THE INTERNAL REVENUE CODE'S PROVISIONS AGAINST LEGISLATIVE ACTIVITY ON THE PART OF TAX-EXEMPT ORGANIZATIONS: A LEGITIMATE SAFEGUARD OR A VIOLATION OF THE FIRST AMENDMENT?

I. INTRODUCTION

Since the enactment of the English Statute of Charitable Uses,[1] it has been generally acknowledged that the relief of poverty, the promotion of religion, the advancement of education and other public purposes qualify as charitable purposes.[2] American courts have been very liberal in determining what sort of bequests may be considered charitable and, as a general rule, have accepted as charitable any beneficial purpose which is not absurd, illegal, obscene, selfish or too offensive.[3] In addition, the notion that an organization which otherwise qualifies as charitable is not charitable if it engages in activities designed to influence legislation has been rejected by the vast majority of American jurisdictions.[4] It has been argued that to hold otherwise would

---

[1] 43 Eliz., c. 4 (1601).

[2] Restatement (Second) of Trusts § 368 (1959) states that charitable purposes include:

(a) the relief of poverty;
(b) the advancement of education;
(c) the advancement of religion;
(d) the promotion of health;
(e) governmental or municipal purposes;
(f) other purposes the accomplishment of which is beneficial to the community.

[3] For example, the following purposes have all been upheld as charitable: A provision in a will providing money to prove the existence of the human soul, In re Estate of Kidd, 106 Ariz. 554, 479 P.2d 697 (1971); a bequest to establish a museum in memory of a testator and his wife and to aid in perpetuation of chiropractic philosophy, science and art, Palmer v. Evans, 255 Iowa 1176, 124 N.W.2d 856 (1964); a trust to provide for the support, education and welfare of minor Negro children whose parents have been convicted of a crime of a political nature, In re Robbins' Estate, 57 Cal.2d 718, 371 P.2d 573, 21 Cal. Rptr. 797 (1962); a trust for the benefit and support of an art gallery, Sessions v. Skelton, 163 Ohio St. 409, 127 N.E.2d 378 (1955); a trust for distributing footwear to needy actors, Guaranty Trust Co. v. New York Community Trust, 141 N.J. Eq. 238, 56 A.2d 907 (Ch. 1948); a trust where the trustee was to distribute the income to persons and purposes as directed by God the Father, Jesus Christ the Son and the Holy Spirit, and as the trustees believed would have been acceptable to the testator, Houston v. Mills Memorial Home, Inc., 202 Ga. 540, 43 S.E.2d 680 (1947); a testimonial gift for the erection of a monumental arch to be dedicated to the Gold Star Mothers of America, In re Barnard's Estate, 170 Misc. 875, 11 N.Y.S.2d 115 (Sur. Ct. 1939); and a bequest for the erection of a drinking fountain for horses and a life-sized monument of testor's race horse, In re Graves' Estate, 242 Ill. 23, 89 N.E. 672 (1909). Accord, Clark, supra note 1, at 443.

[4] American cases upholding as charitable bequests for activities to bring about changes in the existing law include: Register of Wills v. Cook, 241 Md. 264, 216 A.2d 542 (1966), which dealt with a trust to provide funds for the elimination of discrimination against women and support of the passage of the equal rights amendment; Collier v. Lindley, 203 Cal. 641, 266 P. 526 (1928), involving reform for American Indians; Taylor v. Hoag, 273 Pa. 194, 116 A. 826 (1922), which involved a trust to promote improvements in the structure and methods of government; Garrison v. Little, 75 Ill. App. 402 (1898), which dealt with a bequest for the attainment of the franchise by women; George v. Braddock, 45 N.J.Eq. 757, 18 A. 881 (Ct. Err. & App. 1889), dealing with land reform.

Accord, Note, David Meets Goliath in the Legislative Arena: A Losing Battle for an Equal Charitable Voice? 9 San Diego L. Rev. 944, 947 (1972). Restatement (Second) of Trusts § 374, comment j (1959):

deny to many new worthwhile projects a fair chance of becoming established.[5]

However, this liberal judicial attitude which allows charitable organizations to engage in legislative activities without forfeiting their qualification as charitable for general gratuitous transfer purposes has not carried over into the field of federal taxation. The Internal Revenue Code, section 501(c)(3), considers charities to include:

> Corporations, and any community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, ... no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.[6]

In one respect charities can nullify the effect of this language by basing their tax-exempt status on Section 501(c)(4) of the Internal Revenue Code which grants such status to "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare," and which contains no proscriptions against legislative activity.[7] However, section 170(c)(2)(D) of the Code precludes taxpayers from taking income tax deductions for contributions made to nonprofit organizations, a substantial part of the activities of which consist of attempts to influence legislation.[8] Estate bequests and gifts are also subject to the "substantial

---

> A trust may be charitable although the accomplishment of the purpose for which the trust is created involves a change in the existing law. ... The mere fact, however, that the purpose is to bring about a change in the law, whether indirectly through the education of the electors so as to bring about a public sentiment in favor of the change, or through proper influences brought to bear upon the legislators, does not prevent that purpose from being legal and charitable.

4 A. Scott, The Law of Trusts § 374.4 (3d ed. 1967):

> In the United States the notion that a trust for a purpose otherwise charitable is not charitable if the accomplishment of its purposes involves a change in existing law has been pretty thoroughly rejected. Many reforms can be accomplished only by a change in the law, and there seems to be no good reason why the mere fact that they can be accomplished only through legislation should prevent them from being valid charitable purposes.

G. Bogert, The Law of Trusts & Trustees § 378 (2d ed. 1964):

> Many American decisions and, it is submitted, the better reasoned cases, declare that trusts which seek to bring about better government by changing laws or constitutional provisions are charitable, so long as the settlor directed that the reforms should be accomplished peaceably by the established constitutional means, and not by war, riot, or revolution.

However, Massachusetts has taken a contrary view. In Jackson v. Phillips, 96 Mass. (14 Allen) 539 (1867), a bequest to secure passage of laws granting the franchise to women was held not to be charitable. But the *Jackson* court did not consider a trust seeking the abolition of slavery to be charitable. *Jackson* was followed by the decision in Bowditch v. Attorney General, 241 Mass. 168, 134 N.E. 796 (1922), which held that a bequest to promote the causes of women's rights was not charitable because it looked to legislation to accomplish its goals.

5 Clark, The Limitation on Political Activities: A Discordant Note in the Law of Charities, 46 Va. L. Rev. 439, 442-43 (1960). Such new projects might include the concept of public interest law firms or consumer groups. For information regarding public interest law firms see Note, The Tax-Exempt Status of Public Interest Law Firms, 45 S. Cal. L. Rev. 228 (1972).

6 Int. Rev. Code of 1954, § 501(c)(3).

7 Int. Rev. Code of 1954, § 501(c)(4).

8 Int. Rev. Code of 1954, § 170(c)(2)(D) states that a charitable contribution means a contribution to a corporation, trust, or community chest, fund, or foundation "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation. ..."

legislative activity" test.[9] This means that taxpayers cannot take income tax deductions or estate and gift tax deductions for contributions, estate bequests and gifts made to charities which engage in legislative activities. Thus, nonprofit organizations involved in substantial political activities are likely to receive fewer contributions, gifts and bequests than those charities which can meet the requirements of section 501(c)(3) even though both of these groups fit within the general legal definition of "charity" and both qualify for tax-exempt status.

This Note will discuss the historical background of the restrictions against legislative activity on the part of tax-exempt organizations and the arbitrary way these restrictions have been applied by the Internal Revenue Service (IRS) and the courts. It will also attempt to show that such provisions violate the first amendment rights of charitable organizations.

