The Availability of the Federal Educational Tax Exemption for Propaganda Organizations

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By providing important economic benefits to nonprofit organizations, educational tax exemptions directly affect the range of information and knowledge available to the public. This Article analyzes the policy implications of granting tax-exempt educational status to propaganda organizations. It traces the history of the Treasury Department's position on the issue from the early attempts to deny exemption to all propaganda organizations to the current provision which exempts organizations that utilize educational methodology and provide a full and fair exposition of facts supporting their conclusions. The Article argues that the full and fair exposition standard is subjective and unadministrable, and negates the significant benefits provided by propaganda organizations in ensuring maximum public access to all viewpoints. It thus concludes that the Treasury Department should recognize all forms of dissemination of information and propagation of doctrine as educational, except for cases involving a substantial and objective basis for denying exemptions, such as the advocacy of illegal activities.

INTRODUCTION

For more than sixty years, the Treasury Department has grappled with a perceived problem in the administration of the exemption accorded to educational organizations by section 501(c)(3) of the Internal Revenue Code of 1954:[1] under what circumstances a propaganda or-

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[1] I.R.C. § 501(c)(3) (1982) reads:

> (c) List of Exempt Organizations
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> The following organizations are referred to in subsection (a) [which grants exemption]:
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> . . .
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> (3) Corporations, and any community chest, fund, or foundation, organ-

ganization — one that advocates a particular viewpoint or position on an issue or a range of issues — should be granted the educational exemption. Treasury's position on the issue gradually evolved and reached its present form in 1959, when the current definition of "educational" was adopted in the regulations. That definition exempts a propaganda organization if it "presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion."[2]

Until 1980, the Internal Revenue Service (Service) administered the exemption under this full and fair exposition standard with no apparent challenge. However, in 1980 the United States Court of Appeals for the District of Columbia held that the definition, at least as interpreted by the Service, was unconstitutionally vague.[3] The government did not

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ized 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 (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

Hereafter, all statutory references will be to the Internal Revenue Code of 1954, unless otherwise indicated.

[2] Section 1.501(c)(3)-1(d)(3) (1959) of the Treasury Regulations defines "educational" as follows:

(3) Educational defined

(i) *In General.* The term "educational," as used in § 501(c)(3), relates to —

(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or

(b) The instruction of the public on subjects useful to the individual and beneficial to the community.

An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand, an organization is not educational if its principal function is the mere presentation of unsupported opinion.

[3] Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C. Cir. 1980). Big Mama Rag, Inc. is a feminist organization whose principal activity is the publication of a monthly newspaper dealing with issues of concern to women. It has a purely volunteer staff and distributes without charge 2100 of its 2700 monthly copies. It sells the remaining 600 copies at competitive rates. More than half of the organization's income is

seek Supreme Court review of that decision.[4] However, because it had left the Service with no guidelines concerning under what circumstances, if any, the Service could deny an exemption to a propaganda

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derived from contributions, grants, and funds raised through benefits, and the remainder comes from subscriptions and advertising revenues. Advertising in the newspaper is limited to a maximum of 20% of total content and is restricted to advertising of goods and services of particular interest to women. The organization also devotes a considerable minority of its time and resources to operating a free library and to promoting women's rights through workshops, seminars and lectures of interest to women. The newspaper's editorial policy is that it will print anything that will advance the cause of the women's movement, as defined by its editors, and that it refuses to publish material it considers damaging to that cause.

The Service denied the organization tax exemption on the grounds that the content of the newspaper was not educational, that the preparation of the material did not follow methods educational in nature, that the distribution of the material was not valuable in achieving an educational purpose, and that the manner of distribution was not distinguishable from ordinary commercial publishing practices. *Id.* at 1033 n.4. The organization filed an action in the United States District Court for the District of Columbia seeking a declaratory judgment that it was entitled to tax exempt status under § 501(c)(3). The court determined that the organization did not qualify for the educational exemption because its newspaper adopted too doctrinaire a stance and thus did not meet the full and fair exposition standard. *Id.* at 1034. On appeal, the United States Court of Appeals for the District of Columbia held that the full and fair exposition standard as interpreted by the Service was unconstitutionally vague. *Id.* at 1034-35. The court did not discuss the origin or intent of the full and fair exposition standard. For a discussion of the constitutional issue, see Note, *Tax-exempt Status for Educational Organizations in Treasury Regulation Section 1.501(c)(3)-1(d)(3) is Unconstitutionally Vague in Violation of the First Amendment*, 49 GEO. WASH. L. REV. 623 (1981); Comment, *Tax Exemptions for Educational Institutions: Discretion and Discrimination*, 128 U. PA. L. REV. 849 (1980).

[4] The government's decision in that case may have been based upon several salient factors. First, Big Mama Rag, Inc. may have qualified for exemption as a charitable organization, even if it did not qualify as educational. *See* Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959) ("charitable" includes promotion of the social welfare by elimination of prejudice and discrimination, and a charitable organization is not subject to the full and fair exposition standard even if it advocates social or civic changes or advocates a position on controversial issues). Second, the facts of the case were not well developed. The government apparently relied upon statements of editorial policy without analyzing the content of the newspaper to determine whether, in fact, it merely disseminated unsupported opinion. The full and fair exposition standard does not purport to proscribe vehement and doctrinaire argumentation, so long as the facts upon which the arguments are based are fully and fairly presented. For these reasons, the government may have concluded that the case was an inappropriate test case.

The Action on Decision prepared by the Chief Counsel's office states that the government shares "the court's concern that Treas. Reg. § 1.501(c)(3)-1(d)(3) is susceptible to inequitable enforcement and the regulation is under reconsideration by the Service." Action on Decision, *Big Mama Rag, Inc.* (Nov. 19, 1980).

organization, the government presented the issue to the same court in another case.[5] The government also offered an alternative theory for denying the exemption to certain propaganda organizations in an attempt to obtain some guidance for its future administration.[6] However, in that case, the court decided the exemption issue in favor of the gov-

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[5] National Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983). National Alliance was incorporated in 1974 in Virginia for the purpose, among others, of developing in Americans of all ages "an understanding of and a pride in their racial and cultural heritage and an awareness of the present dangers to that heritage." *Id.* at 869 (apparently quoting from National Alliance's organizing documents). Its chief activities are publication of a monthly newsletter called "Attack!" and a monthly membership bulletin called "Action," weekly lectures on film and lecture meetings, and distribution of books published by other organizations that are relevant to its purpose. The publications promote the organization's belief that society's ills are attributable to the existence of the nonwhite and Jewish races.

The discussion of the government's position in this case is taken from the Government's Brief on Appeal, National Alliance v. United States, Nos. 81-1899 and 81-1900 (D.C. Cir., docketed Aug. 6 and Aug. 7, 1981) [hereafter Brief for the United States], and from the district court's opinion in National Alliance v. United States, 48 A.F.T.R.2d (P-H) ¶ 81-5029 (D.D.C. 1981).

According to the government's brief, typical articles liken Jews to bacterial parasites who " 'cannot live without their gentile prey to feed on,' " and lament that Americans fail to comprehend " 'the sub-human savagery to which [blacks] revert in any situation in which they are given the upper hand.' " The brief states that the organization recommends that nonwhites "must be removed, peaceably or otherwise," and that "the Jew must go, totally and unconditionally." The brief states that "[i]n both fictional and nonfictional accounts, the publications favorably portray murder, kidnapping and other violent actions as the means to achieve their aims." It cites specific references to publications containing such material. Brief for the United States, *supra*, at 4. The brief further states that these general themes permeate virtually the entire content of the publications and that editorials expand on the themes, citing specific references. *Id.* at 33-34. Finally, the brief states that throughout its publications, "the organization encourages murder, and other physical violence against innocent persons." *Id.* at 34.

[6] Recognizing the precedential effect of the *Big Mama Rag, Inc.* decision, the government in *National Alliance* sought to uphold the full and fair exposition standard under a so-called "methodology" approach, which the government derived from the early cases dealing with advocacy organizations. The methodology test, according to the government's brief, is comprised of four criteria that are used by the Service to determine whether an organization presents a full and fair exposition of its viewpoint. *See infra* text accompanying note 37. The government also argued that exemption was precluded because the organization induced, condoned and advocated violent crime directed against blacks and Jews. Brief for the United States, *supra* note 5, at 12. The district court held that the case was controlled by *Big Mama Rag, Inc.*, notwithstanding the government's attempt to save the constitutionality of the full and fair exposition standard by use of the methodology approach, or to distinguish that case on the ground that National Alliance induced, condoned, and advocated violent crime. 710 F.2d at 870-71.

ernment on an independent ground that did not require reexamination of the previous decision.[7] Thus, the proper scope of the educational exemption as it relates to propaganda organizations is presently unclear.

This Article traces the history of the Treasury Department's position on the educational exemption to identify and analyze the perceived concerns that led Treasury to seek to deny exemption to certain propaganda organizations. Based on that analysis, the Article suggests a scheme for treating propaganda organizations under the current statutory provisions. The Article concludes that the Treasury Department and the Internal Revenue Service should abandon their attempts to distinguish between exempt and nonexempt propaganda or advocacy organizations on the basis of the quality or methodology of the organization's presentation. Both the "methodology" and full and fair exposition standards presently relied upon are subjective and unadministrable, and are open to serious abuse in the form of censorship. Part I describes the importance of the educational exemption and presents the current Treasury Department position on the scope of the education exemption. The Treasury's perceived concerns over expanding the definition of education to include propaganda organizations are analyzed in part II. This part examines the propaganda process and concludes that, in gen-

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[7] The District of Columbia Court of Appeals held that National Alliance could not be found to be educational within any reasonable interpretation of that term, because there was no rational development of a point of view or factual foundation for the views advocated:

> In sum, National Alliance repetitively appeals for action, including violence, to put to disadvantage or to injure persons who are members of named racial, religious, or ethnic groups. It both asserts and implies that members of these groups have common characteristics which make them sufficiently dangerous to others to justify violent expulsion and separation.
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> Even under the most minimal requirements of a rational development of a point of view, National Alliance's materials fall short. The publications before us purport to state demonstrable facts — such as the occurrence of violent acts, perpetrated by black persons, the presence of Jews in important positions, and other events consistent with National Alliance themes. The real gap is in reasoning from the purported facts to the views advocated; there is no more than suggestion that the few "facts" presented in each issue of *Attack!* justify its sweeping pronouncements about the common traits of non-whites and Jews or the need for their violent removal from society. It is the fact that there is no reasoned development of the conclusions which removes it from any definition of "educational" conceivably intended by Congress. The material may express the emotions felt by a number of people, but it cannot reasonably be considered intellectual exposition.

National Alliance v. United States, 710 F.2d 868, 873 (D.C. Cir. 1983).

eral, it poses no significant problems and instead provides significant benefits by ensuring maximum access by the public to all viewpoints on an issue. Part III outlines the use of an exemption denial as a form of censorship, highlighting an actual example of abuse by the Treasury. In part IV, potential limitations on the education exemption are discussed, and largely rejected in favor of a broad exemption. Part V summarizes the appropriate scope of the exemption, concluding that the charitable exemption and deduction are efficient and desirable tools to give the public access to all views, particularly in areas involving sensitive first amendment considerations. Thus, except in cases involving a clearly substantial and objective basis for excluding a propaganda organization from exempt educational status, such as the advocacy of illegal activities, Treasury should administer the educational exemption so that all forms of dissemination of information and propagation of doctrine qualify as educational.

I. The Educational Exemption for Propaganda Organizations

A. *The Importance of Educational Status*

Section 501(a)[8] exempts from federal income taxation certain organizations, including those organized and operated exclusively for educational purposes.[9] More important than the tax exemption itself are the significant collateral benefits accorded certain organizations, including educational organizations: the deductibility of contributions to such organizations for income,[10] gift,[11] and estate[12] tax purposes.

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[8] I.R.C. § 501(a) (1982) exempts the following from taxation: "An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503."

[9] Educational organizations are described in I.R.C. § 501(c) (1982). *See supra* note 1.

[10] I.R.C. § 170(a)(1) (1982) provides: "There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year."

A charitable contribution is defined in § 170(c)(2) as a contribution to or for the use of a qualified donee. Included among the qualified donees are corporations, trusts, community chests, and funds or foundations organized and operated exclusively for educational purposes. *Id.* § 170(c)(2)(B).

The first provision permitting a deduction for income tax purposes was enacted in 1917. Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300, 330.

[11] I.R.C. § 2522(a)(2) (1982) provides: "In computing taxable gifts . . . there shall be allowed as a deduction . . . the amount of all gifts made . . . to or for the use of — . . . (2) a corporation, or trust, or community chest, fund or foundation, organized and

An organization's right to receive tax deductible contributions is significant.[13] These collateral tax benefits have been analogized to direct

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operated exclusively for . . . educational purposes . . ."

The first such provision was added to the gift tax for an interim period from 1924 to 1926. Revenue Act of 1924, ch. 234, 43 Stat. 253, 314. It became a permanent part of the gift tax in 1932. Revenue Act of 1932, ch. 209, 47 Stat. 169, 247-48.

[12] I.R.C. § 2055(a)(2) (1982) provides:

> (a) In general
> For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers —
> . . . .
> (2) to or for the use of any corporation organized and operated exclusively for . . . educational purposes . . . .

The first such provision was added to the estate tax in 1926. Revenue Act of 1926, ch. 27, § 303(b)(3), 44 Stat. 9, 73.

[13] IRS PUBLICATION NO. 78: CUMULATIVE LIST OF ORGANIZATIONS DESCRIBED IN § 170(C) OF THE INTERNAL REVENUE CODE OF 1954, lists organizations that have received ruling or determination letters stating that contributions to the organizations are deductible under § 170 of the Code. Rev. Proc. 72-39, 1972-2 C.B. 818. Appearance in the Cumulative List is a prerequisite to successful fundraising for most charitable organizations, since many contributors simply will not donate to an organization not appearing on the list. *See* Bob Jones Univ. v. Simon, 416 U.S. 725, 729-30 (1974). With narrowly limited exceptions, a donor may rely on the Cumulative List while an organization maintains its listing, regardless of its actual tax status. Rev. Proc. 72-39, 1972-2 C.B. 818. For this reason, appearance on the Cumulative List is necessary to successful fundraising for most charitable organizations.

One of the obvious purposes of the charitable exemption and deduction is promoting of social goals. Such provisions, which are arguably unrelated to provisions necessary for implementation of an income tax, have been referred to as "tax expenditures." *See* Surrey & McDaniel, *The Tax-Expenditure Concept: Current Developments and Emerging Issues*, 20 B.C.L. REV. 225, 226-27 (1979). A tax expenditure is therefore a revenue loss attributable to a deduction, exemption, preferential tax rate, deferral of tax liability, exclusion or credit, which is unrelated to normal concepts of income and deductions. For articles dealing with the tax expenditure concept in general and as related to the charitable exemption and deduction, see *infra* note 15. The tax expenditure theory analogizes the charitable contribution to a direct governmental matching grant to the donor in the amount of the tax that the government fails to collect because of the deduction. Likewise, it analogizes the charitable exemption to a direct governmental grant to a charitable organization in the amount of the tax that is not collected because the organization is exempt from taxation.

The Congressional Budget Act of 1974 made the concept of tax expenditures an integral part of the budget process, requiring that the budget contain a "Special Analysis" entitled "Tax Expenditures." According to the 1984 analysis, the deduction for charitable contributions to educational organizations resulted, or will result, in tax subsidies to contributors of $830 million, $770 million, and $805 million for fiscal years 1982, 1983, and 1984, respectively. OFFICE OF MANAGEMENT AND BUDGET, SPECIAL ANALYSIS G: TAX EXPENDITURES, SPECIAL ANALYSES, BUDGET OF THE UNITED

federal support that may, either alone or in conjunction with other collateral tax benefits, be subject to constitutional and statutory limitations.[14] Whatever those collateral tax benefits may be technically or le-

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STATES GOVERNMENT 1984, Table G-1, at G-27 (1983).

[14] *See, e.g.*, Green v. Connally, 330 F. Supp. 1150 (D.D.C.) (three-judge court) (exemption denied to a racially discriminatory private school because indirect support for such schools in the form of tax exemption and charitable deduction would frustrate public policy), *aff'd per curiam sub nom.* Coit v. Green, 404 U.S. 997 (1971). In construing the Code provisions to deny exemption, the three-judge court avoided what it considered to be a serious constitutional issue: whether constitutional prohibitions on direct government aid to racially discriminatory schools also extend to indirect aid provided by tax benefits. *See also* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (exemption denied to racially discriminatory religious affiliated schools because such schools violate public policy; constitutional issue not addressed).

The rationale of *Green* has been applied in several cases. In McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972), the court held that the exemption for social clubs under I.R.C. § 501(c)(7) (1982) did not constitute a grant of federal funds because the exemption was limited to membership-generated funds and there were no collateral tax benefits. *Id.* at 457-58 (exemption under § 501(c)(7) does not provide grant of federal funds through the tax system but, rather, is part and parcel of defining appropriate subjects of taxation). However, the court held that the § 501(c)(8) exemption for fraternal organizations stood on a different footing. First, such organizations were not taxed on passive investment income. Second, § 170(c)(4) allows a tax deduction for contributions to such organizations, even though such deduction is limited to amounts to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. *Id.* at 459 (exemption under § 501(c)(8) encompasses passive investment income); *id.* at 459-60 (deductibility of contributions to § 501(c)(8) organizations is a significant collateral tax benefit). The court concluded that the exemption, together with the collateral benefits, constituted sufficient governmental involvement to violate the fifth amendment, and that the benefits constituted federal financial assistance, which was specifically prohibited by the Civil Rights Act of 1964. *Id.* at 462. For a critical analysis of the case see Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51 (1972). Congress later enacted § 501(i), which denies exemption to certain social clubs that discriminate on the basis of race, color, or religion. Act of Oct. 20, 1976, Pub. L. No. 94-568, § 2(a), 90 Stat. 2697 (redesignated subsection (i) by the Revenue Act of 1978, Pub. L. No. 95-600, § 703(g)(2)(8), 92 Stat. 2763, 2940).

In McCoy v. Shultz, 73-1 U.S.T.C. ¶ 9233 (D.D.C. 1973), the court held that the Portland City Club Foundation, an exempt organization under § 501(c)(3) whose members were required to belong to an organization that barred women from membership, did not lose its exemption because of the discrimination. In the court's view, the tax benefits were so far removed from the discrimination as to negate any possibility of complicity in the discrimination. *See also* New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856 (2d Cir. 1975) (grant of § 501(c)(4) civic league tax exemption to an organization that discriminated on the basis of sex held constitutional because even though the United States Jaycees administered federal programs and expended federal funds, they did so on a nondiscriminatory basis); Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees, 495 F.2d 883 (10th Cir. 1974)

gally,[15] they are significant economic benefits to the organizations and the persons who contribute to them. This federal largesse for educational organizations influences any reasoned analysis of the proper scope of the educational exemption. A restrictive definition of "education" that would prevent some or all propaganda organizations from qualifying for the educational exemption will seriously disadvantage the excluded organizations and favor the included organizations. Any definitional lines should be based on significant, identifiable factors, distinguishing the excluded from the included organizations in a manner that can be reasonably and effectively administered.

(same), *cert. denied*, 419 U.S. 1026 (1974); Marker v. Shultz, 337 F. Supp. 1301 (D.D.C. 1972) (tax exemption for labor organizations under § 501(c)(5) is based on "benevolent neutrality" and does not constitute unconstitutional governmental action or federal financial assistance), *aff'd*, 485 F.2d 1003 (D.C. Cir. 1973) .

Recently, the New York Court of Appeals held that a court's exercise of its equitable power to permit the continued administration of gender discriminatory trusts does not violate the equal protection clause. *See In re* Wilson, 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983); *In re* Johnson, 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983); *see also* Shapiro v. Columbia Union Nat'l Bank & Trust Co., 576 S.W.2d 310 (Mo. 1978) (en banc) (charitable trust's scholarship program for the benefit of "deserving boys" violated neither the equal protection clause nor the Civil Rights Act because the University's involvement was not so pervasive as to constitute state action), *cert. denied*, 444 U.S. 831 (1979). *But cf.* Lockwood v. Killian, 179 Conn. 62, 425 A.2d 909 (1979) (gender and racially discriminatory language in a charitable trust's scholarship grant struck down as state action but religious discrimination upheld).

