

**The Inequality of Representation:
The Impact of Charity Law on Political Advocacy**

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Originally prepared for the annual meeting of the American Political Science Association, September 1-4, Washington, D.C., theme panel on “Silent Voices: Disenfranchisement and Barriers to Participation.” Revised for delivery at the Kennedy School of Government, Inequality and Social Policy Seminar, December 19, 2005.

The Inequality of Representation

Abstract

This paper explores the political behavior of 501(c)(3) nonprofits. Since these nonprofits offer tax deductions to donors, and are thus subsidized by taxpayer dollars, the government is justified in regulating what these nonprofits are allowed to do in the political arena. A first step here is to analyze competing interest group theories to judge how nonprofits fit into prevailing conceptions of the appropriate role of interest groups in a democracy. Interestingly, American law on public charities disregards those theories that justify participation by lobbies or recognize how skewed the interest group world is, and instead considers nonprofit lobbying as a potential danger to the integrity of the polity. The lobbying provision of charity law is examined closely and its ambiguity along with the inconsistent and inadequate administration of sec. 501(c)(3) by the IRS discourages nonprofits from participating in the public policymaking process. Drawing on data from the Strengthening Nonprofit Advocacy Project, the evidence demonstrates that nonprofit leaders badly misunderstand their rights under the law. The data also show that charity law sharply reduces the level of legislative lobbying by nonprofits. The result is that the most disadvantaged sectors of society receive significantly reduced representation in the political system.

Introduction

Many believe that American democracy suffers from a combination of pathologies that are working to weaken the vitality of our way of life. At the heart of this illness appears to be a spreading cancer of apathy: various measures show that over time we are participating less in community life and government affairs. But a committee appointed by the American Political Science Association recently reported that there are many barriers that make participation more difficult than it needs to be. These political scientists concluded that “faulty design may either fail to draw citizens into politics or place excessive demands on them” (Macedo et al 2005, 160). The problem is not just us because systemic problems inhibit participation. Beyond the cultural influences that have discouraged Americans from civic engagement, or at least made us apathetic, are obstacles that are the product of public policy. In short, participation is regulated in many different ways and government can make it easier or harder, more accessible or less accessible, if it so chooses.

One of these barriers to participation is the law on public charities. As an inducement to donate to worthy causes, Congress enacted a law in 1917 granting a tax deduction to those who contribute to qualifying nonprofits. There are 27 different kinds of nonprofits, but only one type, those that come under sec. 501(c)(3) of the tax code, can offer tax deductions to donors (Salamon 1999, 8). All other types of nonprofits are exempt from federal income taxes, though that is only a modest benefit as such organizations are not in the business of making a profit. (Following colloquial practice the term “nonprofit” will be used here to refer exclusively to those organizations with tax deductible status.¹) It is tax deductibility that is highly prized as it provides a powerful

incentive for individuals to contribute or to contribute more than one would otherwise be inclined to. For someone with a marginal tax rate of 35 percent, a \$1000 contribution to the American Heart Association only costs \$650. Since other taxpayers effectively subsidize the \$350 lost to the government, requiring necessarily higher taxes levied on themselves, it is entirely legitimate for the government to regulate what nonprofits can do with these subsidized dollars.

And therein lies the rub. As will be detailed below, the government has erected some significant barriers to the participation of nonprofits in the public policymaking process. The limit on both direct legislative lobbying and grassroots mobilization by 501c3s is particularly troublesome. Nonprofits are typically the only organizations that lobby on behalf of the most disadvantaged and dispossessed. The poor, the working poor, immigrants, the disabled, and other marginalized constituencies do not form interest groups on their own. All those who use social services depend on nonprofits to represent them. Indeed, half of all nonprofits large enough to file a tax return with the federal government are either human service providers or in health care. The impact of charity law, however, is to strongly discourage nonprofits from representing their clients and constituents in the governmental process.

This problem concerning the representation of poor people is viewed here through the prism of interest group politics. There is an array of both obstacles and easements that regulate the participation of various types of interest groups in the political process. In this context we ask, how do the barriers to nonprofit participation created by 501(c)(3) compare to the regulations affecting other interest group sectors? In examining the political behavior of nonprofits, this study draws on data from the Strengthening

Nonprofit Advocacy Project, which included a random sample survey of nonprofits from around the country, follow-up interviews with some of the CEOs who filled out the questionnaire, and focus groups with panels of nonprofit CEOs and board members (Berry and Arons 2003).

In the pages that follow the analysis of nonprofits is organized into five sections. The first part of this paper considers three competing theories of interest group participation and looks at how nonprofits are regarded within each. Second, the law on public charities is described and the problems with the underlying theory behind the law and the practical implications of the statute's ambiguity are discussed at length. The next section reports on research measuring the actual impact of the law on the political behavior of nonprofits and on the attitudes of their executive directors. Fourth, attention turns to the continuing efforts of conservatives to intimidate liberal nonprofits through proposals to further restrict nonprofit participation in the policymaking process. In the final section a strategy for overcoming the political weakness of nonprofits is outlined.

Conflicting Images

The conflicting patchwork of regulatory barriers and easements affecting interest groups reflect not just a long history of independent policy decisions directed at different problems, but they also reflect conflicting beliefs as to the role that private organizations should play in our political system. We have not one conception of the appropriate role of interest groups in a democracy, but many. This is hardly surprising, given the complexity of American society and the breadth of issues raised by interest group participation. Indeed, the very justification of interest group participation has been debated since before the Constitution was adopted.

The two polar opposites in our political tradition are, of course, James Madison and Alexis de Tocqueville. Even so they build on a common foundation: a belief that interest groups are a manifestation of freedom. Both Madison and Tocqueville also see freedom balanced by strong institutions that can harness liberty and democracy and produce policies that are well reasoned and acceptable to the groups actively involved in trying to influence them. Neither anticipates that barriers to participation by groups will be necessary and Madison warns against any such regulation.

Yet barriers to participation by groups have, of course, been erected. Those barriers (as well as the easements) spring from different theoretical assumptions about the expression of human nature in a free society. Although today Madison and Tocqueville appear hopelessly naïve, it remains true that our enduring theories of the role of groups in a democracy influences the nature of policies we believe are necessary to regulate them. To fully understand how contemporary barriers to participation emerged over time, it's useful to critically examine the competing visions of interest groups in a democracy. Those different visions lead us to different prescriptions for policies regulating interest groups. Here we'll look at three contending conceptions, in turn looking at interest groups as enablers of democracy, the interest group universe as an unbalanced, skewed set of advocacy organizations, and interest groups as a grave threat to democracy.

ENABLERS

The most positive assessment of interest groups places them at the heart of a democratic polity. For Tocqueville, voluntary associations were a manifestation of a unique form of government, which in turn, was a reflection of the uniquely American character. Freedom was the lubricant but the very spirit of Americans unleashed by

liberty was to solve problems cooperatively. He regarded America as a nation of joiners and believed that popular associations were a defense against despotism and the exercise of arbitrary power by government.

Quaint as it may seem, this view of the relationship between voluntary associations and vibrant democracy could not be more central to contemporary political science. In *Diminished Democracy* (2003) Theda Skocpol makes a persuasive argument that the voluntary organizations that thrived in the period between the end of the Civil War and the beginning of World War I such as the Odd Fellows, the Knights of Columbus, and the General Federation of Women's Clubs, were laboratories of democracy. Ordinary Americans learned from their participation these groups how meetings were run, how to give a talk, how to be tolerant of opposing views, and how their organization could participate in the political world.

