Ickes list was then faxed to Meddoff from the White House. [\[FN18\]](#)

The list that Meddoff received was a hodgepodge of organizations, [\[FN19\]](#) some offering the tax haven that Morgan sought, and others not. Contributions to the two nonprofit charities on the Ickes list, Vote Now'96 and the National Coalition of Black Voter Participation ("Black Voter Coalition"), would be tax deductible. [\[FN20\]](#) By law, these groups must operate exclusively for religious, educational, or similar purposes. [\[FN21\]](#) Such charities are also limited in the political activities they may undertake, and are barred from engaging in political campaigning. [\[FN22\]](#) Contributions to the other two organizations, the Democratic National Committee ("DNC") and the Defeat 209 *974 campaign, [\[FN23\]](#) were not tax deductible, because both are classified under the Internal Revenue Code ("IRC") as groups that typically engage in significant political and political campaign activity, albeit to differing degrees. [\[FN24\]](#)

Meddoff claimed that later during the same day that he received the fax, Ickes, perhaps realizing the potential impropriety of listing tax-exempt charities as Clinton-friendly organizations, called and requested that the fax be shredded. [\[FN25\]](#) Ickes has refuted this allegation, stating that he "did not urge [Meddoff] to destroy the document . . . [to the] best of [his] knowledge."

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[FN26]

In the end, neither the \$1.5 million nor the other \$53.5 million was ever used to the benefit of President Clinton's campaign. [FN27] In fact, the money may never have existed. The contributions were supposed to come from a suspect business transaction involving the sale of old railroad bonds. [FN28] Morgan, Clinton's supposed benefactor-to-be, was also thousands of dollars in debt to the Internal Revenue Service ("IRS"). [FN29]

This bizarre tale, revealed in the Senate hearings on alleged campaign fundraising abuses in the 1996 elections, paints a dubious picture of the American political landscape. Here, mysterious figures who were virtual strangers to President Clinton gained access to him and his closest aides by offering unprecedented contributions, provided that the donations could be routed to tax-deductible sources. Among the many questions that this story raises is how did charities such as Vote Now'96 and the Black Voter Coalition-- groups that face strict limits on the political activities in which they are permitted to engage--make it onto the Ickes list and become the topic of urgent phone calls made from Air Force One during the final days before the election?

This Comment examines an alarming trend in which charities and social welfare groups have become powerful political players, yet have been able to circumvent IRC limits on nonprofit political activity and to avoid nearly all election regulations. Part I analyzes the activities of two supposedly nonpartisan, nonprofit groups, Vote Now'96 (an [I.R.C. § 501\(c\)\(3\)](#) charity) and the Citizens for the Republic Education Fund ("Republic Education Fund") (an [I.R.C. § 501\(c\)\(4\)](#) social welfare organization during the 1996 elections). [FN30] Part II outlines the current regulation of such groups under the IRC and the Federal Election Campaign Act ("FECA"), while Part III explains how both Vote Now'96 and the Republic Education Fund used gaps in the law to engage in otherwise prohibited partisan endeavors.

*976 Part IV of this Comment proposes to close the legal loopholes allowing charities and social welfare groups to engage in unregulated political activities by requiring that any activity likely to influence an election be conducted through nonprofit political action committees ("PACs"). This plan will allow nonprofit organizations to engage in political activity and ensure that such endeavors are regulated, while imposing few burdens on the existing rights of charities and social welfare groups.

I. The Political Underworld of Nonprofits

A. Vote Now'96: The Democrats' Political Charity

Vote Now'96, one of the nonprofit organizations on the Ickes list, offers a telling example of the extent to which the line between political campaigning and charitable endeavors has blurred. [FN31] Vote Now'96, to which Ickes directed Meddoff to contribute \$250,000, [FN32] is touted as a "nonpartisan voter registration or . . . get-out-the-vote group." [FN33] Upon closer inspection, however, Vote Now'96 seems more like a taxpayer- subsidized [FN34] slush fund for the Democratic Party.

*977 Vote Now'96 operated exclusively to increase voter turnout in "heavily Democratic" areas. [FN35] The group's "executive director was deputy finance director of the [DNC] throughout Clinton's 1992 campaign. Its chairman was chairman of the Democratic Senatorial Campaign Committee in 1993- 94." [FN36] On July 12, 1996, President Clinton and the First Lady held a fundraiser for Vote Now'96 at the White House. [FN37]

Some of the [sixty] guests were wealthy donors who wanted to give money to the Democratic Party but preferred to do so quietly, either because they had business before the Government or simply wanted to avoid having their names appear on public donor lists.

The solution was simple, they were told. They could make their donations to an organization called Vote Now'96, which was ostensibly created to encourage voter turnout and, unlike the [DNC] or the Clinton-Gore campaign organization, would not be required to identify the donors or the amount of their gifts. Vote Now'96 ultimately received \$3 million in donations in the 1996 campaign. [FN38]

The Democrats probably made other attempts to steer contributors to Vote Now'96. The charity received \$3,000 from Clinton supporter and Arkansas restaurateur, Yah Lin "Charlie" Trie, [FN39] who was later implicated in a Chinese plot to bias the outcomes of the 1996 federal election. [FN40] A "foreign businessman," Gilbert Chagoury, who was living in Paris and "closely tied to Nigerian dictator Sani Abacha," contributed \$460,000 to Vote Now'96. [FN41] Despite the fact that Chagoury was "not a party contributor and [, as a foreign *978 citizen,] could not legally give to the Democrats," he was invited to a special dinner on December 21, 1996 for the 250 top donors to the DNC. [FN42]

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Vote Now'96 was also scrutinized during the criminal investigation of charges that the DNC "swapped" contributions with Ron Carey's 1996 reelection campaign to head the Teamsters labor union.

At their heart, the swap schemes envisioned the Teamsters contributing not only to the DNC, but also to various tax-exempt organizations

In exchange, the DNC and various tax-exempt organizations would [illegally] contribute directly or indirectly to the election campaign of Teamsters president, Ron Carey, through an entity called the Teamsters for a Corruption-Free Union

[FN43]

When all of these circumstances are considered, Vote Now'96 begins to look a lot less like a nonpartisan charity engaged in voter registration and much more like an offshoot of the Democratic Party, performing the politically valuable service of getting Democrats to the polls. However, despite the arguably partisan activities of Vote Now'96, the anonymous contributors, the foreign donors, and the limitless size of allowable contributions (complete with a tax deduction), there is still one more incredible aspect to this story. And that is the fact that possibly everything Vote Now'96 did is perfectly legal.

[FN44]

*979 B. More Nonprofits Join the Fray: The Republic Education Fund

As a nonprofit group created to advance political interests, Vote Now'96 had plenty of company in 1996. [FN45] Consider, for example, the following television advertisement:

Senate candidate Winston Bryant's budget as Attorney General increased 71 [[[percent]. Bryant has taken taxpayer funded junkets to the Virgin Islands, Alaska, and Arizona. And spent about \$100,000 on new furniture. Unfortunately, as the state's top law enforcement official, he's never opposed the parole of any convicted criminal, even rapists and murderers. And almost 4,000 Arkansas prisoners have been sent back to prison for crimes committed while they were out on parole. Winston Bryant: government waste, political junkets, soft on crime. . . . Call Winston Bryant and tell him to give the money back

[FN46]

Most voters in Arkansas likely would assume that Bryant's Republican opponent for the U.S. Senate, Tim Hutchinson, [FN47] produced this advertisement. Few, however, would guess that it was produced and paid for by a nonprofit social welfare organization, [FN48] incorporated in Washington, D.C., [FN49] called the Citizens for the Republic Education Fund.

[FN50]

The Republic Education Fund was created on June 20, 1996, [FN51] just in time for the 1996 elections. With neither "a staff [n]or an office," however, the social welfare group was little more than a "shell compan[y]" for Tactical Resources in American Democracy ("TRIAD"). [FN52] TRIAD is a supposedly *980 for-profit [FN53] consulting firm incorporated in 1996 [FN54] that routes money from "wealthy conservative donors" to Republican candidates, PACs, and nonprofit groups.

[FN55]

TRIAD is run by Carolyn Malenick, a consultant who "spent her entire professional career in conservative Republican politics." [FN56] In 1996, TRIAD paid political consultants to meet with "as many as 250 Republican campaigns" in order to "assess each candidate's viability . . . [and] to give strategic advice." [FN57] Information generated from these meetings was passed to the Republic Education Fund, [FN58] which then produced "negative attack advertising," such as the anti-Bryant advertisement, that criticized the Democratic opponents of the Republican candidates. [FN59] The Republic Education Fund received much of the money for its attack advertisements from TRIAD, [FN60] which in turn received large contributions from wealthy individuals who had already made the maximum legal donation to the Republican candidates who benefited from the Republic Education Fund's advertisements. *981 [FN61] Even the Mafia would be impressed by this money laundering operation.

In 1996, the Republic Education Fund--which was granted its "tax-exempt status . . . after it told the [IRS that] it would not spend money to influence elections" [FN62]--flooded "\$4 million in[to] more than a dozen congressional districts . . . [for] forceful 'issue' advertisements that left [[[Democratic] candidates wondering what had hit them." [FN63] Over \$300,000 was spent in Little Rock and Jonesboro, Arkansas alone to help Hutchinson defeat Bryant. [FN64] As with Vote Now'96, the Republic Education Fund did not have to disclose its donors, could accept unlimited contributions, and could receive foreign money. [FN65]

II. Nonprofits and the Law

(Cite as: 147 U. Pa. L. Rev. 971)

The activities of groups like Vote Now⁹⁶ and the Republic Education Fund are arguably legal due to loopholes in the IRC and, ultimately, in FECA. For the purposes of this Comment, there are three types of nonprofit organizations: charities (formed under [I.R.C. § 501\(c\)\(3\)](#)); social welfare groups (formed under [I.R.C. § 501\(c\)\(4\)](#)); and political organizations (formed under [I.R.C. § 527](#)). As indicated previously, Vote Now⁹⁶ was an [I.R.C. § 501\(c\)\(3\)](#) charity; [\[FN66\]](#) the Republic Education Fund was an [I.R.C. § 501\(c\)\(4\)](#) social welfare group in 1996; [\[FN67\]](#) and the DNC, a political party, is an [I.R.C. § 527](#) political organization. [\[FN68\]](#)

*982 A. Nonprofits and the IRC

1. Charities

The IRC offers a series of tradeoffs for the three categories of tax-exempt nonprofit groups. [\[FN69\]](#) Charities must operate exclusively for limited and defined functions, such as for charitable, religious, or educational purposes. [\[FN70\]](#) Charities are also restricted in at least three other ways: such groups cannot operate to the benefit of a specific individual; [\[FN71\]](#) no "substantial part" [\[FN72\]](#) of their activities may be for "carrying on propaganda, or otherwise attempting . . . to influence legislation;" [\[FN73\]](#) and no charity may "participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office." [\[FN74\]](#)

The political limitations on charities, then, fall into two categories. Charities are confronted with an absolute bar against taking part in political campaign activity, which the IRC defines as participating in a campaign on behalf of or in opposition to a political candidate. [\[FN75\]](#) Not all political activity, however, rises to the level of campaign activity. [\[FN76\]](#) As long as such actions are not substantial, charities may engage in political (but noncampaign) *983 activities like lobbying to influence legislation. In return for following these limitations on political and political campaign activity, charities have the benefit of their donors receiving a tax deduction for contributions, which encourages donations. [\[FN77\]](#)

2. Social Welfare Groups

Social welfare groups, in contrast to charities, need only be "primarily engaged in promoting in some way the common good and general welfare of the people of the community." [\[FN78\]](#) Consequently, such groups usually do not receive the tax deduction benefits that charities typically enjoy. [\[FN79\]](#) Social welfare organizations, however, have greater leeway in the political activities they may undertake. [\[FN80\]](#) The primary mission of a social welfare group, for instance, may be to lobby on legislative issues, [\[FN81\]](#) something that no substantial part of a charity's activities may constitute.

"The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." [\[FN82\]](#) Because [I.R.C. § 501\(c\)\(4\)](#) nonprofit organizations only need be "primarily" engaged in social welfare, however, social welfare groups--unlike charities--are not completely barred from engaging in political campaign activities. [\[FN83\]](#) Instead, any political *984 campaign expenditure of a social welfare group is subject to the same tax that would apply to certain income of [I.R.C. § 527](#) political organizations. [\[FN84\]](#) Furthermore, political campaign activity of a social welfare group must satisfy the FECA regulations, as outlined in Part II.B.

