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LOBBYING ON THE INTERNET AND THE INTERNAL REVENUE CODE'S REGULATION OF CHARITABLE ORGANIZATIONS

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I. INTRODUCTION

Internet technology[1] has radically changed the way the world communicates, breaking down barriers since its inception and throughout its various stages of development.[2] The relatively slow wheels of governmental regulatory agencies have not kept pace with the technology's rapid growth.[3] Though Congress has been confronted with a multitude of

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1. "Internet" and "Internet technology" are used in this Note as umbrella terms to encompass any transmission of information over a worldwide computer network. This includes the general meaning of the Internet, electronic mail (or "e-mail"), the World Wide Web, listservs, and so forth. For a thorough but easily digestible description of this technology and its development, see *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849-53 (1997).

2. *See id.* at 849-50. In *Reno*, Justice Stevens defined the Internet and outlined its development using stipulated facts by the parties as his basis:

> The Internet is an international network of interconnected computers. It is the outgrowth of what began in 1969 as a military program called "ARPANET," which was designed to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war. While the ARPANET no longer exists, it provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is "a unique and wholly new medium of worldwide human communication."

3. In recounting the stipulated facts in Reno, Justice Stevens also addressed the growth of the Internet.

> The Internet has experienced "extraordinary growth." The number of "host" computers—those that store information and relay communications—increased from about 300 in 1981 to approxi-

issues and questions, it has just recently begun to respond with some initial legislation.[4] In the meantime, absent specific legislation, individuals

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> mately 9,400,000 by the time of the trial in 1996. Roughly 60% of these hosts are located in the United States. About 40 million people used the Internet at the time of trial, a number that is expected to mushroom to 200 million by 1999.

Id. at 850. (footnotes omitted). *See also* Richard Raysman & Peter Brown, *Pending Key Internet Legislation*, N.Y. L.J., Dec. 9, 1997, at 3.

> The law is usually a lagging indicator of business and technology changes. In 1997, legislation began to move more rapidly as the laws began to adapt to our increasingly networked society. We have seen the introduction of a host of new federal Internet-related legislation intended to address concerns that include the protection of on-line privacy, taxation of Internet-related commerce and services, regulation of on-line gambling, use of encryption and copyrights in the digital environment.

Id.

4. A sampling of the issues Congress is now addressing or will soon be forced to address includes pornography, gambling, the safe transmission of credit information for purchases, copyright issues, implications for traditional businesses of the added competition of Internet vendors, and jurisdictional questions. *See* Bill Pietrucha, *Internet Policy Forum Drawing Top Policy Makers*, NEWSBYTES NEWS NETWORK, Jan. 21, 1998, *available in* 1998 WL 5028811 (discussing the multitude of issues to be addressed by policymakers at the Internet Policy Forum to be held February 8-10, 1998, by the Association for Interactive Media); Jack E. Brown, *Obscenity, Anonymity, and Database Protection: Emerging Internet Issues*, 14 No. 10 COMPUTER LAW. 2.

[T]hree of the current legal issues evoked by the Internet [are]:

> (1) The jurisdictional reach of one state to make it a criminal or civil offense to send objectionable Internet communications to another state.
>
> (2) The constitutionality of a state prohibition of anonymity or pseudonymity in Internet communications.
>
> (3) The scope of copyright protection applicable to Internet communications or screen displays.

and organizations are expanding how they communicate and do business in this new context. For some, whose communications may be regulated heavily in the context of traditional media or restricted because of the prohibitive costs of access to traditional media, the Internet provides new opportunities to reach desired audiences.

Lobbying by charities represents one of those gray areas in which there is great opportunity, though little guidance in terms of allowability.[5] Although lobbying activities by charitable organizations are heavily regulated under the Internal Revenue Code,[6] the regulations do not yet contemplate lobbying via Internet technology.[7] As such, the regulated organizations play a guessing game as they begin to take advantage of the technology. Lobbying can be an important tool for charitable organizations to accomplish their missions, and the Internet offers a forum and a method of communication far different from traditional methods.[8] The

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Id. at 2; *Congress Wrestles with the 'Net: How Much to Regulate is the Knotty Question*, CINCINNATI POST, Feb. 9, 1998, at 2A (stating that "[a]s the second session of the 105th Congress gets under way, lawmakers are wrestling with a wide range of Internet-related issues. From taxes to gambling to unsolicited e-mail, dozens of bills have been introduced to restrict or regulate growth of the Internet . . . .").

5. Other examples include artists who want to exhibit their work but who cannot gain recognition by a gallery; cigarette or liquor advertisers who want to reach an audience currently restricted; and pornographers who want to reach audiences by posting sites on the World Wide Web.

6. *See generally* I.R.C. § 501(c)(3) (1994).

7. In fact, the Code does not specifically delineate means of lobbying. However, any references made in the companion Treasury regulations to mode of transmission are to more traditional means, such as television, radio, and direct mail. *See* Treas. Reg. § 1.501(c)(3)-1 (1997).

8. *See Reno*, 521 U.S. at 853. A further recounting of the stipulated facts pertaining to the Internet offers an apt description of the World Wide Web, a commonly used way of accessing the Internet:

> The Web is . . . comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.
>
> From the publishers' point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of mil-

question remains, however, whether and how the government will apply the existing regulations to lobbying using the Internet.

The regulations, as they currently exist, provide no clear mechanism for the government to determine when lobbying via certain forms has reached a proscribed level. The Internal Revenue Code's regulations are largely based on level of expenditure.[9] This basis makes sense in a context of communications over traditional media—radio, television, and mail—which would incur expenditure levels generally commensurate with their impact; for example, the more an organization spends on television advertising, the wider audience it will generally reach. However, in the context of the Internet, because of significantly reduced costs without necessarily any lessening of impact,[10] expenditure levels may not

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> lions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege. "No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web."

Id. (footnotes omitted); Paul Demko and Jennifer Moore, *Charities Put the Web to Work*, CHRONICLE OF PHILANTHROPY (Oct. 8, 1998) <http://www.philanthropy.com/articles.dir/v10.dir/i24.dir/24website.htm>.

> As their initial fascination with the Internet has faded, non-profit groups are changing the way they use its vast capabilities. What many first saw as simply a way to showcase their efforts—much like an electronic billboard—has now become an integral part of how they carry out their day-to-day work.

Id.

9. *See* I.R.C. § 501 (1994).

10. *See* Paul Demko, *Acting Up On Line: The Internet Lets Activists Reach Around the World at Little Cost*, CHRONICLE OF PHILANTHROPY (Apr. 9, 1998) <http://philanthropy.com/articles.dir/v10.dir/i24.dir/12advocacy.htm> ("On-line technologies have

be a sufficient indicator of level of activity. As a result, until (and unless) the government considers how to tackle this question, there could be a significant opportunity for organizations that wish to take advantage of the technology.

Since the early twentieth century, Congress has carved out significant exemptions from taxation for certain organizations created to advance charitable goals.[11] The exemptions continue a long tradition of favored treatment in England, which, for centuries, has also exempted charitable organizations from taxation and other regulations.[12] In provid-

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made the most dramatic difference to small non-profit groups. In the past, the costs of bulk-mail appeals or telephone calls limited the number of people those organizations could reach. But the Internet has in many ways reduced those barriers[.]").

There are arguments on both sides of the question of impact via the Internet. Most would agree, it seems, that many organizations have found that targeted Internet use can be extremely effective. *See generally* Demko & Moore, *supra* note 8 (detailing several examples of charities' successful uses of Internet technology).

11. *See* I.R.C. § 501 (1934); Christian Echoes Nat'l Ministry v. United States, 470 F.2d 849, 853 (10th Cir. 1972) ("Almost since the earliest days of the federal income tax, Congress has exempted certain corporations from taxation."); *see also infra* notes 46-68 and accompanying text for a discussion of the historical development of tax exemption in the United States.

12. *See* GARETH JONES, HISTORY OF THE LAW OF CHARITY: 1532-1827, at 18 (1969) (describing England's Statute of Charitable Uses, enacted in 1601). The Statute of Charitable Uses specified what activities or organizations were to be considered charitable, as outlined in its Preamble:

> Whereas lands, tenements, rents annuities, profits, hereditaments, goods, chattels, money, and stocks of money, have been heretofore given, limited, appointed, and assigned as well by the Queen's most excellent majesty, and her most noble progenitors, as by sundry other well disposed persons: some for relief of aged, impotent, and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities: some for repair of bridges, ports, havens, causeways, churches, seabanks and highways, some for education and preferment of orphans; some for or towards the relief, stock, or maintenance for houses of correction; some for marriages of poor maids; some for supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; and others for relief or redemption of prisoners or

ing these exemptions, the governments of both the United States and England have recognized an inherent value and necessity in charitable organizations.[13] Types of nonprofit organizations that are provided some level of favored treatment under the current Internal Revenue Code include churches, homeless shelters, labor unions, veterans' organizations, country clubs, community development corporations, nonprofit hospitals, private foundations, community foundations, many colleges and universities, the American Red Cross, the National Football League, and the Metropolitan Museum of Art.[14]

> captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes . . . .

Id. at 26 (quoting Statute of Charitable Uses, 1601, 43 Elizabeth I, ch. 4).

13. The government's stated rationale is that "the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare." H.R. REP. NO. 1860, at 19 (1938). *See generally* John W. Gardner, *The Independent Sector, in* AMERICA'S VOLUNTARY SPIRIT ix, xiii-xv (Brian O'Connell, ed., 1983); Waldemar A. Nielsen, *The Third Sector: Keystone of a Caring Society, in* AMERICA'S VOLUNTARY SPIRIT 363, 363-69 (Brian O'Connell, ed., 1983).