Robert Putnam's thesis in *Bowling Alone* (2000) focuses as well on participation in associations. He links the widespread decline in membership in voluntary associations to a drop in social capital. In this vein lower trust and reciprocity leads to less participation directly related to the political process. And fewer people active in associations means that underlying foundation of democracy is decaying. Given the widespread attention paid to *Bowling Alone*, Putnam appears to have hit a raw nerve in the American polity. It is not only the chattering class that agrees with him but most Americans surely believe, at an instinctive level, that community is America in declining.

Although Skocpol and Putnam both see associations as an ameliorating force in American society, it is interesting that neither explicitly ties their argument to the earlier work in political science on pluralism. The pluralists of an earlier generation, most

notably Robert Dahl (1961), also saw associations at the very core of democratic societies. Since Dahl and other pluralists were widely discredited, there is surely a natural disinclination by contemporary analysts to tie their work to this earlier cohort of political scientists. The pluralists' optimism about democracy in America now seems wildly out of place. Dahl concluded that New Haven, and by implication all of America, was democratic, "warts and all" (1961, 311). How many today believe that America approximates what a real democracy should look like?

Yet there is a strong commonality between these two generations of scholars. Without using the term Dahl, like Skocpol and Putnam, argues that civic engagement is crucial to the success of democratic societies. Although all these scholars believe groups build democracies Dahl is more comfortable rationalizing low levels of aggregate participation, believing that most adults will understandably find it worth their while only to participate very selectively when mobilized by leaders on issues of direct concern to them. For Putnam and Skocpol, a general decline of membership in voluntary organizations is disturbing and even dangerous to the future of democracy.

It is this tradition of embracing civic engagement as the foundation of democracy that leads to a strong normative concern with the health of voluntary associations. The commonality among the scholars discussed here are assumptions that interest group advocacy in a democracy is inevitable; that interest groups are a manifestation of freedom; and that the solution to the problems they identify requires a buoyant voluntary association sector, one that broadly engages and mobilizes citizens. In this perspective, regulatory barriers to participation stay conveniently out of focus. Rather, the emphasis is on the relationship between organizations and followers.² Contemporary analysts ask

why has participation fallen among our citizens? Why aren't they more active in their communities?

BALANCE

Two other enduring perspectives look beyond the relationship of citizens to groups to that of groups to government. One of these viewpoints believes that the primary problem is that the interest group universe is unbalanced; some sectors of society are much better represented in the governmental process than others. (The second perspective, which considers interest groups as a danger, will be addressed in the next section.) The imbalance school of thought falls into two broad, but not contradictory, arguments. The first emphasizes the inherent nature of the problem and argues that the forces generating this interest group skew are inevitable because they are fundamentally grounded in the structure of market economies. The second recognizes as well that the imbalance is ingrained in our economic and political structure but does not accept the severity of this condition as permanent. Instead, it offers various public policy remedies to address the problem. In this frame regulatory policing can significantly rebalance the universe of groups.

The leading works that outline the inherent imbalance in the structure of interest group politics are well known and need no extended description here. Mancur Olson's (1968) analysis quickly became part of the conventional wisdom of political science. He concluded that organizations that exist for reasons other than advocacy have an enormous advantage over constituencies with only political motives as incentives to mobilize. That this claim now seems obvious is a tribute to the power of his formal theory. On the other hand it should also be noted that Olson badly underestimated the propensity of citizens to

organize into ideological groups of the left and right. Citizen groups, explicitly political in purpose and lacking any material membership incentives, have become popular with a significant segment of the American population. Nevertheless, Olson's conclusions as to the organizational advantages of private sector institutions in the political system are incontrovertible.

Most of the literature on the power of corporate interests eschews Olson's formal theorizing, and relies instead on documenting resources, advantages, and policy outcomes. Much of this work also supports the view that interest groups are a danger to democracy. But among those who focus on the structural imbalance in advocacy inherent in market economies, perhaps Charles Lindblom's *Politics and Markets* (1977) is best known. Lindblom's meticulous and logical examination of the advantages of the modern corporation is a convincing statement of the enduring advantages of the private sector in democratic politics.

On the other side of this coin are those scholars who believe that the rules of the game can be adjusted to bring a much greater degree of balance to interest group politics, and thus to the representation of interests. Such scholars do not question the underlying dynamics that cause imbalance and do not naively believe that tinkering with the rules of access will fundamentally alter the political consequences of a market economy. But they do believe significant change is possible and do not accept as inevitable an imbalance so large that democratic politics is impossible.

One optimistic assessment is my own, *The New Liberalism* (1999), a study of the evolution of citizen group politics from the 1960s to the 1990's. It documents an impressive level of influence by liberal citizen groups, most notably by environmental

lobbies, even when pitted directly against corporate interests. It also found that these lobbies represented middle class professionals and pushed liberalism more toward postmaterial (quality of life) issues. Conversely, this trend worked to the disadvantage of the working class and the poor as their concerns became somewhat less central to modern liberalism.³ *The New Liberalism* evidenced a strong pattern of change—change that altered the balance of interest group politics because of the growing empowerment of ideological citizen groups.

Narrowing the imbalance of interest group politics can come from leaders who mobilize new constituencies, or conceive of ways to exploit existing opportunities for participation to enhance the influence of their organizations. The rise of citizen groups represent both phenomenon, as entrepreneurs like Ralph Nader and John Gardner of Common Cause developed appealing organizational models that attracted citizens willing to support those groups, while organizations like the Environmental Defense Fund⁴ and the Natural Resources Defense Council that found new ways of using the courts to build their sector.

Changes in public policy are critical as well in stimulating organizational mobilization. The twentieth century is replete with statutory and regulatory changes designed specifically to bring underrepresented constituencies directly into public policymaking. By altering various rules, government has consciously made an effort to diversify the make-up of those around the bargaining table. It has done so by three general means. First it has sometimes eliminated barriers to entry. For example, the Wagner Act made it easier for labor unions to organize which, in turn, gave them the resources to increase their lobbying and expand their reach across the issue spectrum.

Second, government can facilitate participation by instituting new rules mandating that certain kinds of constituencies or a certain proportion of constituencies be involved in specified procedures. The Federal Advisory Act of 1972 requires that federal advisory boards be balanced in the views held by those appointed, many of whom will be directly representing advocacy organizations. The Negotiated Rulemaking Act of 1990 gives agencies the option of appointing a panel of interest group representatives to draft regulations to address a particular problem, while compelling those agencies to fairly balance the primary competing views in the composition of the ad hoc body.

Third, the government has sometimes subsidized the development of organizations. The Smith-Lever Act provided for the funding of farm bureaus across the country, which in turn led to the formation of the American Farm Bureau Federation. More recently, dedicated government funding through the Low-Income Housing Tax Credit has subsidized the growth of Community Development Corporations (CDCs), which advocate on behalf of their catchment areas or neighborhoods. Although these approaches are generally remedial in nature, government sometimes facilitates greater participation for those who are already well represented in public policymaking. The Data Quality Act, enacted in 2000, was widely interpreted as a gift to business interests by enabling advocates to formally dispute the scientific basis of regulatory actions. Such challenges can lead to regulations being rescinded.

