

University of Florida Levin College of Law

UF Law Scholarship Repository

UF Law Faculty Publications

Faculty Scholarship

3-2024

Building Resilience by Removing Barriers: Addressing Structural Impediments to Advocacy by Nonprofit Organizations on Behalf of the Unenfranchised

Kirsten Widner

Heather Kolinsky

Follow this and additional works at: <https://scholarship.law.ufl.edu/facultypub>



Part of the [Law and Society Commons](#), [Nonprofit Organizations Law Commons](#), and the [Tax Law Commons](#)

**BUILDING RESILIENCE BY REMOVING BARRIERS:
ADDRESSING STRUCTURAL IMPEDIMENTS TO ADVOCACY BY
NONPROFIT ORGANIZATIONS ON BEHALF OF THE
UNENFRANCHISED**

*Kirsten Widner and Heather M. Kolinsky**

CONTENTS

I. INTRODUCTION	787
II. ORIGINS OF THE MODERN CHARITABLE NONPROFIT ORGANIZATION AND ITS RELATIONSHIP WITH THE FEDERAL INCOME TAX CODE.....	790
A. <i>From England to the Colonies: Charitable Trusts Evolve</i>	790
B. <i>Modern Charitable Nonprofits</i>	793
1. Evolution of the 501(c)(3) in the IRC.....	795
2. 501(c)(3)s and Lobbying—Navigating the Exceptions: No Substantial Part, Expenditures Test, and the Advent of 501(c)(4)s.....	799
C. <i>Modern Private Foundations</i>	801
1. Two Paths Diverge	801
2. Private Foundation Funding for 501(c)(3)s	802
III. DIFFERENCES MATTER: HOW THE CURRENT IRC FURTHER DISADVANTAGES POLITICALLY DISADVANTAGED GROUPS.....	804
A. <i>The Unique Political Disadvantage of the Unenfranchised</i>	805
B. <i>Differences in IRC Subsections and Reliance on Foundation Funding Among Groups</i>	807
C. <i>Impacts on Advocacy</i>	810
IV. USING VULNERABILITY THEORY TO REVEAL AND RECONSIDER THE IMPACT OF LOBBYING LIMITATIONS ON 501(C)(3)S THAT SERVE THE UNENFRANCHISED	811
A. <i>Vulnerability Theory—Reconsidering Dependency and Creating Resilience Through a Responsive State</i>	811
B. <i>Nonprofit Advocacy and the Vulnerable Subject</i>	814
V. CREATING RESILIENCE FOR NONPROFITS THAT SERVE THE UNENFRANCHISED	816
VI. CONCLUSION	820

[T]here are many charitable, literary and scientific ventures that as an incident to their success require changes in the law. . . . The agitation is ancillary to the end in chief, which remains the exclusive purpose of the association.

–Learned Hand¹

Our primary funder is [a particular private foundation]. And they fund statewide networks in all 50 states. As a state network, we cannot use any of our grant dollars from [the foundation] for lobbying. And that’s pretty normal for most grants, that you can’t use them for lobbying work. You can use them for education. The education piece of advocacy, you can do. But you can’t do the actual lobbying. No policy development, you know, anything at that level.

–Executive Director of a child-focused nonprofit organization²

I. INTRODUCTION

Charitable contributions, particularly those from private charitable foundations, are an essential source of support for many charitable nonprofit organizations. One way that charitable nonprofits can incentivize contributions is to incorporate under Internal Revenue Code (“IRC”) section 501(c)(3), which allows organizations to accept tax-deductible contributions.³ However, Congress imposes restrictions on the use of tax-deductible donations given to nonprofit organizations incorporated under IRC § 501(c)(3) (“501(c)(3)s”). One of the most important limits is on the use of those donations for legislative advocacy,

* Kirsten Widner, B.S. University of San Francisco, J.D. University of San Diego School of Law, Ph.D., Political Science, Emory University, is an Assistant Professor of Political Science at the University of Tennessee whose field of study focuses on political representation, public law, and judicial politics. Heather M. Kolinsky, B.A. Stetson University, J.D. Rutgers University-Camden, LL.M. Emory University School of Law, is a Legal Skills Professor at the University of Florida Levin School of Law whose research focuses on vulnerability theory, family law, and corporate personhood.

1. *Slee v. Comm’r*, 42 F.2d 184, 185 (2d Cir. 1930). In *Slee*, the court ultimately held that the Board of Tax Appeals did not commit error in disallowing *Slee*’s donations to the American Birth Control League. *Id.* Judge Hand observed that “[p]olitical agitation as such is outside the statute, however innocent the aim, though it adds nothing to dub it ‘propaganda.’ . . . Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them,” no matter how much the court itself might sympathize with the League’s goals. *Id.*

2. Interview conducted in 2019 by co-author Kirsten Widner (on file with the author). This confidential interview, along with fifty-nine others with nonprofit presidents and executive directors, was conducted as part of the research for her doctoral dissertation. Kirsten Widner, *Unrepresentative Representatives: Surrogate Advocacy and Policymaking for the Unenfranchised* (2007) (Ph.D. dissertation, Emory University) (on file with Emory University Library system), <https://etd.library.emory.edu/concern/etds/gq67js38z?locale=en>.

3. 26 U.S.C. § 501(c)(3).

lobbying, and political activities.⁴ However, Congress has created an alternative incorporation status under IRC § 501(c)(4) which allows some nonprofit organizations to engage in unlimited lobbying and some political advocacy on behalf of candidates—with a catch:⁵ donations to 501(c)(4)s are generally not tax-deductible.⁶ This means that in order to incorporate as a 501(c)(4), charitable nonprofits need donors who do not rely on tax deductions. Private foundations are often 501(c)(3) organizations themselves, and are prohibited from lobbying.⁷ Thus, a charitable 501(c)(3) nonprofit may need to forgo certain funding from private foundations in order to increase lobbying efforts, unless it has an alternative revenue stream such as membership dues.

Unfortunately, this has an outsized, disparate impact on 501(c)(3) organizations that serve politically disadvantaged groups.⁸ This Article focuses on some of the most politically disadvantaged groups—those groups that lack the right to vote. These groups, which include children, noncitizens, and people disenfranchised due to felony convictions or mental incapacity (“the unenfranchised”),⁹ already have a limited voice in policymaking arenas. Without the financial and administrative support to either maintain a 501(c)(4) or easily navigate the lobbying limitations on 501(c)(3)s, most charitable nonprofits serving these constituencies are unable, and often unwilling, to conduct meaningful legislative advocacy.¹⁰ At the same time, the limitations placed on 501(c)(3)s have

4. *Id.* (providing that with respect to 501(c)(3)s “no substantial part of the activities . . . [may consist of] 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 (or in opposition to) any candidate for public office”).

5. *See id.* § 501(c)(4); *see also* 26 C.F.R. § 1.504(c)(4) (1990); Rev. Rul. 81-95, 1981-1 C.B. 332.

6. “Contributions to civic leagues or other section 501(c)(4) organizations generally are not deductible as charitable contributions for federal income tax purposes. They may be deductible as trade or business expenses, if ordinary and necessary in the conduct of the taxpayer’s business.” *Donations to Section 501(c)(4) Organizations*, IRS, <https://www.irs.gov/charities-non-profits/other-non-profits/donations-to-section-501c4-organizations#:~:text=Contributions%20to%20civic%20leagues%20or,conduct%20of%20the%20taxpayer's%20business> (last visited Feb. 16, 2024).

7. *See infra* Section II.C.

8. Some examples of 501(c)(3)s that represent politically disadvantaged groups are the CHILDREN’S DEF. FUND, <https://www.childrensdefense.org/>, HIAS, <https://hias.org/>, the PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/>, and the ARC, <https://thearc.org/>.

9. We intentionally use the word “unenfranchised” rather than the word “disenfranchised” for two reasons. First, with respect to voting, disenfranchised is generally used to refer to groups who should have the right to vote but have been denied that right for some reason. In contrast, unenfranchised refers simply to the lack of the legal right without a normative assessment of the reason for the denial. *See* further discussion, *infra* note 99. Second, disenfranchised is often used in a broader sense to refer to groups without political power, even if they technically have the right to vote, while here we are focused on the legal right to vote as a distinction.

10. This phenomenon affects nonprofits generally. *See, e.g.*, JEFFREY M. BERRY & DAVID F. ARONS, *A VOICE FOR NONPROFITS* (2005). However, as Widner’s empirical findings show, *infra* Section

done little to curb lobbying and advocacy by more powerful, well-funded interests who work around the system, funnel their advocacy through companion 501(c)(4)s, or are already subject to different standards based on their organizational forms under IRC § 501(c).¹¹ Thus, the sometimes amorphous goals of limiting “selfish” lobbying by bad actors or limiting lobbying with government “subsidies” touted by members of Congress are not really met.¹² Instead, the limitations prevent 501(c)(3)s that rely on donations from private foundations, rather than their own constituencies, from having an equal opportunity to lobby for legislation that benefits their constituencies, and this further diminishes the power and voice of those constituencies.¹³

This Article examines why this seemingly small issue has outsized consequences that further burden already overburdened charitable nonprofits and advocacy groups seeking to advance the interests of the unfranchised. It uses the analytical lens provided by Martha Fineman’s vulnerability theory¹⁴ to demonstrate ways the current tax code inhibits the development of a responsive state that could build resilience for

III, it has an outsized impact on those serving the unfranchised. An excerpt from Bolder Advocacy’s guide for non-profit organizations contextualizes this problem as it is faced by charitable nonprofits on a day-to-day operational basis:

This is probably not something that most people who run nonprofits engaged in lobbying and other public policy work are ever going to say. People who start and run charities are driven to heal the sick, strive against injustice, feed the hungry, educate our children, protect the planet, support great art . . . not become bookkeepers. But these nonprofit advocates also don’t want to spend the time and money it takes to fix the problems that bad recordkeeping can cause. They don’t want to take time off from pursuing their mission so they can attempt to recreate three years of missing lobbying records in response to an Internal Revenue Service (IRS) audit. They don’t want to pay thousands of dollars in penalties to the government (and more to the lawyers defending their organizations) because their nonprofits have exceeded their lobbying limits. And they certainly don’t want to see their organizations stripped of their tax-exempt status, forcing the individuals operating the organization to start over from scratch (or just shut everything down entirely) simply because they did not take their recordkeeping seriously.

JOHN POMERANZ, ALL. FOR JUST., KEEPING TRACK: A GUIDE TO RECORDKEEPING FOR ADVOCACY CHARITIES I, https://afj.org/wp-content/uploads/2018/06/Keeping_Track_paywall.pdf (last visited Aug. 8, 2023).

11. For example, organizations representing businesses, like the US Chamber of Commerce, which holds immense influence, can incorporate under 26 U.S.C. § 501(c)(6). Organizations whose members are relatively wealthy, like the Sierra Club, can incorporate under 26 U.S.C. § 501(c)(4). Both these subsections are subject to fewer restrictions on advocacy activities than those placed on 501(c)(3)s.

12. The current standards do not serve to deter abusers, but rather is more likely to deter nonabusers. BERRY & ARONS, *supra* note 10, 161-62 (noting that the penalties associated with lobbying that exceed a substantial part of a charitable nonprofit’s activities scare those charities into not lobbying but at the same time provide opportunities to circumvent the system if the organization has the right resources).

13. *See id.*; *see also infra* Section III (discussion of empirical research).

14. *See generally* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE L.J. 1, 9-15 (2008); LAW, VULNERABILITY, AND THE RESPONSIVE STATE: BEYOND EQUALITY AND LIBERTY 1-9 (Martha Fineman & Laura Spitz eds., 2023).

unenfranchised groups. Having chosen to outsource much of this country's social support system to privately run, corporatized charities and philanthropic foundations in lieu of active government engagement, the federal government should, at a minimum, reevaluate the limitations it puts on legitimate, cause-based advocacy by such organizations. Our analysis shows that current statutory limitations do not further important policy goals but instead perpetuate and reinforce existing social inequalities between the most and least advantaged groups.

This Article proceeds in six parts. First, the Article provides a summary of the historical context in which nonprofit organizations evolved in this country, how the tax code has been applied to these organizations, and what the current federal tax code provides. Next, it presents original empirical research on the tangible impacts of this system on the most politically disadvantaged groups—the unenfranchised. Then, by employing vulnerability theory, this Article assesses both the shortcomings of the current system and potential solutions to these shortcomings. Next, the authors offer remedial steps that would fit within the current existing federal tax code framework and dismantle some of the structural gatekeeping that disproportionately impacts charitable nonprofits that serve the unenfranchised. Finally, the Article concludes by summarizing the implications of the research presented here and calling for legislative action.