14. A "nonprofit" organization is one that is subject under the Internal Revenue Code to the "nondistribution constraint," which is explained by Professor Henry B. Hansmann as follows:

> [The] organization . . . is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees . . . . Net earnings [after reasonable expenses and staff compensation], if any, must be retained and devoted in their entirety to financing further production of the services that the organization was formed to provide.

Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980). Under section 501 of the Internal Revenue Code, there are three broad categories of nonprofit organizations, each with its own level of benefit and commensurate restrictions. The National Football League—while considered a nonprofit organization—is in a very different category from and has very different benefits and restrictions from a small community-based after-school program for underprivileged children. For a critical look at some of the institutions granted tax exemption by the Internal Revenue Service, see GILBERT M. GAUL & NEILL A. BOROWSKI, FREE RIDE: THE TAX-EXEMPT ECONOMY 1-13 (1993).

Accompanying the privilege of tax exemption is the quid pro quo of increased regulation. For charities, restrictions on lobbying or political activities are among the more significant regulations affecting their work.[15] Many exempt organizations find it necessary to engage in some lobbying activities to further their goals, though the level of lobbying or political activity in which they may engage is limited.[16] For example, an organization that works to aid immigrants in California may need to take a position on proposed legislation to remove bilingual education from the public school system; organizations dedicated to making abortion illegal may want to lobby for increased state restrictions on abortion or for the Senate confirmation of a conservative candidate for Supreme Court justice; a coalition that helps the homeless may need to lobby to receive better services; an organization seeking to make school prayer a requirement may want to persuade members of Congress to legislate in that area.

As with for-profit industry, charitable organizations are finding that to be effective, they must venture onto the Internet to pursue their goals.[17] Electronic mail and the World Wide Web offer new ways for

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15. *See* I.R.C. §§ 501, 4911, 4912, 4945 (1994).

16. *See* Mark Johnson, *Foundations of Power*, PORTLAND OREGONIAN, June 21, 1998, at G1.

17. *See* Demko & Moore, *supra* note 8 (noting that "[t]he number of registered Internet addresses that end in *.org*—usually used by non-profit groups—has jumped from an estimated 500 in 1992 to more than 114,000 as of June [1998]"); Wylie Wong, *Nonprofits Find Funds, Help on the Web*, COMPUTER WORLD, Dec. 22, 1997, at 37.

> If Apple Computer, Inc., and Barnes & Noble, Inc. can look at the Web and see dollar signs, the American Red Cross figures it can, too.... With Internet commerce on the rise, nonprofit organizations and charities are flocking to the fledgling medium .... The World Wide Web also is a cost-effective way to find new volunteers and educate people about an organization's mission.

Id.; Michael Barndt, *Establishing a Presence—Local Nonprofits On-Line* (visited Apr. 12, 1998) <http://www.uvm.edu/People/mbarndt/npdev.htm> (discussing the increased usage of the Internet for smaller, locally based nonprofit organizations). Barndt further states:

charities to reach their constituents or the general public, to seek funding, and to learn about other initiatives. Charitable organizations may use a Web site to network among various constituent organizations and other organizations with similar missions. For the benefit of their constituents, charitable organizations might also create links from their Web sites to research posted on the Web or post their own research and analysis that will be useful to others. Internet technology also opens up new venues for any lobbying activities in which an organization might choose to engage.

Congress has just begun to regulate the Internet, which has thus far gone largely unregulated.[18] The Internal Revenue Code, which is the locus of regulations pertaining to nonprofit organizations—including regulation of lobbying activities—does not, as yet, contain any specific refer-

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> Nonprofit organizations engaged in delivering a service will find that Internet can increase their effectiveness. Nonprofit organizations involved in advocacy will find the Internet an important new outlet for "publishing" their perspectives on issues. Nonprofit organizations committed to community development will use Internet as an additional community building tool. Nonprofit organizations valuing open participation in their work will use Internet to further the democratic process.

Id.; Jayne Cravens, *What Use Is the Internet to a Nonprofit Organization?* (last modified Jun. 21, 1999) <http://www.coyotecom.com/online.html> (listing several of the "tangible benefits of being on-line": immediate communications via e-mail; research; networking; posting information; locating volunteers; fund raising; on-line activism). Ms. Cravens also offers the following general statement:

> The value of using the Net as a way to distribute information to the general public or to find donors/volunteers remains small. However, the Net as a way to network and to communicate with peers is invaluable, and access to various on-line information depositories can drastically reduce time needed for research.

Id.

18. *See* 47 U.S.C. § 230(a)(4) (1996) ("The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."); *see also infra* notes 79-87 and accompanying text (discussion of Congress's first attempt to regulate the Internet and the judicial challenges it has faced).

ences to the use of Internet technology by tax-exempt organizations.[19] This Note examines the intersection of Internet technology use by charitable organizations and the lobbying restrictions imposed upon those organizations. Parts II and III provide background for this inquiry: Part II[20] outlines the Internal Revenue Code's definitions of exempt organizations; Part III[21] discusses lobbying restrictions placed on charitable organizations and the initial restrictions Congress has attempted to place on Internet technology. Part IV[22] examines how free speech protections apply to the lobbying activities of charitable organizations and to communications via the Internet. Part V[23] looks at the mechanisms by which the Internal Revenue Code monitors lobbying activities and how these mechanisms might apply to such activities on the Internet. Finally, Part VI[24] focuses on the impact of lobbying regulations on private foundations that fund Web site development by public charities.

II. BACKGROUND ON CHARITABLE ORGANIZATIONS

A. *An Introduction to the Lobbying Restrictions Imposed on Charitable Organizations*

Tax exemption in the United States is handled through the Internal Revenue Code (hereinafter "the Code") and is thus monitored by the Internal Revenue Service ("IRS").[25] The Code delineates what types of

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19. Recently, however, there have been reports that the Internal Revenue Service is considering asking tax exempt organizations if they have a Web site, and if so, what is contained on it. *See, e.g., IRS Says It Is Beginning Random Audits of PACs*, WALL ST. J., May 20, 1998, at A4.

20. *See infra* text accompanying notes 25-45. While the focus of this article will be on two categories—publicly supported charities and private foundations—an understanding of the various types of nonprofit entities is important.

21. *See infra* text accompanying notes 46-87.

22. *See infra* text accompanying notes 88-131.

23. *See infra* text accompanying notes 132-177.

24. *See infra* text accompanying notes 178-203.

25. *See* I.R.C. § 501 (1994).

organizations are entitled to tax exemption and outlines a series of regulations and restrictions on the organizations that are granted tax-exempt status, proscribing three distinct types of activities: political campaign activities, direct lobbying, and grassroots lobbying.[26] An organization with a charitable purpose may gain tax exemption under section 501(c)(3) of the Code if "no substantial part of [its] activities [constitutes] carrying on propaganda, or otherwise attempting, to influence legislation"[27] and if it "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."[28] As such, charitable organizations may not engage in any political campaign activities but may engage in an "insubstantial" amount of activities attempting to influence legislation.

"Influencing legislation" is broken down into two areas: direct lobbying and grassroots lobbying.[29] The distinctions between the two types lie in their intended audiences and in their content. Direct lobbying is, as it sounds, directed to anyone who has authority to formulate or enact legislation.[30] Grassroots lobbying, on the other hand, consists of efforts "to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof . . . ."[31]

In terms of context, a communication would be considered direct lobbying if it referred to specific legislation (either by name or general idea) and reflected a view on that legislation.[32] Grassroots lobbying would contain a third element in addition to those two: it would encourage the recipients to take action, such as contacting their elected representatives.[33]

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26. *See* I.R.C. §§ 501, 4911, 4945 (1994).
27. *Id.* § 501(c)(3).
28. *Id.*
29. *See id.* § 4911(c).
30. *See id.* § 4911(d)(1)(B).
31. *Id.* § 4911(d)(1)(A).
32. *See* 26 C.F.R. § 56.4911-2 (1990).
33. *See id.* at 51,836.

B. *Categories of Charitable Organizations Under the Internal Revenue Code*

In regulating tax-exempt activities that may influence legislation or political campaigns, the Code separates organizations into several categories, each with different rules.[34] First, noncharitable exempt organizations may freely engage in lobbying as long as it involves legislation (actual or proposed) that would affect the organization's ability to accomplish its exempt purpose;[35] examples of such organizations are labor unions, civic leagues, or chambers of commerce.

Two other categories—charities and private foundations—face much more onerous restrictions. A public charity[36] is permitted to engage in a

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34. *See generally* Miriam Galston, *Lobbying and the Public Interest: Rethinking the Internal Revenue Code's Treatment of Legislative Activities*, 71 TEX L. REV. 1269 (1993); John G. Simon, *The Tax Treatment of Nonprofit Organizations: A Review of Federal and State Policies, in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 67, 67-73 (Walter W. Powell ed., 1987).

An altogether different category of organizations regulated in terms of lobbying activities is for-profit business, which may deduct direct lobbying costs as ordinary and necessary business expenses if there is a cognizable connection between the legislation and the business's continued welfare. *See* I.R.C. § 162 (1994). In fact, all three categories of nonprofit organizations are also permitted under the Code to engage in lobbying if it is for "self-defense" purposes. *See id.* § 501(c)(4) (non-charitable exempt organizations); *id.* § 4911(d)(2)(C) (public charities); *id.* § 4945(e)(2) (private foundations).

