EXAMINING THE LANDSCAPE OF § 501(C)(4) SOCIAL WELFARE ORGANIZATIONS

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INTRODUCTION

After the Supreme Court's 2010 decision in *Citizens United* permitting campaign contributions from corporations[1] and the 2013 admission by the Internal Revenue Service ("IRS") of engaging in overly zealous review of applications for exemption from a number of conservative groups,[2] discussion regarding social welfare organiza-

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1. Citizens United v. FEC, 558 U.S. 310 (2010).

2. A 2013 report from the Treasury Inspector General for Tax Administration concluded that "the IRS used inappropriate criteria that identified for review Tea Party and other organizations applying for tax-exempt status based upon their names or policy positions instead of indications of potential political campaign intervention." TREASURY INSPECTOR GEN. FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW (2013), https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf; *see generally* S. REP. NO. 114-119 (2015); *see also* Lily Kahng, *The IRS Tea Party Controversy and Administrative*

tions exempt under § 501(c)(4) of the Internal Revenue Code (the "Code")[3] has centered on their growing role as the source of so-called dark money in electoral campaigns.[4] In their influential reference book, Hill and Mancino assert: "Section 501(c)(4) is now most commonly used for advocacy organizations engaged in a range of lobbying and campaign activities."[5] Bruce Hopkins in his guidebook concurs: "[T]he principal type of organization that is tax-exempt by reason of this category of exemption is one that is advocacy-oriented—in the sense of focus on community, state, and/or national policymaking, including lobbying . . . ."[6] That is, although § 501(c)(4) organizations have long had the ability to engage in advocacy, this role has taken on increased prominence in public discourse.

The ability of § 501(c)(4) social welfare organizations to engage in lobbying and campaign intervention distinguishes them from § 501(c)(3) exempt organizations, which we generally refer to as charities.[7] Social welfare organizations can lobby without limit and, of particular importance, can engage in campaign intervention—supporting or opposing candidates for public office—so long as such activity is not their primary activity.[8] Applicable tax regulations require that social welfare organizations operate "primarily for the purpose of bringing about civic betterments and social improvements,"[9] and social welfare does not include campaign intervention.[10] The IRS, however, has never officially defined what primary activity means.[11] This failure has left the upper limits on the amount of permitted campaign intervention by § 501(c)(4) organizations unclear, and many advisors

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Discretion, 99 CORNELL L. REV. ONLINE 41 (2013), http://cornelllawreview.org/files/2013/09/99CLRO411.pdf (using the Tea Party controversy to examine the IRS's "informal" discretion outside of the Administrative Procedure Act).

3. I.R.C. § 501(c)(4) (2012).

4. Dark money refers to money from groups that are able to influence elections without disclosing the source of their funds. *See Dark Money,* OPENSECRETS, https://www.opensecrets.org/dark-money/ (last visited Jan. 28, 2019) (explaining various aspects of the phenomenon of dark money); *see generally* JANE MEYER, DARK MONEY (2016) (discussing dark money in the context of the American conservative movement).

5. FRANCES R. HILL & DOUGLAS M. MANCINO, TAXATION OF EXEMPT ORGANIZATIONS ¶ 13.01, at 13-2 (2002).

6. BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS 389 (9th ed. 2009).

7. *Cf.* I.R.C. § 501(c)(3)–(4).

8. Treas. Reg. § 1.501(c)(4)-1(a)(2) (as amended in 1990).

9. *Id.* § 1.501(c)(4)-1(a)(2)(i).

10. *Id.* § 1.501(c)(4)-1(a)(2)(ii).

11. *See* Ellen P. Aprill, *A Case Study of Legislation vs. Regulation: Defining Political Campaign Intervention under Federal Tax Law*, 63 DUKE L.J. 1635, 1636–37 (2014).

to organizations take the position that campaign intervention can constitute up to 49% of a social welfare organization's activities.[12] Such freedom to electioneer comes with a tax price: Donations to social welfare organizations are not deductible as charitable contributions.[13] In contrast, organizations exempt as charities under § 501(c)(3) can lobby only to a limited extent and are prohibited completely from engaging in campaign intervention.[14] Donations to them, however, are deductible from income tax as charitable contributions.[15]

While the role of § 501(c)(4) organizations in lobbying and campaigns activities is of the utmost policy importance, as other symposium papers discuss in detail,[16] recent empirical work, particularly a 2016 study from the Urban Institute, disputes the prominence of political activity among § 501(c)(4) organizations. This 2016 study found the same result whether examining the universe of § 501(c)(4) organizations as a whole or only those organized since *Citizens United*.[17] Jeremy Koulish, the author of the Urban Institute study, emphasizes that "the rules governing political activity are of little to no consequence for most 501(c)(4) organizations because they are not involved in advocacy activities, let alone electoral politics."[18] Another study concludes that "a large proportion of 501(c)(4) organizations are not politically or electorally active. Among those that are, the amount of money spent on influencing elections is very small."[19]

In short, to focus only on the political activities of § 501(c)(4) organizations misrepresents and misunderstands the role and impact of

12. *See IRS: Reform Groups Call on IRS to Clarify 49 Percent Approach*, CAMPAIGN LEGAL CTR. (Apr. 3, 2015), http://www.campaignlegalcenter.org/news/press-releases/irs-reform-groups-call-irs-clarify-49-percent-approach.

13. *Donations to Section 501(c)(4) Organizations*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/other-non-profits/donations-to-section-501 c4-organizations (last updated Apr. 2, 2018).

14. Section 501(c)(3) requires that to be exempt under that subsection, "no substantial part" of the organization's activities consist of attempting "to influence legislation" and that it "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." I.R.C. § 501(c)(3) (2012).

15. *Id.* § 170(c)(2).

16. *See, e.g.*, Roger Colinvaux, *Social Welfare and Political Organizations: Ending the Plague of Inconsistency*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 481 (2018).

17. JEREMY KOULISH, URBAN INST., FROM CAMPS TO CAMPAIGN FUNDS: THE HISTORY, ANATOMY, AND ACTIVITIES OF 501(C)(4) ORGANIZATIONS 26–27 (2016) [hereinafter KOULISH]. The findings of the study are discussed in detail at *infra* Part IV.

18. *Id*. at 3.

19. Jeff Krehely & Kendall Gollday, The Scope and Activities of 501(c)(4) Social Welfare Organizations: Fact Versus Fantasy 24 (2001) (unpublished manuscript) (on file with author and cited with permission). This study, admittedly, predates *Citizens United.*

the subsector. As the IRS observed more than twenty-five years ago, "section 501(c)(4) remains in some degree a catch-all for presumptively beneficial nonprofit organizations that resist classification under the other exempting provisions of the Code."[20] The 2016 Urban Institute study portrays § 501(c)(4) as "a sort of dumping ground for organizations otherwise difficult to categorize."[21] The author of the study characterizes the subsector as containing a "dizzying array of organizational missions, structures, sizes, and activities."[22]

John Simon, Harvey Dale and Laura Chisolm have written about the "border control" functions applicable to charitable organizations, in particular analyzing the tax laws that apply to exempt organizations as "fences—or at least guard rails" to guard against charitable incursion into governmental and commercial spheres.[23] That is, border control rules work to ensure that exempt organizations carry out their exempt functions and do not stray into other domains. I suggest that § 501(c)(4) as a whole carries out this border control function by providing a home for entities that are almost but not quite eligible under § 501(c)(3) or other provisions of § 501(c).[24] By doing so, it has prevented pressure on and distortions of these other provisions. Rather than a dumping ground, I would call the subsector a messy no man's land or, perhaps, a land with fences that are, as described below, full of holes.

Mixing and pushing this metaphor further, I acknowledge that this no man's land is something like the famous optical illusion that can be seen either as a vase or a pair of profiles. Rather than protecting the integrity of § 501(c)(3), the uncertain boundaries of § 501(c)(4) can also operate in the opposite direction—undermining the limits applicable to charity and thereby creating a dangerous no man's land for the exempt sector as a whole. Use of § 501(c)(4) organizations as

20. Internal Revenue Service, *Social Welfare: What Does It Mean? How Much Private Benefit Is Permissible? What Is a Community?*, *in* EXEMPT ORGANIZATIONS: CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1981 (1982), https://www.irs.gov/pub/irs-tege/eotopicg81.pdf [hereinafter 1981 CPE TEXT]. The chapter is not paginated.

21. KOULISH, *supra* note 17, at 4.

22. *Id*. at 3.

23. John Simon, Harvey Dale & Laura Chisolm, *The Federal Tax Treatment of Charitable Organizations*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 267, 284-92 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006).

24. Earlier NCPL major conferences have examined the boundaries of § 501(c)(3) and the role of various doctrines in corralling § 501(c)(3). *See Agenda: Elasticity of the Boundaries: What Is (and Isn't) Charitable?*, NAT'L CTR. ON PHILANTHROPY AND THE LAW, http://ncpl.law.nyu.edu/wp-content/uploads/2014/07/2015-Formal-Agenda.pdf (last visited Jan. 28, 2019). Here I examine an entire subsection of § 501(c) as an exercise in border control.

grantmaking entities free of the restrictions imposed on private foundations,[25] which I discuss briefly below and which is the subject of another symposium paper,[26] offers the best example of such deployment of § 501(c)(4). Developments in the law over the past decades, such as changes in election law, have also undermined this border control function of § 501(c)(4) in other areas, also discussed below.[27] These changes have opened the door for new, and possibly questionable, uses of § 501(c)(4) organizations.

Moreover, provisions enacted as part of the 2017 tax legislation, in particular a substantially increased standard deduction and limits on the itemized deduction for state and local taxes, may well spur donations to § 501(c)(4) instead of § 501(c)(3) organizations.[28] A large number of taxpayers will no longer itemize deductions, including the charitable contribution deduction.[29] Without a tax incentive for charitable contributions, some of these taxpayers may choose instead to make nondeductible contributions to § 501(c)(4) organizations because of their greater flexibility, including the ability to engage in political activities. As a result, the role of § 501(c)(4) in in our tax system and its relationship to § 501(c)(3) may well differ considerably going forward.

The no man's zone of § 501(c)(4) has also witnessed a variety of skirmishes in the past. Both grant of exemption under § 501(c)(4) and denial of such exemption have prompted Congress to enact various pieces of legislation to clarify rules around exempt status for certain organizations and their activities.[30] Congress could adapt other legislation it has enacted in the past involving other exempt organizations,

25. A private foundation is a particular type of § 501(c)(3) organization. Unlike the entities known as public charities, funding for a private foundation typically comes from a single family, individual or corporation. *See* I.R.C. § 509 (2012) (defining private foundation). Private foundations generally support public charities through grants, rather than engaging directly in charitable activities. *See What Is a Private Foundation?,* FOUND. SOURCE, https://www.foundationsource.com/learn-about-foundations/what-is-a-private-foundation/ (last visited Jan. 28, 2019) (comparing public charities and private foundations). Private foundations are subject to a number of onerous excise taxes that operate as prohibitions on certain activities, such as self-dealing, excessive business holdings, imprudent investments, and lobbying. *See* I.R.C. §§ 4941–4945 (2012) (providing for the excise taxes discussed above).

26. David S. Miller, *Social Welfare Organizations as Grantmakers*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 413 (2018) [hereinafter Miller, *Grantmakers*].

27. *See infra* text accompanying notes 181-185.

28. *See infra* Part IX.

29. *See infra* notes 351–352.

30. *See infra* Part VII.

such as taxing certain categories of their income,[31] to further clarify taxation under § 501(c)(4) itself.

Part I gives an overview of the applicable law. Part II reviews the legislative history of the subsection. Part III describes the make-up of organizations exempt under § 501(c)(4). Part IV canvasses the difficulties in constructing a coherent characterization of § 501(c)(4). Part V examines the border control function of § 501(c)(4). Part VI investigates the border skirmishes involving § 501(c)(4) that have prompted administrative, judicial, and congressional action. Part VII discusses possible reforms, in particular suggesting modifications to a proposal Professor Daniel Halperin has made—taxing the investment income of § 501(c)(4) organizations that operate in ways similar to mutual benefit organizations.[32] Part VIII discusses the possible future of § 501(c)(4) after the 2017 tax legislation.

I.
Overview of Applicable Law

Section 501(c)(4) exempts "social welfare organizations" from income tax.[33] The applicable regulations amplify this language, but not especially helpfully: "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

31. *See infra* text accompanying notes 263 and 292 (describing tax treatment of homeowners' associations and social clubs).

32. Daniel Halperin, *The Tax Exemption Under I.R.C. § 501(c)(4)*, 21 N.Y.U. J. Legis. & Pub. Pol'y 519 (2018) [hereinafter Halperin, *I.R.C. § 501(c)(4)*].

33. Section 501(c)(4) also exempts "local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes." I.R.C. § 501(c)(4)(A) (2012). This Article focuses on social welfare organizations, although it does discuss the addition of exemption for local associations of employees in the section on legislative history. Moreover, § 501(c)(4) organizations are often part of a network of organizations, sometimes including both for-profit and non-profit organizations. For example, the National Rifle Association, a § 501(c)(4) organization, runs four affiliated charities and a political action committee. *See* Samuel Brunson, *Is the NRA an Educational Organization? A Lobby Group? A Nonprofit? A Media Outlet? Yes*, The Conversation (March 12, 2018, 6:41 AM), https://theconversation.com/is-the-nra-an-educational-organization-a-lobby-group-a-nonprofit-a-media-outlet-yes-92806 (discussing the NRA's affiliated entities and their tax treatment); *see generally* Hill & Mancino, *supra* note 5, at ¶ 27.06 (discussing the formation and operation of § 501(c)(3) subsidiaries); Hopkins, *supra* note 6, 987–1053 (discussing the tax treatment of complex structures involving tax-exempt subsidiaries, parent organizations, and joint ventures). Hill and Mancino observe that "hospitals have developed the most elaborate structure." Hill & Mancino, *supra* note 5, at ¶ 27.01. This Article does not examine the role of § 501(c)(4) organizations as part of a network.

the community."[34] One court has explained in language no more edifying than the language in the regulations that a § 501(c)(4) organization must be a "community movement designed to accomplish community ends."[35]

Indeed, "[s]ince the test for exemption under IRC 501(c)(4) looks to the organization's primary activities, an organization exempt under IRC 501(c)(4) may engage in substantial non-exempt activities."[36] Thus, as noted earlier, a § 501(c)(4) organization can lobby without limit for issues related to its exempt purpose[37] and engage in candidate campaign intervention so long as such intervention is not its primary activity.[38] Similarly, some amount of private benefit is permissible,[39] although "[a]n organization that primarily benefits a private group of citizens cannot qualify for IRC 501(c)(4) status."[40] However, under relatively recent statutory language,[41] the inurement doctrine does apply; that is, insiders may not receive net earnings of a § 501(c)(4) organization.[42] The applicable regulations also mandate that no § 501(c)(4) organization can have as its primary activity "operating a social club for the benefit, pleasure, or recreation of its members" or

34. Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (as amended in 1990).

35. Erie Endowment v. United States, 316 F.2d 151, 156 (3d Cir. 1963).

36. John Francis Reilly, Carter C. Hull & Barbara A. Braig Allen, *IRC 501(c)(4) Organizations*, *in* EXEMPT ORGANIZATIONS: TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2003, I-25 (2004), https://www.irs.gov/pub/irs-tege/eotopici03.pdf [hereinafter 2003 CPE TEXT]. In contrast, organizations exempt under § 501(c)(3) must be organized "for one or more exempt *purposes.*" Treas. Reg. § 1.501(c)(3)-1(b)(1) (as amended in 2017) (emphasis added). The 2003 CPE TEXT contrasts the primary activity test applicable to § 501(c)(4) organizations with the rule of *Better Business Bureau v. United States*, 326 U.S. 279 (1945), which according to the 2003 CPE Text stands for the proposition that "the presence of a single noncharitable purpose, if substantial in nature, will disqualify an organization from IRC 501(c)(3) status". 2003 CPE TEXT at I-25. Courts, however, have applied *Better Business Bureau* to § 501(c)(4) organizations. *See, e.g.*, Contracting Plumbers Coop. Restoration Corp. v. United States, 488 F.2d 684, 686 (2d Cir. 1974) (adhering to the rule in *Better Business Bureau* to reverse decision of the tax court); *see generally* Miriam Galston, Vision Service Plan v. U.S.*: Implications for Campaign Activities of 501(c)(4)s*, 53 EXEMPT ORG. TAX REV. 165 (2006) (elucidating ambiguities in the IRS's understanding of exempt purpose). As this case law and scholarship make clear, how "activities" relate to "purposes" is difficult to discern.

37. *See* Rev. Rul. 71-350, 1971-2 C.B. 176 (finding that an organization created to represent the public interest at legislative and administrative hearings pertaining to tax law could qualify for exemption under § 501(c)(4)).

38. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii).

39. 1981 CPE TEXT, *supra* note 20 (comparing permissible private benefit under §§ 501(c)(3) and 501(c)(4)).

40. 2003 CPE TEXT, *supra* note 36, at I-3.

41. I.R.C. § 501(c)(4)(B) (2012). See *infra* text accompanying notes 69-73 for a discussion of the history of this provision.

42. *Id.*

"carrying on a business with the general public in a manner similar to organizations which are operated for profit."[43]

Section 501(c)(4) organizations are not required to file with the IRS for recognition of exempt status.[44] Nonetheless, they can choose to apply for exemption in order, for example, to have assurance of their exempt category. If they file an application, they now do so on IRS Form 1024-A, a new form issued in January 2018 and developed solely for § 501(c)(4) organizations.[45] This form requires an applicant to "describe all of your past, present, and planned activities in a narrative, including the percentage of time and funds spent on these activities" as well as a specific question about past or planned campaign intervention.[46]

In addition, § 501(c)(4) organizations, like other exempt organizations, including § 501(c)(3) organizations, are required to file the Annual Information Return, Form 990 or 990EZ, unless they are below the filing trigger.[47] The Form 990, in addition to detailed financial information, requires the organization to describe the organization's mission, governance structure, and any significant changes in program services.[48] Finally, under a provision enacted in 2015, organizations

43. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii).

44. *See* INTERNAL REVENUE SERV., INSTRUCTIONS FOR FORM 1024-A 1 (2018), https://www.irs.gov/pub/irs-pdf/i1024a.pdf.

45. *See Form 1024-A: Application for Recognition of Exemption Under Section 501(c)(4) of the Internal Revenue Code*, INTERNAL REVENUE SERVICE (Jan. 2018), https://www.irs.gov/pub/irs-pdf/f1024a.pdf [hereinafter *Form 1024-A*]. Prior to development of Form 1024-A, § 501(c)(4) organizations applied for exemption on a general Form 1024. *See Form 1024: Application for Recognition of Exemption Under Section 501(a)*, INTERNAL REVENUE SERVICE (rev. Jan. 2018), https://www.irs.gov/pub/irs-pdf/f1024.pdf [hereinafter *Form 1024*]. Section 501(c)(3) organizations have their own application form. *See Form 1023: Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code*, INTERNAL REVENUE SERVICE (rev. Dec. 2017), https://www.irs.gov/pub/irs-pdf/f1023.pdf [hereinafter *Form 1023*]. Section 501(c)(3) organizations, unlike § 501(c)(4) organizations, are required to file an application for exemption to obtain exempt status. *See* I.R.C. § 508(a) (requiring new § 501(c)(3) organizations to apply for recognition of exempt status).

46. *Form 1024-A*, *supra* note 45, Part III, Question 1 and Part V, Question 1.

47. *See Form 990: Return of Organization Exempt from Income Tax*, INTERNAL REVENUE SERVICE (2017), https://www.irs.gov/pub/irs-pdf/f990.pdf [hereinafter *Form 990*]. Currently, § 501(c)(4) organizations with gross receipts normally less than $50,000 may file 990-N, an electronic post card; those with gross receipts less than $200,000 and total assets less than $500,000 may file the less detailed Form 990-EZ; organizations with gross receipts equal to or more than $200,000 and total assets equal to or more than $500,00 file Form 990. *See Form 990 Series Which Forms Do Exempt Organizations File Filing Phase In*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/form-990-series-which-forms-do-exempt-organizations-file-filing-phase-in (last updated July 17, 2018).

48. *See Form 990*, *supra* note 47.

must notify the IRS of intent to operate as a § 501(c)(4) organization within 60 days of formation.[49] This notice requirement applies whether or not the organization later files an application for recognition of exemption, which remains optional.[50] This notice requirement does not apply to other organizations exempt under § 501(c).[51]

Also, as noted earlier, with limited exceptions,[52] donor contributions to § 501(c)(4) organizations are not deductible as charitable contributions under § 170.[53] As is the case with other § 501(c) organizations, including § 501(c)(3) entities, donations of appreciated property do not require recognition of built-in gain.[54] Again, like other § 501(c) organizations, including § 501(c)(3) charitable organizations, § 501(c)(4) organizations enjoy exemption from tax on income, including investment income, so long as the income is not subject to the unrelated business tax.[55] In addition, under § 2501(a)(6), lifetime gifts to § 501(c)(4) organizations as well as § 501(c)(5) labor organizations and § 501(c)(6) trade associations organizations are not subject to gift tax. No parallel provision applies for estate tax purposes. In contrast, charitable contributions to § 501(c)(3) organizations are deductible for both gift and estate tax purposes.[56]

In short, for the most part, the Code treats § 501(c)(4) organizations in the same way as other noncharitable exempt organizations. Many of the same rules also apply to § 501(c)(3) organizations, but those organizations have more favorable treatment in that their donors are able to deduct contributions for income, gift, and estate tax purposes.

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49. Protecting Americans from Tax Hikes Act of 2015, Pub. L. No. 114-113, § 405, 129 Stat. 2242, 3118 [hereinafter the PATH Act] (adding § 506 to the Internal Revenue Code of 1986, as amended). *See also infra* text accompanying notes 68-69.