II. CONGRESSIONAL HISTORY OF THE "SUBSTANTIAL LEGISLATIVE ACTIVITY" TEST

The proposition that legislative activity by otherwise charitable organizations would disqualify contributions to such organizations as charitable deductions first appeared in the Internal Revenue Code as part of a 1934 amendment.[10] However, earlier Treasury rulings had imputed to Congress an intent to restrict such activity on the belief that it was inconsistent with exclusively educational or charitable purposes."[11] Furthermore, the 1919 tax regulations stated that associations "formed to disseminate controversial or partisan propaganda" were not "educational" within the meaning of the statute,[12] and courts had not been loath to read such a restriction into the charitable exemption/deduction provisions of the Internal Revenue Code. An example is Learned Hand's famous remark in *Slee v. Commissioner*:[13] "Political agitation as such is outside the statute, however innocent the aim. . . . Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them."[14]

The 1934 amendment was also influenced by a congressional desire to penalize self-seeking political activity designed to benefit donors. Senator David A. Reed of Pennsylvania discussed this motive: "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 interests of the giver of the money. That is what the committee was trying to reach."[15]

---

[9] Int. Rev. Code of 1954, § 2522(a)(2) states that a taxpayer can deduct from his gift tax gifts made to organizations "no substantial part of the activities of which is carrying on propoganda, or otherwise attempting, to influence legislation. . . ." Int. Rev. Code of 1954, § 2055(a)(2) makes a similar statement regarding estate taxes.

[10] Revenue Act of 1934, ch. 277, § 23(a)(2), 48 Stat. 690 (income tax); Revenue Act of 1934, ch. 277, § 101(b), 48 Stat. 700 (exempt corporations).

[11] Examples of such rulings include O.D. 704, 3 Cum. Bul. 240 (1920) which states that "[a]n association which was organized and operated for the purpose of furthering the enactment of prohibition laws . . . is held to be an organization engaged in the dissemination of partisan propaganda and matters of a controversial nature, and hence not entitled to exemption as an educational association."

[12] Treas. Reg. 45, art. 517; T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919).

[13] 42 F.2d 184 (2d Cir. 1930).

[14] Id. at 185. However, Judge Hand qualified this remark by going on to note that "there are many charitable, literary and scientific ventures that as an incident to their success require changes in the law. . . . It would be strained to say that for this reason it became less exclusively charitable, though much might have to be done to convince legislators." Id.

[15] 78 Cong. Rec. 5861 (1934) (remarks of Senator Reed).

If Senator Reed's comment represents the intent of Congress, then Congress wished to deny tax-exempt status only to pliant organizations controlled by self-interested donors, and the provision would have no effect on organizations with legitimate charitable goals. However, the statutory history of the amendment is unclear, and it is impossible to determine if Senator Reed's views reflected congressional thinking on this matter.[16]

III. REASONS FOR THE PROBLEMS RESULTING FROM THE "SUBSTANTIAL LEGISLATIVE ACTIVITY" TEST

A. Inconsistent Court Interpretations

In interpreting the "substantial legislative activity" restrictions, the courts have given little weight to Senator Reed's remarks. As a result, court decisions in this area have not turned on an inquiry into the motives and self-interest of the donors.[17] Instead, courts have focused on the meaning of "substantial" and have formulated a variety of standards with regard to its definition, not all of them consistent.

In *Seasongood v. Commissioner*[18] the Sixth Circuit held that an organization is not engaged in "substantial legislative activity" if less than 5 percent of its total activities are devoted to influencing legislation.[19] However, other courts have considered the qualitative nature of the legislative activities in determining whether such activities are "substantial" rather than using the quantitative approach employed by *Seasongood*. For example, taxpayers were denied a charitable deduction for a contribution made to the League of Women Voters in *Kuper v. Commissioner*.[20] The *Kuper* court included both direct and indirect legislative activity in making its determination that the League was involved in "substantial legislative activity". The court considered direct legislative activity to be "writing, telegraphing or telephoning to representatives in Congress and the state legislature, testifying before legislative committees,"[21] and conceded that only an insignificant part of the League's activities consisted of such direct activities. *Kuper* then noted that a very substantial portion of the League's activities consisted of indirect legislative activity such as "formulating, discussing and agreeing upon the positions, if any, to be taken with respect to advocating or opposing various legislative

---

16 Garrett, Federal Tax Limitations on Political Activities of Public Interest and Educational Organizations, 59 Geo. L.J. 561, 564 (1971). For congressional debate on this provision of the Internal Revenue Code see 78 Cong. Rec. 5861, 5959, 7831 (1934).

17 However, some cases, while not dealing with the motives of donors, have considered the goals and purposes of the tax-exempt organizations themselves. See, e.g., Liberty Nat'l Bank & Trust Co. v. United States, 122 F. Supp. 759 (W.D. Ky. 1954), where the court stated that the activities of the League of Women Voters were commendable and educational. In an opinion by Justice Blackmun as a circuit judge, the Eighth Circuit justified its earlier decision denying the deductibility of contributions to the St. Louis Medical Society by stating that the Society was substantially concerned with the welfare of its members rather than with the general good. St Louis Union Trust Co. v. United States, 374 F.2d 427, 440 (8th Cir. 1967).

18 227 F.2d 907 (6th Cir. 1955). At issue in the case was the deductibility of Seasongood's contributions to the Hamilton County Good Government League of which Seasongood had been president from 1934 to 1945. The main activities of the League consisted of operating the "Cincinnati Forum of the Air" to permit public discussion by citizens of matters affecting their welfare, distributing literature explaining the dangers of the spread of disease by rodents and urging citizens to vote. However, it was conceded that the League occasionally endorsed candidates for public office and sponsored or opposed legislation through contact with legislative authorities.

19 Id. at 912.

20 332 F.2d 562 (3d Cir.), cert. denied, 379 U.S. 920 (1964).

21 Id. at 562.

measures."[22] Thus the court concluded that donations to the League could not receive an income tax charitable deduction. However, contributions to the Louisville League of Women Voters were allowed an income tax deduction in *Liberty National Bank & Trust Co. v. United States*[23] where the court made no distinction between direct and indirect legislative activity on the part of the League. The court merely noted that "[i]f upon sporadic occasions the zeal of its members has invaded the prohibited area of attempting to influence legislation, this becomes of little consequence viewed against the background of the whole of their efforts in behalf of better government."[24]

Often similar charitable organizations are considered to have engaged in "substantial legislative activities" by some courts and not by others. For example, in *Estate of Blaine v. Commissioner*,[25] the Tax Court denied a deduction for contributions to the Foundation for World Government based on the court's belief that the "ultimate aim" of the organization was not purely educational, but was the attainment of political objectives.[26] The same result occurred in *Marshall v. Commissioner*[27] where bequests in trust to promote economic reforms to safeguard civil liberties and to preserve the wilderness were denied an estate tax deduction because such goals would necessarily involve political agitation. Yet, an organization which urged numerous social reforms, submitted thirty-six bills to state legislatures and drafted eighteen federal statutes was held charitable in *International Reform Federation v. District Unemployment Compensation Board*.[28] The court stated that this advocacy of legislation was merely mediate or ancillary to the primary purpose of establishing a higher code of morality and manners.[29] Even more inexplicable was the opinion in *Leubuscher v. Commissioner*[30] where a deduction for a bequest to teach and propagate the ideas of Henry George was allowed but a deduction for a bequest to the Manhattan Single Tax Club which was trying to carry out one of George's ideas was disallowed even though the activities of the two organizations would substantially overlap.