[15] This Article does not discuss whether the charitable contribution deduction is preferable to a federal matching grant program. *See* Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*, 28 TAX L. REV. 37 (1972); McDaniel, *Federal Matching Grants for Charitable Contributions: A Substitute for the Income Tax Deduction*, 27 TAX L. REV. 377 (1972); McDaniel, *Federal Financial Assistance to Charity: An Alternative to the Tax Deduction*, 55 MASS. L.Q. 243 (1970). Nor does this Article seek to engage in the debate over whether the charitable contribution deduction constitutes a tax expenditure. *See* Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT. TAX J. 244 (1969); Bittker, *The Tax Expenditure Budget — A Reply to Professors Surrey and Hellmuth*, 22 NAT. TAX J. 538 (1969); Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352 (1970); Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1969); Surrey & Hellmuth, *The Tax Expenditure Budget — A Reply to Professor Bittker*, 22 NAT. TAX J. 528 (1969); *see also* McIntyre, *A Solution to the Problem of Defining a Tax Expenditure*, 14 U.C. DAVIS L. REV. 79 (1980); Surrey & McDaniel, *The Tax Expenditure Concept: Current Developments and Emerging Issues*, 20 B.C.L. REV. 225 (1979).

B. The Treasury Department's Position: The Methodology Approach and Full and Fair Exposition Standard

The exemption from income tax for educational organizations now contained in section 501(c)(3) originated in the ill-fated Tariff Act of 1894.[16] The first provision permitting a deduction for contributions to educational organizations was added to the income tax in 1917,[17] to the gift tax in 1924,[18] and to the estate tax in 1926.[19] Neither the statutory language nor the legislative history clearly delineated the scope of the term "educational." The original exemption encompassed all of those organizations included within the Anglo-American legal definition of "charitable," which included relief of poverty, advancement of education, advancement of religion, and other purposes beneficial to the community.[20]

The tax exemption was prompted partly by a desire to foster and assist such organizations because their activities were perceived as socially desirable. Many of the exempt organizations relieve the government of financial burdens that would otherwise require direct appropriations from public funds, or provide public benefits and promote the

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[16] Ch. 349, § 32, 28 Stat. 509, 556 (1894). Section 32 provided: "[N]othing herein contained shall apply to . . . corporations, companies or associations organized and conducted solely for charitable, religious, or educational purposes . . . ."

In 1913, the exemption was broadened to include "scientific" organizations and a restriction was added that no part of the net earnings of an exempt organization can inure to the benefit of any private stockholder or individual. Tariff Act of 1913, ch. 16, § II(G)(a), 38 Stat. 114, 172. In 1918 and 1921, the exemption was further broadened. Revenue Act of 1918, ch. 18, § 231(6), 40 Stat. 1057, 1076 (1919) (prevention of cruelty to children or animals added to exempt purposes); Revenue Act of 1921, ch. 136, § 231(6), 42 Stat. 227, 253 (community chests and literary organizations added to exempt list). Subsequent revenue acts carried forward the exemption provision unchanged. Revenue Act of 1924, ch. 234 § 231(6), 43 Stat. 253, 282; Revenue Act of 1926, ch. 27, § 231(6), 44 Stat. 9, 40; Revenue Act of 1928, ch. 852, § 103(6), 45 Stat. 791, 813; Revenue Act of 1932, ch. 209, § 103(6), 47 Stat. 169, 193.

[17] *See supra* note 10.

[18] *See supra* note 11.

[19] *See supra* note 12.

[20] In its initial version, the exemption covered charitable, religious and educational organizations. This enumeration coincided with Lord Macnaghten's statement of the definition of a common law charity in Commissioner for Special Purposes of Income Tax v. Pemsel [1891] A.C. 531, 583 (" 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."). This definition of charity is also the basis for the American common law. *See, e.g.*, Evans v. Newton, 382 U.S. 296, 307-08 (1966) (White, J., concurring).

general welfare.[21] However, such broad statements of legislative intent are more useful to illustrate the reason for exemptions than to define the outer limits of the educational exemption. Some organizations that are routinely granted educational exemptions might appear unqualified when carefully scrutinized to determine whether they relieve the government of burdens it would otherwise bear or provide other public benefits.[22] Moreover, the term "education" has a usual and accepted meaning that can embrace a broad range of human experiences and that has no clearly defined perimeters.[23]

The Treasury Department never attempted to limit the educational exemption to schools or similar institutions with faculties, curricula, and regularly attending student bodies.[24] In the area of education of the individual, the Service proposed no significant limitations on the availability of the exemption and offered no searching analysis as to whether the organization provided significant public benefits. Rather, in such cases the Service routinely assumed benefit to the individual and concomitant benefit to the public.[25]

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[21] *See* H.R. REP. NO. 1860, 75th Cong., 3d Sess. 19 (1938) (exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the government is compensated for its revenue loss by the relief from financial burdens that would otherwise be met by direct public appropriations and by the benefits resulting from promoting the general welfare); *see also* Trinidad v. Sagrada Orden, 263 U.S. 578, 581 (1924) (exemption recognizes benefits that the public derives from the activities of exempt organizations).

[22] The variety of activities that the Service has ruled educational include the following: instruction in securities management (Rev. Rul. 68-16, 1968-1 C.B. 246); instruction in dancing (Rev. Rul. 65-270, 1965-2 C.B. 160); and instruction in sailboat racing (Rev. Rul. 64-275, 1964-2 C.B. 142). Although these activities admittedly provide public benefits, they are not benefits that the government would normally otherwise provide. In cases involving instruction of the individual, the Service assumes sufficient public benefit without critical analysis.

[23] The definition of education comprehends not merely the instruction received at school or college, but the entire course of training, be it moral, intellectual, or physical. Education may be particularly directed to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it relates to them all. *See* BLACK'S LAW DICTIONARY 461 (5th ed. 1979); *see also* Weyl v. Commissioner, 48 F.2d 811, 812 (2d Cir. 1931) (citing a similar definition from *Funk & Wagnall's New Standard Dictionary*).

[24] *See, e.g.*, I.T. 2296, 5-2 C.B. 65 (1926) (organization to teach and encourage handicrafts); I.T. 2282, 5-1 C.B. 80 (1926) (organization to study ruffed grouse); I.T. 2134, 4-1 C.B. 214 (1925) (organization to maintain forest land and wild bird sanctuary); I.T. 1475, 1-1 C.B. 184 (1922) (organization to foster and disseminate geographic knowledge).

[25] *See, e.g., supra* note 22. The regulation defining "educational" seems to require no inquiry into whether there is a tangible benefit to society in cases involving instruc-

However, from its earliest attempts to administer the exemption to the present, Treasury has deemed it necessary and desirable to limit the availability of the exemption to organizations that educate the general public. Initially, Treasury attempted to exclude all propaganda organizations from exemption,[26] because when providing for deductibility of contributions to educational organizations, Congress did not intend to encourage the dissemination of ideas in support of one doctrine as against another.[27] Thus, Treasury attempted to distinguish between "true education", which is directed at and for the benefit of the individual, and propaganda, which is directed at the individual only as a means to accomplish the purpose of the organization instigating it.[28] The position was applied to all forms of propaganda, with no attempt to distinguish among organizations based upon the perceived desirability of the position advocated.[29]

In a series of cases, courts tested and substantially rejected Treas-

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tion of the individual, as opposed to instruction of the public. *See* Treas. Reg. § 1.501(c)(3)-1(d)(3) (1959).

[26] Treas. Reg. 45, Art. 517 (Revenue Act of 1918); Treas. Reg. 62, Art. 517 (Revenue Act of 1921); Treas. Reg. 65, Art. 517 (Revenue Act of 1924); Treas. Reg. 69, Art. 517 (Revenue Act of 1926); Treas. Reg. 74, Art. 527 (Revenue Act of 1928); Treas. Reg. 77, Art. 527 (Revenue Act of 1932); Treas. Reg. 86, Art. 101(6)-1 (Revenue Act of 1934); Treas. Reg. 94, Art. 101(6)-1 (Revenue Act of 1936). The regulations denied exemption to organizations "formed to disseminate controversial or partisan propaganda."

[27] It is apparent from the Treasury Department's earliest attempts to exclude some propaganda organizations from the educational exemption that the major concern was not the exemption itself, but rather the deductibility of contributions to these organizations. For the precise statement of the Service's position on congressional intent in permitting the deduction of contributions to these organizations, *see infra* note 28. This intent was the stated rationale for the Service's position on the availability of the educational exemption to propaganda organizations.

[28] *See* S.M. 1362, 2 C.B. 152, 154 (1920):

> [I]t was Congress' intention, when providing for the deduction of contributions to educational corporations, not to benefit and assist the aims of one class against another, to the profit of one class and to the detriment of perhaps another, but to foster education in its true and broadest sense, thereby advancing the interest of all over the objection of none.

[29] There were, no doubt, some deviations from this neutral course. *See, e.g.*, I.T. 1224, 1-1 C.B. 256 (1922) (exemption allowed to an organization formed to bring about open-minded consideration of social, industrial, political and international issues by college students). However, no evidence suggests that the Service actively discriminated against organizations that advocated extreme viewpoints, or in favor of organizations that advocated mainstream viewpoints. The evidence suggests that the Service did in fact apply the standard strictly and evenhandedly.

ury's initial position.[30] The courts, however, uniformly denied the edu-

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[30] Slee v. Commissioner, 42 F.2d 184 (2d Cir. 1930), *aff'g* 15 B.T.A. 710 (1929), involved the deductibility of contributions to the American Birth Control League, which was organized "to disseminate lawful information regarding the political, social and economic facts of uncontrolled procreation." 42 F.2d at 184. The Board of Tax Appeals denied the deduction on two grounds, including that the organization disseminated propaganda about a controversial issue. 15 B.T.A. at 715. The Board relied, in part, on its previous decision in Fales v. Commissioner, 9 B.T.A. 828 (1927), in which it had held that contributions to the Massachusetts Anti-Cigarette League were nondeductible for the same reason. The Second Circuit disagreed with that rationale. Judge Learned Hand wrote that "[t]he collection and publication of the information so obtained was also legitimate scientific enterprise, like any collection of medical data. We cannot discriminate unless we doubt the good faith of the enterprise." 42 F.2d at 185.

Weyl v. Commissioner, 48 F.2d 811 (2d Cir. 1931), *rev'g* 18 B.T.A. 1092 (1930), involved the deductibility of contributions to the League for Industrial Democracy, whose objective was the "education for a new social order based on production for use and not for profit." 18 B.T.A. at 1092. The League generally advocated control by the people of their industrial life and, though considerable internal differences of opinion existed concerning the method to accomplish its goals, the League was decidedly partisan in advocating a new social order. *Id.* at 1093-94. The League conducted research, gave lectures, held debates and discussions, and wrote and disseminated pamphlets and books about social and economic problems. 48 F.2d at 811. The Board of Tax Appeals, with two dissenting members, denied the deduction, in part because the organization disseminated information about a controversial subject. The dissenting opinion stated:

> This League is unlike the Birth Control League . . . for it has no legislative program brooding over its educational activities . . . . There are few branches of learning that escape controversy. Freedom of thought and difference of opinion are essential to education and progress. There is no justification for reading into the statute a qualification . . . that the subject is one which . . . Congress wanted to foster.

18 B.T.A. at 1095 (Member Sternhagen, dissenting).

The Second Circuit reversed, holding that the term "educational" was to be given its usual and accepted meaning, which includes imparting or acquiring knowledge. The court stressed that the organization had no legislative program, and that its purposes and activities were educational within the usual and accepted meaning of that term. The opinion stated:

> Congress did not include a definition of the term "education" as used in the act. In the absence of specific definition, the words are to be given their usual and accepted meaning . . . . "Education" has been defined by the encyclopedia and dictionaries as "imparting or acquisition of knowledge; mental and moral training; cultivation of the mind, feelings and manners." The definition given by the Funk & Wagnalls' New Standard Dictionary, vol. 1, may be referred to:
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> > Education as understood today, connotes all those processes cultivated by a given society as means for the realization in the individual of the ideals of the community as a whole. It has for its aim the development of the powers of man (1) by exercising each along its particular line, (2) by properly coordinating and subordinating

cational exemption to organizations that used propaganda to influence legislation.[31] One court also denied exemption to an organization that

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> them, (3) by taking advantage of the law of habit, and (4) by appealing to human interest and enthusiasm. It includes not only the narrow conception of instruction, to which it was formerly limited, but embraces all forms of human experience, owing to the recognition of the fact that every stimulus with its corresponding reaction has a definite effect on character. It may be either mainly esthetic, ethical, intellectual, physical or technical, but to be most satisfactory it must involve and develop all these sides of human capacity.

48 F.2d at 812.

Cochran v. Commissioner, 78 F.2d 176 (4th Cir. 1935), *rev'g* 30 B.T.A. 1115 (1934), involved the deductibility of contributions to the World League Against Alcoholism, which was organized "to attain, by means of education and legislation, the total suppression throughout the world of alcoholism, which is the poisoning of body, germ plasm, mind, conduct and society produced by the consumption of alcoholic beverages." *Id.* at 177. The Board of Tax Appeals denied the deduction, partly because the organization disseminated information about controversial topics. 30 B.T.A. at 1119-20. The Fourth Circuit reversed, holding that the League's purpose to eliminate alcoholism was not controversial, even if it did disseminate information about prohibition and other controversial issues. Although the opinion relied on the League's treatment of controversial issues in a thorough and impartial manner, it did so only to support its finding that the League was not attempting to influence legislation, which would have precluded exemption. 78 F.2d at 179; *see also infra* note 31. The court did not suggest that a lack of impartiality would be noneducational per se.

The Board of Tax Appeals eventually followed the appellate courts' holdings that mere dissemination of information about controversial subjects or the advocacy of a position on a controversial issue did not automatically preclude exemption. *See, e.g.*, Forstall v. Commissioner, 29 B.T.A. 428 (1933) (deduction for contributions to League of Nations denied not because of the controversial nature of the organization's activities, but because of legislative activities); Watson v. Commissioner, 27 B.T.A. 463 (1932) (exemption denied to Citizens League of Cleveland because of legislative activities, not because of the dissemination of controversial propaganda, the Board noting in its opinion that education often thrives best in an atmosphere of controversy).

[31] Slee v. Commissioner, 42 F.2d 184 (2d Cir. 1930), *aff'g* 15 B.T.A. 710 (1929). Judge Learned Hand wrote:

> This raises the only question which seems to us important, which is, whether the League is also agitating for the repeal of laws preventing birth control . . . . 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 . . . .
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> So far as the society at bar sought to relieve itself of the restraints of the law in order the better to conduct its charity, we might indeed hold that it fell within the class of which we have just given some instances [those eligible for the exemption]. So far, however, as its political activities were general, it seems to us, regardless of how much we might be in sympathy

had no legislative program, but merely disseminated conclusions without supporting facts or reasons.[32] The Revenue Act of 1934 amended

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> with them, that its purposes cannot be said to be "exclusively" charitable, educational or scientific. It may indeed be for the best interest of any community voluntarily to control the procreation of children, but the question before us is whether the statute covers efforts to proselytize in that or other causes. Of the purposes it defines "educational" comes the closest and when people organize to secure the more general acceptance of beliefs which they think beneficial to the community at large, it is common enough to say that the public must be "educated" to their views. In a sense that is indeed true, but it would be a perversion to stretch the meaning of the statute to such cases; they are indistinguishable from societies to promote or defeat prohibition, to adhere to the League of Nations, to increase the Navy, or any other of the many causes in which ardent persons engage.

42 F.2d at 185. While the broad language quoted could arguably be applied to all advocacy organizations, the specific cited examples concerned advocacy of causes that would require legislative action for implementation. *Cf.* Cochran v. Commissioner, 78 F.2d 176 (4th Cir. 1935) (exemption granted to organization that disseminated information about controversial issues but which did not do so to influence legislation); Weyl v. Commissioner, 48 F.2d 811 (2d Cir. 1931) (distinguishing *Slee* and granting exemption to a propaganda organization that had "no legislative program hovering over its educational activities"). The courts uniformly held that legislative activities precluded exemption. *See* Estate of Sharpe v. Commissioner, 148 F.2d 179 (3d Cir. 1945); Estate of Marshall v. Commissioner, 147 F.2d 75 (2d Cir. 1945); Forstall v. Commissioner, 29 B.T.A. 428 (1933); Watson v. Commissioner, 27 B.T.A. 463 (1932). For a discussion of the rationale behind the denial of exemption to such organizations, see *infra* note 33.

[32] Leubuscher v. Commissioner, 54 F.2d 998 (2d Cir. 1932), *modifying* 21 B.T.A. 1022 (1930), involved the deductibility for estate tax purposes of two bequests. One bequest was to a corporation to disseminate the ideas of Henry George. The other was to the Manhattan Single Tax Club, formed to advocate George's ideas, to advocate abolition of taxes on industry and enactment of a single tax on land, and to promote social intercourse among single tax adherents. The Board of Tax Appeals denied both deductions because both organizations had a legislative program that precluded exemption. The Second Circuit reversed as to the first bequest, because the corporation had no legislative program, but affirmed disallowance of the second bequest because disseminating conclusions of fact and publishing partisan viewpoints without explaining the underlying reasons are not educational activities or purposes. 54 F.2d at 1000-01. This is the only appellate decision that accepted the broad position that the dissemination of controversial propaganda not connected with a legislative program is not educational. The opinion cites no authority for the conclusion, and the analysis is superficial. The opinion states:

> To advocate means "to plead in favor of, to defend by argument before a tribunal or the public, to support, vindicate or recommend publicly." Websters' International Dictionary. This does not express an educational purpose, although it may be educational in some degree to those who listen to or read the theories urged. It has for its purposes the dissemination

the statute, expressly denying exemption to any organization a substantial part of whose activities included carrying on propaganda or otherwise attempting to influence legislation.[33] The amending language cov-

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of controversial propaganda, which means a plan for the publication of a doctrine or system of principles.

Id. at 1000.

[33] Ch. 277, § 101(6), 48 Stat. 680, 700. Subsequent revenue acts and the Internal Revenue Code of 1939 carried forward the exemption, subject to the same restriction on substantial legislative activities. Internal Revenue Code of 1939, ch. 1, § 101(6), 53 Stat. 1, 33; Revenue Act of 1938, ch. 289, § 101(6), 52 Stat. 447, 481; Revenue Act of 1936, ch. 690, § 101(6), 49 Stat. 1648, 1674. The Internal Revenue Code of 1954 added the further restriction that an organization exempt under § 501(c)(3) cannot "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." Internal Revenue Code of 1954, ch. 1, § 501(c)(3), 68A Stat. 1, 163. In addition, the Internal Revenue Code of 1954 added testing for public safety to the exempt list under § 501(c)(3). *Id.* The Tax Reform Act of 1976 amended § 501(c)(3) and introduced §§ 501(h), 504, and 4911, which define a permissive range of legislative activities in terms of expenditures of funds. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1307, 90 Stat. 1520, 1720-29. *See generally* B. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 235-40 (4th ed. 1983). The Act also added to the list of organizations exempt under § 501(c)(3) those formed "to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment)." Tax Reform Act of 1976, Pub. L. No. 94-455, § 1313(a), 90 Stat. 1520, 1730. This provision was added because of uncertainty whether promotion of sports competition without sports training was educational. *See* H.R. REP. NO. 1515, 94th Cong., 2d Sess. 542 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 4237.

The restriction on legislative propaganda enacted by the Revenue Act of 1934 was added as a floor amendment in the Senate. The sponsor of the bill, Senator Reed, stated that the intent of the provision was to curb a maverick organization known as the National Economy League, and that he did not wish to adversely affect the legislative activities of "any of the worthy institutions that we do not in the slightest mean to affect." 78 CONG. REC. 5861 (1934) (remarks of Senator Reed). As first proposed, the amendment prohibited deductions "for contributions made to an organization a substantial part of whose activities is participation in partisan politics or is carrying on propaganda, or otherwise attempting to influence legislation." S. REP. NO. 558, 73d Cong., 2d Sess. 26 (1934), 1939-1 C.B. (Pt. 2) 586, 606. The House receded with an amendment striking out the words "participation in partisan politics or is." H.R. REP. NO. 1385, 73d Cong., 2d Sess. 17 (1934), 1939-1 C.B. (Pt. 2) 627, 629. The Conference Committee deleted the phrase because of a fear that such a prohibition was too broad. 78 CONG. REC. 7831 (1934) (remarks of Representative Samuel B. Hill, one of the House managers). The amendment, even as enacted, was too broad since it presumably covered the legislative activities of all organizations, contrary to the stated intent of its sponsor, Senator Reed. There is no explanation why the amendment was passed without change even though, in the view of its sponsor, it went much further than intended. It seems likely that less restrictive language, which would not have excluded from its operation the organizations that were intended to be covered, could not be formulated. *See* Clark, *The Limitation on Political Activities: A Discordant Note in the*

ered only propaganda organizations with legislative activities. It

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Law of Charities, 46 VA. L. REV. 439, 447 (1960); Garrett, *Federal Tax Limitations on Political Activities of Public Interest and Educational Organizations*, 59 GEO. L.J. 561, 564 (1971); *see also Hearings on the Revenue Act of 1936 Before the Senate Finance Committee*, 74th Cong., 2d Sess. 41 (1936) (testimony of Arthur Kant, Tax Legislative Counsel) ("[I]t is almost impossible to set up any precise standards that would get the cases that one would like to get and should be gotten, that won't sweep in a lot of cases that should not be included.") Some commentators have suggested that the enactment was intended to liberalize the case law. *See, e.g.*, Borod, *Lobbying for the Public Interest — Federal Tax Policy and Administration*, 42 N.Y.U. L. REV. 1087, 1113-14 (1967); Clark, *supra*, at 447.