50. *See infra* text accompanying notes 80–81.

51. *Id*.

52. Contributions to organizations serving war veterans and volunteer fire departments are deductible in certain situations. *See Donations to Section 501(c)(4) Organizations*, *supra* note 13.

53. In some cases, contributions are deductible as business expenses under § 162. *See* Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations after* Citizens United, 10 ELECTION L. J. 363, 377-79 (2011) (discussing how § 162(e) limits the deductibility of membership dues for § 501(c)(4) organizations).

54. *Cf.* I.R.C. § 84(a) (2012) (requiring recognition of gain on transfer of appreciated property to political organizations).

55. *See generally* U.S. DEP'T OF THE TREASURY, I.R.S. PUB. NO. 598, TAX ON UNRELATED BUSINESS INCOME OF EXEMPT ORGANIZATIONS (2017) (providing guidance to taxpayers concerning unrelated business income tax).

56. *See* I.R.C. § 2522; *id.* § 2055.

II.
Legislative History

As is the case with much tax legislation, the legislative history of § 501(c)(4) reflects a mixture of interest group influence, perceived abuses of the system, anecdotes of uncertain reliability, and the concerns of individual members of Congress.[57] It offers little insight into the intended purpose and scope of the provision.

The predecessor to § 501(c)(4) was enacted without legislative comment as part of the Tariff Act of 1913, which implemented an income tax.[58] The exemption provision applied to what are now many different categories of exempt organizations under § 501(c).[59] The 1913 provision stated that the income tax would not apply to any

> labor, agricultural, or horticultural organizations, or to mutual savings banks not having a capital stock represented by shares, or to fraternal beneficiary societies, orders, or associations operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system and providing for the payment of life, sick, accident, and other benefits to the members of such societies . . . nor to cemetery companies, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual, nor to business leagues nor to chambers of commerce or boards of trade, not organized for profit or no part of the net income of which inures to the benefit of the private stockholder or individual; *nor to any civic league or organi-*

57. *See, e.g.,* Erik M. Jensen, *Legislative and Regulatory Responses to Tax Avoidance: Explicating and Evaluating the Alternatives*, 57 St. Louis U. L.J. 1, 12–17 (2012) (discussing both targeted regulatory responses and broader legislative responses to perceived abuse); Nina J. Crimm, *A Case Study of a Private Foundation's Governance and Self-Interested Fiduciaries Calls for Further Regulation*, 50 Emory L.J. 1093, 1096–98 (2001) (noting the role of perceived abuse, actual abuse, and popular sentiment in shaping the regulation of private foundations); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. Pa. L. Rev. 1, 8–9 (1990) (asserting that Congress's legislative activity is often a way of communicating with the general public or displaying the legislator's own power).

58. 2003 CPE Text, *supra* note 36, at I-2; Tariff Act of 1913, ch. 16, § II(G)(a), Pub. L. No. 63-16, 38 Stat. 114, 166–81.

59. These include organizations falling under §§ 501(c)(3) (charities), 501(c)(4) (social welfare organizations), 501(c)(5) (labor and agricultural organizations), 501(c)(6) (trade associations, boards of trade real estate boards, and chambers of commerce), 501(c)(8) (fraternal beneficiary organizations), and 501(c)(13) (cemetery companies).

zation not organized for profit, but operated exclusively for the promotion of social welfare.[60]

According to the IRS, "It is generally assumed, however, that [the enactment of this provision] was the result of a U.S. Chamber of Commerce request for an exemption for 'civic and commercial' organizations."[61]

The concern expressed by the Chamber of Commerce focused far more on trade associations than civic associations. In a letter included in the hearings on the 1913 Act, the Chamber of Commerce requested an amendment to the tariff bill to exempt from tax "commercial organizations not organized for profit."[62] The letter explained that the commercial organizations not organized for profit, which seems to refer to business leagues, chambers of commerce, real-estate boards, and boards of trade now covered by § 501(c)(6), merited exemption: "The commercial organization of the present day is not organized for selfish purposes, and performs broad patriotic and civic functions."[63] The letter did not discuss "civic organizations,"[64] and the inclusion of this category may have been at least gratuitous if not accidental. Nothing in the legislative history addresses any congressional intention to exempt civic organizations.

Section 231(8) of the Revenue Act of 1921 exempted "[c]ivic leagues or organizations not organized for profit but operated exclu-

60. Tariff Act of 1913 § II.G, 38 Stat. at 172 (emphasis added). The Senate added "business leagues, chambers of commerce, or boards of trade not organized for profit and civic organizations operated exclusively for the promotion of social welfare" to the House provision listing exempt organizations. H.R. REP. NO. 63-5 (1913), *as reprinted in* COMM. REPS. ON ACT OF OCT. 3, 1913; ACT OF OCT. 22, 1913; AND REVENUE ACTS OF 1913 TO 1938, INCLUSIVE, 1939-1 C.B. 1, 3, 4.

61. 2003 CPE TEXT, *supra* note 36, at I-2 (citing *Hearings on Tariff Schedules of the Revenue Act of 1913 Before the Subcomm. of the Comm. on Finance*, 63d Cong. 2001 (1913)).

62. *Hearings on Tariff Schedules of the Revenue Act of 1913 Before the Subcomm. of the Comm. of Fin.*, 63d Cong. 2001 (1913) (letter from Elliot H. Godwin, General Secretary of Chamber of Commerce). The letter pointed out that under the Tariff Act of August 5, 1909, tax applied to "every corporation, joint-stock company or association organized for profit." *Id.* Unlike the 1913 Act, the 1909 Act did not specifically list which entities qualified as tax-exempt and thus had no need to make mention of commercial organizations. *Id.*

63. *Id.*

64. As he discusses in his article in this symposium issue, Lloyd Mayer has found that at the time of the 1913 Tariff Act a number of civic leagues had been established to encourage government and political reform, including women's suffrage. Lloyd Hitoshi Mayer, *A (Partial) Defense Of § 501(c)(4)'s "Catchall" Nature*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 439, 444 (2018) [hereinafter Mayer, *§ 501(c)(4)'s "Catchall" Nature*].

sively for the promotion of social welfare."[65] Congress amended the statute in 1924 to include local associations of employees that had earlier been denied exempt status because they "provided services to a limited group of beneficiaries."[66] A Senate Report explains:

> Paragraph (8) has been extended to apply to local associations of employees the membership of which is limited to employees of a designated person or persons in a particular municipality and the net earnings of which are devoted exclusively to charitable, educational, and recreation purposes, whether or not for the benefit of members and their families. Such organizations frequently perform a service to their members similar to that which forms the basis of the exemption accorded in paragraphs (8) and (9) of section 231 of the existing law. They have been accorded exemption expressly, since it is doubtful if such organizations are exempt under the existing law.[67]

When the tax law was codified in 1939, § 101(8) exempted civic leagues and associations of employees in language identical to today's § 501(c)(4)(A).[68]

More than 50 years later, as part of the Taxpayer Bill of Rights 2,[69] Congress in 1996 added language to § 501(c)(4) explicitly prohibiting any private inurement. At the time of the legislation, § 501(c)(3) and a number of other provisions of § 501(c) forbade inurement, but § 501(c)(4) did not.[70] The same legislation introduced a new provision, § 4958, and included § 501(c)(4) organizations along with public charities as subject to the regime it introduced. Under this intermediate sanction regime, certain disqualified persons (and in some cases organizations' managers as well) are subject to excise taxes for "excess

65. Revenue Act of 1921, ch. 136, § 231(8), 42 Stat. 227, 253.

66. 2003 CPE TEXT, *supra* note 36, at I-2.

67. STAFF OF THE S. COMM. ON FIN., 68TH CONG., STATEMENT OF THE CHANGES MADE IN THE REVENUE ACT OF 1921 AND THE REASONS THEREFOR 23 (Comm. Print 1924). Section 231(8) before amendment applied to "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare." Revenue Act of 1921 § 231(8). Section 231(9) applied to "[c]lubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or member." *Id.* § 231(9).

68. *Compare* I.R.C. § 101(8) (1939) *with* I.R.C. § 501(c)(4)(A) (2012).

69. Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1311(b)(1)–(2), 110 Stat. 1452, 1477 (1996) (adding § 501(c)(4)(B) to the Internal Revenue Code of 1986, as amended).

70. In addition to § 501(c)(3), provisions prohibiting inurement at the time included §§ 501(c)(6) (business leagues), 501(c)(7) (social clubs), 501(c)(9) (voluntary employees' beneficiary associations), 501(c)(11) (local teacher retirement funds), 501(c)(13) (cemetery companies), 501(c)(19) (veterans associations), and 501(c)(26) (high risk individual health care coverage organizations).

benefit transactions" with exempt organizations.[71] The addition of the inurement language to § 501(c)(4) and the inclusion of § 501(c)(4) entities as organizations subject to intermediate sanctions reflected long-held concerns by Rep. Pete Stark of California regarding HMOs,[72] particularly in connection with nonprofit to for-profit conversions.[73]

In December 2016, legislation known as the Protecting Americans from Tax Hikes (PATH) Act of 2015, became part of the Consolidated Appropriations Act of 2016.[74] In this legislation, Congress provided that the gift tax would not apply to contributions to § 501(c)(4), (c)(5) and (c)(6) organizations.[75] This new provision followed a 2011 furor about reported audits of gifts to politically active § 501(c)(4) organizations after many years of the IRS failing to impose the gift tax on such transfers.[76] Republicans in both the Senate and the House questioned these audits.[77] The IRS suspended the audits and made a plea for Congress to clarify legislatively whether the gift tax applied to contributions to § 501(c)(4) organizations.[78] Five years later, Congress did so as part of the PATH Act.

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71. Taxpayer Bill of Rights 2, 110 Stat.at 1477 (codified as amended at I.R.C. § 4958). An excess benefit transaction is one in which the economic benefit received by a disqualified person exceeds the economic benefit received by the organization. *See* I.R.C. § 4958(c)(1).

72. HMOs generally organize as § 501(c)(4) organizations. *See infra* text accompanying notes 204-226 for further discussion of HMOs.

73. *See* Broccolo et al, *Rules to Live By: IRS Releases Intermediate Sanctions Regulations*, 98 TAX NOTES TODAY 173-77 (Sept. 8, 1998) (detailing the genesis and operation of the intermediate sanctions in § 4958); Congressional Research Service, *Tax Aspects of Health Care Reform: The Tax Treatment of Health Care Providers*, 94 TAX NOTES TODAY 94-90 (April 25, 1994) (exploring tax aspects of then current and proposed healthcare reform); Lee A. Sheppard, *HMO Conversions and Self-Dealing*, 93 TAX NOTES TODAY 206-5, (Oct. 6, 1993) (discussing tax issues around the conversion of HMOs to for-profit organizations and private inurement in connection with Peter Stark's health reform agenda).

74. PATH Act of 2015, Pub. L. No. 114-113, 129 Stat. 2242.

75. *Id*. § 408.

76. *See* Stephanie Strom, *I.R.S. Sets Sights on Donors' Gifts That Push Policy*, N.Y. TIMES, May 13, 2011, at A1 (detailing various reactions to the IRS's announcement of applying increased vigilance to enforce nonfilings of gift and estate tax returns); David van den Berg, *IRS Confirms Examinations of Donors to Social Welfare Groups,* 2011 TAX NOTES TODAY 94-2 (May 16, 2011) (recounting practitioner reactions to the IRS's examinations of gift tax returns).

77. Julia Lawless & Antonia Ferrier, Senate Republican Question IRS on Gift Tax Enforcement, 2011 TAX NOTES TODAY 97-31 (May 19, 2011) (describing a letter from ranking Senate Finance Committee member Orin Hatch to the IRS Commissioner); *Camp Says IRS Tax Investigations May Be Targeting Political Speech,* 2011 TAX NOTES TODAY 116-39 (June 16, 2011) (discussing a letter to the IRS Commissioner from House Ways and Means Chairman David Camp).

78. *See* Steven T. Miller, *IRS Suspends Exam on Application of Gift Tax to Contributions Made to Some Exempt Orgs*, 2011 TAX NOTES TODAY 131-18 (July 8, 2011);

Two other provisions of the PATH Act affected § 501(c)(4) organizations. These provisions were added in response to the tremendous controversy involving IRS inquiries and delays in connection with the application for exemption under § 501(c)(4) by conservative organizations, particularly Tea Party organizations.[79] As mentioned earlier, one such provision, codified as new § 506, added a requirement that, with some exceptions, an entity described in § 501(c)(4) and organized after December 18, 2015, notify the IRS within 60 days after the entity is established of its intent to operate as a § 501(c)(4) organization.[80] The IRS must, within 60 days of a receipt of this notice, issue an acknowledgment.[81] Filing such notice, however, does not constitute an application for exemption, which is now done on a special form, Form 1024-A.[82] The legislation also amended § 7428 to permit all organizations seeking exemption under § 501(c), and not just those seeking exemption under § 501(c)(3), to seek a declaratory judgment from a court as to their status in certain situations involving determination or revocation of exempt status by the IRS.[83]

Although the amendment to the declaratory judgment provision of § 7428 applies to more than § 501(c)(4) organizations, the House Report emphasizes that "section 501(c)(4) organizations that receive an adverse determination or upon examination have their exempt sta-

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David van den Berg, *IRS Halts Gift Tax Exams of 501(c)(4) Donors, Won't Start More*, 2011 TAX NOTES TODAY 131-2 (July 8, 2011); *see also* Ellen P. Aprill, *Once and Future Gift Taxation of Transfers to Section 501(c)(4) Organizations*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 289, 292-93 (2012) (discussing the IRS's suspension of its audits of politically active § 501(c)(4) organizations).

79. *See* TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 2 at 2 (detailing the findings of the Treasury Inspector General's audit of the IRS's processing regime); Letter from N.Y. State Bar Ass'n to Hon. Mark Mazur, Assistant Sec'y, Dep't of the Treasury et al. 3 (April 11, 2016), https://www.nysba.org/Sections/Tax/Tax_Section_Reports/Tax_Reports_2016/Tax_Section_Letter_1341.html (requesting, in the wake of the Tea Party controversy, that § 501(c) organizations other than § 501(c)(4) organizations be exempt from § 506's filing requirement).

80. PATH Act of 2015 § 405 (adding § 506 to the Internal Revenue Code of 1986, as amended). Failure to file can subject the organization to a penalty of $20 per day (but no more than $5,000) and, if the organization fails to file the notice after the IRS makes a written demand, additional penalties of $20 per day (up to $5,000 in aggregate) on the organization managers. *Id*.

81. *Id.*

82. *See supra* note 45.

83. PATH Act of 2015 § 406 (adding § 7428(a)(1)(E) to the Internal Revenue Code of 1986, as amended). In response to a mandate in the PATH Act, the IRS has recently created Form 1024-A specifically for use by organizations seeking exemption under § 501(c)(4). Fred Stokeld, *More Time Needed to Review EO Form, Practitioners Say*, 2017 TAX NOTES TODAY 188-7 (Sep. 29, 2017) (urging the extension of the comment period on the draft form 1024-A). See *supra* text accompanying notes 45-46 for a discussion of Form 1024-A.

tus revoked have limited recourse."[84] Regarding the notice requirement, the legislative history declares:

> In recent years, section 501(c)(4) organizations that file an application for recognition of exempt status have faced considerable delays in obtaining a determination from the IRS. . . . The Committee therefore believes it is desirable to eliminate the need for a section 501(c)(4) that desires written IRS acknowledgment of its exempt status to apply for a formal IRS determination . . . .[85]

This explanation is misleading. An acknowledgment that an organization claims § 501(c)(4) status does not constitute IRS acceptance of that characterization. The legislative history recognizes this fact by noting that "[a] section 501(c)(4) organization that desires additional certainty regarding its qualification as an organization described in section 501(c)(4) may file a request for determination."[86]

Individual members of Congress tied this provision directly to the IRS controversy over Tea Party exemption applications. Then-Representative Charles W. Boustany, Jr., M.D. (R-La.), who first introduced the legislation that became § 506, issued a press release stating that the impetus for the legislation was the "unfair partisan targeting" of § 501(c)(4) organizations by the IRS and that the legislation was needed to "provide a checks and balances system to the actions of unelected Washington bureaucrats" and to stop "abuse of American taxpayers by the IRS."[87] Thus, recent legislative activity regarding § 501(c)(4) organizations resulted from perceived abuse by the IRS in connection with § 501(c)(4) organizations planning to participate in campaign intervention.[88] As described below, such activity involves a small fraction of § 501(c)(4) entities, albeit an important aspect for policy reasons. Here, as elsewhere, Congress has revised provisions applicable to tax-exempt organizations in a piecemeal fashion, rather than addressing § 501(c)(4) or organizations exempt under § 501(c) more generally.[89]

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84. H.R. REP. NO. 114-71 at 11 (2015), *reprinted in* 2015 U.S.C.C.A.N. 39, 48.

85. *Id.* at 45 (footnote omitted).

86. *Id.* at 46. Section 506(f) specifies that "[u]pon request by an organization to be treated as an organization described in § 501(c)(4), the Secretary may issue a determination with respect to such treatment." I.R.C. § 506(f) (2012).

87. Letter from N.Y. State Bar Ass'n to Hon. Mark Mazur, *supra* note 79 (citing Press Release, Boustany Defends Taxpayers Against Unfair IRS Targeting (Nov. 19, 2013)).

88. Congress in the Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, § 125, has also denied the IRS the use of any funds to work on guidance relating to the definition of campaign intervention under § 501(c)(4).

89. For criticism of this piecemeal approach as well as an argument that Congress should address § 501(c) more generally, see Roger Colinvaux, *Charity in the 21st*

III.
THE TOPOGRAPHY OF § 501(C)(4)

According to the Koulish 2016 study based on data available from the National Center on Charitable Statistics (NCCS),[90] " 'social welfare' organizations are the second-most common type of nonprofit organization registered with the Internal Revenue Service after section 501(c)(3) organizations."[91] The disparity in number of organizations between the two categories, however, is enormous. The Internal Revenue Service Data Book, Fiscal Year 2017, reports that, based on the number of organizations that applied for tax-exempt status or were exempt by virtue of a tax treaty, those exempt under § 501(c)(3) numbered 1,286,181 and those exempt under § 501(c)(4) numbered 81,935.[92] Moreover, while § 501(c)(3) public charities grew 20.6% between 2003 and 2013, from 783,811 to 945,393, according to the NCCS, the number of § 501(c)(4) organizations declined 31.4% from 119,772 to 82,197 during the same period.[93]

Reported numbers are difficult to interpret and compare. The Internal Revenue Service Data Book, Fiscal Year 2014 gives the number of § 501(c)(4) organizations as 148,585.[94] In contrast, Koulish, using the IRS Business Master File, June 2014 and NCCS Core File 2012, gives the total number of registered § 501(c)(4) organizations as

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Century: Trending toward Decay, 11 FLA. TAX REV. 1, 48 (2011) (advocating for more equal treatment of organizations across the charitable sector rather than legislation targeted at particular types of organizations). For a set of suggestion for reforming § 501(c) as a whole, see David S. Miller, *Reforming the Taxation of Exempt Organizations and Their Patrons*, 67 TAX LAW 451, 492 (2014) [hereinafter Miller, *Reforming the Taxation of Exempt Organizations*] (suggesting specific changes to treatment of both donors and various exempt organizations).

90. *See generally* NAT'L CTR. FOR CHARITABLE STATISTICS, GUIDE TO USING NCCS DATA, http://nccs-data.urban.org/NCCS-data-guide.pdf.

91. KOULISH, *supra* note 17, at 1. "Registered" for these purposes means filing an application for exemption. *Id.* at 31 n. 16.

92. INTERNAL REVENUE SERV., INTERNAL REVENUE SERVICE DATA BOOK, 2017, at 57 tbl.25 (2018), https://www.irs.gov/pub/irs-soi/17databk.pdf. The Internal Revenue Service Data Book, Fiscal Year 2016, reports that organizations exempt under § 501(c)(3) numbered 1,237,094 and those exempt under § 501(c)(4) numbered 83,392. INTERNAL REVENUE SERV., INTERNAL REVENUE SERVICE DATA BOOK, 2016, at 57 tbl.25 (2017), https://www.irs.gov/pub/irs-soi/16databk.pdf.

93. *Number of Nonprofit Organizations in the United States, 2003-2013*, NAT'L CTR. FOR CHARITABLE STATISTICS, http://nccs.urban.org/sites/all/nccs-archive/html/PubApps/profile1.php?state=US (last accessed 28 May 2018) (using the IRS Business Master Files, with modifications by the National Center for Charitable Statistics at the Urban Institute to exclude foreign and governmental organizations).

94. INTERNAL REVENUE SERV., INTERNAL REVENUE SERVICE DATA BOOK, 2014, at 58 tbl.25 (2015), https://www.irs.gov/pub/irs-soi/14databk.pdf.

81,589. He also reports the number filing Form 990 as 28,906.[95] Koulish explains, "The Business Master File contains basic information on every organization registered with the IRS and believed to be active. The NCCS Core File captures financial information for every organization filing a Form 990 return and is considered the more accurate estimator of aggregate sector activity."[96]

Although these numbers give a general sense of the size of the sector, they all must be taken with a grain of salt. On one hand, § 501(c)(4) organizations are not required to apply for recognition of exemption; thus, numbers based on registration may understate the number of § 501(c)(4) organizations. Moreover, because § 501(c)(4) organizations with gross receipts less than $50,000 can file Form 990-N, data based on Form 990 and 990EZ filings may underestimate the number of § 501(c)(4) organizations.[97]

Differences in other sets of reported data also complicate the ability to chart accurately the growth of the sector based on filing of applications for exemption. Relying on information provided by the IRS Exempt Organization function, the Treasury Inspector General, in connection with his investigation of the handling of Tea Party applications, reported the number of new § 501(c)(4) applications received by the IRS from 2009-2012.[98] Koulish, using the NCCS NTEE Master File,[99] reports quite different numbers over that same time period.[100] Moreover, many hundreds, even thousand, of foreign-organized entities could be § 501(c)(4) organizations.[101]

95. KOULISH, *supra* note 17, at 5 tbl.1. He also observes that more than half of § 501(c)(4) organizations were formed before 1970. *Id.* at 13 fig.3.