3. Political Organizations

Political organizations include any group "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures" [\[FN85\]](#) to "influence the selection, nomination, election, or appointment of any individual" for public office. [\[FN86\]](#) As previously indicated, contributions to political organizations are not tax deductible, [\[FN87\]](#) and some limited types of income of such groups are subject to taxation. [\[FN88\]](#)

B. Nonprofits and FECA

Almost all federal political campaigning--whether by political organizations, social welfare groups, or others--is in some way subject to the Federal Election Campaign Act. [\[FN89\]](#) FECA, "landmark legislation" passed by Congress in the 1970s, was intended to "resolve, once and for all, the inequities and abuses of the political finance system." [\[FN90\]](#) Among other things, FECA places limits on the size of political campaign contributions, [\[FN91\]](#) requires *985 regular disclosure of political contributions and expenditures, [\[FN92\]](#) and bars foreign citizens from making political contributions. [\[FN93\]](#)

III. Nonprofits and Legal Loopholes

(Cite as: 147 U. Pa. L. Rev. 971)

A. Fissures in the Law

Due to loopholes in the IRC and FECA, charities and social welfare groups are able to engage in partisan activities, yet argue that their actions are nonpolitical. Vote Now'96 claimed, for example, that it really was a nonpartisan charity and simply engaged in the socially valuable function of ensuring that historically disenfranchised minorities are able to vote. [\[FN94\]](#) The facts that the group registered Democrats and helped to get them to the polls, was headed by former Democratic Party officials, benefited from a White House fundraiser, and received large contributions steered to the group by the DNC were, according to Vote Now'96, indirect consequences of its taxpayer-subsidized, "nonpartisan" mission to increase minority voter turnout. [\[FN95\]](#)

***986** The law supports this claim. Voter registration and turnout efforts are valid activities for a tax-exempt charity. [\[FN96\]](#) Targeting certain constituencies, such as minorities, in voter registration efforts has also been found to be an appropriate charitable purpose. [\[FN97\]](#)

Even being the beneficiary of political party fundraisers and directed contributions does not necessarily jeopardize a nonprofit organization's charitable status. Political organizations are free to "steer donors" to nonprofit groups, provided that the political parties do not "tell the groups how and where to spend the money they collect." [\[FN98\]](#) Funds that charities receive may come from foreign sources as well. [\[FN99\]](#) Finally, because charitable voter turnout efforts are considered nonpolitical, groups like Vote Now'96 avoid all election laws. [\[FN100\]](#)

On the basis of the criteria listed above, Vote Now'96 emerges with a clean slate. Apparently, the IRC and FECA need not follow common sense--or at least "common suspicion"--that a group headed by Democrats, funded by Democrats, and benefiting Democrats is a Democratic organization. Provided that Vote Now'96 engaged in the "nonpartisan" activity of registering voters, and was not overtly controlled by the Democratic Party, it apparently satisfied the requirements of [I.R.C. § 501\(c\)\(3\)](#) to qualify as a nonprofit group. Even though Vote Now'96 virtually operated as a Democratic Party subsidiary, its voter registration efforts were taxpayer-subsidized and unregulated by FECA.

The legal loophole discovered by Vote Now'96, in many ways, is but a slight fissure compared to the gaping crack that allowed the Republic Education Fund to produce its "nonpolitical" television spots. As far as the IRC and FECA are concerned, this group's advertisement about the government-wasting, junket-taking, rapist-paroling, Democratic candidate Winston Bryant ***987** had as much to do with the campaign for a U.S. Senate seat as would a commercial for Arkansas chickens. [\[FN101\]](#) This fact speaks to a larger problem that permeates our campaign system, which is the use of "issue advocacy" [\[FN102\]](#) as a ruse for partisan politicking. [\[FN103\]](#)

Here are the "magic words" for regulated advocacy [\[FN104\]](#): "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'" [\[FN105\]](#) According to the Supreme Court in *Buckley v. Valeo*, words and phrases similar to these must be used in order for a message to be subject to FECA's regulations on "express advocacy" political campaigning. [\[FN106\]](#)

The fundamental difference between express and issue advocacy is that express advocacy--a message that specifically endorses the election or defeat of a candidate--is regulated by FECA, while issue advocacy--a message that often criticizes a candidate, but does not encourage an action on the part of the voter--is usually not. The Court, in an indirect admission that this standard would be confusing in practice, acknowledged that express advocacy and issue advocacy are virtually indistinguishable in many circumstances, even though only express advocacy is regulated by FECA. [\[FN107\]](#)

***988** The Court's decision in *Buckley* has opened the floodgates for vicious, partisan attacks that are free from election limits. As long as words such as "vote against" or "defeat" are not used, nonprofit organizations are considered to be engaged only in "issue advocacy," and not FECA-regulated political campaigning, when they sponsor advertisements such as the Republic Education Fund's anti-Bryant ad. [\[FN108\]](#)

This is one instance where a word or two can make a big difference. Because express advocacy is political campaign activity, a social welfare organization sponsoring such a message is subject to the set of restrictions previously discussed: first, that [I.R.C. § 501\(c\)\(4\)](#) nonprofit organizations primarily operate for a purpose unrelated to political campaign activity; [\[FN109\]](#) second, FECA's regulations, such as reporting requirements, that apply to almost all political campaign activity; [\[FN110\]](#) and third, the IRC provision that ***989** any political campaign expenditure by a social welfare group is subject to taxation. [\[FN111\]](#)

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Absent the magic words, though, a nonprofit organization may pay for an advertisement that looks suspiciously partisan, label it "issue advocacy," and avoid all limits on political campaign activity imposed by the IRC or FECA. In fact, the Republic Education Fund did just that. The group was created less than seven months before the 1996 general election, and the only "primary activity" it engaged in--likely the only activity it engaged in at all--was producing advertisements attacking Democrats. [FN112] For the Republic Education Fund, bumping off (electorally speaking) Democratic candidates was its means of promoting the public good, and all of this was done outside the scope of the election laws.

B. The Nonprofit Political Incentive

As the IRC and FECA now stand, an incentive exists for political parties and candidates to channel activities that they would otherwise pay for out of their own campaign coffers to nonprofit groups. Taxpayers help pay for all activities of an [I.R.C. § 501\(c\)\(3\)](#) nonprofit organization provided that the charity's "political" activity, which is often narrowly defined, [FN113] is not substantial and it obeys the political campaign prohibition. For both charities and social welfare groups, then, independent political activity that does not rise to the level of political campaigning is unregulated by FECA, enabling nonprofit organizations to accept limitless contributions, even from foreign nationals, without having to comply with disclosure requirements.

C. Nonprofits and Politics: An Inevitable Mix?

Serving as the "political equivalent of Swiss bank accounts," charities and social welfare groups are now secret havens where political parties and candidates stash unlimited contributions and foreign money received from *990 anonymous donors. [FN114] Often directed by professional consultants, these nonprofit groups, camouflaged behind virtuous sounding names, such as Citizens for the Republic Education Fund, [FN115] run the "'shadow' campaigns" [FN116]--underground politicking that can determine an election's outcome with a barrage of negative advertisements during the waning days of a campaign and after the actual candidates emptied their own coffers.

Even if attempts are made to plug the legal loopholes, the odds are stacked against efforts to prevent nonprofit organizations from jumping into the political morass. Many of these groups are phantom organizations that live and die by elections. [FN117] There is little way to police their actions until after the debates are over, the ballots are counted, and the winners' bags are packed for Washington, D.C. [FN118]

*991 Government watchdog agencies, such as the IRS or the Federal Election Commission ("FEC") are more like toothless Chihuahuas when it comes to supervising nonprofit organizations. Monitoring tax-exempt organizations is "something of a sideline" [FN119] for the IRS since it rarely results in any money being paid into the Treasury. [FN120] The FEC, the "independent agency . . . with the exclusive authority to 'administer, seek to obtain compliance with, and formulate policy with respect to' the [FECA]," [FN121] is notoriously overworked and has its hands full just trying to keep track of the groups that are allowed to engage in political campaign activity. [FN122] As presently organized, the agency cannot effectively police nonprofit organizations that, for the most part, are supposed to be outside of FECA's regulatory purview.

The "general lack of oversight" by the IRS and the FEC has so troubled many nonprofit organizations that these groups have "asked Congress to provide more controls, lest bad charities [and social welfare groups] effectively drive out the good ones--or dissuade people from supporting *992 them." [FN123] In this "'Wild West'" of American politics, where nonprofit groups can "'get away with almost anything,'" [FN124] a new sheriff is desperately needed to replace the ineffective law enforcement by the IRS and the FEC.

IV. Clipping Nonprofits' Political Wings

A. A Call for Nonprofit PACs

"If you can't beat 'em, join 'em" may not go far as a motivational, rallying cry for revising our nation's laws, but this may be one case where the motto should apply. Allowing nonprofit organizations to engage in regulated political and political campaign activity will accomplish at least three things: nonprofit political activity will be permissible, but subject to public scrutiny and election law safeguards; agencies like the IRS and the FEC could therefore better focus on those nonprofit groups that continue to circumvent the law; and the IRC and FECA will take a step toward reality, instead of existing in a fantasy land where calling a candidate a "rapist paroler" [FN125] or "wife beater" [FN126] on the eve of an election is considered apolitical.

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A charity that intends to engage in political activity prohibited by its [I.R.C. § 501\(c\)\(3\)](#) tax status is already permitted to establish an [I.R.C. § 501\(c\)\(4\)](#) social welfare subsidiary. [\[FN127\]](#) The IRS only requires that a charity and its social welfare arm be separately incorporated and that contributions to the charity that are entitled to a tax deduction not be used to finance the subsidiary's lobbying or propaganda-promoting activities. [\[FN128\]](#)

Aside from maintaining independent bank accounts, a charity and its lobbying arm may coordinate their efforts and engage in the activities permitted [§ 993](#) by their respective tax-exempt status. [\[FN129\]](#) Using the lobbying subsidiary as a model, the IRC and FECA should be amended to allow both [I.R.C. § 501\(c\)\(3\)](#) charities and [§ 501\(c\)\(4\)](#) social welfare groups to establish "nonprofit PACs," which would be similar (but not identical) to other federal PACs.

1. PACs Defined

"The term political action committees, one that does not appear anywhere in the FECA, denotes a loose category of all the committees in federal campaigns other than political party committees and the official campaign committees of candidates." [\[FN130\]](#) Such PACs include "any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 or which makes expenditures aggregating in excess of \$1,000 during a calendar year." [\[FN131\]](#)

Contributions by individuals to PACs are capped at \$5,000 per election. [\[FN132\]](#) Primary and general elections have separate caps, allowing an individual to give \$5,000 to a PAC in each election. [\[FN133\]](#) A PAC may contribute up to \$1,000 per candidate in each election, the same limit that applies to individuals, unless the organization qualifies as a multi-candidate PAC. [\[FN134\]](#) To become a multi-candidate PAC, a committee must be registered as such at least six months prior to an election, receive contributions from more than fifty people, and make contributions to at least five candidates for public office. [\[FN135\]](#) Multi-candidate PACs may contribute up to \$5,000 per candidate in each election. [\[FN136\]](#)

Other types of groups that are barred from directly taking part in political campaign activity are allowed to form PACs. Corporations and labor [§ 994](#) unions, both of which are prohibited from making political contributions from their general treasury funds, may form PACs that solicit or make political contributions through separate segregated funds ("SSFs"). [\[FN137\]](#) Nonprofit groups should similarly be allowed to engage in political and political campaign activity via a political subsidiary. [\[FN138\]](#)

FECA permits charities and social welfare organizations to create regular and multi-candidate PACs. [\[FN139\]](#) The IRC, however, effectively stands as a bar to charities creating PACs, because these groups are prohibited from engaging in political campaign activity, and any "political campaign activities of an SSF are attributed back to the charitable organization that sponsors it." [\[FN140\]](#) Similarly, the IRC restricts the ability of social welfare groups to start a PAC due to the "limit on the amount of political campaign activity in which they can engage without loss of tax-exempt status." [\[FN141\]](#) Charities and social welfare groups often evade these limitations by simply establishing informal ties with like-minded PACs. [\[FN142\]](#)

2. Nonprofit PAC Requirements for Political Campaign Activity

Political campaign activity, as defined by the IRC, is any activity taken on behalf of or in opposition to a candidate for public office. [\[FN143\]](#) Political campaigning includes directly contributing money to a candidate's campaign [§ 995](#) or engaging in express advocacy, described in Buckley as urging voters to "vote for" or "defeat" a candidate. [\[FN144\]](#)

At present, charities are barred from engaging in direct political campaign activity. This prohibition, therefore, prevents charities from making financial contributions for, or taking part in, express advocacy. Social welfare groups are similarly limited, but to a lesser extent. [I.R.C. § 501\(c\)\(4\)](#) nonprofit groups may engage in some political campaign activity--and, thus, make contributions for, or engage in, express advocacy--provided that such groups are primarily operated to promote the public good in some other way.

With the creation of nonprofit PACs, charities and social welfare groups could freely contribute or engage in express advocacy through nonprofit PACs. These political subsidiaries will be subject to many of the FECA requirements that apply to all other federal PACs, such as contribution limits, frequent disclosure reports to the FEC, and the prohibition against receiving foreign money. [\[FN145\]](#) Funds contributed to a charity or social welfare organization will be held in separate accounts, ensuring, for example, that no tax-deductible contributions are used to finance any of a charitable, nonprofit PAC's activities. All political campaigning of [I.R.C. § 501\(c\)\(3\)](#) and [§ 501\(c\)\(4\)](#) organizations will be required to be conducted through such nonprofit PACs.