35. *See* I.R.C. § 501(c)(4) (1994).

36. Public charities may be:

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

minimum of lobbying activities toward its exempt purpose.[37] The level of lobbying allowed under the Code is measured using one of two methods chosen by the charity. The default method mandates that the organization may not devote a "substantial part" of its activities to lobbying.[38] If a charity prefers a more easily calculable and less vague method, it may elect the second option, which uses a sliding-scale formula to calculate the percentage of expenditures that may be spent on lobbying activities.[39] These methods—along with the penalties imposed for failure to comply with the regulations—will be discussed in more detail later.[40]

Private foundations comprise the most restricted category.[41] The Code imposes two levels of excise taxes on a foundation—and on its managers who knowingly authorize a restricted (and thus taxable) expenditure—for any lobbying activities engaged in by the foundation itself or by its grant recipients, whether or not necessary for the organization's exempt purpose.[42] There are three very narrow exceptions to this restriction: (1) providing "technical advice or assistance . . . in response

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> cal campaign on behalf of (or in opposition to) any candidate for public office.

Id. § 501(c)(3).

37. *See id.* § 501(c).

38. *See id.*

39. *See id.* § 501(h).

40. *See infra* notes 132-177 and accompanying text.

41. *See* I.R.C. § 509 (1994) (defining "private foundation").

42. *See id.* § 4945(a)(1)–(2). This section imposes a tax of 10% of each lobbying expenditure on the foundation, and, on any manager who knows that she or he is authorizing a taxable expenditure, the Code imposes a tax of two and one half percent of the taxable amount "unless such agreement is not willful and is due to reasonable cause." *Id.* § 4945(a)(2). Beyond these initial excise taxes, if the infraction is not remedied, additional penalties are imposed: 100% of the expenditure is imposed on the foundation, and 50% on the manager if she or he "refused to agree to part or all of the correction." *Id.* § 4945(b)(2). "Correction" is defined as "with respect to any taxable expenditure, . . . recovering part or all of the expenditure to the extent recovery is possible, and where full recovery is not possible such additional corrective action as is prescribed by the . . . regulations . . . ." *Id.* § 4945(i)(1)(A).

to a written request by [a governmental] body"[43]; (2) lobbying about a possible legislative decision that "might affect the existence of the private foundation, its powers and duties, its tax-exempt status, or the deduction of contributions to such foundation"[44] (commonly called the "self-defense" exception); and (3) "nonpartisan analysis, study, or research."[45]

III. GOVERNMENT REGULATIONS

A. *Lobbying Restrictions: Historical Development and Policy Rationales*

Lobbying restrictions imposed on nonprofit organizations by Congress via the Code have increased in scale and scope since they were first introduced;[46] however, the public policy rationale for them has remained essentially constant.[47] The history of lobbying restrictions shows a gradual evolution from the early part of the twentieth century, when there were no restrictions at all, to the current multilevel set of restrictions.[48] Before the mid-1930s, the Internal Revenue Code contained no explicit restrictions on campaign or lobbying activities, although it denied tax exemption to any organization that disseminated partisan propaganda.[49]

One impetus for adding restrictions came from the unlikely source of a 1930 Second Circuit Court of Appeals decision, *Slee v. Commissioner*,[50] in which the court articulated a public policy rationale for mandating neutrality among organizations that are provided tax exemption.[51]

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43. *Id.* § 4945(e)(2).

44. *Id.* § 4945(e).

45. *Id.*

46. *See, e.g.*, Galston, *supra* note 34, at 1275-1336.

47. *See id.*

48. *See id.*

49. *See* Treas. Regs. 45, art. 517 (1919).

50. 42 F.2d 184, 185 (2d Cir. 1930) (charitable deduction denied for contributions to an organization primarily engaged in lobbying activities).

51. *See id.*

In the context of the political and social debate over birth control that was raging in the 1920s and 1930s, Judge Learned Hand stated:

> Political agitation as such is outside the statute, however innocent the aim, though it adds nothing to dub it "propaganda," a polemical word used to decry the publicity of the other side. Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them.[52]

This statement formed the basis of what is currently known as the "public benefit subsidy theory," which suggests that in providing a tax exemption to an organization deemed charitable, the government is providing that organization with a subsidy equal to the amount of its lost tax revenue.[53] Under this theory, therefore, nonprofit organizations should not be allowed to use this government subsidy to influence the political or legislative process, because then government funds would be used to impact other government activity.[54]

As a direct outgrowth of *Slee*,[55] Congress—in the Revenue Act of 1934—added the currently used language that "no substantial part" of an organization's activities may constitute "carrying on propaganda, or oth-

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52. *Id.* Judge Hand was referring specifically to section 214(a)(11)(B) of the Internal Revenue Act of 1921 (42 Stat. 227) and section 214(a)(10) of the Revenue Acts of 1924 and 1926 (26 U.S.C.A. § 955(a)(10)), which allowed tax deduction of gifts made to "any corporation . . . organized and operated exclusively for religious, charitable, scientific, literary or education purposes, including posts of the American Legion or . . . for the prevention of cruelty to children or animals."—*Id.* at 184. The question in *Slee* was whether the American Birth Control League was organized for charitable purposes according to those Acts. *See id.* The court held that because of the political nature of the League's activities, exemption for deductions to the organization could not be allowed. *See id.* at 184-86.

53. *See* JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 314-17 (1995).

54. *See id.*

55. *See* Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 854 (1972) (stating that "[t]he case which led to the 1934 legislation was *Slee v. Commissioner of Internal Revenue*").

erwise attempting, to influence legislation."[56] The Internal Revenue Code of 1954 then imposed the restriction against any political campaign activities by charitable organizations, prompting revocation of an organization's tax-exempt status for violation of this rule.[57] In the Tax Reform Act of 1969, Congress created the regulatory scheme imposing excise tax penalties on private foundations for lobbying expenditures,[58] adding three exceptions for nonpartisan analysis, lobbying in self defense, and providing technical assistance on request.[59] The last major change to the regulations came in 1976, when Congress added the option for public charities to be able to calculate allowable lobbying expenditures using a mathematical test.[60]

Congress has articulated the public subsidy rationale more recently in modifying and tightening the restrictions and their enforcement. For instance, the House Report on the Omnibus Reconciliation Act of 1987, which included provisions to improve enforcement of the lobbying restrictions, contains the following statement:

> The prohibition on political campaign activities and the restrictions on lobbying activities by charities reflect Congressional policies that the U.S. Treasury should be neutral in political affairs, and that substantial activities directed to attempts to influence legislation should not be subsidized through the tax benefits accorded to charitable organizations and their contributors.[61]

This statement has often been cited by courts upholding the restrictions.[62]

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56. Revenue Act of 1934, Pub. L. No. 73-517 (1934).

57. *See* I.R.C. § 4945 (1954).

58. *See* I.R.C. § 4945(d)(1) (1969).

59. *See* I.R.C. § 4945(e)(2), 4945(f) (1969).

60. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 1307, 90 Stat. 1720 (1976).

61. H.R. REP. NO. 100-391, pt. 2, at 1903 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313.

62. *See, e.g.*, Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 854 (1972).

Fear of undue influence by exempt organizations and their managers and directors has prompted some of Congress's individual enactments in terms of lobbying restrictions. For example, one commentator notes that the relevant portion of the 1934 legislation—denying tax exemption to organizations that had a substantial part of their activities directed at influencing legislation—was "added in the Senate as a floor amendment, aimed at curbing one specific organization (the National Economy League), and was not, according to its sponsor, intended to restrict legislative activities of other 'worthy institutions.'"[63]

One source that provoked concern was a 1977 report of the Commission on Private Philanthropy and Public Needs, which said in part that "foundation lobbying may represent nothing more than the personal political preferences of founders, major donors, and managers."[64] Commentators and members of Congress have often cited this report. For example, in the 1990 Congressional debates on the Senatorial Election Campaign Act,[65] Senator McConnell proposed an amendment that would bring tax-exempt organizations engaging in lobbying and political campaign activity "firmly under the authority of the Federal election laws, where the rest of us have to look for guidance on election activity."[66] In offering this amendment, Senator McConnell relied on the Commission's findings, stating, "Unfortunately, some of these organizations have gone beyond their original charitable and societal purposes and have instead

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63. Harvey P. Dale, *Lobbying and Political Activities of Tax-Exempt Organizations*, 287 PLI/TAX 7, 15 (1989) (quoting 78 CONG. REC. 5861 (1934) (remarks of Senator Reed)); *see also* Dennis McIlnay, *Four Moments in Time*, FOUNDATION NEWS & COMMENTARY, Sept./Oct. 1998, at 30-36 (chronicling "four major Congressional investigations of foundations this century"—the Walsh Commission in 1912, the Cox Committee in 1952, the Reece Committee in 1953, and the Patman Committees in 1961).

64. Galston, *supra* note 34, at 1302 (quoting COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS, *Limitations on Lobbying by Charitable Organizations*, *in* 5 RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS 2945, 2953 (1977)). *See also* McIlnay, *supra* note 63, at 30-32 (discussing the Walsh Commission's attacks on several large private foundations, including those created by John D. Rockefeller and Andrew Carnegie).

65. *See* 136 CONG. REC. S11173-01 (daily ed. July 31, 1990).