96. *Id.* at 4.

97. *See supra* note 47.

98. TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 2, at 3.

99. The NCCS describes the NCCS NTEE Master File as a cumulative list of organizations EINs and NTEE (National Taxonomy of Exempt Organizations classifications). NAT'L CTR. FOR CHARITABLE STATISTICS, GUIDE TO USING NCCS DATA 4, http://nccs-data.urban.org/NCCS-data-guide.pdf.

100. KOULISH, *supra* note 17, at 14 fig.4. It is not clear to me how these two sets of numbers relate. Section 501(c)(4) organizations need not apply for exemption; they do, however, obtain EINs. I would expect the number of new § 501(c)(4) organizations to be larger than the number of applications, even if we allow for a year or so lag, but that is not the case.

101. *See* Letter from N.Y. State Bar Ass'n to Hon. Mark Mazur, *supra* note 79, at 6 (discussing the possibility for foreign social welfare organizations not to file for recognition of § 501(c)(4) status).

Year	TITGA/IRS # of Applications	Koulish, NCCS # of new § 501(c)(4) organizations
2009	1,751	1,373
2010	1,735	2,674
2011	2,265	1,610
2012	3,357	1,990

These numbers are also significant because they would seem to suggest that § 501(c)(4) formation increased in response to *Citizens United.* Koulish, however, cautions that "the reality is likely more complex. . . . [T]he increase in the number of new organizations formed in 2010 is almost entirely attributable to a single organization, the American Association of University Women, which had 1,093 local chapters approved by the IRS in a group ruling."[102]

The IRS reported in its annual Data Book for each of the listed years the following information regarding closing of cases involving application disputes, whether approval or disapproval of exemption, for tax-exempt status under § 501(c)(4):[103]

Fiscal Year	Total Closed	Approved	Disapproved	Other[104]
2008	1,492	1,202	d	d
2009	1,922	1,507	3	412
2010	1,741	1,447	3	291
2011	1,777	1,559	6	212
2012	2,774	2,324	8	442
2013	2,253	1,784	5	464
2014	4,417	4,114	8	295
2015	2,375	2,134	d	d
2016	1,877	1,690	d	d
2017	1,487	1,379	3	d

d – Not shown to avoid disclosure of information about specific taxpayers. However, the data are included in the appropriate totals.

102. KOULISH, *supra* note 17, at 14.

103. My thanks to Lloyd Mayer for his help with this table.

104. INTERNAL REVENUE SERV., INTERNAL REVENUE SERVICE DATA BOOK, 2009, at 55 tbl.24 (2010), https://www.irs.gov/pub/irs-soi/09databk.pdf ("Includes applications withdrawn by the organization; applications that did not provide the required information; incomplete applications; IRS refusals to rule on applications; applications forwarded to other than the Washington, DC office; IRS correction disposals; and others.").

Again, it is not clear how to reconcile these numbers from the IRS Data book regarding the number of applications approved with the numbers of new § 501(c)(4) organizations provided by Koulish.

Changes in IRS policy can mislead researchers. For example, Koulish wonders why the number of new § 501(c)(4) organizations jumped from 1,516 in 2013 to 4,000 in 2014 when the "list of new organizations approved for tax-exempt status is unremarkable; it closely mirrors the social welfare universe as a whole."[105] The Internal Revenue Service Data Book, Fiscal Year 2014 reports the number of new § 501(c)(4) organizations as 4,114 but notes that this data item "overstates the number of social welfare organizations" as a result of "a processing change that occurred in FY2014."[106]

Of importance going forward in obtaining somewhat more accurate numbers of § 501(c)(4) organizations, new § 506, discussed above, requires an organization to notify the IRS of its intent to operate as a § 501(c)(4) organization within 60 days of its formation, with some exceptions for organizations that have already filed Form 990. The IRS developed Form 8976 for electronic filing of such notices and began accepting the form on July 8, 2016.[107] The Internal Revenue Service Data Book, Fiscal Year 2017, reports that the IRS received 2,182 Forms 8976, acknowledged 1,908 of them, and rejected 474.[108]

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105. KOULISH, *supra* note 17, at 14.

106. INTERNAL REVENUE SERVICE DATA BOOK, FISCAL YEAR 2014, *supra* note 94, at 54. This source explains further that the number included organizations that had applied for an employer identification number, but had not filed the application form, and that going forward, the table would include only organizations that have filed the appropriate application form and have been recognized as exempt by the IRS or as a result of a tax treaty. *Id.* JAMES J. FISHMAN ET AL., NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 305 (5th ed. 2015) (Teacher's Manual Update) [hereinafter FISHMAN, SCHWARZ, MAYER] considers the impact of using the total number of § 501(c)(4) organizations, rather than the number of new ones: "The sharp increase in the number of 501(c)(4) organizations recognized by the IRS in 2014 (from 91,056 in 2013 to 148,585) is apparently the result of an error on the part of the Service. According to an IRS employee, this increase represents 'entities that have applied for an [Employer Identification Number] as an exempt organization (EO) but have not yet filed a Form 1023 or 1024 and obtained an EO determination.'" Such entities are therefore not necessarily claiming exemption under § 501(c)(4). *See* Lloyd Hitoshi Mayer, *The Better Part of Valour Is Discretion: Should the IRS Change or Surrender Its Oversight of Tax-Exempt Organizations?*, 7 COLUM. J. TAX L. 81, 84 n. 11 (2016). (The Teacher's Manual Update is on file with the author.)

107. In addition, the IRS has promulgated regulations regarding the new § 506 notice, and these regulations require foreign organizations to file the notice, *see* Treas. Reg. § 1.506-1T(a)(1) (2016), despite the argument of the New York State Bar to the contrary, *see* Letter from N.Y. State Bar Ass'n to Hon. Mark Mazur, *supra* note 79, at 7.

108. INTERNAL REVENUE SERVICE DATA BOOK, FISCAL YEAR 2017, *supra* note 92, at 56 tbl.24b. The Internal Revenue Service Data Book, Fiscal Year 2016, reports that

Whatever the exact numbers, Koulish's 2016 study of § 501(c)(4) offers important insight into the make-up of the subsector. He finds that "[a] clear majority of social welfare organizations can be naturally categorized as voluntary associations that offer some broader community benefit but that do not qualify as public charities because, in most cases, membership eligibility is restricted in some manner."[109] The most common types of § 501(c)(4) organizations are "community service clubs, volunteer fire departments, veterans' organizations, and sports and recreational clubs open to the broader community";[110] those generating the most revenue are hospital chains and HMO providers.[111] The largest organizations are health providers or insurers along with the AARP, a financing organization for rural utilities, the governing bodies of the Olympics and of international soccer, and a locally owned racetrack and casino complex in Iowa.[112] Koulish concludes that § 501(c)(4) advocacy, whether lobbying or campaign intervention, for the most part takes place in less than one-third of § 501(c)(4) organizations and generates less than one-seventh of the subsector's revenue.[113]

Health organizations, fire departments, veterans' organizations, and sports activities all raise special questions that will be addressed in subsequent parts of this Article.[114] However, a brief examination of two of the largest § 501(c)(4) organizations—AARP and Rotary International—gives a further sense of the range of activities in which § 501(c)(4) organizations engage. Because these organizations are well-known to the public (although the public may not realize that they are § 501(c)(4) organizations), they serve as useful vehicles for examining § 501(c)(4).

Rotary International has been in existence for more than 110 years[115] and obtained its exemption as a § 501(c)(4) organization in

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the IRS received 1,427 Forms 8976, acknowledged 1,036 of them, and rejected 149. INTERNAL REVENUE SERVICE DATA BOOK, FISCAL YEAR 2016, *supra* note 92, 56 tbl.24(b). Of course, not all organizations that file the notice may in fact be described in § 501(c)(4).

109. KOULISH, *supra* note 17, at 6. I reproduce in the Appendix Koulish's tables of § 501(c)(4) organizations by type, revenue, and size.

110. *Id*. at 5.

111. *Id.* at 5-6. Health providers and insurers generated $62,715,346,590 (72.5%) of § 501(c)(4) revenue. *Id.*

112. *Id*. at 5-6, 8.

113. Koulish finds the 2001 study by Jeff Krehely & Kendall Gollady, *supra* note 19, to support many of the conclusions in this study. *Id.* at 6–7

114. *See infra* section VII.

115. *Our History*, ROTARY INT'L, https://www.rotary.org/en/about-rotary/history (last visited Jan. 28, 2019). It was formed by a Chicago attorney on February 23, 1905, "so professionals with diverse backgrounds could exchange ideas, form mean-

1958.[116] Its purpose is to support local clubs by coordinating international programs and initiatives. GuideStar, using the IRS Business Master File, gives its gross receipts as $182,402,209 and assets as $159,664,981.[117] Rotary International's 2015 Form 990 reports 1,215,267 volunteers, revenue less expenses of $3,777,119 (with membership fees as the largest source of revenue), and net assets of $126,582,158.[118] Rotary International engages in a number of charitable activities, including: promoting peace; fighting disease; providing clean water, sanitation, and hygiene; saving mothers and children; supporting education; and growing local economies.[119]

The organization's motto is "Service Above Self."[120] It describes its objective to encourage and foster generally "the ideal of service as a basis of worthy enterprise"[121] and, in particular:

> FIRST: The development of acquaintance as an opportunity for service;
>
> SECOND: High ethical standards in business and professions; the recognition of the worthiness of all useful occupations; and the dignifying of each Rotarian's occupation as an opportunity to service society;
>
> THIRD: The application of the ideal of service in each Rotarian's personal, business, and community life;
>
> FOURTH: The advancement of international understanding, good will, and peace through a world fellowship of business and professional persons united in the ideal of service.[122]

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ingful, lifelong friendships, and give back to their communities." *Id.* Its name comes from the group's early practice of rotating meetings among the offices of its members. *Id.*

116. *Rotary International – GuideStar Profile*, GUIDESTAR, https://www.guidestar.org/profile/36-1707667 (last visited Jan. 28, 2019).

117. *GuideStar Search*, GUIDESTAR, https://www.guidestar.org/search (search "Rotary International") (last visited Jan. 28, 2019).

118. GUIDESTAR, *Rotary International Form 990, 2015,* https://www.guidestar.org/FinDocu-ments/2016/361/707/2016-361707667-0dfe7f9e-9O.pdf.

119. *Who We Are*, ROTARY INT'L, https://www.rotary.org/en/about-rotary (last visited Jan. 28, 2019). Like many § 501(c)(4) organizations, Rotary International has a sister § 501(c)(3) organization, the Rotary Foundation, to fund its humanitarian activities. The Foundation's Form 990 for 2015 reported revenue less expenses of $9,438,693 and net assets of $930,133,001. *See* GUIDESTAR, *Rotary Foundation of Rotary International, 2015 Form 990*, https://www.guidestar.org/FinDocuments/2016/363/245/2016-363245072-0dfdd7c7-9.pdf.

120. *Who We Are*, *supra* note 119.

121. *Guiding Principles,* MY ROTARY, https://my.rotary.org/en/guiding-principles (last visited Jan. 28, 2019).

122. *Id*.

Rotary International operates through its clubs or chapters.[123] The Rotary International's webpage describes members of these clubs as people who "share a passion for community service and friendship."[124] It further explains that "Rotary members share ideas, make plans, hear from the community, and catch up with friends during club programs that fuel the impact we make."[125] Moreover, a club connection offers members a "chance to develop skills like public speaking, project management, and event planning."[126]

Rotary International is a § 501(c)(4) organization because of the membership requirement and the explicit offer of personal benefits in addition to and apart from the undertaking of charitable endeavors. It lists as primary among its objectives "the development of acquaintance as an opportunity for service;"[127] that is, personal networking has a high priority. More importantly, for purposes of the private benefit doctrine, members also receive discounts on products and services.[128]

AARP (formerly the American Association of Retired Persons), was founded in 1958[129] and received exemption in 1967.[130] It describes itself "as a nonprofit, nonpartisan social welfare organization with a membership of nearly 38 million that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families—such as health care, employment and income security."[131] It is the largest 501(c)(4) by gross receipts and second largest by total assets.[132] AARP's 2016

123. The website states there are more than 35,000 of such clubs internationally. *Who We Are*, *supra* note 119. Koulish reports 3,298 chapter in the United States and notes that many chapters are small. KOULISH, *supra* note 17, at 7.

124. *Rotary Clubs*, ROTARY INT'L, https://www.rotary.org/en/get-involved/rotary-clubs (last visited Jan. 28, 2019).

125. *Id.*

126. *Id*.

127. *Guiding Principles*, *supra* note 121.

128. *Rotary Global Rewards*, MY ROTARY, https://my.rotary.org/en/member-center/rotary-global-rewards/offers#/offer (last visited Jan. 28, 2019).

129. *AARP History*, AARP (May 10, 2010), http://www.aarp.org/about-aarp/company/info-2016/history.html.

130. *AARP,* GUIDESTAR, https://www.guidestar.org/profile/95-1985500 (last visited Jan. 28, 2019).

131. *About Us: Where Possibilities Are Redefined*, AARP, https://careers.aarp.org/page/show/about (last visited Jan. 28, 2019).

132. *Overview of 501(c)(4)s*, NAT'L. CTR. FOR CHARITABLE STAT., https://beta-nccs.urban.org/publication/overview-501c4s (last visited Jan. 28, 2019). NCCS gives its gross receipts as $31,659,822,817 and total assets as $2,330,580,646. These numbers appear to be out of date. GuideStar gives quite different numbers—gross receipts as $4,234,099,495 and its net assets as $2,3471,948,522. *GuideStar Search*, GUIDESTAR, https://www.guidestar.org/search (last visited Jan. 28, 2019).

Form 990 lists revenue in excess of expenses as $41,452,020 and net assets as $1,154,119,978.[133]

AARP's home page on its website prominently displays to a link listing member benefits.[134] A 21-page booklet describes the benefits, from discounts at restaurants to health programs, available to members.[135] Its webpage also provides information on a wide variety of topics, such as food, health, money, politics, and society.

AARP is actively engaged in advocacy on issues of importance for "age 50 and over individuals and their families at the local, state and national levels."[136] Koulish describes AARP as "widely considered one of the most powerful lobbying organizations in the country."[137] Despite the high absolute number, AARP's total spending on direct lobbying over 17 years was less than one-fifth of its overall spending in 2012 alone.[138] That is, even for the largest and most politically active § 501(c)(4) organizations, the percentage of its resources spent on advocacy is small.

Koulish's analysis of the § 501(c)(4) subsector along with the examination of two of the most prominent § 501(c)(4) organizations demonstrates the breadth of the subsector. This description shows that associating § 501(c)(4) primarily with organizations engaged in political activity, whether lobbying or campaign intervention, views the universe of § 501(c)(4) too narrowly.

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133. AARP 2016 Form 990, GUIDESTAR, https://www.guidestar.org/FinDocuments/2016/520/794/2016-520794300-0e996d6c-9.pdf. Among its related entities, AARP has a sister foundation, with gross receipts of $74,358,878 and assets of $266,584,963. *GuideStar Search*, GUIDESTAR, https://www.guidestar.org/search (last visited Jan. 28, 2019). The Foundation's 2016 Form 990 reports revenue in excess of expenses of $134,090,513 and net assets of $214,726,689. GUIDESTAR, https://www.guidestar.org/FinDocuments/2016/520/794/2016-520794300-0e996d6c-9.pdf. AARP's complex structure, which includes a number of tax-exempt and taxable organizations, as well as the amount of its royalty income has been the subject of a Congressional Hearing and a report titled "Behind the Veil: The AARP America Doesn't Know." The report questioned whether AARP was operating primarily for the benefit of the community. *See* David van den Berg, *AARP's Structure, Royalty Income Addressed at House Subcommittee Hearing*, 2011 TAX NOTES TODAY 64-9 (Apr. 4, 2011).

134. AARP OFFICIAL SITE, http://www.aarp.org (last visited Jan. 28, 2019).

135. AARP, AARP MEMBER BENEFITS GUIDE (2013), http://www.aarp.org/content/dam/aarp/benefits_discounts/membership_services/2013-06/MBCHAE-GUIDE-GEN.pdf.

136. *About AARP Social Impact,* AARP, http://www.aarp.org/about-aarp/company/social-impact/ (last visited Jan. 28, 2019).

137. KOULISH, *supra* note 17, at 8. OpenSecrets.org has found that between 1998 and 2017, AARP spent $266 million on lobbying, eighth among all entities. *Top Spenders (All years: 1998-2017)*, OPENSECRETS, https://www.opensecrets.org/lobby/top.php?indexType=s (last updated Apr. 24, 2018).

138. KOULISH, *supra* note 17, at 17.

IV.
THE MURKINESS OF THE § 501(C)(4) NO MAN'S LAND

Most commentators on § 501(c)(4) detect no coherent policy behind the subsection. According to Koulish, the sector as a whole proves "exceedingly difficult to describe comprehensively."[139] Professor Daniel Halperin states, "The world of § 501(c)(4) cannot be neatly described."[140] Hopkins writes that the very notion of social welfare is confusing "because of the considerable similarity between these entities and those that are *charitable* in nature; *promotion of social welfare* is one of the definitions of a tax-exempt charitable organization."[141]

Hill and Mancino make a heroic stab at coherence. They see the "initial and intended focus" of § 501(c)(4) to have been "on organizations that engage in self-help for civic benefit."[142] They continue:

> As originally conceived, Section 501(c)(4) covered situations in which contributors and beneficiaries are in substantial part the same persons based on a self-help concept, whereas Section 501(c)(3) organizations are based on a charity concept in which contributors provide assistance to a charitable class of beneficiaries other than themselves. The only reason for having two separate types of exempt organizations was that Section 501(c)(4) self-help model appeared to present private benefit issues that might prove troublesome under Section 501(c)(3).[143]

Such a "self-help" characterization would describe a large number of § 501(c)(4) organizations, including the AARP, HMOs, and even the American Association of University Women, but would not by any means capture all of the § 501(c)(4) universe, including the large number of community service clubs. The notion that the contributors are also beneficiaries is an important one, however, and one to which this Article will return at length in Part VII.

Section 501(c)(4) social welfare organizations must pass both a positive and negative test. As described in the following paragraphs, they must provide community benefit, but not benefit primarily a private group of citizens. The issue of private benefit, the meaning of community, and how these two concepts relate are the crucial elements of § 501(c)(4).

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139. *Id.* at 4.
140. Halperin, *I.R.C. § 501(c)(4)*, *supra* note 32.
141. HOPKINS, *supra* note 6, at 389 (emphasis in original).
142. HILL & MANCINO, *supra* note 5.
143. *Id.*

The positive test is that a § 501(c)(4) organization must provide a community benefit.[144] Thus, § 501(c)(4) requires defining community for this purpose. Early case law articulates inspiring generalities that, like the language of the regulations, give little practical guidance. *United States v. Pickwick Electric Membership Corp.*, which held an electric cooperative exempt under a predecessor statute to § 501(c)(4), characterized a civic organization as advancing "the idea of citizens of a community cooperating to promote the common good and general welfare of the community."[145] *Erie Endowment v. United States*, denying § 501(c)(4) status to an organization funded and controlled by a single individual, decreed that a civic organization must be a "community movement designed to accomplish community ends."[146]

The court in *Eden Hall Farm v. United States*[147] demonstrates the difficulty in applying the uncertain "community benefit" standard. The court found that a recreational facility operated for thousands of working women selected by the organization's trustees and consisting primarily of women employed by one particular corporation qualified under § 501(c)(4):

> Eden Hall Farm is an institution which has served a broad community need in the sense that Congress intended, that is, that when one segment or slice of the community, in this case, thousands of working women of the Pittsburg and Allegheny County area are served, then the community as a whole benefits.[148]

The IRS, however, disagreed. In a revenue ruling explaining why it would not follow the case, the IRS acknowledged that "[t]here is no requirement that a section 501(c)(4) organization provide equal benefits to every member of the community."[149] The ruling continues:

> In the instant case, however, the organization imposed limits on the use of its facility other than those that were inherent in the nature of the facility. By restricting the use of the facility to employees of selected corporations and their guests, the organization is primarily

144. *See* 2003 CPE TEXT, *supra* note 36, at I-4.

145. 158 F.2d 272, 276 (6th Cir. 1946).

146. 316 F.2d 151, 156 (3d Cir. 1963).

147. 389 F. Supp. 858 (W.D. Pa. 1975).

148. *Id.* at 866. Elsewhere in the opinion, the court quoted the statute in full, including the language regarding "local associations of employees, the membership of which is limited to employees in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes." *Id.* at 861 n.1. It did not consider whether this language, by negative implication, disqualified Eden Hall Farm, which served more than a particular municipality.