II. ORIGINS OF THE MODERN CHARITABLE NONPROFIT ORGANIZATION AND ITS RELATIONSHIP WITH THE FEDERAL INCOME TAX CODE

A. From England to the Colonies: Charitable Trusts Evolve

The English common law of charity, and the concept of the charitable trust, is a product of both the rise of Christianity and Roman civil law.¹⁵ While some form of charitable trusts existed as early as the Middle Ages, the modern iteration of charitable law and trusts was codified in the

15. CARL ZOLLMAN, *AMERICAN LAW OF CHARITIES* 4 (1924). Zollman explains “the law of charity was, at an indefinite but early period of English judicial history, engrafted upon the common law, and derived its general maxims from the civil law, as modified in the later periods of the Roman Empire by the ecclesiastical elements introduced with Christianity.” *Id.* However, the English and the Romans were not the only cultures to engage in charitable works; records reflect charitable structures in Egyptian and Greek society, as well as the creation of charitable giving, such as *waqf*, in Islamic culture. See MARION FREMONT-SMITH, *FOUNDATIONS AND GOVERNMENT: STATE AND FEDERAL LAW AND SUPERVISION* 14-16 (1965); see also *About Waqf*, NAT'L AWQAF FOUND. OF S. AFR., <https://awqafsa.org.za/about-waqf/> (last visited June 29, 2022).

Statute of Charitable Uses in 1601.¹⁶ The Statute of Charitable Uses set forth an enumerated, but not necessarily exclusive, list of charitable purposes.¹⁷ While charities were recognized in English courts before the modern¹⁸ iteration of charitable law found in the Statute of Charitable Uses came into being, the Statute of Charitable Uses continues to serve as the basis for the law of charitable trusts in England.¹⁹ In the American colonies, the reach of the Statute of Charitable Uses depended largely on the era, the jurisdiction, and the jurist involved.²⁰ Regardless, the Statute of Charitable Uses clearly had an influence on the development of charitable trusts in America.

In colonial America, “[p]ublic and private philanthropy were . . . almost indistinguishable. The law . . . reflected a pragmatic approach to the solving of social problems . . . Colonial assemblies went out of their way to remove obstacles . . . [confronting] charities.”²¹ Charitable trusts were exempt from local taxation, and with some reservations related to religious charitable organizations, the overall policy in colonial America favored charitable organizations.²² While charitable trusts descended

16. Statute of Elizabeth, 1601, 43 Eliz. 1 c. 4. The consensus, as developed through the courts of chancery and later adopted by courts in the U.S., was that the Statute of Elizabeth did not create a new law, but provided new jurisdiction related to charitable trusts, in essence codifying that which came before it. *See Attorney-Gen. for Ireland v. Dublin Corp.*, (1827) 1 Bligh N.S. 312 (wherein Lord Redesdale stated, “We are referred to the statute of Elizabeth with respect to charitable uses . . . as creating a new law upon the subject of charitable uses. That statute only created a new jurisdiction, it created no new law”). Around the same time, Parliament enacted a charitable corporation act that provided exemptions for specific institutions from government charges and required consents when they were formed to:

erect, found, and establish, one or more hospitals, maison de Dieu, abiding places, or houses of correction, . . . as well as for the finding, sustentation, and relief of the maimed, poor, needy or impotent people, as to set the poor to work, to have continuance forever, and from time to time place therein such head and members, and such number of poor as to him, his heirs and assigns should seem convenient.

William H. Byrnes, IV, *The Private Foundation’s Topsy Turvy Road in the American Political Process*, 4 HOUS. BUS. & TAX L.J. 496, 502 (2004) (quoting James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, n.65 (1985)).

17. The list included: “(1) The relief of aged, impotent, and poor people. (2) The maintenance of sick and maimed soldiers and mariners. (3) The maintenance of schools of learning, free schools, and scholars in universities. (4) The repair of bridges, ports, havens, causeways, churches, sea-banks, and highways. (5) The education and preferment of orphans. (6) The relief, stock, or maintenance for houses of correction, (7) Marriages of poor maids. (8) The supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed. (9) The relief or redemption of prisoners or captives. (10) The aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes.” Rupert Sargent Holland, *The Modern Law of Charities as Derived from the Statute of Charitable Uses*, 52 AM. L. REG. 201, 203-04 (1904) (citing AMHERST D. TYSSEN, *THE LAW OF CHARITABLE BEQUESTS* (1888)).

18. Modern being a relative term.

19. ZOLLMAN, *supra* note 15, at 4, 6.

20. *See generally id.* at 5-7; Holland, *supra* note 17, at 205-07.

21. FREMONT-SMITH, *supra* note 15, at 36 (quoting HOWARD S. MILLER, *THE LEGAL FOUNDATIONS OF AMERICAN PHILANTHROPY, 1776-1844* at 11 (1961)).

22. FREMONT-SMITH, *supra* note 15, at 37. Fremont-Smith notes that “[f]ear of the rise in power

largely from their English predecessors, the evolution of charitable organizations in early American society ran afoul of some courts and states.²³ Most notably, in *Trustees of Philadelphia Baptist Association v. Hart's Executors*, decided in 1819, the U.S. Supreme Court determined, using incomplete historical evidence, that charitable trusts did not exist prior to the Statute of Charitable Uses' creation in 1601.²⁴ The Court later rectified this misstep in *Vidal v. Girard's Executors*,²⁵ but *Hart* impacted the development of charitable trusts in several states, even after the Court reversed itself.²⁶ Similarly, New York state courts also refused to recognize the common law cy pres doctrine for charitable trusts, but that later changed with passage of the Tilden Act.²⁷

Despite some of the initial limitations placed on charitable trusts, the U.S. Supreme Court conceived of a broad definition of charity, finding that a charitable use implicated a public purpose without private gain.²⁸ “[W]here neither law nor public policy forbids, [the term charity] may be

of the Church led to passage of restrictions on the holding of property by charitable, particularly religious, corporations, and in some states the legislature was on occasion reluctant to grant charters to these groups.” *Id.*

23. As Fremont-Smith explains, eight states rejected the doctrine of charitable trusts. Instead, gifts had to be made through charitable corporations or to trustees “who were directed to form a corporation within the period of the Rule Against Perpetuities.” *Id.*; see *Vidal v. Philadelphia*, 43 U.S. 127 (1844). There was also a general distrust of religious charitable organizations. Byrnes, *supra* note 16, at 503-07 (discussing the policy issues related to churches and charitable tax exemptions). In fact, James Madison “warned that the accumulation of exempt Church property would eventually result in religion influencing the political process.” *Id.* at 507 (citing John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363, 382 (1991)).

24. *Trustees of Philadelphia Baptist Ass’n v. Hart’s Ex’rs*, 17 U.S. 1 (1819); see FREMONT-SMITH, *supra* note 15, at 37.

25. *Vidal*, 433 U.S. at 127. *Vidal* distinguished *Hart* on three grounds: 1) unlike Virginia, Pennsylvania had not abolished the Statute of Charitable Uses; 2) the trustees in *Hart* were an unincorporated association without the requisite legal capacity to take and hold donations; and 3) recent historical information proved the existence of charitable trusts at common law. Fishman, *supra* note 16, at 627 (citing *Vidal*, 43 U.S. at 191-93, 196).

26. FREMONT-SMITH, *supra* note 15, at 37.

27. See *Bascom v. Albertson*, 34 N.Y. 584, 596-97 (N.Y. 1866) (holding undefined charitable trusts created through bequests with no ascertainable beneficiaries were void under state law); *Tilden v. Green*, 28 N.E. 880, 881, 888-89 (N.Y. 1891) (finding Tilden’s devise of his residual estate to a trust for charitable purposes including for “scientific and educational objects” was indefinite and thus void as to both that direction and the direction to establish a free library in New York); see generally Allison Anna Tait, *The Secret Economy of Charitable Giving*, 95 B.U.L. REV. 1663, 1671-73 (2015) (discussing the initial aversion to bequests to unascertainable beneficiaries through charitable trusts and the corrective legislative action that ultimately permitted these bequests).

Although it has been ascribed many definitions over the years, generally cy pres is understood as an equitable doctrine that is applied when a court attempts to honor the substantive purpose of a charitable bequest where there is a defect that prevents fulfillment as designed. See Alberto B. Lopez, *A Reevaluation of Cy Pres Redux*, 78 U. CIN. L. REV. 1307, 1309 (2010) (explaining cy pres is shorthand for the Norman French phrase that translates to “as near as possible”). Lopez explains that “[f]rom a practical standpoint, cy pres is the law’s response to an instructional void regarding what to do with funds held in charitable trusts that no longer fulfill the donor’s original charitable objective.” *Id.* at 1310.

28. Byrnes, *supra* note 16, at 505.

applied to almost any thing that tends to promote the well-doing and well-being of social man”²⁹

In addition to the pushback against English law, the rise of the corporate form in America led to a shift in the organizational landscape for charitable organizations moving from charitable trusts to charitable corporations.³⁰ As charitable corporations grew in popularity, distinctions were made between charitable trusts and corporations based on the form of organization alone.³¹ Courts likened charitable corporations to business corporations and drew analogies from corporate law rather than applying the body of trust law to charitable organizations.³² As Kenneth Karst observed in 1960, these distinctions gave more weight to “organizational form rather than operational need,” and carried a “substantial burden of justification.”³³ Karst emphasized that the “important differences among charities relate not to their form but their function.”³⁴

Thus, while America largely adopted the underlying purposes of English charitable organizations, the form of charitable organizations, as well as the law that guided those organizations, shifted. As the twentieth century progressed, more changes meant a palpable shift to a corporatized form of charitable organization: the charitable nonprofit, the public foundation, and the private foundation. In turn, the codification of federal tax exemptions that were applied to these charitable organizations often focused on operational form at the expense of operational purpose and, more importantly, operational need.

B. Modern Charitable Nonprofits

Modern charitable nonprofits³⁵ continue to be organized with the intent and purpose to impart social good apart from, and in lieu of, generating profit for owners of the nonprofit or foundation, and these nonprofits generally track the guiding principles that drove English and early

29. *Id.* (quoting Lars G. Gustafsson, *The Definition of “Charitable” for Federal Income Tax Purposes: Defrocking the Old and Suggesting Some New Fundamental Assumptions*, 33 HOUS. L. REV. 587, 610 (1996)).

30. FREMONT-SMITH, *supra* note 15, at 40.

31. *Id.* at 42.

32. *Id.*

33. Professor Karst explains that “there is no good reason for making different rules for the managers of two large foundations simply because one is a corporation and the other a trust. The law should recognize that the charitable trust and the charitable corporation have more in common with each other than each has with its private counterpart.” *Id.* at 42-43.

34. *Id.* at 43.

35. Modern nonprofits are primarily structured as corporations, although a small percentage are charitable trusts. Foundations are a slightly different iteration of a nonprofit but generally have the same structure and goals. However, private foundations have been singled out for different treatment by the federal government. *See infra* Section II.C.

American charitable institutions.³⁶ Under IRC § 501(c), which was enacted in 1954, not all nonprofits have tax-exempt status, and not all nonprofits are charities, but all nonprofits are private entities which are permitted to earn a surplus year to year but prohibited from distributing profits to stakeholders pursuant to a “nondistribution constraint.”³⁷ This Article focuses specifically on “traditional” modern charitable nonprofits, organized as 501(c)(3)s, that often serve the unenfranchised and rely primarily on grants from private foundations, which are also nonprofits. The Article explores the way restrictions on the donations from private foundations further inhibit the ability of the charitable 501(c)(3)s to advocate on behalf of their constituencies, exacerbating the political disadvantage of these groups.³⁸

Because of the prevalence of nonprofits, they have a significant impact on the U.S. economy.³⁹ Most nonprofits are small—over half employ fewer than ten people.⁴⁰ At the other end of the scale, only 2% employ

36. See 26 U.S.C. § 501(c). As Barbara Bucholtz explains, “[a]s a broad-brush description, the listed organizations are considered ‘nonprofits’ because they are organized for some purpose other than generating profits—a purpose which is deemed to confer some benefit on society. Any profit that may be generated is not distributed to, or for the benefit of, any member of the organization.” Barbara Bucholtz, *Reflections on the Role of Nonprofit Associations in a Representative Democracy*, 7 CORNELL J.L. & PUB. POL’Y 555, 555 n.2 (1998).