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3. Nonprofit PAC Requirements for Noncampaign Political Activity

Allowing charities and social welfare organizations to make political contributions and engage in express advocacy, does not, of course, address most of the pursuits of groups like Vote Now'96 and the Republic Education Fund. As indicated before, both of those nonprofit groups arguably could claim that their activities were already legal and that political campaign activity was avoided. [\[FN146\]](#)

With the existence of nonprofit PACs, Vote Now'96 and the Republic Education Fund could conduct their respective voter registration drives and issue advertisements through PAC subsidiaries. An incentive still exists, however, to run activities that do not qualify as political campaign activity through the existing charity or social welfare organization. These groups *996 are not managed by the Mother Teresas of the nonprofit world, after all. [\[FN147\]](#) Given the option to use taxpayer-subsidized funds, [\[FN148\]](#) delve into foreign money, and avoid disclosure requirements, Vote Now'96 and the Republic Education Fund likely will not alter their existing game plan anytime soon.

The solution to this dilemma is to eliminate the option available to nonprofit groups to sponsor any "political" activity outside of PACs. Using common sense and an informed understanding of the realities of contemporary politics as guideposts, anything that looks, sounds, or "walks" like political campaign activity should be expressly required [\[FN149\]](#) to be conducted through a nonprofit PAC. [\[FN150\]](#) Notwithstanding claims by charities and social welfare groups that their endeavors have nothing to do with elections, at a minimum, activities like voter registration drives or "issue" advertisements in which candidates are pictured or discussed should be prohibited unless conducted by a nonprofit PAC.

Applying election laws to the activities of nonprofit PACs will clip the political wings of groups like Vote Now'96 and the Republic Education Fund. Under FECA, all PACs are subject to disclosure requirements and contribution limits and are prohibited from accepting foreign money--regardless of how funds are spent. [\[FN151\]](#) The "soft money" loophole, which allows federal PACs to engage in issue advocacy, voter registration and get-out-the-vote *997 drives, or related activities through non-FECA-regulated state SSFs, could be closed by requiring nonprofit PACs to operate only federal accounts. [\[FN152\]](#) As a result, all specifically-defined "political" activities of charities and social welfare groups will be subject to FECA, removing a primary incentive for candidates and political parties to conduct partisan activities through groups like Vote Now'96 and the Republic Education Fund.

B. Keeping Wayward Nonprofits in the Political Corral

Assuming that at least some charities and social welfare groups comply with the letter and spirit of the law by forming PACs, the government's job of monitoring the political activities of nonprofit organizations should become easier. Fundamentally, nonprofit groups will have a bright line that they know not to cross: do not engage in any prohibited political activity, except through a PAC. As a result, the IRS will not have to haggle as often about what constitutes "substantial propaganda" for a charity or whether a social welfare group is failing to operate "primarily" for the public good. The FEC will receive more paperwork in the form of regular disclosure reports from nonprofit PACs, but having ready access to the disclosed information*998 should prove valuable to any FEC investigation of possible FECA violations by a nonprofit group.

For nonprofit organizations attempting to sponsor prohibited political activity, the sanctions are, and will remain, severe. Under the IRC, if a nonprofit organization engages in forbidden political activity, the IRS may impose "substantial excise tax penalties on errant organizations and their managers," and may "move swiftly . . . to revoke the exempt status of organizations that are determined to be in 'flagrant violation' of the proscription on political expenditures." [\[FN153\]](#) These penalties will remain in place, although the scope of prohibited political activity--unless accomplished through a nonprofit PAC--will be expanded. Any FECA violations by charities or social welfare groups will also be subject to the range of investigatory and prosecutorial powers possessed by the FEC. [\[FN154\]](#)

By thinning the herd of nonprofit groups attempting to evade the IRC and FECA, the IRS and FEC possibly can serve as the alert watchdogs they were intended to be. Any political activity by a charity or social welfare group without a PAC will be per se illegal, and subject to the arsenal of penalties both agencies possess, but use too rarely due to loopholes in the law.

C. Seeking the Constitution's Seal of Approval

Advocating any proposal that may be viewed as restricting the First Amendment rights of nonprofit groups is fraught with danger. This is hardly an area of the law known for its unanimity of opinion regarding what the Constitution permits.

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[FN155] Debate is likely to rage on in Congress about the extent to which nonprofit groups' political activity may be limited. Forecasting the outcome of this policy crap shoot, let alone what the Court *999 will do to any reforms, can be done with about as much certainty as picking next week's winning lottery numbers. A strong argument can be made, however, that requiring nonprofit groups to engage in campaigning and other political activities only through PACs is constitutional.

1. The Constitutionality of the Nonprofit PAC Requirement for Political Campaign Activity

Requiring charities and social welfare groups to engage in political campaign activity, such as contributing money to candidates or taking part in express advocacy, through nonprofit PACs arguably survives constitutional scrutiny. Currently, charities are barred from directly sponsoring such activities, so the ability to form a PAC will be an unexpected boon. Social welfare groups, in effect, already form PACs when they engage in the limited political campaign activity permitted by the IRC, because such activities are typically paid for out of SSFs. [FN156]

One stumbling-block in the way of the nonprofit PAC proposal, though, is the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life, Inc.* ("MCFL"). [FN157] In MCFL, the Court held that a nonprofit group with no business activities or ties to a for-profit corporation cannot be required to engage in independent express advocacy [FN158] through an SSF. [FN159]

Justice Brennan, the author of the MCFL Court's opinion, cited several reasons why nonprofit groups resembling "voluntary political associations" [FN160] cannot be required to establish PACs for independent expenditures. First, "ideological" nonprofit groups do not have access to business income that might enable them to "gain [an] unfair advantage in the political marketplace." [FN161] Because the risk of corporate financial power being used to corrupt the political process is the usual justification given for prohibiting corporations from using their general treasury funds for political purposes, requiring ideological, nonprofit groups with no business income to establish *1000 corporations from using their general treasury funds for political purposes, requiring ideological, nonprofit groups with no business income to establish PACs for independent political campaigning is unnecessary. [FN162] Second, an SSF only may solicit funds from a narrowly defined class of a nonprofit group's "members," which could severely restrict the ability of some groups to raise money for political campaign activity. [FN163] Third, Brennan argued that FECA's "extensive" organizational and reporting requirements for PACs would unconstitutionally burden nonprofit groups, such as small groups of "like-minded persons" who may seek to fund their "occasional endorsement of political candidates . . . by means of garage sales, bake sales, and raffles." [FN164]

MCFL is far from a victory for nonprofit groups seeking to engage in unfettered political campaign activity. Under the decision, I.R.C. § 501(c)(4) organizations must still establish SSFs for nonindependent political campaigning, such as express advocacy that is coordinated with a candidate. IRC limitations on the extent of political campaign activity by charities and social welfare groups also remain in place. All social welfare organizations, including those covered by MCFL, must operate primarily for purposes other than political campaigning. [FN165] Charities are similarly restricted in that they can engage in only limited political activities and no political campaigning. [FN166] Finally, a nonprofit organization closely associated with a for-profit business, such as the Republic Education Fund's ties to TRIAD, is not protected by MCFL. [FN167]

In a number of ways, then, the nonprofit PAC requirement would provide more freedom than the current law for charities and social welfare groups to engage in political campaign activity. With the creation of nonprofit PACs, charities and social welfare groups could engage in unlimited political campaigning, but only through FECA-regulated SSFs. Furthermore, any questions raised by MCFL about the constitutionality of the non-profit *1001 PAC proposal can be remedied by making slight changes to the PAC requirement or the existing laws governing nonprofit organizations.

A primary objection raised by Brennan, for instance, was that ideological, nonprofit groups should not be forced to establish SSFs for independent expenditures because such groups do not generate business income that can be used to corrupt the political process. This ruling should not be fatal to the nonprofit PAC requirement, however, because it is based on current laws that permit nonprofit groups to engage in some degree of political activity without jeopardizing their tax status.

The Court held that the political and political campaign activities of charities and social welfare groups can be restricted, due to the fact that such organizations are taxpayer-subsidized [FN168] and benefit from the "special advantages that the State confers on the corporate form." [FN169] It is only by legislative grace that I.R.C. § 501(c)(4) tax status allows social welfare groups to participate in some political campaign activity. Congress can easily change the tax code to ban social welfare groups from taking part in any such activity, even through SSFs, [FN170] as is the case for charities. [FN171]

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From this perspective, MCFL holds only that ideological, nonprofit organizations engaged in independent campaign activities permitted by their tax status cannot be required to establish SSFs. By altering the IRC to create a blanket prohibition on political campaign activity by [I.R.C. § 501\(c\)\(3\)](#) or [§ 501\(c\)\(4\)](#) nonprofit groups without SSFs, the problems presented by MCFL are avoided, a fact indirectly affirmed by the Court. [\[FN172\]](#)

A second issue raised by MCFL is the solicitation limitations placed on SSFs that prevent a nonprofit group from contacting even "those persons who have . . . contributed to or indicated support for the organization in the past." [\[FN173\]](#) This constraint could fatally handicap the ability of many nonprofit groups to raise sufficient funds to "engage in political speech warranting *1002 the highest constitutional protection." [\[FN174\]](#) Therefore, the "member" requirement and similar restrictions [\[FN175\]](#) on SSF solicitations should be eliminated (or loosened, if constitutionally acceptable standards can be developed) for ideological, nonprofit PACs. [\[FN176\]](#)

The last major hurdle presented by MCFL is FECA's organizational and reporting requirements for PACs, discussed in detail by Justice Brennan. [\[FN177\]](#) Justice Brennan warned that such mandates may chill political speech, with some nonprofit groups, "[f]aced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports, and to monitor garage sales," deciding "that the contemplated political activity [is] simply not worth it." [\[FN178\]](#) It is important to note, however, that Justice Brennan's objections are not part of MCFL's holding, as they appear in the only portion of his opinion not adopted by the Court. [\[FN179\]](#) In fact, at least four other Justices, led by Chief Justice Rehnquist, expressly rejected Justice Brennan's claims that such "burdens" on nonprofit groups engaged in political campaign activity are unconstitutional. [\[FN180\]](#)

Still, it should be obvious that the Republic Education Fund and Vote Now'96 are the types of culprits that create the need for nonprofit PACs. It is hardly going out on a limb to allege that these groups have never funded their activities through "bake sales," and it is unlikely that such organizations, run by highly sophisticated political professionals, will find FECA's requirements to be so complicated that any desired political campaign activity will be abandoned. Reasonable guidelines should be considered that will establish a level of political campaign activity that must be surpassed for an ideological, nonprofit organization to become subject to the PAC requirement. [\[FN181\]](#) For groups that remain below this threshold, the usual, *1003 less stringent FECA regulations for political campaign activity will still apply. [\[FN182\]](#)

With only minor changes to the nonprofit PAC proposal, requiring charities and social welfare groups to engage in political campaign activity only through SSFs seems to satisfy any constitutional concerns. Both [I.R.C. § 501\(c\)\(3\)](#) and [§ 501\(c\)\(4\)](#) organizations likely will find that the ability to make direct campaign contributions and to engage in express advocacy via PAC subsidiaries will entail much gain with little pain.

2. The Constitutionality of the Nonprofit PAC Requirement for Noncampaign Political Activity

The real First Amendment battleground for nonprofit PACs is the requirement that charities and social welfare groups must route all political activities--including noncampaign activities--through SSFs subject to FECA. This issue is difficult to discuss without getting sucked into a constitutional black hole, where different opinions as to what the Court will allow swirl about and frequently collide. [\[FN183\]](#) In defense of the nonprofit PAC requirement, however, justifications exist for insisting that the political activities of charities and social welfare groups only be conducted by SSFs and that such a requirement is constitutional.

As discussed in Part IV.C.1, the political campaign activities of charities and social welfare groups may be restricted due to the benefits these nonprofit groups enjoy as taxpayer-subsidized corporate entities. [\[FN184\]](#) The noncampaign political activity of such groups can be restricted under similar reasoning, as is illustrated by the IRC mandate that no substantial part of a charity's activity may be for propaganda purposes or for influencing legislation. [\[FN185\]](#) The First Amendment should not prevent further express limits on *1004 the political activities in which [I.R.C. § 501\(c\)\(3\)](#) and [§ 501\(c\)\(4\)](#) organizations may engage, [\[FN186\]](#) especially because an avenue remains open for such groups to take part in political activity through PACs. [\[FN187\]](#) By simply expanding the IRC's existing rules against political activity to encompass such actions, the voter registration drives of Vote Now'96 and the "issue" advertisements of the Republic Education Fund can be prohibited unless a FECA-regulated SSF is used.