Likewise, the early cases that had denied exemption to legislative propaganda groups before the Revenue Act of 1934 did not attempt to articulate the precise reasons underlying the denial. In Slee v. Commissioner, 42 F.2d 184 (2d Cir. 1930), Judge Learned Hand stated, without analysis, that "[p]olitical agitation as such is outside the statute, however innocent the aim . . . . Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them." *Id.* at 185; *see supra* notes 30-31. Judge Hand's statement was cited with approval by the Supreme Court in Cammarano v. United States, 358 U.S. 498 (1959), in which the Court upheld the constitutionality of the restrictions on legislative activities of exempt organizations under § 501(c)(3). The Court cited *Slee* to support its conclusion that a sharply defined policy against public support for such groups existed, but did not elaborate as to the source of that policy. *Id.* at 512. The Court stressed that the limitation was not aimed at the suppression of dangerous ideas, but rather expressed the 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." *Id.* at 513.

The policy against lobbying was first reflected in the income tax regulation that disallowed deductions for expenditures for lobbying purposes if claimed as business expenses. The validity of the regulation was upheld in Textile Mills Sec. Corp. v. Commissioner, 314 U.S. 326 (1941). The historical development of the regulation and its underlying rationale are discussed in Sharp, *Reflections on the Disallowance of Income Tax Deductions for Lobbying Expenses*, 39 B.U.L. REV. 365 (1959). The author concluded that if a policy against lobbying activities existed, it was only obtusely defined.

The restriction on lobbying activities of exempt organizations under § 501(c)(3) has been criticized as misguided and based upon a naive and incorrect view of political propaganda, at least when it is conducted in public. *See generally* Clark, *supra*. However, even the recent cases considering the issue have assumed the existence of a strongly defined policy against public subvention of lobbying activities. *See, e.g.*, Taxation With Representation v. United States, 585 F.2d 1219 (4th Cir. 1978) (organization's first amendment right to freedom of speech and the right to petition Congress are not impaired by the lobbying restrictions of §§ 501(c)(3) and 170(c)(2)), *cert. denied*, 441 U.S. 905 (1979); Haswell v. United States, 500 F.2d 1133 (Ct. Cl. 1974) (upholding the constitutionality of the limitations on lobbying activities of § 501(c)(3) organizations, and the further restrictions on such activities by foundations enacted by the Tax Reform Act of 1969, I.R.C. § 4945 (1982), that impose excise taxes on amounts paid

provided no direct guidance on congressional intent with respect to the broader issue of the availability of the educational exemption to propaganda organizations without legislative activities.[34]

After the series of cases rejecting its initial position, Treasury recognized that Congress had failed to overturn those decisions when it focused on propaganda organizations in the Revenue Act of 1934. Thus, in amending the regulations defining "educational," Treasury retreated from the position that no propaganda organization could attain tax exempt educational status. However, the retreat was less than complete. The new definition retained the provision that an organization formed or used to disseminate controversial or partisan propaganda was not educational. However, it qualified the exclusion by holding that publishing books or giving lectures that advocated a controversial cause was

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by private foundations for lobbying activities even if such activities are unsubstantial), *cert. denied*, 419 U.S. 1107 (1975); Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972) (upholding the constitutionality of restrictions on lobbying activities of § 501(c)(3) organizations), *cert. denied*, 414 U.S. 864 (1973). Recently, the United States Supreme Court upheld the constitutionality of the restrictions on lobbying activities of § 501(c)(3) organizations against an equal protection argument. Regan v. Taxation With Representation, 461 U.S. 540 (1983). Veterans' groups are tax-exempt, and contributions to such groups are deductible even though the code imposes no specific lobbying restrictions on these groups. *See* I.R.C. § 501(c)(19) (1982) (exemption); *Id.* § 170(c)(3) (deductibility of contributions for income tax purposes); *Id.* § 2055(a)(4) (deductibility of contributions for estate tax purposes); *Id.* § 2522(a)(4) (deductibility of contributions for gift tax purposes). The Court upheld the constitutionality of the discriminatory treatment. It analogized tax exemptions and deductions to a form of subsidy that is administered through the tax system, holding that Congress is not required by the first amendment to subsidize lobbying activities, and has especially broad latitude in creating classifications and distinctions in tax statutes. 461 U.S. at 544-48.

[34] The statutory language mentions propaganda, but the legislative history and the punctuation of the language suggest that it intended to cover only propaganda aimed at influencing legislation. This interpretation was accepted by the government in administering the amendment, and the full and fair exposition standard, *see infra* notes 37-52 and accompanying text, does not purport to be based upon the 1934 amending language. *See Hearings on H. Res. 217 Before Special Committee to Investigate Tax-Exempt Foundations and Comparable Organizations, House of Representatives*, 83d Cong., 2d Sess., part 1, 433 (1954) (Reece Committee) (statement of Assistant Commissioner (Technical) Norman A. Sugarman) ("Congress at that time was reluctant to require a narrow application of section 101(6) [now § 501(c)(3)] as to 'educational' organizations as the Service had at first attempted") [hereafter *Hearings on H. Res. 217*]. In fact, Congress, in enacting the amending language in 1934, did not intend anything with respect to the position that an organization disseminating controversial or partisan propaganda was not educational, since no indication exists that Congress was even aware of the position.

not, in itself, sufficient to deny exemption, provided the organization did not transgress the express prohibition on substantial legislative activities and that the organization's activities and principal purpose were clearly nonpartisan, noncontroversial, and educational.[35] The amended regulations thus held that the 1934 statutory amendment applied only to legislative propaganda, but that the definition of the term "educational" did not exempt some propaganda organizations without legislative activities.

This definition apparently adopted the traditional educational institution — the school, college, or university — as the educational model, and judged other organizations on the basis of how closely they approached or how broadly they deviated from that ideal. No case law construing this definition exists, because the Service never actually attempted to apply this standard. Instead, the Service administered the exemption under a standard, formulated without the benefit of public discussion or debate and not incorporated into the regulations, that granted a propaganda organization tax exempt status if it utilized educational methodology.[36]

The methodology approach consisted of four criteria: (1) whether the presentation of viewpoints unsupported by a relevant factual basis constitutes a significant portion of the organization's communications; (2) whether, to the extent viewpoints purport to be supported by a factual basis, the facts are distorted; (3) whether the organization makes substantial use of particularly inflammatory and disparaging terms, and expresses conclusions based more on emotional feelings than on objective factual evaluations; and (4) whether the approach to a subject matter is aimed at developing an understanding on the part of the address-

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[35] Treas. Reg. 101, § 19.101(6)-1 (Revenue Act of 1938). The Regulations, for the first time, indicated that attempts to influence legislation and the dissemination of propaganda were independent grounds for denial of the educational exemption. The latter was derived from the definition of education. *See Hearings on H. Res. 217, supra* note 34, at 450-51 (testimony of Assistant Commissioner (Technical) Norman A. Sugarman) ("in terms of express provisions, the statute refers only to propaganda to influence legislation, and not otherwise to other types of propaganda," but "the problem of what is educational is still with us").

[36] *See Hearings on H. Res. 217, supra* note 34, at 433 (testimony of Assistant Commissioner (Technical) Norman A. Sugarman) ("On the basis of judicial precedents we must conclude that it is now reasonably established under the law that an organization may have as its ultimate objective the creation of a public sentiment favorable to one side of a controversial issue and still secure exempt status under section 101(6) [now § 501(c)(3)], provided it does not, to any 'substantial' degree, attempt to influence legislation, and provided further that its methods are of an educational nature.").

ees, by considering the extent of their prior background or training.[37] The methodology approach identified the factors that would be utilized to determine which propaganda organizations would be exempted, rather than merely stating, as did the regulations, the tautology that the principal purpose and substantially all of the activities of the organization must be educational in nature. The factors relied upon in the methodology approach were aimed at two situations: distortion of facts and the use of an emotional rather than a reasoned approach to issues.[38]

The regulations under the Internal Revenue Code of 1954 were the first to attempt more than a superficial definition of education. The first draft of those regulations would have codified the methodology test.[39] However, the second draft[40] and the final regulations[41] appar-

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[37] The government disclosed the elements of the methodology approach in its brief in the *National Alliance* case. *See* Brief for the United States, *supra* note 5, at 7 n.3. Application of the methodology approach is also discussed in some of the General Counsel's Memoranda that the Service has recently made public. *See, e.g.*, G.C.M. 37,469 (Mar. 23, 1978) (conduct of factual inquiries on subjects of public benefit and the dissemination of resulting information has been historically recognized as educational in the charitable sense; the utilization of methods of instruction designed to cause the public to think and have sound reasons for their choice of programs are educational purposes); G.C.M. 34,340 (Aug. 28, 1970) (in determining whether an organization advocating a particular viewpoint is instructing the public, one must determine whether the communications present that viewpoint through traditionally accepted methods of education; this requires determining whether the form of the organization's presentation substantially conforms with the standards observed by regularly established educational institutions and their faculties); G.C.M. 33,617 (Sept. 12, 1967) (organization ruled exempt because those responsible for the educational quality of its materials are generally qualified to discuss the subject matter presented; the articles are generally moderate and responsible, being without rancor, irresponsible assertions and other indications of unfair presentation; the organization's viewpoint is presented through traditionally accepted methods of education).

[38] Factors (1) and (2) of the methodology approach are aimed at distortions of fact, while factors (3) and (4) are aimed at emotional rather than reasoned presentations. On the latter point, the Service clearly administered the exemption with a bias in favor of reasoned analysis from factual bases. *See, e.g.*, G.C.M. 38,845 (May 4, 1982) (organization ruled exempt because the content of its articles has added to the sum total of knowledge in a specialized area, and the compilation of digests of its articles contributes to the advancement of education by effectively increasing diffusion and application of such knowledge; in a broader sense, the organization's activities are educational because they promote clarity of expression and enable the individual to analyze issues); G.C.M. 37,469 (Mar. 23, 1978); *see supra* note 37.

[39] 21 Fed. Reg. 463 (proposed Jan. 21, 1956). The draft regulations defined charitable organizations to "include generally organizations for the relief of poverty, disaster, or other conditions of similar public concern." *Id.* at 464. It defined educational organizations to include not only those "designed and operated primarily for the improvement

ently discarded the methodology test and, for the first time, promul-

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or development of the capabilities of the individual" but also those "whose primary purpose is the instruction of the public, or an association whose primary purpose is to give lectures, or otherwise instruct, on subjects useful to the individual and beneficial to the community." *Id.* With respect to the propaganda issue, it provided:

> In the determination of whether an organization is exempt under this section consideration will be given not only to the purposes for which it was organized, and the powers it possesses, but also to the methods of its operation. To qualify as an exempt educational organization the methods employed by it must in fact be educational. Thus, not only the purpose but also the activities of such an organization must be designed to disseminate knowledge and basic factual material rather than unsupported opinion. The fact that an organization has a particular viewpoint, or takes a particular position, with respect to the subject or subjects presented by it, and that it openly advocates such position, will not of itself operate to deny exemption if in its presentation of the subject or subjects there is a full exposition of the facts upon which the advocated position is premised whereby the individual or the public may form independent opinions or conclusions based upon a fair presentation of pertinent factual material. Conversely, exemption may not be allowed under this section to an organization whose principal function, accomplished through its publications, lectures, or other media, is the presentation of opinion without pertinent facts which would permit the individual or the public to reach independent and informed conclusions.

Id.

[40] 24 Fed. Reg. 1421 (proposed Feb. 26, 1959). The second draft defined charitable "in its generally accepted legal sense" and expanded on the definition to include activities other than relief of the poor. "Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion, advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare." *Id.* at 1423.

The second draft defined education to include the instruction or training of the individual for the purpose of improving or developing her capabilities, or the instruction of the public on subjects useful to the individual and beneficial to the community. *Id.* It allowed advocacy organizations to be classified as educational if they present "a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to inform an independent opinion or conclusion," but denied exemption to organizations that primarily present unsupported opinion. 24 Fed. Reg. 1421, 1423 (Feb. 26, 1959) (proposed Treas. Reg. § 1.501(c)(3)-1(d)(3)(i)); *see supra* note 2.

[41] 24 Fed. Reg. 5217 (June 26, 1959). The definition of "charitable" was further expanded to elaborate on the types of social welfare, the promotion of which could qualify as charitable. "Charitable" included "promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice or discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency." Treas. Reg. § 1.501(c)(3)-1(d)(2) (1960). Further, the regulation defining charitable stated that

> The fact that an organization, in carrying out its primary purpose, advo-

gated the full and fair exposition standard. A propaganda organization is exempt when it presents a sufficiently full and fair exposition of all relevant facts to enable an individual to reach an independent decision on the issue.[42] That standard was an apparent compromise among various factions in the Treasury Department.[43] Some feared that Treasury would again adopt a more literal definition of education, based on the fact that some Treasury officials believed that a return to the stricter standard was the only way to bring the exemption within reasonably administrable bounds.[44] In fact, the adherents to a position much more

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> cates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under § 501(c)(3) so long as it is not an "action" organization of any one of the types described in paragraph (c)(3) of this section.

Id. § 1.501(c)(3)-1(d)(3). The definition of education was carried over unchanged from the second draft. These definitions have remained unchanged to the present.

[42] *See supra* note 2.

[43] *See infra* notes 44-48.

[44] In 1958, Herman T. Reiling, then Assistant Chief Counsel for the Internal Revenue Service, published an article advocating his position on the scope of the charitable and educational exemptions. *See* Reiling, *Federal Taxation: What is a Charitable Organization?*, 44 A.B.A. J. 525 (1958). The article was published while the Treasury Department was formulating the regulations under the Internal Revenue Code of 1954. Reiling recognized that the statute did not define the terms "religious, educational, and charitable," but argued that such definitions were unnecessary in view of the fact that Congress used the term "charitable" in its generally accepted legal sense and intended to incorporate it into the statutory exemption provisions. Reiling felt that the common law of charitable trusts was the necessary starting point for determining whether an organization was entitled to exemption. *Id.* at 526.

In Reiling's view, the effective use of the law of charitable trusts in the administration of the tax law required that the terms "religious" and "educational" be very restrictively defined, and that to be entitled to exemption under § 501(c)(3), any of an organization's purposes or activities that did not fall within those core definitions had to qualify as "charitable" in the generally accepted legal sense of that term. *Id.* at 527-29. Reiling did not state what core definitions of "religious" and "educational" he would have used, but there was some fear that the Treasury Department was considering defining education in terms of classrooms, teachers, and pupils. *See* Clark, *supra* note 33, at 450-51. Reiling would have required that an organization qualify as charitable under the law of the state in which it was organized, in addition to qualifying as charitable in the generally accepted legal sense of that term throughout the country. Reiling, *supra*, at 528-29. This would place the organization under the provisions of state law governing the conduct of charitable organizations, thus simplifying the Service's task in administering the exemption. *Id.*

For Reiling, the strict organizational test, together with the requirement that the organization be charitable under the law of the state in which it was organized, represented control mechanisms by which effective limits could be placed on an exemption.

liberal than even the methodology approach prevailed.[45] The full and fair exposition standard probably indicated an abandonment of any attempt to identify objective factors that can be used to separate the exempt from the nonexempt propaganda organizations.[46] However, it was also intended as a nebulous policy statement that, in some extreme cases, the exemption should be denied because the advocacy activities of the organization totally dominate and overshadow any purposes to impart information or understanding.[47] The test's unfortunate ambiguity

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He recognized that without such control mechanisms, the Service could not effectively administer the charitable exemption, due to its lack of expertise in the area and its limited audit resources. *Id.* at 595-96; *see Hearings on H. Res. 217*, *supra* note 34, at 436-37; *see also infra* note 47.

[45] Reiling's views clearly did not prevail within the Treasury Department. Instead, the final regulations opted for a very expansive definition of "educational," expressly qualified only by the exclusion of "action" organizations (those that engage in prohibited legislative activities) and advocacy organizations that do not satisfy the full and fair exposition standard. An organization was not required to state its purpose or activities with any degree of specificity. *See* Treas. Reg. § 1.501(c)(3)-1(b)(ii) (1960) ("[I]n meeting the organizational test, the organization's purposes, as stated in its articles, may be as broad as, or more specific than, the purposes stated in § 501(c)(3)."). The term "charitable" was defined more expansively than the relief of the poor and distressed, and the regulations did not require that an organization be charitable under the laws of the state in which it was organized, but only in the generally accepted legal sense of that term throughout the country. *Id.* § 1.501(c)(3)-1(d)(2).

[46] *See infra* note 47 and accompanying text.

[47] A reasoned analysis of the relationship between the full and fair exposition standard and the methodology approach is difficult, in view of the lack of available information. However, notwithstanding the government's current argument that full and fair exposition is merely the alter ego of the methodology approach, the full and fair exposition standard was probably intended as an almost complete abandonment of any realistic restrictions on the availability of the exemption. A number of factors support this conclusion. First, the fact that the first draft regulations spelled out the requirement that an organization utilize educational methods while the final regulations deleted the phrase strongly suggests a change in policy. Second, and more importantly, the Treasury Department must have realized, based on its experience with the methodology test, that any attempt to administer the test would create haphazard results. The government acknowledged that even when it purported to utilize the methodology test, it could not adequately monitor the activities of the organizations, and therefore any restrictions on the educational exemption imposed by the methodology test were random at best. *See Hearings on H. Res. 217*, *supra* note 34, at 436 (testimony of Assistant Commissioner (Technical) Norman A. Sugarman). The full and fair exposition standard, if literally applied, would require the Service to evaluate the content of each organization's publications to determine whether the organization was presenting a full and fair exposition of the facts. This inquiry presupposes that the examining agent will have complete familiarity with all aspects of all issues. Such a suggestion is remarkable and unlikely. It is much more likely that Treasury abandoned all realistic attempts to place significant restrictions on the availability of the exemption, leaving itself a stop-

permits a wide range of interpretation. Thus, the standard has been erratically applied[48] and was ultimately held unconstitutionally vague.[49]

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gap in the event that a particularly egregious situation presented itself.

[48] The full and fair exposition standard has been applied in nine revenue rulings published by the Service. In a majority of the rulings, the standard was applied to organizations that purported to base their positions on an analysis of the underlying facts, which is all that the standard requires. *See* Rev. Rul. 79-26, 1979-1 C.B. 196 (educating the public about its right of access to the broadcast media and evaluating of the performance of local broadcasters in fulfilling their public service obligations is an exempt purpose if the organization presents a full and fair exposition of the facts in making its evaluation); Rev. Rul. 74-615, 1974-2 C.B. 165 (educating the public concerning the accuracy and fairness of local newspaper coverage by providing a full and fair exposition of the facts is educational); Rev. Rul. 68-263, 1968-1 C.B. 256 (organization not exempt if a substantial part of its activities is the distribution of publications to discredit particular institutions and individuals based on unsupported opinion and incomplete information); Rev. Rul. 66-255, 1966-2 C.B. 210 (educating of the public about particular method of painless childbirth through meetings, films, forums and publications is an exempt purpose if accomplished through full and fair exposition of the facts); Rev. Rul. 64-192, 1964-2 C.B. 136 (educating of the public as to the quality of radio and television programs and encouraging radio and television stations to fulfill their obligation to better serve the public interest, accomplished by a full and fair exposition of the facts, is exempt purpose). In three rulings, the Service applied the standard to advocacy organizations in situations in which it is not clear whether the organizations purported to base their positions on an objective evaluation of the facts. *See* Rev. Rul. 78-305, 1978-2 C.B. 172 (educating public about homosexuals to foster an understanding of their problems is an exempt purpose if the organization based its conclusion upon a full and fair exposition of the facts); Rev. Rul. 76-443, 1976-2 C.B. 149 (organization formed for making available to the public facilities and equipment for production of noncommercial educational or cultural television programs is educational provided that when a particular viewpoint is to be advocated, the organization ensures a full and fair exposition of the facts); Rev. Rul. 66-220, 1966-2 C.B. 209 (operation of an educational broadcasting station presenting educational, cultural and public interest programs is exempt if the programs present a full and fair exposition of the facts). In one ruling, the Service took the bizarre position that the full and fair exposition standard requires that an organization provide a full and fair exposition of all opposing viewpoints. *See* Rev. Rul. 71-413, 1971-2 C.B. 228 (organization that acts as a clearinghouse and course coordinator by bringing together instructors and individual students in a community is educational if, in controversial courses, it ensures that a full and fair exposition of all viewpoints and facts is presented). This position was confirmed in a General Counsel's Memorandum, G.C.M. 37,173 (June 21, 1977) (organization that advocates the position that homosexuality is a mere preference on a par with heterosexuality must, as a condition of exemption, present other viewpoints), that was generated in connection with Rev. Rul. 78-305, *supra*. The position that an organization must present opposing viewpoints is clearly contrary to case law that exempted partisan propaganda organizations. *See supra* notes 30-32.