Although liberals have been more concerned about imbalance than conservatives, the reality is that incumbents of both parties encourage advocacy from the most advantaged sectors. It serves the interests of incumbents, provides them with campaign money, and works to scare off challengers. Even so legislators do periodically adjust the

rules of the game and, cumulatively, these easements and supports have significantly altered interest group politics. Interest group participation is far broader and far more balanced than would be the case without them. Despite this there are many who would argue that the result is still a system so seriously out of balance that the advantages of business have been largely undisturbed.

DANGERS

From the muckrakers to modern-day web sites like that of OpenSecrets.org,⁵ reporters, activists, and scholars have warned the public about how interest groups corrupt democratic politics. Revelation by revelation, scandal by scandal, they have documented how various lobbyists and interest groups have achieved undue influence by using money, particularly campaign donations, to win sympathy for their goals (Clawson 1992; Renzulli 2002). Their solution is not to build countervailing powers among other sectors of society, but to place greater barriers in the path of those who already possess too much power.

The stories that emerge about undue influence often focus on the unscrupulous behavior of individual lobbyists or the invidious relationship between a lobbyist and a legislator. The legendary Tommy “the Cork” Corcoran let little stand in his way and after going to Supreme Court Justice Hugo Black’s chambers for an ostensible social visit, proceeded to lobby him on behalf of a client with a case pending before the Court (McKean 2004, 267). More recently, the symbiotic relationship between lobbyist Jack Abramoff and House Majority Leader Tom DeLay has highlighted the seamiest side of interest group politics. In a single year Abramoff charged the Choctaw Indian tribe \$7.7 million in fees but only spent \$1.2 million on work for his client. Some of the money was

laundered through a think tank and was spent by Abramoff for personal bills and on a golf junket to Scotland that included Delay as a guest. Private email correspondence would later reveal that Abramoff referred to his clients as “monkeys” (Forsythe 2005).

This is a realist perspective—it assumes that money will always flow to politicians and that it always carries the potential for harm to the integrity of the political system. Little stress is placed on balancing group politics because a more pluralistic system is, likely, a system where even *more* money is going to flow to politicians. In the realists’ equation, more interest groups with more money to contribute does not lead to more balanced decisions. Rather, those with the strongest economic interests will be the most active and have the most to contribute. Farm groups, for example, will always be mobilized on agriculture issues, but save a small number of environmental and consumer groups on selected issues, the farm groups will generally stand alone in the lobbying arena. And even when they don’t stand alone, they will predominate.

Since this is a realist view, it tries only to limit the fundraising arms race rather than trying to ban it. The reformist proposals attempt to constrict opportunities to contribute and to limit the amounts that can be donated. Instead of pretending that a sufficient number of powerful groups will ever emerge to truly balance big business, the goal is to contain what lobbies can do to win favor with legislators. At its core, the realist view is anti-Madisonian. Madison warned against trying to control the “mischiefs of faction,” believing that limiting freedom would do more harm to the new country than giving factions the freedom to pursue their selfish goals. The realist view is that just as the constitutional guarantee of freedom of speech stops at the point at which we do not allow someone to maliciously shout out “fire” in a movie theater, the First Amendment

guarantee of the right “to petition the government for redress of grievances” has boundaries too.

The most conspicuous of these limits are campaign finance laws. Although banning private contributions and relying instead on government grants to finance campaigns might be the most effective route at achieving the goal of reducing interest group influence, it has never been a politically viable option. The laws that have passed focus on two main objectives: reducing the amount that a single individual or organization can contribute and full identification of contributors so that the sunshine of public disclosure can, hopefully, disinfect the system. The campaign finance structure we have today is certainly a better one than in the days when Lyndon Johnson received cash donations in envelopes from oil company executives and then redistributed the money to his Democratic colleagues in the House of Representatives (Caro 1982, 635). Just how much campaign finance reforms have truly reduced interest group influence is an open question.

There are other limitations as well. The Ethics in Government Act restricts contact between agency officials turned lobbyists and their former colleagues for a fixed period. A similar law regulates legislators. Lobbyists working on issues before Congress must file a lobbying disclosure form, including the amount expended during the past six months. Speaking fees, gifts, and junkets are also regulated. These are all valuable steps but few feel that interest group influence is sufficiently controlled. There is one sector, however, where regulation has been very successful in restricting lobbying and preventing its groups from ever achieving any undue influence. That sector, of course, is the nonprofit sector.

Nonprofits' Unique Barrier

One might expect that among the three theories that guide our attitudes toward interest groups, that either of the first two theories would justify an expansive role for nonprofits. The first, recall, celebrates the role of interest groups, and voluntary associations in particular. The associations that stand at the center of Putnam and Skocpol's analysis of contemporary society are nonprofits. If interest groups facilitate democratic policymaking, and if voluntary associations play a particularly important role among all interest groups in the way they build social capital and teach us how to be citizens, then shouldn't it follow that charity law would actively promote the participation of nonprofits in the governmental process?

The second of theories discussed, that of balancing a skewed interest group system with more organizations representing previously underrepresented interests, also offers a convincing rationale for an expanded role for nonprofits. If the inherent advantages of business are to be moderated by an expanded interest group universe, then nonprofits must be one of the counterweights. Since these organizations represent the most marginal and most dispossessed of all Americans, their full inclusion in the governmental process would go a long way toward making interest group advocacy more balanced.

Thus either of these theories, or a combination of them, would provide a logical public policy rationale for incorporating nonprofits into the governmental process and for broadening the universe of interest group active in trying to influence government. Conversely, the third of the three theories discussed here would seem directed at business and labor groups, not public charities. That theory simply but emphatically regards

interest groups as a threat to democratic government. With its emphasis on undue influence and the use of campaign contributions to sway legislators, it seems peculiarly unsuited as a lens through which 501c3s may be observed and evaluated.

Perverse as it may seem the interest group theory that underlies the regulation of nonprofits is the third one. Nonprofit law, sec. 501(c)(3), is very blunt in describing nonprofits as a dangerous threat to the political system.

Propagandists

The many laws that govern interest group behavior have various rationales and, as discussed above, do not reflect one, systematic regulatory scheme. The different laws, addressing different problems, have not produced a level playing field for all those who wish to lobby the government. The underlying principle for regulating 501c3s is straightforward and quite justifiable. Since government loses revenue when taxpayers take a tax deduction for the money they contribute, this constitutes what economists term a tax expenditure and, thus, it is fully appropriate that the federal government has set rules as to how this taxpayer subsidy may be spent (Brody and Cordes 1999; Galston 1993; Hansmann 1987). One of the rules governing nonprofits is that they are prohibited from engaging in partisan activity—making campaign contributions or endorsing candidates for example. This is not controversial as few would argue that taxpayer subsidized dollars should go to candidates running for office. Another of the restrictions involves lobbying and grassroots mobilization of clients or constituents. It is this policy, enforced by the Internal Revenue Service, that has proven to be problematic.