Perhaps the inconsistency of the courts in this area is best highlighted by two decisions in the Eighth Circuit. In *Hammerstein v Kelley*[31] it was held that contributions to the St. Louis Medical Society were not deductible since its political and legislative activities were deemed to be substantial. But two years later the same court, in *St. Louis Union Trust Co. v. United States*,[32] held that an estate bequest to the bar association of St. Louis was deductible. One unfortunate explanation for the different treatment afforded contributions to the bar association is that the judges were prejudiced in favor of their fellow lawyers. At the very least it seems clear from the lack of consistent guidelines in the area that judges can easily let personal predilections enter into their determinations of whether a particular organization should be accorded Internal Revenue Code Section 501(c)(3) tax-exempt status.[33] It is submitted that the "substantial legislative activity" test as applied by the courts is too vague and uncertain to allow the charities involved to ascertain in advance if contributions made to them will qualify for the charitable deduction.

---

22 Id. Similarly the court in Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972), reasoned that the "substantial legislative activity" test included both direct and indirect appeals to legislators and the general public. Id. at 854-55.

23 122 F. Supp. 759 (W.D. Ky. 1954).

24 Id. at 766.

25 22 T.C. 1195 (1954).

26 Id. at 1213.

27 147 F.2d 75 (2d Cir.), cert. denied, 325 U.S. 872 (1945).

28 131 F.2d 337 (D.C. Cir.), cert. denied, 317 U.S. 693 (1942).

29 Id. at 342.

30 54 F.2d 998 (2d Cir. 1932).

31 349 F.2d 928 (8th Cir. 1965).

32 374 F.2d 427 (8th Cir. 1967).

33 It is important to note that under Int. Rev. Code of 1954, § 170(c)(2)(D) taxpayers can receive charitable deductions only for contributions to organization which are tax-exempt under Int. Rev. Code of 1954, § 501 (c)(3). See text accompanying notes 6-10 supra.

B. The Internal Revenue Service's Approach

The IRS must share with the courts responsibility for the inconsistency and uncertainty in the determination of what constitutes "substantial legislative activity". The enforcement of sections 501(c)(3) and 170(c)(2)(D) of the Code by the IRS has been highly selective and sporadic and has not provided any indication as to what are the parameters of the restriction. Perhaps this selective approach is the result of a manpower shortage,[34] but the Sierra Club case illustrates some of the dangers inherent in such a situation.[35] The conservation club took a full page ad in the *New York Times* expressing its disapproval of a bill pending in Congress for the creation of two hydroelectric dams on the Colorado River. The club urged in its advertisement that people write their Congressmen to express their opposition to the bill. A few days later the IRS announced that advance assurance of the deductibility of contributions to the Sierra Club would no longer be extended.[36] This proclamation reportedly resulted in an abrupt decrease of $5000 a week in contributions to the club.[37] Finally, in late 1966, the Sierra Club lost its tax-exempt status under section 501(c)(3).[38] One commentator has pointed out that the IRS announcement on deductibility in response to the Club's advertisement was a different procedure from the usual one and feels that political pressures may have been brought to bear on the IRS to induce such hasty action.[39] The District Tax Commissioner stated that the Sierra Club would probably not have been singled out if it had not advertised. He stated: "There are different ways to lobby. . . . This was so open, so crass that we had to take notice."[40] The use of such criteria in deciding which charitable organizations will be investigated will discourage openness, but will not provide the needed guidelines to be used in determining what constitutes "substantial legislative activity."[41]

C. Congressional Responsibility

Perhaps Congress must take the lion's share of the blame for the present confusion and uncertainty concerning the meaning of "substantial legislative activity" in Sections 501(c)(3) and 170(c)(2)(D) of the Internal Revenue Code. Congress could have done away with the "substantial legislative activity" test and could have provided for a clearer, more explicit provision. For example, it could have simply allowed, or disallowed, deductibility no matter how much legislative activity was involved. Or it could have allowed charitable organizations to spend a definite percentage of their

---

[34] Borod, Lobbying for the Public Interest – Federal Tax policy and Administration, 42 N.Y.U.L. Rev. 1087, 1104 (1967) [hereinafter Borod].

[35] For details on the Sierra Club controversy see Borod, supra note 34, at 1087-1101; Note, The Sierra Club, Political Activity, and Tax-Exempt Charitable Status, 55 Geo. L.J. 1128 (1967).

[36] IRS News Release No. 829, 7 CCH 1966 Stand. Fed. Tax Rep. ¶ 6607.

[37] Borod, supra note 34, at 1089 n.5.

[38] IRS Fact Sheet (Dec. 19, 1966), 7 CCH 1967 Stand. Fed. Tax Rep. ¶ 6376 (Revocation of tax-exempt status not final).

[39] Borod, supra note 34, at 1097

[40] Harwood, IRS May Stir Up a Storm: Inquiry Into the Sierra Club Lobbying Could Affect Tax-Exempt Giants, Washington Post, Aug. 14, 1966, at A6, col. 6, as quoted in Borod, supra note 34, at 1104.

[41] One commentator has noted the possibility that sporadic enforcement might result in congressional control of which organizations will be investigated by the IRS. For example, in March, 1968, a conservative Congressman (now a Senator), William Brock, from Tennessee, demanded that the Southern Christian Leadership Conference be shorn of its tax-exempt status. The SCLC, concerned that the IRS was observing its activities, put a freeze on money being collected for its Poor People's Campaign for fear of losing its tax-exempt status. Borod, Tax Exemption: Lobbying for Conservation, New Republic, Dec. 7, 1968, at 15.

money on legislative activities without losing their section 501(c)(3) tax-exempt status.[42] These proposals would eliminate the uncertainty caused by the use of the "substantial legislative activity" test. Charitable organizations would know in advance exactly what was expected of them. Given the courts' inconsistent handling of the "substantial legislative activity" restriction,[43] Congress' failure to clarify the matter is especially unfortunate.

The sole legislative change Congress has effected in this area resulted in special treatment only for private foundations.[44] Section 4945(e)(1) and 2, added by the Tax Reform Act of 1969[45] provides that any attempt by such foundations to influence legislation (even an insubstantial one) will result in loss of tax-exempt status. However, private foundations are allowed to engage in legislative activities regarding the passage of laws which would affect their tax-exempt status or the tax deductibility of contributions to the foundations.[46] The "substantial legislative activity" test with respect to other charitable organizations was left intact.[47]

---

[42] A bill allowing charitable organizations to spend a maximum of 20% of their annual funds on lobbying activities has been proposed in Congress but not enacted into law. See note 47 infra.

[43] See text accompanying notes 17-33 supra.

[44] The term "private foundation" is defined in Int. Rev. Code of 1954, § 509(a) as a "domestic or foreign corporation described in section 501(c)(3)." Section 501(c)(3) lists "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals. . . ." However, § 509(a) excludes the following from this list of private foundations: Churches, hospitals, organizations receiving most of their support from the federal or state governments, governmental units, organizations which usually receive more than one third of their support from gifts, grants, contributions or membership fees, and organizations organized and operated exclusively for testing for public safety. These excluded organizations are subject to the "substantial legislative activity" test.

The above definition of a private foundation generally conforms to the commonly held definition of a foundation as a "nongovernmental, nonprofit organization having a principal fund of its own, managed by its own trustees or directors, and established to maintain or aid . . . the common welfare." F. Andrews, Introduction to the Foundation Directory 9 (A. Walton & M. Lewis eds. 1964). Private foundations differ from other tax-exempt organizations in that they are not dependent upon donations from the public or government.

For more information on the private foundation problem, which is generally beyond the scope of this Note, see Note, Private Foundations and the 1969 Tax Reform Act, 7 Colum. J.L. & Social Prob. 240 (1971); Note, Regulating the Political Activities of Foundations, 83 Harv. L. Rev. 1843 (1970).

[45] Pub. L. No. 91-172, § 101, 83 Stat. 487.