37. Evelyn Brody & John Tyler, *Respecting Foundation and Charity Autonomy: How Public is a Private Philanthropy?*, 85 CHI.-KENT L. REV. 571, 574-75 (2010). Brody and Tyler explain that one of the challenges faced by “charities” is that there is a lack of common terminology to describe charitable nonprofits and similar organizations which exacerbates an already persistent mindset that private charitable nonprofits actually manage “public money.” *Id.*

Perhaps to deal with these terminological difficulties, it has become common to refer instead to these organizations under the Internal Revenue Code Thus, “nonprofit,” “tax-exempt,” and “section 501(c)(3)” have become interchangeable ways to refer to charities. Unfortunately, there are problems with this approach as well. First, not all charities are tax-exempt Second, . . . the Code distinguishes “private foundations” from non-private foundations, which are called colloquially “public charities” – even though there is no such thing in the Code as a “public foundation” or a “private charity”!

Id.

38. Examples of nonprofits serving the unenfranchised include children’s advocacy centers, such as those in the National Children’s Alliance, NAT’L CHILDREN’S ALL., <https://www.nationalchildrensalliance.org/> (last visited Feb. 16, 2024), organizations serving undocumented and documented immigrants who are not citizens, like HIAS, HIAS, *supra* note 8, organizations serving current and former prisoners, such as the Innocence Project, INNOCENCE PROJECT, <https://innocenceproject.org/> (last visited Feb. 16, 2024), and organizations serving the severely mentally disabled, like the National Alliance on Mental Illness, NAT’L ALL. ON MENTAL ILLNESS, <https://nami.org> (last visited Feb. 16, 2024). These organizations range in size and scope from small, local, service-oriented groups to large, national, policy-focused groups.

39. Peter Molk & D. Daniel Sokol, *The Challenges of Nonprofit Governance*, 62 B.C. L. REV. 1498, 1498 (2021). “Nonprofits account for over a trillion dollars—or 5.6%—of U.S. gross domestic product, employ 12 million people, pay \$670 billion in wages annually, and provide immeasurable benefit to people’s lives.” *Id.* at 1498-99; see also Fishman, *supra* note 16, at 617-20 (commenting on the size and diversity of the nonprofit sector and reflecting similar contributions to U.S. GDP). Of course, charitable tax-exempt nonprofits are a subset of these larger numbers.

40. Specifically, 93,805 of 166,046 nonprofits fall in this category. *Business Employment*

500 people or more.⁴¹ The diffuse allocation of nonprofit resources through a variety of nonprofits that vary in size, formation, structure, and purpose allows for a tailored approach to the constituencies that are served by the charitable nonprofit model, but it can also impact how operational need is met from organization to organization. Diffuse allocation also reflects the outsized role that the country's supposedly neutral federal tax policy can play in the allocation of resources among different types of charitable nonprofit organizations.⁴²

1. Evolution of the 501(c)(3) in the IRC

From the establishment of the first corporate income tax in the U.S., the government's treatment of charitable nonprofits in the modern era has included the provision of tax preferences for charitable nonprofits coupled with corresponding limitations on the activities of the nonprofits receiving tax preferences.⁴³ The legislative history of the "tax-exempt sector" related to nonprofits spans enactments from 1894 to 1969 which have: 1) established "basic principles and requirements of tax-exempt organizations"; 2) identified business activities of nonprofits that are subject to taxation; and 3) "defined and regulated private foundations as a subset of tax-exempt organizations."⁴⁴ Early legislation granted exemptions from federal income tax to nonprofit corporations, established that nonprofits could not benefit individuals within the organization, and provided tax deductions to individuals for contributions made to tax-exempt charitable nonprofits to encourage charitable giving.⁴⁵

Dynamics, U.S. BUREAU OF LAB. STATS., <https://www.bls.gov/bdm/nonprofits/nonprofits.htm> (last visited Feb. 16, 2024). According to the Bureau of Labor Statistics, there were more than 64,000 nonprofits with five or fewer employees, and approximately 1,900 employing more than a thousand. *Id.* Further, these statistics suggest that the majority of nonprofits have fewer than ten employees.

41. About 3,879 nonprofits fall in this category. *Id.*

42. Not all nonprofits enjoy or seek preferential tax treatment. Instead, other reasons explain the use of the nonprofit corporate form for these organizations. See Molk & Sokol, *supra* note 39, at 1504 (citing LESTER M. SALAMON, *AMERICA'S NONPROFIT SECTOR: A PRIMER* 15 (2d ed. 1999)) (estimating that 25% of nonprofits have no federal tax exemption). One of the prevailing theories for nonprofits that do not enjoy a tax preference is the benefit to trust industries due to the lack of group entitlement to a firm's residual earnings and goals that extend beyond maximizing corporate profits. See generally *id.* at 1505-07.

43. The Wilson-Gorman Tariff Act of 1894 established a 2% tax on corporate income, but provided an express exemption for "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes, including fraternal beneficiary . . . associations." Eric C. Chaffee, *Collaboration Theory: A Theory of the Charitable Tax-Exempt Nonprofit Corporation*, 49 U.C. DAVIS L. REV. 1719, 1735 (2016) (quoting Tariff Act of 1894, ch. 349, § 32, 28 Stat. 509); see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 589 n.14, (1983).

44. Paul Arnsberger et al., *A History of the Tax-Exempt Sector: An SOI Perspective*, 2008 STATS. OF INCOME BULL. 105, 106.

45. *Id.*

Beginning in 1894, Congress made charitable nonprofits exempt from federal income taxes.⁴⁶ The Revenue Act of 1913, which marked the beginning of the creation of the modern tax system, included both a tax exemption for charitable nonprofits and a prohibition against private inurement.⁴⁷ As of 1917, individual taxpayers were permitted to deduct contributions to tax-exempt charitable nonprofit organizations on their personal income taxes.⁴⁸ Tax deductions for charitable bequests from estates followed in 1918, and in 1936 corporations were permitted to claim charitable deductions on their tax returns.⁴⁹ Reporting requirements for 501(c)(3)s were enacted in 1943.⁵⁰ Those reporting requirements directed charitable nonprofits to prepare and submit a Form 990 to the IRS each year.⁵¹ Now, not only are nonprofits required to report to the IRS via Form 990, but as of 2006, those forms must be made available for public inspection.⁵² As the IRC evolved, private foundations became

46. Revenue Act of 1894 (Wilson-Gorman Tariff Act of 1894), ch. 349, § 27, 28 Stat. 509, 553. In 1895, the U.S. Supreme Court found the Wilson-Gorman Tariff Act's imposition of an income tax unconstitutional, but the tax exemptions were not affected. *Pollack v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 635, 637 (1895); see generally Sheldon D. Pollack, *Origins of the Modern Income Tax 1894-1913*, 66 TAX LAW. 295, 301-06 (2012).

47. The prohibition against private inurement actually appeared in the Revenue Act of 1909. See *Tariff of 1909*, ch. 6, § 38, 36 Stat. 111, 112. This prohibition is a hallmark of a nonprofit organization. See 26 U.S.C. § 501(c)(3) (stating that no part of the net earnings of a section 501(c)(3) organization may inure to the benefit of any private shareholder or individual). Put simply, private inurement in this context refers to a benefit or profit that flows from a nonprofit organization to a private individual or shareholder of that organization. A private shareholder or member of a nonprofit organization may not share in the profits or income from a nonprofit lest the organization lose its nonprofit status.

48. War Revenue Tax, ch. 63, 40 Stat. 300, 330 (1917). The deduction was intended to encourage charitable giving at a time when income tax rates were rising to fund World War I. Arnsberger et al., *supra* note 44, at 107.

49. *Id.*

50. *Id.* at 106. The forms were designed to increase financial transparency and ensure organizations were complying with the IRC activities requirements. See Peter Swords, et al., *How to Read the IRS Form 990 & Find Out What It Means*, <https://guides.loc.gov/nonprofit-sector/form-990#:~:text=The%20Form%20990%20is%20designed.requirements%20for%20tax%2Dexempt%20stat> us. (last visited Mar. 3, 2024) (2005 Form 990 version).

51. Arnsberger et al., *supra* note 44, at 106.

52. The Pension Protection Act of 2006 requires 501(c)(3)s to make their Form 990-T available for public inspection. *Pension Protection Act of 2006 Revises EO Tax Rules*, IRS (Dec. 4, 2023), <https://www.irs.gov/charities-non-profits/pension-protection-act-of-2006-revises-eo-tax-rules>. The IRS provides the following information regarding which organizations are required to complete Forms 990, 990-EZ, and 990-T, and which forms will be available for public inspection:

Forms 990 and 990-EZ are used by tax-exempt organizations, nonexempt charitable trusts, and section 527 political organizations to provide the IRS with the information required by section 6033. An organization's completed Form 990 or 990-EZ, and a section 501(c)(3) organization's Form 990-T, Exempt Organization Business Income Tax Return, are generally available for public inspection as required by section 6104. Schedule B (Form 990), Schedule of Contributors, is available for public inspection for section 527 organizations filing Form 990 or 990-EZ. For other organizations that file Form 990 or 990-EZ, parts of Schedule B (Form 990) can be open to public inspection. See Appendix D. Public Inspection of Returns, and the Instructions for Schedule B (Form 990) for more

defined separately as a subset of charitable nonprofit organizations.⁵³ The private foundation, as it later came to be understood, gained increased numbers and visibility after the accumulation of wealth precipitated by the U.S. industrial revolution of the late 1800s, and this drew the attention—and sometimes ire—of Congress.⁵⁴

The first codification of limits on political activity appeared in the Revenue Act of 1934 (the “1934 Act”).⁵⁵ The 1934 Act changed the definition of organizations qualifying under section 501(c)(3) to require that “no substantial part of [the organizations’] activities [. . .] is carrying on propaganda, or otherwise attempting, to influence legislation.”⁵⁶ The newly enacted limits did not completely ban lobbying, suggesting that some good could be discerned from what otherwise was perceived to be potential “selfish” motives of donors to causes that benefitted them.⁵⁷ Unfortunately, this legislative pronouncement did nothing to clarify the line between what constituted acceptable and unacceptable lobbying. Neither treasury regulations nor case law offered much guidance for 501(c)(3)s. Generally, the suggested measures for “substantial part” included: by percentage; by context; or by regulations that simply defined what it was not.⁵⁸ From its inception, the no substantial part restriction

details. Some members of the public rely on Form 990 or 990-EZ as their primary or sole source of information about a particular organization. How the public perceives an organization in such cases can be determined by information presented on its return.

Instructions for Form 990 Return of Organization Exempt from Income Tax (2023), IRS, <https://www.irs.gov/instructions/i990>.

53. See generally 26 U.S.C. § 4945.

54. See Byrnes, *supra* note 16, at 530-32. Byrnes notes that “before the twentieth century, only five foundations had been established,” by 1910 they numbered over sixty. *Id.* at 530-31.

55. Revenue Act of 1934, ch. 277, § 101(6), 48 Stat. 680, 700. “Early regulations, however, provided that organizations formed to disseminate controversial or partisan propaganda” were “not educational” within the meaning of the statute. Judith E. Kinsell & John Francis Reilly, *Lobbying Issues*, in EXEMPT ORGANIZATIONS: TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1997 261, 262 (1998) (citing Treas. Reg. 45, art. 517 (1919); T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919)).

56. Rosemary E. Fei & Eric K. Gorovitz, *Practitioner Perspectives on Using § 501(c)(4) Organizations for Charitable Lobbying: Realities and an Alternative*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 535, 537 n.1 (2018) (quoting Revenue Act of 1934, ch. 277, § 101(6), 48 Stat. 680, 700).

57. See Jill Manny, *Nonprofit Legislative Speech: Aligning Policy, Law, and Reality*, 62 CASE W. RES. L. REV. 757, 763-65 (2012). Manny surmised that Congress must have believed that a certain amount of legislative activity by a public charity was consistent with its exempt purpose but Congress provided no indication why this non-selfish lobbying should be restricted or limited in any way given that it arguably served the required constituency and not individual interests. *Id.*; see also Note, *Regulating the Political Activities of Foundations*, 83 HARV. L. REV. 1843, 1845 (1970) (citing Elias Clark, *The Limitation on Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 439, 446-47 (1960) (noting that the broad statutory proscription may have been the result of a failure to properly draft rather than a carefully reasoned policy that all political activity is inherently improper)). Manny posits that the reliance on the public for support would curb legislative agendas that did not serve the public purpose the charitable organization aims to serve, thus obviating the need for the types of restrictions imposed to combat “selfish” motives. Manny, *supra*, at 766-67.