The origins of the lobbying restriction on nonprofits goes back to 1919 when the Treasury Department issued regulations to accompany a law passed two years earlier

creating the tax deduction for charitable organizations. By law, nonprofits qualifying for 501(c)(3) must be working for “religious, charitable, scientific, testing for public safety, literary, or educational purposes.” Trying to ensure that the taxpayer subsidy was not extended to the wrong kind of organizations, Treasury issued a regulation declaring that tax deductible status could not be extended to those organizations “formed to disseminate controversial or partisan propaganda” (Gallagher 1998, 1). In 1934 Congress added teeth to the regulation and wrote into law a provision that tax deductibility could not be granted or maintained by a nonprofit where a “substantial part” of that organization’s activities “is carrying on propaganda, or otherwise attempting, to influence legislation.”⁶

Rather than just being content with articulating the policy that lobbying and grassroots mobilization must remain within limits, American law still today categorizes such activities by nonprofits as “propaganda.” This term seems a more appropriate description of the rhetoric of a dictatorship than of the behavior by community-based organizations providing services to the disadvantaged. If it was just some antiquated wording, little should be made of this definition. Unfortunately, the spirit and meaning conveyed by that term still reflect the view of the Internal Revenue Service.

AMBIGUITY

The harshness of the law is compounded by its maddening ambiguity. The law on public charities permits lobbying, but a nonprofit’s lobbying may not be “substantial.” One might expect that the Internal Revenue Service would have defined this term so that nonprofits would know how much lobbying and grassroots mobilization they can do without running afoul of the law. This is no small matter since the ultimate penalty for violating the law is the loss of tax deductibility, which for most nonprofits is equivalent

to the death penalty. To lose tax deductibility is to lose a significant percentage of funding that comes from individuals and virtually all that may come in the form of foundation grants. At the same time, many nonprofits have a need to talk frequently with officials from government and this limitation is often interpreted as a barrier to nonprofit officials.

Surprisingly, the IRS has steadfastly refused to define what “substantial” means. It has never issued a specific set of guidelines to help nonprofits understand the lobbying provision of the law. Repeatedly, requests have been made to the IRS by nonprofits, asking it to distinguish a substantial amount of lobbying from that which is insubstantial. Over the years the IRS has not budged and its responses as to what falls below the substantial threshold are much too vague to be helpful. Interest groups of all types badger administrative agencies for clarity as to the meaning of ambiguous laws or regulations and, often, receive new regulations or instructional documents as a result. For many years there was no obvious reason as to why the IRS refused to offer an operational definition of the substantial standard. Only in recent years has a real obstacle emerged for the IRS if, unlikely as it might seem, the agency would now like to define the term. The Republicans in Congress have made it clear that they do not want more lobbying by nonprofits as they consider this sector to be overwhelmingly liberal in outlook. The agency has no interest in generating a conflict with conservative legislators, particularly since liberal legislators have never pushed for a standard to clarify the lobbying provision.

As to what constitutes “lobbying,” IRS statements and legal interpretations have been more helpful (Hopkins 1992; Smucker 1999) The law indicates that lobbying refers

only to the lobbying of a legislative body: Congress, state legislatures, and city councils. This includes direct lobbying of legislators or their staffs by nonprofit representatives as well as grassroots campaigns in which a 501c3 works to activate its members, clients or constituents by asking them to contact legislators about a specific bill. An important ambiguity here—some say loophole—is that “educating” legislators and their staffers is considered to be distinct from lobbying and not restricted by 501(c)(3). This, of course, is a useful fiction since nonprofits educate legislators so as to influence them. And to try to influence is to lobby. For political scientists the law’s application to only legislative bodies is particularly illogical. Why is it that nonprofits are free to lobby an administrative agency or file a court suit is permissible, but legislative lobbying is not?

ENFORCEMENT

The law on public charities is complex, ambiguous, and administered by a bureaucracy that doesn’t have the resources to oversee the nonprofit sector. Not surprisingly, enforcement of the law is erratic at best. Yet, as will be demonstrated below, nonprofits are strongly influenced by the belief that the IRS is monitoring them and is ready to take action should they violate the lobbying provisions of 501(c)(3). The Tax Exempt Division of the IRS has responsibility for approximately 1.6 million nonprofits of all types. 501c3’s constitute somewhere in the neighborhood of 800,000 of those.⁷ The agency has just 290 auditors to investigate problems at all these nonprofits, 501c3 or otherwise (Wolverton 2005). The number of 501c3s is growing precipitously, at roughly 5 percent a year (Weitzman et al 2002; Gose 2005). In the period between 1987-1997, nonprofits formed at a rate of more than twice that of new businesses (Weitzman et al 2002, 4-12).

From interviewing the executive directors of nonprofits and from conducting our focus groups with panels of executive directors and members of boards of directors, it became evident that many nonprofit leaders believe that the IRS is looking over their shoulders. Few have any idea that the Tax Exempt Division is seriously underfunded and undermanned, and that it is functionally incapable of systematically overseeing public charities. Despite the feebleness of this bureau of the IRS, the fear is real and is derived from a number of sources. Nonprofit leaders take note of the occasional high profile audit of a nonprofit because of allegations that it has violated the law. They may receive guidance from lawyers and accountants who have little understanding of the law and advise their nonprofit clients to play it safe by not getting involved in lobbying. CEO's are sensitive to signals from their board of directors who, if they don't truly understand the law, may similarly advise caution. Another factor is that some executive directors, feeling overwhelmed with the many demands of their job, are all too grateful for an excuse not to have to add lobbying as one more responsibility.

The IRS's 1966 controversial revocation of the Sierra Club's tax deductible status for its overt lobbying on a government proposal to build two dams on the Colorado River generated an unwarranted but powerful legacy of a vigilant, aggressive Internal Revenue Service.⁸ Other nonprofits have occasionally been punished for violating the lobbying provision of sec. 501(c)(3), but there is no count of such actions because the IRS does not issue public documents or explanations of their actions when they audit nonprofits.

Hostility toward nonprofits can come from other sources aside from the IRS, creating a more general climate of fear that leads to excessive caution by nonprofit officials. Some recent incidents aimed at cowering nonprofits will be detailed below. For

501c3s the major source of concern in addition to the Internal Revenue Service are the administrative agencies, federal, state, and local, that distribute grants in a given nonprofit's policy area. For non-health related public charities, government funding amounts to about 20 percent of annual income. Our survey showed that for human service providers the figure grows to about 33 percent. Even though there is no restriction against the lobbying of administrative agencies, nonprofits receiving grants—or hoping to win grants in the future—are going to be tempered in making any public criticism of an agency that may fund them. Not only is there a worry about hurting grant prospects, but an additional concern is that an agency that is perturbed can file a complaint with the IRS' Tax Exempt Division, alleging lobbying beyond the substantial threshold, and possibly catalyzing an audit of the nonprofit's lobbying endeavors.

Impact

The effect of government regulation on nonprofits has been described in rather general terms. The Strengthening Nonprofit Advocacy Project yielded a great deal of data supporting the argument that government regulation intimidates nonprofits and sharply reduces the representation of chronically underrepresented constituencies. This survey of nonprofits has been detailed at length elsewhere and only some basic information will be conveyed here (Berry et al 2003). The random sample of 501c3s was drawn from the universe of 220,000 nonprofits that filed a form 990 tax return with the Internal Revenue Service for 1998. The questionnaires were sent to the executive director of the organizations and the response rate for the three-wave mailing was 64 percent. In the end we believe we assembled a representative and sufficiently large sample of nonprofits from around the country.