[46] Int. Rev. Code of 1954, § 4945(e)(1) states that "taxable expenditure" in the case of a private foundation means:

> (1) any attempt to influence any legislation through an attempt to affect the opinion of the general public or any segment thereof, and
> (2) any attempt to influence any legislation through communication with any member or employee of a legislative body . . . [but not] an appearance before . . . any legislative body with respect to a possible decision of such body which might affect the existence of the private foundation, . . . its tax-exempt status, or the deduction of contributions to such foundations.

[47] There have been recent attempts in Congress to pass bills allowing more legislative activity on the part of tax-exempt organizations. In the 92d Congress, a bill was introduced to permit publicly supported charitable organizations to spend up to 20% of their annual funds on lobbying activities without the loss of their tax-exempt status. H.R. 13,720, 92d Cong., 2d Sess. (1972). The Nixon administration endorsed the bill. N.Y. Times, May 4, 1972, at 17, col. 1, but it was not enacted into law. A similar bill has been proposed in the 93d Congress by Rep. Charles Price from Illionois. H.R. 2864, 93d Cong., 1st Sess. (1973). However, a proposal to the contrary has been introduced by Rep. John Rarick of Louisiana. H.R. 1644, 93d Cong., 1st Sess. (1973). If enacted this measure would provide that tax-exempt organizations which engage in the activity of carrying on propaganda or otherwise attempting to influence legislation would lose their tax-exempt status.

IV. PROBLEMS POSED BY THE FIRST AMENDMENT FOR THE "SUBSTANTIAL LEGISLATIVE ACTIVITY" TEST

A. The Importance of the Right to Free Speech and the Right To Petition the Government

The Supreme Court has proclaimed that the first amendment right of freedom of speech and right to petition the Government[48] are among our most "preferred" freedoms.[49] In *United States v. CIO*,[50] Justice Rutledge stated that "restricting expenditures for the publicizing of political views ... necessarily deprives the electorate, the persons entitled to hear ... of the advantage of free and full discussion."[51] Justice Harlan, concurring in *Williams v. Rhodes*,[52] reasoned that "[t]he right to have one's voice heard and one's views considered by ... governmental authority is at the core of the right of political association."[53] Therefore, charitable organizations should be allowed to engage in the first amendment freedom of participating in legislative activity without suffering adverse tax consequences unless there is a substantial governmental interest requiring the imposition of such tax penalties.[54]

In addition, the policy of the first amendment is aimed, at least in part, at maximizing the amount of socially useful speech and press available to society.[55] Justice Brennan observed that there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."[56] Charitable organizations can certainly contribute to the "robust and wide-open" debate advocated by Justice Brennan. They can be especially useful in providing Congress and the public at large with viable alternatives to the recommendations of big business lobbies regarding important legislation.

B. *Cammarano* and the Denial of Equal Protection in the First Amendment Context

Cammarano v. United States[57] involved the deductibility of lobbying costs as business expenses under Section 162 of the Internal Revenue Code. The petitioners were beer wholesalers who fought state initiative measures, which, if passed, would have seriously affected or destroyed their business. A unanimous Court in the interest of fairness to all taxpayers denied a tax deduction to Cammarano. Speaking for the Court, Justice Harlan explained:

---

48 U.S. Const. amend. I states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

49 Thomas v. Collins, 323 U.S. 516, 530 (1945).

50 335 U.S. 106 (1948).

51 Id. at 144 (Rutledge, J., concurring).

52 393 U.S. 23 (1968).

53 Id. at 41.

54 Supreme Court decisions requiring that official actions with an adverse impact on first amendment rights must be justified by a very substantial or paramount governmental interest include: De Gregory v. Attorney General, 383 U.S. 825 (1966); NAACP v. Button, 371 U.S. 415 (1963); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); Thomas v. Collins, 323 U.S. 516 (1945); Schneider v. State. 308 U.S. 147 (1939).

55 Note, Regulating the Political Activity of Foundations, supra note 44, at 1862.

56 New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

57 358 U.S. 498 (1959).

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for these activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code.[58]

Congress responded to the *Cammarano* decision by adding section 162(e) to the Code in 1962.[59] Section 162(e) allows deductions for all ordinary and necessary expenses incurred in connection with appearances before legislative bodies or contributions to business organizations of which the taxpayer is a member to enable such organizations to appear before a legislative body. Congress clearly had *Cammarano* in mind since a supporter of the addition, Senator Robert Kerr of Oklahoma, said during a Senate debate regarding the measure that "if the Supreme Court had not handed down the decision [*Cammarano*] holding that the language of the statute did not mean what it said . . . then this amendment would not be necessary."[60] Obviously Congress believed that businessmen were entitled to tax deductions for at least some of their lobbying expenditures.[61]

Therefore, the business community can now deduct their lobbying expenses while all other groups cannot, even though they both may be trying to influence the same legislation.[62] It can be argued, on the basis of *Cammarano*, that to allow tax preferences to one group while denying them to another is discriminatory and unconstitutional under the equal protection clause.[63] Since Congress has abandoned tax neutrality for the business taxpayer, it should abandon it for charitable organizations as well. To do less would be to violate the fourteenth amendment.

Although the fourteenth amendment equal protection clause is limited to "state action"[64] it has been held to apply to federal governmental action as well either through the due process clause of the fifth amendment[65] or on public policy

---

58 Id. at 513.

59 Section 162(e) was added to the Code by Revenue Act of 1962, Pub. L. No. 87-834. § 3, 76 Stat. 960.

60 108 Cong. Rec. 18492 (1962).

61 See congressional debate on lobbying expenditures, 108 Cong. Rec. 18486, particularly the remarks of Senator Spessard Holland of Florida:

> Shall we say that anyone who is engaged in business . . . does not have the right to defend himself when he is confronted with a legislative proposal which he regards as injurious to or destructive of his business, and does not have the right to regard the expenses of his defense as expenses which he should be allowed to deduct from his income tax statement? It seems to me that such a provision is just full of commonsense and reason and equity, and of course I support it.

Id. at 18497.

62 An opponent of the bill, Senator Paul Douglas of Illinois, noted that these deductions would be inequitable to other groups such as consumer advocates and charitable organizations, but his argument went unheeded. Senator Douglas stated:

> Suppose . . . that a State legislature is debating a measure desinged to decrease stream pollution. Manufacturers who dump industrial waste into the river . . . could deduct the cost of their opposition. Members of the public interested in pure water for drinking or for recreational uses would have to finance their support of the measure entirely from thier own pockets.

108 cong. Rec. 18487.

63 U.S. Const. amend. XIV § 1 states: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

64 See note 63 supra.

65 U.S. Const. amend. V states: "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Cases supporting the concept of applying the equal protection clause of the fourteenth amendment to the federal government through the fifth

grounds.[66] Therefore, equal protection arguments can validly be made with regard to congressional legislation such as the Internal Revenue Code.