58. See *Seasongood v. Comm’r*, 277 F.2d 907, 912 (6th Cir. 1955) (suggesting 5% was a proper

cast a chilling effect on nonprofits that sought to avoid the harsh penalties imposed for violating the legislative restrictions on lobbying activity.⁵⁹

The current version of IRC § 501(c) provides tax-exempt status for specific types of nonprofit organizations.⁶⁰ Relevant to this discussion, section 501(c)(3) provides tax exemptions for any corporation, community chest, fund, or foundation organized and operated “exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . prevention of cruelty to children or animals” where “no part of the net earnings of which inures to the benefit of any private shareholder or individual.”⁶¹ This “nondistribution constraint” remains the hallmark of a nonprofit regardless of whether that nonprofit organization generates a profit, serves a charitable purpose, or serves a business trust purpose.⁶² Providing tax exemptions to charitable nonprofits continues to be justified by the idea that the government’s loss of revenue will be offset by the services provided by the nonprofits that “promote the general welfare” in place of the government itself.⁶³

measure for substantial activities); *Christian Echoes Nat’l Ministry, Inc. v. United States*, 470 F.2d 849, 855-56 (10th Cir. 1972); *Kuper v. Comm’r*, 322 F.2d 562, 563 (3d Cir. 1964) (both focusing on the context within which the activities occurred); *see, e.g.*, Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (as amended in 2024) (defining action organizations as non-exempt entities).

59. *See Fei & Gorovitz, supra* note 56, at 540. “The chilling effect, which we encounter frequently, if anecdotally, in our practice derives not just from the uncertainty inherent in the vagueness of the ‘no substantial part’ test, but also from inconsistent enforcement.” *Id.* at 540 n.15 (quoting BERRY & ARONS, *supra* note 10, at 72-74); *see also infra* Section II.B.2.

60. 26 U.S.C. § 501(c). There are twenty-six distinct types of organizations that receive tax exemptions under IRC § 501(c) including the Black Lung Benefits Trust (501(c)(21)), teachers’ retirement fund associations (501(c)(11)), and corporations organized to finance crop operations (501(c)(16)). *See Arnsberger et al., supra* note 44, at 123.

61. 26 U.S.C. § 501(c)(3).

62. Bucholtz, *supra* note 36, at 558 (citing Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 839 (1980)). Hansmann explained the contours of the nondistribution constraint as follows:

A nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees. By “net earnings” I mean here pure profits—that is, earnings in excess of the amount needed to pay for services rendered to the organization; in general, a nonprofit is free to pay reasonable compensation to any person for labor or capital that he provides, whether or not that person exercises some control over the organization. It should be noted that a nonprofit organization is not barred from earning a profit. Many nonprofits in fact consistently show an annual accounting surplus. It is only the distribution of the profits that is prohibited. Net earnings, if any, must be retained and devoted in their entirety to financing further production of the services that the organization was formed to provide.

Hansmann, *supra*, at 838.

63. Bucholtz, *supra* note 36, at 558. Although, as originally conceived, Elizabethan era statutes that provided for charitable uses intended a “partnership between private charity and the State ‘in which the state filled in gaps left by charity rather than charity filling in gaps left by the state.’” FREMONT-SMITH, *supra* note 15, at 26. Interestingly, more than one scholar has observed that the impetus for exempting charitable organizations from income tax is not all that clear. Brody & Tyler, *supra* note 37, at 603 (noting

However, the tax exemption comes with a corollary restriction on lobbying and certain political activities that varies depending on the applicable subsection.

2. 501(c)(3)s and Lobbying—Navigating the Exceptions: No Substantial Part, Expenditures Test, and the Advent of 501(c)(4)s

A 501(c)(3) charitable nonprofit is subject to some of the most restrictive, and challenging, limitations on lobbying.⁶⁴ The “substantial part” test is the default test applied to a 501(c)(3) organization’s activities.⁶⁵ Under this test, no “substantial part of the activities” of a 501(c)(3) may include “carrying on propaganda, or otherwise attempting, to influence legislation,” or “participat[ing] in, or interven[ing] in . . . a political campaign on behalf of (or in opposition to) any candidate for public office.”⁶⁶ If a 501(c)(3) organization “fails” the substantial part test, then the organization may lose its tax-exempt status.⁶⁷

Unfortunately, despite the potential for severe consequences, neither the IRS nor the courts provide clear guidance on the boundary dividing substantial from insubstantial activities.⁶⁸ It is a subjective test that, at

that there was no “original bargain” reflected in the legislative history).

[T]he absence of a single, comprehensive explanation for the exemptions and charitable deduction, and the dearth of specific legislative history, support giving due deference to longevity and an appropriate unwillingness to discount long-standing, centuries-old practices and policies that still work. Moreover, the absence of an explanation implicitly recognizes that foundations and charities benefit society in financial and nonfinancial ways that are of extraordinary importance that should be encouraged and not disturbed lightly.

Id.

64. See Manny, *supra* note 57, at 799 (concluding that the “restrictions placed on the legislative activities of charities are overly complex and under” effective). Manny notes that compliance with lobbying restrictions is unnecessarily expensive and conversely the restrictions are easily avoided for “well-lawyered” organizations. *Id.* at 787.

65. *Id.* at 760-61 (“A 501(c)(3) organization is subject to the Substantial Part Test unless it affirmatively elects the Expenditure Test.”).

66. 26 U.S.C. § 501(c)(3).

67. *Id.*; see Treas. Reg. 1.501(c)(3)-1 (as amended in 2024); see, e.g., *Haswell v. United States*, 500 F.2d 1133, 1142 (Ct. Cl. 1974) (“An organization that engages in substantial activity aimed at influencing legislation is disqualified from a tax exemption, whatever the motivation.”). A private foundation is also subject to excise taxes if it expends “any amount . . . to carry on propaganda, or otherwise to attempt, to influence legislation.” *Parks v. Comm’r*, 145 T.C. 278, 300-01 (2015), *aff’d* *Parks Found. v. Comm’r*, 717 F. App’x 712 (9th Cir. 2017) (citing 26 U.S.C. § 4945).

68. Manny notes that “[n]o one, including the Internal Revenue Service, knows when lobbying becomes ‘substantial’” and even the term “lobbying” is not well-defined. Manny, *supra* note 57, at 761; see also Fei & Gorovitz, *supra* note 56, at 541. Fei and Gorovitz explain that the Treasury regulations interpreting the substantial part test:

provide that any organization whose activities make it an “action organization” does not qualify for exemption. The definition of “action organization” includes an organization a substantial part of the activities of which is attempting to influence legislation by contacting,

best, has become a balancing test weighing “all of the facts and circumstances . . . ‘in the context of the objectives and circumstances of the organization.’”⁶⁹ Manny observes that this is no more than a “smell test” and it is “quite vague and provides almost no guidance to an organization wishing to influence legislation in furtherance of its exempt purposes without jeopardizing its exempt status.”⁷⁰

As an alternative measure, 501(c)(3) nonprofits may elect to comply with an elective safe harbor provision codified in section 501(h) via the expenditures test.⁷¹ Congress enacted section 501(h) in 1976.⁷² In enacting section 501(h), Congress’s primary goals were to eliminate the lack of clarity embodied in the substantial part test; to ameliorate the harsh penalties for noncompliance; to address potential inequities between larger and smaller charitable nonprofits’ access to lobbying as well as to foster equal access between the nonprofit and for-profit sectors; and ultimately, to allow for proper enforcement.⁷³ Section 501(h) sets forth ranges expressed in dollar amounts on a regressive sliding scale with corresponding percentages of allowable expenditures for lobbying at each

or urging the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation, or advocating the adoption of legislation. For this purpose, “legislation” is defined to include “action by the Congress, by any State legislature, by any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure.”

Id. at 540 n.11 (citations omitted) (citing Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (as amended in 2024)); see generally Manny, *supra* note 57, at 767-68 (discussing the lack of effective guidance from the IRS and Treasury regulations).

69. Manny, *supra* note 57, at 761. In 1955, the Sixth Circuit drew the line between substantial and insubstantial by setting the bar at 5% of the organization’s time and effort. *Id.* at 768; *Seasongood v. Comm’r*, 277 F.2d 907, 912 (6th Cir. 1955). Other courts focused on the political activities within the context of the organization’s objectives or the amount of time staff spent on lobbying activities. Manny, *supra* note 57, at 768-69 (comparing *Christian Echoes Nat’l Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972) with *League of Women Voters v. United States*, 180 F. Supp. 379, 383 (Ct. Cl. 1960), *cert. denied* 364 U.S. 822 (1960)). In 1975, the court in *Haswell v. United States*, 500 F.2d 1133 (Ct. Cl. 1975), explained that:

The political efforts of an organization must be balanced in the context of the objectives and circumstances of the organization to determine whether a substantial part of its activities is to influence, or is an attempt to influence, legislation. A percentage test to determine whether the activities are substantial is not appropriate. Such a test obscures the complexity of balancing the organization’s activities in relation to its objectives and circumstances in the context of the totality of the organization.

Id. at 1142. There, the court attempted to fashion a middle ground that considered both objective numbers as well as the “relative primacy of lobbying to the organization’s activities.” Manny, *supra* note 57, at 769 (citing *Haswell*, 500 F.2d at 1145-47).

70. Manny, *supra* note 57, at 761.

71. See 26 U.S.C. § 501(h); Treas. Reg. 1.501(h)-1 (1990). The election is not available to private foundations and churches. See § 501(h)(3)-(5).

72. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1307, 90 Stat. 1520, 1720 (1976).

73. See Manny, *supra* note 57, at 770-71. The intention was to “encourage greater lobbying by the nonprofit sector.” *Id.* at 772.

range.⁷⁴ To participate, a 501(c)(3) submits Form 5768.⁷⁵ Having elected the expenditures test, the 501(c)(3) may spend a percentage of its “exempt purpose expenditures” on lobbying, including direct and grassroots lobbying—the “Lobbying Nontaxable Amount” and the “Grassroots Nontaxable Amount.”⁷⁶ Alternatively, organizations serving similar purposes and populations can also elect to incorporate under section 501(c)(4) in addition to, or instead of, under 501(c)(3), to create a lobbying vehicle that can advance the interests of its constituents.⁷⁷ However, donations to 501(c)(4)s are not tax-deductible.⁷⁸

C. Modern Private Foundations

1. Two Paths Diverge

Legislation in the late 1960s introduced more stringent restrictions on the political voice of one particular type of charitable nonprofit—the private foundation. The Tax Reform Act of 1969 (the “1969 Act”) introduced multiple reforms to the IRC.⁷⁹ The 1969 Act created an explicit definition for private foundations, both operating and nonoperating, and imposed additional tax consequences and distribution requirements.⁸⁰ The 1969 Act also prohibited private foundations from lobbying entirely.⁸¹ Prior to the 1969 Act, private foundations had been

74. § 501(h); *see also* *About Form 5768, Election/Revocation of Election by an Eligible Section 501(c)(3) Organization to Make Expenditures to Influence Legislation*, IRS, <https://www.irs.gov/forms-pubs/about-form-5768#:~:text=This%20form%20is%20used%20by,public%20charities%20to%20influence%20legislation.>

75. § 501(h); Treas. Reg. 1.501(h)-1 (1990).

76. § 501(h); Treas. Reg. 1.501(h)-1 (1990).

77. 26 U.S.C. § 501(c)(4)(A) (providing that organizations created under this section must be “operated exclusively for the promotion of social welfare . . . the net earnings of which are devoted exclusively to charitable, educational, or recreational purpose.”); *see also* Treas. Reg. 1.501(c)(4)-1 (as amended in 2024) (“An organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community. An organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements.”).

78. 26 U.S.C. § 501(c)(4); *Regan v. Taxation with Representation*, 461 U.S. 540, 543 (1983) (“Taxpayers who contribute to § 501(c)(3) organizations, are permitted by § 170(c)(2) to deduct the amount of their contributions on their federal income tax returns, while contributions to § 501(c)(4) organizations are not deductible. Section 501(c)(4) organizations, but not § 501(c)(3) organizations, are permitted to engage in substantial lobbying to advance their exempt purposes.”).

79. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (amending Internal Revenue Code of 1954); *see generally* Byrnes, *supra* note 16, at 575-91 (discussing the Petersen Commission and the 1969 Act).

80. *See supra* note 79; *see generally* Note, *Regulating the Political Activity of Foundations*, *supra* note 57, at 1849.

81. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487; *see* 26 U.S.C. § 4945 (1970). As

subject to political restrictions similar to those of other charitable tax-exempt nonprofits.⁸² By regulating the availability of tax preferences for private foundations and their constituencies, as well as the private actors directing those foundations, Congress sought to blunt the social activism of some of these private foundations.⁸³ In addition to prohibiting lobbying, in the 1969 Act, Congress expanded the definition of lobbying to include two new subcategories.⁸⁴ First, Congress further defined propaganda as “any attempt to influence any legislation through an attempt to affect the opinion of the general public.”⁸⁵ Second, Congress expanded the definition of lobbying to include “attempts to influence” through communications between foundations and any government official who *may* participate in the formulation of legislation.⁸⁶

2. Private Foundation Funding for 501(c)(3)s

While private foundations cannot engage in lobbying, there are lobbying exceptions for nonpartisan analysis, study, or research as well as responses to written requests for technical assistance.⁸⁷ Private foundations may also partner with other organizations by providing general support grants and grants for specific projects, however, there must be a prohibition on lobbying with the proceeds.⁸⁸ However, penalties for lobbying are significant and impact both the foundation and

Byrnes notes, the Senate Finance Committee expressed the opinion that “private foundations are stewards of public trusts and their assets are no longer in the same status as the assets of individuals who may dispose of their own money in any lawful way they see fit.” Byrnes, *supra* note 16, at 588.

82. Note, *Regulating the Political Activity of Foundations*, *supra* note 57, at 1844 (stating that prior to the 1969 Act, a foundation’s tax-exempt status could be withdrawn if a substantial part of its activities consisted of “propaganda, or otherwise attempting, to influence legislation,” or if it participated in an election “on behalf of any candidate,” just as was true for a 501(c)(3)).

83. *Id.* at 1848-49 (“Change[s] in existing law appears to have been motivated by unmistakably partisan activity by foundations, activity which was clearly identifiable with a particular candidate or political party, and by the inability of the existing law to deal with such abuses.”).

84. *See* 26 U.S.C. § 4945(d)-(e) (1970).

85. § 4945(d)(1)-(e)(1).

86. § 4945(d)(2)-(c)(2).

87. § 4945(e)(2); Rev. Rul. 53.4945-2(a)(6).

88. *See* § 4945(f)-(g). However, as Fei and Gorovitz note:

A prohibition on lobbying in a general support grant agreement undermines a primary benefit (to the grantee) of providing general support. General support grants maximize the grantee’s flexibility in the use of grant funds and provide access to resources that the grantee can deploy in whatever way will most effectively advance its charitable purposes. A general support grant that prohibits the use of grant funds for lobbying takes away with one hand what it gives with the other, without providing any greater protection to the funder.

Fei & Gorovitz, *supra* note 56, at 546 n.44. They observe, however, that these grants have been used successfully by conservative political foundations for think tanks that help shape and develop the conservative ideological agenda. *Id.* at 547.

the foundation managers.⁸⁹ Thus, compliance is critical for private foundations that provide grants to 501(c)(3)s that engage in any sort of lobbying.

The Supreme Court has held that lobbying restrictions are constitutional regardless of whether such restrictions are imposed equally on similar organizations.⁹⁰ In *Regan*,⁹¹ the Supreme Court upheld lobbying restrictions against a First Amendment and Fifth Amendment equal protection claim.⁹² The Court found that Congress could treat 501(c) organizations differently with respect to lobbying, holding that different lobbying rules for veterans' organizations did not render other lobbying limitations unconstitutional.⁹³

Legislatively-enacted limitations on lobbying and advocacy enshrined in the modern tax code have a limiting effect on all modern charitable nonprofits, whether they are private foundations, dependent grantees of

89. See § 4945(a)-(b) (imposing a 20% tax on the foundation and a 5% tax on a foundation manager for taxable expenditures). Taxable expenditures are defined as any amount paid or incurred by a private foundation to carry on propaganda, or otherwise to attempt, to "influence legislation through communication with any member or employee of a legislative body, or with any other government official or employee who may participate in the formulation of the legislation (except technical advice or assistance provided to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be), other than through making available the results of nonpartisan analysis, study, or research." § 4945(d)(1)-(c)(e).

90. *Regan v. Taxation with Representation*, 461 U.S. 540, 550-51 (1983).

91. *Id.*

92. *Id.* at 550.

93. The Court held that Congressional selection of particular entities or persons for entitlement to this sort of largesse "is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find." *Id.* at 549. Despite finding that the regulations were not unconstitutional, Justice Blackmun noted in his concurrence that the Court's decision was based on the nature of the relationship between 501(c)(3)s and 501(c)(4)s, and the IRS's treatment of those complementary organizations to ensure that no tax-deductible contributions were used to pay for lobbying, nothing more. *Id.* at 553 (Blackmun, J., concurring). Justice Blackmun wrote:

As long as the IRS goes no further than this, we perhaps can safely say that "[the] Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby." A § 501(c)(3) organization's right to speak is not infringed, because it is free to make known its views on legislation through its § 501(c)(4) affiliate without losing tax benefits for its nonlobbying activities. Any significant restriction on this channel of communication, however, would negate the saving effect of § 501(c)(4). It must be remembered that § 501(c)(3) organizations retain their constitutional right to speak and to petition the Government. Should the IRS attempt to limit the control these organizations exercise over the lobbying of their § 501(c)(4) affiliates, the First Amendment problems would be insurmountable. It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him. Similarly, an attempt to prevent § 501(c)(4) organizations from lobbying explicitly on behalf of their § 501(c)(3) affiliates would perpetuate § 501(c)(3) organizations' inability to make known their views on legislation without incurring the unconstitutional penalty. Such restrictions would extend far beyond Congress' mere refusal to subsidize lobbying. In my view, any such restriction would render the statutory scheme unconstitutional.

Id. at 553-54 (citations omitted).

private foundations, or other types of 501(c)(3)s. However, the practical application of these limitations arguably creates a disparate impact on those 501(c)(3)s that can afford it least—modern charitable nonprofits that serve the unenfranchised.

III. DIFFERENCES MATTER: HOW THE CURRENT IRC FURTHER DISADVANTAGES POLITICALLY DISADVANTAGED GROUPS

A threshold question in considering whether the IRC restriction on lobbying and advocacy by 501(c)(3)s creates a meaningful disadvantage for some of those organizations is whether lobbying itself matters. Political scientists have produced evidence with mixed results on this question, with many studies finding that lobbying has no effect at all on the behavior of policymakers.⁹⁴ However, many of these studies focus on the end of the legislative process—roll call votes on particular bills.⁹⁵ There are many steps before such votes are taken at which lobbying can be influential. For example, advocacy efforts like public education, media outreach, and demonstrations shape public opinion and create demand for change. Conversations with legislators and provision of relevant information can influence the legislative agenda and lead to consideration by legislative committees.⁹⁶

One of the greatest challenges facing any group that hopes to change the policy status quo happens at the agenda-setting stage. To achieve policy gains, groups must get policymakers to pay attention to their issues.⁹⁷ There are many more issues that people want addressed than there are time for in policymakers' schedules. Further, getting and keeping legislative attention is harder for some groups than it is for others. Groups that lack political organization, resources, or voting power tend to have the least access to and voice in the policymaking process. Legislators care about both policy and reelection; thus, they are likely to prioritize issues that help them further both goals.⁹⁸ In other words, they are less likely to prioritize the policy needs of groups that cannot reward them with campaign contributions or votes. In this Article, we focus

94. See David Lowery, *Lobbying Influence: Meaning, Measurement and Missing*, 2 INTEREST GRPS. & ADVOC. 1 (2013) for a discussion of the history of null findings.

95. See generally FRANK R. BAUMGARTNER & BETH L. LEECH, BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND IN POLITICAL SCIENCE (1998).

96. *Id.*

97. FRANK R. BAUMGARTNER ET AL., LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY (2009).

98. See R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 5 (1990); Anne Schneider & Helen Ingram, *Social Construction of Target Populations: Implications for Politics and Policy*, 87 AM. POLITICAL SCIENCE REV. 334, 335 (1993).

specifically on groups lacking the right to vote: the unenfranchised.⁹⁹ The multiple, overlapping layers of political disadvantage faced by the unenfranchised create unique challenges for advocacy organizations seeking policy change on their behalf.

A. The Unique Political Disadvantage of the Unenfranchised

Nearly one-third of people living in the U.S. today lack the legal right to vote. This includes the 22% of the population who are children under the age of eighteen,¹⁰⁰ the 6-7% who are adult noncitizens,¹⁰¹ the 1-2% of the population who are disenfranchised due to felony convictions,¹⁰² and the 0.1% of the population who are disenfranchised due to mental incapacity.¹⁰³ Some of these voting restrictions are consistent across states. No state currently allows children under the age of eighteen to vote in state or federal elections, although a handful of cities allow people to begin voting in municipal elections as young as age sixteen.¹⁰⁴ The citizenship requirement is similar; it is ubiquitous at the state and federal levels, but a few jurisdictions allow noncitizens to vote in school board or other local elections.¹⁰⁵ Other voting restrictions vary greatly from state

99. The more common term, disenfranchised, generally refers to groups that are deprived of a right to vote that they should have. Because there are individuals who lack the right to vote for whom there may be valid reasons for the denial of franchise—for example, infants—we use unenfranchised to apply equally to all people without voting rights, regardless of the justification for the denial.

100. Stella U. Ogunwole et al., *Population Under Age 18 Declined Last Decade*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html#:~:text=By%20comparison%2C%20the%20younger%20population,from%2074.2%20million%20in%202010>.

101. Abby Budiman et al., *Facts on U.S. Immigrants, 2018*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/hispanic/2020/08/20/facts-on-u-s-immigrants-current-data/>.

102. As of 2020, about 5.2 million Americans were disenfranchised due to felony convictions. Chris Uggen et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, THE SENTENCING PROJECT (Oct. 30, 2020), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>. More current estimates are difficult to obtain because this is an area of active policy change at the moment. Several states, including Florida, Kentucky, and Iowa have recently changed their laws in ways which increased the number of people with felony convictions who are able to vote. Brittany Renee Mayes & Kate Rabinowitz, *Since 2016, 11 States and D.C. Have Expanded Voting Rights for the Currently and Formerly Incarcerated*, WASH. POST (Aug. 12, 2020), <https://www.washingtonpost.com/politics/2020/08/12/since-2016-11-states-dc-have-expanded-voting-rights-currently-formerly-incarcerated/>.

103. It is difficult to get an accurate count of this population. The estimate provided is drawn from Michael P. McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter*, 95 AM. POL. SCI. REV. 963, 965 (2001).

104. Jason Axelrod, *Cities Nationwide Push to Lower Voting Age to 16*, AM. CITY & CNTY. (Sept. 10, 2018), <https://www.americacityandcounty.com/2018/09/10/cities-nationwide-push-to-lower-voting-age-to-16/>.

105. Matt Vasilogambros, *Noncitizens Are Slowly Gaining Voting Rights*, STATELINE (July 1,

to state. Disenfranchisement based on felony convictions, for example, does not happen at all in some states,¹⁰⁶ is permanent unless lifted by the governor in one state,¹⁰⁷ varies based on the felony in some states,¹⁰⁸ and occurs until completion of some or all aspects of the person's sentence in other states.¹⁰⁹ This complex patchwork of laws is further complicated by fines and fees. In many states, to have the right to vote restored, the person must have paid all related court fees, fines, and restitution.¹¹⁰ This requirement leaves many otherwise qualified people disenfranchised due to poverty.¹¹¹

Similarly, disenfranchisement due to mental incapacity varies by state. Thirty-eight states have constitutional¹¹² or statutory¹¹³ provisions restricting some voting rights in this category. Most of these states require a court finding of either incompetence to stand trial or inability to manage one's own affairs, though some require a specific court order regarding disenfranchisement.¹¹⁴

2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/07/01/noncitizens-are-slowly-gaining-voting-rights>.