IGNORANCE

The questionnaire included a number of questions intended to assess the impact of the nation's tax law on the behavior of nonprofits. One simple but highly telling approach was to ask executive directors what they knew about charity law. Respondents were asked to fill out a quiz on 501(c)(3), indicating with a check of either a "yes" or "no" box adjacent to each of eight true/false statements. The results of the quiz can be found in Table 1. In a word, the executive directors did miserably. Their knowledge of 501(c)(3) is spotty at best. Since the answer for each question was presented as either yes or no, simply guessing would yield a score, on average, of 50 percent correct. On only three of the eight questions, did the executive directors of nonprofits do appreciably better than if they had flipped a coin. On two questions they scored below 50 percent—*worse* than if they had flipped a coin.

[Table 1 Here]

In fairness, a few of the questions were difficult. The question they scored the lowest on, whether it's permissible to lobby if part of their organization's funding came from government, requires some subtlety in understanding the law. It's impermissible to use government funds to lobby Congress, but there is no prohibition against lobbying if other funds are used to pay for any expenses associated with lobbying. At the same time, it's not rocket science to understand this difference. Even more disturbing is that only a bit more than half (54 percent) of nonprofit CEOs know that their organization has the right to take a public stand on a bill before Congress. In other words close to half the executive directors of this nation's nonprofits believe their organization lacks the rights guaranteed by the First Amendment.

This level of ignorance about the law is alarming, though one might quickly leap to the executive directors' defense by pointing out that running a nonprofit is a demanding job: Nonprofit CEOs typically contend with insufficient budgets, growing demands for services, staffing shortages, and far too many responsibilities in running their organization. After managing the operations of their nonprofit, monitoring its finances, supervising the staff, and directing fundraising, spending time on advocacy is surely seen by many executive directors as a luxury they can't afford. In this vein ignorance of 501(c)(3) becomes one of the excuses not to engage in advocacy. It's also the case that some nonprofits have little reason to lobby as they may not be heavily affected by public policy.

Still, too many nonprofits have every reason to lobby legislators and choose not to do it. Every nonprofit leader, at the very least, should understand what the law says. If directors mistakenly believe that they don't even have the right to take a stand on legislation, their constituents will never be represented and their interests will never be sufficiently taken into account by members of Congress or state legislators. Understanding that you have the right to lobby is certainly the first step toward doing it.

AVOIDANCE

Demonstrating that executive directors are relatively ignorant of the legal standards relating to nonprofit lobbying does not directly prove that those executives or their organizations are inactive. It's possible that executive directors ignore what the law says because they believe lobbying is so vital to their clients or constituents' interests that they are willing to risk the consequences. Alternatively, they may believe that there is little chance of being caught by the IRS for violating 501(c)(3) and have little hesitation

in lobbying when they think it will do some good. And some may create an affiliated organization that is not tax deductible and it use it for lobbying purposes.⁹

In my book, *A Voice for Nonprofits* (2003), I detail a number of different tests to determine if 501(c)(3) influences the behavior on nonprofits. Here I will only elaborate on one, but all the statistical tests I conducted as well as the data from the interviews and focus groups point in the same direction: 501(c)(3) deters participation. As part of the questionnaire the executive directors were asked about nine different advocacy tactics. For each tactic, such as testifying before a legislative body or encouraging their members to write, call, or email policymakers, respondents scored their organization as to the level of utilization. The question used a five-point scale with 0 representing “never” and, at the other end, 4 representing “ongoing interaction.”

A bit of additional background on charity law is necessary here. Table 2 makes a comparison between “H electors” and conventional nonprofits. The H election is a little understood part of the tax code that actually allows nonprofits to escape the ambiguity of the substantial lobbying standard. In 1976 an omnibus tax bill included an option for 501c3s that gives nonprofits an expenditure ceiling on lobbying expenses. In stark contrast to the ambiguity of the substantial standard, the H election is explicit. The 1976 law created a sliding scale specifying the amount that can be spent both on direct lobbying and grassroots lobbying. Spending limits depend on the size of the annual income of the nonprofit. For example, a small nonprofit with an income under \$500,000 can spend up to 20 percent of its budget on direct lobbying and another 5 percent on grassroots lobbying. These percentages decline with increasing annual income but they are generous at all levels (Smucker 1999). What’s more, the H election defines lobbying

more precisely than the conventional definitions under 501(c)(3) and excludes many expenses (research on legislation, for example) that could be reasonably assessed as lobbying expenses. The bottom line is that few nonprofits would ever reach the lobbying expense limits set for H electors.

Despite the obvious advantage of not having to guess whether their lobbying crosses the substantial threshold, few nonprofits have chosen to become 501(c)(3) H electors. Many, if not most, executive directors appear unaware of the option. Some know about it but worry that taking the H election would provide a signal to the IRS that it needs to conduct an audit the organization because of its ostensible political activity. There's no evidence that H electors are singled out for an auditing of lobbying expenses by the IRS, but this belief persists. In truth there's absolutely no disadvantage in taking the H election, and selecting it does not affect tax deductibility in any way. Nevertheless, only 2.4 percent of all 501c3s are H electors. This low percentage is the product not only of ignorance of the option or misinformation about it, but it also reflects the IRS's lack of interest in promoting the H election. When a newly formed nonprofit applies to the IRS for 501(c)(3) status, there is no option for the H election on the application form. By default a new nonprofit is subject to the ambiguous substantial standard. Consequently, assuming a nonprofit actually knows about the H election, it has to obtain tax form 5768 and fill it out.

Accompanying our survey of what we termed "conventional" 501c3s, we did a separate oversample of the 2.4 percent of nonprofits that are H electors.¹⁰ Since H electors self select, they do not constitute a control group. Rather, they offer a point of comparison to the conventional nonprofits, which are 97.6 percent of all 501c3s. From

the H electors' response to the quiz on the lobbying law (which isn't shown in Table 1), we know that they are far more knowledgeable about 501(c)(3) and, as we see in Table 2, they are far more active and aggressive in their advocacy efforts. Since the H electors self select, their overall greater level of advocacy in comparison to the conventional nonprofits means little. Rather the comparison to note is in the division of the nine tactics into two groups. One set of tactics is more legislative in orientation and more aggressive in the approach to government. The second set of tactics is more cooperative in nature and relate more to the administrative process. The averages are computed from a five point scale with zero representing no use of a tactic and 4 indicating ongoing use.

[Table 2 Here]

Recall that 501(c)(3) only applies to legislative lobbying and applies not at all to the lobbying of administrative agencies. And here the comparison is telling. The H electors have identical aggregate utilization scores for both sets of tactics. Thus they lobby legislators and their staffs at roughly the same rate they lobby administrators and their staffs. From what we know from the literature on lobbying, this makes perfect sense. Interest groups that want to be effective in the policymaking process have to be prepared to lobby wherever it is most relevant. We would expect an organization that wants to influence government is prepared to lobby whatever institution is handling the particular policy at a particular time.