A second, more innovative--and speculative [\[FN188\]](#)--approach to regulating much of the political activity that presently escapes FECA's requirements is to expand the definition of political campaign activity set forth in *Buckley v. Valeo*. [\[FN189\]](#)

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In *Buckley*, the Court ruled that only political speech expressly advocating the election or defeat of a candidate is subject to FECA, because a broader application of the law would create ambiguous limits as to what speech is regulated. [\[FN190\]](#) The Court then listed examples of express advocacy, such as urging voters to "support" or to "oppose" a political candidate, in a footnote. [\[FN191\]](#)

Many campaign finance reformers, who are opposed to unregulated advertisements like the Republic Education Fund's that "any reasonable person would view . . . as promoting a specific candidate," [\[FN192\]](#) contend that the Court's list of words and phrases is not an exhaustive definition of express advocacy. [\[FN193\]](#) In fact, legislative proposals recently have been introduced in *1005 Congress that would expand the universe of regulated political campaign speech to include advocacy that, in some specified way, supports or opposes a clearly identified candidate even without using "express" terms. [\[FN194\]](#)

Under such broader definitions of express advocacy, the political attack advertisements of groups like the Republic Education Fund are automatically subject to FECA, eliminating a primary objection to the PAC proposal that nonprofit groups should not be forced to use FECA-regulated SSFs for noncampaign (as currently defined) political activity. Opponents to these attempts to broaden the definition of express advocacy, however, "counter that the Court has defined the terms once and for all and it is . . . [[unconstitutional] to expand on the [*Buckley*] decision." [\[FN195\]](#)

Even if it is constitutional to require charities and social welfare groups to engage in political activity only through PACs, it is a safe bet that nonprofit groups like Vote Now'96 and the Republic Education Fund will vociferously protest the PAC requirement. Implementing such a reform likely will be similar to jabbing a stick in a hornet's nest, with angry charities and social welfare groups storming the Sunday morning political talk shows, proclaiming that their right to free speech has been filched. To borrow a phrase from Shakespeare, however, "[t]he lady doth protest too much methinks." [\[FN196\]](#) Is there really anything draconian about requiring nonprofit organizations to conduct their political activities through PACs, unless these groups are purposely attempting to evade the IRC and FECA?

With nonprofit PACs in place, charities and social welfare groups may engage in unlimited political and political campaign activity as long as the federal election laws are satisfied. Vote Now'96 could openly advertise itself as a vote-getter for the Democratic Party, while the Republic Education Fund could sponsor "anti-liberal" advertisements until the television networks run out of available commercial space. The nonpolitical endeavors of charities and social welfare groups will not be impacted directly in any way.

All political activities of nonprofit groups will be subject to FECA, but this hardly works as a gag order on the political aspirations of charities and *1006 social welfare groups. Disclosure requirements, although a headache to those wishing to keep their political activities a secret, are generally thought of as critical to "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing . . . [political activity] to the light of publicity." [\[FN197\]](#) Nonprofit organizations that come to the political soiree should have to reveal with whom they are dancing. [\[FN198\]](#) Prohibiting nonprofit groups and others from using foreign money for political purposes is similarly a less than earth-shattering reform; if anything, such a provision is probably what Congress has intended all along. [\[FN199\]](#)

The primary pitfall for the nonprofit PAC proposal is the contribution limit that applies to federal PACs. Although nonprofit PACs, like all federal PACs, only face spending limits when engaged in political campaign activity, FECA does restrict how much a contributor may give to a PAC--regardless of how the money is ultimately used. Contributions by individuals to PACs are capped at \$5,000 per election, [\[FN200\]](#) a far cry from the nearly half-million dollar donation Vote Now'96 received from just one foreign supporter. [\[FN201\]](#)

Imposing contribution limits on nonprofit PACs engaged in political, but not political campaign, activity is severe. After all, in these cases the PAC subsidiaries would not be taking part in activities that are normally subject to FECA requirements. For this reason, a concession is in order: The size of contributions to nonprofit PACs should only be restricted when *1007 the funds are used for political campaign purposes. [\[FN202\]](#) Although this is a significant adjustment, it is fair to the nonprofit groups and may be necessary for the PAC requirement to survive a constitutional challenge.

It is important to note here that a stalemate on the issue of regulating the political activities of nonprofit organizations is the practical equivalent of throwing our nation's election laws out the window. [\[FN203\]](#) Without succumbing to the "Chicken Little Syndrome" (that is, arguing for reforms by frantically claiming that the "sky is falling"), it seems incredible that we now live under a system where, hypothetically, communist foreign nationals can legally make millions of dollars in anonymous contributions to a nonprofit group that targets American citizens with the goal of persuading them to support

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specific candidates for federal office. [\[FN204\]](#) Or, perhaps more commonly, is it not a perversion of our political system when nonprofit groups become key players in political campaigns, but are immune from FECA as long as they make no direct financial contributions to the candidates and avoid terms like "vote for" or "defeat" ? The nonprofit PAC requirement is an important step toward ensuring that political activities of nonprofit groups are properly regulated.

Conclusion

In the 1996 federal elections, "there were really two campaigns conducted"-- "an 'overt' campaign and a 'covert' campaign." [\[FN205\]](#) In the overt campaign, all participants abided by FECA. [\[FN206\]](#) The rules of the covert campaign, however, "were utterly different." [\[FN207\]](#) "In this parallel campaign, there *1008 was no disclosure, and there were no limits on how much money could be contributed. Tax-exempt 'issue advocacy' groups and other conduits were systematically used to circumvent the [FECA]," "severely undermin[e] our campaign finance laws and corrupt[ing] the electoral process." [\[FN208\]](#) This is the political underworld in which groups like Vote Now'96 and the Republic Education Fund thrived, and "[t]here is every reason to believe that these de facto campaign[s] . . . determined the outcome of some . . . close [federal] races." [\[FN209\]](#)

Far from being an aberration of the 1996 elections, an "influx of new [[nonprofit] groups" are joining Vote Now'96 and the Republic Education Fund in the political arena, sending "a clear signal that the aggressive role taken by [[nonprofit] organizations in the 1996 campaign[s] likely will be repeated, or expanded," in future elections. [\[FN210\]](#) These charities and social welfare groups, like those in 1996, will "spen[d] millions of dollars on activities designed to affect the outcome of federal elections . . . , yet none [will] disclose[] their contributions or expenditures to the public or acknowledge[] that [FECA] applie[s] to their operations." [\[FN211\]](#) Such secret political activity of nonprofit organizations is the Achilles' heel of federal campaign finance laws and blatantly violates the purposes for which charities and social welfare groups were created.

This Comment proposes that nonprofit groups should be required to conduct their political activities through PACs. The nonprofit PAC requirement is a critical reform that will help plug loopholes in the IRC and FECA that permit taxpayer-subsidized charities and social welfare groups to engage in unregulated political activity. Confronted with this proposal, groups like Vote Now'96 and the Republic Education Fund will no doubt "defend their behavior by waving the First Amendment as if it were some kind of Constitutional hall pass, where having the right to speak freely justifies any and all behavior exercised under it, no matter whom it hurts." [\[FN212\]](#) Congress should not give in to these empty arguments. Nothing less than the integrity of our democracy is at stake.

[\[FNd1\]](#). B.A. 1994, Washington State University; J.D. Candidate 1999, University of Pennsylvania. This Comment is a criticism of people bending the rules, so I will not ask the Law Review editors for more space to express my appreciation to those who helped me with this paper--even though one footnote is not enough. The following, however, deserve my special thanks: my parents, Bob and Barb Meier; the hard-working members of the University of Pennsylvania Law Review; and the "12th Floor Torti." Lastly, to the politicians who are entrusted with leading our democracy, I offer this cautionary note from former President Ronald Reagan: "Politics is supposed to be the second oldest profession. I have come to realize that it bears a very close resemblance to the first." The Oxford Dictionary of Humorous Quotations 256 (Ned Sherrin ed., Oxford Univ. Press 1995).

[\[FN1\]](#). See Investigation of Illegal or Improper Activities in Connection with the 1996 Federal Election Campaign--Part VII: Hearings Before the Senate Comm. on Governmental Affairs, 105th Cong. 251 (1997) [hereinafter Investigation of Illegal or Improper Activities Part VII] (testimony of R. Warren Meddoff, former Director of Governmental Affairs, Bukkehave, Inc.) (testifying that the fundraising dinner occurred on October 22, 1996). The 1996 general election took place on November 5.

[\[FN2\]](#). See id.

[\[FN3\]](#). See id. Meddoff's ticket was paid for by his employer, the American subsidiary of Bukkehave, Inc., a Danish firm that "supplies vehicles and spare parts...[to] the third world." Id. at 250-51.

[\[FN4\]](#). Id. at 252.

[\[FN5\]](#). Id.

[\[FN6\]](#). Id. at 251 .

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[FN7]. See id. at 252 ("[T]he President asked if...he could have another one of [the business] cards for his staff, and [said] that somebody would get in touch with me in a few days.").

[FN8]. See id. (testifying that Ickes contacted Meddoff on October 26, 1996 while calling from Air Force One).

[FN9]. See id. at 274 (statement of Sen. Don Nickles) (stating that Meddoff was offering "unheard-of contributions" to Clinton's reelection campaign, and that "no one individual" has ever made such large donations to a political campaign).

[FN10]. For seven years, Meddoff and Morgan were partners in a speculative-- and unsuccessful--attempt to sell "pre-1940, gold-backed German loan documents," which Germany refuses to honor, to nations now owing money to Germany and seeking to offset their debts to that country. Id. at 250-51, 261, 286 (testimony of R. Warren Meddoff, former Director of Governmental Affairs, Bukkehave, Inc.). However, despite sharing in multi-billion dollar sales contracts (if a deal was ever successful) and speaking on the phone with each other up to "five to ten times a day" for years, the two had never met in person. Id. at 258.

[FN11]. Id. at 252-53.

[FN12]. See id. at 253 ("Mr. Morgan felt that he would have a very large tax liability from [the income from which the donations would be made], and he wanted to see if any special consideration could be given to him by making this contribution to receive a tax-favorable position.").

[FN13]. Id.

[FN14]. Id.

[FN15]. See id.

Mr. Ickes called me, and even though [I] had made it clear [that Morgan and I] were not expecting funds for quite a few days, he said, "[Clinton's campaign has] an immediate need for \$1.5 million within the next 24 hours." ...[A]nd I said, "I don't believe [the money will be available in] 24 hours. Perhaps within 48"
Id.

[FN16]. See id. ("[A]nd I said, 'We don't even know where you need us to send the money or what it's for,' and [Ickes] sa[id], 'I'll get back to you'").

[FN17]. See Investigation of Illegal or Improper Activities in Connection with the 1996 Federal Election Campaign--Part IX: Hearings Before the Senate Comm. on Governmental Affairs, 105th Cong. 95 (1997) [hereinafter Investigation of Illegal or Improper Activities Part IX] (statement of Harold M. Ickes, former Deputy Chief of Staff to the President) ("I was on Air Force One when I talked to Mr. Meddoff. The memorandum...was dictated by me...to somebody at the White House.").

[FN18]. See id. ("[The Ickes list] was typed [at the White House], and it was sent from the White House to Mr. Meddoff.").

[FN19]. The Ickes fax directed Meddoff to make contributions to the following groups: Vote Now'96, the National Coalition of Black Voter Participation, the Democratic National Committee, and the Defeat 209 campaign. See Investigation of Illegal or Improper Activities Part VII, supra note 1, at 645-47 (reporting a facsimile from Harold M. Ickes, former White House Deputy Chief of Staff to R. Warren Meddoff, former Director of Governmental Affairs, Bukkehave, Inc. that listed the name, tax status, bank account information and contact information, and requested donation amount for each group selected by Ickes to receive a contribution).

[FN20]. Both organizations are [I.R.C. § 501\(c\)\(3\)](#) charities. See id. at 294 (statement of Sen. Joseph I. Lieberman). Contributions to such groups are usually tax deductible. See infra note 77 (noting that contributions to qualified charities are deductible under [I.R.C. § 170\(c\)](#)).

[FN21]. See infra note 70 (listing the purposes for which charities may operate to qualify under [I.R.C. § 501\(c\)\(3\)](#)).

[FN22]. See infra notes 69-77 and accompanying text (discussing the limits placed on charities' political and political campaign activities). For a discussion of the difference between "political activity" and "political campaign activity," see

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infra note 76, noting that "political campaign activity" is a subset of "political activity."

[FN23]. Defeat 209 "spearhead[ed] the opposition in California to Proposition 209,...subsequently approved by voters, [which] prohibits race-and gender-based preferences in state hiring, contracts and college admissions." Lawrence M. O'Rourke, Fundraising Reform Ahead?, Sacramento Bee, Sept. 20, 1997, at A1.