In addition to these applications of the full and fair exposition standard under § 501(c)(3), the regulations under § 4945 utilize the same standard to define "nonpartisan analysis." Under § 4945, any amounts paid or incurred by a private foundation to

To save the constitutionality of the standard, the Service has now retreated to the position that the full and fair exposition standard was merely the alter ego of the methodology approach, which was based upon objective, non-content-oriented criteria.[50] This is apparently the Service's current position and the one it presented to the United States Court of Appeals for the District of Columbia to obtain some guidance for the future administration of the exemption.[51] That court avoided the issue, and to date no court has passed on the merits of the Service's position. Thus, although the full and fair exposition standard was intended to provide a clearer definition of "education," the methodology approach, with its emphasis on distortion and emotion,[52] reemerges as a guiding principle for defining the educational exemption. Analyzing the Treasury's perceived concerns in formulating both standards will reveal the fallacies of both approaches.

II. The Perceived Concerns with Respect to Advocacy Organizations

From the evolution of the Service's current position on the definition of education, several of the Service's perceived concerns can be identified and analyzed. The Service's concern over the motives of an organization and its contributors, as well as harmful dissemination of propaganda may, in some instances, be well-founded. However, the following discussion illustrates that vigorous public debate, enhanced by the broad application of the educational exemption, adequately protects against any such perceived evils.

A. Intent of Organizers and Contributors

One concern that pervades all of Treasury's previous proposals is that a propaganda organization serves the selfish motives of its or-

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influence legislation are subject to an excise tax, unless the organization merely makes available the results of a nonpartisan analysis, study, or research. *See* I.R.C. § 4945(d)(1), (e) (1982). The regulations provide that such nonpartisan analysis, study, or research may advocate a particular position or viewpoint providing there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion. *See* Treas. Reg. § 53.4945-2(d)(l)(ii) (1984).

[49] Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C. Cir. 1980); *see also supra* note 2.

[50] *See* Brief for the United States, *supra* note 5, at 6-7.

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

[52] *See supra* note 38.

ganizers and contributors, rather than the individual or public.[53] This rationale for distinguishing propaganda organizations from "truly educational" organizations does not withstand close analysis. From an administrative point of view, ascertaining intent is extremely difficult. More importantly, significant tax consequences should not hinge on such a subjective determination, absent a clear need to do so. Further, a distinction based on motive or intent could entirely eliminate the educational exemption. Much, if not most, charitable giving is motivated by selfish reasons, rather than by a detached and disinterested desire to

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[53] This was the clear import of the Service's initial position, stated in S.M. 1362, *supra* note 28. Likewise, both the methodology approach and the full and fair exposition standard appear to be based on the unstated assumption that, while propaganda may sometimes be educational, at some point an advocacy group may serve a substantial private purpose, or an insubstantial public purpose, and must be denied exempt educational status.

The Service apparently uses the private or noneducational purpose rationale to deny exemption to an organization controlled by an individual or a small group, if the facts indicate that the organization directly and significantly benefits the controlling group or person. *See, e.g.*, G.C.M. 36,323 (June 26, 1975) (§ 501(c)(4) exemption denied an organization that sought to discredit particular institutions and individuals by allegations grounded on disparaging terms, incomplete facts, insinuation and innuendo because the organization was operated primarily to benefit its founder and any public benefits were incidental). While that memorandum concerned § 501(c)(4), a similar analysis would apply to the exemption under § 501(c)(3). *See* G.C.M. 33,771 (Mar. 15, 1968) (section 501(c)(3) exemption denied an organization that primarily questioned national loyalty or otherwise personally attacked named individuals or institutions based on incomplete data because the organization was used to carry on the founder's personal feud with certain public officials); Rev. Rul. 68-263, 1968-1 C.B. 256 (organization does not qualify for exemption if a substantial part of its activities is to distribute publications to discredit particular institutions and individuals based on unsupported opinion and incomplete information).

The insufficient public benefit theory is used to deny exemption when the Service perceives a clear danger to society or a lack of significant benefit to society from the organization's activities. *See* G.C.M. 37,173 (June 21, 1977) (grant of exemption to homosexual oriented educational organizations should be carefully scrutinized under the full and fair exposition test to ensure that they do not encourage or facilitate homosexual practices or encourage homosexual attitudes and propensities, particularly among the young and impressionable); G.C.M. 33,617 (Sept. 12, 1967) (full and fair exposition test is an attempt to determine whether an organization's materials are so lacking in integrity and competence that they would not substantially improve the understanding of those to whom they are directed).

Thus, the full and fair exposition standard apparently focuses on two aspects: private purposes and lack of public benefit. When no private purposes exist, harm to society or the lack of public benefit must be apparent, and the full and fair exposition standard assumes the lack of public benefit when the organization's approach is too emotional.

benefit individuals or society.[54]

The common law of charitable trusts has long recognized this conundrum and avoided it by focusing on the activities of the organizations, rather than on some elusive concept of intent or purpose of its organizers or contributors. Under common law, certain organizations are recognized as exempt because they fall within a broad category of organizations whose activities are widely recognized as providing significant public benefits.[55] In the area of education, the American common law recognizes the propagation of doctrine, that is, propaganda, as educational.[56] The dilemma posed by the fact that an advocacy organiza-

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[54] For example, a contributor may create a charitable trust or contribute substantially to a charitable organization to acquire fame or publicity for herself, to spite her heirs, or because she is particularly biased in favor of the particular type of education offered by an educational institution. These psychic benefits are probably present in most charitable giving. *See* G. BOGERT & G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 366 (2d ed. 1964).

[55] The common law of charitable trusts, including during the early 1900's when the Service first grappled with the issue, has uniformly held that the subjective motives of the donor are immaterial. *See, e.g.*, RESTATEMENT OF TRUSTS § 368 comment d (1935) (if the purposes to which the property is devoted under the terms of the trust are charitable, the motive of the settlor in creating the trust is immaterial).

[56] The American common law of charitable trusts recognizes as charitable any organization that advances charitable goals, even if those goals are also advanced by political parties, and even if those goals would require changes in the law. *See* RESTATEMENT (SECOND) OF TRUSTS § 374 comment j (1959) (changes in law); *id.* comment k (advocacy of causes also advocated by political parties); G. BOGERT & G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 378 (rev. 2d ed. 1977) (both) [hereafter G. BOGERT & G. BOGERT (rev. 2d ed. 1977)]; 4 A. SCOTT, TRUSTS § 374.4 (2d ed. 1956) (both); *see also* Clark, *supra* note 33, at 448. This correctly states American common law since its inception, except for the aberrational cases of Jackson v. Phillips, 96 Mass. (14 Allen) 539 (1867) and Bowditch v. Attorney General, 241 Mass. 168 (1922), 28 A.L.R. 713 (1924), which were never accepted outside of Massachusetts, and are considered incorrectly decided. *See* Clark, *supra* note 33, at 448 n.44. The only significant limitation is that an organization formed to promote a particular political party is not recognized as charitable. *See* RESTATEMENT (SECOND) OF TRUSTS § 374 comment k (1959) (there is no social interest in the community in underwriting one or another of the political parties); *see also* G. BOGERT & G. BOGERT (rev. 2d ed. 1977), *supra*, § 378 (suggesting a contrary result as a matter of policy, but conceding that the weight of authority is against them).

The British common law of charitable trusts is much more rigid. If a predetermined viewpoint is maintained, or the organization presents only one political or other partisan viewpoint, it is not recognized as charitable. *See* G. KEETON & L. SHERIDAN, THE MODERN LAW OF CHARITIES 37-7 (2d ed. 1971); TUDOR ON CHARITIES 33 (6th ed. 1967). Unless an organization's goal of influencing legislation is subordinate to an overriding charitable purpose, the organization is not recognized as charitable. The apparent rationale for the limitation is that a court has no means of judging whether a

tion might also serve the selfish purposes of its organizers or contributors is solved by focusing upon the substantial resulting benefit to society from the free debate of ideas, regardless of who finances that debate.[57] Rather than recognize the importance of free debate, Treasury initially reacted against the problem of selfish motive by denying the education exemption to all but "true" educational institutions.

1. Traditional Educational Prototype

Treasury's initial restrictive position, which would have denied exemption to *all* propaganda organizations,[58] was based on the naive assumption that a self-evident distinction exists between propaganda organizations and the "truly educational" organizations such as schools, colleges, and universities.[59] Once Treasury correctly backed away from

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proposed change in the law will or will not be for the public benefit. *See* TUDOR, *supra*, at 33.

The dichotomy between the American and English common law on these issues is striking. Not surprisingly, the articulated reasons for the American law's position are precisely those that form the basis for the guarantee of free speech: that speech can rebut speech, propaganda will answer propaganda, and free debate of ideas will result in the acceptance of the best ideas in the marketplace. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 503 (1951); Whitney v. California, 274 U.S. 357, 372, 375 (1927) (Brandeis, J., concurring).

The best expression of the reason for the American common law rule is stated in George v. Braddock, 45 N.J. Eq. 757 (1889). The opinion states, in part:

> With respect to all intellectual creations, embracing, of course, laws and judicial institutions, the most potent of all forces tending to improvement and evolution are those of examination and discussion, and recognizing them as the motive agents of progress, I should very confidently have concluded that it was neither proper nor becoming of me, as a judge, to refuse to this testator the right to use them in this instance . . . . In such a situation, if I had possessed the power, I should not only have sanctioned, but have favored, the propagation of any or all of these works, in the conviction that such discussions advance the cause, not of error, but the cause of truth.

Id. at 763. The case dealt with a trust to teach and disseminate the writings and ideas of Henry George, the same issue that was involved in Leubuscher v. Commissioner, 54 F.2d 998 (2d Cir. 1932). *See supra* note 32.

[57] George v. Braddock, 45 N.J. Eq. 757 (1889); *see supra* note 56.

[58] *See supra* note 26.

[59] The Service's position is stated in S.M. 1362, 2 C.B. 152, *supra* note 28 (Congress intended, in providing for the deduction of contributions to educational corporations, to foster education in its true and broadest sense). While the memorandum does not mention traditional educational institutions, such as colleges and universities, the fact that the Service has never attempted to deny exemption to such an organization because it was not educational is strong evidence that the exemption was administered

its initial bright line distinction between propaganda and nonpropaganda organizations, it was forced to articulate exactly what factors could be used to separate exempt from nonexempt propaganda organizations.[60] Treasury recognized that colleges and universities engage in significant amounts of activities that have the effect of disseminating partisan viewpoints on controversial issues.[61]

Traditional educational organizations may be less overtly biased in favor of any particular viewpoint, and a good portion of their activities may involve relatively noncontroversial subjects or the mere dissemination of facts. However, most colleges and universities engage in a significant amount of activities, through teaching and publication, which are not qualitatively different from the activities of advocacy organizations. The desired result is the stimulation of analysis of the advocated position, with its factual and philosophical underpinnings, and the ultimate emergence and dissemination of opposing viewpoints. This dialogue can occur within the confines of one particular institution but more typically will result from the activities of and interactions between a number of educational organizations.

Even if the organizers of and contributors to an advocacy organization intend to implement the particular advocated viewpoint while their college or university counterparts merely intend to foster the free debate of ideas, the fact remains that the advocacy activities of both are substantial and very similar. It is therefore difficult to support a discrimination between such organizations based not on their objective activities, and thus their impact on society, but on some concept of subjective intent.[62]

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with a decided bias in favor of traditional educational organizations. *See also* G.C.M. 33,969 (Nov. 18, 1968) (if the methods of instruction conform reasonably with those traditionally accepted as educational in character, an educational result will be presumed; similarly, employment of educational methods reasonably calculated to accomplish an educational result is deemed to reflect the requisite educational purpose).

[60] *See supra* notes 36-52 and accompanying text.

[61] Most traditional educational organizations probably handle controversial issues in a more balanced or reasoned way than do some of the more extreme or doctrinaire advocacy groups. However, Treasury's initial position was based merely on the fact that an organization dealt with controversial issues, and did not distinguish among various organizations on the basis of how they dealt with those issues. Under such a standard, it is extremely difficult to support the grant of exemption to all traditional educational institutions and the denial of exemption to all nontraditional advocacy organizations.

[62] Perhaps more precisely, the Treasury's early attempts were based upon an examination of an organization's ultimate, rather than immediate purpose. The ultimate purpose of an advocacy-organization is to gain acceptance for and ultimate implementation

Treasury probably preferred the traditional college or university as the educational prototype because this simplified the administration of the exemption.[63] In traditional colleges or universities, the institution provides some control over the educational process through independent review by a presumably objective group of persons. This group acts as a buffer between advocacy groups and the public, thereby ensuring that all viewpoints on an issue are presented, and that clearly erroneous viewpoints are denied presentation, or at least presented in a way that minimizes any potential harm to society. Thus, underlying the Treasury's bias in favor of traditional educational institutions were two unstated assumptions: first, that some forms of propaganda were not educational, and second, that some process, presumably utilized by traditional educational institutions, can identify and discriminate between the educational and the noneducational propaganda.

Assuming that advocacy groups could gain access to the public only through traditional educational institutions, Treasury did not have to articulate any standards to separate the educational from the noneducational. However, once it conceded that educational propaganda could take place outside the traditional college or university, it was compelled to state the factors that it used to distinguish between exempt and nonexempt propaganda organizations.

2. The Methodology Test and Full and Fair Exposition Standard

Initially, the Treasury regulations stated that an advocacy organization could attain tax-exempt educational status if its principal purpose and all of its activities were educational in nature.[64] Apparently, Treas-

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of its viewpoint. The Treasury apparently focused upon that purpose and determined that it was not educational because it went beyond dissemination of information to actual implementation. Since the Service could not be expected to examine the programs of all advocacy organizations to determine whether implementation of those programs was in the public interest, exemption was denied. The trouble with such an analysis is that it equates advocacy with action. Every educational institution, even colleges and universities, disseminates information in the fervent hope that it will be accepted and ultimately acted upon by the individual. Thus, the attempted distinction in the early regulations does not draw a bright line between propaganda organizations and nonpropaganda educational institutions, as the Treasury may have naively believed.

[63] The preference for the traditional educational organization simplifies the administration of the exemption only if one assumes that such organizations have educational purposes and accomplish educational results. This is precisely what the Service now assumes in its administration of the exemption pursuant to the full and fair exposition standard. *See* G.C.M. 33,969 (Nov. 18, 1968); *supra* note 59.

[64] *See supra* note 35 and accompanying text.

ury initially determined that certain obvious characteristics of traditional educational organizations, and the manner in which they handled advocacy or propaganda, could be used to judge all propaganda activities to determine tax-exempt status. The Service later realized that the agents who were to apply the standard and initially determine the exemption issue required definitive guidance concerning what constituted educational purposes and activities. In response to this need, the methodology test and the full and fair exposition standard were developed and utilized.

The methodology test is aimed at two perceived problems: deception or distortion of facts and emotional versus reasoned approaches to issues.[65] The full and fair exposition standard is, to some degree, also aimed at deception or distortion of facts, and is biased in favor of a reasoned approach.[66]

At the outset, and aside from whether the problems identified by these approaches are legitimate governmental concerns, the use of the methodology factors or the full and fair exposition standard to identify the salient characteristics of even the traditional educational institutions is problematic. Books and articles published by colleges and universities are subjected to some review to ensure their basic factual accuracy, and similar restrictions on propaganda organizations would not be objectionable.[67] However, there is probably little control over the degree to

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[65] *See supra* note 38 and accompanying text.

[66] That the Service administers the full and fair exposition standard to identify those organizations that are deceptive or too emotional is reinforced by the provisions of the Internal Revenue Service Manual Handbook. *See* I.R.S. Handbook 7751, § 345.(12)(4):

> The problem relating to the definition of "educational" is now a comparatively narrow one — how to classify public discussion of controversial topics. Rev. Rul. 68-263, 1968-1 C.B. 256, holds that the publication of material which discredits particular institutions and individuals on the basis of unsupported opinions and incomplete information about their affiliations is not educational. In Rev. Rul. 66-256, 1966-2 C.B. 210, however, an organization that conducted public forums, lectures, and debates on controversial social, political, and international questions was held to be educational. Although the speakers were frequently controversial, the organization adopted an unbiased position. Organizations doing research or educating the public on controversial public issues must stick to the reasoned approach and avoid unsupported opinion . . . .

[67] The focus on facts in the methodology approach is very confusing. If limited to deliberate misstatements of basic factual data, its application would be much less troublesome. The accuracy of basic facts asserted in support of an author's conclusions should be verified to the extent possible, and in this regard both advocacy organizations and more traditional educational organizations should be held to similar standards. De-

which an author emphasizes facts favorable to her position. Further, while there may be some bias toward reasoned rather than emotional approaches to issues, most colleges and universities do not normally deny access to groups that are perceived to be too emotional or not sufficiently reasoned.[68] As anyone familiar with the traditional educational process can attest, education in the college or university is not always a quiet, orderly, or totally rational process. Thus, attempting to force all education into a perceived "true education" ideal through either the methodology test or the full and fair exposition standard is a naive illusion that would impose on advocacy organizations limitations that are not imposed on, nor always practiced by, traditionally exempt educational institutions.

Thus, the use of the methodology test or the full and fair exposition

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liberately disseminating erroneous factual data is clearly not an acceptable function of an educational organization under any reasonable definition of that term.

However, the Service is not concerned with accuracy in basic facts in its application of the full and fair exposition standard, and such tactics are probably not practiced by most advocacy organizations. *See infra* notes 72-73 and accompanying text. As the two cases in which the Service has attempted to apply the full and fair exposition standard to deny exemption seem to indicate, the Service is primarily concerned with the inferences that the organization draws from the basic facts, and not with the basic facts themselves. In neither Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C. Cir. 1980), nor National Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983), did the Service question the organization's basic factual data; rather, it questioned the conclusions to be drawn from that data. In *National Alliance*, the government's main argument, and the appellate court's basis for its decision, was that the organization's conclusions did not follow from its data. *See supra* notes 5-7. In *Big Mama Rag, Inc.*, the government argued that the organization provided little or no basic factual data for its conclusions. *See supra* note 3.

In cases in which an organization purports to base its conclusions on a full and fair exposition of the facts, it is fair to require that it do so as a condition to its exemption. It is quite another matter to require all organizations to do so. *See infra* note 78 and accompanying text. While an emotional or biased presentation may not be appropriate for a scholarly journal, this does not indicate that it is therefore not educational in the broader sense of that term.

[68] No doubt scholarly journals are decidedly biased in favor of a reasoned approach to issues, but these are not the only activities of colleges and universities. Newspapers and informal methods of communication such as newsletters and leaflets are not subject to the same rigid standards as are scholarly journals, and are used to disseminate information on a wide variety of controversial issues. Further, colleges routinely invite speakers to their campuses to speak on controversial issues, and make no effort to censor their communications or to ensure that they present a reasoned approach or a full and fair exposition of the facts relevant to their positions. Thus, the image of the college or university as a placid and always entirely rational environment is fictional, yet this is precisely the assumption on which the full and fair exposition standard is apparently based.

standard to describe an educational ideal is inappropriate. In addition, their use is unnecessary and undesirable in administering the educational exemption, because they are based on an incorrect view of the propaganda process and because they lodge with the Service considerable discretionary power, which can and will be used to censor viewpoints that are identified as incorrect or dangerous.

B. Protecting Against Harmful Propaganda

A second concern that underlies Treasury's historic definition of education is protection against harmful propaganda. Although some forms of propaganda should fall outside the ambit of "education," not all propaganda serves antisocial goals. The methodology test, and the Service's current interpretation of the full and fair exposition standard, are based on a naive and discredited view of propaganda.