For the conventional nonprofits the pattern is quite different. Unlike the H electors there is considerable difference between the utilization of the cluster of tactics that are legislative in nature and are more overtly aggressive and those that are more administrative and less aggressive. The utilization rate for the administrative tactics is

more than 50 percent higher than of the cluster that is primarily legislative in nature. Analysis was also conducted to see if the H electors were different from conventional nonprofits in ways that might skew more of their lobbying toward legislatures. In other words, is their division of lobbying between legislative and administrative targets the product of some particular organizational characteristics or the consequence of the government programs they are concerned with? That rather detailed exercise will not be duplicated here, but to summarize in brief we found that the H electors do not appear to be different from the conventional nonprofits in the policy areas they choose, nor in the level of financial support they receive from government (Berry and Arons 2003, 60-64). The impact of 501(c)(3) on conventional nonprofits is unequivocal. The law on public charities strongly discourages nonprofits from representing their clients and constituents in the legislative process.

MOBILIZING CONSTITUENTS

The analysis up to this point has focused on the political behavior of organizations. The survey did, however, yield some data on the mobilization of followers. Since half of all nonprofits large enough to file a tax return work in the areas of health and social services, one might expect that the potential for activating their constituents is relatively low. One of the most persistent findings in the field of political behavior is that political activity correlates with social class. Thus, for those nonprofits primarily serving a low income population, there is ample reason to utilize political strategies more oriented around lobbying by professionals representing constituents than trying to mobilize clients or followers.

This is a critical distinction. Representing clients and mobilizing clients share the identical goal of trying to change public policy, but they are two very different lobbying strategies. Some lobbyists make very limited use of their clients—those representing corporations for example—and are quite effective in influencing government. Still, although the participation of members, followers, or clients is not absolutely necessary to achieve influence, such mobilization is unquestionably helpful to organizational representatives in their interaction with policymakers.

A low-income constituency, though it may be more difficult to engage, is not impossible to mobilize. Being poor does not mean one is apathetic. Nor does it mean that one does not understand the elemental connection between public policy and the current availability and quality of services. There is clearly far more potential for enlisting nonprofit clients and supporters than the current levels of such lobbying documented by our survey. A finer-grained analysis of the political behavior of nonprofits indicates that regulatory restrictions artificially limit the mobilization of nonprofit followers. One of the tactics of influence asked about in the survey was the degree to which an organization encouraged “members to write, call, fax, or email policymakers.” Revisiting Table 2 we see that conventional nonprofits indicate a very low level of usage, an average of only 1.2 on this 5 point scale. By comparison H electing nonprofits score 2.6. Since H electors have been shown to be roughly similar in their organizational dimensions to conventional nonprofits, the large difference in the scores for grassroots mobilization point toward the restrictions in 501(c)(3) and not the nature of the constituency as the real culprit.

Nor does a closer look at the data reveal any large differences among nonprofits focusing on different policy areas. Arts nonprofits and education nonprofits, which

presumably have more educated middle class constituencies, are less aggressive in the aggregate than those nonprofits with low income constituencies (Berry and Arons 99, 2003). Fully 40 percent of all conventional nonprofits never engage in grassroots mobilization, while just 8 percent do it on an ongoing basis. We don't have data on a comparable scale for all other types of lobbies, but surveys of general interest group populations indicate that mobilizing followers is a core competency and an extremely common lobbying tactic (Schlozman and Tierney 150, 1986).

For the poor and disadvantaged, the negative consequences of 501(c)(3) extend beyond the diminished political prowess of sympathetic nonprofits. Part of the process of mobilizing constituents at any income level is to educate them about issues and about the governmental process. This teaching opportunity is lost when nonprofits shy away from involving their follower. Moreover, individual participation can lead to a greater sense of political efficacy, critical for those who are not active in other realms of civil society (Soss 1999). This, too, is lost.

Intimidation

The impact of ignorance and misinformation about the law on public charities is probably far greater than these data can reveal. As is commonly understood, the message of 501(c)(3) is not just don't lobby legislators, but something more pointed and insidious: nonprofits should be nonpolitical. And if organizations are supposed to be nonpolitical and uninvolved in public policymaking, then the type of people nonprofits hire and the way responsibilities of the professionals on the staff are defined are going to be different than they would be in an organization that defines public policy advocacy as part of its

mission. As such the socialization process that defines the appropriate role of a nonprofit works to create structurally nonpolitical organizations.

Nonprofit leaders' misconceptions about the law come not only from their ignorance and failure to learn what it actually says but also, as I've alluded, from the actions of the IRS, agency administrators, and legislators. The Sierra Club case, which sent an enormously powerful signal to all 501c3s, was the beginning of what's become periodic harassment of nonprofits. Following that episode the Nixon administration held up requests for 501(c)(3) status from nonprofits that it regarded as political opponents. Although technically the policy was that of the IRS, it was certainly a White House directive to the agency that led to suspension of selected applications for tax deductibility. A court suit forced the administration to back down (Corrigan 1970). During the Reagan administration OMB proposed new guidelines that would have forbidden nonprofits receiving federal grants from engaging in any kind of lobbying, legislative or otherwise. A nonprofit that wanted to try to influence government would have to start a completely separate organization to handle advocacy, while the core 501(c)(3) tax deductible organization remained removed from any lobbying (Bass et al 1984). This proposal failed as well as the White House retreated because of adverse publicity.

Another round in this ongoing fight was initiated by congressional Republicans initiated after they captured the House of Representatives in 1994. With Newt Gingrich emerging as Speaker and, effectively, as head of the party, new, bold initiatives sprung forth from Republicans in both houses. Although it was not part of Gingrich's Contract with America, a popular objective emerged within the party to try to find a way of

disempowering politically active nonprofits. What enrages conservatives is that many nonprofits receive federal grants and then, allegedly, use that money to lobby the government for liberal policies. Conservative firebrand Grover Norquist, the head of Americans for Tax Reform and a close ally of Gingrich, said “We will hunt [these liberal groups] down one by one and extinguish their funding sources” (Shear 1995, 925).

Many House Republicans coalesced around a bill introduced by Rep. Ernest Istook of Oklahoma. The Istook Amendment took many forms but in its most hostile iteration it expanded the definition of lobbying under 501(c)(3) and then restricted any advocacy under this broader definition to no more than 5 percent of an organization’s budget. The bill received serious consideration in the House and it catalyzed a fierce counterattack by nonprofits around the country. As legislators began to hear from local nonprofit leaders back in their districts, support for the legislation cooled and the proposal eventually died. Like the Sierra Club case some year back, however, it was an episode that had a lingering impact. The attack reverberated throughout the nonprofit grapevine and 501c3s could not help but believe that the federal government was monitoring them closely and is unhappy with those nonprofits that engaged in advocacy. Our interviews confirmed that executive directors were aware of the legislation and many were nervous about adopting an advocacy role because they saw the government as hostile toward nonprofit involvement in the policymaking process. Istook ostensibly lost the battle but surely gained ground by scaring those nonprofits uncertain of their rights under the law.

The attack on nonprofits has continued in the George W. Bush years. In many ways the administration has tried to stop nonprofits from speaking out on various issues.

For example:

--Advocates for Youth, a nonprofit that works to promote effective policies on preventing teenage pregnancy, sexually transmitted diseases, and HIV/AIDS, was subjected to three audits in eight months by the Centers for Disease Control and Prevention. An internal government memo leaked to the *Washington Post* described the organization as “ardent opponent” of the administration’s policies (Wagoner 2004, 69).

--The IRS initiated an investigation of the NAACP because its Board Chairman, Julian Bond, tacitly endorsed Democrat John Kerry at the civil rights organization’s annual convention in 2004. 501c3s may not endorse candidates, though the only specific action that Bond called for was expanding voter registration drives. Voter registration drives are perfectly legal under charity law. The real “violation” seems to be the blistering criticism of Bush in Bond’s speech (Berry 2004a).