106. Maine and Vermont do not disenfranchise due to criminal convictions.

107. Iowa's constitution currently provides that people with felony convictions permanently lose voting rights unless those rights are restored by the governor. IOWA CONST. art. II, § 5. However, since August 2020, voting rights of all people convicted of nonhomicide crimes are automatically restored after completion of sentence under Executive Order 7. *Voting Rights Restoration*, IOWA, <https://governor.iowa.gov/services/voting-rights-restoration> (last visited Feb. 16, 2024).

108. This category includes Alabama, Arizona, Delaware, Florida, Kentucky, Maryland, Missouri, Mississippi, Tennessee, and Wyoming. *Criminal Disenfranchisement Law Across the United States*, BRENNAN CTR. FOR JUST. (Dec. 18, 2019), https://www.brennancenter.org/sites/default/files/2020-03/Criminal%20Disenfranchisement%20Laws%20Map%202012.18.19_0.pdf.

109. *Id.*

110. For example, after Florida voters overwhelmingly approved Amendment 4, which automatically restored voting rights to most people with felony convictions after they completed their sentences, the state legislature enacted Senate Bill 7066 in 2019. This bill redefines completion of sentence to include “[f]ull payment of restitution ordered to a victim by the court as a part of the sentence. . . . [and] [f]ull payment of fines or fees ordered by the court as a part of the sentence or that are ordered by the court as a condition of any form of supervision, including, but not limited to, probation, community control, or parole.” FLA. STAT. § 98.0751 (2024).

111. See, e.g., Danielle Lang & Thea Sebastian, *Opinion: Too Poor to Vote*, N.Y. TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/opinion/election-voting-rights-poverty.html>.

112. For example, the Arizona Constitution provides, “No person who is adjudicated an incapacitated person shall be qualified to vote at any election.” ARIZ. CONST. art. VII, § 2(C). In total, sixteen states have constitutional bans on voting relating to mental incapacity. *Id.*; CAL. CONST. art. II, § 4 (amended 2020); DEL. CONST. art. V, § 2; FLA. CONST. art. VI, § 4; GA. CONST. art. II, § 1, ¶ 3(b); LA. CONST. art. 1, § 10(A); MINN. CONST. art. VII, § 1; N.D. CONST. art. II, § 2; S.C. CONST. art. II, § 7; S.D. CONST. art. VII, § 2; TEX. CONST. art. VI, § 1; UTAH CONST. art. IV, § 6; VA. CONST. art. II, § 1; WASH. CONST. art. VI, § 3; W. VA. CONST. art. IV, § 1; WYO. CONST. art. VI, § 6.

113. For example, New York's constitution does not include mental incapacity as a ground for disenfranchisement, but it has been added by statute. N.Y. ELEC. LAW 5-106(6) (Consol. 2024).

114. Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931 (2007).

Other characteristics of the unenfranchised further contribute to their political disadvantage. Some, like young children or the severely disabled, lack independence, while others, like the incarcerated, lack physical liberty altogether. Others, like recent immigrants from non-English speaking countries or preverbal children, lack the language ability, and yet others lack the financial resources or social capital to successfully advocate for themselves. For these reasons, the unenfranchised are particularly reliant on the efforts of nonprofit organizations to bring their issues to the attention of policymakers. Those organizations, in turn, often rely on charitable contributions—particularly contributions from foundations—to fund their efforts.

*B. Differences in IRC Subsections and Reliance on
Foundation Funding Among Groups*

Using Widner's original survey of nonprofit advocacy organizations conducted in 2018, we are able to provide evidence of different groups' reliance on foundation funding.¹¹⁵ Survey participants were executive directors, CEOs, and policy directors at nonprofit organizations that both include public policy advocacy as some part of their mission and that represent the interests of one or more discrete populations.¹¹⁶ Organizations representing the unenfranchised were oversampled to ensure adequate numbers for comparison.¹¹⁷

Participants were asked to describe the group or groups that their organizations advocate for in the policy process. They were also asked to estimate the percentage of their advocacy efforts that are dedicated to advancing the interests of one or more unenfranchised groups. Figure 1 shows the distribution of these efforts. Interestingly, many professional organizations that responded claimed to use at least some of their advocacy efforts to advance the interests of the unenfranchised. This is most true for professions that serve unenfranchised populations, like K-

115. Co-author Kirsten Widner conducted this survey as part of her dissertation research. Full statistical models and results are available in the dissertation online. See Widner, *supra* note 2, at 135-43. The survey was sent to organizations identified in three ways. First, a random sample of state and national organizations was drawn from a list of state and federal nonprofits that had filed IRS Form 990s in 2015 compiled by the National Center for Charitable Statistics at the Urban Institute. Second, to ensure adequate representation of federally focused organizations, the survey was sent to organizations identified by Matthew Grossmann for his book, *Not So Special Interests*, in 2012 (list on file with the authors). Third, snowball sampling was used to identify additional organizations willing to take the survey. Overall, the survey was sent to approximately 4,750 organizations, and approximately 600 completed the survey, a response rate of approximately 13%. *Id.*

116. By discrete population, we mean a group of people who share identity characteristics such as race, gender, age, or disability, or an experience such as involvement in the criminal justice system or common occupation. *Id.*

117. *Id.*

12 teachers, pediatricians, and criminal and immigration attorneys, but it is not restricted to these groups.

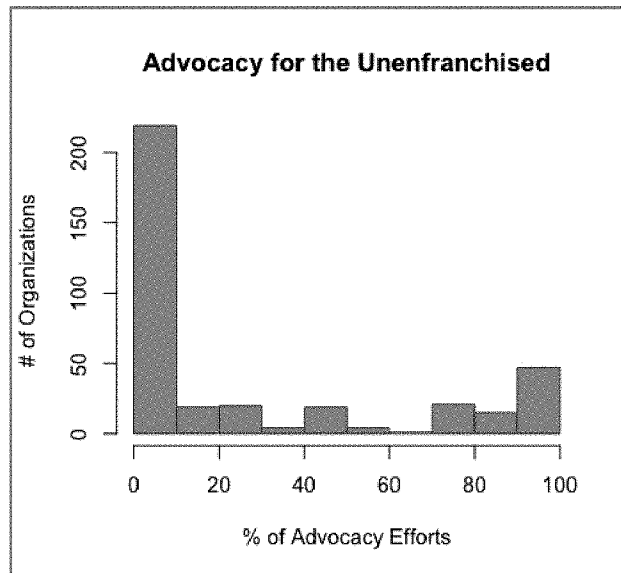


Figure 1: Percent of Advocacy Efforts Focused on the Interests of the Unenfranchised

The organizations' tax identification numbers were used to identify the sections of IRC 501(c) under which they are incorporated. Approximately 66% of the organizations that participated in the survey are incorporated as 501(c)(3)s, and approximately 9% are incorporated under more than one paragraph. Some of these are organizations that have a 501(c)(3) and an associated 501(c)(4). Most of the organizations who had incorporated under both sections represent the LGBTQ community. This community is an example of a group that, despite a legacy of social stigma, has many wealthy members who are able to support organizations irrespective of whether contributions are tax deductible.¹¹⁸ Most other organizations incorporated under more than one subsection are professional organizations that have a related charitable foundation. Overall, the subsections under which the groups are incorporated are highly correlated with the type of groups the organizations represent. Only 33% of organizations representing professional or occupational groups are incorporated as 501(c)(3)s,¹¹⁹ while 94% of organizations representing

118. See, e.g., Andy Kroll, *Meet the Megadonor Behind the LGBTQ Rights Movement*, ROLLING STONE (June 23, 2017), <https://www.rollingstone.com/politics/politics-features/meet-the-megadonor-behind-the-lgbtq-rights-movement-193996/>.

119. This category includes labor unions as well as professional organizations like bar associations.

other types of groups fall in this category. Notably, every single one of the organizations that dedicate a substantial amount of their advocacy efforts to the interests of the unenfranchised are incorporated as 501(c)(3)s.¹²⁰

The subsection an organization incorporates under is both influenced by and further shapes the sources of revenue available to fund the organization's activities. Professional organizations are often membership-driven and can forgo tax-exempt donations and rely on dues; this allows them to elect a status other than 501(c)(3). On the other hand, organizations seeking to advance the interests of poor, unenfranchised, or unpopular groups may need to rely on donations from wealthy benefactors or foundations who insist upon tax deductions or compliance with the restrictions associated with their own incorporation status.

These patterns are reflected in the survey responses. Participants were asked to provide estimates of the percent of their revenue that came from different sources.¹²¹ The differences are stark. On average, over half of professional organizations' revenue comes from membership dues, followed by income from services. In contrast, organizations representing other types of groups rely most heavily on individual donors; federal, state, and local funding; and charitable foundations. Organizations representing the unenfranchised are the most dependent on foundations; on average, they reported that 25% of their revenue came from foundations, compared with just 3% for professional organizations and 16% for other groups. Organizations representing the unenfranchised are also more reliant on federal, state, and local funding than those representing other types of groups. Under 31 U.S.C. § 1352, federal funds cannot be used for lobbying, and many state laws and grant contracts contain similar limitations.¹²² As a result, approximately 60% of the revenue of the average organization representing the unenfranchised is subject to lobbying restrictions.

and it comprises approximately 46% of the survey participants. Given that sections 501(c)(5) and 501(c)(6) have fewer limitations and were designed for business and occupational associations, it is somewhat surprising that even this many professional organizations are incorporated as 501(c)(3)s.

120. This category includes every organization that reported dedicating 75% or more of their advocacy efforts to advancing the interests of one or more unenfranchised groups.

121. The categories of funding sources included: individual donors, membership dues, federal government, state or local government, foundations, corporate contributions, income from services, fundraising events, and other.

122. See, e.g., *Limiting Public Funds for Lobbying*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 3, 2021), <https://www.ncsl.org/research/ethics/50-state-chart-limits-on-public-funds-to-lobby.aspx#:~:text=Fla.,the%20legislative%20or%20executive%20branch>.

C. Impacts on Advocacy

Differences in tax status and funding matter because those differences impact the amount and kinds of advocacy in which organizations can engage. Survey participants were asked to rate, on a scale of 1 to 5, the extent to which various factors were barriers to their organization's participation in the policymaking process. Organizations incorporated as 501(c)(3)s were significantly more likely to consider IRS regulations to be a barrier to advocacy, with an average rating of 2.3, compared to 1.8 for other organizations.¹²³ Organizations representing the unfranchised were also more likely than other groups to consider IRS regulations a barrier to advocacy, though this difference is largely attributable to their greater likelihood of being incorporated as 501(c)(3)s.¹²⁴

Participants were also asked whether foundation funding was a barrier to participation in policy making. For this factor there was a direct relationship between the percentage of an organization's advocacy efforts that were dedicated to the interests of unfranchised and the degree to which the organization saw foundation funding as a barrier.¹²⁵ Organizations that dedicated all of their advocacy efforts to the unfranchised rated foundation funding 0.75 points higher on the 5-point scale—in other words, they saw it as substantially more of an obstacle to advocacy—than did organizations that did not represent the unfranchised.¹²⁶ Professional organizations were least likely to view foundation funding as a barrier to advocacy, while groups representing primarily the unfranchised reported a higher perceived barrier than all other groups.¹²⁷

Finally, survey participants were asked about the degree to which their organizations participated in a wide range of advocacy activities, to see how these perceived barriers impacted their actual practices. Responses suggest that organizations representing the unfranchised are not less likely to participate in legislative lobbying—the particular activity restricted under the tax code—but they emphasize other, unrestricted advocacy activities more than organizations representing other types of groups.¹²⁸ In particular, organizations representing the unfranchised devote a higher proportion of their advocacy efforts to public education and litigation than do other organizations.¹²⁹ While these other advocacy

123. This difference is statistically significant. *See* Widner, *supra* note 2 (providing full models and results).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. This finding holds when organizations are matched with other organizations advocating in the

strategies may be productive, legislatures are the primary policymaking venues in American government. Thus, the restrictions and barriers faced by these groups matter.