66. *Id.* at S11188 (statement of Sen. McConnell).

exerted considerable influence on elections in this country . . . ."[67]

Several commentators have noted the ironic consequences of the Internal Revenue Code's different levels of restrictions for different types of organizations. For example, one commentator notes, "[O]n their face the Code's restrictions on lobbying are more onerous for organizations formed to promote the public interest and more generous for entities formed to serve private or commercial interests; thus, they make it cheaper for businesses to lobby than for noncommercial interests to engage in the same activities."[68]

B. *Highlighting "Educational" Activities to Serve Dual Purposes*

In two very distinct settings, Congress has touted "educational" purposes as something worth preserving and encouraging: in its granting of tax exemption to charitable organizations[69] and in its first attempt to regulate and restrict the Internet.[70] One of the organizational purposes granted exemption under section 501(c)(3) of the Code is "educational."[71] The applicable Treasury regulations break the category of "educational" into two general definitions: one covering traditional educational institutions (e.g., colleges and universities), and the other covering organizations that provide "[i]nstruction of the public on subjects useful to the individual and beneficial to the community."[72] Despite several court challenges to the definitions and the standards used by IRS officials to apply them, Congress and the IRS have remained steadfast in their commitment to educational organizations, including those that resemble advocacy organizations.[73]

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67. *Id.*

68. Galston, *supra* note 34, at 1271-72.

69. *See* I.R.C. § 501(c)(3) (1994).

70. *See* 47 U.S.C.A. § 230(a)(3) (1996).

71. *See* I.R.C. § 501(c)(3) (1994).

72. Treas. Reg. § 1-501(c)(3)-1(d)(3) (1986).

73. The evolution of the IRS standards for "educational" is tumultuous and very interesting. In 1980, the Court of Appeals for the District of Columbia Circuit held that the standard for determining whether an organization is educational was unconstitution-

The government's encouragement of the educational value of nonprofit organizations has been longstanding and essential to the work of charitable organizations throughout the country.[74] Many commentators have noted the inherent value and necessity of philanthropy in developing new ideas and taking on high-risk projects that the government and private industry cannot or will not pursue.[75] "As one former legislative counsel at the Treasury Department has argued, because of charity's openness to creativity and change, 'the role played by nonprofit organizations is not only desirable but may very well be a prerequisite to the continuation of a democratic society.'"[76]

Similarly, Congress has referred in its policy statements to the Internet's considerable educational value, indicating a commitment to keeping the Internet relatively unfettered by regulation. For example, when Congress placed the first restrictions on Internet content in the Communications Decency Act (to be discussed in more detail in the next section), the statute's policy statements included the following: "The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citi-

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ally vague. *See* Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1037 (D.C. Cir. 1980). Following that decision, the IRS clarified the standard by promulgating a new test for applying it; the test was declared by the U.S. Tax Court to cure the vagueness. *See* Nationalist Movement v. Commissioner, 102 T.C. 558, 588-89 (1994), *aff'd on other grounds*, 37 F.3d 216, 218 (5th Cir. 1994); *see also* Rev. Proc. 86-43, 1986-2 C.B. 729 (promulgating a set of criteria for determining whether advocacy by an organization qualifies as educational, which formed the basis for the court's opinion in *Nationalist Movement*). For a full discussion of the "educational" standard and its various interpretations, see generally Tommy F. Thompson, *The Availability of the Federal Educational Tax Exemption for Propaganda Organizations*, 18 U.C. DAVIS L. REV. 487 (1985).

74. *See* Gardner, *The Independent Sector, supra* note 13, at xii ("Government and the voluntary sector have had important, often productive, relationships since colonial days.").

75. *See id.* at xiii-xv; Nielsen, *The Third Sector: Keystone of a Caring Society, supra* note 13, at 363-69.

76. Galston, *supra* note 34, at 1319 (quoting Lawrence M. Stone, *Federal Tax Support of Charities and Other Exempt Organizations: The Need for a National Policy*, 1968 U.S. CAL. L. CTR. TAX INST. 27, 39).

zens";[77] "the Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[78]

C. *The Government's Initial Forays into Internet Regulation*

The Internet has been relatively free from government regulation from its origins as a military and university experiment in communications,[79] to its current existence as a widely used and quickly growing multimedia means of communications and information dissemination. This fact was recognized by Congress in its first attempt to regulate "offensive material"[80] posted on the Web in a companion statute to the Communications Decency Act of 1996.[81]

The legislative findings touted at the beginning of the companion act speak to the rapid growth of the Internet[82] and make strong statements in favor of protecting individual freedom on the Internet: "The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."[83] The policy statements at the beginning of the section also indicate a strong tendency toward freedom from regulation on the Internet:

> It is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer ser-

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77. 47 U.S.C. § 230(a)(1) (1996).

78. *Id.* § 230(a)(3).

79. *See* Reno v. American Civil Liberties Union, 521 U.S. 844, 849-50 (describing the Internet as "the outgrowth of what began in 1969 as a military program called 'ARPANET,' which was designed to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war") (footnote omitted); *see also supra* note 2.

80. *See* 47 U.S.C.A. § 230 (1996).

81. *See id.* § 223(a)–(h).

82. *See* 47 U.S.C.A. § 230(a)(1) (1996).

83. *Id.* § 230(a)(4).

> vices and other interactive media; to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation; to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services . . . .[84]

The Communications Decency Act and its companion statutes were subject almost immediately to successful judicial challenges, which will be discussed below.[85] What stands now in terms of Internet regulation is minimal. Public will seems to be leaning toward extremely limited regulation in favor of user control.[86] However, as the Internet continues to develop, and other segments of the population begin to use it as a tool, there will likely be more attempts by Congress to regulate certain aspects

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84. *Id.* § 230(b)(1)–(3).

85. *See infra* notes 99-109 and accompanying text (outlining the successful court challenges to the CDA).

86. In general, Internet industry representatives (in response to appeals from the general public) and government agencies are looking for means through which individual users (and their parents, in the case of children) can "self-regulate" Internet content received, screening out material they do not wish to see. This type of self-regulation is seen as the best hope for mediating between the conflicting interests of people who want to protect children and others from "obscene" or offensive materials versus those who champion free speech in all contexts, but particularly on the as-yet-unregulated Internet. *See generally* Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J.L. & PUB. POL'Y 475, 483 (1997) (discussing "three possible models for regulating cyberspace: no regulation, government regulation, and self-regulation"); Thomas E. Weber, *Technology Internet Plans Self-Regulation of the Industry: New Measures Are Aimed at Protecting Children from On-Line Stalkers*, WALL ST. J., Dec. 1, 1997, at B16 (discussing a gathering of Internet industry leaders to showcase industry attempts at Internet self-regulation); Lawrence J. Magid, *Kids, Surfing Safety and Other Considerations*, L.A. TIMES, Dec. 1, 1997, at D8 (stating that "the issues surrounding kids and the Internet have for several years now been the focus of one of the fiercest arguments in cyberspace, and the controversy shows no signs of abating"); Spencer S. Hsu, *Backer of Internet Filters Seeks Governor's Aid*, WASH. POST, Apr. 12, 1988, at V1 (discussing recent attempts in Virginia to regulate the Internet in that state).

of Internet use.[87]

IV. FREE SPEECH? EQUAL PROTECTION? DIFFERENT PROTECTIONS FOR DIFFERENT CONTEXTS

A. *Failed Attempts to Challenge Lobbying or Political Activity Restrictions*

As discussed above,[88] heavy restrictions—including those restrictions on lobbying—are the quid pro quo of the benefits of tax exemption. Although Congress has expressed strong support for tax exemptions for charities,[89] it has also mandated that organizations gaining this valuable exemption must limit some of their freedoms—one of which is the freedom of speech.[90] This mandate has been upheld by several federal courts and twice by the Supreme Court.[91]

Over the years, several organizations have attempted to challenge the lobbying restrictions on constitutional grounds. Most attempts have failed.[92] For instance, in *Haswell v. United States*,[93] the U.S. Court of

87. In fact, Congress is already considering additional forms of regulation. *See generally* Pietrucha, *Internet Policy Forum Drawing Top Policy Makers*, *supra* note 4.

88. *See supra* notes 39-51 and accompanying text.

89. *See* I.R.C. § 501(c)(3) (1994); *see also* Lawrence M. Stone, *Federal Tax Support of Charities and Other Exempt Organizations: The Need for a National Policy*, 1968 U.S. CAL. L. CTR. TAX INST. 27, 39.

90. *See, e.g.*, Pietrucha, *Internet Policy Forum Drawing Top Policy Makers*, *supra* note 4.

91. *See, e.g.*, Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983); Cammarano v. United States, 358 U.S. 498 (1959); National Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983); Haswell v. United States, 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975); Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972).

92. One challenge was successful. In *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980), a "nonprofit organization with a feminist orientation" and publisher of a monthly newspaper titled *Big Mama Rag*, which had been denied tax exemption, argued that the Internal Revenue Code's definition of "educational" (as one type of organization that may be granted exemption) was unconstitutionally vague. *Id.* at 1032. The court found the argument persuasive. *See id.* at 1037. Even in holding the pro-

Claims held that restrictions imposed on the Code's various categories of nonprofit organizations were not unjustifiably discriminatory.[94] In *Haswell*, the petitioner attempted to obtain a refund for contributions made to the National Association of Railroad Passengers ("NARP"), an organization formed to "encourage and promote maintenance and improvement of passenger services, operations, and facilities of American railroads."[95] Petitioner argued, *inter alia*, that the Code's denial of tax deductions for contributions to NARP because of NARP's substantial lobbying activities was unjustifiably discriminatory as compared to two other classes of organizations: businesses that are permitted to deduct the costs of lobbying as ordinary and necessary business expenses, and larger nonprofit organizations that can engage in a far greater level of lobbying before it becomes "substantial."[96] This argument failed.[97] The court noted a difference between "[a] small organization that devotes a substantial part of its energies and resources to attempts to influence legislation" and "a large organization that utilizes only an insubstantial and relatively small part of its total resources for such legislative activities."[98] The court further stated:

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vision unconstitutional because of its vagueness, however, the court was careful to note that "First Amendment activities need not be subsidized by the state . . . ." *Id.* at 1034.