[FN24]. Political party organizations, such as the DNC, are organized under [I.R.C. § 527](#), and such groups usually take part in substantial political campaign activity. See infra notes 85-86 and accompanying text (describing the activities in which political organizations engage). Defeat 209 was an [I.R.C. § 501\(c\)\(4\)](#) organization. See Investigation of Illegal or Improper Activities Part VII, supra note 1, at 294 (statement of Sen. Joseph I. Lieberman) (noting the tax status of Defeat 209). Groups established under [I.R.C. § 501\(c\)\(4\)](#) are social welfare organizations that typically engage in extensive lobbying on issues, but may only engage in limited political campaign activities. See infra notes 80-83 and accompanying text (noting that social welfare groups can lobby, but are limited in their capacity to engage in political campaign activity). Contributions to either type of organization do not qualify for tax deductions. See, e.g., Bruce R. Hopkins, Charity, Advocacy, and the Law 250, 464 (1992).

[FN25]. See Investigation of Illegal or Improper Activities Part VII, supra note 1, at 255 (testimony of R. Warren Meddoff, former Director of Governmental Affairs, Bukkehave, Inc.) ("[Ickes] called me and very nicely said, 'I sent you that fax in error. I shouldn't have sent it. Would you please shred it?'").

[FN26]. Investigation of Illegal or Improper Activities Part IX, supra note 17, at 94 (statement of Harold M. Ickes, former Deputy Chief of Staff to the President) (emphasis added). In a June 27, 1997 deposition, Ickes also denied instructing Meddoff to shred the facsimile, but conceded that he "may have told Meddoff that the fax was 'inoperative.'" 3 Senate Comm. on Governmental Affairs, Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns: Final Report, S. Rep. No. 105-167, at 3628- 29 (1998) [hereinafter Final Senate Report on 1996 Illegal Campaign Activities].

[FN27]. See Investigation of Illegal or Improper Activities Part VII, supra note 1, at 276 (testimony of R. Warren Meddoff, former Director of Governmental Affairs, Bukkehave, Inc.) (noting that Morgan did not contribute to Clinton's campaign).

[FN28]. Morgan, of Richardson, Texas, planned to make the \$55 million contribution from a supposed \$300 million profit "from the sale of two old railroad bonds." Robert Nolin, Businessman Regrets Contribution Offer: Potential Clinton Donor Paid Price to Be a Political Player, Sun-Sentinel (Ft. Lauderdale), Sept. 28, 1997, at 1B. Morgan claims to have sold the bonds since then, but has refused to disclose the sum he received for the historical documents. See id.

[FN29]. See Investigation of Illegal or Improper Activities Part VII, supra note 1, at 301 (statement of Sen. John Glenn) (noting that Morgan, in 1995 and 1996, was subject to two IRS liens "totaling about \$26,000"). In 1988, after defaulting on a personal note, Morgan appeared in court claiming that "he could not afford an attorney...[and] had no financial assets to have himself represented." Id. at 279 (statement of Sen. Robert G. Torricelli).

[FN30]. See infra note 48 (noting that the Republic Education Fund was an [I.R.C. § 501\(c\)\(4\)](#) social welfare group). Following the 1996 elections, the Republic Education Fund "switched [its tax] status from [a] 'social welfare' group[] to the same tax status designed to fit political parties." Jeanne Cummings, "Issue Advocacy" Groups to Play Bigger Role, Wall St. J., Mar. 6, 1998, at A16. The Republic Education Fund's new tax status, likely reflecting an attempt by the group to "get off of the media radar screen" and "avoid trouble," "provides the same, if not better, tax benefits and clearly allows political participation." Id. The Republic Education Fund's use of the political party tax status "'push[es] the envelope' of tax and campaign finance rules," and is based upon "two obscure IRS 'private [letter] rulings'" on which the IRS refuses to comment. Karren Gullo, IRS Rules Will Let Donors to "Civic" Groups Stay Secret, Denver Post, Oct. 24, 1997, at A32. Some tax experts predict that the Republic Education Fund's move could set off a new trend among nonprofit groups seeking to evade IRC and Federal Election Campaign Act limits on political activity. See Cummings, supra. This possible new loophole is not examined further in this Comment.

[FN31]. The other charity on the Ickes list, the Black Voter Coalition, could also serve as an example of politics and charitable causes intertwining.

[T]he DNC [has] acknowledged that the party gave \$117,500 to the [Black Voter Coalition] and asked several Democratic donors to contribute directly to the group. The coalition helped register 150,000 African American voters during the "Million

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Man March" in 1995 and it worked to elect Democrats to Congress in 83 House districts during the [1996] election cycle. Ralph Frammolino, DNC Tied to Plan to Test Gifts Limits, L.A. Times, Apr. 4, 1997, at A1.

[FN32]. See Investigation of Illegal or Improper Activities Part VII, *supra* note 1, at 647 (facsimile from Harold M. Ickes, former White House Deputy Chief of Staff to R. Warren Meddoff, former Director of Governmental Affairs, Bukkehave, Inc.).

[FN33]. Investigation of Illegal or Improper Activities Part IX, *supra* note 17, at 167 (statement of Mark F. Thomann, former Midwest Finance Director, DNC).

[FN34]. Charities, such as Vote Now'96, are tax exempt, and contributions to such groups are tax deductible. See *infra* notes 69, 77 (noting that charities are tax exempt and that contributions to such groups are tax deductible).

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

Regan v. Taxation with Representation, 461 U.S. 540, 544 (1983). Because even political parties are, for the most part, tax-exempt, see *infra* notes 69, 88 (noting that political parties are tax exempt, except for taxes imposed on some limited types of income), "taxpayer subsidized" and related terms in this Comment typically will refer only to the additional tax deductions given to charitable contributions.

[FN35]. Jill Abramson & Leslie Wayne, Both Parties Were Assisted by Nonprofit Groups in 1996, N.Y. Times, Oct. 24, 1997, at A1.

[FN36]. Burying the Treasure, Plain Dealer (Cleveland), Nov. 10, 1997, at 10B.

[FN37]. See Abramson & Wayne, *supra* note 35 (reporting that the Clinton's hosted guests for a White House dinner on July 12, 1996 to "help generate donations" for Vote Now'96).

[FN38]. *Id.*

[FN39]. See Investigation of Illegal or Improper Activities Part VII, *supra* note 1, at 649.

[FN40]. See 2 Final Senate Report on 1996 Illegal Campaign Activities, *supra* note 26, at 2501-05 (noting that China's government "fashioned a plan before the 1996 elections" to "influence our political process," and that China acted "to influence U.S. elections"); see also *id.* at 2503 (noting that Trie has been "connected to" political donations made with "foreign money"); China Bank Reportedly Sent Money to DNC Fund-Raiser, Dallas Morning News, Apr. 2, 1997, at 8A (reporting that the government-owned Bank of China "wired large sums of money" to Trie in 1995 and 1996 while he was raising funds for Clinton and the Democratic Party). Trie initially "fled to Beijing rather than testify before a Senate committee investigating campaign abuses," but subsequently returned to the United States and "surrendered to federal agents." Richard Sisk, Clinton Pal Turns Himself in, N.Y. Daily News, Feb. 4, 1998, at 16.

[FN41]. Charles R. Babcock & Susan Schmidt, Voters Group Donor Got DNC Perk, Wash. Post, Nov. 22, 1997, at A1. "Chagoury was solicited by a DNC fund- raiser...to give to...Vote Now ['96]." *Id.*

[FN42]. *Id.*; see also *infra* note 93 (noting that foreign nationals are prohibited by FECA from making political contributions).

[FN43]. Investigation of Illegal or Improper Activities Part IX, *supra* note 17, at 163 (statement of Sen. Fred Thompson). The swap...[was] relatively simple.... [T]he DNC would persuade a wealthy donor to give \$100,000 to Ron Carey's election campaign. In return, the Teamsters [controlled by Carey] would contribute some multiple of that amount, perhaps a million dollars, out of its treasury or PAC funds to the [[Democratic Party]

...In furtherance of the conspiracy in or about July 1996, the DNC determined that a foreign citizen who previously pledged to contribute \$100,000 to the DNC [but who was barred under FECA from making such a political donation] was willing to make that contribution to the Teamsters for a Corruption-Free Union.

When it was determined that the foreign citizen was an employer and, hence, under the Federal labor laws could not contribute to the Carey campaign, the foreign money was steered by the DNC to a tax-exempt organization called Vote Now

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1996.

Id. at 163-64 (statement of Sen. Fred Thompson) (internal quotations omitted).

[FN44]. See, e.g., 6 Final Senate Report on 1996 Illegal Campaign Activities, *supra* note 26, at 9529 (Minority Views) (Additional views of Sen. Joseph I. Lieberman) ("[T]he sad truth is that most of the worst behavior that occurred in the 1996 elections was legal.... [T]he conversion of supposedly non-partisan, tax-exempt groups into political agents...plainly violates the spirit of our laws. Yet [it] appears to be legal.") Aside from Vote Now'96's implication in the DNC-Teamsters-Carey swap scheme likely offering further evidence that the charity is closely tied to the Democratic Party, the alleged illegal plot to funnel contributions to Carey via Vote Now'96 is outside the scope of this Comment and is not discussed further.

[FN45]. See 3 Final Senate Report on 1996 Illegal Campaign Activities, *supra* note 26, at 3993 ("The 1996 election witnessed an unprecedented level of political activity by nonprofit groups.... [D]uring the 1996 election cycle, nonprofit groups spent between 55 and 70 million dollars on political advocacy campaigns.").

[FN46]. Annenberg Public Policy Center of the University of Pennsylvania, Issue Advocacy Advertising During the 1996 Campaign: A Catalogue 23 (1997) [[hereinafter Annenberg].

[FN47]. See *id.* (noting that Democratic U.S. Senate candidate Winston Bryant was opposed, and defeated, by Republican Tim Hutchinson).

[FN48]. See Gullo, *supra* note 30 (reporting that the Republic Education Fund was an [I.R.C. § 501\(c\)\(4\)](#) social welfare group in 1996). For a discussion of [I.R.C. § 501\(c\)\(4\)](#) social welfare organizations, see *infra* Part II.A.2 and accompanying text.

[FN49]. See Gullo, *supra* note 30.

[FN50]. See Annenberg, *supra* note 46, at 23.

[FN51]. See *id.* Actually, the Republic Education Fund "has been through as many incarnations as a candidate's stump speech." Eliza Newlin Carney, *Stealth Bombers*, 29 Nat'l J. 1640, 1640 (1997). The organization was originally established by Ronald Reagan as a PAC to "help bankroll his first successful presidential bid [in 1980]." *Id.* The Republic Education Fund operated actively as a PAC until at least 1992, and, after "a period of near- dormancy,...resurfaced at the start of the 1995-96 election cycle" as a social welfare organization. *Id.*

[FN52]. 5 Final Senate Report on 1996 Illegal Campaign Activities, *supra* note 26, at 6290-91 (Minority Views). "On September 27, 1996, six weeks prior to the election,...Triad entered into a formal consulting agreement with...[the Republic Education Fund that] granted to Triad carte blanche authority to act on behalf of...[the] organization[]." *Id.* at 6302-03.

[FN53]. See *id.* at 6293 ("Triad is not a business in the conventional sense, because it charges no fees and generates no profit.").

[FN54]. See *id.* at 6291 (noting that TRIAD was incorporated in 1996 and "established an office on Capitol Hill").

[FN55]. Abramson & Wayne, *supra* note 35.

[FN56]. 5 Final Senate Report on 1996 Illegal Campaign Activities, *supra* note 26, at 6291 (Minority Views).

[FN57]. *Id.* at 6295.

[FN58]. See *id.* at 6304 ("Both the content of the [Republic Education Fund's] advertising and the determination of where to air advertising was clearly influenced by [the consultants'] conversations with the candidates and the campaigns.").

[FN59]. *Id.* (stating that the candidates benefiting from such negative advertising "were the same candidates for whom Triad had solicited contributions and advised on campaign and fundraising strategy"). A Senate investigation concluded that the Republic Education Fund's advertisements were not FECA-regulated "coordinated expenditures," because the Republican candidates did not "direct[] the substance or location of [the Republic Education Fund's] issue advocacy expenditures" and had only "abstract" communication with TRIAD. 3 *id.* at 4008. See generally [2 U.S.C. § 441a- \(a\)\(7\)\(B\)\(i\) \(1994\)](#) (stating that an expenditure "by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a

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candidate...shall be considered to be a contribution to such candidate"); [11 C.F.R. § 109.1\(b\)\(4\)\(i\)\(A\) \(1998\)](#) (stating that an expenditure is a contribution to a candidate if it is based on information given by the candidate "with a view toward having an expenditure made").

[FN60]. See 5 Final Senate Report on 1996 Illegal Campaign Activities, *supra* note 26, at 6308 (Minority Views) (noting that the Republic Education Fund "was entirely financed by Triad from its creation through September 1996"); see also *id.* at 6307 (noting that "Triad and...[the Republic Education Fund] were largely financed by a single backer," who is "suspected" to be Robert Cone, a businessman who supports conservative causes).