Traditionally, the equal protection clause has been used only to invalidate legislation which does not have some reasonable relationship to legitimate state ends. Chief Justice Warren described this traditional equal protection test as "the wide leeway ... to enact legislation that appears to affect similarly situated people differently and the presumption of statutory validity that adheres thereto."[67] Under this approach the Court almost always finds a reasonable relationship and upholds the statute in question.[68] However, the Warren Court evolved a stricter equal protection standard requiring a compelling state interest to justify different treatment where fundamental rights[69] or suspect classifications[70] are involved. Only in rare cases such as *Korematsu v. United States*,[71] which dealt with wartime national security, has the Court found a compelling governmental interest sufficient to uphold the statute in question. Many of those rights declared fundamental by the Supreme Court have been constitutionally protected ones.[72]

Since the right to petition the Government is a specific constitutional right, it can be persuasively argued that discriminatory restrictions penalizing its exercise (such as the unfavorable tax provisions found in the Internal Revenue Code) can be justified only by a compelling state interest. It could be argued that the Government would find it very difficult to prove that there is a compelling state interest in imposing different tax restraints on legislative activities by charitable organizations than on similar activities by business organizations.[73]

---

amendment due process clause include: Shapiro v. Thompson, 394 U.S. 618 (1969); Schneider v. Rusk, 377 U.S. 163 (1964); and Bolling v. Sharpe, 347 U.S. 497 (1954). This concept has recently been used in a case involving the section 501(c)(3) tax-exempt status of an organization. "Americans United" Inc. v. Walters, CCH 1973 Stand. Fed. Tax Rep., U.S. Tax Cas. (73-1, at 80,215) ¶ 9165 (D.C. Cir. Jan. 11, 1973).

But cf. Helvering v. Lerner Stores Corp., 314 U.S. 463, 468 (1941), where Justice Douglas wrote that "[a] claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment, which contains no equal protection clause." However this case appears to be against the great weight of authority today.

66 Hurd v. Hodge, 334 U.S. 24 (1948) (the Court held that the District of Columbia courts could not enforce restrictive covenants because it would be contrary to the public policy of the United States to allow a federal court to enforce an agreement constitutionally unenforceable in state courts).

67 McDonald v. Board of Election Comm'rs, 394 U.S. 802, 808 (1969).

68 See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483 (1955), which used the reasonable relationship approach to uphold a statute precluding opticians from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist.

Only three times has the reasonable relationship approach resulted in a finding of unconstitutionality. Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971); and Morey v. Dowd, 354 U.S. 457 (1957). *Eisenstadt* and *Reed*, however, appear to be using a stricter standard than the traditional reasonableness standard.

69 See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972) (right to travel, right to vote); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote). In Dandridge v. Williams, 397 U.S. 471, 484 (1970), the Supreme Court stated that to deserve strict scrutiny, a fundamental right must be a constitutionally protected one.

However, in a later case the Court stated that a standard of review stricter than reasonable relationship is required when fundamental personal rights are affected by the state statutory classifications. The opinion does not state that these rights must be constitutionally protected ones. Wever v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

70 See, e.g., Loving v. Virginia, 388 U.S. 1 (1967) (race); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (race); Korematsu v. United States, 323 U.S. 214 (1944) (ancestry). Several cases have discussed wealth as a suspect classification. See, e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963). However, in San Antonio Independent School Dist. v. Rodriguez, 41 U.S.L.W. 4407 (U.S. March 21, 1973), and in James v. Valtierra, 402 U.S. 137 (1971), the Court seems to have rejected this concept.

71 323 U.S. 214 (1944).

72 See cases cited in note 69 supra.

73 See text accompanying notes 86-89 infra.

It must be noted, however, that the Burger Court has shown increasing dissatisfaction with the rigid two-tier formulation of reasonableness and compelling state interest evolved by its predecessor.[74] Instead it has opted for a more flexible approach where the equal protection clause can be used to invalidate legislation without resorting to the compelling state interest formula.[75] This approach is exemplified by the decision in *Weber v. Aetna Casualty & Surety Co.*,[76] where the Court stated that the common inquiry in both old and new equal protection cases was "inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[77]

This new approach has been used in the first amendment area of protected speech. In *Police Department v. Mosley*,[78] the Supreme Court sustained an equal protection claim "closely intertwined with First Amendment interests"[79] in striking down a city ordinance which made an impermissible distinction between labor picketing and other peaceful picketing.[80] Speaking for the Court, Justice Marshall carefully avoided any use of the compelling state interest test but emphasized that such a distinction must be "carefully scrutinized" and tailored to serve substantial governmental interests if it was to be upheld.[81] The Court found no substantial governmental objectives served by the *Mosley* ordinance because of the importance of first amendment rights. It was pointed out that the Government has no power to restrict expression because of its ideas, its subject matter or its content. *Mosley* also noted that "[u]nder the Equal Protection Clause ... government may not grant the

---

74 Recent equal protection cases which do not seem to be using the traditional two-tier formulation of equal protection include: Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). However, Justice Marshall feels the Court may now be reverting to its former dual approach. In his dissenting opinion in San Antonio Independent School Dist. v. Rodriguez, 41 U.S.L.W. 4407 (U.S. march 21, 1973), Justice Marshall stated: "The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review - strict scrutiny or mere rationality." Id. at 4437.

75 Gunther, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 12 (1972).

76 406 U.S. 164 (1972).

77 Id. at 173. Justice Marshall also used this new approach to equal protection in his dissent in San Antonio School District v. Rodriguez, 41 U.S.L.W. 4407, 4445 (U.S. March 21, 1973), where he stated:

> The nature of our inquiry into the justification for state discrimination is esentially the same in all equal protection cases: We must consider the substantiality of the state interests sought to be served, and we must scrutinize the reasonableness of the means by which the State has sought to advance its interests.

See also Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) where Justice Marshall, in a dissenting opinion, described his equal protection approach as:

> Equal protection analysis ... is not appreciably advanced by the *a priori* definition of a "right," fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and asserted state interests in support of the classification.

78 408 U.S. 92 (1972).

79 Id. at 95.

80 The Chicago ordinance construed in *Mosley* stated:

> A person commits disorderly conduct when he knowingly:
>
> ....
>
> (i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session ... provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute. ...

408 U.S. at 92-93.

81 408 U.S. 92, 99 (1972).

use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . [G]overnment must afford all points of view an equal opportunity to be heard."[82] The Government appears to be denying charitable organizations this "equal opportunity to be heard" when it conditions their exercise of free speech on tax restrictions while allowing business lobbies unrestricted speech opportunities.

An equal protection argument has been made in the first amendment area of religious freedom as well. In *Niemotko v. Maryland*[83] a group of Jehovah's Witnesses was denied a permit to use a city park for Bible talks although other political and religious groups had been allowed to put the park to such use. The Court held that this permit refusal violated the Jehovah's Witnesses' right to equal protection in their exercise of freedom of religion and speech protected by the first and fourteenth amendments. A similar conclusion was reached by the Court in *Fowler v. Rhode Island*[84] where another group of Witnesses was denied permission to conduct religious services in a park although other groups had been allowed to do so. Justice Black also used an equal protection approach in a first amendment case involving picketing to protest racial discrimination:

> I believe that the First and Fourteenth Amendments require that if the streets of a town are open to some views, they must be open to all. . . . [B]y specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets.[85]

In the instant situation, by allowing businessmen tax deductions while imposing tax restrictions on charitable organizations, Congress appears to be guilty of this discriminatory "picking and choosing" and thus violating the fourteenth amendment equal protection clause.

In *Mosley* the Court stated that under an equal protection analysis "[d]iscriminations among pickets must be tailored to serve a substantial governmental interest."[86] No such governmental interest was found in *Mosley*, and it is submitted that there is also no "substantial governmental interest" in treating business lobbying differently from the lobbying of charitable organizations. It has been argued that treating business lobbying differently is acceptable because the Government will get a share of future business profits, but to allow charities who lobby to maintain their section 501(c)(3) tax-exempt status would be an outright subsidy.[87] Such an argument ignores the fact that businesses will get the deductions whether or not they actually show profits. Moreover, the primary reason for giving charities tax-exempt status is that it is thought they will perform necessary functions which the Government would otherwise have to undertake.[88] The performance of such functions

---

[82] Id. at 96.

[83] 340 U.S. 268 (1951).

[84] 345 U.S. 67 (1953).

[85] Cox v. Louisiana, 379 U.S. 536, 580-81 (1965) (Black, J., concurring in part, dissenting in part).