IV. USING VULNERABILITY THEORY TO REVEAL AND RECONSIDER
THE IMPACT OF LOBBYING LIMITATIONS ON 501(C)(3)S THAT
SERVE THE UNENFRANCHISED

A. *Vulnerability Theory—Reconsidering Dependency and
Creating Resilience Through a Responsive State*

Vulnerability theory seeks to supplant the traditional legal paradigm, with its autonomous liberal subject, individual rights focus, and sameness of treatment approach to equality. Instead, it offers a framework centered on a universally vulnerable and dependent subject who requires a responsive state to build resilience.¹³⁰ In this sense, vulnerability theory recognizes that dependency is a universal condition resulting from our embodied existence, but its effects are particularized to each person. “Dependency and subsidy as social phenomena are inevitable and universal,” and every person, regardless of whether they deem themselves “independent” and “fully autonomous,” receives some form of subsidization during their lifetime.¹³¹ Such subsidy and support may be societal (like unpaid family care); tax-based deductions or credits; direct support such as welfare or food stamps; or programs such as Medicaid, Medicare, and Social Security.¹³² As such, dependency is not a fixed mark to be measured, but rather modulates over the course of each vulnerable subject’s lifetime:¹³³

If vulnerability is understood to be an inherent and inevitable aspect of what it means to be human, and also as the source of social institutions and relationships, it must necessarily be the foundation for any social or political theory. The universal political and legal subject we construct

same state or federal policy making environments. *Id.* at 182-87.

130. See Martha Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 263-66 (2011) [hereinafter Fineman, *Responsive State*]. Fineman posits that the American version of equality, which focuses on sameness of treatment “brackets off vulnerability and dependency in order to be able to assume away the resulting disadvantages and burdens they place on individuals’ ability to generate options and, thereby, their ability to exercise autonomy.” *Id.* at 261.

131. Martha Fineman, *Dependencies*, 12-221 EMORY UNIV. SCH. OF L. LEGAL STUDS. RSCH. PAPER SERIES 1, 1 (2012).

132. Fineman discusses the tension among subsidies and the stigma attached to some that is not attached to others while highlighting the fact that everyone receives subsidies from the government—particularly when the tax system is in play. *Id.* at 2-3.

133. See Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 2-5, 9-10 (2008).

should reflect the reality that we all live and die within a fragile materiality that renders us constantly susceptible to both internal and external forces beyond our control. The social contract that binds society together should be fashioned around the concept of the vulnerable subject, a construct that would displace the autonomous and independent liberal subject that currently serves to define the core responsibilities of policy and law.¹³⁴

With the vulnerable subject and their inevitable dependency at the heart of this framework, vulnerability theory considers how the state and institutions, both public and private, provide (or, often, fail to provide) the requisite resilience for a vulnerable subject to successfully navigate their life course.¹³⁵ However, just as individuals are vulnerable, so too are the state and institutions which shape and support those individuals requiring support to provide resilience to vulnerable subjects and mediate their own vulnerabilities as well.¹³⁶

Vulnerability theory suggests that the problem with the way in which the state and society have historically conceived of equality is that the narrow confines of sameness of treatment do not sufficiently fill the gaps created by “growing inequality in wealth, position, and power that we have experienced in the U.S. over the past few decades.”¹³⁷ Both vulnerability and dependency are inevitable, universal, and constant, and thus individuals must become resilient through social institutions and a responsive state. As such, a responsive state must seek to find ways to build resilience so that dependency can be managed fairly by all individuals. The relationship between the state and the individual requires that the state build resilience among vulnerable and dependent individuals based on their vulnerabilities, not simply based on a conception of a liberal autonomous legal subject that is neither embodied nor contextualized.¹³⁸

“Resilience is perceived as necessary to both confront life’s challenges and to allow individuals to manage risk and to take advantage of life’s

134. See Martha Fineman, *Vulnerability, Resilience, and LGBT Youth*, 23 TEMP. POL. & C.R. L. REV. 307, 310 (2014).

135. See Fineman, *Responsive State*, *supra* note 130, at 255-57.

136. See *id.* at 256; see also Heather M. Kolinsky, *Situating the Corporation Within the Vulnerability Paradigm: What Impact Does Corporate Personhood Have on Vulnerability, Dependency, and Resilience*, 25 AM. U.J. GEN. SOC. POL’Y & L. 51 (2017) (discussing in more detail how corporations are situated within the vulnerability theory framework).

137. See Fineman, *Responsive State*, *supra* note 130, at 251. Fineman observes that rather than having any obligation to address these inequities, the state here is restrained from interference in “the name of individual liberty, autonomy, and paramount principles such as freedom of contract.” *Id.* at 251-52; see also Martha Fineman, *Equality, Still Elusive After All These Years*, in GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP 251, 256 (Joanna Grossman & Linda McClain eds., 2009).

138. The legal subject is the hypothetical person to whom laws apply. Kolinsky, *supra* note 136, at 57; see Fineman, *Responsive State*, *supra* note 130, at 251.

opportunities and enjoyments.”¹³⁹ There are five primary asset or resource conferring systems that allow an individual to build resilience: physical or material; human; relational; environmental; and existential.¹⁴⁰ Each asset conferred by these systems assists individuals in building resilience to vulnerabilities that they face over a lifetime that is both embodied and embedded.¹⁴¹

Ultimately, a vulnerability theory analysis begins with the premise that the state has a responsibility to act, and in acting, to avoid systems that unduly privilege one constituency over another. Instead, the state should create systems “in which all individuals can aspire to meaningfully realize their individual capabilities as fully as possible.”¹⁴² Thus, the expectation is that a responsive state will provide basic social goods such as housing, healthcare, and a living wage, and create a system whereby individuals can achieve substantive equality.¹⁴³ When a state acts passively, it is more likely to permit the private sphere and the free market to resolve inequities with little state involvement beyond formal equality and sameness-of-treatment protections.

Regardless of whether the state responds actively or chooses to remain passive, when the state acts, the goal should be to move toward substantive equality that accounts for vulnerabilities of all subjects—individual and institutional—to create resilience that supports the whole of society. The disparate burden on modern charitable nonprofits that

139. Kolinsky, *supra* note 136, at 58 (citing Jonathan Fineman, *The Vulnerable Subject at Work: A New Perspective on the Employment At-Will Debate*, 43 SW. L. REV. 275, 301 (2013) [hereinafter Fineman, *A New Perspective*]).

140. See PEADAR KIRBY, VULNERABILITY AND VIOLENCE: THE IMPACT OF GLOBALIZATION 55-72 (2006); Fineman, *The Vulnerable Subject at Work*, *supra* note 139, at 302. Physical assets are those such as housing, food, healthcare, and other resources that support individuals’ physical well-being in society. *Id.* Human assets include training, education, and other supports. *Id.* Relational assets include family, friends, and other social networks in individuals’ lives throughout their life course. *Id.* Environmental assets include individuals’ natural environment clean air, safe drinking water, plants, trees, animals, and the built environment. *Id.* Finally, existential assets include religion, philosophy, art and culture, and those things that provide people with emotional support and that can transcend the tangible. *Id.*

141. See generally *id.* “The embodied characteristics of the vulnerable legal subject reflect the material realities of bodily vulnerability—the flesh-and-blood vulnerability that is apparent at the beginning of life when we were totally dependent on others for our survival and that remains a constant component of our human experience.” Mark Roark & Lorna Fox O’Mahony, *Comparative Property Law and the Pandemic: Vulnerability Theory and Resilient Property in an Age of Crises*, 82 LA. L. REV. 789, 805-06 (2022) (internal quotation marks omitted). Fineman explains a vulnerable legal subject’s embedded characteristics as existing “even before the moment of birth” “in webs of economic, cultural, political, and social relationships and institutions.” Martha A. Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights Over Children’s Interests*, 46 U. BALT. L. REV. 57, 61 (2016). Embeddedness is the manifestation of these interwoven relational webs that create the “legitimate means through which we can gain the assets or resources necessary to mediate, negotiate, or cope with our human vulnerability.” *Id.*

142. Fineman, *Responsive State*, *supra* note 130, at 274.

143. See MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 285 (2004).

serve the unenfranchised reflects an instance in which an otherwise passive state response creates barriers to access resources that have been effectively outsourced to the free market/private sphere, thus harming vulnerable subjects. This is the case despite the state's efforts to mitigate some of the problems faced by modern charitable nonprofits that seek to engage in advocacy and lobbying. Those mitigating efforts—the creation of the expenditures test and 501(c)(4)s—fail to resolve the underlying problems with section 501(c)(3)'s limits on lobbying. Instead, they create even greater disparities between more privileged groups and those nonprofits that lack the infrastructure to access these resources and rely heavily on grants from private foundations and the state for funding.

B. Nonprofit Advocacy and the Vulnerable Subject

Investigating a system's impact on the vulnerable subject requires inquiry “into the organization, operation, and outcomes” of the identified structure and organizations that exist therein, and “through which societal resources are channeled.”¹⁴⁴ With respect to nonprofit advocacy, then, the question becomes: how does the state system that permits charitable nonprofits, provides tax preferences for them, and promotes their quasi-governmental goal of serving “the public good” intersect with the embedded, embodied experience of the unenfranchised people served by some of those nonprofits, as well as the nonprofits themselves? Put simply, does the tax code's treatment of modern charitable nonprofits disproportionately harm those entities that serve the unenfranchised? The simple answer is yes. The current treatment weighs more heavily on those that are least able to shoulder the burden and accomplishes few, if any, of its purported goals in the process.

Consider the federal tax code writ large. Generally, there is an underlying assumption that the IRC is neutral; indeed, that is the expressed intention.¹⁴⁵ However, in practice this neutrality is more myth than fact.¹⁴⁶ There is nothing about the IRC that is neutral in the literal

144. Fineman, *Responsive State*, *supra* note 130, at 274.

145. Neutrality in this sense is about the structure of taxes generally as well as the impact that tax policy has on individuals and institutions. Thus, one version of neutrality is considered when taxes are introduced, while the other focuses on the outcome of tax policy on different cohorts of citizens. See generally David Elkins, *A Critical Reassessment of the Role of Neutrality in International Taxation*, 40 *NW. J. INT'L L. & BUS.* 1, 10 (2019) (“The principle of neutrality posits that the best types of taxes are those that least affect behavior and thus minimize . . . deadweight loss. For instance, the concept of neutrality is one of the ideas behind traditional tax reform, which seeks to lower the tax rate by broadening the base. The broader the base the more difficult it is to avoid the tax by changing one's behavior, and the lower the rate the less incentive there is to avoid the tax by changing one's behavior.”).

146. Nancy Knauer observed:

The myth of taxpayer neutrality makes it impossible for policy makers to evaluate the

sense. Instead, policy choices are frequently made to serve specific governmental agendas.¹⁴⁷ The problem is that the act of bestowing tax preferences, regulating tax preferences, or removing tax preferences—in addition to imposing restrictions on the behavior of those who benefit from those preferences—can amplify inequality and act as a roadblock to sound policymaking rather than accomplish the original policy goals of a purportedly neutral and beneficial tax policy.¹⁴⁸

The results of Widner’s empirical study reflect that those charitable nonprofits that are least able to navigate the lobbying restrictions and regulations of the IRC are often those that could benefit from access to lobbying the most. Well-resourced organizations can take advantage of section 501(c)(4), successfully navigate the safe harbor of section 501(h), or take advantage of the statuses that are not available to those organizations that cannot afford the necessary professional assistance.¹⁴⁹ Conversely, charitable nonprofits that serve the unenfranchised are dissuaded from taking advantage of available lobbying within the system because of the fear of potential penalties and lack of administrative resources. Moreover, the private foundations that often underwrite their causes via grants are subject to additional restrictions that have an amplifying effect on the disincentives placed on these charitable nonprofits. In addition to the penalties a charitable nonprofit may suffer, the organization also risks losing its funding sources for any noncompliance with lobbying restrictions.¹⁵⁰

incidence of taxation along identity group lines. Accordingly, tax policy can lead to unintended consequences where the tax code ends up reinforcing existing disparities or creating undesirable incentives. These unintended consequences would qualify as implicit bias—the natural result of a system where “tax legislation intersects with . . . relationships, norms, and economic behavior.” An example of implicit gender bias would be where a tax code privileges a certain type of economic behavior that is more often associated with men.

Nancy J. Knauer, *Critical Tax Policy: A Pathway to Reform?*, 9 NW. J. L. & SOC. POL’Y 206, 235 (2014) (quoting *Issues Brief: Gender Equality and Poverty Reduction*, U.N. DEV. PROGRAMME, Apr. 2010, at 4).

147. Sometimes these tax policy choices can be good—encouraging health care insurance, retirement savings, and higher education, as well as deterring smoking or drinking. Sometimes these tax policy choices can unduly burden or fail to encourage those for whom the policy is out of reach—such as subsidies for home ownership.