149. Rev. Rul. 80-205, 1980-2 C.B. 184.

> benefiting a private group rather than primarily benefiting the common good and general welfare of the community.[150]

The General Counsel Memorandum related to the *Eden Hall Farm* case ruling regretted that it was "nearly impossible" to set guidelines as to how large a benefited group had to be to qualify under § 501(c)(4).[151] As Hill and Mancino observe, "Although the number of persons benefited does not itself determine whether an organization qualifies for exemption under Section 501(c)(4), it is generally true that qualifying organizations serve purposes that benefit a broad component of the community rather than a specifically delineated membership."[152]

Under what can be seen as a negative test, § 501(c)(4) organizations cannot benefit primarily a private group of citizens.[153] The size of the community benefit, however, bears upon the degree of private benefit permitted. A limitation of private benefit applies to both § 501(c)(3) and § 501(c)(4) organizations, but the source of the doctrine differs for the two subsections. For § 501(c)(3), the IRS has derived the concept from the requirement that a § 501(c)(3) organizations must "serve[ ] a public rather than private interest."[154] As a result, as *Better Business Bureau* explains, the presence of private benefit, if substantial in nature, will destroy an organization's § 501(c)(3) exemption.[155] Any private benefit the organization provides to its members must be only insubstantial.[156]

The notion for § 501(c)(4), in contrast, is a "logical extension of the general requirement that social welfare is for the benefit of the general community as a whole."[157] The IRS has interpreted this differ-

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150. *Id.*

151. I.R.S. Gen. Couns. Mem. 37,675 (Sept. 15, 1978). General Counsel Memoranda are no longer issued. They were documents prepared by the IRS Office of Chief Counsel that "contain the reasons behind the adoption of revenue rulings, private letter rulings, and technical advice memoranda." Taxation with Representation Fund v. IRS, 485 F. Supp. 263, 266 (D.D.C. 1980).

152. HILL & MANCINO, *supra* note 5, ¶ 13.03. I read the quoted language to use "member" to mean a contributor-beneficiary, not a legal member under state law.

153. *See* 1981 CPE TEXT, *supra* note 20 (discussing the magnitude of permissible private benefit an organization can provide and still qualify for § 501(c)(4) treatment).

154. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 2017); *see* Am. Campaign Acad. v. Comm'r, 92 T.C. 1053, 1067 (1989).

155. 326 U.S. 279, 283 (1945).

156. *See* Andrew Megosh et al., *Private Benefit Under IRC 501(c)(3)*, *in* EXEMPT ORGANIZATIONS: CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2001, at 135, 135 (2002), https://www.irs.gov/pub/irs-tege/eotopich01.pdf [hereinafter 2001 CPE TEXT] (identifying authority for the allowance of insubstantial private benefit).

157. 1981 CPE TEXT, *supra* note 20.

ence to permit § 501(c)(4) organizations to confer greater private benefit than can § 501(c)(3) entities. A § 501(c)(4) organization generally cannot limit its services and benefits to its members;[158] a certain amount of private benefit is permissible, but the organization must remain primarily devoted to social welfare.

The 1981 Continuing Professional Education text tries to elucidate how much private benefit is permissible. It illustrates the distinction between organizations that serve the community and those that serve only their members or some other restrictive class by contrasting revenue rulings involving similar activities.[159] Of the many cases and revenue rulings discussed in the 1981 Continuing Professional Education text, description of three pairs follows, chosen to clarify these distinctions, to the extent possible, by contrast.

Revenue Ruling 78-69 concludes that providing bus transportation during rush hours for a suburban community qualified under § 501(c)(4) because the organization was "providing a useful service to all members of the community. . . . Participation in the organization's affairs is open to all community residents, and volunteers carry

158. Although the issue is not free from doubt, I do not believe that the meaning of "member" when used by the IRS in the § 501(c)(4) context requires a "member" to have legal rights as a member, such as voting for the members of the board of directors, under state law. The term, I think, refers instead to those who have a right to benefits from the organization and generally pay membership dues, that is, those who are both contributors and beneficiaries. We often see this use of "member" in the § 501(c)(3) context as well. My "membership" in the Los Angeles County Museum of Art gives me no voting rights but does give me admission to the museum and to various special events. As far as I can tell, membership in AARP does not include any rights to vote, including any right to vote for the board of directors. My husband, who is a member, has never received a ballot from the AARP. (I did not join when I became eligible; I figured one member in the family was enough.) The revenue rulings discussed in the immediately following paragraphs do not state or require the assumption that the members of the organization were legal members with voting rights under state law. Consider also the many HMOs exempt under § 501(c)(4). As the HMO cases discussed *infra* Part V show, "member" is used to mean "subscriber," not someone with voting rights under state law.

159. 1981 CPE TEXT, *supra* note 20. The document also notes, "In instances where an organization limits its benefits to members, the organization is generally considered not to be operated for social welfare purposes. However, this presumption (inference) may be overcome." *Id.* It offers Revenue Ruling 66-148 as an example. There, a nonprofit corporation was formed to establish a system for the storage and distribution of water. *Id.* Any water user could join the organization with payment of an assessment based upon the number of gallons of water pumped from the user's private well. *Id.* The organization nonetheless qualified for exemption because its activities benefitted all residents of the community, whether or not they were members or paid any assessments, because the organization's activities increased the level of the underground water table, to the benefit of all residents of the community. *Id.*; *see also* Rev. Rul. 66-148, 1966-1 C.B. 143.

out its activities."[160] In contrast, Revenue Ruling 55-311 found that a local association of employees operating a bus system only for its members did not qualify for exemption under § 501(c)(4) because the bus system was "operated primarily for the benefit of the members."[161]

A second contrasting pair of revenue rulings involves television stations. Revenue Ruling 54-394 denied exemption under § 501(c)(4)'s predecessor, § 101(8), to a group that furnished television reception on a cooperative basis based on members contracting for services and paying installation fees.[162] In contrast, under Revenue Ruling 62-167, a nonprofit organization formed to provide television for a community as a whole, with membership fees and contributions on a voluntary basis, did qualify.[163]

The third pair addresses organizations that clean up spills. In *Contracting Plumbers Cooperative Restoration Corp. v. United States*,[164] the Second Circuit denied exemption under both § 501(c)(4) and § 501(c)(6) for an organization that repaired "cuts" in city streets resulting from members' plumbing activities and for which they were liable. The court found that "each member of the cooperative enjoys . . . economic benefits to the extent he uses and pays for its restoration services."[165] The private benefit was such that the organization was not "primarily" devoted to the common good. In contrast, Revenue Ruling 79-316 granted § 501(c)(4) status to an organization with members that was required under state law to clean up oil spills in a port city. Because services were available to members and non-members alike, it operated to prevent deterioration of the port to the benefit of the community and thus qualified for exemption under § 501(c)(4).[166]

Distinguishing between organizations that provide benefits only to those the organization recognizes as members for the purpose of certain privileges and those that also offer benefits to a large segment of the community is relatively easy. Determining qualification for § 501(c)(4) status in other cases is far more difficult. As Hill and Mancino point out, striking the proper balance between benefit to members and community benefit is particularly challenging with vol-

160. Rev. Rul. 78-69, 1978-1 C.B. 156.
161. Rev. Rul. 55-31, 1955-1 C.B. 476.
162. Rev. Rul. 54-394, 1954-2 C.B. 122.
163. Rev. Rul. 62-167, 1962-2 C.B. 142.
164. 488 F.2d 684, 685 (2d Cir. 1974).
165. *Id.* at 687.
166. Rev. Rul. 79-316 1979-2 C.B. 228.

untary associations that provide benefits to public employees, such as police officers and firemen.[167] The IRS has rejected § 501(c)(4) status for such associations: "Although the class of employees benefited by the organization consists of police officers engaged in the performance of essential and hazardous public services and there is an incidental benefit provided by the organization to the larger community, the fact remains that the primary benefits from the organization are limited to its members."[168]

Understanding § 501(c)(4)'s border is further complicated by the number of § 501(c) subsections with which it overlaps.[169] That is, the structure of § 501(c) seems to call for drawing fine distinctions for its various subsections, but the lines of division both depend on other subsections and blur at the edges. A favorite example involves garden clubs. Revenue Ruling 66-179 describes how garden clubs can qualify under §§ 501(c)(3), 501(c)(4), 501(c)(5) or 501(c)(7). In situation 1, the club qualified under § 501(c)(3) because it engaged in educational activities for the public and efforts to beautify roads, thus combating community deterioration. The organization in situation 2 qualified under § 501(c)(4), and not § 501(c)(3), because a substantial part of the organization's activities, but not its primary activity, consisted of social functions for the benefit of its members. The third organization

167. HILL & MANCINO, *supra* note 5, at ¶ 13.06.

168. Rev. Rul. 81-58, 1981-1 C.B. 331; *see also* Police Benevolent Ass'n of Richmond v. United States, 661 F. Supp. 765, 771-72 (E.D. Va. 1987), *aff'd*, 836 F.2d 547 (4th Cir. 1987), (denying exemption for organization which pooled and invested funds to supplement members' pension benefits). To avoid this result, many states have adopted statutory schemes to support volunteer fire departments. These statutes govern funding and set mandatory and automatic eligibility for benefits. Under these statutes, these relief organization may qualify under § 501(c)(3) as lessening the burdens of government. Debra Cowen & Terry Berkovsky, *Volunteer Firefighters' Relief Organizations; A Second Look*, WASH. POST, Jan. 10, 1999, at A-1 (detailing the application of such statutes). These relief organizations also now qualify under § 501(c)(4). In Rev. Rul. 87-126, 1987-2 C.B. 150, an association established and maintained by a local government to provide retirements benefits for certain of its firefighters qualified under § 501(c)(4) because the association was governed by state law and the benefits were funded primarily by state and local governments. The government apparatus demonstrated that the organization's activities were in the public interest.

169. The 1981 Continuing Professional Education text speaks of "overlap" between § 501(c)(4) with § § 501(c)(3), 501(c)(5), 501(c)(6), 501(c)(7), 501(c)(8), 501(c)(9), 501(c)(12), 501(c)(17) and 501(c)(21). 1981 CPE TEXT, *supra* note 20. It finds that the § 501(c)(3)/(c)(4) overlap is the greatest source of difficulty for the Service. *Id.* It identifies Rev. Rul. 74-361 as "probably the first instance where the Service publicly conceded that the subparagraphs of § 501(c) are not necessarily mutually exclusive." *Id.* A number of examples of bases for exemption overlapping with § 501(c)(4) are discussed in Part VI. As Lloyd Mayer details in his article, electric and water cooperatives find exemption under both § 501(c)(4) and § 501(c)(12), thus presenting another overlap. *See* Mayer, *§ 501(c)(4)'s "Catchall" Nature*, *supra* note 64.

had as its purpose bettering the condition of persons engaged in horticultural pursuits and improving the grade of their products. It thus fell under § 501(c)(5). The fourth organization consisted of amateur gardeners to promote their common interest. Because it was operated exclusively for the pleasure and recreation of its members, it was exempt under § 501(c)(7) as a social club.[170]

Later rulings attempt to illuminate further how to balance public and private benefit. In Revenue Ruling 68-14, an organization organized and operated to preserve and develop the beauty of a city was deemed eligible for exemption under § 501(c)(3). Its activities included planting trees in public areas, keeping the city clean, educating the public about tree planting, and encouraging architects and builders to plant trees. The ruling concludes that the organization lessened the burdens of government, educated the public, architects, and builders and combated community deterioration.[171]

In contrast, the organization in Revenue Ruling 75-286 was formed by residents of a city block to preserve and beautify that block. The organization also sought to prevent deterioration of the block by, for example, planting trees on public property within the block as well as picking up litter and refuse in the public street. Membership in the organization was restricted to those living on the block or owning property or operating businesses on it. The ruling concluded that the organization's activities did in fact promote social welfare by beautifying and preserving public property in cooperation with the local government and that this effort benefits the community as a whole. That its activities consisted of activities traditionally entrusted to government enabled the IRS to overcome the presumption that the organization was organized and operated primarily for the benefit of its members, a conclusion that would have prevented exemption under § 501(c)(4). However, because its efforts were restricted to improving the area adjacent to the residence of its own members and enhanced its members' property rights, it qualified for exemption under § 501(c)(4) and not § 501(c)(3). That is, the organization exhibited too much private benefit in comparison to public benefit to meet the standards of § 501(c)(3).[172]

No ruling to my knowledge considers whether, for example, beautification efforts for a neighborhood would qualify under § 501(c)(3) or § 501(c)(4). Much would appear to depend, as elsewhere in § 501(c)(4), on the criteria for membership and the extent to

170. Rev. Rul. 66-179, 1966-1 C.B. 139.
171. Rev. Rul. 66-14, 1966-1 C.B. 75.
172. Rev. Rul. 75-286, 1975-2 C.B. 210.

which members benefit from membership. Currently, there are no bright lines. As discussed further *infra*,[173] focusing on membership may be a more promising route to reform of § 501(c)(4) than any attempt to define such broad and amorphous concepts such as "community" or "social welfare."[174]

The 1981 Continuing Professional Education text concluded that "'social welfare' is inherently an abstruse concept that continues to defy precise definition. Careful case-by-case analyses and close judgments are still required."[175] Such may well be the case, but so ill-defined a standard risks administrative discretion that produces inconsistent results.

V.
An External View of § 501(c)(4): Border Control

Rather than trying to make sense of § 501(c)(4) within its own confines, we may have better success viewing § 501(c)(4) as an attempt to protect the boundaries of other subsections, particularly § 501(c)(3). I believe such an approach is useful, although it is a far from perfect perspective, given the frequent overlap between § 501(c)(4) and other subsections. Protecting the border of § 501(c)(3) matters because § 501(c)(3) is the subsection that offers the full complement of tax benefits—deductibility and exemption from income tax for all income, including investment income,[176] as well as exemption from gift and estate tax.[177] As a result, organizations may be tempted

173. *See infra* Part VII.

174. I had hoped that social science research on community might be helpful. Such research views the concept of community even more broadly than does the IRS. For example, one recent article described community as follows: "First and foremost, community is not a place, or an organization; nor is it an exchange of information over the Internet. Community is both a feeling and a set of relationships among people. People form and maintain community to meet common needs." David M Chavis & Kien Lee, *What Is Community Anyway*, Stanford Soc. Innovation Rev. (March 12, 2015), https://ssir.org/articles/entry/what_is_community_anyway.

175. 1981 CPE Text, *supra* note 20.

176. Section 4940 does impose a one- to two-percent tax on the investment income of private foundations. I.R.C. § 4940 (2012).

177. I acknowledge that the language and requirements of these provisions—§§ 170(c), 501(c)(3), 2055, and 2522(a)—are not identical in all respects, but this is not the place for discussions of those differences. For discussions of the interplay of these different exemption requirements, see, for example, Harvey P. Dale, *Foreign Charities*, 48 Tax Law. 655 (1995); David E. Pozen, *Remapping the Charitable Deduction*, 39 Conn. L. Rev 531 (2006); Eric M. Zolt, *Tax Deduction for Charitable Contributions: Domestic Activities, Foreign Activities, or None of the Above*, 63 Hastings L.J. 361 (2012). Section 501(c)(3) status also confers additional federal benefits. S*ee* Bazil Facchina et al., *Privileges & Exemptions Enjoyed by Nonprofit Organizations*, 28 U.S.F. L. Rev. 85, 99, 103–105 (1993) (finding that state tax bene-

to shoehorn themselves into the subsection without carrying out the charitable purposes or adhering to doctrines, such as private benefit, designed to ensure that these organizations serve a public benefit. Moreover, because § 501(c)(3) organizations are by far the most numerous of exempt organizations,[178] abuse of rules applicable to them will inevitably have a disproportionate influence on the sector as a whole.

One key way in which § 501(c)(4) protects the requirements of § 501(c)(3) is by permitting lobbying related to exempt purpose without limit and campaign intervention that is less than the organization's primary activity, in contrast to § 501(c)(3)'s limit on lobbying and prohibition of campaign intervention. Section 501(c)(4) offers a tax-exempt route to such activities. In *Regan v. Taxation with Representation of Washington*, Justice Blackmun concurred with the rest of the Supreme Court that limits on lobbying by § 501(c)(3) organizations were consistent with the First Amendment. He was able to reach this conclusion only because a § 501(c)(3) organization could form a § 501(c)(4) affiliate to enable it to engage in unlimited lobbying in an organization not subject to income tax.[179] In the years after this decision, both the Supreme Court and appellate courts have often relied on Justice Blackmun's concurrence.[180]

The state of the law regarding campaign finance changed considerably since Congress established the statutory contours of § 501(c)(4) and the IRS promulgated regulations in 1959 permitting a substantial amount of campaign intervention.[181] Congress enacted the Federal Election Campaign Act of 1971,[182] amended it in the Bipartisan Cam-

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fits for income, sales, and property taxes often follow from an organization qualifying under § 501(c)(3)).

178. According to the IRS, using data from fiscal year 2016, § 501(c)(3) organizations total 1,237,094 and all other nonprofit organizations 362,337. *Tax-Exempt Organizations and Nonexempt Charitable Trusts — IRS Data Book Table 25*, https://www.irs.gov/statistics/soi-tax-stats-tax-exempt-organizations-and-nonexempt-charitable-trusts-irs-data-book-table-25 (last visited Jan. 28, 2019).

179. Regan v. Taxation with Representation of Wash., 461 U.S. 540, 552–53 (1982) (Blackmun, J., concurring).

180. *See* Aprill, s*upra* note 53, at 369-72 (discussing the treatment of Justice Blackmun's concurrence in subsequent circuit court opinions).

181. *See* T.D. 6391, 24 Fed. Reg. 5217 (June 26, 1959) (regulation effective retroactive to 1953) (publishing Treas. Reg. § 1.501(c)(4)-1); Ellen P. Aprill, *The IRS's Tea Party Tax Row: How "Exclusively" Became "Primarily"*, PAC. STANDARD (June 7, 2013), https://psmag.com/news/the-irss-tea-party-tax-row-how-exclusively-became-primarily-59451 (examining the history of the IRS's requirement that § 501(c)(4) organizations be "primarily" engaged in the promotion of social welfare).

182. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered §§ of 26 and 52 U.S.C.).

paign Reform Act of 2002,[183] and enacted § 527 in 1975.[184] All of these statutes require disclosure of campaign donors; § 501(c)(4) organizations, however, need not disclose the source of their donations to campaigns. Thus, while § 501(c)(4) continues to protect the boundaries of § 501(c)(3), it now undermines disclosure that, in my mind, is crucial to our campaign finance law.[185] However, I leave further discussion of lobbying and campaign intervention to other articles in this symposium issue that focus on these topics.[186]

Section 501(c)(4) to some extent patrols the border of private foundations because no charitable deduction is allowed for contributions to § 501(c)(4) organizations dedicated to charitable grantmaking. If, however, the charitable contribution deduction does not matter to potential donors,[187] either because of the donors' enormous wealth or

183. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, 82.

184. Act of Jan. 3, 1975, Pub. L. No. 93-625, 88 Stat. 2108, 2116.

185. *See* Aprill, *supra* note 53 at 403-04 (discussing the importance of disclosure in campaign finance law and different models for disclosure); *see also* Roger Colinvaux, *Social Welfare and Political Organizations: Ending the Plague of Inconsistency*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 481 (2018) [hereinafter Colinvaux, *Ending the Plague of Inconsistency*]; Roger Colinvaux, *Political Activity Limits and Tax Exemption: A Gordian's Knot*, 34 VA. TAX REV. 1, 5–7 (2014) [hereinafter Colinvaux, *A Gordian's Knot*] (advocating uniform disclosure rules for charitable organizations); Lloyd Hitoshi Mayer, *Nonprofit, Politics and Privacy,* 62 CASE-WESTERN L. REV. 801, 803–04 (2012) (discussing how disclosure obligations are important but must also take into account right-to-privacy issues). Congress, by its failure to pass legislation requiring disclosure of those who make contributions to § 501(c)(4) organizations for purposes of campaign intervention, clearly takes a view of disclosure different from mine. *See* Press Release, Democracy 21, Summary of DISCLOSE Act (Jan. 21, 2015), https://perma.cc/FD8D-6EVH (summarizing the contents of the DISCLOSE Act and Congress's failure to pass it).

186. *See, e.g.,* Colinvaux, *Ending the Plague of Inconsistency*, *supra* note 184; 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 (2018).

187. As David Miller's article in this symposium issues discusses, this use of § 501(c)(4) can be especially useful for foreign organizations. Miller, *Grantmakers*, *supra* note 26. In other cases, a donor's wealth may so exceed income that the charitable contribution deduction will not be available because of limits on the deduction related to the donor's adjusted gross income. *See* I.R.C. § 170(b) (2012). Various structures allow a § 501(c)(4) engaged in campaign intervention to establish its social welfare activities with funds that have been deducted as charitable contributions. For example, as practitioners have described to me, donors can set up a private foundation, getting the charitable contribution deduction or donations to it, then donate funds earmarked for charitable activities from the private foundation to a § 501(c)(4) organization. The private foundation undertakes oversight known as expenditure responsibility for those donated funds. *See* I.R.C. § 4945(h). The contributions from the private foundation permit the § 501(c)(4) to use other contributions for lobbying and campaign intervention. Use of § 501(c)(4) organizations can also offer advantages to trusts. As Carlyn McCaffrey has shared with me, the trustee of a trust will receive a

because the donors will take the standard deduction rather than itemize deductions, this aspect of § 501(c)(4) has little bite. Such donors are free to use the § 501(c)(4) organization to make grants for worthwhile projects without the need to comply with the many restrictions on private foundations, which include tax on investment income, mandatory distributions, and excise taxes on self-dealing and excess business holdings, among others. Grantmaking § 501(c)(4) organizations have existed for decades.[188]

However, such use of § 501(c)(4) organizations may be increasing since the passage of the gift tax exclusion for contributions to § 501(c)(4) organizations. Except for the impact of changes introduced by the 2017 tax legislation, I leave detailed discussion of this phenomenon to other articles in this symposium issue.

Section 501(c)(4) also protects the boundaries of § 501(c)(3) in connection with specific activities. Consider low income housing. Section 501(c)(4) low income housing organizations play an important role in the provision of low income housing. The tax credit of § 42 provides a tax incentive for low income housing.[189] The U.S. Department of Housing and Urban Development calls this credit "the most important resources for creating affordable housing in the United States today."[190] Private parties make use of this credit by setting up joint ventures between for-profit developers and tax-exempt organizations,[191] including § 501(c)(3) and § 501(c)(4) organizations.[192]

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distribution deduction for a distribution of trust property to a § 501(c)(4) organization even if a deduction would not have been permitted if the distribution of that property had been made to a § 501(c)(3) organization. Section 642(c) permits the deduction of a trust distribution to § 501(c)(3) organizations only if the distribution can be traced to the gross income of the trust. Email from Carlyn McCaffrey, Partner, McDermott, Will & Emery to Ellen P. Aprill, Professor of Law, Loyola Law School (Mar. 18, 2018) (on file with author).