[FN61]. See *id.* at 5982 ("[S]everal Triad donors had contributed the legal maximum in 'hard dollars' to candidates who benefited from advertisements run by Triad's tax-exempt organization[.]").

[FN62]. Gullo, *supra* note 30.

[FN63]. Carney, *supra* note 51, at 1640. For a discussion of political "issue advertisements," see *infra* note 103 and accompanying text, noting that "issue advocacy" is used "as a ruse for partisan politicking."

[FN64]. See Annenberg, *supra* note 46, at 23 ("[T]he education fund paid for more than \$300,000 worth of television advertisements attacking Democratic Senate candidate Winston Bryant. The media campaign ran in late October in Little Rock and Jonesboro.").

[FN65]. See *infra* notes 102-07 and accompanying text (noting that the Republic Education Fund's advertisements are considered to be "issue advocacy" that is not subject to election limits); see also *infra* Part II.B (discussing the FECA requirements for political campaign activity).

[FN66]. See *supra* note 20 (noting Vote Now'96's tax status).

[FN67]. See *supra* note 48 (noting the Republic Education Fund's tax status).

[FN68]. See *supra* note 24 (noting the DNC's tax status).

[FN69]. See, e.g., Hopkins, *supra* note 24, at 6 (noting that charities, social welfare groups, and political organizations are three categories of tax exempt, nonprofit groups).

[FN70]. See [I.R.C. § 501\(c\)\(3\) \(1994\)](#) (noting that charities must be "operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition..., or for the prevention of cruelty to children or animals").

[FN71]. See *id.* (prohibiting charities from operating for the benefit of a specific individual).

[FN72]. *Id.*

[FN73]. *Id.* The Supreme Court has found that "political propaganda" refers to a full range of advocacy. See [Meese v. Keene, 481 U.S. 465, 477 \(1987\)](#) (noting that propaganda may be "slanted, misleading speech that does not merit serious attention" or advocacy that is "completely accurate and merit[s] the closest attention and the highest respect").

[FN74]. [I.R.C. § 501\(c\)\(3\)](#). The limits placed on [I.R.C. § 501\(c\)\(3\)](#) groups prevent charities from becoming "action organizations." 26 C.F.R. § 1.501(c)(3)-1(c)(3) (1998) (stating that a charity is not operated exclusively for an exempt purpose if it is an action organization). A group is an "action organization" if a "substantial part of its activities is attempting to influence legislation by propaganda or otherwise;" "it participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office;" or "[i]ts main...objectives may be attained only by legislation or defeat of proposed legislation" and it "advocates" these "objectives" instead of "engaging in nonpartisan analysis... and making the results thereof available to the public." *Id.*

[FN75]. See Hopkins, *supra* note 24, at 394 (defining political campaign activity under the IRC as participating or intervening in a political campaign on behalf of, or in opposition to, a candidate for public office).

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[FN76]. See *id.* at 408 ("The concept of 'political activity' is broader than the concept of 'political campaign activity.' That is, the political campaign intervention limitation applies only upon the occurrence of a particular, defined subset of political activity.").

[FN77]. See [I.R.C. § 170\(c\)](#) (allowing federal income, estate, and gift tax deductions for contributions to qualified charities).

[FN78]. 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i).

[FN79]. See Hopkins, *supra* note 24, at 433 ("A social welfare organization... cannot attract charitable contributions that are deductible for income, gift, and estate tax purposes."). But, "[a] social welfare organization will qualify for exemption as a charitable organization if it falls within the definition of charitable...and is not an action organization." 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i). For a description of "charitable" and "action organization," see *supra* notes 70, 74.

[FN80]. See Hopkins, *supra* note 24, at 433 ("[O]ne trade-off between [[[charities and social welfare groups]]] is a somewhat greater scope of permissible political campaign activities as opposed to deductible contributions as a source of revenue."). An organization that is organized and operated to inform the public by educational methods on a subject of public interest and concern may be exempt under [section 501\(c\)\(4\)](#) of the Code even though the subject evokes controversy and even though the organization advocates a particular viewpoint and seeks changes in law to reflect such viewpoint.
[Rev. Rul. 68-656, 1968-2 C.B. 216.](#)

[FN81]. See Hopkins, *supra* note 24, at 250 ("A social welfare organization may engage in any type of lobbying effort, both direct and grass roots, as long as its primary purpose is the advancement of social welfare.").

[FN82]. 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii).

[FN83]. See, e.g., [Rev. Rul. 81-95, 1981-1 C.B. 332](#) ("Although the promotion of social welfare...does not include political campaign activities, the regulations do not impose a complete ban on such activities for [section 501\(c\)\(4\)](#) organizations.").

[FN84]. See [I.R.C. § 527\(f\)\(1\) \(1994\)](#) (requiring that any political campaign expenditure of [I.R.C. § 501\(c\)\(4\)](#) nonprofit organizations be "subject to tax...as if it constituted political organization taxable income"); see also *infra* note 88 (noting that some gross income of political organizations is taxable).

[FN85]. [I.R.C. § 527\(e\)\(1\) \(1994\)](#).

[FN86]. *Id.* [§ 527\(e\)\(2\)](#).

[FN87]. See Hopkins, *supra* note 24, at 464 ("[I]ndividual donors are not entitled to claim a tax credit for contributions to political organizations.").

[FN88]. See [I.R.C. § 527\(b\)-\(c\)](#) (imposing a tax on political organizations for gross income, excluding exempt function income such as contributions or membership dues received, above allowable deductions).

[FN89]. FECA exempts some minor activities from its requirements, such as allowing voluntary itemized reporting requirements for small political campaign contributions. See, e.g., [2 U.S.C. § 434\(b\)\(3\) \(1994\)](#) (granting discretion to political committees to identify sources that contribute an aggregate amount of \$200 or less within a calendar year).

[FN90]. Anthony Corrado, *Creative Campaigning: PACs and the Presidential Selection Process* xiii (1992).

[FN91]. See [2 U.S.C. § 441a \(1994\)](#).

[FN92]. See *id.* [§ 434\(a\)\(4\)](#) (requiring "[a]ll political committees other than authorized committees of a candidate" to file, among other things, "monthly reports in all calendar years which shall be filed no later than the 20th day after the last day of the month").

[FN93]. See *id.* § 441e (prohibiting foreign nationals from making political contributions). A possible loophole may exist, however, that allows foreigners to make "soft money" contributions to federal political party committees. See [Bruce D. Brown, Alien Donors: The Participation of Non-citizens in the U.S. Campaign Finance System, 15 Yale L. & Pol'y Rev. 503,](#)

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[516 \(1997\)](#) ("The use of 'soft money'...is...essentially unconstrained by FECA, suggesting that foreign nationals may be able to make [soft money] contributions to the national political parties"). For a discussion of soft money, see *infra* note 152, noting that soft money is not subject to FECA regulations, yet often is used to influence federal elections. For a discussion of Congress's intent to bar foreign soft money contributions, see *infra* note 199, noting Congress's intent to prohibit foreign contributions from having any impact on U.S. elections.

[\[FN94\]](#). See Abramson & Wayne, *supra* note 35 (quoting a Vote Now'96 attorney as stating that voter registration is the "only interest" of the charity's financial supporters); Babcock & Schmidt, *supra* note 41 (quoting a DNC spokesperson as stating that Vote Now'96 is "'a voter participation project of importance to the DNC...because of its effort to increase participation in traditional[ly] disenfranchised, low income and minority communities"). See generally David B. Magleby & Candice J. Nelson, *The Money Chase* 206 (1990) ("Another source of undisclosed campaign-related expenditures is nonprofit foundations that pursue voter registration and get-out-the-vote drives.... Although they are in principle nonpartisan, in fact they often focus their election activities on demographic groups that have predictable partisan tendencies."); Carney, *supra* note 51, at 1640 ("Leaders of politically active tax-exempt groups maintain that they are educating the public and promoting legislative issues, not influencing elections.").

[\[FN95\]](#). See *supra* note 35 and accompanying text (noting that Vote Now'96 operated to increase minority voter turnout in heavily Democratic areas, but that the group claimed to be nonpartisan).

[\[FN96\]](#). See, e.g., [I.R.C. § 4945\(f\) \(1994\)](#) (authorizing nonpartisan voter registration drives by tax-exempt organizations as a permissible exempt activity). Under [I.R.C. § 4945\(f\)\(5\)](#), voter registration efforts are considered nonpartisan for tax purposes if contributions...[to fund the] drives are not subject to conditions that they may be used only in specified States, possessions of the United States, or political subdivisions or other areas of any of the foregoing, or the District of Columbia, or that they may be used in only one specific election period.
Id.

[\[FN97\]](#). See, e.g., [Priv. Ltr. Rul. 95-40-044 \(Oct. 6, 1995\)](#) (authorizing a charity's intention to register "large numbers of female voters, particularly in minority communities" as a proper activity).

[\[FN98\]](#). Abramson & Wayne, *supra* note 35.

[\[FN99\]](#). See, e.g., Babcock & Schmidt, *supra* note 41 (noting that foreigners "may legally contribute to nonprofit groups").

[\[FN100\]](#). See *supra* note 96 (noting that a qualified voter registration drive is a permissible charitable activity).

[\[FN101\]](#). See *supra* text accompanying note 46 (quoting the Republic Education Fund's anti-Bryant ad).

[\[FN102\]](#). See [Buckley v. Valeo, 424 U.S. 1, 42 \(1976\)](#) (permitting the "discussion of issues and candidates" without necessarily becoming subject to limits on express advocacy); see also Annenberg, *supra* note 46, at 3 ("Issue advocacy describes a communication to the public whose primary purpose is to promote a set of ideas or policies.").

[\[FN103\]](#). See, e.g., Annenberg, *supra* note 46, at 3 ("To the naked eye,... issue advocacy ads are often indistinguishable from ads run by candidates. But in a number of key respects, they are different. Unlike candidates, issue advocacy groups face no contribution limits or disclosure requirements. Nor can they be held accountable by the voters on election day.").

[\[FN104\]](#). *Id.* at 4.

[\[FN105\]](#). [Buckley, 424 U.S. at 44 n.52.](#)

[\[FN106\]](#). See [id. at 44](#) (noting that FECA limits on express advocacy "must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office"); see also Annenberg, *supra* note 46, at 3 ("Express advocacy describes a communication to the public whose primary purpose is to advocate the election or defeat of a candidate."). But see [FEC v. Furgatch, 807 F.2d 857, 864 \(9th Cir. 1987\)](#) (ruling that an anti-President Jimmy Carter advertisement, which cautioned voters "Don't let him do it," was express advocacy despite the absence of "magic words" in the ad).

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[FN107]. [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

[Buckley, 424 U.S. at 42.](#)

[FN108]. As nonprofit corporations, charities are subject to FECA's prohibition against corporate political campaigning. See [2 U.S.C. § 441b \(1994\)](#) ("It is unlawful for ... any corporation ... to make a contribution or expenditure in connection with [a federal election]"). Under Federal Election Commission ("FEC") regulations, the bar against corporate political campaigning is violated if a corporation's communication, "when taken as a whole and with limited reference to external events, such as the proximity of the election, could only be interpreted by a reasonable person" as advocating the election or defeat of a candidate. [11 C.F.R. § 100.22\(b\) \(1998\)](#) (emphasis added). This "reasonable person" test does not require that "magic words" be used in order for a corporation to be found in violation of the [2 U.S.C. § 441b](#) prohibition against corporate express advocacy. See Scott E. Thomas, *Hot Issues--Have the Courts Cooked the FECA?*, in *Corporate Political Activities 1998: Complying with Campaign Finance, Lobbying and Ethics Laws* 547, 549-50 (1998) (noting that the FEC uses a "reasonable person approach" that does not require "magic words" to enforce [§ 441b](#)). Under this standard, the Republic Education Fund's anti-Bryant advertisement arguably could be considered express advocacy in violation of FECA's prohibition on corporate political campaigning. The FEC's "reasonable person" standard, however, has been declared unconstitutional by a number of courts. See *id.* at 550 (noting that the "[First] and [Fourth] Circuits clearly will not enforce the FEC's 'reasonable person' 'express advocacy' definition," and that "[a] district court in the [Second] Circuit recently ruled [that] the FEC's 'express advocacy' definition was impermissible"). The standard has also been criticized as "defining express advocacy through external events and the perception of others," which is "precisely" what the Buckley Court rejected when ruling on other provisions of FECA. Bradley A. Smith, [Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban](#), 24 J. Legis. 179, 190 (1998). Putting aside issues of the constitutionality of the "reasonable person" standard, the rule's effectiveness is highly questionable if an incorporated social welfare organization like the Republic Education Fund can spend millions of dollars on advertisements that any reasonable person would view as attacking Democratic candidates and still not be cited for any violations of FECA.