[86] 408 U.S. 92, 99 (1972).

[87] Cooper, The Tax Treatment of Business Grassroots Lobbying: Defining and Attaining the Public Policy Objectives, 68 Colum. L. Rev. 801, 817 (1968).

[88] 51 Am. Jur. Taxation § 600 (1944) states that "[t]he fundamental ground upon which the exemption is based is the benefit conferred upon thhe public by such institutions [charities] and the consequent relief, to some extent, of the burden imposed on the state to care for and advance the interests of its citizens."

Accord, St. Louis Union Trust Co. v. United States, 374 F2d 427, 432 (8th Cir. 1967); Congregational Sunday School & Publishing Soc'y v. Board of Review, 290 Ill. 108, 125 N.E. 7 (1919); Massachusetts Gen. Hosp. v. Belmont, 233 Mass. 190, 124 N.E. 21 (1919); Lutheran Hosp. Ass'n v. Baker, 40 S.D. 226, 167 N.W. 148 (1918).

saves the Government money and therefore achieves much the same result as the taxing of business profits. Of course, if a particular charity does not perform a valid public function, it should not be given tax-exempt status at all whether it lobbies or not, but the criteria for such a determination are found in the general law of charitable trusts[89] and not in any "substantial legislative activity" test. Therefore, it is apparent that the Government has no substantial interest in distinguishing between the legislative activities of business organizations and charitable organizations for tax purposes.

Another possible violation of the equal protection clause arises through the use of "substantial" as part of the Internal Revenue Code test for determining section 501(c)(3) tax-exempt status. The use of the "substantial" test would permit a large organization like the Roman Catholic Church to legislate for repeal of laws permitting abortion since such actions would not be a substantial part of its overall activity. Yet, a smaller organization favoring current abortion laws might lose its exemption if it engaged in the same amount of lobbying on the opposite side of the issue.[90] This would be particularly anomalous since a primary aim of the first amendment is to safeguard the freedom of expression of minority groups.[91] Again, there is no important governmental interest to be served by this type of discrimination.

C. Taxation of First Amendment Rights Is Unconstitutional

While never dealing directly with the issue of first amendment rights in the context of legislative activities performed by charitable organizations, the Supreme Court has, on several occasions, struck down taxes considered to be infringements on first amendment rights. *Grosjean v. American Press Co.*[92] declared a tax on gross receipts of newspapers having a circulation of more than 20,000 copies per week unconstitutional since it violated the first amendment right of freedom of the press. In *Murdock v. Pennsylvania*,[93] where a flat license tax on peddlers was declared unconstitutional as applied to Jehovah's Witnesses, Justice Douglas emphatically stated that "freedom of speech, freedom of the press, freedom of religion are available to all, not merely those who can afford to pay their own way."[94] A similar tax was also

---

89 See note 2 supra defining valid charitable purposes.

90 A charitable organization recently made such an argument in a District of Columbia court. The organization had lost its tax-exempt status under Int. Rev. Code of 1954, § 501(c)(3) on the ground that it engaged in substantial political activity. It claimed that its first and fifth amendment rights had been violated since its attempts to influence legislation might be regarded as "substantial" although the same activities performed by a larger organization would not be regarded as "substantial." The court held that the Anti-Injunction Act § 7421(a) of the Internal Revenue Code which prohibits the maintenance of suits to restrain the assessment or collection of taxes did not bar an organization whose § 501(c)(3) exemption had been revoked from seeking an injunction against the enforcement of the claimed unconstitutional disqualifying clause. The court recognized that the loss of tax-exempt status was very damaging to the financial status of charitable organizations. However, the constitutional issues were not reached in the case. "Americans United" Inc. v. Walters, CCH 1973 Stand. Fed. Tax Rep., U.S. Tax Cas. (73-1, at 80,215) ¶ 9165 (D.C. Cir. Jan. 11, 1973), petition for cert. filed, 41 U.S.L.W. 3576 (U.S. April 10, 1973) (No. 72-1371).

91 Street v. New York, 394 U.S. 576 (1969). Justice Harlan's majority opinion in *Street* spoke about the freedom to be "intellectually diverse . . . or even contrary" to the prevailing public opinion. Id. at 593. Accord, Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion"); Barenblatt v. United States, 360 U.S. 109, 145 (1959) (Black, J., dissenting: "The First Amendment means . . . that the only constitutional way our Government can preserve itself is to leave its people the fullest possible freedom to praise, criticize or discuss . . . all governmental policies").

92 297 U.S. 233 (1936). However, the first amendment does not relieve a newspaper reporter of the obligation that all citizens have of responding to a grand jury subpoena and answering questions relevant to a criminal investigation. Branzburg v. Hayes, 408 U.S. 665 (1972).

93 319 U.S. 105 (1943).

94 Id. at 111.

invalidated in *Follett v. Town of McCormick*.[95] In *Follett*, Justice Murphy warned that the taxing and licensing powers were dangerous and potent weapons which could be used to supress constitutional freedoms.[96] Chief Justice Marshall's famous dictum in *McCulloch v. Maryland*[97] that the power to tax is the power to destroy conveys a similar warning. These warnings seem applicable to the situation of charitable organizations. If they are denied their tax-exempt status due to their political activities, their first amendment right to petition the Government would be impaired. Furthermore, without tax-exempt contributions many of these organizations would find it difficult to survive.[98]

The Supreme Court has recognized that the denial of tax exemptions, like the imposition of taxes, may burden first amendment rights. In *Speiser v. Randall*,[99] the Court construed a California statute requiring veterans to take loyalty oaths[100] in order to get a veterans' property tax exemption. In delivering the opinion of the Court, Justice Brennan stated: "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech."[101] Justice Brennan also pointed out that statutes which might infringe freedom of speech must be closely scrutinized and that only considerations of the greatest urgency could justify restrictions on speech. Justice Brennan found that the state's interest here was not sufficient to justify requiring veterans to take a loyalty oath.

Similarly it can be argued that the Government's interest in prohibiting lobbying by tax-exempt organizations is not sufficiently important to justify imposing tax restrictions on such organizations. The interest in precluding lobbying has been explained by the Government's desire to maintain tax neutrality and not to subsidize politics.[102] However, by allowing business organizations to deduct lobbying expenses,[103] the Government has already violated any policy of neutrality it might formerly have had. Another argument advanced to support government prohibition of lobbying by charitable organizations is that only the rich are likely to give to charities since they are the only ones who itemize their deductions and thus receive tax benefits from their contributions.[104] It is feared that charities which engage in legislative activities may be reflecting the views of their largest donors. Such arguments ignore the fact that if charities are self-seeking or reflect only the selfish interests of their benefactors, they should not, under the general law of gratuitous transfers, be classified as charities in the first place. Other, more fundamental safeguards, which do not

---

95 321 U.S. 573 (1944).

96 Id. at 579.

97 17 U.S. (4 Wheat.) 316, 431 (1819).

98 In one case, an organization claimed that its loss of § 501(c)(3) tax-exempt status in 1969 had dried up its source of contributions to such an extent that it operated at a deficit for the first time in its history in 1970. The court recognized the problem by noting that potential contributors are careful to get the most for their contributed dollars, a plan which would not be advanced by contributing to nonsection 501(c)(3) corporations. "Americans United" Inc. v. Walters, CCH 1973 Stand. Fed. Tax Rep., U.S. Tax Cas. (73-1, at 80,215, 80, 219-20) ¶ 9165 (D.C. Cir. Jan. 11, 1973).

99 357 U.S. 513 (1958). Accord, Golden Rule Church Ass'n v. Commissioner, 41 T.C. 719 (1964). There the court stated: "Although tax benefits such as exemptions may be matters of legislative grace . . . nevertheless, a denial of such benefits granted to others of essentially the same class may well rise to the level of an unconstitutional discrimination." Id. at 729.