Propaganda, like education, is a term that has no clearly defined meaning. In its broad sense, it includes all dissemination of doctrine, political or religious.[69] After World War I, it took on connotations of deliberate distortion and fabrication in light of tactics used by some governments during the war to win the support of neutral nations, de-

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[69] *See, e.g.*, L. DOOB, PUBLIC OPINION AND PROPAGANDA 240 (2d ed. 1966) (propaganda is the "attempt to affect the personalities and to control the behavior of individuals toward ends considered unscientific or of doubtful value in a society at a particular time"); H. LASSWELL & D. BLUMENSTOCK, WORLD REVOLUTIONARY PROPAGANDA 9 (1939) (propaganda is the control of attitudes by the manipulation of symbols, i.e., words and word substitutes like pictures and gestures); B. SMITH, H. LASSWELL & R. CASEY, PROPAGANDA, COMMUNICATION, AND PUBLIC OPINION 1 (1946) (propaganda sends words and other symbols such as pictures, through the radio, press, and film with the intent to influence mass attitudes on controversial issues); D. TRUMAN, THE GOVERNMENTAL PROCESS 223 (1951) (propaganda is any attempt, by the manipulation of words and word substitutes, to control the attitudes and consequently the behavior of a number of individuals concerning a controversial matter). Attempts have been made to distinguish between propaganda and education. *See, e.g.*, L. DOOB, *supra*, at 240-41 (the teaching of verifiable facts or a scientific approach to a problem is education, and reliance on dogmatism, while propaganda from a scientific viewpoint, is nevertheless also education in terms of the values possessed by certain groups; the dissemination of a viewpoint considered by a group to be "bad," "unjust," "ugly," or unnecessary is propaganda in terms of that group's standards); B. SMITH, H. LASSWELL & R. CASEY, *supra*, at 1 (when words are used in teaching how to read, write and figure, the process is education, which is primarily concerned with transmitting skill or insight, not attitude; the definition of education may be extended to include the transmission of noncontroversial attitudes as well as skills). These distinctions are clearly based on the perceived worth or value of the messages presented rather than on any objective differences.

moralize the enemy, and encourage the home front.[70] But the usual and customary meaning of propaganda is merely dissemination of doctrine and, as such, it is no more than a means of communication.[71] The ends and means of propaganda can cover a broad spectrum, but the process itself involves no more than organized attempts to influence attitudes.

In its derogatory sense, propaganda connotes censorship and omission or distortion of facts, and is often equated with brainwashing by an emotional rather than a reasoned approach to issues.[72] However, the use of these devices does not pose a significant problem. Effective censorship presupposes that access to the omitted or distorted facts can be controlled by the propagandist. If such access cannot be controlled, then censorship or distortion tactics are very risky, since they will almost surely be exposed and the propagandist discredited.[73] In addition, direct, emotional attacks on preexisting public attitudes are considered among the least effective methods of propaganda.[74] Members of the public have acquired attitudes and are disposed to act primarily accord-

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[70] For studies of the use of propaganda in World War I, see, e.g., G. BRUNTZ, ALLIED PROPAGANDA AND THE COLLAPSE OF THE GERMAN EMPIRE IN 1918 (1938) (analysis of propaganda organizations, methods and tactics, symbols and appeals, selected determinants in the material environment, and means of measuring the effects); G. CREEL, HOW WE ADVERTISED AMERICA (1929) (account of the Committee on Public Information that directed the United States news and publicity campaign during World War I); J. MOCK & C. LARSON, WORDS THAT WON THE WAR: THE STORY OF THE COMMITTEE ON PUBLIC INFORMATION, 1917-19 (1939) (study of the committee based on its own files). For a comprehensive reference to other studies of war propaganda, see B. SMITH, H. LASSWELL & R. CASEY, *supra* note 69, at 322-459.

[71] *See* D. TRUMAN, THE GOVERNMENTAL PROCESS 222 (2d ed. 1971). This Article relies upon Truman's analysis of the propaganda process. Truman's basic assumption is that propaganda groups cannot actually implement their programs without combining in some fashion into a majority. Whether all groups have potential input into that process has recently been the subject of critical analysis. *See* R. DAHL, DEMOCRACY IN THE UNITED STATES 448-93 (3d ed. 1976) (suggesting that some groups are completely ignored because their political passivity is not a matter of choice but rather a result of social and economic status). The precise manner in which interest groups gain ultimate acceptance and implementation of their viewpoints is not crucial to the analysis in this Article. What is crucial is that interest groups cannot unilaterally implement their viewpoints, but rather must form some kind of coalition, regardless of whether all groups have input into that coalition, to ultimately implement their views.

[72] The term "propaganda" is often used as a polemic to decry the publicity of the other side. *See* Slee v. Commissioner, 42 F.2d 184, 185 (2d Cir. 1930) (political agitation as such is outside the statute, however innocent its aims, though it adds nothing to dub it "propaganda," a polemical word used to decry the publicity of the other side); *see also supra* note 31.

[73] *See* D. TRUMAN, *supra* note 71, at 242-43.

[74] *Id.* at 228-29.

ing to what they have experienced and learned; they are not likely to act contrary to their learned values in the face of a highly emotional presentation.[75] The unskilled amateur and the zealot are likely to fail to influence the public because they assume that their audience will react as they themselves would, and will make little or no attempt to fit their messages to their audience's preexisting attitudes.[76]

For these reasons, the use of the methodology test or the full and fair exposition standard to identify dangerous or undesirable activities of propaganda organizations is unnecessary. The propaganda process itself, when conducted in public, adequately responds to any legitimate concerns that may exist. Nor should the Service be given a stopgap measure, a tool that it can use if the process itself fails to adequately protect the interests of society in a given case. The use of deception and deliberate omission or distortion of facts are clearly not proper functions of an educational organization. However, the concept of what constitutes deception or distortion will inevitably be colored by one's own assessment of the correctness of the position advocated, as will the seemingly objective inquiry whether a significant part of an organization's communications consists of viewpoints unsupported by a relevant factual basis.[77] Likewise, in determining whether an organization's presentation of an issue is too emotional, one will likely be biased against viewpoints with which one does not agree and, conversely, more tolerant of emotional presentations of mainstream viewpoints. In the same way, determining whether an organization has presented a full and fair exposition of the facts used to support its position often is a subjective, value-laden conclusion. Further, given this subjective appli-

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[75] *Id.* at 228 (The propagandist must deal with people as they are, because "[t]hey are not blank pages on which [the propagandist] can write as he will, but rather organisms that have already acquired attitudes, and that are disposed to act in certain ways as a result primarily of what they have experienced and learned.").

[76] *Id.* at 229 ("The unskilled amateur and the zealot . . . assume that most of their audience will react as they themselves would, that pre-existing attitudes of their audience are essentially identical with their own."). Truman cites examples from Communist propaganda in Chicago in the 1930's and from the Republican campaign of 1936. *See* H. LASSWELL & D. BLUMENSTOCK, WORLD REVOLUTIONARY PROPAGANDA 247-358 (1939); *see also* P. LINEBARGER, PSYCHOLOGICAL WARFARE 27 (1968) ("[T]he propagandist must tell the enemy those things which the enemy will heed; he must keep his private emotionalism out of the operation.").

[77] The Court of Appeals for the District of Columbia encountered this trap in its opinion in National Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983). It is not a function of the Service, or of any court, to determine whether an organization's viewpoint is actually supported by the facts upon which it relies, yet that is precisely what that court decided. *See supra* note 7.

cation of the methodology test and the full and fair exposition standard, no court can effectively review the Service's determination and ascertain whether the Service has exercised a subtle form of censorship.

Rather than granting the Service such a discretionary power, the public interest is best served by encouraging public access to all groups that have formulated a position on an issue. Identifying these groups as advocacy or propaganda groups that present only one side of an issue adequately protects the public from any potential harm.[78] This identification notifies the public that the organization is not providing an unbiased, objective evaluation of the issue and can be expected to stress the facts most favorable to its position. This "distortion" of facts does not seriously threaten society, nor does it substantially detract from the benefits that the organization provides.[79] Similarly, a bias against emotional responses to issues cannot be supported by any argument that such organizations endanger society or provide no public benefit. An extreme bias against emotional propaganda is an outgrowth of the naive and discredited notion of propaganda as brainwashing.

Recognizing emotional or slanted presentations as educational in nature does not require that the Service exempt all advocacy organizations. An organization may go beyond advocacy to the actual direction and implementation of an advocated viewpoint. In such a case, the organization's activities fall outside the purview of any conventional notion of education.[80] Similarly, one of the purposes or activities of an advocacy organization may be essentially social or fraternal, and not ancillary to the educational purpose or activities of the organization. In such cases, the educational exemption should be denied, not because the advocacy is not educational, but because the purposes and activities of

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[78] If an organization, pursuant to its articles, is supposedly engaged in nonpartisan analysis, then it is reasonable to require it to do so as a condition of its exemption. In that case, the organization holds itself out as a nonadvocacy organization and should be held to its representation.

[79] A major premise of this Article is that propaganda organizations provide significant benefits. The most substantial benefit such organizations provide is the assurance of maximum public access to all viewpoints on an issue through the free debate of ideas. *See infra* notes 96-97 and accompanying text. Another of the major premises of this Article is that the charitable deduction is uniquely adapted to accomplish that purpose. *See infra* notes 98-103 and accompanying text.

[80] "Education," in its usual and accepted sense, is defined as imparting or acquiring knowledge or training the individual. *See supra* notes 23 & 30. While all education is based on the desire that the knowledge or training imparted will be accepted and acted upon by the individual, such action is not directed or immediately accomplished by the educational organization.

the organization are not exclusively educational.[81] Advocacy organizations, like other educational organizations, can engage in a wide range of activities other than the dissemination or propagation of their viewpoints. An examination and analysis of those activities, and whether they are educational, is necessary to determine whether the organization is exclusively educational.

The methodology test and the full and fair exposition standard approach that analysis indirectly. They presume that certain activities of advocacy organizations, particularly emotional rather than reasoned approaches to issues, always imply the existence of substantial noneducational purposes or a lack of sufficiently significant public benefits to warrant the exemption. That presumption, and the fact that it effectively precludes reasoned analysis, argues strongly against using either of those standards to administer the educational exemption.

In addition to being unnecessary to respond to any identifiable governmental interests, the methodology test and the full and fair exposition standard make it difficult to administer the educational exemption. Both tests are based on the assumption that, at least in some cases, the

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[81] To obtain and maintain exemption from income tax under § 501(c)(3), an organization must be organized and operated exclusively for an exempt purpose. The term "exclusively" has not been construed to mean "solely." *See* Church in Boston v. Commissioner, 71 T.C. 102, 107 (1978) (exclusively does not mean solely but rather primarily or substantially). *See generally* B. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 201-08 (4th ed. 1983). An organization that engages in nonexempt activities can obtain exempt status so long as those activities are only incidental to an exempt purpose and less than substantial. *See, e.g.*, St. Louis Union Trust Co. v. United States, 374 F.2d 427 (8th Cir. 1967) (nonexempt activity will not result in loss of deduction or of exemption if that activity is only incidental and less than substantial); Steven Bros. Found. v. Commissioner, 324 F.2d 633, 638 (8th Cir. 1963) (to be exempt, an organization must be devoted exclusively to exempt purposes and if there is present a single substantial nonexempt purpose, though it may have other truly important exempt purposes, it is not entitled to exemption), *cert. denied*, 376 U.S. 969 (1964); *see also* Better Business Bureau v. United States, 326 U.S. 279, 283 (1945) (presence of a single substantial nonexempt purpose will destroy the exemption regardless of the number or importance of truly exempt purposes); First Libertarian Church v. Commissioner, 74 T.C. 396, 403 (1980) (if a nonexempt activity is more than an insubstantial part of an organization's activities, or if an activity has more than an insubstantial nonexempt purpose, the organization will fail to qualify for exemption); San Francisco Infant School v. Commissioner, 69 T.C. 957, 964 (1978) (same). Social or recreational purposes are not exempt under § 501(c)(3). *See* Schoger Found. v. Commissioner, 76 T.C. 380 (1981) (exemption denied when organization's substantial, if not sole, purpose was to provide a facility where guests could relax, socialize, and engage in recreational activity); Rev. Rul. 73-439, 1973-2 C.B. 176 (organization denied educational exemption because its activities did not go substantially beyond the promotion of personal contact and fellowship among its members).

Service has the right and duty to identify and deny exemption to certain propaganda groups which are "too biased" or "too emotional." Even assuming that this identification could be based on some neutral, objective, non-content-oriented criteria, there are severe administrative difficulties that argue against vesting such a power in the Service.

The Service cannot monitor all or even a significant part of the activities of all of the educational organizations, but has admitted that it must rely on secondary sources of information, such as published reports of activities and complaints received from taxpayers, other organizations, and even members of Congress.[82] Thus, only those organizations that are particularly vocal, or that happen to offend certain important elements in society, are likely to be identified and singled out for loss of exemption. This leads to a very selective application of the methodology test or the full and fair exposition standard. More importantly, since the Service will become aware of the offending organizations only indirectly, the opposition forces will attack the organizations by presenting viewpoints that may be no less biased or based on distortions of facts. The Service has no presumed or actual expertise to resolve disputes of this kind. Yet the methodology test and the full and fair exposition standard would require that it do precisely that, without the benefits of public discussion or debate.

The Service's early attempts to administer a bright line distinction between exempt and nonexempt propaganda organizations were based on a crude concept of education as the dissemination of facts, on the assumption that if you give the public "the facts" they will inevitably arrive at the one true and correct position on an issue. Most issues are, of course, much more complex than such a naive model would admit. Thus, there is no objective way to determine, without public debate, which of many positions on an issue should be accepted and implemented. In all instances in which the Service's attention has been drawn to the activities of a propaganda organization, the opposition will have crystallized and articulated the opposing viewpoints. In such instances, there is no reason why the Service must act to protect society's interests. The dispute can and should be resolved by public debate.

III. Exemption Denial as a Form of Censorship

Allowing the Service to make such determinations is also undesirable because the determinations cannot be made pursuant to objective criteria and can and will be utilized as a power of censorship. That the

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[82] *See supra* note 47.

Service will utilize any subjective standard to censor the activities of organizations that it deems to be undesirable or dangerous is not an idle fear.[83] At one time the Service took the position that no organization that advocated the position that homosexuality was not an illness and was a mere sexual preference on a par with heterosexuality should be granted an educational exemption.[84] It based this position on a determination by the Commissioner's Exempt Organizations Coordinating Committee that, in light of the available historical, legal and medical knowledge, the organization advocating homosexual activities could be harmful to the public.[85] In addition to requiring that an organization not advocate the equation of homosexuality with heterosexuality in any of its educational programs and materials (most notably the broadcast media), the Service further restricted an organization advocating positions on homosexuality as a condition to exemption. Specifically, it required that the organization's discussions and counselling sessions be professionally controlled and that any social activities be both incidental and essential to achieving its exempt purposes. The reasons for these additional restrictions should be obvious.[86]

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[83] The following discussion is taken from G.C.M. 37,173 (June 21, 1977), which the Service recently made public. The memorandum presents a very good discussion of the Service's position concerning the intent and scope of the full and fair exposition standard.

[84] G.C.M. 36,556 (Jan. 16, 1976), discussed *infra* note 86.

[85] G.C.M. 34,696 (Nov. 26, 1971). The memorandum concerned exemption for a homosexual oriented organization under § 501(c)(4), but the same position was later taken with respect to exemption under § 501(c)(3). *See* G.C.M. 36,556 (Jan. 16, 1976), discussed *infra* note 86.

[86] The Chief Counsel's office stated in detail its grounds for imposing of special standards on homosexual advocacy organizations in a previous memorandum. *See* G.C.M. 36,556 (Jan. 16, 1976). In that memorandum, Counsel considered whether an organization that ministers to the religious needs of homosexuals by conducting regular worship services and sponsoring a variety of other related functions for the primary benefit of homosexuals, and that also conducts educational programs to further the development of more just and understanding public attitudes toward homosexuality qualifies for exemption under § 501(c)(3). The Service had proposed to deny tax exemption on the ground that the organization's activities were likely to produce certain potentially serious adverse consequences for society. According to the G.C.M., that conclusion was based "on the premise that many interpersonal relationships of a homosexual nature include certain physical activities which most members of the general public continue to regard as both maladaptive and opprobrious, and which for that reason cannot properly be fostered or encouraged by any exclusively charitable organization." On that foundation, the Service's proposed letter ruling then concluded that the overall program outlined above carried a serious risk for society by fostering or facilitating undesirable homosexual activities among the participants in its socially oriented meetings, and generally contributing to the development of an unsound attitude toward ho-

In 1977, an organization refused to agree to these conditions to exemption. This was apparently the first time that any organization had challenged the Service's authority in this area.[87] The Chief Counsel's

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mosexuality by at least some important segments of the general public.

The Chief Counsel's office disagreed with the proposed ruling, on the ground that an organization is not denied educational exemption because it seeks to inform the public on a controversial issue or take a position that is not widely accepted. The memorandum noted that objections such as those cited by the Service might be valid if the avowed purpose of the organization was to advocate that homosexuality is not a sickness, but merely a preference like heterosexuality. However, the organization discussed in the memorandum was not objectionable merely because it operated from the "premise that homosexuals should not generally feel ashamed or remorseful about being physically and emotionally attracted to other individuals of the same sex and should join together in seeking acceptance as creatures of God by . . . the general public." The Counsel's office concluded that:

> [t]he presence of a scholarly or religious setting for publicly airing the controversial views that [the organization] favors, together with its general practice of limiting all public development or presentation of arguments in support of such views to forums in which there can be a reasonably full and fair presentation of opposing views would seem to leave very little room for any potentially adverse societal consequences in this regard.

The memorandum concluded that, even in the circumstances of that case, the Service should not classify as charitable any "general program of mere rap sessions that is carried on without professional supervision, no matter what educational purpose such a program may be intended to serve." In addition, it concluded that no favorable ruling under § 501(c)(3) should be issued to the organization unless it first agreed to refrain from using or supporting the use of public broadcast media to advocate that homosexuality is a mere preference. That requirement was imposed because, in Counsel's judgment, "the use of such media for that purpose necessarily carries too great a risk of encouraging the development of undesirable sexual attitudes and propensities by some of the youngest and most impressionable members of the general public."

Further, even with those restrictions, Counsel's office still believed that at least some risk of adverse social consequences existed. Thus, Counsel recommended that the favorable ruling be issued only if the organization was willing to agree to a blanket restriction on the content of all of its ex parte educational programs and materials, requiring it "to wholly abstain in all such activities and materials from the inclusion of any substantial advocacy of the position that homosexuality is a mere preference, orientation, or propensity which is on a par with heterosexuality or should otherwise be regarded as normal."

[87] As part of the Tax Reform Act of 1976, Congress enacted a new Code section providing for declaratory judgments with respect to the tax status of organizations claiming exemption under § 501(c)(3). *See* I.R.C. § 7428 (1982). This declaratory judgment procedure was designed to facilitate prompt judicial review of certain exempt organization issues. Prior to enactment of the declaratory judgment procedures, an organization facing adverse treatment from the Service was required to go through the normal Tax Court or refund procedures to contest the Service's action. These procedures were slow, and the organization could have disbanded in the interim because many contributors would simply not make contributions to organizations not cleared by

Office concluded that no legal basis existed for the conditions.[88] However, the General Counsel's Memorandum announcing the change of position stated that the Service was still legitimately concerned that the activities of such organizations could harm society by encouraging or facilitating homosexual practices, or would encourage the development of homosexual attitudes and propensities by the general public, especially the young and impressionable. The memorandum concluded that "the educational methodology guidelines of Treasury Regulation section 1.501(c)(3)-1(d)(3)(i) provide adequate protection" because an organization, to gain exemption, would have to present viewpoints other than its own view that homosexuality is a preference rather than a pathology.[89] The clear implication of the memorandum is that the Service, and the Chief Counsel's office, have determined that the position advocated by such organizations is wrong and presents potential harm to society, thus requiring and justifying the application of a special standard.[90] While the memorandum purported to use the methodology test and the full and fair exposition standard in that case, any judgmental or subjective standard could and would be similarly utilized.

The General Counsel's Memorandum states the startling and disturbing position that the Service should use the full and fair exposition standard to protect society from the perceived dangers presented by organizations that advocate erroneous positions on particularly volatile issues.[91] That is nothing short of blatant censorship. It is emphatically not the function of government, through the tax system or otherwise, to

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the Service. *See supra* note 13. The enactment of the declaratory judgment procedures made it possible for organizations to contest some of the Service's positions on the availability of the educational exemption.

[88] G.C.M. 37,173 (June 21, 1977).