148. See, e.g., A. Mechele Dickerson, *Systemic Racism and Housing*, 70 EMORY L.J. 1535, 1555-56 (2021) (“Race-neutral federal tax homeownership subsidies perpetuate and exacerbate existing racial disparities in housing and disproportionately help white homeowners. U.S. housing policies continue to favor homeowners, who receive roughly 70% of all federal housing subsidies, higher-income homeowners receive a disproportionate share of federal tax subsidies, and higher income families are mostly white.” (citing WILL FISCHER & BARBARA SARD, CTR. ON BUDGET & POL’Y PRIORITIES, CHART BOOK: FEDERAL HOUSING SPENDING IS POORLY MATCHED TO NEED 5 (2017))); Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1365 (2000) (discussing the discriminatory nature of the home mortgage interest deduction).

149. See Manny, *supra* note 57, at 787.

150. See BERRY & ARONS, *supra* note 10, at 161-62.

V. CREATING RESILIENCE FOR NONPROFITS THAT SERVE THE UNENFRANCHISED

While an ideal solution would allow tax-exempt charitable nonprofits, including private foundations, to use funds as they see fit without restriction, it may not be the easiest strategy to implement given the current tax structure and political climate. With that said, the lobbying and advocacy limitations imposed on tax-exempt charitable nonprofits and private foundations in the twentieth century make little sense in the era of *Citizens United v. FEC*,¹⁵¹ the expansion of corporate personhood, the existence of affinity 501(c)(4)s with clear political agendas,¹⁵² and that of social welfare organizations more generally.¹⁵³ This is particularly true given that the impetus for the earliest tax exemptions and accompanying restrictions lack a cohesive origin story that justifies the ongoing imposition of those restrictions.¹⁵⁴

To create a more responsive state that builds resilience, the state needs to move beyond thinking of nonprofit lobbying as an effort to influence the national legislative agenda for “selfish” reasons, with whatever perceived evils that may have carried with it. Instead, it must consider how the state can provide more equitable access to channels of communication with the legislators who enact policy at a critical juncture: when policy agendas are established. The critical flashpoint for policy changes to the status quo is not when legislators are ready to cast a vote, but rather at the agenda-setting stage.¹⁵⁵ To effect meaningful change, groups must get policymakers to pay attention to their issues, an already challenging task for organizations serving the unenfranchised.¹⁵⁶

The current state response to advocacy by modern charitable nonprofits has created a complex system that deters those who are the most politically disadvantaged from accessing funds to allow them to engage at effective points in time during the legislative process. At the same time,

151. 558 U.S. 310 (2010).

152. See Marilyn E. Phelan & Ryan P. Phelan, *The Aftermath of Citizens United, Speech Now, and McCutcheon- A Pathway to Buying Congress and the Presidency?*, 39 QUINNIPIAC L. REV. 73, 89-95 (2020).

153. “Nothing in the legislative history of the tax exemption or charitable deduction substantiates tax-favored treatment as a way for government or the public to intrude on the autonomy and independence of fundamentally private enterprises.” Brody & Tyler, *supra* note 37, at 600. “Why limit lobbying or ban political activity when legislative or even political change might most efficiently accomplish a charitable purpose?” *Id.* at 602.

154. See Note, *Regulating the Political Activity of Foundations*, *supra* note 57, at 1845 (neither the extent nor rationale for the changes to tax policy vis a vis private foundation was ever clearly enunciated); Brody & Tyler, *supra* note 37, at 603 (noting that there was no “original bargain” reflected in the legislative history). Limits to grassroots lobbying seemingly sprang “out of some unidentified fear.” Manny, *supra* note 57, at 777.

155. BAUMGARTNER ET AL., *supra* note 97.

156. *Id.*

the current state response allows those organizations with more resources to end run the system as implemented. Widner's study, building on Berry's previous research, reflects what is instinctively knowable—too much gatekeeping of lobbying keeps out those that cannot afford the appropriate support to access the right to lobby.¹⁵⁷

To resolve this, the state should endeavor to provide the unenfranchised who are often shut out of policy conversations with more meaningful access to those conversations. The underlying tax policies in place were not purposefully enacted to silence those least able to advocate on their own behalf. But that is their impact. Current tax policy deters the most disadvantaged groups from lobbying, while encouraging those who have ready access to resources to avail themselves of lobbying, thereby ultimately unduly burdening charitable nonprofit entities advocating for the voteless and voiceless.

Evolving markets, social dynamics, and the modern political process necessitate a reexamination of the efficacy and purpose of the existing regulation of charitable nonprofits in the federal tax system. Barriers should be stripped away so that these organizations can perform optimally and effectively for their constituents. As the state has decided not to address the needs of these varying constituencies directly, instead relying on the private charitable sector to perform necessary work, the state should, in fact, accept tax exemptions and preferences as the realistic price of doing business. Only in allowing charitable nonprofits to advocate and lobby on behalf of their constituencies can the state effectively, systemically support all individuals.

The simplest solution, and one similar to proposals by other scholars, would be to remove “ambiguous, confusing, and ineffective” lobbying restrictions for 501(c)(3)s.¹⁵⁸ Manny provides reasons for removal that resonate with vulnerability theory's framework: (1) “public charities permit voices less often heard in the discourse to participate”; (2) lobbying is an effective and efficient way to engage in formulating public policy; (3) a citizen's right to petition government is fundamental to democracy; and (4) lobbying promotes social welfare.¹⁵⁹ Thus, removing restrictions centers the benefit on the vulnerable legal subject and the charitable institution providing voice and value to that individual. Manny proposed that Congress amend section 501(c)(3) to permit unlimited legislative activity by all public charities, or alternatively, make the expenditures test the default test for lobbying activity.¹⁶⁰ Definitions of lobbying and advocacy that are more permissive with respect to

157. BERRY & ARONS, *supra* note 10, at 147-50.

158. See Manny, *supra* note 57, at 759-60.

159. *Id.* at 783.

160. *Id.*

nonprofits' advocacy on behalf of their identifiable constituencies for relevant issues should also be crafted to help center lobbying on serving an embedded, embodied vulnerable legal subject.

Further, if advocacy (including lobbying) and pure political activity (in the form of candidate support or opposition) are disaggregated between types of 501(c) organizations, then that more nuanced distinction could cleave apart more objectionable practices from more desirable forms of engagement and create space for all tax-exempt charitable nonprofits to advocate for their identified constituencies without complex restrictions or regulations. Doing so would permit these organizations to address the needs of their constituents throughout the legislative process, including at the critical agenda-setting stage.

As a counterbalance, any access to pure political activity, and its offshoots, could continue to be limited. Restrictions on political advocacy that is directed solely at a specific political candidate or party would continue for 501(c)(3)s and that type of advocacy would remain within the realm of 501(c)(4)s and other social welfare organizations to the extent permitted.¹⁶¹ As Berry found, and Widner's study reinforces, 501(c)(3)s are often unable or unwilling to even take advantage of the substantial part or expenditures allowances for fear of losing their status.¹⁶² Continuing to restrict direct political action while permitting unrestricted lobbying and legislative advocacy would serve the underlying goals of tax preferences for 501(c)(3)s, simplify the 501(c)(3)s operating parameters, and give 501(c)(3)s a bright line to follow when conducting their advocacy.

While removing lobbying restrictions for 501(c)(3)s would solve an immediate problem, the reality is that many charitable nonprofits that serve the unenfranchised receive the lion's share of their funding from private foundations which are themselves subject to a lobbying ban.¹⁶³ The ban on lobbying for private foundations should also be removed, at least in the context of providing financial support to 501(c)(3)s that would be permitted to lobby and engage in legislative advocacy. Simplified funding sources, perhaps through an account with restrictions akin to a Roth IRA-type vehicle, or simply removing the requirement that general grants cannot be used for lobbying, would permit a free flow of resources

161. See *supra* Section II.B. and notes 78-79. 501(c)(4)s are generally unavailable to charitable nonprofits that serve the unenfranchised because those organizations do not have the resources to support a separate advocacy and lobbying arm. As noted previously, in the study, every one of the organizations that dedicate a substantial amount of their advocacy efforts to the interests of the unenfranchised are incorporated as 501(c)(3)s. See *supra* Section III.B.

162. See BERRY & ARONS, *supra* note 10, at 161-62.

163. Private foundations also have safe harbors allowing contributions to 501(c)(3)s, but removing some of the reporting requirements, or creating a system that allows 501(c)(3)s to proceed as they see fit in terms of advocacy or lobbying would minimize the risk to both the foundation and the 501(c)(3).

to charitable nonprofits that rely on private foundations for funding. The amount of unrestricted lobbying funds could still be capped, but any limitation should minimize the administrative burden on the charitable nonprofits receiving the funds. The funds could even be earmarked in a specific grant *for* lobbying, a required contribution amount could be set for each year, and reporting requirements could be streamlined.

With each of these proposed solutions, the intention is to create an unfettered flow of income to charitable nonprofits that bypasses the administrative headaches and practical exclusions of 501(h) and 501(c)(4)s, and the substantial part test, to create a system that would allow lobbying dollars to be allocated on an ongoing basis to groups that are most in need of lobbying support. A state response that relaxed the restrictions on 501(c)(3) lobbying and removed administrative barriers to funding through private foundations would provide resilience to the charitable nonprofits that serve the unenfranchised as well as their constituents.

Such proposals are likely to face pushback centered on the government's aversion to "subsidizing" lobbying and concerns about selfish and self-dealing motives, but the reality is that the government routinely provides tax exemptions and preferences for a multitude of reasons.¹⁶⁴ In the absence of an active response by the state, the state should, at a minimum, acknowledge the need to support organizations that provide resilience the state itself has chosen to outsource to the charitable community.

Charitable giving existed before tax deductions and tax exemptions, and the state chose to take advantage of that. At the outset of the creation of the IRC, the state purposefully acted to amplify the public good gained from the instinct to give charitably through tax expenditures and preferences, and these ultimately benefit the state.¹⁶⁵ Relying on that charitable instinct and using it to support communities in the most efficient way should include lobbying and advocacy that permits charitable nonprofits to serve those communities as effectively as possible. This is even more critical when a charitable nonprofit entity

164. See Brody & Tyler, *supra* note 37, at 600, 605-07 (noting that the tax-favored status for nonprofits is not qualitatively different from other forms of tax-favored treatment afforded individuals and businesses). "Neither the charitable deduction nor the income-tax exemption is limited to those organizations that lessen the burdens of government." *Bob Jones Univ. v. United States*, 461 U.S. 576, 601 (1983) (Powell, J., concurring).

165. See Brody & Tyler, *supra* note 37, at 603 ("[T]he absence of a single, comprehensive explanation for the exemptions and charitable deduction, and the dearth of specific legislative history, support giving due deference to longevity and an appropriate unwillingness to discount long-standing, centuries-old practices and policies that still work. Moreover, the absence of an explanation implicitly recognizes that foundations and charities benefit society in financial and nonfinancial ways that are of extraordinary importance that should be encouraged and not disturbed lightly.").

serves groups that have no other voice in policy or the body politic. The unenfranchised do not have the same support that others have, and do not have the same access to current tax-preferred vehicles. At the same time, meaningful change is only going to happen if policy changes occur.

VI. CONCLUSION

Where the state has actively chosen to outsource social supports to charitable organizations in lieu of providing such services itself, the state needs to support, and not impede, those charitable organizations' efforts to provide resilience to vulnerable subjects. The state cannot and should not have it both ways; responsiveness requires attention to results, and here, the ongoing limitations on lobbying disparately impact vulnerable organizations. The state can continue to maintain a system where the safe default for charitable nonprofits that serve the unenfranchised is to—for example, continue to advocate for paying children's dental care one child at a time—or the state can allow charitable nonprofits to advocate for universal dental coverage for minors where it can be the most effective: at the agenda-setting stage. Allowing organizations to optimize their goals through lobbying and advocacy supports a proactive approach to resolving social issues, while limits on lobbying maintain the reactive status quo and inexcusably limit a charitable nonprofit's ability to fulfill its purpose.

The reality for modern charitable nonprofits that serve the unenfranchised, as reflected in Widner's empirical research, and the ineffectiveness of lobbying limitations that attempt to deter perceived bad actors, suggest Congress should amend the IRC to permit legislative advocacy and 501(c)(3) lobbying. Regulation of targeted political activity, particularly support for or opposition to a particular candidate, can and should continue. Further, how funds flow from private foundations to these charitable nonprofits should also be updated and the current restrictions on the use of those funds should be removed to improve both the resiliency and effectiveness of those charitable nonprofits and ultimately the resilience of the constituencies they serve.