100 The Constitution provided: "Notwithstanding any other provisions of this [Calif.] Constitution, no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means . . . shall . . . (b) receive any exemption from any tax imposed." Calif. Const. art. XX, § 19 (1952). Thus the statute was not limited to veterans in its applications.

101 357 U.S. 513, 518 (1958).

102 See text accompanying notes 57-64 supra.

103 See text accompanying notes 59-64 supra.

104 Note, The Tax-Exempt Status of Public Interest Law Firms, supra note 5, at 242 n.43.

infringe upon free speech, should be used to deal with such subterfuge.[105] It should be recognized that engaging in legislative activities does not make a truly charitable organization noncharitable.

It is also contended that to allow deductions for politically active charities would cause the Government to receive less revenue and thereby erode the tax base.[106] This argument has little merit because, it one charity is declared nonexempt by reason of its legislative activities, prospective donors will, in all probability, merely make their donations to similar charities which are still tax-exempt. Lastly, it has been asserted that there is an inherent undesirability in lobbying.[107] This assertion is particularly unfair when applied to nonprofit organizations since the persons involved do not lobby for their personal monetary gain. Moreover, the Supreme Court in *Cammarano* regarded lobbying as a lawful activity.[108] Therefore, the Government does not have a sufficiently strong interest for disallowing the section 501(c)(3) tax-exempt status of charitable organizations which engage in legislative activities.

D. Tax Exemptions, Though a Governmental Privilege, May Not be Used To Infringe First Amendment Rights

The anti-lobbying provisions of the Internal Revenue Code have been justified by the argument that tax exemptions and deductions are acts of legislative grace and not a constitutional requirement. For example, Justice Douglas concluded that tax deductions were a matter of legislative grace and the state does not have to subsidize first amendment rights with tax exemptions.[109]

However, when the legislature does grant an exemption or any other benefit, it cannot do so in a manner which will discriminate against the exercise of first amendment rights. Thus the Supreme Court has stated that "the appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty' its denial may not infringe speech."[110] In *American Communications Association v. Douds*[111] Justice Frankfuter stated: "Congress may withhold all sorts of facilities for a better life but if it affords them, it cannot make them available in an obviously arbitrary way or exact surrender of freedoms unrelated to the purpose of the facilities."[112] The opinion in *Sherbert v. Verner*[113] was even stronger on this point. *Sherbert* dealt with a South Carolina court's refusal to give a woman unemployment benefits because she would not work on Saturdays due to religious beliefs. The Supreme Court stated:

> Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege'. It is too late in the

---

105 For example, the Attorney General of each state may protect, supervise and enforce charitable trusts. G. Bogert, The Law of Trusts & Trustees § 411 (2d ed. 1964). Also, many states now have statutes dealing with charitable trust regulations. States should provide more money and manpower to better enforce these statutes and enable the Attorney General to adequately supervise charitable trusts. For more information concerning this problem, see Note, State Attorney General — Gaurdian of Public Charities? 14 Clev.-Mar. L. Rev. 236 (1965); Note, The Attorney General and the Charitable Trust Act — Wills, Contest and Construction, 14 Clev.-Mar. L. Rev. 194 (1965).

106 Garrett, supra note 16, at 581.

107 Id. at 582.

108 Cammarano v. United States, 358 U.S. 498, 513 (1959).

109 Id. at 515 (Douglas, J., concurring).

110 Speiser v. Randall, 357 U.S. 513, 518 (1958).

111 339 U.S. 382 (1950).

112 Id. at 417 (Frankfuter, J., concurring in part, dissenting in part).

113 374 U.S. 398 (1963).

day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.[114]

Similarly, the anti-lobbying sections in the Internal Revenue Code condition the tax-exempt privilege of charities upon an abridgement of free speech and the right to petition the government.

However the Tenth Circuit recently rejected the argument that revocation of an organization's section 501(c)(3) tax-exempt status because the organization had engaged in "substantial legislative activity" was an unconstitutional infringement on the organization's first amendment right of free speech.[115] The court emphasized that first amendment rights were not absolute and that tax exemptions were a privilege and not a right.[116] In reaching its decision the Tenth Circuit did not consider the Supreme Court's opinion in *Sherbert* or the Court's decisions regarding the effect of taxation on first amendment rights.[117] Moreover the case may deserve special treatment since the organization involved was a religious institution and the Tenth Circuit considered that the government had a compelling interest in maintaining the separation of church and state.[118]

E. The Void for Vagueness Doctrine

The anti-lobbying sections in the Internal Revenue Code might also be struck down under first amendment theory as being void for vagueness. The void for vagueness test has been defined as "whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."[119] Vague statutes have been criticized for several important reasons. First, they do not give adequate notice of what type of behavior the statute is trying to control, and thus people may inadvertently break the law. As Justice Marshall explained: "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning."[120] The Supreme Court has often declared statutes to be vague and, therefore, unconstitutional for this reason.[121]

Secondly, the enforcement of vague laws is arbitrary and discriminatory because vague laws provide no explicit standards for those who must enforce the laws. A recent example of this problem arose in *Coates v. Cincinnati*[122] where the Court struck down

---

114 Id. at 404.

115 Christian Echoes Nat'l Ministry Inc. v. United States, 470 F.2d 849 (10th Cir. 1972), petition for cert. filed, 41 U.S.L.W. 3576 (U.S. April 12, 1973) (No. 72-1378).

116 Id. at 856-57.

117 For Supreme Court cases regarding the effect of taxation on first amendment rights see text accompanying notes 92-108 supra.

118 Christian Echoes Nat'l Ministry Inc. v. United States, 470 F.2d 849, 857 (10th Cir. 1972).

119 Jordan v. DeGeorge, 341 U.S. 223, 231-32 (1951).

120 Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

121 For example, in dealing with a vagrancy statute, the Court in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), found *inter alia* that the statute was void for vagueness "in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.'" Id. at 162. Accord, Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Jordan v. DeGeorge, 341 U.S. 224 (1951); Connally v. General Constr. Co., 269 U.S. 385 (1926); United States v. Cohen Grocery Co., 255 U.S. 81 (1921); International Harvester Co. v. Kentucky, 234 U.S. 216 (1914).

122 402 U.S. 611 (1971).

a Cincinnati ordinance which made it illegal for "three or more persons to assemble ... on any of the sidewalks ... and then conduct themselves in a manner annoying to persons passing by."[123] The ordinance was declared unconstitutional in that it subjected the exercise of the right of assembly to an unascertainable standard. In coming to this conclusion Justice Stewart found particular fault with the word "annoying". To him "annoying" specified no standard of conduct at all since "conduct that annoys some people does not annoy others."[124]

However, it should be noted that the void for vagueness doctrine has certain limitations. In upholding an anti-noise ordinance which had been attacked as vague, Justice Marshall explained that "we can never expect mathematical certainty from our language."[125] In another case, the Court noted that the fertile legal imagination can always conjure up hypothetical cases in which the meaning of disputed terms will be in question.[126]

The Internal Revenue Code's use of the "substantial legislative activity" test seems vague when measured by the above criteria. The meaning of "substantial" is not clear from the Code itself. Moreover, the courts and the IRS have not evolved a workable definition of what is meant by "substantial legislative activity."[127] As discussed above, the same type of legislative activity by similar types of organizations has been deemed "substantial" by some courts, and "insubstantial" by other courts.[128] Therefore, charitable organizations are not being given adequate notice of precisely what type of conduct is precluded by the Internal Revenue Code restrictions. The vagueness of the "substantial legislative activity" test has also led to an arbitrary and discriminatory application of the law. This is shown by the highly selective enforcement of these tax restrictions by the IRS.[129]

There is also the danger that charitable organizations actually involved in insubstantial legislative activity may be deprived of their tax-exempt status since the courts have not developed a clear test of what constitues substantial legislative activity. Thus charitable organizations may be penalized for exercising their first amendment right to petition the government although the Internal Revenue Code tax restrictions were not meant to apply to them.