188. *See generally* Miller, *Grantmakers*, *supra* note 26; Mayer, *§ 501(c)(4)'s "Catchall" Nature*, *supra* note 64.

189. I.R.C. § 42.

190. *Low Income Housing Tax Credits*, HUD USER, https://www.huduser.gov/portal/datasets/lihtc.html (last updated June 6, 2018).

191. The particulars of these structures and of the low-income housing tax credit program are beyond the scope of this Article. For a detailed approach, see MICHAEL L. SANDERS, JOINT VENTURES INVOLVING TAX-EXEMPT ORGANIZATIONS 939–1002 (4th ed. 2013); JOHN R. WASHLICK, BLOOMBERG TAX MANAGEMENT PORTFOLIO NO. 478, JOINT VENTURES INVOLVING TAX-EXEMPT ORGANIZATIONS pt. VIII (2007); BENNETT L. HECHT, DEVELOPING AFFORDABLE HOUSING: A PRACTICAL GUIDE FOR NONPROFIT ORGANIZATIONS 246 (3d ed. 2006).

192. The IRS allocates federal tax credits for low income housing to state housing credit agencies based on each state's population. I.R.C. § 42(h)(5)(A) requires that each year, a state must set aside a minimum of 10 percent of its total credit ceiling exclusively for projects involving qualified nonprofit organizations. A qualified non-

Low income housing can be a charitable activity eligible for exemption under § 501(c)(3) in relieving the poor and distressed.[193] Revenue Procedure 96-32 established a safe harbor for organizations that provide low income housing to qualify under § 501(c)(3) rather than under § 501(c)(4).[194] These requirements include percentage requirements for units occupied by residents that qualify as low income, actual occupancy by low income residents, and affordability by charitable beneficiaries.[195] Such organizations must also ensure that they do not violate the private inurement and private benefit requirements of § 501(c)(3).[196]

Many organizations cannot meet these safe harbors, which serve to preserve the boundaries of § 501(c)(3). They instead achieve exemption under § 501(c)(4),[197] in part because of § 501(c)(4)'s less stringent private benefit requirements. Thus, the existence of § 501(c)(4) advances an important public purpose without stretching or warping the boundaries of § 501(c)(3), in particular its strict application of the private benefit doctrine.

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profit organization for these purposes can be either a § 501(c)(3) or a § 501(c)(4) organization. I.R.C. § 42(h)(5)(C)(i).

193. *See, e.g.*, Rev. Rul. 76-408, 1976-2 C.B. 145; Rev. Rul. 70-585, 1970-2 C.B. 115; Rev. Rul. 67-138, 1967-1 C.B. 129.

194. Rev. Proc. 96-32, §§ 1, 3, 1996-20 I.R.B. 14.

195. Rev. Proc. 96-32, § 3, 1996-20 I.R.B. 14. For example, to qualify under § 501(c)(3), a low income housing organization must establish for "each project that (a) at least 75 percent of the units are occupied by residents that qualify as low-income; and (b) either at least 20 percent of the units are occupied by residents that also meet the very-low income limit for the area or 40 percent of the units are occupied by residents that also do not exceed 120 percent of the area's very low-income limit." *Id.* The 75 percent requirement is more stringent than the low-income-housing tax credit itself, which requires that either 20 percent or more of the residential units are both rent-restricted and occupied by individuals whose income is 50 percent or less of area median gross income or that 40 percent or more of the residential units in such project are both rent-restricted and occupied by individuals whose income is 60 percent or less of area median gross income. I.R.C. § 42(g)(1). If the safe harbor of Revenue Procedure 96-32 is not satisfied, an organization may demonstrate that it relieves the poor and distressed by surrounding facts and circumstances. The Revenue Procedure lists factors to be considered. Rev. Proc. 96-32, § 4, 1996-20 I.R.B. 14. The Revenue Procedure also lists other possible bases for organizations that provide low income housing to qualify under § 501(c)(3), including combatting community deterioration, lessening the burdens of government, and lessening neighborhood tensions. *Id*. § 6.

196. I.R.C. § 501(c)(3).

197. *See, e.g.*, KOULISH, *supra* note 17, at 6 tbl.2 (giving the number of § 501(c)(4) engaged in housing and community developments as 978). Koulish also identifies 315 organizations in the "other" category of the 2012 NCCS Core File as belonging in the category of housing and shelter under the Major National Taxonomy of Exempt Entities. *Id.* at 16 tbl.17.

The ongoing controversy and uncertainty about whether prepaid medical plans, particularly HMOs, can qualify for exemption under § 501(c)(3) also demonstrates how the IRS deploys § 501(c)(4) for border control.[198] The IRS has stated that it considers exemption under § 501(c)(4) for prepaid medical service plans to be an exception to the "general rule that a social welfare organization may benefit its members so long as the principal beneficiaries remain the community as a whole."[199] It has further observed that the "first prepaid medical plans were recognized as exempt during the great depression" and that it would "not as a rule overturn longstanding positions favorable to a taxpayer where subsequent legislative enactments have failed to do so. This is particularly true where such action could have adverse impact on a large proportion of U.S. citizens."[200] Thus, the IRS continues to maintain that HMOs are not eligible for exemption under § 501(c)(3), while begrudgingly accepting their exemption under § 501(c)(4).

The replacement of the charitable care test by the community benefit test as the basis for hospital exemption under § 501(c)(3) put pressure on this IRS position.[201] Revenue Ruling 69-545 was the first piece of IRS guidance to apply the new test:

> The promotion of health, like the relief of poverty and the advancement of education and religion, is one of the purposes in the general law of charity that is deemed beneficial to the community as a whole even though the class of beneficiaries eligible to receive a direct benefit from its activities does not include all members of the community, such as indigent members of the community, provided that the class is not so small that its relief is not of benefit to the community.[202]

As the ruling made clear, in the case of hospitals, operating an emergency open to all persons regardless of ability to pay is of particular importance in satisfying this community benefit standard.[203]

Applying the standard of Revenue Ruling 69-545, the Tax Court rejected the Service's position that the HMO in *Sound Health Associa-*

198. *See, e.g.*, *id.* at 6 tbl.2 (giving the number of § 501(c)(4) organizations that are health providers and insurers as 459, of which 314 file Form 990).

199. 1981 CPE TEXT, *supra* note 20.

200. *Id*.

201. The arrival of Medicare and Medicaid in 1965 led to the community benefit standard replacing the charitable care test. Daniel M. Fox & Daniel C. Schaffer, *Tax Administration as Health Policy: Hospitals, the Internal Revenue Service, and the Courts*, 16 J. HEALTH POL., POL'Y & L. 251, 257-59 (1991) (detailing the development of the community benefit standard).

202. Rev. Rul. 69-545, 1969-2 C.B. 117.

203. *Id.*

tion v. Commissioner[204] did not qualify for exemption under § 501(c)(3).[205] The HMO in the case operated an outpatient clinic that treated members on a prepaid basis and non-members on a fee-for-service basis.[206] Moreover, it provided emergency care to whoever needed it, regardless of ability to pay, within the clinic's capabilities. The court concluded that the Sound Health HMO was like the hospital that satisfied the requirements for exemption under § 501(c)(3) in Revenue Ruling 69-545, by operating an emergency room open to all regardless of membership status or ability to pay.[207] In addition, the HMO had established a research program, an education program, and a fund to help subsidize membership for person who could not make the requirement monthly payments.[208] The court pointed to the organization's particular form of membership as extending, for all practical purposes, to "the class of member of the community itself."[209]

Eventually, the IRS acquiesced to the result in *Sound Health.*[210] In a General Counsel Memorandum, however, it developed, a twelve-factor test for an HMO to qualify for exemption under § 501(c)(3) rather than § 501(c)(4).[211] That is, as it did with the revenue procedure applicable to low income housing, the IRS established an administrative test to define and maintain the boundaries between § 501(c)(3) and § 501(c)(4).[212] Factors included: "provision of services to non-members on a fee-for-service basis; care and reduced rates for the indigent; . . . a meaningful subsidized membership program; [and] a board of directors broadly representative of the community."[213] The General Counsel Memorandum listed additional factors for membership organizations, including "a membership composed of both groups and individuals where such individuals compose a substantial portion of the members" and "an overt program to attract individuals to be-

204. 71 T.C. 158, 178–80 (1978), *acq.*, 1981-2 C.B. 1, *rev'd*, 985 F.2d 1210 (3d Cir. 1993).

205. The HMO in *Sound Health* operated under the staff model, in that health care was provided by the entity itself through its own salaried staff and not indirectly through agreements with physician or other entities, a fact important to later developments. *Id.* at 158.

206. Because the issue of membership is so important in the context of § 501(c)(4), I note that those referred to as "members" of HMOs do not possess legal rights as members under state law.

207. 71 T.C. at 181 n. 9, 194.

208. *Id.* at 184.

209. *Id.* at 185.

210. 1981-2 C.B. 1, 1981 WL 383642.

211. I.R.S. Gen. Couns. Mem. 39,828 (Sept. 30, 1990).

212. *Id.*

213. *Id.*

come members."[214] A leading textbook believes that "[p]articularly targeted were contract model HMOs that arranged for the delivery of health care through agreements with physicians or other entities but did not actually provide medical services using their own staff."[215]

Overruling the Tax Court, the Third Circuit, in *Geisinger Health Plan v. Commissioner*,[216] denied exemption under § 501(c)(3) to an HMO that served only its paying subscribers, even if it intended to establish a subsidized dues program. The court found that the HMO did not provide any health care services itself and did not ensure that those who are not its subscribers had access to health care or information about health care.[217] The appellate court concluded that the HMO could not demonstrate that "it benefits anyone but its subscribers."[218] A subsidized dues program did not in and of itself sufficiently benefit the community to qualify for exemption under § 501(c)(3).[219] The appellate court reached this decision even though "the organizational structure of the Geisinger system was mandated by state licensing requirements" and it and its affiliated entities "satisfied most of the Service's criteria for community benefit."[220]

IHC Health Plans, Inc. v. Commissioner[221] also denied exemption under § 501(c)(3) to three HMOs formed as part of an integrated delivery system. The court articulated the test for exemption under § 501(c)(3), in the context of health care providers, as whether the taxpayer operates "*primarily for the benefit of the community.*"[222] According to the court, "an organization cannot satisfy the community-benefit requirement based solely on the fact that it offers health-care

214. *Id.*
215. FISHMAN, SCHWARZ, MAYER, *supra* note 106, at 305.
216. 985 F.2d 1210 (3d Cir. 1993). Its HMO followed the individual practice association, not staff, model. *Id.* at 1218 n.4.
217. *Id.* at 1219.
218. *Id.*
219. *Id.* at 1220. The court declined to reach the question of whether the HMO could be exempt under § 501(c)(3) not standing alone but as an integral part of the health care system. It remanded the case to the Tax Court for clarification of that issue. *Id*. The Tax Court held on remand that the HMO did not meet the integral part doctrine because it failed to establish that its activities would not have been considered an unrelated trade or business if carried on by the related entities. Geisinger Health Plan v. Comm'r, 100 T.C. 394, 406-07 (1993). The Third Circuit affirmed, but on the grounds that the HMO's affiliation with other entities did not increase the portion of the community for which it promoted health. Geisinger Health Plan v. Comm'r, 30 F.3d 494, 502 (3d Cir. 1994).
220. FISHMAN, SCHWARZ, MAYER, *supra* note 106, at 305. They conclude that "the Third Circuit was unwilling to grant exempt status to a stand-alone entity that performed no health services itself." *Id.*
221. 325 F.3d 1188 (10th Cir. 2003).
222. *Id.* at 1197 (emphasis in original).

services to all in the community in exchange for a fee . . . Rather, the organization must provide some additional 'plus.' "[223] It not very helpfully explained that this additional benefit

> must either further the function of government-funded institutions or provide a service that would not likely be provided within the community but for the subsidy. Further, the additional public benefit conferred must be sufficient to give rise to a strong inference that the public benefit is the *primary purpose* for which the organization operates.[224]

The petitioners failed this test. The court also denied exemption under § 501(c)(3) under the integral part theory. It rejected this basis for exemption on the grounds that petitioners did not function to further the "parent" organization because only 20% of the physicians who provided services to the HMO came from physicians employed by the parent organization. Therefore, petitioner did not function solely to further the exempt purposes of the parent entity.[225]

Thus, the current state of affairs regarding HMOs is that § 501(c)(4), with its less rigid requirements, protects § 501(c)(3) from pressure to loosen its requirements. As the Joint Committee of Taxation has written, HMOs "often obtain exempt status under § 501(c)(4) rather than under § 501(c)(3) because of the private benefit concerns and the difficulty in satisfying the charitable purpose requirement of § 501(c)(3)."[226]

Nonetheless, in all of these categories of activities, the availability of § 501(c)(4) has operated to safeguard the limits of § 501(c)(3) and to defend the integrity of § 501(c)(3). Such safeguards have often, but not always, occurred through administrative action by the IRS. For all these categories of activities, § 501(c)(4) has operated to safeguard the limits of § 501(c)(3) and to defend the integrity of § 501(c)(3). In the case of lobbying and campaign intervention, the safeguards appear in the § 501(c)(3) statute itself. For low income housing and HMOs, the IRS has announced boundaries between § 501(c)(3) and § 501(c)(4), although courts have also played a role in the latter. Expansion of § 501(c) grantmaking activities may lead to congressional or administrative action.

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223. *Id.* (footnotes omitted).
224. *Id.* at 1198 (emphasis in original).
225. *Id* at 1203.
226. STAFF OF THE JOINT COMM. ON TAX'N, 109TH CONG., HISTORICAL DEVELOPMENT AND PRESENT LAW OF THE FEDERAL TAX EXEMPTION FOR CHARITIES AND OTHER TAX-EXEMPT ORGANIZATIONS 116 n.3 (Comm. Print 2005), http://www.jct.gov/x-29-05.pdf.

VI.
SECTION 501(C)(4) BORDER SKIRMISHES

The fragmented nature of § 501(c)(4) can reveal fault lines in tax-exemption. When identified, these fault lines can shift the exemption landscape in two different ways. First, they can trigger new bases for exemption, whether under § 501(c)(4) or § 501(c)(3). Second, they can prompt clarification of the bases for denying exemption under those and other provisions regarding tax-exempt organizations. That is, in addition to reinforcing the borders of various provisions of § 501(c)—particularly § 501(c)(3)—§ 501(c)(4) plays an important role in changing these borders. Once the borders are changed, § 501(c)(4) renews its border patrol function, now patrolling different borders. We can see these changes in revenue rulings, judicial decisions, and statutory changes.

Sometimes the IRS itself changes the borders between the subsections of 501(c). Revenue Ruling 67-294, with little analysis or discussion, recognized as exempt under § 501(c)(4) a nonprofit organization created to make loans to business entities in order to alleviate unemployment in an economically depressed area when similar loans were not available from commercial sources.[227] Fewer than ten years later, Revenue Ruling 74-587 found exempt under § 501(c)(3) an organization that provided "funds and working capital to corporations or individual proprietors who are not able to obtain funds from conventional commercial sources because of the poor financial risks involved in establishing and operating enterprises in th[o]se communities."[228] The ruling did not discuss private benefit in any detail. In fact, it stated, "Although some of the individuals receiving financial assistance in their business endeavors under the organization's program may not themselves qualify for charitable assistance as such, that fact does not detract from the charitable character of the organization's program," which included "relief of poverty . . . the lessening of neighborhood tensions, and the combating of community deterioration."[229]

Court decisions also push the IRS to shift these borders. Revenue Ruling 78-131 found an organization with the purpose of developing

227. Rev. Rul. 67-294, 1967-2 C.B. 193.

228. Rev. Rul. 74-587, 1974-2 C.B. 162.

229. Of course, we do not know whether the organization in Revenue Ruling 67-294 sought § 501(c)(3) status and was rejected or whether it sought only § 501(c)(4) status. For a discussion of whether Congress intended some categories of § 501(c) to be exclusive, see Lloyd Mayer's piece in this issue. Mayer, *§ 501(c)(4)'s "Catchall" Nature*, *supra* note 64.

and encouraging an interest in arts by holding a community art show exempt under § 501(c)(4). Even though the organization received income from exhibitors' fees, sales commissions, and catalogue sales, the ruling emphasized that the art show was conducted in a noncommercial manner. It included works of amateurs, set aside space for students, and relied on volunteers.[230] In *Goldsboro Art League v. Commissioner*, however, the Tax Court rejected the IRS's argument that commerciality and the private benefit afforded artists whose works were exhibited prevented exemption under § 501(c)(3) for an organization that, among other educational activities, operated two galleries showing works chosen by a jury and for their representation of modern trends.[231] According to the Tax Court, "Exhibiting an artist's more daring works in a part of the country where there are no nearby art museums or galleries illustrates that petitioner's purpose is primarily to educate rather than sell."[232] The court also found the activities with respect to the gallery sales incidental to its other educational activities.[233]

The Goldsboro Art League engaged in a far wider range of activities, including sponsoring art classes and art demonstrations, than did the organization in Revenue Ruling 78-131. Thus, the contrast here is not as sharp as that between the two economic development rulings. Nonetheless, *Goldsboro Art League* establishes that art sales by a community art organization do not automatically prevent exemption under either § 501(c)(4) or § 501(c)(3).

The most important examples of border skirmishes, however, involve activities that produced statutory changes—veterans' organizations, homeowners' associations, amateur sports, and credit counseling.

Until 1972, war veterans' organizations, like other veterans' organizations, were recognized as exempt under § 501(c)(4). These war veterans' associations often formed subsidiaries recognized as exempt as social clubs under § 501(c)(7), and a number of these veterans' associations also offered various kinds of insurance to their members and their members' dependents.[234]

The Tax Reform Act of 1969 extended the unrelated business income tax to all exempt organizations, including social welfare orga-

230. Rev. Rul. 78-131, 1978-1 C.B. 157.
231. 75 T.C. 337, 342 (1980).
232. *Id.* at 344.
233. *Id.* at 345.
234. *See* INTERNAL REVENUE SERV., TAX GUIDE FOR VETERANS' ORGANIZATIONS 4 (2018), https://www.irs.gov/pub/irs-pdf/p3386.pdf.

nizations and social clubs.[235] The Joint Committee explained that this change corrected "an injustice by which some tax-exempt organizations are subjected to tax on their business income while others remain tax-free with respect to the same sort of business income."[236] These changes prompted congressional concern regarding taxation of insurance for veterans. That concern was heightened by a provision in the Tax Reform Act of 1969 that extended the unrelated business income tax to all exempt organizations, provided a specific exemption from the tax for insurance income of § 501(c)(8) fraternal societies,[237] but made no mention of insurance provided by veterans' organizations.

In 1972, Congress, still troubled about the taxation of insurance activities of war veterans' organizations,[238] passed § 501(c)(19), a new subsection for veterans' organizations, and § 512(a)(4), which exempted certain insurance benefits for veterans and their dependents from the unrelated business income tax.[239] At the time of its enactment, at least seventy-five percent of the members of a § 501(c)(19) organization had to be past or present members of the armed forces; and substantially all of the other members[240] had to be cadets or the

235. Tax Reform Act of 1969, Pub. L. No. 91-172, § 121, 83 Stat. 487, 536 (adding § 501(c)(19) to the Internal Revenue Code of 1954, as amended).

236. STAFF OF THE JOINT COMM. ON TAXATION AND S. FIN. COMM., 91ST CONG., SUMMARY OF H.R. 13270, THE TAX REFORM ACT OF 1969, at 27 (Comm. Print 1969), http://www.jct.gov/s-61-69.pdf.

237. *See* STAFF OF THE JOINT COMM. ON TAXATION, 100TH CONG., OVERVIEW OF THE UNRELATED BUSINESS INCOME TAX ON EXEMPT ORGANIZATIONS 5 (Comm. Print 1987); INTERNAL REVENUE SERV., *supra* note 234, at 4.

238. Internal Revenue Serv., *Veterans' Organizations*, *in* EXEMPT ORGANIZATIONS: CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1986 (1987), https://www.irs.gov/pub/irs-tege/eotopicp86.pdf [hereinafter 1986 CPE TEXT]. This document is not paginated.

239. Act of Aug. 29, 1972, Pub. L. No. 92-418, § 1(b), 86 Stat. 656, 656. These provisions were retroactive to January 1, 1970. *Id.* § 1(c). Congress passed another subsection for veterans, § 501(c)(23). Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 354, 96 Stat. 324, 640-41. It exempts organizations organized prior to 1880, more than seventy-five percent of the members of which are past or present members of the Armed Forces, and the primary purpose of which is provide insurance and other benefits to veterans and their dependent. *Id.* "This legislation was proposed on behalf of the Army Mutual Aid Association and the Navy Mutual Aid Association. It is broader than IRC 501(c)(19) in that the membership requirements are more lenient. It is limited in application, however, since it applies only to organizations created before 1880. The Army and Navy Mutual Aid Societies are the only organizations known to qualify under this section." I.R.M. § 7.25.19.9. *The Nonprofit Almanac*, however, gives the number of § 501(c)(23) organizations registered and filing Form 990 as three. BRICE S. MCKEEVER, NATHAN E. DIETZ & SAUNJI D FYFFE, THE NONPROFIT ALMANAC 4 tbl1.1 (9th ed. 2016).