[89] *Id.* The origin of the requirement that an organization present other viewpoints in addition to its own is unclear. It certainly cannot be extrapolated from any of the four factors that make up the methodology approach. *See supra* text accompanying notes 37-38. Moreover, the full and fair exposition standard focuses on the quality of an organization's presentation of its own viewpoint, and does not purport to require a presentation of other viewpoints. The requirement seems to be an unwarranted application of the full and fair exposition standard. The government now agrees that an organization need not present opposing viewpoints. *See* Brief for the Appellees at 17, Big Mama Rag, Inc. v. United States, No. 79-1826 (D.C. Cir. docketed Aug. 1, 1979).

[90] If an organization is in fact a social club or some other noneducational organization, then exemption can and should be denied on that ground, rather than on the ground that social interaction among advocates of homosexuality is dangerous and undesirable. The existence of even one substantial noneducational purpose or activity of an organization is sufficient to deny exemption. *See supra* note 81.

[91] G.C.M. 37,173 (June 21, 1977).

pass on the merits of the positions advanced by various advocacy organizations.[92] Yet this memorandum invites the Service to do precisely that, and, if it determines that an organization's viewpoint is incorrect, to apply the full and fair exposition standard to deny exemption if the organization takes any action beyond mere dissemination of its viewpoint. This is so even if those actions would not normally jeopardize the educational exemption. Thus, the Chief Counsel's office has clearly sanctioned a use of the full and fair exposition standard that is not neutral and non-content-oriented, but rather is applied with varying degrees of severity, depending on how dangerous the Service perceives the organization's viewpoint to be.

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[92] Direct attempts by government to censor the communications of an advocacy organization would almost surely be contrary to the first amendment, unless the expression occurs under circumstances likely to produce an imminent violation of law. *See infra* note 125 and accompanying text. Likewise, a tax benefit may unconstitutionally infringe on first amendment rights if the availability of the tax benefit is based upon the taxpayer's willingness to refrain from protected speech. *See* Speiser v. Randall, 357 U.S. 513 (1958) (California state tax program held unconstitutional because it conditioned eligibility for property tax exemption on willingness to sign a loyalty oath that would have required the taxpayer not to engage in certain constitutionally protected activities). *See generally* Comment, *Tax Exemptions for Educational Institutions: Discretion and Discrimination*, 128 U. PA. L. REV. 849, 868-69 (1980). However, the government need not subsidize all first amendment rights through the tax system. *See* Regan v. Taxation With Representation, 461 U.S. 540, 546 (1983) (prohibition on lobbying by § 501(c)(3) organization is constitutional because Congress has not infringed any first amendment rights or regulated any first amendment activity, but rather has simply chosen not to pay for lobbying by any organization). Likewise, Congress has broad discretion to formulate tax policy and does not violate the equal protection clause if a rational basis exists for distinguishing between two types of organizations, and the distinction is not aimed at suppressing of dangerous ideas or a similar ideological result. *See id.* at 2003-04 (grant of exemption to veterans' groups even though they engage in lobbying activities does not violate equal protection because there is a rational, nonideological basis for the distinction). The problem is to distinguish between the two types of cases. A broad and ambiguous standard that can be used by the Service to make ideological distinctions presents very significant problems. This was the principal reason that the District of Columbia Court of Appeals held the full and fair exposition standard unconstitutional. Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C. Cir. 1980). The potential for such invidious discrimination should be a major factor in determining whether Congress intended to permit the Service to administer an exemption under a flexible and subjective standard. *See also* Paper Mill Playhouse v. Millburn Township, 95 N.J. 503, 518, 472 A.2d 517, 524 (1984) (theater was entitled to exemption from local property taxes even though it may have produced popular shows, because a distinction on the basis of whether a show was popular or classical would put the tax assessor in the "untenable position of drama critic and by extension, censor, determining whether a specific play promotes society's moral and mental improvement").

The government has argued that the methodology test "goes about as far as humanly possible in verbalizing a line separating education from non-educational expression."[93] Flexible standards are sometimes necessary and appropriate because of the complexities of the situation, but they can also be used to mask ulterior purposes.[94] They should never be allowed to frustrate analysis, and if analysis discloses that such standards serve no legitimate governmental interests, and may instead be seriously abused in their application, they should be discarded as unnecessary.

The American common law of charitable trusts struggled with the

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[93] *See* National Alliance v. United States, 710 F.2d 868, 875-76 (D.C. Cir. 1983) (quoting government's brief) (citation omitted):

> The methodology test leads to the minimum of official inquiry into, and hence potential censorship of the content of expression, because it focuses on the method of presentation rather than the ideas presented. The methodology test is thus the least intrusive standard available to evaluate an organization's qualification for tax exemption . . . . The statute commands the Internal Revenue Service, as it were, to steer between Scylla and Charybdis: exemption to all or exemption, in effect, only to degree granting academic institutions. The methodology test, supervised by the courts, is a carefully-charted middle course.

[94] The fact that flexible standards can and will be used for ulterior purposes is well illustrated by the history of censorship, as stated in the following passage from a case:

> The focus of censorship has changed with the times, depending upon the overriding concerns of the era. The procession of censorship has been from heresy to treason to obscenity.
>
> In the Age of Faith, with the Church supreme, the focus of suppression was upon heresy and blasphemy. For a long time the Church concerned itself little with obscenity as such and looked with some tolerance upon pagan and later writers and their alleged obscenities. Boccaccio may have been on the Index Librorum Prohibitorum, but the passages under ban were not those suppressed in modern times, but those reflecting upon religion and the Church. With the coming of the Reformation and the emergence of the State as the absolute power, the focus of suppression was upon treason and sedition. The censor was concerned more and more with literary proprieties in the political field . . . . The censor's preoccupation with sexual morality (obscenity) began to develop only in the time of Queen Victoria, soon after the beginnings of the Industrial Revolution and the rise of technology. It has continued to our day.

Bantam Books v. Melko, 25 N.J. Super. 292, 303, 96 A.2d 47, 52-53 (1953), *modified and aff'd*, 14 N.J. 524, 103 A.2d 256 (1954).

It is readily apparent from the history of censorship that government feels a need to suppress the perceived evils of the day. Flexible or subjective standards give it the means to do precisely that without appearing to do so. *See* Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960).

issue of the charitable status of propaganda organizations long before the Service faced the issue. The common law recognized that any significant limitation on the availability of charitable status to such organizations would dangerously approximate, and probably operate, as a power of censorship over unpopular ideas.[95] Thus, the common law recognizes as educational the propagation of doctrine, regardless how doctrinaire its presentation.[96] The articulated reasons for that position are identical to those supporting the guarantee of free speech: that speech can rebut speech, propaganda will answer propaganda, and the free debate of all ideas will result in significant public benefits.[97]

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[95] *See* George v. Braddock, 45 N.J. Eq. 757, 763 (1899) (with respect to all intellectual creations, examination and discussion are the most potent of all forces tending to improvement and evolution, and it is therefore proper that the law should favor the propagation of any and all viewpoints on an issue); *see also* G. BOGERT & G. BOGERT (rev. 2d ed. 1977), *supra* note 56, at § 375 (courts are inclined to support the advocacy of dubious causes and eccentric ideas); 4 A. SCOTT, THE LAWS OF TRUSTS § 370.4 (3d ed. 1967) (a trust for the dissemination of beliefs or doctrine is charitable unless they are so irrational that their dissemination cannot be said to be of any benefit to the community; the difficult task is to distinguish between those that are absurd, which are not charitable, and those that are merely displeasing to the majority, which are charitable); RESTATEMENT (SECOND) OF TRUSTS § 374 comment l (1959) (courts do not take sides or attempt to decide which of two conflicting views of promoting the social interest is better adapted to the purpose, even though the views are opposed to each other; one of the great advantages resulting from charitable trusts is the fact that they permit experimental tests of ideas that have not been generally accepted).

[96] *See supra* notes 56 & 95.

[97] *See* George v. Braddock, 45 N.J. Eq. 757 (1889); *supra* note 56. The American common law does not analyze an organization's presentations under either the methodology approach or the full and fair exposition standard to determine whether it is entitled to exemption. One federal tax case, which has not been followed, purported to apply some form of the methodology approach. *See* Leubuscher v. Commissioner, 54 F.2d 998 (2d Cir. 1932); *see also supra* note 32. Thus, the Service's attempted use of methodology or the full and fair exposition standard is not supported by common law precedent. *See also* Bob Jones Univ. v. United States, 461 U.S. 574, 586-90 (1983) (the exemption under § 501(c)(3) has its origin in the common law of charitable trusts); Simon, *The Tax-Exempt Status of Racially Discriminatory Religious Schools*, 36 TAX L. REV. 477, 486 (1981) (footnote omitted) ("Although charitable trust law is not explicitly written into § 501(c)(3), . . . the common law of charitable trusts forms the conceptual basis for the enactment of § 501(c)(3) and, as such, is necessary to a meaningful interpretation of that section"). The common law cases neither mention nor discuss the possibility of utilizing the methodology approach or the full and fair exposition standard in judging the exemptions of advocacy organizations. *See, e.g.*, Taylor v. Hoag, 23 Pa. 194, 116 A. 826 (1922) (trust to improve government held charitable); Peth v. Spear, 63 Wash. 291, 115 P. 164 (1911) (trust to propagate socialist doctrine held charitable). In cases in which the organization goes beyond the propagation of doctrine and supports a political party or political cause, exemption is denied. *See, e.g.*,

The policy of the federal tax law in connection with the administration of the educational exemption should be precisely the same: to assure maximum public access to all viewpoints on an issue. The charitable deduction is uniquely adapted to that purpose. The deduction operates as a form of rebate to the contributor.[98] The amount of the rebate depends upon the contributor's tax bracket and the amount of the contribution,[99] and percentage limitations restrict the magnitude of the charitable deduction allowed to any one taxpayer in one taxable year.[100] While the benefits to the charitable organizations from this in-

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In re Grossman's Estate, 75 N.Y.S.2d 335 (Surr. Ct. 1947) (gift to New York Socialist Party not charitable); *see also supra* note 56. The fact that the government, in its attempt to uphold the constitutionality of the full and fair exposition standard, has never cited any common law precedent in support of its position is further evidence that the standard is unsupported by the common law of charitable trusts.

[98] *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983) ("When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors.' "); Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983) (footnote omitted) ("A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions.").

[99] For example, a donor who is in the 50% tax bracket and makes a qualifying $100 contribution receives $50 back from the government in the form of a reduction in income taxes. Some advocate eliminating the deduction and instituting a formal matching grant program. *See* Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*, 28 TAX L. REV. 37 (1972); McDaniel, *Federal Matching Grants for Charitable Contributions: A Substitute for the Income Tax Deduction*, 27 TAX L. REV. 377 (1972); McDaniel, *Federal Financial Assistance to Charity: An Alternative to the Tax Deduction*, 55 MASS. L.Q. 243 (1970). Others suggest substituting a tax credit for the deduction, which would equalize the tax benefits received by two donors who make the same contribution, regardless of their tax bracket. *See* Davies, *The Charitable Contributions Credit: A Proposal to Replace Section 501(c)(3) Tax-Exempt Organizations*, 58 CORNELL L. REV. 304 (1973); McDaniel, *Alternatives to Utilization of the Federal Income Tax System to Meet Social Problems*, 11 B.C. INDUS. & COM. L. REV. 867 (1970).

The benefit to the organization that receives the contribution is only indirectly measured by the tax benefit the donor receives. The benefits to the organization exceed the revenue loss to the government. *See* B. HOPKINS, *supra* note 81, at 41 (citing research performed for the Filer Commission showing that "for each $1.00 that the federal government loses because of the charitable deduction, the charitable sector gains between $1.15 and $1.29, depending on the donor's tax bracket"); *see also* Fullerton & Goodman, *The Economic Recovery Tax Act of 1981: Implications for Charitable Giving*, 16 TAX NOTES 1027 (1982) (discussion of the efficiency of the charitable deduction).

[100] In the case of individuals, the amount of the charitable contribution is limited by

centive do not exactly equal the rebates given to contributors,[101] the aggregate amount of indirect economic benefits received through the charitable deduction is proportional to the direct benefits to the contributors and is therefore roughly proportional to the number of taxpayers willing to contribute. Thus, the magnitude of the indirect federal support received by a charitable organization is one measure of the organization's popular support.[102] In the vast majority of cases involving advocacy groups, the specter of inordinate indirect federal assistance to an organization with little or no broad based public support is an ill-founded fear, and should not form the basis for a major policy decision in the administration of the educational exemption.[103]

IV. Limitations on the Availability of the Education Exemption

The most important issue in defining the scope of the education exemption is whether the tax law may completely exclude certain groups

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a certain percentage of the taxpayer's "contribution base," which is essentially adjusted gross income. *See* I.R.C. § 170(b)(l)(E) (1982). These limitations are: (1) 50% of contribution base in any taxable year for contributions to public charities and certain private foundations. *Id.* § 170(b)(l)(A); (2) 30% of contribution base for contributions to organizations other than "50 percent charities," including most private foundations. *Id.* § 170(b)(l)(B); (3) 30% of contribution base for contributions of appreciated property to public charities. *Id.* § 170(b)(l)(C)(i); and (4) 50% of contribution base for contributions of appreciated property to public charities when the amount of the contribution is reduced by 40% of unrealized appreciation. *Id.* § 170(b)(l)(C)(ii).

In the case of corporations, deductible charitable contributions may not exceed 10% of taxable income in any taxable year beginning after December 31, 1981. *Id.* § 170(b)(2).

[101] *See supra* note 99.

[102] One can, of course, hypothesize a situation in which a small group of eccentric millionaires are able to generate significant indirect federal support for an advocacy organization that commands no substantial degree of public support. However, there is no evidence that this in fact occurs and if it does, the problem is not confined to advocacy organizations. If a structural deficiency in the charitable deduction exists, it impacts all charitable organizations. The remedy is to correct the deficiency, not to single out one group of educational organizations for special treatment. These deficiencies could be corrected by strictly limiting the federal matching grant to a specific amount, rather than a percentage of income, and making the amount low enough so that a small number of contributors could not generate a large amount of federal support. This could be accomplished either through deductions, or by a matching grant or tax credit, which could be made refundable. For articles discussing the credit and matching grant methods, see *supra* note 99.

[103] Further, any organization that receives almost all of its support from a relatively small number of substantial contributors would almost surely be classified as a private foundation and be subjected to a very strict statutory regime. *See infra* note 104.

from access to the public, or favor some groups over others.

A. Private Foundations

This issue is closely related to the more general debate over the role of private foundations (charitable organizations that are controlled by a single source, such as one donor, a family, or a company) in American charity law.[104] Congress has long been concerned over possible abuses that can result from the concentration of power in large foundations. In the early 1950's, two House committees investigated the alleged support of subversives by foundations.[105] During these investigations, the Ser-

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[104] The term "foundation" was not statutorily defined before 1969, although between 1964 and 1969 § 170(b)(l) distinguished between certain public charities, contributions to which were deductible up to 30% of an individual donor's adjusted gross income, and other charitable organizations, contributions to which were deductible up to 20% of adjusted gross income. The Tax Reform Act of 1969 added § 509, which defined the term "private foundation." Tax Reform Act of 1969, Pub. L. No. 91-172, § 509, 83 Stat. 487, 496-97. Section 509(a) identifies four groups of organizations that are deemed not to be private foundations. The first three, described in § 509(a)(1), (2) and (3), are those that either have broad public support, or actively support such organizations. The fourth, described in § 509(a)(4), is an entity organized and operated exclusively for public safety testing, contributions to which are not deductible in any event. *See generally* B. HOPKINS, *supra* note 81, at 380-416. The basic thrust of the Tax Reform Act of 1969 provisions relating to private foundations was to impose excise taxes on certain activities of those organizations. Section 4941 imposes an excise tax on any act of self-dealing, as defined in the accompanying regulations, between a private foundation and a disqualified person as defined in § 4946(a)(1). Section 4942 requires a foundation to distribute each year at least a minimum amount of cash or property for charitable purposes, or be subject to an excise tax on the undistributed amounts. Section 4943 generally limits the interest in a business enterprise that a private foundation and all disqualified persons combined may hold, subject to an excise tax on the excess holding. Section 4944 defines a category of "jeopardizing investments" that are subject to an excise tax. Section 4945 restricts the purpose and activities for which private foundations may expend their funds and subjects any prohibited expenditures to an excise tax. Prohibited expenditures include expenditures for legislative activities, regardless of how substantial, electioneering, certain grants to individuals, and any other noncharitable purposes. In addition, § 4940 imposes a tax on the investment income of private foundations, while § 507 imposes a tax in certain cases when the status of an organization as a private foundation is terminated. *See generally* B. HOPKINS, *supra* note 81, at 430-527.

[105] These were the Cox Committee and the Reece Committee, named after their respective chairs. *See Final Report of the Select Committee to Investigate Foundations and Other Organizations*, H.R. REP. NO. 2514, 82d Cong., 2d Sess. (1953) (Cox Committee); *Report of the Special Committee to Investigate Tax-Exempt Foundations and Comparable Organizations*, H.R. REP. NO. 2681, 83d Cong., 2d Sess. (1954) (Reece Committee) [hereafter *Report*]. The Cox Committee was authorized and directed to fully and completely investigate and study educational and philanthropic foun-

vice first publicly disclosed that it administered the educational exemption under the methodology approach.[106] The primary concern was that individual large foundations could wield significant power, and the fear that foundations, particularly acting in concert, could materially determine the development of social, political, and academic opinion by selectively granting or withholding foundation awards.[107] The major concern, quite properly, was not that educational organizations supported by foundations might advocate many diverse and perhaps extreme positions or ideas, but rather that foundations, by selective grant making, could completely deny certain groups the ability to express their viewpoints to the public.[108]

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dations and comparable exempt organizations to determine which foundations and organizations were using their resources for purposes other than those for which they were established, especially for un-American and subversive activities or purposes not in the interest or tradition of the United States. *See* H. Res. 561, 82d Cong., 2d Sess. (1952). Due to time limitations, the Committee was unable to complete its investigation; therefore, the Reece Committee continued and expanded its work under a similar House mandate. *See* H. Res. 217, 83d Cong., 2d Sess. (1954).

[106] *See supra* notes 34-36.

[107] *See Report, supra* note 105. The findings of the Special Committee included:

The Committee Finds as Follows:

> 1. The country is faced with a rapidly increasing birth-rate of foundations . . . . The possibility exists that a large part of American industry may eventually come into the hands of foundations. . . .
>
> 3. The power of the individual large foundation is enormous. It can exercise various forms of patronage which carry with them elements of thought control. It can exert immense influence on educational institutions, upon the educational processes, and upon educators. It is capable of invisible coercion through the power of its purse. It can materially predetermine the development of social and political concepts and courses of action through the process of granting and withholding foundation awards upon a selective basis, and by designing and promulgating projects which propel researchers in selected directions. It can play a powerful part in the determination of academic opinion, and, through this thought leadership, materially influence public opinion.
>
> 4. This power to influence national policy is amplified tremendously when foundations act in concert. There is such a concentration of foundation power in the United States, operating in the social sciences and education.

Id. at 16-17. The conclusions of the committee were not shared by all committee members. *See id.* at 421-32 (minority report of Wayne L. Hays and Gracie Pfost).

[108] Ironically, one of the basic concerns was in the area of the social sciences. The specific problem perceived was the bias toward empirical or factfinding, rather than theoretical research.

Among the committee's findings were:

The Committee Finds as Follows:

Despite findings that foundations presented a significant policy issue because of their ability to influence the development of social and political thought through their financial power, Congress did not respond. The Tax Reform Act of 1969 did make substantial changes in the treatment of private foundations and their grantors, officers and directors, but none of them was aimed at their nonlegislative propaganda

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. . . .

2. Foundations are clearly desirable when operating in the natural sciences and when making direct donations to religious, educational, scientific, and other institutional donees. However, when their activities spread into the field of the so-called "social sciences" or into other areas in which our basic moral, social, economic, and governmental principles can be vitally affected, the public should be alerted to these activities and be made aware of the impact of foundation influence on our accepted way of life.

. . . .

9. This power team has promoted a great excess of empirical research, as contrasted with theoretical research. It has promoted what has been called an irresponsible "fact finding mania." It is true that a balanced empirical approach is essential to sound investigation. But it is equally true that if it is not sufficiently balanced and guided by the theoretical approach, it leads all too frequently to what has been termed "scientism" or fake science, seriously endangering our society upon subsequent general acceptance as "scientific" fact. It is not the part of Congress to dictate methods of research, but an alertness by foundation trustees to the dangers of supporting unbalanced and unscientific research is clearly indicated.