The IRS subsequently modified the definition of "educational" and the "full and fair exposition" requirement to be less vague; this modification has been recognized in more recent cases. *See, e.g., National Alliance*, 710 F.2d at 875 (stating that the Methodology Test recently added by the IRS to clarify the "full and fair exposition" requirement "reduces the vagueness found by the *Big Mama* decision"); Nationalist Movement v. Commissioner, 102 T.C. 558, 583 (1994), *aff'd on other grounds*, 37 F.3d 216, 218 n.2 (5th Cir. 1994) (holding that the Methodology Test did indeed cure the vagueness); *see also supra* note 73 for a brief discussion of the "educational" standard and *infra* notes 101-107 and accompanying text for a fuller discussion of *National Alliance.*

93. 500 F.2d 1133 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975).

94. *See id.* at 1150.

95. *Id.* at 1136.

96. *See id.* at 1146.

97. *See id.* at 1148.

98. *Id.* at 1150.

> [S]uch a classification [is] appropriate. Contributors to an organization whose political activities involve only an insubstantial part of its total efforts are motivated to different objectives, and their interests permit recognition as a separate class. Contributors to an organization that has as a primary purpose political action and whose political activities require a substantial part of its total efforts, on the other hand, have different interests and objectives for their payments. Congressional interest in prevention of the use of tax funds to support lobbying is compelling.[99]

The court also applied this holding to the deductions allowed for businesses.[100]

More frequent challenges to the lobbying restrictions have come in the form of First Amendment challenges, particularly regarding the freedom of speech. In one case, the United States Circuit Court for the District of Columbia rejected a free speech challenge to the IRS's refusal to certify an organization called the National Alliance as an exempt "educational" institution.[101] The National Alliance issued newsletters, bulletins, books, and pamphlets for the "stated purpose of arousing in white Americans of European ancestry 'an understanding of and pride in their racial and cultural heritage.'"[102] The National Alliance's literature included severe statements about black "savagery"[103] and "Jewish manipulation of American society."[104] The court upheld the IRS's finding that

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99. *Id.*

100. *See id.*

101. *See* National Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983).

102. *Id.* at 869.

103. *Id.* at 872.

104. *Id.* at 872 n.10. Specifically, the court noted that the general theme of most issues of National Alliance's newsletter *Attack!* was that "'non-whites'—principally blacks—are inferior to white Americans of European ancestry ("WAEA"), and are aggressively brutal and dangerous; Jews control the media and through that means—as well as through political and financial positions and other means—cause the policy of the United States to be harmful to the interests of WAEA." *Id.* at 871. "The organization's newsletter describes its themes of black savagery or Jewish manipulation as warnings to WAEA of the 'dangers which arise from the presence of so many alien groups in our

the organization did not meet the Internal Revenue Code's definition of an "educational" institution, therefore denying it tax exemption.[105] In response to National Alliance's free speech challenge, the court responded, "We have no doubt that publication of the National Alliance material is protected by the First Amendment from abridgement by law. But it does not follow that the First Amendment requires a construction of the term 'educational' which embraces every continuing dissemination of views."[106] Because National Alliance's publications offered only a one-sided viewpoint, the organization did not satisfy the Code's "educational" standard.[107]

In another First Amendment challenge, the Christian Echoes National Ministry, after having its tax exemption revoked for excessive lobbying activities, filed a suit on the basis of the constitutional protection of the free exercise of religion; this suit also failed.[108] The Tenth Circuit held that this revocation did not unconstitutionally abridge the organization's First Amendment rights, stating:

> We hold that the limitations imposed by Congress in Section 501(c)(3) are constitutionally valid. The free exercise clause of the First Amendment is restrained only to the extent of denying tax exempt status and then only in keeping with an overwhelming and compelling Governmental interest: That of guarantying

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midst.' A National Alliance membership bulletin state[d] that these perceived dangers [could] only be averted by the removal of non-whites and Jews from society. Issues of *Attack!* advocate[d] that the removal be violent." *Id.* at 872-73 (citation and footnotes omitted).

105. *See id.* at 869-73. The court held that the organization's materials did not meet the Code's requirement that they "present[] 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." *Id.* at 870. *See also* I.R.C. § 501(c)(3) (1994); Treas. Reg. § 1.501(c)(3)-1(d) (1988).

106. *National Alliance*, 710 F.2d at 875 (citations omitted).

107. *See id.* at 873; *see also supra* note 73 for a brief discussion of the "educational" standard.

108. *See* Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 856 (10th Cir. 1972).

that the wall separating church and state remain high and firm.[109]

Finally, the U.S. Supreme Court has twice upheld the Treasury Department's regulation of lobbying in the face of free speech challenges—once in the 1959 case *Cammarano v. United States*[110] and more recently in the oft-cited 1983 case *Regan v. Taxation with Representation of Washington*.[111] In *Cammarano*, the petitioners (who were retail sellers of wine and beer) argued that denial of a business deduction for publicity regarding proposed legislation that would have imposed statewide prohibition against alcohol sales in Arkansas was unconstitutional.[112] Justice Harlan, writing for the Court, responded:

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those 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 .... [I]t appears to us to express a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned.[113]

The Court thus held that the Treasury regulations did not present a substantial constitutional issue under the First Amendment guarantee of freedom of speech or of the press.[114]

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109. *Id.* at 856-57.

110. 358 U.S. 498 (1959).

111. 461 U.S. 540 (1983).

112. *See Cammarano*, 358 U.S. at 513.

113. *Id.*

114. *See id.* at 512-13. The petitioners were beer and liquor wholesalers lobbying to defeat legislative proposals that, in one instance, would have placed retail sale of wine

In *Regan*, the plaintiff organization, Taxation With Representation of Washington ("TWR"), filed suit after being denied tax exemption by the IRS, seeking a declaratory judgment that it qualified for tax-exempt status.[115] TWR's primary arguments centered on the First Amendment and an equal protection claim under the Fifth Amendment. TWR argued that because it provides exemptions for veterans' organizations but would not provide an exemption for TWR, the IRS was acting in a discriminatory manner.[116] Both claims were denied in a clear validation of the Code's distinctions.[117] The Court distinguished the government's restriction of lobbying from the government's failure to subsidize lobbying: "The issue in this case is not whether TWR must be permitted to lobby, but whether Congress is required to provide it with public money with which to lobby . . . . [W]e hold that it is not."[118]

B. *Current Challenges to Internet Regulations*

In stark contrast to the courts' unwillingness to entertain constitutional challenges to lobbying restrictions are the early judicial responses to constitutional challenges to Internet regulations. After President Clinton signed the Communications Decency Act of 1996[119] ("CDA" or "Act") into law on February 8, 1996, suits were filed—within days of the law's passage—in several venues challenging the validity of the law on constitutional grounds. In two of three cases[120] in which judges considered the question, preliminary injunctions on constitutional grounds were issued precluding enforcement of the Act's provisions: in *American Civil*

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and beer exclusively in the state of Washington's control, and in the other instance, would have imposed a statewide prohibition in Arkansas. *See id.* at 500-02.

115. *See Regan*, 461 U.S. at 542.

116. *See id.* at 546-47.

117. *See id.* at 548.

118. *Id.* at 551.

119. 47 U.S.C. § 223(a)–(h) (1996).

120. *See e.g.*, Sanger v. Reno, 966 F. Supp. 151, 161 (E.D.N.Y. 1997) (The third case was deemed not justiciable on First Amendment grounds).

Liberties Union v. Reno,[121] a federal district court granted a preliminary injunction against enforcement of the CDA on First Amendment grounds;[122] and in *Shea v. Reno*,[123] another federal district court granted a preliminary injunction on grounds that plaintiffs had a cognizable claim that the CDA is unconstitutionally overbroad, though not unconstitutionally vague.[124] These cases were followed within a year by the Supreme Court's determination in *Reno v. American Civil Liberties Union*[125] that the CDA is indeed unconstitutional as facially overbroad in violation of the First Amendment.[126]

There has been a strong debate raging among government actors and agencies regarding the appropriate areas for, and levels of, Internet regulation. On the one hand, "more than 300 members of Congress have cosponsored bills to regulate the Internet, from electronic commerce to copyrights to content . . . ."[127] On the other hand, policymakers across a

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121. 929 F. Supp. 824 (E.D. Pa. 1996).

122. *See id.* at 883.

123. 930 F. Supp. 916 (S.D.N.Y. 1996).

124. *See id.* at 950.

125. 521 U.S. 844 (1997).

126. *See id.* at 885. In addition to holding the CDA to be unconstitutional on overbreadth grounds under the First Amendment, the Court in *Reno* held that in a limited instance, by virtue of its severability clause, part of the CDA could be saved from a facial overbreadth challenge through the removal of the phrase "or indecent" from the "indecency" provision, 47 U.S.C.A. § 223(a) (1996), which "applies to 'any comment, request, suggestion, proposal, image, or other communication which is *obscene or indecent*.'" *Id.* at 883. The Court further stated that the appellees:

> [did] not challenge the application of the statute to obscene speech, which, they acknowledge[d], can be banned totally because it enjoys no First Amendment protection . . . . As set forth by the statute, the restriction of "obscene" material enjoys a textual manifestation separate from that for "indecent" material, which we have held unconstitutional. Therefore, we will sever the term "or indecent" from the statute, leaving the rest of § 223(a) standing. In no other respect, however, can § 223(a) or § 223(d) be saved by such a textual surgery.