240. Based on legislative history, "substantially all" for this purpose means ninety percent. S. REP. NO. 92-1082, 1972-2 C.B. 713 (1972).

spouses, widows, or widowers of either cadets or past and present members of the Armed Forces.[241]

Congress amended the provision in 1982 and 2003 to relax membership requirements and broaden the purposes of war veterans' organizations.[242] Under current law, organizations exempt under § 501(c)(19) must be organized in the United States or its possessions; have at least seventy-five percent of its members be past or present members of the armed forces; and have substantially all of its remaining members be either cadets or the spouses, widows, widowers, ancestors or lineal descendants of past or present members of the U.S. Armed Forces or cadets.[243] Congress has permitted § 501(c)(19) organizations to have a broad range of purposes. Exempt purposes include providing "entertainment, care, and assistance to hospitalized veterans or members of the Armed Forces," providing "insurance benefits," and "providing social and recreational activities" for members.[244]

The most recent edition of *The Nonprofit Almanac* gives the number of registered § 501(c)(19) organizations in 2015 as 29,588 and the number reporting to the IRS in 2013 as 8,338.[245] Organizations exempt under § 501(c)(19) are "unique in the tax-exempt sector."[246] They are exempt from income tax, contributions to them may be deductible,[247] and some are permitted to set aside amounts to provide

241. I.R.M. § 7.25.19.2; 1986 CPE TEXT, *supra* note 238.

242. The 1982 amendment deleted the requirement that seventy-five percent be *war* veterans, Tax Equity and Fiscal Responsibility Act § 354(a)(1), and the 2003 Act allowed ancestors and lineal descents to be part of the veteran base, Military Family Tax Relief Act of 2003, Pub. L. No. 108-121, § 105, 117 Stat. 1335, 1338.

243. I.R.C. § 501(c)(19) (2012).

244. Treas. Reg. § 1.501(c)(19)-1(c) (1976). Other permitted purposes include promoting social welfare, perpetuating the memory of veterans and comforting their survivors, sponsoring or participating in patriotic activities, and conducting programs for religious, charitable, scientific, literary, or educational purposes. *Id.*

245. MCKEEVER, DIETZ & FYFFE, *supra* note 239.

246. INTERNAL REVENUE SERV., *supra* note 234, at 3.

247. Under § 170(c)(3), contributions are deductible if made to a war veterans' organization. *See* I.R.C. § 170(c)(3). That is, Congress did not amend § 170(c)(3) when it made other changes regarding veterans' organizations. To be a war veterans' organization, the organization must satisfy the original definition for § 501(c)(19) organizations—at least ninety percent of all members must be war veterans and substantially all of the other members must be veterans, cadets, or spouses, widows, or widowers of war veterans, veterans, or cadets. The organization must also be organized for the more limited purposes allowed in the 1972 legislation. *See* Rev. Rul. 84-140, 1984-2 C.B. 56 (allowing deductions for contributions to an organization whose purposes were consistent with §§ 170(c)(3) and 2522(a)(4)); I.R.M. § 7.25.19.6. Contributions to § 501(c)(4) organizations that meet these requirements are also deductible. *Id.*

insurance for members. Moreover, they can engage in lobbying and campaign intervention without limit.[248]

Despite all these advantages, however, veterans' organizations today continue to be recognized under a number of other subsections of 501(c).[249] In particular, the enactment of § 501(c)(19) did not end the use of § 501(c)(4) organizations in this area.[250] Koulish lists the number of § 501(c)(4) organizations registered as military and veterans' organizations as 6,365 and the number filing Form 990 as 1,102.[251] In particular, "an organization that cannot meet the membership percentage test of IRC 501(c)(19) but is primarily engaged in activities that promote social welfare, such as providing assistance to needy and disabled veterans and/or promoting patriotism, can qualify for IRC 501(c)(4) exemption."[252] Thus, § 501(c)(4) now protects the boundary of § 501(c)(19).

Other new code provisions have been enacted as a result of difficulties with the application of § 501(c)(4). Qualification of homeowners' and tenants' associations under § 501(c)(4) proved to be a frequent problem prior to congressional intervention in 1976. Revenue Ruling 74-99, for example, modified an earlier ruling, Revenue Ruling 72-102, which had stated that a housing development could constitute a community. The later ruling explained that to overcome the presumption of being organized for its members, a homeowners' association must show that it serves a community bearing a reasonably recognizable relationship to an area ordinarily identified as governmental, must not conduct activities directed to the exterior mainte-

248. The taxpayer argued in *Regan v. Taxation with Representation* that permitting deduction along with unlimited lobbying for veterans' organizations but not other tax-exempt organizations violated the equal protection component of the Fifth Amendment. 461 U.S. 540, 546-47 (1983). The Court rejected this argument, finding that it was not irrational for Congress to subsidize lobbying by veterans' associations in recognition of their service to our country. *Id.* at 550-51.

249. INTERNAL REVENUE SERV., *supra* note 234, at 4, lists the following: §§ 501(c)(2), 501(c)(4), 501(c)(7), 501(c)(8), 501(c)(10), 501(c)(19) and 501(c)(23). Including charities exempt under § 501(c)(3) that aid veterans, GuideStar gives the total number of organizations devoted to veterans as more than 45,000. GUIDESTAR, U.S. VETERANS ORGANIZATIONS BY THE NUMBERS 2 (2015), https://www.guidestar.org/downloadable-files/us-veterans-organizations.pdf. Of this 45,000, 65% are posts or organizations such as the American Legion or VFW and 18% are charities. *Id.*

250. The special UBIT exception for amounts set aside for insurance payments, however, applies only to § 501(c)(19) organizations. *See* INTERNAL REVENUE SERV., *supra* note 234, at 37.

251. KOULISH, *supra* note 17, at 6.

252. 2003 CPE TEXT, *supra* note 36, at I-22.

nance of private residences, and must maintain common areas or facilities for the use and enjoyment of the general public.[253]

These requirements set a high bar.[254] Congress thus enacted § 528 as part of the Tax Reform Act of 1976[255] "because many homeowner's associations found it difficult to meet the requirements for exemption under IRC 501(c)(4)."[256] Congress concluded that it would not be appropriate to tax the revenue of an associations of homeowners who act together if an individual homeowner acting alone would not be taxed on the same activity.[257] Homeowners acting alone, however, would face tax on any investment income, and Congress required homeowners' associations to do the same.[258] That is, unlike the case with veterans' organizations, Congress treated homeowners' associations as a conduit for and a pooling of individual homeowners and subject to tax on that basis.[259]

A homeowners' association may elect to be exempt under § 528. If assessments and dues are used for the maintenance and improvement of association property, the provision exempts from income tax any dues and assessments received by a qualified homeowners' association that are paid by property owners who are members of the association.[260] Sixty percent or more of the association's gross income must consist of "amounts received as membership dues, fees, [and] assessments" from owners of residential units or residences, and ninety percent or more of the associations' expenditures must be for the "acquisition, construction, management, maintenance, and care of

253. Rev. Rul. 74-99, 1974-1 C.B. 132. A later revenue ruling, Rev. Rul. 80-63, 1980-1 C.B. 116, discusses additional issues raised by Revenue Ruling 74-99. It states, for example, that "if the association owns and maintains common areas and facilities for the use and enjoyment of the general public as distinguished from areas and facilities whose use and enjoyment is controlled and restricted to members of the community, then it may satisfy the requirement of serving a community." *Id*.

254. Nonetheless, Koulish gives the number of homeowner and tenant association registered with the IRS under § 501(c)(4) as 1,891 and the number filing Form 990 as 988; he separately lists housing communities and developments, with 978 registered and 819 filing Form 990. KOULISH, *supra* note 17, at 6 tbl.2. The organizations also sometimes seek exemption as § 501(c)(7) social clubs. *See* 2003 CPE TEXT, *supra* note 36, at I-12.

255. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2101, 90 Stat. 1525, 1897 (adding § 528 to the Internal Revenue Code of 1954, as amended).

256. 2003 CPE TEXT, *supra* note 36, at I-20.

257. *See* STAFF OF THE JOINT COMM. ON TAXATION, *supra* note 226, at 28-29.

258. H.R. REP. 94-648 (1975) (reproduced in 1979-3 C.B. 373).

259. For a discussion of pooling as one theory underlying methods of taxation, see Donald B. Tobin, *Political Advocacy and Taxable Entities: Are They the Next Loophole*, 6 FIRST AMEND. L. REV. 41, 75–81 (2007).

260. I.R.C. § 528(d) (2012).

association property."[261] The provisions of § 528 permit homeowners' associations to exclude exempt function income from gross income.[262] Other income, such as investment income and fees from non-members to use facilities, is taxed at a flat thirty percent rate.[263] As discussed in Part VII of this Article, although § 501(c)(4) organizations must offer more community benefit than homeowners' associations, a somewhat similar approach may be appropriate for § 501(c)(4) organizations that offer benefits to members.

Compared to § 501(c)(3), § 501(c)(4) has less stringent requirements, and organizations unable to qualify for exemption under § 501(c)(3) often turn to § 501(c)(4) instead.[264] As the cases of veterans' organizations and homeowners' associations demonstrate, the requirements of § 501(c)(4) proved too strict for these particular types of organizations, and Congress responded with more generous provisions.

Congress has also acted in situations regarding potential overlap of § 501(c)(3) and § 501(c)(4). In 1976, Congress amended § 501(c)(3) to include organizations "to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment.)"[265] According to the Joint Committee on Taxation, one of the purposes of this addition was to address the "confusion and inequity for amateur sports organizations" under prior law.[266] Before the amendment, organizations fostering national or international sports competition could qualify under § 501(c)(4) or § 501(c)(6), but not as educational or charitable organizations under § 501(c)(3).[267]

Although it was intended as a fix, Congress quickly came to view the facilities and equipment prohibition as unsatisfactory.[268] In 1982,

261. *Id.* § 528(c)(1)(B).

262. *Homeowners' Associations*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/other-non-profits/homeowners-associations (last updated July 24, 2018) (discussing qualifications for the exempt function election under § 528).

263. *See* I.R.C. § 528(b).

264. *See* KOULISH, *supra* note 17, at 3.

265. Tax Reform Act of 1976, Pub. L. 94-455, § 1313, 90 Stat. 1370, 1730.

266. STAFF OF JOINT COMM. ON TAXATION, 94TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, at 423-24 (Comm. Print 1976). The Joint Committee further explained that the restriction on provision of athletic facilities or equipment "is intended to prevent the allowance of these benefits for organizations which, like social clubs, provide facilities and equipment for their members." *Id.*

267. *See. e.g*., Rev. Rul. 70-4, 1970-1 C.B. 126.

268. *See* HILL & MANCINO, *supra* note 5, at ¶ 3.09 n.295: ("[T]his statute has caused tremendous financial problems for the amateur sports world. . . . Many of the development drives that assist and prepare our Olympic athletes and other national and regional amateur sports organizations are at a standstill simply because it is necessary

Congress enacted § 501(j), retroactive to 1976, under which the facilities and equipment prohibition did not apply to "qualified amateur sports organization[s]."[269] A qualified organization under the provision is "any organization organized and operated exclusively to foster national or international amateur sports competition if such organization is also organized and operated primarily to conduct national or international competition in sport or to support and develop amateur athletes for national or international competition in sports."[270]

Thus, the amendment to § 501(c)(3) and the addition of § 501(j) expanded the number of amateur athletic organizations that can look to § 501(c)(3) instead of § 501(c)(4) for exemption. That is, in this case, congressional clarification expanded, rather than reduced, the number of organizations that could qualify under § 501(c)(3). Even so, amateur athletic associations may not satisfy § 501(c)(3) and continue to qualify for exemption under § 501(c)(4). Koulish reports that, in the category of sports and recreation, 8,265 organizations have filed for exemption under § 501(c)(4) and 3,888 file Form 990s.[271] Both the governing bodies of international soccer and the Olympics are exempt as foreign § 501(c)(4) organizations.[272] The United States Olympic Committee, in contrast, is exempt under § 501(c)(3).[273]

Credit counseling is another area in which Congress, responding to judicial decisions and perceived abuses, has intervened to clarify the border between §§ 501(c)(3) and 501(c)(4). During the 1960s the IRS took the view that credit counseling organizations rarely qualified under § 501(c)(3). To qualify for exemption under § 501(c)(3), they needed, for example, to help the indigent without charge.[274] Credit

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for many of these organization to provide training facilities and equipment and they cannot receive tax exempt status under the current interpretation.") (citing 128 Cong. Rec. S8919 (July 22, 1982)).

269. Tax Equity and Fiscal Responsibility Act of 1982, § 286(a), Pub. L No. 98-369, 98 Stat. 494 (adding § 501(j) to the Internal Revenue Code of 1954, as amended).

270. 26 U.S.C. § 501(j)(2) (2012). The statute also provides that a qualified amateur organization would not fail to qualify under § 501(c)(3) "merely because its membership is local or regional in nature." *Id.* § 501(j)(1)(B).

271. KOULISH, *supra* note 17, at 6 tbl.4.

272. *Id.* at 5-6. A GuideStar search gives the following: For the International Olympic Committee, gross receipts in 2016 of $3,557,087,000, and assets of $3,185,106,000; for the Federation Internationale de Football Association in 2016, gross receipts of $555,721,582 and assets of $3,351,899,816. *International Olympic Committee*, GUIDESTAR, https://www.guidestar.org/profile/98-0123241 (last visited Jan. 31, 2019); *Federation Internationale de Football Association*, GUIDESTAR, https://www.guidestar.org/profile/98-0132529 (last visited Jan. 31, 2019).

273. United States Olympic Committee, 2016 Form 990, *available at* https://www.guidestar.org/FinDocuments/2016/131/548/2016-131548339-0e292507-9.pdf.

274. *See, e.g.*, Rev. Rul. 69-441, 1969-2 C.B. 115.

counseling organizations without such programs could be exempt only under § 501(c)(4).[275] In 1978, however, the court in *Consumer Credit Counseling Service of Alabama, Inc. v. United States* reversed the IRS revocation of exemption under § 501(c)(3) of a number of credit counseling organizations.[276] The court held that the organizations, whose services were not limited to low income individuals and their families were "educational because they instruct the public on subjects useful to the individual and beneficial to the community."[277]

In the 2000s, the IRS, having seen an increase in exemption applications for such organizations and an accompanying increase in abuse, undertook a new program of enforcement. "[B]y 2005, the IRS had a substantial portion of the nonprofit credit counseling 'industry' under review either when these organizations filed for recognition of exemption or by audit."[278] The IRS released documents to provide a legal framework for determining the exempt status of such organizations.[279] The Commissioner of the IRS testified on the issue before the Subcommittee on Oversight of the House Ways and Means Committee in 2003, before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs in 2004, and before the Senate Finance Committee in 2005.[280]

In 2006, as part of the Pension Protection Act, Congress enacted a new subsection of § 501, § 501(q), containing a special set of rules for credit counseling organizations.[281] Whether applying for exemp-

275. *See, e.g.*, Rev. Rul. 65-299, 1965-2 C.B. 165 (granting exemption under § 501(c)(4) to a credit counseling organization that relied primarily on donations but charged clients a nominal fee for counseling services).

276. No. 78-0081, 1978 WL 4548 at *3-4 (D.D.C. Aug. 18, 1978).

277. *Id.* at *3.

278. HOPKINS, *supra* note 6, at 205; *see* FRANCES R. HILL & DOUGLAS M. MANCINO, TAXATION OF EXEMPT ORGANIZATIONS ¶ 3.03 (Supp. 2017) (describing in detail the background leading up to the 2006 statutory provisions regarding credit counseling organizations).

279. *See* I.R.S. Chief Counsel Advisory 200620001 (May 9, 2006), 2006 WL 1321249; I.R.S. Chief Counsel Advisory 200431023 (July 13, 2004), 2004 WL 1701316.

280. *See* Fred Stokeld, *IRS Taking Aim at Abusive Credit Counseling Outfits, Everson Says,* 43 EXEMPT ORG. TAX REV. 26 (2004) (detailing the Commissioner's testimony before the House Ways and Means Oversight Subcommittee); *Hearing on the Role and Tax-Exempt Status of Certain Not-For-Profit Credit Counseling Agencies Before the Permanent Subcomm. on Investigations of the S. Comm. on Gov't Affairs*, 108th Cong., 78-80 (2004) (written testimony of Mark Everson, Comm'r); Fred Stokeld, *EO Reform Proposals Considered at Finance Committee Hearing*, 48 EXEMPT ORG. TAX REV. 127 (2005) (discussing the testimony before the Senate Finance Committee).

281. Pension Protection Act of 2006, Pub. L. No. 109-280, § 1220(a), 120 Stat. 780, 1086 (adding § 501(q) to the Internal Revenue Code of 1986, as amended).

tion under § 501(c)(3) or under § 501(c)(4), the organization must comply with a number of requirements regarding its services, its charges, the composition of its board, its customers, its relationship with related entities, and revenue from debt management plans. A credit counseling organization seeking exemption under § 501(c)(4), unlike other § 501(c)(4) entities, must apply for recognition of exemption, as prescribed in regulations. Additional requirements apply to a credit counseling organization seeking exemption under § 501(c)(3), including a prohibition on soliciting contributions from consumers while they receive services from the organization and limits on the percentage of revenue derived from payments by consumers.[282]

As all agree, the area occupied by § 501(c)(4) is both broad and uncertain. Inevitably, questions arise related to the boundaries of not only § 501(c)(4) itself but other provisions as well. In some cases, these border skirmishes have resulted in both administrative and congressional action and may do so again in the future. If use of § 501(c)(4) organizations as grantmaking entities that avoid the strictures applicable to private foundations becomes well-known and well-publicized,[283] I suspect that such use could attract congressional attention as an abuse of current law and produce a new set of rules, as it did in the case of credit counseling organizations. That is, this use of § 501(c)(4) could prompt further restrictions, unlike the developments such as those in connection with veterans' organization or homeowners' associations that led to additional bases for exemption.

VII.
Possible Reform of § 501(c)(4)

With all the recent concern about the role of § 501(c)(4) organizations in campaign intervention after *Citizens United*,[284] many recent proposals for reform have concentrated on that aspect of § 501(c)(4). For example, in 2013, the New York Times hosted a debate, "Does the IRS Scandal Prove That 501(c)(4)'s Should be Eliminated?"[285] Professor John Colombo argued that they should; Professor Lloyd Mayer argued for disclosure of donors regardless of tax classification and for

282. *See* I.R.C. § 501(q)(2) (2012).

283. Such use of § 501(c)(4) may be an unintended consequence of the 2016 legislative change making clear that transfer to § 501(c)(4) organizations are not subject to gift tax. *See supra* note 56.

284. *See generally* OpenSecrets, *supra* note 4.

285. John D. Colombo, *The I.R.S. Should Eliminate 501(c)(4) Organizations*, N.Y. Times: Room for Debate (May 15, 2013), https://www.nytimes.com/roomfordebate/2013/05/15/does-the-irs-scandal-prove-that-501c4s-should-be-eliminated/the-irs-should-eliminate-501c4-organizations.

regulation by the FEC instead of the IRS; I suggested a new category for organizations primarily engaged in lobbying.[286] Rosemary Fei reminded readers that § 501(c)(4) also covered such important activities as low income housing and health maintenance organizations.[287]

In a piece drafted before the Tea Party controversy and included in this symposium issue, Professor Daniel Halperin outlined an approach to taxation of § 501(c)(4) organizations based not on their potential for political activity, but the benefits they offer their members.[288] In particular, he argues for taxation of the investment income of § 501(c)(4) organizations that offer members more than incidental benefits.[289] He contends that § 501(c)(4) organizations that provide more than incidental benefits to members should be seen as another category of mutual organizations and taxed like social clubs.[290]

In 1969, Congress explained the principles behind taxation of social clubs as under a theory of pooling:

> Since the tax exemption for social clubs and other groups is designed to allow individuals to join together to provide recreational or social facilities or other benefits on a mutual basis, without tax consequences, the tax exemption operates properly only when the sources of income of the organization are limited to receipts from the membership. Under such circumstances, the individual is in substantially the same position as if he had spent his income on

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286. *Id.*; Lloyd Hitoshi Mayer, *The I.R.S. Fiasco Has Much to Do with Disclosure Requirements*, N.Y. TIMES: ROOM FOR DEBATE (May 15, 2013), https://www.nytimes.com/roomfordebate/2013/05/15/does-the-irs-scandal-prove-that-501c4s-should-be-eliminated/the-irs-fiasco-has-much-to-do-with-disclosure-requirements; Ellen Aprill, *Create a New Exemption Category to Distinguish Between Lobbying and Electioneering*, N.Y. TIMES: ROOM FOR DEBATE (May 15, 2013), https://www.nytimes.com/roomfordebate/2013/05/15/does-the-irs-scandal-prove-that-501c4s-should-be-eliminated/create-a-new-exemption-category-to-distinguish-between-lobbying-and-electioneering. Rosemary Fei and Eric Gorovitz make a somewhat similar but much more sophisticated suggestion in their article for this symposium. Fei & Gorovitz, *supra* note 185.

287. Rosemary Fei, *501(c)(4)'s Serve a Unique and Useful Purpose*, N.Y. TIMES: ROOM FOR DEBATE (May 15, 2013), https://www.nytimes.com/roomfordebate/2013/05/15/does-the-irs-scandal-prove-that-501c4s-should-be-eliminated/501c4s-serve-a-unique-and-useful-purpose-18.

288. Halperin, *I.R.C. § 501(c)(4)*, *supra* note 32 at 528.

289. *Id.* David S. Miller has also suggested taxing the investment income of § 501(c)(4) organizations, but on a very different basis: that any § 501(c)(4) and other tax-exempt organization that engages in "any substantial amount of lobbying or campaigning would be taxable on all of its net investment income." Miller, *Reforming the Taxation of Exempt Organizations*, *supra* note 89 at 492.