--After the administration introduced a bill in 2003 to alter the Head Start program, some Head Start program directors publicly criticized the legislation. The Department of Health and Human Services tried to stop the advocacy by sending a letter to all Head Start grantees telling them that they could not lobby against the bill because they receive federal funds. This letter was categorically inaccurate. As noted above in the discussion of our survey, the law permits federal grantees to lobby as long as no government funds are used (Bass et al 2003, 2-4).

--The Individuals with Disabilities Education Act (IDEA) funds approximately 100 parent centers around the country. Their purpose is to provide a range of services and

education for families with a disabled child. A bill introduced by Michael Castle (R-DE) proposed amending IDEA by banning grants to parent centers that did any kind of “federal relations.” Negative fallout from the proposal led Castle to drop this provision but it may have accomplished its goal by ominously threatening the centers (Bass et al 2003, 4-5).

Many more examples could be offered but the pattern should be sufficiently clear. Since the Nixon years Republicans in Congress and Republican administrations have continually gone after nonprofits, trying to intimidate them with proposed legislation, regulatory directives, and IRS audits. The Republican antagonism is grounded in two strongly held beliefs, one philosophical and the other partisan. The philosophical argument is that interest group politics should emanate from people organizing on their own, promoting their causes with their own resources. Government grants, therefore, should not be used to support, even indirectly, any kind of advocacy by nonprofits. To do so would be to favor one sector with taxpayer dollars over all others. This position conveniently overlooks market failure—that the most disadvantaged in society don’t have the resources to support organizations to act on their behalf.

The second belief is that nonprofit advocacy provides direct political support for liberals and Democrats. Since Democrats use the rules of government to support themselves when they’re in power, Republicans feel justified in doing the same. Republicans are certainly correct in their assessment of the political views of those nonprofits that do become engaged in government relations. Given the population of 501c3s, the bulk of nonprofit lobbying comes from health and social service providers. These organizations are at the very least trying to maintain a large government role in our

society. Thus nonprofits stand in the way of minimal government, the most basic pillar of conservative philosophy. Not surprisingly, many nonprofit advocates also favor the kinds of programs that conservatives dislike, such as family planning, abortion, strong business regulation, national health insurance, and consumer protection. The Republicans' logic is unassailable: by weakening nonprofit advocacy, conservatives will reduce *liberal* advocacy.

Overcoming Political Weakness

For all the services that nonprofits provide to working Americans, to the poor, and to the disadvantaged, the political party that ostensibly represents these same interests has not been terribly energetic in trying to protect these organizations from the Republicans' ongoing attacks. The Democrats in Congress have certainly opposed the policy proposals aimed at silencing nonprofits, but protecting 501c3s not been a priority and there has been little effort in trying to push through policies that would help to empower the sector.

The Democrats' lackluster record in this regard reflects in large part the broader political weakness of the nonprofit sector. This "sector" cuts quite a swath through American society and the categorization of all the kinds of organizations that qualify under 501(c)(3) into one grouping greatly exaggerates the commonality among the constituent parts. Community health centers, arts councils, hospices, Meals-on-Wheels agencies, and animal rights groups share little in common beyond their legal status. The collective action problem among the full range of organizations that constitute this sector is enormous and, heretofore, difficult to overcome. There are some national organizations, such as Independent Sector and the National Council of Nonprofit Associations that work on behalf of nonprofits as well as many statewide associations of

nonprofits that do the same. Unfortunately these peak associations have yet to develop a working alliance that has proven to be politically influential.

There are also trade associations of nonprofits in separate fields, often organized on a statewide basis, that have greater political sophistication than the typical 501c3. These organizations, like a statewide association of mental retardation centers could, along with the national nonprofit leadership groups and statewide associations of nonprofits, provide the nucleus of a stronger, empowered nonprofit sector. These organizations have existed for years and their weakness in promoting the broad nonprofit sector is hardly encouraging (Abramson and McCarthy 2002).

Beyond the collective action problem for nonprofits, substantial as it is, lies another significant hurdle in overcoming the barrier to advocacy. Lobbying by nonprofits is not broadly seen as a means of enabling democracy or balancing interest group politics. These two theories defending interest groups in a democracy should easily rationalize the lobbying by 501c3s. The theories speak to the importance of inclusiveness and of hearing a diversity of voices. The democratic process falls short when significant constituencies with obvious interests before government are inactive and their voices just a murmur. In contrast to private sector lobbies, nonprofits are celebrated in America as embodying the compassion and generosity of our culture. The extensive voluntarism that is part and parcel of the nonprofit sector is similarly praised. But despite the many virtues of nonprofits this widespread admiration doesn't seem to extend to appreciation of their efforts to raise the voice of their clients and constituents in the policymaking process.

As noted earlier the legal regulation of nonprofit advocacy remains firmly grounded in the third of the three theoretical perspectives central to interest group

scholarship. Charity law considers nonprofits as a danger to democracy and regards their advocacy as potentially propagandistic. Although this line of argument is not used against nonprofits in public debate, the guiding philosophy of the law does influence the IRS and is surely part of the reason why the agency refuses to help nonprofits navigate the lobbying restriction in 501(c)(3). After the provision in the 1976 tax law that created the H election alternative, the IRS took 14 years to write the regulations that put it into effect.

Conservatives continue to attack nonprofit lobbying, arguing that these organizations are simply another set of selfish interest groups. As long as the debate focuses on lobbying by nonprofits and the grants they receive from government, the conservatives will maintain a strong political position. Those who believe that nonprofits should be involved in public policymaking and who believe that it's important for 501c3s to mobilize their clients and supporters so that they participate, should try to shift the terms of this argument. In the best of all possible worlds, discussion of nonprofit advocacy should focus on *representation, inclusion, and civic engagement*. In these contexts, emphasis should be placed on the disadvantaged who cannot otherwise participate, whose voice will not be heard unless nonprofits work to amplify it. Arguments about advocacy should be connected to appealing, sympathetic clientele of nonprofits, such as frail elderly, the disabled, battered women, developmentally challenged children, and single working mothers. These constituencies must come to life, vividly drawn, to move discussion away from abstract principles about lobbying to a message about letting all Americans participate.

A sensitivity to the way rhetoric is used and how to design messages about nonprofits is just a first step. More important is organizing. Since the obvious vehicles for

pulling together nonprofit coalitions have proven to be failures at it, thought should be given to shifting organization downward to the local level and to creation of nonprofit councils (Berry 2004b). These should be small elite-driven organizations rather than a formal coalition of nonprofits from the area. Trying to organize a large coalition of local nonprofits is expensive and the free-rider problem remains as a substantial obstacle.

Nonprofits councils should be built at the congressional district level, with one of its main purposes to make legislators understand that they are being closely monitored by a cadre of nonprofit leaders. Such a nonprofit council would be composed of some of the leading citizens of the communities encompassed in the district. Nonprofits have a tremendous resource in their boards of directors. To examine the letterhead stationery of a nonprofit, scanning the names of the board members identified on the side of the page is, typically, to read down a list of highly respected elites from different sectors of the community. Boards are put together to build credibility for an organization and, most significantly, to donate money and to raise money from others. A nonprofit council, composed of a cross-section of assorted nonprofit CEOs and board members, could easily command periodic meetings with local, state, and federal legislators. If such a council regularly met with their member of the federal House of Representatives, no matter how conservative that legislator, it will be difficult for him or her to explain to bank presidents, hospital CEO's, and ministers, why they're prepared to vote for something like the Istook amendment. When such elites say "you're trying to shut up my organization and this will make it more difficult for the United Way and homeless shelters and the local council of churches," it changes the calculus of such a vote in the Congress.