Id. (citations omitted).

127. Pietrucha, *Internet Policy Forum Drawing Top Policy Makers*, *supra* note 4.

broad spectrum of federal governmental offices and agencies have articulated a commitment to minimal regulation.[128] Former Chairman of the Federal Communications Commission ("FCC") Reed Hundt "called for a Free Internet Law that would protect service providers from government regulation."[129] FCC Commissioner Susan Ness has also spoken, though less emphatically than Hundt, of a commitment to minimal regulation: "Throughout the evolution of the Internet, the FCC has been careful to tread lightly .... We want to promote investment and innovation, not unnecessary work for government and unnecessary constraints on business and consumers."[130] Furthermore, President Clinton has expressed a desire for an unburdened Internet while seeking to give parents the tools they need to protect their children from "inappropriate material."[131]

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128. Several members of Congress have taken up the opposite banner of those seeking to introduce regulation, stating, for example, "We want to keep the infection of regulation out of the Internet." *Internet Heads Tauzin's 'To-Do' List*, MULTIMEDIA DAILY, Jan. 28, 1998, at 17 (quoting Rep. W.J. Tauzin, who serves as chair of the House Commerce Subcommittee on Telecommunications, Trade and Consumer Protection). The article also references Senator John McCain, chair of the Senate Commerce, Science and Transportation Committee, as making "a similar promise." *Id.*

129. John Breeden, *Departing FCC Chairman Hundt Warns of Threats to Internet*, 16 GOV'T COMPUTER NEWS, at 8 (Sept. 8, 1997).

130. Bill Pietrucha, *FCC's Ness Calls for Internet Friendly FCC Policies*, NEWSBYTES NEWS NETWORK, Feb. 10, 1998, *available in* 1998 WL 5029608.

131. *See* Juliana Gruenwald, *Congress, Uneasy with Net's Ways, Wants Laws*, SAN DIEGO UNION-TRIB., Feb. 10, 1998, at 4 ("In his State of the Union address on Jan[uary] 27, Clinton said, 'We must give parents the tools they need to help protect their children from inappropriate material on the Net, but we also must make sure that we protect the exploding global commercial potential of the Internet.'"); *see also New Media*, COMM. DAILY, Oct. 17, 1997, *available in* 1997 WL 13779896 ("President Clinton reiterated [the] Administration's concern Thurs[day] about overregulation of [the] Internet .... Clinton said [the] U.S. 'is trying to get all the countries in the world to promise not to overly regulate or tax or burden the Internet so that we can get more information out.'").

V. HOW WILL THE CURRENT TESTS FOR LOBBYING ACTIVITIES FARE IN THE CONTEXT OF INTERNET TECHNOLOGY?

A. *Testing Options for Lobbying Activities*

The Code offers two methods of "calculating" lobbying expenditures to determine if an organization qualifies for, or should remain eligible for, tax exemption. The default method—the one in place since the Tax Reform Act of 1934[132]—is the "substantial part test," which comes straight from the definition of a section 501(c)(3) organization: an otherwise charitable organization qualifies for tax exemption if "no substantial part of [its] activities [constitutes] carrying on propaganda, or otherwise attempting, to influence legislation."[133] The other method of computation, which may be elected by any public charity, is a sliding scale based on the overall budget and expenditures of an organization;[134] it was added by Congress because of dissatisfaction with the vagueness of the "substantial part" test.[135] In the context of lobbying over the Internet, the calculation method chosen by the charity is crucial.

The phrase "no substantial part" has never been explicitly defined by the IRS or in the Code.[136] Interpretations of it have generally come from case law. In several early cases, courts found the substantial part test to be difficult to apply and attempted to quantify the levels in terms of expenditures.[137] More recent cases have rejected those attempts, however,

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132. Revenue Act of 1934, Pub. L. No. 73-216 (1934); *see also supra* note 56 and accompanying text.

133. I.R.C. § 501(c)(3) (1994).

134. *See id.* § 501(h).

135. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 1307, 90 Stat. 1720 (1976); *see also* Lobbying by Charities; Lobbying by Private Foundations, 53 Fed. Reg. 51826, 51827 (1988) (to be codified at 26 C.F.R. pts. 1, 53, 56) ("Congress was aware . . . of the belief that the vague standards of the substantial part test tended to create uncertainty and allow subjective and selective enforcement.").

136. *See* I.R.C. § 501(c)(3) (1994).

137. *See, e.g.*, Seasongood v. Commissioner, 227 F.2d 907, 912 (6th Cir. 1955) (finding that five percent of activities devoted to lobbying was clearly not excessive). The court in *Seasongood* does not seem to have examined other factors besides level of ex-

finding that the inquiry should be a balancing test.[138] For example, the U.S. Court of Claims stated the following in 1974:

> The political efforts 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 is to influence, or is an attempt to influence, legislation. A percentage test to determine whether the activities are substantial is not appropriate. Such a test obscures the complexity of balancing the organization's activities in relation to its objectives and circumstances in the context of the totality of the organization.[139]

The test generally used now is such a balancing test, taking into consideration all of the activities of the organization and examining its attempts to influence legislation in light of several factors, including "the percentage of [the] organization's budget (or employee time) spent on lobbying; the continuous or intermittent nature of the organization's legislative involvement; the nature of the organization and its aims; and, realistically, the controversial nature of the organization's position and its visibility."[140]

Alternatively, under the expenditure test, codified at section 501(h) of the Internal Revenue Code, the IRS's sole inquiry is into expenditure amounts; the IRS looks at two broad categories of expenditures to determine the proper calculation.[141] The starting point is the charity's operating budget, which includes all expenditures made toward the organization's exempt purpose, including lobbying expenditures.[142] From that base point, the organization determines for a given tax year its "lobbying

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penditure in making its determination that the "substantial" threshold was not crossed. *See id.*

138. *See, e.g.*, Haswell v. United States, 500 F.2d 1133, 1142 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 1107 (1975).

139. *Id.*

140. FISHMAN & SCHWARZ, *supra* note 53, at 504.

141. *See* I.R.C. § 501(h) (1994).

142. *See id.*

nontaxable amount"—the total amount it can spend on all lobbying activities[143]—and its "grassroots nontaxable amount"—the amount within the total lobbying amount that can be devoted to grassroots lobbying.[144]

Applying both of these tests to the context of the Internet, a significant distinction emerges. Under the traditional substantial part test, the IRS will look at the totality of the circumstances rather than just financial indicators as under the expenditure test.[145] Costs are generally minimal for an organization to post information on the World Wide Web,[146] which creates an interesting disparity in how the activity would be treated under the two lobbying tests. Suppose an organization with an annual budget of $100,000 posts a statement regarding pending legisla-

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143. The "lobbying nontaxable amount" is measured based on the following sliding scale: 20% of the first $500,000 of the operating budget; $100,000 plus 15% of the amount between $500,000 and $1,000,000; $175,000 plus 10% of the amount between $1,000,000 and $1,500,000; and $225,000 plus 5% of any amount over $1,500,000. *See id.* § 4911(c)(2). The amount is capped at $1,000,000 in total lobbying expenditures. *See id.*

144. The "grassroots nontaxable amount" is equal to 25% of the lobbying nontaxable amount. *See id.* § 4911(c)(4).

145. *See* Lobbying by Charities; Lobbying by Private Foundations, 53 Fed. Reg. 51826, 51827 (1988) (to be codified at 26 C.F.R. pts. 1, 53, 56) ("In contrast to the substantial part test . . . the expenditure test imposes no limit on lobbying activities that do not require expenditures, such as certain unreimbursed lobbying activities conducted by bona fide volunteers.").

146. The real costs for posting materials on the Internet can be incurred in the initial set-up of a Web site, which often includes hiring a graphics firm to design a site. Once it is in place, posting materials or generating "hyperlinks" to other posted materials can be done at a minimal cost. Other costs can include the maintenance of the site, which generally includes paying a service fee to another organization that houses the site on its own network. *See generally* Mike Hogan, *You Can Make Money on the Web*, NEWSWEEK, June 23, 1997, at N2 (one of the many articles available in print and on the Internet discussing costs). Even those costs can be reduced for charities, which often receive services for significantly reduced costs. For example, a New York-based Web design company, Mediapolis, charged the Gay, Lesbian, and Straight Education Network "just $5,000 for design work that would normally cost about $10,000; it also donate[d] software that it normally charges customers $50,000 a year to use." Demko & Moore, *supra* note 8. *See also infra* text accompanying notes 168-177 (discussion of whether set-up and maintenance costs should be considered lobbying expenditures).

tion on the Web, urging readers to call their representatives to vote a particular way. Suppose the cost of this posting is $1,000, including staff time to type it into a readable format and to submit it to the organization's Internet provider.[147] Suppose further that the Web site on which this call to action is posted is visited by thousands of people, and the response in the legislators' offices is significant. Phone calls, letters, and e-mails come in regularly, asking legislators to vote as suggested in the posting. Under the expenditure test, the amount spent is only five percent of the annual allowable expenditures for an organization with a budget that size.[148] Even considering this to be grassroots lobbying, as it would be,[149] the expenditures are well under the threshold, representing only

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147. The cost of posting information on the Web varies depending on individual organizations' arrangements. However, for almost any organization, the costs are extremely low. This hypothetical assumes that most of the set-up costs are already paid. For a discussion of the impact this has on the reach some organizations could achieve, see *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997).