Report, *supra* note 105, at 16, 18.

The Committee disclosed that the Service administered the educational exemption under a methodology approach. Significantly, the Committee did not suggest that such an approach would result in the denial of exemption to a foundation that engaged in philosophical propaganda, let alone that doctrinaire advocacy by one interest group would deny exemption, or that only factually oriented positions would be considered educational.

Assistant Commissioner (Technical) Sugarman testified that the statute refers only to propaganda to influence legislation, and not to other types of propaganda. But he added that "the problem of what is educational is still with us." *Hearings on H. Res. 217*, *supra* note 34, at 450-51. He further testified that

> Without getting into the term 'propaganda,' we get into the same problem of whether or not the method smacks of attempting to educate people, to give them the data, the information on which they may draw conclusions, or whether it is merely opinion and so forth which gives some resort to conclusions without the facts.

Id. at 451. Significantly, he made no reference to doctrinaire positions on philosophical, political, or other nonfactual issues as being of any particular concern to the Service. Indeed, this was precisely the conclusion that the majority of the committee invited — that a philosophically doctrinaire organization could be denied tax exemption — and the conclusion that the government witnesses always carefully avoided.

activities.[109] The Service's policy on the availability of tax-exempt educational status to advocacy organizations largely answers the argument that foundations seriously threaten the free flow of ideas.[110] The availability of the exemption to a broad array of advocacy groups enables any group with a fair degree of public support to garner enough indirect economic support to gain direct access to the public. Thus, the widest possible grant of exemption to propaganda groups can serve as an effective and easily administrable check on the power of private foundations.[111]

B. Legislative Propaganda Groups

The exemption of all nonlegislative propaganda groups can also be distinguished from the specific denial of exemption to legislative propaganda groups. The proliferation of organized interest groups following World War I represented a profound shift in political and social participation.[112] Rather than working solely through political parties or other

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[109] *See supra* note 104.

[110] Because the charitable deduction is of more benefit to donors in high tax brackets, and can be utilized to a greater extent by persons with large incomes than by those with relatively modest incomes, the balance still favors the private foundations that garner much of their support from high bracket taxpayers. *See supra* notes 98-100.

[111] The charitable deduction works well as a measure of how broad based the support of an organization is if all taxpayers who make a charitable contribution receive some tax benefit. However, due to the operation of the standard deduction, now termed the zero bracket amount, not all taxpayers receive a tax benefit by making a charitable contribution. Over the years, the standard deduction has increased, and during President Carter's term, Treasury Department data estimated that his tax proposals (which would have increased the zero bracket amount and eliminated or lowered certain itemized deductions), would have converted six million taxpayers from itemizers to users of the standard deduction. As a result, 84% of the taxpayers would be nonitemizers and therefore have no tax motivation to make charitable contributions. *See* B. HOPKINS, *supra* note 81, at 18-19. The Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 97th Cong., 1st Sess., 95 Stat. 172, partially converted the charitable contribution deduction into an "above the line" or nonitemized deduction. In 1982 and 1983, a donor can deduct 25% of the first $100 contributed to charity. In 1984, a donor can deduct 25% of the first $300 contributed to charity. In 1985, a donor can deduct 50% of all contributions. In 1986, a donor can deduct all charitable contributions without itemizing. *See* I.R.C. § 170(i) (1982). However, the new subsection will expire after 1986, unless renewed by Congress.

[112] For an excellent discussion of groups, their internal organization and leadership, and how they influence and are influenced by the activities of other institutions and organizations, see D. TRUMAN, *supra* note 71. A more recent book on the subject is A. TOFFLER, THE THIRD WAVE (1980). Toffler's thesis is that the future will inevitably bring an increased diversity in ideas, political convictions, sexual proclivities, educational methods, eating habits, religious views, ethnic attitudes, musical tastes, fashions,

institutions, such organizations sought to directly influence public opinion to gain acceptance and ultimately implement their viewpoints and goals. These groups were concerned not only with legislative change, but also with molding public opinion in favor of civic or social change.[113] The interest groups that concentrated on directly molding public opinion were, however, initially identified with the lobby and pressure groups that had long been a familiar aspect of the American political scene. These groups were basically concerned with bringing pressure and influence to bear directly on the legislative process. It was probably the identification of all propaganda groups with such lobby groups, without any searching analysis, that initially led Treasury to attempt to deny exemption to all propaganda organizations.[114]

Discrimination between legislative and nonlegislative propaganda organizations with respect to the granting of tax-exempt status can be defended, in part, by focusing on the importance of ensuring maximum public access to all viewpoints. The purpose of legislative propaganda is, directly or indirectly, to gain access to legislators and thereby implement a desired goal through legislation. But access to legislators is not equally available to all organizations, and the access problems are not entirely financial.[115] Allowing exemptions to legislative propaganda

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and family trends. *Id.* at 242. Some commentators have suggested that this increased diversity and "de-massification" of society will reshape the future of tax-exempt organizations. *See* B. HOPKINS, *supra* note 81, at 693-702, which argues that the concept of education is expanding and will include a wide variety of different types of organizations other than traditional and educational institutions. Hopkins also foresees an emerging need to invent imaginative new institutions at the transnational level, to form consortia and other teams of nongovernmental organizations to attack various global problems, and for a variety of minorities to form organizations to enable them to regulate more of their own affairs. *Id.* at 697. Finally, Hopkins suggests that, if these predictions are correct and given the American tendency to create associations, nonprofit tax-exempt organizations are and will increasingly be an integral part of the American societal and political structure. *Id.* at 701-02.

[113] *See* D. TRUMAN, *supra* note 71, at 213-23. Truman cites the distinction made by Herring between the "old lobby" of behind-the-scenes "wire pullers" that characterized legislative operations in the nineteenth century, and the "new lobby" that concentrates on molding public opinion through propaganda. P. HERRING, GROUP REPRESENTATION BEFORE CONGRESS 59-61 (1929).

[114] The "old lobby" groups were generally perceived as disreputable organizations that utilized unethical and illegal methods to attain their goals. *See* D. TRUMAN, *supra* note 71, at 46 (while lobby and pressure groups were common, they were "accepted in the way that the typhoid bacillus is, as an organization that is a feature of civilized existence but that must be eradicated if society is to develop and prosper.").

[115] The access problem may not be directly present in the case of all legislative propaganda aimed at the general public. But it is difficult to distinguish between true grass

groups would benefit those organizations with access, and would therefore magnify rather than ameliorate the disadvantaged position of organizations without access to legislators. In addition, the advocacy of legislative action raises different policy issues than advocacy in general. If successful, the legislative propagandist's position will be imposed on the public by legislative fiat. Thus, implementation of the advocated position would be coercive and is, in general, a more real and proximate possibility than with nonlegislative propaganda.[116]

These two factors, the structural access problem and the coerciveness and proximity of the implementation of legislative propaganda, justify the disparate treatment of legislative and nonlegislative propaganda organizations. Generally, no structural access problem exists with nonlegislative propaganda activities aimed at the general public.[117] Rather, the only access problems are financial. In such cases, exempting the broadest spectrum of organizations best serves the public interest and advances the policies underlying the grant of exemption to the propa-

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roots lobbying activities and those aimed at certain segments of the public with peculiar access to legislators. The latter activities bring only indirect pressure on certain legislators and present the access problem. Concerns over the access problem were not expressed in any of the legislative history pertaining to the limitations on propaganda activities of exempt organizations. However, the concern was expressed that once one determines that some legislative propaganda groups should be denied exemption, it is difficult to draw the line with any degree of precision. *See supra* note 33.

[116] In some cases, a nonlegislative propaganda organization may go beyond advocacy and directly and immediately seek to implement its viewpoint. In such cases, the educational exemption is properly denied. *Compare* DeForest v. Commissioner, 19 B.T.A. 595 (1930) (organization organized and operated to promote the cause of constructive philanthropy held educational), *acq.* 9-2 C.B. 15 (1930), *and* Forbes v. Commissioner, 7 B.T.A. 209 (1927) (organization formed to promote a responsible world democracy and cooperation among nations by educating the American public as to the necessity and desirability of such action held educational), *acq.* 6-2 C.B. 3 (1927) *with* Estate of Blaine v. Commissioner, 22 T.C. 1195 (1954) (organization formed to create a climate in favor of a form of world government and to actually establish that government held not educational). *See supra* notes 80-81 and accompanying text.

[117] The Service was apparently concerned over the use of the broadcast media by propaganda organizations. *See, e.g.*, G.C.M. 37,173 (June 21, 1977); G.C.M. 36,556 (Jan. 16, 1976). The Service identified the use of broadcast media to support its position that homosexual advocacy groups might present a real danger to society, but not because of any problems of access. There might legitimately be an access issue if only certain types of advocacy organizations could gain access to the public through the broadcast media. However, there is no evidence that such an access problem exists, since most advocacy organizations utilize the print media to disseminate their messages, and all educational organizations are entitled to the privilege of preferred second or third class mailing rates. 39 U.S.C. § 4355 (1964) (repealed 1970); *see* 39 U.S.C. § 3622(b)(8) (1982).

ganda organization.[118] Any fear of rapid and unwanted implementation of incorrect or unwise positions as a result of nonlegislative propaganda must be based on the naive and discredited view of propaganda as a dangerous form of brainwashing.

C. Unlimited vs. Limited Exemptions

If one takes the policy of providing maximum public access to all viewpoints to its extreme, the government would ensure access by all groups exercising the first amendment right of free speech, regardless of how broad based their support might be. However, this would entail a direct grant program, rather than a tax deduction or a nonrefundable or refundable tax credit.[119] Such a system would raise a number of different policy issues. First, one must decide whether substantial federal funds should be appropriated in support of very narrow interests. Presently, the charitable deduction largely permits the marketplace to allocate federal financial assistance.[120] Second, the present method provides the least intrusive manner of providing assistance to advocacy organizations, a factor extremely important in areas involving sensitive first amendment rights.[121] Under the present statutory scheme, if properly

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[118] *See supra* note 79.

[119] A refundable tax credit is a credit that is treated as a payment made by the taxpayer even if the taxpayer has no tax liability or a liability less than the amount of the credit. Thus, it operates in much the same way as a direct grant, in that it is not geared to tax liability or taxable income. *See, e.g.*, I.R.C. §§ 43, 45, 6401(b) (1982). A refundable tax credit that is computed on the basis of a taxpayer's income would not assist a taxpayer with no income. In those cases, either a negative income tax or a direct subsidy would be needed. *See* Tobin, Pechman & Mieszkowski, *Is a Negative Income Tax Practical?*, 77 YALE L.J. 1 (1967).

[120] This is a variation on the policy of promoting voluntarism and pluralism that is furthered by the charitable exemption. One of the accepted rationales for recognizing certain organizations as charitable is that the indirect nature of the governmental support promotes diversity and acts as a bulwark against overreliance on big government. *See* B. HOPKINS, *supra* note 81, at 7. In the same way, it acts to preclude government interference with and influence over educational organizations.

[121] In this regard, the administration of the educational exemption is subject to limitations similar to those that have confronted the Service in administering the religious exemption. An attempt to define religion for purposes of the exemption provision would necessarily limit what can or cannot constitute a religion. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 164 (1878) (in upholding the constitutionality of a federal law making polygamy criminal, the Court held that the statute was aimed not at mere religious belief or opinion, but at actions that were in violation of social duties or subversive of good order); *see also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 658 (1943) (Frankfurter, J., dissenting) ("[T]his Court cannot be called upon to determine what claims of conscience should be recognized and what should be rejected

administered, the government does not become excessively entangled with propaganda organizations. Therefore, the possibility of direct or indirect governmental influence over the content of public debate is minimized.[122] These significant benefits of the present system would be partially frustrated if assistance were given in the form of a direct grant, or if the administration of the exemption were based on subjective or discretionary criteria that invite subtle or overt censorship.

Over the past fifty years, there has been a decided shift in emphasis away from centralized, institutional education and toward a more di-

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as satisfying the 'religion' which the constitution protects. That would indeed resurrect the very discriminatory treatment of religion which the Constitution sought forever to forbid.").

In Unity School of Christianity v. Commissioner, 4 B.T.A. 61 (1926), the Board of Tax Appeals applied the same reasoning to the scope of the exemption for religious organizations. The opinion stated that:

> In considering whether a corporation is religious, charitable or educational, we must always be guided by the character of the organization and its activities. Religion is not confined to a sect or a ritual. The symbols of religion to one are anathema to another. What one may regard as charity another may scorn as foolish waste. And even education is to-day not free from divergence of view as to its validity. Congress left open the door of tax exemption to all corporations meeting the test, the restriction being not as to the species of religion, charity, science or education under which they might operate, but as to the use of its profits and the exclusive purpose of its existence.

Id. at 70.

The interplay of the religious exemption and the first amendment's establishment clause has effectively precluded the Service from formulating any definition of "religious" beyond the vague contours of sincere and meaningful beliefs similar to orthodox beliefs in God. *See* United States v. Seeger, 380 U.S. 163 (1965) (definition of religious beliefs in the Military Selective Service Acts); *see also* United States v. Ballard, 322 U.S. 78 (1944) (the truth of a person's religious beliefs cannot be submitted to a jury because the constitutional freedom of religious beliefs embraces beliefs that cannot be proved and that may be rank heresy to the followers of an orthodox religion). *But see* Church of the Chosen People v. United States, 548 F. Supp. 1247, 1253 (D. Minn. 1982) (organization whose only main doctrine was a single-faceted doctrine of sexual preference and peculiar life style is not religious; its ideology did not address the fundamental and ultimate questions concerning the human condition).

[122] While the charitable tax exemption and deduction are similar to cash subsidies, they are not identical. The federal financial assistance granted by both is indirect rather than direct, and the choice to exempt charitable organizations from tax results in less government intrusion on the activities of charitable organizations than would the choice to tax them. For these reasons, the Supreme Court has held that the charitable exemption for religious organizations does not violate the first amendment. *See* Walz v. Tax Comm'n, 397 U.S. 664, 674-76 (1970); *id.* at 690-91 (Brennan, J., concurring); *id.* at 699 (opinion of Harlan, J.).

verse, less structured form of education.[123] This shift has been fostered at least in part by Treasury's long-standing position that almost all advocacy organizations are entitled to tax-exempt status.[124] More than fifty years of experience with administration of the educational exemption under that liberal interpretation has disclosed no significant identifiable considerations to indicate that the liberal interpretation was misguided. The proliferation of single issue advocacy groups has made public discourse more strident, but there is no evidence that it has not provided substantial public benefit, or that it threatens harm to the individual or society. Even if it were possible to turn back the clock and enforce Treasury's initial position that denied exemption to all propaganda organizations, that could not be supported from a policy standpoint. Across-the-board denials of exemption to all propaganda organizations would discriminate in favor of the status quo or the popular position, which would be represented in some form with or without the incentive provided by the charitable deduction. The peripheral, marginal groups would suffer most from loss of exemption, and society in general would be deprived of the full range of diverse viewpoints.

The policy decision to expand the scope of the educational exemption to encompass propaganda organizations was correct when made, and experience has only reinforced its correctness. The methodology approach is outdated, unnecessary and dangerous. The full and fair exposition standard — which holds that some advocacy organizations that cannot be objectively identified are not worthy of exemption and must be controlled by the Service — is equally unnecessary and more dangerous. Some special situations that may present unique problems are discussed in the next section. In general, however, the exemption should be extended to all advocacy organizations, and the last vestige of discretionary governmental control over the educational process, the full and fair exposition standard, should be eliminated.

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[123] *See* B. HOPKINS, *supra* note 81, at 696-98.

[124] Once Treasury retreated from its initial position that no propaganda organization was educational, and adopted the methodology approach and ultimately the full and fair exposition standard, it clearly abandoned any real attempt to place significant limits on the availability of the exemption to propaganda organizations. The Service's lack of expertise and audit resources would have effectively precluded any attempt at vigorous enforcement. *See supra* note 47. Further, the full and fair exposition standard was probably a conscious policy decision to deny exemption only in very extreme cases. *Id.* The lack of reported cases in which the government has taken the position that an organization has not satisfied the full and fair exposition standard demonstrates that this standard is very rarely invoked.

D. Special Cases: Advocacy of Illegal Activities or Activities that are Contrary to Public Policy

Having concluded that there should generally be no limitations on the availability of the educational exemption to propaganda organizations based on their methods, one other possible source of limitation on the availability of the exemption still exists: the nature of the activities advocated by the organization. Giving the Service the power and duty to examine the positions advanced by propaganda organizations and to determine, on that basis, which should be accorded tax-exempt status, would be blatant and undesirable censorship. However, there are two situations in which distinctions can be made based on external, objective criteria, thereby limiting the Service's discretion: the advocacy of illegal activities and the advocacy of activities that, if currently implemented, would be contrary to public policy.

1. Organizations Advocating Illegal Activities

The easiest case is advocacy of illegal activities. But even in that case, if the policy favoring maximum access of the public to all viewpoints is taken very seriously, extending the educational exemption to that extreme could be defended. Under current constitutional law, the government may not proscribe advocacy of illegal activity unless the expression occurs under circumstances likely to produce an imminent violation of the law.[125] These limits are aimed at assuring the individual maximum access to the public and the public maximum access to all viewpoints and expressions, the same policies that underlie the grant of exemption to propaganda organizations.[126] However, the scope of the educational exemption need not be coterminous with the limits on the government's right to proscribe first amendment activity. All organizations exercising first amendment rights need not be accorded tax exemption, or other forms of federal financial assistance, so long as the denial of exemption does not seek to suppress dangerous or noxious ideas.[127]

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[125] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969). The government, in the *National Alliance* case, admitted that the taxpayer's conduct was immune from criminal prosecution under this standard. *See* Brief for the United States, *supra* note 5, at 30 n.7. This is probably true of most organizations seeking the educational exemption.

[126] *See supra* text accompanying notes 95-103.

[127] How that distinction is to be made is problematic in some cases. The Service adamantly argues that its current application of the full and fair exposition standard is not aimed at suppressing dangerous or noxious ideas, but rather seeks to objectively distinguish between educational and noneducational organizations. *See* Brief for the

The constitutional requirements are aimed at limiting the government's right to forcibly exclude an advocacy organization from access to the public, and do not address the issue whether, and to what extent, the government must or should affirmatively encourage and subsidize the activity of an advocacy organization.[128] Whether the exemption should be granted to organizations that advocate illegal activities depends on balancing the policy favoring maximum access of the public to all viewpoints against any identifiable countervailing policies. The constitutional limit on the government's ability to proscribe advocacy of illegal activities may also appropriately limit the scope of the educational exemption. The first amendment protection is designed to distinguish between appeals to action or contemplated action that are sufficiently remote that they must gain voluntary acceptance by the public to succeed, and contemplated action that is immediate and directed by the organization advocating the position, or presents a clear and present danger of success.[129] The same distinction could support a grant of tax exempt status to organizations engaged in protected activities. The benefits to society provided by advocacy organizations engaged in constitu-

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United States, *supra* note 5, at 32 n.8. However, if the only purpose of the standard is to single out certain organizations that are deemed not to provide sufficient public benefits to warrant the educational exemption, then whether the standard is objective or subjective misses the point: its sole purpose is to suppress the expression of certain types of viewpoints for inarticulable reasons.

[128] *See, e.g.*, Taxation With Representation v. United States, 585 F.2d 1219 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979); 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), *cert. denied*, 414 U.S. 864 (1973). Recently, the Supreme Court held that the grant of exemption and deductibility of contributions to veterans' organizations did not violate the first or fifth amendments, even though those organizations were not subject to the restrictions on legislative activity imposed on § 501(c)(3) organizations. *See* Regan v. Taxation With Representation, 461 U.S. 540, 549-50 (1983) (although government may not place obstacles in the path of a person's exercise of freedom of speech, it need not remove those not of its own creation).

[129] *See* W. GELLHORN, AMERICAN RIGHTS 77-78, 83-84 (1960); *see also* Gitlow v. United States, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting):

> Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result . . . . If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.

tionally protected activities, while diminished perhaps in cases when the organizations advocate illegal activities, are still present, and the possibility of harm to society is relatively remote. However, countervailing considerations argue against such a broad interpretation of the educational exemption.