290. Halperin, *I.R.C. § 501(c)(4)*, *supra* note 32 at 534.

> pleasure or recreation (or other benefits) without the intervening separate organization.[291]

But this pooling principle for exemption does not extend to exemption for nonmember income, including investment income, and social clubs are taxed on these amounts.[292]

By comparing § 501(c)(4) organizations to certain mutual benefit organizations, Halperin's work on § 501(c)(4) builds on his earlier work regarding §§ 501(c)(5) and 501(c)(6) and the extent to which various types of income of tax-exempt organizations should be taxed.[293] This work, in turn, built on the work of Bittker and Rahdert and Hansmann.[294] In their classic article, *The Exemption of Nonprofit Organizations from Federal Income Tax*, Bittker and Rahdert classified political organizations and § 501(c)(4) organizations along with § 501(c)(3) as public service organizations that should be exempt from income tax because there is no satisfactory way either to define and compute their income or to fit the tax rate to the ability of their beneficiaries to pay.[295] Bittker and Rahdert viewed unions and business leagues along with social clubs and consumers' cooperatives as mutual benefit organizations operated to provide goods and services to their members at cost.[296] Exempting the accumulated income of a business league or union was "the equivalent of currently imputing its income to its members, but allowing them to deduct these amounts when they are ultimately used," or allowing the organization to reduce dues in future years, thus compensating "the Treasury, albeit belated, for the revenue lost by exempting the . . . income when realized . . . except for the time value of money."[297] The authors did not seem especially concerned with the time value of money lost to the Treasury.

Henry Hansmann famously disputed Bittker and Rahdert's contention that we cannot construct a workable definition of income for nonprofits.[298] Even for § 501(c)(3) nonprofits that depend on dona-

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291. S. REP. NO. 91-552, at 71 (1969).

292. *See* I.R.C. § 512(a)(3) (2012) (stating special rules for unrelated business taxable income for social clubs).

293. Daniel Halperin, *Income Taxation of Mutual Nonprofits*, 59 TAX L. REV. 133, 133 (2006) [hereinafter Halperin, *Income Taxation*].

294. The next three paragraphs are taken from Aprill, *supra* note 53 at 394-95.

295. Boris L. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Tax*, 85 YALE L. J. 299, 305–07 (1976).

296. *Id*. at 348–57.

297. *Id.* at 354-55. At the time the authors were writing, union dues were likely to be deductible, since the limits on deduction of unreimbursed employee expenses under § 67 were not introduced until 1986.

298. Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 56–62 (1981).

tions, such as the Red Cross, he urged conceptualizing the donor as buying the product or service the organization provides.[299] In the case of the Red Cross, for example, the services provided would be disaster relief.[300] Without exemption, tax would apply to earnings saved for expenditures in future years and net capital investment, which Hansmann called retained earnings.[301] Exemption thus operates as a subsidy for capital that nonprofit exempt organizations cannot raise from private investors.[302] Under Hansmann's analysis, then, it would seem that exemption of tax on retained earnings of § 501(c)(4) organizations would also be seen as a tax subsidy. Hansmann criticized the exemption for social clubs because the members themselves could provide capital,[303] but did not discuss § 501(c)(4), § 501(c)(5), or § 501(c)(6) organizations as such.

Daniel Halperin has extended Hansmann's work regarding taxation of capital to § 501(c)(5) and § 501(c)(6) organizations.[304] He views the goal in taxing such entities to be the proper measure of income rather than the provision of any special subsidy.[305] He largely accepts Bittker and Rahdert's analysis, but, unlike them, assigns great significance to the time value of money. "Since member dues, and for that matter investment and other income, might not be used for business expenses until a future taxable period, the failure to tax such income when received results in tax deferral for the association."[306] He reviews a number of mechanisms to end the deferral: permitting deductions only when expenditures were incurred; allocating excess of current income over deductions back to members; and a 2000 Treasury proposal to tax the investment income of § 501(c)(6) organizations.[307] He concludes that taxation of investment income is less accurate but simpler to administer than other alternatives, dubbing it "an indirect way of eliminating the benefit of deferral."[308] In effect, the current exemption from taxation for investment income operates as a deferral that amounts to a subsidy, with the longer the deferral, the larger the tax benefit.

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299. *Id*. at 61–62.
300. *Id*. at 61.
301. *Id*. at 59-60.
302. *Id.* at 72.
303. *Id*. at 94.
304. *See generally* Halperin, *Income Taxation*, *supra* note 292. Unlike Bittker and Rahdert, he categorizes political organizations as mutual nonprofits.
305. Halperin, *I.R.C. § 501(c)(4)*, *supra* note 32, at 520.
306. Halperin, *Income Taxation*, *supra* note 293, at 155.
307. *Id.*at 158.
308. *Id.*

Professor Halperin extends his analysis regarding the tax subsidy of deferral—and thus a recommendation that investment income be taxed—to those § 501(c)(4) organizations that provide more than incidental benefits to those who belong to the organization.[309] Currently, as Professor Halperin makes clear, § 501(c)(4) organizations with investments receive an income tax subsidy that § 501(c)(4) organizations without investment income do not.[310] Since contributions to § 501(c)(4) organizations are not deductible as charitable contributions, many § 501(c)(4) organizations do not have investment income to exempt. They thus receive little if any federal tax benefit from income tax exemption. As Halperin explains:

> the charitable deduction has the effect of reducing the cost of charitable outputs both current and in the future. An income tax exemption, on the other hand, will not, for the most part, reduce the costs of current operations. It will affect only the relative costs of setting aside funds for the future as compared to providing current benefits.[311]

Professor Halperin makes clear the great value that tax-free buildup of investment income bestows. Nominally, all § 501(c)(4) organizations are subject to the same tax regime, but in practice they are not; only those with investment income benefit from income tax exemption.[312]

Professor Halperin's basic approach regarding taxation of investment income persuades me. The proposal, however, faces challenges. Applying the distinction he endorses would be as problematic as the current application of the private benefit doctrine to various subsections of § 501(c).

Experience under § 501(c)(3) demonstrates the difficulties in applying the concept of incidental private benefit. As noted earlier, an organization will not qualify for exemption under § 501(c)(3) unless "it serves a public rather than a private interest."[313] The IRS allows organizations to qualify under § 501(c)(3) if they provide no more than incidental private benefit.[314] The IRS has stated that private bene-

309. Halperin, *I.R.C. § 501(c)(4)*, *supra* note 32, at 528.
310. *Id.* at 532.
311. *Id.* at 532 (emphasis in original).
312. Other of Professor Halperin's work addresses the impact of the exemption for investment income on § 501(c)(3) organizations. *See, e.g.*, Daniel Halperin, *Is Income Tax Exemption for Charities a Subsidy?*, 64 TAX L. REV 283 (2011); Daniel Halperin, *Tax Policy and Endowments: Is Excessive Accumulation Subsidized?*, 67 EXEMPT ORG. TAX REV. 125 (2011).
313. Treas. Reg. § 1.501(c)(3)-1(d)(1) (as amended in 2017).
314. *See* 2001 CPE TEXT, *supra* note 156, at 136-37 (citing I.R.S. Gen. Couns. Mem. 37789 (Dec. 18, 1978)); Internal Revenue Serv., *Overview of Private Inurement/Private Benefit Issues in IRC 501(c)(3)*, *in* EXEMPT ORGANIZATIONS: CONTINU-

fit must be incidental "both qualitatively and quantitatively."[315] Such guidance gives little help as to where incidental stops and impermissible begins. Hopkins laments, "The private benefit doctrine is boundless; its use by the IRS is pliant."[316]

State law treatment of nonprofit organizations will not be helpful in identifying those § 501(c)(4) organizations that provide their members with more than incidental private benefit. Under some state laws that distinguish public benefit from mutual benefit organizations, most if not all § 501(c)(4) organizations, like § 501(c)(3) organizations, would seem to qualify as public benefit corporations.[317] The webpage of the California Secretary of State, for example, directs that "a corporation organized to act as a civic league or social welfare organization and which plans to obtain . . . federal tax exempt status under Internal Revenue Code § 501(c)(4) is a nonprofit Public Benefit corporation."[318] The April 2016 draft of *Restatement of the Law: Charitable Nonprofit Organizations* comments that "[s]ome, but not all organizations exempt under [§ 501(c)(4)] may be considered charities for state-law purposes."[319] The draft Restatement, however, does not specify how to distinguish those that do from those that do not, as Professor Halperin's approach would require.

Requiring that members be a member with legal rights under state law, whether in the context of a public benefit or mutual benefit organization, would be a bright line rule easy to apply. I do not think,

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ING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1990 (1991), https://www.irs.gov/pub/irs-tege/eotopicc90.pdf [hereinafter 1990 CPE TEXT] ("However, even substantial private benefit may be tolerated where it is incidental to the accomplishment of charitable purposes"). This text is not paginated.

315. 2001 CPE TEXT, *supra* note 314 (citing I.R.S. Gen. Couns. Mem. 37,789 (Dec. 18, 1978)); *see also* 1990 CPE TEXT, *supra* note 315 (citing General Counsel Memorandum 37,789 (Dec. 18, 1978)) (discussing the "qualitative and quantitative" facets of the private benefit doctrine).

316. HOPKINS, *supra* note 6, at 607; *see also* John Colombo, *In Search of Private Benefit*, 58 FLA. L. REV. 1063, 1105 (2006) ("There is no reason to let the IRS substitute an overbroad private benefit doctrine for hard analysis of the true evils of transactions between exempt organizations and for-profit ones . . . .").

317. Fishman, Schwarz, and Mayer explain, "A public benefit organization can be defined as a group . . . to do good works, benefit society or improve the human condition. In contrast, a distinctive characteristic of mutual benefit organizations is that they are formed primarily to further the common goals of their members rather than for profit or a public or religious purpose." FISHMAN, SCHWARZ & MAYER, *supra* note 106, at 51.

318. *Corporate Filing Tips,* CAL. SECRETARY OF ST., http://www.sos.ca.gov/business-programs/business-entities/filing-tips/filing-tips-corp/ (last visited Jan. 28, 2019).

319. RESTATEMENT OF THE LAW: CHARITABLE NONPROFIT ORGANIZATIONS § 1.01(8) (AM. LAW INST., Tentative Draft No. 1, 2016).

however, that being such a member captures the kind of "more than incidental" benefit that Halperin has identified.[320]

Moreover, the IRS believes that state law prevents it from revoking the exemption even of § 501(c)(4) organizations that are mutual benefit organizations with legal members who have the right to receive assets upon the organization's dissolution, rights that would seem to indicate clearly impermissible private benefit. According the *1981 CPE Text*, the IRS has made the argument for revocation of § 501(c)(4) status for such organizations based "on the concept that an irrevocable dedication of assets to public purposes is as much an essential element of social welfare in 501(c)(4) as it is for charitable property in 501(c)(3)."[321] However, "courts have for the most part rejected this argument because the dissolution of social welfare groups is largely dictated by state law relating to dissolution of membership organizations."[322]

The current Form 990 also gives little help in any attempt, as Halperin's approach would require, to distinguish § 501(c)(4) organizations with members who benefit from association with the exempt organization from those without such members. The instructions to Form 990 explain that "[m]embership dues can consist of both contributions and payments for goods and services. In that case, the portion of the membership dues that is payment for goods or services should be reported on line 2, *Program Service Revenue*. The portion that exceeds the FMV of the good or services provided should be reported on line 1b."[323] The instructions continue with a heading, "Membership dues and assessments received that compare reasonably with membership benefits provided by the organization."[324] It then explains, "Organizations described in section 501(c)(5), (6) or (7) generally provide

320. *See supra* note 158.

321. 1981 CPE TEXT, *supra* note 20.

322. *Id.* The 1981 CPE TEXT states that "legislative action" would be necessary to change this rule. *Id.* I question this reasoning and conclusion. The case the 1981 CPE TEXT cites, *Mill Lane Club, Inc. v. Comm'r*, 23 T.C. 433 (1954), *acq.* C.B. 1955-1, 5, is in fact a case involving a social club, not a social welfare organization. *See id.* at 433. Moreover, the 1981 CPE TEXT ignores the fact that regulations under § 501(c)(4), unlike those for § 501(c)(3), do not require that assets must be dedicated to one or more exempt purposes upon dissolution. 1981 CPE TEXT, *supra* note 20. Legislative action is not needed. Regulatory amendment would suffice.

323. INTERNAL REVENUE SERV., INSTRUCTIONS FOR FORM 990 RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX 37 (2017), https://www.irs.gov/pub/irs-pdf/i990.pdf.

324. *Id.* at 38.

benefits that have a reasonable relationship with dues."[325] No mention is made of § 501(c)(4).

I would suggest that, instead of revising § 501(c)(4) to tax the investment income of those organization that provide members with more than incidental benefit, we establish at least a brighter line and tax the investment income of any § 501(c)(4) with members who receive any benefits beyond the legal rights of members under state law to vote for directors and on major corporate changes. Moreover, I would not require that a member have such legal rights; those associated with the organization who pay some kind of "membership fee," subscription, or its equivalent and, as a result, receive benefits from it (the contributor-beneficiary) would be members for this purpose.[326]

One possibility would be to define "more than incidental private benefit" by borrowing from prior election law. Long before *Citizens United* allowed all corporations to engage in campaign intervention, the Supreme Court held in *Massachusetts Citizens for Life v. FEC* that the Constitution required certain nonprofit corporations, unlike other corporations at the time, to be able to use treasury funds to advocate expressly for candidates in a federal election.[327] The nonprofit corporations permitted to engage in such campaign intervention had to be 1) formed for the express purpose of promoting political ideas and prohibited from engaging in business activities; 2) have no shareholders or others with a claim to its assets or earnings; and 3) not be established by a business corporation or labor union and not accept contributions from such entities.[328]

In its regulations implementing *Massachusetts Citizens for Life,* the FEC defined a qualified nonprofit corporation eligible for this special treatment as a § 501(c)(4) organization that met the three require-

325. *Id.* at 38-39. Examples listed include "subscriptions to publications, newsletters . . . free or reduced-rate to events sponsored by the organization, use of the facilities, and discounts on articles or services that member and nonmembers can buy." *Id.* The glossary to the Form 990 does not define "member."

326. This idea, if pursued, would need further development, both to avoid gaming and to draw the appropriate lines. For example, a definition would need to make clear whether campers who pay fees for camps would be considered members for this purpose. Also, a de minimis exception, like that used for quid-pro-quo contributions, *see* Rev. Proc. 92-49, 1992-26 I.R.B. 18; Rev. Proc. 90-12, 1990-1 C.B. 471, would seem appropriate. Most importantly, an anti-abuse rule would be needed to prevent a series of related organizations that separate membership fees from membership benefits. I note that the 2017 Form 990 requires reporting of membership dues paid to other organizations "to obtain general membership benefits from other organizations, such as regular services, publications, and other materials." Instructions for 2017 Form 990, *supra* note 323, at 45.

327. 479 U.S. 238, 241 (1986).

328. *Id.* at 264.

ments of the case and also did not have any persons who received benefits such as "credit cards, insurance policies or savings plans" or "training, education, or business information."[329] I recommend that Congress or the IRS use this FEC definition or a similar approach to defining which § 501(c)(4) organizations offer more than incidental private benefit and thus would be taxed on investment income in order to provide a bit more clarity and certainty as to what constitutes more than incidental private benefit.

According to IRS Statistics of Income, investment income for all § 501(c)(4) organizations that report at least one or more members totaled about $1.14 billion in 2012, a not insignificant number.[330] The IRS calculation of "investment income" included investment income, royalties, rent, and net capital gain from sales of assets—all items of the type taxed as investment income for private foundations under § 4940. Of course, any tax on investment income would encourage § 501(c)(4) organizations to change their portfolio choices to reduce the amount of income. But such is the case for any provision that taxes investment income, whether applicable to social clubs under § 512(a)(3), private foundations under § 4940, or certain university endowments under new § 4968.[331]

I would urge other changes to the taxation of § 501(c)(4) organizations. In addition to organizations that provide benefits to members, § 501(c)(4) encompasses non-member organizations that receive con-

329. 11 C.F.R. §§ 100, 106, 109, 114 (1995). The regulation, because of its context, did allow training or education "necessary to enable recipients to engage in the promotion of the group's political ideas." *Id.*

330. Personal communication from Professor Brian Galle, March 2, 2018 (on file with author). Galle notes that IRS Statistics of Income data are based on samples but do include all organizations with more than $10 million in assets, and thus give a good sense of investment income. Another set of sources is data from individual large § 501(c)(4) organizations. AARP's 2015 Form 990 reports investment income for the year as $112,678,020. AARP 2015 Form 990, GUIDESTAR, https://www.guidestar.org/FinDocuments/2015/520/794/2015-520794300-0cf9b7ae-9.pdf (last accessed 28 May 2018). It also lists $838,640,664 of royalty income. Blue Care Network of Michigan, which the NCCS lists as the second largest § 501(c)(4) by gross receipts, *see supra* note 132, reports investment income of $35,437,699 and no income from royalties on its 2015 Form 990. *See* 2015 Form 990, Blue Care Network of Michigan, http://www.guidestar.org/FinDocuments/2015/382/359/2015-382359234-0d8352ab-9O.pdf. The third largest, Delta Dental of California, reports investment income of $23,843,241 and no royalties on its 2015 Form 990. *See* Delta Dental of California, 2015 Form 990, https://www.guidestar.org/FinDocuments/2015/941/461/2015-941461312-0d6f6f61-9O.pdf.

331. *See* I.R.C. § 512(a)(3) (2012) (expanding definition of unrelated business taxable income for social clubs); I.R.C. § 4940 (imposing 2% tax on net investment income for private foundations); I.R.C. § 4968 (West 2018) (imposing 1.4% tax on net-investment income for private colleges and universities).

tributions, particularly § 501(c)(4) organizations that engage primarily in grantmaking and those that engage in political activity, whether lobbying or campaign intervention.[332] At least for these § 501(c)(4) organizations, if not for all organizations exempt under § 501(c)(4), I would also suggest taxing appreciation on contributed assets to the donor, as we do under § 84 for political organizations.[333] For those § 501(c)(4) organizations involved in campaign intervention, such tax on appreciation would remove one of the incentives for using a § 501(c)(4) organization instead of a § 527 organization.[334] For § 501(c)(4) organizations that engage primarily in grantmaking, such a tax would provide a kind of counterbalance to the ability of such organizations to avoid the private foundation excise taxes. Admittedly, most § 501(c)(4) organizations fall into neither of these categories. For these organizations, we need to consider whether recognition of gain upon contribution of appreciated assets to any § 501(c) organization is the proper approach as a matter of policy and whether § 501(c)(4) is an appropriate place to enact the policy.[335]

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332. *See supra* Part III.

333. *See* I.R.C. § 84 (2012). This provision requires a transferor contributing appreciated property to a political organization to pay tax on the appreciation. *Id.* § 84(a). Section 84 defines political organization by reference to § 527. *Id.* § 84(c). A § 527 organization must be "organized and operated primarily" for the function of "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors." I.R.C. § 527(e)(1), (2).

334. Unlike § 501(c)(4), however, § 527 organizations must publicly disclose the names of donors. *Compare* I.R.C. § 501(c)(4) *with id.* § 527(j). The fact that § 501(c)(4) organizations are not required to disclose their donors publicly would remain a significant advantage for § 501(c)(4) organizations. For further comparison of § 501(c)(4) and § 527 organizations, see Aprill, *supra* note 53 at 375-91.

335. Much attention has been given to the ability to donate appreciated assets to charities without a tax on appreciation while nonetheless receiving a charitable contribution deduction for full fair market value. *See, e.g.*, Roger Colinvaux, *Charitable Contributions of Property: A Broken System Reimagined*, 50 HARV. J. ON LEGIS. 263, 325–26 (2013) (arguing that the deduction of the full fair market value of donated property should only be allowed when there is a "measurable benefit to the donee"); Daniel Halperin, *A Charitable Contribution of Appreciated Property and the Realization of Built-In Gains,* 56 TAX L. REV. 1, 1–2 (2002) (exploring the appropriateness of not taxing the long-term capital gain for charitable donations of appreciated property). Donors to other § 501(c) organizations, although they cannot take a deduction, do have the ability to contribute appreciated property without deemed realization. Little attention has been paid to this benefit and the contrast to § 84. The first piece of scholarship to identify this issue was, I believe, Gregg D. Polsky & Guy-Uriel Charles, *Regulating 527 Organizations*, 73 G.W. L. REV. 1000, 1013 n.81 (2005); I discuss the issue in Aprill, *supra* note 45. David S. Miller responded to my recommendation regarding § 84 in *Reforming the Taxation of Exempt Organizations and*

I would also tax § 501(c)(4) organizations that are not membership organizations (again, using member to mean someone who pays dues and receives benefits, whether or not the person has legal rights as a member) on the lesser of their investment income or the amount spent on lobbying, as we do for amounts spent by § 501(c) organizations on campaign intervention under § 527(f). Not taxing all amounts spent on lobbying by noncharitable organizations undermines an important tax principle related to political activities. The Code, with the important exception for the limited lobbying permitted for § 501(c)(3) organizations, requires that only after-tax amounts be spent on political activities, whether lobbying or campaign intervention. That is, funds so used must be taxed at least once.[336] Thus, § 162(e) denies a business deduction for lobbying. Under § 6033(e), a tax-exempt organization that engages in lobbying funded by tax-deductible membership dues and other contributions must either pay a "proxy" tax on its lobbying activities or follow notification "flow-through provisions."[337] This complicated set of rules works to ensure that amounts spent on lobbying do not enjoy the subsidy of deduction. It does not, however, address amounts spent on lobbying, especially by § 501(c)(4) organizations without members, that have enjoyed the subsidy of untaxed investment income. To the extent that we require investment income of § 501(c)(4) organizations to be taxed in connection with amounts spent on campaign intervention so that all amounts used for political purposes be taxed at least once, we should do the same for amounts spent on lobbying, whether or not the organization receives dues deductible by its members.[338]

Further, we need also to consider carefully and explicitly whether there should be an exception from the estate tax for § 501(c)(4) orga-

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Their Patrons, *supra* note 89. He argues that the donation of appreciated property to a § 501(c) organization should be treated as a sale by the donor and be taxed. *Id.* at 461.