[FN109]. See *supra* notes 78-84 and accompanying text (noting that a social welfare group must be engaged primarily in promoting the public good and that political campaigning is not considered to be such a purpose).

[FN110]. See *supra* Part II.B (discussing examples of the FECA's requirements for political campaign activity).

[FN111]. See *supra* notes 84, 88 and accompanying text (noting that the political campaign expenditures of social welfare groups are subject to the same taxes that apply to some limited types of political party income).

[FN112]. See 5 Final Senate Report on 1996 Illegal Campaign Activities, *supra* note 26, at 6301 (Minority Views) (noting that the Republic Education Fund "has [n]ever engaged in any service or activity other than paying for the production and airing of political advertising").

[FN113]. For example, with minimal requirements, "political" activity does not include even voter registration drives in targeted communities. See *supra* notes 96-97 and accompanying text (noting that voter registration drives, including those in targeted communities, are nonpartisan activities in which a charity or social welfare group may engage).

[FN114]. Abramson & Wayne, *supra* note 35.

[FN115]. [Nonprofit groups] who market their agendas to voters have come to realize that the name of the messenger is at least as important, if not more so, than the ideas for sale.... Often, the names bear little conviction to what's being communicated, or are so innocuous as to give no hint to who or what is behind them.

Ken Foskett, *Tax Exempts--The Hidden Force: An Interest Group by Any Other Name...Might Not Succeed*, Atlanta J., May 31, 1998, at A8.

[FN116]. Lance Gay, *Loopholes Gape for Elections in 2000*, Plain Dealer (Cleveland), Oct. 24, 1997, at 12A.

[FN117]. The social welfare group Citizens for Reform offers a telling example of the short life span of many nonprofit organizations apparently organized with the sole purpose of influencing elections. Citizens for Reform was headed by Peter

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Flaherty, a "conservative Republican activist" who "also [[ran] the Conservative Campaign Fund" and was "chairman of Citizens for Reagan." Annenberg, *supra* note 46, at 21. The group was founded in May 1996, and, like the Republic Education Fund, was a client of TRIAD. See *id.* (describing the activities of Citizens for Reform). Citizens for Reform lay dormant, however, until October 11, 1996, "when it opened a bank account." Abramson & Wayne, *supra* note 35. "In the next 20 days,...the group...received \$1.6 million from Triad donors in 12 bank transactions." *Id.* By the general election, on November 5, 1996, Citizens for Reform spent \$2 million on advertisements such as the following: "Who is Bill Yellowtail? He preaches family values, but he took a swing at his wife. And Yellowtail's explanation? He 'only slapped her.' But her nose was broken." Annenberg, *supra* note 46, at 4. This issue advocacy advertisement was "cited by political analysts as tipping a tight race" in favor of the Republican running against Yellowtail, a Democratic candidate for Congress. *Id.*

[FN118]. [E]nforcement [by the I.R.S. against nonprofit groups engaging in prohibited political activity] is based largely upon annual information returns filed by exempt organizations themselves. Given the relatively brief existence of the [nonprofits], by the time the I.R.S. ha[s] the information in hand, it [[i]s often too late to respond effectively. If the organization ha[s] not already ceased operating, all the I.R.S. c[an] do in response to violations [i] s to revoke the organization's exempt status. Deductions taken for donations to [charitable] organization[s] before revocation cannot be retroactively disallowed.

Laura Brown Chisolm, [Sinking the Think Tanks Upstream: The Use and Misuse of Tax Exemption Law to Address the Use and Misuse of Tax-Exempt Organizations by Politicians](#), 51 U. Pitt. L. Rev. 577, 593 (1990) (footnote omitted); see also George Rodrigue, For America's Nonprofit Sector, the Watchdog Seldom Barks, Nieman Rep., Mar. 22, 1998, at 50, 56 (noting that when journalists attempted to investigate the activities of nonprofit groups like the Republic Education Fund in 1996, they "could learn precious little" because the nonprofit groups' "tax returns [were] not due until months after [the] election"); *infra* note 122 and accompanying text (discussing the FEC's ineffectiveness in policing campaign abuses).

[FN119]. Chisolm, *supra* note 118, at 593.

[FN120]. See Lobbying and Political Activities of Tax-Exempt Organizations: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 100th Cong. 222, 234 (1987) (testimony of Sheldon S. Cohen, former IRS Commissioner) ("The major function of the IRS is to bring in revenue and an exempt function is specifically designed not to bring in revenue. Therefore, no matter how you enforce it, you are not going to get enough money out of it to spit at, to put it crudely."); see also Carney, *supra* note 51, at 1643 ("The IRS...lacks the staff and budget to enforce the law.... The IRS division in charge of nonprofits has had a flat budget for decades."); Rodrigue, *supra* note 118, at 53 ("[T]he [IRS], the only nationwide regulator of nonprofits, is overwhelmed.... [A] group [can] expect to go 50 to 100 years, statistically speaking, without an IRS audit.").

[FN121]. Kenneth A. Gross, The Federal Election Commission Compliance, and Enforcement Procedures Under the Federal Election Campaign Act, in *Funding Federal Political Campaigns: PACs, Corporate Activities and Contributions, and Lobbying Laws* 211, 213 (1986) (quoting 2 U.S.C. § 437c-(b)(1) (1986)).

[FN122]. [The FEC] has neither the will nor the means to deter wanton violators [of FECA], who sometimes ridicule openly the commission's weakness. It has interpreted the law so permissively that special interest groups may funnel money to candidates practically without limit if they wish. And those who wish to evade or violate election laws have had little to fear from the FEC. It often overrules its own staff's recommendations to investigate suspected infractions, and it can consume years resolving even a relatively simple case.

Brooks Jackson, Broken Promise: Why the Federal Election Commission Failed 1 (1990).

[FN123]. Rodrigue, *supra* note 118, at 53.

[FN124]. Jim Drinkard, "Issue Advocacy" Groups: The New Electoral Power, USA Today, Mar. 9, 1998, at 13A (quoting Stuart Rothenberg, a political analyst).

[FN125]. See *supra* text accompanying note 46 (quoting the Republic Education Fund's anti-Bryant advertisement).

[FN126]. See *supra* note 117 (quoting the Citizens for Reform's anti- Yellowtail advertisement).

[FN127]. See Hopkins, *supra* note 24, at 250 ("A charitable organization that is operating under the substantial part test can, in general, establish an affiliated tax-exempt organization for the purpose of engaging in substantial lobbying activities.").

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[FN128]. See [Regan v. Taxation with Representation](#), 461 U.S. 540, 545 n.6 (1983) ("The IRS apparently requires only that [a charity and social welfare group] be separately incorporated and keep records adequate to show that tax deductible contributions are not used to pay for lobbying.").

[FN129]. The activities of a [PAC] that is affiliated with a charitable organization will be attributed to the charitable organization for purposes of determining the ongoing tax-exempt status of the charitable organization.

....

...[As long as the PAC engages in political activity that is not political campaign activity,]...a charitable organization can establish an affiliated [[PAC] and not lose its tax-exempt status

Hopkins, supra note 24, at 426-27.

[FN130]. Frank J. Sorauf, *Inside Campaign Finance: Myths and Realities* 100 (1992).

[FN131]. [11 C.F.R. § 100.5\(a\)](#) (1998).

[FN132]. See [2 U.S.C. § 441a-\(a\)\(1\)\(C\)](#) (1994).

[FN133]. See [11 C.F.R. § 100.2\(b\)-\(c\)](#).

[FN134]. See [2 U.S.C. § 441a-\(a\)\(1\)\(A\)](#).

[FN135]. See id. [§ 441a-\(a\)\(4\)](#).

[FN136]. See id. [§ 441a-\(a\)\(2\)\(A\)](#).

[FN137]. See id. [§ 441b-\(a\)](#) (prohibiting corporations or labor unions from making political contributions); id. [§ 441b-\(b\)\(2\)\(C\)](#) (permitting corporations or labor unions to form PACs by establishing "separate segregated fund[s]" that are not subject to the political contribution prohibition).

[FN138]. See, e.g., [Laura Brown Chisolm, Politics and Charity: A Proposal for Peaceful Coexistence](#), 58 *Geo. Wash. L. Rev.* 308, 352 (1990) (arguing that charities should be permitted to establish political subsidiaries under [I.R.C. § 527](#)).

[FN139]. See Hopkins, supra note 24, at 426-28 (noting that charities and social welfare groups, according to election law, can establish PACs). The FEC, in an advisory opinion, even has "sanction[ed] the concept of" the managers of a charity establishing an independent PAC in order to engage in political campaign activity without jeopardizing the charity's tax status. Id. at 427. "[T]he IRS has yet to address this matter" Hopkins, supra note 24, at 427.

[FN140]. Hopkins, supra note 24, at 491.

[FN141]. Id. at 428.

[FN142]. See Anne H. Bedlington, *Loopholes and Abuses*, in *Money, Elections, and Democracy: Reforming Congressional Campaign Finance* 69, 83 (Margaret Latus Nugent & John R. Johannes eds., 1990) ("Some tax-exempt organizations are being misused to save money for their informally affiliated PAC, thus leaving the PAC with more money to spend on candidate contributions or independent expenditures.").

[FN143]. See supra note 75 (defining political campaign activity).

[FN144]. See supra text accompanying note 105 (listing Buckley's examples of express advocacy).

[FN145]. See supra notes 91-93 and accompanying text (listing examples of FECA's requirements).

[FN146]. See supra Part III.A (noting that Vote Now'96 and the Republic Education Fund claim that their activities were not political campaigning under existing IRC and FECA regulations).

[FN147]. Some nonprofit groups will go to great lengths to circumvent--or break--the law. For example, in 1986, it was revealed that the National Endowment for the Preservation of Liberty, an [I.R.C. § 501\(c\)\(3\)](#) charity, had "engag[ed] in

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campaign efforts against members of Congress who opposed aid to the [Nicaraguan] Contras and, to add insult to injury...allegedly financ[ed] these efforts with profits from arms sales to Iran." Chisolm, *supra* note 138, at 309 (footnotes omitted). See generally Rodrigue, *supra* note 118, at 52 ("The structure of nonprofits partly explains the problem of misuse of funds. They lack many of the checks and balances built into private businesses.").

[FN148]. As previously discussed, charities, not social welfare groups, typically are the only nonprofits to receive this benefit. See *supra* Part II.A.2.

[FN149]. Specifically defining what activities are "political" and must be conducted through a nonprofit PAC should overcome the Court's objections that general definitions of prohibited political activity may be unconstitutional. See, e.g., [Buckley v. Valeo](#), 424 U.S. 1, 41 (1976) (noting that an "indefinite" definition of prohibited political activity that "fails to clearly mark the boundary between permissible and impermissible speech" is unconstitutional); [NAACP v. Button](#), 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

[FN150]. Government agencies like the FEC or IRS could be required to develop guidelines expressly dictating what activities must be conducted through a nonprofit PAC, with nonprofit groups free to contact these agencies for advice or approval for specific projects if any regulation seems unclear. Also, some "political" activity can be exempted from the PAC requirement, such as certain types of legislative lobbying, so that [I.R.C. § 501\(c\)\(4\)](#) social welfare groups--which are often formed for the sole purpose of engaging in the political activity of lobbying--can continue to exist, independent of a PAC.

[FN151]. See *supra* notes 91-93 and accompanying text (listing examples of FECA's requirements).

[FN152]. Soft money "refer[s] to funds that are not subject to the provisions of [FECA] but are used to influence the outcome of a federal election." Corrado, *supra* note 90, at 6. Congress created the soft money loophole in 1979, in response to criticisms that FECA

reduced the traditional role of state and local [political] party organizations in federal elections and discouraged certain party-building activities. In order to redress this grievance and increase the role of parties in federal contests, the 1979 [amendments to FECA] exempted certain state and local party activities from the act's definition of "contribution" and "expenditure." This allowed party organizations to raise and spend unlimited amounts of money for voter registration, campaign materials, get-out-the-vote drives, and other activities without having to disclose these funds to the [FEC].

....

The 1979 amendments made no specific provision for the use of nonfederal soft money accounts by nonparty political committees. The use of separate nonfederal accounts by PACs is...a result of the ambiguities of federal law rather than its particular sanctions.

Id. at 12, 121 (footnote omitted).

Unregulated get-out-the-vote drives or issue advocacy advertisements, then, are typically run through state political parties, state PACs, and nonfederal accounts of federal PACs. Because such organizations, in these cases, are subject only to state election laws, they may "receive contributions in excess of the amount permitted by federal statutes, [and] solicit funds from sources long prohibited from participating in federal elections.... They can also operate in relative secrecy because most state disclosure laws lack the rigorous requirements for public disclosure established at the federal level." *Id.* at 121-22. This soft money loophole can be closed, however, by requiring all nonprofit PACs to be federal (making them subject to FECA) and by prohibiting them from establishing nonfederal soft money accounts.