While limits on the government's ability to proscribe advocacy of illegal activities seek to strike a balance between society's interests and individual rights, the limit imposed by the clear and present danger test is decidedly skewed in favor of individual rights. The policy decision has been made that if America is to survive as a free society, it will have to take certain risks that the clear and present danger test embodies.[130] But it is quite another matter to suggest that the government should or must take any affirmative action that could increase those risks. Equally important, the denial of the exemption to organizations that advocate illegal activities can be administered by the Service under objective, non-content-oriented criteria. The legislature[131] has made an independent determination that such activities, rather than being encouraged, should be prohibited and penalized.[132] Denying exemption to

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[130] Even in the context of the first amendment, that policy decision is not without its critics. *See* Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 189 (1956):

> The basic "postulate," therefore, which should "limit and control" the First Amendment is that it is part of the framework for a constitutional democracy and should, therefore, not be used to curb the power of Congress to exclude from the political struggle those groups which, if victorious, would crush democracy and impose totalitarianism.

[131] This analysis assumes that the criminal statute was enacted for reasons apart from the possible limitations it might impose on the activities of charitable organizations. If the primary or sole purpose of the criminal statute is to deny exemption to organizations that participate in the proscribed activities, a closer question would be presented. *See* Speiser v. Randall, 357 U.S. 513, 518 (1958) (although first amendment activities need not be subsidized by the state, the discriminatory denial of tax exemption can impermissibly infringe first amendment rights).

[132] Collateral issues may arise, as when the Service, under § 162 and before the enactment of § 162(c) and § 162(f), sought to deny as business deductions illegal bribes, kickbacks, and similar payments. The issue is whether some types of illegal behavior are not as serious as other types, and should therefore not result in denial of exemption. With business deductions, Congress, in enacting § 162(c), ultimately determined that a payment should be denied a deduction only when it is illegal under a United States law or a generally enforced law of a State, and when it subjects the payer to a criminal penalty or loss of license or privilege to engage in trade or business. Further, the statute requires that the government show, by clear and convincing evidence, that the requirements of the statute for disallowance have been met. *See* I.R.C. § 162(c) (1982).

Similar problems can arise in the charitable exemption areas. Advocacy of illegal activity should result in denial of exemption only if the activity would violate public

propaganda organizations that advocate illegal activities does not discriminate based on a subjective evaluation of the organization's message, but rather on whether the activities advocated by the organization fall within an independently defined class, a determination that the Service can make under neutral and nondiscriminatory criteria.[133]

Congress should have as much latitude in determining which organizations should be accorded tax exempt educational status — and therefore should be entitled to the substantial direct and indirect federal assistance that flows therefrom — as it would have in providing direct federal grants to such organizations.[134] As a matter of congressional intent, it is difficult to argue that Congress would desire to benefit, directly or indirectly, organizations that advocate illegal activities. Such organizations fall outside of the broad categories of organizations that Congress presumably intended to benefit, because their positions can be implemented currently only through illegal acts or changes in the law. Neither of these activities are, under current statutory provisions, appropriate for a tax-exempt educational organization. Further, denying exemption to such organizations is consistent with the weight of author-

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policy, which presupposes that the criminal statute is generally enforced. Presumably, the Service could administer the exemption within such boundaries. The burden of proof is on the taxpayer to prove entitlement to exemption. National Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983), in which the illegality of the advocated conduct was clear and uncontested, appears to be the only educational exemption case in which the issue was raised. However, in view of the Service's present hostility toward groups that advocate homosexual equality, some overzealous Service employee might disallow the exemption because the organization directly or indirectly advocates and condones homosexual activities, which are illegal under the laws of many states, without analyzing exactly what types of activities such organizations in fact advocate.

[133] There is always the possibility that the Service may discriminate in applying the exemption by ignoring those organizations advocating illegal activities that the Service deems to be of little potential harm. Further, the Service encountered a problem when it purported to administer the exemption under the methodology test: the Service cannot monitor the activities of all exempt organizations, but must rely on indirect sources of information to identify the offending organizations. *See supra* note 47. However, these issues are much less important if the focus is only upon illegal activities. One would expect very few otherwise charitable organizations to advocate illegal activities, and the Service would very likely be made aware of all such instances. In addition, once the Service has identified such organizations, there is no apparent reason why it would choose to proceed against some but not others. If this occurred, it would be relatively easy to detect.

[134] *See* Regan v. Taxation With Representation, 461 U.S. 540, 549 (1983) (congressional selection of particular entities or persons for entitlement to this sort of largesse is a matter of policy and discretion not normally open to judicial review).

ity in the American common law of charitable trusts.[135] For these reasons, denying exemption to organizations that advocate illegal activities is supportable from a policy perspective and reasonably administrable under the current statutory scheme.

2. Organizations Advocating Activities Contrary to Public Policy

The more troubling issue is whether an organization advocating actions that, while not illegal, would be contrary to public policy if currently accomplished, can and should be denied tax-exempt educational status. The United States Supreme Court's recent decision in *Bob Jones University v. United States*[136] lends considerable support to the denial of exemption in such cases. In that case, the Service determined that private schools with racially discriminatory policies were not entitled to educational tax-exempt status. The Service determined that the schools were no longer charitable under the common law of charitable trusts because, even though the activities of the schools involved were not illegal, they contravened sharply defined public policy against racial discrimination in education.[137]

The Court held that Congress intended that an organization seeking exemption under section 501(c)(3) must serve a public purpose and provide a benefit to society.[138] A corollary of the public benefit doctrine,

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[135] *See* RESTATEMENT (SECOND) TRUSTS § 377 comment a (1959) (a trust to promote revolution, or to print and circulate books and pamphlets whose printing and circulation are forbidden by law is invalid; so also is a trust to promote polygamy or other sexual offenses).

[136] 461 U.S. 574 (1983).

[137] Prior to 1970, the Service held that racially discriminatory private schools were entitled to exemption, but during litigation challenging this position, the Service decided that it could no longer recognize such schools as tax-exempt. *See* Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd per curiam sub nom.* Coit v. Green, 404 U.S. 997 (1971); *see also Equal Educational Opportunity: Hearing Before the Senate Select Comm. on Equal Educational Opportunity*, 91st Cong., 2d Sess. 1995 (1970) (statement of Commissioner Randolph W. Thrower) (the Service's change in position was based on "the basic principles of the common law of charities, applied in the light of today's knowledge and understanding."). The Service later published Rev. Rul. 71-447, 1971-2 C.B. 230, in which it restated its position in the *Green* case. In 1975, the Service published Rev. Rul. 75-231, 1975-1 C.B. 158, in which this position was applied to church-related and church-operated organizations conducting racially discriminatory schools. Bob Jones University and Goldsboro Christian Schools, Inc. challenged the Service's position and it was those two cases that were decided by the Supreme Court. Two Fourth Circuit panels had upheld the Service's denial of exemption. *See* Bob Jones Univ. v. United States, 639 F.2d 147 (4th Cir. 1980), *aff'd*, 461 U.S. 574 (1983). The companion decision was unpublished.

[138] 461 U.S. at 586-90. The Court seemed to rely on the common law of charitable

according to the Court, is the requirement, long recognized in the law of trusts, that the purpose of a charitable trust may not be illegal or violate established public policy.[139] Finding a declared public policy against racial discrimination in education at the judicial, legislative, and executive levels of government, the Court held that "it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising 'beneficial and stabilizing influences in community life' . . . or should be encouraged by having all taxpayers share in their support by way of special tax status."[140] The Court cautioned that "a declaration that a given institution is not 'charitable' should be made only when there can be no doubt that the activity involved is contrary to a fundamental public policy."[141] The Court concluded that the legitimate educational functions of the schools could not be isolated from their discriminatory practices, because discriminatory treatment exerts a persuasive influence on the entire educational process.[142] Thus, because in the Court's opinion racially discriminatory private schools provide no public benefit and in fact violate a fundamental public policy, they are not entitled to exemption.

An important unsettled issue beyond the scope of this Article is how to determine whether the activities advocated by an organization would violate public policy if accomplished, without giving the Service the same kind of discretionary power that it now claims under the methodology test and the full and fair exposition standard.[143] Assuming that this determination can be made, the further issue is whether advocacy, as opposed to actual accomplishment, of activities that would violate public policy justifies denial of exemption. The actual accomplishment of activities is different from their mere advocacy. In the former case, the organization presents a *fait accompli*, the actual implementation of its viewpoint, which goes far beyond the usual and customary meaning

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trusts to support that conclusion, but the opinion also referred to the independent federal public policy doctrine previously developed under § 170. *Id.* at 591 n.17.

[139] *Id.* at 591-92. The opinion cites the usual common law authority and analogizes the grant of exemption and allowance of the charitable deduction to direct government financial assistance, paid for by all taxpayers, to support its conclusion that an educational organization's purpose "must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred." *Id.* at 592.

[140] *Id.* at 595. Again, the Court relied on the analogy of tax benefits to direct federal financial assistance in arriving at its conclusion.

[141] *Id.* at 592.

[142] *Id.* at 593-95.

[143] *See* Thompson, *Public Policy Limitations on the Tax Exemption for Charitable Organizations*, 2 DEN. TAX L.J. 1 (1984).

of education.[144] In such cases, the section 501(c)(3) exemption should be granted only if the activities of the organization are recognized as charitable in the generally accepted legal sense of that term. The federal government and the taxpayers should not be compelled to subsidize the implementation of programs that, under current norms, are not recognized as beneficial enough to society to warrant charitable status.

Advocacy, on the other hand, is at least one step removed from actual implementation, and thus the advocacy organization's impact on society is indirect and much less immediate. Further, the presentation of various and diverse viewpoints on issues to the public is generally recognized as providing significant benefits to society, regardless of how undesirable the advocated viewpoint may be under current public policy notions. Thus, the advocacy activities of such organizations can be separated from the possibility of actual acceptance and implementation of the advocated position. This differs from the situation in which the organization actually implements its program, such as the racially discriminatory private schools considered by the Supreme Court.

On the other hand, as with the advocacy of illegal activities, one can argue that the government should not subsidize, and thereby possibly encourage, activities that, under current standards, are deemed to be inimical to the public interest. While the government cannot affirmatively proscribe such activities, it need not and should not encourage them. However, one important factor distinguishes the advocacy of illegal activities from the advocacy of activities contrary to public policy. Society still finds some benefit, though minimal, in activities that have not been made illegal, and the legislature has not clearly indicated any desire to foreclose all debate on the issue. That is, the legislature has not purported to freeze current perceptions of public policy by making the activities illegal. Similarly, the federal tax law, through the educational exemption, should not stifle that debate and woodenly attempt to protect the status quo against change in currently unpopular directions. If the organizations advocating such positions can gain sufficient consensus to implement their viewpoints, they will have succeeded in changing the contours of public policy sufficiently to accomplish that end. The legislature can end the debate by proscribing the activities in question but, until and unless it does so, the Service should not administer the educational exemption to accomplish such censorship indirectly.[145]

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[144] *See supra* note 23.

[145] The suggested position may be contrary to the weight of American common law of charitable trusts, which appears to treat the advocacy of activities that would be

V. SUMMARY: THE APPROPRIATE SCOPE OF THE EDUCATIONAL EXEMPTION

The current statutory provisions are well designed to provide the Service sufficient flexibility to deal with propaganda organizations without granting it a nebulous censorship power. One must first distinguish between organizations whose principal purposes include the actual direction and implementation of a particular program and those that merely advocate a position.[146] If an organization's purpose is to directly implement change, then the organization is not exclusively educational, and the benefits of exemption under section 501(c)(3) should

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contrary to public policy if accomplished the same as the advocacy of illegal activities. *See* RESTATEMENT (SECOND) TRUSTS § 377 comment c (1959) (a trust for a purpose, the accomplishment of which is contrary to public policy although not forbidden by law, is invalid; thus, a trust to establish a course of medical school lectures in which a theory of disease treatment that has been proved to be dangerous should be taught is invalid). However, the example given goes much further than mere advocacy to the actual training of doctors to implement the program. In most cases, courts are inclined to support the advocacy of even dubious causes, rather than exercise a censorship power. *See supra* notes 30, 56 & 95.

[146] The distinction between advocacy and action is not always easy to draw. Because the benefit that society derives from the free debate of ideas underlies the grant of exemption to propaganda organizations, the most logical dividing line is the one used in the criminal law, the clear and present danger test. The Supreme Court's struggle with the advocacy versus action issue in delineating the scope of the first amendment guarantees of freedom of speech and assembly indicates the utter futility of attempting to make reasoned distinctions among the concepts "expression of idea," "opinion," "counsel," "exhortation," "advocacy," and "incitement." *See* Gorfinkel & Mack, Dennis v. United States *and the Clear and Present Danger Rule*, 39 CALIF. L. REV. 475, 493 (1951). The only realistic distinction is between appeals to action or contemplated action that are sufficiently remote that, in order to succeed, must gain acceptance in the marketplace of ideas, and contemplated action that is immediate and direct. *See supra* note 129 and accompanying text.

The Service's use of the full and fair exposition standard clearly seeks to draw fine distinctions among various types of advocacy and would proscribe many forms of advocacy that could clearly pass muster under the clear and present danger test. This is highlighted by the fact that the same test is used to define "nonpartisan analysis" in the regulations under § 4945. *See supra* note 48. Nonpartisan analysis is a term used to denote activities that touch upon legislative matters, but which do not constitute attempts to influence legislation, and for which expenditures by a private foundation would be subject to an excise tax under § 4945. Thus, the full and fair exposition standard is clearly designed to distinguish between expression of ideas and attempts at action. Although such a distinction is necessary and appropriate in the case of legislative activities because the statute proscribes all attempts to influence legislation no matter how close they may come to fruition, it is inappropriate to apply the distinction to all propaganda organizations. It draws a line too far removed from any realistic probability of action.

not be available unless that implementation would be charitable in the generally accepted legal sense of that term. Such an organization must thus pass muster under the more searching "charitable" standard.[147] Even if such an organization cannot meet the current standards of charitable status, it may attain tax-exempt status under section 501(c)(4) if its activities are deemed to promote the social welfare in some manner not yet recognized as charitable. That section exempts from taxation civic organizations operated for the promotion of social welfare, but contributions to such organizations are not deductible.[148] Section

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[147] The concept of "charitable," as currently defined in the regulation, is very broad. *See supra* notes 41-45. Under the current definition, an organization must be charitable in the generally accepted legal sense of that term. Treas. Reg. § 1.501(c)(3)-1(d)(2) (1959). This definition, which was adopted in 1959, seems to have significantly expanded the earlier definition, which was based on the narrower, colloquial sense of the term charitable. *See* B. HOPKINS, *supra* note 81, at 48-59. Under the current definition, the concept of charitable therefore evolves as the common law evolves. *See* G. BOGERT & G. BOGERT (rev. 2d ed. 1977), *supra* note 56, § 369; 4 A. SCOTT, *supra* note 95, §§ 368, 374.2.

[148] Section 501 (c)(4) provides:

> (c) List of Exempt Organizations. — The following organizations are referred to in subsection (a) [which grants exemption]:
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> . . .
>
> (4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

I.R.C. § 501(c)(4) (1982). The provision exempting nonprofit civic leagues or organizations operated for the promotion of social welfare was enacted without comment as an amendment to the Tariff Act of 1913. Tariff Act of 1913, ch. 16, § II(G)(a), 38 Stat. 172. It was apparently enacted in response to testimony by the United States Chamber of Commerce seeking an exemption covering "civic or commercial" organizations. *See* McGovern, *The Exemption Provisions of Subchapter F*, 29 TAX LAW. 523, 530 (1976) (citing *Hearings on Tariff Schedule of the Revenue Act of 1913 Before the Subcommittee of the Committee on Finance*, 63d Cong., 1st Sess. 2001 (1913)). Since the provisions concerning political activities of charitable, religious, and educational organizations were not enacted until 1934, it is unlikely that Congress enacted the exemption for social welfare organizations because of any perceived need to distinguish between organizations that engaged in such activities and those that did not. Because deductions for contributions to certain exempt organizations were not permitted until after 1917, the exemption for social welfare organizations could not have been intended to distinguish between organizations that were deemed worthy of such collateral benefits and those that were not. Notwithstanding this, the exemption under § 501(c)(4) has, in fact, operated as the exemption of last resort for organizations that cannot attain exemption under § 501(c)(3).

501(c)(4) thus operates as a halfway measure between no exemption and the favored exemption under section 501(c)(3). An organization that implements a program that is neither charitable nor promotes social welfare would be denied any exemption.[149]

If an organization advocates rather than directs and implements action, its exemption should be judged under the less searching definition of "education." The educational exemption should be extended to all organizations that disseminate information or propagate doctrine, no

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Section 1.501(c)(3)-1(c)(3)(v) of the regulations provides that even an "action" organization (one that engages in legislative and political campaign activities sufficient to deny it exemption under § 501(c)(3)) can qualify as a social welfare organization if it meets the requirements of § 501(c)(4). Section 1.501(c)(4)-1(a)(2) of the regulations defines social welfare as the promotion in some way of the common good and general welfare of the community. The definition is extremely broad and could cover most organizations that cannot meet the full and fair exposition standard. *See* McGovern, *supra*, at 530 (1976) (suggesting that the application of the exemption provision is "limited only by the imagination of the attorney").

The Treasury Department has long recognized the tension between the exemption under § 501(c)(3) and the exemption under § 501(c)(4). Obviously, any organization that qualifies as charitable or educational under § 501(c)(3) would automatically qualify for exemption under § 501(c)(4), but the converse is not true. The regulations under the Internal Revenue Code of 1939 recognized the tension but did little to resolve it, stating only that civic leagues entitled to exemption comprised those not organized for profit but operated exclusively for purposes beneficial to the community as a whole, and, in general, included organizations engaged in promoting the welfare of mankind, other than those entitled to exemption under the more favorable provisions of § 101(6) of the Internal Revenue Code of 1939 (§ 501 (c)(3) of the Internal Revenue Code of 1954). Treas. Reg. 118, § 39.101(8)-1 (1953).

[149] Because § 501(c)(4) may be the exemption of last resort for some organizations that because of their purposes and activities cannot achieve tax exempt status under § 501(c)(3), the standards under which the § 501(c)(4) exemption are administered assume added significance. Very little authority exists concerning the standards to be applied under § 501(c)(4). The Service's position is that an organization may qualify for exemption under § 501(c)(4) by presenting information to the public even though it does not utilize the educational methodology required by the methodology approach under the government's current interpretation of the full and fair exposition standard. *See* G.C.M. 36,323 (June 26, 1975). The memorandum states that the activities of some organizations that do not satisfy the methodology test are not "so potentially injurious to private citizens and detrimental to the community" that § 501(c)(4) exemption should be denied. *Id.* This indicates that the Service uses the methodology test to identify dangerous or undesirable organizations. Its position is that some such organizations are sufficiently undesirable to be denied both exemptions, apparently based on the Service's own subjective determination of just how far from the educational ideal the organization is. It is undesirable and unnecessary to give the Service such flexible control over the availability of the exemption under § 501(c)(4). The interpretation of §§ 501(c)(3) and (c)(4) suggested in this Article would make such exercises of administrative discretion unnecessary.

matter how doctrinaire their methods. The only significant limitation on the availability of the educational exemption should be the advocacy of illegal activities. Beyond that, the policy of the federal tax law should be to provide maximum public access to all viewpoints on all issues, in the firm conviction that this will provide maximum public benefits and minimal direct or indirect governmental influence on the content of public debate.

CONCLUSION

The definition of education must be expanded to include all forms of dissemination of information and propagation of doctrine, even if presented in a doctrinaire manner, and even if the position advocated is repugnant to currently held notions of public policy. A broader educational exemption serves the public interest and avoids imposing subjective and unadministrable standards on educational organizations that can, and inevitably will be, used by the Service as a form of censorship. The Treasury Department, in regulations promulgated under the Internal Revenue Code of 1954, made a courageous and correct policy decision that all but accomplished that result. However, the regulations retained the ambiguous and confusing full and fair exposition standard as a limitation on the availability of the exemption.

There will always be those who believe that the suppression of some or all minority viewpoints is rational and desirable. The unfortunate ambiguity of the full and fair exposition standard, which was probably intended only as a statement of policy that the Service could use in particularly extreme cases, left open the possibility of censoring the activities of advocacy groups seeking exemption. Those who lost out in the policy dispute that shaped the current regulation provisions have seized upon the full and fair exposition standard to reimpose an undesirable degree of administrative control over advocacy organizations. The long and tortuous history of the evolution of the current regulatory provisions, together with a careful analysis of all competing policies, leads to the conclusion that the full and fair exposition standard is unnecessary and dangerous, and should finally be discarded. The issues that the government has resurrected through its current applications of the full and fair exposition standard are not novel, but rather are the same ones that plagued the Treasury Department from its initial attempts to administer the educational exemption until the promulgation of the comprehensive regulatory scheme in 1959. The policy decisions made in the course of formulating those regulations were designed to put difficult distinctions among propaganda organizations to rest. The

last vestige of the perceived need to retain some governmental control over such organizations should be eliminated so that those policy decisions can finally be implemented.