336. *See Disclosure of Political Activities of Tax-Exempt Organizations: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 106th Cong. 27-42 (2000) (statement of Joseph M. Mikrut, Tax Legislative Counsel, Department of the Treasury) (describing the tax consequences and treatment for various § 501(c) organizations engaged in political advocacy).

337. *See* I.R.C. § 6033(e). The proxy tax is imposed at the highest marginal rate of the corporate income tax on all lobbying expenses of the tax-exempt organization, as defined in § 162(e)(1). *Id* § 6033(e)(2)(A). The flow-through option requires the organization to provide all donors or other contributors with a reasonable estimate of the portion of dues or other contributions that is allocable to expenditures not deductible under § 162. *See* Aprill, *supra* note 53, at 377-79 (detailing requirements and penalties related to § 162(e) disclosures).

338. *See* I.R.C. § 527(f) (requiring organizations performing exempt functions within the meaning of § 527(e)(2) to include certain amounts in gross income). Such income is taxed at the highest rate of tax specified in § 11(b). I.R.C. § 527(b).

nizations.[339] In enacting an exception for transfers to § 501(c)(4) organization from the gift tax but not the estate tax,[340] Congress reacted to a particular controversy and followed the model established for transfers to political organizations, which also enjoy exception under the gift tax but not the estate tax.[341] My understanding from discussion with practitioners is that currently they must engage in careful and elaborate tax planning to avoid estate tax inclusion under § 2036(a) when a contributor to a § 501(c)(4) organization retains rights to designate the persons who can enjoy property or income from property, as, for example, a director and/or officer of a § 501(c)(4) organization.[342] I have been told that this situation arises most often with § 501(c)(4) organizations engaged in political activity.[343] Well-advised contributors to § 501(c)(4) organizations thus can avoid an estate tax liability that less sophisticated donors cannot.[344]

On one hand, we may conclude that it is appropriate to maintain the new status quo, with a gift but not estate tax exception. The current scheme parallels that applicable to political organizations, and it seems, as discussed in Part II, that Congress had § 501(c)(4) organizations engaged in political activity in mind when it passed the gift tax provision.[345] Subjecting grantmaking § 501(c)(4) organizations to es-

339. For a discussion of whether current § 2055 might apply to grantmaking § 501(c)(4) organizations, see Miller, *Grantmakers*, *supra* note 26.

340. As *supra* Part II describes, the recent legislation also provided an exception from the gift tax for § 501(c)(5) and (c)(6) organizations, and a full analysis of extending the estate tax would require consideration of these organizations as well.

341. *See* I.R.C. § 2501(a)(4). Legislative history of the provision applicable to political organizations states that "if a decedent includes a political organization as a beneficiary of his estate, the amount so transferred is to be included in his estate." S. REP. NO. 93-1357, at 32 (1974). Eric G. Reis, *Mr. Soros Goes to Washington: The Case or Reform of the Estate and Gift Tax Treatment of Political Contributions*, 42 REAL PROP. PROB. & TR. J. 299, 303 (2007), argues that transfers to political organizations should also be exempt from estate tax because "a bequest at death is less likely to have a corrupting influence on public officials than a gift made during lifetimes."

342. *Cf.* Rev. Rul. 72-552, 1972-2 C.B. 525 (holding that the value of property transferred to a foundation was includible in decedent's gross estate under § 2036(a)(2) because as a director and the president of foundation, decedent had power to direct disposition of funds by determining charitable recipients; although the property was included in the gross estate, its inclusion was offset by the charitable deduction).

343. Techniques described to me include having children and close associates of the transferor, but not the transferor him or herself, serve as directors and officers of the § 501(c)(4) organization or requiring all the assets of the § 501(c)(4) organization to be contributed to a § 501(c)(3) organization upon the death of the transferor.

344. Of course, with the maximum current estate tax exclusion set at over $22,000,000 for a married couple, only the very wealthy are subject to estate tax. *See Estate Tax*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-business es-self-employed/estate-tax (last updated Nov. 27, 2018).

345. *See* I.R.C. § 2501(a)(6).

tate tax inclusion may serve as a kind of substitute for application of the private foundation excise taxes. On the other hand, there are many other types of § 501(c)(4) organizations, as discussed in Part III, and we may conclude that the relationship between the gift and estate tax as a supposedly unified system mandates extending the exception to the estate tax. Congress, however, did not make this change in the 2017 tax legislation; it instead doubled the exclusion amount for gift and estate from $5 million to $10 million, adjusted for inflation, through 2025.[346]

Taxing all or even some of the investment income of § 501(c)(4) organizations or making the other changes I have suggested would represent a fundamental change to § 501(c)(4). The suggested changes do not go so far as calling for repeal of the provision. The provision has a long history. Its catch-all nature serves an important function. The changes instead call for recognizing that at least some § 501(c)(4) organizations in at least some ways resemble § 501(c)(3) organizations less than they resemble other § 501(c) organizations and should be taxed accordingly.

VIII.
THE FUTURE OF § 501(C)(4) ORGANIZATIONS

As discussed earlier, donations to § 501(c)(3) organizations are deductible as charitable contributions, but organizations exempt as charities under § 501(c)(3) can lobby only to a limited extent and are prohibited completely from engaging in campaign intervention. In contrast, donations to § 501(c)(4) organizations are not deductible as charitable contributions but such organizations can lobby without limit in connection with their exempt purpose and can engage in campaign intervention to a considerable extent.[347] However, the 2017 Tax Cuts and Jobs Act, by vastly reducing the number of taxpayers who can benefit from the charitable contribution deduction, could make § 501(c)(4) organizations comparatively much more attractive to contributors.

A charitable contribution deduction benefits only those taxpayers who choose to itemize their deductions rather than take the standard deduction. In recent years, approximately 30% of taxpayers have itemized their deductions.[348] The 2017 tax legislation, however, made two

346. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11061(a) (to be codified at I.R.C. § 2010(c)(3)(C)).

347. *See supra* text accompanying notes 7-15.

348. SEAN LOWRY, CONG. RESEARCH SERV., R43012, ITEMIZED TAX DEDUCTIONS FOR INDIVIDUALS: DATA ANALYSIS 2 (2017); *T18-0001 – Impact on the Number of*

changes, both effective through 2025, that will drastically reduce the number of taxpayers who itemize. First, it increased the standard deduction to $24,000 for married couples and $12,000 for single persons.[349] Second, it limited the deduction for state and local taxes to $10,000, both for married couples and single individuals.[350]

As a result of these changes, the percentage of taxpayers who will itemize is estimated to fall sharply; the vast majority of taxpayers—almost 90 percent—will benefit more from taking the standard deduction.[351] Those taxpayers with income between $86,000 and $150,000 will represent a particularly large shift from itemizing to taking the standard deduction, dropping from over 50% to under 20%.[352]

Many charitable organizations are worried about the impact of these changes on charitable giving.[353] The nonpartisan Tax Policy Center estimates that the number of taxpayers claiming an itemized deduction for charitable giving will fall from about 37 million to 16 million[354] and charitable contributions could decline by $12.3 billion to $19.7 billion per year.[355]

Itemizers of H.R.1, The Tax Cuts and Jobs Act (TCJA), by Expanded Cash Income Level, 2018, TAX POL'Y CTR. (Jan. 11, 2018), http://www.taxpolicycenter.org/model-estimates/impact-itemized-deductions-tax-cuts-and-jobs-act-jan-2018/t18-0001-impact-number (estimating that 26.4% of taxpayers itemized before the 2017 legislation).

349. Tax Cuts and Jobs Act, § 11011(b)(2) (to be codified at I.R.C. § 63(c)).

350. *Id.* § 11042(a) (to be codified at I.R.C. § 164(b)(6)(B)).

351. TAX POL'Y CTR., *supra* note 348.

352. Howard Gleckman, *21 Million Taxpayers Will Stop Taking the Charitable Deduction Under the TCJA*, TAX POL'Y CTR.: TAXVOX: CAMPAIGNS, PROPOSALS, AND REFORMS (Jan. 8, 2018), https://www.taxpolicycenter.org/taxvox/21-million-taxpayers-will-stop-taking-charitable-deduction-under-tcja; *see T18-0009 – Impact on the Tax Benefit of Charitable Deduction of H.R.1, the Tax Cuts and Jobs Act, by Expanded Cash Income Level, 2018*, TAX POL'Y CTR. (Jan. 11, 2018), http://www.taxpolicycenter.org/model-estimates/impact-itemized-deductions-tax-cuts-and-jobs-act-jan-2018/t18-0009-impact-tax; *see also* TAX POL'Y CTR., *supra* note 348 (showing expected decrease in the benefit of itemizing charitable contributions across income ranges).

353. *See, e.g.*, David Rogers, *GOP Tax Law a One-Two Punch to Charities—and American Giving,* POLITICO (Jan. 13, 2018, 7:02 AM), https://www.politico.com/story/2018/01/13/gop-tax-law-charities-giving-339039 (interviewing representatives of charities and describing lobbying efforts against the 2017 legislation); Brian McQueeney, *The GOP Tax Reform Will Devastate Charitable Giving*, L.A. TIMES (Dec. 27, 2017, 4:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-mcqueeney-charitable-giving-under-new-tax-law-20171227-story.html (claiming that "[n]onprofits will need to prepare for a tough 2018 and beyond").

354. TAX POL'Y CTR., *supra* note 352.

355. Joseph Rosenberg & Philip Stallworth, *The House Tax Bill is NOT Very Charitable to Nonprofits*, TAX POL'Y CTR.: TAXVOX (Nov. 15, 2017), https://www.taxpolicycenter.org/taxvox/house-tax-bill-not-very-charitable-nonprofits.

Fewer itemizers, however, could mean the growth of § 501(c)(4) organizations. Charitable organizations that are dependent the most on the middle class, which include organizations that provide social services, are now likely to have few itemizers among their donors.[356] In contrast, the arts and education tend to enjoy support from higher income taxpayers.[357] A number of nonprofit law experts believe that many nonprofits focused on social services and other activities supported by the middle class may decide to form new § 501(c)(4) organizations or encourage contributions to an existing § 501(c)(4) organization.[358] For donors not itemizing the deductions, there is no tax disadvantage to giving to a § 501(c)(4) organization instead of a § 501(c)(3) entity. But there are advantages. Tax-exempt § 501(c)(4) organizations can not only do good, but they can also lobby legislatures freely on issues important to them and give considerable support to candidates for election who share their positions on key issues.

Thus, given the coming conflict in Congress over the size and scope of the social safety net, the ability to engage in lobbying or campaign intervention through a § 501(c)(4) social welfare organization will hold enormous, perhaps irresistible, appeal, as such organizations will undoubtedly explain to potential donors.

Recent empirical work by Brian Galle on giving to § 501(c)(4) organizations, however, suggests that reduced giving to § 501(c)(3) organizations may reduce giving to § 501(c)(4) organizations as well.[359] He finds that gifts to § 501(c)(4) organizations respond to

356. ARTON CAPITAL & WEALTH-X, CHANGING PHILANTHROPY: TREND SHIFTS IN ULTRA WEALTH GIVING 11-12 (3d ed. 2016), https://www.wealthx.com/report/the-wealth-x-and-arton-capital-philanthropy-report-2016; Alex Daniels & Anu Narayanswamy, *The Income-Inequality Divide Hits Generosity*, CHRON. PHILANTHROPY (Oct. 5, 2014), https://www.philanthropy.com/article/The-Income-Inequality-Divide/152551 (discussing a general trend of poor and middle-income persons donating a larger percentage of their income to charities compared to higher-income individuals); Kate Rogers, *Poor, Middle Class and Rich: Who Gives and Who Doesn't?*, FOXBUSINESS (Apr. 24, 2013), http://www.foxbusiness.com/features/poor-middle-class-and-rich-who-gives-and-who-doesnt (describing charitable giving trends among different income levels); THE CTR. ON PHILANTHROPY AT IND. UNIV., PATTERNS OF HOUSEHOLD CHARITABLE GIVING BY INCOME GROUPS, 2005, at 7, 15-16 (2007), https://scholarworks.iupui.edu/bitstream/handle/1805/5838/giving_focused_on_meeting_needs_of_the_poor_july_2007.pdf (analyzing the sources of contributions to various charitable organizations based on donor's income level).

357. THE CTR. ON PHILANTHROPY AT IND. UNIV., *supra* note 356, at 9-10.

358. *See, e.g.*, Gene Takagi, *A Prediction for Nonprofits in 2018: Rise of the 501(c)(4) Organizations*, NONPROFIT L. BLOG (Jan. 25, 2018), http://www.nonprofitlawblog.com/a-prediction-for-nonprofits-in-2018-rise-of-the-501c4-organizations/.

359. Brian D. Galle, The Dark Money Subsidy Tax Policy and Donations to 501(c)(4) Organizations 4 (Nov. 27, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3075508.

changes in the net-tax price of giving to charity, with nearly the same degree of response to changes in net-price.[360] He suggests that one reason for this matched response may be that donors do not understand the difference between the two sets of donee organizations.[361] He also entertains the possibility of strategic fundraising, in particular that § 501(c)(4) organizations "might fundraise more aggressively during periods when the value of donating to competing c(3) organizations is higher."[362]

I predict a different impact on strategic fundraising going forward—that given the changed landscape for itemizing deductions, § 501(c)(4) organizations will increase fundraising because the value of donating to competing § 501(c)(3) organizations has decreased for many. That is, for many taxpayers, the net-tax benefit is the same for donations to either type of organizations—zero.

Many have criticized Congress, in its hurry to pass the tax legislation, for failing to consider fully the combined impact of changes to the law, in particular on charitable giving.[363] I doubt very much that anyone in Congress gave a moment's thought to the possibility that the legislation would, inadvertently, encourage the expansion of § 501(c)(4) organizations. Section 501(c)(4) organizations, unlike political organizations subject to § 527, do not have to disclose their donors.[364] Thus, growth of § 501(c)(4) organizations will encourage the likely growth of unknown and unidentifiable donors free to engage in substantial electioneering. Moreover, if this shift occurs, activities traditionally undertaken by § 501(c)(3) organizations could move to § 501(c)(4) organizations, without the special protections, such as limiting giving to a charitable class of beneficiaries and a narrower definition of private benefit that have regulated § 501(c)(3) organizations.[365]

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360. *Id*.

361. *Id.* He observes that donors may be erroneously deducting their gifts to § 501(c)(4) organizations. *Id.* at 6.

362. *Id.* at 5.

363. *See, e.g.*, Jonathan Curry, *Rushed Timeline Blamed for Tax Law Marred by Glitches*, 158 TAX NOTES TODAY 1429–30 (March 5, 2018); *see also* Symposium, *The Past, Present, and Future of the Federal Tax Legislative Process*, 81 LAW & CONTEMP. PROBS., no. 2, 2018, at 1.

364. *See* Aprill, *supra* note 53 at 364 (describing reactions to the lack of disclosure requirements for 501(c)(4) organizations); *see also* Colinvaux, *Ending the Plague of Inconsistency*, *supra* note 184; Colinvaux, *A Gordian's Knot*, *supra* note 184, at 5–7 (arguing for uniform disclosure rules to prevent abusive use of § 501(c) organizations for political purposes); Mayer, *supra* note 184, at 805.

365. *See generally* Ellen P. Aprill, *Charitable Class, Disaster Relief, and First Responders,* 153 TAX NOTES TODAY 949 (2016) (discussing the relationship between charitable class and exempt status).

Conclusion

Any changes to the taxation of § 501(c)(4) organizations, including taxation of investment income, seem unlikely. Such is the case despite Professor Halperin's valiant efforts to help us understand how exemption for investment income operates as an important subsidy for those tax-exempt organizations, including § 501(c)(4) organizations, able to accumulate funds.

Longstanding practice under § 501(c)(4), whether it is related to the amount of campaign intervention allowed,[366] treatment of HMOs,[367] or the degree of private benefit afforded to members,[368] is resistant to change. While narrowly targeted legislation, such as that now applicable to credit counseling organizations[369] and hospitals, has its drawbacks, as Professor Colinvaux has discussed,[370] codifying requirements for particular segments of § 501(c)(4) organizations, be they HMOs or community service clubs, may be a somewhat more likely legislative change as past history suggests. Congress has not been willing to consider wholesale changes to § 501(c)(3).

Even targeted changes seem to have little chance of enactment, absent some scandal. With hindsight, we might well wish that the statutory language of § 501(c)(4), the regulations applicable to it, and interpretations of it did not exist in their current form, particularly when it comes to campaign intervention. Nonetheless, it is likely that we will continue to live with the current version of § 501(c)(4) and all its uncertainties. Furthermore, the changes introduced by the 2017 tax legislation that will reduce the number of taxpayers who will itemize deductions may well fuel the growth of § 501(c)(4) organizations and thus magnify the impact of the provision's uncertainties in ways that will alter the tax-exempt section, particularly by increasing grantmaking, lobbying, and campaign intervention under § 501(c)(4) instead of the more stringent rules regarding such activities for organizations exempt under § 501(c)(3).

Regardless of the likelihood for change, examination of this subsection reveals our uncertainty and ambivalence as to what activities merit tax exemption. It helps us to understand that federal tax exemp-

366. *See supra* text accompanying notes 8-15.
367. *See supra* text accompanying notes 204-225.
368. *See supra* Part VII.
369. *See* text at *supra* notes 275-282.
370. Colinvaux, *supra* note 89 at 48, finds statutory "micro-management" of credit counseling organizations and hospitals troubling and "unprecedented." Like Professor Mayer in his article for this issue, I believe that § 501(c)(4) organizations that operate as grantmaking organizations free from the limits on private foundations are ripe for congressional attention.

tion is not monolithic but involves a number of discrete elements—deductibility, deemed realization upon contribution of appreciated assets, treatment of investment income, applicable rates on income that is subject to income tax, applicability of the gift and estate tax, as well as state issues including property and sales tax.

We need not offer every tax benefit to every category of § 501(c) organizations; we can mix and match according to the contribution that policymakers deem each category to make to civil society. For § 501(c)(4) organizations that offer benefits to members, additional tax in the form of taxing investment income is an option worthy of consideration. Such a tax could also discourage a movement by donors away from § 501(c)(3) organizations to § 501(c)(4) organizations in order to help ensure that charitable activities are conducted by organizations subject to the law—statutory, regulatory, and judicial—that has developed in connection with tax-exempt charities. Doing so would further protect the boundaries that distinguish § 501(c)(4) from § 501(c)(3).

APPENDIX[371]

Organization type	Number and percentage of § 501(c)(4) organizations registered	Number and percentage of § 501(c)(4) organizations filing Form 990	Revenue (number and percentage)
Community service clubs	31,811(39.0%)	7,506(26.0%)	$702,095,840(0.8%)
Health providers and insurers	459(0.6%)	314(1.1%)	$62,715,346,590(72.5%)
Homeowner and tenant associations	1,891(2.3%)	988(3.4%)	$586,706,079(0.7%)
Housing communities and developments	978(1.2%)	819(2.8%)	$921,778,251(1.1%)
Military and veterans' organizations	6,365(7.8%)	1,102(3.8%)	$303,046,379(0.4%)
Neighborhood and community associations	3,804(4.7%)	1,557(5.4%)	$870,579,428(1%}
Sports and recreation	8,265(10.1%)	3,888(13.5%)	$3,413,831,029(3.9%)
Volunteer public safety	5,167(6.3%)	3,902(13.5%)	$917,955,288(1.1%)
Other	22,750(27.9%)	8,790(30.4%)	$10,780,905,841(12.5%)
Domestic total	81,490 (99.9%)	**28,866 (99.9%)**	**$81,212,244,725 (93.8%)**
Foreign organizations	99(0.1%)	40(0.1%)	$5,325,229,383(6.2%)
Total	**81,589 (100%)**	**28,906 (100%)**	**$86,537,474,108**(100%)

Sources: IRS Business Master File, June 2014; NCCS Core File, 2012.

Revenue category	Number and percentage of § 501(c)(4) organizations filing Form 990	Revenue (number and percentage)	Average revenue
$0 or less	546(1.9%)	-$14,472,097(-0.0%)	-$26,506
$1-$25,000	5,146(17.8%)	$62,128,219(0.1%)	$12,073
$25,001-$50,000	5,608(19.4%)	$207,196,635(0.2%)	$36,947
$50,001-$100,000	6,577(22.8%)	$466,959,472(0.5%)	$70,999
$100,001-$500,000	7,856(27.2%)	$1,678,495,252(1.9%)	$213,658
$500,001-$1,000,000	1,394(4.8%)	$976,637,708(1.1%)	$700,601
$1,000,001-$5,000,000	1,281 **(4.4%)**	$2,687,998,146(3.1%)	$2,098,359
$5,000,001-$10,000,000	200(0.7%)	$1,380,789,027(1.6%)	$6,903,945
$10,000,001-$100,000,000	205(0.7%)	$6,128,309,072(7.1%)	$29,894,191
$100,000,001-$1,000,000,000	68(0.2%)	$24,837,167,178(28.7%)	$365,252,459
More than $1,000,000,000	25(0.1%)	$48,126,265,496(55.7%)	$1,925,050.620
Total	**28,906 (100%)**	**$86,537,474,108 (100%)**	$2,993,755

Source: NCCS Core File, 2012.

371. Tables from Jeremy Koulish, Research Report: From Camps to Campaign Funds: The History, Anatomy, and Activities of Section 501(c)(4) Organizations, Urban Institute I (Jan. 2016).