To ensure that a nonprofit council is not viewed as hostile to the member of Congress, it should include some friends and campaign contributors. At the same time, it must be prepared to play a little hardball, an approach uncharacteristic of the nonprofit sector. But this leadership council does not have to formally organize and does not need 501(c)(3) status as it needs little funding. It can be “housed” in someone’s business, with the little clerical assistance necessary provided by one of the board member’s assistants. One tool it can use is the familiar legislative tactic of a report card, which would be distributed to an extensive mailing list of local nonprofits who, provided the report card is nonpartisan in nature, can be reprinted and distributed by 501c3s. Whatever the tactical approach, the essential point is for the council to be obviously engaged in oversight of legislators.

Although the problem of nonprofit quiescence is an enduring one, it is ever more important today. A transformation of the American system of welfare from dependence on income maintenance to one centered on social services has vastly expanded the role of nonprofits in our society. This transformation extends not only to a change in the nature of what’s offered by government, but it has also resulted in a devolution of responsibility (Smith and Lipsky 1993; Salamon 1995, Grønbjerg and Salamon 2002). States and cities are dependent on nonprofits to administer the welfare state. As government is now structured, it cannot function without nonprofits to provide necessary programs. Nonprofits have adapted well to the needs of government, mixing government funds and charity that they solicit, and converting those dollars into services that provide help to those in need (Salamon 2002). But nonprofits need to adapt themselves further to become more effective voices for those who have no other advocate before government.

Nonprofits need to define advocacy as part of their mission and stop pretending that the regulatory limits on their participation is a legal barrier to active involvement in public policymaking. The law permits nonprofits to be advocates but, unfortunately, too many nonprofit leaders believe otherwise.

Table 1

Executive Directors' Understanding of Charity Law

<i>Can your organization</i>	<i>Correct Answer</i>	<i>Percentage Answering Correctly</i>
Support or oppose federal legislation under current IRS regulations	Yes	54
Take a policy position without reference to a specific bill under current regulations	Yes	61
Support or oppose federal regulations	Yes	62
Lobby if part of your budget comes from federal funds	Yes	32
Use government funds to lobby Congress	No	93
Endorse a candidate for elected office	No	84
Talk to elected public officials about public policy matters	Yes	80
Sponsor a forum or candidate debate for elected office	Yes	45

QUESTION WORDING: There is a good deal of confusion about whether various activities by nonprofits relating to the policymaking process are permissible. Based on your understanding, can your organization:

SOURCE: Strengthening Nonprofit Advocacy Project, survey of nonprofits filing tax form 990 with the IRS.

Table 2

Confrontation or Cooperation?

	Frequency, Mean Scores	
TACTICS:		<i>Conventional</i>
<u>More legislative, more aggressive</u>	<u>H Electors</u>	<u>Nonprofits</u>
Testifying at hearings	2.2	.7
Lobbying on a bill or policy	2.5	.9
Encouraging members to write, call, fax, email	2.6	1.2
Releasing research reports to the media, public, or policymakers	1.9	.8
	<i>avg. 2.3</i>	<i>avg. .9</i>
 <u>More administrative, less aggressive</u>		
Meeting with government officials	2.8	1.4
Working in a planning or advisory group	2.7	1.4
Responding to requests for information	2.5	1.5
Discussing grants with government officials	1.7	1.3
Socializing with government officials	1.8	1.4
	<i>avg. 2.3</i>	<i>avg. 1.4</i>

QUESTION WORDING: A variety of means of communicating and interacting with those in government are listed below. Please use the scale on the right to indicate how frequently, if at all, your organization engages in these activities. (By “your organization” we mean the executive director, other staff, volunteers, or members of the board.) In this scale, “0” means never, “1” is relatively infrequent interaction, and “4” is ongoing interaction.

The averages in bold are the mean of the aggregate scores for each tactic, not the mean of all responses. The “n” for each subsample is 320 for the H electors and 583 for the conventional nonprofits. The aggregate responses to each tactic are a tiny bit smaller.

SOURCE: Jeffrey M. Berry with David F. Arons, *A Voice for Nonprofits* (Washington, D.C.: Brookings Institution Press, 2003), p. 101.

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Endnotes

¹ Nonprofits qualifying under section 501(c)(3) are often labeled as 501c3s. When referring to the section of the tax code regulating nonprofits we'll use "501(c)(3)." When discussing nonprofit organizations, we'll use the less cumbersome "501c3."

² Dahl is different in this respect as he focuses more on the relationship of groups to government

³ Surprisingly, perhaps, the study found that working class issues composed only a small percentage of the congressional agenda in 1963 (the first data point in the research), nor is 1979 (the second of three sessions of Congress studied). Thus it may be that the commitment of the Democratic party to the working class was exaggerated. The Democrats controlled the Congress in those two years, as it did for 1991 (the last data point).

⁴ Its name is now Environmental Defense.

⁵ OpenSecrets.org is the web site of the Center for Responsive Politics.

⁶ *Revenue Act of 1934*, sec 517, 48 Stat. 760. For a detailed history of the evolution of the basic law on nonprofits and the subsequent amendments and regulations, see Judith E. Kindell and John Francis Reilly, *Lobbying Issues*, <http://www.irs.gov/pub/irs-utl/topic-p.pdf>.

⁷ The record keeping is such that some cease to exist before they are eventually purged from IRS lists. IRS rules require 501c3s with a yearly income of at least \$5,000 register with the agency. Nonprofits with a yearly income of at least \$25,000 must file a yearly tax return and those returns are a matter of public record.

⁸ Ironically, the Sierra Club had a separate 501(c)(3) foundation and used it to receive tax deductible donations after the revocation. Not only was it not hurt by the revocation it actually profited as the ensuing controversy over the IRS's action created both publicity and sympathy for the organization, leading to a *gain* in membership.

⁹ Nonprofits that are dedicated advocacy organizations can qualify under sec. 501(c)(4), an misleadingly labeled category for "social welfare" organizations. These nonprofits can lobby without limit, though they are subject to restrictions on partisan activity. Some 501c3s have affiliated 501c4s, which allow them to conduct their lobbying through the c4 without concern for IRS limits while still being able to raise tax deductible donations through the c3. This requires separate boards of directors and some strict accounting so that there is no commingling of funds, which must be raised separately. The "H" election, which will be discussed, is a much better option for 501c3s worried about violating the lobbying restriction. The utilization of affiliated 501c4s is not growing in popularity as the number of organizations registering as social welfare nonprofits has not increased significantly in recent years while the number of 501c3s pushes ever higher.

¹⁰ There were actually four separate surveys. The comparison here is between H electors that list lobbying expenditures on their 990 with conventional nonprofits that list no lobbying expenditures on their 990. See Berry et al, 2003 for a complete discussion of the sampling. Table 1 is derived solely from the sample of conventional nonprofits listing no lobbying expenditures (n=583).