> [T]he Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that "[a]s many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999." This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.

Id. (footnotes omitted).

148. This is calculated as follows: Because the organization's budget is only $100,000, the lobbying nontaxable amount is 20% of that budget, or $20,000. *See supra* note 143. $1,000 is thus only 5% of that limit.

149. This activity would be grassroots lobbying because it is an "attempt to influence ... legislation through an attempt to affect the opinions of the general public or a segment thereof ...." I.R.C. § 4911(d)(1)(A) (1994). It meets the three-part test for grassroots lobbying, because it refers to specific legislation, reflects a view on the legislation, and encourages the recipient to take action. *See* Lobbying by Charities; Lobbying by

twenty percent of the allowable grassroots expenditure.[150] There would not seem to be any problem, and the IRS would not question the expenditures.

The substantial part test, however, paints a different picture. Under this test, the IRS looks at the other activities of the organization and could conceivably consider the impact of the lobbying.[151] Although the organization might not lose its exemption for this one instance, it could be at risk. Under the expenditure test, on the other hand, the organization could engage in five times this amount and still remain safely within allowable limits.[152]

The irony is that only about one percent of eligible charities elect the expenditure test because it is seen as too new and too rigid.[153] Many organizations seem to perceive a disadvantage in losing the ability to argue that their level of lobbying activity is insubstantial, even in the face of an IRS challenge, or fear an increased risk of auditing under a mathematical test.[154] What organizations may also fail to consider is the difference in

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Private Foundations, 53 Fed. Reg. 51,826, 51,838 (1988) (to be codified at 26 C.F.R. pts. 1, 53, 56).

150. Further calculations show that the grassroots non-taxable amount is capped at $5,000 (25% of the lobbying non-taxable amount of $20,000). *See supra* note 144. $1,000 is 20% of that limit. These hypothetical numbers may not even come close to illustrating the minimal costs of Web site maintenance as compared to some organizations' total budgets. *See, e.g.*, Demko & Moore, *supra* note 8 (noting that one nonprofit group, after its initial design expenditures, spends only about $3,600 annually of its $1.7 million budget to maintain its Web site).

151. *See* Haswell v. United States, 500 F.2d 1133, 1142 (1974). Although there is no specific requirement—or even suggestion—that the IRS look at impact, such an examination is not precluded. I posit, therefore, that the only indication the IRS may be able to use in this new context is impact, where level of expenditure or effort may no longer be commensurate with the kind of influence an organization is able to exert.

152. *See* I.R.C. § 501(h) (1994).

153. *See* FISHMAN & SCHWARZ, *supra* note 53, at 532 ("[S]ome charities prefer the vagueness of the general rules to the specificity and recordkeeping requirements of the § 501(h) election. . . . In fact, it has been reported that fewer than 4,000 of approximately 380,000 eligible § 501(c)(3) organizations have made the expenditure test election.").

154. *See* Open Letter to Eligible Charities Regarding Section 501(h) Election, *reprinted in* FISHMAN & SCHWARZ, *supra* note 53, at 533-34. "We particularly disagree

penalties. The penalty for lobbying activities deemed substantial under the first test is loss of tax exemption; the punishment is absolute and can be imposed after only one year of substantial lobbying expenditures.[155] Under the expenditure test, on the other hand, there is an intermediate level of penalty—an excise tax of twenty-five percent of the excess lobbying expenditures.[156] It is only when lobbying expenditures above the limits become excessive for four consecutive years that the organization will lose its exemption.[157]

For the IRS, this disparity may become a cause for concern. It would be difficult for the IRS to regulate lobbying activities on the Web using either test (because level of expenditure is still a significant factor in the substantial part test),[158] but it is particularly difficult under the expenditure-based test that the IRS has been urging. Several commentators have proposed other methods of monitoring lobbying activities, focusing less on the level of expenditure and more on the nature of the activities.[159] For example, Jeffrey Hart, "a commentator opposed to lobbying by chari-

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with those who, while recognizing the benefits [of § 501(h) election], decline to elect because of a vague concern that present or future administrations may target electing groups for audit. Internal Revenue Service officials have repeatedly denied that election has—or will have—any such effect." *Id.* at 534. The 17 attorneys, accountants, and academics who wrote this "open letter" to charities also highlight the relative benefits, including the ability to predict what is allowable and the lesser sanctions that can be imposed before tax exemption is revoked. *See id.* at 533-34.

155. *See* FISHMAN & SCHWARZ, *supra* note 53, at 533.

156. *See* I.R.C. § 501(h) (1994); *see also* FISHMAN & SCHWARZ, *supra* note 53, at 531.

157. Loss of exemption will be imposed under the expenditure test if the organization "normally" (interpreted as over a four-year period) makes lobbying expenditures in excess of 150% of the nontaxable (allowable) amounts. *See* I.R.C. § 501(h)(1)(A), (h)(2)(B) (1994).

158. *See supra* text accompanying note 140 (discussing the factors the IRS will generally consider under the substantial part test).

159. *See* Jeffrey Hart, *Foundations and Social Activism: A Critical View*, *in* THE FUTURE OF FOUNDATIONS 43, 47-48 (Fritz. F. Heimann ed., 1973); Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 294-98 (1987-1988).

ties,"[160] has suggested using a constituency-based test for allowable lobbying activities.[161] Under his proposed restrictions, only organizations having broad, well-established constituencies with generally accepted views and goals (such as labor unions and veterans groups) would qualify for exemption.[162] Proposing a substantively different but procedurally similar test, commentator Laura Chisolm has also suggested a constituency-based test;[163] however, she would exclude those organizations that Hart would allow and allow those that Hart would exclude. Chisolm proposed allowing lobbying activities for charitable, "educational" purposes[164] and for the benefit of traditionally under-served and under-represented groups (such as children or the homeless).[165]

Under either the substantial part test or the section 501(h) expenditure test, there does not currently exist an appropriate mechanism for assessing whether an organization is engaging in more than allowable lobbying activities. Chisolm expressly recognized this problem, stating that "[a] better-designed reporting process is essential if the aim is to identify and withhold section 501(c)(3) benefits from purportedly 'charitable' organizations which simply promote private interests."[166] Another commentator, in a somewhat different context, pointed out that the IRS's reporting requirements, centering on Form 990 (the tax-exempt organization's annual tax return form), are inadequate for capturing the substantive information necessary to make a determination of whether activities are charitable.[167] The problem seems to lie in the mechanism through which Congress has chosen to monitor tax-exempt organizations—the

160. Galston, *supra* note 34, at 1306.

161. *See id.* at 1306-07.

162. *See* Hart, *supra* note 159, at 47-48; *see also* Galston, *supra* note 34, at 1306-08.

163. *See* Chisolm, supra note 159, at 294-98.

164. *See id.* at 285-86.

165. *See id.* at 284.

166. *Id.* at 286.

167. *See* Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1517 (1984) (arguing that better mechanisms should be promulgated to determine whether so-called public interest law firms are actually promoting private interests).

Internal Revenue Code. The IRS is ill-equipped to monitor anything from a vantage point other than a primarily (or exclusively) expenditure-based one.

B. *Should the Development, Maintenance and Use of Web Sites Be Considered Lobbying Expenditures?*

Under the current tests, it would seem that the development of a Web site cannot be considered a lobbying expenditure, unless the stated purpose is to engage in grassroots lobbying.[168] And as long as the predominant use of the site is not lobbying, the maintenance of the site would not be considered exclusively a lobbying expenditure. Specifically, under the section 501(h) expenditure test, the Code provides for allocation of expenditures that are for multiple purposes among the three types of expenditures—non-lobbying, direct lobbying, and grassroots lobbying.[169] Allocable expenses generally include salaries of employees who spend some of their time on lobbying activities, overhead costs, and costs of newsletters.[170]

An appropriate analogy to Web site expenditures might be telephone costs. The installation of a phone system and the maintenance of that system (including, for example, repairs, voice mail set-up, and general phone company charges) would not be thought of as lobbying expenditures;[171] if, however, an organization used its phone system for little more than calling members of the public and urging them to contact their representatives to encourage them to vote a particular way on pending legislation, the phone costs would then likely be considered primarily lobbying expenditures.[172] Similarly, if an organization uses its Web site purely for encouraging the public to contact legislators, the Web site

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168. *See* I.R.C. § 4911(c)(3) (1994); *see also supra* notes 25-33 and accompanying text for a discussion of the Code's definition of lobbying, including grassroots lobbying.

169. *See* I.R.C. § 501(h) (1994).

170. *See* Treas. Reg. § 56.4911-3(a)(3) (1986).

171. *See* I.R.C. § 501(h) (1994).

172. *See id.*

costs would most likely be considered lobbying expenditures. Along the same lines, the posting of non-partisan analysis—the production of which is not considered a lobbying or taxable expenditure under the Code[173]—on the Web would not convert it into a lobbying expenditure.