[FN153]. Chisolm, *supra* note 138, at 318-19 (quoting [I.R.C. § 6852 \(Supp. V 1987\)](#)); see also [I.R.C. § 4955 \(1994 & Supp. II 1996\)](#) (imposing taxes on prohibited political expenditures of charities); [I.R.C. § 7409 \(1994\)](#) (allowing the IRS to seek an injunction against charities flagrantly violating political expenditure limits).

[FN154]. See [2 U.S.C. § 437\(d\) \(1994\)](#).

[FN155]. See, e.g., Archibald Cox, The [Case for Campaign Finance Reform](#), 1 *Green Bag* 2d 289, 291 (1998) ("The Supreme Court today...[is] very much divided on [issues such as whether issue advocacy ads may be prohibited]....And it's awfully hard to prejudge where [the Court] will come down [on these issues]."). Compare 6 Final Senate Report on 1996 Illegal Campaign Activities, *supra* note 26, at 9546 (Minority Views) (Additional views of Sen. Joseph I. Lieberman) (arguing that proposals to "forbid [nonprofit groups from] run[ning] advertisements...identifying a candidate within 60 days of a general election or 30 days of a primary election" would "pass constitutional muster"), with Smith, *supra* note 108, at 192 (arguing

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that restricting nonprofit organizations from sponsoring issue advertisements identifying candidates within 60 days of a general election is "truly silly and blatantly unconstitutional").

[FN156]. See Hopkins, *supra* note 24, at 427 (noting that FECA permits social welfare groups to create PACs).

[FN157]. [479 U.S. 238 \(1986\)](#).

[FN158]. An independent expenditure is defined as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate" [2 U.S.C. § 431\(17\)](#).

[FN159]. [MCFL, 479 U.S. at 263-64](#) (holding that a nonprofit organization cannot be required to engage in independent express advocacy through an SSF if (1) the group does not "engage in business activities"; (2) the group has "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) the group is not established or funded by business corporations or labor unions).

[FN160]. *Id.* at 263.

[FN161]. *Id.*; see also [id. at 258-59](#) (arguing that funds available to business corporations are unrelated to the "popular support for the corporation's political ideas," while resources available to an ideological, nonprofit group reflect "its popularity in the political marketplace").

[FN162]. See [id. at 263-64](#) (holding that concerns about corporate wealth as a "threat to the political marketplace" are unwarranted where corporations with "features more akin to voluntary political associations than business firms" are engaged in independent political campaigning).

[FN163]. See [id. at 260](#) ("The limitation on solicitation...means that nonmember corporations can hardly raise any funds at all"); see also [2 U.S.C. § 441b-\(b\)\(4\)\(A\)-\(C\) \(1994\)](#) (requiring that an SSF only solicit a corporation's stockholders and their families, the corporation's executive or administrative personnel and their families, or the members of a labor organization and their families, if the group is a membership corporation without capital stock).

[FN164]. [MCFL, 479 U.S. at 254-55](#).

[FN165]. See *supra* Part II.A.2 (discussing the requirements for [I.R.C. § 501\(c\)\(4\)](#) tax status).

[FN166]. See *supra* Part II.A.1 (discussing the requirements for [I.R.C. § 501\(c\)\(3\)](#) tax status).

[FN167]. See [MCFL, 479 U.S. at 264](#) (stating that a nonprofit group can only make an independent expenditure without a PAC if the group is "not established by a business corporation...and it is [the group's] policy not to accept contributions from such entities").

[FN168]. See *supra* note 34 and accompanying text (noting that the tax-exempt status of charities and social welfare groups, as well as the tax deductibility of contributions to charities, are subsidies).

[FN169]. [FEC v. National Conservative Political Action Comm., 470 U.S. 480, 495 \(1985\)](#).

[FN170]. See 6 Final Senate Report on 1996 Illegal Campaign Activities, *supra* note 26, at 9546 (Minority Views) (Additional views of Sen. Joseph I. Lieberman) (arguing that nonprofit organizations can be prohibited from engaging in political campaign activity due to the government subsidies that such groups receive under their tax-exempt status).

[FN171]. See *supra* text accompanying note 140 (noting that the IRC bars charities from engaging in political campaigning).

[FN172]. See [MCFL, 479 U.S. at 262](#) (noting that the extent to which an ideological, nonprofit group can participate in political campaign activity is ultimately limited by the group's tax status).

[FN173]. *Id.* at 254 (citing [FEC v. National Right to Work Comm., 459 U.S. 197, 204 \(1982\)](#)).

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[FN174]. [Id. at 260.](#)

[FN175]. See, e.g., [2 U.S.C. § 441b-\(b\)\(4\)\(B\) \(1994\)](#) (limiting SSFs to "[two] written solicitations for contributions during the calendar year").

[FN176]. But see [MCFL, 479 U.S. at 269](#) (Rehnquist, C.J., concurring in part and dissenting in part) (arguing that it is constitutional to require a nonprofit group's independent expenditures to be made through SSFs that are subject to solicitation restrictions).

[FN177]. See [id. at 253-55](#) (listing FECA requirements for PACs, such as provisions that all committees must appoint a treasurer, file reports with the FEC, and keep records of contributions).

[FN178]. [Id. at 255.](#)

[FN179]. See [id. at 241.](#)

[FN180]. See [id. at 270-71](#) (Rehnquist, C.J., joined by White, Blackmun & Stevens, JJ., concurring in part and dissenting in part) (arguing that Congress has the power to require nonprofit organizations to engage in independent expenditures only through PACs).

[FN181]. Such guidelines will be similar to FECA's requirement that any group receiving contributions, or making political campaign expenditures, in excess of \$1,000 in a calendar year must establish a PAC. See text accompanying supra note 131 (stating that a group becomes a political committee once it receives \$1,000 in contributions or makes \$1,000 in expenditures). In MCFL, the nonprofit group spent almost \$10,000 to independently publish and distribute over 100,000 copies of a guide that rated candidates on anti-abortion issues. See [MCFL, 479 U.S. at 243-44 \(describing the activities of Massachusetts Citizens for Life in the 1978 elections\)](#). This appears to be the type of large-scale, independent political campaign activity that should be sufficient to make a group subject to the nonprofit PAC requirement.

[FN182]. See, e.g., [2 U.S.C. § 434\(c\) \(1994\)](#) (requiring "[e]very person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of \$250 during a calendar year" to make certain disclosures about the person's donors and political campaign activities).

[FN183]. See, e.g., supra note 155 and accompanying text (noting the different opinions of two legal commentators on the constitutionality of restricting nonprofit groups' political activities).

[FN184]. See supra note 34 and accompanying text (noting that the tax-exempt status of charities and social welfare groups, as well as the tax deductibility of contributions to charities, are subsidies).

[FN185]. See supra notes 71-74 and accompanying text (discussing restrictions on the political activities of charities).

[FN186]. See, e.g., [Regan v. Taxation with Representation, 461 U.S. 540, 544-45 \(1983\)](#) (noting that by limiting the political activity of nonprofit groups, "Congress has merely refused to pay for [such activities] out of public moneys"); 6 Final Senate Report on 1996 Illegal Campaign Activities, supra note 26, at 9546 (Minority Views) (Additional views of Sen. Joseph I. Lieberman) (arguing that nonprofit group political advocacy may be restricted due to the benefits nonprofit groups receive from their tax status).

[FN187]. See generally [Taxation with Representation, 461 U.S. at 553](#) (Blackmun, J., concurring) (arguing that it is constitutional to limit the political activities of charities due to the fact that such groups can establish SSFs to engage in otherwise prohibited political speech).

[FN188]. See, e.g., Smith, supra note 108, at 184 ("[Campaign finance regulatory enthusiasts] argue that [issue] ads are intended to influence federal elections, and...may be regulated under the Buckley framework. In fact, we have been down this road before, and the advocates of regulation are dramatically wrong.").

[FN189]. [Buckley v. Valeo, 424 U.S. 1 \(1976\)](#).

[FN190]. See [id. at 44](#) (ruling that "in order to preserve the [FECA] against invalidation on vagueness grounds, [the law]

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must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate").

[FN191]. See [id. at 44 n.42](#) (listing examples of express advocacy); see also *supra* note 106 and accompanying text (discussing Buckley's examples of express advocacy).

[FN192]. 6 Final Senate Report on 1996 Illegal Campaign Activities, *supra* note 26, at 9534 (Minority Views) (Additional views of Sen. Joseph I. Lieberman).

[FN193]. See *id.* ("[T]here is nothing in the Court's decision to suggest that ... footnote [42 in Buckley] defined the exclusive universe of candidate-focused speech"); see also Tena Jamison Lee, A Pro and Con Debate: How Much Campaign Finance Reform Do We Need?, *Hum. Rts.*, Winter 1998, at 14, 15 ("[T] here is room for Congress to define with more clarity what is meant by issue advocacy and political campaigning without running afoul of the Court's real intent.")

[FN194]. See, e.g., S. 25, 105th Cong. § 406(b) (1997) (defining express advocacy as a communication "that refers to a clearly identified candidate, that a reasonable person would understand as advocating the election or defeat of the candidate, and that is made within 30 days before the date of a primary election...or 60 days before a general election"); H.R. 493, 105th Cong. § 251(b) (1997) (same).

[FN195]. Lee, *supra* note 193, at 15.

[FN196]. William Shakespeare, *Hamlet* act 3, sc. 2, line 229 (John Dover Wilson ed., Cambridge Univ. Press 2d ed. 1980) (circa 1600).

[FN197]. [Buckley v. Valeo, 424 U.S. 1, 67 \(1976\).](#)

[FN198]. See, e.g., Magleby & Nelson, *supra* note 94, at 206 ("We propose that any person, party or foundation disclose the amount spent on any activity that could influence the outcome of a federal election, including nonpartisan registration and get-out-the-vote campaigns.").

[FN199]. See 4 Final Senate Report on 1996 Illegal Campaign Activities, *supra* note 26, at 4579 (Minority Views). "The federal law barring foreign contributions in U.S. elections is set forth in section 441e of [FECA]. Section 441e is intended to prohibit foreign money from playing any role in U.S. elections, but the statutory language is not as clear or as strong as needed and should be strengthened." *Id.* (emphasis added); see *id.* at 4580 (noting that "[c]lear legal prohibitions on [the ability of] foreign nationals" to contribute soft money for "issue ads" are "vital to keeping foreign money from influencing U.S. elections"); see also 3 *id.* at 4471 ("[The] prohibition [[[against foreign nationals directly or indirectly contributing to U.S. elections] dates from 1966 legislation responding to congressional hearing revelations that Philippine sugar producers and agents of Nicaraguan president Luis Somoza contributed to federal candidates."); Stuart W. Nolan, Jr., Comment, [Campaign Finance Reform: Applying the First Amendment in a Marketplace of Ideas, 6 CommLaw Conspectus 113, 119 \(1998\)](#) ("FBI investigators [[[examining alleged campaign fundraising abuses in the 1996 elections] uncovered illegal foreign contributions of so-called 'soft money' to the [[DNC]. This prompted the introduction of three additional bills from Congress proposing to make such contributions expressly illegal." (emphasis added) (footnotes omitted)).

[FN200]. See text accompanying *supra* note 132.

[FN201]. See *supra* note 41 and accompanying text (discussing Chagoury's \$460,000 contribution to Vote Now'96).

[FN202]. Regulating these contributions can be done as easily as requiring nonprofit PACs engaged in political and political campaign activity to maintain two separate accounts: one for unlimited contributions that may be used for nonpolitical campaign purposes, and another for capped donations that may be used for either political or political campaign activities.

[FN203]. See, e.g., 5 Final Senate Report on 1996 Illegal Campaign Activities, *supra* note 26, at 7055 (Minority Views) ("It is possible...that a single wealthy donor could influence the outcome of dozens of congressional races by channeling millions of dollars through tax-exempt organizations. If large donors are allowed to operate on that scale--and with no disclosure and no accountability--the campaign finance laws will be meaningless.").

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[FN204]. Does this sound preposterous? It is not. Suppose that a social welfare group called the "Communist Social Welfare Fund" is established. The Communist Social Welfare Fund, like the Republic Education Fund, would be free to accept unlimited and anonymous contributions from foreign sources. Those funds could then be used to conduct communist-oriented propaganda campaigns and voter registration drives in targeted districts.

[FN205]. 4 Final Senate Report on 1996 Illegal Campaign Activities, *supra* note 26, at 5983 (Minority Views).

[FN206]. See *id.* ("In the 'overt' campaign, all contributors...revealed their names, their occupations, and the size of their donations to the [[FEC].").

[FN207]. *Id.*

[FN208]. *Id.* at 5983-84 (Minority Views).

[FN209]. *Id.* at 5983.

[FN210]. Cummings, *supra* note 30.

[FN211]. 4 Final Senate Report on 1996 Illegal Campaign Activities, *supra* note 26, at 5926 (Minority Views).

[FN212]. 6 *id.* at 9552 (Additional views of Sen. Joseph I. Lieberman).

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