F. The Possibility of a "Chilling Effect"

Perhaps the greatest danger that vague statutes present is the possibility of deterring people from exercising their first amendment rights. People contemplating privileged action which could come within the ambit of a vague statute may be discouraged by a respect for legality, an uncertainty that their right will be upheld in a court, a fear of the statutory penalties which may be imposed on them for violating the statute and a general unwillingness to bear the burden of litigation.[130] The Supreme Court recognized this danger in *Baggett v. Bullitt*[131] where it noted that uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone" than if the boundaries were clearly marked.[132]

---

123 Id. at 611.

124 Id. at 614.

125 408 U.S. 104, 110 (1972).

126 American Communication Ass'n v. Douds, 339 U.S. 382, 412 (1950).

127 See text accompanying notes 17-41 supra.

128 See text accompanying notes 17-33 supra.

129 See text accompanying notes 33-41 supra.

130 Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 854-55 (1970).

131 377 U.S. 360 (1964).

132 Id. at 372, quoting Speiser v. Randall, 357 U.S. 513, 526 (1958).

This danger has been referred to as a "chilling effect" on privileged first amendment activity. The expression "chilling effect" was first used by Justice Frankfuter in *Wieman v. Updegraff*[133] to refer to an increased reluctance to engage in free expression as a result of governmental action. However, it was not until Justice Brennan's use of the phrase in *Dombrowski v. Pfister*[134] that it achieved constitutional prominence. In *Dombrowski*, the appellants were threatened with a criminal prosecution under a state statute regulating speech. The Court found such threatened prosecutions to have a "chilling effect" on the appellants' free expression and authorized the federal district court to issue an injunction restraining the state government from prosecuting, or attempting to prosecute, the appellants under the Louisiana statute in question. However, the *Dombrowski* decision was reconsidered in *Younger v. Harris*[135] where the Court held that because of the fundamental policy against federal interference in state court proceedings, there must be "great and immediate" irreparable injury for a federal court to enjoin pending state court proceedings.[136] The Court did not deny that pending state prosecutions have a "chilling effect" on first amendment rights, but expressed a belief that such rights generally must be vindicated in state court proceedings.[137] The Court further limited the "chilling effect" doctrine in *Laird v. Tatum*[138] by requiring that a suit alleging a "chilling effect" on first amendment rights must claim that immediate sanctions on the exercise of these rights exist rather than just a present inhibition of expressive conduct.[139]

Charitable organizations are suffering damage through the "chilling effect" on their right to lobby. For example, on October 9, 1970, the IRS announced a "moratorium" on granting new tax exemptions to public interest organizations involved in litigation and suggested that major commitments to such organizations should not be undertaken during a sixty-day IRS study period.[140] There was speculation that corporate pressure was being applied to weaken opposition to corporate pollution, unfair trade practices and unsafe products.[141] The study concluded that such organizations could retain their tax-exempt status,[142] but a dangerous precedent has been established. At the very least such action will undoubtedly make charities unduly hesitant about becoming involved in political activities. However, this burden may not be enough to prove an unconstitutional "chilling effect" in the light of *Tatum's* requirement of an immediate risk of direct injury.

G. The Question of Standing

There remains the issue of whether or not charitable organizations, as well as private individuals, enjoy the protection of the first and fourteenth amendments. Business organizations, such as newspapers,[143] and civil rights organizations, such as

---

133 334 U.S. 183, 195 (1952) (Frankfuter, J., concurring).

134 380 U.S. 479, 487 (1965). The Supreme Court has used the "chilling effect" concept in Baird v. State Bar of Arizona, 401 U.S. 1 (1971); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Lamont v. Postmaster Gen., 381 U.S. 301 (1965); and Baggett v. Bullitt, 377 U.S. 360 (1964).

135 401 U.S. 37 (1971).

136 Id. at 46, quoting Fenner v. Boykin, 271 U.S. 240, 243 (1926).

137 Id. at 50-51.

138 408 U.S. 1 (1972).

139 Id. at 13-14.

140 7 CCH 1970 Stand. Fed. Tax Rep. ¶ 6938A.

141 Garrett, supra note 16, at 575.

142 IRS News Release No. 1078, 7 CCH 1970 Stand. Fed. Tax Rep. ¶ 6943G.

143 New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

the NAACP,[144] have successfully claimed rights under the first amendment. The Supreme Court has considered private corporations to be "persons" entitled to the protection of the fourteenth amendment equal protection clause.[145] Therefore, it would seem that charitable organizations would be allowed to litigate first and fourteenth amendment issues as well.

Another problem is the question of whether an organization has standing to raise the deductibility question. Technically, this issue can be raised only by taxpayers whose deductions for contributing to the organization are disallowed. However the IRS usually permits charitable organizations to argue the deductibility issue as well as the "substantial legislative activity" issue under section 501(c)(3).[146] Were there any doubt, a charitable organization might eliminate the problem by having one of its members donate a small amount to the organization and thereby obtain standing to sue as a taxpayer.

V. CONCLUSION

The "substantial legislative activity" provisions of the Internal Revenue Code have proven themselves to be unworkable and unduly burdensome to charitable organizations. Punishing charitable organizations who lobby to obtain their goals with the loss of their section 501(c)(3) tax-exempt status appears to be violative of the equal protection clause in view of the favorable status given similar activities when undertaken by business organizations. Moreover, lobbying is not incompatible with the concept of charitable organizations and, indeed, may be necessary to achieve the laudable goals of many worthwhile organizations. Therefore, the Code sections precluding such activities on the part of nonprofit organizations should be eliminated. Rather, the approach of the private law of charitable trusts, which has found this restriction unnecessary, should be followed by the Government.

Furthermore, the first amendment with its preferred right of free speech and the right to petition the Government compels such an approach. As Justice Black stated:

> I believe "that the First Amendment grants an absolute right to believe in any governmental system, [to] discuss all governmental affairs and [to] argue for desired changes in the existing order. This freedom is too dangerous for bad, tyrannical governments to permit. But those who wrote and adopted our First Amendment weighed those dangers against the dangers of censorship and deliberately chose the First Amendment's unequivocal command that freedom of assembly, petition, speech and press shall not be abridged. I happen to believe this was a wise choice and that our free way of life enlists such respect and love that our Nation cannot be imperiled by mere talk."[147]

In addition, it has been recognized by the Supreme Court that the taxation of first amendment activities is unconstitutional and that tax exemptions, such as the

---

144 NAACP v. Button, 371 U.S. 415, 428 (1963).

145 Liggitt Co. v. Lee, 288 U.S. 517, 536 (1933); Frost v. Corporation Comm'n, 278 U.S. 515, 522 (1929); Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 400 (1928).

146 Borod, supra note 34, at 1092.

147 Speiser v. Randall, 357 U.S. 513, 531 (1958) (Black, J., concurring), quoting Carlson v. Landon, 342 U.S. 524, 555-56 (1952) (Black, J., dissenting).

exemption granted to charitable organizations, may not be used to infringe speech. Statutes which are vague have been found to interfere with the exercise of first amendment rights. These statutes are similar to the "substantial legislative activity" sections of the Internal Revenue Code. Therefore, the tax restrictions against substantial legislative activity on the part of charitable organizations appear to be violative of the first amendment.

EILEEN C. BUDNOVITCH