One area in which the IRS could consider Web site use to be entirely a lobbying expenditure is in conjunction with the lobbying restrictions' prohibition of mass media communications,[174] though there is no specific reference to Internet technology in the current regulations.[175] The rule is that any paid advertisement appearing in "mass media" will be "presumed to be a grassroots lobbying communication" if, "within two weeks before a vote by a legislative body . . . on a highly publicized piece of legislation, . . . [it] reflects a view on the . . . legislation and . . . encourages the public to communicate with legislators."[176] The regulations do not indicate what is considered to be mass media; it is likely, however, that the Internet would fall under any definition because it is possible to reach large segments of the population via the Web or electronic mail. As one commentator, discussing the Supreme Court decision in *Reno*, suggests, "[T]he rapid emergence of the Internet has brought with it the most accessible, dynamic, and democratic form of mass communication in history . . . . It provides an outlet for a cacophony of ideas with virtually no geographic, economic, social, or political restraints, giving a voice to the People in a way the Constitution's Framers could only have dreamed possible."[177]

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173. *See id.* § 4945(f).

174. *See id.* § 4945.

175. In fact, current indicators of what is considered mass media would suggest that the Internet may not be included. *See* Lobbying by Public Charities; Lobbying by Private Foundations, 53 Fed. Reg. 51838 (1988) (to be codified at 26 C.F.R. pts. 1, 53, 56) ("'mass media' means television, radio, and general circulation newspapers and magazines"). Note, however, that the proposed regulations referenced here were suggested in 1988, while the Internet was much less known or used than it is more than a decade later.

176. *Id.*

177. Stephen C. Jacques, *Reno v. ACLU: Insulating the Internet, the First Amendment, and the Marketplace of Ideas*, 46 AM. U. L. REV. 1945, 1947 (1997).

VI. SPECIAL PROBLEMS FOR PRIVATE FOUNDATIONS

Much of the discussion above has focused on lobbying restrictions as they apply to public charities, as these are the organizations likely to be engaging in lobbying activities. However, private foundations are subject to even more stringent regulations against lobbying expenditures; foundations are prohibited from making any expenditures or providing any funding at all for lobbying activities.[178]

Private foundations are charitable organizations formed to distribute funds in furtherance of their own specified goals.[179] They range in size from small community-based foundations with minimal assets, relying on annual contributions and dedicated to helping that community, to national foundations with large endowments providing funding for national and international initiatives.[180] The primary mechanism used by foundations for achieving their goals is grants.[181] Whether proactively seeking

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178. *See* I.R.C. § 4945 (1994).

179. The definition of a "foundation" offered in The Foundation Directory, which is published by the Foundation Center, is:

> [A] foundation ... [is] a nongovernmental, nonprofit organization with its own funds (usually from a single source, either an individual, family or corporation) and program managed by its own trustees and directors, which was established to maintain or aid educational, social, charitable, religious, or other activities serving the common welfare primarily by making grants to other nonprofit organizations.

THE FOUNDATION CENTER, THE FOUNDATION DIRECTORY, at v (1994); *see generally* DAVID F. FREEMAN, THE HANDBOOK ON PRIVATE FOUNDATIONS 1-9 (rev. ed. 1991).

180. *See* FREEMAN, *supra* note 179, at 6-7.

181. *See Glossary*, THE FOUNDATION CENTER'S USER-FRIENDLY GUIDE, INTERNET EDITION (visited Feb. 22, 2000) <http: //fdncenter.org/onlib/ufg/ufg_gloss.html>. The Glossary defines "private foundation" as follows:

> A nongovernmental, nonprofit organization with funds (usually from a single source, such as an individual, family, or corporation) and program managed by its own trustees or directors. Private foundations are established to maintain or aid social, educational, reli-

funding proposals to meet the guidelines already set by foundation officers and trustees, or reactively responding to unsolicited proposals, foundations have different methods of deciding where to provide funding.[182] But the ultimate result of a decision to provide funding is the making of a grant—an award of a specified sum of funds for a specified purpose.[183]

In response to a perceived threat of undue influence by wealthy contributors to private foundations and by foundation managers, Congress promulgated an extensive series of restrictions on private foundations.[184] In addition to mandates to refrain from any legislative or political campaign activities, foundations must pay taxes on all net investment income and distribute a certain percentage of their investment assets each year.[185] There are strict rules against self-dealing, financial practices, and program activities.[186] The penalties are severe, ranging from excise taxes to revocation of tax exemption.[187]

Although grantee organizations—most often the public charities that have been the focus of much of this article—are limited in the level of expenditures they can make for lobbying activities, foundations are not required to inquire whether the prospective grantee is in compliance with the regulations.[188] The inquiry can stop at the particular project being funded, and a foundation may rely on statements of purpose by a prospective grantee—as long as the grantee is a qualified section 501(c)(3) organization,[189] the purpose of the grant is not to influence legislation[190]

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gious, or other charitable activities serving the public welfare, primarily through the making of grants.

Id.

182. *See* FREEMAN, *supra* note 179, at 6.

183. One dictionary definition of "grant" is "a gift for a particular purpose." MERRIAM-WEBSTER DICTIONARY 312 (1974).

184. For a full discussion of Congressional fears of and "assaults" on large private foundations, *see* WALDEMAR A. NIELSEN, THE BIG FOUNDATIONS 7-17 (1972).

185. *See* I.R.C. §§ 509, 4940-4946 (1994).

186. *See id.*

187. *See supra* note 42 and accompanying text.

188. *See* I.R.C. § 4945(f)(1) (1994).

189. *See id.*

and is nonpartisan,[191] and the organization meets several other criteria (such as having a wide base of funding support[192]). A foundation may also exercise "expenditure responsibility"[193] over any particular grant, which "means that the private foundation is responsible to exert all reasonable efforts and to establish adequate procedures" to ensure that the grantee will comply with the regulations.[194]

It is also worth noting the distinction between project-based support and core (or general) support of an organization. Grantee organizations will generally obtain the bulk of their funding through project-specific support.[195] They will have other expenses, however, that cannot be attributed to any one project or that were not adequately covered through project support. These expenses are built into the organization's core budget.[196] Some foundations provide core support to select organizations that advance goals similar to the goals of the foundation.[197] As long as the grantee organization is a qualified section 501(c)(3) organization, the foundation is not required to monitor or ensure that its activities do not constitute lobbying.[198]

One provision that could, under the current regulations, provide some cause for concern among foundations funding nonpartisan analysis is the "subsequent use rule."[199] If a grantee uses its nonpartisan analysis

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190. *See id.* § 4945(f).

191. *See id.* § 4945(f)(2).

192. *See id.* § 4945(f)(4).

193. *See id.* § 4945(h).

194. *Id.* The procedures must be implemented: "(1) to see that the grant is spent solely for the purpose for which made, (2) to obtain full and complete reports from the grantee on how the funds are spent, and (3) to make full and detailed reports with respect to such expenditures . . . ." *Id.* § 4945(h)(1)–(h)(3).

195. *See The Foundation Center: Online Orientation to the Grantseeking Process* (visited Feb. 25, 2000) <http://fdncenter.org/onlib/orient/org5.html>.

196. *See The Foundation Center: Frequently Asked Questions* (visited February 26, 2000) <http://fdncenter.org/onlib/faqs/faq.html>.

197. *See id.*

198. *See* I.R.C. § 4945 (1994).

199. *See* 26 C.F.R. §§ 56.4945-2, 56.4911-2 (1990).

or research for a lobbying activity—accompanied by a direct encouragement to action, within six months of receipt of the last payment of foundation funds—and the IRS determines that the organization's primary purpose in undertaking or preparing the analysis was for subsequent use in lobbying, the foundation will be taxed on the amount as if it had funded the analysis as a lobbying activity from the start.[200] With the advent of the World Wide Web, the organization could disseminate the analysis much more quickly and use it to prompt its constituents to lobby their legislators, posing a greater risk of subsequent-use determinations.

If the tax regulations of exempt organizations as they pertain to lobbying continue as they have for the past sixty plus years, private foundations may have little cause for concern in funding Web sites, provided they monitor the grant proposals as they normally would (or should). What would happen, however, if the regulations were shifted to a substantive-based test, such as those proposed by commentators Hart and Chisolm (discussed above)?[201] If Congress is to monitor lobbying activities on the Internet effectively, it will have to institute some changes in monitoring practice and in how it penalizes organizations for such activities.

VII. CONCLUSION

The Internet has opened up entire new areas of potential regulation. Not surprisingly, the law is slow to catch up. The dual public policies of keeping the Treasury out of political affairs and of keeping the Internet free from excessive regulation may eventually come head to head, in light of strong vocal arguments on both sides of the regulation debate.[202] Charities are just beginning to explore the options presented by Internet

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200. *See id.*

201. *See supra* notes 159-167 and accompanying text.

202. *See, e.g.*, Jill Lawrence, *Political Battlegrounds of the Future*, USA TODAY, Aug. 8, 1997, at 6A ("Technology marches on in . . . cyberspace, opening new frontiers of political and moral conflict. [A] Supreme Court ruling[] this year against . . . Internet censorship signal[s] the beginning rather than the end of [that] debate[].").

technology for furthering their tax-exempt purposes.[203] Congress may be forced to choose which public policy is more worthy: the neutrality of the Treasury in political affairs or the free access to information on the Internet. If it decides to regulate heavily those activities in which charities engage on the Web, it may have to promulgate a new series of substance-based regulations. The Internal Revenue Service may then no longer be the appropriate venue for such regulations, as it is ill-equipped to monitor such activities even through an expenditure-based test.

Pamela O'Kane Foster

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203. *See, e.g.*, Audrie Krause, *The On-Line Activist: Tools for Organizing in Cyberspace: Part One: E-mail* (Apr. 28, 1997) <http://www.mojones.com/hellraiser_central/features/krause1.html>.